



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

LEONARD J. ACCARDO and
LYNN M. ACCARDO, et al.,

Appellants,

vs.

DCA NO: 1D10-4072

GREGORY S. BROWN, Property
Appraiser for Santa Rosa County,
Florida, and STAN C. NICHOLS,
Tax Collector for Santa Rosa County,
Florida,

Appellees.

_____ /

INITIAL BRIEF OF APPELLANTS

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

LOWER TRIBUNAL NOS. 06-1064 CA
07-1421 CA
08-1950 CA
09-2212 CA 01-OTH

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PRELIMINARY STATEMENT

Appellants, Leonard J. Accardo and Lynn M. Accardo, et al., are referred to collectively as “plaintiffs;” Appellees, Gregory S. Brown, Property Appraiser for Santa Rosa County, Florida, and Stan Nichols, Tax Collector for Santa Rosa County, Florida, as “defendants” or as “Property Appraiser” and “Tax Collector.” The record on appeal consists of three divisions.¹

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from an Order Granting Defendants’ Motion for Summary Judgment and Denying Plaintiffs’ Motion for Summary Judgment and Entry of Final Judgment (hereafter, “Judgment”), entered in the Circuit Court of Santa Rosa County, Florida, by Circuit Judge Gary Bergosh. (R1, V13, 2149; A:1). Plaintiffs state the following issues to be determined on appeal:

1. Whether Santa Rosa County, Florida, had the power to convey or transfer equitable ownership of the land where the Deed of Conveyance from the United States allows the land to be leased to private persons, “but never to be otherwise disposed of or conveyed;”

¹ The latter two divisions relate to earlier proceedings in this Court that were consolidated for oral argument. Each division has a number of volumes. References to the record are made with an “R” indicating the record, followed by a number, indicating the division, a “V” indicating the volume of that division, and the page number of the document, e.g. (R1, V1, 110). References to the Appendix are made with an “A:” followed by the tab and page number of the appended document, e.g. (A:3, p. 4). The first division has been supplemented, and references thereto are made with “RSupp.,” followed by the page number.

2. Whether *Ward v. Brown*, 919 So. 2d 462 (Fla. 1st DCA 2005), *rev. den.*, 923 So. 2d 1165 (Fla. 2006) (“*Ward*”), which dealt only with taxation of improvements, by virtue of a specific provision of Fla. Stat. § 196.199(2)(b) (a provision not applicable to the land), governs the issue of taxation of the land within plaintiffs’ leaseholds;

3. As to taxation of improvements, whether this case is governed, under *stare decisis*, by this Court’s ruling in *Bell v. Bryan*, 505 So. 2d 690 (Fla. 1st DCA), *rev. den.*, 513 So. 2d 1060 (Fla. 1987);

4. Whether defendant Tax Collector had standing to challenge the constitutionality of Fla. Stat. §§ 196.199(2)(b) and 199.023(1)(d) (2005);

5. Whether the challenged statutes are unconstitutional; and

6. Whether tax liens, tax certificates, and tax deeds may be used to collect delinquent taxes against private leaseholds of property owned by Escambia County at Navarre Beach, despite the existence of Fla. Stat. §§ 196.199(8)(a) and 197.432(9), which prohibit such procedures, where, as here, the leases require payment of rent.

There were no genuine issues of material fact in the proceedings below. The plaintiffs are private lessees, assignees, or sublessees of 887 parcels of property on Navarre Beach. While improvements have been built on most, a number of parcels involved in this action have no improvements at all.

The chain of title is important. The lands of Santa Rosa Island were deeded to Escambia County by the United States of America in 1947. The deed required Escambia County to “retain” the land for public purposes; Escambia County received authority to use or lease the lands, “but [they were] never to be otherwise disposed of or conveyed” by the county to private persons. (R2, V2, 232-3; A:2, pp. 1-2).² Since 1956, Santa Rosa County has leased Navarre Beach at the eastern end of the island from Escambia County (R2, V2, 235; A:3). The lease of Navarre Beach to Santa Rosa County is for 99 years and includes a provision for automatic renewal (A:3 at p. 3). The leases involved in *Ward*, and a limited number of plaintiffs’ leases, contain language allowing renewal on the same terms as Santa Rosa County’s lease from Escambia; e.g. (R2, V2, 260-61).³

Examination of these leases and the affidavit of Dennis Tackett (R1, VSupp., 2372) establish the following undisputed facts:

² Escambia County, having determined that private development serves a public purpose, leases property of Pensacola Beach (near the western end of Santa Rosa Island) to private lessees through its agency, the Santa Rosa Island Authority (“SRIA”).

³ Copies of specific plaintiffs’ leases were attached to the First Amended Complaint (R2, V2, 240-98), and seven others were attached, as examples, to the affidavit of Dennis Tackett (R1, VSupp., 2372). A copy of every plaintiff’s lease was included within two compact discs (“CDs”) submitted to the court below prior to the summary judgment hearing (R1, V11, 1786).

1. All of the plaintiffs' leases require the lessees to construct (at the lessees' expense) specified improvements, and some set forth a specified period of time within which to do so. Some of the parcels have no improvements.

2. All of the plaintiffs' leases provide that legal title to any building or improvement of a permanent character erected on the premises vests in the lessor Santa Rosa County "forthwith" or at the lease's termination.

3. The leases all require lessees to repair or rebuild any building or improvement damaged or destroyed by fire, windstorm, water, or any other cause so the building or improvement is in as good and tenable condition as it was before the damage or destruction. No lessee may remove any building or improvement of a permanent character from the leased premises.

4. Plaintiffs' leases provide that, on default, lessees shall forfeit all rights of possession of the leased property. All of the leases provide that, upon expiration or sooner termination of a lease, the lessee shall have 15 days to remove all personal property, and that the lessee must surrender possession of the land and improvements in as good state and condition as reasonable use and wear permit.

5. None of the leases grants plaintiffs an option ever to purchase or otherwise acquire legal title to the land or the leasehold improvements.

6. Some leases prohibit any assignments, subleases, or transfers of the lessees' leasehold interest without prior written consent of the lessor. Some allow

the lessees to assign their leasehold interests, but prohibit sublease of the leased premises without the lessor's prior consent. Some allow assignments, subleases, or transfers of the lessees' leasehold interests without prior consent.

7. Most of the leases at issue are for 99-year terms. Many of those have an option for a 99-year renewal, by giving Santa Rosa County written notice of the election to renew at least six months before expiration of the original term. Some leases have 40-year terms, with a similar option to renew for 40 years.

8. Some leases contain no renewal provision at all, and still others provide for a renewal of 25 years.

9. Most of the leases granting lessees an option to renew require affirmative action by the lessees to exercise their option to renew.

10. Some leases declare that the lease "shall renew automatically." Others have a "renewal option" subject to provisions of the county-to-county lease (the renewal of which is "automatic").

11. No plaintiff's lease uses words such as "perpetual," "for infinity," or "forever" to describe the length of the lease term.

In 1980, the Florida Legislature enacted Chapter 80-368, Laws of Florida, later codified in Fla. Stat. §§ 196.199 and 199.023. Subsection 199.023(1)(d)⁴

⁴ This section was repealed, but at the time of repeal Section 196.199(2)(b) was amended to retain the reference to Section 199.023(1)(d) (2005). Thus, in effect,

defined as “intangible personal property” leasehold interests of an initial term of less than 100 years in governmentally owned properties, if the leaseholds were undeveloped or predominantly used for commercial or residential purposes, and if rent was payable for the leasehold.⁵ Subsection 196.199(2)(b) directs that such leasehold interests are to be taxed only as intangible personal property, while improvements and personal property **owned** by a lessee are to be taxed as real property.

Until 1991, when the boundary line between the counties was revised, Navarre Beach was part of Escambia County. In 1982 and 1983, the Escambia County taxing officials appraised and taxed the lessees’ interest in the Santa Rosa Island improvements as real property. In 1984, lessees of eight parcels on Pensacola Beach sued the Tax Collector for declaratory judgment that the taxes were improperly levied on the improvements at real property rates; and in 1986 the tax collector sued the same persons to enforce tax liens against the improvements (the Property Appraiser intervened in that action). The lessees prevailed at the trial court level in both cases and in the respective appeals to this Court. *See, Bell v. Bryan*, 505 So. 2d 690 (Fla. 1st DCA), *rev. den.*, 513 So. 2d 1060 (Fla. 1987) (“*Bell I*”), *aff’g, R.D. Bryan v. Bell*, 84-1911-CA-01 (Fla. 1st Cir. Ct. Jan. 13, 1985).

the law remains unchanged. [In this brief, only the citations to the repealed statute will include the year.]

