DEPARTMENT OF REVENUE v. CITY OF GAINESVILLE: THE FLORIDA SUPREME COURT ATTEMPTS TO DEFINE THE SCOPE OF MUNICIPAL EXEMPTION FROM AD VALOREM TAXATION

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I. INTRODUCTION

In *Florida Department of Revenue v. City of Gainesville*,[1] the Florida Supreme Court addressed the scope of Article VII, Section 3(a), of the Florida Constitution, which exempts from ad valorem taxation municipal property used exclusively by the municipality "for municipal or public purposes." The Court held that municipal property is constitutionally exempt only where it is used to provide services "essential" to the health, morals, safety, or general welfare of the citizens of the municipality.[2] Applying this gloss to the "municipal purpose" language of the constitutional exemption, the Court concluded that a statute purporting to subject to taxation municipal property owned and used by the City of Gainesville to provide telecommunications services was not facially unconstitutional.[3] The Court, however, did not decide whether the statute would be unconstitutional *as applied* to Gainesville's telecommunications property.[4]

In its struggle to craft an appropriate test for the scope of the exemption under Article VII, the *Gainesville* Court arguably departed from the very principles of constitutional interpretation it

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1. 918 So. 2d 250 (Fla. 2005).
2. *Id*. at 264.
3. *Id*. at 266.
4. *Id*.

expressly embraced.[5] Even so, a careful reading of the opinion reveals that it does not impose a narrow limitation on the scope of the exemption, and lower courts would be mistaken to read it as doing so.

II. FACTS AND PROCEDURAL HISTORY

In 1995, the Florida Legislature authorized governmental entities, including municipalities, to sell two-way telecommunications services to the public.[6] That same year, the City of Gainesville conducted a planning study which concluded that "[n]o substantial communications services competition appears to be emerging in Gainesville" and that "[i]f the citizens of Gainesville are to be provided with all of the benefits which will be possible through the National Information Superhighway at a reasonable price, a major independent investor will need to assume a role in shaping the communications environment."[7] Accordingly, the City obtained two certificates of authority from the Public Service Commission,[8] invested millions of dollars in developing and expanding the necessary infrastructure, and began providing services under these certificates.[9]

In 1997, the Legislature enacted a law providing that municipalities may hold a certificate under Chapter 364[10] only if they pay ad valorem taxes on municipal property used to provide two-way telecommunications services to the public:

> A telecommunications company that is a municipality or other entity of local government may obtain or hold a certificate required by [C]hapter 364, and the obtaining or holding of said certificate serves a municipal or public purpose under

5. *See infra* pt. IV(A) (explaining that the Court has interpreted a phrase in two different ways without a basis in the text or history of the provisions using the phrase).

6. *See* Fla. Stat. § 364.02(12) (1995) (establishing that "every political subdivision in the state . . . offering two-way telecommunications service to the public" constitutes a "telecommunications company").

7. *City of Gainesville*, 918 So. 2d at 255.

8. *See* Fla. Stat. § 364.335 (2006) (setting forth the requirements for obtaining a certificate of authority for telecommunications companies).

9. *City of Gainesville*, 918 So. 2d at 254–255.

10. Chapter 364 of the Florida Statutes governs the regulation of telecommunications companies in Florida.

> 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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> * * *
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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 [C]hapter 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.[11]

Although the statute ostensibly addressed the conditions under which a municipality was authorized to provide telecommunications services to the public (rather than directly imposing a tax), the all-too-clear "purpose and effect" of this legislation was to "make property owned and used by a municipality for a telecommunications business subject to ad valorem property taxation."[12]

Under Article VII, Section 3(a), of the Florida Constitution, "[a]ll property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation."[13] The City of Gainesville brought a declaratory judgment action against the Department of Revenue to determine whether the provisions of the legislation facially violated Article VII, Section 3(a).[14] The circuit court declared the statute facially unconstitutional and granted the City's motion for summary judgment.[15] The First District Court of Appeal affirmed, holding that because telecommunications services constitute a municipal purpose under "any reasonable interpretation of the term," property used to provide such services is constitutionally exempt.[16]

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11. Fla. Stat. § 166.047 (1997) (emphasis added).
12. *City of Gainesville*, 918 So. 2d at 254.
13. Fla. Const. art. VII, § 3(a).
14. *City of Gainesville*, 918 So. 2d at 255.
15. *Id.*
16. *Dept. of Revenue v. City of Gainesville*, 859 So. 2d 595, 600 (Fla. 1st Dist. App. 2003), *rev'd* 918 So. 2d 250.

