

## SUMMARY OF ARGUMENT

Turner argues herein that the portion of 196.012(6) found unconstitutional by both the trial court and the Second District Court of Appeals is in fact unconstitutional for the reasons set forth in Appellee Raymond McIntyre's answer brief. Additionally, the statutory provision violates the constitutional requirement that the property not be used by a private entity; and ignores the fact that the test for governmental exemption is limited to ownership and use. Finally, Turner argues that the governmental-governmental versus governmental-proprietary distinction set forth by the court cannot be circumvented by statute.

## ARGUMENT

### **I. Adoption of McIntyre's Brief.**

Turner agrees with and adopts in whole the argument made in Appellee Raymond McIntyre's answer brief.

### **II. 196.012(6) violates Article VII, Sec 3(a) and Sec. 10 Florida Constitution because the statute directly conflicts with the requirement that property not be used by a private entity.**

Although not articulated by the trial court as a reason for finding a portion of 196.012(6) unconstitutional<sup>1</sup>, Turner believes that the same section is

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<sup>1</sup> The court may uphold the ruling of the trial court, even if under an alternate theory than used by the trial court. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979).

unconstitutional because it violates another provision of Article VII, Sec.

3(a): the requirement that the property be used by a governmental unit.

The offending portion of 196.012(6) reads,

*The 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.*

196.012(6) attempts to grant an exemption specifically when property is used by a non-governmental lessee, which is in direct contravention with the plain language of Article VII, Sec. 3(a) Florida Constitution, the drafter's intent and Article VII, Sec. 10, Florida Constitution. As such, the statute cannot pass constitutional muster.

**A. The plain language of the Florida Constitution prohibits an exemption when the property is not used by a governmental agency.**

Article VII, Sec 3(a), Florida Constitution states in relevant part,

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

A plain reading of Article VII, Section 3, Florida Constitution thus requires that property owned by a government entity must also be *used by it* for exempt purposes.

To permit an exemption when property is not being used by a governmental entity would violate the premises that every word of the state constitution should be given its intended meaning. State ex. Rel. Ellars v. Bd. of Cnty Commisioners of Orange Cnty, 3 So. 2d 360 (Fla. 1941). The phrasing is unambiguous and should be given its plain meaning: the property must be used by the government entity itself to entitle the property to an exemption.

**B. The drafter’s intent of Article VII, Section 3(a) clearly prohibits an exemption if the property is used by a private entity.**

When Article VII, Section 3(a) was revised as a part of the 1968 constitutional revision, the Commentary to the section, authored by Talbot D’Alemberte, evidenced the drafter’s intent. The commentary notes in part,

In order to qualify for the constitutional mandatory municipal exemption, property must (1) be owned by a municipality and (2) *be used exclusively by the municipality* for either municipal or public purposes and (3) be within the municipality.

Here, the property must be owned and *used exclusively by a municipality* for municipal or public purposes, in order to qualify for the exemption.

Art. VII, Sec. (3)(a) Fla. Const., Commentary (emphasis added). Thus, even if it could be argued the constitutional language is vague, the requirement of government use of the property is made clear by the Commentary.

**C. Article VII, Section 10 also does not permit exemption where private occupancy exists.**

Additionally, Article VII, Sec. 3(a), which must be read *in pari materia* with Article VII, Sec. 10 Florida Constitution also mandates taxation when a public project, financed with government bonds, is occupied by a private entity. Article VII, Sec. 10 reads in relevant part,

If any project, so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

Because the Property Appraiser assesses property in fee simple<sup>2</sup>, which includes the “property interest” noted in Article VII, Sec. 10, that section also supports the Article VII, Sec. 3(a) mandate to assess government property when not used by the government.

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<sup>2</sup> Department of Revenue v. Morganswood Greentree, Inc., 341 So. 2d 756 (Fla. 1976).

**IV. 196.012(6) violates Article VII, Sec. 3(a) Florida Constitution  
because it attempts to grant an exemption not based upon use, but  
upon user and property type.**

196.012(6) also violates Article VII, Sec. 3(a) because it attempts to grant an exemption on the basis of the party using the property and the property type, as opposed to the constitutional requirements of ownership and use. The language of the statute describes the criteria for exemption in terms of *who* is using the property (“lessee, license, or management company”) and the *type of property* being used (convention center, visitor center, sports facility with permanent seating, concert hall, arena, stadium, park or beach”). Both criteria, user and property type, fail to identify a type of *activity* claimed to be a public use. As such, that portion of 196.012(6) violates Article VII, Sec. 3(a) in that it fails to follow the mandated criteria (ownership and use) of the constitution.