⁵ The residential leases at issue in this case all have initial lease terms of less than 100 years, and thus fit the statutory definition of intangible personal property.

1986); and *Bell v. Bryan*, 519 So. 2d 1024 (Fla. 1st DCA 1988) (“*Bell II*”), *aff’g*, *Bell v. R.D. Bryan*, 86-678-CA-01 (Fla. 1st Cir. Ct. Jan. 2, 1987) (hereafter, the appellate decisions will be collectively referred to as the *Bell* cases).⁶ After the *Bell* decisions, the county taxing officials ceased appraising and taxing the lessees’ interests in the improvements as real property.

From 1988 through 2000, the Escambia and Santa Rosa property appraisers and tax collectors continued to regard the lessees’ interests in the Navarre Beach improvements as intangible personal property, and thus not subject to real property taxes. Then, for the tax year 2001, defendant Brown, as Santa Rosa Property Appraiser, appraised the improvements on a limited number of Navarre Beach leases as real property. The improvements were placed on Santa Rosa’s 2001 tax roll and the former Santa Rosa Tax Collector issued 2001 tax notices for those real property taxes. Litigation led to this Court’s *Ward* decision.⁷

During tax years 2002-2005, class actions were filed, challenging taxation of Navarre Beach improvements. The cases were consolidated and eventually

⁶ Portions of the records of the administrative and legal proceedings which led to the decisions in the *Bell* cases are attached to the affidavit of Merrell Fairchild (R1, VSupp., 2299-2368).

⁷ Donald Partington, counsel for lessees in the *Ward* case discussed *infra*, testified by affidavit that no evidence of the lower court proceedings in the *Bell* cases was presented to the trial court in *Ward*. (R1, VSupp., 2369-71).

dismissed.⁸ The trial court here took judicial notice of those cases (R2, V2, 398-9). During that class action litigation, Gregory Brown testified that, in his opinion, the land involved in the Navarre Beach leases was owned as follows: Escambia County had title, Santa Rosa County had equitable ownership, and lessees were not to be taxed on the land, because the counties had the ownership interests. (R3, V70, 62-63, 85-86).

In 2006, for the first time, Mr. Brown, as Santa Rosa Property Appraiser, included in the tax assessments the land within plaintiffs' leaseholds and the Tax Collector issued notices to collect taxes on both the land and the improvements. Plaintiffs filed suit on November 30, 2006.⁹ Under Fla. Stat. § 197.141, they were required to file suit each consecutive year, and the 2007-2009 actions were

⁸ The present case was before this Court in 2007, because the trial court granted partial summary judgment on *res judicata* grounds, finding that taxation of land beneath Navarre Beach condominiums had been litigated in the earlier class action cases. This Court reversed the partial summary judgment in *Werks Unlimited, LLC et al., v. Gregory S. Brown, etc., et al.*, Case No. 1D07-6090 (Dec. 5, 2008). A copy of this decision is at (R1, VSupp., 2292).

⁹ Plaintiffs sought the following relief: (1) a declaration that their leasehold interests have been defined by statute for tax purposes as intangible personal property; (2) an injunction to prevent the Property Appraiser from assessing the land and improvements on their leasehold property as real property, and the Tax Collector from levying and collecting real property taxes; (3) an estoppel of the defendants from pursuing taxation of the leasehold improvements under the doctrines of *stare decisis*, *res judicata*, and collateral estoppel, pursuant to this Court's *Bell* decisions; and (4) an injunction to prevent the Tax Collector from using tax liens, tax certificates, and tax deeds to collect delinquent taxes. (R2, V2, 200-218)

consolidated with the 2006 case. (R1, V13, 2146). All are included in this appeal. As an affirmative defense, the Tax Collector raised constitutional challenges to Fla. Stat. §§ 196.199(2)(b) and 199.023(1)(d) (2005) (R1, V11, 1787-95), and plaintiffs moved to strike the affirmative defense. (R1, V11, 1838-41).

Santa Rosa's attorney testified that the County had granted no deed to any plaintiff; that each plaintiff's interest in the real property was determined by his or her particular lease; and that the leases "speak for themselves." (R1, V16, 12-14, 21-22, 29-30). The Tax Collector testified that he thought the statutes prohibiting use of tax liens and certificates did not apply to leasehold property which the Property Appraiser deemed to be equitably owned by the lessee. (R1, V15, Nichols 43-52). In fact, his office had requested issuance of a tax deed on a parcel not involved in this case. (*Id.* at pp. 25-31, Exhibits 4-5).

After discovery, plaintiffs and defendants filed cross motions for summary judgment. (R1, V1, 111-17; 125-34). Both sides submitted legal memoranda. (R1, V12, 1843; R1, V13, 2095). After a hearing, the lower court denied plaintiffs' motion to strike, and entered the order granting defendants' motion for summary judgment and final judgment in favor of defendants and against plaintiffs. (R1, V13, 2149; A:1). Plaintiffs timely filed notice of appeal.

In the Judgment, reference was made to six cases (A:1, pp. 5-6). Although not so stated in the Judgment, none of these involved taxation of land; taxation of

leasehold improvements only was the subject of the litigation in each case. In the fifth case cited, *1108 Ariola, LLC v. Jones*, Case No. 2004-CA-002290 (Fla. 1st Cir. Ct. Dec. 18, 2009), the court granted summary judgment for defendants against lessees of all but eight of the 2,200+ residential parcels involved in that case on Pensacola Beach.¹⁰ The lessees of the eight parcels were either litigants, or in privity with the litigants, in the *Bell* cases, and summary judgment was granted to them on *res judicata* grounds. Defendants there did not appeal that ruling. As a result, on Pensacola Beach, eight residential parcels bear no real property tax at all, and more than 2,200 parcels are taxed on improvements only. On Navarre Beach, there are 887 parcels on which both land and improvements are taxed, due to the Judgment under appeal here.

SUMMARY OF THE ARGUMENT

The Deed of Conveyance from the United States to Escambia County specifically retained, and did not convey, the right to dispose of or convey the land to a private person or entity, although the county could lease the land to private persons and entities. The court below erred in ruling that the leases granted by Santa Rosa County conveyed or transferred ownership of the land to plaintiffs, who are mere lessees. Santa Rosa County had no power to so dispose of or convey

¹⁰ A copy of the trial court order in that case is found at Tab 2 of the Appendix to plaintiffs' motion to consolidate the appeals for oral argument. See Case No. 1D10-2050.

the land. The U.S. Constitution and U.S. Supreme Court decisions deny the county authority to make the transfer that the trial court has decreed.

The land of Navarre Beach, owned by Escambia County, is immune from taxation, meaning Santa Rosa County has no ability to tax it. Plaintiffs have no equitable ownership in the land because they are not the real owners and they have no ability ever to become holders of legal title to the land.

As to taxation of improvements, the court below erred in relying on *Ward* rather than *Bell I*. Evidence before that court established that, in *Bell I*, the tax authorities argued that the lessees equitably owned the improvements. This court rejected that argument. The *Ward* majority was incorrect when it declined to give *stare decisis* treatment to *Bell I*; Judge Benton's dissent correctly states the law.

A county tax collector has no standing to challenge the constitutionality of a taxing statute, and the trial court erred in concluding otherwise. The Tax Collector is a public official who, like the Property Appraiser, has no authority to nullify or seek to have declared unconstitutional taxing statutes adopted by the Legislature. *The Crossings at Fleming Island, etc. v. Echeverri*, 991 So. 2d 793 (Fla. 2008). The "public funds" exception to this general rule does not apply to the Tax Collector, because his administration of the challenged enactments does not "require the expenditure of public funds." *Barr v. Watts*, 70 So. 2d 347 (Fla. 1953) (cited in *The Crossings*, 991 So. 2d at 799).

Finally, even if real property taxes could be levied against plaintiffs, there is no lien on the leasehold, land, or improvements, so no tax certificates or tax deeds may be issued for delinquent taxes. *See*, Fla. Stat. § 196.199(8) and 197.432(9); *State Dep't of Revenue v. Gibbs*, 342 So. 2d 562 (Fla. 1st DCA 1977); and *Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306 (Fla. 2006). The trial court erred in approving the use of such procedures.

ARGUMENT

Standard of Review. This Court has jurisdiction over an appeal of a final order granting summary judgment. There were no genuine issues of material fact in the proceeding below, and the grant of summary judgment was based upon conclusions of law. Thus, the standard of review is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000).

