

**IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA**

**CASE NUMBERS
1D07-2292, 1D07-2293,
1D07-2294, 1D07-2295, 1D07-2296,
1D07-2297, 1D07-2298, 1D07-2305**

**PORTOFINO TOWER ONE HOMEOWNERS
ASSOCIATION AT PENSACOLA BEACH, INC., et al.,**

Appellants,

vs.

CHRIS JONES, Property Appraiser, etc. et al.,

Appellees.

**ON APPEAL FROM THE CIRCUIT COURT IN AND FOR ESCAMBIA
COUNTY, FLORIDA - LOWER TRIBUNAL NUMBERS**

**04-CA-2288, 04-CA-2289, 05-CA-2309, 05-CA-2310,
05-CA-2311, 06-CA-2368, 06-CA-2369, 06-CA-2370**

APPELLANTS' REPLY BRIEF

**EDWARD P. FLEMING
Fla. Bar No. 615927
R. TODD HARRIS
Fla. Bar No. 651931
MCDONALD - FLEMING -
MOORHEAD
25 West Government Street
Pensacola, Florida 32502
(850) 477-0660
(850) 477-4510 (fax)**

**LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
4300 Bayou Boulevard, Suite 36
Pensacola, Florida 32503
(850) 475-1211
(850) 475-1290 (fax)
lrosenbloum@rosenbloumlaw.com**

Attorneys for Appellants

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I. JURISDICTION

A. **Summary Final Judgment.** All parties agree the test for jurisdiction over an appeal from a final summary judgment as to some but not all counts is whether the count remaining arises ““from a set of common facts or a single transaction.”” Massachusetts Life Ins. Co. v. Crapo, 918 So. 2d 393, 394 (Fla. 1st DCA 2006) (citation omitted). “The ‘analysis in each case hinges on whether there is a factual and legal overlap between the claims.’” Id. at 394.

Appellees claim the remaining Count before the trial court, Count III, arises from “common facts” and involves “identical parties.” (Answer Brief “AB,” p. 13) Having identical parties does not preclude jurisdiction under the test outlined by this Court in Massachusetts Life. As discussed herein, Count III arises under separate and distinct facts, could have been brought as an independent action, and involves separate and distinct legal issues than the appeal now before this Court.

In a case analogous to the one at bar, this Court found jurisdiction in an appeal from a partial final judgment as to one count of two separate and distinct counts between the same parties. Gordon v. Omni Equities, Inc., 605 So. 2d 538 (Fla. 1st DCA 1992). In Gordon, plaintiffs brought two counts based on two separate and distinct wrongful acts by defendants. Id. at 540. This Court was satisfied jurisdiction was proper as these counts were “independent actions.” Id. The same is true in the case now before the Court.

Counts I and II, on which final summary judgment was issued by the court below, concern the Property Appraiser's failure to classify Appellants' leasehold interests in government owned property as "leasehold interests," as mandated by section 196.199(2)(b), Florida Statutes. The factual issues related to these counts involve a review of written documents creating Appellants' leasehold interest, and facts regarding the nature and duration of the leasehold. The law required to resolve this appeal focuses on Chapters 196 and 199, Florida Statutes, the Florida Constitution governing "equal protection," and statutory and common law definitions of "leasehold."

Count III addresses the completely separate and separable issue of whether the Property Appraiser correctly appraised fair market value of the improvements. Facts relating to that issue include comparable sales, income generated, replacement costs of the improvements, and expert testimony regarding means and methods for appraising property values. Separate and distinct statutes and regulations govern the Property Appraiser's duties in establishing fair market or "just" value of real estate. See, e.g., §193.011, et seq., Fla. Stat. (2004).

To determine whether a partial summary judgment was a final appealable order, this Court has previously considered whether the counts could be "maintained independently of each other" and whether the remaining claims "required proof of many of the same facts" as the counts on appeal. Kirkland v.

Dept. of Health and Rehabilitative Services, 489 So. 2d 800, 801 (Fla. 1st DCA 1986). Application of the Kirkland jurisdiction test supports the acceptance of jurisdiction over the instant appeal, as Count III could have been brought as a separate action, and involves separate issues of law and fact.

