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IN THE SUPREME COURT OF FLORIDA

JIM FORD, Brevard County Property Appraiser; and JAMES NORTHCUTT, Brevard County Tax Collector

Petitioners,

vs.

ORLANDO UTILITIES COMMISSION,

Respondent.

CASE NO. 81,440

5th DCA CASE NOS.: 92-539
92-677

CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT
CASE NOS. 90-2558-CA-S
90-20858-CA-S

ANSWER BRIEF OF RESPONDENT, ORLANDO UTILITIES COMMISSION

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PRELIMINARY STATEMENT

Petitioner, Jim Ford, is the duly elected Property Appraiser of Brevard County, Florida, and will be referred to herein as the "Petitioner, Property Appraiser". Petitioner, James Northcutt, is the duly elected Tax Collector of Brevard County, Florida, and will be referred to herein as the "Petitioner, Tax Collector". Petitioners were Appellants in the District Court and Defendants in the trial court. Respondent, Orlando Utilities Commission, will be referred to herein as "OUC" or "Respondent". Respondent was the Appellee in the District Court and Plaintiff in the trial court. References to the Record on Appeal will be designated as (R:___) followed by the page number.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case concerns the taxable status of certain real and tangible personal property consisting of an electric power generating plant, fuel oil storage facility, and associated transmission facilities in Brevard County, Florida, owned by Respondent and the City of Orlando. A description of the property is attached to the Complaint and Amended Complaint (R:373-423; 503-599).

In February 1990, OUC filed suit (Circuit Court Case No. 90-2558-CA-S) against the Property Appraiser, the Tax Collector, and Defendant, Tom Herndon, as Director of the Department of Revenue, asking the Court to enjoin the Appraiser from denying OUC's tax exempt status regarding said property for the tax year 1989 (Count I), to determine void the attempted back assessment of said property (and the "Apollo Campground" property hereinafter described) for the tax years 1986 through 1988 (Count II) and to determine void

the method of assessment regarding OUC's leasehold property (Count III) (R:373-423; 503-559). The cause proceeded on an Amended Complaint.

In December 1990, OUC filed a two-count Complaint (Circuit Court Case No. 90-20858-CA-S) against the Property Appraiser, the Tax Collector, and Defendant, Tom Herndon, Director of the Department of Revenue, attacking the denial of ad valorem tax exemption for the tax year 1990 on OUC's power plant and related facilities located in Brevard County and the validity of the assessment on its leasehold property (R:564-589).

Petitioners' answers to the Complaint and Amended Complaint are found in the record as follows: R:618-620; 621-623; 624-626; 627-629. Thereafter, OUC filed a Motion for Summary Judgment as to Counts II and III of the Amended Complaint (Case No. 90-2558-CA-S) and Count II of the Complaint (Case No. 90-20858-CA-S) (R:634-635; 652-653; 654-655). OUC's Motion as to Count II of the Amended Complaint was granted (R:918-919). Count II of the Amended Complaint challenged the Petitioner Property Appraiser's back assessment of all of OUC's property in Brevard County which had previously been granted exemption. OUC's Motions for Summary Judgment as to Count III of the Amended Complaint and Count II of the Complaint regarding the validity of the assessment of its leasehold property were denied (R:902-903).

The parties entered into a Stipulated Statement of Facts with exhibits and in October, 1991 the matter came on for non-jury trial (R:939-949; 950-951). The trial court subsequently entered Final Judgment for Respondent OUC finding that the Brevard County power plant property and related facilities at issue were entitled to exemption from ad valorem taxation (R:304-328).

The Property Appraiser and the Tax Collector filed motions for rehearing which were denied after argument (R:329-332; 333-336; and 339-340). Notices of Appeal were timely filed with the Fifth District Court of Appeal by the Property Appraiser and Tax Collector. (R:355-356; 357-358). After the Oral Argument, the District Court entered its unanimous opinion dated February 19, 1993, affirming the Final Judgment. 18 Fla. L. Weekly D521 (Fla. 5th DCA Feb. 26, 1993).

As previously stated, the parties entered into a Stipulated Statement of Facts which are summarized as follows: (R:939-949)

OUC was created as a statutory commission as a part of the government of the City of Orlando, a municipal corporation, by enactment of Chapter 9861, Laws of Florida (1923), as amended.

OUC is authorized by this special legislation to, among other things, maintain and/or operate electric generating plants, electric lines and facilities incident thereto within the boundaries of Brevard and Orange Counties, Florida.

OUC's Indian River Plant located in Brevard County, parcels 1 through 8 (the "Plant"); parcel 9 which is leased from the Canaveral Port Authority and is improved with OUC's oil storage facility for the storage of fuel oil burned at the Plant; parcels 10 through 18, OUC's transmission corridor from the Plant to the Orange County line, and OUC's tangible personal property located thereon, are used exclusively for the generation and transmission of electricity.

Pursuant to both state and federal law and public policy concerning the coordination of electric utilities, OUC maintains and operates electric power lines which are a part of an

intrastate and interstate interconnecting power grid system. OUC has an interconnection with Florida Power and Light (FP&L) on the Indian River Plant site located in Brevard County on the Indian River.

For purposes of illustration, OUC sales to FP&L as a percentage of the Indian River Plant net generation in 1989 was 3.9% and in 1990, 2.3%.

There is no way to determine the generation sources of energy sold by OUC to FP&L.

OUC's sales of electricity fall into two categories, (1) retail sales and (2) bulk sales (also referred to as sales for resale). Retail customers are those with meters on residences and/or businesses that get billed by OUC monthly. Bulk sales (sales for resale) are sales to other utilities.

OUC does not supply electricity to any retail customers outside of Orange County.

OUC does not directly supply electricity to any residential consumer or commercial consumer in Brevard County.

As noted in the opinion of the District Court and in the Briefs of the parties, Chapter 61-2589, Laws of Florida (1961), specifically authorizes the acquisition and location of property in Brevard County for the generation and transmission of electricity, and for the interconnection, sale, and transfer of generated electricity by Respondent with other public or privately owned utilities.

