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# Governmental Immunity And Taxation In Florida

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# ARTICLE

## GOVERNMENTAL IMMUNITY AND TAXATION IN FLORIDA

*David M. Hudson\*\*\**

I. INTRODUCTION . . . . .	221
II. BACKGROUND . . . . .	223
III. GOVERNMENTAL IMMUNITY IN AD VALOREM TAXATION . . . . .	228
A. <i>Importance to Local Government Revenue</i> . . . . .	228
B. <i>Prior to 1971</i> . . . . .	230
C. <i>The 1971 Legislation</i> . . . . .	238
D. <i>Governmental Purpose</i> . . . . .	247
E. <i>Taxation of Governmentally Owned Fee Interest</i> . . . . .	251
IV. GOVERNMENTAL IMMUNITY IN SALES AND USE TAX . . . . .	256
V. GOVERNMENTAL IMMUNITY IN MISCELLANEOUS TAXES . . . . .	260
VI. CONCLUSION . . . . .	263

### I. INTRODUCTION

Governmental immunity from tort actions by private persons is a legal precept brought to this country from the common law of England under the notion that “the King can do no wrong.”<sup>1</sup> Governmental immunity from tort liability can be, and has been, statutorily waived in certain circumstances by all levels of government — federal,<sup>2</sup> state,<sup>3</sup> and local.<sup>4</sup> In Florida, the statutory waiver of tort immunity applies equally to all levels of state and local government, so that municipalities, counties, and the state are treated in the same manner.<sup>5</sup>

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1. *Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981).

2. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1994).

3. FLA. STAT. § 768.28 (1997).

4. *Id.*

5. *Cauley*, 403 So. 2d at 387.

The immunity of one level of government from taxes imposed by another level of government has less clear origins, but when a state government has attempted to tax the federal government,<sup>6</sup> or vice versa,<sup>7</sup> the Supreme Court has generally found the putative taxpayer to be immune from the levy. In Florida, courts had long held that property owned by the state or a county was immune from the imposition of ad valorem taxation by another governmental entity.<sup>8</sup> However, changes made in the 1968 revision of the Florida Constitution,<sup>9</sup> and legislation enacted in 1971<sup>10</sup> effectively waived governmental immunity from ad valorem taxation in certain circumstances.

In Florida, the ad valorem property tax is the single most important source of revenue for local governments.<sup>11</sup> Considerable revenue is lost to local governments when property that should be taxed is not taxed because of mistaken application of the governmental immunity doctrine. Most governmentally owned property is used by the governmental entity for governmental purposes and remains nontaxable. However, when governmentally owned property is used by a nongovernmental person for a nonexempt use, the property no longer enjoys governmental immunity and is taxable.<sup>12</sup> After all, such property is being used for private, profit-seeking purposes in competition with nongovernmentally owned property being used for similar purposes; the privately owned property is taxable, and so too is the governmentally owned property.

It is a matter of compelling public interest that Florida's tax system is applied in a fair, evenhanded manner — that similarly situated taxpayers be taxed in the same manner. When property is being used for private, nonexempt purposes, it should be subject to ad valorem taxation, regardless of who owns the underlying fee interest in the property.

Part II of this article briefly discusses the governmental immunity doctrine and the circumstances under which it has been waived. Part III explores the waiver of immunity from ad valorem taxation in Florida when governmentally owned property is used by a nongovernmental entity for a nonexempt use. Part IV discusses the role that the state and local governments play in Florida in the imposition and collection of sales tax. Part V examines the governmental immunity doctrine in the context of Florida's gross receipts tax and documentary stamp tax.

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6. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

7. *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1870).

8. *See Park-N-Shop v. Sparkman*, 99 So. 2d 571 (Fla. 1957).

9. FLA. CONST. art. VII, § 3 (1968).

10. 1971 Fla. Laws ch. 71-133.

11. FLORIDA SENATE WAYS AND MEANS COMM. AND HOUSE FIN. & TAX'N COMM., FLORIDA TAX HANDBOOK 125 (1996) [hereinafter FLORIDA TAX HANDBOOK].

12. FLA. STAT. §§ 192.011, 196.199 (1997).

## II. BACKGROUND

Governmental immunity from taxation was the issue before the Supreme Court in the landmark case of *McCulloch v. Maryland*<sup>13</sup> in which a tax that Maryland imposed on a branch of the Bank of the United States, a federal instrumentality, was struck down. After concluding that the federal government had the power to create the Bank and to establish a branch in Maryland,<sup>14</sup> the Court acknowledged Maryland's sovereign power of taxation,<sup>15</sup> but observed that "the power to tax involves the power to destroy [and] the power to destroy may defeat and render useless the power to create."<sup>16</sup> When powers wielded by the federal government and by a state government are in conflict, the Supremacy Clause<sup>17</sup> of the Constitution mandates that the exercise of the otherwise valid state power must yield to the exercise of the federal power.<sup>18</sup>

Under *McCulloch*, therefore, immunity of the federal government or federal instrumentalities from taxation by state governments is founded on the Supremacy Clause, an important principle established in the infancy of our new country. But what if the conflicting powers are reversed and the federal government imposes a tax on a state government or state instrumentality?<sup>19</sup> The Court addressed this issue a half century later, in *Collector v. Day*,<sup>20</sup> which posed the question of whether a federal tax could be imposed on the income of a judge derived from a salary paid to him by the state of Massachusetts.<sup>21</sup> The *Day* Court approached this question by considering the sovereign powers that the states possessed prior to the adoption of the Constitution, such as the power to "maintain a judicial department."<sup>22</sup> The

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13. 17 U.S. (4 Wheat.) at 316.

14. *Id.* at 425.

15. *Id.*

16. *Id.* at 431.

17. U.S. CONST. art. VI, cl. 2.

18. *McCulloch*, 17 U.S. (4 Wheat.) at 436. There are other constitutional provisions, however, that may affect the interactions between the federal and state governments. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1129 (1996) (stating that Congress lacks authority under the regulatory powers provision, art. I, § 8, to subject unconsenting states to suits brought by private persons in federal court).

19. For thorough examination of this issue, see David M. Richardson, *Federal Income Taxation of States*, 19 STETSON L. REV. 411 (1990).

20. 78 U.S. (11 Wall.) at 113.

21. In an earlier case, the Court had held that the states were prohibited from imposing tax on the income of a federal employee because the impact of the tax would fall on the federal government, albeit indirectly. *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435, 449-50 (1842). Similarly, in *Day*, the Court considered the impact of the tax to fall on the state because even though the tax was imposed directly on Judge Day's salary, the source of that salary was the state of Massachusetts. *Day*, 78 U.S. (11 Wall.) at 122-23.

22. *Day*, 78 U.S. (11 Wall.) at 126.

Supremacy Clause, the Court concluded, does not apply to an "original inherent power never parted with,"<sup>23</sup> a power which had been expressly reserved to the states under the Tenth Amendment.<sup>24</sup> Like the immunity from state taxation enjoyed by the federal government, the immunity from federal taxation bestowed by the Court upon the states arises not from any specific provision of the Constitution, but "rests upon necessary implication."<sup>25</sup>

The seemingly broad sweep of the states' implied immunity from federal taxation enunciated by the *Day* Court has subsequently been eroded. In *South Carolina v. United States*,<sup>26</sup> the Court upheld the imposition of a federal license tax on dispensers of intoxicating liquors, which in South Carolina was a business run by the state itself. The Court reasoned that when the Constitution was drafted, the drafters did not contemplate that states would operate proprietary activities, and thus, such activities were not immune from federal taxation.<sup>27</sup> In *Flint v. Stone Tracy Co.*,<sup>28</sup> the Court upheld imposition of the federal corporation tax on corporations operating under state franchises, including some private corporations that were rendering public services.<sup>29</sup> In *New York v. United States*,<sup>30</sup> the Court further upheld a federal tax imposed on water taken from a spring owned by the state of New York. A federal registration fee imposed on a state helicopter was upheld in *Massachusetts v. United States*.<sup>31</sup> However, the opportunity that *South Carolina v. United States* seemed to present for federal income taxation of state proprietary activities, such as lotteries, electric power companies, and health care facilities,<sup>32</sup> has not been pursued, with one exception.<sup>33</sup> The amorphous Constitutional foundation for granting states immunity from federal taxation has led one commentator to conclude

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23. *Id.* at 126-27.

24. *Id.* at 124.

25. *Id.* at 127.

26. 199 U.S. 437 (1905).

27. *Id.* at 457.

28. 220 U.S. 107 (1911).

29. *Id.* at 171-72.

30. 326 U.S. 572 (1946).

31. 435 U.S. 444 (1978).

32. Richardson, *supra* note 19, at 452.

33. I.R.C. § 511(a)(2)(B) (West Supp. 1997). Section 511(a)(2)(B) imposes the federal corporate income tax on "unrelated business taxable income" earned by state colleges and universities. Generally, such income is derived from a trade or business that is not substantially related to the exercise or performance of the educational purpose of the college or university. *Id.* § 513(a). Thus, the use of a university's auditorium for concerts by professional entertainers and professional sporting events gives rise to unrelated business taxable income. Priv. Ltr. Rul. 91-47-008 (Nov. 22, 1991). On the other hand, providing summer educational programs to students and the public does not give rise to such income. Priv. Ltr. Rul. 91-24-064 (Mar. 22, 1991).

that it is the political process, rather than the Constitution, which has produced this result, observing that “[a]n article entitled ‘Federal Income Taxation of States’ might be only one sentence long — ‘There isn’t any.’”<sup>34</sup>

In contrast to the federal constitutional considerations of governmental immunity involved when federal and state powers conflict, when the focus turns to the role of governmental immunity in *intrastate* activities, it is state constitutional law which is the touchstone. Furthermore, the subject of governmental immunity has most frequently arisen in Florida in the context of liability for torts against private parties allegedly committed by a governmental entity or its employees. Governmental immunity from tort actions has been described as being founded on two distinct theories.<sup>35</sup> The first is the notion that the “King can do no wrong,”<sup>36</sup> part of the common law of England which Florida has incorporated as part of her laws.<sup>37</sup> A second theory is simply “the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”<sup>38</sup> Although these theories might support governmental immunity from tort liability, neither of them seem persuasive, or relevant, in the context of the immunity of one level of state or local government from taxation by another level of the state or local government; nonetheless a brief exploration of governmental tort immunity is instructive.<sup>39</sup>

In Florida, the state, its agencies, and its counties enjoyed full immunity from tort actions until legislation enacted in 1973 became effective on July 1, 1974.<sup>40</sup> The extent of tort immunity for municipalities, however, was

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34. Richardson, *supra* note 19, at 509.

35. John B. Ostrow & Joseph H. Lowe, *Sovereign Immunity*, 33 U. MIAMI L. REV. 1297, 1299 (1979).

36. *Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981).

37. *See* FLA. STAT. § 2.01 (1997) (incorporating the common and statutory laws of England as of July 4, 1776).

38. *Kawanankoa v. Polyblank*, 205 U.S. 349, 353 (1907).

39. For a more complete discussion of governmental tort immunity in Florida, *see* Susan C. McDonald, *Sovereign Immunity — Revisited But Still Not Refined*, 12 FLA. ST. U. L. REV. 401 (1984); Ostrow & Lowe, *supra* note 35, at 1297; Kenneth McLaughlin, Case Note, *Sovereign Immunity Trilogy: — Commercial Carrier Revisited But Not Refined*, 10 FLA. ST. U. L. REV. 702 (1983); John Mizell, Case Note, *The Florida Supreme Court's View of State Sovereign Immunity: An Exercise in Confusion Producing Restrictive Results*, 15 STETSON L. REV. 831 (1986); S. Stockwell Stoutamire, Case Note, *The Doctrine of Sovereign Immunity Is Alive and Well*, 8 FLA. ST. U. L. REV. 377 (1980).

40. 1973 Fla. Laws ch. 73-313, *amended by* 1974 Fla. Laws ch. 74-235 (codified at FLA. STAT. § 768.28 (1995)). Actually, there had been an earlier experiment with waiving sovereign immunity that lasted only one year. 1969 Fla. Laws ch. 69-116 (waiving immunity, effective July 1, 1969); 1969 Fla. Laws ch. 69-537 (repealing 1969 Fla. Laws ch. 69-116, effective July 1, 1970). In addition, governmental bodies that purchased liability insurance could be sued for amounts up to the limits of the policy in certain situations. 1953 Fla. Laws ch. 28220, § 1.

less clear.<sup>41</sup> A municipality was considered to be a special type of corporation which, when exercising its governmental powers was properly immune from tort actions; however, when engaging in proprietary activities, a municipality should have been liable for its torts in the same manner as a private corporation. *City Tallahassee v. Fortune*,<sup>42</sup> decided in 1850, was the first of a series of cases which held that a municipality could be held liable for its torts.