III. THE DECISION OF THE FLORIDA SUPREME COURT

The Supreme Court reversed the First District and held that the statute was not facially unconstitutional.[17] The Court did not determine whether the statute was unconstitutional as applied to the City's telecommunications property and instead remanded for further proceedings.[18] The Court supported its conclusion by holding that "municipal or public purposes" under Article VII, Section 3(a), must include only functions that are "essential" to the health, safety, or general welfare of the citizens of a municipality.[19] Telecommunications services, the Court concluded, might not in *all* cases be "essential," and therefore the challenged statute was not *facially* unconstitutional.[20]

A. Applicable Principles of Construction

In its analysis, the Court initially emphasized that in interpreting a constitutional provision, it was required to follow the same principles applicable to statutory interpretation.[21] Those principles require that the Court begin with the explicit language of the statute,[22] and that the Court limit itself to interpreting any provision of the statute as consistent with the intent of the framers and the will of the people.[23] Multiple constitutional provisions dealing with a similar subject should be read *in pari materia* to give a logical and consistent meaning to their language.[24] The Court also held that the rule requiring courts to strictly construe statutes granting tax exemptions had no application to exemptions claimed by municipalities under the Constitution.[25] Finally, the Court held that the framers should be presumed to have adopted prior judicial constructions of a constitutional provision unless a contrary intent was stated.[26]

17. *City of Gainesville*, 918 So. 2d at 266.
18. *Id*.
19. *Id*. at 264.
20. *Id*. at 264–265.
21. *Id*. at 256.
22. *Id*.
23. *Id*.
24. *Id*. The term *in pari materia* means "on the same subject" or "relating to the same matter." *Black's Law Dictionary* 794 (7th ed., West 1999).
25. *Id*. (citing *State ex rel. Green v. City of Pensacola*, 126 So. 2d 566, 569 (Fla. 1961)).
26. *Id*. at 264.

B. Case Law under the 1885 Constitution

To discern the intent of Article VII, Section 3(a), the Court reviewed the history leading to its adoption in the 1968 Constitution. As the Court explained, prior to the 1968 revisions, all corporately owned property, whether owned by municipalities or private entities, was exempt from taxation where it was "*held and used exclusively for* religious, scientific, *municipal*, educational, literary, or charitable *purposes*."[27] Case law under the 1885 Constitution had held that this provision was not self-executing and thus required action by the Legislature to grant an exemption.[28] In cases decided under this prior provision, the Court had deferred to legislatively granted exemptions and read the term "municipal purpose" very broadly.[29]

In *State ex rel. Harper v. McDavid*,[30] for example, the Court held that low-rent housing owned by the city's housing authority and used as part of a slum-clearing project was tax exempt, deferring to the Legislature's declaration that such projects served a municipal purpose.[31] In reaching this conclusion, the *McDavid* Court expressly rejected the argument that the project did not serve a valid municipal purpose simply because it competed with private enterprise.[32]

In addition to the Legislature's declaration on this point, the Court pointed out that the scope of "municipal purposes" was much broader than it had been in the past. The Court noted that "[t]he time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental but that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection, and welfare of the municipality."[33] With respect to the project in question, the Court noted that the housing projects were not held for a profit, were restricted in use to low-

27. *Id*. at 257 (emphasis supplied in opinion) (quoting Fla. Const. art. XIV, § 16 (1885)).
28. *Id*. at 258 (citing *Jasper v. Mease Manor, Inc.*, 208 So. 2d 821, 825 (Fla. 1968)).
29. *Id*. (citing *State ex rel. Harper v. McDavid*, 200 So. 100, 102 (Fla. 1941)).
30. 200 So. 100 (Fla. 1941).
31. *Id*. at 101–102.
32. *Id*. at 102.
33. *Id*.

income groups, and "contribute[d] materially to the health, morals, safety[,] and general welfare of the people."[34]

The *Gainesville* Court also pointed to *Saunders v. City of Jacksonville*.[35] *Saunders* had addressed a legislatively granted tax exemption for property that was owned by the city's public utility, but located and used in a different county.[36] *Saunders* rejected the argument that the municipal utility's property was taxable simply because the municipal utility might compete with private companies whose property was subject to taxation.[37] The *Saunders* Court held that it was a "controlling factor" that the governmental owner of the property "has no stockholders, or partners, and any income must necessarily accrue to the general public."[38]