In their appeal to the District Court of Appeal, Petitioners raised as an issue error by the trial court in granting Respondent's Motion for Summary Judgement as to Count II of the Amended Complaint, thus preventing back assessment of the "Apollo Campground"

parcels for the tax years 1986 through 1988. However, the District Court of Appeal did not address this issue in its opinion, and the certified question make no reference to the issue. Petitioners have now reasserted this issue in their Brief to this Court.

Respondent would call to the Court's attention that the "Apollo Campground" parcels were only involved in the back assessment issue, Count II of the Amended Complaint (R:373-423). Respondent did not contend that the "Apollo Campground" parcels were tax exempt for 1989 or 1990. The only issue in the trial court, therefore, as to the "Apollo Campground" parcels (referred to as OUC's recreational park by Petitioners) was the back assessment for tax years 1986 through 1988. No facts were introduced into the record which support Petitioners unsubstantiated assertions that the use of the "Apollo Campground" parcels for the years in question is similar to the use of OUC's property which was the subject of Orlando Utilities Commission v. Milligan, 229 So. 2d 262 (Fla. 4th DCA 1969), cert. denied, 237 So. 2d 539 (Fla. 1970).

SUMMARY OF ARGUMENT

Respondent, the Orlando Utilities Commission, and the City of Orlando, own certain real and tangible personal property located in Brevard County, Florida, which is used exclusively for the generation and transmission of electricity. This Court has repeatedly held that the generation and transmission of electricity is a municipal or public purpose. Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d 648 (Fla. 1946), Gwin v. City of Tallahassee, 132 So. 2d 273 (Fla. 1961). The property is therefore exempt from ad valorem taxation by the first sentence of Article VII, § 3(a) of the 1968 Florida Constitution, which this Court has held to be self-executing. City of Sarasota v. Mikos, 374 So. 2d 458, 460 (Fla. 1979). The property is also granted exemption by § 196.199(1)(c), Florida Statutes (1991).

The second sentence of Article VII, § 3(a) of the 1968 Florida Constitution, provides authority for the Legislature to enact a general law allowing for imposition of taxation, or some other form of payment, by the taxing unit in which municipal property may be located, when located outside of its territorial boundaries. The Legislature has not enacted such a general law. Absent such specific legislative authority, the Petitioner Property Appraiser is not authorized to deny exemption to Respondent's property. There is no provision in the Constitution or statutes stating that municipal property located without its territorial boundaries is required to provide the municipal or public purpose to the citizens of the jurisdiction in which it is located in order to be entitled to ad valorem tax exemption.

Respondent's enabling legislation specifically authorizes the location of its property in Brevard County for the generation and transmission of electricity, and authorizes its electric utility system to interconnect with and sell and transfer electricity to other electric

utilities. Such interconnection, sale, and transfer of electrical energy is itself a municipal or public purpose, and is accomplished in furtherance of public policy.

Petitioner Ford, Brevard County Property Appraiser, attempted to revoke ad valorem tax exemption granted by his predecessor, and back assess Respondent's property, for the tax years 1986, 1987, and 1988. Such attempt is void under Florida law, as it has been held that the grant of an exemption by a Property Appraiser is an exercise of his judgment and can not be changed after the tax roll is certified for a particular year. Underhill v. Edwards, 400 So. 2d 129 (Fla. 5th DCA 1981), rev.denied, 411 So. 2d 381 (Fla. 1981). An exemption decision is not an error of omission or commission which can be corrected retroactively by the Property Appraiser.

The trial court was therefore correct in its Final Judgment in relying upon the first sentence of Article VII, § 3(a) of the 1968 Florida Constitution, and in finding and holding that the Legislature must enact a general law enabling Petitioner Property Appraiser to deny exemption to Respondent's property, and to validate the actions of the Petitioners in this case. The trial court was also correct in entering Summary Judgment finding that Petitioner Ford, as Property Appraiser, could not back assess property previously determined to be exempt.

The Fifth District Court of Appeal was correct in affirming the trial court, and in holding that Petitioner's remedy lies with the Legislature as provided for in the second sentence of Article VII, § 3(a) of the Constitution.

ARGUMENT

POINT I. WHERE A MUNICIPALITY, PURSUANT TO STATUTORY AUTHORITY, LOCATES ON ITS PROPERTY IN ANOTHER COUNTY AN ELECTRICAL GENERATING PLANT WHICH SUPPLIES MOST OF ITS ELECTRICITY TO SUCH MUNICIPALITY'S RESIDENTS AND THE REMAINDER TO PRIVATE UTILITY COMPANIES, BUT DOES NOT SUPPLY ANY ELECTRICAL POWER TO THE RESIDENTS OF SUCH COUNTY, SUCH MUNICIPALLY OWNED PROPERTY IS EXEMPT FROM AD VALOREM TAXATION.

Article VII, § 3(a) of the 1968 Florida Constitution states:

> *All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is located.* Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.

As is clear from the plain meaning of this section, all property owned by a municipality, and used exclusively by it for municipal or public purposes, is exempt from taxation. There is no expressed limitation on the location of the municipal property in order to entitle it to exemption. While the second sentence authorizes the Legislature by general law, to require "payment" by the municipality for property it owns outside of its boundaries, no such general law has been enacted. As noted in the opinion of the District Court, the commentary by Talbot "Sandy" D'Alemberte in Florida Statutes Annotated, Volume 26A, Page 43 (1991), to this section, indicates that the "payment" referred to in this second sentence is not further defined, and is therefore, not necessarily a "tax", ad valorem or otherwise. Thus this "payment", if legislatively authorized, may be a tax, or some other form of revenue levy, but the "payment" is not necessarily in lieu of taxation, as asserted by

Petitioners in their Brief. The two sentences appearing in the same paragraph are clearly related, and both refer to taxation, which is the subject of Article VII.

This Court has held that this constitutional provision is self executing, and enabling legislation is not required. City of Sarasota v. Mikos, supra. Thus, municipally owned property used exclusively for municipal or public purposes is entitled to exemption, and there is no need for statutory authorization or action by a County Property Appraiser approving exemption. The trial court was therefore correct when it held in its Final Judgment (R:315), in referring to Article VII, § 3(a) that "This first sentence is absolute in its terms. It controls the decision in the present case. The only "out" for the taxing authorities here is found in the second quoted sentence, but the Legislature has not enacted any general law to validate the action of the Defendants (Petitioners) in this case".

