**IN THE FLORIDA SUPREME COURT**
**STATE OF FLORIDA**
**TALLAHASSEE, FLORIDA**

| | | |
|---|---|---|
| THE SEARING AIRPORT AUTHORITY and SEARING INTERNATIONAL RACEWAY, INC., | : | |
| Appellants, | : | |
| v. | : | CASE NO.: 94,118 |
| C. RAYMOND McINTYRE, PROPERTY APPRAISER OF HIGHLANDS COUNTY, FLORIDA; and J.T. LANDRESS, TAX COLLECTOR OF HIGHLANDS COUNTY, FLORIDA, | : | |
| Appellees. | : | CONSOLIDATED |
| THE DEPARTMENT OF REVENUE, STATE OF FLORIDA | : | |
| Appellant, | : | |
| v. | : | CASE NO.: 94,105 |
| C. RAYMOND McINTYRE, PROPERTY APPRAISER OF HIGHLANDS COUNTY, FLORIDA; and J.T. LANDRESS, TAX COLLECTOR OF HIGHLANDS COUNTY, FLORIDA, | : | |
| Appellees. | : | |

**ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL,**
**STATE OF FLORIDA, LAKELAND, FLORIDA**

# APPELLANTS' AUTHORITY AND RACEWAY'S INITIAL BRIEF

Paul R. Pizzo, Esquire
Florida Bar No. 113794
Hala A. Sandridge, Esquire
Florida Bar No. 454362
Charles Tyler Cone, Esquire
Florida Bar No. 0145165
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
ATTORNEYS FOR APPELLANTS
AUTHORITY AND RACEWAY

**CERTIFICATE OF TYPE, SIZE AND STYLE**

Counsel for Appellants certify that this brief is typed with Courier 10 point print, which has 10 characters per inch.

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

PAGE

**Decisional Authority**

**Statutory Authority**

**Other Authority**

## STATEMENT OF THE CASE AND FACTS

Sebring Airport Authority is a legislatively created public instrumentality.[1/2/] From the late 1970's to 1991, the Authority promoted and operated the "Twelve Hours of Sebring" ("Race"), on real property it owns in Highlands County, Florida. In 1991, to alleviate financial difficulties and continue the race, the Authority entered into a lease agreement with Sebring International Raceway ("Raceway"), a for-profit corporation. The agreement required Raceway to assume the Authority's promotion and operation of the Race. See Sebring Airport Auth. v. McIntyre, 642 So. 2d 1072, 1072-73 (Fla. 1994) ("Sebring I").

In 1991, the Raceway sought an ad valorem tax exemption under section 196.199(2)(a), Florida Statutes, on the basis that the property was being used for public purposes. See Sebring I, 642 So. 2d at 1073. The Appraiser denied the exemption. See id. The Authority and Raceway sued the Appraiser. See id. The Authority and Raceway lost in both the trial court and before the Second District. See id. On further appeal, this Court ultimately concluded, based on a governmental/proprietary analysis, that the operation of a racetrack for-profit did not serve any public

---

[1/] Appellant, Sebring Airport Authority, will be referred to as the "Authority." Appellant, Sebring International Raceway, will be referred to as the "Raceway." Co-Appellant, the Department of Revenue, State of Florida, will be referred to as the "Department." Appellee, C. Raymond, McIntyre, Property Appraiser of Highlands County, Florida will be referred to as the "Appraiser." All other entities and individuals will be referred to by name.

[2/] All references to the Record on Appeal will be referred to by the symbol "R." followed by the appropriate volume number and page number of that volume.

purpose as defined by the then-current statutory provision. See id. at 1073-75. In construing section 196.199(2)(a), this Court held:

> 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).

Id. at 1074.

In 1994, the Florida Legislature amended section 196.012(6) (the "1994 Amendment"). This amendment defined a "public purpose" to include, among other uses, the use by a lessee of real property as a sports facility with permanent seating open to the general public.[3/] Because the Raceway operated such a facility on the subject property, it sought an ad valorem tax exemption under the 1994 Amendment. (V1:3, 28, 35) The Appraiser again denied the exemption. (V1:3, 28) The Raceway and Authority filed this lawsuit. (V1:6) The trial court concluded that the 1994 Amendment was unconstitutional because the Legislature exceeded its authority when it enacted the 1994 Amendment. (V1:157) The Raceway and

---

[3/] In full, the 1994 Amendment reads:

> 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 serves 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.

Ch. 94-353, § 59, Laws of Fla. (codified at § 196.012(6), Fla. Stat. (1997)).

Authority appealed this ruling to the Second District Court of Appeal. See Sebring Airport Auth. v. McIntyre, 718 So. 2d 296 (Fla. 2d DCA 1998) ("Sebring II").

