

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, FLORIDA

DAVID C. NOLTE, as Property
Appraiser for Indian River
County, Florida, etc.,

CASE NO. 4D07-603

Appellant,

L.T. Case Nos.: 02-792-CA17
03-831-CA17
04-764-CA17
05-792-CA17

v.

PARIS AIR, INC., ETC., ET AL.,
a Florida corporation,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA**

BRIEF OF AMICUS CURIAE
FLORIDA AVIATION TRADES ASSOCIATION
IN SUPPORT OF APPELLEE PARIS AIR, INC. ETC., ET AL.

Daniel W. Anderson
FORIZS & DOGALI, P.L.
Fla. Bar No.: 0490873
4301 Anchor Plaza Parkway, Suite 300
Tampa, FL 33634
Telephone: (813) 289-0700
Facsimile: (813) 289-9435
E-mail: danderson@forizs-dogali.com
Counsel for *Amicus Curiae*,
Florida Aviation Trades Association

TABLE OF CONTENTS

| <u>Description</u> | <u>Page</u> |
|--|-------------|
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES | iii |
| INTEREST OF <i>AMICUS CURIAE</i> | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 2 |
| 1. THE STATUTORY EXEMPTION IS CONSTITUTIONAL AS APPLIED TO APPELLEES..... | 3 |
| a. For-Profit Use of Municipal Property Does Not Constitute Governmental-Proprietary Purpose <i>Per Se</i> | 4 |
| b. Appellant Has Conceded That Appellees Meet the Governmental-Governmental Test..... | 7 |
| i. Appellant has conceded that Appellees use the property to perform functions that could properly be performed by the City of Vero Beach..... | 8 |
| ii. Appellant has conceded that Appellees perform a function or serve a purpose that would otherwise be a valid subject for the allocation of public funds..... | 11 |
| 2. THE STATUTORY EXEMPTION IS FACIALLY CONSTITUTIONAL | 12 |
| a. Appellant Has Conceded That There Is At Least One Set of Circumstances Under Which The Statute May Be Upheld | 13 |
| b. Other Courts Have Concluded that a Legislature May Constitutionally Exempt FBOs from Ad Valorem Taxation..... | 14 |
| c. The Functions Performed By A Privately Owned FBO On Airport Property Leased From A Municipality Could Properly Be Performed Or Served By A Municipality | 18 |
| d. FBOs Perform A Function Or Serve A Purpose Which Would Otherwise Be A Valid Subject For The Allocation Of Public Funds..... | 19 |
| CONCLUSION..... | 20 |
| CERTIFICATE OF SERVICE..... | 21 |
| CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210 | 21 |
| CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER 11-05 | 21 |

TABLE OF AUTHORITIES

| <u>State Cases</u> | <u>Page</u> |
|---|--------------|
| Burgess v. Burgess, 447 So. 2d 220 (Fla. 1984) | 6 |
| Canaveral Port Auth. v. Dep't of Revenue, 690 So. 2d 1226 (Fla. 1996) | 6, 8 |
| Cheyenne v. Board of County Comm'rs, 484 P.2d 706 (Wyo. 1971)..... | 15, 16, 17 |
| City of Bartow v. Roden, 286 So. 2d 228 (Fla. 2d DCA 1973)..... | 9 |
| Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250 (Fla. 2005) | 3, 8, 12, 13 |
| Gwin v. Tallahassee, 132 So. 2d 273 (Fla. 1961) | 18 |
| Islamorada v. Higgs, 882 So. 2d 1009 (Fla. 3d DCA 2003)..... | 9 |
| Nikolits v. Runway 5-23 Hangar Condo. Ass'n, 847 So. 2d 1054 (Fla. 4th DCA 2003) | 14 |
| Reynolds v. State, 842 So. 2d 46 (Fla. 2002)..... | 6 |
| Sebring Airport Auth. v. McIntyre, 783 So. 2d 238 (Fla. 2001)..... | 3, 4, 13 |
| Sebring Airport Auth. v. McIntyre, 642 So. 2d 1072 (Fla. 1994)..... | 4 |
| Smith v. Krosschell, 937 So. 2d 658 (Fla. 2006)..... | 8 |
| Sun 'n Lake v. McIntyre, 800 So. 2d 715 (Fla. 2d DCA 2001) | 9 |
| United States Sugar Corp. v. Henson, 787 So. 2d 3 (Fla. 1st DCA 2000)..... | 18 |
| Walden v. Hillsborough County Aviation Auth., 375 So. 2d 283 (Fla. 1979) | 5 |
| <u>State Statutes</u> | |
| Fla. Stat. § 196.012 | passim |
| Fla. Stat. § 196.199 | 5, 8, 9 |
| <u>Other Authorities</u> | |
| Wikipedia, The Free Encyclopedia, (http://en.wikipedia.org/wiki/General_aviation) (last visited August 8, 2007) | 1 |
| Welcome to the LaBelle, Florida Municipal Airport (X14) (available at http://members.aol.com/browne/airport.html) (last visited Sept. 7, 2007) | 18 |
| Page Field General Aviation Airport, FBO/The Aviation Center (available at http://www.flylcpa.com/fmy/facilities/fbo.php) (last visited Sept. 7, 2007) | 18 |

