IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

SOUTHEAST HOUSING, LLC,
by through its managing member,
BBC MILITARY HOUSING – NAVY
SOUTHEAST, LLC,

Plaintiff,

v. CASE NO. 2012-CA-000831-K

KARL D. BORGLUM, as the Property Appraiser for
Monroe County, Florida; DANISE D. HENRIQUEZ, as
The Tax Collector for Monroe County, Florida; and
MARSHALL STRANBURG, as Interim Executive Director
Of the Florida Department of Revenue,

Defendants.
____/

DEFENDANT PROPERTY APPRAISER'S MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant, Scott P. Russell, as Property Appraiser of Monroe County, Florida (Property Appraiser) (successor to Karl D. Borglum, see Rule 1.260(d), Florida Rules of Civil Procedure) files this Memorandum of Law in support of Defendant's Motion for Summary Judgment and states the following:

FACTS:

The Plaintiff, Southeast Housing, LLC (Southeast), filed an amended Complaint seeking to establish its entitlement to an exemption from ad valorem taxation of its tangible personal property (TPP) located in Monroe County, Florida and more particularly described in its Complaint (The Property). Southeast is a for profit entity that is comprised of BBC Military Housing-Navy Southeast, LLC (BBC) and United States of America, Department of Navy

(USA). (A - 8)[1]. Southeast is owned 10% by BBC, which is the Managing Member, and 90% by the USA, as Non-Managing Member. BBC receives 10% of the entity's net profits. (OA Section 5, A - 8). In addition to the net profits, Balfour Beatty Military Housing Management, LLC, an affiliate of BBC, is the Property Manager under a Property Management Agreement (PMA) and receives a management fee of 2% of the gross revenues plus another 2% incentive fee. (PMA paragraph 5.02, A - 9). Another 1% asset management fee is also paid. BBC Military Housing is a subsidiary of Balfour Beatty, a British multi-billion entity. (A – 2, Love Depo page 22, A – 12).

Southeast's rental income is taxable income under 26 USC §61, (the Internal Revenue Code, IRC). See Southeast's Response to Request for Admissions and OA, Section 3.10. (A - 8). In addition, Southeast has paid the required Florida state documentary taxes and the bonds issued by Plaintiff are taxable under the IRC. (A – 4, Ground Lease p 1, A- 7). The only jurisdiction under Southeast's claims not receiving taxes from Southeast are the local jurisdictions including Monroe County. Ironically, it is the local jurisdiction that depends on property taxes in order to provide infrastructure, law enforcement, schools, and other benefits to the residential housing units.

The Property consists of 895 existing residential housing units together with supporting infrastructure conveyed to Plaintiff in fee simple pursuant to a Ground Lease of 50 years together with residential housing units built hereon during the term of the lease. See Ground Lease (GL paragraph 1.2, A - 7). (The GL was originally with GMH Military Housing –Navy Southeast, LLC but assigned to Southeast at its creation.) The Property is leased to both active Navy personnel and their families and other classes including non-military and civilian tenants. While

[1] Citations to the Appendix (A -_____).

the percentage of Navy occupants changes annually, there was 20% of active Navy tenants in 2008 and 26% of active Navy tenants in 2012. This is a stark comparison to the allegation of Plaintiff's counsel that only one percent is occupied by non-Navy. (TR p 7, A - 16).

HISTORICAL TIMELINE:

On July 24, 2006, the United States of America, Department of the Navy issued an Invitation for Offers, Solicitation N62467-06-0283 (IFO) for the submission of offers to own, develop and manage the military housing units located in the Key West Naval Air Station (NAS) together with numerous other jurisdictions, The Property. That IFO stated that offerors should submit their offers specifically including an allocation for the local ad valorem taxes (IFO-Section 2i, A- 1). On January 25, 2007, GMH Military Housing, LLC (GMH) submitted an offer. To their offer the Navy requested, through follow up questions, justification for their ad valorem tax estimate, to which GMH responded stating they had contacted local taxing officials. (A - 3). GMH ultimately was selected to own, develop and manage The Property.

In April of 2007 an informal community meeting was held in Monroe County, Florida. The meeting was conducted by GMH attorneys. In attendance at the meeting were Navy officials, police department officials, fire department officials, and other local county officials.

In May of 2007, Russell Love, the attorney for GMH, sent a Memorandum to the Property Appraiser of Monroe County regarding the ad valorem property tax exemption status. (A – 5). This Memorandum did not provide any of the documentation regarding ownership, management and control of The Property. There was no Ground Lease (GL), Operating Agreement (OA) or Property Management Agreement (PMA) provided or even in existence at this time. The Property Appraiser was presented with hypothetical facts regarding the

exemption status and taxability of The Property. The Memorandum was filled with falsities and inaccurate legal analysis directed to mislead the Property Appraiser.