B. Injunction. Appellees argue the final judgment is not immediately appealable as a non-final order denying an injunction because “[t]he order under review did not have the effect of refusing to enjoin Appellees from collecting taxes, because section 194.171(3), Florida Statutes, has already stayed collection action.” (AB, p. 15) This argument lacks merit, however, because the stay afforded by section 194.171(3) is temporary, lasting only during the pendency of “the action.”

II. ARGUMENTS AS TO MERITS

A. Constitutional Challenge: The Legislature has the exclusive authority under the Florida Constitution to classify for taxation purposes the Portofino property interests as “leasehold” interests subject to taxation as intangible personal property, and to establish the tax rate for this property interest.

Appellees assert section 196.199(2)(b), Florida Statutes, violates “equal protection” and other constitutional provisions. (AB, p. 39-49).¹ Identical

¹ This Court recently adopted the “defensive posture exception” to the general rule which prohibits state officers and agencies from challenging the constitutionality of the statutes affecting their duties. See Zingale v. Crossings at Fleming Island Community Dev. Dist., 960 So. 2d 20 (Fla. 1st DCA 2007). The Supreme Court of Florida has accepted jurisdiction. (Case No. SC07-1556). Appellants, while

arguments were rejected on virtually identical facts in Miller v. Higgs, 468 So. 2d 371, 374 (Fla. 1st DCA 1985), rev. denied, 479 So. 2d 117 (Fla. 1985). In Miller, this Court not only rejected the same constitutional arguments raised by appellees, it also rejected the Monroe County Property Appraiser's reliance on three Pensacola Beach cases, Williams v. Jones, 326 So. 2d 425 (Fla. 1975), dismissed, 429 U.S. 803 (1976), Archer v. Marshall, 355 So. 2d 781 (Fla. 1978), and Am Fi Inv. Corp. v. Kinney, 360 So. 2d 415 (Fla. 1978), the same cases cited by appellees at bar. Miller, 468 So. 2d at 376-77.²

Appellees claim Miller was expressly overruled by Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448, 453 (Fla. 1993). However, it was overruled on limited issues not relevant to those now before the Court. Miller's ruling that the Legislature's powers and discretion in regard to classifying and taxing property

preserving their "lack of standing" argument, demonstrate in this and their Initial Brief that the legislation at issue, section 196.199, was well within the authority granted to the Legislature by the Florida Constitution to classify property interests for tax purposes.

² Appellees claim that Straughn v. Camp, 293 So. 2d 689, 695 (Fla. 1974), *requires* that leasehold estates be taxed as "real property." (AB, 40). However, as with Williams, Archer and Am Fi, the Straughn case simply upheld the broad powers of the Legislature to classify and tax property interests, rejecting constitutional challenges made to statutory classifications that existed in 1974. Following those decisions, and being deemed to have full knowledge of those decisions, the Legislature exercised that same broad authority granted by the Florida Constitution in adopting in 1980 the classification statute now at issue, section 196.199(2)(b). The right of the Legislature to classify and tax property interests was recognized, not restricted, by these decisions.

interests are “broad, plenary, unlimited and supreme,” subject only to “constitutional restrictions and the will of the people expressed through elections,” correctly reflects the legal principals governing the Property Appraiser’s constitutional challenge. Miller, 468 So. 2d at 375. As this Court has succinctly stated:

As long as the legislature does not violate constitutional restrictions, the courts have no concern with the wisdom or policy of the tax, the political or other motives behind it, or the amounts to be raised, since such matters are exclusively for the lawmaking body to decide. Id.

See, also, City of Jacksonville v. Bowden, 64 So. 769, 770 (Fla. 1914) (courts have no “veto power” over Legislative acts absent violation of “organic law.”)

Thus, the threshold question on this constitutional issue is: *Does §196.199(2)(b) violate the “organic law” of the Florida Constitution?* As this Court found in Miller, it does not.

This Court has recognized that the “Equal Protection Clause does not forbid classifications” and the state is granted “considerable leeway to legislate classifications and to define lines and limits that, in their considered judgment, result in reasonable taxation systems.” Reinish v. Clark, 765 So. 2d 197, 203-04 (Fla. 1st DCA 2000). This Court noted:

“Unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause requires only that the classification rationally further a legitimate state interest.”

