IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE

Appellant,

v.

Case No. SC 03-2273
Lower Case No. 1D02-1582

THE CITY OF GAINESVILLE

Appellee.

APPELLANT DEPARTMENT OF REVENUE'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellant, Florida Department of Revenue, Appellant below, will be referred to herein as "the Department." The City of Gainesville, Appellee below, will be referred to herein as "the City" or "the Appellee."

References to the record on appeal will be prefixed with Vol., followed by the appropriate volume number, followed by the letter R, which in turn will be followed by the appropriate page number, e.g., Vol. 3, R-411-416.

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STATEMENT OF THE CASE AND FACTS

In 1997, the Legislature enacted Chapter 97-197, Laws of Florida, which became effective October 1, 1997. Section 2 created Section 166.047, Florida Statutes, which states in pertinent part:

> 166.047. Telecommunications services– 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:
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> ...
>
> (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.
>
> ...

In Chapter 97-197, Section 3, Laws of Florida, the Legislature amended Section 196.012(6), Florida Statutes, which sets forth what activities are or are not to be deemed a "governmental, municipal, or public purpose or function." It added the following language:

> . . . Providing two-way telecommunications services to the public for hire by the use of a telecommunications facility, as defined in s. 364.02(13), and for which a certificate is required under chapter 364 does not **constitute an exempt use** for purposes of s. 196.199, unless the telecommunications services are provided by the operator of a public-use airport, as defined in s. 332.004, for the operator's provision of telecommunications services for the airport or its tenants, concessionaires, or licensees, or unless the telecommunications services are provided by a public hospital. However, property that is being used to provide such telecommunications services on or before October 1, 1997, shall remain exempt, but such exemption expires October 1, 2004. (emphasis supplied)

The City, doing business under several fictitious names, including Gainesville Regional Utilities (GRU), GRUCom and GRU.net, provides electrical, natural gas, water, wastewater services, telecommunications (hereinafter "telecom") services and Internet access to the Gainesville region. 2nd Supp. Vol. 1, R-548; R-570. All such services are provided by the City; neither GRU, GRUCom, nor GRU.net are separate corporations or entities distinct from the City. 2nd Supp. Vol. 1, R-549; R-570.

Under the name "GRUCom," the City sells telecom infrastructure and integrated telecom services to customers located both within and without the City limits charging contractually agreed-upon rates for the services provided. 2nd Supp. Vol. 1, R-549; R-570.

GRUCom today has approximately thirty leases with seven wireless telephone companies on thirteen City towers that it either owns or manages located within and without the City's territorial limits. 2nd Supp. Vol. 1, R-557; R-573. These wireless companies utilize GRUs Fiber Optic Network to carry their signals from their tower locations to the local points of presence of interexchange carriers or directly to their telecom switches (i.e., equipment which routes calls between the public switched telephone network and the wireless companies' tower sites). 2nd Supp. Vol. 1, R-557; R-573. The City has developed a multifaceted multi-functional telecom system. Although the fiber optic property at issue in this litigation has not yet been assessed, the Alachua County Property Appraiser has assessed the City ad valorem taxes on these towers, and the City has paid these taxes under protest.[1] 2nd Supp. Vol. 1, R-557; R-574. Prior to 1993 the City was not authorized to engage in this type of multi-functional telecom services.

In its complaint for declaratory judgment (Vol. 1, R-1-35), the City contends that all of its telecom property is "absolutely exempt" from ad valorem taxation by virtue of Article VII, Section 3(a), Florida Constitution, and that this exemption

[1]The tax status of these towers is not a issue in this appeal. However, in City of Gainesville v. Crapo, et. al, Case No. SC 03-1697, the taxable status of these towers is at issue.

cannot be waived, modified or impaired by the Legislature. The City challenges the Legislature's authority to define what is a public purpose as that phrase is used in Article VII, Section 3, of the Florida Constitution, not whether the Legislature's enactment is a reasonable attempt to do so. The City alleges that Chapter 97-197, Laws of Florida, is facially unconstitutional because it has defined what constitutes a "public purpose,"[2] that the Legislature exceeded its legislative power,[3] and that Chapter 97-197, Laws of Florida, including Section 166.047, Florida Statutes, and the amendment to Section 196.012(6), Florida Statutes, are all void as the "Act purports to impose a comprehensive scheme of ad valorem (and other) taxation" on municipal property that is "absolutely exempt from such taxation by virtue of Article VII, Section 3(a)" of the Florida Constitution.[4] Vol. 1, R-7-10.

