FLORIDA SUPREME COURT

CASE NO: **SC06-1224**

O R I G I N A L

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

Petitioner,

vs.

FLORIDA DEPARTMENT OF MANAGEMENT SERVICES,

Respondent.

_____/

Lower Tribunal No. **1D05-1731**

INITIAL BRIEF OF PETITIONER RICK BARNETT, BAY COUNTY PROPERTY APPRAISER

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PRELIMINARY STATEMENT

Petitioner, Rick Barnett, Bay County Property Appraiser, will be referred to herein as the "property appraiser." Peggy Brannon, Bay County Tax Collector, will be referred to herein as the "tax collector." Respondent, Department of Management Services, will be referred to herein as "DMS." References to the record on appeal from the First District Court of Appeal will be delineated as (R-page #). References to the record on appeal from the circuit court will be delineated as (R-volume #-page #).

STATEMENT OF THE CASE

This case is before this Court on certified question from the First District Court of Appeal pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v). The question certified is as follows:

> WHETHER IN ENACTING CHAPTER 957, FLORIDA STATUTES, THE LEGISLATURE INTENDED THAT PRISON FACILITIES CONSTRUCTED AND OPERATED BY PRIVATE CONTRACTORS AND LEASED TO THE STATE OF FLORIDA UNDER A LEASE-PURCHASE AGREEMENT SHALL BE SUBJECT TO AD VALOREM TAXES?

Barnett v. Dept. of Management Servs., 31 Fla. L. Weekly D1419, 1422 (Fla. 1st DCA May 22, 2006) (R-38)

This case was commenced with the filing of a complaint in Bay County, Florida, by the Correctional Privatization Commission (CPC) against the property appraiser and the tax collector challenging the 1999 assessment of the subject property. (R-I-1-4) A Notice of Redenomination of Plaintiff was filed in July 2004, substituting the Department of Management Services (DMS) as the plaintiff. (R-I-197)

The complaint alleged that the CPC was the owner of the real and tangible personal property which was the subject of the lawsuit, and that the property was illegally assessed by the property appraiser. (R-I-1) Paragraph 2 of the complaint stated:

> 2. The Plaintiff, CORRECTIONAL PRIVATIZATION COMMISSION ('CPC'), is an agency of the State of Florida created in Chapter 957. Pursuant to Section 957.04(8), it is the owner of the real and tangible personal property, the subject of this lawsuit, which is illegally assessed by Defendant Property Appraiser. The Bay County Correctional Facility Finance Corporation holds bare legal title to the subject real property; it does so simply as a financing medium for the State. The State is the owner of the tangible personalty.

(Id., emphasis added.) The complaint alleged that the property was owned by the state and immune from ad valorem taxation. (R-I-2) Similar complaints were filed for tax years 2000, 2001, and 2002. (R-I-82; I-128; I-160) The court ultimately entered an order consolidating the four cases purposes of trial. (R-I-184)

The property appraiser initially filed an answer to the 1999 complaint but subsequently withdrew same and moved to dismiss the complaint for failure to state a cause of action and for failure to join an indispensable party. (R-I-10; I-13; I-15) The property appraiser filed similar motions to dismiss in response to the complaints for tax years 2000, 2001, and 2002. (R-I-86; I-131; I-172) These motions subsequently were denied. (R-II-218-219) In response to the 1999 case, the tax collector filed an answer which contained affirmative defenses to the complaint. (R-I-5)

As part of the motions to dismiss for failure to state a cause of action, the property appraiser contended that the complaints should be dismissed because

they did not allege that the CPC was the owner of such property as identified therein, and, in fact, the complaints alleged that title to the property was held by Bay County Private Correctional Facility Finance Corporation (finance corporation). (R-I-1; I-82; I-128; I-160) Attached to the property appraiser's motions was a copy of the complaint filed by the CPC in Bay County Circuit Court Case No. 97-1787, identified as exhibit #1, and a copy of the trial court's order dismissing that complaint identified as exhibit #2. (R-I-19-37; I-90-108; I-135-153) As part of the property appraiser's motions, it was contended that the CPC had failed to join two indispensable parties, one of which was the finance corporation and the other was Corrections Corporation of America (CCA), and section 11.7 of the contract between CPC and CCA was quoted in the property appraiser's motions to dismiss. (RI-17)

Subsequently, in January 2003, the tax collector filed a motion for partial summary judgment concerning partial payment of ad valorem taxes. (R-I-52) In the tax collector's motion it was noted that the Florida Legislature had approved an appropriation to pay the ad valorem taxes otherwise due on the subject property since 1998, although the 2001 tax payment was only a partial payment. (R-I-53)

The 1999 complaint was the third lawsuit filed by the CPC challenging the assessment of ad valorem taxes against the subject property. In

1997, two suits were filed both of which resulted in decisions adverse to the position of the CPC. (Bay County Circuit Court Case Nos. 97-1787-CA and 97-3510-CA; R-I-52; I-57; R-IV-14-15; IV-80).

By order of the trial court, the complaints challenging the 2000, 2001, and 2002 assessments of the subject property were consolidated with the 1999 lawsuit for purposes of trial. (R-I-126; I-158; I-182; I-184) It is the trial court's Amended Final Judgment adjudicating the rights of the parties in these four cases which is before this court on appeal. (R-II-373)

The first complaint filed by the CPC in 1997 challenging the property appraiser's assessment of the subject properties for tax years 1995, 1996, and 1997 was filed in July 1997. (R-I-15-37; I-86-108; I-131-153) No complaint was filed challenging the property appraiser's assessment of the subject properties for tax year 1998. (R-II-243) In the first 1997 lawsuit, the property appraiser filed a motion to dismiss the complaint on the basis that the court lacked subject matter jurisdiction, and the CPC responded by contending that the owner of the property was the state and, accordingly, was not bound by the 60-day jurisdictional time period for filing suit. (R-I-26) The trial court, speaking through Judge Michael Overstreet and after a hearing and review of briefs, entered an Order granting the property appraiser's motion to dismiss for tax years 1995 and 1996 with prejudice,

and as to tax year 1997, permitted the CPC to file an amended complaint within a 30-day time period. (R-I-23-37)

The CPC elected not to file an amended complaint and, instead, filed a new lawsuit, case no. 97-3510, making essentially the same allegations as made in the first complaint. (Request for Judicial Notice admitted at Trial) No appeal was taken by the CPC from the trial court's order dismissing with prejudice the complaint as to tax years 1995 and 1996.

After hearing and review of the legal memorandum filed by the CPC, Judge Overstreet found that the second 1997 lawsuit, case no. 97-3510, attempted to re-litigate the precise issues raised in the first 1997 lawsuit, case no. 97-1787, and that such barred by res judicata. (Request for Judicial Notice admitted at Trial) Thereafter, the CPC filed an appeal to this court which subsequently was dismissed by order of the court dated May 25, 1999. See Correctional Privatization Comm'n v. Peggy Brannon, No. 1D99-392 (Fla. 1st DCA May 25, 1999).

After some discovery and depositions in the instant consolidated cases, a non-jury trial was held based in large part on the stipulation of the parties. (R-II-310-327) The stipulation identified the pertinent documents and the facts were not in dispute. Subsequently, the trial court entered an Order in favor of DMS finding that the property was not taxable. (R-II-336-342) DMS filed a motion to alter or amend the judgment and, after further hearing, the trial court

amended the judgment to make it clear that it did not apply to any tax years prior to 1999. (R-II-373-379) The property appraiser timely filed a notice of appeal to the district court and the tax collector filed a notice of joinder in the appeal. (R-II-380-381; II-397-398) DMS also timely filed a notice of cross-appeal. (R-II-395-396)

The district court rendered its decision finding that the case was controlled by this Court's decision in Leon County Educ. Facilities Auth. v. Hartsfield, 698 So.2d 526 (Fla. 1997). Barnett v. Dept. of Management Servs., 31 Fla. L. Weekly D903 (Fla. 1st DCA Mar. 27, 2006). (R-5) On motions for rehearing, the district court issued a revised decision reaching the same conclusion, and certified to this Court the question previously stated. Barnett, 31 Fla. L. Weekly at 1422. (R-38)

STATEMENT OF THE FACTS

The parties entered into a stipulation of facts which in large part identifies the various documents which are involved with regard to the acquisition of the property, construction, financing, and management of the correctional facility. (R-II-310-327) In 1993, the legislature enacted chapter 957, Florida Statutes, through chapter 93-406, Laws of Florida, to create the "Correctional Privatization Commission," and to allow for it to enter into contracts for the operation of private correctional facilities. (R-VI-445-452) The statute sets forth the qualifications for the commission members, fixes the terms of office, and sets

forth the commission's duties with regard to fulfilling the purpose as specified in this statute. (Id.) See § 957.03, Fla. Stat. (1995). The Act was amended in 1994 and 1995 in chapter 94-148, section 2, Laws of Florida, chapter 95-283, section 49, Laws of Florida, and chapter 95-325, section 23, Laws of Florida.

