SUPREME COURT OF FLORIDA
CASE NO. SC06-1224

RICK BARNETT, Bay County Property Appraiser, et al.,

Petitioners,

Lower Tribunal No. 1D05-1731

vs.

FLORIDA DEPARTMENT OF MANAGEMENT SERVICES,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT DEPARTMENT OF MANAGEMENT SERVICES

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PRELIMINARY STATEMENT

Respondent, State of Florida Department of Management Services, will be referred to herein as the "Department" except when reciting from the Joint Stipulation of Fact and Documents, where the Department was referred to as "DMS". The State of Florida Correctional Privatization Commission, the predecessor to the Department, will be referred to herein as the "Commission". The State of Florida, inclusive of its departments, agencies and commissions, will be referred to as the "State". Petitioner, Rick Barnett, Bay County Property Appraiser, successor to Richard Davis, former Bay County Property Appraiser, will be referred to herein as the "Property Appraiser". Peggy Brannon, Bay County Property Tax Collector, will be referred to herein as the "Tax Collector". The state prison facility financed in the instant case is sometimes referred to as the "Property", the "Bay Correctional Facility" or the "financed facility". References to the Record on appeal and the Supplemental Record on appeal will be delineated as (R-volume # - page #).

SUPPLEMENTAL STATEMENT OF THE CASE

The Property Appraiser makes reference to certain cases involving the Commission, the Property Appraiser, and the Tax Collector in 1997. Contrary to Property Appraiser's innuendo, these cases are not before this Court, nor part of the case below. The 1997 cases were dismissed by the trial court because the court did not have subject matter jurisdiction. *See* Property Appraiser's Appendix to Initial Brief, Tab #2, page 14.

In the Initial Brief, the Property Appraiser discussed a motion filed by the Tax Collector for partial summary judgment (which was denied), but cites to a motion filed by the Tax Collector seeking an order from the trial court concerning the "partial tax payments." Initial Brief, 3. The motion the Property Appraiser cites to, but does not discuss, was filed by the Tax Collector in January 2003 requesting an order as to whether the Tax Collector could accept "partial tax payments"[1] for 2001 and 2002. (R-I-52-54) Ultimately, the trial court determined that the Tax Collector could deposit the State's checks, but withheld ruling on whether that would prejudice the Tax Collector in the pending action. (R-IV-130-131).

[1] These payments were not partial payments as classified by the Tax Collector, but payments in lieu of taxes. § 957.04(8), Fla. Stat. (1999).

SUPPLEMENTAL STATEMENT OF THE FACTS

The following Supplemental Statement of the Facts supplements the Statement of the Facts in the Property Appraiser's Initial Brief to provide this Court with certain stipulated factual statements and those facts as found by the court below. Indeed a good portion of the Property Appraiser's Statement of the Facts was argument of counsel, specifically that of Mr. Reid and Mr. Davis, and not testimony of either. We call the Court's attention to the December 13, 2004 hearing transcript from the case below. (R-IV-8-47)

The Property Appraiser states that the Lease Agreement with Option to Purchase dated May 1, 1994 (the "Lease Purchase Agreement") recognizes that it is the contractor who is buying the property and constructing the facilities. In support of this misstatement of fact, the Property Appraiser refers to the provision of the Lease Purchase Agreement which recognizes the obligation of the contractor to pay the Commission liquidated damages if the Bay Correctional Facility is not constructed on time. This is a standard liquidated damages provision in construction agreements, and cannot demonstrate the proposition that it is really the contractor who is buying the property. The Record is devoid of any reference to any ownership interest in the Bay Correctional Facility held by the contractor.

Although the Property Appraiser quotes section 11.7 of the Operation and Management Services Contract (R-IX-1157-1159) and provides the Court with a

lengthy underlining of various portions of this section, the Property Appraiser elects to draw the Court's attention away from the most relevant phrase in this section, which is found in the first line, specifically, the reference to "lawful" taxes and assessments. However, the Property Appraiser did correctly point out that the Lease Purchase Agreement permits the lessee (the Department) to challenge the assessment of real property taxes.

The following paragraphs are recited in their entirety (referenced by their respective paragraph numbers) from the Joint Stipulation of Facts and Documents agreed to by all parties and accepted by the trial court as the relevant facts before the court and as a part of the basis for the Amended Final Judgment. (R-IV-18-20) This recitation does not contain all numbered paragraphs, but only those viewed by the Department as essential to this Court's decision. The entire Joint Statement of Facts and Documents can be found in the Record at II-310-327 with respect to the Statement of Facts, and in the Record at VI-445-659, VII-660-885, VIII-886-1091 and IX-1092-1303 with the references to the Documents. References to the Documents will be both by their original Tab as part of the Joint Stipulation of Facts and Documents and to their Record cite on appeal.

[3] The Bay Correctional Facility is a 750 bed adult male medium custody secure correctional facility ("Correctional Facility") designed to house

male inmates referred by the State of Florida Department of Corrections. (R-II-311)

[6] The Florida Legislature created the Correctional Privatization Commission (the "Commission") in Section 40 of Chapter 93-406, Laws of Florida, to privatize the operation of state prison facilities and directed the implementation of the initial two facilities and the appointment of the members of the Commission in Sections 41 and 42 respectively of Chapter 93-406, Laws of Florida. (R-II-311); [Tab 1, Chapter 93-406, Laws of Florida (R-VI-445-452)]

[7] The Commission was established as an independent Commission of the State of Florida (the "State"), administratively organized within the Department of Management Services (the "DMS"). It is a part of the governmental structure that constitutes the State. By statute, it exists "for the purpose of entering into contracts with contractors for the designing, financing, acquiring, leasing, constructing, and operating of private correctional facilities". (R-II-311-312)

[11] Panama City Port Authority transferred title of the Property to the Finance Corporation on June 23, 1994, by Warranty Deed, which was recorded in the Official Records of Bay County at Book 1509, Page 638. (R-II-312); [Tab 4, Warranty Deed, made and executed on June 23, 1994 (R-VI-473-476)]

[12] Finance Corporation was created to acquire and hold title to the Property upon which the Correctional Facility is located, and to lease purchase the

Correctional Facility to the Commission, as Lessee, in order to utilize a lease purchase financing technique specifically authorized by Section 957.04(2)(a), Florida Statutes. (R-II-312)

[13] On June 28, 1994, the Finance Corporation, as Lessor, leased the Correctional Facility and the Property to the Commission, as Lessee, pursuant to the terms of the Lease Agreement with Option to Purchase (the "1994 Lease-Purchase Agreement"), as provided for under Chapter 957, Florida Statutes (2004). (R-II-313); [Tab 5, Lease Agreement with Option to Purchase, dated as of May 1, 1994 (R-VI-477-554)]

[15] In accordance with Section 5 of the 1994 Lease-Purchase Agreement, the Commission is responsible for all repairs and maintenance of the Correctional Facility. (R-II-313); (R-VI-518)

[16] In accordance with Section 9 of the 1994 Lease-Purchase Agreement, the Commission is responsible for providing insurance for the Correctional Facility. (R-II-313); (R-VI-523)