Bartow Chamber of Commerce, Economy -- Industry (available at
<http://chamberocity.com/Bartow/default.cfm?page=BartowEconomy2>)
(last visited September 7, 2007) 18

Bartow Municipal Airport and Industrial Park, Bartow Flying Service
(available at <http://www.bartow-airport.com/fbo.htm>)
(last visited Sept. 7, 2007) 18-19

Florida Department of Transportation, *Airports Economic Impact*
(available online at <http://www.dot.state.fl.us/aviation/economicimpact.htm>)(last visited Sept. 7, 2007)..... 19

Florida Airports Council, *General Aviation Airports – Economic Development
Engines for Florida’s Community Development* (available online at
<http://www.sebring-airport.com/Docs/Draft-final-report-feb-2006.pdf>)
(last visited Sept. 7, 2007) 19

Florida Department of Transportation, *Florida Aviation System Plan 2025,
Statewide Overview* (available at [ttp://www.cfaspp.com/Documents/
Statewide%20Overview%2018%20May%202005.pdf](http://www.cfaspp.com/Documents/Statewide%20Overview%2018%20May%202005.pdf))
(last visited Sept. 7, 2007) 20

INTEREST OF *AMICUS CURIAE*

The Florida Aviation Trades Association is a non-profit organization that was founded in 1946 to promote and protect the interests of General Aviation businesses in Florida. The 150 members of FATA are General Aviation businesses that provide flight training, air charter, aircraft maintenance, aircraft fuel, aircraft parking, hangar facilities, parts, supplies, insurance, equipment, and a vast array of other General Aviation services.¹ Many FATA members are Fixed Base Operators (FBOs) that will be directly impacted by the decision of this Court.² Moreover, FATA members who provide services to FBOs, such as wholesale fuel suppliers, parts suppliers, and equipment vendors, will be directly impacted by the decision of this Court. As such the FATA and its members have a substantial stake in the outcome of this appeal.

¹ The term "General Aviation" commonly refers to "all flights other than military and scheduled airline flights, both private and commercial." Wikipedia, The Free Encyclopedia, <http://en.wikipedia.org/wiki/General_aviation> (accessed August 8, 2007).

² The FATA is proud to include Appellees Paris Air, Inc. and Sun Aviation, Inc. as a distinguished FATA members.

SUMMARY OF ARGUMENT

Appellant seeks to tax property leased by two FBOs merely because these FBOs are privately owned and operated on a for-profit basis. Appellant concedes that a city could operate the FBOs on a tax-exempt basis, and in doing so concedes that the property leased by Appellees is used for a governmental purpose. As such, the property leased by Appellees is subject to the same tax exemption a city would enjoy if a city operated the FBOs rather than Appellees. Contrary to the assertion of Appellant, the use of the property is paramount in determining whether or not it may properly be exempted from taxation. The exemption provided in Fla. Stat. § 196.012(6) is constitutional as applied to Appellees because Appellees' use of the property meets the governmental-governmental test. Additionally, the statute is facially constitutional because there is at least one set of circumstances under which it may be upheld.