Id. at 204 (citation omitted). Further, this “relaxed rational basis standard is consonant with the understanding that making distinctions is an inherent, unavoidable legislative function, and this standard is particularly deferential concerning classifications made in complicated tax matters.” Id.

Section 196.199(2)(b), Florida Statutes, does not conflict with Article VII, section 3 of the Florida Constitution by providing an “exemption” from ad valorem taxation. Unlike the special acts invalidated by the Florida Supreme Court in Archer and Am Fi, this section does not exempt leasehold interests in government property from taxation, but instead classifies these interests as what they are by definition; i.e., leasehold estates. The Act then classifies those leasehold estates, different in nature and kind from fee simple estates, as intangible personal property subject to taxation under Article VII, section 2, of the Florida Constitution. Miller, 468 So. 2d at 376-77.

Without question, a true leasehold interest, as discussed above, constitutes an estate in real property different than a “fee simple” estate. State Road Department v. White, 148 So. 2d 32 (Fla. 2nd DCA 1963). Equally clear is that Appellants’ leasehold interest is intangible personal property, as defined by section 199.023(1)(d), and is not subject to the exclusions found in Article VII, section 4(1) of the Florida Constitution, or section 196.199(7), Florida Statutes. The

Legislature did not violate the Florida Constitution by recognizing a distinction between fee simple and leasehold estates in real property.

B. The “leasehold interests” to be taxed under Fla. Stat. § 196.199(2)(b) are not “converted” to fee simple ownership (“equitable title”) by virtue of the lessee “renting” ownership rights during duration of the lease.

The Property Appraiser claims that because Appellants’ leasehold interests grant to them rights and duties like those of an owner during the term of the lease, Appellants are not “leaseholders” as defined by section 196.199(2)(b), Florida Statutes. Yet, these rights and obligations are typical of those created by any long term lease. (R-XL, 7533) (unrebutted testimony of real estate expert John Griffing)

(1) *Property Appraiser ignores the essential nature of a leasehold interest*

The Property Appraiser ignores the fact that all lessees “look like” fee simple owners *during the term of the lease*. He further ignores the fact the lessor, (Escambia County) retains a reversionary right to all rights to the property at the end of the lease. These facts establish the nature of Appellants’ property interest as being “leasehold interest” subject to taxation under section 196.199(2)(b), Florida Statutes.

“Turning to the law on the subject of ownership interest by a lessee, we find that, in the law of real property, it is well established that a valid lease for a term of

years is a conveyance of an interest in land.” White, 148 So. 2d 32, at 34 (Fla. 2d DCA 1963). “A lessee’s interest in a leasehold estate is thus stated: ‘During the life of a lease, the lessee holds an outstanding *leasehold estate* in the premises, which *for all practical purposes is equivalent to absolute ownership*. The estate of the lessor during such time is limited to his *reversionary interest*, which ripens into *perfect title* at the *expiration of the lease*.’” Id. (emphasis supplied)(citation omitted). Obviously, if the lease never expires, i.e., is “perpetual,” as in Ward v. Brown, there would be no “reversionary interest.” Having retained nothing, the government entity is not a “lessor,” and the estate conveyed is “fee simple” – not leasehold. Thus, the Portofino lessees possession of rights and duties that “for all practical purposes” are “equivalent to absolute ownership” *during the term of the lease*, does not negate the nature of their interests in the property at issue. The day will come when the lease expires. On that day, Appellants have no rights in the property as all rights revert to Escambia County, the owner/lessor. Appellants “own” a “leasehold estate” created by written contract with the government, the same government that now seeks to disavow the interest it created. It is the duty of the courts to give effect to legislative enactments, and not allow the “veto” of those enactments by administrative or judicial fiat. Moore v. State, 343 So. 2d 601, 604 (Fla. 1977).