On appeal, the Raceway and Authority argued that this Court should defer to the Legislature's conclusion that the facilities listed in the 1994 Amendment served public purposes. In support of the Legislature's reasonableness, the Raceway and Authority argued that tourism served valid public purposes and that the operation of the racetrack furthered tourism. The Raceway noted that this Court, in Poe v. Hillsborough County, 695 So. 2d 672 (Fla. 1997), concluded that the tourism created by the operation of a football stadium served a valid public purpose to support the validity of a bond validation proceeding. See Sebring II, 718 So. 2d at 299. The Second District disagreed with the applicability of the Poe holding, asserting that, in Poe, this Court "was concerned with whether or not a particular clause in a stadium lease... would change the purpose of the project" so as to affect the validity of a proposed bond issue. Id.

The Second District ultimately affirmed the trial court's conclusion that the 1994 Amendment was unconstitutional, holding that it was "an impermissible attempt by the legislature to create a tax exemption that is not authorized by the Florida Constitution." Id. at 297. The court also held that:

> [t]he 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 for a proprietary purpose.

Id.

This timely appeal by the Authority and Raceway followed.[4/]

[4/] The Department of Revenue also appealed the lower court's order to the extent the lower court held section 196.012(6) unconstitutional.

## POINTS ON APPEAL

I. WHETHER THE LEGISLATURE USED THE NORMAL AND ORDINARY MEANING OF THE CONSTITUTIONAL TERM "PUBLIC PURPOSES" WHEN IT INCLUDED IN § 196.012(6) THE TYPES OF FOR-PROFIT-OPERATED FACILITIES WHICH ARE RECOGNIZED NATIONWIDE TO PROMOTE THE GENERAL WELFARE BY STIMULATING TOURISM AND ECONOMIC DEVELOPMENT.

A. Whether the Mere Lease of Government Property to a For-Profit Lessee Undermines the "Public Purpose" Use of the Property.

B. Whether the Construction and Operation of Facilities Promoting Tourism and Economic Development Fall Within the Definition of "Public Purposes."

C. Whether the Constitutional Limitation on "Use" by a Municipality Focuses on the Actual Use to Which the Property Is Put, Not the Status of the Lessee of the Property.

## SUMMARY OF THE ARGUMENT

The appeal before this Court results from the struggle between citizen expectations and government finances. The societal change causing such legal disharmony is the nationwide trend of citizens expecting more services from their governments. This expectation, in turn, increases the monetary pressures on government to provide these services as efficiently as possible.

Without creativity, however, government does not always have the additional revenues needed to finance these expected services. Operation of our government is partially financed by the ad valorem taxes it collects. Citizens understandably find it unpalatable for their ad valorem tax to be continuously increased. One enterprising alternative is to offer ad valorem tax exemptions to private industry willing to supply the needed public service.

This financing option -- offering tax incentives -- is not left to the unfettered whims of local government, or even of the state Legislature. By the terms of their Constitution, the people of this state have decided which uses of property will receive such exemptions. In enacting these constitutional provisions, our citizens have implicitly concluded that encouraging the creation or continuation of certain activities outweighs the ad valorem tax revenues that would have been collected from such activities. One such constitutional provision mandates exemptions for real property that serves public purposes.

The Constitution does not define what constitutes a public purpose. This task is, as it should be, left to the Legislature.

Identifying the needs of its citizens, the Legislature is best suited to weigh these exemptions against the need government has for ad valorem tax revenues to financially support its operations. If the Legislature is most thoroughly equipped to strike a balance between societal demands and government's fiscal needs, it follows the Legislature is also best suited to define what are public purposes within this context.

Not only is this the practical result of our style of government, it is consistent with the legal rule pronounced by this Court. This Court has continuously recognized that, unless patently erroneous, Florida courts should defer to the Legislature's definition of what serves a public purpose. The premise for this rule is that the Legislature, as a popularly elected body, is better attuned to citizens' needs and demands, and is therefore in a superior position to determine what constitutes public purposes.

The nationwide consensus among the courts addressing the public purpose issue is that its definition is not static. Rather, what constitutes a public purpose depends upon the times, interests, and conditions confronting the community at the moment the definition is decided. Certainly, what was **not** a public purpose 20 years ago -- such as a $200-million sports complex -- may, in this day and age, be viewed as an essential facility for any viable community.

