CLARK PARTINGTON HART
LARRY BOND & STACKHOUSE
ATTORNEYS AT LAW
Pensacola • Destin • Santa Rosa Beach • Tallahassee

William J. Dunaway
*Licensed to Practice in
Florida & Mississippi

Direct (850) 208-7020
wdunaway@cphlaw.com

MEMORANDUM

TO: Jim Cox
Benjamin Stevenson
Pensacola Beach Advocates

FROM: Will Dunaway

DATE: June 10, 2015

RE: SRIA Lease Reductions

This memorandum addresses the following five (5) issues Pensacola Beach Advocates ("PBA") has presented our firm with respect to the Santa Rosa Island Authority ("SRIA") and the lease fees and ad valorem taxes that Escambia County (the "County") and SRIA assess and collect against leased parcels of real property located on Pensacola Beach:

(1) Does SRIA have the legal authority to reduce the lease fees?

(2) If the County begins paying for certain services on Pensacola Beach from ad valorem tax proceeds, and SRIA reduces lease fees by a similar amount, would such action be subject to legal challenge as an unconstitutional exemption from taxation?

(3) Can SRIA reduce the lease fees of the residential leaseholders at a different rate than the reduction of commercial lease fees, or must they be reduced proportionately?

(4) Can SRIA require that any reduction in lease fees to a master leaseholder be passed on to sub-lessees?

(5) Can SRIA require that any reduction in commercial lease fees be passed on to customers of the commercial lessees?

I. Does SRIA have the legal authority to reduce the lease fees?

Yes. As a general proposition, SRIA does have the authority to reduce the fees it charges to Pensacola Beach leaseholders for use of the parcels. Although SRIA is a public entity,[1] the lease agreements are generally governed by the same rules as any private contract and thus a bargained-for reduction in lease fees would be permissible. *See Frankenmuth Mut. Ins. Co. v. Escambia County*, 289 F.3d 723, 728 (11th Cir. 2002) (applying "traditional contract principles" of Florida law to the interpretation of a lease agreement between Escambia County and a private entity).

This conclusion becomes stronger in light of the language in Special Act 47-24500 specifically authorizing the County and SRIA to enter into leases on "such terms and conditions and for such periods of time as it shall fix …." *See also, e.g., Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 384 (1960) ("It is undoubtedly true, as a general proposition, that the State is free to adopt measures reasonably designed to facilitate the leasing of its own land."); *Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 510 F.Supp.2d 691, 719 (M.D. Fla. 2007) ("In the absence of specific constitutional or statutory requirements, a public agency has no obligation to establish a bidding procedure and may contract in any manner not arbitrary or capricious.") (emphasis added).

The primary limitation on SRIA's authority to negotiate lease modifications is that SRIA, as a government actor, is subject to due process constraints against arbitrary and unreasonable conduct that are not applicable to private contracting

[1] SRIA is the statutory "agent" of Escambia County per Special Act 47-24500, Laws of Florida (1947). *See also 1108 Ariola, LLC v. Jones*, 71 So.2d 892, 894 n.2 (Fla. 1st DCA 2011).

parties. *See Thorpe v. Housing Authority of City of Durham*, 386 U.S. 670, 678 (1967) (J. Douglas, concurring) ("The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.") (citing *Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955)). Therefore, as long as SRIA reduces the lease fees reasonably and equally for all similarly situated lessees, SRIA may do so.

II. If the County begins paying for certain services on Pensacola Beach from ad valorem tax proceeds, and SRIA reduces lease fees by a similar amount, would such action be subject to legal challenge as an unconstitutional exemption from taxation?

At first blush, PBA's suggested reduction in lease fees resembles the facts of *Archer v. Marshall*, in which the Florida Supreme Court held unconstitutional a special act of the Florida Legislature (Chapter 76-361) providing that "rentals due the Santa Rosa Island Authority on leases dated on or before December 1, 1975, will be reduced each year by the amount of ad valorem taxes for county and school purposes paid on the leasehold interests for the preceding year." 355 So.2d 781, 783 (Fla. 1978) (stating "the purpose and effect of this special act is to create an indirect exemption from taxation on property not authorized by the state constitution ….").

However, *Archer* is inapplicable here because the proposed lease fee reduction is not tied to paid taxes. Instead, an across-the-board, percentage reduction in the lease fees paid by each leaseholder would stand irrespective of the specific amount of the lease fees and the taxes currently paid by each lessee. For

example, a leaseholder would get a 50% lease fee reduction, whether they paid $500 or $5,000 in taxes and whether the original lease fee was $400 or $4,000. For these reasons, a court would probably find that PBA's proposed reduction in lease fees does not amount to an unconstitutional tax exemption.

III. Can SRIA reduce the lease fees of the residential leaseholders at a different rate than the reduction of commercial lease fees, or must they be reduced proportionately?

While this proposal may present equal protection concerns, it would likely withstand an attack on such grounds for two reasons: The residential leaseholders and commercial leaseholders are not "similarly situated" for purposes of equal protection, and even if they were, a disparate reduction in their lease fees would be subject only to rational basis review and would probably satisfy such scrutiny.