On May 15, 2007, the Property Appraiser sent a letter to GMH attorney, Russell Love, followed by a subsequent revised letter on May 21, 2007, both stating in pertinent part; "Key West Naval Air Station is "*a federally"* owned facility and as such exempt under Florida law." The letters further stated; …. "Should anything change in the existing relationship between GMH and The Navy, this office would reserve the right to review these changes and reconsider our conclusions." (A - 6). At the time of the May letters, Borglum understood that this was to continue as military owned property and they were just bringing in a management company. (Borglum Depo page 26, 140-151, A - 10)

On October 1, 2007, the GL was executed and a change of ownership occurred. After the conveyance to Southeast, neither the prior owner of The Property, USA, BBC, GMH or Southeast, notified the Property Appraiser that The Property had been transferred to Southeast, nor did Southeast or anyone acting in its behalf file an application for any exemption. The property appraisers do not check the public records for a transfer of TPP. A taxpayer is required to report, annually, its TPP and return it for taxation. (Borglum Depo p 136, 140, A - 10). As a result, The Property was maintained and assessed on the Monroe County, Florida tax roll from January 1st 2007 through January 1st 2012 in the name of the USA. Taxes were not extended against The Property during those years as The Property was immune from ad valorem taxes. (Borglum Depo p 54, 141, 142, A - 10).

The Property Appraiser's office, upon discovering the true nature of the transaction reviewed the appropriate documentation, sought legal counsel and determined The Property was conveyed to Southeast, a non-exempt entity for a non-exempt use, and The Property had become

taxable. The Property Appraiser filed liens on The Property pursuant to Section 196.011(9)(a), Florida Statutes in the name of the Grantee, Southeast, of The Property. (Borglum Depo pp 140-151, A – 10).

SOLICIATION (IFP), RESPONSE (OFFER), IMPLIMENTING DOCUMENTS (GROUND LEASE (GL), OPERATING AGREEMENT(OA), AND PROPERTY MANAGEMENT AGREEMENT(PMA)

IFP:

The IFP required a response meeting the Project Requirements. (IFP p. 28, A - 1). The IFP required a financial proposal. (Paragraph D(4)(b) IFP, A-1, Appendix A GMH Submittal, A – 3).

Also, included in the IFP under Section 2, Project Requirements is a requirement regarding local ad valorem taxes (property taxes) which provides:

i. Local Ad Valorem Taxes

> For preparation of proposals, Offerors shall assume that full property taxes and/or possessory interest taxes will be assessed on all privatized homes at the projected 2006 rate for the applicable jurisdiction, and include such costs in their financial projections. Where only 2005 rates are available, escalate rates by 3% to project 2006 proposal costs. For the purpose of proposal submission, Offerors should adjust property taxes based on a 3% per year inflation factor. The application of any savings will be mutually agreed upon with the designated Offeror. (A - 1).

Southeast's asserted reliance on Borglum's letter is false. The financial response to the IFP on January 25, 2007 could not be altered, the Basic Allowance Housing for the military rentals, BAH, could not change, nor would the local market rentals change as a result of Borglum's letter and taxation of The Property, the tax expense having already been included, nothing in the GL, OA or PMA changes.

GROUND LEASE (GL):

Under the GL the new construction and renovation of the existing housing units are accomplished by the issuance of "taxable" bonds by Southeast secured by a mortgage on the leasehold interest of Southeast together with a first mortgage on The Property conveyed. (GL: page 1, paragraphs 22.2 and 22.3, A - 7).

The GL and accompanying OA give Plaintiff, in addition to conveying The Property to Plaintiff, the following rights, obligations and authority:

GROUND LEASE

Paragraph 7.1 - The Leased Premises shall be used solely for the development, design, demolition, construction, renovation, operation, management, leasing and maintenance of the Housing Units, together with amenities for recreation and related uses necessary for or incident to such Housing Units and for the sale of the Sales Property (the "**Permitted Uses**").

Paragraph 10 – Payment of Ad valorem taxes

Lessee shall be responsible for the payment of any applicable and enforceable taxes, assessments and similar charges on the Leased Premises applicable to and enforceable against the Leased Premises during the Term of this Lease, prior to such amounts becoming delinquent.

Paragraph 13.1 – Operation and Maintenance of Leased Premises

Lessee shall operate and maintain the Leased Premises in conformance with the Development/Management Obligations and this Lease. *Lessee shall*, at all times and at no expense to the Government, except as specifically provided herein, *protect, preserve, maintain and repair the Leased Premises, and keep them in good order and condition*. Lessee shall at all times exercise due diligence in protecting the Leased Premises against damage or destruction other than the Existing Improvements which are to be demolished as part of the Construction Project and such alterations and modifications permitted pursuant to Article 18. (A - 7).

