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AD VALOREM TAXATION OF LEASEHOLD INTERESTS IN GOVERNMENTALLY OWNED PROPERTY

BONNIE ROBERTS

I. INTRODUCTION

To remedy a situation currently fraught with confusion and inequity, the Florida Constitution Revision Commission devoted a portion of its time to the question of taxation of leasehold interests in governmentally owned property held by private individuals and entities.¹ Under current Florida law, leasehold interests in governmentally owned property are subject to ad valorem taxation unless expressly exempted.² Since the inception of ad valorem taxation of leasehold interests in 1961, constitutional and statutory provisions have exempted certain leasehold interests. Numerous changes in these constitutional and statutory provisions, however, have kept the legal standards relevant to leasehold tax exemptions in a state of confusion. Moreover, inequity has arisen in that some leasehold interests which were tax-exempt at the beginning of the lease are now subject to ad valorem taxation by virtue of the changed exemption standards. Thus, a lessee who finds himself in this position must now pay an unexpected tax bill in addition to the regular rental payment on the leasehold interest.

The revision commission initially took up the issue of leasehold tax exemptions in order to provide relief to lessees of governmentally owned property who had allegedly relied on the tax-exempt status of their leasehold interests.³ The first proposal made to the commission was simple and straightforward: All existing leasehold interests in governmentally owned property were to be exempt from ad valorem taxation. To accomplish this objective, the commission adopted Proposal 206, which stated: "Ad valorem taxes on leaseholds of property owned by the United States, State of Florida, or any political subdivision, authority, municipality, or other public body shall not be applicable to existing international or interstate commerce facilities, maritime, transportation, military, sports, recreational or other leasehold interests."⁴

¹. The scope of this note pertains only to the question of ad valorem taxation of leasehold interests in governmentally owned property. The discussion does not relate to the taxable nature of leasehold interests in privately owned property.
². FLA. STAT. § 196.001 (1977) provides: "Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law: . . . (2) All leasehold interests in property of the United States, of the state, or any political subdivision, municipality, agency, authority, or other public body corporate of the state."
⁴. Proposal 206, which was cosponsored by Commissioners Kenneth Plante and Yvonne
Although Proposal 206 was adopted by a wide margin, its passage was not uncontested. Opponents of the proposal questioned the merits of a wholesale exemption of any and all such existing leasehold interests which did not consider the use to which the leased property was being put. To illustrate the broad scope of the proposed exemption, Commission Chairman Talbot "Sandy" D'Alemberte cited the example of a Miami yacht club which could, under Proposal 206, qualify for a property tax exemption on lands leased from the state and used solely for recreational purposes. This, D'Alemberte suggested, was an exemption the State of Florida should not grant. Amid growing concern about the broad scope of the exemption, Proposal 206 was referred to a select committee for further consideration.

After hearing testimony, the committee substantially revised the proposal and reported back to the commission. The provision that the commission finally approved for the ballot in November is a narrower and more specific exemption. Although Proposal 206 would have granted a wholesale exemption to all existing leasehold interests, the final proposed revision would place certain restrictions on that exemption:

All leasehold interests created prior to January 1, 1978, in property owned by the United States, the state, or any political subdivision, municipality, authority, district, agency or public body corporate shall be exempt from ad valorem taxes when:

(1) The leasehold interests were created pursuant to legislation or lease agreements which exempted, or which covenanted to exempt, such leasehold interests from ad valorem taxes, or which covenanted to indemnify or hold harmless the lessee from any ad valorem taxes levied in respect of the leased premises, or

(2) The property is leased for use in connection with providing air, ground or water transportation, or is leased for use in connection with providing services to the public engaged in air, ground or water transportation; provided however, no leasehold interest shall be exempted by the provisions of this paragraph (2) if, prior
to January 1, 1978, there shall have been a voluntary payment of ad valorem taxes levied in respect of such leasehold interest.\textsuperscript{9}

Another important distinction between Proposal 206 and the final proposed revision is that although the former made no mention of exempting leasehold agreements concluded after January 1, 1978, the latter implicitly allows this to be done by law. The proposed revision provides:

\textit{All leasehold interests in property owned by the United States, the state, or any political subdivision, municipality, authority, district, agency, or public body corporate may be exempted from ad valorem taxation as provided by law when the property is leased for a public purpose for use in connection with providing air, ground, or water transportation, whether or not for private profit,\textsuperscript{10} or is leased for a public purpose for use in connection with providing necessary services, whether or not for private profit,\textsuperscript{11} to the public engaged in air, ground or water transportation.}\textsuperscript{12}

Finally, the proposed revision adopted for the November ballot contains an additional section which reads: \textit{"The exemption of leasehold interests from ad valorem taxation provided by subsections (c) and (d) shall not be granted to any lessee who discriminates in its membership, services or other activities on account of race, religion, sex or physical handicap."}\textsuperscript{13}

Thus, in moving from the wholesale exemption for all existing leasehold interests to the more restricted exemptions embodied in the final revision proposal, the commission intended to provide relief only to that narrow class of lessees who, in the commission's estimation, had received unfair treatment by the application of the 1968 constitution and implementing legislation. Because the final revision is a response to the problems created by the 1968 constitution, a review of the history and theory of leasehold taxation in Florida is necessary for an evaluation of the scope and effect of the proposed constitutional amendment.

\begin{itemize}
\item \textsuperscript{9} Fla. C.R.C., Rev. Fla. Const. art. VII, § 3(c) (May 11, 1978).
\item \textsuperscript{10} The language "whether or not for private profit" was inserted by the commission on April 14, 1978. Commissioner Donald H. Reed proposed the additional language, which was adopted by a vote of 36-0. 30 Fla. C.R.C. Jour. 566 (Apr. 14, 1978).
\item \textsuperscript{11} See note 10 supra.
\item \textsuperscript{12} Fla. C.R.C., Rev. Fla. Const. art. VII, § 3(d) (May 11, 1978).
\item \textsuperscript{13} Id. § 3(e). Proposed by Commissioners Thomas H. Barkdull, Jr. and Jesse J. McCrary, Jr., this rather noncontroversial portion of the amendment serves merely to deny an exemption to any lessee who discriminates on the basis of the enumerated grounds. For a very broad discussion of this amendment, see 2 Transcript of Fla. C.R.C. proceedings 79-83 (Mar. 9, 1978).
\end{itemize}
II. HISTORICAL PERSPECTIVE

A. The Theory of Leasehold Taxation

At common law, a leasehold interest in property was treated as personal property rather than real property and was, therefore, not subject to ad valorem taxation. Florida courts, however, have traditionally held that the legislature could vary this common law rule by statute. In 1957, in Park-N-Shop, Inc. v. Sparkman, the Florida Supreme Court all but invited the legislature to enact such legislation by stating that although such leasehold interests were not presently taxable, "we are not conscious of any reason why the legislature could not set up machinery for that purpose . . . ."

The parties advocating taxation in Sparkman argued that taxation was necessary, not as a source of additional revenue, but rather as a means of equalizing the competitive positions of businessmen who had the benefits of leasehold interests in government property and businessmen who owned their own property. The competing businessmen may be initially in the same economic position. But the businessman who owns his property suffers an economic disadvantage in that he must pay ad valorem taxes while the businessman who leases from the government is not taxed. To the extent that the two businesses use the same amount of services

15. Thalheimer v. Tischler, 46 So. 514 (Fla. 1908); Oliver v. Mercaldi, 103 So. 2d 665 (Fla. 2d Dist. Ct. App. 1958).
16. 99 So. 2d 571 (Fla. 1957).
17. Id. at 574. At issue in Sparkman was the taxable status of leasehold interests held by private businessmen on county-owned property. The chancellor found the leasehold interests to be taxable as tangible personal property. The county was willing to accept this determination, but the appellant insisted that the leases should be subject to an ad valorem tax. The supreme court rejected the positions of the chancellor and the appellants and held that the leasehold interests in county-owned property were not subject to taxation.
18. Id. at 572. In basing the theory of leasehold taxation on an attempt to equalize competitive positions, advocates of the tax apparently overlook the property owner's inherent advantage of being able to deal with his property in whatever manner he chooses. The lessee, on the other hand, finds his use of leased property circumscribed by the terms and duration of the lease. This distinction in the quality of ownership serves as the rationale for subjecting the property owner, but not the lessee, to ad valorem taxation in the purely private lease agreement. When the lessee leases governmentally owned property, however, he automatically becomes subject to ad valorem taxation.

