SUPREME COURT
STATE OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE

Appellant,

v.

Case No. SC03-2273
DCA Case No. 1D02-1582

THE CITY OF GAINESVILLE,

Appellee

____/

ANSWER BRIEF OF APPELLEE, THE CITY OF GAINESVILLE

Robert Pass
Florida Bar Number 183169
E. Kelly Bittick, Jr.
Florida Bar Number 654035
CARLTON FIELDS, P.A.
215 South Monroe Street
Suite 500
Tallahassee, FL 33601
Telephone: (850) 224-1585
Facsimile: (850) 222-0398
E-Mail: rpass@carltonfields.com
kbittick@carltonfields.com

Attorneys for Appellee, The City of Gainesville

TABLE OF CONTENTS

TABLE OF CITATIONS iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 7

ARGUMENT 12

I. **The District Court Correctly Held the Act Unconstitutional Because It Seeks to Impose Ad Valorem Taxes on Municipal Property Used for Public or Municipal Purposes in Violation of Article VII, Section 3(a) of the Florida Constitution** 12

A. Municipal Property Used by a Municipality Itself to Provide Telecommunications Services to the Public Under a Certificate Granted under Chapter 364 is Exempt from Ad Valorem Taxation under Article VII, Section 3(a) 13

B. The Act Impermissibly Attempts to Repeal the Exemption Granted by Article VII, Section 3(a) of the Florida Constitution 16

C. The Act Cannot be Saved by Reference to Case Law Permitting Ad Valorem Taxation of Municipal Property Leased to or Otherwise Used or Operated by Private, For-Profit Entities 17

D. Neither Competition with Other Providers Nor the Generation of Revenues in Excess of Expenses Renders Property Used for Telecommunications Purposes Taxable under Article VII, Section 3(a)........27

E. The City's Position Property Harmonizes Article VII, Section 3(a) and Article VIII, Section 2(b)........33

II. The Act Cannot be Sustained as a Valid Exercise of Legislative Authority to Define What Constitutes a "Public Purpose" 37

CONCLUSION 44

CERTIFICATE OF SERVICE 45

CERTIFICATE OF COMPLIANCE 46

TABLE OF CITATIONS

CASES

In re Advisory Opinion to the Governor,
509 So. 2d 292 (Fla. 1987) 12

Alachua County v. State,
737 So. 2d 1065 (Fla. 1999) 16

Archer v. Marshall,
355 So. 2d 781 (Fla. 1978) 38

Basic Energy Corp. v. Hamilton County,
652 So. 2d 1237 (Fla. 1st DCA 1995) 14

Campbell v. Johnson,
182 So. 2d 244 (Fla. 1966) 40

Canaveral Port Authority v. Dep't of Revenue,
690 So. 2d 1226 (Fla. 1996) 41

Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Commission,
838 So. 2d 492 (Fla. 2003) 36

City of Bartow v. Roden,
286 So. 2d 228 (Fla. 2d DCA 1973) 19, 27

City of Miami v. McGrath,
824 So. 2d 143 (Fla. 2002) 13

City of Sarasota v. Mikos,
374 So 2d 458 (Fla. 1979) 12, 16, 19-20, 42

City of Winter Park v. Montesi,
448 So. 2d 1242 (Fla. 5th DCA 1984) 14

Cobo v. O'Bryant,
116 So. 2d 233 (Fla. 1959) 40

Commercial Carrier Corp. v. Indian River County,
371 So. 2d 1010 (Fla. 1979) 32

Department of Revenue v. City of Gainesville,
859 So. 2d 595 (Fla. 1st DCA 2003) 5, 6, 21

Department of Revenue v. Fla. Boaters Ass'n,
409 So. 2d 17 (Fla. 1981) 38, 39

Department of Revenue v. Florida Home Builders Association,
564 So. 2d 173 (Fla. 1st DCA 1990) 12

Edris v. Sebring Utilities Comm'n,
237 So. 2d 585 (Fla. 2d DCA 1970) 24

Ford v. Orlando Utilities Comm'n,
629 So. 2d 845 (Fla. 1994) 15, 23, 24, 25, 29

Goldstein v. Acme Concrete Corp.,
103 So. 2d 202 (Fla. 1958) 36

Greater Orlando Aviation Authority v. Crotty,
775 So. 2d 978 (Fla. 5th DCA 2000) 25, 27

Jetton v. Jacksonville Electric Authority,
399 So. 2d 396 (Fla. 1st DCA 1981) 32

Markham v. Maccabee Invs, Inc.,
343 So. 2d 16 (Fla. 1977) 21

Lewis v. Florida Bar,
372 So. 2d 1121 (Fla. 1979) 7, 38

Oliver v. State,
619 So. 2d 384 (Fla. 1st DCA 1993) 12

Orlando Utilities Comm'n v. Milligan,
229 So. 2d 262 (Fla. 4th DCA 1970) 15, 27

Page v. City of Fernandina Beach,
714 So. 2d 1070 (Fla. 1st DCA 1998) 6, 13, 14, 18, 19, 23, 25, 33-34, 42

Saunders v. City of Jacksonville,
25 So. 2d 648 (Fla. 1946) 26, 27, 32

Schultz v. Crystal River Three Participants,
686 So. 2d 1391 (Fla. 5th DCA 1997) 15

Sebring Airport Authority v. McIntyre,
783 So.2d 238 (Fla. 2001) 20, 22, 23, 24, 34

Sebring Airport Authority v. McIntyre,
642 So. 2d 1072 (Fla. 1994) 18, 22, 24, 25

Sebring Airport Authority v. McIntyre,
718 So. 2d 296 (Fla. 2d DCA 1998),
aff'd, 783 So. 2d 238 (Fla. 2001) 21, 39

Smith v. Welton,
710 So. 2d 135 (Fla. 1st DCA 1998),
aff'd on other grounds, 729 So. 2d 371 (Fla. 1999) 12

State ex rel. Burbridge v. St. John,
197 So. 131 (Fla. 1940) 26

State ex rel. Nuveen v. Greer,
102 So. 739 (Fla. 1924) 12

State v. City of Jacksonville,
50 So. 2d 532 (Fla. 1951) 14

State v. City of Port Orange,
650 So. 2d 1 (Fla. 1994) 43

Sun 'n Lake of Sebring Improvement District v. McIntyre,
800 So. 2d 715 (Fla. 2d DCA 2001) 27

Turner v. Concorde Properties,
823 So. 2d 165 (Fla. 2d DCA 2002) 27

Volusia County v. Daytona Beach Racing and Recreational Facilities District,
341 So. 2d 498 (Fla. 1976) 21, 22, 24, 25