The Department contends that the purpose of this legislation in not including municipal telecom property in its definition of public purpose is to ensure that the portion of the City's commercial telecom system which provides telecom service "for hire" pays ad valorem taxes in the same manner as any other

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[2]See Vol. 1, R-7.

[3]See Vol. 1, R-7.

[4]See Vol. 1, R-7.

commercial enterprise to fund county government operations. The City's telecom business does not exercise or dispense any element of municipal sovereignty. Instead, the City's telecom business is in direct competition with companies such as BellSouth and Cox Communications. Vol. 3, R-374. The Department's position is consistent with the governmental-governmental/governmental-proprietary analysis that focuses on the use of the property as originally set forth by this Court in Williams v. Jones, 326 So. 2d 425 (Fla. 1975)(hereinafter "Williams"), and as reiterated by this Court in Sebring Airport Authority v. McIntyre, 783 So. 2d 238 (Fla. 2001)(hereinafter "Sebring IV").

On March 20, 2002, the trial court entered its order granting summary judgment in favor of the City and declaring certain statutory provisions unconstitutional (hereinafter "the Order"). Vol. 3, R-392-398. Thereafter, the trial court entered its final summary judgment and declaration holding that:

> The portions of Chapter 97-197, Laws of Florida, as codified in Sections 166.047 and 196.012(6), Florida Statutes that (i) seek to subject municipal property used by a municipality to provide telecommunications services to the public for hire to ad valorem taxation "or fees in an amount equal thereto," (ii) purport to define what is a "municipal purpose" under the Constitution under Article VII, § 3(a) of the Florida Constitution, and (iii) condition municipalities' holding or exercise of their telecommunications certificates of approval on the payment of ad valorem taxes or

> equivalent "fees" on such telecommunications property are hereby **DECLARED FACIALLY UNCONSTITUTIONAL,** because they irreconcilably contravene Article VII, § 3(a) of the Florida Constitution.

Vol. 3, R-415-416, (emphasis in the original).

On appeal, the First District affirmed the trial court. See Department of Revenue v. City of Gainesville, 859 So. 2d 595 (Fla. 1st DCA 2003)(hereinafter "Gainesville"). The majority opinion of the First District in Gainesville affirmed the ruling of the trial court, holding that the City's property in question:

> "...is being used by the City for a municipal purpose and the legislatures's attempt to condition the provision of these municipal services on the payment of any amount equal to any ad valorem tax liability is in direct conflict with Article VII, Section 3(a) of the Florida Constitution." Gainesville, 859 So. 2d, at 597.

The majority opinion in Gainesville summarily dismissed the application of the holding of this Court in Sebring IV, and interpreted the phrase "municipal or public purpose" in Article VII, Section 3(a) of the Florida Constitution in the same broad sense of the term "municipal purpose" found in Article VIII, Section 2(b) of the Florida Constitution. Gainesville, supra, at 598-599.

The dissenting opinion of Judge Ervin in Gainesville carefully reviewed the pertinent legislative history leading to the enactment of Chapter 97-197, Laws of Florida, and the

historical background of the "public purpose" exemption for municipal property that culminated in this Court's decision in Sebring IV. See Gainesville, supra, at 601-608 (Ervin, J., dissenting). Judge Ervin's dissent noted that the term "municipal purpose" used in Article VII, Section 3(a), "is not coextensive with the same term as used in Article VIII, Section 2 [of the Florida Constitution]," citing this Court's decision in Sebring IV. Gainesville, supra, at 607. Thus, Judge Ervin's dissent concluded the trial court's order of summary judgment should be reversed and the statutes in question held constitutionally valid. Gainesville, supra, at 608.

The Department timely appealed the decision of the First District to this Court on December 22, 2003.

SUMMARY OF ARGUMENT

This Court's analysis in Williams and Sebring IV, requires a finding that Chapter 97-197, Laws of Florida, is a valid constitutional enactment of the Legislature. Both the trial court and the First District's majority opinion erred in holding that the property used for the City's telecom business is exempt from taxation under Article VII, Section 3(a), of the Florida

Constitution. Under this Court's jurisprudence, the City-owned telecom property used for commercial purposes does not serve a "municipal or public purpose" because the City's telecom business is a commercial enterprise that does not exercise or dispense any element of municipal sovereignty. Both the trial court and the First District's majority opinion incorrectly relied on the premise that the governmental-governmental and governmental-proprietary test applies only to property leased by the City to a private party for proprietary use.