(2) ***Cases relied on by Property Appraiser are factually distinguishable from case now before the Court.***

The cases relied on by Appellees for their claim that Appellants do not own “leasehold interests” but fee simple (“equitable”) title to the improvements at issue, all fit into one of the following five categories that distinguish them from the situation now before the Court:

(a) **Cases in which “lessee” leased land only, and held legal title to improvements.**

The Property Appraiser cites to several cases in which the taxpayer owned the improvements at issue during the term of the lease. By statutory definition, those improvements were not “leasehold interests,” and thus section 196.199(2)(b), Florida Statutes, could not be applied. Those were the facts before the courts in several cases erroneously relied on by the Property Appraiser, including: Parker v. Hertz Corp., 544 So. 2d 249 (Fla. 2d DCA 1989), Marathon Air Services, Inc. v. Higgs, 575 So. 2d 1340 (Fla. 3d DCA 1991); Gay v. Jemison, 52 So. 2d 137 (Fla. 1951); Gellman v. Eden Point South Assoc., Inc., 504 So. 2d 43 (Fla. 3rd DCA 1987); San Souci v. Division of Fla. Land Sales and Condominiums, Dept. of Business Reg., 421 So. 2d 623 (Fla. 1st DCA 1982); Regency Villas v. Keltner, 610 So. 2d 661 (Fla. 1st DCA 1989); and Ward v. Brown, 919 So. 2d 462 (Fla. 1st DCA 2005), rev. denied, 923 So. 2d 1165 (Fla. 2006).

The leases now before the Court make the government, not Appellants, the owner of the improvements throughout the term of the lease. Thus, the interest held by Appellants is a “leasehold interest” subject to taxation as intangible personal property as mandated by section 196.199(2)(b). Bell v. Bryan, 505 So. 2d 690 (Fla. 1st DCA 1987).

(b) Cases in which the contract was termed a “lease,” but was in reality conveyance of fee simple title, including “contract for deed” cases

In other cases cited by Appellees, there was a factual finding that the conveyance, although labeled a “lease,” was in reality a transaction in which the “lessor” was the “seller,” and held bare legal title as security for a financed sale. This is often referred to as a “contract for deed” transaction, and Florida courts deem the “title” held in these cases to equate to a mortgage. Those clearly distinguishable facts were found in First Union Nat’l Bank of Fla. v. Ford, 636 So. 2d 523 (Fla. 5th DCA 1993) (“owner” held bare legal title as security for payment of purchase price; thus “tenant” (governmental entity) was true owner); Hialeah, Inc. v. Dade County, 490 So 2d 998, 1001 (Fla. 3d DCA 1986) (mirror image of Ford case, in that government held bare legal title as security for payment of purchase price from private purchaser); Service Metro Corp. v. Bell, 768 So. 2d 1216 (Fla. 1st DCA 2001) (trial court found transaction to be tantamount to fraud.) (R-XX 3464-3637, Item 76) (trial court’s opinion). The leases now before the

Court are true leases; not “contracts for deed.” See e.g., R-XL 7531-45, Pars. 6, 12 (leases are in all respects typical of long-term, “triple net” leases).

(c) Cases in which contracts creating the property interest did not meet Statutory definition of “leasehold” under Fla. Stat. §196.199(2)(b).

The Legislature narrowed the definition of “leasehold estate” recognized at common law by restricting such interests, for tax classification purposes, to those with an initial term of less than 100 years, and to those contracts in which the lessee paid rent. §196.199(7); §196.199(2)(b), Fla. Stat. (2004). Cases relied on by Appellees include those in which the claimed “leaseholds” were outside of these definitional restrictions. See Williams v. Jones, 326 So. 2d 425 (Fla. 1975)(duration of the lease exceeded statutory definition, which in 1975 was 99 years versus 100 years, and a different legislative classification was in place); Ward. (leases were perpetual and thus greater than 100 year definitional restriction of section 196.199(2)(b), and taxpayers held legal title to the improvements).

(d) Cases where conveyer of rights did not retain a “reversionary interest” in the improvements at issue; thus conveying all rights.

A true lease involves a lessor who retains a “*reversionary interest*, which ripens into *perfect title* at the *expiration of the lease*.” Rogers, 99 So. at 551. If no reversionary interest is retained, however, all rights to the property have been conveyed, and that equates to a grant of fee simple title – not a leasehold estate. This occurs when the “useful life” of the improvements are less than the duration

of the land lease. Those facts were present in Archer, 355 So. 2d at 784 (court found improvements at issue “will have long since been destroyed by the end of the leases”); Gay, 52 So. 2d at 138 (court concluded, in an analysis that included “useful life” issue, that the improvements at issue would not revert to the government at end of lease); Offutt Housing Co. v. County of Sarpy, 351 U.S. 253 (1956) (factual finding that useful life of improvements was less than term of the lease); and Ward, 919 So. 2d at 462 (perpetual lease means term never ends, and thus conveyor of property rights retained no reversionary interest). Thus, nothing was retained to ripen “into *perfect title* at the *expiration of the lease*.” Rogers, 99 So. at 551.