Of the states that have recently addressed the issue, most, if not all, have concluded that the construction and for-profit

operation of facilities such as stadiums, arenas, and convention centers, do serve the valid public purpose of encouraging tourism and economic development. Tourism and economic development may not have been as starkly recognized 50 years ago as serving public purposes. But in today's world, these purposes have been recognized as so essential to any community competing for precious dollars that courts have routinely sanctioned tax exempt status to such facilities.

The 1994 Amendment reflects what today's world considers to be facilities that serve valid public purposes, regardless of whether operated by a lessee for-profit. Decisions from around the country certainly highlight the reasonableness of the Legislature's public purpose definition. This Court should defer to the Legislature's knowledge and conclude that the Legislature was not patently erroneous when it defined public purposes to include the facilities listed in the 1994 Amendment.

## ARGUMENT

I.

THE LEGISLATURE USED THE NORMAL AND ORDINARY MEANING OF THE CONSTITUTIONAL TERM "PUBLIC PURPOSES" WHEN IT INCLUDED IN § 196.012(6) THE TYPES OF FOR-PROFIT-OPERATED FACILITIES WHICH ARE RECOGNIZED NATIONWIDE TO PROMOTE THE GENERAL WELFARE BY STIMULATING TOURISM AND ECONOMIC DEVELOPMENT.

The issue before this Court involves the Florida Legislature's role in defining, by statute, the constitutional term "public purposes." The Legislature had the power to construe the term "public purposes" as used in Article VII, section 3(a), of the Florida Constitution.[5/] See Department of Revenue v. Florida Boaters Ass'n, 409 So. 2d 17 (Fla. 1981). The only limitation was that the Legislature must give this term its normal and ordinary meaning. See id. at 19. This Court has held on several occasions that legislative declarations of public purpose are presumed valid, and should be deemed correct unless patently erroneous. See, e.g., Pepin v. Division of Bond Fin., 493 So. 2d 1013, 1014 (Fla. 1986); Zedeck v. Indian Trace Community Dev. Dist., 428 So. 2d 647, 648 (Fla. 1983).

Rather than attempting to define "public purposes" in the first instance, then, this Court should defer, as it ordinarily does, to the Legislature's definition of the term in the 1994 Amendment unless patently erroneous. Appellants believe that given

---

[5/] All property owned by a municipality and used exclusively by it for municipal or **public purposes** shall be exempt from taxation.

Art. VII, § 3(a), Fla. Const. (emphasis added).

societal changes, overwhelming out-of-state authority, and recent constitutional amendments, this Court should conclude the Legislature properly used the normal and ordinary meaning of the term "public purposes" in the 1994 Amendment.[6/]

### A. The Mere Lease of Government Property to a For-Profit Lessee Does Not Undermine the "Public Purpose" Use of the Property.

The original analyses of whether facilities serve public purposes to be entitled to an ad valorem tax exemption are found in Straughn v. Camp, 293 So. 2d 689 (Fla. 1974) and Williams v. Jones, 326 So. 2d 425 (Fla. 1975). However, the facts -- and therefore the concern -- in both cases are strikingly different from the facts here.

In Straughn, this Court held:

> The finding by the trial court that the plaintiffs'... leaseholds **(i.e., mostly leases for dwellings used as private homes)** serve a public purpose... is a finding of law contrary to controlling case law.
>
> ...
>
> The plaintiffs ... admit that the great majority of their leases are those wherein **an**

---

[6/] Much of the case law developing the definition of public purposes dealt with the issue in terms of statutory construction, due to the absence of an unequivocal express statutory public purpose definition. See, e.g., Sebring Airport Auth. v. McIntyre, 642 So. 2d 1072 (Fla. 1994); Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1977); see also Amicus Br. of the Fla. League of Cities, et al. To the extent such cases discern a legislative intent to distinguish between governmental-governmental and governmental-proprietary purposes, the 1994 Amendment unequivocally supersedes them. The Legislature has now weighed in with its definition of "public purposes," which rejects the use of the more limited proprietary analysis when considering facilities listed in the 1994 Amendment.

> **individual lessee is occupying and enjoying a private home for the use and benefit of the lessee and his or her family.**

293 So. 2d at 695 (emphasis added). Here, conversely, the facilities listed in the 1994 Amendment are only exempt if open to the general public. Thus, the Straughn concern -- use limited to a select few -- is not present here.

In Williams, this Court expressed concern that one commercial establishment operating for-profit could be given a tax exemption, but another one located in an adjoining county would not be afforded such an exemption. See, 326 So. 2d at 433. In sum, this Court was concerned that there be "equality" in taxing in our free-market economic system.