OPERATNG AGREEMENT

Section 2.03 – Purposes of the Company

The Company has been organized exclusively to design, finance, demolish, construct renovate, own, manage, acquire, lease, operate and maintain the Project, to market and see the Sales Property and to conduct any activities that are related or incidental thereto, including, without limitation, the following (the "**Purposes**"):

(a) lease the Land from the DoN and accept conveyance of fee title to the Existing Improvements;

(b) issue the Project Debt under the Indenture, perform the obligations of the issuer under the Indenture and each of the Bond Documents, and effectuate the Financial Restructuring and the Project Rescope;

(d) demolish certain existing housing units, renovate certain existing housing units, construct new housing units and construct, operate, maintain, improve, buy, own, sell, convey, assign, mortgage, rent or lease the Company Property and any real property and any personal property, improvements and facilities reasonably necessary for the development and/or operation thereof;

(e) maintain, manage and operate the Project and enter into any lawful agreement for the management or construction of the Project;

(f) rent Company Housing Units in the Project from time to time, collect the rents therefrom and pay the expenses incurred in connection with the Project;

(h) perform its obligations under the various agreements contemplated by this Agreement and all ancillary agreements;

(i) make distributions to the Non-Managing Member and the Managing member in accordance with this Agreement, subject to any requirements and limitations which may be imposed by the Bond Documents;

(j) sell the Sales Property;

(k) purchase the Fee Property, encumber the Fee Property with a LURA (as defined hereinbelow) and pledge or mortgage the Fee Property to secure the Project Debt; (A - 8).

Plaintiff through the Managing Member is responsible for those matters set forth in the OA Section 4.01(b):

Management and Control. Subject to any other provisions of this Agreement regarding the specific obligations of the managing member or the Non-Managing Member, *the Managing Member shall have sole and exclusive management and control of the business of the Company and shall make all decisions regarding the affairs of the Company*. The Managing Member shall have all the rights, powers and authority of a Managing Member not prohibited by the Act or in law. The signature or other action of the Managing Member acting as such shall be the signature

or other action of the Company. Except as otherwise expressly provided in this Agreement, the Managing Member is granted the right, power and authority to do, on behalf of the Company, either directly or through an Affiliate, all things which are necessary, proper or desirable, in the Managing Member's sole but reasonable discretion, to carry out its duties and responsibilities and accomplish the Company's purposes, including, but not limited to, the following:

(iii) To employ and dismiss from employment, any and all employees, agents, independent contractors, attorneys, property managers and accountants, including Affiliates of the Managing Member;

(iv) To purchase, at the expense of the Company, such liability, casualty, property, Renter's Insurance and other insurance in such amounts as the Ground Lease, any applicable LURA, the Bond Documents, Project Lender or federal, state of local government may require, or if greater, as the Managing Member deems advisable, in tis reasonable business judgment, to protect the Company Assets against loss or claims of any nature

In the event there is an early termination of the GL, the Managing Member receives payment from the sale of The Property. (Section 6.02 OA, A - 8).

Upon the term expiration The Property, if not sold, shall become The Property of the then owner of the land. (GL, paragraph 1.25, A - 7).

BBC is a for profit entity receiving 10% of the net profits. OA Section 5. Balfour Beatty Military Housing Management, LLC, an affiliate of BBC, is the Property Manager under a Property Management Agreement (PMA) and receives a management fee of 2% of the gross revenues plus another 2% incentive fee. PMA paragraph 5.02. Another 1% asset management fee is also paid. (A - 9).

LAW:

I. FEDERAL LAW: CONCURRENT JURISDICTION

Southeast, as was done in GMH Communities' Memorandum by Russell Love, attempts to mislead the court in the application of Florida tax laws within the Key West Naval Air Station, (NAS) enclave under their asserted legislative jurisdiction. See Art. I, §8, Clause 17, U.S. Const.

The Memorandum states:

> (A) . . . the State of Florida lacks proper authority under Federal law to tax Navy Southeast LLC Interests because the Federal government has not consented to the taxation of the Navy SE Project; Memo p6 (A - 5) and.

The Amended Complaint alleges:

> ¶12 When the United States acquires property by purchase with the consent of the state where the property is located for the purpose enumerated in Article I, Section 8, Clause 17 of the U.S. Constitution, the property is thereafter subject to federal jurisdiction, exclusive of state authority, which includes being free of state taxation.

These statements and the allegation are not accurate, nor does the Complaint allege the true legislative jurisdiction. The Secretary of the Navy on October 1st 1991 retroceded to the State of Florida "concurrent" legislative jurisdiction. (A - 14) *James v. Dravo Contracting Co*., 302 U.S. 134 (1937); *US v. State Tax Commission of Mississippi,* 412 U.S. 363 (1973). In *Dravo*, with regard to concurrent legislative jurisdiction the state of West Virginia had consented to the acquisition by the federal government by statute which included a statement which "cedes to the United States 'concurrent jurisdiction with this state in and over any land so acquired . . . for all purposes.' *Dravo*, at p. 144. The court stated:

> In the present case, the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective.
>
> We conclude that, so far as territorial jurisdiction is concerned, the state had authority to lay the tax with respect to the respondent's activities carried on at the respective dam sites.