Article VII, Section 3(a), Florida Constitution, requires that the use of property for a public or municipal purpose must first be established before it qualifies for an exemption. The Florida Legislature, in enacting Sections 166.047 and 196.012(6), Florida Statutes, has determined that the proprietary provision of telecom services by a municipal government is not a municipal or public purpose unless certain conditions are satisfied. The Florida Legislature properly exercised that authority under the Constitution in defining public purpose for ad valorem taxation purposes by not allowing municipalities an exemption for property used for telecom services. The purpose of Chapter 97-197 is to ensure that municipalities engaged in a commercial enterprise (i.e., not a governmental-governmental function or activity) share in the tax burden imposed by, among others, county

government, local government authorities, and local schools.

This Court in Sebring IV has expressly stated that the scope of Article VII, Section 3(a) is much narrower than other constitutional provisions dealing with whether a given activity is a "municipal" or "public" purpose. The Legislature has the authority to define what it believes to be a "municipal or public purpose" activity under Article VII, Section 3(a), of the Florida Constitution. Id. The test of the constitutionality of Sections 166.047 and 196.012(6), Florida Statutes, must be read through the prism of this Court's holding in Sebring IV. This Court should adopt the analysis of the dissenting opinion of Judge Ervin in Gainesville and follow its holding in Sebring IV. Chapter 97-197, Laws of Florida, is a valid and constitutional enactment of the Florida Legislature.

STANDARD OF REVIEW

When the issue before the Court is the constitutionality of a state statute, the appropriate standard of review is *de novo*. See City of Miami v. Magrath, 824 So. 2d 143, 146 (Fla. 2002); Carribean Conservation Corp., Inc. v. Florida Fish & Wildlife

Conservation Commission, 838 So. 2d 492, 500 (Fla. 2002); and, Padavano, Florida Appellate Practice, Section 9.4 (2001-2002 ed.).

ARGUMENT

I. THE FIRST DISTRICT ERRED IN FAILING TO FOLLOW THIS COURT'S HOLDINGS IN WILLIAMS v. JONES, 326 So. 2d 425 (Fla. 1975) AND SEBRING AIRPORT AUTHORITY v. MCINTYRE, 783 So. 2d 238 (Fla. 2001) AND FINDING CHAPTER 97-197, LAWS OF FLORIDA, FACIALLY UNCONSTITUTIONAL.

Both the trial court[5] and the First District in its majority opinion erred by holding that the City's telecom property used for its commercial enterprise was exempt from taxation under Article VII, Section 3(a), of the Florida Constitution. Such a determination is not supported by the case law of this Court construing Article VII, Section 3(a), of the Florida Constitution.

Article VII, Section 3(a), of the Florida Constitution, states in pertinent part:

> All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is located.

It is undisputed that the City's telecom property at issue in this case is owned by the City and not leased to another entity. In both its order granting summary judgment and its final

[5]Vol. 3, R-411-416.

summary judgment the trial court failed to mention or consider the pertinent controlling decision of this Court: Sebring IV.

This Court established the "governmental-governmental" and "governmental-proprietary" analysis as the proper functional test to review a legislative enactment defining a public purpose, as that phrase is used in Article VII, Section 3(a) of the Florida Constitution. This Court's functional test must include an analysis of the actual use of the municipal property and whether the property's use is an exercise of some element of sovereignty. Sebring Airport Authority v, McIntyre, 718 So. 2d 296, (Fla. 2nd DCA 1998)(hereinafter "Sebring III") and Sebring IV, supra. In this case, the City's commercial telecom business is not an exercise of any element of municipal sovereignty. To the contrary, the City's commercial telecom business actively competes with the private sector in a highly-competitive industry.

The trial court also ignored the "governmental-governmental" and "governmental-proprietary" functional test first set out by this Court in Williams v. Jones, 326 So. 2d 425 (Fla. 1975) and later reaffirmed in Sebring IV.

The First District's majority opinion in Gainesville likewise ignored the holdings of this court in Williams and Sebring IV, briefly mentioning Williams and dismissing this Court's holding in Sebring IV with just two sentences, stating:

> Appellant has not cited any case which supports the proposition that when property is owned and used by a municipality the term "municipal purpose" as used in Article VII, Section 3(a), Florida Constitution, should be narrowly construed. (footnote omitted) McIntyre [Sebring IV] and other cases cited for adopting a narrow interpretation involve situations where municipal property is being leased or utilized by a private entity.

Gainesville, at 598.

