SUPREME COURT OF FLORIDA

CASE NO. 94,105

THE SEBRING AIRPORT AUTHORITY and SEBRING INTERNATIONAL RACEWAY, INC.,

Appellants,

vs.

C. RAYMOND McINTYRE, PROPERTY APPRAISER OF HIGHLANDS COUNTY, FLORIDA; and J.T. LANDRESS, TAX COLLECTOR OF HIGHLANDS COUNTY, FLORIDA,

Appellees.

THE DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Appellant,

vs.

C. RAYMOND McINTYRE, PROPERTY APPRAISER OF HIGHLANDS COUNTY, FLORIDA; and J.T. LANDRESS, TAX COLLECTOR OF HIGHLANDS COUNTY, FLORIDA,

Appellees.

ON APPEAL FROM THE FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT

AMICUS CURIAE BRIEF
OF THE GREATER ORLANDO AVIATION AUTHORITY

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INTRODUCTION

This brief is filed amicus curiae on behalf of the Greater Orlando Aviation Authority ("the Authority"). The Authority, which operates Orlando International Airport ("OIA") in Orange County, Florida, is an independent special district of the State of Florida created by Chapter 1658, Special Acts of 1957. The real property on which OIA is located is owned by the City of Orlando, but is leased to the Authority pursuant to an Operation and Use Agreement between the Authority and the City of Orlando, dated September 17, 1976, which entitles the Authority to full rights of occupancy, use, and control of the property until September 30, 2026.

The Authority makes portions of OIA available to a wide range of private tenants for the conduct of the day-to-day operations of the airport, including: the lease of ticket counters, gates, holdrooms, baggage claim areas, apron areas, and other portions of the airport to airlines: the lease of facilities to fixed-base operators to supply fuel, maintenance, ground handling, and other services to the airlines; and the lease of space in the terminal complex to concessionaires to provide food and beverages, ground transportation, duty-free goods, and other goods and services to airport passengers.

In defining the use of property for a "municipal or public purpose" under article VII, section 3(a) of the Florida Constitution, the legislature has specified a number of airport activities that are deemed to come within that definition, including activities undertaken by a lessee of property at a public

airport deemed to perform an "aviation or airport" purpose[1] and activities in connection with the conduct of an aircraft full-service fixed-base operation undertaken by a lessee of property designated as an aviation area on an airport layout plan approved by the Federal Aviation Administration.[2] At OIA and other large public airports around the state, many of these uses are conducted by airlines, fixed base operators, concessionaires, and other private companies that earn a profit from their activities.

Regardless of whether this court determines that the legislature may define "municipal or public purpose" to include the activities of Sebring International Raceway, Inc., it is of vital public importance that this court make it clear that the legislature is not automatically and necessarily precluded from

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[1] "Any activity undertaken by a lessee which is permitted under the terms of its lease of real property dedicated as a public airport as defined in s. 332.004(14) by municipalities, agencies, special districts, authorities, or other public bodies corporate and public bodies politic of the state, or which is located in a deepwater port identified in s. 403.021(9)(b) and owned by one of the foregoing governmental units, subject to a leasehold or other possessory interest of a nongovernmental lessee that is deemed to perform an aviation or airport or maritime or port purpose or operation shall be deemed an activity that serves a governmental, municipal, or public purpose." § 196.012(6), Fla. Stat. (1997).

[2] "[A]n activity undertaken by a lessee which is permitted under the terms of its lease of real property designated as an aviation area on an airport layout plan which has been approved by the Federal Aviation Administration and which real property is used for the administration, operation, business offices and activities related specifically thereto in connection with the conduct of an aircraft full service fixed base operation which provides goods and services to the general aviation public in the promotion of air commerce shall be deemed an activity which serves a governmental, municipal, or public purpose or function." § 196.012(6), Fla. Stat. (1997).

declaring that a profit-making activity serves a municipal or public purpose.

STATEMENT OF THE CASE AND FACTS

The Authority incorporates and relies upon the "Statement of the Case and Facts" set forth in the initial brief filed by The Sebring Airport Authority and Sebring International Raceway, Inc., the appellants in this case.

SUMMARY OF THE ARGUMENT

The district court's opinion strays too far from settled law in suggesting that the legislature has only limited constitutional authority to declare what constitutes a "governmental, municipal, or public purpose" for purposes of determining when governmentally-owned property is exempt from ad valorem taxation. Contrary to what the district court concluded, Florida law does not prohibit the legislature from properly and reasonably determining that certain uses of governmentally-owned property are used for a "governmental, municipal, or public purpose," even if such uses are proprietary in nature.