Also, the United States Code provides that even under Article I, Section 8, Clause 17, when property is acquired, for exclusive legislative jurisdiction to vest in the Federal Government, it has to be accepted otherwise it is presumed it has not. 40 U.S.C. §3112.

Neither the Complaint nor the 2007 Memorandum provided to the Defendant's office truthfully stated the status of the legislative jurisdiction of the NAS. Both assert "exclusive legislative jurisdiction" when the facts establish without question that it is concurrent legislative jurisdiction. (A - 14).

The NAS is under concurrent legislative jurisdiction and the Florida tax laws apply to the property owned by Southeast. *Dravo, State Tax Comm. Miss., id., Fort Leavenworth Railroad Co. v. Lowe,* 114 U.S. 525 (1885); *Silas Mason Co. v. Tax Comm. of Washington,* 302 U.S. 186 (1937). Since the NAS is under concurrent legislative jurisdiction, there is no reason to need a congressional waiver under the Military Housing Privatization Initiative. 10 U.S.C. 2871 at seq.; *Offutt Housing Co. v. Sarpy*, 351 U.S. 253 (1956). The court in *Sarpy* held that the only reason Congress waived immunity from taxation under the old leasing act of 1947, amended by the Wherry Act which extended the 1947 act to housing, was to allow states to tax private interests in projects located in areas under "exclusive legislative jurisdiction." *Offutt*, id. at pp 258, 260.

Also, the Navy has specifically stated for this Property, that when Offerors submitted a proposal they were to assume that ad valorem taxes were due and payable. (A - 1).

II. FLORIDA TAX LAW

All property, real and personal, unless expressly exempted from taxation is subject to ad valorem taxes. §196.001, Fla. Stat. To be entitled to exemption The Property must be both owned by an "exempt entity" and used for an "exempt purpose." §196.192, Fla. Stat. §196.195, Fla. Stat.; *TEDC/Shell City, Inc. v. Robbins,* 690 So.2d 1323 (Fla. 3rd DCA 1997); *Leon County Educational Fac. Auth. v. Hartsfield*, 698 So.2d 526 (Fla. 1997); *Mastroanni v. Memorial Medical Center of Jacksonville*, 606 So.2d 759 (Fla. 1st DCA 1992); *Broward County v. Eller Dev., Ltd.*, 939 So.2d 130 (Fla. 4th DCA 2006). Exemption statutes are construed ***<u>against</u>*** the

taxpayer and the exemption and the burden is on the taxpayer to show entitlement to the exemption. *Parrish v. Pier Club Apartments, LLC,* 900 So.2s 683 (Fla. 4th DCA 2005); *Sebring Airport Authority v. McIntyre,* 623 So.2d 541 (Fla. 2nd DCA 1993) (Sebring I); *Sebring Airport Authority v. McIntyre*, 642 So.2d 1072 (Fla. 1994) (Sebring II); *Sebring Airport Authority v. McIntyre*, 718 So.2d 296 (Fla. 2nd DCA 1998) (Sebring III); *Sebring Airport Authority v. McIntyre*, 783 So.2d 238 (Fla. 2001) (Sebring IV); *First Union National Bank v. Ford*, 636 So.2d 523 (Fla. 5th DCA 1993); *Southlake Community Foundation, Inc. v. Havill,* 707 So.2d 361 (Fla. 5th DCA 1998).

A. FLORIDA STATE LAW- EXEMPTION APPLICATIONS AND TPP RETURN REQUIRED

Florida law requires all owners of tangible personal property to return that property each year and indicate any claim for exemption on the return. §§193.052(1); 196.021, Fla. Stat. *Robbins v. Daniel*, 9 So.2d 381 (Fla. 1942). In addition, Florida law requires that all owners of property claiming an exemption from taxation are required to file, on or before March 1st of the year for which the exemption is claimed, an appropriate application for exemption §§196.011(1)(a); 196.021; 196.195, Fla. Stat. Failure to file constitutes a waiver of the exemption privilege for that year. *Parrish, id.; Turner v. Lusk,* 812 So.2d 258 (Fla. 2nd DCA 2002); *Mitchell v. Higgs,* 61 So.3d 1152 (Fla. 3rd DCA 2011); *Page v. McMullan,* 849 So.2d 15 (Fla. 1st DCA 2003). The Plaintiff failed to file any application. Upon conveyance, Plaintiff was required to but failed to apply for the exemption and return The Property.

B. FLORIDA LAW REQUIRES AN EXEMPT USE

In the application process the applicant is required to meet the criterion for both establishing it is an exempt entity, §196.195, Fla. Stat. *TEDC/Shell, id*., and the exempt purpose which it claims. *Southlake, id*. The land is still owned by the USA and immune from taxation.