[17] In accordance with Section 21 of the 1994 Lease-Purchase Agreement, the Commission has indemnified lessor and holds lessor harmless with respect to the Correctional Facility. (R-II-313); (R-VI-534)

[18] In accordance with Section 15 of the 1994 Lease-Purchase Agreement, the Commission assumes all risk of loss with respect to the Correctional Facility. (R-II-313); (R-VI-530)

[19] In accordance with Section 8 of the 1994 Lease-Purchase Agreement, the lease is a net lease, whereby the rent to be paid by the Commission is net of all expenses to the Lessor. (R-II-313); (R-VI-521)

[20] In accordance with Section 17 (R-VI-532-533) and Exhibit C (R-VI-545-548) of the 1994 Lease-Purchase Agreement, the Commission has an option to purchase the Correctional Facility (and acquire the legal title held by the Financing Corporation) at any time during the term of the 1994 Lease-Purchase Agreement for the remaining principal payments under the 1994 Lease-Purchase Agreement (which are also the principal portion of the lease payments) plus (during the early portion of the lease) a prepayment premium. This payment is described in the 1994 Lease-Purchase Agreement as the "concluding payment". (R-II-314); (R-VI-488)

[21] In accordance with Section 17 (R-VI-532-533) and Exhibit C (R-VI-545-548) of the 1994 Lease-Purchase Agreement, the Commission has an option to purchase the Correctional Facility and receive all right, title and interest of lessor automatically, upon expiration of the lease with no further payment on its part. (R-II-314)

[24] Pursuant to the 1994 Indenture, Nationsbank of Florida, N.A., (the "Trustee") issued Certificates of Participation ("1994 COPs") to investors, the proceeds of which were used by the Finance Corporation to acquire the Property on behalf of the Commission and by the Commission to construct the Correctional Facility thereon. (R-II-315); [Tab 9, Certificates of Participation (R-VII-677-679)]

[25] The 1994 COPs evidence an individual ownership interest in the Trust Estate, primarily consisting of the annual rent payments paid by the State through Trustee to the holders of the 1994 COPs, pursuant to the 1994 Lease-Purchase Agreement. (R-II-315)

[26] In order to secure the 1994 COPs, the Finance Corporation granted a Mortgage and Security Agreement in its interest in the Property to the Trustee (the "1994 Mortgage"), which was recorded in the Official Records of Bay County at Book 1509, Page 641. (R-II-315); [Tab 10, Mortgage and Security Agreement, dated as of May 1, 1994 (R-VII-680-713)]

[28] The State appropriates funds to the Commission on an annual Fiscal Year basis sufficient in amount to pay the annual lease payments to the Trustee as required under the 1994 Lease-Purchase Agreement and to pay the cost of operating the Correctional Facility; however, the State is under no legal obligation to appropriate such funds. (R-II-315-316)

[32] In 2001, the 1994 COPs were refunded. (R-II-316)

[42] The Corrections Corporation of America operates and maintains the Property as provided for in the terms of the Operation and Management Services Contract. (R-II-318); [Tab 24, Operation and Management Services Contract, dated March 29, 1994 (R-IX-1092-1173)]

In November, 2001, the 2001 COPs: were issued and the proceeds were used to refund and defease, in full, the 1994 COPs and to pay the cost of issuing the 2001 COPs, however, no material changes were made to the documents that establish the State's equitable ownership. The trial court, in its Amended Final Judgment, specifically found this to be the case. (R-II-373-379).

Contrary to the assertions made by the Property Appraiser, the 1994 Mortgage granted by the Finance Corporation on its interest in the financed facility has no effect and cannot be enforced unless an "Event of Default" or an "Event of Non-Appropriation" under the Lease Purchase Agreement has occurred. If the Department ever causes an Event of Default to occur, or the Legislature causes an Event of Non-Appropriation to occur, the State would no longer have an interest in the Property (at least after the then current fiscal year). Indeed, the 1994 Mortgage specifically provides:

> PROVIDED, HOWEVER, that so long as the Commission is not in default under the Lease Purchase Agreement or an Event of Non-Appropriation has not occurred the mortgage granted herein is subordinate and subject to the rights of the Commission under the Lease Purchase Agreement.

(R-VII-683)

The critical nature of the 1994 Lease-Purchase Agreement (R-VI-477-554) is not the fact that it is subject to annual renewal as claimed and argued by the Property Appraiser, but rather that the Finance Corporation is required to transfer fee simple title to the State under the Lease Purchase Agreement upon payment in full of the lease payments. The lease payments may be prepaid. The prepayment is referred to in the Lease-Purchase Agreement as a "Concluding Payment". (R-VI-532-533); (R-VI-547) Thus, by the terms of the 1994 Lease-Purchase Agreement, at the end of the Lease Term, the State is not even required to make a nominal payment in order to obtain fee simple title to the financed facility. This was unchanged in the 2001 refinancing. (R-VIII-986) See Appendix "A and "B" attached hereto for the actual payment schedules incorporated into the 1994 Lease-Purchase Agreement (R-VI-547) and the 2001 Lease Schedule (R-VIII-986), respectively.

SUMMARY OF ARGUMENT

The case before the court actually involves several interconnected, well-settled principles of law, and does not represent a disagreement among the District Courts as to the current state of the law. The District Court's reliance on *Leon County Education Facilities Authority v. Hartsfield*, 698 So. 2d 526 (Fla. 1997) was rightfully taken. The essential question before the Court in the *Hartsfield*

decision was whether the Leon County Educational Facilities Authority was the "equitable owner" of the student dormitory under the lease purchase agreement for purposes of ad valorem taxation, and not whether the dormitory was eligible for an ad valorem tax exemption. Indeed, it was agreed by the parties in *Hartsfield* that the financed project would qualify for an "exemption" if the Leon County Educational Facilities Authority was determined to be the "owner" for purposes of ad valorem taxation. *Hartsfield*, 698 So. 2d at 529.

It is settled law that the State and its political subdivisions are immune from taxation, and such immunity can only be waived by a clear expression of such waiver by the Legislature, if indeed the Constitution would even permit such a waiver. The statutes providing for an exemption from local taxes simply do not and can not apply to the State in light of its immunity.

Many of the arguments proffered by the Property Appraiser as to Legislative intent rely on misquotations of applicable Florida Statutes. For example, contrary to the Property Appraiser's statements, Section 957.03(4)(a), Florida Statutes (1999), does not require the private vendor to "provide its own financing" but rather, provides that "the Commission shall enter into a contract or contracts with one contractor per facility for the . . . financing . . . of that facility . . . ." There is a significant legal difference between these two statements. Based on these misstatements as to what Florida Statutes provide, the Property Appraiser seeks to

draw a distinction between the underlying stipulated facts of the instant case and the virtually identical stipulated facts underlying the *Hartsfield* decision. A simple review of the stipulated facts referenced in the *Hartsfield* decision will demonstrate the similarity of the underlying facts in these two cases.