Williams v. City of Jacksonville,
160 So. 15 (Fla. 1935) 40

Williams v. Jones,
326 So. 2d 425 (Fla. 1975) 22, 23, 24, 25

FLORIDA CONSTITUTION

Article VII, § 3(a), Fla. Const. .... passim

Article VII § 10, Fla. Const 35

Article VIII, § 2(b), Fla. Const .... passim

STATUTES

Chapter 97-197, Laws of Florida (1997) 2, 3

Chapter 364, Florida Statutes .... passim

Fla. Stat. § 166.047 .... 3, 4

Fla. Stat. § 166.047(1) 32

Fla. Stat. § 166.047(2) 32

Fla. Stat. § 196.012(6) 3, 23

Fla. Stat. § 196.199 3

Fla. Stat. § 196.199(2)(a) 23

Fla. Stat. § 212.08(6) 32

Fla. Stat. § 364.01 .... 2, 8, 15

Fla. Stat. § 364.01(3) 16

Fla. Stat. § 364.02(1) 2, 8

Fla. Stat. § 364.02(12) 15

Fla. Stat. § 364.32 16

Fla. Stat. § 364.337(6)(a) 2

PRELIMINARY STATEMENT

In this brief, the appellee, City of Gainesville, Florida, will be referred to as the "City." Appellant Florida Department of Revenue will be referred to as the "Department" and references to its initial brief will be designated "DOR br. at __." Amicus curiae Florida Telecommunications Industry Association will be referred to as the "FTIA." Amicus curiae Ed Crapo, the Alachua County Property Appraiser, will be referred to as "Crapo." Amicus curiae Property Appraisers' Association of Florida will be referred to as "PAAF." References to the briefs of these amici will be designated "FTIA br.," "Crapo br." and PAAF br." respectively. The record in this case consists of four volumes. References to the record will be designated by the letter "R" followed by the appropriate volume and page number (e.g., "R.2 at 73-34" for Volume 2, pages 73-74). All emphasis in quoted material is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Department has appealed from a decision of the First District Court of Appeal affirming a final judgment of the Circuit Court for Leon County declaring sections 166.047 and 196.012(6), Florida Statutes, unconstitutional as violating Article VII, Section 3(a) of the Florida constitution. That constitutional provision declares that "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." The invalidated sections (hereafter, the "Act ") were adopted as part of Chapter 97-197, Laws of Florida. They became law without the Governor's signature.

The Act applies to municipalities providing telecommunications service to the public under certificates issued by the Florida Public Service Commission under Chapter 364, Florida Statutes. The City holds two such certificates, issued prior to the passage of the Act. [R.2 at 73-74, 76, 78]. The City provides telecommunications services to the public under those certificates. [R.2 at 71, 73-79].[1]

---

[1] Telecommunications services essentially involve the transmission of information (sound, visual images or other types of data) between one point and another. Such services could include, for example, "local exchange telecommunications service," providing basic voice dial-up service for individual residential customers. Telecommunications services also include providing "private line" service connecting one specific location with another (for example, transmitting patient information in data, as opposed to voice form, from a hospital to a physician in another location), or providing a local customer with access to the network of a long distance carrier. *See generally* Fla. Stat. §§ 364.01, 364.02 (1), 364.337(6)(a).

As codified at Florida Statutes Section 166.047, the Act provides relevant part:

> A telecommunications company that is a municipality or other entity of local government may obtain or hold a certificate required by chapter 364, and the obtaining or holding of said certificate serves a municipal or public purpose under the provision of s. 2(b), Art. VIII of the State Constitution, only if the municipality or other entity of local government:
>
> (1) Separately accounts for the revenues, expenses, property, and source of investment dollars associated with the provision of such services;
>
> (2) Is subject, without exemption, to all local requirements applicable to telecommunications companies; and
>
> (3) *Notwithstanding any other provision of law, pays, on its telecommunications facilities* used to provide two-way telecommunications services to the public for hire and for which a certificate is required pursuant to chapter 364, ad valorem taxes, or fees in amounts equal thereto, to any taxing jurisdiction in which the municipality or other entity of local government operates. Any entity of local government may pay and impose such ad valorem taxes or fees. [2]

Thus, the Act directs a municipality such as the City to "pay on its telecommunications facilities . . . *ad valorem taxes* . . . to any taxing jurisdiction in which the municipality . . . operates." The Act makes no exceptions. The Act also purports to declare that municipalities providing telecommunications services are serving a "municipal or public purpose" only if they pay ad valorem taxes on the

[2] *See also* Fla. Stat. § 196.012(6) (also codifying Ch. 97-197; provision of two way telecommunications services to the public for hire does not constitute an "exempt use" for purposes of the government property exemption set forth in Florida Statutes Section 196.199)

city property used to provide the service. § 166.047, Fla. Stat. In addition to the plain language of the Act the legislative history makes clear that its very purpose was to "remove the exemption municipalities . . . have for ad valorem taxes on real property used for the purpose of providing telecommunications services to the public . . . ." *See House of Representatives Final Research & Economic Impact Statement* for CS/HB 313 (as revised by the Committee on Utilities and Communication), at 1. [R.3 at 260].

The legislative history further notes that the proponents of the Act contended that eliminating local governments' "tax advantages" would create a "'level playing field'" with "private enterprise" telecommunications providers. [*Id*. at 270, ¶ III(C)(3)]. In other words, the intention and effect of the Act therefore was to eliminate the tax exemption conferred on cities by the Constitution and thereby to render municipal telecommunications services more expensive to provide and thus more costly to the consumer.

As a municipality providing telecommunications services to the public and having invested millions of dollars in municipality-owned property to provide such services (and planning to continue to invest in such property), appellee, the City, brought a declaratory judgment action against the Department seeking a determination of whether the Act violates Article VII, Section 3(a). [R.1 at 1-35]. The City alleged, *inter alia*, that it had an obligation not to expend public funds to

pay taxes if those taxes were prohibited by the Constitution, and that it had an immediate, practical need for a determination of constitutionality -- so that the City could make appropriate budget decisions concerning the payment or non-payment of such taxes, among other things. [R.1 at 7-8]. The City alleged that it believed that the Act was unconstitutional, that the Department contended otherwise, and that the City was entitled to a declaratory judgment resolving the Act's constitutionality. [*Id.*].

The City presented the constitutional issue to the Circuit Court by motion for final summary judgment. [R.1 at 65-68; R.3 at 292-313]. The court conducted two hearings on the issue. By its final judgment of April 18, 2002 [R.3 at 411-16], the court held the Act unconstitutional under Article VII, Section 3(a).

On *de novo* review, the First District Court of Appeal also concluded that the Act violated this constitutional prohibition and affirmed, with one dissent. *Department of Revenue v. City of Gainesville,* 859 So.2d 595 (Fla. 1st DCA 2003). The court concluded that the Act does precisely what the Constitution forbids: impose *ad valorem* taxes on municipally owned property used by the municipality to serve a municipal or public purpose. The court found that the provision of telecommunications services constitutes a valid municipal purpose under "any reasonable interpretation" of that term, *id.* at 600, and that such services are utility-type services of the sort long held tax exempt. *Id.* at 598.

The court also rejected the Department's contention that property owned and used by a municipality is not exempt from taxation because telecommunications is a "proprietary" municipal function. Thus, the court observed that all the authorities on which the Department relied for this contention involved municipal property *leased to and used by a private business* for private, profit-making ends. The court found that no case holds that when property is owned *and used* by a municipality itself, the constitutional exemption is limited to property used for purely "governmental functions." *Id*. at 598-99.

Indeed, the court noted that its own decision in *Page v. City of Fernandina Beach,* 714 So. 2d 1070 (Fla. 1st DCA 1998) (hereafter "*Page*") held that the "governmental" versus "proprietary" function analysis is not implicated in such a situation. The policy considerations precluding tax exemption for property leased by a municipality to a private, for profit enterprise – i.e., preventing the private enterprise from gaining an advantage over competitors simply because its landlord is a municipality – do not apply where the property is not leased, but used by the City itself. *Id*. at 599. The fact that a municipality might compete with private enterprise does not render a service that promotes the comfort, convenience, safety and happiness of the citizens of a municipality any less a municipal purpose. *Id*. at 601.

Finally, the court held that the fact that the legislature attempted to achieve its objective by purporting to condition the holding of a certificate under Chapter 364 on payment of ad valorem taxes on telecommunications property did not avoid the constitutional infirmity, since the "Legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." Id. (quoting *Lewis v. Florida Bar,* 372 So.2d 1121, 1122 (Fla. 1979)).