§ 196.199(1)(c), Florida Statutes (1991) states:

> All property of the several political subdivisions and municipalities of this state or of entities created by general or special law and composed entirely of governmental agencies, or property conveyed to a nonprofit corporation which would revert to the governmental agency, which is used for governmental, municipal, or public purposes shall be exempt from ad valorem taxation, except as otherwise provided by law.

This is the primary statutory source for municipal exemption, in conjunction with § 196.192(1), currently in the Florida Statutes. Other provisions of Chapter 196 deal primarily with entitlement to exemption of privately owned property. While this statute mirrors the Constitution's exemption of "all property" used for municipal or public purposes, it should be noted that "used exclusively" is not contained within the statute. Thus, the Legislature did not qualify the property interest that would be subject to exemption except for the requirement of governmental, municipal or public purpose use.

There are no other Constitutional or statutory provisions which deal directly with the exemption of Respondent's Brevard County power plant property and related facilities in this case, and none are needed. However, besides the fact that the Legislature has never implemented the second sentence of Article VII, § 3(a), there are other indicators in the statutes evidencing that the Legislature has never intended for municipal property used for municipal or public purposes to be subject to ad valorem taxation. For instance, Article VII, § 10(d) of the Florida Constitution, adopted in 1974, to allow joint ownership, construction and operation of electrical, generating, or transmission facilities between municipal and other governmental entities, and private entities, was implemented by the adoption of Chapter 361, Part II, Florida Statutes, the Joint Power Act. Section 361.17, Florida Statutes (1991) states:

> Except as provided in § 10, Article VII of the State Constitution, no joint electric supply projects authorized under this statute shall lend or use its taxing power or credit to aid any corporation, association, partnership, or person. *The private interest portion of such joint projects shall be subject to all taxation in accordance with their proportionate interest in such projects.*

The last sentence of this section indicates the Legislature's recognition that the private interest portion of a joint power project would be taxable, and that a municipal or other governmental portion would not be. The statute makes no distinction as to location of any such joint power project. One example of such a joint power project is the Florida Power & Light Company (FP&L) Nuclear Plant in St. Lucie County, which was addressed by Respondent's expert witness at trial, Joseph P. Cressy, former Chairman of the Florida Public Service Commission (R:93). As indicated in the testimony of Mr. Cressy, Respondent owns 6.1 percent of that joint project, FP&L owns 85 percent, and the Florida Municipal Power Agency (FMPA), owns 8.9 percent. Mr. Cressy testified that 16 municipal members

of the FMPA participated in the ownership of this nuclear plant in St. Lucie County, and only one of them, Ft. Pierce, is a municipality located in that county. These Constitutional and statutory provisions and this joint power project were the subject of this Court's opinion in State v. Florida Municipal Power Agency, 428 So. 2d 1387 (Fla. 1983).

Respondent therefore asserts that since the use of its property fits within the Constitutional and statutory provisions, it is entitled to exemption and the Final Judgment and opinion of the District Court properly so held. Even if there were some ambiguity in the statutes, which there is not, this Court has consistently held that exemption statutes are not to be strictly construed against municipalities. In Saunders v. City of Jacksonville, supra at 651, a case which is relied upon by all parties to this Appeal, and which is discussed at length in the opinion of the District Court, this Court stated:

> Many opinions have been cited to sustain the principle that exemption from taxes are frowned upon, and each claim should be strictly construed. This rule does not apply where the question is raised by municipalities asserting the exemption, by virtue of a statute duly passed pursuant to the Constitution. In the latter case exemption is a rule and taxation is the exemption (sic).

See also Overstreet v. Indian Creek Village, 248 So. 2d 2 (Fla. 1971), and cases cited therein.

In addition, in Gwin v. City of Tallahassee, supra, another case relied upon by the parties, and discussed in the opinion of the District Court, this Court held at 277

> If property owned by the municipalities of this State held and used for valid municipal purpose is to be subjected to taxation by another political body, we think the legislative authority for so doing should be clear and unambiguous.

The trial court in its Final Judgment (R:315) quotes verbatim both of the above referenced quotes from Saunders and Gwin. The Final Judgment also quotes from the last paragraph of Gwin, at 277, as follows:

> That the Legislature of this State, has the power to permit Wakulla County to tax the electrical generating plant and transmission lines of the City of Tallahassee is beyond question. That the acts relied on by the county in this litigation did not accomplish that purpose is equally clear.

The Final Judgment concludes "That the legislature here has specific authority to require payment by taxation or otherwise is equally beyond question. Unless and until the legislature does so, however, the Plaintiff's properties, except the campground, stand exempt from taxation". (R:316)

The District Court opinion, in its conclusion, states at 18 Fla. L. Weekly D523 (Fla. 5th DCA Feb. 26, 1993):

> "However, as we have previously pointed out, Article XII, § 3(a) of the Florida Constitution, provides that a municipality may be required by general law to make payment to the taxing unit in which the property is located. Consequently, we conclude that Appellants remedy lies with the Legislature, as provided for in the Constitution."

For the reasons stated above, Respondent asserts that both the conclusion of the trial court and the District Court are eminently correct, and that in the absence of clear legislative authority negating exemption, the certified question must be answered in the affirmative.

The issue thus decided by the trial court and the District Court, was whether the property owned by Respondent and the City of Orlando, which is located in Brevard County, was in fact used exclusively for municipal or public purposes, within the meaning of Article VII, § 3(a) of the Florida Constitution, and the applicable provisions of Chapter 196, Florida

Statutes, and thus exempt from ad valorem taxation. Although the Petitioners in their Brief spend considerable time discussing other issues, and the factual background of the Saunders and Gwin cases, they conspicuously avoid addressing this issue.

The Stipulated Statement of Facts (R:939-949) states that Respondent's property is used for the generation and transmission of electricity and for no other purpose, although Petitioners in the trial court sought to make an issue of the use of that electricity.