The Bay County Private Correctional Facility Finance Corporation (finance corporation) is a paper entity created in 1994 to facilitate financing and has no employees or officers. The situation is explained by the department to the trial court as follows:

> But, essentially, the way it works is that an RFP is put out, and a contractor responds, and is solicited, and responds, and is awarded a bid to acquire the land, build the property, build the prison, if you will, and operate it. And then a financing is structured. Very typical, very similar to the way school boards often do it. And the way it works is because the state cannot legally mortgage its property, there is no mortgage on the interest of the state. What happens is there is an entity created to hold bare legal title, which, in this case, was the Financing Corporation. And that entity enters a lease back, where the real property and [sic] interest, which was the Correctional Privatization Commission, has now been - - its duties are being merged into the Department of Management Services. But it's, essentially, the state is the lessee.

(R-IV-8-9, emphasis added.) Thereafter, it was further explained as follows:

> Your Honor, there will be an issue about a mortgage, because it's been raised in the brief of the - - of the property appraiser. There is, in this situation, in this case, a mortgage. However, the crucial fact is that there is no mortgage on the interest of the state. The mortgage

> is only on the - - the mortgage is subordinate to the interest of the state. In fact, the mortgage says that as long as the state makes its lease payments, that mortgage is subordinate to the state's interest. The state has not mortgaged it's property.

(R-IV-11, emphasis added.) Continuing it was stated:

> The Finance Corporation, as the fee title holder, the one actually holding the deed during the financing, is to - - it also grants a mortgage of its interest to the trustee. All for the benefit of the certificate holders. They purchase those certificates, proceeds from the sell [sic] go to the trustee. The trustee dispensed payments, the proceeds of the bonds, in two places. One to fund the purchase of the land, put it in the name of the Finance Corporation.

(R-IV-22, emphasis added.) Thereafter it was stated:

> The state chose, through legislative wisdom, to instead of do a state-bond issue for the prisons, to do a Lease Purchase Financing structure, which is what this is. In order to do a Lease Purchase Financing, you have to create a legal fiction of a lessor and a lessee because you have to have a lessor to lease from in order to have a lease agreement. You can't have a lease agreement with yourself.
>
> So, the Finance Corporation is set up to hold the title in order to have a lease with the state, and then all of those rights are then assigned to the trustee for the trustee to deal with the bondholders. And, at that point, this is your triangle; essentially back to where you would have been had it not been a state-bond issue.

(R-IV-24-25, emphasis added.) Continuing it was stated:

> Now, the difference with this is technically the state has the legal ability to say, we don't want this prison anymore. We are going to walk away from it, because it's annual appropriation. In a year they say, we don't

> want it. We're not going to appropriate money for it. And they do it. And they have done this with one building, as a matter of fact, which is now where the National High Magnetics Laboratory is, FSU, about 10 years ago.

(R-IV-25, emphasis added.) Thereafter it was stated:

> On June 23, 1994, they entered into the initial operating agreement with a private operator to operate it once it was build. On June 23, 1994, the Finance Corporation issued its mortgage and assignment of leases and all other documents to the trustee under the trust, which was established as of June 23, 1994. And on June 23, 1994, the certificate holders paid to the trustee a little over thirty million dollars, which was then disbursed over the next 12 to 18 months to acquire and construct a facility. And has since then been repaid, according to the payment schedules, by the state of Florida through annual appropriations. All of this goes back to the date the state took title, June 23, 1994.

(R-IV-47, emphasis added.) The financing corporation, Bay County Private Correctional Facilities Finance Corporation, originally created by the contractor was made up of three people who were residents of Minnesota. They were subsequently replaced by persons with the CPC in 2001. (R-IV-64-65) The statute required the contractor to arrange for its own financing. See 957.04(2)(c), Fla. Stat. (1999).

The Lease Agreement with Option to Purchase dated May 1, 1994, recognizes that it is the contractor who is buying the property and constructing the facilities stating:

> 3.3. Failure to Complete Acquisition and Construction. The Lessor and the Lessee mutually agree that in the event of the failure of CCA to complete the acquisition of the Land or the construction of the Project by the Substantial Completion Date and then to achieve the Completion Date within 45 days thereafter pursuant to the Development Agreement, that the Lessee shall incur damages that are not ascertainable as to amount as of the date hereof. Therefore, upon such failure to so acquire or construct by CCA, CCA has agreed to pay to the Lessee liquidated damages for such failure as specified in the Development Agreement. The payment of such liquidated damages shall be the Lessee's sole remedy for such failure.

(R-VI-503, emphasis added)

Section 11.7 of the Operation and Management Services Contract relates to taxes, liens, and assessments and provides that the contractor shall pay or make provision for the payment of all taxes and assessments levied or assessed by federal, state or local government on the facility, or any machinery or equipment installed or located thereon. (R-IX-1157-1159) It states in part:

> Taxes, Liens and Assessments. CONTRACTOR shall: (i) pay, or make provision for payment of all lawful taxes and assessments levied or assessed by the Federal, State or any local government on the Facility or any machinery, equipment or other property installed or located by CONTRACTOR therein or thereon, or upon the Financing Corporation with respect to the Facility or any part thereof, including any taxes levied upon or with respect to the income or revenues of the Financing Corporation from the Facility, or upon any payments pursuant to the Lease/Purchase Agreement; (ii) not create or suffer to be created any lien or charge upon the Facility or any part thereof; (iii) pay or cause to be

> discharged or make adequate provision to satisfy and discharge, within sixty (60) days after the same shall come into force, any lien or charge upon the Facility or any part thereof and all lawful claims or demand for labor, materials, supplies or other charges which, if unpaid, might be or become a lien upon the Facility or any part thereof, except Permitted Encumbrances, as defined in the Lease/Purchase Agreement with respect to the Facility entered into by and between COMMISSION and the Financing Corporation; and (iv) pay all utility charges, including "service charges", incurred or imposed with respect to the Facility.

(Id., emphasis added) Paragraph 8.1 of the lease -purchase agreement permits the lessee to challenge the assessment of real estate taxes. (R-VI-521) This is the original lease agreement.

Pertinent Documents

A. Mortgage and Security Agreement.

Review of the various documents and information reflects that the subject property on which the correctional facility is located resulted from a conveyance of a parcel of real property by warranty deed dated June 23, 1994, in which the property as described therein was conveyed by the Panama City Port Authority (authority) to the Bay County Private Correctional Facility Finance Corporation (finance corporation).[1] (R-II-312; R-VI-473-476) A second

[1]The port authority had contractually agreed to sell the subject property to Corrections Corporation of America (CCA) for the purpose of constructing a private prison. This resulted in a suit being filed by the tenants of the industrial park against the port authority contending that the operation of a private prison was

conveyance occurred by corporate warranty deed dated September 24, 1996, from Corrections Corporation of America (CCA) to Bay County (county). This parcel apparently is not involved in this suit.