While this analysis makes sense with respect to the types of for-profit commercial establishments involved in Williams -- barber shops, plumbing businesses, laundries -- the same concern is simply not present with respect to the facilities contained in the 1994 Amendment. Practically speaking, without the involvement of government and significant community support -- that is, without a public-private alliance -- no developer will undertake the massive expenditures needed to build a stadium or convention center, which, in today's world, easily exceeds $200 to $300 million per stadium.

In short, the 1994 Amendment is fully consistent with Williams and Straughn. In deciding which types of facilities to include, the Legislature reasonably singled out those facilities which depend on significant government and community support for their

successful operation, and which benefit the public as a whole in a way that private homes and barber shops do not.

Moreover, the 1994 Amendment overcomes the prior precedent obstacle this court encountered in Sebring I -- Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1977). In Volusia County, this Court stated that the operation of an automobile racetrack for profit is not even arguably the performance of a "governmental-governmental" function. See id. at 501. As previously explained, see supra note 6, now that the Legislature has expressly described certain facilities that serve a public function, this Court's more narrow governmental-governmental test could apply only to uses of property outside the scope of the 1994 Amendment. With respect to those facilities listed in the 1994 Amendment, this Court need only decide whether the amendment's definition of a public purpose is a reasonable one. If so, then the facility here -- a sports facility with permanent seating -- serves a public purpose even if the activity taking place in this sports facility is the operation of a racetrack. To the extent this Court disagrees with this analysis, and given the public policy arguments made herein, Appellants alternatively request this Court to reconsider its conclusion that a racetrack can never serve a public purpose.

The history of the Sebring race is an instructive example of the public-private alliance required to build and operate the type of facility listed in the 1994 Amendment. For many years, the Authority itself oversaw operation of the racetrack to carry out

the public purpose of stimulating Sebring's share of the state's tourist economy. See ch. 67-2070, §§ 2, 22, Laws of Fla., as amended by, ch. 89-484, Laws of Fla. (authorizing, inter alia, the Authority's operation of racing facilities as "essential to the economic welfare of the inhabitants of the City of Sebring"). When it became apparent that, without more skilled management, the Authority's efforts to put Sebring on the map would ultimately fail, local government solicited the assistance of companies that had the experience and know-how to fulfill the Authority's objectives more efficiently. (V1:35-36) They found the Raceway. It would be incongruous to conclude that the use of the property by the Authority to conduct the race serves public purposes, but that the same use by the Raceway does not serve public purposes simply because the operator or lessee is a for-profit company more capable of running the event.

Thus, although they are frequently operated by for-profit companies, the facilities listed in the 1994 Amendment are not typical private-sector businesses; indeed, they are not really part of the private sector at all. There is no "competition" amongst these types of facilities because they are not routinely built and operated as part of our free market economy.

Unlike restaurants or barber shops, private industry alone does not bring about the creation and operation of stadiums or convention centers. Unless there is a public-private alliance, these type of capital improvements are rarely built in the first place. Application of the underlying premise for requiring that

property serve public purposes -- equality in taxing-- is thus not a concern for the types of facilities that the Legislature deemed to serve public purposes in the 1994 Amendment.

As reflected in constitutional amendments subsequent to Williams, moreover, the citizens of Florida have concluded that equality of taxation must coexist with other principles, such as ensuring the economic viability of this state. For instance, Article VII, section 3, of the Florida Constitution authorizes, and section 196.1995, Florida Statutes, implements, an ad valorem tax exemption to new business as defined in section 196.012(15). There is no limitation that the new business be not-for-profit. Yet, the effect of this constitutional tax exemption gives new businesses a tax break that other businesses do not have. The clear purpose of this tax exemption is to stimulate economic growth in this state. The citizens of this state presumably understood this point when they adopted this amendment, but nonetheless concluded that the tax break was justified in light of the substantial benefits to be reaped from new business development. See also Article VII, section 3(e) and section 199.1997 (ad valorem tax exemption for historic properties); Article VII, section 3(d) and section 196.175 (ad valorem exemption for renewable energy source device); section 376.84 (Brownfield redevelopment economic incentives). As can be seen from these post-Williams constitutional amendments, the majority of Florida residents have sanctioned the use of selective tax exemptions to stimulate the state's economy in areas which they feel merit assistance.

Practically speaking, governments are not necessarily denied needed revenues when a for-profit corporation receives an ad valorem tax exemption. Rather, providing an ad valorem tax exemption to a for-profit governmental lessee may **benefit** government. If a governmental entity is able to shift the economic responsibility for a public function to a private for-profit lessee, the governmental entity is skillfully channeling its funds to provide other public services. The Legislature could thus reasonably conclude that tax revenues relinquished by the governmental entity are minimal compared to the public funds the taxpayers save as a result of this transaction. Indeed, in exchange for relinquishing the right to receive tax revenues, governmental units often derive a direct monetary benefit from the projects by their receipt of rental or license income and/or a percentage of revenues or profits.