C. 1968 Constitutional Revisions

The 1968 revisions to the Florida Constitution that created Article VII, Section 3(a), exempted from taxation all property owned by a municipality and used exclusively by it for municipal or public purposes. These revisions were self-executing and no longer required legislative action.[39] In addition, unlike the exemption available under the 1885 Constitution, this exemption did not apply to all property used for a municipal purpose, regardless of who owned or used the property. Instead, the exemption was limited to property (1) owned by a municipality *and* (2) used exclusively *by the municipality* for a municipal or public purpose.[40]

This second limitation was a response to decisions under the 1885 Constitution approving tax exemptions for property leased by municipalities to private corporations that used the property to generate a profit.[41] In a series of cases interpreting the 1968 revisions, the Court held that municipal property leased to and used by private corporations could only be exempt when used for a *gov-*

34. *Id.*
35. 25 So. 2d 648 (Fla. 1946).
36. *Id.* at 649.
37. *Id.* at 650.
38. *Id.* at 651.
39. *City of Gainesville*, 918 So. 2d at 259.
40. *Id.* at 259–260.
41. *Id.* at 260.

ernmental purpose.[42] In practice, this rule meant that such property would *never* be exempt. Accordingly, property leased to private entities and used for such purposes as convention and visitor centers, sports facilities, concert halls, stadiums, residential uses, and the selling of food and beverages was deemed taxable.[43]

Significantly, the *Gainesville* Court's review of the history of the 1968 revisions led the Court to conclude, contrary to the Department of Revenue's argument, that the restrictive test applied in the leasehold cases was never intended to apply to property owned and used by a municipality, as opposed to property leased to a private entity.[44]

Having dispensed with the Department of Revenue's overly narrow position, the Court turned first to whether the exemption for property used by a municipality for municipal or public purposes under Article VII, Section 3(a), of the 1968 Constitution was as broad as that accorded to property used for "municipal purposes" under the 1885 Constitution and such decisions as *McDavid* and *Saunders*. Second, the Court addressed where the boundaries of the exemption lay.[45]

The Court answered the first question in the affirmative.[46] The Court found no basis to conclude that the framers of Article VII of the 1968 Constitution intended "municipal or public purposes" to be any narrower in meaning than the same terminology used in the 1885 Constitution and case law decided under it.[47] Had the framers intended a different meaning, the Court surmised, they could have specifically defined the term or used different terminology altogether.[48]

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42. *Id.* (emphasis added) (citing, *inter alia*, Bonnie Roberts, *Ad Valorem Taxation of Leasehold Interests in Governmentally Owned Property*, 6 Fla. St. U. L. Rev. 1085, 1091–1092, 1097 (1978)). This stringent test, applied to municipal property leased to private interests, became known as the "governmental-governmental" classification test. *Id.* at 1097. When applied to municipal services, "governmental" refers to the "administration of some phase of government," in contrast to "proprietary" services, which "promote the comfort, convenience, safety and happiness of citizens," but involve no exercise of sovereignty. *Page v. Fernandina Beach*, 714 So. 2d 1070, 1074 (Fla. 1st Dist. App. 1998).

43. *City of Gainesville*, 918 So. 2d at 260.

44. *Id.* at 261.

45. *Id.* at 261–262.

46. *Id.* at 263.

47. *Id.*

48. *Id.* at 263–264.

In determining the breadth of the exemption, however, the Court rejected the City's position that the term "municipal or public purposes," as used in Article VII, Section 3(a), was equivalent to the term "municipal purposes" as used in Article VIII, Section 2(b), which describes the extent of municipal power in general.[49] Under Article VIII, courts had afforded a very broad sweep for the concept of "municipal purposes," recognizing such activities as the operation of day care centers and radio stations as constituting valid municipal purposes.[50] The Court offered two reasons supporting its conclusion that the scope of municipal or public purposes under Article VII, Section 3(a), was not the same as the scope of municipal purposes under Article VIII, Section 2(b). First, the language in some of the decisions interpreting Article VIII had been "imprecise" in that the language appeared to recognize a municipal activity as furthering a valid "municipal purpose" as long as it was merely "related to"—as opposed to "essential to"—the health, safety, or general welfare of the municipality.[51] *McDavid* and *Saunders*, the Court noted, had defined "municipal purposes" under the exemption in the 1885 Constitution as those "essential" to the health, safety, and general welfare.[52]

Second, the Court found precedent construing Article VIII, Section 2(b), was of limited use in construing the tax exemption provided by Article VII, Section 3(a), because the two provisions served "different functions."[53] The Court, however, did not explain precisely how the differences should affect the interpretation of virtually identical language in the two provisions. Nor did the Court address why, if the framers intended something different, they would have used the same terminology—"municipal purposes"—in both provisions.