Prior to final consummation of the financing arrangement an approval opinion (bond opinion) was obtained from the law firm of Bryant, Miller & Olive, P.A., which, after review of all documents, concluded that no constitutional infringement resulted from the arrangement, and that the arrangement resulted in the CPC being a lessee. (R-II-210-212) Thereafter, all documents were executed and certificates of participation (COP) were sold. (R-VII-677-679)

The finance corporation executed a mortgage and security agreement in favor of Nations Bank of Florida, N.A. (trustee), on May 1, 1994, and simultaneously entered into a trust indenture with the mortgagee (trustee) as of May 1, 1994, pursuant to which $30,235,000.00 certificates of participation were sold to finance the construction of the facility and the acquisition of any property needed for the operation thereof. (R-II-315; R-VI-562-659; VI-587; R-VII-680-713) The certificates of participation evidence fractional undivided interests of the owners thereof in the basic rent payments to be made under a "lease agreement"

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not an "industrial use." See Panama City Port Auth. Industrial Park Civil Improvement Assoc., Inc. v. Panama City Port Authority, Case No. 94-851, referenced in the joint stipulation of which judicial notice was taken. The contract was assigned to the finance corporation.

with option to purchase entered into between the financing corporation and the State of Florida, Correctional Privatization Commission (CPC). (R-VI-477-554; R-VII-677-679) The Mortgage and Security Agreement contains the following provisions:

> WHEREAS, the Mortgagor has acquired a fee estate in the "Land," as hereinafter defined, for the purpose of constructing and equipping a 750 bed correctional facility thereon (the "Project") by the Mortgagor for lease to the Commission pursuant to a Lease Agreement with Option to Purchase dated as of May 1, 1994, (the "Lease Purchase Agreement"); and
>
> WHEREAS, the Mortgagor will acquire certain items of equipment (the "Equipment") to be used in conjunction with the Project and leased to the Commission pursuant to the Lease Purchase Agreement;

(R-II-313; R-VII-680) The mortgagor is the paper entity, the finance corporation, which was created solely for that purpose. (R-IV-24-25) The Trust Indenture which also is referenced in the Mortgage and Security Agreement contains the obligation of the mortgagor to pay the mortgagee the amount set forth as stated at page 2 of the agreement:

> WHEREAS, the Trust Indenture sets forth the obligation of the Mortgagor to pay the Mortgagee the original principal amount of $30,235,000 together with interest, premium if any, and any other amounts due thereon, <u>but solely from amounts paid therefor to the Mortgagor from the Commission pursuant to the Lease Purchase Agreement</u>, all as provided in the Trust Indenture for the payment of the Certificates;

(R-II-314; R-VI-562-659; R-VII-681, emphasis added) The total indebtedness for the construction and equipping of the facility is secured as provided therein as follows:

> NOW THEREFORE, to secure the payment of any and all indebtedness now existing or which may hereinafter arise by reason of (1) the Trust Indenture, this Mortgage or any of the Certificate Documents, including any renewals, extensions, modifications or substitutions thereof; (2) all amounts due to [Bond Insurer]; (3) any expenditures made by the Mortgagee hereunder, including, without limitation, sums expended for professional fees and costs, abstracting or title work; (4) any sums expended by the Mortgagee to cure any defaults of the Mortgagor under the Trust Indenture, this Mortgage or any of the other Certificate Documents; or (5) any other cost or expense which, by the terms of the Certificate Documents, may be the subject of reimbursement to the Mortgagee by the Mortgagor and, in addition thereto, all interest and premium thereon (all of the foregoing hereinafter sometimes individually and collectively called the "Indebtedness"), Mortgagor hereby mortgages to the Mortgagee all its right, title and interest in the real property more particularly described on Exhibit A attached hereto and made a part hereof (hereinafter called the "Land");
>
> TOGETHER WITH all buildings, structures and improvements now and hereinafter located on the Land, and the fixtures attached thereto, and all rents, issues, proceeds and profits accruing and to accrue from the Land, all of which are included within the foregoing description, and the addendum hereof, and together with all gas, steam, electric, water and other heating, cooking refrigerating, plumbing, ventilating, irrigating and power extensions, appliances, fixtures and appurtenances, including air-conditioning ducts, machinery and equipment, which are now or may hereinafter pertain to

> or be used with, in or on the Land, though they be either detached or detachable, including all renewals, replacements and additions thereof, and a security interest in all items and matters set forth on Exhibit B, attached hereto and made a part hereof, as well as the proceeds of any sale, transfer, pledge or other disposition of any or all of the foregoing property (the Land and all of the foregoing hereinafter being called the "Mortgaged Property").

(R-II-314; R-VII-681-682, emphasis added) On page 3 of the mortgage agreement, it is re-emphasized that the mortgagor has no duty to make payments of principal, interest, and other sums constituting the indebtedness except "from amounts provided to the mortgagor for such purpose by the commission." (R-II-315; R-VII-682) On page 4, paragraph 2. relates to the "PAYMENT OF TAXES" and provides:

> Pursuant to the Lease Purchase Agreement, the Commission is required to make, or to cause to be made, all payments of taxes, including, but not limited to, assessments, levies, liabilities, liens for public improvements, obligations and encumbrances of every nature upon the Mortgaged Property (hereinafter collectively called the "Impositions") before same become delinquent, but solely from amounts provided to the Mortgagor for such purpose by the Commission; provided, however, that, as to taxes, payment shall be made by the Mortgagor, not later than the April 1 immediately following the date said taxes are due. The Mortgagor shall deliver to the Mortgagee receipts evidencing the payment of the Impositions immediately upon the payment thereof as required in this paragraph. In the event Mortgagor is in default thereof, said Mortgagee may, but shall not be required to, at any time pay the same without waiving or affecting the option to

> foreclose or any right hereunder and every payment so made shall be immediately due and payable by Mortgagor, with interest thereon, at the rate set forth in the Trust Indenture applicable to a period when default exists thereunder, and shall be secured by this Mortgage.

(R-II-314; R-VII-683-684, emphasis added) The requirement that the commission pay all taxes becoming due on the property is also evidenced in the prior paragraph 1 dealing with "PAYMENT OF INDEBTEDNESS" as follows:

> Principal and interest and premium, if any, on the Indebtedness secured hereunder are payable in lawful money of the United States of America, without deduction for or on account of any present or future taxes, duties or other charges levied or imposed on the Trust Indenture or the amounts payable thereunder, by any government, or any instrumentality, authority, or political subdivision therefor. The Mortgagor agrees, upon the request of the Mortgagee, to pay all such taxes, duties and other charges in addition to the principal and interest and premium due under the Trust Indenture, exclusive of United States income taxes and Florida income taxes, but solely from amounts provided to the Mortgagor for such purpose by the Commission. Failure to do so shall constitute a default under the terms of this Mortgage.

(R-II-315; R-VII-682, emphasis added)

Paragraph 6. of the mortgage and security agreement contains the "MORTGAGOR'S DEFAULT/REMEDIES" and references the various occurrences which can give rise to a default, and includes the "Event of Non-Appropriation." (R-VII-686-687)

The document contains the general rights and options of a landlord-tenant arrangement in the event of default on the mortgage. The document also emphasizes that the mortgagor is to remain liable for any deficiencies in payment of the amounts to retire the certificates of participation but emphasizes that such liability is "solely from amounts provided to the mortgagor for such purpose by the Commission." (R-VII-688-689) This clause authorizes the mortgagee to foreclose on the property in the event that the commission does not purchase the property.

On page 11, paragraph 8 provides:

> A. That pursuant to the Assignment, the Commission as Lessee under the Lease Purchase Agreement shall pay over directly to Mortgagee all amounts coming due from the Commission in accordance with the terms of the Lease Purchase Agreement, and that in the event of a default under any of the Trust Indenture, this Mortgage or the other Certificate Documents, or of the filing of a complaint to foreclose this or any other mortgage encumbering the Mortgaged Property, the Mortgagee shall immediately and without notice be entitled, as a matter of right and without regard to the value of the Mortgaged Property or to the solvency or insolvency of the parties, to the appointment of a receiver of the Mortgaged Property and of the rents, issues and profits thereof, with the usual power of receivers in such cases, and such receiver may be continued in possession of the Mortgaged Property until the time of the sale thereof, under such foreclosure, and until the confirmation of such sale by the court.
>
> B. That all of the rents, deposits, revenues, issues and profits arising out of the operation of the Mortgaged

> Property are, by the terms hereof, assigned to the Mortgagee as further security for the payment of Indebtedness and no other instrument or documents need be executed by the Mortgagor to effect such assignment, although the Mortgagor agrees to execute any such documents or instruments as Mortgagee may require in furtherance of the terms hereof, within five (5) days of any request by the Mortgagee. Any subsequent assignment of the rents, deposits, revenues and profits of the Mortgaged Property, or any part thereof, to any party other than Mortgagee, shall at all times be inferior and subordinate to the assignment granted hereby and to the rights of the Mortgagee.