Each time that this Court has opined on the question, it has held, absolutely and unequivocally, that the generation and transmission of electricity is a governmental, municipal, or public purpose. Saunders v. City of Jacksonville and Gwin v. City of Tallahassee. In the Saunders case, Clay County attempted to tax electric transmission lines and other associated facilities located in Clay County, and owned by the City of Jacksonville, then located in Duval County. Clay County contended that the furnishing of electricity in Clay County was not a municipal purpose of the City of Jacksonville. The Court ruled otherwise, holding that the City's property could not be taxed by Clay County. The following are significant quotations from the Court's opinion:

> 1. It is conceded by the City that the properties are being held and used by the City in its proprietary capacity, which narrows the question to whether property so held and used may be for a municipal purpose as contemplated by our Constitution (at 649).
>
> 2. *There is no doubt that the furnishing of electric current is a municipal purpose (at 650).*
>
> 3. The exemption inures to the property itself when *held* and *used* for municipal purposes. *The Constitution makes no requirement as to its location.* If the property serves a municipal purpose to the residents within Jacksonville, then it likewise serves a municipal purpose to the residents outside of

> Jacksonville. Its character does not change when the power line traverses the city or county line (at 650). (This quotation was cited by the District Court in its opinion.)
>
> 4. If the residents of the area within the city reap all the benefits then not only the county's theory is disproved but the Constitution makes no restrictions as to where the property must be located to enjoy the exemption (at 651).
>
> 5. With few exceptions the Courts hold that the exemption applies even where the utility lines extend beyond the city limits and come in competition with privately owned utilities (at 651).

In Gwin, the Tax Assessor of Wakulla County, Florida, attempted to assess an electrical generating plant and transmission and distribution lines of the City of Tallahassee, located in Wakulla County. The City had been provided Special Act authority by the Legislature, to supply public utility service to its citizens, and to individuals and corporations outside the limits of the City, much like the OUC enabling legislation provides to it. The City had extended its electrical distribution lines to the community of St. Marks in Wakulla County, then later acquired a tract of land in Wakulla County, and constructed on that land an electric generating plant for the purpose of furnishing electricity to the City of Tallahassee. Again, this Court had no trouble finding that the City's property was not subject to ad valorem taxation.

Although the Saunders and Gwin decisions were decided under the Constitution of 1885, a review of the former Constitutional provisions and statutes in existence at the time of those decisions, and prior to the 1968 Constitutional revision, will show that the decisions are still viable and that the present Constitution provides even stronger support for the decisions.

At the time the Saunders and Gwin cases were decided, the Constitution of 1885 was in effect. That Constitution had two provisions dealing with exemption from ad valorem taxation of municipal property. The last sentence of Article IX, § 1, provided:

> The special rate or rates, or the taxes collected therefrom, may be apportioned by the Legislature, and shall be exclusive of all other State, County, District and municipal taxes; and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, *excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes.*

Article XVI, § 16, provided:

> The property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the peninsula of Florida, if the Legislature should so enact, whether heretofore or hereafter incorporated, *shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes.*

Unlike Article VII, § 3(a) of the 1968 Constitution, Article IX, § 1, contemplated legislative implementation.

Prior to the effective date of the 1968 Constitution, January 7, 1969, there was a provision in § 192.06, Florida Statutes implementing this provision (transferred to and appearing as § 196.191(2) in the 1969 Statutes), which read:

> The following property shall be exempt from taxation:
>
> All public property of the several counties, cities, villages, towns and school districts in this state, used or intended for public purposes, including both real and personal property of all fire, hose and hook and ladder companies, except land sold for taxes for the use of any counties, cities, villages, towns or school districts; *and including all property of municipally owned and operated public utilities held and used exclusively for municipal purposes.*

This provision was originally enacted in 1957 and is discussed at length in Gwin.

In 1971, in order to fully implement the provisions of the then new Constitution, including Article VII, § 3(a), the Legislature enacted Chapter 71-133, Laws of Florida, which encompassed a comprehensive revision to Chapter 196. Section 15 of Chapter 71-133 repealed § 196.191, in its entirety. Subsection 2 was replaced by § 196.199(1)(c). The language specifically exempting all property of municipally owned and operated public utilities, held and used exclusively for municipal purposes, was no longer necessary in light of the self-executing language of the first sentence of Article VII, § 3(a), and the holdings of the this Court in the Saunders and Gwin cases.

It should be noted parenthetically also, that at the time the 1968 Constitution became effective, § 196.011 required annual application for exemption for all property, except property owned and used exclusively for governmental purposes. Chapter 71-133 inadvertently omitted the exception for governmental property, and in 1972, the Legislature corrected this oversight by amending revised § 196.011, to reinsert the omitted language. Had it been necessary to respecify exemption for municipally owned and operated public utilities, as it had been under the provisions under the 1885 Constitution, the Legislature would have reinserted this provision also.

Subsequent to the these two Florida Supreme Court decisions, the Florida Attorney General has opined, on at least three occasions, on similar issues one of which addressed Respondent's Brevard County property. In AGO 058-167, the Attorney General replied to several questions posed by the State Comptroller concerning the very Indian River Power Plant property which is the subject of this case, and which Respondent was then acquiring in Brevard County. In summary, the opinion holds that Respondent's power plant property

and related facilities held and used for a municipal purpose was not subject to ad valorem taxation by Brevard County.

In AGO 072-228, the Attorney General answered the Question: "May St. Johns County levy taxes against property of the City of Jacksonville or the City of Jacksonville Beach located wholly within St. Johns County including, but not limited to, electric substations, transmission lines and meters or other measuring devices used exclusively by the Jacksonville Electric Authority for the sale of electric power in St. Johns County?"

In summary, the opinion states that property used by the Jacksonville Electric Authority should be considered as serving a "governmental purpose" for property tax exemption purposes, even though located in an adjacent county. This opinion, which was rendered under the 1968 Constitution, cites Saunders v. City of Jacksonville and Gwin v. City of Tallahassee, and § 196.199(1)(c), Florida Statutes. The opinion also notes that there existed no clear implementation by general law of the provision requiring payment to the taxing unit in which municipal property is located when out of its own boundaries, as referred to in the second sentence of Article VII, § 3(a) of the Constitution.