ARGUMENT

The parties stipulated in the trial court below that Appellees, Paris Air and Sun Aviation, are both full-service fixed base operators ("FBOs") and Appellant concedes this fact on appeal. (Transcript of Proceedings of September 11, 2006, at p. 5-7, 20; Initial Brief of Appellant David C. Nolte at p. 1). Thus, there is no dispute as to whether Appellees are FBOs, as that term is used in Fla. Stat. § 196.012(6). Two of the primary issues on appeal, however, are whether the

exemption granted by Section 196.012(6) is: 1) constitutional *as applied* to Appellees; and, 2) *facially* constitutional. In this appeal, the Court has been asked to decide whether the Florida Legislature may constitutionally exempt privately owned for-profit FBOs from paying *ad valorem* taxes on real property the FBO leases from a municipality. For the reasons cited by Appellees, in the briefs filed in support of Appellees, and those that follow, the Court should answer this question in the affirmative and uphold the decision of the trial court.

1. THE STATUTORY EXEMPTION IS CONSTITUTIONAL AS APPLIED TO APPELLEES

The Supreme Court of Florida has consistently found that a statutory exemption to *ad valorem* taxation is valid if it applies to government owned property that is used for a governmental, municipal, or public purpose or function. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 264 (Fla. 2005); *Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238 (Fla. 2001)(*Sebring IV*). A tax exemption may be constitutionally permitted for private leaseholds of municipal property if the private use of the property is one that "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." *Gainesville*, 918 So. 2d at 260 (citing *Sebring IV*, 783 So. 2d at 246-48); Fla. Stat. § 196.012(6). This is the so-called "governmental-governmental" test.

Under *Gainesville* and *Sebring IV*, the governmental-governmental test applicable to the statutory exemption granted to Appellees by the trial court has two prongs: 1) do the Appellees use the property to perform functions that could properly be performed or served by the City of Vero Beach? or, 2) do Appellees perform a function or serve a purpose that would otherwise be a valid subject for the allocation of public funds? If either of the two prongs is answered in the affirmative, then Appellees perform a "governmental, municipal, or public purpose or function" and the statutory exemption is constitutionally sound.

a. For-Profit Use of Municipal Property Does Not Constitute a Governmental-Proprietary Purpose *Per Se*

Appellant cites *Sebring Airport Auth. v. McIntyre (Sebring II)*, 642 So.2d 1072 (Fla. 1994) and *Sebring IV*, 783 So.2d 238, for the proposition that "any proprietary for profit entity using governmental property as lessee is per se for a governmental-proprietary purpose and cannot be declared exempt by the legislature." (Initial Brief of Appellant David C. Nolte at p. 17). This is simply a misstatement of the law.

Neither the *Sebring II* court, nor the *Sebring IV* court, held that the test for whether property is used for a governmental-proprietary purpose is whether the property is used by a privately owned for-profit entity. On the contrary, both courts considered the *use* of the property itself, not the *user*, in determining whether the tax exemption was constitutional. In both cases, the court determined

that the tax exemption at issue was unconstitutional because the *use* was not for a "governmental, municipal, or public purpose or function." Both courts could have reached the same conclusion even if an otherwise tax-exempt municipality was using the property.³ Thus the privately owned, for-profit, status of Appellees is not determinative. Rather, it is the *use* of the property that is at issue in deciding whether Appellees meet the governmental-governmental test. *Walden v. Hillsborough County Aviation Auth.*, 375 So. 2d 283, 286 (Fla. 1979)(citing *Williams v. Jones*, 326 So. 2d 425, 432 (Fla. 1975).

The language of Fla. Stat. § 196.199(2) specifically contemplates that under certain circumstances, property owned by a governmental units "but used by nongovernmental lessees" is exempt from taxation. One of the exemptions under this statute is for "governmental property leased to an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes." Fla. Stat. § 196.199(2)(c); *see also* Fla. Stat. § 196.012(2). Under Appellant's reading of the law, this exemption would not apply to any private, for-profit organization, regardless of whether the organization used the property "exclusively for literary, scientific, religious, or charitable purposes."

³ For example, the Sebring Airport Authority could not have operated the racetrack itself and still claim an exemption because the *use* of the property would remain the same regardless of the change in *users*. Thus it is not the *user*, but rather the *use*, of the property that determines whether a tax exemption is appropriate.