(R-VII-690, emphasis added)

On page 14, paragraph 18 deals with escrow of taxes and insurance and provides:

> That notwithstanding the provisions of Paragraph 2 or any other paragraph hereof, following an Event of Non-Appropriation or an Event of Default, under the Lease Purchase Agreement, the Mortgagor will pay to the Mortgagee, but solely from amounts provided to the Mortgagor for such purpose by the Commission, a sum equal to (A) the Mortgagee's estimate of the taxes and assessments next due on the Mortgaged Property; and (B) all annual insurance premiums on insurance policies which the Mortgagor is required to carry hereunder, less any sums already paid the Mortgagee with respect thereof, divided by the number of months to elapse before one (1) month prior to the date when such taxes, assessments and insurance premiums become due and payable, such sums to be held by the Mortgagee, without interest, in order to pay such items. If at any time the sums held by the Mortgagee hereunder are insufficient to pay any such item when due, the Mortgagor shall forthwith, upon demand, pay the deficiency to the Mortgagee, but solely from amounts provided to the

> Mortgagor for such purpose by the Commission. The moneys to be paid by the Mortgagor pursuant to this paragraph are solely for the added protection of the
>
> Mortgagee and entail no responsibility on the Mortgagee's part beyond the allowing of due credit, without interest, for sums actually received by the Mortgagee.

(R-II-315; R-VII-693) Payment of taxes is also mentioned in paragraph 19 as follows:

> That if the total of the payments by the Mortgagor under Paragraph 18 preceding shall exceed the amount of payments actually made by the Mortgagee for taxes, assessments and insurance premiums, as the case may be, such excess shall be credited by the Mortgagee against the next subsequent payments to be made by the Mortgagor pursuant to Paragraph 18. If, however, the payment made by the Mortgagor under Paragraph 18 shall not be sufficient to pay taxes, assessments and insurance premiums, as the case may be, when the same shall become due and payable, then the mortgage may, at the Mortgagee's sole option, immediately pay such taxes, assessments and insurance premiums, and such payment by the Mortgagee shall be subject to the provisions of Paragraphs 9 and 20 hereof.

(R-II-315; R-VII-693)

B. Lease Agreement with Option to Purchase.

The "Lease Agreement with Option to Purchase" (lease-purchase agreement) is dated May 1, 1994, with the commission as lessee from the finance corporation, as lessor. (R-II-313; R-VI-477-554) This document states that it is a

lease-purchase agreement entered into pursuant to chapter 957, Florida Statutes (1993), and the Florida Constitution. (R-VI-483) Paragraph 2.5(a) provides:

> 2.5. Rent is Limited Obligation; No Abatement or Set-Off.
>
> (a) The Lessee represents and warrants that for the Initial Lease Term and upon the renewal hereof for any Renewal Lease Term the obligation of the Lessee to pay Rent hereunder, for such Fiscal Year of Lessee, shall constitute a current obligation of the Lessee and shall not in any way be construed to be a debt of the Lessee in contravention of any applicable constitutional, statutory or charter limitations or requirements concerning the creation of indebtedness by the Lessee. THE PAYMENTS DUE HEREUNDER ARE TO BE MADE ONLY FROM THE LESSEE'S LEGALLY AVAILABLE FUNDS AND NEITHER THE LESSEE, THE STATE OF FLORIDA, NOR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF SHALL BE OBLIGATED TO PAY ANY SUMS DUE TO LESSOR HEREUNDER FROM OTHER THAN DULY APPROPRIATED FUNDS AND NEITHER THE FULL FAITH AND CREDIT OF THE LESSEE, NOR THE STATE OF FLORIDA NOR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF IS PLEDGED FOR PAYMENT OF SUCH SUMS DUE HEREUNDER AND THE CONTRACTUAL OBLIGATION HEREUNDER TO HAVE THE LESSEE REQUEST AN APPROPRIATION TO PAY SAME DOES NOT CONSTITUTE AN INDEBTEDNESS OF THE LESSEE, OR THE STATE OF FLORIDA OR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF WITHIN THE MEANING OF ANY CONSTITUTIONAL, STATUTORY OR CHARTER PROVISION OR LIMITATION. THE STATE OF FLORIDA'S PERFORMANCE AND OBLIGATION TO PAY UNDER THIS LEASE PURCHASE AGREEMENT IS CONTINGENT UPON AN ANNUAL APPROPRIATION BY THE LEGISLATURE.

(R-II-313; R-VI-499-500, emphasis added.)

Prior to issuance of the COP's, a bond opinion was obtained by the law firm of Bryant, Miller & Olive, P.A., authored by Robert C. Reid, counsel for DMS, which opined that the constitution was not violated by the financing agreement and that the lease purchase with option was a "lease" and not a mortgage. (R-II-210-212; III-402-435)

Provision 2 of the agreement sets forth the lease term. (R-II-313, R-VI-498) It provides in part:

> 2.1. Lease Term. Effective as of the Lease Commencement Date, Lessor hereby rents and leases to the Lessee and the Lessee hereby rents and leases from the Lessor the Project for the Initial Lease Term. The Lease Term shall commence on the Lease Commencement Date and terminate on the Lease Termination Date, unless this Lease Purchase Agreement is earlier terminated pursuant to Section 2.2 hereof.

(R-VI-498, A-2-22, emphasis added) Paragraph 2.2.1, which deals with termination, states that the lease term will terminate upon the events listed therein, and (c) thereof provides that the lease will terminate upon:

> (c) the expiration of the Initial Lease Term or any Renewal Lease Term and the non-renewal of this Lease Purchase Agreement due to an Event of Non-Appropriation under section 2.6.1 hereof;

(Id.) The effect of the termination of the lease-purchase agreement is set forth in paragraph 2.2.2 as follows:

> Effect on the Lessee of Expiration or Termination of the Term of this Lease Purchase Agreement. The expiration or termination of the term of this Lease Purchase Agreement as to the Lessee pursuant to Section 2.2.1 hereof shall terminate all obligations of the Lessee hereunder (except to the extent that the Lessee shall incurred any obligation to pay Rent from moneys theretofore appropriated and available for such purpose) and shall terminate the Lessee's rights of use and occupancy of the Project; provided, however, that all other terms of this Lease Purchase Agreement and the Trust Indenture, including all obligations of the Trustee with respect to the holders of the Certificates and the receipt and disbursement of funds, shall be continuing until the lien of the Trust Indenture is discharged, as provided in the Trust Indenture. The termination or expiration of the term of this Lease Purchase Agreement as to the Lessee pursuant to Section 2.2.1 hereof, of itself, shall not discharge the lien of the Trust Indenture.

(R-II-313; R-VI-498-499) Paragraph 1.5 of the document states that the parties "explicitly intend to create a relationship of landlord and tenant and not of mortgagee and mortgagor." (R-VI-498)

C. Operation and Management Services Contract.

The term "management agreement" is defined in the lease-purchase agreement as follows:

> "Management Agreement" shall mean the Operation and Management Services Contract dated as of March 29, 1994 between the Lessee and CCA, pursuant to which CCA will operate and manage the Project on behalf of the Lessee, as such may be extended, renewed, amended or replaced from time to time.

(R-II-313; R-VI-491) Pursuant to the lease-purchase agreement, the finance corporation the titleholder/mortgagor/lessor rents and leases to the commission, as lessee, the "project" as defined therein which such definition references exhibit “B" which states:

> A 750-bed adult male medium custody secure correctional facility to be located on 99.93± acres in Bay County, Florida.

(R-VI-494; VI-543) The "Operation and Management Services Contract" (contract) is between the commission and CCA. (R-II-318; R-IX-1092-1173) The contract is dated March 29, 1994, which is prior to the date of the lease-purchase agreement date of May 1, 1994. At all times the arrangement contemplated that CCA would have exclusive use, occupancy, possession and control of the premises. The contract states that it is entered into pursuant to chapter 957, and indicates that the contractor was the successful bidder on such contract by stating:

> Whereas, a Request for Proposals (RFP) was issued on December 23, 1993, by the COMMISSION in order to select a CONTRACTOR(S) to design, finance, acquire, lease, construct, and operate up to two 750 bed, medium custody, secure correctional facilities for adult male inmates;

(R-II-318; R-IX-1092-1093) Section 2.1 of the contract states that the term is for a period of three years, unless earlier terminated as provided in the contract, but that the commission may renew the contract for additional two-year periods. (R-IX-1087-1098)

Pursuant to the contract, exclusive, use, possession, and control of the land and property is granted by the commission to CCA in section 3.1 and 3.2 as follows:

> Section 3.1 Possession of Facility. On the Services Commencement Date, the COMMISSION shall grant to CONTRACTOR exclusive use, possession and control of the land and property comprising the Facility and its grounds, subject to the right of the COMMISSION to enter and inspect same.
>
> Section 3.2 Possession of Lease Furnishings and Equipment. On the Services Commencement Date, the COMMISSION will grant CONTRACTOR exclusive use and possession, subject to the terms of this CONTRACT, of leased furnishings and equipment as same is defined and set out in the Lease Agreement.