A "municipal" use of governmentally-owned property is not necessarily exclusive of a "proprietary" use of that property. The broad language stating otherwise in the district court's opinion is an inaccurate statement of Florida law, and it is not contrary to the Florida Constitution for the legislature to recognize and determine that property is used for a "governmental, municipal, or public purpose"--and therefore exempt from ad valorem taxation--

even if the property is leased to, and used by, a private tenant who uses and operates the property on a for-profit basis.

Finally, there is dangerous, and clearly incorrect, dicta in the district court's opinion suggesting that the exempt status of governmentally-owned property is determined by the same standard regardless of whether the property is leased to, and used by, a private tenant, or, alternatively, whether the property is used and operated by the governmental owner itself, without the involvement of a nongovernmental lessee. In the latter situation, the tax-exempt status of the property is determined by a broad, liberal standard under which exemption is the rule and taxability is the rare exception. In suggesting that this latter situation is governed by the same test as the one that has been applied in the context of governmental property subject to a lease--focusing on whether the property is used for a "proprietary" purpose--the district court plainly erred.

ARGUMENT

I. THE LEGISLATURE HAS BROAD AUTHORITY TO DEFINE "MUNICIPAL OR PUBLIC PURPOSE" AS USED IN ARTICLE VII, SECTION 3(a) OF THE CONSTITUTION SO LONG AS IT DOES NOT DISTORT THE "NORMAL AND ORDINARY MEANING" OF THOSE TERMS

As the district court recognized, "the legislature may refine and redefine broadly defined terms and concepts in the constitution" provided that "such refinement or definition must not . . . conflict with the constitution." Sebring Airport Authority v. McIntyre, 718 So. 2d 296, 298 (Fla. 2d DCA 1998). As shown

below, this fundamental principle has been repeatedly affirmed by this court.

Jasper v. Mease Manor, Inc., 208 So. 2d 821 (Fla. 1968), presented an issue remarkably similar to the issue presented here. The constitution in effect at that time limited tax exemption statutes to those for "municipal, education, literary, scientific, religious or charitable purposes," and required that "the property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." The legislature enacted a statute providing an exemption from ad valorem taxation for property of a home for the aged operated by a Florida not-for-profit corporation provided that it met certain specified criteria. The statute did not require that the aged persons served by the home be financially or physically unable to provide for their own needs.

This court noted that "[t]he statute . . . clearly constitutes a legislative definition of 'charitable' to include operation of a home under the stated conditions for persons who are chronologically aged without regard to dependence or independence," and concluded that this was "within the legislative prerogative." Id. at 825. The court stated that

> [t]he test for measuring such legislation against the constitutional restraints must be that of reasonable relationship between the specifically described exemption and one of the purposes which the constitution requires to be served. The problem therefore differs significantly from that which has been presented in cases requiring judicial

> definition of the constitutional concepts in the absence of an explicit statute. Application in those cases of a more limited definition of charitable use, in the primary sense of relief for the indigent or helpless, does not require or justify rejection of the current statute on constitutional grounds.

Id. at 825 (footnotes omitted; emphasis added).

This court reached a similar result two years later in the frequently-cited case of Greater Loretta Improvement Association v. State ex rel. Boone, 234 So. 2d 665 (Fla. 1970). In that case, one of the issues was whether the game of "bingo" constituted a "lottery" within the meaning of the constitutional prohibition of lotteries applicable at the time the statute was enacted. This court upheld the authority of the legislature to authorize bingo, an action by which the legislature necessarily accepted a definition of "lottery" that did not include bingo. The court stated:

> The situation then, as it presents itself in connection with our constitutional provision, is at least that by the decisions of the courts of Florida and other jurisdictions the word "lottery" may have either of several meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the legislature has by statute adopted one, its action in this respect is well-neigh, if not completely controlling.

Id. at 669 (emphasis added).

The court emphasized its unwillingness to interfere with the acts of the legislature. As it explained:

> When the legislature has once construed the constitution, for the courts then to place a

> different construction upon it means that they must declare void the action of the legislature. It is no small matter for one branch of the government to annul the formal exercise by another of power committed to the latter. The courts should not and must not annul, as contrary to the constitution, a statute passed by the legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution. This is elementary.

Id. at 670.

Department of Revenue v. Florida Boaters Association, Inc., 409 So. 2d 17 (Fla. 1981), the principal case relied upon by the district court below, is not to the contrary. In fact, Florida Boaters Association underscores the principles established by this court in Jasper and Greater Loretta Improvement Association.