The fact that public purposes are oftentimes more successfully effectuated by parties making a profit is recognized by courts and legislatures around the country. Other states' courts have even recognized that a lessee's profit from the operation of a stadium is irrelevant to determine whether the property is exempt from ad valorem taxes. For instance in Erie County v. Kerr, 373 N.Y.S.2d 913 (N.Y. App. Div. 1975), the court upheld an ad valorem tax exemption:

> Presently Rich County Stadium is being employed in furtherance of the exact purpose for which it was contemplated, i.e., to provide the residents of Erie County the benefit of a first-class recreational, sports and cultural facility. The existence of a

> private profit motive by the lessee does not preclude the operation of the stadium from being a public purpose (Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235; Matter of Murray v. LaGuardia, 291 N.Y. 320, 52 N.E.2d 884). In fact, the Court of Appeals previously recognized that it was reasonable and consistent with the project's public purpose that Erie County should authorize that the management, operation and maintenance of the stadium be carried out by a private organization with expertise in this field. Whether a municipal or private corporation operates the stadium does not affect the benefit derived by the public . . . .

Id. at 919. Likewise, in Dubbs v. Board of Assessment Review, 367 N.Y.S.2d 898 (N.Y. Sup. Ct. 1975), the court held that a coliseum used for sporting and cultural events was exempt from ad valorem taxes despite the profit making motive of the lessee operating the coliseum. The court noted that it is the use of the property, not the use of the proceeds from the property, which determines whether the tax exemption applies. See also In re Spectrum Arena, 330 F. Supp. 125 (E.D. Pa. 1971) (arena used for sporting, musical and cultural events exempt from taxation); Cleveland v. Carney, 174 N.E.2d 254 (Ohio 1961) (auditorium used for trade shows, civic meetings, etc., exempt from taxation).

As noted by one court:

> [W]e are not unmindful of the fact that the Seattle Mariners may also reap benefits as the principal tenant of the publicly owned stadium that will be built as a consequence of the passage of the Stadium Act. That fact is not fatal to the act, however, as long as a public purpose is being served. The fact that private ends are incidentally advanced is immaterial to determining whether legislation furthers a public purpose.

CLEAN v. State of Washington, 928 P.2d 1054, 1061 (Wash. 1996). In a similar vein, another state court stated:

> In addition, the fact that a private entity such as the Brewers will benefit from the Stadium Act does not destroy the predominant public purpose of this act. In Reuter, this court addressed a similar argument against a legislative appropriation to the Marquette School of Medicine. That appropriation was challenged as supporting a private school which would not serve a public purpose. We found that this argument confused the means with the end and explained that an act is constitutional if it is designed in its principal parts to promote a public purpose so that the attainment of the public purpose is a reasonable probability. Reuter, 44 Wis.2d at 214, 170 N.W.2d 790. The benefit to the private Marquette School of Medicine was not enough to destroy the public purpose of that appropriation. Similarly, the fact that a private entity such as the Brewers might benefit from the Stadium Act does not destroy the predominant public purposes of this act.
>
> Other jurisdictions have reached similar conclusions See Annotation: Validity of Governmental Borrowing or Expenditure for Purposes of Acquiring, Maintaining or Improving Stadium for Use of Professional Athletic Team, 67 A.L.R.3rd 1186 (1976).

Libertarian Party v. State of Wisconsin, 546 N.W.2d 424, 434 (Wis. 1996).

This conclusion is consistent with the weight of authority from around the country. See CLEAN, 928 P.2d at 1061. Indeed, shortly after CLEAN was decided, this Court recognized that benefit to a for-profit entity does not strip a facility of its public purpose. See Poe, 695 So. 2d at 675-79.

Our system of government reflects the will of the people. If citizens decide to provide certain private industries tax

incentives to develop or operate public purpose facilities, there is no reason why their will should not be enforced. The decision of what constitutes public purposes is best left in the hands of the elected officials and their constituents, not the court system. In State v. Globe Communications Corp., 648 So.2d 110 (Fla. 1984), this Court stated:

> No duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt, that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law...**The courts have no veto power, and do not assume to regulate state policy**; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

Id. at 113 (emphasis added). Appellants recognize the constraints placed upon the Legislature by the Constitution, and do not suggest that this Court ignore the "public purposes" limitation under Article VII, section 3. Rather, Appellants ask that, when it comes to the definition of "public purposes," this Court defer to the Legislature's superior fact-finding ability and knowledge of the current impediments hampering the successful operation of government; and that this Court uphold, as a reasonable interpretation of the Florida Constitution, the Legislature's conclusion that the types of facilities listed in the 1994 Amendment serve public purposes even when they are operated by a for-profit company. Such a conclusion could peacefully co-exist with this Court's holdings in Straughn and Williams that

residences, barber shops, and the like do not serve such public purposes. More importantly, as noted by this Court in Poe, the principal check on this conclusion is at the "ballot box.... Only time will tell if the policy choices made here were wise ones." 695 So. 2d at 679.