Having held that the exemption applies where the property is used to perform functions or provide services that are "essential" to the health, safety, and welfare of the municipality, the Court further held that the term "essential" referred to something "basic, necessary, or indispensable."[54] The *Gainesville* court con-

49. *Id*. at 262.
50. *Id*.
51. *Id*. at 262–263.
52. *Id*. at 264 (citing *McDavid*, 200 So. at 101 and *Saunders*, 25 So. 2d at 650).
53. *Id*. at 263.
54. *Id*. at 264.

cluded that this "thread of necessity" ran through case law interpreting the scope of municipal purposes for tax-exemption purposes.[55]

D. Telecommunications Services as a "Municipal Purpose"

Applying this definition to the facial challenge before it, the Court emphasized that a facial challenge required the challenger to show that the statute is unconstitutional in every conceivable application.[56] Specifically, this meant that the City bore the burden of demonstrating that telecommunications services *always* constitute a valid municipal or public purpose under the Court's test; in other words, such services are *always* "essential" to the health, safety, and general welfare.[57] The Court found that the City had not met this burden.[58]

The Court pointed out that the legislation authorizing various entities, including municipalities, to engage in the telecommunications business did so to "provide customers with freedom of choice, encourage the introduction of new telecommunications service[s], encourage technological innovation, and encourage investment in telecommunications infrastructure."[59] The Court stated that municipalities *might* enter the telecommunications market "regardless of whether their participation furthers *any* of these goals."[60] Under such hypothetical circumstances, a municipality would not be providing services "essential to the health, morals, safety, and general welfare of the people within the municipality."[61] Accordingly, it could not be said that telecommunication services would "always" serve a municipal or public purpose.

E. Justice Anstead's Dissent

Justice Anstead dissented, criticizing the majority's focus on the word "essential" as overly narrow, arbitrary, and unsupported

55. *Id*.
56. *Id*. at 265 (citing *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977)).
57. *Id*.
58. *Id*. at 265–266.
59. *Id*. at 265 (quoting Fla. Stat. § 364.01(3) (2004)).
60. *Id*.
61. *Id*.

by case law.[62] Although the *McDavid* Court had used the term "essential," it had done so in the course of affording a very broad view of the term, and an expanded scope as to what might constitute a tax-exempt municipal purpose.[63] Justice Anstead also pointed out that the majority's decision ran contrary to the broad home-rule powers afforded to municipalities, leaving municipalities in doubt as to whether traditionally tax-exempt locations such as parks, pools, and zoos would remain exempt.[64] Finally, with respect to the specific statute under challenge, Justice Anstead believed the City qualified for the exemption even under the majority's test for "municipal purpose." "It cannot be denied," Justice Anstead argued, that telecommunications services are "essential" in light of the ongoing revolution in technology and communications systems.[65] Accordingly, the majority's opinion, in his view, dealt "a substantial blow to local government in Florida, placing in doubt the constitutional tax-exempt status of all municipal property whose public use does not fit the majority's new and restrictive definition of municipal purpose."[66]

IV. ANALYSIS OF THE COURT'S DECISION

The Court's adoption of the "essential" services test for tax-exemption cases under Article VII, Section 3(a), and its holding that the exemption is narrower to some degree than the scope of municipal powers under Article VIII, Section 2(b), are not well grounded in the text of the Constitution or prior case law, nor does the Court explain precisely how much narrower the exemption is. Nevertheless, the Court's opinion should not be read as suggesting a narrow scope for the constitutional exemption.

A. Basis for the "Essential Services" Test

The Court gave two reasons for its conclusions regarding the scope of "municipal purposes." First, the Court held that cases

62. *Id.* at 266.