Florida Boaters Association involved the interpretation of article VII, section 1(b) of the constitution, which provides as follows:

> Motor vehicles, boats, airplanes, trailers, trailer coaches and mobile homes, as defined by law, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes.

Art. VII, § 1(b), Fla. Const. The legislature defined "boat" broadly, but sought to exclude "live-aboard vessels" from the meaning of the term "boat" so as to subject them to ad valorem taxation.[3]

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[3] "Live-aboard vessel" was defined to mean: "(a) Any vessel used principally as a residence; or (b) Any vessel represented as a place of business, a professional or other commercial enterprise, or legal residence, and providing or serving on a long-term basis the essential services or functions typically associated with a structure or other improvement to real property, and, if used as a

The court found that exclusion to be unreasonable, and therefore unconstitutional. The court held that "[t]he flexibility . . . granted to the legislature does not empower it to depart from the normal and ordinary meaning of the words chosen by the framers and adopters of the constitution." 409 So. 2d at 19 (citations omitted). It concluded that the legislature had impermissibly "decreed that when the transportational or navigational use of a boat is secondary to other uses, the boat will be subject to ad valorem taxation instead of a license tax." Id.

However, this court's decision in Florida Boaters Association did not question, and, in fact clearly reaffirmed, the broad authority of the legislature to define a constitutional term so long as it does so in a reasonable manner. This is illustrated in Land v. State Department of Revenue, 510 So. 2d 606 (3rd DCA 1987), review denied, 518 So. 2d 1276 (Fla. 1987), which was, in effect, a follow-up case to Florida Boaters Association.

Subsequent to this court's decision in Florida Boaters Association, the legislature defined a "floating structure" that was excluded from the definition of "boat" for purposes of the constitutionally-mandated exemption from ad valorem taxation.[4]

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means of transportation, said use is clearly a secondary or subsidiary use; or (c) Any vessel used by any club or any other association of whatever nature when clearly demonstrated to serve a purpose other than a means of transportation."

[4] "Floating structure" was defined to mean "a floating barge-like entity, with or without accommodations built thereon, which is not primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property. The term 'floating structure' includes, but is not limited to, each entity used as a residence, place of business, office, hotel or motel,

Houseboat owners challenged the constitutionality of the statute on the basis of Florida Boaters Association. The Third District Court of Appeal upheld the statute as a reasonable attempt by the legislature to exclude from the definition of "boat" a structure that "has the characteristics associated with real property, rather than the characteristics associated with structures commonly used primarily for transportation . . . ." 510 So. 2d at 608.

Similarly, when the legislature has adopted specific definitions of what constitutes a "municipal or public purpose" for purposes of exemption from ad valorem taxation, such definitions should be, in the words of this court, "well-neigh, if not completely controlling" (Greater Loretta Improvement Association, 234 So. 2d at 669), and should be upheld by the courts unless they are manifestly unreasonable. Even if the court would otherwise be inclined to adopt a more restrictive definition, it must uphold the definitions promulgated by the legislature if there is a reasonable basis for enacting them.[5]

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restaurant or lounge, clubhouse, meeting facility, storage or parking facility, mining platform, dredge, dragline, or similar facility or entity represented as such. . . ."

[5] It should be noted that although the constitutional provision addressed in Florida Boaters Association specifically provided for legislative definition of the term "boat," there was no such specific constitutional authorization (and no such specific authorization was deemed to be required) in either Jasper or Greater Loretta Improvement Association.

II. THERE IS A REASONABLE BASIS FOR THE LEGISLATURE TO CONCLUDE THAT CERTAIN ACTIVITIES SERVE A "MUNICIPAL OR PUBLIC PURPOSE" EVEN IF THEY ARE UNDERTAKEN BY A PRIVATE COMPANY FOR A PROFIT

In determining which uses of property serve a "municipal or public purpose" within the meaning of article VII, section 3(a) of the constitution, the legislature is not confined to uses that are purely and solely "governmental" and which are not "proprietary." As this court stated in State v. City of Jacksonville, 50 So. 2d 532 (Fla. 1951):

> Though there was a time when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental that concept has now been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality.

Id. at 535.

This court has recognized that a broad range of activities serve valid municipal and public purposes. For example, this court has held that the operation of a public airport serves a public purpose. In State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952), the court found that

> air transportation, such as that flowing into and out of Miami, serves a real public purpose, and in developing this port, owning and operating the same, it could not be said that the City of Miami was not serving a public purpose and municipal purpose.

Id. at 784.