In Williams, supra, this Court first enunciated the current "governmental-governmental" standard for determining "public purpose" in the ad valorem tax exemption context, later confirmed in the Volusia County, case, infra. This Court in Williams determined that this standard was constitutionally required:

> The operation of the commercial establishments represented by Raceway's cases is purely proprietary and for profit. They are not governmental functions. If such a commercial establishment operated for profit on Panama City Beach, Miami Beach, Daytona Beach, or St. Petersburg Beach is not exempt from tax, then why should such an establishment operated for profit on Santa Rosa Island Beach be exempt? No rational basis exists for such a distinction. The exemptions contemplated under Sections 196.012(5) [now (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.**

Williams, at 433. (emphasis supplied)

Thus, Williams thus marked a dramatic turning point: it limited ad valorem tax exemptions to governmentally-owned property used by non-governmental persons or entities. No longer was it sufficient simply to find that the governmental entity is serving some broad "public purpose" and that the non-governmental lessee is in some way furthering that public purpose in order for the property to be exempt.[6] This Court stated that the use to which the property is being put by the non-governmental lessee must be scrutinized, and the property will be exempt only if it is being used for a "governmental-governmental" purpose or activity; a "governmental-proprietary" purpose or activity will not suffice. Williams, at 433.

The plain language of Article VII, Section 3(a) of the Florida Constitution, requires this Court to focus on the use of the property in question. As was stated by Judge Ervin in his dissenting opinion in Gainesville:

> My conclusion is supported by a plain reading of article VII, section (3)(a), which provides in pertinent part: "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." Nothing in this provision remotely supports the trial court's conclusion that so long as the property is itself used by a municipality, the type of use made of it is

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[6]See e.g., Daytona Beach Racing & Recreational Facilities District v. Paul, 179 So. 2d 349 (Fla. 1965).

> immaterial to a determination of its tax-exempt status. The constitutional language clearly requires the use be for a public or municipal purpose before it qualifies for the exemption. Unfortunately, subsection (3) does not provide a definition of such purpose; nevertheless, I believe it entirely unlikely that the supreme court intended the governmental-proprietary classification, discussed in pertinent Florida Supreme Court decisions, should be limited to only leasehold interests of governmentally owned property. (emphasis supplied)

Gainesville, at 603.

This Court has defined "governmental-governmental" activities to be those that concern the administration of some phase of government and "governmental-proprietary" activities as matters that promote the comfort, convenience, safety and happiness of citizens. See Sebring Airport Authority, et al. v. McIntyre, 642 So. 2d 1072, 1073-74 (Fla. 1994)("Sebring II"). The Second District in the later case of Sebring Airport Authority v, McIntyre, 718 So. 2d 296 (Fla. 2nd DCA 1998)(hereinafter "Sebring III"), observed that

> "A governmental function has been defined as one having to do with the administration of some phase of government, that is, exercising or dispensing some element of sovereignty, and a proprietary function has been defined as a function designed to promote the comfort, convenience, safety and happiness of the citizens (citation omitted)."

Sebring III, supra, at 299.[7] Under this definition - one that

[7]The First District has observed that government services typically provided from the receipt of taxes include "police and

focuses on the use of the City's property - the City's commercial telecom business is a "governmental-proprietary" activity. Because the operation of a commercial telecom business cannot be deemed to in any way to partake of any aspect of municipal sovereignty, it is not a municipal or public purpose under Article VII, Section 3(a), of the Florida Constitution.

The Legislature in enacting Chapter 97-197, Laws of Florida, expressly stated that a telecom company that is a municipality or other entity of local government holding a certificate under Chapter 364 [Florida Statutes] "serves a municipal or public purpose under the provision of Article VIII, Section 2(b), Florida Constitution...."[8] See Chapter 97-197, Laws of Florida, Section 2. Chapter 97-197, Laws of Florida, does not conflict with Article VII, Section 3(a), of the Florida Constitution, and it meets the guidelines established in this Court's decisions

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fire protection, the use of public roads ... and the other advantages of a civilized society..." TA Operating Corp. v. Department of Revenue, 767 So. 2d 1270, 1276 (Fla. 1st DCA 2000), rev. denied, 790 So. 2d 1108 (Fla. 2001), cert. denied, 534 U.S. 893, 122 S.Ct. 212 (2001).

[8]Article VIII, Section 2(b) of the Florida Constitution states that "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective."

pertaining to ad valorem taxation. Municipal property used for commercial purposes - *a governmental-proprietary function* - is subject to ad valorem taxation.