Further, the Property Appraiser continues to imply that there exist specific statements regarding "ad valorem taxes" in Chapter 957, Florida Statutes. A simple phrase search of Chapter 957, Florida Statutes, will demonstrate the fact that the phrase "ad valorem taxes" or similar words do not currently appear in Chapter 957, Florida Statutes. The only reference can be found in Section 957.04(8), Florida Statutes (1999)[2], where the Legislature clarified its original intent in enacting Chapter 957, Florida Statutes, that the financed prison facilities were treated as owned by the Commission and authorized the legislature to appropriate payments in lieu of taxes to the counties where a financed prison is located. The payment of ad valorem taxes and a payment in lieu of taxes are mutually exclusive concepts. A clear reading of Chapter 957, Florida Statutes, as envisioned by this Court in *Koile v. State*, 934 So. 2d 1226 (Fla. 2006), in fact demonstrates that the Legislature clearly anticipated that the financed prisons would be treated as State property, and as such be immune from ad valorem taxes.

[2] The Legislature replaced this subsection in 2004 with a new subsection (8) relating to the Department.

There is no need for a strained reading of Chapter 957, Florida Statutes, to arrive at a contrary conclusion.

STANDARD OF REVIEW

This case is before this Court on undisputed facts. The only issue before this Court is whether the courts below properly applied the applicable law to these facts. Based on this, the Department agrees with the Property Appraiser that this review is a *de novo* review of the application of the laws to the facts in this case. *Agency for Health Care Admin. v. Wilson*, 782 So. 2d 977, 978 (Fla. 1st DCA 2001). The facts themselves are not being disputed, contested or challenged.

ARGUMENT

I. *HARTSFIELD* IS WELL SETTLED LAW, APPLICABLE HERE, AND NO BOND REFERENDUM WAS REQUIRED.

The concept of equitable ownership of property in the context of ad valorem taxation has long been a part of Florida law. *Hartsfield*, 698 So. 2d at 528. The equitable owner's identity, not that of the holder of bare legal title is determinative of whether the Property is subject to ad valorem taxation. *See Hartsfield*, 698 So. 2d at 529 (holding that the County Educational Facilities Authority's equitably owned student housing property was exempt from ad valorem tax); *First Union Nat'l Bank of Fla. v. Ford*, 636 So. 2d 523 (Fla. 5th DCA 1993), *aff'f sub nom. Leon Co. Educ. Facilities Auth. v. Hartsfield*, 698 So. 2d 526 (Fla. 1997) (holding that the Bank office building leased to the County was equitably owned by the

County and immune from tax). When property is leased from one who holds legal title through a lease–purchase agreement which shifts the benefits and burdens of ownership to the lessee and where the lessee has the right to purchase for a nominal consideration, the law will classify the lessee-purchaser as the equitable owner for purposes of assessing ad valorem taxation. *See Robbins v. Mt. Sinai Med. Ctr., Inc.*, 748 So. 2d 349 (Fla. 3d DCA 1999) (holding that the lower court wrongfully classified the lessee as the equitable owner because it lacked a true option to purchase for nominal consideration at the end of the lease term). In this situation, the owner of the bare legal title is ignored and the lessee-purchaser, classified as the equitable owner, is the owner upon which focus is placed. *Hartsfield*, 698 So. 2d at 529; *Ford*, 636 So. 2d at 527. *See also* Black's Law Dictionary 1137 (8th ed. 2004) (defining an equitable or beneficial owner as "one recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else"). In *Hartsfield*, it was specifically acknowledged that the issue before the Court was whether the Authority was the equitable owner of the student housing authority, since it was also acknowledged that if the Authority was the owner, then the property would be exempt from ad valorem taxation. *Hartsfield*, 698 So. 2d at 529.

The lessee-purchaser is said to hold equitable ownership in leased property under a lease-purchase financing agreement that shifts the benefits and burdens of

ownership to the lessee. The key factor in determining whether a lease conveys equitable ownership is whether it confers upon the lessee the benefits and burdens of ownership, as defined by Florida courts. A review of the facts involved in this case makes it unquestionable that the State enjoys all of the benefits and burdens of ownership, and not the lessor who only holds bare legal title as a nominal lessor in order to create the factual pattern necessary to make the lease-purchase financing structure work.

The Florida courts look to the following benefits and burdens when confronted with a claim of equitable ownership: (a) the purpose of the lease, (b) what the leased property will be used for, (c) who has the obligation to maintain the property, (d) who is responsible for securing insurance, (e) who is liable for paying taxes, and most importantly, and (f) whether there is a true option to purchase at a nominal value. *See Ford*, 636 So. 2d at 524; *Robbins*, 748 So. 2d at 351; *Hartsfield*, 698 So. 2d at 527, 529-30.

The concept of equitable ownership by a lessee under a lease-purchase arrangement was probably best summarized in *Robbins*:

> Valid "burdens and benefits" considered by Florida courts include the lessee's obligation to insure, maintain and pay taxes on the leased property, as well as the lessee's option to purchase the leased property at the end of the lease term. None of these factors, including an option to purchase, convey to a lessee equitable title to leased property when considered individually. However, when these factors are considered in relation to one another, the courts may determine that a lessee is the equitable owner of leased property. In considering all of these

> aforementioned factors, Florida courts have only granted a lessee equitable ownership of leased property when that lessee retained an option to purchase the leased property for *nominal value.*

Robbins, 748 So. 2d at 351 (internal citations omitted) (emphasis added). *See also* Dustin Duell Deese, *Recent Development: Taxation*, 31 Stetson L. Rev. 541 (2002) (commenting on the *Robbins* decision, the author stated that "[a]lthough termed a lease, this type of transaction essentially operates as a sale, and equitable ownership is conveyed").

When, however, a lessee lacks a true option to purchase for a nominal amount, the courts will not classify that lessee an as equitable owner. In *Robbins*, for example, the court found that the "Lessee's payment of taxes, insurance, maintenance, and repair of the leased properties, considered in the context of the relationship between the parties, did not convey Lessee equitable title to the leased properties" because there was no true option to purchase. *Robbins*, 748 So. 2d at 352. This key factor was also discussed by the court in *Hartsfield*, where this Court held that because lessee could purchase a dormitory and food service project for one dollar, it was the project's equitable owner, and by the Court in *Ford*, where the Court held that lessee was the equitable owner of leased property because title would pass automatically to lessee upon full payment of debt. *Hartsfield*, 698 So. 2d at 527; *Ford*, 636 So. 2d at 524, 527. Therefore, when any security arrangement for a financed purchase requires the purchaser to simply

make a series of periodic payments, with no additional significant or material performance required at the end of the financing term, such purchaser is the equitable owner. *Robbins*, 748 So. 2d at 351-52; *Hartsfield*, 698 So. 2d at 529-30; *Ford*, 636 So. 2d at 524, 527.

The State, initially through the Commission and later through the Department, leased the Property pursuant to the 1994 Lease-Purchase Agreement, as provided for under Chapter 957, Florida Statutes (1993), and specifically, Section 957.04(2)(a), Florida Statutes (1993). (R-VI-477-554) Under the 1994 Lease-Purchase Agreement, the Commission, whose powers are now held by the Department, acts as the lessee and leases the Bay Correctional Facility from the Finance Corporation which acts as the nominal lessor. The 1994 Lease-Purchase Agreement vests all of the benefits and burdens of ownership in the Commission, which is the State.