Other examples of activities found by this court to serve a municipal or public purpose include: construction and operation of a parking garage, Gate City Garage v. City of Jacksonville, 66

So. 2d 653 (Fla. 1953); construction and operation of a marina and civic auditorium, Panama City v. State, 93 So. 2d 608 (Fla. 1957); acquisition and maintenance of a golf course, West v. Town of Lake Placid, 97 Fla. 127, 120 So. 361 (1929); making fishing facilities available in a public park and earning revenue by leasing a portion of the park to a business firm for construction and operation of a fishing pier, Sunny Isles Fishing Pier v. Dade County, 79 So. 2d 667 (Fla. 1955); and operation of a radio broadcasting system, State v. City of Jacksonville, supra.

The distinction that the district court drew between "municipal" purposes and "proprietary" purposes is no longer valid. The two terms are not mutually exclusive. As shown by the cases cited above, many activities found to serve a municipal or public purpose are proprietary. The district court effectively acknowledged this when it stated that "[m]unicipal purposes generally relate to health, morals, safety, protection or welfare of the municipality and its citizens." McIntyre, 718 So. 2d at 298-99. Clearly, such a definition includes many proprietary activities.

As demonstrated above, the legislature has broad authority to define "municipal or public purpose" as used in article VII, section 3(a) of the constitution. While the legislature's latitude in defining what activities serve a municipal or public purpose has limits--we agree with the circuit court and the plaintiff below that "the legislature cannot transform horses into cows by words so declaring"--it is fully

appropriate for the legislature to determine that certain proprietary activities conducted by a lessee of government property serves a municipal or public purpose.

As the legislature has repeatedly recognized, strict adherence to the notion that any proprietary activity conducted by a lessee on municipal property should result in the loss of the ad valorem property tax exemption is unworkable. Such a notion is contrary to two very significant trends in our society: (1) the expansion of the scope of services provided by government beyond traditional sovereign functions; and (2) the growing trend to delegate the conduct of many of those services to private parties. Where the legislature has made a determination that an activity by a lessee serves a municipal or public purpose, such a determination should be binding unless it is manifestly unreasonable.

Williams v. Jones, 326 So. 2d 425 (Fla. 1975), cited by the district court below, did not deal with tenants performing functions that could reasonably be characterized as "municipal or public." On the contrary, the tenants in Williams were engaged in activities that were "purely proprietary and for profit," id. at 433, including "the operation of barber shops, plumbing businesses, beauty shops, laundries, rental cottages or rental units, motels, restaurants and campgrounds." Id. at 428. Nor did the legislature declare such activities to serve a municipal or public purpose. Rather, the plaintiff taxpayers in Williams relied upon (and the Williams court interpreted) the general language set forth in

section 196.012(5) at the time the Williams case arose, and now contained in section 196.012(6) of the Florida Statutes.[6]

It would be a mistake (and directly contrary to this court's decisions in Jasper, Greater Loretta Improvement Association, and Florida Boaters Association) for this court to rigidly and mechanically apply the rule established to interpret the general language reviewed in Williams in such a way as to preclude the legislature from ever directing that a private, profit-making tenant serves a public or municipal purpose for purposes of exemption from ad valorem taxation.

Surely there is a practical, common-sense distinction between a tenant whose activities are "purely proprietary and for profit" such as a plumbing business on Santa Rosa Island addressed in Williams, and, for example, a tenant whose activities are essential to the operation of a vital public facility such as a large public airport and whose activities--were they not performed by such private tenant--would need to be performed by the public entity itself. We urge you to uphold the constitutional authority of the legislature to make such reasonable distinctions.

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[6] "Governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any government leasehold created in property of the United States, the state or any of its political subdivisions, or any municipality, agency, special district, authority or other public body corporate of the state is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a governmental purpose which would otherwise be a valid subject for the allocation of public funds." § 196.012(6), Fla. Stat. (1997).

III. THE DISTRICT COURT ERRED IN SUGGESTING THAT MUNICIPALLY-OWNED PROPERTY IS SUBJECT TO AD VALOREM TAXATION WHEN USED FOR A PROPRIETARY PURPOSE, EVEN WHEN THE GOVERNMENTAL OWNER IS ITSELF USING THE PROPERTY AND THE PROPERTY IS NOT BEING LEASED TO A PRIVATE TENANT

1. The District Court Erroneously Failed to Distinguish Between the Legal Standard Applicable to Determining the Taxable Status of Governmentally-Owned Property That is Used and Operated by the Governmental Owner Itself Without the Involvement of a Tenant, and the Entirely Different Standard Applicable to Determining the Taxable Status of Governmentally-Owned Property That is Leased to a Private Entity

Certain language in the district court's opinion, though clearly dicta, is so obviously contrary to the well-settled law of this state, and so dangerous in its implications, that this court should clarify and correct it regardless of whether and to what extent it otherwise grants any relief to the appellants in this case. The dicta in question suggests that municipally-owned property is subject to ad valorem taxation if the property is used for a "proprietary" purpose, even if the governmental owner is itself using the property and the property is not being leased to a private tenant. The district court's suggestion in this regard is unquestionably wrong.