63. *Id.* at 270 (citing *McDavid*, 200 So. at 102); *see supra* nn. 30–35 and accompanying text (discussing the Court's historically broad interpretation of the term "municipal purposes").

64. *Id.* at 266, 270.

65. *Id.* at 271.

66. *Id.* at 273.

deciding the scope of municipal purposes under Article VIII were "imprecise" because they contained language suggesting that valid municipal activities could merely be related to the health, safety, or general welfare, rather than "essential to" those ends, as required by language in such cases as *McDavid*.[67] This distinction appears to depend on the unstated premise that the *McDavid* Court, by using the term "essential" in the tax context, intended something more "precise" and, in fact, narrower, than "municipal purpose" as used in cases involving the extent of municipal powers generally.

As suggested by Justice Anstead's dissent, however, nothing in *McDavid* suggests such a distinction or implies that the Court used the word "essential" to narrow the scope of "municipal purpose." In fact, the *McDavid* Court expressly contemplated a "very much expanded" scope for municipal purposes.[68] Further, when describing the specific property and services at issue, the Court stated that they "contribute materially" to the health, safety, and general welfare and that they "aid materially" in furthering valid municipal goals.[69] This statement appears to contemplate something less than "essential." In addition, the *McDavid* Court cited for the "essential" services language two cases involving the extent of municipal powers generally, rather than taxation.[70]

Thus, the very cases relied upon by the Court contain the same "imprecision" as do cases deciding the scope of municipal powers generally. Furthermore, as the Court itself noted, case law addressing the scope of municipal powers under Article VIII cited pre-1968 decisions using the same definition of municipal purposes as used in the tax cases *McDavid* and *Saunders*.[71] Simply put, neither the case law under the 1885 Constitution nor the case law under the 1968 Constitution has recognized two different definitions for the term "municipal purposes."[72] The Court cer-

67. *Id.* at 262.

68. *Id.* at 270.

69. *McDavid*, 200 So. at 102.

70. *Id.* (citing *City of Fernandina v. State*, 197 So. 454 (Fla. 1940) and *State v. City of Tallahassee*, 195 So. 402 (Fla. 1940)).

71. *City of Gainesville*, 918 So. 2d at 262 (citing *e.g. State v. City of Jacksonville*, 50 So. 2d 532, 535 (Fla. 1951)).

72. *See generally City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983) (relying on *State v. City of Jacksonville*, 50 So. 2d 532, which in turn used the same definition of "municipal purposes" employed by *McDavid* and *Saunders*). *City of Boca Raton* also refers to

tainly offered no reason to think that the drafters of the 1968 Constitution intended any such distinction. To the contrary, under the Court's own rule of construction, the framers are presumed to have had in mind this very case law, which drew no distinction between the meaning of "municipal purposes" in the tax context and otherwise.[73]

The Court's second reason for holding that the scope of "municipal purposes" under Article VII was to some degree narrower than the scope of municipal powers under Article VIII was that the two provisions were intended to serve "different functions."[74] As noted above, however, the Court offered no explanation whatsoever as to how the different functions should impact the interpretation of the *identical* language in the two constitutional provisions. In fact, given the different functions of the provisions, it is all the more striking that the framers used the very same terminology. Considering the pre-1968 case law, there is no reason to think that the framers did not intend the same definition in both constitutional provisions.[75] To paraphrase the Court's observation in another context, had the drafters intended the term used in Article VII, Section 3(a), to be narrower than the same term as used in Article VIII, Section 2(b), "they could have specifically defined 'municipal or public purposes' or used different terms altogether."[76]

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the municipal activity in question as "rationally related to the health, morals, protection[,] and welfare" of the municipality. *City of Boca Raton*, 440 So. 2d at 1281. Additionally, *City of Boca Raton* quotes *City of Jacksonville* as stating that those purposes "comprehend all activities essential" to those interests. *Id*. at 1280 (quoting *City of Jacksonville*, 50 So. 2d at 535).

73. *City of Gainesville*, 918 So. 2d at 264.

74. *Id*. at 263.

75. *See Goldstein v. Acme Concrete Corp.*, 103 So. 2d 202, 204 (Fla. 1958) (assuming that the Legislature intended certain exact words and phrases in two different statutes, both of which dealt with mechanics' liens, to mean the same thing).