Had the Florida Legislature wished for the exemption to apply only to public entities or non-profit organizations, it could have said so in the statute. *Reynolds v. State*, 842 So. 2d 46, 49 (Fla. 2002)("if the Legislature wanted the statute to include the specific intent to cause a cruel death or suffering, they could have specifically said so."); *Burgess v. Burgess*, 447 So. 2d 220, 223 (Fla. 1984)("If the legislature had intended for this statute to constitute an exception to the interspousal immunity rule they should have said so."). Because it did not, we must assume that the Florida Legislature "knew how to draft the statute" and chose to draft it in such a way that a private, for-profit entity, might lease government property "exclusively for literary, scientific, religious, or charitable purposes," and therefore be entitled to the exemption. *Reynolds*, 842 So. 2d at 49.

The same is true under Fla. Stat. § 196.012(6), wherein an exemption is granted to "the lessee under any leasehold interest" if the use of the property "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." Fla. Stat. § 196.012(6); *Canaveral Port Auth. v. Dep't of Revenue*, 690 So. 2d 1226, 1229 (Fla. 1996)(finding ad valorem taxation of fee interests in government property leased by a nongovernmental lessee appropriate "unless the lessee is serving a governmental,

municipal, or public purpose or function as defined in section 196.012(6) or uses the property exclusively for a literary, scientific, religious, or charitable purpose."). Again, if the Florida Legislature had wished to limit the exemption to public or non-profit entities, it could have drafted the statute that way. Because it did not, the mere fact that Appellees are private, for-profit corporations does not deprive Appellees of the claimed exemption.

If the Court were to hold, as Appellant urges, that a privately owned, for-profit lessee can never be exempted from paying *ad valorem* taxes on property that it leases from a governmental unit, it would run contrary to all of the applicable case law, the Florida Constitution, and the entire statutory framework enacted by the Florida Legislature. Accordingly, the Court should reject Appellant's reading of the law.

b. Appellant Has Conceded That Appellees Meet the Governmental-Governmental Test

In his brief, Appellant states: "[i]f a city itself operated an FBO on a non-profit basis, such an operation could not be proprietary and would be exempt under the statute." (Initial Brief of Appellant David C. Nolte at p. 19). As such, Appellant has conceded that Appellees meet both prongs of the governmental-governmental test.⁴ If it is true, as Appellant contends, that a city can operate an FBO on a non-

⁴ Presumably "the statute" to which Appellant refers is Fla. Stat. § 196.199(1)(c). Both this statute, and Fla. Stat. § 196.012(6), exempt property from taxation only if

profit basis and that such an operation would be tax exempt, it follows that: 1) Appellees must use the property to perform functions that could properly be performed by the City of Vero Beach; and, 2) Appellees perform a function or serve a purpose that would otherwise be a valid subject for the allocation public funds. Accordingly, Appellees have met both prongs of the governmental-governmental test.

i. Appellant has conceded that Appellees use the property to perform functions that could properly be performed by the City of Vero Beach

As discussed *supra*, the governmental-governmental test does not consider the status of Appellees *vis-a-vis* the City of Vero Beach in determining whether or not Appellees are entitled to the claimed tax exemption. Rather, the test requires the Court to consider whether the property is being used by Appellees for a "governmental, municipal, or public purpose or function." *Gainesville*, 918 So. 2d at 264; Fla. Stat. § 196.199(1)(c).

it is used for "governmental, municipal, or public purposes." Accordingly, property that is used for such purposes under one statute is necessarily used for such purposes under the other statute. To read the two statutes any other way would produce an absurd result and would therefore be impermissible. *Smith v. Krosschell*, 937 So. 2d 658, 663 (Fla. 2006)(citing *Korash v. Mills*, 263 So. 2d 579, 582 (Fla. 1972))("[j]ustice may be 'blind' but it is not stupid" . . .and we cannot adopt a statutory interpretation that would produce such an absurd and unfair result.").

Here, Appellant concedes that if the City of Vero Beach were operating an FBO "such an operation could not be proprietary and would be exempt under the statute." (Initial Brief of Appellant David C. Nolte at p. 19). It matters not whether the operation by the City is for-profit, or non-profit, the issue is whether or not the use of the property is for a "governmental, municipal, or public purpose or function."