For municipal tort immunity, the distinction between governmental functions and proprietary functions remained the litmus test, albeit sometimes confusingly applied, until 1979.<sup>43</sup> In that year, the Florida Supreme Court decided *Commercial Carrier v. Indian River County*.<sup>44</sup> Although the defendants were the state and county governments, not a municipality, the Florida Supreme Court looked to — and rejected — earlier case law involving the governmental versus proprietary distinction for determining when immunity was warranted, and when it was not.<sup>45</sup> The provisions of the 1974 statutory waiver of sovereign tort immunity applied not only to the state and counties, but also to municipalities,<sup>46</sup> and the Florida Supreme Court believed this evoked an intention to treat all governmental entities

41. See J. Bart Budetti & Gerald L. Knight, *The Latest Event in the Confused History of Municipal Tort Liability*, 6 FLA. ST. U. L. REV. 927 (1978); William N. Drake, Jr. & Richard D. Oldham, III, *The King Is Dead, Long Live the Emperor: Commercial Carrier Decision & the Status of Governmental Immunity in Florida*, 53 FLA. B.J. 504 (1979); Hugh Douglas Price & J. Allan Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953); Stanley L. Seligman & Robert L. Beals, *The Sovereignty of Florida Municipalities: In-Again, Out-Again, When-Again*, 50 FLA. B.J. 338 (1976); Sylvia J. Hardaway, Note, *The Tort Liability of Florida Municipal Corporations*, 16 U. FLA. L. REV. 90 (1963); Osmond C. Howe, Jr., Note, *A Statutory Approach to Governmental Liability in Florida*, 18 U. FLA. L. REV. 653 (1966); Judith Goldstein Korchin, Note, *An Insurance Program to Effectuate Waiver of Sovereign Tort Immunity*, 26 U. FLA. L. REV. 89 (1973).

42. 3 Fla. 19 (1850).

43. See *Cauley*, 403 So. 2d at 382-83. In addition to the governmental-proprietary consideration, if a municipality engaged in an activity that was legislative, quasi-legislative, judicial, or quasi-judicial, immunity still applied. *Gordon v. West Palm Beach*, 321 So. 2d 78, 80 (Fla. Dist. Ct. App. 1975).

44. 371 So. 2d 1010 (Fla. 1979), *rev'g* 342 So. 2d 1047 (Fla. Dist. Ct. App. 1977) and *Cheney v. Dade County*, 353 So. 2d 623 (Fla. Dist. Ct. App. 1977) (consolidated case).

45. *Commercial Carrier*, 371 So. 2d at 1015.

46. 1973 Fla. Laws ch. 73-313, § 1 (codified at FLA. STAT. § 768.28 (1975)), which provides in pertinent part:

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or sub-divisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. . . .

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

equally for purposes of immunity from tort liability.<sup>47</sup> However, the court acknowledged that, the statutory waiver notwithstanding, there remained *some* activities that should still enjoy immunity, activities which the court labeled as “planning” or “decision-making” in contrast to “operational” functions which were no longer immune.<sup>48</sup> Planning level activities consist of “those requiring basic policy decisions, while operational functions are those that implement policy.”<sup>49</sup> Subsequent decisions have, as one commentator noted, “muddied the waters”<sup>50</sup> as to where the line should be drawn between immune and nonimmune activities, but the important points are: first, that sovereign immunity has been statutorily waived and second, that some governmental acts remain immune from tort liability.

Two years after *Commercial Carrier*, the Florida Supreme Court held that the statutory waiver of sovereign immunity had effectively preempted the previous case law of municipal tort liability.<sup>51</sup> The monetary cap on governmental liability contained in the statute<sup>52</sup> applied to a municipality for a tort arising out of proprietary activities, a suit which could have been brought prior to the enactment of the statutory waiver without a monetary limit on recovery. The court emphasized that its interpretation of the statute brings “fairness, equality, and consistency to an area of the law which for over one hundred years has been beset with contradiction, inconsistency, and confusion.”<sup>53</sup> In addition, the court suggested that its construction “furthers the philosophy of Florida’s present constitution that all local governmental entities be treated equally.”<sup>54</sup> In conclusion, the court stated: “It is our decision that, in this state, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner.”<sup>55</sup>

Thus, in Florida, governmental immunity from tort liability can, and has been, statutorily waived in a broad range of circumstances, and the waiver applies equally to all levels of state and local government. It is the position of the author that governmental immunity from *tax* liability also has been waived in a number of instances, and that the waiver applies equally to all levels of state and local government.

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47. *Commercial Carrier*, 371 So. 2d at 1015.

48. *Id.* at 1021.

49. *Id.*

50. Mizell, *supra* note 39, at 860.

51. *Cauley*, 403 So. 2d at 387.

52. The statutory limits in effect for the case was \$50,000 per person and \$100,000 per incident. FLA. STAT. § 768.28(5) (1977).

53. *Cauley*, 403 So. 2d at 385.

54. *Id.*

55. *Id.* at 387.



### III. GOVERNMENTAL IMMUNITY IN AD VALOREM TAXATION

#### A. Importance to Local Government Revenue

In Florida, the ad valorem property tax levied on real property and tangible personal property is the principal source of revenue for local governments, generating more than \$11.6 billion in fiscal year 1995-1996.<sup>56</sup> Since 1940, the state government has been constitutionally prohibited from imposing ad valorem property taxes,<sup>57</sup> except on intangible personal property, leaving this important source of revenue to the counties, municipalities, school districts, and special districts.

There are two components to an ad valorem property tax imposed by a local government: the *rate* at which the tax will be imposed<sup>58</sup> and the *assessed value* of the taxable property within the geographical jurisdiction of the local government, which is determined by the property appraiser.<sup>59</sup> The amount of tax imposed on any particular parcel of taxable property is simply the product of multiplying the assessed value by the rate.<sup>60</sup>

Local governments are limited to a maximum rate at which they may impose the property tax. Counties, municipalities, and school districts are each constitutionally limited to a maximum rate of 10 mills, or one percent of the assessed value of taxable property within their respective jurisdictions.<sup>61</sup> A county that furnishes municipal services in unincorporated areas may impose additional taxes within the municipal purpose limitation.<sup>62</sup> With the exception of water management districts, special districts are limited to whatever rate was authorized by law and approved by a vote of the electors within the jurisdiction of the special district.<sup>63</sup> These limitations

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56. FLORIDA TAX HANDBOOK, *supra* note 11, at 125.

57. FLA. CONST. art. IX, § 2 (1885), *amended* by S.J. Res. 69, 1939 Fla. Laws ch. 1651 (during the general election of 1940). The prohibition is now contained in FLA. CONST. art. VII, § 1(a).

58. The procedures for determining the rate of ad valorem taxes are contained in FLA. STAT. ch. 200 (1997).

59. FLA. STAT. § 192.011; *see* David M. Hudson, *Florida's Property Appraisers*, 7 NOVA L.J. 477 (1983).

60. FLA. STAT. §§ 192.001(6), 193.122(2).

61. FLA. CONST. art. VII, § 9(b) (1968). School districts are further limited by legislation if they choose to participate in the state funding program. FLA. STAT. § 236.25; *see* Florida Dept. of Rev. v. Glasser, 622 So. 2d 944 (Fla. 1993) (upholding legislation restricting school districts from imposing ad valorem taxes at a rate less than the Florida Constitution's 10 mill maximum).

62. FLA. CONST. art. VII § 9(b) (1968), *implemented* by FLA. STAT. § 125.01(1)(q).

63. *Id.* Water management districts are constitutionally limited to 1 mill (0.1%), but the limit is only 0.05 mill (0.005%) for the "northwest portion of the state lying west of the line between ranges two and three east." *Id.*

may be exceeded when approved by a vote of the electors for the purpose of paying for capital improvements,<sup>64</sup> or for other purposes but only for a period of not longer than two years.<sup>65</sup> In fiscal year 1994-1995, the average millage rate imposed by counties was 8.21, by school districts, 9.81, and by municipalities, 4.95.<sup>66</sup> Thus, particularly for the school districts and counties, there remains little additional revenue available from ad valorem property taxation simply from raising the rate of the tax.

The property appraiser is charged with the duty to assess all property within her county, "whether such property is taxable, wholly or partially exempt, or subject to classification reflecting a value less than its just value at its present highest and best use."<sup>67</sup> The determination of whether property is exempt from taxation is made, initially, by the property appraiser<sup>68</sup> with review of the denial of an exemption available before the value adjustment board<sup>69</sup> and subsequent judicial review in the circuit court.<sup>70</sup> If property is exempt or immune from ad valorem taxation, obviously no taxes are imposed on that property and local governments receive no ad valorem tax revenue from that source.

For fiscal year 1994-1995, data collected by the Florida Department of Revenue is reported in a variety of formats. One presentation breaks down by statutory authorization the total values of property exempted from taxation under the respective statutory provision. Exempt property owned by the federal,<sup>71</sup> state,<sup>72</sup> and local<sup>73</sup> governments totaled \$23.8 billion, \$11.1 billion, and \$38.2 billion,<sup>74</sup> respectively, for a grand total of \$73.1 billion. In addition, a further \$232 million<sup>75</sup> of governmentally owned property value was exempted where the property was being used by a nongovernmental lessee for an exempt purpose.<sup>76</sup> An important source of revenue is lost to local governments for any governmentally owned property which should be taxed, but which currently is not taxed. Each \$1 billion of governmentally owned property which is improperly exempted from the ad valorem property tax represents a loss of nearly \$23 million in revenue to local

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64. *Id.* § 12.

65. *Id.* § 9(b).

66. FLORIDA TAX HANDBOOK, *supra* note 11, at 128.

67. FLA. STAT. § 192.011 (1997).

68. *Id.* § 193.114(2)(c), (3)(c).

69. *Id.* § 194.011(3)(d).

70. *Id.* § 194.171(1).

71. Exempt pursuant to FLA. STAT. § 196.199(1)(a) (1997).

72. *Id.* § 196.199(1)(b).

73. *Id.* § 196.199(1)(c).

74. DEPARTMENT OF REVENUE, STATE OF FLORIDA, FLORIDA PROPERTY VALUATIONS & TAX DATA 201 (Dec. 1995).

75. *Id.*

76. FLA. STAT. § 196.199(2) (1997).

governments.<sup>77</sup>

Data analyzing the state-imposed intangibles tax provides another insight to the magnitude of the loss of revenue to local governments when governmentally owned property is used by a nongovernmental person for nonexempt purposes. In those circumstances, the value of the leasehold interest is subject to tax as an item of intangible personal property<sup>78</sup> at a maximum rate of two mills.<sup>79</sup> In fiscal year 1991-1992 the total value of nonexempt leasehold interests reported to the Department of Revenue was \$661 million. If these leaseholds had been taxable by the local governments as real property, an additional \$15.2 million<sup>80</sup> in revenue would have been produced, but that is only the proverbial tip of the iceberg because the total value of the fee interests underlying these taxable leasehold interests is unknown, and surely it is enormous.

### B. *Prior to 1971*

Issues concerning the appropriate ad valorem tax treatment of property which is owned by a governmental entity, but which is used by a private entity, have been dealt with by the Florida Constitution, the legislature, and the courts in a somewhat confusing manner over the past forty years. An early case dealing with this issue was *Park-N-Shop v. Sparkman*,<sup>81</sup> decided in 1953. Hillsborough County leased property that it owned in downtown Tampa to certain individuals who constructed and operated various commercial enterprises on the property. A provision in the lease specified that “no ad valorem taxes whatsoever (County or City)’ should be levied against the property.”<sup>82</sup> Owners of other privately owned property were concerned about the unfair competition; they would have to pay taxes on their property while the County’s lessees would not. They brought an action against the county tax assessor, in an attempt to have the property placed on the tax rolls.<sup>83</sup>

On appeal, the Florida Supreme Court noted that, insofar as any levy on property owned by a county was concerned, “property of the state and of a county, which is a political subdivision of the state, . . . is immune from taxation, and we say this despite references to such property in [the statutes]

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77. This assumes the property would be taxed at a rate of 22.97 mills, which is the total of the average millage rates imposed by counties, school districts, and municipalities. See *supra* text accompanying note 66.

78. FLA. STAT. § 196.199(2)(b) (1997).

79. *Id.* § 199.032.

80. See FLORIDA TAX HANDBOOK, *supra* note 11, at 128.

81. 99 So. 2d 571 (Fla. 1957).

82. *Id.* at 572.

83. *Id.*

as being exempt.”<sup>84</sup> But what of the property interest held by the private persons — the leasehold estate? The chancellor had directed the tax assessor to tax the leasehold interest as tangible personal property.<sup>85</sup> The Florida Supreme Court consulted the statutory definitions of both “tangible personal property” and “intangible personal property” and concluded that the leasehold interest in question did not fit within either definition. The opinion concluded with the following tantalizing passage:

In our examination of the tax statutes we have not found provisions for the specific assessment of the lessees’ interest and we have been referred to none, although we are not conscious of any reason why the legislature could not set up machinery for that purpose in situations such as that presented in this case, but we are satisfied that the interests of lessees are neither tangible nor intangible personal property as presently defined.<sup>86</sup>

At that time, the Florida Constitution did not specifically address exemption or immunity from ad valorem taxation for governmentally owned property, but it did provide that “property . . . may be exempted by law for *municipal . . . purposes*.”<sup>87</sup> In addition, it required that “property of all corporations . . . be subject to taxation unless such property is held and used exclusively for . . . *municipal . . . purposes*.”<sup>88</sup> Thus, when Panama City leased land for a term of fifty years to the Southern Kraft Corporation in 1930, the tax assessor determined that it was not being used for “municipal purposes” and treated it as taxable.<sup>89</sup> The Florida Supreme Court looked at the use to which the lessee was putting the property, finding that although the lease agreement called for the lessee to construct and operate a public dock system, the property was not being so used at that time.<sup>90</sup> Similarly, when property owned by the Hillsborough County Port Authority was leased to a private corporation, which in turn subleased it to the Illinois Grain Corporation who built and operated a grain elevator on it, the Florida Supreme Court carefully considered how the property was being used.<sup>91</sup> The trial court had determined that the property was being “used exclusively by Illinois [Grain Corporation] for its private business purposes and not for a

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84. *Id.* at 573-74 (emphasis added).

