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The "Public Purpose" and "Charitable" Tax Exemption in Florida: A Judicial Morass

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THE "PUBLIC PURPOSE" AND "CHARITABLE" TAX EXEMPTION IN FLORIDA: A JUDICIAL MORASS

> All exemptions being in the nature of special privileges or immunities, must be construed strictly in favor of the Sovereign in order to confine such exemptions to the limitations prescribed by said Sovereign; otherwise the law-making intent and the very purpose of government itself may be frustrated to the detriment of the public welfare and the common weal.
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> —*Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211, 216 (1939)

Tax exemptions, and their often ruinous consequences, are as old as the concept of taxation itself.[1] Article IX, section 1, of the Florida Constitution serves as the organic source of all ad valorem real property taxation within the state.[2] The taxing power under article IX, section 1, is inclusive of all real property in the state, but certain enumerated exceptions are provided by the constitution and general law.[3] The subject of concern here will be limited to exemptions arising from three sources: (1) article IX, section 1, of the Florida Constitution; (2) article XVI, section 16, of the Florida Constitution; and (3) the general exemption statute enacted under article IX, section 1.[4] Within this context primary emphasis will be placed upon the "charitable" and "public purpose" exemptions.

HISTORICAL BACKGROUND

The Florida Constitution establishes two sources of real property tax exemptions.[5] Article XVI, section 16, is a self-executing provision applicable to "corporations."[6] The section provides:

> The property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the peninsula of Florida, if the Legislature should so enact, whether heretofore or hereafter incorporated, shall be subject to taxation

1. PALMER, A HISTORY OF THE MODERN WORLD 162-63 (2d ed. 1956).
2. Miller v. Doss, 46 So. 2d 888, 889 (Fla. 1950).
3. Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211, 216 (1939); Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 237 (1936); Rast v. Hulvey, 77 Fla. 74, 80 So. 750, 753 (1919).
4. FLA. STAT. §192.06 (1965).
5. FLA. CONST. art. IX, §1; FLA. CONST. art XVI, §16.
6. Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 239 (1936).

> unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes.

The antecedents of article XVI, section 16 reach back to the Reconstruction Constitution of 1868.[7] The section was amended in the constitution of 1875.[8] The principal change at that time was to make the exemption dependent on the purpose for which corporate land was actually used as opposed to the purpose for which the corporation existed.[9] A corporation using land for private profit could no longer escape taxation on the ground that the organization was incorporated for a tax exempt purpose. The present wording of the section first appeared in the constitution of 1885.[10]

The second source of real property tax exemptions is found in article IX, section 1.[11] This is a non-self-executing provision[12] that has been judicially described as comprehending "the whole law for taxing real and personal property."[13] This section dates back to the Reconstruction Constitution.[14] Amendments were added in 1924[15] and 1944[16] bringing the section into its present form:[17]

> The Legislature shall provide for a uniform and equal rate of taxation, except that it may provide for special rate or rates on intangible property .... and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, education, literary, scientific, religious, or charitable purposes.

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7. FLA. CONST. art. XVI, §24 (1868): "The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such corporation be for religious, educational, or charitable purposes."

8. FLA. CONST. art. XVI, §24 (1875): "The property of all corporations whether heretofore or hereafter incorporated, shall be subject to taxation, unless *such property be held and used exclusively* for religious, educational, or charitable purposes." (Emphasis added.)

9. Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 239 (1936).

10. FLA. CONST. art. XVI, §16 (1885).

11. FLA. CONST. art. IX, §1.

12. Rast v. Hulvey, 77 Fla. 74, 80 So. 750, 752 (1919).

13. Miller v. Doss, 46 So. 2d 888, 889 (Fla. 1950).

14. FLA. CONST. art. XII, §1 (1868): "The Legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes."

15. Fla. Laws, S.J. Res. 358 (1923), *adopted*, (1924).

16. Fla. Laws, H.J. Res. 348 (1943), *adopted*, (1944).

17. FLA. CONST. art. IX, §1.

Aside from its non-self-executing nature, article IX, section 1, is distinguished from article XVI, section 16, in that (1) the provision is not limited solely to corporations[18] and (2) the land involved need not be held exclusively for any of the purposes enumerated.[19]

The relationship between these two distinguishing characteristics raises a complicated array of constitutional questions. The basic issues may be summarized as:

> (1) Does article XVI, section 16, apply to all types of incorporated organizations whether private, nonprofit, or public in nature?
>
> (2) May a corporation obtain an exemption under article IX, section 1, as well as under article XVI, section 16?
>
> (3) If a corporation may obtain an exemption under article IX, section 1, must this exemption be read in light of the "exclusive" use requirement of article XVI, section 16?

The answer to these queries does not come easily. It may be obtained only by a careful reading of a line of cases involving the statutory exemptions adopted under article IX, section 1.[20]

The "Charitable" and "Fraternal" Exemptions

The conflict between article IX, section 1, and article XVI, section 16, developed with the passage of chapter 18312 of the 1937 Florida session laws.[21] Until that time the general exemption laws under article IX, section 1, included the same "exclusive" use requirement found in article XVI, section 16:[22]

> The following property shall be exempt from taxation:
>
> . . . .
>
> Second. — All public property of the several counties, cities, villages, towns and school districts in this State, *used or intended for public purposes* . . . .
>
> Third. — Such property of educational, literary, benevolent, charitable and scientific institutions within the State as shall be *actually occupied and used by them solely for the purposes for which they have been or may be organized* . . . .

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18. State *ex rel.* Cragor Co. v. Doss, 150 Fla. 486, 8 So. 2d 15, 16 (1942).
19. *Ibid.*
20. FLA. STAT. §192.06 (2), (3) (1965).
21. Fla. Laws, 1937, ch. 18312.
22. FLA. REV. GEN. STAT. §697 (1920), *as amended*, FLA. COMPILED GEN. STAT. §897 (1927). (Emphasis added.)

Since the "sole use" standard of the third section of the statute was interpreted to mean "exclusive use,"[23] there was no need to distinguish between an unincorporated organization under article IX, section 1, and a corporation under article XVI, section 16. The same effect was achieved under the second part of the statute when the Florida Supreme Court in *City of Lakeland v. Amos*[24] construed "public purpose" as that land held in an exclusively governmental capacity, as opposed to a proprietary capacity.[25]

In 1937 the third part of the general exemption law was substantially amended.[26] The "sole use" requirement was abandoned and the applicable institutions were permitted to rent as much as fifty per cent of their property to private concerns without loss of tax exempt status. The only limitation imposed was that the profits derived from the rent had to be applied to the purpose for which the institution was created. The rental percentage was amended to seventy-five per cent in 1939[27] and has since remained at that figure.[28]

Once a different standard had been established under article IX, section 1, it became necessary to define the scope of article XVI, section 16. There was little doubt that article XVI, section 16, applied to the private profitmaking corporation,[29] but did it also apply to the nonprofit corporation? If it did, the nonprofit corporation would be required to meet the strict test of article XVI, section 16, while an identical nonprofit association would come under the liberal test of article IX, section 1. The Florida Supreme Court first reacted to the problem in *State ex rel. Miller v. Doss*.[30] The case arose as a mandamus proceeding questioning the validity of a tax exemption granted to the Lake County Medical Center, a nonprofit Florida corporation. Although the property involved met all the statutory exemption requirements,[31] the court held that the exemp-

23. Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211, 217 (1939); Rast v. Hulvey, 77 Fla. 74, 80 So. 750, 752 (1919).

24. 106 Fla. 873, 143 So. 744 (1932).

25. The holding is consistent with older Florida case law. See City of Bradentown v. State, 88 Fla. 381, 102 So. 556 (1924).

26. Fla. Laws, 1937, ch. 18312.

27. Fla. Laws, 1939, ch. 19376.

28. FLA. STAT. §192.06(3) (1965).

29. Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 239 (1936).

30. 146 Fla. 752, 2 So. 2d 303 (1941).

31. "The record presents the following material facts: that the property involved is a four story building; it is owned by the Lake County Medical Center, Inc., a corporation not for profit. The three upper floors are used exclusively by the Medical Center for charitable purposes. The first floor contains places of business rented to private persons. The rents are paid to the Medical Center and are used exclusively to operate the hospital." State *ex rel.* Miller v. Doss, 146 Fla. 752, 2 So. 2d 303, 304 (1941).

tion was invalid under article XVI, section 16. Part of the property was rented to private concerns and thus not devoted "exclusively" to charitable purposes. The plain implication of the holding was that the term "all corporations" in article XVI, section 16, included both profitmaking and nonprofit corporations.