(R-II-318; R-IX-1103, emphasis added) Section 3.3 relates to inventory and leased furnishings and equipment, and section 3.4 authorizes CCA to provide other equipment as it deems necessary and requires that all equipment be properly identified and inventoried. (R-IX-1103-1104) It recognizes that ownership of such additional property shall remain with CCA. CCA is required to maintain the premises and the property, and a person referred to as the "contractor monitor," the executive director of the commission or his designated representative is authorized to have access at all times to all areas of the facility, to inmates and the staff. (R-IX-1103)

Section 7.5 of the contract provides:

> Defenses/Immunity. By entering into the Contract, neither the State, COMMISSION, or DOC nor CONTRACTOR waives any immunity defense which may be extended to them by operation of law including limitation of damages. Excepting only that the CONTRACTOR may not assert the defense of sovereign immunity.

(R-II-318; R-IX-1144, emphasis added.) This provision is consistent with the intent of chapter 957, which is to allow for privatization of prisons. See § 957.05, Fla. Stat. (1995). Section 9.8 recognizes that the contract may be terminated by the event of non-appropriation stating:

> Termination for Non-Appropriation. The payment of compensation hereunder by the COMMISSION is contingent upon the availability of funds legislatively appropriated to pay such compensation. In the event funds for compensation pursuant to the Contract become unavailable due to non-appropriation, the COMMISSION shall have the right to terminate this Contract without penalty.

(R-II-318; R-IX-1151, emphasis added.)

Section 11.7 relates to taxes, liens, and assessments and provides that CCA shall pay or make provisions for the payment of all taxes and assessments levied or assessed by federal, state or local government on the facility, or any machinery or equipment installed or located thereon. (R-IX-1157-1159) It states:

> Taxes, Liens and Assessments. CONTRACTOR shall: (i) pay, or make provision for payment of all lawful taxes and assessments levied or assessed by the Federal, State or any local government on the Facility or any machinery, equipment or other property installed or

> located by CONTRACTOR therein or thereon, or upon the Financing Corporation with respect to the Facility or any part thereof, including any taxes levied upon or with respect to the income or revenues of the Financing Corporation from the Facility, or upon any payments pursuant to the Lease/Purchase Agreement; (ii) not create or suffer to be created any lien or charge upon the Facility or any part thereof; (iii) pay or cause to be discharged or make adequate provision to satisfy and discharge, within sixty (60) days after the same shall come into force, any lien or charge upon the Facility or any part thereof and all lawful claims or demand for labor, materials, supplies or other charges which, if unpaid, might be or become a lien upon the Facility or any part thereof, except Permitted Encumbrances, as defined in the Lease/Purchase Agreement with respect to the Facility entered into by and between COMMISSION and the Financing Corporation; and (iv) pay all utility charges, including "service charges", incurred or imposed with respect to the Facility.

(Id., emphasis added)

SUMMARY OF ARGUMENT

The case before the court embraces issues other than that directly stated in the certified question as posed by the district court. The district court bottomed its decision on this Court's decision in Leon County Educ. Facilities Auth. v. Hartsfield, 698 So.2d 526 (Fla. 1997)(Hartsfield II), in which this Court reversed the First District Court's decision in Leon County Educ. Facilities Auth. v. Hartsfield, 669 So.2d 1105 (Fla. 1st DCA 1996)(Hartsfield I). The decision in Hartsfield I was authored by the same district court judge who authored the decision in the instant case. The district court found that case and the instant case

"essentially indistinguishable". Barnett, 31 Fla. L. Weekly at 1421. (R-32) The property appraiser suggests that Hartsfield II is distinguishable because of the following. (1) Relied on in Hartsfield II was a specific statute providing tax exemption--section 243.33, Florida Statutes--which statute was not mentioned in the district court's decision in Hartsfield I, but which was relied upon by this Court stating:

> At the outset, we note that among the powers given to the Authority, it is authorized to lease property as a lessee or lessor. § 243.22(5)(a), Fla. Stat. (1991). Moreover, the language of section 243.33 is broadly stated. The clear intent of the statute is to exempt from taxation a project being operated and maintained by an authority under the provisions of chapter 243, part II, Florida Statutes. It is unlikely that the legislature intended that property being used by the Authority for its authorized purpose should be denied a tax exemption solely because it does not hold bare legal title. The only reason legal title is held by SRH is to facilitate the financing of the project. In essence, SRH is a conduit through which the lease payments are used to repay the COPS holders.

Hartsfield II, 598 So.2d at 529 (emphasis added.) (2) This Court made it clear that its holding was confined to the "stipulated facts" of that case stating:

> Our holding in this case should not be construed to mean that one who leases property from another becomes the equitable owner of the property if the lease contains an option to purchase. To the contrary, this Court has long held that the status of parties to the ordinary lease with an option to purchase remains that of landlord and tenant until the option is exercised and that the lessee has no equitable interest in the property. *Gautier v. Lapof,* 91 So.2d 324 (Fla. 1956). We hold only that under the

> stipulated facts of this case, the project is not subject to ad valorem taxation because the Authority holds virtually all the benefits and burdens of ownership.

Hartsfield II, 698 So.2d at 530 (emphasis added.) (3) No tax dollars, state or local, were involved in Hartsfield, and the only funds pledged were those received from a portion of the housing authority's rents, services, fees, cafeteria, etc., and this means no potential article VII, section 12, Florida Constitution, infringement issue existed. Funds to retire bonds were payable solely from revenue sources provided through sections 243.29 and 243.30, Florida Statues (2005). (4) Section 243.22(5)(a)(b) and (c), Florida Statutes (2005), expressly authorizes the authority to construct and lease the property. At bar, the statute provides that the private contractor constructs and operates the facility.

At bar, the statutory framework is for a private entity to construct prison facilities, provide its own financing of same, and operate the prison facilities. Section 957.03(4)(a), Florida Statutes (1999), provides:

> (a) The commission shall enter into a contract or contracts with one contractor per facility for the designing, acquiring, financing, leasing, constructing, and operating of that facility or, if specifically authorized by the Legislature, separately contract for any such services. The commission shall not enter into any contract to design, acquire, finance, lease, construct, or operate more than two private correctional facilities without specific legislative authorization.

(Emphasis added.) Section 957.04(2)(c), Florida Statutes (1999),provides:

> (2) Each contract entered into for the design and construction of a private correctional facility or juvenile commitment facility must include:
>
> * * * * *
>
> (c) A specific provision requiring the contractor, and not the commission, to obtain the financing required to design and construct the private correctional facility or juvenile commitment facility built under this chapter.

(Emphasis added.) There presently are five privately-operated prisons in Florida.

In Hartsfield, the authority constructed the project, operated same, was authorized to lease as lessee or lessor, and to regulate same. See § 243.22(5)(a), Fla. Stat. (2005). There, the authority provided the financing. Here, the private contractor is required by statute to provide all the financing.

In Hartsfield, the authority fixed the rents, rates, and charges for services furnished to any renter, and to pay the principal and interest of outstanding bonds from same. See § 243.30, Fla. Stat. (2005). At bar, the contractor must meet the bid requirements set forth in section 957.07, Florida Statutes (2005), for construction of the facility and operation of same, and is paid with state tax dollars. Section 957.07 makes it clear that in meeting the bid requirement and to be certified by the Auditor General, the contractor is allowed to take into account the fact that it is a private entity, and subject to state and local taxes, not a governmental entity, which would not be subject to the imposition of sales tax or

local ad valorem taxes. The property appraiser respectfully disagrees with the learned judge in the district court's analysis of section 957.07 in stating:

> Appellant urges the foregoing language evinces the legislative intent that privately operated prison facilities shall be subject to ad valorem taxation just as any other private commercial enterprise. Contrary to appellant's position, we conclude the quoted provision should be viewed merely as an indicator of legislative intent that, in making the cost-saving determination to qualify for a contract to operate a prison facility, a private contractor shall be allowed a credit for any tax liability it would otherwise incur if it were operating a commercial enterprise, rather than a government facility. That is, in the cost-saving determination for purposes of an award of the contract, the private contractor is allowed a credit for costs for which the state is exempt.