85. *Id.* at 572.

86. *Id.* at 574.

87. FLA. CONST. art IX, § 1 (1885) (emphasis added).

88. *Id.* art. XVI, § 16 (1885) (emphasis added).

89. *Panama City v. Pledger*, 140 Fla. 629, 631, 192 So. 470, 471 (1939).

90. *Id.*

91. *Illinois Grain Corp. v. Schleman*, 144 So. 2d 329, 332 (Fla. 1962).

public or municipal purpose,"<sup>92</sup> and the Florida Supreme Court agreed.

In 1961, apparently in response to *Park-N-Shop*,<sup>93</sup> the legislature enacted a statute (the 1961 statute) which arguably waived sovereign immunity from ad valorem taxation when governmentally owned property was used for private purposes:

Any real or personal property which for any reason is *exempt or immune from taxation but is being used*, occupied, owned, controlled or possessed, directly or indirectly by a person, firm, corporation, partnership or other organization *in connection with a profit making venture*, whether such use, occupation, ownership, control or possession is by lease, loan, contract of sale, option to purchase or in any wise made available to or used by such person, firm, corporation, partnership or organization, *shall be assessed and taxed to the same extent and in the same manner as other real or personal property*.<sup>94</sup>

The waiver of exemption or immunity from ad valorem taxation was not to apply, however, when

[t]he property is owned or used by the state, any county, municipality, or public entity or authority created by statute and is leased or otherwise made available to such person, firm, corporation, partnership or organization by such public body for a consideration *in the performance by the public body of a public function or public purpose authorized by law*, or which property prior to the effective date of this act was leased for valuable consideration for the purposes not otherwise exempt hereunder . . . .<sup>95</sup>

However, some, or at least one, property appraiser did not rely on the enactment of this statute to determine that government-owned land was taxable. For example, in *State v. Daytona Beach Racing & Recreational Facilities District*, the property appraiser in Volusia County did not rely on the enactment of this statute in determining that a 374-acre tract of land

92. *Id.*

93. See *Lykes Bros. v. Plant City*, 354 So. 2d 878, 880 n.8 (Fla. 1978).

94. FLA. STAT. § 192.62(1) (1961), enacted by 1961 Fla. Laws ch. 61-266, § 1 (emphasis added). In 1969, this section was subsequently renumbered as FLA. STAT. § 196.25. 1969 Fla. Laws ch. 69-55, § 15. It was repealed in 1971. 1971 Fla. Laws ch. 71-133, § 15.

95. FLA. STAT. § 192.62(2)(c) (1961) (emphasis added). Additional exceptions were provided when the property was used exclusively for religious, scientific, municipal, educational, literary, or charitable purposes as well as for more narrow classes of property such as public utilities facilities and housing authorities. *Id.* § 192.62(2)(a), (f).

owned by Daytona Beach was taxable in 1960 and 1961.<sup>96</sup> The land had been leased to the Daytona Beach Racing and Recreational Facilities District (the District) and subleased to the Daytona International Speedway Corporation (the Corporation), a private, for-profit corporation.<sup>97</sup> In addition, there was a 70-acre parcel adjoining the city's land that the District owned and leased to the Corporation, which the tax assessor also determined to be taxable.<sup>98</sup> Before the tax issue arose, however, under the authority of the Special Act which had created it,<sup>99</sup> the District had proposed to sell \$2.9 million of revenue bonds and to use the proceeds to construct an automobile speedway and other recreational facilities.<sup>100</sup> In the bond validation proceeding,<sup>101</sup> the Florida Supreme Court noted that "[t]he enabling act expressly stated [the District's] purpose was to further public purposes"<sup>102</sup> and "the issuance of the \$2,900,000 revenue bonds is in aid of a valid public purpose[.]"<sup>103</sup> affirming the decree of validation which had been entered by the circuit court judge. Although the bonds had been validated, the District was not successful in selling them and it renegotiated its agreement with the Corporation, which undertook the obligation to obtain the necessary funding and construct the speedway and recreational facility.<sup>104</sup>

Daytona Beach and the District sued the tax assessor,<sup>105</sup> seeking to have their property exempted from ad valorem taxation. The trial court ruled against them, as did the First District Court of Appeal.<sup>106</sup> The bond validation proceeding had determined that the use to which the funds would be put by the District — to construct and operate a speedway and recreational facilities — served a "public purpose" such that the bonds could legally be sold. However, this was not at issue in the ad valorem tax exemption case. In *Paul I* and *Paul II*, the question was whether Daytona Beach and the District were using their property for "municipal purposes."<sup>107</sup> The arguments made by Daytona Beach and the District that

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96. 89 So. 2d 34, 37 (Fla. 1956) [hereinafter *Daytona Beach Racing*].

97. *Id.* at 36-37.

98. *Id.* at 37.

99. 1955 Fla. Laws ch. 31343.

100. *Daytona Beach Racing*, 89 So. 2d at 35.

101. See FLA. STAT. ch. 75 (1997).

102. *Daytona Beach Racing*, 89 So. 2d at 37.

103. *Id.* at 38.

104. *Daytona Beach Racing Recreational Facilities Dist. v. Paul*, 157 So. 2d 156, 158 (Fla. Dist. Ct. App. 1963) [hereinafter *Paul I*], *rev'd by* 179 So. 2d 349 (Fla. 1965) [hereinafter *Paul II*].

105. Other tax officials, such as the county tax collector and the state comptroller, also were defendants. *Id.*

106. *Id.*

107. *Id.* at 162.

they served a municipal service by “provid[ing] a needed attraction for tourists” were rebuffed, the court noting that other, privately owned tourist attractions, “such as a dog track, jai alai fronton, fishing pier and casino, shooting gallery, [and a] miniature golf course” are subject to ad valorem taxation.<sup>108</sup> Although the provisions of the 1961 statute were not applicable to the tax years before the court,<sup>109</sup> the taxing authorities argued that the statute should affect the court’s interpretation of the statutes that were applicable. However, the court concluded that the 1961 “statute does not provide a competent basis on which to make a finding of legislative intent materially bearing on the issues of this appeal.”<sup>110</sup>

The Florida Supreme Court reversed the First District Court of Appeal.<sup>111</sup> Unlike the First District Court of Appeal, the Florida Supreme Court believed “the terms ‘municipal purpose’ and ‘public purpose’ have synonymous application in respect to the question of the validity of the tax exemption.”<sup>112</sup> Because the issue of “public purpose” had been resolved in favor of the District in the bond validation proceeding, the *Paul II* court stated that determination was “decisive of the issues of this case.”<sup>113</sup> In addition, the Florida Supreme Court acknowledged that the District’s enabling act not only deemed its activities to serve a public purpose, but also granted ad valorem “tax exemption to the lands and facilities owned or leased by the District and used in the operation of the Speedway facility.”<sup>114</sup> The penultimate paragraph of the majority opinion contained the following premonition:

Like the Almighty in all things, the Legislature in certain mundane things “giveth and taketh away.” Unless and until the Legislature repeals the tax exemption we hold it must stand. Its wisdom and policy in granting or continuing the exemption is now beyond our reach, inasmuch as we have in a proper case heretofore in unequivocal language aligned this Court with the legislative determination of the public nature of the facility.<sup>115</sup>

The 1961 statute was first addressed by the Florida Supreme Court in

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108. *Id.*

109. FLA. STAT. § 192.62 (1961) (enacted with an effective date of June 16, 1961, by 1961 Fla. Laws ch. 61-266, § 6). The tax years before the court were 1960 and 1961. *Paul II*, 179 So. 2d at 351.

110. *Paul I*, 157 So. 2d at 161.

111. *Paul II*, 179 So. 2d at 349.

112. *Id.* at 353.

113. *Id.* at 351.

114. *Id.*

115. *Id.* at 355.

*Hillsborough County Aviation Authority v. Walden*.<sup>116</sup> Various parcels of land were either owned outright by the Hillsborough County Aviation Authority, or were leased by it from Hillsborough County and the City of Tampa. The Authority, in turn, leased the properties to various private firms, which operated for-profit businesses.<sup>117</sup> The trial judge made the factual determinations that, with one exception,<sup>118</sup> the properties owned by the Authority, or leased by it from the City, were “being used by the respective lessees thereof for predominantly private as opposed to public or airport related purposes,”<sup>119</sup> and thus were not entitled to an exemption from taxation. To the extent the 1961 statute provided exemptions for property used for predominantly private purposes where the lease had been entered into prior to the effective date of the statute, the statute was held to be unconstitutional.<sup>120</sup>

One parcel of property involved in the litigation was owned not by the Authority or the City, but by Hillsborough County. It had been subleased to the Tampa Airport Motel company, which was “using such property for a predominantly private purpose.”<sup>121</sup> The trial judge merely asserted that “[s]uch property is, therefore, immune from ad valorem taxation,”<sup>122</sup> citing *Park-N-Shop*.<sup>123</sup> Neither the trial judge nor the Florida Supreme Court addressed the question of whether the 1961 statute operated as a waiver of immunity from ad valorem taxation in these circumstances. Instead of addressing the waiver of immunity from taxation of the *fee interest* of county owned property, the trial judge ordered that the taxing authorities “ha[ve] the lawful right and duty to assess the *leasehold interest* of the said Tampa Airport Motel, Inc., in said premises as real property for each of such years.”<sup>124</sup> This directive was issued even though, at that time, there were no statutory provisions for imposing ad valorem property taxes on leaseholds as real property in these situations. The Florida Supreme Court also ignored the waiver of immunity issue, but wrote: “We also agree with the Circuit

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116. 210 So. 2d 193 (Fla. 1968).

117. *Id.* at 194. The businesses included a restaurant, a service station, two car rental businesses, a motel, a construction company, an aircraft repair and salvage company, and a radio and communications equipment repair company. *Id.* at 196.

118. The exception was the Barkses' Restaurant Service Building: “[T]he Court finds that the use of such premises was and is predominantly public in nature as an indispensable facility supporting the operation of the restaurant located in the airport terminal building proper, its use for private purposes being only incidental in relation to such predominant, public use.” *Id.* at 196.

119. *Id.*

120. *Id.* at 197.

121. *Id.* at 195.

122. *Id.*

123. *Park-N-Shop*, 99 So. 2d at 571; *see supra* text accompanying note 82.

124. *Hillsborough County Aviation*, 210 So. 2d at 196 (emphasis added).



Court that the decision in *Park-N-Shop, Inc. v. Sparkman, supra*, does not apply to render immune from taxation the leasehold interest of Tampa Airport Motel, Inc.”<sup>125</sup>

The second appellate case considering the 1961 statute, *Opa-Locka v. Metropolitan Dade County*,<sup>126</sup> also involved private businesses operating on leaseholds at an airport. Although the Opa-Locka Airport property was owned by Dade County, some portions of it were within the city limits of Opa-Locka.<sup>127</sup> The City brought a writ of mandamus action against the county tax assessor and county tax collector to assess and collect taxes on the leasehold interests being used for predominantly private purposes.<sup>128</sup> The tax assessor granted exemptions to “all leasehold interests where the lease agreement showed a business connected with aviation . . . [because] activities which directly relate to commercial aviation and without which an airport cannot function efficiently or successfully . . . primarily serve a public or municipal purpose.”<sup>129</sup> The Third District Court of Appeal upheld the exemptions that had been granted by the tax assessor as being within the purview of the 1961 statute granting an exception to the waiver from immunity or exemption where a private person or entity uses governmentally owned property “in the performance by the public body of a public function or public purpose authorized by law.”<sup>130</sup>

The *Opa-Locka* court did not discuss the properties to which exemptions were *not* granted.<sup>131</sup> However, it was leasehold interests which had been assessed,<sup>132</sup> and the court gave no consideration to the issue of whether the statute waived the county’s sovereign immunity, thereby rendering the county’s fee interest taxable. This was despite the court’s paraphrase of the 1961 statute as “provid[ing] that property otherwise exempt or immune from ad valorem taxation by reason of its ownership by a municipality, county or the state, *loses such immunity* if it is being used, occupied or controlled by a private party for a profit making venture under lease, loan, contract or option.”<sup>133</sup>

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125. *Id.* at 197.

126. 247 So. 2d 755 (Fla. Dist. Ct. App. 1971).

127. *Id.* at 757.

128. *Id.*

129. *Id.*

130. *Id.* (quoting FLA. STAT. § 192.62(2) (1961)).

131. The City of Opa-Locka attempted to argue before the appellate court that the trial court had erred in determining that some of the leaseholds were being used for public purposes, but because the City had not assigned that as error as required by the Florida Appellate Rules, the court refused to consider the issue. *Id.* at 759.

132. *Id.* at 758.

133. *Id.* (emphasis added).