The 1994 Lease-Purchase Agreement vests the following benefits and burdens in the Commission as lessee:

(a) Lessee is responsible for all repairs and maintenance of the Bay Correctional Facility. (R-VI-518)

(b) Lessee is responsible for providing insurance for the Bay Correctional Facility. (R-VI-523-524)

(c) Lessee indemnifies lessor and holds lessor harmless with respect to the Bay Correctional Facility. (R-VI-534)

(d) Lessee assumes all risk of loss with respect to the Bay Correctional Facility. (R-VI-530)

(e) The lease is a net lease, whereby the rent to be paid by the Lessee is net of all expenses to the Lessor. (R-VI-521)

(f) Lessee has an option to purchase the financed facility (and acquire the legal title held by the Financing Corporation) at any time during the term of the 1994 Lease-Purchase Agreement for the remaining principal payments under the 1994 Lease-Purchase Agreement (which are also the principal portion of the lease payments) plus (during the early portion of the lease) a prepayment premium. This payment is described in the 1994 Lease-Purchase Agreement as the "concluding payment". (R-VI-532-533); (R-VI-547)

(g) Lessee has the right to receive all of the right, title and interest of lessor automatically, upon expiration of the lease with no further payment on its part. (R-VI-532-533); (R-VI-547)

The State ultimately does incur all of the burdens and benefits of ownership as discussed in *Hartsfield* and *Ford*. And most importantly, upon payment of the full amount of principal due under the 1994 Lease-Purchase Agreement, whether at

the end of the lease period or earlier pursuant to the purchase option, the Property must be transferred to the State. The 1994 Lease-Purchase Agreement provides in that regard, "Lessor as 'Optionor' hereby grants unto Lessee as 'Optionee' the irrevocable Option (the 'Option') and right to purchase the Project demised under the 1994 Lease-Purchase Agreement for a concluding payment during the lease equal to the remaining principal payments (plus a premium for early redemption during the early years of the lease) and at the end of the lease, a concluding payment of zero ('0')." (R-VI-532-533); (R-VI-547)

The State appropriates funds to the Commission (and now the Department) on an annual Fiscal Year basis sufficient in amount to pay the annual lease payments as required under the 1994 Lease-Purchase Agreement or the 2001 Lease-Purchase Agreement, as applicable and to pay the cost of operating the Bay Correctional Facility. § 957.15, Fla. Stat. (2004).

The lease payments are made to the Finance Corporation, which has assigned its interest in the 1994 Lease-Purchase Agreement to the Trustee, who issued the 1994 COPs to investors, which provided funds to the Finance Corporation to acquire the Property on behalf of the Commission and to allow the Commission to construct the Bay Correctional Facility thereon. (R-VI-562-659); (R-VII-660-676)

As stated above, in 2001, the 1994 COPs (R-VII-677-679) were refunded and the proceeds were used to refund and defease, in full, the 1994 COPs and to pay the cost of issuing the 2001 COPs (R-VIII-1012-1040), however, no material changes were made to the documents that establish the State's equitable ownership. The Property Appraiser has raised no issue or argument that the 2001 COPs financing documents were materially different from the 1994 COPs financing documents.

The 1994 Lease-Purchase Agreement used in the instant case is a finance lease that is treated as a capital lease under the Internal Revenue Code and under relevant governmental accounting standards. The court below took judicial notice of Governmental Accounting Standards Board, Statement 13, as adopted by Chapter 10.550 of the Rules of the State of Florida Auditor General. (R-IV-151-153)

This concept has been recognized by the court in *Robbins*, where, under the facts presented the court opined:

> There is no question that, had Lessee acquired these properties via a capital lease, Lessee would have been entitled to an ad valorem tax exemption on the properties. Under a capital lease, the leased properties are treated as debt, and, after all lease payments are made to lessor, the lessee acquires title to the property either automatically or by payment of a nominal sum.

Robbins, 748 So. 2d at 350. Because the 1994 Lease-Purchase Agreement is a capital lease, it is treated as debt thereby once again establishing equitable

ownership in the State as the lessee-purchaser. This Court has also recognized that a Lease-Purchase Agreement is a capital lease. *Sarasota County*, 561 So. 2d at 552; *Hartsfield*, 698 So. 2d at 529.

The Property Appraiser contends "that if the lease-purchase agreement operated to transfer equitable ownership to the state from inception, a bond referendum was required by Article VII, Section 11, Florida Constitution, because the state was at that moment the owner and using state taxes to repay the debt." Initial Brief, 32 (emphasis in original). As support for this position, the Property Appraiser relied on the dissenting opinion of Justice McDonald in *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990), which actually addressed Article VII, Section 12 of the Florida Constitution rather than Article VII, Section 11 of the Florida Constitution. The Property Appraiser's argument completely ignores the majority holding in the *Sarasota County* decision involving the corollary provisions of Article VII, Section 12 of the Florida Constitution, which regulates the issuance of bonds by a unit of local government which are payable from ad valorem taxes. Article VII, Section 12 of the Florida Constitution, requires a referendum if a local government desires to issue bonds with a maturity of more than twelve months which are payable from ad valorem taxes. Such bonds are customarily referred to as "general obligation bonds" or "full faith and credit

bonds" since the governmental issuer has pledged the full taxing authority of the governmental unit to repay the bonds.

This Court, in the *Sarasota County* decision, held that since the certificates of participation at issue in that case represented year to year lease obligations of the governmental unit, with the right retained by the government to non-appropriate future lease payments and walk away from the lease purchase obligation, a referendum was not required by Article VII, Section 12 of the Florida Constitution. *Sarasota County*, 561 So. 2d at 552-53. This was true even though ad valorem taxes were a source for payment of the annual lease obligations supporting the certificates of participation. *Id*. at 551. This decision was consistent with earlier decisions of this Court in *State v. Brevard County*, 539 So. 2d 461 (Fla. 1989) and *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980).

Article VII, Section 11 of the Florida Constitution, restricts the issuance of state bonds, and generally provides that (a) bonds pledging the full faith and credit of the state must be approved by referendum prior to their issuance, (b) moneys sufficient to pay debt service on state bonds must be appropriated, (c) state bonds pledging the full faith and credit of the state may be combined for purposes of sale, (d) revenue bonds may be issued without a vote so long as the bonds are payable from sources other than state tax revenues, (e) state bonds pledging specific state

tax revenues may be issued for certain purposes, and (f) each project to be financed by revenue bonds must be approved by the legislature. In determining whether an instrument evidencing indebtedness is a "state bond" in violation of the constitutional provision regulating its issuance, it must be determined whether the taxing power of the state may be called on to service or discharge it. *State v. Inter-American Center Auth.*, 143 So. 2d 1 (Fla. 1962); *State v. Bd. of Control*, 65 So. 2d 469 (Fla. 1953). Since the essence of a lease purchase financing arrangement, as recognized by this Court in *Sarasota County*, is the year to year nature of the government's lease payment obligation, certificate of participation financing can not fall within the definition of "state bonds" for purposes of Article VII, Section 11 of the Florida Constitution.

