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.	)	
_____	)	

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REPLY BRIEF OF APPELLANT FLORIDA DEPARTMENT OF REVENUE

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On Appeal From The District Court of Appeal,
First District of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA CONSTITUTION

FLORIDA STATUTES

LAWS OF FLORIDA

ARGUMENT

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

Municipal property used by the municipality to provide telecommunication ("telecom") services to the public under a certificate granted under Chapter 364 is not exempt from ad valorem taxation under Article VII, Section 3(a). The City's focus on the Act's declaration that a city is engaging in a municipal purpose "only" if it pays ad valorem tax, see Ans. Br. at 11, is simply a misreading of Chapter 97-197.

Chapter 97-197, Laws of Florida, (the "Act"), acknowledges that telecom services are a municipal purpose under Article VIII, Section 2(b). The Act specifies that the municipality pay ad valorem taxes as a requirement to obtain a certificate under Chapter 364. The City must obtain a certificate under Chapter 364 in order to provide telecom services. The Act is simply a mechanism for the City to legally engage in telecommunication services as a municipal purpose under Article VIII, Section 2(b).[1] The City's conclusion that any public purpose suffices

[1]The City acknowledges that Chapter 364, Florida Statutes, recognizes that telecom services provided by a municipality constitute "appropriate exercises of municipal power." See Ans. Br. at 15.

to establish an exemption from ad valorem tax under Article VII, Section 3(a) is contrary to this Court's interpretation of that section in Sebring Airport Authority v. McIntyre, 783 So. 2d 238 (Fla. 2001)(Sebring IV). The Act does not expand the limited exemption found in Article VII, Section 3(a) to include any "municipal purpose" as that term is used in Article VIII, Section 2(b).

The City argues that the provision of telecom services by itself, without considering the functional test for determining whether property is exempt from ad valorem tax set forth in Sebring IV, qualifies the City for exemption under Article VII because such an activity serves the "comfort, convenience, safety and happiness of citizens." The City cites no authority in its brief for this proposition. A public or governmental purpose as defined for the purposes of ad valorem tax is not the same as a municipal purpose under Article VIII, Section 2(b). Sebring IV; see also Sebring Airport Authority v, McIntyre, 718 So. 2d 296, 299 (Fla. 2nd DCA 1998) (Sebring III) (a governmental function has to do with the administration of some phase of government, that is exercising or dispensing some element of sovereignty).

This Court in Sebring IV 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. See also, Dep't of Revenue v. City of Gainesville, 859 So. 2d 595, 606 (1st DCA 2003) (Ervin, J., dissenting); Sebring III, at 298. The City's argument that any municipal purpose under Article VIII should qualify for the narrow and limited exemption under Article VII, Section 3(a) is contrary to this Court's express reasoning in Sebring IV.[2] As discussed in point II, the dicta relied upon by the City and the First District majority below in Page v. City of Fernandina Beach, 714 So. 2d 1070 (Fla. 1st DCA 1998), is not controlling and is contrary to Sebring IV.

II. THE GOVERNMENTAL-GOVERNMENTAL AND GOVERNMENTAL-PROPRIETARY TEST IS THE CORRECT STANDARD TO BE APPLIED IN THIS CASE.

The fact that the municipality itself uses the property in question is not, as the City states in reliance on Page, a key factor in determining whether municipal property is exempt under Article VII, Section 3(a). The dicta in Page does not harmonize

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[2]This Court has stated that "the draftsmen of the Constitution of 1968 limited the municipal purpose exemption to 'property owned by a municipality and used exclusively by it for municipal or public purposes.' Article VII, Section 3(a), Florida Constitution 1968." Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498, 502 (Fla. 1976). See Sebring IV, at 245-246 (same). The Sebring IV opinion contains similar references to the limited exemption of Article VII, Section 3(a) on pages 241, 244, and 249, n. 11. See also, Sebring III, at 298-299.

Article VII, Section 3(a) and Article VIII, Section 2(b). The proper legal standard to be applied in this case is the governmental-governmental/governmental-proprietary test as set forth by this Court in William v. Jones, 326 So. 2d 425 (Fla. 1975) and Sebring IV. The use itself is the paramount issue in this case; the status of the user of the property is not the determining factor.