When the constitution proscribes a method of achieving something, the means is exclusive. Overstreet v. Andrews, 113 So. 2d 701 (Fla. 1959).

**V. 196.012(6) cannot alter a prior court decision interpreting the Florida Constitution.**

The governmental exemption set forth in Article VII, Sec. 3(a) is, unlike other ad valorem exemptions, a *mandatory* exemption.<sup>3</sup> It requires no enabling legislation to activate the provision and does not seek to apply the exemption via general law. The recent rejection of proposed Revision 10 to the Florida Constitution, which would have permitted the legislature to determine a “public purpose” further establishes the will of the people of this state.<sup>4</sup>

Because Article VII, Sec. 3(a) does not contemplate or require legislative action, it should not be the legislative attempt at gutting the intention of the constitution that is given deference. This court, as is its duty, has defined the constitutional phrase “municipal or public purpose” according to the organic law, and the common meaning of the terms.<sup>5</sup>

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<sup>3</sup> Contrary to the situation analyzed in Jasper v. Mease Manor, Inc., 208 So. 2d 821 (Fla. 1968), the statute at hand is not necessary to give effect to Article VII, Sec. 3(a). In Jasper, the exemption was not effective until given life by legislative act.

<sup>4</sup> The relevant portion of Proposed Revision 10 read as follows: “Section 3 (a) All property owned by a municipality and used for governmental or municipal purposes shall be exempt from taxation. All property owned by a municipality not otherwise exempt from taxation or by a special district and used for airport, seaport, or public purposes, as defined by general law, and uses that are incidental thereto, may be exempted from taxation as provided by general law.”

<sup>5</sup> Parenthetically, Turner would like to point out that appellant’s and their amici’s argument that the court cannot define such terms as set forth in the Florida Constitution sows the seeds of their own destruction. The only reason Sebring Airport Authority, a special district, gets to the table in this case is

“Moreover, it is axiomatic that a state statute cannot constitutionally alter a prior court decision interpreting the state constitution.” Sarmiento v. State, 371 So. 2d 1047, 1051 (Fla. 3d DCA 1979).

This court has already discussed the rationale behind the 1968 constitutional revision that put Article VII, Sec. 3(a) into effect. In Volusia County v. Daytona Beach Racing and Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1976), this court noted,

The phrase ‘municipal ...purposes’ was broadly interpreted to include any ‘public’ purpose; under the Constitution of 1885, this Court decided that simply holding a proprietary interest in ‘a community recreational asset and business stimulant’ like the speedway served a ‘municipal purpose.’ Perceiving decisions of this kind as creating inequities in the tax structure, the draftsmen of the Constitution of 1968 limited the municipal purpose exemption.... .”

Id at 501, citations omitted. The offending portion of 196.012(6) effectively obviates the intention of the 1968 Constitution and brings us back to 1885.

The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfil the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make

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via the grace of this court’s decision in Holbein v. Hall, 189 So. 2d 797 (Fla. 1966) wherein this court determined that the term “municipality” as used in the constitution’s tax exemption section encompassed all non-immune governmental entities, such as an authority. Without this court’s interpretation of “municipality”, appellant would not be entitled to an exemption under any circumstances.

it possible for the will of the people to be frustrated or denied.

Gray v. Bryant, 125 So. 2d 846, 862 (Fla. 1960).

To give validity to the portion of 196.012(6) at issue will surely deny the will of the people of Florida.

### CONCLUSION

The court should affirm the decision of the trial court and the Second District Court of Appeals and find that the portion of Fla. Stat. 196.012(6) under review is unconstitutional.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to Paul R. Pizzo, Esquire, Hala A. Sandridge, Esquire, and Charles Tyler Cone, Esquire, Post Office Box 1438, Tampa, FL 33601; Clifford M. Ables, III, Esquire, 457 South Commerce Avenue, Sebring, FL 33870; Joseph C. Mellichamp III, Esquire, State Attorney General, Department of Legal Affairs, The capitol, Tallahassee, FL 32399-1050; Larry E. Levy, Esquire, Post Office Box 10583, Tallahassee, FL 32302; J. Wendall Whitehouse, Esquire, 445 South Commerce Avenue, Sebring, FL 33870 and Mark C. Extein, 111 North Orange Avenue, Suite 1800, Orlando, FL 32802-2193 this \_\_\_\_ day of January, 1999.

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