### B. Facilities Promoting Tourism and Economic Development Fall Within the Definition of "Public Purposes."

Logic underpins the Florida courts' recognition that they should defer to the Legislature's definitions of "public purposes." Legislators, not the courts, are the representatives of the people, and the laws they enact presumably reflect their constituents' beliefs and provide for their needs. Although tangentially concerned with public **policy**, courts are not the cornerstone of societal **change**. Consequently, while courts are confined to applying existing legal principles to changed factual circumstances, the Legislature may enact new laws necessitated by widely accepted views about often sweeping societal changes. Florida courts have thus consistently refused to encroach on legislators' duties to furnish what their constituents have placed them there to provide.

As a result of such societal changes, certain facilities become part of what the public expects its government to provide. As noted by one court addressing the public purposes of a stadium:

> Moreover, times, conditions, and interests change over the years. As this court said in Central Lumber Co. v. City of Waseca, 152 Minn. 201, 188 N.W. 275 (1922), where we upheld a municipal operation of a lumber and coal yard:

> "Economic and industrial conditions are not stable. Times change. Many municipal activities, the propriety of which is not now questioned, were at one time thought, and rightly enough so, of a private character. The constitutional provision that taxes can be levied only for public purposes remains, but conditions which go to make a purpose public change."

Lifteau v. Metropolitan Sports Facilities Comm'n, 270 N.W.2d 749, 754 (Minn. 1978). The idea that there is some "traditional" sphere of activities that defines the public sector is not just antiquated, it is unworkable. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (rejecting the governmental/proprietary distinction in the context of intergovernmental immunity). In reaching its decision, the Garcia Court realized that any rule "that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes", 469 U.S. at 546, and that legislatures were better able to deal with the constantly changing conditions that determines what services and functions the public welfare demands, see id. Compare Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984), in which the Court unanimously construed the "public use" requirement of the Takings Clause as coextensive with a state's power to legislate in the public interest. This Court has already recognized the virtue (if not constitutional mandate) of deference to legislative

determinations of policy. See Globe Communications Corp., 648 So.2d at 113; see also State v. Miami Beach Redev. Agency, 392 So. 2d 875, 886-87 (Fla. 1980) (legislative determination that exercise of eminent domain serves a public purpose entitled to strong presumption of validity).

How can it be said that the Florida Legislature acted unreasonably in concluding that the facilities contained in the 1994 Amendment serve public purposes when courts and legislatures around the nation have reached a similar conclusion? Could all these various courts and legislatures be acting unreasonably when they too concluded that stadiums, arenas and coliseums serve public purposes? If not, then the Florida Legislature's similar conclusion that the facilities contained in the 1994 Amendment serve public purpose logically cannot be labeled "unreasonable."

The Legislature can and should be entrusted with this power in the first instance. As demonstrated by the scope of the 1994 Amendment, the Legislature has acted prudently by notably excluding from the exemption certain items -- such as golf courses and marinas -- which the Legislature presumably recognized could and would be built without a public-private alliance. Private industry can successfully and profitably build and operate numerous public facilities without the participation of government.

Conversely, other facilities simply cannot be built and operated unless there is a public-private alliance. The Legislature could easily conclude that no commercial developer would erect a $200-million stadium in a city unless it was part of

an overall community project, with the participation and approval of the citizens and government. Likewise, a developer is unlikely to build a convention center in the hopes the public will use the facility. These projects are laced through with the involvement of government, reflecting an inherent sense of serving the public. It is inconceivable these projects -- stadiums, convention centers, and arenas -- are simply built by developers in the hopes that, once built, "they will come."[7/] Rather, these tourism facilities are typically the result of a public-private alliance. This fact is exemplified by the Legislature's exclusion from the 1994 Amendment of projects that are viable without the necessity of such an alliance.[8/]

In today's world, these tourism facilities are financially beyond the means of many governments. It makes perfect sense for government to encourage private industry to undertake the massive expense of such projects in return for a tax break. Governments should not be hampered in establishing these vital projects by being unable to offer tax incentives.

---

[7/] With all due respect to the hit movie, "Field of Dreams."