The differing treatment of leasehold interests in governmentally owned and privately owned properties may be traced to the character of the lessor. When a private property owner leases to a commercial enterprise and both parties profit from the arrangement, public opinion applauds the arrangement as a good business deal. When a governmental unit is the lessor, however, a policy question arises as to the government's equal treatment of all its citizens and enterprises. To avoid the appearance of impropriety that occurs when the government gives a competitive advantage to a commercial enterprise, advocates of the tax urge that it must be imposed on such leasehold interests.
provided by the taxing unit, such as police and fire protection, the property owner is required to pay for services not only to his business but to the lessee's business as well. In this way, free enterprise is thwarted, and the lessee is given an unfair economic advantage. Assessment of ad valorem taxes against the leased property would reestablish equality in competitive positions.

Four years after the Sparkman decision, the 1961 Florida Legislature accepted the invitation offered by the court and enacted a statute, section 192.62(1), authorizing ad valorem taxation of leasehold interests in governmentally owned property. Not all leasehold interests needed to be taxed, however, because not all such interests were being used in a commercial setting in competition with private businesses. So the legislature turned its attention to framing an appropriate exemption provision.

A significant limitation on the legislative authority to frame any property tax exemption is the general rule that all statutory exemptions must be based on authorization granted in the Florida Constitution. Thus, before granting any exemption from leasehold taxation, the legislature had to find authorization in the 1885 constitution.

Two sections of the 1885 constitution afforded the basis for an exemption. Article IX, section 1 permitted the legislature to exempt by law property used for "municipal, education, literary, scientific, religious or charitable purposes." Article XVI, section 16 provided an exemption for corporate property held and used exclusively for the same specified purposes. Relying on these provisions, the 1961 legislature exempted leasehold interests from ad valorem taxation if the underlying property was being used for a "public purpose."

19. Ch. 61-266, § 1, 1961 Fla. Laws (repealed 1971), states:

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.


21. The two provisions were distinguishable in that art. IX, § 1 was applicable to all real property but required implementing legislation while art. XVI was limited to corporate property and was generally held to be a self-executing provision. Lummus v. Miami Beach Congregational Church, 195 So. 607 (Fla. 1940); Lummus v. Florida Adirondack School, 168 So. 232 (Fla. 1936). Contra, Jasper v. Measemanor, 208 So. 2d 821 (Fla. 1968).

22. Ch. 61-266, § 1, 1961 Fla. Laws 497 (repealed 1971), states:

(2) This section shall not apply to property described in subsection (1) when:

... the property is owned or used by the state, any county, municipality, or public
In addition to this general statutory exemption enacted in 1961, the legislature from time to time passed special acts exempting specific leasehold interests. These acts always contained a legislative finding that the underlying property was being used in a manner consistent with a public purpose. It was of some significance that although the constitutional provisions in articles IX and XVI referred to use for "municipal purposes," the legislature based the statutory exemptions on use for a "public purpose." Subsequent cases construing the legislation, however, found the terms "municipal purposes" and "public purposes" coextensive, thereby avoiding a clash between the constitutional and statutory sections.

Although the 1961 law appeared on its face to require taxation of most leasehold interests used in profitmaking ventures, judicial interpretation severely limited its reach. In Daytona Beach Racing & Recreational Facilities District v. Paul, the first in a series of cases involving taxation of the Daytona International Speedway, the court was forced to determine the scope of the taxing statute and the municipal/public purposes exemption. The case arose when the City of Daytona Beach leased 374 acres of city-owned property to the Daytona Beach Racing and Recreational Facilities District. A special act of the 1955 legislature created the district and provided that any racing and recreational facilities constructed by the district would be exempt from taxation.

A ninety-nine year lease between the city and the district provided that the city would not tax the leased property. The district planned to issue revenue bonds to finance construction of a racetrack. The bond issue was validated by the Florida Supreme Court, but the attempted sale was unsuccessful. The district then subleased the property to the Daytona International Speedway Co-


25. 157 So. 2d 156 (Fla. 1st Dist. Ct. App. 1963), rev'd, 179 So. 2d 349 (Fla. 1965).


27. State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34 (Fla. 1956).
poration under a fifty-year lease with a twenty-five year renewal option. The corporation's primary consideration for the leasehold was its obligation to build the racetrack at its own expense. The lease between the district and the corporation provided that the corporation would not be liable for any taxes assessed on the leased land.

In 1960 and 1961, Volusia County assessed the leased property for ad valorem taxes. The corporation, the district, and the city all sued to enjoin collection of this tax. The First District Court of Appeal held the leasehold interest taxable, stating that "while a project may be of great benefit to the public, if its primary purpose is to benefit private persons or a private corporation, it is not a municipal purpose." The Florida Supreme Court reversed this decision in 1965, holding that under article IX, section 1 of the 1885 constitution the exemption should be granted. The court reasoned that the speedway's contribution to the economic, commercial, and residential development of the Daytona Beach area was indeed a public purpose, and that, in this context, a public purpose was equivalent to a municipal purpose.

The supreme court's holding in Daytona dealt a substantial blow to the legislature's attempt to tax leasehold interests. The exemption of a racetrack simply because the facility stimulated the local economy implied a broad construction of the public purpose test. The decision placed most commercial lessees in precisely the same position as they were before the legislative enactments—untouched and unaffected by ad valorem taxation. Thus, businessmen who owned their own property found themselves still subsidizing governmental services to commercial lessees of governmentally owned property.

B. The Erosion of Constitutional Change

The drafters of the 1968 Florida Constitution attempted to deal
with the problem by limiting the constitutional grounds on which an exemption could be based. The 1968 constitution states: "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." The constitution appears to specify three requirements for the exemption. First, the property must be owned by a municipality. This requirement was a significant change from article IX, section 1 of the 1885 document, which referred to property being held or used for enumerated purposes but placed no restrictions on ownership of the property. The second requirement of the 1968 constitution is that the municipally owned property must be used "exclusively by it," that is, by the municipality. The third constitutional requirement is that the use to which the property is put must serve a municipal or public purpose.

Pursuant to the 1968 constitution, the 1971 Florida Legislature enacted a sweeping reform of chapters 192 and 196 of the Florida Statutes. The legislature repealed all the statutory provisions, both general laws and special acts, relevant to leasehold taxation and exemption. In their place, the legislature substituted a provision stating that all leasehold interests in governmental property were taxable unless expressly exempted by law. The lawmakers provided an express exemption to leaseholds "only when the lessee serves or performs a governmental, municipal, or public purpose or function . . . ." Governmental, municipal, or public purpose or function was defined as a use which 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."

When read together, the provisions of article VII, section 3(a) of the 1968 constitution and the 1971 statutory modifications substantially tighten the requirements of an exemption. No longer, or so it seemed, could a leasehold interest such as that involved in Daytona be exempted simply because the leasehold interest served a "public purpose" in the broadest sense of that term. Instead, the new provi-

33. Id. (codified at Fla. Stat. § 196.012(5)). For the text of the statute, in part, see note 2 supra.
35. Id. § 196.012(5).
sions required taxation of all leasehold interests not expressly exempted by law, with an express exemption granted to only those interests owned and used exclusively by a municipality in a manner consistent with the performance of governmental functions or the allocation of public funds.