Barnett, 31 Fla. L. Weekly at 1422 (emphasis added). (R-38-39). The property appraiser suggests that the language recognizes that the private contractor would be subject to sales tax on materials purchased for construction of the prison and subject to ad valorem taxes when completed and privately operated by the contractor. If it were intended to be state constructed and owned from the inception, no mention of state taxes--sales tax--or local government taxes would have been necessary because the state was intended to be the equitable owner from inception, and the state is not subject to any such taxes. See §§ 196.199, 212.08, Fla. Stat. (2005). Moreover, it is the responsibility of the contractor to supply its own financing. If a contractor, for instance, constructed the facility without the lease-purchase financing, it would be both owner and operator, and section 957.07

applies to all bidders not only those using lease-purchase financing. Throughout Florida, there are buildings constructed for lease to the state and its agencies, and all are subject to sales tax on the construction materials, and ad valorem tax when completed. Simply observe the privately-owned buildings located east of Tallahassee on Capital Circle south of Highway 27 where many state offices are housed via lease. The property appraiser suggests that a proper reading of section 957.07 is that a bidder can add on anticipated sales tax paid, or needed to pay for materials for construction of the facility, and an amount for ad valorem taxes it will owe before calculating the seven percent (7%) costs savings threshold fixed by the Auditor General.

STANDARD OF REVIEW

This Court has jurisdiction pursuant to article V, sections 3(b)(4), Florida Constitution, to review decisions of district courts in which a question of great public importance has been certified. The issues here involve questions of law and statutory interpretation and are subject to de novo review. B.Y. v. Dept. of Children & Families, 887 So.2d 1253, 1255 (Fla. 2004); D'Angelo v. Fitzmaurice, 863 So.2d 311, 314 (Fla. 2003).

ARGUMENT

I. THAT THE DISTRICT COURT'S RELIANCE ON HARTSFIELD II IN FINDING SAME TO BE "ESSENTIALLY INDISTINGUISHABLE" FROM THE CASE AT BAR IS MISPLACED.

In the rehearing decision, the district court made several statements in explaining the property appraiser's position which are not entirely correct. The district court stated:

> The appraiser alternatively argues that if, in fact, the lease had the effect of transferring equitable ownership to the CPC, its legal effect was that of a mortgage given to secure the repayment of the debt evidenced by the mortgage the Finance Corporation conveyed to the Trustee; therefore, the repayment of the COP's for the purpose of satisfying the debt by state funds would have required compliance with the referendum provision of article VII, section 12 of the Florida Constitution, and because there was none, the debt was invalid.

Barnett, 31 Fla. L. Weekly at 1420. (R-28) The property appraiser does contend 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 states taxes to repay the debt. A similar observation was made in the dissent by Justice McDonald, joined by Justice Overton, in State v. School Bd. of Sarasota County, 561 So.2d 549 (Fla. 1990). In his dissent, Justice McDonald easily

distinguishes State v. Brevard County, 539 So.2d 461 (Fla. 1989), which did not involve tax dollars. He stated:

> These financing schemes are secured by a pledge of ad valorem taxes, at least on a year-by-year basis. This contrasts with the financing plan approved in *State v. Brevard County*, 539 So.2d 461 (Fla.1989), where ad valorem taxes were not a part of the financing agreement. If certificates are secured by a pledge of ad valorem taxes, they are bonds and must be approved by the voters. *Klein v. City of New Smyrna Beach*, 152 So.2d 466 (Fla.1963).

Sarasota County, 561 So.2d at 554. Previously, he stated:

> Today the Court approves form over substance. The financial schemes employed in these cases are the equivalent to the issuance of bonds and pledging ad valorem taxes to support them. Thus, I totally disagree that the bonds in question can be approved without a referendum from the owners of freeholds as required by article VII, section 12 of the Florida Constitution. I believe it pure sophistry to say that 'these obligations are not supported by the pledge of ad valorem taxation.' Majority at 552. If ad valorem taxes are not levied and paid each year for the duration of the agreements the school boards default not only all interest acquired under the agreement for the remainder of the agreement, but they also lose the right to use the preowned property for the remainder of the agreement. Never before have we approved a nonreferendum bond where ad valorem taxes have been involved to the extent they are involved in these cases. By approving these financing agreements we have approved a method of nullifying the provisions of article VII, section 12, Florida Constitution.

Sarasota County, 561 So.2d at 553-54. But the property appraiser does not agree that equitable ownership in the state was vested from inception.

The point which the property appraiser makes is that, if we accept the conclusion of the bond opinion that the document is a lease, and that no compliance with article VII, section 12, Florida Constitution, was necessary, then it must also be a lease for taxation purposes. Like Sarasota County, taxes are to be used to repay the debt (bonds) and, if not repaid, the property itself will be forfeited because there is a mortgage held by the Trustee as subordinated security for the bond indebtedness.

The district court opinion finds Hartsfield "similar" to this case. However, significant dissimilarities exist. Barnett, 31 Fla. L. Weekly at 1420. (R-30)

1. In Hartsfield, the authority owned the land and the financing arrangement was to pay for construction by it of the dormitory project. At bar, the contractor by contract acquired the land and then assigned title to it in the paper, non-profit entity for financing purposes. The starting points are totally different.

2. In Hartsfield, no tax dollars were involved; here, tax dollars are involved and were from the inception. The state pays tax dollars to the entity which holds legal title only via the deed assignment from the contractor. In case of default, the contractor has lost his land through the mortgage foreclosure by the Trustee for the bondholders.

3. In Hartsfield, there was no mortgage. Here, there is.

4. In Hartsfield, the bondholders could continue to look only to the rents, fees for services, etc., but could not cause forfeiture of the property through a mortgage foreclosure.

Exactly as Justice McDonald stated in Sarasota County, and as this Court held in Nohrr v. Brevard County Educ. Facilities Auth., 247 So.2d 304 (Fla. 1971), there is no way the state is going to stand by and watch a prison be foreclosed on if the state is actually the equitable owner as it now argues. But, if it is only a lessee, that's a horse of a different color. The original owner, the contractor, will lose its investment in the land and the bondholders can foreclose and perhaps convert the prison into a time-share or public housing.

Although both Hartsfield and this case had lease-purchase agreements, at bar the lease-purchase agreement and the management agreement were executed simultaneously so that the contractor, the actual property purchaser, occupies and possesses the property and the land on which the property is located, and contracted to buy wholly independent of the public body. In fact, the involved statutes so require. See § 957.04, Fla. Stat. (2005). Here, the private contractor is building the facility; in Hartsfield, the public authority was building the facility.

While the cases are "similar" in that both had non-profit corporate entities to hold title, they are dissimilar in that in Hartsfield it was the public entity which had originally owned the property and was constructing the dormitory. At

bar, it is the private contractor which acquired the property to be transferred to the paper entity--CPC--created to hold title, and which is constructing the facility.

In sum, if it was a lease at the inception it had to remain a lease throughout. Otherwise, the state could not "walk away" without liability simply by not appropriating funds. Similarly, if it was the equitable owner at the end, it was the equitable owner at the beginning. It cannot change along the way.

A comment in the district court's decision indicates some misunderstanding of the property appraiser's comment about bond validation. It states that in Hartsfield "no mention was made of the necessity of a bond referendum. Barnett, 31 Fla. L. Weekly at 1420. (R-30-31). Hartsfield did not involve ad valorem taxes or any tax revenues. That is why a bond referendum was never an issue or needed to validate the debt. If the revenue source for repayment of the COP's is not taxes (ad valorem/state), then no article VII, section 12 issue arises.

The district court stated "we consider the facts essentially indistinguishable from those in Hartsfield, . . . " Barnett, 31 Fla. L. Weekly at 1421. (R-32) Based on the differences previously noted, the property appraiser respectfully disagrees. They are significantly different.

The district court cites Sarasota County and Brevard County, which were cited by both parties below, but misstates the property appraiser's argument

pertaining to same. These cases were cited for the property appraiser for the proposition that in both cases this Court held that the financing document was a "lease" and not a mortgage and, hence, no bond referendum was required. As stated previously herein, Justice McDonald, joined by Justice Overton in a vigorous dissent in Sarasota County, disagreed with the holding.

The property appraiser's position is that if the lease-purchase agreement was a lease in those cases, then the lease-purchase in this case also is a lease with an option to purchase, and not a mortgage. Florida law is quite clear that an instrument conveying or selling property, whether real or personal, for the purpose or with the intention of securing the payment of money shall be deemed and held a mortgage. See § 697.01, Fla. Stat. (2005). If the lease with option to purchase in the instant case is not a mortgage within the statutory parameters, then it is a lease and if it is a lease then the property is taxable. No exemption exists in Florida for property held by a private entity and leased to the state or a state agency. See Ocean Highway & Port Auth. v. Page, 609 So.2d 84 (Fla. 1st DCA 1992).