Although the decision was logically consistent with the phraseology of article XVI, section 16, it soon led to inequitable results. In *State ex rel. Cragor Co. v. Doss*[32] the court considered the validity of tax exemptions granted to certain fraternal organizations. In sustaining the exemptions the court employed the rationale of the *Miller* case in reverse. "The record discloses that neither of the owners of the properties are corporations as contemplated by Section Sixteen of Article Sixteen of the Constitution so that provision has no application to the question."[33] Instead, article IX, section 1, was controlling and it was not necessary that the property be devoted exclusively to fraternal purposes.

The effect of the *Miller* and *Cragor* holdings was to make the existence or nonexistence of tax exempt status rest on the label attached to the organization. Although the presence of a profitmaking corporation might justify a difference in tax treatment,[34] there is no reason why a nonprofit incorporated medical center should be distinguished for tax exemption purposes from a nonprofit unincorporated medical center.[35] Tax consequences rest on the purpose that the organization actually serves, not on the formalities of incorporation.[36] The court itself recognized the inequities of the situation in a companion case to *Cragor,* also styled *State ex rel. Cragor Co. v. Doss.*[37] In this case the fraternal organizations were incorporated. They failed the test of article XVI, section 16, in that a small percentage[38] of the property

32. 150 Fla. 486, 8 So. 2d 15 (1942).

33. State *ex rel.* Cragor Co. v. Doss, 150 Fla. 486, 8 So. 2d 15, 16 (1942).

34. There would ordinarily be a difference in the substance of the organization. Except for rare instances such as that which occurred in Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232 (1936), the profitmaking corporation is not founded for charitable purposes.

35. *Cf.*, Miller v. Doss, 46 So. 2d 888, 889 (Fla. 1950); Rogers v. City of Leesburg, 157 Fla. 784, 27 So. 2d 70, 71 (1946).

36. Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 238 (1936); University Club v. Lanier, 119 Fla. 146, 161 So. 78, 79 (1935).

37. 150 Fla. 491, 8 So. 2d 17 (1942).

38. Two-thirds of the building owned by Leesburg Lodge No. 58 of the F. & A.M. was rented to private concerns with revenues from the rent used to retire the indebtedness on the property. The property of the Woman's Club of Leesburg consisted of a two-story building. One-sixth of the first floor was rented to the Works Progress Administration. The remainder of the first floor was occupied, at no charge, by the Leesburg Public Library. The second floor was rented out for private social affairs approximately five times per year. The rents received were applied to the operational maintenance of the property.

involved was rented to private business concerns. Relying completely on extra-jurisdictional authority,[39] the court held: "[W]hen a property is owned by a charitable association or corporation and part of it is used for the purposes of the association and the balance used for commercial or profit purposes, if severable that part used for the purpose of the corporation . . . may be exempt from taxation while that part used for profit may be taxed."[40]

This approach did not, however, correct the basic inequity. Under the statutory exemption a nonprofit unincorporated charitable organization renting less than seventy-five per cent of its property to private concerns was still entitled to a greater tax exemption than an identical incorporated charitable organization. The severing approach was nonetheless a step toward the eventual abandonment of *State ex rel. Miller v. Doss*.[41] Three years later in *Rogers v. City of Leesburg*[42] the court once again faced the situation of an incorporated nonprofit fraternal organization renting part of its property to private concerns. The court held that the property was *totally* exempt. The decision was based on two grounds: (1) that article XVI, section 16, was never intended to apply to nonprofit corporations and (2) that a tax exemption distinction between nonprofit corporations and unincorporated nonprofit organizations served no rational purpose.

The early decisions under article XVI, section 16, support the historical interpretation adopted in *Rogers*.[43] During the pre-Civil War era the state granted numerous tax exemptions to railroad corporations.[44] The exemptions had grown so pervasive that article XVI, section 16, was included in the Reconstruction Constitution primarily as a means of terminating what had become an intolerable situation.[45] Viewed in this light it seems reasonable to conclude that article XVI, section 16, is basically unrelated to the nonprofit corporation. Following this line of reasoning, the court in *Rogers* concluded:[46]

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39. Y.M.C.A. v. Lancaster County, 106 Neb. 105, 182 N.W. 593 (1921); Hibernian Benevolent Soc'y v. Kelly, 28 Ore. 173, 42 Pac. 3 (1895); 2 COOLEY, TAXATION 1442-44 (4th ed. 1924).

40. State *ex rel.* Cragor Co. v. Doss, 150 Fla. 491, 8 So. 2d 17, 18 (1942).

41. 146 Fla. 752, 2 So. 2d 303 (1941).

42. 157 Fla. 784, 27 So. 2d 70 (1946).

43. See Bloxham v. Florida Cent. & P.R.R., 35 Fla. 625, 17 So. 902 (1895); Palmes v. Louisville & N. Ry., 19 Fla. 231 (1882); Atlantic & Gulf R.R. v. Allen, 15 Fla. 637 (1876).

44. See Bloxham v. Florida Cent. & P.R.R., 35 Fla. 625, 17 So. 902, 917 (1895); Internal Improvement Act of 1855, Fla. Laws, ch. 610 (1855-1856).

45. Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 239 (1936).

46. Rogers v. City of Leesburg, 157 Fla. 784, 27 So. 2d 70, 71 (1946).

> It is not the function of courts to be didactic, but it is their function to square their judgments with reason . . . . [T]here is not an instance in the history of this state when the Legislature or the people have shown an intent to tax fraternal associations. They have repeatedly shown a contrary purpose, and the mere fact that these associations take a corporate name for the purpose of transacting their fraternal business does not deprive them of their exemption granted by the Constitution.

Thus, the tax exemption status of the nonprofit corporation is to be construed in light of article IX, section 1, not article XVI, section 16.[47]

From a tax policy standpoint there is good reason for placing the nonprofit corporation under article IX, section 1. To place it under article XVI, section 16, amounts to a triumph of form over substance. Nonetheless, if the nonprofit corporation is to gain an exemption under article IX, section 1, the exemption must fit within the confines of that constitutional provision. Article IX, section 1, is an inclusive taxing provision with certain enumerated exceptions.[48] To qualify for one of these exceptions the land must be used for "municipal, education, literary, scientific, religious or charitable purposes." The court in *Rogers* held that a corporate label should not deprive an organization of an exemption "granted by the Constitution." The problem ignored by the court was that article IX, section 1, does not permit exemptions for "fraternal" purposes. Although the general exemption statute permits such exemptions,[49] it is an elementary principle of constitutional law that a legislative enactment must conform to the limits imposed by a constitutional mandate.[50] A non-

47. Following the *Rogers* decision the tax assessor removed the Lake County Medical Center from the tax rolls. This was the same property that had been held nonexempt in State *ex rel.* Miller v. Doss, 146 Fla. 752, 2 So. 2d 303 (1941). The action of the tax assessor was once again challenged in a mandamus proceeding. The facts had not been changed; even the petitioning taxpayer was the same as in the earlier case. The court in Miller v. Doss, 46 So. 2d 888 (Fla. 1950), held that the property was exempt on the basis of its decision in *Rogers*. Since the facts in *Miller v. Doss* were identical with those in *State ex rel. Miller v. Doss*, there can be no doubt that the latter case has been abandoned by the court.

48. See cases cited note 3 *supra*.

49. FLA. STAT. §192.06(3) (1965): "Such property of educational, literary, benevolent, *fraternal*, charitable and scientific institutions within this state . . . ." (Emphasis added.)

50. This proposition was expressly recognized and applied to Florida tax exemptions in Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 239 (1936): "[T]he Legislature may by enactments not inconsistent with the intendments of the Constitution define 'educational purposes,' and thereby prescribe that class of property which may come within the exemption . . . . Or, the Legislature may . . . leave it to judicial construction to determine whether or not the purpose for which the property is held and used is an 'educational purpose.'

profit *charitable* corporation falls within article IX, section 1, but a nonprofit *fraternal* corporation has no such constitutional position.