Thus, it is not axiomatic that a municipality's use of its own property makes that property exempt from ad valorem taxation. The City's statement in its answer brief at page 18 that "municipal property only loses its exempt status when it is leased to or otherwise used by private parties for their own ends," as stated in Page at 1073-1074, is simply contrary to Williams and Sebring IV. A plain reading of Article VII, Section 3(a), as set forth in Judge Ervin's dissent in Gainesville and this Court's interpretation of Article VII, Section 3(a) in Sebring IV, focuses on the use of the property, not on the status of the user of the property.[3] The majority in

[3]In its answer brief at pages 20-23, the City dismisses this Court's holdings in Williams, Sebring IV, and Sebring Airport Authority v. McIntyre, 642 So. 2d 1072 (Fla. 1994) (Sebring II), as well as the holding in Sebring III, because these cases all deal with municipal property leased to private businesses for a profit, and, therefore, the property is subject to tax. In support of this proposition, the City once again relies on Page, arguing that Page makes it clear that where municipal property is not privately used, but is used by the municipality, the

Gainesville, and the City in its answer brief, rely on a broad reading of the Article VII, Section 3(a) exemption that finds no support in decisions of this Court.

As the dissent in Gainesville correctly states, there is nothing in Article VII, Section 3(a) that supports the majority's conclusion that "so long as the property is itself used by a municipality, the type of use made of it is immaterial to a determination of its tax-exempt status." Gainesville, at 603 (Ervin, J., dissenting). In support of its conclusion that the use of municipal property is immaterial to a determination of its tax-exempt status, the majority stated that:

> While the provision of telecommunications services may also partake of "no aspect of sovereignty," it is no less "a legitimate municipal corporate undertaking for the comfort, convenience, safety, and happiness of the municipality's citizens" than a marina. Indeed, if anything, it is more analogous to such services as electricity and water, long recognized as serving valid municipal and public purposes.

Gainesville, at 600 (emphasis supplied).[4] See also Gainesville,

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holdings of those cases do not apply.

[4]This rationale is contrary to the First District's earlier statement in Page, quoted by the Court in the Gainesville decision at 599-600, where the court stated "[b]ut 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." Page, at 1077. The Department submits that the First District's use of the dicta in Page to underpin the rationale for its holding in Gainesville highlights once again

at 599 ("The same policy considerations do not apply where the property is being owned and operated by the municipality itself, in which case the focus of the municipality is the provision of service to its citizens."). The majority's conclusion is wrong.

Article VII Section 3(a) contemplates that use, not ownership or the service provided by the municipality, determines whether municipal property is exempt from ad valorem tax. In order to qualify for an ad valorem exemption, the use of the property must first be established. Article VII, Section 3(a); Gainesville, at 603, (J. Ervin, dissenting). The majority's focus on the provision of the services by the City, and its citation to cases involving utilities cases that do not involve Article VII Section 3(a), is contrary to this Court's holdings in Williams and Sebring IV. As Chapter 97-197 correctly recognizes, the City's provision of telecommunication services using its own property does not make it exempt from ad valorem tax.[5]

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the internal inconsistency manifest in the Gainesville decision, clearly undermines the holding, and is contrary to the case law of this Court.

[5]After Sebring IV clarified the legislature's limited power to determine what uses constitute a public purpose, it is unlikely that the legislature could have instead conversely defined the internet and telecommunication services as a municipal use, because of the proprietary nature of such services and because traditionally such services do not partake of an aspect of sovereignty. In contrast, the provision of

After determining that the provision of telecommunication services by the City constitutes a valid "municipal purpose," the majority below cited as the "best evidence" the language defining a "telecommunications company" found in Section 364.02(13), Florida Statutes.[6] Gainesville, at 600. Section 364.02(13), which provides "that political subdivisions within the state may be issued certificates by the Public Service Commission to act as a telecommunications provider," Gainesville, at 600, is not the proper starting place for an analysis of whether the City's property is exempt from ad valorem taxation. The proper starting point is the governmental-governmental/governmental-proprietary standard as stated in Williams and Sebring IV.