The uncontroverted evidence in this case is that the improvements being rented to Appellants by the government will last far longer than the duration of the lease. (Affidavit of Roger Craft, R-XLI 7694-96, at 10.) (“Properly maintained,³ the Portofino buildings have a useful life well in excess of 100 years.”); (Affidavit of Robert Rinke, R-XLV 8162-63, at 6.) (The Portofino Towers “will have useful lives far in excess of 100 years.”). (See also, Affidavit of Vicky Bell, R-XXXIX 7289-7234) (Property Appraiser’s tax roles show numerous properties older than 100 years with increasing valuation.). Thus, in the case at bar, the government

³ The government lease requires these improvements be properly maintained. R-XII 1871

retains a valuable reversionary interest distinguishing this case from those relied on by Appellees.⁴

(e) Cases decided prior to legislative revisions.

Other cases relied upon by Appellees are inapplicable because there has been a material change in section 196.199(7) Florida Statutes since those cases were decided. Appellees claim equitable ownership in this case is established by Williams v. Jones, 326 So. 2d 425 (Fla. 1975), dismissed, 429 U.S. 803 (1976), and Archer, 355 So. 2d 781 (Fla. 1978). Appellees argue that Williams “held that the type of lease involved in this case ‘for a term of 99 years or more is tantamount to ownership in fee’” (AB, pp. 29-30) Appellees fail to note, however, that when the court decided Williams, section 196.199(6) (now section 196.199(7)), Florida Statutes, provided: “‘Property which is originally leased for 99 years or more, exclusive of renewal options, shall be deemed to be ‘owned’ for purposes of this section.’” Williams, 326 So. 2d at 435.

⁴ The Property Appraiser’s only “attempt” to rebut this evidence was to show that the federal government allows investors to deduct their investments in real estate over a period of 27.5 years, and the roofs would need to be replaced every 20 years. As established by the testimony of Certified Public Accountant, James Cox, investment recovery periods do not establish “useful life,” but rather reflect federal tax policy. (R-XXXII 5777-5974, p. 20, line 5, 21-22.) The estimated life of a roof does not equal “useful life” of the structure. If it did, the numerous 100-year-old buildings on the Property Appraiser’s tax rolls should be valued as worthless. They are not.

After Williams was decided, the Legislature changed the cutoff from 99 years or more to its current status, “100 years or more.” §196.199(7), Fla. Stat. (Supp. 1980). Thus, if the Supreme Court of Florida were deciding Williams today, it would likewise defer to the authority of the Legislature to classify property for tax purposes, and would conclude a lease for a term of 100 years or more is tantamount to ownership of the fee. The Williams court today also would recognize the “rational basis” for classifying a leasehold estate separately from fee simple title, and reject any argument that such classification violated the “equal protection” provisions of the Florida or Federal constitutions. As the Florida Supreme Court noted in that case, “the Legislature is presumed to know the existing law when it enacts a statute and is also to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is enacted.” Id. at 435 (citations omitted). In this case, the “later statute” is section 196.199(7) which changes the 99 year limit on duration of a defined “leasehold” to 100 years. Equally true is that the Legislature would have known the difference between a leasehold estate, and a fee simple estate, and elected to tax the former as intangible personal property when the subject of the lease was government owned improvements, as in the case at bar. Thus, the Legislature intended to, and did, change the maximum duration at which a lease will be considered a lease. Following Williams, the Legislature also expressly reclassified leasehold interests

as intangible personal property for purposes of ad valorem taxation. See §199.023(1)(d); §196.199(2)(b), Fla. Stat. (2004). Under the rationale of Williams, the Legislature was acting well within its power to classify and tax property interest.

C. Escambia County cannot, by Ordinance, alter the nature of the property interest conveyed to Appellants.

The Property Appraiser selectively quotes from an Escambia County Ordinance that complains about the Legislature's decision to tax leasehold interests of government owned improvements as intangible personal property. Escambia County Code sections 46-204(1) and (3) reads:

(1) The leaseholds constitute the equivalent of fee simple ownership.