I. THE UNITED STATES CONSTITUTION PROHIBITS OWNERSHIP OF NAVARRE BEACH PARCELS BY PRIVATE PERSONS OR ENTITIES.

A. Pursuant to the Federal Grant, Escambia County Owns the Land and Is Powerless to Convey Ownership to Plaintiffs.

The land at Navarre Beach was deeded from the United States to Escambia County in 1947, by a Deed of Conveyance limiting what Escambia could do with the property. (R2, V2, 232-3; A:2, pp. 1-2). The deed allows the County to convey the property “back to the Federal Government, or to the State of Florida or any agency thereof.” But if the county retains it, the property:

shall...be used...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 and upon such terms and conditions as it shall fix...but never to be otherwise disposed of or conveyed by it...

Escambia County, through the SRIA, leased the property known as Navarre Beach to Santa Rosa County, with stipulations that its purpose was “island development” and that the lessee could grant leases for residential, recreational, and commercial purposes, “provided the leases shall be substantially on the same terms, covenants and conditions, as like leases then in use by the lessor.” (R2, V2, 237; A:3, p. 3).

Thus, Escambia County and Santa Rosa County, as its lessee, both have power to lease to private persons, when the particular county determines it is in the public interest, but neither can “otherwise” dispose of or convey the property to private persons. Neither can grant a perpetual lease to a private person. It is a fundamental principle of property law that a person or entity cannot convey better ownership interest or title than he has, nor can one claim better title than he receives. *Dicks v. Colonial Fin. Corp.*, 85 So. 2d 874, 876 (Fla. 1956); *Trumbull Chevrolet Sales Co., Inc. v. Seawright*, 134 So. 2d 829, 841 (Fla. 1st DCA 1961). A deed or conveyance vests in the grantee all interest the “grantor had power to [convey],” unless a contrary intention appears in the instrument. Fla. Stat. § 689.10.

Escambia could give Santa Rosa no more ability or power to deed to private persons or “otherwise” dispose of or convey than Escambia had -- which was no power. Because Santa Rosa had no power to dispose of the Navarre Beach land or convey the land to private persons, it could not make them equitable owners of the land.

The trial court ruled that, by entering into sublease agreements with plaintiffs, Santa Rosa County did through a lease what it was legally prohibited from doing: It conveyed equitable ownership to the lessees, disposing of those parcels. This ruling violates the federal grant and deprives Escambia County of its equitable ownership interest. The Judgment is contrary to Florida property law and the plain words of the U.S. Government deed.

Plaintiffs acknowledge that the *Ward* majority described the lease from Escambia to Santa Rosa as perpetual because it contains a provision that renewal would be “automatic.” 919 So. 2d at 463. Plaintiffs question this Court’s reasoning on that point,¹¹ but if one accepts that Santa Rosa has a perpetual lease on the Navarre Beach end of the island -- in essence supplanting Escambia as owner of all Navarre Beach parcels in this case -- Santa Rosa can do no more than Escambia can in conveying to private persons. *Dicks, Trumbull*, and Fla. Stat. § 689.10.

¹¹ In *Sisco v. Rotenberg*, 104 So. 2d 365, 368 (Fla. 1958), the Florida Supreme Court declined to construe a similar lease renewal provision to allow more than one renewal.

Under the U.S. Deed of Conveyance, a lessee from Santa Rosa County cannot claim ownership of the land -- which the deed says lessees may never receive. If the County cannot convey ownership and the lessees cannot claim ownership, there is only one logical conclusion: plaintiffs have no ownership interest in the land they are leasing.

B. Santa Rosa County Has No Power to Grant Leases That Convey Ownership of the Land to Plaintiffs.

Santa Rosa clearly had the power, and was expected to grant leases to private persons. But it had no power to dispose of or convey the land. Thus, Santa Rosa cannot grant perpetual leases to private persons.

In *Ward*, the Court cited *Thompson v. First National Bank of Hollywood*, 321 So. 2d 466 (Fla. 4th DCA 1975), where a perpetual lease was described, to quote *Ward*, “as a conveyance in fee, reserving rent,” 919 So. 2d at 464.¹² Santa Rosa had no power to grant a perpetual lease of the land (“a conveyance in fee”) to any of the plaintiffs. For this court to rule otherwise would directly contradict U.S. Supreme Court precedent and a Florida statute limiting transfer to only those interests the grantor has. *Dicks*, 85 So. 2d at 876.

The *Ward* majority did not address Santa Rosa’s lack of power to convey the land to private persons. That case dealt only with taxation of improvements and,

¹² *Ward* also cited *Penick v. Atkinson*, 139 Ga. 649, 652, 77 S.E. 1055, 1057 (1913) (“[A]n absolute grant of exclusive possession of land is inconsistent with any other estate except that of a fee”). *Ward*, 919 So. 2d at 464.

according to the dissent (p. 465, footnote 3), the defendants there (the same as in this case) conceded that the land was not subject to real estate taxation. The deed from the United States did not address leasehold improvements; it dealt only with the bare land.

The trial court here did not address the issue of whether any of plaintiffs' leases are perpetual, but the court -- in relying on the lease terms to declare plaintiffs the owners of this land, subject to local county taxation -- ignored the prohibition set out in the Deed of Conveyance.

This is not an option. The Property Clause of the U.S. Constitution provides that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...” U.S. Const., Art. IV, Section 3, cl. 2. The term “property” in the clause has been defined to include “all...real property rightfully belonging to the United States.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 331 (1936). Congress has power “without limitation” to dispose of federal property. *Alabama v. Texas*, 347 U.S. 272, 273 (1954).

Congress alone can determine to whom the “soil of the United States” will be sold and under what conditions. *Van Brocklin v. Anderson*, 117 U.S. 151, 167 (1886). Therefore, an individual or entity may not dispose of federally owned property unless Congress has conferred such power, expressly or implicitly. *Butte*

City Water Co. v. Baker, 196 U.S. 119, 126 (1905). Here, the deed declared *expressly* that the county may never dispose of or convey the Santa Rosa Island lands to private persons. Thus, Congress reserved to itself the ability to convey to private persons any land described in the deed. Escambia did not receive fee simple title; the United States did not convey to Escambia the right to convey the land to private persons. The trial court has no authority to nullify Congress' decision.¹³

¹³ The U.S. District Court for the Central District of California addressed the issue of whether state law or state agencies could determine ownership of Federal land (actually a single-family home) contrary to Federal law, in *Secretary of H.U.D. v. Sky Meadow Ass'n*, 117 F. Supp. 2d 970 (C.D. Cal. 2000). Answering the question in the negative, and quieting title to the foreclosed property in the United States, the trial judge wrote:

When Congress acts pursuant to its power under the Property Clause, all regulations necessarily take precedence over any state or local laws. This is, of course, the rule under the Supremacy Clause of the Constitution. The Supremacy Clause, in pertinent part, states that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof;...shall be the supreme Law of the land, and the Judges in every State shall be bound thereby...” U.S. Const. Art. VI, cl.2.

117 F.Supp. 2d at 976-77.

Pennsylvania's Commonwealth Court applied these principles in a case involving the tax sale of a parcel the Veterans' Administration owned because of an earlier foreclosure. Real estate taxes apparently had not been paid by the foreclosed borrower. Although Congress had adopted a statute waiving sovereign immunity -- for a *judicial* tax sale of property the VA has foreclosed upon (28 U.S.C. §2410) -- there was no Federal statute allowing an agency like the “Tax Claim Bureau” of the State to carry out a *non-judicial* sale of Federal government land. As a result, the Pennsylvania court, citing *Sky Meadow*, reversed an order denying the petition to set aside the tax sale, pointing out that:

In the instant case, the trial court has declared plaintiffs the equitable owners of the land, which is clearly “against the consent of the government.” This land is “never to be otherwise disposed of or conveyed” to private persons, words placed in a deed “by virtue of the authority contained in the act of July 30, 1946 (Public Law 564, 79th Cong.)...” (R2, V2; A:2, p.1). The decision below directly contravenes the Property Clause and the Supremacy Clause of the U.S. Constitution.

The trial court decision that lessees must pay ad valorem taxes on the land because they own it creates the problem that any failure to pay could result ultimately in a non-judicial tax deed sale under Fla. Stat. § 197.542, and the issuance of a tax deed under § 197.552. This would be the very result that the Pennsylvania Commonwealth appellate court held invalid in the *Upset Tax Sale* case.