Under Fla. Stat. § 196.199(1)(c), a municipality must use public property for a "governmental, municipal, or public purpose or function," otherwise the exemption does not apply. Thus, if a city utilizes public property for a non-exempt purpose, the property is subject to taxation. *Sun 'n Lake v. McIntyre*, 800 So. 2d 715, 722 (Fla. 2d DCA 2001)(citing *City of Bartow v. Roden*, 286 So. 2d 228 (Fla. 2d DCA 1973)). Conversely, when a city uses public property for a tax-exempt public purpose, the property is not subject to taxation even if the city makes a profit. *Islamorada v. Higgs*, 882 So. 2d 1009, 1011 (Fla. 3d DCA 2003)(citing *Page v. City of Fernandina Beach*, 714 So. 2d 1070, 1076 (Fla. 1st DCA 1998)).

Under the authority cited above, and the express language of Fla. Stat. § 196.199(1)(c) and Fla. Stat. § 196.012(6), it is clear that the distinguishing factor is how the property is used, not whether the entity using the property is a municipality, or whether a profit is made on the use of the property. If government owned property is used for a governmental, municipal, or public purpose or

function, it is exempt. If it is not used for a governmental, municipal, or public purpose or function, it is not. It does not matter whether the entity using the property is a municipality or a privately owned business, or whether the privately owned lessee is for-profit or non-profit. The sole question for the Court to consider is how the property is used.

Put another way, under the governmental-governmental test, public property used for the purpose of operating an FBO is either tax-exempt or it is not. If a city can properly use public property to operate an FBO on a tax-exempt basis, it stands to reason that a private entity using the same property for the same purpose would also be subject to the same tax exemption. Under those circumstances, the private entity would be performing the same functions as the city. Because Appellant has conceded that a city could use public property to operate an FBO, and that the property would be tax-exempt, Appellant has also conceded that Appellees meet the first prong of the governmental-governmental test because Appellees use the property to perform functions that could properly be performed by the City of Vero Beach.

- ii. *Appellant has conceded that Appellees perform a function or serve a purpose that would otherwise be a valid subject for the allocation of public funds*

Similarly, Appellant has conceded that Appellees perform a function or serve a purpose that would otherwise be a valid subject for the allocation of public funds. It only stands to reason that if a city may properly operate an FBO and enjoy a tax exemption based on such use of the property, the city must be performing a function or serving a purpose that is a valid subject for the allocation of public funds. Accordingly, where a private lessee uses city property to operate an FBO, the lessee is necessarily performing a function or serving a purpose that would *otherwise* be a valid subject for the allocation of public funds. In the instant case, Appellant has conceded that Appellees meet the second prong of the governmental-governmental test because Appellees perform the same function or serve the same purpose that the City of Vero Beach would serve if it operated an FBO on the subject property.

For the foregoing reasons, the statutory exemption provided by Fla. Stat. § 196.012(6) is constitutional as applied to Appellees.

2. THE STATUTORY EXEMPTION IS FACIALLY CONSTITUTIONAL

In addition to Appellant's challenge as to the constitutionality of Fla. Stat. § 196.012(6) as applied to Appellees, Appellant also asserts a facial challenge as to the validity of the statute.⁵ Under a facial constitutional challenge, the Court is to "determine only whether there is *any* set of circumstances under which the challenged enactment might be upheld." *Gainesville*, 918 So. 2d at 265 (citing *State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004))(emphasis added).

The test of facial validity appropriate under *Gainesville* and *Sebring* is similar to the *as applied* test discussed *supra*. The primary difference is that it is irrelevant whether Appellees' specific use of the property passes constitutional muster. *Gainesville*, 918 So. 2d at 265 ("Because this is a facial challenge to the constitutionality of legislation taxing municipal use of municipally owned property, we need not determine whether the specific services provided by the City pass this test."). On the contrary, the statute should be upheld if the Court finds that there is any set of circumstances under which: 1) the functions performed by a

⁵ Appellees have already addressed the many reasons why the Court need not even reach the question of whether the exemption contained in Fla. Stat. § 196.012(6) is constitutional and, in fact, should avoid doing so. To the extent that this Court finds it necessary to reach the issue of whether the exemption granted to FBOs by Fla. Stat. § 196.012(6) is constitutional, the statute should be upheld because FBOs meet the governmental-governmental test established by the Supreme Court of Florida.