Under lease-purchase financing, the taxing power of the state can not be called on to service or discharge the state's obligations to make lease payments if the state exercises its rights to non-appropriate the annual lease payment. In light of this, the Property Appraiser's argument on the necessity of a referendum fails.

The Property Appraiser's arguments are also founded on blurring the line between an operating lease and a finance or capital lease, such as the lease-purchase agreement in the instant case and the lease purchase agreement involved in *Hartsfield*. While both an operating lease and a finance lease involve the periodic payment of rent and may in fact impose on the lessee certain of the

obligations of ownership, an operating lease does not give rise to any claim to equitable ownership in the lessee. *See* Chapter 10.550, Rules of the State of Florida Auditor General adopting G.A.S.B. Statement 13. An operating lease is merely an agreement for the use of designated premises for a set rent for a specified period of time. *See Robbins*, 748 So. 2d 349 (Fla. 3d DCA 1999); *Ocean Highway & Port Authority v. Page*, 609 So. 2d 84 (Fla. 1st DCA 1992).

On the other hand, a lease-purchase agreement is a finance or capital lease which involves the acquisition of ownership in the financed property by the lessee through the payment of periodic lease payments, and may include a right to prepay the lease obligations at any time and accelerate the transfer of the naked legal title from the lessor to the lessee. *See Robbins*, 748 So. 2d 349 (Fla. 3d DCA 1999). The nature of a lease purchase agreement as a finance or capital lease has been fully recognized by the State in Chapter 10.550 of the Rules of the State of Florida Auditor General where the state adopted the Governmental Accounting Standards Board, Statement 13 (R-IV-151-153), and by this Court in *Brevard County*, *Sarasota County* and *Hartsfield*.

In the instant case, this Court is presented with a lease-purchase agreement that fully constitutes a finance lease, because the Department has assumed all of the benefits and burdens of ownership, and upon payment of the final lease payment (or earlier Concluding Payment as permitted by the Lease-Purchase

Agreement), the finance corporation is required to transfer its fee title to the Department without further payment. Thus, at the conclusion of the Lease-Purchase Agreement when all payments have been made, the Department will not be obligated to pay any additional sum in order to obtain full legal title. This is completely distinguishable from the effect of an operating lease, which never creates an equitable ownership interest in the lessee. These arguments raised by the Property Appraiser rely on the assumption that the Lease-Purchase Agreement involved in the instant case is merely an operating lease with fundamentally different legal consequences to the lessee. We submit, with all due respect to counsel, that these arguments can only collapse under the weight of their own confusion.

The Property Appraiser next argues that the facts underlying the *Hartsfield* case are quite dissimilar to those in the instant case. This is simply not true. Much of the Property Appraiser's argument is based on the absence of a mortgage in the *Hartsfield* fact pattern. This absence, the Property Appraiser argues, is a fundamental and controlling distinction from the facts in the instant case. The Property Appraiser argues that this distinction removes *Hartsfield* from being the controlling authority in this case. This argument is fatally flawed. There was a mortgage in *Hartsfield*. Just as in this case, the lease-purchase arrangement was secured by a mortgage on the financed premises.

The District Court was justified in relying on *Hartsfield* since these two cases involve virtually identical facts, as was clearly understood by Judge Ervin, the author of the District Court opinion in the instant case as well as in the District Court's opinion that led to the *Hartsfield* decision. *Barnett v. Department of Management Services*, 931 So. 2d 121, 124 (Fla. 1st DCA 2006); *Leon County Educational Facilities Auth. v. Hartsfield*, 669 So. 2d 1105 (Fla. 1st DCA 1996) (hereinafter referred to as "*Hartsfield I*")

1. In *Hartsfield*, legal title to the financed property was held by SRH, Inc. ("SRH"), the finance corporation and not the Authority and payment for purchase of the underlying real property was part of the financing arrangement. *Hartsfield*, 698 So. 2d at 527-28. This is the exact same factual pattern found in the instant case. (R-II-312-313)

2. In *Hartsfield*, although the Authority uses net operating revenues of the financed facility to fund its lease payments, a State prison does not generate net revenues. *Hartsfield*, 698 So. 2d at 527. As with any State prison, the Legislature appropriates on an annual basis all of the costs of operating the prison and in the instant case, the lease payment as well. (R-II-315-316) Thus, both the Authority and the legislature are appropriating, on an annual basis, their respective lease payments from their legally available revenues.

3. In *Hartsfield*, SRH granted to the certificates of participation trustee a mortgage and security agreement on its interest in the financed student housing property in a virtually identical manner as the Finance Corporation in the instant case granted a mortgage on its interest in the financial facility to the certificates of participation trustee. *Hartsfield I*, 669 So. 2d at 1106; (R-V-680-713)

4. In *Hartsfield*, the mortgagee did have a right of foreclosure, but as in the instant case, the mortgagee could not exercise this remedy until after a lease default or event of non-appropriation occurred which terminates the lessee's rights to the financed facility. *Hartsfield I*, 669 So. 2d at 1106; (R-V-683)

5. In *Hartsfield*, the Authority had the right to purchase the financed facility after making all lease payments with the payment of a nominal sum. *Hartsfield*, 698 So. 2d at 527. In the instant case, the Department does not need to make any additional payments once all lease payments have been made, and can elect to purchase the facility earlier by prepaying the principal portion of the future lease payments not then due. (R-VI-532-533); (R-VI-545-548); (R-VIII-986)

6. In *Hartsfield*, a separate management company operates the student dormitory facility being financed rather than the Authority. *Hartsfield I*, 669 So. 2d at 1106. This is exactly the same factual situation in the instant case where Corrections Corporation of American operates the financed prison facility for the Department. (R-IX-1092-1173)

7. In both *Hartsfield* and the instant case, the underlying land and the improvements to be constructed on the land were financed with the proceeds of the respective certificates of participation. *Hartsfield*, 698 So. 2d at 527; (R-II-313) Neither the Authority nor the Department held title to the underlying land prior to the financing.

Based on a review of the underlying facts in *Hartsfield* and in the instant case, the District Court was fully justified in relying on *Hartsfield* as the controlling authority, since the facts are virtually indistinguishable.