McCulloch v. Maryland, 17 U.S. 316 (1819); *Cason v. Fla. Dept. of Mgt. Serv.,* 944 So.2d 306 (Fla. 2006). (. . . immunity connotes the absence of [a power to tax].)

The use of The Property, leasing of the housing to active military and non-active military and civilian tenants, is not a recognized exempt use. (See §196.1978, Fla. Stat. the only delineated housing exemption). The military rents, Basic Allowance for Housing (BAH), given to service members are based upon market conditions and market rents to all others both were accepted as part of selection process. See Navy's Solicitation N62467-06-R-0083, and Plaintiff's Proposal including financial pro forma.

The Navy even agreed in its Solicitation that The Property was taxable as follows "For preparation of proposals, Offerors shall assume that full property taxes and/or possessory interest taxes will be assessed on all privatized homes at the projected 2006 rate for the applicable jurisdiction, and include such costs in their financial projections." *Southlake, id.; Parrish, id.*

The buildings having been conveyed in fee simple to Plaintiff do not remain under the federal government immune status and are subject to tax. §§196.199(2)(b), Fla. Stat.; *Offutt, id.; Fort Leavenworth, id.; Parker v. Hertz Corp.,* 544 So.2d 249 (Fla. 2nd DCA 1989); *Ward v. Brown,* 919 So.2d 462 (Fla. 1st DCA 2005); *Broward County v. Eller, id. Southlake Community Foundation, Inc. v. Edward Havill*, 707 So.2d 36 1 (Fla. 5th DCA 1998); but *see Public Housing Assistance, Inc. v. Havill,* 571 So.2d 456 (Fla. 5th DCA 1990).

The Property once it became the property of Southeast, its use became a for profit rental housing business. *Sebring, II, id*. Southeast has attempted to come under the umbrella of the Navy, as performing a governmental function or purpose. *See Williams v. Jones*, 326 So.2d 425 (Fla. 1985). The Supreme Court of Florida in *William*s, opined that there are two types of governmental functions:

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

Williams involved among other uses, residential leaseholds. When the *Williams* case was decided, Section 196.199, Florida Statutes provided for the taxation of governmental leaseholds. The legislature in 1980 amended that Section to the current statute which, first, made governmental leaseholds intangible personal property, taxed by the state, §196.199(2)(a), Fla. Stat., and second, provided this did not exempt buildings or other improvements to governmental property. §196.199(2)(b), Fla. Stat. The Supreme Court extended this characterization of governmental-governmental v. governmental proprietary to buildings and improvements. *Sebring I, II, III and IV.*

Subsequent to the 1980 amendment the property appraisers started taxing these improvements. In a series of cases the taxation was upheld. *Marathon Air Service, Inc. v. Higgs,* 575 So.2d 1340 (Fla. 3rd DCA 1991); *Parker v. Hertz, id.* and recently, *Broward County v. Eller, id.* In one case, *Bell v. Bryan,* 505 So.2d 690 (Fla. 1st DCA 1987), the First District held the buildings were immune from taxation because they were owned by the county during the life of the lease. Later, in series of cases the First District receded from *Bryan* and recognized the concept of "equitable ownership." *Ward v. Brown*, *id.*; *Accardo v. Brown,* 63 So.3d 798 (Fla. 1st

DCA 2011*); 1108 Ariola, LLC v. Jones,* 71 So.3d 892 (Fla. 1st DCA 2011). *See also Offutt* and *Gay v. Jemison*, 52 So.2d 137 (Fla. 1951).

In each of these cases, the concept of equitable ownership and legal ownership established that ownership for taxation/exemption purposes was determined by the party having the "indicia of ownership." In *Leon County Educational Facilities Auth. v. Hartsfield*, 698 So.2d 526 (Fla. 1997) relied upon by Plaintiff it was the governmental non-profit entity, the authority that was responsible for maintenance, insuring and to pay any taxes. *Leon County, id*. at p 528. In *Leon*, the housing project was legally owned by a non-profit entity established to issue non-taxable bonds, then leased it to the county housing authority. Like the cases in which held equitable title was held in a taxable entity the district court stated:

> Fairness dictates that the doctrine of equitable ownership should be applied evenhandedly regardless of whether a tax is being imposed or any exemption is being claimed. Indeed, in the instant case the property appraiser has never argued that legal title is an absolute prerequisite to a tax exemption.

In addition, in a series of cases out of the second district court upheld by the Florida Supreme Court *Sebring Airport Authority v. McIntyre,* 623 So.2d 541 (Fla. 2nd DCA 1993) (Sebring I); *Sebring Airport Authority v. McIntyre*, 642 So.2d 1072 (Fla. 1994) (Sebring II); *Sebring Airport Authority v. McIntyre*, 718 So.2d 296 (Fla. 2nd DCA 1998) (Sebring III); *Sebring Airport Authority v. McIntyre*, 783 So.2d 238 (Fla. 2001) (Sebring IV), governmental property leased to private enterprise was taxable as performing a governmental proprietary use.