The City argues for the use of the Article VII, Section 3, Florida Constitution, definition of "public purpose" for leased municipal property and an "anything goes" principle[9] for non-leased municipal property based on a misapplication of Article VIII, Section 2(b), of the Florida Constitution. That is, the City argues that effectively all municipal-owned property is immune from ad valorem taxation. This Court has rejected such a position.

In Sebring IV the Sebring Airport Authority and Sebring International Raceway argued for a more liberal interpretation of "public purpose" adopted from several bond validation cases. This Court rejected the appellants' analysis stating that the cited cases were not analogous to tax exemption cases and the legal theories cannot be used interchangeably. Sebring IV, at 250.

This Court's decision in Sebring IV is the culmination of over thirty years of case law concerning what is a "public purpose" and the Legislature's attempts to transform what are "governmental-proprietary" activities into "governmental-

[9]I.e., all municipal-owned property, *regardless of use*, is immune from ad valorem taxation.

governmental" activities for the purposes of the exemption from taxation provided by Article VII, Section 3(a), Florida Constitution. While these cases deal with government leased property under Article VII, Section 3, Florida Constitution, the "public purpose" analysis applies to all municipal property and makes no distinction between leased or non-leased property.

In Sebring IV, this Court reviewed and struck down a legislative enactment, Chapter 94-353, Section 59, at 2566, Laws of Florida, which amended Section 196.012(6), Florida Statutes, to deem the use of government-owned property leased to non-governmental lessees and used for (among other things) "a sports facility with permanent seating, concert hall, arena, stadium park or beach" a use that "serves a governmental, municipal, or public purpose or function...."[10] The Sebring Airport Authority and Sebring International Raceway argued that the Florida Constitution is a "fluid document" and the Legislature's determination of what constitutes a "public purpose" should be upheld unless patently erroneous when interpreted in light of current common usage.

[10]Section 196.012(6), Florida Statutes (Supp. 1994), states that "[t]he use by a lessee, licensee, or management company of real property or a portion thereof as a convention center, visitor center, sports facility with permanent seating, concert hall, arena, stadium, park, or beach is deemed a use that serves a governmental, municipal, or public purpose or function when access to the property is open to the general public with or without a charge for admission." This part of Section 196.012(6), Florida Statutes, is still in effect today.

Sebring IV, at 243. This Court rejected this argument and stated that the amendment at issue is to be measured against Article VII, Section 4, and Article VII, Section 3(a), of the Florida Constitution, rather than by what is "currently popular." Sebring IV, at 244.[11]

The Sebring Airport Authority also argued in Sebring IV that "the Legislature used the normal and ordinary meaning of the constitutional term 'public purposes' when it included in Section 196.012(6) the types of for-profit operated facilities which are recognized ... to promote the general welfare by stimulating tourism and economic development." Sebring IV, at 252. In rejecting this argument, this Court stated:

> The Second District determined otherwise, reasoning that "[t]he legislature's redefinition of the term in this instance must fail because the redefined term conflicts with the 'normal and ordinary meaning' of the phrase 'governmental, municipal or public purpose or function.'" Sebring III, 718 So. 2d, at 298.
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> ...
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> As we stated in Volusia County, 341 So. 2d at

[11]This Court went on to note that Article VII, Section 4, Florida Constitution, contains the central and dominant provision that "[B]y general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation..." Article VII, Section 3(a), Florida Constitution, sets forth the mandatory and permissive exemptions from this constitutional admonition regarding ad valorem taxation. Sebring IV, at 245.

> 502, "Operating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function."

Sebring IV, at 252-253 (footnotes omitted). See also Greater Orlando Airport Authority v. Crotty, 775 So. 2d 978, 980 (Fla. 5th DCA 2000), review dismissed, 790 So. 2d 1103 (Fla. 2001) (holding real and personal property used in the operation of a hotel on city-owned airport property was subject to ad valorem taxation).

The City incorrectly contends that the phrase "municipal purpose" in Article VIII, Section 2(b), Florida Constitution, should be read into Article VII, Section 3, Florida Constitution. This is inconsistent with this Court's holding in Sebring IV to the extent that the first sentence of Article VIII, 2(b), differentiates between governmental, corporate and proprietary powers. Article VII, Section 3(a), however, deals not with the extent of municipal powers, but rather the limitation on tax exemptions to be granted. Sebring IV, at 241, 244, 245-246, and 249, fn. 11. In this context, this Court has strictly and narrowly construed Article VII, Section 3(a). Sebring IV, supra. The City's reading of these Articles together blends the definitions of public purpose in a manner forbidden by this Court in Sebring IV.