SUMMARY OF ARGUMENT[3]

The Circuit Court and District Court of Appeal correctly held the Act unconstitutional under Article VII, Section 3(a) of the Florida Constitution. That section directs that "*All* property *owned* by a municipality and *used* exclusively by it for *municipal or public* purposes *shall be exempt* from taxation." The Act attempts to do precisely what the constitutional provision forbids by requiring municipalities to pay *ad valorem* taxes on property *owned* and *used by the municipality* to provide telecommunication services *to the public.* There is no ambiguity or doubt that this is what the Act seeks to do. It requires that a municipality holding a Chapter 364 certificate to provide telecommunications services "*to the public*" must "pay[ ] on *its* [i.e., property owned by the

[3] The City recognizes that this summary of argument, although less than the permitted five pages, is somewhat longer than the norm. The Department and its amici, however, have filed more than 80 pages of briefs, raising numerous issues. These are addressed at length in the body of the City's brief, but because of the very length of the brief and the number of issues addressed below, the City believes it is important to a proper understanding of the case that the City's chief points be stated at the outset at somewhat greater length than is customary.

municipality] telecommunications facilities . . . *ad valorem taxes* . . . to any taxing jurisdiction in which *the municipality* . . . *operates* [i.e., uses its property to provide service].”

The Act’s legislative history also confirms that the Act’s desired goal was to “*remove the exemption* of municipalities . . . . for ad valorem taxes on real property used for the purpose of providing telecommunications services to the public.” The constitutional exemption is self executing, however, and acts as a restraint on legislative powers. This Court has therefore made clear that the legislature may not repeal the exemptions granted municipalities by the constitution.

Where, as here, property is owned and used *by the municipality* itself (i.e., not leased to a private user), the Article VII requirement of a “municipal or public purpose” is satisfied where the activity serves the “comfort, convenience, safety and happiness of citizens.” A municipality’s provision of telecommunications services to the public under a Chapter 364 certificate easily satisfies this broad standard. Indeed, the legislature itself recognized in Chapter 364 that the provision of telecommunications services is an appropriate area of municipal activity.

The Department’s argument that telecommunications is a “governmental-proprietary,” not a “governmental-governmental,” activity and is therefore not within the constitutional exemption is unsupported by, and contrary to, case law and constitutional policy. It asks (without saying so directly) that this Court

effectively reverse decades of case law that treats whether municipally-owned property is serving a "proprietary" function as relevant for ad valorem tax purposes only when the property has been leased to a private (non-municipal) enterprise. The case law relied upon by the Department involves municipal property leased to, or otherwise used by, private persons or entities. The Constitution does not permit taxation of property owned and used by the municipality itself, simply because the function carried out on the property could be labeled "proprietary."

The case law distinguishes between municipal property being used by the municipality and municipal property being used by a private lessee because the constitution distinguishes them. Property leased to a private business and therefore used by that party to conduct its own profit making enterprise is obviously not, in the words of Article VII, Section 3(a), property "owned by a municipality and *used exclusively by it* for municipal or public purposes." Accordingly, the constitutional policy reflected in this Court's decisions denying tax exempt status to municipal property leased to private businesses is that all *privately used* property be subject to taxation. Thus, the decision below correctly recognized that the "governmental/proprietary" distinction is not relevant where, as here, the municipality itself uses the property to provide a service.

The Act itself attempts to evade the constitutional prohibition by two constitutionally impermissible means. First, it invokes legislative authority over

municipal powers under Article VIII, purporting to declare that municipalities providing telecommunications services are serving a "municipal or public purpose" under Article VIII "only" if they pay ad valorem taxes on the property used to provide those services.

The constitution is not so easily circumvented. This Court long ago recognized that the legislature cannot condition the exercise of a municipal power under Article VIII on the requirement that the municipality violate another constitutional provision. This principle is reflected in the First District's conclusion that "It is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." The Act violates this prohibition by requiring the violation of Article VII under the guise of limiting municipal powers under Article VIII.

Second, to the extent that the Act attempts to evade the constitutional exemption by legislatively "defining" or "declaring" what is a "municipal or public purpose" for Article VII purposes, it is equally invalid. The legislature may not limit or reduce the scope of a constitutional provision by the simple act of "declaring" or "defining" the meaning of the constitutional terms. This would obviously amount to granting the legislature power to repeal or amend the constitution, which it cannot do. Legislative definitions or declarations of the

meaning of constitutional terms must be fully consistent with and implement the constitutional text, not alter it or collide with it.

Here, the Act's attempted declaration that municipalities providing telecommunications services are serving a "municipal or public purpose" under Article VIII "only" if they pay ad valorem taxes on the property used to provide those services violates that principle. Indeed, the declaration is a constitutional oxymoron: the Act declares cities to be serving a "municipal or public purpose" by *paying* taxes when the *presence* of such a purpose is an element of the constitutional tax *exemption*.

The Act cannot be sustained by referring to reasons the legislature may have believed it desirable to impose ad valorem taxes on municipal property used to provide telecommunications services. The City does not agree that the Act represents sound policy at all. It will make utility services more expensive to provide. Moreover, because private telecommunications providers enjoy advantages over municipal providers in many respects, imposition of ad valorem taxes does not truly "level the playing field" in the telecommunications arena. At issue here, however, is not the wisdom of the Act, but whether it passes constitutional muster. As shown below, it does not.

ARGUMENT

I. The District Court Correctly Held the Act Unconstitutional Because It Seeks to Impose Ad Valorem Taxes on Municipal Property Used for Public or Municipal Purposes in Violation of Article VII, Section 3(a) of the Florida Constitution

It is fundamental that the Constitution represents the organic law of the State, superior in its force and effect to statutory law enacted by the legislature. *State ex rel. Nuveen v. Greer*, 102 So. 739, 743 (Fla. 1924). If a legislative enactment conflicts with an express or implied provision of the Constitution, such an enactment does not even become law; it is invalid from the date of its enactment. *Id.*; *Oliver v. State*, 619 So. 2d 384, 386 (Fla. 1st DCA 1993).

It follows that the legislature may not impose a tax that is prohibited by the Constitution, and any attempt to do so is invalid. *See, e.g., In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987); *Smith v. Welton*, 710 So. 2d 135 (Fla. 1st DCA 1998), *aff'd on other grounds*, 729 So. 2d 371 (Fla. 1999); *Department of Revenue v. Florida Home Builders Association*, 564 So. 2d 173 (Fla. 1st DCA 1990). More specifically, the legislature is without the power to repeal by statute a tax exemption granted by the Constitution. *City of Sarasota v. Mikos*, 374 So. 2d 458, 460 (Fla. 1979).

As the First District recognized, however, that is precisely what the Act attempts to do. The constitutionality of the Act presents a question of law subject

to *de novo* review by this Court. *City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002). For all the reasons discussed below, the court below correctly held the Act to be unconstitutional, and this Court should affirm that ruling.

A. Municipal Property Used by a Municipality Itself to Provide Telecommunications Services to the Public Under a Certificate Granted under Chapter 364 is Exempt from Ad Valorem Taxation under Article VII, Section 3(a)

Article VII, Section 3(a) of the Constitution prohibits the legislature from passing any law that imposes ad valorem taxes on municipal property that is used for a municipal or public purpose. The constitutional provision simply declares that:

> All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation.

Contrary to the arguments of the Department, the First District's decision in *Page* provides the correct analysis and makes clear that where property is not only owned by but also used by a municipality itself, rather than leased to and used by private, profit-making entities, this provision of the Constitution grants a "*broad*" exemption from ad valorem taxes. *Id*. at 1073. The exemption is emphatically *not* limited to property used by a city for purely "governmental" purposes, but includes all property used for a proper or legitimate municipal or public purpose. *Id*. at 1076-77.