The courts held first, that governmental property used for a profit making ventures could not under the constitution be exempt from taxation. *Sebring* I and II. When the legislature attempted, through amendment, to grant exemptions to the same property, the second district declared the act unconstitutional, which was upheld by the Florida Supreme Court. *See Sebring*

III and IV. Finally, the first district has carried the equitable ownership analysis to the actual land when leased to a for profit entity. *1108 Ariola, id.*

The U.S. Supreme Court in *Offutt* carried the same analysis to housing on a military installation equitably owned by a for profit entity and held that an entity that had the same *indicia* of ownership as in our case, was taxable for ad valorem tax. *Offutt, id*. at p 261.

The *Offutt* court stated:

> Petitioner argues, however, that the Government has a substantial interest in the buildings and improvements, since the Government prescribed the maximum rents and determined the occupants, had voting interests in petitioner, provided services, and took the financial risks by insuring the project. Petitioner compares its own position to that of a "managing agent." This characterization is an attempt by use of a phrase to make these facts fit an abstract legal category. This contention would certainly surprise a Congress which was interested in having private enterprise and not the Government conduct these housing projects. The Government may have "title," but only a paper title, and, while it retained the controls described in the lease as a regulatory mechanism to prevent the ordinary operation of unbridled economic forces, this does not mean that the value of the buildings and improvements should thereby be partially allocated to it. If an ordinary private housing venture were being assessed for tax purposes, the value would not be allocated between an owner and the mortgage company which does his financing or between the owner and the State, which may fix rents and provide services. In the circumstances of this case, then, the full value of the buildings and improvements is attributable to the lessee's interest.

Section 196.199(2)(b), Florida Statutes provides that buildings and other improvements located on lands owned by a governmental entity but leased to a non-governmental entity are taxable. *Parker , id.; Eller id.* In our case Southeast is BOTH THE LEGAL AND EQUITABLE OWNER OF THE PROPERTY.

C. FLORIDA REQUIRES THAT FOR AN EXEMPTION THE APPLICANT HAS TO BE AN EXEMPT ENTITY

The Plaintiff's receives 2% of gross revenues (plus a performance enhancement of 2%) plus 10% of net profits.

The income is taxable income under the IRC therefore, the Plaintiff is not an exempt entity. *See TEDC/Shell, id.; Southlake Comm. Foundation, Inc. v. Havill,* 707 So.2d 361 (Fla. 5th DCA 1998) but *see Public Housing Assistance, Inc. v. Havill,* 571 So.2d 456 (Fla. 5th DCA 1990).

D. PROPERTY APPRAISER IS NOT REQUIRED TO GIVE NOTICE

Southeast has asserted that the Defendant failed to notify it as required by Section 196.193(5), Florida Statutes. Section 196.193 is for exemption *applicants*. An application was not filed in this case. Since there never was an initial application then the provisions of Section 196.193 have no application and the notification under subsection (5) has no bearing since there was no determination by the Defendant for an exemption as none was applied for. *Mitchell v. Higgs, id*.

Southeast alleges in Count I of its Complaint that the Property Appraiser improperly removed a preexisting exemption. The Plaintiff, however, ignores the facts. The USA was listed as the owner as of January 1st 2007 through January 1st, 2012. *See Mastroianni, id.; Mitchell, id.* It was not until the Property Appraiser received the documents relating to the transfer of The Property, TPP to Southeast that the new owner was replaced on the tax roll and the liens recorded. The TPP was not transferred by recorded deed of transfer as is real property. The "Existing Exemption" was not improperly removed, there never was an exemption. The immunity of the federal government ceased to exist when the ownership changed. The federal government was never required to file an application and, as an immune entity, it was not a taxpayer. *Cason, id*.

Florida law provides that when the ownership of property changes, the owner is required to notify the property appraiser. §196.011(9)(a), Fla. Stat. Neither the USA nor Southeast notified the Property Appraiser. *See Mitchell v. Higgs*, 61 So.3d 1152 (Fla. 3rd DCA 2011); *Mastroianni, id*. The previous exempt/immune status ended upon the conveyance. There was no new application by Southeast. See §196,011(9)(a), Fla. Stat. (". . . Notwithstanding such waiver, re-filing of an application . . . shall be required when any property granted an exemption is or otherwise disposed of, when the ownership changes in any manner. . .")