privately owned FBO on airport property leased from a municipality can properly be performed or served by a municipality; or, 2) FBOs perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. *Gainesville*, 918 So. 2d at 260; *Sebring IV*, 783 So. 2d at 246-48; Fla. Stat. § 196.012(6).

a. Appellant Has Conceded That There Is At Least One Set of Circumstances Under Which The Statute May Be Upheld

As discussed *supra*, Appellant has already acknowledged that a city may operate an FBO on public property and that the property would not be subject to taxation under such circumstances. Accordingly, Appellant has expressly acknowledged that there is at least one set of circumstances under which the statute may be upheld -- e.g. the statutory exemption granted to an FBO under Fla. Stat. § 196.012(6) would properly apply to a city operating an FBO on a non-profit basis. *See* (Initial Brief of Appellant David C. Nolte at p. 19; Transcript of Proceedings of September 11, 2006, at p. 80-81).

Based on Appellant's own admission, one set of circumstances under which Fla. Stat. § 196.012(6) may be upheld is where a city leases land from another municipality for the purpose of operating an FBO on a non-profit basis. Under such circumstances, the city's use of the property would fall squarely within the statutory exemption provided by Fla. Stat. § 196.012(6). Accordingly, there is at least one set of circumstances under which the exemption granted to FBOs under

Fla. Stat. § 196.012(6) may be upheld. For this reason, the Court's analysis may stop here because even Appellant tacitly admits that the statute is facially constitutional. If the Court continues its analysis, however, it will find even more reasons to uphold the statute.

b. Other Courts Have Concluded that a Legislature May Constitutionally Exempt FBOs from Ad Valorem Taxation

Appellant cites only two cases for the proposition that Fla. Stat. § 196.012(6) is facially unconstitutional. (Initial Brief of Appellant David C. Nolte at p. 19-21). However, neither *Sebring II*, nor *Sebring IV*, dealt with the statutory exemption granted to FBOs that is the subject of this appeal. Courts that *have* dealt with the issue of statutory exemptions for public property leased by an FBO have determined that the exemption applies.

In *Nikolits v. Runway 5-23 Hangar Condo. Ass'n*, 847 So. 2d 1054 (Fla. 4th DCA 2003), for example, the property appraiser appealed a finding by the trial court similar to the case at bar. The trial court had determined that that airplane hangars located on state-owned land and leased to private users were exempt from *ad valorem* taxation. *Id.* at 1054. The property at issue was leased to the Boca Raton Aviation authority, and sub-leased to an FBO. *Id.* The FBO, in turn, sub-leased some of the hangars to private individuals, and some to a condominium association. *Id.* The condominium association then sub-leased the hangars to its members. *Id.*

The property appraiser conceded that the hangars the FBO sub-leased to private individuals were exempt from taxation by virtue of Fla. Stat. § 196.012(6). *Id.* at 1055. However, the property appraiser contended that the hangars leased by the condominium association to its members were not exempt. *Id.* The Fourth District disagreed, and affirmed the trial court order granting summary judgment in favor of the condominium association. *Id.*

In another case that is directly apposite to the case at bar, the Supreme Court of Wyoming considered whether the legislature could constitutionally grant a statutory exemption to FBOs for the use of public property. *Cheyenne v. Board of County Comm'rs*, 484 P.2d 706 (Wyo. 1971). In *Cheyenne*, a city leased public buildings located on its municipally owned and operated airport to private, for-profit entities. *Id.* at 707. The county added the buildings to its tax rolls claiming that the buildings were not being used for governmental purposes. *Id.* The city refused to pay and litigation ensued. *Id.* The trial court determined that three of the buildings were partially exempt and that the other two were subject to taxation. *Id.* The city appealed. *Id.*

On appeal, the Supreme Court of Wyoming began its analysis by reflecting on another case in which it considered amendments to the Wyoming statutes and constitution that were intended to "discard ownership as the sole basis for

exemption and to limit the exemption of such property to that owned and 'used primarily for a governmental purpose.'" *Id.* The court stated:

[I]n considering whether or not as a general proposition buildings owned by a municipality and located upon its airport and used primarily for the housing, care, repair and service of aircraft can be said to constitute a "governmental purpose" we are, of course, as indicated above, impressed with the fact that the legislature apparently regarded such facilities as an essential or necessary adjunct to an airport. **The mere fact that the city accomplishes such use through a lessee or receives rent in return for such use is not controlling.**

Neither do we think, as the county seems to contend, that the mere renting of the buildings to a lessee engaged in a profit-making venture is of itself a use for nongovernmental purposes. It depends upon the circumstances. The test, as we view it, is whether or not those buildings were primarily used and being so used as reasonably necessary or essential facilities to the efficient operation and maintenance of the airport. If so, the improvements were not subject to taxation. If not, the tax imposed was proper.