Although the new constitutional and statutory requirements seemed clear, the judicial application of these requirements to leasehold interests proved to be complex. In 1973, the Florida Supreme Court considered the new requirements in *Dade County v. Pan American World Airways, Inc.* At issue in *Pan American* was the taxation of the airline's leasehold interest in property at Miami International Airport. The real estate involved was owned by Dade County, leased to the Dade County Port Authority, and subleased to the airline. When Dade County attempted to tax the leasehold interests, the airline challenged the validity of the assessment. The trial court enjoined collection of the taxes, and the Florida Supreme Court affirmed, thus approving an exemption.

Dade County tried to use the constitutional requirements to defeat the exemption. Turning first to the requirement in article VII, section 3(a) that the leasehold interest be owned by the municipality in order to merit an exemption, the county attempted to distinguish the ownership of the property interests involved by pointing out that although the municipality owned the real estate, the airline owned the interest in question, the leasehold. Since the constitutional language extends only to interests owned by the municipality, the county argued that the leasehold interest owned by the airline could not satisfy the requirement of municipal ownership. Without satisfactory explanation, the court rejected the argument as being without merit. According to the majority, "[t]here is no require-

36. 275 So. 2d 505 (Fla. 1973).

37. Although art. VII, § 3(a) expressly grants an exemption only to municipally owned property, the section has been applied with equal force to property owned by a county or the state. The reason for this apparent discrepancy stems from the tax status of state and county property as opposed to municipal property. Municipal property would be taxable but for the exemption in art. VII, § 3. State and county property, on the other hand, is immune from taxation and requires no specific exemption to codify that immunity. Thus, there is simply no need for a constitutional provision restating the immunity of state and county property. *Dickinson v. City of Tallahassee,* 325 So. 2d 1 (Fla. 1975). See also R. Shevin, Report and Recommendations of Attorney General Robert L. Shevin to the 1978 Constitution Revision Commission 147 (June 1977). As discussed in the text accompanying note 20 supra, without a constitutional basis, the legislature cannot exempt from taxation any leasehold interest. The joinder of the two rules of construction would appear to require taxation of all leasehold interests in state and county property. To avoid this harsh result, the Florida courts have, with little or no discussion of the problem, interpreted art. VII, § 3 as applying to all governmentally owned property, whether it be owned by the state, a county, or a municipality.

38. Justice Ervin, however, based his dissent on that argument and urged that an exemp-
ment in Article VII, § 3(a) (1968), or old Article XVI, § 16 (1885), that the municipality own the leaseholds; the municipality must only own the property as it does here.”

In holding that a lessee could qualify for an exemption so long as the municipality owned the underlying property, the Pan American court also eroded a portion of the second constitutional requirement—that the property be used exclusively by the municipality. Although the court in Pan American did not deal directly with the argument that the only exempt use contemplated by the constitution was use by a municipality and not be a lessee, rejection of this argument was implicit in the court’s conclusion that a lessee may qualify for the exemption.

After glossing over the requirements of ownership and use by the municipality, the supreme court was left with only the third constitutional requirement, that the property be “used exclusively . . . for municipal or public purposes . . . .” Dade County argued that this phrase required total devotion of the property to public purposes. Since the airline used its leasehold interest for the private purpose of making a profit, the county maintained that the airline’s use of the leased property was not “exclusively” for public purposes. Again, the supreme court rejected the county’s argument.

It is of some significance that in adopting a definition of use for a “public purpose” the court did not look to the statutory definition of the term found in section 196.012(5). Indeed, the only mention the court made of the 1971 statutory reform was in a brief footnote which did no more than acknowledge the existence of the new statutory provisions. Two reasons may be offered to explain the court’s failure to use the statutory definition of public purpose. First, the court seemed concerned that the relevant leasehold interests were executed prior to the effective date of the 1971 legislation. The pre-1971 legislation may have been applied to avoid retroactivity problems. Second, the court may have deemed the new legislation consistent with the previous law and, thus, may have seen no need to differentiate between the provisions. The latter explanation seems unlikely, though, because of the 1971 statutory definition of public purpose. Although perhaps not inconsistent with the prior judicial definition of the term, the statutory definition could certainly be

39. Id. at 513 (emphasis in original).
40. 275 So. 2d at 512.
41. Id. at 511 n.8.
42. Ch. 71-133 took effect Dec. 31, 1971. The leases in Pan American were executed prior to this date. 275 So. 2d at 511-12.
read as more restrictive than the case law definitions. At the least, it should have been noted as a departure from prior law.

Instead of looking to the statutory definition of public purpose in order to evaluate the airline's leasehold, the Pan American court fell back on the common law definition of the term, invoking a two-step analysis. Following the theory set forth in Daytona, the court defined public purpose broadly as any use "primarily and predominantly for the public benefit even though there may be some incidental private purpose, too." Since both parties had stipulated that the airport facility was used for a public purpose, the court turned to the second issue—whether the use for a public purpose was an exclusive use. Given the judicial conclusion that a public purpose could encompass "inconsequential private purposes," the court stated that the profit motive involved in the leasehold had so merged with the stated public purpose of providing airline transportation that the Pan American leasehold interest was, in fact, being used exclusively for public purposes.

After Pan American, little remained of the stricter constitutional and statutory exemption requirements. Pan American narrowed the three constitutional requirements to two: A leasehold exemption could be granted if (1) the municipality simply owned the real estate subject to the lease agreement and (2) the lessee used the property primarily for a public purpose, regardless of any incidental private purposes, including use for private profit. By employing a broad definition of public purpose rather than the narrower statutory definition, the court in effect reinstated the Daytona holding, notwithstanding the legislative attempts to tighten the exemption requirements.

43. 275 So. 2d at 512.
44. Id.
45. Id. A subsidiary issue in Pan American was the applicability of Fla. Const. art. VII, § 10(c), which provides that if any facility financed with industrial revenue bonds is "occupied or operated by any private corporation, association, partnership or private 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." Because the relevant leases were executed before the effective date of the 1968 constitution, the Pan American court refused to construe this section. The court did construe the provision, however, in Hertz Corp. v. Walden, 299 So. 2d 121 (Fla. 2d Dist. Ct. App. 1974), aff'd, 320 So. 2d 385 (Fla. 1975). Indicating that the section required implementing legislation, the court found no mandate to tax per se. Rather, the lessee would be allowed to establish an exemption under art. VII, § 3(a). The court indicated that the purpose of § 10(c) was to put property financed with revenue bonds on an equal footing with property not so financed. In applying art. VII, § 3(a) to the property in question, the Hertz court found that a car rental facility located on the premises of the Tampa International Airport served a public purpose, whereas a remote Hertz facility did not.
Decisions in the years immediately following *Pan American* adhered to the court's broad exemption theory. For example, a Hertz car rental outlet located in Tampa International Airport obtained an exemption, as did an amusement park located in Tampa. Although these cases referred to the statutory definition of public purpose, no distinction was drawn between use for private profit and use which would be a valid governmental function or allocation of public funds.

C. The Judicial Retreat

The judicial abandonment of the broad exemption theory articulated in *Pan American* and subsequent cases began rather subtly. The first important step was a holding by the Florida Supreme Court in 1974, in *Straughn v. Camp*, that "in the instances where the predominant use of governmentally leased lands is for private purposes the Constitution requires that the leasehold be taxed." The theoretical basis for this holding has not been explained by the court. Given the court's admission in *Pan American* that the 1885 constitution did not require such taxation, coupled with its assertion that the 1968 constitution was "comparable insofar as relevant" to the provisions of the 1885 constitution, this construction is somewhat puzzling. But regardless of its basis, the court has since remained firm in its position that leaseholds used for predominantly private purposes must, under the 1968 constitution, be taxed. The importance of this holding, however, was not appreciated until the court recently began to retreat from the broad definition of "public purpose."