The third appellate case to consider the 1961 statute<sup>134</sup> also involved leaseholds at an airport, leaseholds used by Pan American World Airways at the Miami International Airport, which was owned by Dade County.<sup>135</sup> Notwithstanding the fact that the underlying fee interest was owned by Dade County, not a municipality, the Florida Supreme Court considered the 1970 assessments in light of the then newly revised Florida Constitution, which now provides: "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation."<sup>136</sup>

The Florida Supreme Court acknowledged that this "is a completely new treatment of municipal tax exemptions,"<sup>137</sup> but that it was comparable to the 1885 Florida Constitution,<sup>138</sup> and therefore, caselaw handed down under the 1885 Florida Constitution remained viable.<sup>139</sup> The *Pan American* court defined a "public purpose" as being served by "projects primarily and predominantly for the public benefit even though there may be some incidental private purpose, too."<sup>140</sup> Furthermore, the court illustrated that "the requirement for 'exclusive use' is not affected by a private purpose incorporated into the meaning of 'public purpose.'"<sup>141</sup> Because the airport property, as a whole, was being used exclusively for public purposes, it was appropriate to exempt it from ad valorem taxation even though a portion of it was being used by a private, for-profit business.

The fourth, and final, appellate opinion addressing the 1961 statute, *Bartow v. Roden*,<sup>142</sup> once again involved an airport. The City of Bartow owned the property, and in 1970, the tax assessor assessed the portions of it that had been leased or held out for lease to private businesses unrelated to aviation.<sup>143</sup> The Second District Court of Appeal acknowledged that the 1961 statute authorized the taxation of municipal property leased to private businesses, but that the Florida Constitution also mandated exemption where the municipal property is used exclusively for public purposes.<sup>144</sup> The City

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134. The statute was renumbered in 1969 as FLA. STAT. § 196.25 (1969) by 1969 Fla. Laws ch. 69-55, § 5.

135. *Dade County v. Pan Am. World Airways*, 275 So. 2d 505, 511 (Fla. 1973).

136. FLA. CONST. art. VII, § 3(a) (1968).

137. *Pan Am.*, 275 So. 2d at 511.

138. FLA. CONST. art. XVI, § 16 (1885) provides: "property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes."

139. *Pan Am.*, 275 So. 2d at 512.

140. *Id.* (citing *Paul II*, 179 So. 2d at 349); see *supra* text accompanying note 104.

141. *Id.* (emphasis in the original).

142. 286 So. 2d 228 (Fla. Dist. Ct. App. 1973).

143. *Id.* at 229.

144. "For the years in question, there was applicable statutory authority for taxing municipally owned property leased to private interests for non-public uses. However, the statute could not and did not change the constitutional requirement that municipal property which is used exclusively for public purposes shall be exempt from taxation." *Id.* (footnote

noted that the legislature had acted to authorize municipalities to acquire property and operate airports, denominating this to be a “public purpose.”<sup>145</sup> Further, the legislature authorized municipalities to “lease any property, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its governing body, may not be required for aeronautic purposes.”<sup>146</sup> Therefore, the argument went, the leasing of airport property, even for nonaeronautic purposes, served a public purpose, and the property should be exempt from ad valorem taxation.<sup>147</sup> The court did not accept that argument, concluding, “[W]e do not believe that when the Legislature stated that the use of property acquired for an airport was for a public purpose, it was determining that those portions of the airport property which might be leased to private enterprise for non-aeronautical activities would be tax exempt.”<sup>148</sup> In so holding, the court noted that if the property had been entitled to exemption, it would create an unfair situation of “either hav[ing] the effect of giving a preference to a lessee of airport property over his competitors or of permitting the municipality to charge more rent than the ordinary landlord because the lessee would not have to pay taxes.”<sup>149</sup>

None of these appellate court cases addressed whether the immunity from taxation, which governmentally owned property might have previously enjoyed, had been waived by the 1961 statute. Instead, in the instances where the private leasehold was found to not be used for a public purpose, it was the leasehold interest that was taxable if the underlying fee was owned by a county, but if the property was owned by a municipality, the value of the fee was taxable.<sup>150</sup>

### C. *The 1971 Legislation*

In 1971, the Florida Legislature enacted the Tax Reform Act,<sup>151</sup> dramatically changing the statutory landscape upon which governmentally owned property was to be dealt with for purposes of ad valorem taxation. First, the slate was wiped clean by repealing not only the 1961 statute,<sup>152</sup> but also “[a]ll special and local acts or general acts of local application

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omitted).

145. FLA. STAT. § 332.03 (1969).

146. *Id.* § 332.08(4).

147. *Bartow*, 286 So. 2d at 230.

148. *Id.*

149. *Id.*

150. *Hillsborough County Aviation*, 210 So. 2d at 193; *see supra* text accompanying notes 116-24.

151. *See Williams v. Jones*, 326 So. 2d 425, 428 (Fla. 1975).

152. 1971 Fla. Laws ch. 71-133, § 15.

granting specific exemption from property taxation.”<sup>153</sup> Secondly, a foundation for the broad, far-reaching sweep of ad valorem taxation was laid. It stated, “Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law: (1) All real and personal property in this state, and all personal property belonging to persons residing in this state . . . .”<sup>154</sup>

This statutory language, just as the 1961 statute did,<sup>155</sup> waives the immunity from ad valorem taxation for state and local governmentally owned property. There are many situations, of course, where it would not be appropriate or good policy to tax governmentally owned property, and the legislature added a new section to the Florida Statutes entitled, “Exemptions for property owned by governmental units,”<sup>156</sup> providing:

(1) Property owned and used by the following governmental units shall be exempt from taxation under the following conditions:

(a) All property of the United States shall be exempt from ad valorem taxation, except such property as is subject to tax by this state or any political subdivision thereof or any municipality under any law of the United States.

(b) All property of this state which is used for governmental purposes shall be exempt from ad valorem taxation except as otherwise provided by law.

(c) All property of the several political subdivisions and municipalities of this state which is used for governmental, municipal, or public purposes shall be exempt from ad valorem taxation, except as otherwise provided by law.<sup>157</sup>

The statute first addresses property owned by the federal government, which is immune from taxation. This immunity, of course, cannot be waived *by the state*, but where the federal government has waived its immunity, its property then is clearly taxable in Florida. The exemption from ad valorem taxation for property owned by the state and local governments now focuses on how the property is being *used*; mere ownership of property by the state or local government is no longer sufficient for such property to not be taxable. State-owned property must be used for “governmental purposes,”<sup>158</sup> while property owned by political subdivisions and municipalities

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153. *Id.* § 14.

154. FLA. STAT. § 196.001 (1973) (enacted by 1971 Fla. Laws ch. 71-133, § 16).

155. *See supra* text accompanying note 94.

156. FLA. STAT. § 196.199 (enacted by 1971 Fla. Laws ch. 71-133, § 11).

157. *Id.*

158. *Id.* § 196.199(1)(b).

must be used for “governmental, municipal, or public purposes”<sup>159</sup> in order to be entitled to exemption. It does not appear, however, that state-owned property is being held to a different standard of use from that applicable to local government owned property, because the terms were defined collectively.<sup>160</sup>

For the first time, the 1971 legislation, apparently in response to the manner in which the courts had applied the 1961 statute,<sup>161</sup> addressed the taxation of leasehold interests in governmentally owned property. The legislation provides that “all leasehold interests in [governmentally owned] property” are subject to taxation except where it has been “expressly exempted.”<sup>162</sup>

Again, against this backdrop of providing for the taxation of all leasehold interests in governmentally owned property, exemptions were provided both to the leasehold interest and the underlying remainder in the fee where the leasehold was being used for certain exempt purposes:

(2) *Property owned by the following governmental units but used by nongovernmental lessees shall only be exempt from taxation under the following conditions:*

(a) Leasehold interests in property of the United States, of the state or any of its several political subdivisions, or of municipalities, agencies, authorities, and other public bodies corporate of the state shall be exempt from ad valorem taxation only when the lessee serves or performs a governmental, municipal, or public purpose or function, as defined in § 196.012(5). *In all such cases, all other interests in the leased property shall also be exempt from ad valorem taxation.*<sup>163</sup>

This provision expressly exempted from taxation the governmental entity’s remainder interest in property when the lessee is using the leasehold for an exempt purpose. If the governmental entity’s remainder interest in the fee were still *immune* from taxation, the last sentence quoted above would not be necessary. Conversely, when the nongovernmental lessee is *not* using the leasehold for an exempt purpose, not only is the leasehold interest taxable, but so too is the governmental owner’s remainder interest, as

159. *Id.* § 196.199(1)(c).

160. *See infra* text accompanying note 217.

161. *See supra* text accompanying notes 116-26, for a discussion of *Hillsborough County Aviation*, 210 So. 2d at 193.

162. FLA. STAT. § 196.001 (1973) (enacted by 1971 Fla. Laws ch. 71-133, § 16).

163. *Id.* § 196.199(2) (enacted by 1971 Fla. Laws ch. 71-133, § 11) (emphasis added). Also entitled to exemption is “(b) [a]ny governmental property leased to an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes.” *Id.*

required by the first sentence quoted above. Legislative intent to waive sovereign immunity from taxation also was demonstrated in another newly enacted statutory provision:

(4) *Property owned by the United States, by the state, or by any political subdivision, municipality, agency, authority or other public body corporate of the state which becomes subject to a leasehold interest of a nongovernmental lessee other than that described in subsection (2)(a) above on or after June 1, 1971, and the leasehold interest of such a lessee, shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary, scientific, religious or charitable purposes.*<sup>164</sup>

This provision appears to be redundant in light of paragraph 2, discussed above. Apparently, the legislature was concerned that the other provisions might be ruled invalid insofar as they apply to leaseholds in existence at the time of the consideration of the legislation.<sup>165</sup> This provision clearly alerts governmental entities and potential nongovernmental lessees alike that, for leases on or after June 1, 1971, both the “[p]roperty owned by” the governmental entity “and the leasehold interest” of a nongovernmental lessee “shall be subject to ad valorem taxation” unless the lessee uses the property for an exempt purpose.<sup>166</sup>

Unfortunately, just as had been the case with the 1961 statute, the courts did not address the 1971 legislation’s waiver of sovereign immunity, but chose to focus on the taxation of privately held leasehold interests. The Florida Supreme Court’s first opportunity to examine the 1971 legislation was in *Straughn v. Camp*.<sup>167</sup> Property owned by Escambia County on Santa Rosa Island had been leased for private use under more than 750 separate leases.<sup>168</sup> Some leaseholds were used for single-family residences, while others were used for motels, gift shops, restaurants and other commercial establishments.<sup>169</sup> The trial judge ruled that the leaseholds were “performing a proper public purpose” and thus were entitled to exemption from taxation.<sup>170</sup> The Florida Supreme Court reversed, noting that the 1971 legislation had expressly made privately held leaseholds in

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164. *Id.* § 196.199(4) (enacted by 1971 Fla. Laws ch. 71-133, § 11) (emphasis added).

165. The legislation was approved by the Governor on June 15, 1971 and became effective on December 31, 1971. 1971 Fla. Laws ch. 71-133, § 17.

166. FLA. STAT. § 196.99(4) (1973) (enacted by 1971 Fla. Laws ch. 71-133, § 11).

167. 293 So. 2d 689 (Fla.), *appeal dismissed* 419 U.S. 891 (1974).

168. *Id.* at 692.

169. *Id.*

170. *Id.* at 693.

governmentally owned property subject to taxation, unless they were serving a public purpose as defined in the 1971 legislation.<sup>171</sup> The new definition of public purpose looks, among other things, to see whether the function is one “which would otherwise be a valid subject for the allocation of public funds.”<sup>172</sup> The *Straughn* court did not provide any real analysis of this new definition, but concluded that “[t]he finding by the trial court that the plaintiffs’ (appellees’) leaseholds (i.e., mostly leases for dwellings used as private homes) serve a public purpose and are therefore entitled to exemption under taxing statutes is a finding of law contrary to controlling case law.”<sup>173</sup> The only case cited was a 1938 decision holding that a contract providing for a municipality to use tax money to pay a private individual to operate his privately owned golf course was ultra vires because the expenditure served a private purpose, not a public purpose.<sup>174</sup> The court also noted that a provision in the still relatively new 1968 constitution “requires taxation of leaseholds of similar nature to those here involved.”<sup>175</sup> Thus, the court held that “as a matter of law . . . taxes should be imposed upon plaintiffs’ leaseholds.”<sup>176</sup>

The Florida Supreme Court did not use its second opportunity to address the 1971 legislation when it simply issued a terse, per curiam affirmance and adopted the opinion of the Second District Court of Appeal in *Walden v. Hertz*.<sup>177</sup> Hertz Corporation had leased two portions of the Tampa airport to use in its car rental business. One portion was immediately adjacent to the airport terminal (the Outside Facility), and the other was a mile or so away (the Remote Facility) where a much larger number of cars could be stored until needed at the Outside Facility.<sup>178</sup> In a King Solomon-like decision, the Second District Court of Appeal concluded that the Outside Facility “immediately adjacent to the terminal was essential to the successful operation of the airport” and thus served a public purpose and was entitled

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171. *Id.* at 694.

172. FLA. STAT. § 196.011(5) (1973) (enacted by 1971 Fla. Laws ch. 71-133 § 1).

173. *Straughn*, 293 So. 2d at 695.