[8/] For instance, a developer will often build a golf course as part of his overall efforts to market the sale of lots in a residential development. The Legislature obviously concluded that a golf course would not automatically be **deemed** to serve a public purpose. This is not to say that merely because a facility is not listed in the 1994 Amendment necessarily means it can never serve a public purpose. Rather, it simply means that a party claiming a public purpose could not rely on the presumption created by the 1994 Amendment, to which this Court should defer unless the definition is patently unreasonable.

The Legislature's recognition, in enacting the 1994 Amendment, that facilities built and operated as part of a public-private alliance further legitimate public purposes, is not just eminently reasonable; it also more closely connects with the needs of today's governments. In Libertarian Party v. State of Wisconsin, 546 N.W.2d 424 (Wis. 1996), the court stated:

> "[T]he concept of public purpose is a fluid one and varies from time to time, from age to age, as the government and its people change. **Essentially, public purpose depends upon what the people expect and want their government to do for the society as a whole and in this growth of expectation, that which often starts as hope ends as entitlement.**"
>
> ...
>
> In the present case, the legislature has expressly declared that the formation of local baseball park districts will serve a statewide public purpose by "encouraging economic development and tourism, by reducing unemployment and by bringing needed capital into the state for the benefit and welfare of people throughout the state." § 51 (creating § 229.64). These are clearly public purposes and will provide direct, not remote, advantages or benefits to the public at large.

Id. at 433-34 (quoting State ex rel. Warren v. Reuter, 170 N.W.2d 790 (Wis. 1969)) (emphasis added). The Washington Supreme Court had this to say:

> Our conclusion that the Stadium Act does not run afoul of article VII, section 1 recognizes, as have the majority of courts around the nation, that public provision of a venue for professional sports franchises serves a public purpose in that the presence in a community of a professional sports franchise provides jobs, recreation for citizens, and promotes economic development and tourism.

CLEAN v. State of Washington, 928 P.2d 1054, 1061 (Wash. 1996). Similarly, the Florida Legislature has reasonably concluded that tourism and economic development serves valid public purposes in the ad valorem tax exemption context.[9/]

C. The Constitutional Limitation on "Use" by a Municipality Focuses on the Actual Use to Which the Property Is Put, Not the Status of the Lessee of the Property.

The constitutional provision at issue in this case provides that property owned by a municipality and "used exclusively by it for municipal or public purposes shall be exempt from taxation." Art. VII, § 3(a), Fla. Const. This Court has repeatedly held that this establishes a test of "function by utilization": "It is the utilization of the leased property from a governmental source that determines whether it is taxable under the Constitution." Straughn v. Camp, 293 So. 2d 689, 695 (Fla. 1974).

In Dade County v. Pan American World Airways, Inc., 275 So. 2d 505 (Fla. 1973), this Court established a two part test for determining whether property is used exclusively for public purposes: (1) Is the facility a public purpose; and, if so, (2) is the property used exclusively for that purpose?[10/]

---

[9/] Poe, implicitly at least, recognizes that a stadium serves a "paramount public purpose" for purposes of validating public bonds issued to finance its construction. See 695 So. 2d at 675-79 (citing, inter alia, Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965)).

[10/] As Volusia County points out, the statutory exemption at issue in Pan Am has been superseded. See 341 So. 2d at 502 n.5. Pan Am's constitutional analysis, however, has never been challenged, and indeed, was applied as recently as 1993. See Northcutt v. Orlando Util. Comm'n, 614 So. 2d 612 (Fla. 5th DCA 1993).

The Pan Am Court went on to explain both parts of the test. The first question necessarily requires the definition of public purposes. See id. at 512. As argued above, the Legislature reasonably defined "public purposes" to include facilities whose construction and operation require extensive cooperation between the public and private sectors -- that is, facilities that demand a public-private alliance. Such a definition will, of course, implicate private gain. This should not detract from the fact that the facilities fulfill a public function. See Poe, 695 So. 2d at 675-79; cf. Libertarian Party of Wisconsin, 546 N.W.2d at 434; CLEAN, 928 P.2d at 1061.

The second part of the Pan Am test simply insures that the private lessee is, in fact, using the facility for the public purposes it was intended to fulfill. See 275 So. 2d at 511. There is no dispute that the Raceway is using the track to operate the race, and thereby furthering the public purposes contemplated by the 1994 Amendment. The use of the property thus satisfies the requirements of Article VII, section 3(a), of the Florida Constitution.

To the extent this and other courts have treated the public purpose issue differently with respect to the **construction** of the facility and the **operation** of it, this distinction should be abolished. Although no court has explicitly noted this distinction, courts apparently have been more willing to conclude that a government's decision to **construct** a tourism facility serves

public purposes rather than the subsequent operation of the facility by a lessee.