As was noted earlier, section 196.012(5), Florida Statutes, had already provided the basis for a more limited construction of the term "public purpose" than that which was used in *Pan American*. In 1975, in *Williams v. Jones*, the supreme court finally recognized this statute as a limitation on exempt uses. The court found that

50. See, e.g., Lykes Bros. v. City of Plant City, 354 So. 2d 878 (Fla. 1978).
51. 326 So. 2d 425 (Fla. 1975). *Williams* involved a challenge by Santa Rosa Island lessees to taxation of their leasehold interests. The lessees argued that leasehold interests should be taxed as intangible personality rather than as real property, that the attempt to classify leasehold interests as real property constituted an unreasonable classification in violation of art. VII, §§ 2, 4 of the 1968 constitution, and that the tax violated the equal protection clauses of the Florida Constitution and the 14th amendment to the United States Constitution. *Id.* at 429. The court rejected all three of these arguments.
only those leasehold interests used for "governmental-governmental" functions could be exempted, whereas those used for "governmental-proprietary" functions could not be. Although the court failed to elaborate on the criteria relevant to the newly established "governmental-governmental" classification, it appeared that the reference was to that limited class of activities that a governmental unit could legally perform or finance itself. Of major significance in Williams was the court's denial of an exemption to leasehold interests which were "purely proprietary and for profit." The reference to the profit motive in connection with a taxable leasehold was a significant indication that the court might reconsider the Pan American holding that a profit-oriented use could be deemed inconsequential for purposes of the exemption.

The decision that dealt the final blow to this aspect of Pan American is a striking illustration of the recent change in the law. In 1976, the Daytona International Speedway once again found itself in court, this time litigating the validity of its ad valorem tax bill under the 1968 constitution and the new statutory provisions. The only fact that had changed since the 1963 litigation was that the City of Daytona Beach had conveyed its interest in the leased lands to Volusia County. The county still asserted that the leasehold interest was taxable. The speedway still argued against taxation. In Volusia County v. Daytona Beach Racing & Recreational Facilities District, the lower court found the leasehold interest tax-exempt, and the taxing authorities appealed to the supreme court. Despite the 1965 holding that the speedway served a public purpose, Justice Hatchett, writing for the majority, found the speedway's leasehold interest taxable. Hatchett based the decision on a finding that "[t]he lessee in the present case does not serve a governmental purpose... The Corporation exists in order to make profits for its stockholders and uses the leasehold to further that purpose. The use is determinative." The essence of the court's holding was that

52. Id. at 433. Although the governmental-governmental/governmental-proprietary distinction is currently being used by the Florida courts, proponents of the proposed constitutional revision have argued that the distinction has effectively destroyed any exemptions that could have been granted under art. VII, § 3(a) because a governmental unit simply does not delegate governmental-governmental functions to anyone and certainly not to lessees. Fla. C.R.C., Select Committee on Proposal 206 Minutes (Mar. 7, 1978) (testimony of Woodrow Mervin, Jr.).
53. 326 So. 2d at 433.
54. 341 So. 2d 498 (Fla. 1976).
55. Id. at 502. The Daytona International Speedway has recently argued that the Florida Supreme Court denied the exemption solely because the speedway did not perform a function which could appropriately be performed by a governmental unit. The court did not rule on the question of whether the speedway performs a function "which would otherwise be a valid
any leasehold interests used for private profit would be classed as a proprietary, that is, a taxable, interest.

The contrast between the Pan American and Volusia County decisions is striking. In 1973, the court in Pan American allowed a profit-oriented use to qualify for an exemption. In 1976, the court in Volusia County deemed a profit-oriented use ineligible for an exemption.

The composition of the Florida Supreme Court changed substantially between 1973 and 1976. Surely, it is no mere coincidence that the judicial retreat from the broad notion of a "public purpose" coincided with a major turnover in the membership of the court. Justice Hatchett, one of the newcomers to the court, attributed the result in Volusia County solely to the statutes. But the constitutional ramifications of the decision must be appreciated.

If one were to accept the statutory definitions of public purpose as the sole basis for the decision in Volusia County, one might conclude that some legislative tinkering with the appropriate statutes could once again render a profit-oriented lease tax-exempt. This conclusion, however, would be erroneous because of that seemingly innocuous statement in Straughn v. Camp that leasehold interests used for private purposes must be taxed by virtue of the 1968 constitution. Should the legislature attempt to amend the statutory definition of public purpose to include private uses for profit, the supreme court might strike the amendment as unconstitutional on the ground that private use under the 1968 constitution must be subjected to ad valorem taxation.

subject for the allocation of public funds." FLA. STAT. § 196.012(5) (1977). An appellate court has rejected this argument but has certified the case to the Florida Supreme Court as a question of great public interest. Daytona Beach Racing & Recreational Facilities Dist. v. Volusia County, 355 So. 2d 175 (Fla. 1st Dist. Ct. App. 1978).

56. Brill & Hayes, State and Local Taxation, 31 MIAMI L. REV. 1231, 1251 (1977). The 1973 Florida Supreme Court was led by Chief Justice Vassar B. Carlton. The six other justices were James C. Adkins, Jr., Joseph A. Boyd, Jr., David L. McCain, Hal P. Dekle, Richard W. Ervin, and B.K. Roberts. By 1976 the composition of the court had changed substantially. B.K. Roberts was again the chief justice. Justices Adkins and Boyd were also still with the court. Askew appointees replaced Justices Dekle and McCain, who had resigned in 1975 during inquiries into judicial conduct by the Florida House of Representatives.


57. Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d at 502 n.5.
D. The Inequities

Thus, it was clear by the time the Constitution Revision Commission convened in 1977 that all leasehold interests in governmentally owned property had to be taxed in the absence of a specific exemption. This premise had been based by the court on both constitutional and statutory grounds. An express exemption could be granted only to a lessee who put the property to a "governmental-governmental" use, and any attempt to broaden the basis for which an exemption could be granted to include private uses would violate the constitutional requirement that all private uses of leasehold interests be taxed.

Recalling that leasehold taxation is intended to equalize the competitive positions of the commercial lessee and the property owner, one might well conclude that this tightening of the exemption standard is a positive step that should not be altered by constitutional amendment. The present state of the law, however, is not without its inequities. Problems have arisen for the lessee who, under the old constitution and the old exemption statutes, negotiated a long-term, tax-exempt lease and made improvements on the property, only to find in 1977 that the basis for a tax exemption had changed so drastically that the leasehold interest could no longer qualify for the exemption. Some lessees who entered into agreements in reliance on the tax-exempt status of the leasehold interest now find themselves faced with an ad valorem tax bill in addition to the rental payments on the lease.

The problem of the lessee who once had, then lost, an exemption has arisen in two contexts. The Daytona International Speedway exemplifies the first class of lessees: profit-oriented individuals or entities which once qualified for the exemption under the broad "primary benefit to the public" definition of public purpose. Under

58. The legislature attempted to avoid the result of the repealed exemption by providing in Fla. Stat. § 196.199(3) (1977) that:

Nothing herein or in s. 196.001 shall require a governmental unit or authority to impose taxes upon a leasehold estate created, extended, or renewed prior to April 15, 1976, if the lease agreement creating such leasehold estate contains a covenant on the part of such governmental unit or authority as lessor to refrain from imposing taxes on the leasehold estate during the term of the leasehold estate, but any such covenant shall not prevent taxation of a leasehold estate by any such taxing unit or authority other than the unit or authority making such covenant.

This provision was severely limited by the supreme court in Lykes Bros. v. City of Plant City, 354 So. 2d 878 (Fla. 1978), in which the court stated that at the time of enactment of § 196.199(3), the Florida Legislature no longer possessed the constitutional power to exempt municipally owned property used by a private lessee predominantly for private purposes. Id. at 881. The court avoided the question of the statute's constitutionality by finding that § 196.199(3) was not intended to exceed constitutional limits.
current law, the use of the leasehold for profit-oriented purposes renders these interests taxable. The second class of lessees who no longer qualify for the exemption are individuals who use their leased property as residential dwellings. No profit-oriented use is involved. The most publicized examples of this class are the residents of Escambia and Okaloosa counties who lease county property located on Santa Rosa Island and Holiday Isle.