174. *City of Daytona Beach v. King*, 132 Fla. 273, 288, 181 So. 1, 7 (1938).

175. *Straughn*, 293 So. 2d at 695. The provision cited was FLA. CONST. art. VII, § 10, which provides with respect to certain capital projects funded with revenue bonds issued by the state or local government that

[i]f any project is so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, *the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.*

FLA. CONST. art. VII, § 10(c) (emphasis added).

176. *Straughn*, 293 So. 2d at 696.

177. 320 So. 2d 385 (Fla. 1975), *aff'g* *Hertz v. Walden*, 299 So. 2d 121 (Fla. Dist. Ct. App. 1974).

178. *Hertz*, 299 So. 2d at 122.

to exemption.<sup>179</sup> On the other hand, the court stated that it was not necessary for the Remote Facility to be located on airport property in order to provide support to the Outside Facility, and thus, this leasehold interest was taxable.<sup>180</sup>

The leaseholders at Santa Rosa Island were back before the Florida Supreme Court in 1975 in *Williams v. Jones*,<sup>181</sup> and this time the Florida Supreme Court elaborated on its construction of certain portions of the 1971 legislation, especially the exemption for leaseholds in governmentally owned property when used for a "public purpose." The *Williams* court quoted with approval from *Straughn* that under the 1971 legislation, "[i]t is the utilization of leased property from a governmental source that determines whether it is taxable under the Constitution."<sup>182</sup> Then, with regard to whether the leaseholds were being used for commercial purposes and to the leaseholders' argument that the leaseholds were being used for a public purpose or function and thus entitled to exemption,<sup>183</sup> the court wrote:

The operation of the commercial establishments represented by appellants' cases is purely proprietary and for profit. They are not governmental functions. If such a commercial establishment operated for profit on Panama City Beach, Miami Beach, Daytona Beach, or St. Petersburg Beach is not exempt from tax, then why should such an establishment operated for profit on Santa Rosa Island Beach be exempt? No rational basis exists for such a distinction. The exemptions contemplated under Sections 196.012(5) and 196.199(2)(a), Florida Statutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions. With the exemption being so interpreted all property used by private persons and commercial enterprises is subjected to taxation either *directly* or *indirectly* through taxation on the leasehold. Thus all privately used property bears a tax burden in some manner and this is what the Constitution mandates.<sup>184</sup>

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179. *Id.* at 125. In reaching this conclusion, the court relied on *Dade County v. Pan Am. World Airways*, 275 So. 2d 505 (Fla. 1973) and *Hillsborough County Aviation*, 210 So. 2d at 193.

180. *Id.* The Second District also construed the provisions of article VII, section 10 of the Florida Constitution, "to mean that even though the construction of facilities has been financed through the issuance of revenue bonds under this section, such facilities when leased to private entities are not necessarily exempt from taxation simply because public financing has been involved." *Id.* at 123 (citing FLA. CONST. art. VII, § 10 (1968)) (emphasis in the original).

181. 326 So. 2d 425 (Fla. 1975).

182. *Id.* at 432 (quoting *Straughn*, 293 So. 2d at 695).

183. *Id.* at 428.

184. *Id.* at 433 (emphasis in the original). The Santa Rosa Island leaseholders, who hung tenaciously to the belief that they should not have to pay taxes, persuaded the legislature to



*Williams* thus marked a dramatic turning point in extending ad valorem tax exemptions to governmentally owned property that is being used by nongovernmental persons or entities. No longer is it sufficient simply to find that the governmental entity is serving some broad “public purpose” and that the nongovernmental lessee is in some way furthering that public purpose in order for the property to be exempt.<sup>185</sup> Now, the use to which the property is being put by the nongovernmental lessee must be scrutinized, and it will be exempt only if it is being used for a “governmental-governmental” purpose or function; a “governmental-proprietary” purpose or function will not suffice.<sup>186</sup> Traditionally, a governmental purpose or function “has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty.”<sup>187</sup> In contrast, a proprietary purpose or function encompasses that broad range of activities in which a governmental entity may engage which “redounds to the public or individual advantage and welfare of the [governmental entity] or its people.”<sup>188</sup>

The Florida Supreme Court soon had an opportunity to apply the distinction between governmental and proprietary purposes or functions to a familiar facility, the Daytona Speedway. The same facility that had been held to be exempt under the 1961 statute a decade earlier<sup>189</sup> was now scrutinized under the provisions of the 1968 Constitution and the 1971 legislation.<sup>190</sup> The use to which the governmentally owned property was being put by the nongovernmental lessee had not changed; it was being used as a raceway and associated facilities. But the law had changed. After cataloging the changes in the Florida Constitution and statutes since the earlier case and quoting from the *Williams* opinion discussing the distinction between “governmental-governmental” and “governmental-proprietary”,<sup>191</sup> the court concluded tersely, “Operating an automobile racetrack for profit is not even arguably the performance of a “governmental-governmental”

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enact 1976 Fla. Laws ch. 76-361, providing for a reduction in their rent in an amount equal to the ad valorem taxes they had paid the previous year. This was held to be unconstitutional “on the ground that it provides for an indirect exemption from ad valorem taxes not authorized by our state constitution.” *Archer v. Marshall*, 355 So. 2d 781, 782 (Fla. 1978).

185. *E.g.*, *Daytona Beach Racing & Recreational Facilities Dist. v. Paul*, 179 So. 2d 349 (Fla. 1965); *see supra* text accompanying note 111.

186. *Williams*, 326 So. 2d at 433.

187. *Daly v. Stokell*, 63 So. 2d 644, 645 (Fla. 1953).

188. *Id.*

189. *Paul II*, 179 So. 2d at 349; *see supra* text accompanying note 111.

190. *Id.*

191. *Volusia County v. Daytona Beach Racing & Recreational Facilities Dist.*, 341 So. 2d 498, 502 (Fla. 1976) (quoting *Williams*, 326 So. 2d at 433).

function.”<sup>192</sup>

Three years later in 1979, the Florida Supreme Court addressed another familiar scenario: nongovernmental lessees at the Tampa International Airport.<sup>193</sup> Various portions of the airport property had been leased to private, for-profit enterprises for a number of commercial enterprises, including the sale of “food and beverages to the public in a variety of ways including a buffet, a dining room, cocktail lounges, and fast food service facilities.”<sup>194</sup> Eleven years earlier in 1968, the court had decided that because a restaurant at the airport was providing indispensable support of the airport, the use of the property was predominantly public in nature, and thus was entitled to exemption from ad valorem taxation.<sup>195</sup> In 1977, the leaseholders successfully persuaded the Second District Court of Appeal<sup>196</sup> that they were entitled to exemption on the authority of *Hillsborough County Aviation*,<sup>197</sup> *Hertz v. Walden*,<sup>198</sup> and *Pan American*.<sup>199</sup> In 1979, the Florida Supreme Court reversed, holding that their more recent decisions in *Williams*<sup>200</sup> and *Volusia County v. Daytona Beach Racing & Recreational Facilities*<sup>201</sup> had “superseded” and “impliedly overruled” those earlier cases:

Applying the “function by utilization” test of *Williams v. Jones*, we hold that the district court and the trial judge erred in holding that the leasehold interests of Host, Dobbs, and Bonanni were not taxable. It is undisputed that these leaseholds are being utilized for commercial, profit-making purposes, and for this reason they have a “governmental-proprietary” function. Having such a function, they

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192. *Id.*

193. *Walden v. Hillsborough County Aviation Auth.*, 375 So. 2d 283 (Fla. 1979). In 1977, the Florida Supreme Court had quashed a decision that held that a nongovernmental lessee using city owned property to operate a theater was entitled to exemption because it was furthering a public purpose of the city. In a brief opinion with no real analysis, the court simply cited the *Daytona Speedway* case, 341 So. 2d at 498, as the authority for quashing the decision below. *Markham v. MacCabee Invs., Inc.*, 343 So. 2d 16 (Fla. 1977), *rev'g* 311 So. 2d 718 (Fla. Dist. Ct. App. 1975). In 1978, the First District Court of Appeal also applied the *Daytona Speedway* case and held that a lessee who was using governmentally owned land to service and store imported automobiles was not serving a governmental purpose and thus, was not entitled to exemption from ad valorem taxation. *St. John's Assocs. v. Mallard*, 366 So. 2d 34 (Fla. Dist. Ct. App. 1978).

194. *Walden*, 375 So. 2d at 284.

195. *Hillsborough County Aviation*, 210 So. 2d at 196; *see supra* text accompanying note - 116.

196. *Walden v. Hillsborough County Aviation Auth.*, 351 So. 2d 419 (Fla. Dist. Ct. App. 1977).

197. *Hillsborough County Aviation*, 210 So. 2d at 193.

198. 299 So. 2d 121 (Fla. Dist. Ct. App. 1974), *aff'd* 320 So. 2d 385 (Fla. 1975).

199. *Pan Am.*, 275 So. 2d at 505.

200. *Williams*, 326 So. 2d at 425.

201. 341 So. 2d 498 (Fla. 1976).

are taxable.<sup>202</sup>

Although the shift in focus from the overall public nature of a facility, such as an airport, to the use to which leased property was being put, granting exemption only when a governmental (as opposed to a proprietary) purpose or function was being served, was important, none of the cases beginning with *Williams*<sup>203</sup> dealt with the more important question of taxing the underlying governmentally owned remainder interest in the property. Each of these cases was concerned with the tax exempt status of the leasehold interest that was taxable as real property. The new tax regime of the 1968 Florida Constitution and 1971 legislation was intended "to impose an ad valorem real property tax upon [governmental entities] consistent with the tax imposed upon persons who make similar uses of property."<sup>204</sup> Owners of real property in Florida face a total tax rate of a combination of taxes levied by counties, municipalities, school districts, and special districts that could easily approach thirty mills,<sup>205</sup> or three percent of the assessed value of the property. Furthermore, each of the taxing entities levying an ad valorem property tax secures revenue from the taxes levied on the property located within its jurisdiction, which is used to provide services to the people and property within its jurisdiction.<sup>206</sup> In 1980, however, the legislature dramatically altered the taxation of nonexempt leaseholds in governmentally owned property by making them taxable as *intangible personal property* if rental payments are due in consideration for the leasehold,<sup>207</sup> subject to an ad valorem tax imposed by the state at a maximum rate of 1 mill, or 0.1%.<sup>208</sup> Thus, a taxable leasehold interest assessed at a value of \$1 million, which may previously have been paying \$30,000 in ad valorem real property taxes to the local governments where it was located, would now pay only \$1000 to the state.<sup>209</sup> No longer will "the holders of leases of publicly owned lands [bear] their fair share of the tax burden,"<sup>210</sup> they will no longer be "plac[ed] . . . on a parity with other real property in the private sector devoted to similar uses."<sup>211</sup> Although the First District Court of

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202. *Walden*, 375 So. 2d at 287.

203. *Williams*, 326 So. 2d at 425.

204. *Id.* at 432.

205. FLA. CONST. art. VII, § 9(b) (1968).

206. *Id.*

207. FLA. STAT. § 196.199(2)(b) (1981) (enacted by 1980 Fla. Laws ch. 80-368, § 1).

208. *Id.* § 199.032(1). The maximum rate has now been increased to 2 mills or 0.2%. FLA. STAT. § 199.032 (1997).

209. As something of a solace to the school districts, any taxes collected on these leaseholds is to "be returned to the local school board for the county in which the property subject to the leasehold is situated." *Id.* § 199.292(1).

210. *Williams*, 326 So. 2d at 430.

211. *Id.*

Appeal has upheld this legislation,<sup>212</sup> it was careful to note that “[t]he question before us is not whether this law is wise, fair, or well drafted.”<sup>213</sup>

#### D. *Governmental Purpose*

The 1971 legislation, which apparently waived any state or local governmental immunity from ad valorem property taxation,<sup>214</sup> provided tax exemptions for such property (and for privately held leaseholds in such property) when the property (or the leasehold) is used for “governmental, municipal, or public purposes.”<sup>215</sup> In addition to the constitutionally authorized exemptions for property used for “educational, literary, scientific, religious or charitable purposes,”<sup>216</sup> it is *only* when property is used for “governmental, municipal, or public purposes” that any exemption is available. What, then, does this phrase mean? The 1971 legislation provided the following explanation:

(5) Governmental, municipal or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of the United States, the state or any of its political subdivisions, or any municipality, agency, authority or other public body corporate of the state, is demonstrated to perform a function or serve a *governmental purpose* which could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. The term “governmental purpose” shall include a direct use of property on federal lands in connection with the federal government’s space exploration program. Real property and tangible personal property owned by the federal government and used for defense and space exploration purposes or which is put to a use in support thereof shall be deemed to perform an essential national governmental purpose and shall be exempt.<sup>217</sup>

Recall that this is the provision, along with the provision exempting

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212. *Miller v. Higgs*, 468 So. 2d 371, 278 (Dist. Ct. App.), *rev. denied*, 479 So. 2d 117 (Fla. 1985).

213. *Id.* at 377.

214. *See supra* text accompanying notes 151-53.