The correct analysis and result was obtained by the Second District Court of Appeal in Turner v. Concorde Properties, 823 So.

2d 165 (Fla. 2d DCA 2002), rev. denied, 842 So. 2d 843 (Fla. 2003)(hereinafter "Turner"), a case decided after the decision of this Court in Sebring IV. At issue in Turner was whether a public golf course situated on publicly-owned property, but operated by a private for-profit business entity, was entitled to a "public purpose" exemption from ad valorem taxes pursuant to Section 196.199(2)(a), Florida Statutes. The Second District in Turner reversed the trial court and based its decision on this Court's decisions in Sebring II and Sebring IV. Turner, at 166-167. After setting forth the definition of "public purpose," the Second District specifically held that:

> Concorde was not entitled to judgment as a matter of law since the operation of a golf course by a for-profit business falls within the definition of the governmental-proprietary operation, which is, by definition, not a "public purpose" and is not entitled to an ad valorem tax exemption as defined by the Florida Supreme Court. Accordingly, we conclude that Concorde is not entitled to the "public purpose" ad valorem tax exemption and that the trial court erred in granting judgment in Concorde's favor.

Turner, at 167.

Thus, the fact that a particular commercial municipal enterprise provides a service or benefit to the general public does not automatically result in the necessary conclusion that it serves the requisite "municipal or public purpose" entitling the municipal property to an exemption from ad valorem taxation. See

Sebring IV, at 252.

There is a historical line of case law cited by the dissenting opinion of Judge Ervin in Gainesville that has considered this issue.[12] The subject of what governmentally-owned property would be exempt from taxation under the Constitution of 1885 was broadly interpreted to include any "public" purpose under the Constitution of 1885. In other words, if the activity was being conducted by a City, that in itself determined that it was for a "public purpose." For example, this Court decided that simply holding a proprietary interest in a community recreational asset as the Daytona Speedway served a "municipal purpose." Daytona Beach Racing and Recreational Facilities Dist. v. Paul, 179 So. 2d 349, 353 (Fla. 1965). Anticipating that decisions of this kind could create inequities in the tax structure, the drafters of the 1968 Florida Constitution limited the municipal purpose exemption to "property owned by a municipality and used exclusively by it for municipal or public purposes." Sebring IV, at 245-246.

Pursuant to the adopted changes which resulted in the 1968 Constitution, the 1971 Legislature enacted a "sweeping reform" of

[12]See Gainesville, at 605-608 (Ervin, J., dissenting).

Chapters 192 and 196, Florida Statutes.[13] The Legislature repealed all the statutory provisions, both general laws and special acts, relevant to leasehold taxation and exemption. Thus, when read together, the provisions of Article VII, Section 3(a), Florida Constitution (1968), and the 1971 statutory modifications (which are still included in Sections 196.199 and 196.012(6), Florida Statutes) substantially narrowed the requirements for such an exemption.

Pursuant to this Court's "governmental-governmental" and governmental-proprietary" functional test, Article VII, Section 3(a), of the Florida Constitution does not contemplate non-leased (i.e., municipal-owned) properties being used for a **governmental-proprietary**[14] activity to be tax exempt nor does it permit municipal property leased to private entities for **governmental-proprietary** activities to be tax exempt. To interpret Article

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[13]See Chapter 71-133, Laws of Florida (commonly known as the "Tax Reform Act"). In Sebring IV, this Court noted that these changes were first given effect in the cases of Williams v. Jones, 326 So. 2d 425 (Fla. 1975), and Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1976). Sebring IV, at 245-248; See also Gainesville, at 605-607 (Ervin, J., dissenting).

[14]The governmental-proprietary test is not synonymous with a government-leasehold test. The first prong of the test conveys that a governmental entity owns the property; the second prong conveys the use in which the property is put (i.e., exercising an element of sovereignty or a commercial enterprise), not whether a lease or a fee is involved.

VII, Section 3(a) of the Florida Constitution, as the City argues and the First District majority held below, wrongfully transforms the narrow municipal exemption into an absolute immunity from ad valorem taxation of the City's for-profit telecom business. The City has not described a single example of non-leased municipal property that would be subject to ad valorem taxation.