Id. at 709 (internal citations omitted)(emphasis added).

Applying this test to the facts of the case, the *Cheyenne* court found that the three government-owned buildings leased to two FBOs were not subject to taxation.⁶ *Id.* The court reasoned that the parties had recognized that an FBO "was a necessary adjunct to the operation of an airport," and that "it reasonably follows that the buildings here discussed meet the test we said should be applied and were 'used primarily for a governmental purpose'

⁶ Although *Cheyenne* dealt with government-owned buildings, as opposed to government-owned real property, the principles are the same with respect to determining whether government-owned property (be it real or personal) may be exempted from taxation.

within the reach of the constitutional provision and the exemption statute."

Id.

In the present case, there is no dispute that Appellees are both FBOs and fall clearly within the exemption provided by Fla. Stat. § 196.012(6). As discussed *supra*, Appellant has also acknowledged that an FBO is a "necessary adjunct to the operation of an airport" by admitting that a city may properly operate an FBO on a non-profit basis. The only question then, is whether the operation of an FBO by a private entity on a for-profit basis may also be constitutionally exempted from taxation.

Under the rationale of *Cheyenne*, the exemption provided by Fla. Stat. § 196.012(6) is constitutional because FBOs are a necessary adjunct to the operation of an airport. Therefore property leased by an FBO is necessarily used primarily for a governmental purpose. No one would seriously question whether the operation of a public airport is a governmental function. It follows then that any use of airport property that is an adjunct to the operation of a public airport is necessarily a governmental function. For this reason, property upon which a control tower, runways, and taxiways, sit is not taxable because it is used for the operation of the airport. Similarly, land upon which an FBO sits is exempt from *ad valorem* taxation because the operation of an FBO is an adjunct to the operation of an airport. Accordingly, Fla. Stat. § 196.012(6) should be upheld.

c. The Functions Performed By A Privately Owned FBO On Airport Property Leased From A Municipality Could Properly Be Performed Or Served By A Municipality

Municipal governments operate FBOs throughout Florida.⁷ For example, the FBO at the La Belle Municipal Airport is owned and operated by Hendry County.⁸ Hendry County sells aviation fuel, hangar space, tie-down space, aviation charts, and miscellaneous pilot and aircraft supplies through its publicly owned and operated FBO.⁹ The same is true at Page Field in Lee County, where the Lee County Port Authority operates the only FBO at the airport and offers a full range of FBO services.¹⁰ Similarly the city of Bartow owns the Bartow Municipal Airport, and the Bartow Municipal Airport Development Authority manages the airport and operates the only full service FBO.¹¹

⁷ It is appropriate for the Court to consider matters outside of the record during a *de novo* review for the limited purposes of determining whether or not the Florida Legislature may constitutionally exempt privately owned FBOs from paying *ad valorem* taxes on airport property leased from a municipality. *Gwin v. Tallahassee*, 132 So. 2d 273, 277 (Fla. 1961)(finding it appropriate to take judicial notice of certain general facts outside of the record when determining whether government property is used for a municipal or public purpose); *see also United States Sugar Corp. v. Henson*, 787 So. 2d 3, 15 (Fla. 1st DCA 2000)(citing *Brim v. State*, 695 So. 2d 268, 274 (Fla. 1997).

⁸ Welcome to the LaBelle, Florida Municipal Airport (X14)(available at <http://members.aol.com/browne/airport.html>)(last visited Sept. 7, 2007).

⁹ *Id.*

¹⁰ Page Field General Aviation Airport, FBO/The Aviation Center (available at <http://www.flylcpa.com/fmy/facilities/fbo.php>)(last visited Sept. 7, 2007).