Whereas a distinction based on corporate labels serves no useful tax function in this context, the distinction between a "fraternal" and a "charitable" organization is a matter of substance. The charity performs a valuable service for society in relieving the demands that would otherwise be placed on state welfare agencies.[51] The fraternal organization, on the other hand, is primarily a social or recreational organization.[52] Although many of these organizations also perform charitable services,[53] the statute does not make this a requirement for their tax exempt status. The standard invoked by the constitution is a "charitable" purpose, and it would seem that unless the fraternal organization can meet the requirements of a charity there is no constitutional or policy justification for granting it tax exempt status.[54]

The "Public Purpose" Exemption

The "public purpose" exemption dates back to the post-World War I era.[55] The wording of the statute has remained essentially un-

"We do not mean to say that the power vested in the Legislature to define property included within the exemption prescribed by the Constitution may be exercised in an arbitrary and unreasonable manner. Such Legislative definition would have to be in harmony with the intent of the Constitution."

In relation to this constitutional principle the court has also expressly stated: "Undoubtedly the Legislature is without power to provide for exempting from taxation any class of property which the Constitution itself makes no provision for exempting. The principle has been more than once affirmed in this state that the Constitution must be construed as a limitation upon the power of the Legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." L. Maxcy, Inc. v. Federal Land Bank, 111 Fla. 116, 150 So. 248, 250 (1933).

51. Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211, 217 (1939), quoting Congregational Sunday School & Pub. Soc'y v. Board of Review, 290 Ill. 108, 125 N.E. 7, 10 (1919): "'The fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and the consequent relief, to some extent of the burden upon the state to care for and advance the interests of its citizens.'"

52. See University Club v. Lanier, 119 Fla. 146, 161 So. 78 (1935); Johnson v. Sparkman, 159 Fla. 276, 31 So. 2d 863 (1947). This is not meant to imply that such organizations have no eleemosynary purposes. The point is that fraternalism standing alone, does not confer the benefits on the state which justify an exemption for charitable institutions.

53. The children's hospitals maintained by the "Shrine" are a case in point.

54. See Moffett v. Ashby, 139 So. 2d 133 (Fla. 1962); Johnson v. Sparkman, 159 Fla. 276, 31 So. 2d 863 (1947); Simpson v. Bohon, 159 Fla. 280, 31 So. 2d 406 (1947); University Club v. Lanier, 119 Fla. 146, 161 So. 78 (1935).

55. FLA. REV. GEN. STAT. §697 (1920): "The following property shall be exempt from taxation. . . . Second. All public property of the several counties, cities, villages, towns and school districts in this State, used or intended for

changed.[56] The statute establishes two requirements for an exemption: (1) that the land be owned by a municipal corporation and (2) that the land be used for a public function or purpose.[57] The statute does not require that the public function be actually *performed* by the municipality. A private profitmaking corporation may lease the land and maintain the public function without loss of the tax exemption.[58] Further, there is no *express* requirement that the land be devoted exclusively to a public purpose.

The early decisions were not inclined to adopt a liberal interpretation of this statute.[59] In *City of Lakeland v. Amos*[60] the municipality questioned the validity of a state tax imposed on profits received from the operation of a public utility system. The court held that a municipal corporation fell within the mandate of article XVI, section 16, and that its property was not exempt unless held in an exclusively governmental capacity. Since the operation of a public utility was proprietary, not governmental in nature, there could be no tax exemption.

The strict interpretation of this exemption continued until the early 1940's.[61] Unfortunately such consistency did not prevail. In 1939 the legislature authorized the city of Tallahassee to issue bonds for the purpose of constructing an office building.[62] The building was to be rented to federal, state, and county governmental agencies for profit. In *State v. City of Tallahassee*[63] the validity of the bonds was questioned on the ground that they were not issued for a "public purpose." The court, relying primarily on non-Florida case law,[64]

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public purposes . . . ."

56. FLA. STAT. §192.06 (2) (1965).

57. In this context it is important to note that the courts have used the constitutional term "municipal purpose" and the statutory term "public purpose" as functional equivalents. See State v. City of Tallahassee, 142 Fla. 476, 195 So. 402 (1940); City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744 (1932); City of Bradentown v. State, 88 Fla. 381, 102 So. 556 (1924).

58. Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965); see Comment, 18 U. FLA. L. REV. 708 (1966).

59. See City of Bradentown v. State, 88 Fla. 381, 102 So. 556 (1924); State v. Town of Belleair, 125 Fla. 669, 170 So. 434 (1936).

60. 106 Fla. 873, 143 So. 744 (1932).

61. City of St. Augustine v. Middleton, 147 Fla. 529, 3 So. 2d 153 (1941); Panama City v. Pledger, 140 Fla. 629, 192 So. 470 (1940); State v. Town of Belleair, 125 Fla. 669, 170 So. 434 (1936).

62. Florida Spec. Acts, 1939, ch. 20158.

63. 142 Fla. 476, 195 So. 402 (1940).

64. City of Sacramento v. Adams, 171 Cal. 458, 153 Pac. 908 (1915); State v. City of Lawrence, 78 Kan. 234, 100 Pac. 485 (1909); Merrick v. Amherst, 12 Allen (94 Mass.) 500 (1866); State *ex rel.* Bd. of Comm'rs v. Clausen, 95 Wash. 214, 163 Pac. 744 (1917). The only Florida case cited by the court was State *ex rel.* Gibbs v. Gordon, 138 Fla. 312, 189 So. 437 (1939).

held that the construction and operation of an office building for rent to other governmental agencies was a valid municipal purpose. The decision is important in two respects: (1) it represented a clear departure from the strict interpretation of public purpose and (2) it indicated that more substantial departures were to follow. Hidden within the body of the majority opinion, the court states: "The answer to what is a municipal purpose is not static. Each generation may determine its concept of these things."[65]

Following *State v. City of Tallahassee*[66] the judicial interpretation of public purpose entered into a period of liberalization.[67] While the public purpose concept underwent considerable expansion, the exclusive use requirement of article XVI, section 16, was increasingly ignored.[68] Even under the strict interpretation of the 1930's the court had recognized that a corporation was not prevented from obtaining an article XVI, section 16, exemption merely because it was operated for profit.[69] The profit, however, had to be "incidental" to the religious, scientific, municipal, educational, literary, or charitable purpose of the corporation.

Lummus v. Florida-Adirondack School, Inc.[70] was the first case to develop fully the "incidental profit" rationale. The corporation involved was an educational institution the profits of which were devoted solely to the living expenses of the owners and operators of the school. In determining that the profits were incidental the court did not adopt an express test to serve as a guideline for the resolution of this issue. Instead, future courts were permitted to exercise their judgment on the question according to the facts of each particular case. The effect was to open the door to a wholesale dilution of the exclusive use requirement of article XVI, section 16. By 1956 the private operation of an automobile raceway on public land was adjudged to create sufficient community-wide economic benefits that the corporate profit received was incidental to this public purpose.[71]

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65. State v. City of Tallahassee, 142 Fla. 476, 195 So. 402, 403 (1940).

66. 142 Fla. 476, 195 So. 402 (1940).

67. See State v. Inter-American Center Authority, 84 So. 2d 9 (Fla. 1955); Seaboard Airline R.R. v. Peters, 43 So. 2d 448 (Fla. 1949). For a complete discussion of the interpretation given to public purpose see text following the subheading THE PUBLIC PURPOSE EXEMPTION: A CONCEPTUAL DILEMMA, *infra*.

68. See State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34 (Fla. 1956). A complete discussion of this area will be found under the subheading THE PUBLIC PURPOSE EXEMPTION: A CONCEPTUAL DILEMMA, *infra*.

69. See Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232 (1936).

70. *Ibid.*

71. State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34 (Fla. 1956).

THE RESULT

There are four assets on which a state may base its tax revenue: property, personal income, sales, and excises.[72] State taxation in Florida rests largely on sales and excise assets, while local taxation is primarily property oriented.[73] What is the effect of tax exemptions on local tax assets? In 1961, Arthur L. Cunkle, an economist with the Florida Legislative Reference Service, illustrated the difficulties in attempting to answer this query:[74]

> We do not know the amount of taxes paid by homeowners, though the total is very large. We do not know the amount of taxes or exemptions in Florida cities, though both are large. We do not know the size of inventory taxes, though there are perennial attempts to exempt inventories. We do not know how vacant lots, farms, forests, subdivisions, personal property and hotels are assessed, though we know there are as many answers as there are assessors. We do not know how much property other than homes is exempt from taxation, or for what purposes.