Finally, in AGO 073-252, the Attorney General answered the Question: "May Wakulla County place the power plant located in Wakulla County and owned by the City of Tallahassee on the Wakulla County tax roll and tax it?", by stating in summary that the Wakulla County Tax Assessor must list and value the electric generating plant situated in that county owned by the City of Tallahassee (located in Leon County) on the Wakulla County real property assessment roll, but such property is not subject to ad valorem taxation, being exempt therefrom under Article VII, § 3, of the State Constitution and § 196.199,

Florida Statutes. This opinion also cites Saunders and Gwin, and discusses the provisions of Article VII, § 3, and § 196.199(1)(c), Florida Statutes, and the absence of implementing legislation for the second sentence of Article VII, § 3(a).

Thus, it is clear, and the law is overwhelming that, the use of Respondent's property, for the generation and transmission of electricity, is a municipal or public purpose within the meaning of Article VII, § 3(a), and Chapter 196, Florida Statutes. The certified question should accordingly be answered in the affirmative.

Petitioners' attempts to distinguish the Saunders and Gwin decisions miss the point. While there was special legislative authority involved for the municipalities in those cases, the majority of the Court in each case focused on the use of the property for municipal or public purposes, and the lack of legislative authority imposing ad valorem taxation, the same circumstances which exist in the case at Bar.

The opinion of the District Court discusses the decisions in Saunders and Gwin at length, and holds that Petitioners' reliance on the cases is misplaced, and that the cases support Respondent's position. The opinion of the District Court even notes that a reading of both of the dissenting opinions in Saunders and Gwin supports the trial court's Final Judgment and Respondent's position (see footnote 6 of the opinion), and cites the fact that both the majority opinions in Saunders and Gwin, as well as the dissent in Gwin, recognize that if a municipality, pursuant to legislative authorization, locates an electric generating plant on its property situated in another county, and the plant serves the residents of that municipality, such property is used exclusively for municipal or public purposes because the Constitution make no requirement as to its location. The District Court also notes that to

subscribe to Petitioners argument that Saunders and Gwin require that the municipality must in part service the residents of the taxing entity, would lead to the anomaly that a municipality has a tax exempt status when it competes with private enterprise in the taxing entity, but looses its tax exempt status when it does not so compete.

Despite this overwhelming authority, Petitioners have taken the position in this litigation that Respondent's property is not entitled to ad valorem tax exemption because the property is located in Brevard County, but Respondent is not authorized to and does not provide any public purpose or benefit to the citizens or residents of Brevard County.

With regard to this argument, Respondent asserts the following.

First, this position ignores the language in the Special Act creating Respondent, which as amended authorizes it to acquire, establish, construct, maintain, and operate electric generating plants, electric lines and facilities incident thereto in Brevard County, and which is certainly a legislative expression of municipal purpose. Chapter 61-2589, Laws of Florida (1961).

Second, Saunders and Gwin also make clear that the location of a municipal facility is irrelevant to the issue of entitlement to exemption. This being the case, it is not relevant whether or not the host governmental jurisdiction receives a public purpose or benefit from the municipal facility located within its boundaries. The second sentence of Article VII, § 3(a) clearly leaves it up to the Legislature to determine what form of "payment", be it ad valorem taxation or otherwise, is to be made to the host governmental jurisdiction in such an instance.

In State v. Florida Mun. Power Agency, supra, this Court dealt with an appeal to a bond validation by the FMPA, which sought to sell bonds to finance its acquisition of an 8.9 percent ownership interest in the St. Lucie Unit 2 Nuclear Power Plant, being constructed by FP&L in St. Lucie County. 16 of the 26 municipal or public entity members of the FMPA were involved in the project. This Court affirmed a judgment of the Circuit Court validating the bonds, which had found that the project was a valid public purpose, and that the sales contracts, by which power would be provided from the plant to the FMPA members, were for a proper public purpose. This Court cited Article VII, § 10(d) of the Constitution, which as previously noted, authorizes joint public and private entity projects, and which makes no restriction as to location, and the provisions of Chapter 361. Although not specifically made an issue in the opinion, it is implicit that the location of the plant in St. Lucie County, owned in part by and serving municipalities located outside of that county, had no legal effect on the public purpose aspect of the project. Had the public purpose aspect not been recognized and approved by this Court, the bonds of course would not have been validated.

Petitioners in their Brief spend considerable time arguing that in order for a municipality to be engaged in a municipal or public purpose beyond its territorial boundaries, it must be exercising some aspect of its governmental police power, and it then follows that since Respondent does not have the authority to, and does not provide electrical service to retail customers in Brevard County, it can not exercise a police power public purpose in that county. Petitioners cite the extraterritorial authority provided to the cities in Saunders and Gwin to provide electrical service, and argue that since Respondent does

not have the same authority to provide electrical service in Brevard County, it can not be providing a public purpose.

Respondent has consistently asserted, that it is not required to provide electrical service to the citizens and residents of Brevard County, in order to be performing a public purpose in that county, and that it has complete authority by the provisions of its Charter to exercise a public purpose in Brevard County on behalf of the citizens and residents of Orlando and Orange County. The performance of a municipal or public purpose is not restricted to exercise of the governmental police power in the sense in which it is argued by Petitioners, as is evident by Saunders and Gwin. No decision holds, and Petitioners cannot reasonably argue, that the generation and transmission of electricity is an exercise of the governmental police power. Petitioners are mistakenly attempting to restrict the scope of the decisions in Saunders and Gwin, and are simply not recognizing their continued applicability, as did the Attorney General in the 1972 and 1973 opinions referred to above. Petitioners are also not recognizing the requirement that there must be a specific general law authorizing imposition of taxation on municipal property, and there is no such law.

Petitioners' citations to municipal annexation cases, and to other cases decided prior to the adoption of the present Florida Constitution, are equally irrelevant to the fact that Respondent is authorized to, and does perform a municipal and public purpose in Brevard County.