215. FLA. STAT. § 196.199(1)(c), (2)(a) (1971).

216. FLA. CONST. art. VII, § 3(a).

217. FLA. STAT. § 196.012(5) (1971) (emphasis added). This provision was renumbered to paragraph (6) in 1988, but no changes were made to the language of the provision at that time. 1988 Fla. Laws ch. 88-102, § 1.

privately held leaseholds in governmentally owned property,<sup>218</sup> which the *Williams* court said

relate[s] to “governmental-governmental” functions as opposed to “governmental-proprietary” functions. With the exemption being so interpreted all property used by private persons and commercial enterprises is subjected to taxation either *directly* or *indirectly* through taxation on the leasehold. Thus all privately used property bears a tax burden in some manner and this is what the Constitution mandates.<sup>219</sup>

Therefore, if the function being performed, or the purpose being served, is inherently “governmental-proprietary,” no exemption from taxation is permissible under the Florida Constitution. This has been reiterated by the Florida Supreme Court more recently in *Sebring Airport Authority v. McIntyre*.<sup>220</sup> In that case, the Authority leased real property that it owned to Sebring International Raceway (Raceway), a for-profit corporation, to operate an automobile racing facility.<sup>221</sup> The property appraiser denied Raceway’s application for exemption and the Florida Supreme Court upheld the denial based upon the factually similar *Volusia*<sup>222</sup> and *Williams*.<sup>223</sup> The court went on to elaborate:

Serving the public and a public purpose, although easily confused, are not necessarily analogous. A governmental-proprietary function occurs when a nongovernmental lessee utilizes governmental property for-proprietary and for-profit aims. We have no doubt that Raceway’s operation of the racetrack serves the public, but such service does not fit within the definition of a public purpose as defined by section 196.012(6). Raceway’s operating of the race for profit is a governmental-proprietary function; therefore, a tax exemption is not allowed . . . .<sup>224</sup>

The court noted: “Proprietary functions promote the comfort, convenience, safety and happiness of citizens, whereas government functions concern the administration of some phase of government.”<sup>225</sup>

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218. FLA. STAT. § 196.199(2)(a) (1971).

219. *Williams*, 326 So. 2d at 433 (underline added); *see supra* text accompanying note 181.

220. 642 So. 2d 1072 (Fla. 1994).

221. *Id.* at 1073.

222. *Volusia*, 341 So. 2d at 498.

223. *Williams*, 326 So. 2d at 435.

224. *Sebring Airport*, 642 So. 2d at 1073-74.

225. *Id.* at 1074 n.1 (citing Black’s Law Dictionary 1219 (6th ed. 1990)).

Over the years, the Florida Supreme Court and the District Courts of Appeal have addressed a number of situations in which governmentally owned property has been leased to private for-profit lessees and have held that the use to which the property was being put was a governmental-proprietary purpose, and thus no exemption was allowed.<sup>226</sup> Such leaseholds have been used for the following proprietary purposes: a marina,<sup>227</sup> a stadium leased to the Chicago White Sox organization,<sup>228</sup> a performing arts center,<sup>229</sup> the Daytona Beach Raceway,<sup>230</sup> a golf course used as a private club,<sup>231</sup> and restaurants, barbershops, private dwellings, commercial campgrounds, cottages for rent, and motels.<sup>232</sup>

Notwithstanding this lengthy list of examples of governmental-proprietary uses to which governmentally owned property had been put, thus rendering it subject to ad valorem taxation, the Florida Legislature has made several attempts to *legislatively* specify that certain governmental-proprietary activities are to be treated as exempt.<sup>233</sup> The first such attempt was made in 1993, as explained in the title of the bill, to “expand[] the definition of governmental, municipal or public purpose to include certain aviation activities; [and to] defin[e] the term ‘owned by the lessee’.”<sup>234</sup> The legislation added the following language to the statute:

For purposes of the preceding sentence, an activity undertaken by a lessee which is permitted under the terms of its lease of real property designated as an aviation area on an airport layout plan which has been approved by the Federal Aviation Administration and which real property is used for the administration, operation, business offices and activities related specifically thereto in connection with the conduct of an aircraft full service fixed base operation which provides goods and services to the general aviation public in the promotion of air commerce shall be deemed an activity which serves a governmental, municipal or public purpose or function. . . . “Owned by the lessee” as used in this chapter does not include personal property, buildings, or other real property improvements

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226. See *infra* notes 227-32.

227. *Mikos v. City of Sarasota*, 636 So. 2d 83, 84 (Fla. Dist. Ct. App. 1994). But see *Page v. Fernandina Harbor Joint Venture*, 608 So. 2d 520 (Fla. Dist. Ct. App. 1992), *disapproved* in *Sebring Airport*, 642 So. 2d at 1074.

228. *Mikos v. City of Sarasota*, No. 91-3877-CA-01 (Fla. Cir. Ct. Nov. 5, 1992).

229. *Markham v. Macabee Invs., Inc.*, 343 So. 2d 16, 16-17 (Fla. 1977), *quashing* *Macabee Invs. Inc. v. Markham*, 311 So. 2d 718 (Fla. Dist. Ct. App. 1975).

230. *Volusia County*, 341 So. 2d at 500.

231. *Capital City Country Club, Inc. v. Tucker*, 613 So. 2d 448, 450 (Fla. 1993).

232. *Williams*, 326 So. 2d at 425; *Straughn v. Camp*, 293 So. 2d 689, 692 (Fla. 1974).

233. 1993 Fla. Laws ch. 93-233.

234. *Id.*

used for the administration, operation, business offices and activities related specifically thereto in connection with the conduct of an aircraft full service fixed based operation which provides goods and services to the general aviation public in the promotion of air commerce provided that the real property is designated as an aviation area on an airport layout plan approved by the Federal Aviation Administration. For purposes of determination of "ownership," buildings and other real property improvements which will revert to the airport authority or other governmental unit upon expiration of the term of the lease shall be deemed "owned" by the governmental unit and not the lessee.<sup>235</sup>

This legislation was clearly enacted in response to cases such as *Walden v. Hillsborough County Aviation Authority*<sup>236</sup> in which the court held that the function being served by nongovernmental lessees was governmental-proprietary and that "the Constitution mandates"<sup>237</sup> that it is not entitled to exemption from ad valorem taxation. However, the legislature does not have the power to create, by statute, an exemption from taxation that is not authorized by the Florida Constitution.<sup>238</sup> The Florida Constitution does not authorize an exemption when governmentally owned property is being used by private, for-profit persons for governmental-proprietary purposes. An attempt to convert a donkey into a horse by legislatively labeling the donkey a "horse" does not, of course, effectuate a biological transformation; the donkey remains a donkey even if people call it a "horse." Similarly, legislatively deeming a governmental-proprietary purpose to be a "governmental-governmental" purpose does not change its true nature and does not result in the constitutional awarding of a tax exemption where, absent the legislation, there clearly could be no exemption.

In 1994, the Florida Legislature again tried to convert donkeys into horses with the insertion of the following language into the statute:

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

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235. FLA. STAT. § 196.012(6) (1997), amended by 1993 Fla. Laws ch. 93-233, § 3.

236. 375 So. 2d 283, 287 (Fla. 1979) (citing *Williams*, 326 So. 2d at 425); see also *supra* text accompanying note 193.

237. *Williams*, 326 So. 2d at 433.

238. *Archer v. Marshall*, 355 So. 2d 781, 783 (Fla. 1978) (citing *Presbyterian Homes of the Synod of Fla. v. Wood*, 297 So. 2d 556 (Fla. 1974)).

If property deeded to a municipality by the United States is subject to a requirement that the Federal Government, through a schedule established by the Secretary of the Interior, determine that the property is being maintained for public historical preservation, park, or recreational purposes and if those conditions are not met the property will revert back to the Federal Government, then the property shall be deemed to serve a municipal or public purpose.<sup>239</sup>

In acknowledgment of the problematic constitutional validity of this provision, the legislation contained a severability clause.<sup>240</sup> If one provision is declared unconstitutional, as seems likely insofar as an exemption is purportedly granted to a "sports facility with permanent seating," in direct contravention of *Sebring Airport Authority v. McIntyre*,<sup>241</sup> the remaining provisions ostensibly remain viable until struck down. However, the severability clause notwithstanding, the court has the power to strike down a statute that is facially unconstitutional.<sup>242</sup> The functions and purposes enumerated in this legislation are clearly governmental-proprietary, and it is unconstitutional to grant exemptions to governmentally owned property being used by private, for-profit persons for such purposes.

#### E. *Taxation of Governmentally Owned Fee Interest*

As previous discussion has illustrated, for many years the focus has been on the taxation of a leasehold interest in governmentally owned property, when the leasehold is not being used for an exempt purpose. In two recent cases, however, the Florida Supreme Court has acknowledged that, even if the privately held leasehold interest is subject to the state imposed intangibles tax, the underlying fee is also subject to ad valorem taxation by the local governments as real property.<sup>243</sup>

In *Capital City Country Club v. Tucker*,<sup>244</sup> the Florida Supreme Court dealt with the assessment of a fee interest in real property belonging to the City of Tallahassee that had been leased to a private corporation (the Club) for use as a private golf course.<sup>245</sup> The Club contested the assessment, asserting that because the leasehold interest had already been taxed by the state as intangible personal property, the underlying fee could not be taxed

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239. FLA. STAT. § 196.012(6), amended by 1994 Fla. Laws ch. 94-353, § 59.

240. 1994 Fla. Laws ch. 94-353, § 60.

241. 642 So. 2d 1072 (Fla. 1994); see *supra* text accompanying notes 220-25.

242. *Schmitt v. State*, 590 So. 2d 404, 415 n.12 (Fla. 1991).

243. *Capital City Country Club*, 613 So. 2d at 448; *Sarasota-Manatee Airport Auth. v. Mikos*, 605 So. 2d 132 (Fla. Dist. Ct. App. 1992).

244. 613 So. 2d at 448.

245. *Id.*



as real property.<sup>246</sup> The Florida Supreme Court dismissed an argument that a statute,<sup>247</sup> which prescribed taxation of leaseholds such as the Club's if entered into *after* a certain date, implicitly authorized exemption if the leasehold had been entered into *before* that date. The court held that the legislature could not constitutionally provide for such an exemption explicitly and thus, the statute would not be construed to supply the exemption implicitly.<sup>248</sup> Furthermore, the *Capital City* court rejected the Club's contention that imposing the state intangible tax on the leasehold interest effectively operated to exempt the underlying fee from local ad valorem taxes on real property.<sup>249</sup> The court stated, "[W]e hold that the golf course property is subject to real estate taxation."<sup>250</sup>

Alternatively, the Club asserted that if the fee was subject to tax as real property, the assessed value of the fee should be reduced by the value of the leasehold interest, again because the leasehold interest already had been taxed as intangible property.<sup>251</sup> The court concluded that the intangible tax and the real estate tax are two separate taxes, imposed by different branches of government on different subjects.<sup>252</sup> There was, therefore, no "double taxation,"<sup>253</sup> and "[t]he value of the real property for ad valorem taxation is its fair market value without regard to any leases or encumbrances on the property."<sup>254</sup>

Significantly, the *Capital City* court noted that the property was owned by a *municipality* rather than some other governmental entity.<sup>255</sup> In *Sarasota-Manatee Airport Authority v. Mikos*,<sup>256</sup> the Second District Court of Appeal concluded that real property owned by a special district was immune from ad valorem taxation even when used by nongovernmental lessees.<sup>257</sup> This conclusion was based on the legislative designation of the Authority as a "political subdivision,"<sup>258</sup> and the view that "[s]pecial districts that are created as political subdivisions of the state enjoy the same immunity from taxation as does the state."<sup>259</sup> The Florida Supreme Court

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246. *Id.* at 450-51.

247. See FLA. STAT. § 196.199(4) (1991).

248. *Capital City Country Club*, 613 So. 2d at 451-52.

249. *Id.* at 452.

250. *Id.*

251. *Id.* at 450.

252. *Id.* at 452.

253. *Id.*

254. *Id.* at 453.

255. *Id.* at 450.

256. 605 So. 2d 132, 133 (Fla. Dist. Ct. App. 1992).

257. *Id.*

258. 1991 Fla. Laws ch. 91-358, § 18.

259. *Sarasota-Manatee Airport*, 605 So. 2d at 133.

denied review of the Second District Court of Appeal's decision in 1993.<sup>260</sup> However in 1995, it accepted jurisdiction<sup>261</sup> to review the Fifth District Court of Appeal's decision in *Florida Department of Revenue v. Canaveral Port Authority*.<sup>262</sup>

In *Canaveral Port Authority*, unlike *Sarasota-Manatee*, there was no legislative declaration that the Canaveral Port Authority was a "political subdivision."<sup>263</sup> Instead, the Fifth District Court of Appeal decided that whether the Authority was a political subdivision would depend on case law, which looks at whether the entity "acts as a branch of general administration of the policy of the state."<sup>264</sup> After examining the Authority's "powers, functions, and duties,"<sup>265</sup> the district court concluded that the Authority was not a political subdivision, and thus its property was not immune from ad valorem taxation.<sup>266</sup> The Florida Supreme Court approved the holding of the Fifth District that the Authority was not immune from ad valorem taxation, but for a different reason. The Fifth District had held that the Authority was not a political subdivision because the court determined that the Authority did not act "as a branch of general administration of the policy of the state."<sup>267</sup> The supreme court, in an effort to narrow the governmental immunity doctrine, concluded that immunity extends only to "counties, entities providing the public system of education, and agencies, departments, or branches of state government that perform the administration of the state government."<sup>268</sup> Although the case was not directly before it, the supreme court specifically rejected the Second District's holding in *Sarasota-Manatee*.<sup>269</sup>

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260. *Mikos v. Sarasota-Manatee Airport Auth.*, 617 So. 2d 320, 320 (Fla. 1993).