76. *City of Gainesville*, 918 So. 2d at 263–264. At oral argument, several Justices asked whether construing the constitutional exemption as coextensive with municipal powers under Article VII would render the reference to "municipal or public purposes" in Article VII, Section 3(a), meaningless or superfluous. It does not do so. Instead, the language in Article VII 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. Additionally, when read together with the requirement that the property be used "exclusively by" the municipality for municipal or public purposes, this language ensures that municipal property leased to and used by private businesses for proprietary, for-profit (as opposed to governmental) activities is subject to taxation. *Id*. at 259–260.

In short, then, the Court appears to have departed from the very principles of constitutional interpretation it professed to apply—without any basis in the text or history of the provisions—by holding 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. At oral argument, it appeared that some Justices were uncomfortable with the notion that the municipal purposes required for tax exemption provided in Article VII should be as broad as the scope of municipal purposes in Article VIII. The Justices feared that a municipality, using tax-exempt municipal property, might open a restaurant, a grocery store, or a motel. Rather than straining to craft a test for "municipal or public purpose" that appears at odds with the text of the Constitution, the Court should simply have recognized that its concern could be addressed by the Legislature's plenary authority under Article VIII to forbid municipalities from engaging in any particular activity.[77]

B. The Scope of Municipal Purposes under *City of Gainesville*

Having drawn the distinction between "municipal purposes" under Articles VII and VIII, the Court's opinion does not explain *how much* narrower the Article VII definition is. Contrary to the pessimistic dissent by Justice Anstead, however, the Court's opinion offers no reason to conclude that the distinction is very sharp. To see why this is so, it is important to examine what the opinion does and does *not* hold.

First, as noted above, the Court rejected the notion that municipal property is tax exempt only when used to provide services that are "governmental" in nature—such as fire control and police services.[78] Instead, the Court's opinion permits exemptions for "proprietary" activities to be carried on without fear of ad valorem taxation. By definition, such activities are the same sort of corporate activities in which private business may engage, activities "for the comfort, convenience, safety, and happiness of the municipality's citizens."[79]

77. Fla. Const. art. VIII, § 2(b) (stating that municipalities may exercise power for municipal purposes "except as otherwise provided by law").

78. *City of Gainesville*, 918 So. 2d at 262–263.

79. *Page*, 714 So. 2d at 1076.

Second, as the Court itself emphasized, its opinion may not be read as a "narrowing" of the concept of municipal purposes from that in effect prior to the 1968 Constitution. The Court expressly held that nothing in the 1968 Constitution suggests that a narrower scope should be afforded to the meaning of municipal or public purposes than that given to it under the 1885 Constitution and in such cases as *McDavid* and *Saunders*.[80] As Justice Anstead pointed out in his dissent, those cases advocated a "very much expanded" definition of municipal purpose.[81] Significantly, the majority expressly stated that it agreed with Justice Anstead as to the parameters of the exemption but simply disagreed as to its application to the telecommunications property under the facial challenge before the Court.[82]

Third, as the Court's opinion makes clear, while competition from private industry in the same service area may be relevant to a determination of whether municipal services are "essential," such competition is not the touchstone of whether a property is tax exempt. The Court specifically noted that under *McDavid* and *Saunders*, a municipal purpose may be served even though the activity competes with the private sector, as long as it is "essential to the welfare of the municipality."[83]

Fourth, the Court's opinion does not hold that generating a "profit" for a municipality, in the sense of revenue over and above expenses, renders the property producing that revenue subject to ad valorem taxation, as long as the services provided are "essential" to the health, safety, or general welfare.[84]

Fifth, the Court suggested that the exemption would apply to any services traditionally provided by municipalities, such as electric utility services, parks, or other recreational opportunities,

80. *City of Gainesville*, 918 So. 2d at 263.

81. *Id.* at 270.

82. *Id.* at 265.

83. *Id.* at 259.