The record in this case reflects that defendants have treated Navarre Beach taxpayers who are not parties to this suit as if they are owners, selling tax certificates and having the Clerk issue tax deeds if the taxes are not paid.¹⁴

Property owned by the United States, for reasons of public policy, “cannot be seized by authority of another sovereignty against the consent of the government.”

In Re: Upset Tax Sale, 976 A. 2d 1271 (Pa. Commonw. Ct. 2009), quoting from *Armstrong v. U.S.*, 364 U.S. 40, 43 (1960).

¹⁴ See, pp. 26-29 of Nichols’ deposition. (R1, V15, Nichols, 26-29).

As this Court has acknowledged, the Supremacy Clause underpins federal preemption of commercial regulation. In *State Department of Banking and Finance v. Standard Federal Savings & Loan Ass'n*, 463 So. 2d 297 (Fla. 1st DCA 1984), Judge Zehmer, writing for a unanimous Court, left no doubt that state actions contrary to Federal law are void:

Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found “where compliance with both federal and state regulations is a physical impossibility”...or where the state “law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁵

Id. at 301.

The Supremacy Clause, U.S. Supreme Court decisions, and Florida court rulings demonstrate that the trial court had no power to judicially declare or grant to plaintiffs an ownership interest in Navarre Beach lands. There is no basis for levying or collecting taxes on the land without such a declaration; the leases grant nothing more than possession for a definite period of time. The taxing authorities’ attempt to thwart the “full purposes and objectives of Congress” -- or to claim that Santa Rosa has done so by its leases -- is beyond the County’s power; thus, taxes

¹⁵ The Court also quoted from *Perez v. Campbell*, 402 U.S. 637, 652 (1971): “State regulation is deemed preempted where its enforcement ‘frustrates the full effectiveness of federal law.’” *Standard Federal*, 463 So. 2d at 301. *See also, Nash v. Fla. Industrial Comm’n*, 389 U.S. 235 (1967), where a ruling by the Florida Industrial Commission was held to have violated the Supremacy Clause.

that plaintiffs have paid must be ordered refunded, and defendants enjoined from further efforts to assess or enforce real estate taxes on the land.

II. THE LAND AT NAVARRE BEACH IS IMMUNE FROM TAXATION

A. County-Owned Land Is Immune From Taxation.

The Florida Supreme Court has made clear that the "state and counties are immune from taxation." *Fla. Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250, 255 (Fla. 2005).¹⁶

A county owns the Navarre Beach land which is leased to plaintiffs. Whether that county is Escambia (as we believe) or Santa Rosa, matters not; the land is immune from taxation. It has not been, and cannot be, conveyed to the plaintiffs. Appraising and placing the land on the tax rolls and sending notices to plaintiffs for 2006-2009 real property taxes on the land were unlawful actions.

B. Plaintiffs Have No Equitable Ownership in the Land.

Defendants claim that plaintiffs, who possess the land under lease agreements, have become "equitable owners" of the land, despite the lack of any document transferring such interests, and despite the county's lack of power to convey ownership. The leases themselves grant enough "burdens and benefits" to plaintiffs, defendants say, to justify taxing plaintiffs as if they are owners. But §§

¹⁶ An exemption presupposes an ability to tax, whereas an immunity indicates the absence of that ability. *Markham v. Broward County*, 825 So. 2d 472, 474 (Fla. 4th DCA 2002) (County-owned land leased to private for-profit businesses held to be immune from real estate taxes).

199.023(1)(d) (2005) and 196.199(2)(b), Florida Statutes, do not allow that option; instead, they declare that these leaseholds are taxed only as "intangible personal property." The taxing authorities attempt, through alchemy, to turn leases into ownership.

Defendants' argument that plaintiffs are "equitable owners" of the land is based on the doctrine of "equitable conversion," which is derived from common law. The doctrine arose out of agreements for deed under the terms of which the purchaser obtained possession of the property and all "burdens and benefits" of ownership, but the seller retained legal title to secure payment of the purchase price. Once the seller was paid in full, a deed was executed, giving the purchaser title to the property. These "agreements for deed" were held to convey equitable or beneficial interest in the property to the purchaser with the seller deemed to hold only "naked title," "legal title," or "bare title" to the property. Under such circumstances, the purchaser was held to be the "equitable owner" of the property.¹⁷

Many Florida cases have recognized and applied the equitable conversion doctrine.¹⁸ The Legislature has deemed a contract for deed to be a mortgage,

¹⁷ In Black's Law Dictionary, 4th Edition, "equitable title" is defined as the beneficial interest of the person whom equity regards as the "real" owner; and under the "equitable owner" definition, such an owner is contrasted with the one who has only "nominal or legal" ownership.

¹⁸ *Hull v. Md. Casualty Co.*, 79 So. 2d 517 (Fla. 1955); *B.W.B. Corp. v. Muscare*,

requiring foreclosure in the event of default. Fla. Stat. § 697.01. But no lessee here has entered into an arrangement with Santa Rosa County that in any way resembles an agreement for deed or a mortgage. There is no future date when a debt is to be paid off and legal title to land or improvements is to be delivered to the lessee. The leases call for monthly payments of rent, not principal and interest like an installment sales agreement or mortgage.

The leases require that lessees will surrender possession of the land and improvements in good condition and repair upon the expiration of the lease. All of plaintiffs' leases provide that legal title to any building or improvement of a permanent character erected on the premises shall vest in Santa Rosa County, subject to the terms of the leases. The leases all contain clauses requiring the lessees to repair or rebuild any building or improvement damaged or destroyed by fire, windstorm, water, or any cause so as to place the same in as good and tenable condition as it was before the event causing such damage or destruction. Further, pursuant to the lease agreements, no plaintiff may remove any building or improvement of a permanent character from the leased premises. Clearly, the ultimate benefit of ownership remains in the County, not in the lessees.

349 So. 2d 183 (Fla. 3d DCA 1977); *Estate of Sweet v. First Nat'l Bank of Clearwater*, 254 So. 2d 562 (Fla. 2d DCA 1971); *Waldorff Ins. and Bonding, Inc. v. Eglin Nat'l Bank*, 453 So. 2d 1383 (Fla. 1st DCA 1984); *Bowman v. Saltsman*, 736 So. 2d 144 (Fla. 5th DCA 1999).

The only logical conclusion regarding plaintiffs' leases is that there has been no equitable conversion -- no transfer of ownership to the lessees. Escambia owns the land, subject to the federal prohibition regarding transfers or conveyances to private persons. Santa Rosa is a lessor with the ultimate benefit of ownership of improvements on Navarre Beach. Plaintiffs have no title of any kind, no prospects of ever receiving title, and no beneficial ownership of land or improvements.

C. The Leases Grant Plaintiffs No Equitable Interest In The Land.

Historically, a lease has been viewed as providing the lessee with only a possessory interest during the lease term. The lessee was never considered an equitable owner of the property covered by the lease.

Most leases (including those at issue here) contain covenants fully protective of the owner's fee simple interest in the leased premises. Such standard covenants include provisions requiring the lessee to: (1) maintain the property in good condition and repair; (2) keep the property insured against casualty losses; (3) maintain liability insurance to protect the lessor and lessee; and (4) pay any taxes assessed on the property. On the benefit side, a lease grants the lessee the right of possession and control of the premises during the lease term.

Most leases grant the lessee the right to rent the premises and retain the rental income, to sublease the property, and to assign the leasehold to a third party. “[U]nder common law a tenant has the right to assign his leasehold interest without

the consent of the lessor.” *Fernandez v. Vazquez*, 397 So. 2d 1171, 1172 (Fla. 3d DCA 1981), citing *Frissell v. Nichols*, 94 Fla. 403, 114 So. 431 (1927) and 3A R. Thompson, *Real Property* § 1200 (J. Grimes, 1981).

In the absence of an express agreement to the contrary, a tenant has a property right in the premises that may stand as security for a loan. *See, e.g., Oliver v. Mercaldi*, 103 So. 2d 665, 667 (Fla. 2d DCA 1958), citing *Johnson v. Metzinger*, 116 Fla. 262, 156 So. 681 (1934) (“The Supreme Court of Florida has specifically recognized the mortgaging or pledging of leasehold interests in realty.”) Defendant Brown agreed that none of these provisions is unusual in the context of lease agreements between private parties. (R1, V15, Brown 46-49).

These covenants, taken separately or collectively, do not convert a lessee’s possessory interest to “equitable ownership.” If they did, then virtually every lease could be swept into defendants’ taxing net.