While the trial court's Final Judgment concluded that Respondent's property in Brevard County is not used by Respondent for municipal or public purpose in so far as Brevard County is concerned, the Judgment also found that "The properties are without

doubt used exclusively by the Plaintiff (Respondent) for municipal or public purposes, in so far as Orange County is concerned, Orange County being the geographical area which receives the benefit of its services". (R-312)

The opinion of the District Court in affirming the trial court, cites Traverse City v. Blair Township, 190 Mich. 313, 157 N.W. 81 (1916) and Town of Hamdem v. City of New Haven, 91 Conn. 589, 101 A. 11 (1917), and discusses these cases at length, citing them as supporting the conclusion reached by the trial court, that the furnishing of electricity in Brevard County for the sole benefit of the residents of Orange County, constitutes a municipal purpose. In Traverse City v. Blair Township, the Michigan Supreme Court also noted that the applicable provisions of the Michigan law providing for exemption of municipal property used for municipal purposes, was without distinction as to location, and upheld an exemption for the Defendant Township, which owned a utility plant outside of its boundaries, and located in the Plaintiff's city. With regard to the unjust or unequal taxation argument of the Plaintiff, the Court noted that such matters of taxation were to be determined by the Legislature. As the trial court Final Judgment and the opinion of the District Court recognize, the second sentence of Article VII, § 3(a) of the Florida Constitution, also leaves the question of taxation of municipal property located outside of the municipal boundaries of that municipality up to the Legislature.

In short, Petitioners are asking this Court to rewrite Article VII, § 3(a) of the Constitution, since there is no language in the Constitution or statutes supporting the Petitioners contention that a municipal or public purpose must be provided to the citizens and residents of the jurisdiction seeking to impose taxation in order to justify exemption, or

the contention that the governmental police power must be exercised by the municipality in that jurisdiction. What the Petitioners are asking the Court to do is judicially revise the first sentence of Article VII, § 3(a) of the Constitution, to read as follows:

> "All property owned by a municipality and used exclusively by it for municipal or public purposes *in the jurisdiction in which it is located, and upon which the governmental police power is exercised*, shall be exempt from taxation".

Obviously this the Court can not do.

Petitioners also took the position in the trial court that because Respondent sells at bulk sale, electricity generated from its Brevard County plant to other public utilities, that its property is not used exclusively for municipal or public purposes, and exemption is lost for the entire property. Respondent acknowledges that the Stipulated Statement of Facts states that a percentage of the electricity generated by all of the facilities in its system, located inside and outside of Brevard County, is sold on an annual basis to other municipally owned utilities, and to Florida Power and Light Co., and investor owned non-tax exempt entity. It should be emphasized that the percentage figures of 16.6% and 17.8% of total sales as representing the resale of electricity from paragraph 22 of the Stipulated Statement of Facts (R:42) cited by Petitioners in their Brief, and referred to by the District Court in its opinion, refer to Respondent's total electric utility operating revenues and percentage of bulk sales from its entire five generating plant system, located in Orange, Brevard, Citrus, Polk, and St. Lucie Counties, and not just from its Indian River Plant in Brevard County, which is the subject of this litigation. Paragraph 15 of the Stipulated Statement of Facts (R:41) states that by way of illustration bulk sales to FP&L, as a percentage of the Indian River Plant net generation in 1989, was 3.9 percent, and in 1990, 2.3 percent, and paragraph

16 states that there is no way to determine the exact generation sources of energy sold by Respondent to FP&L.

Therefore, it is misleading to cite total system revenues and sales, since these figures do not relate to the property in issue, in support of the argument being put forth by Petitioners. Respondent contended in the trial court that the amount which may be attributed to generation by its Brevard County plant is so small as to be incidental, and does not, as a matter of law, effect the exclusivity of its use for exempt purposes. In addition, Respondent contended in the trial court, that in any event, this sale of electricity itself is pursuant to a public purpose, and therefore, an exempt use.

First, as noted previously, § 196.199(1)(c) does not include the word "exclusively", as does the Constitutional provision, so the Legislature has chosen, as it may do so, a different, but not more stringent, standard than allowed by the Constitution. Secondly, the Legislature has defined the terms "exempt use of property" and "exclusive use of property" in § 196.012, Florida Statutes. It is also provided however, that the definition of "exclusive use of property" does not necessarily mean that there can be no more than a single use. For instance, the second sentence of § 196.196(2) provides "In no event shall an <u>incidental</u> use of property, either qualify such property for exemption, or impair the exemption of an otherwise exempt property". The intent of the Legislature is therefore clear that it is the primary use of property that controls determination of exemption. The primary use of Respondent's property located in Brevard County is to generate and transmit electricity to its customers in the City of Orlando and Orange County.

This legislative intent is also found in the case law, and in fact there is no reported case in Florida which states that an incidental amount of private use or benefit results in a total loss of exemption. Rather, existing case law holds that a municipal facility serving an incidental private purpose in addition to a primary public purpose is still exempt from taxation. The District Court so noted in discussing this issue in its opinion.

In Gwin v. City of Tallahassee, as noted previously, the statutory language provided that all public property would be exempt "including all property of municipally owned and operated public utilities held and used exclusively for municipal purposes". First this Court holds that the terms "municipal purpose" and "public purpose" are synonymous. The Court states at page 276 "Even if we concede arguendo that the distribution lines serving the residents of St. Marks and Newport and incidental customers along the main transmission line between the City of Tallahassee and those communities was a private purpose as distinguished from a municipal or public purpose, such fact would not destroy the exempt status of this property."

The Court continues on page 277 to state that uses which may be deemed private or non-public, which are part of a public facility are to be deemed merely incidental to the main or primary purpose of the public facility and do not in any way effect the public nature of the facility.

In Orlando Utilities Commission v. Milligan, supra, at issue was the taxability of property owned by Respondent in Orange County, and used as a recreational area for the exclusive use of its employees and their families. The Court on the taxability issue, noted that since Respondent is a municipally owned and operated public utility, its real property

is exempt from ad valorem taxation when the property is used exclusively for municipal purposes. The Court cited the Saunders and Gwin cases for the proposition that the furnishing of electricity, power and water, is a municipal purpose.