Such municipal or public purposes broadly include anything that relates to the health, safety, protection or welfare of the citizens of the municipality. *Basic Energy Corp. v. Hamilton County*, 652 So. 2d 1237, 239 (Fla. 1st DCA 1995*); City of Winter Park v. Montesi*, 448 So. 2d 1242, 1244 (Fla. 5th DCA 1984) (noting broad interpretation of "municipal purpose" under current case law, and noting cases holding that valid municipal purposes include operation of a radio station, parking garage, golf course, operation of a marina the like); *State v. City of Jacksonville*, 50 So. 2d 532 (Fla. 1951) (municipal purposes are not restricted to police protection or other strictly governmental enterprises). Thus, such municipal or public purposes include not only purely governmental functions, but also embrace the exercise of the municipality's "proprietary" powers to provide services, even where those same services could be provided by private enterprise, or where the municipality is in competition with private enterprise. *City of Winter Park, supra.*

Thus, in *Page*, the First District recognized that the operation of a marina by the municipality that owned it, even though such activity "partakes of no aspect of sovereignty," nevertheless constitutes a municipal or public purpose, because it "is a legitimate municipal corporate undertaking for the comfort, convenience, safety, and happiness of the municipality's citizens." *Id*. at 1076-77. As such, property used in this way enjoys a "broad" exemption from ad valorem taxes. *Id*. at 1073.

There is nothing in the nature of telecommunications activity making it improper or invalid as a subject of municipal activity, nor rendering property used to provide such services subject to ad valorem taxation. To the contrary, in today's highly technological society, communications, along with such staples as electricity and water, constitutes an essential basic service. *See Ford v. Orlando Utilities Comm'n*, 629 So. 2d 845 (Fla. 1994) (property used in furnishing electricity is used for a valid municipal purpose); *Schultz v. Crystal River Three Participants,* 686 So. 2d 1391 (Fla. 5th DCA 1997) (same; interest of municipalities in private power plant was tax exempt); *Orlando Utilities Comm'n v. Milligan*, 229 So. 2d 262 (Fla. 4th DCA 1969) (furnishing of electricity, power, and water was a municipal purpose under Florida's 1885 Constitution).

Moreover, in Chapter 364 itself, the legislature recognized that fact. That Chapter, enacted in 1993, grants the Florida Public Service Commission (PSC) authority to grant certificates authorizing "telecommunications compan[ies]" to provide telecommunications services to the public. Recognizing that such services are appropriate exercises of municipal power, Chapter 364 expressly included municipalities among the entities to whom the PSC could grant such certificates. Thus, Section 364.02(12) defines "telecommunications company" to include "every corporation . . . and every political subdivision in the state." *See also* Fla.

Stat. § 364.32 (defining "person" for purposes of subsequent sections to include municipalities).

Finally, the text of the Act itself (quoted above) does not in any way suggest that anything in the nature of telecommunication services removes such services from the category of valid municipal or public purposes as those terms are commonly understood. To the contrary, the statute expressly provides that the provision of such services constitutes a valid municipal or public purpose. It simply attempts to condition that provision on the payment of ad valorem taxes on property used to provide such services.

B. The Act Impermissibly Attempts to Repeal the Exemption Granted by Article VII, Section 3(a) of the Florida Constitution

As shown above, the legislature has no power to repeal or abrogate the constitutional exemption for municipal property. *Mikos*, 374 So. 2d at 460. The purpose and effect of the Act, however, is to do just that. Thus, the Act purports to authorize and/or impose ad valorem taxes "or fees in amounts equal thereto,"[4] on all of the City's telecommunications property used by the City to serve the public pursuant to its Chapter 364 certificates.

[4] The legislature cannot circumvent the constitutional prohibition on taxation by authorizing the collection of "fees in amounts equal" to the prohibited taxes. Nomenclature does not control over substance. A "fee" partaking of all the aspects of a tax is still a tax for constitutional purposes. *Alachua County v. State*, 737 So. 2d 1065 (Fla. 1999). Here, the Act makes that analysis glaringly simple by textually equating the taxes and the "fees."

Under the Act, if such taxes are paid, the provision of telecommunications services is deemed to constitute a valid "municipal or public purpose."

In other words, then, the basic, underlying premise of the Act is the legislature's recognition that telecommunications property *does* in fact serve a public or municipal purpose under the Constitution and would therefore be exempt from ad valorem taxation. The legislative history confirms that the intent behind the Act was to "remove" this exemption. *See House of Representatives Final Research & Economic Impact Statement* for CS/HB 313 (as revised by the Committee on Utilities and Communication), at 1 [R.3 at 260]. As such, the Act is unconstitutional.

C. The Act Cannot be Saved by Reference to Case Law Permitting Ad Valorem Taxation of Municipal Property Leased to or Otherwise Used or Operated by Private, For-Profit Entities.

Despite the clear conflict between the Act and Article VII, Section 3(a), the Department makes a number of arguments in an attempt to show that the trial court and the District Court nevertheless erred in finding the law unconstitutional. None of these arguments has merit.

First, the Department urges that the provision of telecommunications by a municipality is not a so-called "governmental-governmental" activity, but is instead "governmental-proprietary" in nature, and therefore not subject to the exemption provided from ad valorem taxation provided by Article VII, Section

3(a). Governmental functions are activities of the municipality as sovereign and therefore "concern the administration of some phase of government." Proprietary functions, in contrast, while they "partake of no aspect of sovereignty," nevertheless constitute legitimate and proper municipal undertakings to "promote the comfort, convenience, safety and happiness of citizens." *Page*, 714 So. 2d at 1074 (quoting *Sebring Airport Authority v. McIntyre*, 642 So. 2d 1072, 1074 n.1 (Fla. 1994) (*Sebring II*)).

A non-exempt "governmental-proprietary" function occurs "*when a non-governmental lessee* utilizes governmental property for proprietary and for-profit aims." *Sebring II,* 642 So.2d at 1034. In contrast, property used by a municipality itself, whether in its "governmental" or "proprietary" capacity, for legitimate municipal or public purposes is exempt from ad valorem taxes; municipal property only loses its exempt status when it is leased to or otherwise used by private parties for their own ends. *Page* makes this point (at 1073-74). *Page* expressly distinguished between property used by a municipality itself and property leased to private persons, and held that the governmental-proprietary test applies *only* to the latter. As the *Page* court held, while property leased to private enterprise would only be exempt if used for a so-called "governmental-governmental" purpose, in contrast, "where municipal property is used by the municipality that owns it . . . *the constitution has established a broad exemption*." *Id.* at 1073.

Accordingly, addressing the status of a marina owned and operated by a municipality, the *Page* court held that the operation of a marina by a municipality was not a "governmental" function because such activities "partake of no aspect of sovereignty." Nevertheless, municipal property *used by the municipality* for this activity would be exempt from taxation:

> Municipal operation of a marina is a legitimate municipal corporate undertaking for the comfort, convenience, safety, and happiness of the municipality's citizens. . . When a city operates a marina it owns, marina property it has not leased to a nongovernmental entity is exempt from ad valorem taxation. . . . But operating a marina partakes of no aspect of sovereignty and does not warrant an exemption for a marina leased to a nongovernmental operator seeking profits.

Id. at 1076-77. Because the property reached by the challenged Act is used by municipalities themselves to provide services to the public, rather than leased to a private corporation seeking to do so for profit, the broad constitutional exemption broadly applies, and the "governmental-proprietary" test is inapplicable.

The reasoning of *Page*, followed by the court below, faithfully implements the distinctions drawn by this Court in its prior decisions. Thus, in drawing the distinction between "public" and "private" purposes, this Court in *Mikos* had distinguished cases, including *City of Bartow v. Roden*, 286 So. 2d 228 (Fla. 2d DCA 1973), relied on by the Department here, where such a "private" use was found to exist, *precisely because they involved municipal property leased to private entities*:

> We recognize that property owned by a municipality is not exempt from taxation if it is used for a private purpose. *See Panama City v. Pledger*, 140 Fla. 629, 192 So. 470 (1939) (land *leased* to a private corporation is not in use for a public purpose); *City of Bartow v. Roden*, 286 So. 2d 228 (Fla. 2d DCA 1973) (land *leased* to a private enterprise for nonaeronautical activities is not in use for public purpose); *Illinois Grain Corp v. Schleman*, 144 So. 2d 329 (Fla. 2d DCA 1962) (land *leased* to a private corporation is not in use for a public purpose). None of these cases even imply that unimproved vacant land owned by a municipality falls within the category of land held for a private purpose.