It also is not unusual for a lease to contain an option granting the lessee an opportunity to purchase the property. In Florida, however, even an option to purchase in a lease does not result in the lessee being considered the property’s equitable owner. In *Gautier v. Lapof*, 91 So. 2d 324 (Fla. 1956), the Florida Supreme Court held that, until the option to purchase was exercised, no contract for sale and purchase was formed, and thus there was no “equitable conversion.”

In that case, the Lapofs purchased a building on a lot in Dade County on September 1, 1953. On that same date, they took assignment of a 99-year lease covering the lot on which the building stood. The lease contained an option to purchase the lot, which the Lapofs exercised on July 1, 1954. They applied for 1954 homestead exemption claiming they were equitable owners of the property from September 1, 1953, when they acquired the lease by assignment. The Supreme Court held that the Lapofs were not the equitable owners of the property on January 1, 1954, stating:

[U]nder a lease with option to purchase the relation of the parties is merely that of landlord and tenant until the option is exercised, and the tenant has no estate in the land beyond the lease, until he elects to purchase.

It seems clear to us that until an optionee exercises the right to purchase in accordance with the terms of his option he has no estate, either legal or equitable, in the lands involved...

The majority rule is that the change of position from optionee to purchaser occurs at the date an option becomes, by acceptance, a contract of sale and purchase, and that the change cannot relate back to the date of the option (emphasis added).

Lapof, 91 So. 2d at 326.

The Supreme Court cited *Lapof* with approval, in *Leon County Educational Facilities Authority v. Hartsfield*, 698 So. 2d 526 (Fla. 1997), and warned against construing *Leon County* to mean that anyone who leases property becomes its equitable owner simply because the lease contains an option to purchase. In *Leon*

County, the court held that the lessee was the “equitable owner,” but the facts of that case drove the court’s decision.¹⁹ The Court held that the County (through the Authority) had “virtually all the benefits and burdens of ownership,” and thereby the property was immune from taxation. *Id.*, 698 So. 2d at 530.

Leon County was based on the doctrine of “equitable conversion,” as evidenced by its reference to *Bancroft Investment Corp. v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162 (1946), where the court applied the doctrine of “equitable conversion” and found the purchaser of property under a contract of sale was the “equitable owner” of the property.

In *Leon County*, the court also cited *Hialeah, Inc. v. Dade County*, 490 So. 2d 998 (Fla. 3d DCA 1986). This, too, was a fact-driven case, in which: (1) the lease was designed to obtain tax-free financing for the project which would substantially reduce Hialeah, Inc.’s lease payments by reducing the interest rate payable on the municipal revenue bonds; (2) the City of Hialeah, lessor, had absolutely no “burdens and benefits” of ownership, but held bare legal title solely

¹⁹ The Court found: (1) the legal owner of the property “SRH” held only “bare title” to the property; (2) SRH had been created for the sole purpose of securing financing; (3) the only purpose for SRH was to collect the rental payments from the lessee and use them to retire the certificates of participation that had been issued to finance the project; the legal owner had absolutely no “burdens and benefits” of ownership; (4) any net proceeds in excess of the amount owed the certificate holders were to be paid to the lessee; (5) the lessee had the option to purchase the property for one dollar (\$1.00) upon satisfaction of the indebtedness; and (6) the lessee had been created through legislation that was clearly intended to exempt this type of project from ad valorem taxation.

to facilitate financing of the project; and (3) legal title to the property would revert to Hialeah, Inc., upon its satisfaction of the indebtedness and payment of the nominal sum of one hundred dollars to the City.

The Supreme Court granted review in *Leon County* based on this Court's certification that its decision was in conflict with the Fifth District's holding in *First Union National Bank v. Ford*, 636 So. 2d 523 (Fla. 5th DCA 1993). In *First Union*, Brevard County sought to construct a center to house its primary governmental and administrative offices. Based on the facts, Brevard County was held to be the property's beneficial owner, and the property therefore was immune from real property taxation. *Id.* at 527. In *Leon County*, the Supreme Court approved this result. 698 So. 2d at 530.²⁰

In each of these cases finding a lessee to be the "equitable owner" of leased premises prior to the lessee's exercise of an option to purchase, legal title was vested in the lessor solely to secure financing for the project and the lessor had no benefits or burdens of ownership. In each case, there was an expectancy that legal fee simple title to the property would be transferred to the lessee upon satisfaction

²⁰ See also, *Barnett v. Dep't of Mgmt. Servs.*, 931 So. 2d 121 (Fla. 1st DCA 2006), *rev. dism.*, 953 So. 2d 461 (Fla. 2007), where this Court held that the facts presented were indistinguishable from those in *Leon County*. The court concluded that the lessee (the Correctional Privatization Commission, a public entity) was equitable owner of the leased premises, expressly noting that the lease granted the lessee an option to purchase and receive all the lessor's interest in the premises upon expiration of the lease without payment of any additional consideration.

of the indebtedness and payment of a nominal sum or no additional consideration to the lessor. Here, there is no such expectancy -- nor could there be, given the prohibition in the original deed from the U. S. government.

The Supreme Court's declaration about leasehold interests in *Leon County* is significant. The Court was clear that it did not overrule *Lapof*, stating: "[T]his Court has long held that the status of parties to the ordinary lease with an option to purchase remains that of landlord and tenant until the option is exercised and that the lessee has no equitable interest in the property." 698 So. 2d at 530.²¹

A lessee under a lease without an option to purchase can not be held to have any equitable interest in the leasehold property. That is exactly what the Third District Court of Appeal held in *Robbins v. Mt. Sinai Medical Center, Inc.*, 748 So. 2d 349 (Fla. 3d DCA 1999). After discussing some of the "benefits and burdens" considered by Florida courts in determining whether a lessee can be the equitable owner of leased premises, that court stated:

In considering all of these aforementioned factors, Florida courts have only granted a lessee equitable ownership of leased property when that lessee retained an option to purchase the leased property for nominal value.

Id. at 351 (emphasis omitted).

²¹ Eleven years later, the Florida Supreme Court repeated that statement in *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association One, Inc.*, 986 So. 2d 1279, 1287 (Fla. 2008).

Metropolitan Dade County v. Brothers of the Good Shepherd, Inc., 714 So. 2d 573 (Fla. 3d DCA 1998), dealt with a charitable organization with a 99-year lease obligating it to construct a building on the premises, which it did. At the end of the lease term, the property, including the improvements, would have to be surrendered to the lessor, and there was no option to purchase. In holding that the lessee could not be considered the property's "equitable owner" because it did not hold "virtually all the benefits and burdens of ownership", the Third DCA cited *Leon County, Lapof, Hull, First Union, and Hialeah. Brothers of the Good Shepherd*, 714 So. 2d at 573-4.

Legal title to the Navarre Beach land is not vested in Escambia County solely to facilitate financing of projects on the leased premises. The lessees are required to obtain their own financing and to construct designated improvements on the leased properties as a fundamental part of the consideration for Santa Rosa County entering into the leases. Most important, the lessees here have no option ever to purchase or acquire legal title to the land or to the improvements they lease.

Clearly, the lessees are not the "real" owners of the land, nor does Escambia County hold only "nominal" title to it. The concept simply does not apply here: The lessees are mere lessees, and the interests in the land are to be taxed as intangible personal property as the Legislature directed, as they were for 18 years under the law, and as land in the adjacent county, Escambia, is still taxed.

III. THE DECISION IN *BELL V. BRYAN* CONTROLS THE TAXATION OF IMPROVEMENTS.

Defendants rely on the last sentence of Subparagraph (2)(b) of Section 196.199, Florida Statutes, to assert a right to tax improvements or buildings constructed on plaintiffs' Navarre Beach leaseholds. That sentence reads: "Nothing in this paragraph shall be deemed to exempt personal property, buildings, or other real property improvements owned by the lessee from ad valorem taxation." The key word is "owned." Taxation of improvements will not be allowed unless the lessee actually owns the improvements.

Defendant Brown and defendant Nichols' predecessor argued successfully in *Ward* that the seven Navarre Beach lessees who brought suit there, having certain rights and responsibilities under their lease agreements, could be deemed equitable owners of the improvements constructed on those leaseholds. 919 So. 2d at 463. When the plaintiffs in that case brought the court's attention to its decision in *Bell I*, the *Ward* majority declared that *Bell I* was "not controlling because the issue of equitable ownership was not addressed." *Id.* at 464, n.2. While it is correct that *Bell I* said nothing about equitable ownership, *per se*, plaintiffs have supplied this Court with evidence that, just as Judge Benton's dissent stated, the specific issue was raised by the county taxing officials, and was rejected at the trial court level and in this Court, not once, but twice.