84. *See Saunders*, 25 So. 2d at 651 (finding it controlling "that the owner of the property [the municipality] has no stockholders, or partners, and any income must necessarily accrue to the general public"); *Jetton v. Jacksonville Electric Auth.*, 399 So. 2d 396, 397 (Fla. 1st Dist. App. 1981) (noting that municipalities are not created, and do not operate, for individual financial gain; rather, profit from proprietary operations stays in the public treasury, from which claims for injuries are paid); *Islamorada, Village of Islands v. Higgs*, 882 So. 2d 1009, 1011 (Fla. 3d Dist. App. 2003), *rev. denied*, 944 So. 2d 987 (Fla. 2006) (finding that despite the fact that the municipality earned a profit from operating a marina, the property was exempt from ad valorem taxation).

apparently without regard to whether they would otherwise meet the "essential services" test.[85]

Finally, the Court did not reach any conclusion as to whether the telecommunications services offered by the City were "essential," whether the City of Gainesville could obtain summary judgment on remand with respect to an as-applied challenge, or even whether telecommunications services in general will usually pass the test announced by the Court.[86]

In fact, the Court's opinion itself signals that in an as-applied challenge, the City's telecommunications services probably would pass the Court's test. The majority opinion took pains to set out specific findings by the City in its 1995 planning study concerning the need for municipal provision of such services in order to allow the citizens of Gainesville to benefit from the telecommunications revolution,[87] even though these facts were not relevant to the facial constitutional challenge before the Court.

The Court's example of an operation that would *not* satisfy the test is also instructive. The Court pointed out that the legislation authorizing various entities, including municipalities, to engage in the telecommunications business did so to "provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure."[88] The Court stated that a municipality may enter the telecommunications market "regardless of whether [its] participation furthers *any* of these goals."[89] Under those circumstances, however, a municipality would not be providing services "essential" to the health, morals, safety, and general welfare of the people within the municipality.[90]

85. *City of Gainesville*, 918 So. 2d at 265.

86. The First District, following the Supreme Court's decision in *City of Gainesville*, recently held that municipal property containing the City's fiber-optic network and internet service provider equipment was not tax exempt as a matter of law. *City of Gainesville v. Crapo*, 2007 WL 437219 at *5 (Fla. 1st Dist. App. Feb. 12, 2007). Accordingly, the First District reversed the trial court's grant of summary judgment and remanded for further factual determination on the issue of whether these telecommunications services were used for municipal or public purposes. *Id.*

87. *City of Gainesville*, 918 So. 2d at 255.

88. *Id.* (quoting Fla. Stat. § 364.01(3) (2004)).

89. *Id.* at 265 (emphasis added).

90. *Id.*

While not explicitly stating that a municipal telecommunications system that furthered one or more of these goals would definitely pass the test, the Court's example suggests the bar is not that high. In particular, it suggests that the City of Gainesville's system, which was created based on findings that "[n]o substantial communication services competition appears to be emerging in Gainesville" would likely pass muster.[91] The Court simply did not have reason to decide that question, or explore further the contours of the "essential" test, due to the facial nature of the challenge before it.

Despite the foregoing, focusing on the word "essential" might lead lower courts to take an overly restrictive view of the tax exemption. The Fifth District Court of Appeal's recent decision in *CAPFA Capital Corp. 2000A v. Donegan*[92] illustrates the confusion that may result when a lower court reads the *City of Gainesville* decision as more narrow than it is. In that case, 2000A, a nonprofit instrumentality of the City of Moore Haven, appealed a summary judgment determining that an apartment complex it owned near the University of Central Florida to be used for student housing was not serving a municipal or public purpose under Article VII, Section 3(a), and thus was not entitled to tax-exempt status.[93]

The Fifth District affirmed summary judgment.[94] Numerous references in the Court's opinion supporting this result reveal a misunderstanding of the scope of the *City of Gainesville* decision. The Fifth District pointed to evidence that the "predominant purpose" of 2000A's ownership of the apartment complex was to generate revenue for the City of Moore Haven,[95] even though nothing in the *City of Gainesville* opinion suggests that a municipality's subjective intent establishes whether an activity provides something that is "essential" to the health, safety, or general welfare. The court also stated that the Florida Supreme Court in *City of Gainesville* had "further narrowed" the definition of municipal

91. *Id.* at 255.

92. 929 So. 2d 569, 571 (Fla. 5th Dist. App. 2006), *rev. denied*, 948 So. 2d 758 (Fla. 2007).

93. *Id.* at 573–574.

94. *Id.* at 574.

95. *Id.* at 571.

purposes for tax-exemption purposes.[96] As noted above, however, the Supreme Court expressly held that the 1968 Constitution did *not* narrow the scope of public purpose; rather, it remained just as broad as it was under the 1885 Constitution. For that same reason, the Fifth District's rejection of case law decided under the 1885 Constitution, on the ground that under that prior Constitution, courts deferred to the Legislature as to what constituted a municipal purpose, conflicts with *City of Gainesville*.