For instance, in Poe, this Court, quoting extensively from Daytona Beach Racing & Recreational Facilities District v. Paul, 179 So. 2d 349 (Fla. 1965), validated bonds to construct a stadium. See 695 So. 2d at 672. This Court apparently did so because this Court recognized the stadium served public purposes. Indeed, in the text of Poe, this Court noted that the fact that a lease to operate the facility does not detract from the original public purposes for which the facility was built:

> But as we have seen, the revising of the lease did not detract from the predominantly public purpose of the facility, which was the successful operation of the Speedway itself, pure and simple, as a tourist attraction to the area []--[] a unique facility in the state which 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 past.

Poe, 695 So. 2d at 678 (quoting Paul, 179 So. 2d at 355).

There is no rational reason why this Court's conclusion that the **construction** of the stadium in Poe served public purposes would not similarly apply here.[11/] As noted in Paul:

> No substantial transmutation has occurred in the public nature and character of the

---

[11/] As it now stands, this Court's public purpose determination in Poe is meaningless to the Tampa Sports Authority's future request for an ad valorem tax exemption. What has happened to Raymond James Stadium from the time this Court validated the bonds that makes it no longer a public purpose for tax purposes? Nothing. Yet, unless this Court upholds the constitutionality of the 1994 Amendment, a property appraiser may be entitled to conclude the stadium does not serve a public purpose and is not entitled to an ad valorem tax exemption.

> speedway... since it was judicially declared to be a public or municipal purpose in the bond validation case... so that it may no longer be considered a public or municipal purpose enjoying the usual tax exemption privileges....

179 So. 2d at 353.

When the Sebring raceway was constructed, cf. Poe, 695 So. 2d at 675-79, it was undeniably done with the intention that the facility would be used to attract tourism to Sebring. The track is being employed in furtherance of the exact purposes for which it was contemplated. To say then that operation of the track no longer serves public purposes defies explanation. Cf. Erie County v. Kerr, 373 N.Y.S.2d 913, 919 (N.Y. App. Div. 1975) (use of stadium for same public purpose contemplated in building it satisfied public purpose requirement).[12/]

More generally, companies do not simply move into the facilities listed in the 1994 Amendment and operate them however they see fit; instead there continues to be significant public-sector involvement. Companies who operate the facilities listed in the 1994 Amendment must insure that their actions continue to serve the same public purposes for which the facilities were built in the first place. To do otherwise would risk the powerful displeasure of their government landlords, and would probably be a breach of

---

[12/] In other words, the answer to Judge Quince's question, "Why then should this racetrack because of its location on government owned property have a tax advantage by being granted an exemption?" Sebring II, 718 So. 2d at 300, is that its location insures that the local body politic was involved in the decision to construct and operate the facility.

the lease agreement with the government. Indeed, it would result in the loss of the exemption altogether.

There is no rational reason to distinguish between the construction and operation of public purpose facilities. They are simply two parts of the same public purpose package. Neither the Appraiser nor the Second District generated any logic for such differing treatment. There is none. To the extent the Second District rationalized its conclusion that Poe was inapplicable because it involved a bond validation proceeding, this Court should reject such a distinction.

## CONCLUSION

For all the foregoing reasons, the lower court erred when it held the 1994 Amendment to section 196.012(6), Florida Statutes unconstitutional. This Court should defer to the Legislature's eminently reasonable conclusion that facilities resulting from a public-private alliance, as referenced in the 1994 Amendment serve an inherent public purpose: furthering the valuable goal of tourism and economic development. Under this nationally accepted test, section 196.012(6), which defines a sports arena with permanent seating to serve municipal or public purposes, would be valid. This Court should therefore reverse this final summary judgment and remand this matter to the lower court with instructions to enter summary judgment in favor of the Authority and Raceway on Count I of the complaint.

Respectfully submitted,

Paul R. Pizzo, Esq.
Florida Bar No.: 113794
Hala A. Sandridge, Esquire
Fla. Bar No.: 0454362
Charles Tyler Cone, Esq.
Fla. Bar No.: 0145165
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

BY: _____

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **Clifford M. Ables, III, Esquire**, 457 South Commerce Avenue, Sebring, Florida, 33870; **Joseph C. Mellichamp, III, Esquire**, State Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, **Larry E. Levy, Esquire**, Post Office Box 10583, Tallahassee, Florida, 32302, and **J. Wendell Whitehouse, Esquire**, 445 South Commerce Avenue, Sebring, Florida 33870 on this the 25th day of November, 1998.

_____
Hala A. Sandridge, Esquire