A. The *Bell* Cases Held That Escambia County -- Not The Lessees -- Owns the Improvements.

Immediately after the Legislature's enactment of Ch. 80-368, Laws of Florida, the Property Appraiser for Escambia County (of which Navarre Beach was then a part), took the position that leaseholders on Santa Rosa Island were the beneficial owners of their leasehold improvements.

In hearings before the Property Appraisal Adjustment Board in 1981, leaseholders who subsequently became parties in the *Bell v. Bryan* lawsuits contended that their leasehold improvements had been classified as intangible personal property by the Florida Legislature, and that the Property Appraiser and the Tax Collector had no authority to appraise and tax such improvements as real property. The Property Appraiser responded -- and the Property Appraisal Adjustment Board agreed -- that the petitioners owned all beneficial interests in the improvements and their interests in the improvements were subject to taxation as real property. The Board's statement in each of the leaseholder's cases was:

The Property Appraiser's position is that the lessee/petitioner owns all beneficial interests in the improvements upon the subject land and should be deemed to own the improvements for purposes of Chapter 80-368. Therefore, the improvements should be taxed as ad valorem real property.

(See, attachment to affidavit of Fairchild, submitted with plaintiffs' second request for judicial notice in this action; R1, VSupp., 2327-28).

In the litigation that followed the Adjustment Board's decision, *R. D. Bryan v. Bell*, Case No. 84-1911, (Fla. 1st Cir. Ct. Jan. 13, 1986), counsel for the Tax Collector argued that, although legal title to the leasehold improvements was vested in Escambia County, they "can be sold, mortgaged,...or used as the taxpayer sees fit," and were therefore actually owned by the lessees. (R1, VSupp., 2334-5). In *Bell I*, this Court affirmed summary judgment for the leaseholders.

In *Bell v. R.D. Bryan*, 86-678-CA-01 (Fla. 1st Cir. Ct. Jan. 2, 1987), the Tax Collector reiterated that legal title to the improvements was not in dispute. This is the case in which the Escambia property appraiser intervened and was made a party.

The Tax Collector acknowledged that legal title to the land, the buildings, and other improvements was vested in Escambia County, and stated that the real property taxes he assessed were not on the lessees' leasehold estates. His position was that the lessees' interests in the real property improvements on the demised premises had been converted into "ownership". (R1, VSupp., 2362-3). This is the same position the Property Appraiser had taken in convincing the Property Appraisal Adjustment Board that the petitioners were the "beneficial owners" of their leasehold improvements. This case was reviewed in *Bell II*, which affirmed the dismissal of the tax collector's lawsuit based upon *Bell I*.

The taxing officials argued in the *Bell* cases that the leaseholders were beneficial owners of the improvements and that the improvements should be taxed as real property, pursuant to the last sentence in Fla. Stat. § 196.199(2)(b).

These are the same arguments the trial court relied on in the decision under review here. The court concluded that, although the lessees do not have legal title, they are nevertheless “equitable owners” of the leasehold improvements and have all “benefits and burdens” of ownership²² including the right to “enjoy the capital appreciation and rental income derived” from the leaseholds, “the right to convey their interests without restraints,” and the “right to encumber their properties with mortgages.” (R1, V13, 2150; A:1, p.2). As burdens, they must maintain and repair, must pay taxes that are levied, and are responsible for insuring the improvements. (*Id.*)

The appellate court in *Bell I* also addressed the contention of the taxing authorities that the lessees “owned” the improvements, although legal title was vested in Escambia County. After referring several times to Escambia County’s ownership Judge Nimmons wrote: “We can find no basis in law or reason for determining that the improvements on the real property are not as much a part of the leasehold as the real property itself.” *Bell I*, 505 So. 2d at 691-2.

²² The leases in the *Bell* cases and in this case contain most of the same operative clauses.

His opinion was issued on April 21, 1987, years after Florida courts had recognized the doctrine of equitable ownership. *Bancroft*, 27 So. 2d 162. The Judge also expressly took into consideration the last sentence of Section 196.199(2)(b), Florida Statutes, reciting this statute in his opinion. *Bell I*, 505 So. 2d at 691.

It is at least implicit in the *Bell* decisions that this Court considered the “equitable” or “beneficial” ownership argument in holding that Escambia owned the improvements. An issue is law of the case if it was implicitly addressed or necessarily considered by the appellate court's decision. *City of Pembroke Pines v. Villasenor*, 894 So. 2d 991 (Fla. 1st DCA 2005).

In contrast to the *Bell* cases, *Ward* was not a unanimous decision. Judge Benton pointed out in dissent that *Bell I* dealt with “equitable ownership”:

The majority opinion contends that *Bell v. Bryan* “is not controlling because the issue of equitable ownership was not addressed.” *Ante* [p. 464]n.2. But nothing else could have been addressed in *Bell v. Bryan*. Legal title has never been in question. The issue in *Bell v. Bryan*, like the issue here, was neither more or less than whether the lessees owned real property improvements for ad valorem tax purposes.

Ward, 919 So. 2d at 470.

The trial court erred in concluding that this Court “rejected” *Bell v. Bryan* (R1, V13, 2154; A:1, p.6). Declining to follow a case is not a rejection of it. This

Court addressed equitable ownership of leasehold improvements on Santa Rosa Island in the *Bell* cases and ruled there was no equitable ownership.

In his *Ward* dissent, Judge Benton correctly pointed out that *Bell v. Bryan* had rejected the argument that real property improvements on Santa Rosa Island were owned by the leaseholders and that it should have been rejected in *Ward* as a matter of *stare decisis*. 919 So. 2d at 465.

B. Even If *Ward* Applies, Most of the Leases Here Are Different.

Plaintiffs submit that, even if *Ward* were valid precedent, the trial court erred in ruling that plaintiffs “have sufficient rights and duties regarding their leasehold improvements to make them equitable owners of those improvements” like the *Ward* lessees. (R1, V13, 2155, A:1, p. 6).

This Court’s ruling in *Ward* was based upon a finding that the leases in that case were perpetual leases. Only 333 of the 887 leases in the present case could arguably fall into the same category as the *Ward* leases. (R1, V12, 1971-79).

In *Ward*, this Court affirmed a trial court finding that the lessees were equitable owners of improvements to their leasehold real property: “Because we agree with the trial court that appellants have sufficient rights and duties regarding the property to make them equitable owners, we affirm.” *Ward*, 919 So. 2d at 463.

It is significant that this Court specified that its *Ward* decision was based on the “rights and duties” of the lessees, and not on the “benefits and burdens”

analysis performed by the trial court. *See, Ward v. Brown*, 01-892-CA01 (Fla. 1st Cir. Ct., Mar. 18, 2004). (R1, V14, 2192-2204). The first right discussed by this Court is also the pre-eminent right, which distinguishes the leases there from ordinary leases: the right of the lessees in that case to possess their property forever, through perpetual leases.²³ The leases in *Ward* were unusual, because of their unique connection to another lease:

The land underlying appellants' improvements was conveyed by the United States of America to Escambia County in 1947. Escambia County later leased this land to Santa Rosa County for 99 years with automatic renewals for additional 99-year periods in perpetuity. It is undisputed that appellants have the right to renew their own assigned interests in this land lease for the same term of Santa Rosa County's lease term from Escambia County, thereby providing appellants with the same right to perpetual renewals.

Ward, 919 So. 2d at 463 (emphasis added).

After finding that the lessees enjoyed a perpetual right to possession, this Court quoted from several cases which declare that the grant of a perpetual lease is the same as a grant of land in fee simple with a reservation of rent, the result being that the lessor is left with mere legal title, which is "disregarded." *Id.* at 463-64. If a perpetual lease leaves the lessor with only bare legal title, then the corollary is that the lessee must hold equitable title to the property. Given the finding that the leases in *Ward* were perpetual, it follows that the lessees were deemed equitable

²³ Beyond a mere mention, no other right of the lessees (or duty, for that matter) was given any attention at all.

owners of the improvements to their property. *Id.* This Court’s decision was based upon the fact that the lessee’s perpetual interests were equivalent to a conveyance in fee with a reservation of rent.