Although many problems still remain unsolved, the present situation is not as dismal as the one that faced Mr. Cunkle in 1961.

The 1965 tax assessment rolls indicate that the assessed value of all nonexempt real property in Florida amounts to 17,036,887,343 dollars.[75] The total value of all exempt real property, excluding the homestead allotment, is 3,901,172,696 dollars.[76] Thus in Florida for every $4¼ billion worth of taxable property there is approximately $1 billion worth of exempt nonhomestead property. The effect is that the local tax basis, on the average, is reduced by approximately twenty per cent.[77]

A random sampling from some of the more populous counties indicates the following relationship between exempt and nonexempt real property:[78]

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72. SLY, TAX ASSETS AND TAX POLICIES IN FLORIDA 1 (1964).
73. *Id.*, at 9-13.
74. *Id.*, at iv.
75. Analysis by County of the 1965 Ad Valorem Tax Rolls (compiled annually by the Office of the State Comptroller [Fla.] and available on request).
76. *Ibid.*
77. This figure is determined by adding the worth of nonexempt property to the worth of exempt property and then computing the percentage exempted from the total potential tax base.
78. Analysis by County of the 1965 Ad Valorem Tax Rolls.

	Assessed Value Nonexempt Real Property	Valuation of Land Wholly Exempt
Broward County	$1,569,592,288	$ 38,788,948
Dade County	4,565,223,715	1,135,325,190
Duval County	1,295,374,600	321,702,560
Escambia County	206,993,270	24,897,540
Hillsborough County	474,114,857	192,600,430
Pinellas County	1,256,448,370	177,639,780
Polk County	574,698,280	120,889,319
Sarasota County	261,215,780	14,074,940

Because of peculiar local conditions some counties have as much as fifty per cent of their taxable basis exempted. Alachua County, with the University of Florida and the state medical center, has 243,424,570 dollars worth of nonexempt real estate as compared with 244,310,625 dollars worth of exempted property.[79] Brevard County, with the federal facilities at Cape Kennedy, has 474,910,005 dollars worth of nonexempt property and 976,928,970 dollars worth of wholly exempted property.[80]

The statewide trend during the past four years has been toward an increased valuation in both categories of property.[81]

	Assessed Value Real Estate Nonexempt	Ratio — Per cent		Valuation of Land Wholly Exempt
1962	$10,058,594,667	10.0:1.6	(16.0%)	$1,605,933,340
1963	10,447,314,575	10.4:1.7	(16.3%)	1,718,789,950
1964	13,831,811,107	13.8:2.3	(16.6%)	2,345,958,830
1965	17,036,887,343	17.0:3.9	(22.9%)	3,901,172,696

Although there is no means of determining how much of this increase in value is to be attributed to reassessment or natural appreciation, it is significant to note that the percentage base has steadily increased over the four-year period. Regardless of the source of this increase, the effect is that the exempted percentage of the tax base has shown a steady pattern of growth in relation to the taxable base.

It is a matter of common knowledge that modern society has placed ever increasing demands on local, state, and federal govern-

79. *Ibid.*

80. *Ibid.*

81. These figures are taken from the Analysis by County of the 1965 Ad Valorem Tax Rolls and similar reports for the years 1962, 1963, and 1964.

ment.[82] If these demands are to be met, they must be financed from the only source of income available to government – taxation. The state legislature[83] and several independent study groups[84] have already recommended a thorough reexamination of all facets of state and local tax policy. An excellent starting point from both a legislative and judicial frame of reference would be the loosely worded and loosely interpreted tax exemptions granted under the Florida Statutes.[85]

THE CHARITABLE EXEMPTION: PROFITABLE ALTRUISM

Article IX, section 1, as interpreted, and its enacting statute provide for an exemption to nonprofit corporations that serve a charitable purpose. The rationale behind this exemption was expressed in *Miami Battlecreek v. Lummus*[86] when the Florida Supreme Court, quoting from an Illinois case,[87] stated: " '[T]he fundamental ground on which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and the consequent relief, to some extent of the burden upon the state to care for and advance the interest of its citizens.' "

There is little doubt that an institution that confers a substantial charitable benefit upon the state may be entitled to a favorable tax treatment.[88] It is equally clear that an institution that confers only an incidental benefit upon the state is not intended to be within the exempting statute.[89] For example, a manufacturing corporation may serve the interests of the state by reducing unemployment.[90] Yet all such corporations are not entitled to preferential tax treatment. Beyond this level, however, the *Miami Battlecreek* decision does not

82. SLY, *op. cit. supra* note 72, at 30-31: "Florida is a rapidly growing state. It is almost an 'exploding state.' With a predicted population of 8 million in 1970, there will be more pressures for services and more pressures for revenues . . . ."

83. See Report and Recommendations of the Joint Legislative Interim Committee on Finance and Taxation [Fla.] (1959-1961).

84. See Report and Recommendations of the Florida Citizens Tax Council (March 1957); KILPATRICK, FINANCING STATE AND LOCAL GOVERNMENTS IN FLORIDA (1957).

85. FLA. STAT. §192.06 (1965).

86. 140 Fla. 718, 192 So. 211, 217 (1939).

87. Congregational Sunday School & Pub. Soc'y v. Board of Review, 290 Ill. 108, 125 N.E. 7, 10 (1919).

88. See, *e.g.*, Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230 (Fla. 1963); Orange County v. Orlando Osteopathic Hosp. Inc., 66 So. 2d 285 (Fla. 1953); Miller v. Doss, 46 So. 2d 888 (Fla. 1950); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939).

89. State v. Town of North Miami, 59 So. 2d 779, 784-85 (Fla. 1952).

90. *Ibid.*

attempt to define the conceptual source of the exemption – that is, the term "charitable." The rationale of the case is more a justification for charitable exemptions than a test to determine what types of corporations are comprehended by the statute.

The language of the Florida Constitution[91] and the statute[92] gives no insight into the meaning and scope of the charitable exemption. The burden has fallen upon the courts to construe the provisions and to define and limit those types of corporations that fall within the term.[93] Defining "charitable" has proved to be no easy task. The character and functions of charitable corporations are almost as varied as the number of such corporations.[94] Furthermore, the distinction between a charitable corporation and a noncharitable corporation is often hard to detect. It would be extremely difficult to devise a precise test that would be broad enough to encompass all charitable corporations and yet exclude noncharitable or quasi-charitable corporations.

The Florida courts have not formulated any comprehensive definition of charitable. Instead, the courts have examined the character, function, and purpose of each institution claiming a charitable exemption and then determined on such evidence whether the institution came within the confines of the statute.[95] Thus, the test has been an individual one for each particular corporation.[96] An individual test may reach the most equitable results in a particular case, but such a test does not offer persuasive standards for determining whether other corporations should or should not be granted exemptions. The result is confusion and uncertainty over what constitutes a charitable corporation in Florida.[97]

Further complicating a determination of the standards imposed upon charitable corporations is the fact that all the reported cases have been concerned with the effect of an *operational gain* on the charitable status of the corporation, as well as the *basic character* of

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91. FLA. CONST. art. IX, §1.

92. FLA. STAT. §192.06 (3) (1965).

93. Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 239 (1936).

94. Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 180 (2d D.C.A. Fla. 1965).

95. See, *e.g.*, Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176 (2d D.C.A. Fla. 1965); Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230 (Fla. 1965); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939).

96. Haines v. St. Petersburg Methodist Home, Inc., *supra* note 95, at 181.

97. *Compare* Presbyterian Homes of the Synod of Florida, Inc. v. City of Bradenton, Case No. 34,232, Fla. Sup. Ct., Oct. 5, 1966, *with* Fellowship Foundation v. Paul, 86 So. 2d 808 (Fla. 1956).

the property itself.[98] It should be noted that these are two distinct issues.[99] The charitable exemption is given to the corporation on the basis of how it uses the land. The use of the operational gain does not necessarily classify a corporation as charitable. The use of the profits is not the same thing as the use of the land. Nonetheless, the use of profits may serve as a guideline in determining whether such use is inconsistent with the charitable purpose of the property.[100] The courts, however, have not made a clear distinction in this area.[101]

Effect of Operational Gain

A discussion of the effect of an operational gain on the charitable corporation presupposes that the corporation is of a charitable nature. For the purposes of this discussion, therefore, the charitable nature of any corporation will be assumed with discussion being limited to the effect of an operational gain on this charitable nature.