In 1947, Escambia County acquired land on Santa Rosa Island from the federal government. The deed stated that the property was “to [B]e used by it [Escambia County] for such purpose as it shall deem to be in the public interest or be leased by it . . . to such persons and for such purposes as it shall deem to be in the public interest. . . .”59 In that same year, the Florida Legislature, by special act, created the Santa Rosa Island Authority to control and manage the property.60 Two years later, again by special act, the legislature exempted all lands controlled by the authority from ad valorem taxation.61

While these exemptions were in force, the authority advertised the lands as suitable for residential dwellings and offered leases for a term of ninety-years. Although none of the leases contained a clause expressly exempting the lessee from tax liability, the tax-free status of the leasehold was an important part of the advertising campaign. Some 750 leases were executed, and the lessees remained exempt from taxation until the legislative tax reform of 1971.62

With the passage of the new exemption and taxation statutes, though, the Santa Rosa Island lessees found themselves facing property taxation. Use of the leasehold interests for residential dwellings clearly was not a use which the governmental unit could properly perform or finance. Unwilling to pay the taxes, the lessees litigated the validity of the tax in Straughn v. Camp63 and then in Williams v. Jones.64 In both cases, they lost.

The primary argument advanced by Santa Rosa Island lessees was that the legislature’s rescission of the previously granted exemptions constituted an impairment of contractual obligations in

62. Straughn v. Camp, 293 So. 2d 689, 692 (Fla. 1974), appeal dismissed, 419 U.S. 891 (1975). While none of the leases contained exemptions, a few of the agreements contained a provision that if taxes were ever assessed, the lessee would be liable for the tax due. Id. at 693.
63. 293 So. 2d 689 (Fla. 1974), appeal dismissed, 419 U.S. 891 (1975).
64. 326 So. 2d 425 (Fla. 1975).
violation of article I, section 10 of the United States Constitution.65 Their contracts clause argument, however, was flawed in two respects. First, the contracts relating to the Santa Rosa Island property had never contained express exemptions for the lessees' land. Thus, no relevant contractual promise was impaired by the subsequent revocation of the exemption.66

The lessees maintained that although the agreements did not contain exemption clauses, exempt status had been made part of the agreement implicitly by the authority's advertisement of tax-exempt leaseholds. This argument raised the issue of the authority's power to grant such exemptions, and, more narrowly, the issue of whether any governmental body, including the legislature, could grant an exemption for any period of time other than the immediate taxing year. Here the second flaw of the residential lessees' argument became apparent, for the United States Supreme Court has held that one legislature cannot bind subsequent legislatures to tax exemptions.67 Just as the 1949 legislature had the power to grant the exemption to the Santa Rosa Island lessees, so the 1971 legislature had the power to repeal that exemption.68 Consequently, the lessees could not argue successfully that their reliance on the exemption was reasonable.

Although there appears to be no legal impediment to taxation of lessees who negotiated leases with the understanding that the interest was tax-exempt, lessees who find themselves in this position have argued that the tax-exempt status was part of a good faith bargain, one they might not have entered into had the interest been taxable initially. In reliance on exempt status, the lessees occupied

65. Straughn v. Camp, 293 So. 2d at 690.
66. Id. at 695.
68. Straughn v. Camp, 293 So. 2d at 684. Although dormant for a few years after Straughn, the contracts clause argument has recently reappeared. In Daytona Beach Racing & Recreational Facilities Dist. v. Volusia County, 355 So. 2d 175 (Fla. 1st Dist. Ct. App. 1978), the most recent speedway case, the lessees argued that the Straughn court's analysis of the issue was no longer valid in light of the United States Supreme Court's decision in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The Supreme Court held there that a state could vary its own contracts only upon a showing "that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the state." Id. at 1521. The Supreme Court defined the standards of reasonableness and necessity as arising only when less drastic means were not available and the circumstances relating to alteration of the contract were unforeseen at the time the contract was made.

The First District Court of Appeal rejected the contracts clause argument, stating that if United States Trust had in fact affected the Straughn holding, the Florida Supreme Court would have an opportunity to overrule Straughn by virtue of the district court of appeal's certification of the case as one of great public interest. The Florida Supreme Court has not yet ruled on this issue.
and improved the properties, often at substantial personal expense. Since the leases were long-term, the lessees expected the benefit of the improvements to inure to them rather than to the lessors. For the legislature and the courts to determine, after all the improvements have been made, that the initial promise of exemption is no longer binding is unfair in the minds of the lessees. 69

III. THE REVISION COMMISSION

A. Statutory Exemptions

It is to lessees like the Daytona International Speedway and the residents of Santa Rosa Island, lessees who once had, then lost, a tax exemption, that the first portion of the proposed constitutional revision is addressed. If passed, the revision will exempt any lessee who had an exemption either by lease agreement or by special legislative act prior to January 1, 1978. As noted earlier, this proposal differs significantly from Proposal 206, which would have exempted all existing leasehold interests without regard to the lessees' use of the property or the lessees' reliance on a promised exemption. The final proposed revision, however, refers to the lessees' reliance on the exempt status of the lease by exempting only those leasehold agreements "created pursuant to legislation or lease agreements which exempted . . . such leasehold interests from ad valorem taxes . . . ." 70

Although the Commission was in relative agreement that lessees who had been promised an exemption should receive one, there was some disagreement among the commissioners as to the best way to achieve that goal. Chairman D'Alemberte, still concerned about the broad scope of the exemption provision, 71 offered a substitute proposal which would have granted to all existing leasehold interests in governmentally owned property "equitable adjustment of rental payments upon proof that any charge in [such] lease was intended to be in lieu of ad valorem taxes or upon proof that the lease was induced through governmental representation that such taxes would not be levied and that the lease payments are inequitable." 72 D'Alemberte's substitute proposal was based in part on an excerpt from Williams v. Jones, where the court stated that if lessees could prove that their rent had been in lieu of taxes, "such lessees may

69. Fla. C.R.C., Select Committee on Proposal 206 Minutes (Mar. 7, 1978) (testimony of Santa Rosa Island lessees).
71. 2 Transcript of Fla. C.R.C. proceedings 21-22 (Mar. 9, 1978) (remarks of Chairman Talbot "Sandy" D'Alemberte).
72. Id. at 19.
very well be entitled, in a proper forum, to seek an equitable adjustment of their rental payments . . . ”73 Under D'Alemberte's proposal, the lessor and lessee could agree to the equitable adjustment between themselves. Failing such an agreement, the lessee could resort to the courts.74

Two objections were raised to the D'Alemberte amendment. First, commissioners wondered how the terms "equitable" and "inequitable" would be construed. Would they be interpreted in a way that would unfairly restrict the exemption? Would the standards applied to the terms of the lease be those relevant to a 1978 business deal or those that would have applied when the lease was executed?75 Despite D'Alemberte's argument that the terms would only invoke a court's traditional equity powers,76 the commission passed an amendment striking the terms from the substitute proposal.77

The second objection raised was that the proposal recommended resort to the courts for an adjustment in the rental payment to account for taxes. During debate, Commissioner Yvonne Burkholz maintained that since resort to the courts had not proved helpful before, D'Alemberte's proposal to send the lessees back into court was no solution to the problem.78 The Commission rejected the D'Alemberte proposal by a vote of nineteen to thirteen79 and adopted the current "grandfather" provision by a vote of twenty-seven to seven.80

The "grandfather" clause of the proposed amendment has significant legal and economic consequences. As is true of all tax exemp-