This Court in *Ward* further showed its reliance on the perpetual lease argument by using it to counter two other arguments made by the lessees. When the lessees argued that they should not be deemed equitable owners because of a requirement to convey their improvements to the county at the end of the lease, the Court responded: “We are not persuaded because there is no end to the lease.” *Id.* at 464, n. 1. When the lessees argued that, because Section 196.199(7), Fla. Stat., requires any lease with an original term of 100 years or more to be taxed as if owned by the lessee, then the converse must be that leases with original terms of 99 years or less should not be taxed, this Court responded: “A plain reading of the section indicates that it does not address 99-year term leases, with automatic renewals for additional 99-year periods in perpetuity, or any other circumstances from which equitable ownership may be found.” *Id.* Thus, this Court left no doubt in *Ward* that its finding of perpetual leases was central to its decision.²⁴

²⁴ The decision in *Ward* declaring that leases with automatic renewals are equivalent to perpetual leases is directly contrary to the Florida Supreme Court’s holding in *Sisco*, 104 So. 2d at 368 (“This argument of course must fail, since most courts have taken the view that a covenant to renew is satisfied by one renewal thereof, due to their disfavor of perpetuities and perpetual leases.”) *See also*, *Sheradsky v. Basadre*, 452 So. 2d 599 (Fla. 3d DCA 1984) (relying on *Sisco*, renewal provision in lease construed to grant only one renewal.)

The trial court made no finding that any lease in the present case is perpetual. Only a limited number of the leases renew automatically, and a number of the leases have no renewal provisions at all. (R1, V11, 1781-85). It is evident that the County, according to its attorney, did not intend to grant ownership, but just a leasehold to each lessee. (R1, V16, 12, 29-30).

In *Ward*, the Court considered the analysis done by the circuit judge, including his recitation of “benefits and burdens” bestowed on the lessees by the lease documents. But those benefits and burdens were not enough to cause this Court to declare that an instrument intended to be a lease had been converted or transformed into a conveyance of ownership of the leasehold improvements.²⁵ If those benefits and burdens had been enough, there would have been no need for the Court to devote nearly half its opinion to the perpetual aspect or the tax implications of automatic renewals. This Court’s determination that the leases in *Ward* were perpetual was pivotal in its decision that the lessees could be taxed as owners of the improvements. In doing so, this Court followed the authority of *Leon County*, which had repeated the principle set out in *Lapof*, that “the status of parties to the ordinary lease with an option to purchase remains that of landlord and tenant

²⁵ See, *Burklow & Assc., Inc. v. Brown*, 931 So. 2d 218, 220-1 (Fla. 1st DCA 2006) (trial court’s finding that lessees owned improvements on state property which could be used during lease term, but without any retained interest after leases ended, held to be “clearly erroneous.”).

until the option is exercised and...the lessee has no equitable interest in the property.” *Leon County*, 698 So. 2d at 530.

Except for the right to automatically renew, the leases in *Ward* were ordinary leases. Virtually all leases involving real property give the lessee rights that are cited in the *Ward* opinion: “the right to use...the improvements.” 919 So. 2d at 463. The right to “rent” or “transfer their property rights” (*Id.*) to someone else without the lessor’s consent has long been part of Florida common law. *Fernandez*, 397 So. 2d at 1172. The right of lessees to “encumber their interests” (*Ward*, 919 So. 2d at 463) is also assured in the state’s common law, absent an express agreement to the contrary. *Mercaldi*, 103 So. 2d at 667. Allowing a lessee, obligated to pay rent and responsible for constructing and maintaining improvements, to “realize any appreciation in value from sale or rental income” (*Ward*, 919 So. 2d at 463), is merely a corollary of the rights to rent or transfer -- rights recognized in *Fernandez* and in *Frissell*, 114 So. 431.²⁶

The leases in *Ward* were extraordinary only because this Court interpreted the renewal provision in each to create a perpetual lease, a term rarely found in such leases and of course completely absent from 554 of the leases at issue in this case. In ordinary leases, “the lessee has no equitable interest in the property.” *Leon County*, 698 So. 2d at 530. The Judgment of the court below, following *Ward*

²⁶ While this discussion focuses on the “rights” granted to lessees, the “duties” are likewise ordinary. See discussion at pp. 22 above.

(which is inapplicable for the plaintiffs whose leases do not renew automatically) and refusing to follow the Supreme Court in *Leon County* and *Lapof*, is erroneous.

Taken at face value, the decision below puts at risk every ordinary lease with similar ordinary provisions. Declaring a party an “equitable” owner means that person has real ownership, not “for the purpose of taxation only” [only the Legislature can impose that legal fiction], but incorporating all aspects of ownership except title.

Given that fewer than 40 per cent of the leases in the present case provide automatic renewals, that none contains purchase options, and that legal title to the land and improvements is unquestionably vested in Escambia County at all times, the plaintiffs do not enjoy sufficient rights and duties regarding the property to make them equitable owners. *Ward* should not be applied to the facts in the present case. *Bell v. Bryan* is the only case that applies to all of the facts here, because they are the same facts that were presented to this Court twenty-three years ago.

The leases in this case contain many of the same terms found in any typical commercial lease. If this Court rules that the ordinary terms of a residential lease must be subject to a “rights and duties” or “benefits and burdens” analysis to determine equitable ownership, then the law of landlord and tenant will be radically altered. Every lease, residential or commercial, will be at risk of litigation to decide whether it can be construed as a conveyance of equitable ownership. The

Court should not cast such doubt on ordinary leases. This Court in *Ward* avoided opening the floodgate of ownership issues for standard leases by finding that the leases in that case were perpetual. A substantial majority of the plaintiffs here do not hold leases that are even arguably perpetual. This Court should be guided by the *Bell* cases and hold that the leasehold improvements are not subject to real property taxes.

IV. THE TAX COLLECTOR LACKS STANDING TO ATTACK THE CONSTITUTIONALITY OF THE STATUTES TAXING PRIVATE LEASEHOLDS OF GOVERNMENT PROPERTY.

In his affirmative defense, the Tax Collector asserted that “the exemption sought by Plaintiffs” violates the Florida Constitution. The “exemption” referred to is Fla. Stat. Section 196.199(2)(b), which *Bell I* held -- in 1987 -- to apply to Santa Rosa Island leaseholds. 505 So. 2d at 691. As discussed earlier, Fla. Stat. § 199.023(1)(d) (2005) provides the intangible property definition that applies here, so it is these two statutory provisions that the defendant sought to have declared unconstitutional.

Plaintiffs moved to strike the affirmative defense because the Tax Collector has no standing to challenge the constitutionality of the very statutes he is obligated to abide by in carrying out the duties of this office. (R1, V11, 1838-41). The trial court denied the motion to strike. (R1, V13, 2156-58; A:1, pp. 8-10).

The “Constitutional Construction” portion of the Judgment below attempts to exempt the Tax Collector here from the general principles discussed by the Florida Supreme Court in *The Crossings*, 991 So. 2d 793. Plaintiffs acknowledge that that case involved a county property appraiser, not a tax collector. But, if affirmed, the decision below will displace the scholarship of the six justices in *The Crossings*. If the decision stands, a property appraiser who wants to disregard a particular taxing statute would be free to levy the tax or deny the exemption, forcing the taxpayer(s) to file suit. So long as a tax collection issue is raised, the local tax collector will be required to be a party (Fla. Stat. § 194.181(3)), and the property appraiser can “nudge” that official to challenge the law’s constitutionality.²⁷

The circuit court decision declares an exception to *The Crossings* that swallows the rule: Property appraisers cannot challenge tax laws, but tax collectors can. Such a decision is contrary to the public policy relied on by *The Crossings* to hold that a taxing official cannot be allowed to challenge a statute. *The Crossings*

²⁷ That is exactly what happened here. The Santa Rosa County Tax Collector testified in his deposition that he had no input (advice, comment, discussion) regarding Brown’s decision, as the Property Appraiser, to begin levying taxes on Navarre Beach land leased by the county to private persons. (R1, V15, Nichols 10). Brown clearly was the one who decided to start taxing the land. (R1, V15, Brown 44-45). The initial answer filed by both defendants contained the constitutional challenge, but Brown withdrew from those defenses after plaintiffs served a motion for attorneys’ fees under Fla. Stat. § 57.105. (R1, V11, 1796). *The Crossings* undeniably closed the door on his attack on the statutes. So he did it vicariously, through the Tax Collector.

quoted *State ex rel. Atlantic Coast Line Ry. Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681 (1922), saying that the prior opinion:

explained that “every act of the Legislature is presumptively constitutional until judicially declared otherwise, and the oath of office ‘to obey the Constitution’ means to obey the Constitution, not as the officer decides, but as judicially determined.” *Id.* at 683.