In *Lummus v. Florida-Adirondack School, Inc.*, the first case to concern the effect of operational gain, the Florida Supreme Court stated: "The earning of a livelihood or even a mere incidental surplus, if any, would not be deemed to effect a change in the purpose for which the private property was held and used by the individual or organization."[102] The court held that an educational institute could charge the recipients for its services and not lose its exempt status. The principle was adhered to and expanded considerably by the courts in later cases involving charitable corporations.[103] In *Miami Battlecreek v. Lummus*[104] a private hospital brought an action to restrain the tax collector of Dade County from assessing its property. In 1936, the hospital derived a total of 170,613.65 dollars from paying patients and expended 39,381.97 dollars on charity cases.

98. See Presbyterian Homes of the Synod of Fla., Inc. v. City of Bradenton, note 97 *supra*; Maxwell v. Good Samaritan Hosp. Ass'n, 161 So. 2d 31 (Fla. 1964); Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230 (Fla. 1963); Fellowship Foundation, Inc. v. Paul, note 97 *supra*; Orange County v. Orlando Osteopathic Hosp., 66 So. 2d 285 (Fla. 1953); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939); Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176 (2d D.C.A. Fla. 1965).

99. Johnson v. Sparkman, 159 Fla. 276, 31 So. 2d 863, 864 (1947). For a comparison of this case with those in other jurisdictions see Annot., 34 A.L.R. 634, 659 (1925) and Annot., 172 A.L.R. 1067 (1948).

100. Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211, 218 (1939).

101. See, *e.g.*, Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230 (Fla. 1963); Orange County v. Orlando Osteopathic Hosp. Inc., 66 So. 2d 285 (Fla. 1953).

102. 123 Fla. 819, 168 So. 232, 240 (1936).

103. See Orange County v. Orlando Osteopathic Hosp. Inc., 66 So. 2d 285, 288 (Fla. 1953); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211, 218 (1939).

104. 140 Fla. 718, 192 So. 211 (1939).

There was a substantial operational gain realized during the year. The profits were reinvested in the corporation for expansion and modernization of its facilities. In upholding the tax exempt status of the corporation, the court held that profits do not alter the character of a charitable institution provided such funds are "devoted exclusively and in good faith to the charitable . . . purposes of the institution."[105] The court went on to say that such practices as payment of dividends to stockholders or exorbitant and unreasonable salaries to the officers "would prevent the institution from being exempt from taxation."[106]

In *Haines v. St. Petersburg Methodist Home, Inc.*,[107] the Second District Court of Appeal held that exorbitant profits, accumulated in order to cover the expense of persons in the retirement home who subsequently became unable to pay, were not sufficient justification to prevent the charitable status from expiring. The case is confusing, however, because the court did not make a clear distinction between the uses of an operational gain and the basic character of the property itself. It is not certain whether the manner in which the profit was used altered the charitable status of the corporation or if the operational gain was one of the factors used to determine whether the property was not devoted to a charitable purpose.

The case is important, however, because it may mark the first time that a Florida court has considered the proposition that a high operational gain is itself inconsistent with the charitable exemption. Consider for example, the following hypothetical situation: *X* Corporation, a private clinic, treats twenty per cent charity patients and eighty per cent paying patients. In one year the corporation realized a profit of 100,000 dollars, which is reinvested in the corporation. Under *Miami-Battlecreek*, the corporation would remain tax exempt because its profits were used consistent with the charitable purpose. Under *Haines*, however, it is arguable that the profits per se showed that the corporation was not using the land as a charity within the meaning of the constitution and statutes. Such an argument would be predicated upon the idea that there is a basic inconsistency between a charitable corporation and one that realizes substantial profits regardless of the use that is made of those profits.

Although the *Haines* court did not expressly state that exorbitant profits were inconsistent with "charity," the case implies such a result. Nonetheless, with the exception of the implication in *Haines*, the Florida Supreme Court's position on the effect of an operational gain may be summarized as:

105. 140 Fla. 718, *id.* at 218.
106. *Ibid.*
107. 173 So. 2d 176 (2d D.C.A. Fla.), *cert. denied*, 183 So. 2d 230 (Fla. 1965).

(1) a charitable corporation may charge its recipients who are able to pay and not lose its charitable status, and

(2) a charitable corporation may have a substantial operational gain and not lose its charitable exemption provided such profits are used consistent with the charitable purposes of the corporation.

The Character of a Charitable Corporation in Florida

No effort has been made to define a charitable corporation as it exists under Florida law. The discussion has been limited to the uses of an operational profit that will cause the charitable status to expire. As previously stated, the courts have not devised a precise test to determine whether a corporation is or is not, in fact, a charity.[108] Instead, the courts have recited the facts surrounding the function and purpose of the corporation and declared on the basis of those facts that the corporation was or was not entitled to a tax exemption.[109] The situation is further complicated in that the courts often neglect to state the specific facts on which the decision is based.[110] Thus to a large extent, what does or does not constitute a charitable corporation is limited to the factual situations presented by the cases decided by lower appellate courts. The charitable exemption cases in Florida can, however, be divided into essentially two categories — (1) factual situations involving retirement homes,[111] and (2) factual situations involving hospitals or clinics.[112] Although it is not clear why the courts should differentiate between the two types of corporations,[113] it appears that markedly different results have been reached depending more on whether the corporation was a hospital or retirement home than on the amount of charitable work actually done.[114]

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108. See cases cited note 98 *supra*.

109. Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 180-81 (2d D.C.A. Fla. 1965).

110. Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230, 231 (Fla. 1963).

111. Presbyterian Homes of the Synod of Florida, Inc. v. City of Bradenton, Case No. 34,232, Fla. Sup. Ct., Oct. 5, 1966; Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176 (2d D.C.A. Fla. 1965); Fellowship Foundation v. Paul, 86 So. 2d 808 (Fla. 1956).

112. See Orange County v. Orlando Osteopathic Hosp. Inc., 66 So. 2d 285 (Fla. 1953); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939).

113. See Justice Robert's dissent in Presbyterian Homes of the Synod of Florida, Inc. v. City of Bradenton, Case No. 34,232, Fla. Sup. Ct., Oct. 5, 1966.

114. *Compare* Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211, 214 (1939) (charitable *hospital* with operation gain of $141,221.62), *with* Presbyterian Homes of the Synod of Fla., Inc. v. City of Bradenton, note 113 *supra* (charitable *retirement home* with no operational gain).

Retirement Homes. In *Fellowship Foundation, Inc. v. Paul*[115] the corporation operated a home for elderly Christian people. Its purpose was to carry on educational, religious, and charitable activities. The chancellor found that leases for rooms ran as high as 10,500 dollars for the life of the patient. The facts disclosed that every room in the home was being paid for by the patients and that the home had never treated a nonpaying patient. On these facts the trial court dismissed the claim of the foundation and refused to enjoin the tax assessor from placing the property on the tax rolls. On appeal, the Florida Supreme Court remanded on the ground that the record did not conclusively show that the foundation was not charitable. The court did not, however, indicate any guidelines for the trial court to follow in making a new determination as to whether the foundation was charitable. For example, could the lower court grant an exemption to the foundation if there were a single charity case? Or was it necessary for the foundation to devote a substantial amount of its facilities to charitable work before it could qualify for a favorable tax treatment?

A recent decision indicates that a retirement home must provide more than a nominal amount of charity work to qualify for the exemption. In *Presbyterian Homes of the Synod of Florida, Inc. v. City of Bradenton*[116] the Florida Supreme Court affirmed a lower court decision holding that a retirement home was not exempt when only twenty-three of some 126 patients paid less than the average monthly maintenance cost. The facts of the case also disclosed that each patient was required to pay a "founder's fee" of 5,000 dollars before entering the hospital. The court, however, did not state whether it based the decision on the fact that there were so few nonpaying patients or that the founder's fee negated any inference of a charitable purpose. Further complicating the decision is that the case was ostensibly decided under article XVI, section 16, of the Florida Constitution, not under article IX, section 1. Since article IX, section 1, does not have an "exclusive use" requirement, the question remains open whether the corporation would have been granted an exemption if it had brought its action under this constitutional provision.