Mikos, 374 So. 2d at 461.

Ignoring the key distinction between leased and non-leased property, the Department relies instead upon *Sebring Airport Authority v. McIntyre,* 783 So. 2d 238 (Fla. 2001) (*Sebring IV*), but that case does not support the Department's argument**.**

In the first place, the *Sebring* case addressed the tax status of municipal property *leased* to a private corporation, and held that such leased property is not tax exempt where used by the private corporation for proprietary, for-profit purposes. The Court's opinion could not have been clearer on this point. The Court expressly stated that its discussion was limited to such leased property, *see* 783 So. 2d at 245 ("Here, we are required to interpret the application of article VII, section 3(a), to private, for profit uses of leased, governmental property . . ."), and the opinion uses the terms "lease" or some variant of "leasehold" more than 40 times.

The PAAF cites language in the Second District's opinion in the same case (*Sebring III*) suggesting that even when a municipal government uses its own property in carrying out a proprietary function, it too must carry its tax burden. (PAAF br. at 16-17 (quoting and citing *Sebring* III at 300)). Although this broad language might at first blush appear to lend some support to the appellant's position, on closer inspection that support disappears. Not only did the *Sebring* case itself involve leased property, but immediately after making the seemingly broad statement quoted by the PAAF, the Second District cited in support this Court's decision in *Markham v. Maccabee Invs, Inc.,* 343 So.2d 16 (Fla. 1977), and in doing so specifically noted that that case involved property leased to a for-profit entity (a theater). *Sebring III*, 718 So. 2d at 300.

The same is true of the other case cited by the Second District (and also cited by *Markham*), *Volusia County v. Daytona Beach Racing and Recreational Facilities District,* 341 So.2d 498 (Fla. 1976) (holding leased property used by racetrack was not exempt, because "'all property used by private persons and commercial enterprises is subjected to taxation . . . '") (quoting *Williams v. Jones*, 326 So.2d at 433).

Thus, although broadly phrased, the language in the Second District's opinion should be read as applying only to leased property, since the specific "proprietary" activity at issue involved property leased to a private, for-profit

enterprise. To the extent that the language could be interpreted as going beyond that factual situation, it is merely dictum. It is worth noting that in reviewing the Second District's decision, this Court not only carefully made clear that the case before it dealt with a lease situation, it approved the Second District's opinion in *Sebring III* "only to the extent" that it was consistent with this Court's analysis in *Sebring IV.*

The same is true of the series of earlier decisions upon which this Court relied in *Sebring IV* for its conclusion. In *each and every case*, the Court was expressly addressing property *leased* to and used by private businesses. *See Williams v. Jones*, 326 So. 2d 425 (Fla. 1975) (addressing taxability of leasehold interests on Santa Rosa Island, and holding "all property *used by private persons and commercial enterprises* is subject to taxation"); *Volusia County,* 341 So. 2d at 501-02 (addressing taxability of municipal property *leased* to private corporation for the operation of a raceway); *Sebring II,* 642 So. 2d at 1074 ("A governmental-proprietary function occurs *when a nongovernmental lessee utilizes governmental property* for-proprietary and for-profit aims").

These cases all hold that where municipal property is leased to private businesses which use the property to make a profit, the use of the property is "governmental-proprietary," rather than "governmental-governmental," and the property is subject to tax. This rule follows from the constitutional requirement

that "all *privately used* property bears a tax burden in some manner . . ." *Sebring IV*, 783 So. 2d at 243 (quoting *Williams*, 326 So. 2d at 433). As *Page* makes clear, where, as here, municipal property is not *privately* used, but is used *by the municipality*, the rule does not apply.[5]

The limited nature of the holding in *Sebring IV* and the fundamental flaw in the Department's argument are both further confirmed by this Court's earlier decision in *Ford v. Orlando Utilities Comm'n*, 629 So. 2d 845 (Fla. 1994). In *Ford*, this Court held that property owned by the Orlando Utilities Commission (part of the government of the City of Orlando) located in Brevard County and used for the generation of electricity was constitutionally exempt from ad valorem taxes. The Court held that the generation of electricity constituted a "valid municipal purpose" and that the constitutional exemption therefore applied. Clearly, the generation of electricity, which can be and often is performed by

---

[5]The dissent below argues that the historical background of the 1968 constitutional revisions supports the Department's position, but even the dissent's own discussion demonstrates that the framers were concerned with the tax treatment of property leased to private persons. This concern was addressed by adding language making clear that exempt property must not only be owned by the municipality but *used exclusively by it* for municipal or public purposes. It was similarly reflected in the statutory definition of "governmental, municipal or public purpose or function" incorporated into Florida Statutes Section 196.012(6) in 1971. (DOR br. at 24-26). This provision, adopted just a few years after the constitutional revisions, does define those terms as relating to purely "governmental" functions. Significantly, however, that definition expressly applies only to property that is *leased to private entities.* Fla. Stat. §§ 196.012(6), 196.199(2)(a). Thus, this provision is consistent with the City's contention that the 1968 revisions to the constitutional exemption, as well as the subsequent statutory changes, were intended to ensure that property leased to private entities remained subject to ad valorem taxation.

private companies for a profit, does not relate to any aspect of the administration of government, but is instead a "proprietary" activity that promotes the convenience or happiness of the citizens. *See, e.g., Edris v. Sebring Utilities Comm'n*, 237 So. 2d 585 (Fla. 2d DCA 1970) (municipality operating a utility is operating in its proprietary capacity, not its governmental capacity).

Significantly, *Ford* was decided in 1994, when the seminal decisions on the governmental/proprietary distinction, *Williams* and *Volusia County,* had been on the books for almost 20 years, and the same year as the Court's decision in *Sebring II.* Yet, in reaching its conclusion that the property in question was constitutionally exempt from taxation, the *Ford* Court did not even mention the governmental/proprietary distinction urged by the Department here. If the governmental/proprietary distinction applied to property used *by the municipality itself*, as opposed to leased for use by private businesses, the Court simply could not have reached the conclusion it did.

Thus, the Department's position is unsupported by this Court's decision in *Sebring IV*. It is unsupported by the Court's earlier cases, all of which, like *Sebring IV*, involved leaseholds. It is unsupported by the constitutional policy underlying those decisions, which is that all "privately used" property be taxed. And it flies in the face of this Court's decision in *Ford*.

The Department also attempts to draw support from the Fifth District's decision in *Greater Orlando Aviation Authority v. Crotty*, 775 So. 2d 978 (Fla. 5th DCA 2000), but that case cannot save the Act either. *Crotty* did not address the statute at issue here, nor did it involve municipal property used by a municipality itself to provide telecommunications services. Instead, *Crotty* involved airport authority property used for an airport hotel. The hotel was actually operated, not by the authority, but by Hyatt, a private business (it was called the "Hyatt Regency Orlando International Airport").[6] To the extent that language in *Crotty* could be read as holding generally that property used by a municipality for "proprietary" purposes such as telecommunications (or electricity) is not exempt from ad valorem taxation, it is inconsistent with Florida law, including *Ford* and the First District's decision in *Page*.[7]

Moreover, the Fifth District's actual holding in *Crotty* was simply that the airport hotel in that case was subject to ad valorem taxation because it did not serve the citizens of Orlando at all, but by its very nature as an airport hotel served only

---

[6] In fact, although the court did not reach the issue, the property appraiser in *Crotty* contended that the management agreement between the authority and Hyatt amounted to a lease, and therefore could only be tax exempt if used for a "governmental-governmental" purpose. 775 So. 2d at 981 n.2 (citing *Page*).