The First District's majority opinion, with its overly-expansive interpretation of what is a "public purpose," taken to its logical end would extend ad valorem tax immunity to the City's operation of a hotel, golf course or pizzeria. This interpretation was specifically rejected by this Court in Sebring IV. Likewise, this Court should find that the City's commercial telecom property does not fall under the "governmental-governmental" exemption under Article VII, Section 3(a), Florida Statutes. Thus, Chapter 97-197, Laws of Florida, is not facially unconstitutional.

II. THE LEGISLATURE PROPERLY EXERCISED ITS AUTHORITY IN DEFINING A PUBLIC PURPOSE FOR AD VALOREM TAXATION PURPOSES

The Florida Legislature has correctly acted within its range of authority and carefully defined public purpose as it relates to the City's entry into the commercial telecom business. See Gainesville, at 601-604 (Ervin, J., dissenting). The City is engaging in a commercial activity that is in direct competition

with private companies. This activity partakes of no aspect of sovereignty and is therefore not a public purpose activity contemplated by Article VII, Section 3(a), of the Florida Constitution.

The Florida Legislature was very precise in its delineation of public purpose. Chapter 97-197, Laws of Florida, does not provide that the portion of the City's telecom system used for internal operational needs of the City or Alachua County (hereinafter "the County"), the provision of internal information services, such as tax records, engineering records, and property records, by the City or County to the public for a fee, or for certain specified airport or hospital uses, are subject to ad valorem taxation.[15]

Under the case law of this Court an analysis of the exemption provided for under Article VII, Section 3, Florida Constitution, involves three tests:

(1) Is the property owned by the City;

(2) Does the City use it exclusively for public purposes; and,

(3) Is the use actually a "public purpose" as defined by law?

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[15]The Act also provides that a telecom company owned by a municipality or entity of local government will be subject to paying sales tax, intangible tax, or fees to taxing jurisdictions in which it operates. See Chapter 97-197, Section 5, Laws of Florida.

See Sebring II, supra, and Sebring IV, supra.

The third test dealing with whether the use of the property is for a "public purpose" is precisely the issue before this Court. The language of Article VII, Section 3(a), Florida Constitution, does not contain a definition of what is a "public purpose." The Legislature has supplied such definitions through duly-enacted statutes. As stated in the First District Court of Appeal in the case of Page v. City of Fernandina Beach, 714 So. 2d 1070, 1072-73 (Fla. 1st DCA 1998) (hereinafter Page II):

> Generally, our supreme court has said "all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them." (citations omitted)
>
> ...
>
> Where municipal property is used by the municipality that owns it, however, the constitution has established a broad exemption, which the ***Legislature has implemented*** by providing that "[a]ll property of the several ... municipalities of this state ... used [by them] 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., (1995). (emphasis supplied)

The Legislature enacted Section 196.199, Florida Statutes, as a result of the Tax Reform Act of 1971.[16] Section 196.199,

[16]This Court has recognized that "[p]ursuant to the adopted changes which resulted in the 1968 Constitution, the 1971 Legislature enacted a "sweeping reform" of Chapters 192 and 196, Florida Statutes." Sebring IV, at 246.

Florida Statutes, reads in relevant part:

> (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..., which is used for governmental, municipal, or public purposes shall be exempt from ad valorem taxation, except as otherwise provided by law.
>
> (2) Property owned by the following governmental units but used by nongovernmental 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).

Section 1(c) applies to a situation where a municipality owns the property in question. Section 2(a) applies where a municipality owns property and leases it to a third party. In both situations, the property must be used for a "governmental, municipal, or public purpose or function."

While no definition or standards are included in either Section 1(c) or Section 2(a), the Legislature has defined these terms in Section 196.012(6), Florida Statutes.[17] The relevant

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[17]Section 196.012(6), Florida Statutes, states in pertinent part that “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,

portion of that statute reads as follows:

> **196.012. Definitions–** For the purpose of this **chapter**, the following terms are defined as follows, except where the context clearly indicates otherwise:
>
> (1) "Exempt use of property" or "use of property for exempt purposes" means predominant or exclusive use of property owned by an exempt entity for educational, literary, scientific, religious, charitable, or governmental purposes, as defined in this chapter.
>
> (2) "Exclusive use of property" means use of property solely for exempt purposes. Such purposes may include more than one class of exempt use.
>
> ...
>
> (6) . . . Providing two-way telecommunications services to the public for hire by the use of a telecommunications facility, as defined in s. 364.02(13), and for which a certificate is required under chapter 364 does **not** constitute an exempt use for purposes of s. 196.199, unless the telecommunications services are provided by the operator of a public-use airport, as defined in s. 332.004, for the operator's provision of telecommunications services for the airport or its tenants, concessionaires, or licensees, or unless the telecommunications services are provided by a public hospital. However, property that is being used to provide such telecommunications services on or before October 1, 1997, shall

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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 purpose which would otherwise be a valid subject for the allocation of public funds."