* * *

(3) The Leaseholds are uniquely classified real property interests under current law that escape the uniform imposition of ad valorem taxes to pay their fair share of the cost of County services provided to such Leaseholds and the Occupants.

The full text recognizes that the Escambia County Commission acknowledged, albeit with disapproval, the Legislative classification that the Property Appraiser has elected to ignore. In this Ordinance, the Escambia County Commission recited its opinion of this classification by the Legislature as its justification for creation of a special tax district imposing taxes on Appellees and other lessees on Pensacola Beach. The Portofino interests were created by

contract. Neither those contracts nor Chapter 196, Florida statutes, can be altered by the Escambia County Commission's enactment of a county ordinance.⁵ See e.g., Chiles, 615 So. 2d 671, 673 (Fla. 1993).

The nature of the "sales" transactions referred to by Appellees (AB, p. 7) is established by the documents of conveyance. (R-XII 1867-2044.) So, for example, when Appellants mortgage their interests, the interest being pledged is expressly described as being a "leasehold interest." And the nature of the "title" being insured by title companies to mortgagees and purchasers is not fee simple title, but "leasehold interests."⁶

Although the Property Appraiser attempts to characterize the nature of the "leasehold interests" created by the governmental leases to be a "land lease" (AB, p. 38), the written contract refutes that position. In fact, the lease rates were based on the improvements being constructed at the lessees' sole expense, yet owned from the inception by the government. (R-XII 1870); (Affidavit of Robert Rinke,

⁵ Nor can the documents creating Appellants' leasehold interest be modified by statements by real estate agents, property managers, descriptions contained in advertisements, contracts for the sale of these leasehold interests, or by the language of mortgages, as the Property Appraiser argues. (AB, pp. 4-9)

⁶ The recorded closing documents emphasize this distinction. For example, the mortgages typically provide: "The interest hereby conveyed is a sub-subleasehold interest and wherever herein the term 'fee simple' is used, this instrument is to be construed to mean and refer to said leasehold interests." (R-XXXVII 66976-7141, Rider to Mortgage and Security Agreement, Composite Ex. 2, 5).

R-XLV 8163) (“Under the terms of the Master Lease and all subleases, these structures have belonged to the Santa Rosa Island Authority, a political subdivision of Escambia County, since the first pilings were driven. They have never, at any time, belonged to the tenants (leaseholders)”); (Affidavit of William Griffith, R-XLI 7644, at 7) (“When determining lease fees, the SRIA looks not only at the location of the real property but also the type and quality of the improvements to be constructed.”) When the Portofino lessees wanted to add to the improvements, for example, the SRIA would not allow that to occur without renegotiating the amount of rent to be paid. (Affidavit of Robert Rinke, R-XLV 8162-64, at 13.)

D. The SRIA did not “convert” Appellants’ leasehold interests into fee simple title by “consenting” to the creation of the Portofino Condominium Associations.

The Property Appraiser falsely implies that by agreeing in the Development Lease Agreement that the land would be submitted to a “plan of condominium ownership,” the nature of the leasehold estate held by the Portofino lessees was converted to “fee simple” versus “leasehold.” The language of the Master Lease makes it clear, however, that the interest being conveyed by the lease is a *leasehold interest*. (R-XII 1867-78.) The “Joinder” by Santa Rosa Island Authority in the condominium declaration specifically provides that nothing shall “affect or alter or in anyway change any provision of the Lease as it pertains to the leasehold estate in the land described in the Declaration of Condominium.” (R-XXIV – R-XXVII

4324-5120, tab C, at 72.) In addition, section 718.103(13), Florida Statutes defines “condominium property” to include “leaseholds and personal property that are subjected to condominium ownership.” Section 718.401(1)(c) expressly contemplates condominium unit “owners” owning a “leasehold estate” in property owned by the government. Thus, Chapter 713 does not alter the “leasehold interest” classification of Appellants’ property interest under Chapters 196 or 199.

E. Appellants do not have a “right” to renew; nor do they have automatic renewal clauses like those in Ward v. Brown.

The master lease in Ward contained the following “renewal” provision:

If lessee shall fully perform all the terms, provisions and conditions on its part to be performed for the full term hereof, this lease shall *automatically* be renewed for a further term of ninety-nine (99) years on the like covenants, provisions and conditions as are in this lease contained, including the right in lessee for further renewals. (emphasis supplied).