The fact that the majority found that the City is a "telecommunications company" within the definition of Section

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electrical services has been recognized as a borderline function where the legislature is within its narrow range of discretion to either exempt or tax the municipality. See Gwin v. City of Jacksonville, 132 So. 2d 273 (Fla. 1961) By even stronger force of reasoning, the legislature clearly has authority to determine that the services in the instant case are taxable.

[6]Section 364.02(13) defines "telecommunications company" to include "every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility."

364.02(13), Florida Statutes, does not make the City's property exempt under Article VII, Section 3(a). Section 364.02(13), Florida Statutes, does not address in any way the fundamental issue in this case: whether the City's use of its property in providing such services is exempt as a municipal or public purpose under Article VII, Section 3(a). Municipal property exempt from ad valorem tax must be used by the municipality for a public or municipal purpose as understood and explained in Williams and Sebring IV. That is, it must be used for a governmental purpose, i.e., one that generally involves some element of sovereignty.

As legal support for the proposition that the City's provision of telecommunication services constitutes a valid "municipal purpose," the majority below relied on Ford v. Orlando Utilities Commission, 629 So. 2d 845 (Fla. 1994), Schultz v. Crystal River Three Participants, 686 So. 2d 1391 (Fla. 5th DCA 1997), and Orlando Utilities Commission v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1969). These decisions are distinguishable from the instant case and are inconsistent with this Court's longstanding application of the governmental-governmental/governmental-proprietary functional test that determines whether the use of property constitutes a public purpose for ad valorem tax purposes. Sebring IV; Williams,

supra.[7]

In Ford v. Orlando Utilities Commission, 629 So. 2d 845 (Fla. 1994), this Court held that the Indian River power plant operated by the Orlando Utilities Commission within the boundaries of Orange County and neighboring Brevard County was exempt from ad valorem taxation in Brevard County. The Legislature in 1961 granted the Orlando Utilities Commission the authority to construct the power plant and furnish electricity in a special act. See Chapter 61-2589, Laws of Florida, at pages 3101-3102. While this Court in Ford did affirm the Fifth District's holding[8] that the generation of electricity by the Orlando Utilities Commission constituted a "municipal purpose," this Court simply adopted the decision of the Fifth District that relied in large part on pre-1968 cases from other states. Ford, at 847. In addition, both this Court in Ford and the Fifth District in Northcutt did not apply the "governmental-governmental/governmental-proprietary" functional test of Williams, and the later case of Sebring IV had not been decided.[9]

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[7]The City does not dispute that it provides telecom services "acting in its proprietary capacity, not its governmental capacity." See Ans. Br. at 30.

[8]Northcutt v. Orlando Utilities Commission, 614 So. 2d 612 (Fla. 5th DCA 1993)

[9]The Fifth District observed that "Article VII, section 3 of the Florida Constitution provides that a municipality may be

In Schultz v. Crystal River Three Participants, 686 So. 2d 1391 (Fla. 5th DCA 1997), the Fifth District held that the 7.8533 percent ownership interest in a nuclear power plant collectively held by several cities was used for a "municipal purpose" and therefore the cities' interest was exempt from ad valorem taxation by Citrus County. The power plant, located on the Crystal River in Citrus County and not in any Florida municipality, was jointly owned by the cities, an electric cooperative and Florida Power Corporation, a private utility company, with over ninety per cent of the ownership interest held by Florida Power Corporation. Schultz, at 1391. Schultz relied in part on this Court's earlier decision in Ford, but, again, the Fifth District did not apply the functional test set forth in Sebring IV and Williams.

Instead, the Fifth District found authority for its holding in Chapter 361, Part II, Florida Statutes, the Joint Power Act, finding that the law provided a tax exemption for a "municipal or public interest" in power plants as well as for the revenue bonds used to finance the power plants. Schultz, at 1393-1394. In support of this reasoning, the Fifth District stated that "[i]t would be anomalous to hold bonds tax-free but the plant

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required by general law to make payment to the taxing unit in which the property is located." Northcutt, at 618-619.

itself taxable." Id. However, this approach was expressly rejected Sebring IV. "Bond validation cases such as Poe v. Hillsborough County, 695 So. 2d 672 (Fla. 1997), and State v. Osceola County, 752 So. 2d 530 (Fla. 1999), are not analogous to tax exemption cases, and the legal theories cannot be used interchangeably." Sebring IV, at 250.