The Crossings, 991 So. 2d at 798. The Court also noted that *Atlantic Coast Line*: “found that to allow a public official to refuse to obey a law would be ‘the doctrine of nullification, pure and simple.’” *The Crossings*, at 798.²⁸

The Crossings court also cited and quoted from *Barr v. Watts*, 70 So. 2d 347 (Fla. 1953):

The Court explained that allowing executive officers to refuse to administer statutes not yet judicially passed upon would result in “chaos and confusion” and that the “people of this state have the right to expect that each and every such state agency will promptly carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives.” *Id.* at 351.

The Crossings, 991 So. 2d at 798-99.

The court below has declared that a tax collector has the right to ignore a presumptively constitutional statute,²⁹ nullify its effect, and create chaos and

²⁸ Here, defendant Brown justified his decision to tax Navarre Beach lessees contrary to the legislative determination as “a fairness issue.” (R1, V15, Brown 92).

²⁹ This statute has, in fact, already passed constitutional muster in this Court, in *Miller v. Higgs*, 468 So. 2d 371 (Fla. 1st DCA 1985), *disapproved on limited grounds*, *Capital City Country Club, Inc. v. Tucker*, 613 So. 2d 448 (Fla. 1993)

confusion by treating a statute that says plaintiffs' leaseholds are to be taxed *only* as intangible personal property as if it had been repealed. Even before *The Crossings*, this Court had held that a tax collector has no power to act contrary to the manner authorized by Florida statutes.³⁰

The decision below states that the "public funds" exception applies to a tax collector because he collects tax money and disburses it to the appropriate authorities, such as the county, the school district, etc., relying upon *Green v. City of Pensacola*, 108 So. 2d 897 (Fla. 1st DCA 1959). There, the official bringing the challenge was the State Comptroller, not a tax collector. The cases cited in *Green* establish that the Supreme Court has remained true to the limitations on the public funds exception, allowing it only where, for the public official making the challenge, *administration of the enactment in question* "will require the expenditure of public funds." *Barr*, 70 So. 2d at 350, quoted in *The Crossings* at 991 So. 2d 799.³¹

(City-owned land is subject to county ad valorem tax, if leased to a private entity for non-public use). Compare, *Markham v. Broward County*, 825 So. 2d 472, 474 (Fla. 4th DCA 2002) (County-owned land leased to private for-profit businesses held to be immune from ad valorem real estate taxes).

³⁰ *Escambia County v. Bell*, 717 So. 2d 85, 88 (Fla. 1st DCA 1998) ("The tax collectors, like other county officers are constitutional officers whose duties are imposed by, and their powers derived from, statutes.") (citation omitted).

³¹ See also dictum in *Davis v. Gronemeyer*, 251 So. 2d 1, 3 (Fla. 1971) ("[U]nless expenditure of public funds is involved, the officeholder is foreclosed from questioning the validity of the act"). Nichols' responsibility to deliver tax receipts

The trial court also cited to *Kaulakis v. Boyd*, 138 So. 2d 505 (Fla. 1962), which actually supports plaintiffs' position. There, the Dade County Commission questioned the constitutionality of a provision in the county's home rule charter. The issue arose in a personal injury case and, if the provision (a waiver of sovereign immunity) had been deemed applicable, the Board would have been required "to expend public funds" in satisfaction of any damages that the county negligently caused. *Id.* at 507. In the present action, the Tax Collector is not required by the challenged statutes to expend public funds; in fact, as written and as applied since the *Bell* cases, these statutes actually prohibit the Tax Collector from collecting real property taxes on leasehold land and improvements owned by the County.³² Administration of the enactment (*Barr*, 70 So. 2d at 350), never puts one cent of public funds into the Tax Collector's possession. *Barr* and *Kaulakis* deny the "public funds" exception to him. These defendants cannot make a valid challenge to the statute, and the judgment should be reversed.³³

from one governmental pocketbook (the Tax Collector's account) to another (such as the School District's) cannot be characterized as an "expenditure of public funds."

³² Intangible personal property taxes on leaseholds of government property are paid directly to the State, Fla. Stat. § 199.202, and returned to the local school district. Fla. Stat. § 199.292.

³³ The trial court referred to Santa Rosa County as possibly having standing to challenge these statutes. While the County was a defendant at the time of the hearing on the cross-motions for summary judgment, it did not join the motion filed by defendant taxing authorities. Thus, the County's claim for standing cannot

V. NO LIEN FOR TAXES EXISTS ON PLAINTIFFS' LEASEHOLDS, THE LAND, OR THE IMPROVEMENTS.

A. Florida Statutes Declare, Unequivocally, That No Tax Lien Exists on the Leaseholds or on the Government's Property.

The trial court declared that “the Tax Collector has the right to sell tax certificates on these equitably owned interests of the Plaintiffs,” (Judgment, p. 6), a conclusion contrary to statutes and to unambiguous directives from this Court and from the Florida Supreme Court. Section 196.199(8)(a), Florida Statutes, provides that taxes assessed on leasehold interests in governmental property “shall not become a lien on same, or the property itself, but shall constitute a debt due and shall be recoverable by legal action or by the issuance of tax executions that shall become liens upon any other property in any county of this state of the taxpayer who owes said tax.”

Section 197.432(9), Florida Statutes, prohibits creation of a lien on property owned by the government which has become subject to taxation due to its lease to a nongovernmental lessee. That section reads, in part:

A certificate may not be sold on, nor is any lien created in, property owned by any governmental unit the property of which has become subject to taxation due to lease of the property to a nongovernmental lessee. The delinquent taxes shall be enforced and collected in the manner provided in §196.199(8).

be deemed a basis for the Tax Collector to have standing. Moreover, these statutes do not obligate the County to make “an expenditure of public funds,” so its Board has no standing to demand a declaration regarding their validity. *Branca v. City of Miramar*, 634 So. 2d 604, 605-6 (Fla. 1994).

That section provides an exception for leaseholds taxed as real property under Fla. Stat. §196.199(2)(b), and for which no rental payments are due under the agreement that created the leasehold. Taxes in that situation do become a lien on the leasehold, to be collected through tax certificates, etc., per § 197.432(9).

Section 196.199(2)(b), Florida Statutes, provides, in part, that: “If no rental payments are due pursuant to the agreement creating such leasehold or other interest, the leasehold or other interest shall be taxed as real property.” That is not the situation in this case. All the plaintiffs’ leases require plaintiffs to make rental payments on their leases, and plaintiffs’ leaseholds are not taxable as real property.

These two statutes establish that no tax liens exist for the Tax Collector to enforce against the leaseholds, the land, or the improvements. Therefore, no tax certificates may be sold, which of course precludes issuance of tax deeds. That these statutes mean what they say has been verified by this Court and by the Florida Supreme Court. *See, Gibbs*, 342 So. 2d at 565 (statute deemed private leaseholds of government property of 99 years or more as owned by lessees for the purpose of county real property taxation; however, county had no lien on leasehold or the property because of Fla. Stat. § 196.199(7)(a) [now renumbered as § 196.199(8)(a)]). The *Gibbs* case dealt directly with leaseholds on Santa Rosa Island.

The Florida Supreme Court, in *Cason*, 944 So. 2d at 314, made clear that, “when...a leaseholder of State property is subject to ad valorem taxation, the penalty for non-payment falls on the leaseholder and not the State.” As discussed *supra*, a county is a subdivision of the state and property owned by a county has the same immunity as property owned by the state. The *Cason* opinion continues:

[E]ven when the State has leased its property to a nongovernmental entity and the property is used for nongovernmental purposes, the Legislature has specifically prohibited the issuance of a tax certificate or a lien on the property itself. Thus, under no circumstances can the State lose its property when the lessee fails to pay...ad valorem taxes.

Id.

Thus, even if this Court concludes that plaintiffs are the equitable owners of either the land or the improvements on the leasehold estates, the Tax Collector has no lien to enforce against that property and no right to issue tax certificates (or tax deeds) for the collection of the taxes that have been levied. Section 196.199(8)(a), Florida Statutes, as stated in *Gibbs* and verified in *Cason*, provides the only available means of collecting such taxes. The trial court erred in ruling otherwise.

CONCLUSION

Plaintiffs are mere lessees, not owners, of the land and improvements included within their respective leases. The Tax Collector has no standing to challenge the constitutionality of the statutes, which require taxing the leaseholds only as intangible personal property; and there is no lien that can be enforced against the property.

Plaintiffs urge the Court to reverse the decision below, and remand with instructions to enter judgment for plaintiffs, enjoining defendants from assessing, levying, and collecting real property taxes on the land and the improvements within plaintiffs' respective leaseholds. The order from this Court should also require a refund of any real estate taxes (and any interest) paid to defendant Tax Collector by any plaintiff, for Navarre Beach leasehold property, for the years 2006 and thereafter.