(R-XVIII 3185-3239, App., tab 1, p. 3)

In the present case, the master lease contains the following provision:

In the event Lessee shall fully perform all of the terms provisions and conditions on its part to be performed for the full term of this lease. Lessee shall have the full right and privilege at its election to renew this lease for a further term of ninety-nine years by giving the Authority written notice of such election to renew not later than six months prior to the expiration of the original such. (sic) *Terms, provisions and conditions of renewed lease to be mutually agreed to by both parties.*

(emphasis supplied). R-XII 1875.

It cannot be argued that these two clauses provide the lessees with the same “rights.” In the first instance, the lease “renewed” automatically at the end of 99 years for an additional 99 years on the same terms and conditions.

By contrast, the Portofino leases create no “right to renew.” Any tenant, with or without such illusory language, has the “right” to attempt to negotiate “[t]erms, provisions and conditions of [a] renewed lease.” It is well established that such language in a lease is illusory. E.g., LaFountain v. Estate of Kelly, 732 So. 2d 503, 505 (Fla. 1st DCA 1999).

F. “Ownership” for purposes of Homestead Exemption does not negate leasehold classification under §196.199(2)(b).

Appellees argue, at least by implication, that this Court has found that a lease with an initial term of 99 years could not be deemed a “leasehold interest” under section 196.199(2)(b). They base their erroneous argument on the following language from Ward:

Moreover, the Florida Constitution expressly contemplates equitable ownership for leases with initial terms of 99 years by providing homestead exemptions for leaseholds in excess of 98 years. See Art. VII, § 6(a), Fla. Const.”

Ward, 919 So. 2d at 464. Ward’s reference to the constitutional homestead exemption simply illustrates that equitable title may arise from a lease that has a duration of less than 100 years. That point is not disputed. It is, in fact, demonstrated by the “useful life” cases in which courts have found that title to the

improvements is effectively conveyed (i.e., “equitable title” exists) when the duration of the lease exceeds the useful life of the improvements. See e.g., Archer, 355 So. 2d at 784. Contrary to Appellees’ argument, this Court did not intend in Ward to effectively replace the 100-year definitional restriction adopted by the Legislature in section 196.199(2)(b) by referencing the shorter duration applicable to homestead exemption found in section 196.041(1). The homestead provision was to be used for “no other purpose.”

G. The Property Appraiser falsely claims Escambia County asserts no ownership interest in the property leased to Appellants

The Property Appraiser argues without citation to the record, and ignoring the plain language of the leases, that the government claims no ownership interest in the improvements leased to Appellants. (AB, p. 36) Here, the written document creating the Appellants’ property interest is the Master Lease to Gary Work as Trustee. (R-XII 1875.) This document states the government, not Appellants, owns the improvements from their inception.

H. Legislature, not the Executive or Judiciary, is charged with establishing tax policy. Property Appraiser violated “Separation of Powers” Doctrine through “vetoing” Legislative enactment

The Property Appraiser reveals in his Answer Brief his motivation for ignoring the Legislative enactment at issue in this case, section 196.199(2)(b); i.e., his belief that application of the tax classification mandated by the Legislature would generate less tax revenue for general use by local government. (AB, pp. 47-

49). The Property Appraiser argues that recognizing Appellants' property interest to be "leasehold interests" as mandated by section 196.199 would allow Appellants to "avoid paying their fair share of taxes," and "none of the lease fees support public schools," or "Sheriff costs" or certain other public services. (AB, pp. 47-48). This argument ignores the fact the government set the lease fees, the government decided how the revenue generated is used, and the government obtained a valuable reversionary interest in improvements it did not build. In addition, the government obtained millions of dollars a year in tax revenues generated by the tourist economy promoted by the construction of valuable improvements on government property at the lessee's sole expense. (R-XLI 7546-7608.)

The combination of lease rates, the government's reversionary interest in property it did not build, and intangible taxes, gives the government the contractual benefits it bargained for in these leases.