73. 326 So. 2d 425, 436-37 (Fla. 1975).
74. 2 Transcript of Fla. C.R.C. proceedings 47 (Mar. 9, 1978) (remarks of Chairman Talbot "Sandy" D'Alemberte).
75. Id. at 29, 41 (remarks of Commissioners Dexter Douglass and James Elliott Messer).
76. Id. at 40 (remarks of Chairman Talbot "Sandy" D'Alemberte).
77. Id. at 44. The amendment to strike the reference to equity in the D'Alemberte amendment was proposed by Commissioner William H. Gardner. Id. at 39.
78. Id. at 26 (remarks of Commissioner Yvonne B. Burkholz). Commissioner Burkholz's argument ignored the fact that under the D'Alemberte proposal, the lessees would go back into court with a new constitutional provision mandating a rent adjustment upon a proper showing of facts.
79. Id. at 69. Attempts by Commissioner DuBose Ausley to revive the D'Alemberte proposal also failed to win commission approval. Id. at 84-88. D'Alemberte then proposed another substitute amendment which would have replaced article VII, § 3(c) with a provision that the legislature could by law exempt leasehold interests. Id. at 69. By vesting constitutional power in the legislature to grant exemptions, D'Alemberte argued that the commission could achieve its goal of aiding lessees who had actually been victims of misrepresentation while at the same time deferring the problem to a more competent factfinding body. Id. at 72-74. The commissioners, however, defeated D'Alemberte's second proposed amendment by a vote of 17-15. Id. at 79.
80. Id. at 97.
tions, the economic consequences of exempting certain lessees from ad valorem taxation would be either a net loss of revenue for the taxing entity or a shifting of the tax burden to other taxpayers. It is, therefore, essential to determine the exact amount of tax dollars involved in each exemption. The commission was less than diligent in formulating statistics. No concrete figures were ever made available on the potential fiscal impact of the proposed revision.\textsuperscript{81}

Proponents of Proposal 206 initially indicated that exemption of all existing leasehold interests would have no fiscal impact since the exemption would not affect property listed on current tax rolls.\textsuperscript{82} During public testimony on Proposal 206, however, Representative Carl Ogden of Jacksonville, a legislative authority on state and local taxation, estimated that $300,000,000 in assessed property would be removed from the tax rolls if the proposal passed.\textsuperscript{83} Chairman D’Alemberte later pegged the assessed value of affected property at $700,000,000.\textsuperscript{84} In considering the final proposal, the commissioners could not gauge the potential economic impact of their actions accurately.\textsuperscript{85} However, given projections that exemption of the Santa Rosa Island lessees alone would mean an annual loss of $2,400,000 in revenue,\textsuperscript{86} it can be safely said that approval of the grandfather clause would have an important economic impact. Probably it should have been considered more carefully by the Commission.

In contrast, the legal impact of the grandfather clause seems relatively clear. The amendment would apparently overrule all cases presently requiring taxation of the Santa Rosa Island and Daytona International Speedway leaseholds. It would forestall any attempt by county authorities to tax pre-1978 leasehold interests if the lessee can show that an exemption was contained in the lease agreement or in a special legislative act. Although the grandfather clause is drafted in narrow, clear language, it leaves unanswered a few questions that may be raised in its implementation.

One question is the lessee’s liability for assessed taxes prior to the

\textsuperscript{81} Fla. S., Appropriations Comm., Preliminary Analysis—Pending Amendments to Constitution Revision Commission’s Proposals 6 (Mar. 7, 1978). The fiscal impact study prepared for the commission’s use indicated only that the proposal was “pending further study.”

\textsuperscript{82} Transcript of Fla. C.R.C. proceedings 201 (Jan. 24, 1978) (remarks of Commissioner Yvonne B. Burkholz).


\textsuperscript{84} 2 Transcript of Fla. C.R.C. proceedings 31 (Mar. 9, 1978).

\textsuperscript{85} Commissioner Nat Polak expressed dissatisfaction with the financial impact statement prepared for the commission. Commissioner Kenneth Plante argued that no comprehensive fiscal statement could be assembled until the commission adopted a specific exemption. Id. at 106.

\textsuperscript{86} Pensacola J., Mar. 8, 1978, § 2 (West Florida), at 1, col. 3.
effective date of the revision. Many of the lessees who argue that their exemption was taken from them wrongfully by the 1971 legislature have either refused to pay the annual tax assessment or have paid under protest. Should the revision become law and all existing, qualifying leasehold interests become exempt, would each lessee thereby be exonerated from the taxes assessed since 1971 and empowered to petition for a refund of any taxes paid? Or would the taxing units insist on collecting taxes for that period of time during which the leaseholds were taxable? This question is not answered by the proposed revision. Indeed, one might ask whether the Constitution Revision Commission could legally propose a retroactive exemption.

In the light of the long controversy surrounding the taxation of these interests, a decision by the taxing authorities not to push for the collection of the 1971-1977 taxes or a corresponding decision by the lessees to abandon their fight against payment seems unlikely. Whatever the voters do in November, both parties to the controversy will undoubtedly maintain their longstanding positions on the tax bills for this seven-year period. Undoubtedly, the courts will again be asked to resolve the question.

The court’s answer to these questions if the proposed revision does not pass is clear. Justice Hatchett authored the Florida Supreme Court’s unanimous opinion in *Am Fi Investment Corp. v. Kinney*, where the court held unconstitutional special legislative enactments requiring Escambia County to repay ad valorem taxes paid or owing by Santa Rosa Island leaseholders from 1972 through 1974. The court reasoned that the Santa Rosa Island leaseholds were not performing or serving a public purpose and that the special acts provided an indirect exemption not authorized by the state constitution. “The Florida Constitution requires that all property used for private purposes bear its just share of the tax burden for the support of local government and education, with certain exceptions specifically enumerated in the constitution.”

Another problem associated with the grandfather clause is whether the language “leasehold interests created pursuant to legislation or leasehold agreements” requires that the lessee have relied on the exempt status of the lease. Although the language clearly provides an exemption to a lessee who held an interest exempted by virtue of legislation or a lease agreement, how much further the provision extends is unclear. Would the exemption, for example, reach a bona fide purchaser of a leasehold interest even if the pur-

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87. 360 So. 2d 415, 416 (Fla. 1978).
chase occurred after passage of the 1971 legislation, so that the purchaser was on notice that the leasehold interest would be taxed? What of the 300 Santa Rosa Island leases concluded after the 1971 tax reform?²⁸

If the intent of the grandfather clause is to exempt only those lessees who relied on the purported exemption when signing their leases, then arguably any lessee who entered into an agreement after the 1971 tax reform did not rely on a promise of exemption and should not be reached by the grandfather clause. This result could be reached by a court's construing the language "interests . . . created pursuant to legislation or lease agreement" to include only leases negotiated when an exemption was legally possible.

Although this result would appear to be consistent with the theory of reliance underlying the grandfather clause, it apparently is not consistent with the intent of the commission. In discussing the problem of the 300 post-1971 leases on Santa Rosa Island, Commissioner Kenneth Plante, the chief sponsor of the proposed revision, maintained during debate that "we still ought to grandfather them all in and just say for the duration of that lease."²⁹ Plante said too that the bona fide purchaser of a once-exempt leasehold interest should likewise be granted an exemption.³⁰ Given the tension between the underlying theory of the grandfather clause, the possible constructions that may be placed on the revision's language, and Plante's statements about the revision's coverage, it seems likely that a significant number of law suits may be spawned by the uncertainty over the necessity of reliance by the lessee.

Aside from problems of interpreting the effect of the grandfather clause, the overriding question facing the voters in November is whether, as a policy matter, the exemption offered by proposed article 7, section 3(c)(1) is advisable. Proponents of the grandfather clause maintain that the proposal would eliminate double taxation of leasehold interests and, furthermore, would uphold the integrity of the state. Opponents argue that the problem of double taxation is nonexistent and that the state owes no moral obligation to preserve in perpetuity the exempt status of some leasehold interests.