As to Count II, the application for 2012, (1) it was filed late, §196.011(a), Fla. Stat. and therefore waived, *Turner, id*., (2) it did not set forth a constitutionally or a statutorily created exempt use or exempting and (3) the Plaintiff, applicant was not an exempt entity, §§196.195, 196.196, Fla. Stat. *Public Housing Assistance v. Harill*, 571 So.2d 45 (Fla. 5th DCA 1990). *TEDC/Shell, id.; Turner, id.*

E. EQUITABLE OWNERSHIP

Described above in section II, B is the evolution of case law regarding taxation/exemption on the taxable owner when ownership is based upon equitable ownership. In Florida cases the determination of the taxable status based upon the ownership follows the benefits/obligations of the controlling owner be it the equitable or legal owner, the court in *Accardo v. Brown*, 63 so.3d 798 (Fla. 1st DCA 2011) codified the reasoning as follows:

> Turning to the taxation of the underlying property, an issue which was not addressed *Ward*, appellants first contend that the Deed of Conveyance prohibits ownership of the property at issue by private persons. While Appellants are correct, the issue presented in this case is not whether they are the legal owners of the property. Instead, the issue is whether they are the equitable owners of the property for ad valorem taxation purposes. The Deed of conveyance has no bearing on this issue.

> Appellants next assert that the underlying property is immune from taxation. See Fla. Dep't of Revenue v. City of Gainesville, 918 So.2d 250, 256 (Fla. 2005) (noting that the State and counties are immune from ad valorem taxation). We reject his argument as well given that Appellants' focus is again on the legal ownership of the property. As we stated with respect to the previous argument, the issue is whether Appellants are the equitable owners of the property for ad valorem taxation purposes. Whether Escambia County is immune from taxation has no bearing on this issue either.

Southeast alleges that The Property is actually still owned virtually and beneficially by the USA. For this argument Southeast has argued that the facts fall within those set forth in *Leon County Educational Facilities Auth. v. Hartsfield*, 698 So.2d 526 (Fla. 1997).

In *Hartsfield*, a non-profit entity was used to own property and build housing on it for students of Florida State University and Florida A & M University and lease it to the immune governmental authority, the rental to retire the bonds. Tax free bonds were issued to accomplish the project. All excess cash flow was paid to the authority. The governmental authority would operate the project.

The actual facts in this case are the same as those in *Parker v. Hertz Corp.*, 544 So.2d 249 (Fla. 2nd DCA 1989); *Marathon Air Service, Inc. v. Higgs*, 575 So.2d 1340 (Fla. 3rd DCA 1991) and *Broward County v. Eller Dr. Ltd.*, 939 So.2d 130 (Fla. 4th DCA 2006). (See Chart A - 17). Along with exclusive control given to Southeast it being the Managing Member these are all the *indicia* of ownership for both the benefits and obligations. *Parker, id.*

F. ESTOPPEL ARGUMENT

Southeast has suggested that Borglum's May 2007 letters in response to Southeast's Memorandum regarding the continued exemption (immunity) status of The Property somehow entitles it to the exemption. First, however, a claim for exemption cannot be predicated thereon. *Southlake, id*. In *Southlake,* the Plaintiff sought a tax exemption and relied on a Memorandum

from the Property Appraiser which stated that the exemption would be granted. At the time of this Havill's memo, Southlake had not yet acquired the property and there was no pending application for exemption. The property appraiser, Havill, later denied the exemption. The trial court held that Section 197.122, Florida Statutes precludes a property appraiser from preventing any tax payment regardless of any prior statement. The Fifth District Court of Appeals upheld this finding by the trial court. The property appraiser was required to act only on current applications and to consider the actual situation as of January 1st of each tax year.

Clearly, under *Southlake*, Borglum could not have granted an exemption in May of 2007 for the 2008 tax year. There was no pending application, Southeast did not exist and the federal government owned The Property.

Second, the Memorandum provided by GMH's attorney, Russell Love, as shown was based upon an inaccurate statement of legislature jurisdiction. Moreover, the Memorandum was filled with misleading information, and failed to provide the Property Appraiser with actual facts or documentation regarding The Property. The management and control was in Southeast not the Navy.

Southlake further destroys Southeast's assertion that because the Department of Revenue filed an answer supporting Southeast's claim for exemption via equitable ownership or in the alternative estoppel via letter, that it is therefore binding on the court. In *Southlake* the Property Appraiser based his initial decision regarding exemption in light of an opinion provided by the Florida Department of Revenue (DOR) and as stated above *Havill*, the property appraiser later denied the exemption in complete opposition to the DOR's opinion.

In this case the DOR solely communicated with and relied on Southeast's Complaint and attachments and the Memorandum provided by Southeast to base their opinion and Answer.

(Keller Depo p 49, 50, A – 11). Prior to rendering an Answer, the DOR failed to communicate or view any documentation provided the Monroe County Property Appraiser's office or it's counsel. (Keller Depo p 24, 41, 44, A - 11).

Therefore, Defendant is not equitably estopped from assessing The Property and recording the liens. *Dolphin Outdoor Advertising v. Department of Transportation,* 582 So.2d 709 (Fla. 1st DCA 1991); *Crowell v. Monroe County,* 578 So.2d 837 (Fla. 3rd DCA 1991).