[7] In fact, *Crotty* probably does not sweep so broadly, because the *Crotty* Court quoted with approval from the First District's holding in *Page* that, where municipal property is operated by the municipality itself, and is not leased to a private entity, such property is tax exempt where used to promote the comfort, convenience, safety and happiness of the citizens of a municipality, even though such uses "partake[] of no aspect of sovereignty." 775 So. 2d at 981.

persons who resided *elsewhere* and therefore required public accommodations. This holding is not only inapplicable here, it is inconsistent with the decision of this Court in *Saunders v. City of Jacksonville*, 25 So. 2d 648 (Fla. 1946). *Saunders* expressly *rejected* the notion that the Constitution draws distinctions between serving persons residing inside a municipality and those residing outside a municipality for purposes of determining whether an activity serves a municipal purpose. *Id*. at 650-51 ("The contention of Clay County then narrows to the claim that the property is not held and used for the benefit of the inhabitants residing within the corporate limits of the City of Jacksonville. *This claim is untenable. . . If the property serves a municipal purpose to the residents within Jacksonville, then it likewise serves a municipal purpose to the residents outside of Jacksonville*.").[8]

The other decisions relied upon by the Department and amici are similarly distinguishable as they involved property that was not used by the municipality itself to provide a service to the public, but instead either used or operated by

---

[8] Amicus Crapo quotes language from *State ex rel. Burbridge v. St. John*, 197 So. 131, 134 (Fla. 1940), to the effect that the Constitution does "not exempt the corporate business or proprietary *activities* of municipalities, such as the generation and sale of electric power, from taxation." *Burbridge*, however, involved property owned by a separately incorporated housing authority, not by a municipality. Moreover, the property in question was leased to private individuals, who paid rent to the housing authority. The Court expressly stated that the fact that the property was not owned by the municipality or controlled by it was of "great significance" in determining the issue of exemption. *Id*.

private persons or corporations, or held out for sale or lease to such persons for their use. *See Turner v. Concorde Properties*, 823 So. 2d 165 (Fla. 2d DCA 2002) (property leased by Hillsborough County Aviation Authority to private, for-profit business entity), *review denied*, 842 So. 2d 843 (Fla. 2003); *Sun 'n Lake of Sebring Improvement District v. McIntyre*, 800 So. 2d 715 (Fla. 2d DCA 2001) (property held out for sale to private entities for residential development), *review denied*, 821 So. 2d 298 (Fla. 2002); *City of Bartow v. Roden*, 286 So. 2d 228 (Fla. 2d DCA 1973) (property held out for lease to private entities); *Orlando Utilities Comm'n v. Milligan*, 229 So. 2d 262 (Fla. 4th DCA 1970) (utility property used not to supply service but as recreational facility for the "private benefit and use of the Utility's employees and their families" was not used for a "municipal purpose" under the 1885 Constitution).

D. Neither Competition with Other Providers Nor the Generation of Revenues in Excess of Expenses Renders Property Used for Telecommunications Services Taxable under Article VII, Section 3(a).

Drawing upon dictum in the *Crotty* decision suggesting that allowing a tax exemption for the airport hotel property at issue in that case would require extending the exemption to a municipal "pizzeria," the Department criticizes the City's position as advocating an "anything goes" principle for property that is not leased, and that the City's argument would extend a tax exemption to the City's operation of a hotel, golf course or pizzeria. (DOR br. at 15-16, 22). The PAAF

expands on this theme and adds to the parade of horribles the specter of municipal movie theaters, liquor stores and pool halls. (PAAF br. at 10). The flaw in these arguments is two-fold.

First, this case simply does not involve pizzerias, pool halls, theaters, liquor stores or anything of the kind. At issue here are telecommunications services that allow members of communities, and society generally, to communicate with each other at a distance by voice and other means. As a matter of common experience today these services are becoming part of the basic infrastructure of our communities, just as are electricity and water services. Such services indeed provide the basis upon which such secondary endeavors as "pizzerias" may be erected. Chapter 364 itself recognizes the important nature of these services to the public and authorizes municipalities to provide them. In short, whatever may be the constitutional limits of the activities in which municipalities may engage while enjoying the exemption conferred by Article VII, Section 3(a), this case does not test, or even approach, those limits.

Second, the Department's argument would equally apply to the furnishing of other utility-type services by a municipality, which as noted above is plainly not "governmental" but "proprietary" in nature, and therefore would fall on the non-tax exempt side of the line under the Department's own argument. As discussed

above, it is well-settled that property used for such services is tax exempt as serving a public or municipal purpose.

The PAAF attempts to distinguish the case of electrical service by arguing that such service is subject to a "carefully crafted and statutorily regulated system" and that electrical utilities have separate areas of operation. Noticeably missing from this argument is any suggestion what *constitutional* difference these *ad hoc* distinctions make. Nothing in the Constitution suggests that municipal competition with private enterprise or the generation of revenues in excess of expenses determines the tax treatment of municipal property.[9] Under whatever regulatory scheme, the provision of electrical service by a municipality plainly does not involve the exercise of its governmental powers, but its proprietary powers. Yet under *Ford* it just as plainly serves a valid municipal or public purpose under Article VII, Section 3(a).

The FTIA also points to language in the City's start up plan for its telecommunications service suggesting a business-like approach and using business-like terminology with respect to the provision of telecommunications services. (FTIA br. at 15-17). This terminology is hardly surprising, however.

[9] For that reason, the FTIA's suggestion that "the issue" in this case is "whether a governmental entity serves a public purpose when it uses its regulatory and tax advantages to compete in the telecommunications market for the purpose of making a profit" is a red herring (FTIA br. at 14), as is FTIA's argument that, since other telecommunications providers exist, telecommunications services by municipalities are not "essential." (FTIA br. at 19).

There is no dispute in this case that in providing telecommunications services, the City is acting in its proprietary capacity, not its governmental capacity.

The FTIA also points out that the City's start up plan focused on obtaining as customers local large and medium size businesses and governmental entities, rather than the general public, and that the plan included an observation that the telecommunication unit's *start up* activities may only marginally benefit the general population of the City. (*Id*. at 16).

The FTIA has taken this excerpt from the business plan regarding the "marginal" benefit to the general population out of context. The very next sentence, which the FTIA omits, states: "Therefore GRUCom will strive to expand the fiber optic infrastructure in a manner which will also bring new communication technologies and services in an integrated, low cost manner to homes and apartments." [R.3 at 346].

Other sections of the base planning study and the business plan, which together comprised a two volume report, explain that one of the goals of the proposed telecommunications unit within GruCom would be "to ultimately extend the [GRU Fiber Optic Network] to every home, business and office in Gainesville, and to interconnect with other networks, linking Gainesville with other communities." [R.2 at 209]. To achieve this objective, the base planning study recommended an incremental approach, initially providing services that would

assist other licensed providers in directly serving the residents of the Gainesville community, as well as offering direct services to high volume local customers. [*Id*. at 209-210].

It is all too plain why the FTIA and its constituents would want to require the City as an entrant into a field formerly occupied by incumbent private telecommunications providers to have a fully operational telecommunications unit providing universal service in place and ready to go from the outset, rather than proceeding incrementally as proposed in the City's planning study and business plan. It would effectively hinder municipal entrants into this area and prevent competition with the incumbents. FTIA, however, points to nothing in the Constitution imposing such a requirement. In fact, its brief affirmatively states that municipalities do not have an obligation to provide universal service.

Amicus PAAF, citing case law relating to tort liability of municipalities, argues that municipalities are more like businesses than arms of government. (PAAF br. at 8). Amicus Crapo, also pointing to cases involving sovereign immunity, argues that where municipalities exercise their proprietary powers they are subject to the same laws applicable to a private business engaged in similar activity, including tort liability. (Crapo br. at 5-6).