The language in question appears towards the end of the district court's opinion. It reads as follows:

> Even property that is owned by a municipality but used by it for other than a governmental purpose loses its tax exemption. When the government operates in other than its governmental capacity, i.e., in a proprietary capacity, it too must carry its share of the tax burden. This issue was addressed by the supreme court in Markham v. Maccabee Invs.,

> Inc., 343 So. 2d 16 (Fla. 1977). There, the court reversed a ruling by the Fourth District which allowed a tax exemption to a theater that was located on property owned by a city but leased to a for-profit entity. Accord Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1976). Property owned by a governmental unit and leased to a proprietary entity must pay its fair share.

The Sebring Airport Authority v. McIntyre, 718 So. 2d 296, 300 (Fla. 2d DCA 1998) (emphasis added).

The district court's careless language results, probably unintentionally, in a confusion of two distinct situations: (1) those in which governmentally-owned property is leased to a private tenant and used by that tenant for proprietary purposes; and (2) those in which the governmental owner itself uses and operates its property, without the involvement of a tenant, for proprietary purposes. Only the former situation was presented in this case, and, thus, no one pointed out to the district court the body of Florida case law recognizing an entirely different legal standard that is applicable to the latter situation.

That the district court failed to appreciate the difference between these two situations is revealed by the court's own language. Although the court speaks of a governmental owner's use of its own property (suggesting that no leasehold situation is involved), it cites only two cases in support of its statement: Markham and Volusia County, both of which concerned only the taxation of leased property and neither of which involved the taxation of governmentally-owned property that the governmental

owner uses and operates itself without the existence of a private leasehold on the property.

The distinction is critical. Under Florida law, as explained more fully below, governmentally-owned property used by the governmental owner itself, and not leased to a private tenant, is entitled to a broad tax exemption. For such property, tax-exempt status is the presumption, and instances where such property is properly taxable are exceedingly rare. The converse, however, appears to be true for governmentally-owned property leased to a private tenant. Under current case law, property of this nature is often taxable, with the potential tax exemption construed somewhat narrowly (at least in the absence of legislative enactments to the contrary).

One of the serious mistakes of the district court in this case was to suggest that this latter, narrow standard applies to situations (i.e., government use and operation of its own property, without a landlord-tenant relationship) in which a broad tax exemption is not only available, but actually mandated by the constitution. No prior reported decision of any appellate court in this state supports, even remotely, such a statement, and the district court's opinion is literally unprecedented in that regard.

2. Florida Law Provides a Broad Tax Exemption for Governmentally-Owned Property That the Governmental Owner Uses and Operates Itself, Without the Involvement of a Private Tenant

When governmentally-owned property is used and operated by the governmental owner itself, and not leased to a private tenant, it is presumptively tax exempt. Article VII, section 3(a)

of the Florida Constitution exempts from ad valorem taxation "all property owned by a municipality and used exclusively by it for municipal or public purposes." There are no exceptions when the governmental entity is itself using the property. The exemption is absolute. As the First District Court of Appeal held earlier this year, "[w]here municipal property is used by the municipality that owns it . . . the constitution has established a broad exemption" from ad valorem taxation. Page v. City of Fernandina Beach, 714 So. 2d 1070, 1073 (Fla. 1st DCA 1998).

Although this constitutional provision is self-executing, the broad nature of the exemption granted by the constitution is also recognized by statute. Specifically, section 196.199(1)(c) of the Florida Statutes provides as follows:

> (1) Property owned and used by the following governmental units shall be exempt from taxation under the following conditions:
>
> . . .
>
> (c) All property of the several political subdivisions and municipalities of this state or of entities created by general or special law and composed entirely of governmental agencies or property conveyed to a nonprofit corporation which would revert to the governmental agency, which is used for governmental, municipal or public purposes shall be exempt from ad valorem taxation, except as otherwise provided by law.

§ 196.199(1)(c), Fla. Stat. (1997) (emphasis added).