> remain exempt, but such exemption expires October 1, 2004. (emphasis supplied)

There is only one statutory definition of the term "governmental, municipal, or public purpose or function." See Section 196.012(6), Florida Statutes. The same definition must apply to both City property it owns and uses itself and to property the City leases. To do otherwise would be to adopt an interpretation that when a municipality owns property and uses it pursuant to any of its powers, there would be no limitation on its use as it relates to ad valorem taxation. The First District's majority opinion ignores Sebring IV (See argument I, pages 10-22) and therefore its analysis reaches a result which neither the Florida Constitution, this Court's case law nor the Legislature intend. As Judge Ervin noted in his dissenting opinion in Gainesville:

> "[a]s the court intimated in Williams, Article VII, Section 3(a) and Article VIII, Section 2 are simply parts of the total legal framework placed under the Finance and Taxation Article of the Florida Constitution, and are designed to narrow the occasions under which an exemption would be permitted."

Gainesville, at 606 (Ervin, J., dissenting).

The City's position of absolute exemption is tantamount to claiming that the City enjoys immunity from ad valorem taxation. This assertion by the City is contrary to this Court's holding in Canaveral Port Authority v. Department of Revenue, 690 So. 2d 1226

(Fla. 1996). In that case, this Court specifically held that only the state and its political subdivisions[18] enjoy immunity from taxation. Municipalities are not political subdivisions of the state and are therefore not immune from taxation. It is clear from the language of Article VII, Section 3(a), Florida Constitution, that some municipal property can be taxed as the exemption applies only to property used exclusively for municipal purposes.

The Legislature properly exercised its authority under the Constitution in defining a public purpose for ad valorem taxation purposes by not allowing municipalities an economic advantage over competing commercial telecom providers. The purpose of Chapter 97-197 is to ensure that municipalities engaged in a commercial enterprise (i.e., not a governmental-governmental function) share in the tax burden imposed by, among others, county governments, local government authorities, and local schools. Certainly this Court can take judicial notice of the weak financial situation of Florida local governments in providing an adequate level of governmental services (including waste management, land use planning and zoning, county sheriffs' offices, K-12 schools, and

[18]The political subdivisions are limited to counties, entities providing the public system of education, and the agencies, departments or branches of state government that perform the administration of state government. Canaveral Port Authority, at 1228 and footnotes 4-6.

Florida colleges and universities) in the current struggling economy in the face of constitutional constraints on taxation and compliance with new constitutional mandates.[19]

The Florida Legislature has properly and lawfully determined within its discretion and as allowed by this Court in Sebring IV that a municipality's operation of a commercial telecom business is not a public purpose except under certain conditions. Thus, the decision of First District's majority that Chapter 97-197, Laws of Florida is facially unconstitutional must be reversed.

CONCLUSION

The First District majority erred in declaring Sections 166.047 and 196.012(6), Florida Statutes unconstitutional by failing to apply the principles enunciated by this Court in Williams and Sebring IV. The City's commercial telecom operations partake no aspect of municipal sovereignty and therefore are taxable as a private commercial enterprise.

WHEREFORE, based upon the forgoing arguments and authorities, the Department respectfully requests that this Court reverse the decision of the First District and find Chapter 97-197, Laws of Florida, facially constitutional in its entirety.

Dated at Tallahassee, Florida, this 12th day of February,

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[19]See e.g., Fla. Const., Art. IX, Section 1(a) and Art. VII, Section 4.

2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to: Robert Pass, Esquire, and E. Kelly Bittick, Jr., Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 215 South Monroe Street, P.O. Drawer 190, Tallahassee, Florida 32302-0190; Raymond O. Manasco, Jr., Esquire, Gainesville Regional Utilities, Post Office Box 147117, Sta. A-138, Gainesville, Florida 32614-7117; Kenneth Hart, Esquire, and Jason Gonzalez, Esquire, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302; John

C. Dent, Jr., Esquire, and Sherri L. Johnson, Esquire, Dent & Associates, P.A., Post Office Box 3259, Sarasota, Florida 34230, this ___ day of February, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2), in that this Brief uses Courier New 12-point font.

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