The double taxation argument is based on the theory that the higher than usual rental paid by a lessee should be treated as a payment in lieu of taxes. The lessees argue that the original lease-

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²⁹  Id. at 54.
³⁰  Id. at 55.
hold agreements were negotiated with this thought in mind and that to assess property taxes in addition to the high rental payments would amount to double taxation. This argument has been advanced most persistently by the Santa Rosa Island lessees. Convinced that those lessees should receive aid in their fight against taxation, the 1975 legislature passed a bill which would have allowed the island lessees to reduce their tax bill by the amount of rent paid on their lease. Governor Askew, however, vetoed the bill.

In 1976, the legislature again attempted to assist the island lessees by passing a bill which required ad valorem taxes in Escambia and Okaloosa counties to be reduced by the rental payment made in the preceding year. Although this act became law, the supreme court recently held it unconstitutional as an unauthorized tax exemption. However, even Governor Askew seems to have accepted the double taxation argument, at least with regard to the island lessees, for he stated during a recent interview:

A lease where the amount of lease is reasonably equivalent of what you would otherwise pay taxes [sic] and it's so stated that you pay them in lieu of ad valorem taxes which is the way almost all of the leases on Santa Rosa Island are, . . . so in that category, in my opinion it's double taxation. If you are paying the equivalent of

91. Fla. HB 1759 (1975):
(b) In the case of governmental property leased or subleased to a nongovernmental lessee whose lease agreement covenants that assessments to be paid are in lieu of taxes or who purchased a lease under a statute which covenanted and implied same, the annual ad valorem tax to be paid by the nongovernmental lessee on such leasehold shall be diminished by the amount of the rent on such leasehold paid to any governmental lessor, or sublessor, regardless of whether the rent is paid to the same governmental unit that levies the ad valorem tax, unless the lease provided to the contrary.

93. Ch. 76-361, 1976 Fla. Laws (Special Acts) 101. Governor Askew allowed the bill to become law without his signature.
94. Archer v. Marshall, 355 So. 2d 781 (Fla. 1978). In 1971, the Florida Legislature repealed a 1949 special law which exempted hundreds of long-term leases between individuals and the Santa Rosa Island Authority from ad valorem taxes. The leasehold interests, therefore, were liable for ad valorem taxes beginning in 1971. The 1976 legislature passed a special law which provided that the annual rent payable by the lessees would be reduced by an amount equal to that paid to Escambia County for the ad valorem taxes on their lease interests. The Florida Supreme Court determined that the special law was, in effect, a tax bill and that the legislature had no constitutional authority to grant the exemption.
taxes in your lease payment, and then you have to pay taxes, then you are paying taxes twice.  

Opponents of the grandfather clause, though, insist that the theoretical basis of the double taxation argument is faulty. The rental payment, they assert, is not a payment in lieu of taxes but simply a payment for use of land. Any taxes paid by the lessees would be used to provide such county services to the lessees as police protection, fire protection, roads, and a court system. In writing for the court in Archer v. Marshall, Justice Hatchett agreed that a rental payment for the use of land must be distinguished from a tax payment used to provide services to county residents.

In their testimony to the revision commission, island residents attempted to demonstrate that their use of governmental services was taken into account when their rental payments were set. The commercial lessees attempted to show that they made no use of county services. For example, in testimony before the commission, representatives of the Daytona International Speedway indicated that the speedway uses very few county-supplied services. It provides its own security force in lieu of county police and also provides for its own cleanup and sanitation.

The resolution of the double taxation problem turns on whether one accepts the lessees' characterization of the situation or Justice Hatchett's analysis in Archer. At least to some extent, it may be assumed that the rental payments do cover the lessees' use of governmental services. "Regardless of the term used to describe the set-off, the reduction in rent afforded the leaseholders has the effect of a tax exemption and as such is unconstitutional since such exemption is not within the provisions of our present state constitution."

A more difficult argument to deal with is the lessees' contention that the state has a moral obligation to sustain the exempt status of these leasehold interests. Although it is true that at one time the

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97. Id.
98. Fla. C.R.C., Select Committee on Proposal 206 Minutes (Mar. 7, 1978) (testimony of Santa Rosa Island lessees).
99. Id. (testimony of representatives of Daytona International Speedway and City of Daytona Beach).
100. 355 So. 2d at 784.
State of Florida, through the legislature, provided an exemption for these interests, one must recognize the legislature's authority to change or repeal tax exemptions at will. The lessees in fact may have relied on the exempt status of their leasehold interests, but legally that reliance can only be termed unreasonable. A less legalistic view, however, would indicate that although the lessees should not have relied on the exemptions, they had no reason to expect that the legislature would ever repeal them. A cogent argument can be made that the state does owe some obligation to these lessees.

B. Transportation-related Leases

The second exemption proposed by the revision commission is yet another grandfather clause. This one would afford an exemption to all existing leasehold interests in governmentally owned property where the lessee uses the property in connection with providing transportation or providing services to the public engaged in transportation.\(^\text{101}\) The exemption would be denied, however, to any qualifying lessee who has voluntarily paid taxes on the leasehold interest. According to Commissioner Plante, this denial is intended only where lessees in transportation-related facilities have traditionally paid taxes.\(^\text{102}\) The exemption would be allowed in all other cases of transportation-related facilities.

This special grandfather section was included because lease agreements for transportation-related facilities have not generally included tax-exemption clauses. Moreover, such facilities have not generally been the recipients of special legislative exemptions. The transportation facilities have always been deemed to serve a public purpose and to merit a tax exemption based, not on an express promise, but rather on common practice.\(^\text{103}\) This common understanding has been altered, however, by the holding in Volusia County that any leasehold interest used in furtherance of a profit motive is not constitutionally eligible for an exemption.\(^\text{104}\) Under the logic of Volusia County, lessees making a profit on their leasehold interests must be assessed ad valorem taxes. In the wake of this decision, the transportation facilities, most notably the airlines, have been waiting for tax bills to arrive.

In order to avoid the application of the Volusia County holding to transportation-related facilities, the Constitution Revision Com-

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101. See text accompanying note 9 supra.
102. 2 Transcript of Fla. C.R.C. proceedings 89 (Mar. 9, 1978).
103. Id. at 16.
104. 341 So. 2d 498, 502 (Fla. 1976).
mission has proposed an exemption for existing leasehold interests. The scope of this proposed exemption is rather broad. It would include property "leased for use in connection with providing air, ground or water transportation . . . ." This language seems to extend to airlines, railroads, or steamship companies that use their leasehold interests to provide transportation services directly. The phrase "in connection with" indicates that the exemption would not be limited to those portions of the leasehold actually necessary to provide transportation services. Thus, potentially, an airline could claim an exemption not only for its leasehold interests in landing rights or plane storage, but for its corporate offices as well. Of course, the breadth of the phrase "in connection with" would ultimately depend on judicial construction.

Similarly, the courts may be called on to determine the scope of the phrase "leased for use in connection with providing services to the public engaged in air, ground or water transportation . . . ." It is unclear exactly what services the commission had in mind. Arguably, the language is broad enough to include any lessee who sets up business in a transportation-related facility. Is a car rental company, for example, engaged in transportation within the meaning of the proposal? What about a cafeteria? An ice cream parlor? A bar? A clothing store? All these lessees could argue that they are fulfilling the requirement if they are located in a transportation facility. Whether the commission intended this result is questionable, for the commissioners could hardly have meant to encourage a case-by-case consideration of every lessee in every transportation-related facility. The potential problems raised by the broad language in this section might have been avoided had the commission drafted a per se exemption for all lessees in transportation-related facilities, in the alternative, or been more specific as to the nature of the supplied services that would qualify for an exemption.

The third and final exemption proposed by the commission is embodied in a grant of power to the legislature to exempt by law all leasehold interests in governmentally owned property when the property is leased for a public purpose and used in connection with providing air, ground, or water transportation or used in connection with providing services to the public engaged in air, ground, or water transportation. This proposed exemption was separated

105. Walden v. Hertz Corp., 320 So. 2d 385 (Fla. 1975). The Florida Supreme Court affirmed per curiam the decision of the Second District Court of Appeal that a rental facility attached to the airport terminal building was public in nature and entitled to an exemption but that the remote facility used for storing automobiles was not.