An alternative argument raised by the Property Appraiser is that Correction Corporation of America, the private operator of the Bay Correctional Facility, is really the owner of the property. Unfortunately for the Property Appraiser, the record is void of any facts that support this position. Rather the stipulated facts are that the Finance Company holds the bare legal title to the financed facility subject to the rights of the Department under the Lease-Purchase Agreement. (R-VI-473-476)

The Property Appraiser next argues that if the lease-purchase agreement was a lease as in *Sarasota County*, then the lease-purchase agreement in the instant case was also a lease with option to purchase, and not a mortgage. Department fully agrees with this analysis and legal conclusion. This Court in *Sarasota County* treated the finance agreement for what it was, a lease-purchase agreement, and did

not recharacterize it as a mortgage. As the Property Appraiser points out, this Court in *Sarasota County* specifically ruled that a lease purchase agreement was not a mortgage, as it vested in the lessor only those rights of a lessor under a lease.[3]

Lease purchase financing is a recognized method of financing governmental property in Florida, and is used to acquire such property as fire trucks, computer equipment, schools, prisons and courthouses. The Property Appraiser's argument that *Hartsfield* does not apply since a lease can not be a mortgage and no exemption is provided for private property that is leased to the state, citing *Ocean Highway & Port Authority v. Page*, 609 So. 2d 84 (Fla. 1st DCA 1992), is simply misplaced. In *Ocean Highway & Port Authority*, the port authority was simply leasing private lands for use as a road. *Id*. at 85. As discussed by this Court in *Hartsfield*, "these cases were properly decided on the unremarkable basis that privately owned property is not entitled to a tax exemption solely because it is leased to a governmental entity for a governmental use." *Hartsfield*, 698 So. 2d at 530. Clearly, this Court has recognized the essential difference between an operating lease as was involved in *Ocean Highway & Port Authority* and a finance lease which created equitable ownership in the lessee as was the case in *Hartsfield*.

The Property Appraiser cannot avoid the application of the *Hartsfield* decision simply by ignoring the well settled law of equitable ownership in Florida.

[3] This remained true even where the finance company granted mortgage on its property. *See Sarasota County, 561 So. 2d at n.9.*

Under the Lease-Purchase Agreement, the Department assumed and undertook all of the benefits and burdens of ownership of the financed facility, the Bay Correctional Facility. This assumption, coupled with the right to acquire the facility either at the term of the lease for no additional payment or at any time prior to that date by simply paying all future principal portions of the scheduled lease payments resulted in the Department becoming the equitable owner of the financed facility. The facts in the instant case cannot be distinguished from the facts in *Hartsfield*.

II. THE STATE IS THE EQUITABLE OWNER OF THE FACILITY FROM THE DATE OF EXECUTION OF THE DOCUMENTS AND NO MORTGAGE IS REQUIRED.

As fully discussed in the Department's first argument set forth above, it is clear that the State is the equitable owner of the Bay Correctional Facility, and should be treated as the owner for purposes of ad valorem taxation.

The second argument raised by the Property Appraiser rests on the proposition that in order to make the State the equitable owner of the Property, the 1994 Lease-Purchase Agreement (and later the 2001 Lease-Purchase Agreement) would have to constitute a "mortgage". The Property Appraiser argues that the State could not be the equitable owner of the Property unless the Lease Purchase Agreement is a mortgage. In support of this position, the Property Appraiser misstates the existing case law regarding equitable ownership in an attempt to

transform the ability to mortgage property into the true and only test for equitable ownership. The cases cited by the Property Appraiser simply do not support this position. In addition, the Property Appraiser demonstrates a lack of understanding of the structure of a lease-purchase financing when he contends that at the time the Certificates of Participation were issued, the State needed the 1994 Lease-Purchase Agreement to be a lease, but now the State needs the 1994 Lease-Purchase Agreement to be a mortgage. The State has maintained the consistent position that both the 1994 Lease-Purchase Agreement and the 2001 Master Lease Agreement are in fact not mortgages, but simply lease purchase agreements.

In order to create a lease-purchase financing structure, such as the one utilized to finance the acquisition and construction of the Bay Correctional Facility in the instant case, it is necessary to separate the bare legal title from the possessory interest of the lessee. This is the case because the financing structure is designed to give the State the ability to not appropriate the finance payments (the lease payments) for any fiscal year if the State elects to give up its ownership interest in the financed facility. For that reason, the Finance Corporation was created at the direction of the Commission. The Finance Corporation was created to acquire and hold in trust for the Commission title to the Property upon which the Bay Correctional Facility is located and to lease purchase the Bay Correctional Facility and the underlying real property to the Commission, as Lessee. This lease-

purchase financing technique was specifically authorized by Section 957.04(2)(a), Florida Statutes (1993). The Finance Corporation, now Florida Correctional Finance Corporation, successor by Merger, is nothing more than a nominal party set up to facilitate the financing of the Bay Correctional Facility. (R-VI-467-472); (R-VII-788-793); (R-VII-800-805)

This Court has determined that financing mechanisms like that used in the acquisition and construction of the Bay Correctional Facility meets constitutional muster, in that a lease-purchase agreement is free of the credit pledging restrictions and is not subject to the constitutional constraints requiring a referendum under Article VII, Section 12 of the Florida Constitution. *Sarasota County,* 561 So. 2d at 552. The same analysis employed by this Court in *Sarasota County* is fully applicable to the provisions of Article VII, Section 11 of the Florida Constitution, as previously discussed. The State, through the Commission, is a lessee under the 1994 Lease-Purchase Agreement (R-VI-477-554), which is a lease agreement with option to purchase, that vests an "equitable ownership" interest in the State in the leased property. This lease is not a mortgage, nor has it ever been claimed to be a mortgage. For purposes of this case, the existence of a mortgage is not a relevant fact.

III. IN CHAPTER 957, FLORIDA STATUTES, THE LEGISLATURE SQUARELY INTENDED THAT ALL FACILITIES CONSTRUCTED PURSUANT TO BIDS RECEIVED FROM PRIVATE COMPANIES ARE STATE-OWNED PROPERTY AND THEREFORE, UNDER SETTLED LAW IN FLORIDA, IMMUNE FROM AD VALOREM TAXATION REGARDLESS OF WHO ACTUALLY USES THE PROPERTY

It is clear that through the enactment of Chapter 957, Florida Statutes, the Florida Legislature intended to create State owned and financed correctional facilities that were to be operated by private, rather than governmental, operators. The Property Appraiser's arguments to the contrary commence with the assertion that Section 957.03(1), Florida Statutes (1993), in stating the reasons for the creation of the Correctional Privatization Commission, declared the state prisons to be "private prisons". The Correctional Privatization Commission was created as a separate and distinct entity from the Florida Department of Corrections, to undertake the financing of state prisons that were to be operated by a private vendor rather than the Florida Department of Corrections. The referenced expression of legislative intent simply is not a legislative declaration that the Legislature intended these prisons to be something other than state prisons.

A simple word search of Chapter 95, Florida Statutes, for the phrases "ad valorem tax" or "property tax" demonstrates that these terms are not currently

found within Chapter 957, Florida Statutes. The only place the phrase "ad valorem taxes" used to appear was in Section 957.04(8), Florida Statutes (1999), which stated:

> (8) Buildings and other improvements to real property which are financed under paragraph 2(a) and which are leased to the Correctional Privatization Commission are considered to be owned by the Correctional Privatization Commission for the purposes of this section whereby the terms of the lease, the buildings, and other improvements will become the property of the state at the expiration of the lease. For any facility that is bid and built under the authority of requests for proposals made by the Correctional Privatization Commission between December 1993 and October 1994 and that is operated by a private vendor, a payment in lieu of taxes, from funds appropriated for the Correctional Privatization Commission, shall be paid until the expiration of the lease to local taxing authorities in the local government in which the facility is located in an amount equal to the ad valorem taxes assessed by counties, municipalities, school districts, and special districts.