Presbyterian Homes and *Fellowship Foundation* are the only two cases concerning charitable exemptions for retirement homes that have been entertained by the supreme court. In *Fellowship Foundation* the court reversed and remanded the case to the lower court to determine if the home was a charity, without offering any guidelines to assist the lower court in its determination. The *Presbyterian Homes* case was a per curiam decision merely asserting the facts and

115. 86 So. 2d 808 (Fla. 1956).
116. Case No. 34,232, Fla. Sup. Ct., Oct. 5, 1966.

affirming on the basis of the lower court opinion. The only reasoned opinion in this area is by the Second District Court of Appeal in *Haines v. St. Petersburg Methodist Home, Inc.*[117]

In a well-written opinion, the *Haines* court classified the home as a "profitable business" and refused to grant an exemption. Citing an Oregon case,[118] the court based its decision on a consideration of the following factors:

> (1) the application or use of the corporate income;
>
> (2) a comparison between the treatment given to paying patients and that given to nonpaying patients;
>
> (3) whether the corporation treated paying and nonpaying patients;
>
> (4) a comparison of the fees collected from paying and indigent patients;
>
> (5) whether a charitable trust fund had been created by the corporation;
>
> (6) if the corporation had no operation gain, whether there were offsetting advantages that compensated for the lack of profit; and
>
> (7) the provisions made in the bylaws as to the distribution of assets in the event of corporate dissolution.

After an analysis of these factors the court stated:[119]

> We thus conclude that the plaintiff, though altruistically motivated and serving a socially constructive purpose, is nevertheless a financially viable institution whose property is not entitled to exemption from taxation.

Though the court did not elaborate on the full significance of all the factors brought forward, the decision nonetheless presents a possible test for resolving the factual question of what is a charity. By doing so the court has come to the essence of the problem in this area, and the solution offered, although perhaps not perfect, is better than the *ad hoc* undefined approach applied by the Florida Supreme Court.

Hospitals. In the area of charitable hospitals the *ad hoc* approach of the supreme court is applied with abandon. Since the court has determined the tax status of hospitals in Florida on the basis of the particular facts of each case, the holdings are thus limited to those

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117. 173 So. 2d 176 (2d D.C.A. Fla.), *cert. denied*, 183 So. 2d 211 (Fla. 1965).

118. Oregon Methodist Homes, Inc. v. Horn, 226 Ore. 298, 360 P.2d 293 (1960).

119. Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 185 (2d D.C.A. Fla. 1965).

facts. Nothing would be gained by an elaborate recitation of the facts presented in each case. Suffice it to say that the supreme court has granted exemptions to: (1) a corporation that expended 39,391.97 dollars on charity cases and collected 170,613.65 dollars from its paying patients,[120] (2) a corporation that averaged 34 19/100 per cent of its net revenues from supposedly "charity cases,"[121] and (3) a corporation that had a per patient income in excess of per patient cost.[122] In each of these cases the corporations involved were profitmaking in nature. They escaped taxation by reinvesting the profits in the corporation. But, if the use of the land was not charitable, it is difficult to see why the mere act of reinvestment prevented taxation. If operational gain destroys the charitable nature of the property, the profits are not being reinvested into a charitable pursuit — they are in substance being reinvested into income producing capital.

Some confusion and uncertainty exists over what constitutes a charitable corporation in Florida. Consequently it is difficult to determine whether Florida has adopted tax policies that serve the best interest of the state. It is beyond the scope of this note to evaluate the relative merits of a restrictive as opposed to a liberal charitable exemption policy. One area of the tax policy, however, warrants further consideration — granting charitable exemptions to corporations that realize substantial profits. Under Florida law viable and lucrative businesses can receive a charitable exemption.[123] These businesses, of course, do provide charity work that is a benefit to the state. The issue, however, is whether the interests of the citizens of the state are advanced more by allowing lucrative businesses a charitable exemption than by assessing their property and using the revenue to finance state services. Charitable exemptions are special favors by the state and should be limited to institutions that are organized primarily for a charitable purpose. Such exemptions should not be extended to profitable corporations even if they provide charity incident to their operation.[124] The charitable exemption should serve as incentive and assistance to true charities and not as extra income to thriving enterprises.

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120. Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939).

121. Orange County v. Orlando Osteopathic Hosp. Inc., 66 So. 2d 285 (Fla. 1953).

122. Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230 (Fla. 1963) (by implication).

123. See Orange County v. Orlando Osteopathic Hosp. Inc., 66 So. 2d 285 (Fla. 1953); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939).

124. See generally Annot., 34 A.L.R. 634, 636 (1925).

THE PUBLIC PURPOSE EXEMPTION: A CONCEPTUAL DILEMMA

The "public purpose" concept has wide application in both state and municipal law. The concept serves as a condition precedent to governmental action in three areas:

(1) private property may not be taken by eminent domain unless the taking is for a valid public purpose;[125]

(2) the credit of the state may not be pledged, nor governmental funds appropriated, for other than a public purpose;[126] and

(3) the property of a municipality is subject to taxation unless held for a public purpose.[127]

The varied application of the term illustrates its conceptual nature. As such, the interpretation given it will vary according to the social context and environmental predisposition of the court.[128]

In the tax exemptions area both article IX, section 1, and article XVI, section 16, grant exemptions to land held and used for "municipal purposes." The general exemption laws under article IX, section 1, grant exemptions to land held and used for a "public purpose."[129] The courts have ignored this phraseological distinction, interpreting "municipal" purpose and "public" purposes as functional equivalents.[130] Further, by restricting the scope of the statutory public purpose exemption to land held and used in an *exclusively* governmental or municipal capacity,[131] the courts have in effect removed the basic distinction between article IX, section 1, and article XIV, section 16.[132]

A public purpose may, of course, benefit both public and private interests.[133] The presence of some private benefit will not contaminate the public purpose as long as the private benefit is "incidental."[134]

125. FLA. CONST. art. XVI, §29.

126. FLA. CONST. art. IX, §§5, 10.

127. FLA. CONST. art. IX, §1; FLA. STAT. §192.06 (2) (1965).

128. State v. City of Tallahassee, 142 Fla. 476, 195 So. 402, 403 (1940).

129. FLA. STAT. §192.06 (2) (1965).

130. See cases cited note 57 *supra*.

131. See State *ex rel.* Burbridge v. St. John, 143 Fla. 544, 197 So. 131, 133 (1940); City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744, 747 (1932); City of Bradentown v. State, 88 Fla. 381, 102 So. 556, 558 (1924).

132. It will be recalled that article XVI, §16, bases its exemption on an "exclusive" municipal purpose, while article IX, §1, contains no "exclusive" requirement.

133. Gate City Garage, Inc. v. City of Jacksonville, 66 So. 2d 653, 659 (Fla. 1953): quoting 18 AM. JUR. *Eminent Domain* §41 (1938): "'The general rule is settled that the exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which will not itself warrant the exercise of the power.'"

134. *Ibid.*

The difficulty is that the term "incidental," like the term "public purpose," is subject to varying and often conflicting interpretations according to the viewpoint of the court at a particular time. The treatment accorded these terms by the Florida Supreme Court illustrates some of the conceptual difficulties involved.

"Public Purpose"

The Florida Supreme Court's interpretation of public purpose was once so restrictive as to regard the operation of a public utilities system as essentially proprietary, not governmental, in character.[135] In the 1940's, however, a more expansive concept began to appear.[136] In *State ex rel. Harper v. McDavid*[137] the court held that the operation of a low rent housing project on public land was a valid municipal purpose entitling the property to a tax exemption. In discussing public purpose the court stated: "The time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental but that concept has been very much expanded and a municipal purpose may not comprehend all activities essential to the health, morals, protections, and welfare of the municipality."[138]

The housing project in *Harper* was authorized by act of the state legislature.[139] The act conferred tax exempt status on the land by virtue of a legislative declaration that the property was held and used for a municipal purpose. In construing the declaration the court held that the legislative definition of public purpose would be accepted as binding unless it constituted a clear abuse of discretion. The declaration was upheld in that (1) the land was not held for profit, but restricted to low-income groups and (2) the project materially contributed to the morals, safety, and general welfare of the municipality. On the basis of this test the court has continued to exempt the property of similar housing authorities.[140] Nonetheless, the property must comply with both elements of the test. In *Adams v. Housing Authority of Daytona Beach*[141] a housing authority had been established with the authority to lease land to commercial and

135. City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744, 747 (1932).
136. State v. City of Tallahassee, 142 Fla. 476, 195 So. 402, 403 (1940).
137. 145 Fla. 605, 200 So. 100 (1941).
138. 145 Fla. 605, *id.* at 102.
139. Fla. Laws 1937, ch. 17981.
140. See Garrett v. Northwest Fla. Regional Housing Authority, 152 Fla. 551, 12 So. 2d 448 (1943); Smith v. Housing Authority of Daytona Beach, 148 Fla. 195, 3 So. 2d 880 (1942); State *ex rel.* Grubstein v. Campbell, 146 Fla. 532, 1 So. 2d 483 (1941).
141. 60 So. 2d 663 (Fla. 1952).

industrial concerns. The court regarded this as a violation of the first element of the test, that is, the land was used for profit and not restricted to low-income groups.