G. CHANGE OF JUDGMENT ARGUMENT

Section 196.011 (9) (a), Florida Statutes in pertinent part reads as follows:

> The owner of any property granted an exemption who is not required to file an annual application or statement shall notify the property appraiser promptly whenever the use of the property of the status or condition of the owner changes so as to change the exempt status of the property. If any property owner fails to so notify the property appraiser and the property appraiser determines that for any year within the prior 10 years the owner was not entitled to receive such exemption, the owner of the property is subject to the taxes exempted as a result of such failure plus 15 percent interest per annum and a penalty of 50 percent of the taxes exempted.

This statute gives the Defendant in this case the ability to claw back up to ten (10) years and in this case the tax years 2008, 2009, 2010, 2011.

Southeast cites *Underhill* and asserts that the "change in judgment" rule restricts the Defendant from back assessing tax years 2008-2011. However, the "change in judgment" rule is inapplicable to this case. See *Mitchell v. Higgs, id.* In *Mitchell*, the Court distinguishes the reasoning in *Underhill* and held that, "retroactive revocation of the homestead exemption is the subject of an express legislative enactment, section 196.161, Fla. Stat., and that provision is not subject to the 'change in judgment' rule. *Mitchell, id.* Were it otherwise, section 196.161 could

never be given effect for any prior year, much less ten prior years, after a tax roll has been certified." *Mitchell, id*.

Section 196.161, Florida Statutes reads:

> (b) In addition, upon determination by the property appraiser that for any year or years within the prior 10 years a person who was not entitled to a homestead exemption was granted a homestead exemption from ad valorem taxes, it shall be the duty of the property appraiser making such determination to serve upon the owner a notice of intent to record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property shall be identified in the notice of tax lien.

Section 196.011(9)(a), Florida Statutes which reads:

> the property appraiser determines that for any year within the prior 10 years the owner was not entitled to receive such exemption, the owner of the property is subject to the taxes exempted as a result of such . . . property appraiser making such determination shall record in the public records of the county a notice of tax lien against any property owned by that person or entity.

Underhill involves a charitable use exemption. In the instant case the property appraiser did not have a change in judgment. There was no judgment ever exercised, the Southeast never filed an application. Rather, a change of ownership occurred mandating the new owner to apply for exemption. See subsection (9)(a) of Section 196.011.

CONCLUSION

Summary judgment is proper if there are no genuine issues of material fact and a moving party is entitled to judgment as a matter of law. *Accardo*, 63 So.3d 798, at page 800. In this case there are no material facts for the issues raised in Defendant's motion for summary judgment, and therefore, a partial summary judgment should be entered holding that the Southeast is a taxable entity under law, see §196.197, Florida Statutes and as the equitable and legal owner of The Property, its use, the leasing of residential units to active Navy personnel and non-Navy

tenants to an including civilians does not qualify for any exempt use or entitle it to exemption including a governmental use.

Further, in response to Southeast's motion, 1) the Defendant, Property Appraiser never granted Southeast an exemption in 2007; there was a change in ownership and a change in use, i.e., personnel to a proprietary leasing of residential housing. 2) There was no requirement from 2008 to 2011 to provide a notice an exemption to a proprietary entity which had not filed an application for one. 3) Southeast did not timely file for an application in 2012 and it, therefore was waived. Southeast failed to comply with the statute, Section 196.011(9)(a), Florida Statutes. *See Turner, id.* 4) Military housing owned by a for profit entity and leased to military personnel and the general public is neither exempt no immune from taxation.

Therefore, Southeast's Motion for Summary Judgment should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to James M. Spoonhour, Esq. and S. Brendan Lynch, Esq., 215 N. Eola Drive, P.O. Box 2809, Orlando, Florida 32802 at james.spoonhour@londes-law.com and brendan.lynch@londes-law.com, David P. Horan, Esq., 608 Whitehead Street, Key West, Florida 33040 at dph@horan-wallace.com, Timothy E. Dennis, Assistant Attorney General, at timothy.dennis@myfloridalegal.com, and Joseph C. Mellichamp, III, Esq., Chief Assistant Attorney General, Office of the Attorney General, Revenue Litigation Bureau, PL-01, The Capitol, 400 South Monroe Street, Tallahassee, Florida 32399-1050 at joe.mellichamp@myfloridalegal.com, and Nathan E. Eden, Esq., 302 Southard Street, Suite 205B, Key West, Florida 33040 at neecourtdocs@bellsouth.net, on this 22nd day of April, 2013.

DENT & MCCLAIN, CHARTERED
3415 Magic Oak Lane
Sarasota, Florida 34232
Phone: (941) 952-1070
Fax: (941) 952-1094
Attorneys for Defendant
Scott P. Russell

s/John C. Dent, Jr.
JOHN C. DENT, JR.
Florida Bar No. 0099242
jdent@dentmcclain.com
JENNIFER A. MCCLAIN
Florida Bar No. 0446830
jmcclain@dentmcclain.com