On the exclusiveness question, the Court at page 264 cited Gwin for the proposition that the exclusiveness of municipal purpose is not destroyed by private benefit or use, if it is incidental to the predominate municipal purpose, and also cited, Daytona Beach Racing and Recreational Facilities District v. Paul, 179 So. 2d 349 (Fla. 1965).

Other cases which have addressed this issue are Maccabee Investments, Inc. v. Markham, 311 So. 2d 718 (Fla. 4th DCA 1975), and Dade County v. Pan American World Airways, Inc. 275 So. 2d 505 (Fla. 1973). At page 512 of the Opinion in Dade County v. Pan American World Airways, Inc., cited by the District Court in its opinion, this Court stated:

> We return now to the main thrust of appellant's argument, which urges us to hold that the leased property does not satisfy the *constitutional* tax exemption for "municipalities" in Article VII, § 3(a), or Article XVI, §16, on the theory that the property is not used *exclusively* for public purposes inasmuch as the airline has a private purpose of engaging in a profit making venture. We cannot accept this contention and for good reason. The word "exclusively" in these constitutional provisions modified the preceding verb "used" and its object "public purposes." ("*used* exclusively for public purposes") The use is a public one. So, in order to determine whether the property is used *exclusively* for a public purpose we must ask ourselves the following two questions:
>
> (1) Whether the facility is a "public purpose" and, if so,
>
> (2) Whether the property is *used exclusively* for that "public purpose".
>
> In answering the first question, we must necessarily define "public purposes." Under our decisions "public purposes" are projects primarily and predominantly for the public benefit even though there may be some incidental private purpose, too.[10] (footnote omitted) In this connection, it must be kept in mind that upon concluding that the project meets the test of a "public

> purpose", such an incidental private purpose as here necessarily loses its identity as a private matter and is merged within the term "public purpose". In other words, "public purposes" is a legal concept encompassing inconsequential private purposes. Thus the private character of a "public purpose" is not material to the second question concerning "exclusive use". Precisely stated, the second question is whether the property is *used exclusively* for purposes defined as "public purposes." In this context, the property can be used *exclusively* for public purposes if the private purpose has merged into the term "public purposes" and if the property is *used* solely for such "public purposes".
>
> By this analysis we have not changed the ordinary meaning of "exclusive" from its dictionary definition of "single," "sole" and "entirely." Instead, we have pointed out that the requirement for "exclusive *use*" is not affected by a private purpose incorporated into the meaning of "public purpose." Stated in another way, the property must be used *exclusively* for purposes designated as "public purposes" which may include such an incidental private purpose as here.

The fact that an incidental use, which may not otherwise itself qualify for exemption, does not effect entitlement to total exemption, is in accord with the legal maxim de minimis non curat lex, simply meaning that, "the law does not care for small things". See, e..g., Loeffler v. Roe, 69 So. 2d 331, 338 (Fla. 1954) (nominal encroachment on easement does not make title unmarketable); Dept. of Revenue v. Yacht Futura Corp., 510 So. 2d 1047, 1049 (Fla. 1st DCA 1987) (de minimis use of yacht in state did not subject it to taxation); Smith v. Winn Dixie Stores, Inc., 448 So. 2d 62, 64 (Fla. 3d DCA 1984) (lease would not be defaulted due to breach that was de minimis); Metropolitan Dade County v. Shiver, 365 So. 2d 210, 213 (Fla. 3d DCA 1978) (refusing to stop election when difference between ballot language and authorizing statute was de minimis); Hialeah, Inc. v. Dade County, 490 So. 2d 998, 1001 (Fla. 3d DCA 1986) ("lessee" was in effect equitable owner of property where lease required only payment of nominal consideration to transfer title).

Thus, it is obvious that the term "exclusively used" does not contemplate a 100% single use to the exclusion of every other use. However, even were this not the case, Respondent contends that the position of Petitioners in this regard is without merit and untenable. It is undisputed in this case that the property is used for the generation and transmission of electricity, which has been held to be a municipal or public purpose. Therefore, the fact that Respondent sells the electricity generated to retail and bulk customers is irrelevant. While this is also obvious from Saunders and Gwin, Petitioner's argument also overlooks the point that it is the use of the property, and not the use of the product or proceeds from the sale of the property that determine the exemption. Certainly, Respondent can not be expected to restrict the use of its electricity to tax exempt entities, or to give away electrical energy it generates without compensation; hence, it sells to its retail customers in Orange County, and at bulk sale to others, as part of an interconnecting grid system, which was fully explained at the trial through the expert testimony of Joseph P. Cressy (R:61).

The Court in Maccabee Investments, Inc. v. Markham, supra, discussed this very aspect at page 724, where it stated in referring approvingly to a Pennsylvania case "The court also considered the argument that the "private profit motive" (of the lessee) precluded the operation of the Spectrum from being a public purpose. In referring to Pennsylvania decisional law the U.S. District Court observed that "it is the *use of the property and not the use of the proceeds from the property* which determines whether tax exemption may constitutionally be granted". The court concluded that the public facility leased for operation

to private parties deriving a profit therefrom instead of being operated by the public authority itself did *not* destroy the tax exempt status of the facility".

Petitioners asserted in the trial court that Respondent should not be allowed to earn a "profit" on the sale of its electricity (or in the municipal sense a surplus of revenues over expenses) nor to provide revenues to the City of Orlando, without paying property tax to Brevard County. Again, the proceeds of any such sale have nothing to do with entitlement to exemption. In Rosalind Holding Company v. Orlando Utilities Commission, 402 So. 2d 1209 (Fla. 5th DCA 1981), cert. denied, 412 So. 2d 469 (Fla. 1982), this point was discussed. In that case, the Plaintiff sought to prove that the utility rates charged by OUC were unreasonable and confiscatory, but failed at both the Circuit Court and the District Court of Appeal level. The District Court discussed the annual payment by OUC to the City of Orlando, as a "franchise-equivalent fee" in addition to "profits" earned by OUC. The Court characterized this as merely a transfer of funds from one pocket to another, since OUC is in actuality part of the City.