It is unnecessary to debate this proposition in the abstract, because this case addresses a specific challenge to a specific portion of a statute on the ground that it

violates a specific constitutional prohibition. The City has *not* challenged the provisions of the Act imposing other legal requirements and taxes when cities engage in the provision of telecommunications services. *See* Fla. Stat. §§ 166.047(1) (accounting requirements), 166.047(2) (local requirements regarding telecommunications companies), 212.08(6) (sales tax). The narrow challenge brought relates to ad valorem taxation, where the Constitution expressly provides an exemption for property used by the municipality for municipal or public purposes, and makes no distinction between the exercise of governmental powers and proprietary powers.

Moreover, as the First District pointed out in *Jetton v. Jacksonville Electric Authority*, 399 So.2d 396, (Fla. 1st DCA 1981), even prior to the abandonment of the governmental/proprietary distinction as it relates to municipal tort liability in *Commercial Carrier Corp. v. Indian River County,* 371 So.2d 1010 (Fla. 1979), the distinction was subject to criticism on the ground that even in the exercise of their corporate or proprietary powers, municipalities differ from private corporations. Municipalities are not created and do not operate for individual financial gain; profit from proprietary operations stays in the public treasury and claims for injuries are paid out of the same public treasury. *Id*. at 397 n.7; *Saunders*, 25 So.2d at 651 ("It is a controlling factor that the owner of the property [the

municipality] has no stockholders or partners, and any income must necessarily to the general public").

E. The City's Position Properly Harmonizes Article VII, Section 3(a) and Article VIII, Section 2(b).

The Department and amici also argue that, even though Article VIII, Section 2(b) of the Florida Constitution authorizes cities to use their governmental as well as proprietary powers for "municipal purposes," and Article VII, Section 3(a) provides for ad valorem tax exemption of municipal property used by municipalities for "municipal or public purposes," the quoted language means something very different under the two provisions. While the language appearing in Article VIII is broadly interpreted, they argue, the same language appearing in Article VII is much narrower.

The First District's decision in *Page*, however, demonstrates that is not the case at all. As *Page* points out, a key factor in determining the applicability of the exemption is *whether the property is used by the municipality itself*. When it is, the Constitution provides a "broad" exemption, not a "narrow" exemption as contended by the Department. As long as the municipality is itself using the property for a proper municipal or public purpose, including any "legitimate"

municipal undertaking, 714 So. 2d at 1076, the property is exempt from taxation even though the use of the property is "proprietary" rather than "governmental."[10]

The case law cited by Department or amici does not support their argument that the same language with reference to the powers and functions of municipalities means something different in Article VIII from its meaning under Article VII. They rely principally upon this Court's 2001 decision in *Sebring*. As shown above, however, *Sebring* involved property leased to and used by a private entity, and the Court's discussion was clearly limited to that context.

The *Sebring* Court did reject the argument that decisions employing the term "public purpose" or "paramount public purpose" in bond validation *cases* under Article VII, Section 10 of the Constitution could be imported into the interpretation of "public purpose" under Article VII, Section 3(a). *But, as the Court pointed out, Article VII, Section 10 itself does not even refer to "municipal" or "public" purposes at all.* That terminology is simply a gloss by the case law. *See* 783 So. 2d at 250 n.15. In addition, Article VII, Section 10 itself expressly provides that property leased to private entities would *not* be tax exempt. *Id*. at 241, 251. Article VIII, Section 2(b), in contrast, expressly uses the terms "municipal

---

[10] Alluding to case law emphasizing that the use, not merely the ownership, of municipal property is key, the dissent below incorrectly characterizes the City's position as asserting that as long as a municipality owns the property at issue, the use of the property is irrelevant. As is clear from the foregoing discussion, the City merely contends that the constitutional test focuses upon the "use" of the property (1) by the municipality, (2) for municipal or public purposes.

functions" and "municipal purposes," and contains no limitation suggesting that the meaning of those terms should be understood differently from the meaning of "municipal purposes" in Article VII, Section 3(a).

The PAAF argues that the language of Article VII, Section 3(a) refers to municipal or public purposes, but does not used the words "corporate" or "proprietary" and that to accept the City's position would be effectively to insert the latter language into the Constitution when the framers chose to refer only to "municipal or public" purposes. (PAAF br. at 18-20). This argument, however, overlooks the distinction between the *powers* and *purposes* of a municipality. Article VIII, Section 2(b) makes clear that municipalities have certain powers that include "governmental, corporate and proprietary powers." These powers in turn may be exercised to "conduct municipal government, perform municipal functions and render municipal services," and more generally "for any municipal purposes except as otherwise provided by law." Thus, there is nothing whatsoever inconsistent in reading the reference to municipal or public *purposes* in Article VII, Section 3(a) as *including* the exercise of corporate or proprietary *powers*. In short, "proprietary" and "municipal" are not mutually exclusive categories.

Finally, FTIA argues that, unless the constitutional exemption is construed in the narrow manner urged by the Department, the reference to "municipal or public purposes" in Article VII, Section 3(a) would be meaningless. (FTIA br. at

9-10). But that is not true. In the first place, the language in question ensures that, in the event a municipality were to employ its property in an activity not within its powers under Article VIII, Section 2(b), that property would not be tax exempt. Second, when read together with the requirement that the property by used "exclusively by" the municipality for municipal or public purposes, this language ensures that municipal property leased to and used by private business for proprietary, for-profit (as opposed to governmental) activities is subject to taxation, consistent with the case law discussed above.

Far from rendering any provision meaningless, the City's position is necessary because provisions of the Constitution should be read *in pari materia* and each provision given a consistent and logical meaning. *See, e.g.*, *Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Commission*, 838 So.2d 492, 501 (Fla. 2003); *see also Goldstein v. Acme Concrete Corp.*, 103 So.2d 202, 204 (Fla. 1958) (Court would assume that legislature intended certain exact words or exact phrases in two different statutes to mean the same thing). It would be anomalous to hold that the very same term – municipal purpose – used in one section of the Constitution should be read to mean something different when used in another section.

This case does not require that the Court decide whether the terms used in Article VIII, Section 2(b) and Article VII, Section 3(a) are coextensive, because,

for all the reasons discussed above, the provision of telecommunications services to the public as authorized by Chapter 364 falls well within the concept of "municipal or public purpose" under Article VII, Section 3(a). The judgment below was correct and should be affirmed.

II. The Act Cannot be Sustained as a Valid Exercise of Legislative Authority to Define What Constitutes a "Municipal or Public Purpose"

The Department contends that, since the Constitution does not define municipal or public purpose, the legislature was entitled to define those terms by statute, and in doing so to exclude telecommunications services in order to prevent municipalities from enjoying an "economic advantage" over other providers. This argument should also be rejected.

In the first place, it should be noted that the challenged legislation did not expressly purport to define "municipal or public purpose" which establishes the exemption from ad valorem taxes under Article VII, Section 3(a). Instead, it purported to define those terms for purposes of Article VIII, Section 2(b), which establishes the home rule powers possessed by municipalities. In other words, the legislature sought to achieve its stated goal of "removing" the constitutional exemption enjoyed by municipalities under Article VII, Section 3(a) by an end run maneuver under Article VIII, Section 2(b), implicitly admitting that it could not be done directly. It is therefore disingenuous to argue that the Act constitutes a valid

exercise of legislative power to define what constitutes a "municipal or public purpose" for ad valorem tax purposes.