As more fully discussed below, cases decided under article VII, section (3)(a) of the constitution and section 196.199(1)(c) of the Florida Statutes have consistently recognized that a broad exemption from ad valorem taxation is available for

governmentally-owned property that the governmental owner uses and operates itself, without a lease to a private tenant. Similarly, absent such a leasehold on the property, courts apply a liberal standard--and defer to the legislature--in determining whether a governmental entity is using its land for "governmental, municipal, or public purpose," rather than the judicially-created, restrictive standard, relied upon by the district court in this case, that focuses only on whether the property is being used for a "proprietary" purpose.

Leased property is somewhat different, and the test for determining whether governmentally-owned property is tax exempt when leased to a private tenant is narrower and more restrictive than is the situation when no tenant is present and the governmental owner uses and operates the property itself.

Part of this difference results from the fact that a different statute altogether applies to situations in which governmentally-owned property is leased to a private tenant. Those situations are governed by sections 196.199(2)(a) and 196.012(6) of the Florida Statutes, not section 196.199(1)(c). Section 196.199(2)(a) provides as follows:

> (2) Property owned by the following governmental units but used by non-governmental lessees shall only be exempt from taxation under the following conditions:
>
> (a) Leasehold interests in property of the United States, of the state or any of its several political subdivisions, or of municipalities, agencies, authorities, and other public bodies corporate of the state shall be exempt from ad valorem taxation only when the lessee serves or

> performs a governmental, municipal, or public purpose or function, as defined in s. 196.012(6). In all such cases, all other interests in the leased property shall also be exempt from ad valorem taxation. . . .

§ 196.199(2)(a), Fla. Stat. (1997) (emphasis added); see also § 196.199(4), Fla. Stat. (1997).

The definition of "governmental, municipal, or public purpose" applicable to these instances is, by statutory directive, much more limited than in the context of property that is not subject to a leasehold interest. Section 196.012(6) of the Florida Statutes provides this more limited definition of "governmental, municipal, or public purpose," which applies only in the context of governmentally-owned property that is subject to a lease. That statute provides, in pertinent part, as follows:

> (6) Governmental, Municipal or Public Purpose or Function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of the United States, the state or any of its political subdivisions, or any municipality, agency, authority, or other public body corporate of the state is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds.

§ 196.012(6), Fla. Stat. (1997) (emphasis added).

Thus, section 196.199(2)(a) incorporates a definition of "governmental, municipal, or public purpose" that (1) applies only to governmentally-owned property subject to a leasehold and (2) is more limited and restrictive than the definition of "governmental,

municipal, or public purpose" that applies when the governmental owner is using its own property, not leasing it to a private party. Section 196.199(1)(c), the statute applicable to situation in which no leasehold is present, does not incorporate this restrictive definition of "governmental, municipal, or public purpose" set forth in section 196.012(6).

In addition to the differences in the governing statutes, the other reasons why tax exemptions are more narrowly construed for leased property can be traced to this court's decision in Williams v. Jones, 326 So. 2d 425 (Fla. 1975). In that case, this court created the governmental-governmental/governmental-proprietary distinction used in later cases and relied upon by the district court in this case. Williams concerned the taxation of leaseholds, not real property, and the lessees were using the property (leased from the Santa Rosa Island Authority) for both residential and commercial nonpublic purposes.

The court, in creating the governmental-governmental/ governmental-proprietary test, indicated that there was no rational basis for exempting the leased government property used for nonpublic purposes but not exempting similar commercial establishments operating on privately-owned land. Id. at 433. In the most frequently-quoted part of its decision, the court stated:

> 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 on

> Santa Rosa Island be exempt? No rational basis exists for such a distinction. The exemptions contemplated under Sections 196.012(5) [now 196.012(6)] 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.

Id. at 433 (emphasis in original).

The language of the court reveals that there were two motivating reasons for the Williams decision. First, the court wanted to ensure that business lessees on government-owned property leased for nonpublic purposes were not granted an unfair, irrational economic advantage over their competitors who operated on privately-owned land. Second, the court wanted to ensure that all privately-used property bears a tax burden "in some manner," which would "either" be taxation "directly" through taxation of the real property or "indirectly" through the taxation of the tenants' leasehold interests.

These themes reappear, and play dispositive roles, throughout the line of cases applying the Williams analysis to the question of whether governmentally-owned land is taxable when leased to, and used by, a private tenant--up to and including this court's most recent decision in this area and the district court's opinion in this very case. See Canaveral Port Authority v. Department of Revenue, 690 So. 2d 1226, 1229 (Fla. 1996) ("[N]o

rational basis exists for exempting from ad valorem taxation a commercial establishment operated for profit on CPA [Canaveral Port Authority] property while a similar establishment located near, but not on, CPA property is not exempt."); Sebring Airport Authority v. McIntyre, 718 So. 2d 296, 300 (Fla. 2d DCA 1998) ("[A] racetrack with the same type of operation and physical facility as the Sebring International Raceway but located on property that is not leased from a governmental unit would not be entitled to an ad valorem tax exemption. Why then should this racetrack because of its location on government owned property have a tax advantage by being granted an exemption?").