261. *Canaveral Port Auth. v. Department of Revenue*, 652 So. 2d 816, 816 (Fla. Dist. Ct. App. 1995).

262. 642 So. 2d 1097 (Fla. Dist. Ct. App. 1994).

263. *Id.* at 1100. The trial court had held the Authority to be immune from taxation because "it was more in the nature of a county than a municipality." *Id.* at 1098.

264. *Id.* at 1100.

265. *Id.*

266. *Id.* at 1101-02.

267. *Id.* at 1100.

268. *Canaveral Port Auth. v. Department of Revenue*, 690 So. 2d 1226, 1228 (Fla. 1996) (footnotes omitted); Richard Buxman, Case Comment, *Constitutional Law: Ad Valorem Taxation Exemptions and Statutory Enactments*, 9 U. FLA. J.L. & PUB. POL'Y 111, 111 (1997).

269. *Canaveral Port Auth.*, 690 So. 2d at 1228.

We reject the Second District's holding in *Sarasota-Manatee* that classification as a political subdivision and, consequently, immunity from ad valorem taxation is dependent upon whether an entity is more like a county than a municipality. . . . We also reject the Second District's analysis in *Sarasota-Manatee* recognizing the Sarasota-Manatee Airport Authority as a "political subdivision" in part because the legislature designated it as such. The Florida Constitution does not empower the legislature to designate what entities are immune from ad valorem

In its discussion of the extent to which governmental immunity from taxation exists in Florida, the Florida Supreme Court relied on the authority of *State ex rel. Charlotte County v. Alford*<sup>270</sup> and *Dickinson v. City of Tallahassee*.<sup>271</sup> The *Alford* case involved legislation “designed to restore to the tax rolls of Charlotte County” land owned by the Florida Game and Fresh Water Fish Commission.<sup>272</sup> After noting that governmental immunity from taxation “is not dependent upon statutory or constitutional provisions but rests upon broad grounds of fundamentals in government,”<sup>273</sup> the Florida Supreme Court acknowledged that the legislature has the power to waive such immunity.<sup>274</sup> However, the court construed the statute not as a waiver of immunity from taxation for these state-owned lands, but as an attempt to direct the Commission to make an annual payment to Charlotte County, in lieu of taxes.<sup>275</sup> The Commission was limited by the Florida Constitution to spending its funds only for certain purposes,<sup>276</sup> which does not include the payment of ad valorem taxes or amounts in lieu thereof.<sup>277</sup> Under this interpretation, the statute “obviously attempts to do what the Constitution says may not be done; it is therefore void.”<sup>278</sup>

The *Dickinson* case involved an excise tax imposed by Tallahassee on purchases of electricity, water, and gas within the city limits; there were exemptions for purchases by the federal government and churches, but no exemptions for purchases by the state or other governmental entities.<sup>279</sup> The City of Tallahassee attempted to levy the tax on purchases made by the state, various of its agencies and departments, Leon County, and the Leon County School Board.<sup>280</sup> There was no distinction in the imposition of the tax based upon the use of the utility service by the purchaser.<sup>281</sup> Thus, electricity purchased by the state to operate the lights in the Capitol building, clearly a governmental function, were taxed in the same manner as utility services used in some proprietary activity. The tax was levied pursuant to

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taxation.

*Id.*

270. 107 So. 2d 27 (Fla. 1958), cited at *Canaveral Port Auth.*, 690 So. 2d at 1227 n.2.

271. 325 So. 2d 1 (Fla. 1975), cited at *Canaveral Port Auth.*, 690 So. 2d at 1227 n.2. The opinion also cited *Park-N-Shop v. Sparkman*, 99 So. 2d 571 (Fla. 1957). *Id.* at n.2; see *supra* text accompanying note 82.

272. *Alford*, 107 So. 2d at 28.

273. *Id.* at 29.

274. *Id.*

275. *Id.*

276. FLA. CONST. art. IV, § 30(6) (1885).

277. *Id.*

278. *Alford*, 107 So. 2d at 29.

279. *Dickinson*, 325 So. 2d at 2.

280. *Id.*

281. *Id.*

legislation authorizing municipalities to impose such taxes,<sup>282</sup> and providing:

(4) A municipality may exempt from taxation hereunder the purchase of the taxable items by the United States government, the State of Florida, or any other public body as defined in section 1.01, Florida Statutes, and shall exempt [purchases by] any recognized church in this state for use exclusively for church purposes.<sup>283</sup>

The Florida Supreme Court was unwilling to construe this provision as a waiver of the state's immunity from the excise tax.<sup>284</sup> In so holding, the court considered the economic impact of concluding that purchases of utilities by the state could be taxed by the numerous municipalities throughout the state: "The State would have no way to anticipate revenue needs or appropriate funds sufficient to meet those variant tax burdens."<sup>285</sup> Thus, *Dickinson* struck down an excise tax imposed by a municipality on utility services that could be, and often were, used by governmental purchasers in carrying out their governmental functions.

To recapitulate, after *Canaveral Port Authority*, the doctrine of sovereign immunity from ad valorem taxation applies only to property owned by the state, counties, and school districts.<sup>286</sup> When property is owned by a municipality or a special district, but is used by a nongovernmental lessee for a nonexempt purpose, the underlying fee interest is subject to ad valorem taxation at its full fair market value.<sup>287</sup> The legislature has the power to waive state and local sovereign immunity.<sup>288</sup> In Florida, governmental immunity from tort liability has been statutorily waived in a manner which has been interpreted by the Florida Supreme Court to apply equally to the state and all levels of local government.<sup>289</sup> For reasons of "fairness, equality, and consistency,"<sup>290</sup> the provisions of the Tax Reform Act found in sections 196.001 and 196.199 should be acknowledged as waiving state and local governmental immunity, thus permitting ad valorem taxation of the underlying fee interest when property owned by the state, a county, or a

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282. FLA. STAT. § 166.231(1) (1973).

283. *Id.* § 166.231(4).

284. *Dickinson*, 325 So. 2d at 4.

285. *Id.*

286. *Canaveral Port Auth.*, 690 So. 2d at 1228.

287. *Capital City Country Club v. Tucker*, 613 So. 2d 448, 452 (Fla. 1993).

288. *State ex rel. Charlotte County v. Alford*, 107 So. 2d 27 (Fla. 1958); *see supra* text accompanying note 275.

289. *Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981); *see supra* text accompanying note 1.

290. *Cauley*, 403 So. 2d at 385.

school district is used by a nongovernmental entity for a nonexempt purpose.<sup>291</sup> Finally, a nongovernmental lessee performs a “governmental, municipal or public purpose” only when performing “‘governmental-governmental’ functions as opposed to ‘governmental-proprietary’ functions.”<sup>292</sup>

#### IV. GOVERNMENTAL IMMUNITY IN SALES AND USE TAX

The sales<sup>293</sup> taxes imposed by the State of Florida under Chapter 212 of the Florida Statutes provide the state with its largest source of revenue, approximately \$11.9 billion in 1996.<sup>294</sup> These taxes are imposed on the retail sale of a wide variety of goods and services,<sup>295</sup> as well as the leasing of real estate for commercial purposes,<sup>296</sup> admissions to entertainment events,<sup>297</sup> and the rental of hotel accommodations.<sup>298</sup> Sovereign immunity from taxation has been waived in many instances when the state or a local government is a party to a transaction covered by the sales tax.

The sales tax is intended to be imposed on the purchaser in a taxable transaction.<sup>299</sup> When the purchaser is the state or a local governmental entity, the transaction is not immune from taxation,<sup>300</sup> but may be entitled to an exemption if it falls within a carefully worded statutory provision.<sup>301</sup> Until 1985, the statutory exemption provision read: “(6) EXEMPTIONS; POLITICAL SUBDIVISIONS; COMMUNICATIONS. — There are also exempt from the tax imposed by this chapter sales made to the United States Government, the state, or any county, municipality, or political subdivision

291. See *supra* text accompanying note 151.

292. *Williams*, 326 So. 2d at 433; see *supra* text accompanying note 181.

293. When a sale takes place outside the jurisdiction of Florida, but the purchased property is subsequently brought into Florida and used here, it is subject to a use tax. FLA. STAT. § 212.05(1)(b) (1997); see *Green v. Pederson*, 99 So. 2d 292 (Fla. 1958). For convenience, this article will refer solely to the imposition and collection of the sales tax, but the principles which are discussed apply equally to the use tax.

294. FLORIDA TAX HANDBOOK, *supra* note 11, at 98. In addition to the state imposed sales tax, local governments are authorized to impose sales taxes in certain instances. See, e.g., FLA. STAT. § 212.0306 (local option food and beverage tax). These local levies will not be addressed further in this article, but the principles discussed with regard to the state sales tax also apply to the local levies.

295. FLA. STAT. § 212.05.

296. *Id.* § 212.031.

297. *Id.* § 212.04.

298. *Id.* § 212.03.

299. *Id.* § 212.07(1)(a) provides: “The privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer.” For convenience, this article will refer only to the “purchaser” in a transaction.

300. Immunity may apply if the sale is to the federal government. See *In re Five Dames*, 14 B.R. 143, 144 (Bankr. S.D. Fla. 1981).

301. FLA. STAT. § 212.08(6) (1997).

of this state; . . . .”<sup>302</sup>

In April 1985, the First District Court of Appeal handed down its decision in *Alachua County v. Department of Revenue*.<sup>303</sup> In that case, county employees on authorized travel paid for hotel rooms with their own funds and subsequently submitted claims for reimbursement from the county.<sup>304</sup> The county authorized the employees to present the county’s tax exemption number to hotels, but the hotels refused to allow the exemption, following directions from the Department of Revenue.<sup>305</sup> The county took the position that it could not properly reimburse employees for sales taxes they had paid because of the county’s entitlement to the exemption, even though Florida Statutes required governmental employees to be reimbursed for travel expenses “substantiated by paid bills therefor.”<sup>306</sup> The court held that this indirect imposition of the sales tax on the county was entitled to the exemption.<sup>307</sup> The court stated, “Accordingly, any rental to a county employee on authorized travel who is to be reimbursed by the county is exempt from the tax imposed by § 212.03 by virtue of the general exemption of § 212.08(6) which specifically exempts the counties from taxes imposed by Chapter 212.”<sup>308</sup>

The legislature quickly expressed its disagreement with this interpretation of the exemption, and in June 1985, reversed the result in *Alachua County* by adding the following language to the statute:

(6) Exemptions; Political Subdivisions. — There are also exempt from the tax imposed by this chapter sales made to the United States Government, a state, or any county, municipality, or political subdivision of a state *when payment is made directly to the dealer by the governmental entity. This exemption shall not inure to any transaction otherwise taxable under this chapter when payment is made by a government employee by any means, including, but not limited to, cash, check, or credit card when that employee is subsequently reimbursed by the governmental entity.*<sup>309</sup>

Thus, the exemption is available only when the governmental entity itself makes a purchase; if an employee of the governmental entity makes a purchase and is subsequently reimbursed, the exemption does not apply even

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302. *Id.* § 212.08(6) (1983).

303. 466 So. 2d 1186 (Fla. Dist. Ct. App. 1985).

304. *Id.* at 1187.

305. *Id.*

306. *Id.* (quoting FLA. STAT. § 112.061(6) (1983)).

307. *Id.* at 1188.

308. *Id.*

309. FLA. STAT. § 212.08(6) (1997) (enacted by 1985 Fla. Laws ch. 85-342, § 220).

though the economic impact of the tax is ultimately borne by the governmental employer.

Although the legislature has clearly waived sovereign immunity when an employee of a state or local governmental entity makes a purchase, the legislature has no power to waive federal governmental immunity. In *Chestnut Fleet Rentals v. Department of Revenue*,<sup>310</sup> federal government employees rented automobiles for official travel, paid for the rentals with personal funds, and later were reimbursed by the federal government.<sup>311</sup> The court held that the employees were “constituent parts” of the federal government, and therefore, the incidence of the tax was on the federal government.<sup>312</sup> Under the Supremacy Clause,<sup>313</sup> the rental transactions could not be taxed.<sup>314</sup>

Further evidence of the limited nature of the governmental exemption is seen in the treatment of sales of tangible personal property made to contractors employed by a governmental entity to construct “public works”. Prior to 1959, such sales were expressly entitled to the exemption.<sup>315</sup> However, the legislature reversed the treatment of such transactions, and today, the exemption is expressly made *inapplicable* to sales made to contractors either employed directly or as an agent of a governmental entity, even if the property becomes a part of public works owned by the governmental entity.<sup>316</sup> In 1969, the legislature expressly withdrew the

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310. 559 So. 2d 264, 265 (Fla. Dist. Ct. App. 1990).

311. *Id.*

312. *Id.* at 268.

313. U.S. CONST. art. VI, cl. 2.

314. *Chestnut*, 559 So. 2d at 268.