In any event, even if viewed as an attempt to define municipal or public purposes under Article VII, Section 3(a), such an "end run" around a constitutional prohibition itself violates the Constitution and is impermissible. "It is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." *Lewis v. Florida Bar*, 372 So. 2d at 1122 (attempt to impose documentary stamp tax on transaction between Florida Bar and bank, which tax would be passed on to Bar, constituted an attempt to impose an indirect tax on an immune governmental body.); *see also Archer v. Marshall*, 355 So. 2d 781 (Fla. 1978) (legislature is without authority to grant a reduction in rent that had the effect of a tax exemption where such an exemption was not authorized by the constitution); *Department of Revenue v. Fla. Boaters Ass'n*, 409 So. 2d 17 (Fla. 1981) (statute attempting to define the term "boat" for purposes of tax exemption held unconstitutional where it failed to provide a reasonable definition of that term, but simply constituted a decree that certain uses of boats would render them subject to ad valorem taxation, contrary to constitutional exemption). In short then, the legislature may not remove constitutional exemptions by the expedient of defining them away.

That, however, is what the Act attempts to do. It declares that municipally-provided telecommunications serve a municipal or public purpose "*only if" the municipalities pay ad valorem taxes* on the property used to provide those services. In other words, the property is legislatively declared to satisfy the conditions for *tax exemption* (serving a municipal or public purpose) only when the property *is taxed*. This legal oxymoron does not constitute a permissible legislative definition of the *constitutional* terms "municipal or public purpose." As the Second District noted in *Sebring III*, legislative declarations as to what is a municipal purpose are "subject to the provisions and principles of organic law" and the legislature may not "depart from the normal and ordinary meaning of the words chosen by the framers and adopters of the constitution." 718 So. 2d at 297-98.

Here, too, the legislature's attempt in the Act to define "municipal or public purpose" under the Constitution violates the "principles of organic law," specifically, Article VII's express tax exemption for property owned and used by municipalities. The legislature's attempt to "define away" the constitutionally-granted exemption "depart[s] from the normal and ordinary meaning of the words chosen by the framers and adopters of the Constitution." *Id.*; *Florida Boaters*. It does so by purporting to define as a "municipal purpose" or as a "public purpose" the doing of an act (paying ad valorem taxes) that is *constitutionally prohibited*.

Under no circumstances (and by definition) can the violation of Article VII, Section 3(a) serve a municipal or public purpose.

It is true, of course, that Article VIII, Section 2(b) authorizes the legislature to prohibit municipalities from exercising particular powers. However, not surprisingly, Article VIII does *not* authorize -- or tolerate -- what the legislature has done here, which is to purport to use its powers over municipalities *to violate another constitutional provision*. Even prior to the constitutional grant of Home Rule Powers to municipalities, it was the law that:

> The broad powers vested in the legislature with regard to municipalities by Section 8 of article 8 of the Constitution are not unlimited. *We have frequently held that in exercising the powers thus conferred the legislature must not violate any other provision of the Constitution.*

Williams v. City of Jacksonville, 160 So. 15, 20 (Fla. 1935); *see also Campbell v. Johnson*, 182 So. 2d 244, 247 (Fla. 1966) (while the legislature has plenary power over municipalities, "[t]he power is bridled to the extent that the law-making body cannot enact statutes that collide with other provisions of organic law."); *Cobo v. O'Bryant*, 116 So. 2d 233, 235-36 (Fla. 1959)(legislature has "authority to abolish [a municipality] and certainly has the power to regulate and control its government by statutory enactment . . . [but that power] is not unbridled, in that the legislature will not be permitted to enact statutes that violate some other provision of the organic law").

Yet, here -- in purporting to exercise its power over municipalities -- the legislature has done exactly what these cases hold it cannot do. As previously discussed, the Act requires the payment of ad valorem taxes precisely in the situation that it defines as creating the exemption (*i.e.*, the performance of a public or municipal function). In purporting to exercise its constitutional powers to control or limit the exercise of municipal powers, it has undertaken therefore to *grant* those powers and *define* them as serving the public purpose only upon the City's violation of a separate constitutional provision, namely Article VII, Section 3(a).

This runs squarely afoul of the cases discussed above and is no more valid an exercise of the legislature's authority over municipalities than it would be to declare that the provision of parks serves a municipal purpose only if the city refuses to permit members of a particular ethnic or religious background to use the parks. While the legislature may have power to withdraw from cities the power to provide parks, it may not condition the retention of that power on the municipality's violation of another constitutional provision.

The Department argues that the City's argument is tantamount to claiming "immunity" from taxation, which is enjoyed by counties, not by cities. (DOR br. at 27, citing *Canaveral Port Authority v. Dep't of Revenue*, 690 So.2d 1226 (Fla. 1996)). That is not correct. The City is not arguing "immunity." As discussed

above, the City acknowledges that municipal property must be used for public or municipal purposes in order to enjoy exemption from taxation. The City simply disagrees with the Department's unduly narrow contention as to the meaning of those terms.

Moreover, the Department's argument overlooks the fact that, while municipalities may not enjoy "immunity," they do enjoy a broad *constitutional* exemption from taxation. *Page*, 714 So. 2d at 1073. Unlike the permissive exemptions which the legislature may grant under Article VII, Section 3(a) for educational, literary, scientific, religious or charitable uses, the exemption of municipal property used by the municipality for municipal or public purposes is mandatory and self-executing. It does not require legislative enactment in order to be effective, and cannot be removed by the legislature. *Mikos, supra*.

It remains only to briefly address the suggestion that the legislature acted properly in passing the Act in order to prevent municipalities from having an advantage over other telecommunications providers and to increase tax revenues to help ensure sufficient funding for other local governments. (DOR br. at 28). This appeal does not turn on the wisdom of the ultimate ends the legislature had in mind with respect to promoting competition in the telecommunications field, or upon whether the means chosen were practical or fair. It does not turn on whether the legislature had a rational basis for its action. The issue is whether the Act violates

a specific provision of the Constitution. *State v. City of Port Orange*, 650 So. 2d 1, 10 (Fla. 1994) (revenue pressures on government do not justify circumventing constitutional prohibitions).

The foregoing should not, however, be taken as suggesting that the City agrees that the Act represents sound policy. It does not. As amicus curiae Florida Municipal Electric Association will discuss in its brief, incumbent telecommunications providers enjoy a number of inherent advantages over municipalities attempting to enter the telecommunications field, including name recognition, economies of scale, confidential operations (municipalities are subject to public records and Government in the Sunshine requirements), flexibility in employment, advantages in obtaining financing, and flexibility in contracting.

Thus, imposing ad valorem taxes on municipalities does not by any stretch create a "level playing field" as urged by the Act's proponents. In all events, as shown above, even if the end chosen by the legislature were desirable, the legislature failed to use constitutional means to achieve it, and the courts below correctly held the Act unconstitutional.

CONCLUSION

For all the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted,

____

Robert Pass
Florida Bar Number 183169
E. Kelly Bittick, Jr.
Florida Bar Number 654035
CARLTON FIELDS, P.A.
215 South Monroe Street
Suite 500
Tallahassee, FL 32301
Telephone: (850) 224-1585
Facsimile: (850) 222-0398
E-Mail: rpass@carltonfields.com
kbittick@carltonfields.com

Attorneys for Appellee, The City of Gainesville

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing appellee's Answer Brief has been furnished by United States Mail this ____ day of March, 2004, to Nicholas Bykowsky, Esquire, and Mark T. Aliff, Esquire, Office of the Attorney General, Tax Section, the Capitol, Tallahassee, Florida 32399-1050; John C. Dent, Jr., and Sherri L. Johnson, Dent & Cook, 330 S. Orange Avenue, Sarasota, Florida 34236; John R. Beranek, Kenneth R. Hart and Jason Gonzalez, Esq., Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302; and Larry E. Levy and Loren E. Levy, The Levy Law Firm, 1828 Riggins Road, Tallahassee, Florida 32308.

____
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief is submitted in Times New Roman 14 point font, double spaced in compliance with Rule 9.210(a)(2), Fla. R. App. P.

____

Attorney