However, when no leasehold is present and a governmental owner is using and operating its own property, even in a proprietary capacity, these concerns cease to have any application. In such cases, there is no danger of granting one private entity an unfair advantage over its competitors through a tax break, and there is, by definition, no "privately used property" that is failing to carry its "tax burden" (Williams, 326 So. 2d at 433).

It is for this reason, in part, that an altogether different, more liberal, test is applied under Florida law when determining the tax-exempt status of governmentally-owned property that the governmental owner is itself using and operating without the involvement of a nongovernmental lessee. When a governmental entity is using its own property, the property is presumptively exempt and its retains that tax exempt status as long as the use of the property is for a valid municipal purpose, the property is not

used for a purely or predominantly private purpose, and the use of the property is rationally related to the public purpose being served by the governmental owner. The tax exemption available in such instances is not lost by the mere fact that the use of the property may be "proprietary."

For example, in State ex rel. Harper v. McDavid, 145 Fla. 605, 200 So. 100 (1941), this court upheld the tax exempt status of municipally-owned property used "for the conduct of a low rent housing and slum clearance project." 200 So. at 101. In reaching that conclusion, the court deferred to the legislature's determination that such a use of the property would be for "municipal purposes," finding it essentially irrelevant that the property was being used for a purpose that would be deemed proprietary if engaged in by a private entity. Id. The court stated:

> This Court has repeatedly said that it is competent for the legislature to make classifications and exemptions of certain properties from taxation for particular public purposes. We have also conceded power in the legislature to define a municipal purpose as contemplated by the provisions of the Constitution alluded to.
>
> . . .
>
> It is contended that the business of the Housing Authority is in no sense municipal, that it is in direct competition with private enterprise and even though declared by the legislature to be strictly municipal and charitable, its properties should not be exempt from taxation and that any attempt to make them so should be held in violation of the Constitution.

> What constituted a municipal purpose is a legislative question that should not be interfered with by the courts in the absence of a clear abuse of discretion. A municipal purpose is much broader in its scope than it was a generation ago. Under our system of jurisprudence, constitutional validity may be determined by practical operation and effect. Measured by this test, we cannot say that the legislature exceeded its power in pronouncing the properties of the Housing Authority held for a municipal purpose free from all forms of taxation.

Id. at 101-02.

To the same effect is Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648 (1946), in which this court upheld the tax-exempt status of municipally-owned land upon which the governmental owner placed electric light poles and other property used to transmit electric power. The court freely acknowledged that the property was being used in a "proprietary" capacity, but the court nonetheless held that the property was "held and used . . . for a municipal purpose as contemplated by our Constitution." 25 So. 2d at 649. The court expressly noted that a "proprietary" use of governmentally-owned property was not inconsistent with a "municipal" use of that property.

> Many of our cases are cited to show that when a City exercises proprietary functions it incurs responsibilities for torts as any private agency, nevertheless the controlling fact remains that in the exercise of these functions a municipal purpose is exercised and the [tax] exemption attaches. [Citations omitted.]
>
> . . .
>
> Many of our opinions have been cited to sustain the principle that exemptions from taxes are frowned upon and each claim should

> be strictly construed. This rule does not apply where the question is raised by a municipality asserting the exemption by virtue of a statute duly passed pursuant to the Constitution. In the latter case exemption is the rule and taxation is the exemption [sic].
> . . .
>
> The effect of a contrary conclusion would render all property held and used by municipalities in their proprietary capacities subject to taxation and would result in disrupting the long established status of municipalities throughout the state.

Id. at 651-52; see also Northcutt v. Orlando Utilities Commission, 614 So. 2d 612, 618 (Fla. 5th DCA 1993) (holding that municipally-owned property used by the governmental owner for the production and supplying of electricity is used for a municipal purpose and therefore tax exempt), aff'd, 629 So. 2d 845, 846 (Fla. 1994) (approving "in its entirety the opinion of the district court"); Schultz v. Crystal River Three Participants, 686 So. 2d 1391, 1392 (Fla. 5th DCA 1997), review denied, 697 So. 2d 512 (Fla. 1997) (municipally-owned property used as power plant for generation and transmission of electricity is tax exempt because used for a "public or municipal purpose").