Finally, the Fifth District observed that the apartment complex at issue "did not come close" to meeting the "essential" services test laid down by the Supreme Court in *City of Gainesville* because the property was "more similar to a telecommunications system established by a city in competition with other private providers."[97] The only thing the *City of Gainesville* Court decided, however, was that property used for telecommunications services would not necessarily be tax exempt in all cases.[98] The Court did not suggest that such services would never pass muster, nor did it hold that the City of Gainesville's telecommunication property was taxable.[99] If anything, the Court's language suggests that it *would* be tax exempt.[100] The Court also relied on case law that rejected the notion that competition with private business precludes tax-exempt status for municipal property.[101] Therefore, the Court's holding with respect to telecommunications property does not support a lower court's summary judgment against a municipality claiming a constitutional exemption.

Contrary to the restrictive approach taken in *CAPFA Capital*, it should in fact be a rare case where a court determines that municipal property used exclusively by the city to provide services that are lawful for it to provide under Article VIII is not exempt from ad valorem taxes under Article VII. This conclusion follows

96. *Id*. at 572.

97. *Id*. at 573–574.

98. Because *City of Gainesville* involved only a facial challenge, the Court did not need to determine whether the specific services provided by the City would be subject to ad valorem taxation. *City of Gainesville*, 918 So. 2d at 265.

99. *Id.*

100. *Id*. at 265 (stating in dicta that a municipality seeking to enter an already crowded telecommunications market is not providing a service "essential" to the health, morals, safety, or general welfare). However, the City, in its 1995 planning study, noted that "[n]o substantial communication services competition [was] emerging in Gainesville." *Id*. at 255.

101. *Id*. at 259.

from the broad scope accorded to the exemption under *McDavid*, *Saunders*, and the cases they rely upon, as well as the longstanding principle that with respect to municipalities, taxation is the exception and exemption is the rule. [102]

For that reason, lower courts should afford municipalities a broad field in which to operate without incurring ad valorem taxes and should accord weight to a municipality's determination that municipal property is being used to provide "essential" or "necessary" services. A clear statement from the Court endorsing this approach would help eliminate the potential confusion *City of Gainesville* could create. A more definitive statement would also allow municipalities to plan, finance, own, and operate large projects with confidence in their financial feasibility, and with some confidence as to their tax status. The Court should take the next opportunity to make this clear.

V. CONCLUSION

In short, in *City of Gainesville*, the Florida Supreme Court rejected the Department of Revenue's argument that the tax-exempt status of municipal property used to provide services turns on whether the function served is "governmental" or whether the service competes with private enterprise. At the same time, the Court rejected the City's position that "municipal or public purposes" for purposes of tax exemption under Article VII, Section 3(a), of the Florida Constitution was identical to "municipal purposes" under the constitutional grant of municipal power, Article VIII, Section 2(b). Instead, the Court's approach to "municipal or public purpose" under Article VII, Section 3(a), focused on whether the services provided were "essential."

The Court, however, drew this test from *McDavid* and *Saunders*, tax cases that the drafters of the 1968 Constitution were presumed to have had in mind when they crafted the language of Article VII, Section 3(a). Those cases afford a very broad definition to municipal purposes. For that reason, and because the Constitution uses the identical term "municipal purpose" in both Article VIII and Article VII, the Court's attempt to distinguish between the "municipal purpose" language in Article VII and Article

102. *Saunders*, 25 So. 2d at 651; *McDavid*, 200 So. at 102.

VIII appears to rest on a shaky foundation, as Justice Anstead correctly recognized in his dissent.

However, Justice Anstead's description of the import of the majority's holding is overly pessimistic. Despite the seeming narrowness implied by the Court's use of the term "essential," the Court's reliance on *McDavid* and *Saunders* to set the boundaries for municipal or public purposes under Article VII, Section 3(a), requires lower courts to be equally liberal in deciding when particular services are "essential." Courts should not readily second-guess municipal determinations that particular activities are "essential" to the health, safety, or general welfare. To the contrary, deference by the courts to such determinations would be wholly consistent with the *City of Gainesville* opinion. Because, however, the Court's opinion could be misconstrued as a "narrowing" of the definition of municipal purpose previously in effect, the Court should take the next opportunity to clarify this potential misconception.