The liberal interpretation of public purpose was soon extended beyond housing projects to the field of public utilities. In *Saunders v. City of Jacksonville*[142] the municipality sought to enjoin Clay County from collecting property taxes on electrical equipment used by the city utility system. The property involved was outside the city limits. The county contended that since power was sold to both residents and nonresidents of the city, the land was not held and used for an exclusively municipal purpose. In effect, the county was attempting to limit municipal purpose to those functions that benefit only the residents of the municipality. The court, however, held:[143]

> The exemption inures to the property itself when *held* and *used* for municipal purposes. The Constitution makes no requirement as to its location. If the property serves a municipal purpose to the residents within Jacksonville, then it likewise serves a municipal purpose to the residents outside of Jacksonville. Its character does not change when the power line traverses the city or county line.

The court distinguished *City of Lakeland v. Amos*[144] on two grounds: (1) that the earlier case concerned excise taxes on utility revenues, not real property taxes, and (2) that municipal purpose was no longer restricted to strictly governmental functions. "[W]here the claim for exemption [is] dependent upon the property being used for a *public* purpose, it [is] not essential that it be shown to be used as a *governmental* purpose. . . . [T]he exemption [attaches] if the property [is] held and used for the health, comfort and welfare of the public."[145] This was basically a restatement of one of the elements of the test for public purpose developed in *State ex rel. Harper v. McDavid*.[146] The court did not, however, carry over the other element of the test: that the land be used for non-profitmaking purposes. Further, the court has continued to grant exemptions to municipally owned utilities regardless that the system was operated for profit.[147]

The Florida court has applied an identical approach to municipally owned and operated recreational facilities.[148] Such facilities

142. 157 Fla. 240, 25 So. 2d 648 (1946).

143. 157 Fla. 240, *id.* at 650.

144. 106 Fla. 873, 143 So. 744 (1932) (holding that the operation of a public utilities system was proprietary, not governmental, in character).

145. Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648, 651 (1946).

146. 145 Fla. 605, 200 So. 100, 102 (1941).

147. See Gwin v. City of Tallahassee, 132 So. 2d 273 (Fla. 1961).

148. See, *e.g.*, State v. Daytona Beach Racing & Recreational Facilities Dist.,

were regarded as contributing significantly to the general welfare in that they provided a leisure outlet for the community and promoted tourism.[149] The presence of this contribution to the general welfare was sufficient to establish a public purpose irrespective whether part of the land was used for profitmaking pursuits.[150] Under such circumstances the profitmaking purpose was not viewed as objectionable as long as it remained "incidental" to the public purpose on which the exemption was founded.

"Incidental Profit"

By the late 1940's the "public purpose" concept had gone through a three-stage evolution:

(1) land held and used for a public purpose was originally restricted to public land employed in a strictly governmental capacity;[151]

(2) land held and used for a public purpose was then expanded to include non-profitmaking functions on public land that materially contributed to the general welfare;[152] and

(3) finally, land held and used for a public purpose was interpreted to mean any function performed on public land that contributed to the general welfare.[153]

In its third and present stage of development a public function may be profitmaking,[154] or non-profitmaking,[155] in nature. The fact that the operation of the function results in profit to the municipality,[156] or to a private concern,[157] does not prevent an exemption so long as the profit is incidental to the public purpose.

The use of the term "incidental" would seem to imply a balancing test in this area. How much of the property involved is held for

89 So. 2d 34 (Fla. 1956); State v. Inter-American Center Authority, 84 So. 2d 9 (Fla. 1955); State v. Escambia County, 52 So. 2d 125 (Fla. 1951).

149. State v. Inter-American Center Authority, *supra* note 148, at 12-14.

150. Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349, 354 (Fla. 1965); Panama City v. State, 93 So. 2d 608, 612-14 (Fla. 1957).

151. As is illustrated by City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744, 747 (1932).

152. As is illustrated by State *ex rel.* Harper v. McDavid, 145 Fla. 605, 200 So. 100, 102 (1941).

153. As is illustrated in cases cited note 148 *supra.*

154. See State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34 (Fla. 1956).

155. See State v. Inter-American Center Authority, 84 So. 2d 9 (Fla. 1955).

156. See State v. City of Miami, 76 So. 2d 294 (Fla. 1954) (international trade "mart" owned by the city).

157. See State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34 (Fla. 1956) (public speedway leased by a private corporation).

profit? Does the private benefit outweigh the public purpose? An analysis of the decisions indicates, however, that the court does not in fact apply a balancing approach. In *State v. Town of North Miami*[158] the municipality attempted to issue bonds for the purpose of constructing industrial facilities. The facilities were then to be leased to a private profitmaking corporation. The court held that the construction of commercial or industrial facilities was not a valid municipal purpose. It reasoned that:[159]

> Every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new super market, a new department store, a new meat market, a steel mill, a crate manufacturing plant, a pulp mill, or other establishments which could be named without end, may be of *material benefit to the growth, progress, development and prosperity of a municipality*. But these considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose.

The court, however, has been willing to find a public purpose when a private profitmaking corporation operates a recreational facility on public land. In *State v. Daytona Beach Racing & Recreational Facilities District*[160] bonds were issued for the purpose of constructing the Daytona Beach International Automobile Speedway. The speedway was to be leased to a private profitmaking corporation for a period of at least six months per year. The court dismissed cases such as *Adams v. Housing Authority of Daytona Beach*[161] and *State v. Town of North Miami*[162] by reasoning that: "[T]hese cases involved attempts of the city to use public funds to develop property for private benefit . . . . In each of these cases the private purpose was predominant, not incidental to a public purpose."[163] What made the private purpose predominant in *Town of North Miami* and only incidental in *Daytona Beach Racing*? One possible distinction is that the industrial corporation was to have exclusive use of the land in the former case while in the latter the municipality had the right to use the land when the speedway was not in operation. The court, however, did not choose to rely on this distinction. The public purpose involved encompassed more than occasional use of the facilities

158. 59 So. 2d 779 (Fla. 1952).
159. *Id.* at 784-85. (Emphasis added.)
160. 89 So. 2d 34 (Fla. 1956).
161. 60 So. 2d 663 (Fla. 1952).
162. 59 So. 2d 779 (Fla. 1952).
163. State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34, 36 (Fla. 1956).

for nonprofit recreational activities. The community-wide economic benefits derived from the operation of the speedway per se were regarded as the public purpose justifying the issuance of bonds. The implication is that even if the municipality had no right to use the facility, the project still would have been for a valid public purpose.

The above implication would seem to result in a clear conflict between *Daytona Beach Racing* and *Town of North Miami.* If the profits from the exclusive operation of a recreational facility are "incidental" to the public purpose, the profits from operation of an industrial complex should also be "incidental" to the community-wide economic benefits derived therefrom.[164] The only answer to the seeming paradox is that these decisions are not in fact based on the incidental profit rationale. The rationale is no more than a label whereby the court may sustain a profitmaking project, *if in the judgment of the court, it is for a valid public purpose.*

When the purpose of the project is *recreational,* the project may be operated in part[165] or exclusively[166] for profit without the loss of its nature as a public purpose. The court does not, however, regard the construction of industrial or manufacturing facilities as a proper public purpose. In *State v. Clay County Development Authority*[167] an attempt was made to issue bonds for the purpose of constructing an industrial plant to be leased to a private corporation. The plant was to be placed on a small portion of the land held by the authority. The remainder of the land was being used for public recreational facilities. These facts were closely related to those that occurred in *Panama City v. State*[168] when the municipality issued bonds to construct a recreational area with a small portion of the land being rented to private profitmaking concerns. The distinction was that the private concerns in *Panama City* were food and concession stands, which contributed to the over-all recreational purpose of the land. On the other hand, the purpose of the profitmaking firm in *Clay County Development Authority* was basically unrelated to the function of the remainder of the land as a recreational area:[169]

> The dominant and paramount purpose is to lend the credit of the county to a private corporation . . . . The only possible public purpose which it serves is to promote the general development of the area by furnishing employment to the resi-

164. See Justice Terrell's dissent in State v. Suwannee County Dev. Authority, 122 So. 2d 190, 194 (Fla. 1960).

165. Panama City v. State, 93 So. 2d 608, 612-14 (Fla. 1957).

166. See State v. City of Miami, 76 So. 2d 294 (Fla. 1954).

167. 140 So. 2d 576 (Fla. 1962).