This broad tax exemption available when a governmental owner is using and operating its own property is not without some limitations, but those situations are rare. The case law reveals that a tax exemption is unavailable for such property only if the property is being used for a purely or predominantly private purpose that has no reasonable relationship to the public purpose being served by the governmental owner.

For example, in Orlando Utilities Commission v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1969), cert. denied, 237 So. 2d 539 (Fla. 1970), the court held that property owned by the Orlando Utilities Commission and used "as a recreation area for the exclusive use of its employees and their families" was taxable. Id. at 263 (emphasis in original). The court stated:

> In the instant case, the property being taxed is located many miles from the property upon which generating plants and other necessary power supply equipment are located. The subject property is not being used for the municipal purpose of supplying electricity to residents of Orlando; but rather, it is being used predominantly for recreation for the private benefit and use of the Utility's employees and their families.
>
> . . .
>
> The use is primarily one of a private nature vis-a-vis public and tax exemptions should not be based on the favoring of particular persons and corporations at the expense of taxpayers generally, or granted on any idea of individual property owners, but are based on the accomplishment of public purposes, and are granted on the theory that they will benefit the public generally. Such is not the case here.

Id. at 265.

Similarly, in City of Sarasota v. Mikos, 374 So. 2d 458 (Fla. 1979), this court upheld the tax-exempt status of vacant land owned by the City of Sarasota. The court, relying upon the self-executing provisions of article VII, section 3(a), held that the land could not be taxes because it was not being "used for a private purpose." Id. at 461; see also Page v. City of Fernandina Beach, 714 So. 2d 1070, 1078 (Fla. 1st DCA 1998) (vacant land owned

by municipality was tax exempt because it was not "actually in use for a private purpose on tax assessment day").

The above cases show, in short, that the standard that the courts apply in cases involving the tax-exempt status of governmentally-owned property that the governmental owner is itself using and operating is the traditional, common law, deferential standard for determining what constitutes a "governmental, municipal or public purposes." In implying, even in dicta, that a different, more restrictive standard applies to such situations, the district court plainly erred.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that this court reverse or modify the decision of the district court so as to make it clear:

1. That the legislature has, within reasonable limits, the power and authority to determine and define what uses of property shall constitute uses for a "municipal or public purpose" within the meaning of the state constitutional provisions concerning exemptions from ad valorem taxation for governmentally-owned property;

2. That the legislature is not constitutionally prohibited from determining that governmentally-owned property is used for a "municipal or public purpose" even if the property is being used for a "proprietary" purpose;

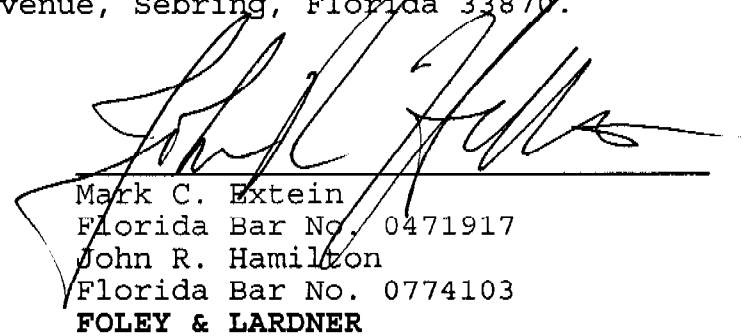
3. That "proprietary" uses of governmentally-owned property and "municipal" uses of such property are not mutually

exclusive, and that the use of municipally-owned property for a "proprietary purpose" does not necessarily compel the conclusion that the property is not being used for a "municipal or public purpose" within the meaning of the constitutional and statutory provisions concerning exemption from ad valorem taxation; and

4. That the determination of whether municipally-owned property is exempt from ad valorem taxation--when the governmental owner is itself using and operating the property and the property is not leased to a private tenant--is not governed by whether the property is being used for a proprietary, for-profit purpose.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by United States mail this 25th day of November, 1998, to: Paul R. Pizzo, Esq., Hala A. Sandridge, Atty. at Law, and Charles Tyler Cone, Esq., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Post Office Box 1438, Tampa, Florida 33601; Clifford M. Ables III, Esq., 457 South Commerce Avenue, Sebring, Florida 33870; Joseph C. Mellichamp III, Esq., State Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050; Larry E. Levy, Esq., Post Office Box 10583, Tallahassee, Florida 32302; and J. Wendall Whitehouse, Esq., 445 South Commerce Avenue, Sebring, Florida 33870.



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