In Sarasota County, the majority makes it crystal clear that only a lease is involved and not a mortgage. It stated:

> The state in addition argues that validation is precluded by *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304 (Fla. 1971). In *Nohrr*, we held that a bond-supporting agreement which granted a

> mortgage with right of foreclosure violated the predecessor to article VII, section 12, absent an approving referendum. The rationale of *Nohrr* does not apply to the instant case. There is no mortgage with right of foreclosure. Here, the bondholders are limited to lease remedies and the annual renewal option preserves the boards' full budgetary flexibility.

Sarasota County, 561 So.2d at 553 (emphasis added). The district court stated:

> In this case, the CPC is in the same position as that of the school boards in *Sarasota County* and the county in *Brevard County*.

Barnett, 31 Fla. L. Weekly at 1421. (R-34) If this is an accurate statement, then the documents must be a lease as were the documents in Sarasota County and Brevard County.

The district court's statement that, in case of default, "the state would cease to be the equitable owner of the property" ignores the fact that in both Sarasota County and Brevard County, the county never became the equitable owner because the document was a lease. Barnett, 31 Fla. L. Weekly at 1421. (R-35) At bar, the bond opinion held that the document was a "lease," although the state now argues that it was the equitable owner from the inception.

If the state were the equitable owner under section 697.01, then ownership can only be divested by a mortgage foreclosure because that is precisely what the statute protects against; that is, divesture of ownership through simple default in paying the commitment of the lease purchase agreement, or in some

cases, a lender would require a borrower to execute a deed to the lender to obtain the loan, and on the simplest default, such as a late payment, the lender would use the deed to divest the borrower of ownership without a mortgage foreclosure which would protect the borrower's right of redemption.

The lease-purchase agreement cannot be a chameleon--it is either a "lease" or a "mortgage." If it is a lease, the property is taxable. But, it cannot be a lease at the beginning, become a "mortgage" so as to make the CPC the equitable owner, and then become a "lease" again if the state decides to "walk out."

II. THE STATE IS NOT THE EQUITABLE OWNER OF THE FACILITY FROM EXECUTION OF THE DOCUMENTS BECAUSE THE LEASE-PURCHASE AGREEMENT IS A "LEASE."

In the trial court, DMS admitted that the involved document was a "lease," but nevertheless contended that it operated to transfer equitable ownership to the CPC on June 23, 1994. At page 2 of its reply trial memorandum, counsel for DMS stated its position as follows:

> The undisputed facts in this case are that the Lease Agreement with Option to Purchase (the 'Lease-Purchase Agreement') is <u>indeed a lease</u>, and no claim has been raised by any party that the Lease-Purchase Agreement is a mortgage. It is also an undisputed fact that the Correctional Privatization Commission, the original lessee under the Lease-Purchase Agreement, and the Florida Department of Management Services, the current lessee, are part of the 'State of Florida' and constitute state agencies.

> The Defendant in its Trial Memorandum simply ignores the law of 'equitable ownership' in Florida and the tests imposed by the Florida courts to determine whether a lessee with an option to purchase is the equitable owner. *See First Union Nat'l Bank of Fla. v. Ford*, 636 So.2d 523 (Fla. 5th DCA 1993); *Robbins v. Mt. Sinai Medical Ctr., Inc.*, 748 So.2d 349 (Fla. 3d DCA 1999); *Leon County Educational Facilities Auth. v. Hartsfield*, 698 So.2d 526 (Fla. 1997).

(R-II-329, emphasis added) Thereafter, it stated:

> No court in Florida has ever used the granting of a mortgage as part of the test of equitable ownership, and the Defendant has not cited any authority for the argument that since the lessee did not grant a mortgage the lessee can not be the equitable owner.

(Id., emphasis added) Since DMS has admitted that the document is a "lease," as indeed it must do because otherwise the bond opinion rendered by counsel for the department which had recognized it as a "lease" in concluding that no vote of the electors was required would have been incorrect under article VII, section 11. However, DMS further stated that, notwithstanding that it considers the document a "lease," it contends that equitable ownership was transferred to CPC by the document at the time of execution. If it operated to transfer title to the state at the "time" of execution, the bond opinion does not acknowledge this. By concluding that no article VII, section 11 infringement occurred, it had to have concluded that equitable title/ownership was not transferred. A lease does not transfer an equitable ownership interest or possessory interest in real property. This is a

common issue which arises insofar as receipt of homestead exemption in Florida. Persons occupying real property as renters do not qualify for homestead exemption because they are neither legal nor equitable owners of real property. See Art. VII, § 6, Fla. Const; §§ 196.031 and 196.041, Fla. Stat. (2004).

In fact, Hartsfield II, recognized that in a lease situation no equitable title is vested in the lessee. If the subject lease agreement was, in fact, a "lease" as the department has admitted, then the state agency was a lessee and not an owner of the subject property and, under Florida law, no state agency is exempt from taxation by virtue of the fact that it is a lessee of privately owned and held property. See Ocean Highway & Port Auth. The state cannot have it both ways. If it was, in fact, the equitable owner of the property when the bond opinion was rendered, then the bond opinion is legally incorrect and the bonds were invalidly issued because of noncompliance with the jurisdictional requirements of article VII, section 11. If equitable ownership were transferred at that time, then the legal effect of the document was that it was a "mortgage" given to secure the repayment of debt evidenced by the mortgage to Nations Bank and the certificates of participation through state funds appropriated by the legislature and this would have required compliance with the provisions of article VII, section 11. Had CCA itself directly obtained the financing and mortgaged its property to the bank and transferred legal title by quit-claim deed to secure repayment, there can be no

doubt but it would be the equitable owner. The substance of the transaction is just that, because that is what happened.

Furthermore, DMS' statement that no Florida case has ever used the "granting of a mortgage as part of the test of equitable ownership," is incorrect. That is precisely the test that Florida courts traditionally have always used in bond validation proceedings where public funds are used to pay for the costs of capital improvements which require payment over a period of time in excess of 12 months. In fact, this Court recognized this in Sarasota County in which it stated:

> The state in addition argues that validation is precluded by *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304 (Fla.1971). In *Nohrr*, we held that a bond-supporting agreement which granted a mortgage with right of foreclosure violated the predecessor to article VII, section 12, absent an approving referendum. The rationale in *Nohrr* does not apply to the instant case. There is no mortgage with right of foreclosure. Here the bondholders are limited to lease remedies and the annual renewal option preserves the boards' full budgetary flexibility.

561 So.2d at 553 (emphasis added).

In Nohrr, this Court reversed a trial court which had upheld the issuance of bonds in a bond validation proceeding in a situation where the land also was mortgaged for the repayment of the funds acquired from the sale of the bonds to pay for the construction. In doing so, it stated:

> With certain exceptions not pertinent to the case *sub judice*, a mortgage with the accompanying right of

> foreclosure is not constitutionally permissible without an election. * * * Consistency is desirable and absent specific constitutional authority a mortgage securing revenue bonds of a public body should not be approved without an election.

Nohrr, 247 So.2d at 311. As in Nohrr, here the property is subject to a mortgage from the finance corporation to the trustee. To avoid losing the property the state would feel coerced to spend state taxes to retire the debt to COP holders.

In a true lease situation, as recognized in Sarasota County and Brevard County, there is no tax secured debt beyond the 12-month time period because the document is a lease. If the document is a mortgage and taxes are used to repay same, bonds cannot be validated because debt extends beyond 12 months. The dissent in Sarasota County recognized this also. In a lease situation the owner of the property remains the owner and retains all indicia of ownership including equitable title. However, if a purchaser acquires property from another, he becomes either the legal and equitable owner or the equitable owner of the property subject to his financial obligations to the seller who may hold a mortgage and legal title as security for repayment of the debt. The latter situation was recognized by this Court in Bancroft Inv. Corp. v. City of Jacksonville, 157 Fla. 546, 27 So.2d 162 (Fla. 1946), in which the United States sold its post office building pursuant to a retain title contract and the court held that, even though legal title was held by the United States, the equitable ownership of the property had

transferred to the private buyer and, accordingly, was subject to tax. If the situation was reversed and the United States was acquiring the property through the identical agreement, the property would be exempt because the United States would be the equitable owner.