(emphasis added). This provision was enacted by the Legislature in 1999 following years of clamoring by local governments who were losing ad valorem tax revenues as the State continued to acquire additional property, whether through the prison program, environmental lands acquisitions under the CARL or Preservation 2000 program, or otherwise. This legislative provision can only be interpreted as an expression of the original legislative intent in enacting Chapter 957, Florida Statutes, that the Legislature understood that the financed prison property would be State property during the finance period. In 2004, when the Legislature amended Chapter 957, Florida Statutes, to abolish the Correctional

Privatization Commission, shift its duties to the Department, and authorize additional prison facilities and expansions of several of the existing prison facilities, the Legislature removed Section 957.04(8), Florida Statutes, from the statute books. Thus at this time, the phrase "ad valorem tax" or "property tax" does not appear in Chapter 957, Florida Statutes.

The Property Appraiser's oblique reference to the difference in the statutory provisions found in Chapter 243, Florida Statutes, relating to county educational facilities authorities is not relevant. Chapter 243, Florida Statutes, is the enabling legislation for a county educational facilities authority, and as such provides that the property of such an authority is to be exempt from ad valorem taxes. It is settled law that the State and its political subdivisions are immune from such taxation. This was recognized by the United States Supreme Court over 100 years ago, when the Court declared that "[g]eneral tax acts of a state are never, without the clearest words, held to include its own property . . . although not in terms exempt from taxation." *Van Brocklin v. Anderson*, 117 U.S. 151, 173-74 (1886).

Property owned by the State is constitutionally immune from taxation. *State ex rel. Charlotte County v. Alford*, 107 So. 2d 27, 28-29 (Fla. 1958); *Florida Dep't of Revenue v. Canaveral Port Auth.*, 642 So. 2d 1097, 1099 (Fla. 5th DCA 1994); *Dickinson v. City of Tallahassee*, 325 So. 2d 1, 3 (Fla. 1975); *Greater Orlando Aviation Auth. v. Crotty*, 775 So. 2d 978, 980 (Fla. 5th DCA 2000).

In *Canaveral Port Authority*, the court, in determining that the Authority did not share the immunity of the state because it was not a "political subdivision," stated the rule as to immunity as follows:

> The threshold issue is whether the CPA is a "political subdivision" of the state. If so, it is immune from taxation, since the state and its political subdivisions have an "inherent sovereign immunity" from taxation, which "is not dependent upon statutory or constitutional provisions but rests upon broad grounds of fundamentals in government."

642 So. 2d at 1099 (internal citations omitted).

The court went on to say that "[t]he determination that the state and its political subdivisions are immune from taxation was identified in case law and the test of whether a particular entity is a political subdivision of the state also derives from case law." *Id.*

The immunity of the State exists when the State acts through an agency or department. *Dickinson*, 325 So. 2d at 2-4. The department through which the State contracted for ownership of the Property was initially the Commission, which was created as a commission of the State by Section 957.03, Florida Statutes (1993), administratively organized under the Department, which was created as a department of the State by Section 20.22, Florida Statutes (2004).

When the state waives its sovereign immunity from suit, or when it waives its immunity from taxation and accepts the attendant consequences, it must state its intent to do so in the clearest terms. *See Spangler v. Florida State Turnpike Auth.*,

106 So. 2d 421, 424 (Fla. 1958) (waiver of sovereign immunity must be clear and unequivocal and will not be reached as product of interference or implication); *First Union Nat. Bank v. Ford*, 636 So. 2d 523, 525-26 (Fla. 5th DCA 1993) (requiring clear manifestation of intent to waive immunity from taxation), *aff'f sub nom. Leon Co. Educ. Facilities Auth. v. Hartsfield*, 698 So. 2d 526 (Fla. 1997); *Dickinson*, 325 So. 2d at 4 (requiring clear and direct expression of intent to waive immunity of taxation). That clear statement of legislative intent is nowhere to be found within Chapter 957, Florida Statutes.

The Property Appraiser goes on to argue that Section 957.04(2)(c), Florida Statutes which requires the contractor, and not the Commission, to obtain the financing required to design and construct the correctional facility to be built under Chapter 957, Florida Statutes, requires the private contractor and not the State to own the facility is a complete misreading of this statutory provision. Indeed, Section 957.04(2)(c), Florida Statutes, makes no reference to the contractor owning the facility. The reference is simply to the contractor obtaining the financing rather than the Commission. This was done through the Request for Proposal process where each submitting potential vendor had to propose a financing mechanism and finance team to accomplish this financing.

Section 957.04(2)(c), Florida Statutes, needs to be read in context with the other portion of Section 957.04(2), Florida Statutes. Section 957.04(2), Florida

Statutes, sets forth the mandatory contract provisions required in order for the Commission to be authorized to enter into any contract with respect to a prison facility. The first, primary and most critical requirement is set forth in Section 957.04(2)(a), Florida Statutes, which states:

> Notwithstanding any provision of chapter 255 to the contrary, a specific provision authorizing the use of tax-exempt financing through the issuance of tax-exempt bonds, certificates of participation, lease-purchase agreements, or other tax-exempt financing methods. (emphasis added)

In 1993 (and in subsequent years) the only method available to finance a prison with tax-exempt debt was for the prison to be owned by a governmental entity. Section 103 of the Internal Revenue Code of 1986 (the "Code") controls what may be financed with tax-exempt debt. In order for the interest on a debt obligation to be excluded from federal income taxation (in other words, to constitute "tax-exempt" debt) it must be issued by a unit of state or local government and except for certain exceptions, must be used by a state and local governmental unit. The Correction Privatization Commission, as an agency of the State of Florida, is such a governmental entity. Exceptions for private use (that is, non-governmental use) are provided for certain specific exempt facilities listed in Section 142 of the Code. None of these exceptions involve a prison. Thus, for the Commission to meet the paramount requirement of Section 957.04(2)(a), Florida Statutes, for entering into any contracts relating to a prison facility, the

Commission must be the owner of the facility. If the Commission (now the Department) was not the owner, the prison facilities simply could not have been financed on a tax-exempt basis. The Property Appraiser's attempt to "write in" the term "own" into Section, Florida Statutes, in an effort to make his argument that the Legislature intended the prison facilities to be subject to ad valorem taxes simply has no basis and can not be supported. This is especially true once the Property Appraiser admits in his brief that the Lease-Purchase Agreement involved in the instant case is essentially the same agreement that was considered by this Court in both *Sarasota County* and *Brevard County*.