The Equal Protection provisions of the U.S. Constitution (14th Amendment, § 1) and the Florida Constitution (Article 1, § 2) require only that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (emphasis added); *see also D.M.T. v. T.M.H.*, 129 So.3d 320, 341 (Fla. 2013) ("The constitutional guarantee of equal protection 'is essentially a direction that all persons similarly situated should be treated alike.'") (emphasis added). To establish an equal protection claim, one must demonstrate that "(1) she is similarly situated to others who received more favorable treatment, and (2) her discriminatory treatment was based on some constitutionally protected interest." *Hatcher v. DeSoto County School Dist. Bd. of Educ.*, 939 F.Supp.2d 1232, 1236 (M.D. Fla. 2013) (citing *Jones v. Ray*, 279 F.3d 944, 946-47 (11th Cir. 2001)). Thus, "[e]qual protection is not violated merely because some persons are treated

differently than other persons. It only requires that persons similarly situated be treated similarly." *Troy v. State*, 948 So.2d 635, 645 (Fla. 2006).

Here, the residential leaseholders and the commercial leaseholders are not "similarly situated" for equal protection purposes, given the differences in their respective lease terms, their uses of the parcels and the sums each pays in lease fees, among other reasons. *See Highland Properties v. Lee County Utilities Authority*, 173 F.Appx. 806, 809 (11th Cir. 2006) (finding that subdivision developers were not similarly situated for equal protection purposes regarding disparate utility rates charged by a public utility provider, where the developers' preexisting utility contracts differed as to termination, etc.); *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314-15 (11th Cir. 2006) (a credit union and a medical center were not similarly situated to a developers' proposed apartment building, and thus were not valid comparators for purposes of the developers' claim that a city violated their equal protection rights by denying them approval for the apartment project, inasmuch as the credit union and medical center were commercial projects as opposed to a large residential complex).

Moreover, even if the residential leaseholders and the commercial leaseholders were found to be "similarly situated," since a disparate reduction in their lease fees would not seem to involve a fundamental right[2] or a suspect

[2] A "person's right to contract and pursue lawful business," while recognized by the U.S. and Florida Constitutions, are not "absolute rights" and are "subject to reasonable restraint in the interest of the public welfare. Legislative limitations upon the exercise of these liberties are constitutional if they rationally relate to a valid state objective." *Dept. of Business Regulation v. National Manufactured Housing Federation, Inc.*, 370 So.2d 1132, 1136 (Fla. 1979) (emphasis added).

classification, the reduction would be subject only to rational basis scrutiny. *See Armour v. City of Indianapolis, Ind.*, 132 S.Ct. 2073 (U.S. 2012) (applying rational basis review in upholding a city's refusal to issue refunds to residents who paid sewer assessments in a lump sum before the city's adoption of a new system for funding sewer improvement projects and a resolution forgiving the payment obligations of other residents who had not yet paid the assessments in full); *see also Highland Properties, supra,* 173 Fed. Appx. at 809 ("When state economic activity is challenged and there is no claim of discrimination based on some suspect class, then the state activity is presumed valid unless it is not rationally related to a legitimate state interest.") (citing *Foto USA, Inc. v. Bd. of Regents of the Univ. Sys.*, 141 F.3d 1032, 1037-38 (11th Cir. 1998)); *American Fabricare v. Township of Falls*, 101 F.Supp.2d 301, 307-08 (E.D. Penn. 2000) (city's distinction between residential and commercial users as to rates charged for sewer tapping fees, under which residential users were charged standard rate but commercial users were charged variable rate depending on level of discharge, was not irrational under equal protection clause).

PBA has maintained that SRIA's reduction in lease fees should be the same for both residential leaseholders and commercial leaseholders. However, a disparate reduction in the lease fees would not violate equal protection because the residential and commercial leaseholders are not "similarly situated," and even if they were, such a reduction would withstand judicial review because "there is a plausible policy reason for the classification, the … facts on which the classification is apparently based rationally may have been considered to be true by [SRIA], and

the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Armour, supra,* 132 S.Ct. at 2080.

IV. Can SRIA require that any reduction in lease fees to a master leaseholder be passed on to sub-lessees?

Under existing law, SRIA does not have the authority to compel master leaseholders to pass-on lease fee reductions to their sub lessees. The master leaseholders have contracts with sub-leaseholders and any interference with that contract (legislative or otherwise) would be subject to the constitutional prohibitions against the impairment of contracts, or alternatively, may constitute a taking and therefore require the County to pay just compensation to the master leaseholders. SRIA does, however, have the ability (as would any landlord) in its negotiations with the master leaseholders to insist, as a condition to modifying the master leases, that any reduction in lease fees be passed on to the end users of the parcels (i.e., SRIA will reduce fees if the savings are passed to sub lessees). There would seem to be no financial disadvantage to the master leaseholders if the lease fee reductions were passed on dollar-for-dollar to the end users as set out above.

V. Can SRIA require that any reduction in commercial lease fees be passed on to customers of the commercial lessees?

The same analysis for Issue (4) applies here.

WJD/ht
A1755531.DOCX