The Property Appraiser erroneously argues (or at least implies) that "[t]his disparity in the funding of local services and schools *was the reason* the Williams Court ordered the Plaintiffs to pay property taxes at "parity" with the other real property in the private sector." (AB, p. 48) (emphasis supplied). Appellees argument assumes that the judiciary in Williams was *vetoing a legislative classification* with which it disagreed to achieve a more "fair" taxation. In

actuality, the Williams court was *enforcing the legislative classification* as written, precisely what Appellants are asking that this Court do. The Williams court rejected an “equal protection” challenge to the legislative classification in effect in 1975, finding the power to classify property was “clearly” within the “broad powers of classification for taxation purposes” given exclusively to the Legislature; a power not to be disturbed if a rational basis for that particular classification exists. It did not preclude adoption of a different classification.

In this case, the same deference must be given to the classification of Appellants’ property interest as being “leasehold interests.” There is a rational basis for treating a “leasehold estate” differently than a “fee simple estate.” These two “estates in real property” differ in nature, kind, duration, and statutory definition. A leasehold interest is an indirect, limited duration, property interest; i.e., an “intangible” property. See §199.023(1)(d), Fla. Stat. (2004). A fee simple estate is direct ownership of real property of unlimited duration.

Classifying and taxing property interests is the role of the Legislature. The Property Appraiser cannot substitute his political views on this policy issue for the views of the Legislature. While tax policy may be both set and changed by “the will of the people,” acting through their elected representatives, it may not be altered by the Property Appraiser. Miller, 468 So.2d at 375.

CONCLUSION

When the Executive Branch trespasses on the powers granted exclusively to the Legislature, it is the duty of the Judicial Branch to step in and whistle “foul.” That is the situation now before the Court. The Property Appraiser, under the guise of “following” Ward v. Brown, has ignored the clear and legally controlling distinctions between improvements owned by the government (the case at bar), and improvements owned in perpetuity by the taxpayer (Ward). Thus, he has failed and refused to apply the “leasehold interest” classification to the Portofino leaseholds, electing instead to apply a different classification he believes is more “equitable” and generates more tax revenue for local coffers.

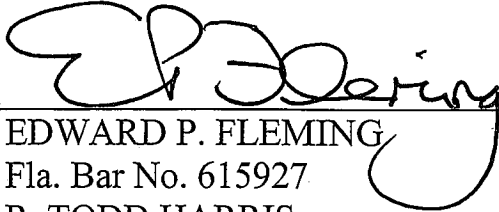
That action cannot be allowed to stand. The property interest held by Appellants’ is a leasehold interest, meeting all common law and statutory definitions and parameters of “leasehold” as to nature, type and duration. Being classified as “leasehold,” it must be taxed as “leasehold.” It is the business of the Legislature, not the Property Appraiser, to classify property interests, and to establish the type, rate and uses for the tax revenue generated.

For these reasons, Appellants ask this Court to reverse the Final Judgment on Counts I and II of Plaintiffs’ First Amended Complaints and remand the case with directions to enter summary judgment in favor of the Portofino leaseholders.

Respectfully submitted:

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LOUIS K. ROSENBLOUM, P.A.
4300 Bayou Boulevard, Suite 36
Pensacola, Florida 32503
(850) 475-1211
(850) 475-1290 (fax)
lrosenbloum@rosenbloumlaw.com

Attorneys for Appellants

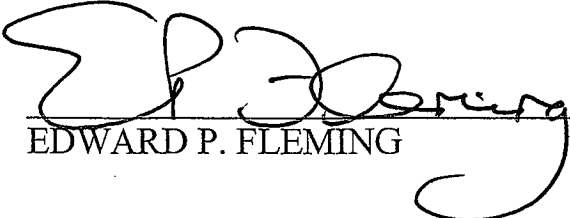

EDWARD P. FLEMING
Fla. Bar No. 615927
R. TODD HARRIS
Fla. Bar No. 651931
MCDONALD - FLEMING -
MOORHEAD
25 West Government Street
Pensacola, Florida 32502
(850) 477-0660
(850) 477-4510 (fax)
epfleming@pensacolalaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Elliot Messer, Esquire, and Thomas M. Findley, Esquire, Messer, Caparello & Self, P.A., 2618 Centennial Place (32308), Post Office Box 15579, Tallahassee, Florida, 32317 by U.S. Mail this 25th day of February, 2008.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a Times New Roman 14-point font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.


EDWARD P. FLEMING