III. IN ENACTING CHAPTER 957, THE LEGISLATURE SQUARELY INTENDED AND RECOGNIZED THAT ALL FACILITIES CONSTRUCTED PURSUANT TO BIDS RECEIVED FROM PRIVATE CONTRACTORS WOULD BE SUBJECT TO AD VALOREM TAXATION, AND RECOGNIZED AS PRIVATE PRISON FACILITIES.

There can be no doubt but that the stated legislative purpose of creating the CPC and enacting chapter 957 in 1993 was for the purpose of providing for the construction and operation of "private" correctional facilities. Section 957.03(1), Florida Statutes (1993), provided upon creation[2]:

> Commission.–The Correctional Privatization Commission is created for the purpose of entering into contracts with contractors for the designing, financing, acquiring, leasing, constructing, and operating of private correctional facilities. For administrative purposes, the commission is created within the Department of Management Services.

(Emphasis added.) This is totally different from the statutes involved in Hartsfield. The facility which is the subject matter of this lawsuit was constructed in 1994-95,

[2]Subsequent to the commencement of these cases, chapter 957 was amended.

and became operational shortly thereafter pursuant to the various contracts and agreements which are found in the record, and which in large part comprise the financing documents for the construction and operation of such facility. Section 957.04, quoted previously herein contains the various contract requirements and specifically requires "[a] specific provision requiring the contractor, and not the commission, to obtain the financing required to design and construct the private correctional facility built under this chapter." Nothing could be clearer but that the legislature is intending that the contractor is expected to construct, own, and operate the correctional facility and, thus, the facility would be a “private” as opposed to a “public” correctional facility. The language in section 957.04(2)(d), makes it clear that the state is not obligated for any payments that exceed the current annual appropriation. This is squarely consistent with the contracts and agreements involved at bar because the lease is for a 12-month period with an option to renew and contains language which clearly states that the state is under no obligation to appropriate funds in subsequent years. Thus, this type lease essentially is the same as that considered by the supreme court in Sarasota County and Brevard County, because the documents before the court in those cases also contained language specifying that the leases were for a 12-month time period and that there was no commitment or obligation for the county or school board

respectively to levy ad valorem taxes in the future to pay for the construction of the improvements funded therein.

More significantly, section 957.07, Florida Statutes (1993), required a certification by the Auditor General that the contractors bid had been examined and found to be in compliance with the statutory requirement that the private contractor would be able to furnish the services at a cost of at least seven percent less than the state. These costs include the "construction and operation of similar facilities or services as certified to the commission by the Auditor General." § 957.07, Fla. Stat. (1993). The statute specifically directed the Auditor General in arriving at the determination that the seven percent threshold had been met to consider "[r]easonable projections of payments of any kind to the state or any political subdivision thereof for which the private entity would be liable because of its status as private rather than a public entity." Id. This is entirely proper since a private prison would be subject to pay ad valorem taxes and other special assessments levied by local government while a public prison would not. Similarly, if the state were constructing a prison, it would not have to pay sales tax on all materials and equipment purchased for constructing and operating the facility but a private entity would. See § 212.08, Fla. Stat. (2005), and § 957.07, Fla. Stat. (1995) (directs the Auditor General to consider that also). Thus, the

legislature clearly has set forth its recognition that these are private facilities and as a private facility will have to pay ad valorem taxes. Nothing could be clearer.

Moreover, the statutes draws no distinction between prisons constructed as authorized in section 957.04(2)(a), which provided for the use of tax exempt financing and prison facilities constructed where the contractor was not able to avail himself of that authorized in section 957.04(2)(a). The Bay County facility bidder opted to use section 957.04(2)(a), and that was the type of financing used. However, the successful bidder in the instant case, CCA, also had to comply with the requirements of section 957.07, which meant that it received the benefit of paying ad valorem taxes and sales taxes when the Auditor General was calculating whether the bidders achieved the seven percent threshold required by the statute in order to be deemed a qualified bidder. The property appraiser submits that the legislature has clearly shown that this is to be considered a private prison so constructed and operated and, as such, is expected to pay ad valorem taxes. This clearly distinguishes the statutes involved in the instant case and those involved in Hartsfield. In Hartsfield the legislature had created a specific tax exemption and the supreme court so noted this and applied it in its decision–here the legislature, not only enacted no statutory exemption, it expressed its intent clearly that the private contractor would be paying ad valorem taxes.

A fundamental goal in construing statutes is to determine the legislative intent and the property appraiser submits that this intent could hardly be clearer in the instant case. In construing statutes, it is proper to take into consideration the state of affairs in Florida at that time. In 1993, Florida was experiencing a public demand that crime be dealt with hastily--chain gangs, mandatory sentences, longer sentences, etc. In short, get tough on crime. At the same time, it was the clamoring "no new taxes" and "no increase in taxes." At about this time, came the movement to privatize state services, because "private enterprise can do the work cheaper and better."

Faced with these various competing pressures, one way to solve the shortage of prison space to "keep them locked up longer" was to have prisons contracted, paid for, financed, and operated by private businesses. It was in this political climate from whence came chapter 957. As stated in 82 C. J. S., section 321:

> Since the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with organic law of the state, to the intention or purpose of the legislature as expressed in the statute. Thus, it is the duty of the court to endeavor to carry out the intention and policy of the legislature, and it has been said that in the construction of a statute, as in the construction of a will, the paramount rule is to give effect to the intention of the maker if it does not run counter, in

> the case of a will, to some positive rule of law, or, in the case of a statute, to some constitutional inhibition.

(Emphasis added.) Further in 82 C. J. S. section 351, it is stated:

> Where, after a consideration of the language of the entire statute, as discussed supra §§ 345-350, there remains a doubt as to its meaning, reference may be had not only to the language of the statute, but to the subject matter of the act, its object, purpose, expediency, occasion, and necessity, the remedy provided, the condition of the country to be affected, the consequences following its enactment, as discussed supra § 322, the results that would follow different constructions, as considered supra § 326, and various other extrinsic matters, presumably in the mind of the legislature at the time of enactment, which throw some light on the legislative intent. The construction should be in the light of the circumstances existing at the date of the statute's enactment, as discussed infra § 353, and not in the light of subsequent developments.
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> * * * *
>
> The court may also make use of general facts of common knowledge of public notoriety, in addition to the other matters discussed infra §§ 352-373.

(Emphasis added.) Later, in 82 C. J. S. section 353, it is stated:

> In seeking to ascertain the legislative intent where the language of a statute is ambiguous, the courts will take into consideration all the facts and circumstances existing at the time of, and leading up to, its enactment, such as the history of the times. In seeking to ascertain the legislative intent the courts will, likewise, take into consideration the settled practices of the legislature, the existence, force, and function of established institutions of local government, contemporary customs, and will also take into consideration the habits and activities of

> the people, and the state of the existing law. Other contemporaneous circumstances which will be considered by the court include the evils to be remedied by the new act, the remedy provided for the removal or mitigation of such evils, and the reason for such remedy is also a factor which is to be taken into consideration.

(Emphasis added.)

Taking all these things into consideration together with a clear reading of chapter 957 requirements and legislative direction that private contractors shall construct prisons; private contractors shall arrange for financing same; private contractors shall operate same; and, in bidding, private contractors shall be allowed credit for sales and use taxes incurred in constructing the prison and ad valorem taxes and other local government charges that any private entity would have to pay, the property appraiser asserts that the legislature's intent is clear--the prisons are subject to ad valorem taxation.

Significantly, at no time has DMS ever contended or offered any proof that sales taxes were not paid on materials used in constructing the facility. If sales taxes were paid because it was not a state-owned property, then ad valorem taxes should also be paid.

CONCLUSION

Based on the arguments and authorities cited herein, this Court respectfully is requested to answer the certified question in the affirmative and reverse the district court's decision.

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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 **ROBERT C. REID, ESQUIRE** and **THERESA BIXLER PROCTOR, ESQUIRE**, Bryant, Miller & Olive, P.A., 101 N. Monroe Street, Suite 900, Tallahassee, Florida 32301; **MICHAEL S. DAVIS, ESQUIRE**, Bryant, Miller & Olive, P.A., One Tampa City Center, Suite 2700, 201 N. Franklin Street, Tampa, Florida 33602; **DOUGLAS L. SMITH, ESQUIRE**, Burke, Blue, Hutchinson & Walters, P.A., Post Office Box 70, Panama City, Florida 33402-0070 on this the **21st** day of August 2006.

Larry E. Levy

CERTIFICATE OF COMPLIANCE

The undersigned counsel for petitioner certifies that the font size and style used in the foregoing initial brief is 14 Times New Roman and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a).

Larry E. Levy