Orlando Utilities Commission v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1969), is also distinguishable as it was decided under the 1885 Constitution. This Court in Sebring IV recognized the sweeping changes brought about under the Constitution of 1968 and the Legislative imprint upon those changes brought about by the enactment of the Tax Reform Act of 1971. Sebring IV, at 246.[10]

These three cases, which the City and the First District majority heavily rely on, do not hold that the functional test of Williams and Sebring IV would not be applicable under the facts of this case. Moreover, the natural monopoly of electricity generation, transmission and distribution is materially different from the highly-competitive commercial telecom industry at issue in this case. Thus, the utility

[10]Likewise, the decision in State v. City of Jacksonville, 50 So. 2d 532 (Fla. 1951), cited by both the trial court and the First District for the definition of the term "municipal purpose," is also inapplicable to the instant case as it predates the 1968 Constitution and the Tax Reform Act of 1971.

decisions are not controlling authority for this case.

Finally, it should be noted that Chapter 97-197, Laws of Florida, specifically referred to Article VIII, Section 2(b) of the Constitution, when it created Section 166.047, Florida Statutes. The Legislature did not mention Article VII, Section 3(a), Florida Constitution, in Chapter 97-197 because the Legislature knew that property used for telecommunication services was not exempt from ad valorem taxation under Article VII, Section 3(a), but was taxable under the governmental-proprietary standard as a commercial enterprise. Section 166.047, Florida Statutes, has determined that the proprietary provision of telecommunications services is not a municipal purpose unless certain conditions are satisfied.

The City's provision of telecommunication services is an activity that does not involve any aspect of sovereignty or administration of government and thus fails to meet the "governmental-governmental" standard for an ad valorem tax exemption under Article VII, Section 3(a). The City's reliance on the utility cases is clearly inappropriate. The proper test to be applied is the governmental-governmental/governmental-proprietary standard as stated by this Court in Williams and Sebring IV.

III. CHAPTER 97-197 IS A VALID EXERCISE OF LEGISLATIVE AUTHORITY.

The Legislature has the authority to interpret what it believes to be a "municipal or public purpose" activity under Article VII, Section 3(a), and has properly construed that section as not allowing municipalities an ad valorem tax 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. The constitutionality of Sections 166.047 and 196.012(6), Florida Statutes, must be determined in light of this Court's holding in Sebring IV.

Chapter 97-197 is a valid and constitutional enactment of the Florida Legislature. The Legislature is not attempting to "define away," as the City argues on page 39 of the answer brief, the "organic law" of Article VII, Section 3(a). Article VII, Section 3(a) provides for a tax exemption for municipal property that is exclusively used by the municipality for municipal purposes. The use of the municipal property exclusively for municipal purposes qualifies municipal property for exemption, not the ownership and use of the property under the broad definition of municipal or public purpose under Page.

The Act in no way violates Article VII, Section 3(a).

The Act does not violate Article VIII, Section 2(a), either. That subsection provides that municipalities "may exercise any power for municipal purposes except as otherwise provided by law." Section 166.047 simply states that "otherwise"--municipalities must pay ad valorem taxes on a municipally-operated telecommunications system. The power of municipalities may be constitutionally limited by the Legislature, and the limitation in Section 166.047 is consistent with the proper interpretation of Article VII, Section 3(a).

This Court has stated that Article VII, Section 3(a) is a limitation upon the establishment of ad valorem tax exemption for property owned by municipalities. Sebring IV, Volusia County, supra. The Act comports with this Court's view of the "organic law," and the dicta in Page relied upon by the City does not overcome this Court's reasoning in Sebring IV. The Legislature was well within its authority to recognize telecom services as a municipal purpose under Article VIII, Section 2(a) and to require the payment of ad valorem taxes as a condition of obtaining a certificate under Chapter 364, Florida Statutes.

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 are not an exercise of its governmental or sovereign powers and therefore are taxable as a private commercial enterprise.

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 May, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Reply 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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