¹¹ Bartow Chamber of Commerce, Economy -- Industry (available at <http://chamberocity.com/Bartow/default.cfm?page=BartowEconomy2>)(last visited September 7, 2007); *see also* Bartow Municipal Airport and Industrial Park,

It is clear from the examples cited above that the functions performed by a privately owned FBO on airport property leased from a municipality *can* properly be performed or served by a municipality. For this reason, privately owned FBOs that lease airport property from municipal governments meet the first prong of the governmental-governmental test and may be properly exempted from paying *ad valorem* tax.

d. FBOs Perform A Function Or Serve A Purpose Which Would Otherwise Be A Valid Subject For The Allocation Of Public Funds

Florida's general aviation airports serve as a focal point for many health, welfare, environmental, and safety-related services that help to improve the quality of life for all Florida residents.¹² Included among the health, welfare, environmental and safety benefits afforded to local communities by general aviation airports are: "emergency medical flights, search and rescue operations, aerial applications to control insects, wildfire fighting, law and drug enforcement, and news and traffic reporting."¹³ To ensure that these benefits remain available to

Bartow Flying Service (available at <http://www.bartow-airport.com/fbo.htm>)(last visited Sept. 7, 2007).

¹² Florida Department of Transportation, *Airports Economic Impact* (available online at <http://www.dot.state.fl.us/aviation/economicimpact.htm>)(last visited Sept. 7, 2007).

¹³ *Id.*; Florida Airports Council, *General Aviation Airports – Economic Development Engines for Florida's Community Development* (available at <http://www.sebring-airport.com/Docs/Draft-final-report-feb-2006.pdf>)(last visited Sept. 7, 2007).

local communities, the State of Florida and local governments have invested vast sums of money in the development of general aviation airports and will continue to do so far into the future.¹⁴ It is therefore appropriate for a local government to expend public funds to provide FBO services to ensure that a public airport remains open and available to serve the needs of the local community. Based on this reasoning, the exemption provided under Fla. Stat. § 196.012(6) meets the second prong of the governmental-governmental test and the statute should be upheld.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.

Respectfully submitted this __ day of September 2007.

FORIZS & DOGALI, P.L.

Daniel W. Anderson
Fla. Bar No.: 0490873
4301 Anchor Plaza Parkway, Suite 300
Tampa, FL 33634
Telephone: (813) 289-0700
Facsimile: (813) 289-9435
E-mail: danderson@forizs-dogali.com
Counsel for *Amicus Curiae*,
Florida Aviation Trades Association

¹⁴ Florida Department of Transportation, *Florida Aviation System Plan 2025, Statewide Overview* (available at <http://www.cfaspp.com/Documents/Statewide%20Overview%2018%20May%202005.pdf>)(last visited Sept. 7, 2007).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Federal Express on the ___ day of September, 2007, to: JOHN C. DENT, JR., ESQ., Dent & Johnson, Chartered, 3415 Magic Oak Lane, Sarasota, Florida 34236; CANDA B. BROWN, ESQ., Jackson, Barkett & Brown, 2165 15th Avenue, Vero Beach, Florida 32960; LISA N. THOMPSON, ESQ., Collins, Brown, Caldwell, Barkett & Garavaglia, P.O. Box 64-3686, Vero Beach, Florida 32964; BENJAMIN K. PHIPPS, ESQ., The Phipps Firm, Post Office Box 1351, Tallahassee, Florida 32302; MARK T. ALIFF, ESQ., Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050; ROBERT C. NALL, ESQ., Post Office Box 5325, Vero Beach, Florida 32961-5325; CHARLES P. VITUNAC, ESQ., P.O. Box 1389, Vero Beach, Florida 32961, and GREGORY T. STEWART, ESQ., Nabors, Giblin & Nickerson, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, Florida 32308.

Daniel W. Anderson

CERTIFICATE OF COMPLIANCE WITH
FLA. R. APP. P. 9.210

I HEREBY CERTIFY that the foregoing brief is submitted in Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210.

Daniel W. Anderson

CERTIFICATE OF COMPLIANCE WITH
ADMINISTRATIVE ORDER 11-05

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished as an attachment to an e-mail to the address **efiling@flcourts.org** pursuant to Administrative Order 11-05.

Daniel W. Anderson