315. FLA. STAT. § 212.08(7) (1957) provided:

There shall also be exempt . . . [all] sales made to the United States Government, the state or any county, municipality or political subdivision of this state, including sales of tangible personal property made to contractors employed by any such government or political subdivision thereof where such tangible personal property goes into and becomes a part of public works owned by such government or political subdivision thereof.

*Id.*; see *Gay v. Jemison*, 52 So. 2d 137, 13 (Fla. 1951) (holding that property constructed by governmental contractor did not constitute public work; exemption was denied); *Green v. Eglin AFB Hous., Inc.*, 104 So. 2d 463, 469 (Fla. Dist. Ct. App. 1958) (holding that property constructed by governmental contractor did constitute public work; exemption was allowed for purchases of tangible personal property, but not for purchases of gasoline, tools, and other supplies that formed no part of completed structures even though they may be consumed in process of construction).

316. The third sentence of FLA. STAT. § 212.08(6) (1997) provides:

This exemption does not include sales of tangible personal property made to contractors employed either directly or as agents of any such government or political subdivision thereof when such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision thereof, except public works in progress or for which bonds or revenue certificates have

exemption for purchases of machinery and equipment made by a governmental entity in operating the proprietary activity of generating electricity.<sup>317</sup> In 1971, the statute was clarified to deny the exemption for purchases of property used in the transmission or distribution of electricity, as well as generating electricity.<sup>318</sup>

More recently, the legislature eliminated governmental immunity for local governments and political subdivisions engaged in providing of telecommunication service to the public for hire.<sup>319</sup> The legislation is intended to create a level playing field in providing telecommunication services by eliminating the tax advantage previously enjoyed by governmental entities that provide these services. In addition to expressly being made subject to sales and use taxes,<sup>320</sup> local governments that enter the telecommunications business also are subject to ad valorem property taxes<sup>321</sup> and intangibles taxes.<sup>322</sup> The legislature was clear in targeting only the proprietary activity of providing telecommunications for sale to others, because operation of telecommunication facilities for internal use or to provide public records is not subject to taxation.<sup>323</sup>

Governmental immunity also is waived when the state or a local governmental entity is the seller or lessor in a taxable transaction. Under the general sales tax provision, "every *person* is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state."<sup>324</sup> A "person" is defined as "includ[ing] a political subdivision, municipality, state agency, bureau or department."<sup>325</sup> Although at first blush, the tax appears to be imposed on the *seller*, the statutes clearly provide

been validated on or before August 1, 1959.

*Id.*

317. *Id.* § 212.08(6) (enacted by 1969 Fla. Laws ch. 69-222, § 15).

318. 1971 Fla. Laws ch. 71-360, § 7. Today, the fourth sentence of FLA. STAT. § 212.08(6) provides:

This exemption does not include sales, rental, use, consumption, or storage for use in any political subdivision or municipality in this state of machines and equipment and parts and accessories therefor used in the generation, transmission, or distribution of electrical energy by systems owned and operated by a political subdivision in this state except sales, rental, use, consumption, or storage for which bonds or revenue certificates are validated on or before January 1, 1973, for transmission or distribution or expansion.

319. 1997 Fla. Laws ch. 97-197.

320. *Id.* § 5.

321. *Id.* §§ 1-2.

322. *Id.* § 4.

323. *Id.* §§ 1-2.

324. FLA. STAT. § 212.05 (emphasis added). Similar language is contained in FLA. STAT. § 212.03(1) (transient rentals tax), FLA. STAT. § 212.031(1)(a) (lease or rental of or license in real property tax), and FLA. STAT. § 212.04(1)(a) (admissions tax).

325. *Id.* § 212.02(12).



for the tax to be passed along to the *buyer* when a taxable transaction occurs.<sup>326</sup> To ease the administration and enforcement of the tax, the statutes place the responsibility for collecting and remitting the tax on the “dealer,” who is generally the seller in a taxable transaction.<sup>327</sup> The term “dealer” is very broadly defined and specifically “includes the state, county, municipality, any political subdivision, agency, bureau or department, or other state or local governmental instrumentality.”<sup>328</sup> If a dealer fails to collect the tax from the buyer, the dealer is liable for the amount of the tax due,<sup>329</sup> even when the “dealer” is the state or a local governmental entity.

The obligation of state and local governments to register with the Department of Revenue as a “dealer”<sup>330</sup> and collect sales taxes when they engage in taxable sales is clear.<sup>331</sup> However, the taxes collected by local governments seem to fall short of what would be expected. For example, in 1995, municipalities only collected \$36 million in sales tax,<sup>332</sup> representing some \$600 million of taxable transactions. More specifically, Miami reported slightly more than \$1 million in sales tax collections,<sup>333</sup> representing some \$17 million of taxable transactions, including leases of real property. However, in its budget for the fiscal year 1995-1996, Miami reported more than \$27 million in revenue from items such as parking rentals, pools admissions, rental properties, the Diner Key Marina, and the Coconut Grove and Miami Convention Centers<sup>334</sup> — all of which apparently should be subject to sales tax.

## V. GOVERNMENTAL IMMUNITY IN MISCELLANEOUS TAXES

The issue of intergovernmental immunity from taxation has arisen in the context of the imposition of several miscellaneous taxes in Florida. Municipalities are authorized by general law to impose a “public service tax”

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326. *Id.* § 212.07(1)(a). Section 212.07(1)(a) provides: “The privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer.” *Id.* In addition, subparagraph (2) further provides: “[s]uch tax shall constitute a part of [the sale] price . . . which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts.” *Id.* § 212.07(2).

327. *Id.* § 212.07(1)(a).

328. *Id.* § 212.06(2)(i).

329. *Id.* § 212.07(3). Criminal penalties also may be imposed under this provision. *Id.*

330. *Id.*

331. See 1975 Op. Att’y Gen. 075-267 (1975); 1973 Op. Att’y Gen. 073-249 (1973).

332. STATE OF FLORIDA DIV. OF MGMT. SERV., STATE ACCOUNTING SYS. (Jan. 9, 1997) (on file with the *University of Florida Journal of Law and Public Policy*).

333. *Id.*

334. City of Miami, Annual Budget, Fiscal Year 1995-1996, at 11-15 (1995) (on file with *The University of Florida Journal of Law and Public Policy*) (available from the Miami Dade Public Library).

on the purchase of electricity and other enumerated utility services.<sup>335</sup> Exemptions from this excise tax<sup>336</sup> are authorized by the following provision: "(5) A municipality may exempt from taxation hereunder the purchase of the taxable items by the United States Government, this state, or any other public body as defined in s. 1.01 . . . shall exempt purchases by any recognized church in this state for use exclusively for church purposes."<sup>337</sup>

Pursuant to this provision, it would seem that municipalities have the power to impose the tax on all purchasers of utilities, with the single mandatory exception of churches, and then only when used exclusively for church purposes.<sup>338</sup> The Florida Supreme Court held otherwise in *Dickinson*.<sup>339</sup> Tallahassee had adopted an ordinance imposing the tax on all purchases of electricity, water, and gas made within the city limits.<sup>340</sup> The ordinance exempted purchases made by churches and the federal government, but not purchases made by the state or any other public body.<sup>341</sup> Before Tallahassee actually made any attempt to collect the tax, Leon County, the Leon County School Board, and the state filed a declaratory action seeking to have the statute and the implementing ordinance held unconstitutional insofar as they imposed tax on utility purchases made by those governmental entities.<sup>342</sup> Tallahassee prevailed in the circuit court, but the Florida Supreme Court reversed, holding that the state, the county and the school board were immune from municipal taxation.<sup>343</sup> The court was not persuaded by Tallahassee's arguments that any immunity had been implicitly waived by the constitutional provision empowering municipalities to levy taxes when authorized to do so by general law,<sup>344</sup> and by the enactment of the general law, including the exemption quoted above, authorizing the public service tax.<sup>345</sup>

The governmental immunity doctrine has been held to apply in the

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335. FLA. STAT. § 166.231(1)(a).

336. See *State v. City of West Panama City Beach*, 127 So. 2d 665 (Fla. 1961); *Peninsular Tel. Co. v. City of Clearwater*, 39 So. 2d 473 (Fla. 1949).

337. FLA. STAT. § 166.231(5).

338. Purchases made by a church and used for schools, clinics, recreation areas, playgrounds, convents, or rectories do not qualify for the exemption, unless the activity constitutes a direct adjunct of the church and congregation. 1975 Op. Att'y Gen. 075-209 (1975).

339. 325 So. 2d at 4.

340. *Id.* at 2.

341. *Id.*

342. *Id.*

343. *Id.* at 4.

344. FLA. CONST. art. VII, § 9(a) (1968).

345. *Dickinson*, 325 So. 2d at 4.

context of Florida's documentary stamp tax.<sup>346</sup> The tax at issue in *Lewis v. The Florida Bar*<sup>347</sup> was imposed on a promissory note given by The Florida Bar Association to Barnett Bank. Under the statutes, both parties to the transaction are potentially liable for the tax,<sup>348</sup> and the Florida Department of Revenue assessed the bank for the tax on the transaction.<sup>349</sup> The bank then required The Florida Bar to pay the tax, pursuant to the terms of the loan agreement between the two parties, and The Florida Bar sued for a refund of the tax, asserting that it was immune from the tax.<sup>350</sup> The Florida Supreme Court, adopting the opinion of the First District Court of Appeal, held that the Florida Bar is "part of the judiciary [and therefore] is immune from taxation."<sup>351</sup> The court noted that even though the assessment had been made against the bank, it was common practice for banks to contractually obligate the borrower to pay such taxes, and thus the tax constituted "an indirect tax upon the tax immune body."<sup>352</sup>

In addition to the documentary stamp tax on obligations to pay money, which was involved in *Lewis*, Florida imposes another documentary stamp tax on deeds and other instruments relating to the transfer of interests in real property.<sup>353</sup> In *Florida Department of Revenue v. Orange County*,<sup>354</sup> the Department of Revenue asserted that the tax was due on a deed conveying "property to a county under threat of condemnation and in lieu of eminent domain proceedings and the county is contractually bound to pay" the tax.<sup>355</sup> The Florida Department of Revenue assessed the tax against the sellers of the real property, but the Florida Supreme Court, following *Lewis*, held that the tax would be an indirect tax on the county.<sup>356</sup> Because the conveyance was in the context of a condemnation proceeding, it was immune from tax:

We conclude that both the Constitution and public policy require that in the context of condemnation proceedings, the act of transferring property as part of an out-of-court settlement is immune from the documentary stamp tax. The immunity here arises by necessary implication from the sovereign attributes of eminent domain and

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346. FLA. STAT. §§ 201.01, 201.08 (1975).

347. 372 So. 2d 1121 (Fla. 1979), *aff'g* 358 So. 2d 897 (Fla. Dist. Ct. App. 1978).

348. FLA. STAT. § 201.17(1) (1975).

349. 358 So. 2d at 898.

350. *Id.*

351. *Lewis*, 372 So. 2d at 1122 (quoting 358 So. 2d at 899).

352. *Id.* (quoting 358 So. 2d at 899).

353. FLA. STAT. § 201.02(1) (1989).

354. 620 So. 2d 991 (Fla. 1993), *aff'g* 605 So. 2d 1333 (Fla. Dist. Ct. App. 1992).

355. *Id.* at 992 (quoting *Orange County v. Florida Dep't of Revenue*, 605 So. 2d 1333, 1335 (Fla. Dist. Ct. App. 1992)).

356. *Id.* at 992-93.

from article X, section 6 of the Florida Constitution. . . . [W]e need not and therefore do not address the question of whether a similar immunity presently exists in any other context. We limit our holding here solely to the context of condemnation proceedings.<sup>357</sup>

The governmental immunity doctrine has been applied in only a few instances in the context of taxes other than the ad valorem property tax and the sales tax. However, both the *Dickinson* case and the *Lewis* case illustrate that the doctrine should be applied more narrowly. In *Dickinson*, the legislature had clearly authorized municipalities either to tax, or to exempt, purchases of utility services by governmental entities, and yet the court applied the immunity doctrine. The *Lewis* court permitted a tax that was the legal liability of a bank to be avoided when the bank contractually shifted responsibility for payment of the tax to a governmental entity. Only in *Orange County* did the court appropriately apply the doctrine to a conveyance resulting from an out-of-court settlement of condemnation proceedings, when a conveyance by a judgment of condemnation would clearly have been immune.

## VI. CONCLUSION

In Florida, the sales tax and the ad valorem property tax are the largest sources of revenue for state and local governments, respectively, and thus, the confusion surrounding the proper application of the governmental immunity doctrine in these arenas is of most importance. There are several other instances, however, where the courts have explored the intersection between the governmental immunity doctrine and taxation. An important underlying theme in considering the proper application of the governmental immunity doctrine and taxation is that whenever a governmental entity allows its property to be used for something other than a “governmental-governmental” or exempt purpose, or whenever it engages in a transaction that would clearly be taxable if done by a private person, it distorts the commercial competitive market for that type of property or those kinds of transactions if the property or the transaction is not taxed. It is essential that the governmental immunity doctrine be relegated to its proper, limited role in taxation, in order for the tax system of this state to be fairly and uniformly administered.

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357. *Id.*