Similar arguments by the Property Appraiser were expressly rejected by the District Court in the instant case. The Court therein stated:

> The property appraiser next argues that in enacting chapter 957, the legislature intended that facilities constructed pursuant to such legislation would be subject to ad valorem taxation in their status as private prison facilities. Only by fixing on isolated portions of the legislation is the property appraiser able to reach such conclusion, one with which we cannot agree. Among other things, he points to section 957.03(1), requiring the CPC to enter into contracts with contractors for the purpose of designing, leasing, constructing, and operating the facilities, and section 957.04(2)(c), designating the contractor, not the CPC, as the entity responsible for obtaining the financing necessary to design and construct the facility. This argument overlooks the fact that section 957.04(2) (a) authorizes the use of tax-exempt financing of the facilities through the issuance of tax-exempt bonds, COPs and LPAs.
>
> A well-recognized maxim of statutory construction is that the legislature must be presumed to be aware, at the time it enacts new legislation, of the status of the law then existing, including pertinent

> judicial case law. Thus, when the legislature adopted chapter 957 in 1993, it was no doubt aware of the supreme court's decisions in *Sarasota County* and *Brevard County*, approving financing arrangements involving LPAs through the issuance of bonds or COPs which would be paid from sources that included ad valorem taxes, and that such arrangements did not require a public referendum. Any lingering uncertainty as to the legislative intent behind the creation of the Act was, in our opinion, clearly dispelled by the legislature's addition of subsection (8) to section 957.04 in 1999, which provides that the buildings and other improvements financed under section (2)(a) and leased to the CPC would, upon the expiration of the lease, become the property of the state.

Barnett, 931 So. 2d at 127.

The Property Appraiser next misreads the effect of Section 957.07, Florida Statutes (1993), regarding certification of costs savings. A simple reading of this statute would demonstrate that it is the responsibility of the Commission (now the Department) to certify that the costs of construction and operation of a proposed prison facility by a private vendor is at least 7% less than comparable costs that would be incurred by the Department of Corrections for a similar facility. The Auditor General certifies as to the Department of Correction's cost numbers only, and has no input as to the private vendor's cost numbers. This is solely within the province of the Department. In adjusting the costs of the private vendor, there is taken into account "[r]easonable projections of payments to the state or any political subdivision thereof for which the private entity would be liable because of its status as a private rather than a public entity, including, but not limited to, corporate income and sales tax payments . . . . § 957.07(2), Fla. Stat. (1993). It is

obvious that the Legislature did not include ad valorem taxes within this limit because the Legislature was operating under the belief that the prison would be State immune property. The group of taxes that a private but not a public entity would be liable for clearly includes sales taxes and corporate income taxes as no public entity would be liable for these taxes, but would not include ad valorem taxes, as a public entity can be liable for ad valorem taxes on its property if the public entity does not meet one of the applicable exemptions from ad valorem taxes. This reading of Section 957.07, Florida Statutes, is consistent with the principles of *ejusdem generis*. *See Fayad v. Clarendon Nat. Inc. Co.*, 899 So. 2d 1082 (Fla. 2005); *State v. Otte*, 887 So. 2d 1186 (Fla. 2004).

As additional support for the Property Appraiser's arguments involving Section 957.07, Florida Statutes, the Property Appraiser makes the statement that the bidding vendor for the Bay Correctional Facility "opted" to use Section 957.04(2)(a), Florida Statutes, so that was the type of financing used. Nothing could be further from the truth. The Commission was completely prohibited from entering into any contract with the private vendor unless the paramount requirements of Section 957.04(2)(a), Florida Statutes, were satisfied, which requirements mandated the use of tax-exempt financing for the correctional facility.

In another attempt to bolster his arguments, the Property Appraiser seeks to distinguish *Hartsfield* by saying that since *Hartsfield* involved a specific statutory exemption, the Legislature therefore intended the financed prisons to be subject to ad valorem taxes since it did not provide an exemption to the Department in Chapter 957, Florida Statutes. The fallacy in this argument is simply that a county educational facilities authority created pursuant to Chapter 243, Florida Statutes, is not a political subdivision of the State. As such its property would not be immune from ad valorem taxes, but would only be entitled to an exemption if and to the extent one is granted by the Legislature. In *Hartsfield*, whether the property would qualify for an exemption was not the issue, but rather, whether the Leon County Educational Facilities Authority was the owner of the property for purposes of ad valorem taxes.

The Department disagrees with the Property Appraiser's recitation from Corpus Juris Secondum selections, specifically 82 C.J.S. *Statutes* §§ 321, 351, 353, as to the need to look behind the clear meaning of Chapter 957, Florida Statutes, in order to determine Legislative intent. As this Court recognized in *Koile v. State*, 934 So. 2d 1226, 1230 (Fla. 2006), "[b]efore resorting to the rules of statutory interpretation, courts must first look to the actual language of the statute itself." When this Court takes into account what the Legislature actually did through the enactment of Chapter 957, Florida Statutes, rather than the interpretations

proffered by the Property Appraiser, only one conclusion can be achieved. The Legislature, in enacting Chapter 957, Florida Statutes, wanted to create a separate State agency to provide for the tax-exempt financing and private operation of State prisons separate and apart from the operation of other State prisons by the State Department of Corrections. There never was, nor is there now, any Legislative expression of intent to waive the State's immunity from ad valorem taxes, even if such immunity could be waived by other than a Constitutional amendment.

The Property Appraiser's final argument refers to a matter not in the Record, as this was not an argument raised by the Property Appraiser in either lower court. Simply stated, the Property Appraiser claims that if sales tax was paid on any of the materials used to construct the Bay Correctional Facility, then this meant that the facility had to be private property subject to ad valorem taxation. Unfortunately for the Property Appraiser, this argument completely misconstrues the relationship between the sales tax and the ad valorem tax. The ad valorem tax is a local tax imposed on the "owner" of real property while the sales tax is imposed on a non-exempt purchaser of personal property. The law clearly recognizes that the owner of property for ad valorem tax purposes is the "equitable owner". *Hartsfield*, 698 So. 2d at 528. The sales tax is levied on the party that purchases personal property. If the State (or another governmental entity) issued a purchase order for personal property and pays for such purchase with State funds,

the sale is not subject to sales tax. If a non-governmental party issues a purchase order for personal property and pays for it with private funds, the sale is subject to sales tax.

CONCLUSION

Based on a review of the facts in the instant case, it is clear that the District Court's reliance on the *Hartsfield* decision as the controlling law was well founded. When the facts of the two cases are examined side by side, the only conclusion is that the facts in the instant case support the conclusion of equitable ownership even more strongly than the facts in *Hartsfield*. It is settled law in Florida that "equitable ownership" of property is the deciding factor in determining which party is the owner of real property for purposes of levying an ad valorem tax on that property.

While a governmental entity in Florida other than the State and its political subdivisions must look to the statutory exemptions from ad valorem tax, the property of the State and its political subdivisions are immune from such taxation.

The Florida Legislature intended that the prison facilities financed under the purview of Chapter 957, Florida Statutes, would be immune from ad valorem taxes, just as any other state property. As a result, the subject property became State property, immune from ad valorem taxation as of June 23, 1994, and remains such today. This immunity from ad valorem taxation would only cease if and when the Legislature elected to specifically non-appropriate the annual lease payment and end its possession of the Bay correctional Facility under the Lease Purchase Agreement.

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 Larry E. Levy, Esq., The Levy Law Firm, 1828 Riggins Lane, Tallahassee, FL 32308 on this _____ day of September, 2006:

_____
Robert C. Reid

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Department certifies that the font size and style in the foregoing Answer Brief is 14 Times New Roman and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a).

_____
Robert C. Reid