106. See text accompanying note 10-12 supra.
from the exemption relating to existing leasehold interests in transportation-related facilities because of a philosophical difference among members of the select committee which drafted the final proposal. Commissioners Plante and Thayer felt that the exemptions for existing and future leasehold interests in the transportation area could be dealt with in a single exemption provision.\(^\text{107}\)

In contrast, Commissioner James Apthorp maintained that an exemption for existing leasehold interests in transportation facilities was acceptable but that granting a prospective exemption to transportation-related leasehold interests would extend an unwarranted advantage to the transportation industry.\(^\text{108}\) To retain Apthorp's support for the bulk of the proposal, the prospective exemption was placed in a separate section.\(^\text{109}\)

Although the language in the amendment relating to the exemption for existing transportation-related leaseholds is similar to that for prospective transportation-related leaseholds, there was originally a significant difference between the two. The exemption for prospective leaseholds contains the requirement of use for a public purpose, a requirement which was not in the amendment as originally proposed by Commissioner Plante.\(^\text{110}\) Plante intended to allow the legislature to exempt by law transportation-related facilities created in the future on exactly the same grounds as those stated in the exemption for existing leasehold interests.

The underlying intent of the Plante proposal was to allow the legislature to offer a tax break to the transportation industry, an industry which Plante termed "vital . . . to the economy of the State of Florida . . . ."\(^\text{111}\) Without the legislature's ability to grant future exemptions, the transportation industry would surely be faced with ad valorem taxation as soon as existing leases expired. Faced with the threat of taxation, in addition to the fact that adjoining states impose no such leasehold taxes,\(^\text{112}\) Plante believed that the transportation industry would likely move all their non-essential maintenance facilities and corporate offices to other states, thus dealing a significant blow to Florida's economy. This economic loss could be avoided, Plante argued, by allowing the legislature to exempt future leasehold interests.\(^\text{113}\)

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108. Id. at 127 (remarks of Commissioner James Apthorp).
109. Id. at 98-99 (remarks of Commissioner Kenneth Plante).
110. Id. at 99.
111. Id.
113. 2 Transcript of Fla. C.R.C. proceedings 100-01 (Mar. 9, 1978).
In offering the "public purpose" requirements as an amendment to the Plante proposal, Chairman D'Alemberte argued that such an addition limited the legislative power only slightly and would prevent any and all lessees in a transportation-related facility from qualifying for an exemption. According to D'Alemberte:

"The public purpose test is broad enough to cover those things which you want to see covered and yet will provide us with some protection to make sure that we are not granting the ability to government to get itself involved in giving tax exemptions to one form of business and discriminate against other businesses."

D'Alemberte suggested that the "public purpose" language would serve as only a minor check on legislative authority.

The problem with adoption of the public purpose language is, of course, that article VII, section 3(a) of the present constitution already contains an exemption for leasehold interests used for public purposes. And "public purpose" has been interpreted by the supreme court in Volusia County in such a way that it does not extend to proprietary, profitmaking leasehold interests. To the extent that the legislature's power to grant future exemptions is circumscribed by the Volusia County definition of public purpose, the power would be virtually meaningless despite the revision. If the legislature could not exempt profitmaking leasehold interests in transportation-related facilities, it could not grant future exemptions to the transportation industry.

During debate, Commissioners D'Alemberte and Ben Overton staunchly maintained that addition of the public purpose language did not render the prospective exemption section ineffective. Commissioner Overton, a member of the Supreme Court, insisted that Volusia County does not mandate taxation of all leasehold interests used for profit. Rather, he interpreted Volusia County as being simply an application of the Pan American definition of public purpose—a project primarily and predominantly for the public benefit despite some incidental private purposes as well. Overton argued that in Volusia County, the private purposes involved in the speedway had gone beyond an incidental nature and had become controlling. The presence or absence of a profit motive was not decisive.

114. Id. at 103.
115. Id. at 131.
116. See note 55 supra and accompanying text.
117. Justice Overton participated in the Volusia County decision. 341 So. 2d at 502.
118. 2 Transcript of Fla. C.R.C. proceedings 128-29 (Mar. 9, 1978) (remarks of Commissioner Ben Overton).
Although this reading of the Volusia County case is tenable, the language of the opinion, coupled with language from Williams v. Jones,\textsuperscript{119} lends more support to the theory that leasehold interests used to make a profit will be classified in the future as proprietary and nonexempt.\textsuperscript{120}

To avoid application of the Volusia County court's narrow definition of "public purpose" to the grant of legislative power, the commission simply appended to the term "public purpose" the phrase "whether or not for private profit."\textsuperscript{111} By so doing, the commission made clear its intent to allow the legislature to exempt transportation-related facilities that benefit the public and make a profit as well. With the addition of this language, the same transportation facilities that would qualify for the exemption provided for existing leasehold interests would apparently also qualify for an exemption granted by the legislature. Clearly, all lessees who provide air, ground, or water transportation directly to the public serve a public purpose in providing a benefit to the public. The elimination of the profit motive tests qualifies all lessees which serve the public while still making a profit for an exemption from leasehold taxation.

In contrast to lessees which provide transportation directly are lessees which provide services to a transportation facility. As noted earlier, the proposed revision offers an exemption to any lessee which provides services to a transportation facility with no qualifications or standards imposed. The power of the legislature to exempt service-oriented lessees in the future, however, has been narrowed to the extent that a service-oriented lessee must prove that it provides a service to a public purpose whether or not for private profit. The relevant question, then, becomes: which lessees in an airport, for example, provide services to the public engaged in transportation that primarily and predominantly benefit the general public as well? It seems unlikely that an airport clothing store or a bar could satisfy this requirement. A car rental agency or a cafeteria, on the other hand, might very well be able to demonstrate that

\textsuperscript{119} 326 So. 2d 425, 433 (Fla. 1975).

\textsuperscript{120} Commissioner Plante was so convinced that the Volusia County holding mandated taxation of leasehold interests used to make a profit that upon the commission's favorable vote to add the "public purpose" language, he moved to kill the entire amendment provision relating to legislatively granted exemptions. Plante maintained that the additional language rendered the proposal meaningless and an unnecessary addition to the constitution. The commission passed the legislative exemption section, with the "public purpose" phrase included, by a vote of 20-15. 2 Transcript of Fla. C.R.C. proceedings 121-23 (Mar. 9, 1978).

\textsuperscript{121} 30 Fla. C.R.C. Jour. 566 (Apr. 14, 1978). The inserted language was proposed by Commissioner Donald H. Reed.
it provides services and benefits the public at the same time. The scope of the legislature’s power to grant exemptions under this portion of the proposed amendment would depend ultimately on how broadly the court would be willing to construe the term “public purpose.”

IV. CONCLUSION

Whether these three exemption provisions become law is, of course, up to the voters in November. The first proposed exemption, granting an exemption to lessees who entered into their leases in reliance on an exemption, is perhaps the most appealing of the three. Although opponents argue that these lessees should be made to pay their fair share of the cost of governmental services, there is a strong argument in favor of granting this exemption. The argument can be made here that the state has a moral obligation to these lessees. The second proposed exemption, which pertains to exemption of existing leasehold interests in transportation-related facilities, is slightly less appealing in that the reliance of the lessee cannot be demonstrated as clearly as in the first case. This exemption, however, can be justified by finding an implied reliance by the lessee on the tax exempt status of the interest. The third proposed exemption, the grant of power to the legislature to exempt future transportation-related leasehold interests, is based primarily on the fear of economic loss to the state should the transportation industry abandon the state in order to avoid leasehold taxation. This final exemption seems appealing only to those who share this fear that a failure to provide the tax break would result in a loss of industry to the state.