168. 93 So. 2d 608 (Fla. 1957).

169. State v. Clay County Dev. Authority, 140 So. 2d 576, 580 (Fla. 1962).

> dents of Clay County . . . . If we approve the issuance of bonds by the public authorities of this state to build and finance private enterprises . . . in order to alleviate unemployment and to promote the economic development of the area, then there is no limit to the extent to which the credit of the State and its authorities may be extended to private interests.

To justify government financing of industrial development more must be shown than that such development will contribute to the general economic welfare. The purpose of the project must be related to some recognized public purpose — recreational facilities,[170] education,[171] traffic[172] or transportation control,[173] et cetera.

From Confusion to Clarity

Cases such as *Clay County Development Authority* have restricted the public purpose concept. The implication in the tax exemption area is that a profitmaking concern on public land may obtain an exemption only if its purpose is related to some recognized public purpose.[174] But does sound tax policy *ever* justify a real property tax exemption in favor of a profitmaking operation? The basic assumption behind real property taxation is that property may be taxed by the state since it is the state that protects those rights and privileges incident to ownership.[175] The basic policy behind tax exemptions is that certain land uses are of such benefit to the state that a special tax privilege is justified.[176] When a nonprofit corporation operates a public function, it benefits the state.[177] Further, this benefit is conferred without corresponding private profit to the corporation. Considering the absence of a profit incentive, the *purpose of the corporation* seems essentially public in nature.

A profitmaking corporation, on the other hand, derives private benefit when it undertakes the operation of a public function. Al-

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170. See Hanna v. Sunrise Recreation, Inc., 94 So. 2d 597 (Fla. 1957); Panama City v. State, 93 So. 2d 608 (Fla. 1957).

171. See State v. Board of Control, 66 So. 2d 209 (Fla. 1953).

172. See Gate City Garage, Inc. v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953).

173. See Seaboard Air Line R.R. v. Peters, 43 So. 2d 448 (Fla. 1949).

174. A comparison of State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34 (Fla. 1956), *with* Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965) illustrates how easily the public purpose justifying the issuance of bonds is carried over into the tax exemption context.

175. SLY, TAX ASSETS AND TAX POLICIES IN FLORIDA 9 (1964).

176. See case cited note 51 *supra*.

177. Miller v. Doss, 46 So. 2d 888, 889 (Fla. 1950).

though a change in corporate label does not affect the *use of the land,*[178] it does seem to alter the basic *purpose of the corporation.* Why does a profit corporation undertake to operate a public function? Realistically speaking, it is absurd to state that its motives are primarily altruistic. Franchises to operate public facilities are sought because they are a sure investment. A concession at a beach or sports arena is a valuable economic right. Is not this economic benefit, conferred by the state, sufficient compensation without the "iceing" of preferential tax treatment?

The 1961 report of the Florida Joint Legislative Committee on Finance and Taxation was in apparent agreement with the tax policy discussed above.[179] The committee recommended a series of amendments to the exemptions under Florida Statutes, chapter 192. The report states: "The primary purpose of the amendments is to require persons now exempt from taxation who engage in profit making enterprise not contemplated by the Florida Constitution to share in the cost of providing governmental services."[180] In line with this policy statement the committee suggested that chapter 192 be amended by adding a new section to the effect that:[181]

> (1) 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.
>
> (2) This section shall not apply to property described in subsection (1) when:
>
> the property is used *exclusively* for religious, scientific, municipal, educational, literary or charitable purposes . . . .

The suggested amendment was apparently designed to eliminate tax exemptions on land held by profitmaking organizations. The only exception was for land devoted exclusively to the purposes enumerated in subsection two. The suggested amendment was adopted

178. Rogers v. City of Leesburg, 157 Fla. 784, 27 So. 2d 70, 71 (1946).

179. See generally Report and Recommendations of the Joint Legislative Interim Committee on Finance and Taxation 39-43 (1959-1961).

180. *Id.* at 41.

181. *Id.* at 42. (Emphasis added.)

verbatim by the 1961 legislature.[182] The legislature, however, added a proviso exempting property:[183]

> [O]wned or used by the state, any county, municipality, or public entity or authority created by statute and . . . leased or otherwise made available to such person, firm, corporation, partnership or organization . . . *in the performance by the public body of a public function or public purpose authorized by law* . . . .

Although the court has not had occasion to rule on the above provisions, they do not seem to have changed the law substantially. The "exclusive use" requirement is left open to judicial construction, and there is precedent holding that this requirement does not necessarily exclude profit-producing property that is otherwise exempt.[184] The exclusive use requirement would have been more meaningful if the legislature had adopted another proposal of the committee:[185]

> *Definition of exclusive use* — The term "exclusive use" or "exclusively" whenever used in connection with, or describing any exemption under this chapter, is interpreted to render inoperative the exemption *for any use of property which is not fully, completely, and specifically for the exempt purpose.* Any deviation from this definition will not qualify that proportionate part of the subject property otherwise used to the exemption.

In the absence of a provision such as this, or a strengthened judicial interpretation, "exclusive use" will continue to be the same vague concept that has confused Florida tax law for years.

By enacting subsection (2) (c) to Florida Statutes, section 192.62, the legislature apparently sought to codify the present judicial interpretation of the public purpose exemption. The subsection permits exemptions for profitmaking use of public land so long as that use is related to a valid public purpose. Such a provision operates as a substantial qualification on both the underlying policy and the desired effect of the committee's original proposal. The provision leaves

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182. FLA. STAT. §192.62 (1), (2) (a) (1965).

183. FLA. STAT. §192.62 (2) (c) (1965). (Emphasis added.)

184. See Lummus v. Florida Adirondack School, Inc., 123 Fla. 810, 168 So. 232, 240 (1936). The *Florida Adirondack* case was brought under the exclusive use requirement of article XVI, §16, and it is possible that the court could attach a more rigid definition to a specific *legislative* requirement of exclusive use. Nonetheless, the other exceptions under FLA. STAT. §192.62 (1965) are so pervasive as to make such an interpretation unlikely.

185. Report and Recommendations, *supra* note 179, at 42. (Emphasis added.)

a loophole in section 192.62 whereby the profitmaking corporation can escape paying its share in the cost of government services.

The Florida Supreme Court, however, may have decided to adopt a judicial solution to the problem. In *Brandes v. City of Deerfield Beach*[186] the municipality issued bonds for the purpose of constructing a baseball stadium. The facilities were to be leased to a private corporation, which would then rent the park to the Pittsburgh Pirates during the spring training season. During the remainder of the year the park was to be rented to minor league teams. The court held that the project was not a valid public purpose.

As was pointed out by the dissent, the case represents a clear departure from precedent such as *State v. Daytona Beach Racing & Recreational Facilities District.*[187] The over-all purpose of the sports complex was recreational in nature, contributing to the community-wide welfare. As such it seems to meet the *Daytona Beach Racing* test for public purpose. Although it is too early to make an accurate assessment of *Deerfield,* it is possible that the case represents an abandonment of the tax policy announced in *Daytona Beach Racing.* In the future the rule may be that the private operation of a public function may be considered exempt only when that private operation is of a nonprofit nature. If and when that day comes, the court will be able to say with honesty that the tax policy of Florida is consistent with the principle:

> All exemptions being in the nature of special privileges or immunities, must be construed strictly in favor of the Sovereign in order to confine such exemptions to the limitations prescribed by said Sovereign; otherwise the law-making intent and the very purpose of government itself may be frustrated to the detriment of the public welfare and the common weal.
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> —*Miami Battlecreek v. Lummus,* 140 Fla. 718, 192 So. 211, 216 (1939).

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186. 186 So. 2d 6 (Fla. 1966).
187. 89 So. 2d 34 (Fla. 1957).