The Court held that a municipal utility is entitled to earn a reasonable rate of return on its capital, like any other utility.

At page 1213 the Court stated "Municipal utilities in Florida are entitled to earn a profit on their utilities operations, and some municipalities in Florida take a higher percentage of the utilities profit in general revenues than Orlando does, even including the franchise-equivalent payment.[19]"

Footnote 19 reads:

> The City of Jacksonville receives 30% of its utility's *gross* revenue. In an extreme case, there may arise the specter of a tax-free town made wealthy by its utilities operations both inside and outside its political limits.

At page 1212 the Court discusses the annual voluntary contribution made by OUC to Orange County, and recognizes that OUC's property can not legally be taxed by Orange County absent a general statute, which does not exist, citing Article VII, § 3(a) of the Constitution. (see footnote) Petitioners refer to this "payment" in their Brief, which Respondent wishes to emphasize is totally voluntary, and therefore, subject to unilateral change at any time. Petitioners also imply in their Brief that Respondent's service in unincorporated Orange County entitles it to exemption in that County. The Court's reference to Article VII, § 3(a), obviously indicates to the contrary.

Thus, Rosalind Holding Company stands for the proposition that not only may a municipality earn "profits", (or in the municipal sense, a surplus of revenues over expenses), but that such activity does not necessarily mean that a municipality is engaged in a proprietary function, since the furnishing of electricity is a municipal or public purpose. Petitioners mistakenly contend to the contrary, and the reference in their Briefs to Respondent's "retained earnings", which are undefined in the record, is equally irrelevant.

Since the Courts have made it clear that a municipal utility may sell electricity to customers other than its own citizens without jeopardizing its ad valorem tax exempt status, it certainly can not be reasonably argued that the tax exempt status is jeopardized when those customers are other municipal utilities receiving electricity at bulk sale.

Respondent has asserted consistently in any event, the sale of electricity to retail and bulk sale customers is itself a public purpose and part of public policy. Petitioners contended in the trial court that the interconnection of power lines with other electrical utilities at the OUC plant not only effects the exclusivity of use, but also renders the Plant property, at least in part, subject to taxation. This argument also has no merit, and is untenable. In fact, it is a matter of federal and state public policy to promote such interconnection of power lines among utilities. This was evidenced as early as the 1961 amendment to the 1923 OUC Special Act, which authorized the interconnection system now participated in by OUC.

Further, Chapter 366, Florida Statutes, provides for the regulation of public utilities by the Florida Public Service Commission (PSC). The purpose of this Chapter is to create a centralized commission to oversee and assure the development and maintenance of a coordinated power grid throughout Florida. See the legislative declaration in § 366.01. Municipally owned utilities are made subject to the Commission's jurisdiction by their inclusion in the definition of electric utility contained in § 366.02(2).

Section 366.055 specifically provides for an interconnecting grid system among the municipal and investor owned electric utilities in Florida. Subsection (1) states:

> Energy reserves of all utilities in the Florida energy grid *shall* be available at all times to ensure that grid reliability and integrity are maintained. The commission is authorized to take such action as is necessary to assure compliance.

Subsections (3) provides:

> To assure efficient and reliable operation of a state energy grid, the commission *shall* have the power to require any electric utility to transmit electrical energy over its transmission lines from one utility to another or as part of the total energy supply of the entire grid, subject to the provisions hereof.

See §§ 366.04(2)(c), 366.04(5), 366.05(7) and (8) for further references to the grid system.

Federal law also encourages the interconnecting of utility lines. 16 U.S.C.A. § 824(a) (West 1993) states the Federal Power Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities, for the generation, transmission, and sale of electric energy. . . It shall be the duty of the Commission to promote and encourage such interconnection and coordination. . .

Respondent and other Florida utilities, public and private, as a result of increased interstate interconnections over the years, are involved in interstate commerce, and are therefore subject to federal laws governing energy utilization and conservation. (See Federal Power Commission v. Florida Power & Light Company, 404 U.S. 453, 92 S. Ct. 637, 30 L. Ed. 2d 600 (1972), where the Court, in determining whether the FPC has jurisdiction over the activities of FP&L, focused on the sharing or commingling of power with out-of-state utilities, and held that if the FPC determines that such commingling is present, then interstate commerce in impacted and the FPC has jurisdiction.)

As was addressed by Joseph P. Cressy in his expert testimony (R:61), the result of this legislation and public policy is that all of the electric utilities in the State of Florida, whether municipally or investor owned, are interconnected by this grid system by mandate of the PSC, and both sell and purchase electrical power as needed. Whenever available, the grid system encourages one utility to purchase power, if it can do so less expensively than generating it itself, at the most economical rate from the least expensive source, which generally depends on the source of fuel for that source. Sales are also conducted on an

emergency basis, such as during seasonal hot or cold weather, and when capacity is otherwise reduced. Emergency sales are on a cost basis, that is, without profit to the supplying utility. Therefore, Respondent has no choice but to participate in the grid system and bulk sales.

The effect of this interconnecting grid system is to benefit all of the electrical customers of the state, no matter what city or county they are located in, by keeping rates as low as possible, and power continuously available. Mr. Cressy testified that the citizens of Brevard County specifically benefit from this interconnection grid system and the fact that Respondent's plant in Brevard County contributes to the system by its bulk sales. (R:84-85) There can be no doubt then that Respondent's interconnections with other utilities, whether such utilities are investor owned or not, are in furtherance of a public purpose, and that the sale of electricity to other municipal utilities, and a non tax exempt entity, such as FP&L, is no less a municipal or public purpose than a sale of electricity to OUC retail customers in the City of Orlando and Orange County.

Perhaps the fallacy in the Petitioner's position in this case is best illustrated by review of City of Sarasota v. Mikos, supra. In that case, the Sarasota County Property Appraiser had sought to tax vacant real property owned by the City of Sarasota. This Court held that vacant land held by municipalities was presumed to be in use for a public purpose, if it is not actually used for private purpose on the tax assessment day (January 1), and thus the vacant land of the City was exempt from taxation under the self executing provisions of Article VII, § 3(a). The Court made it clear that it had to weigh "the balance and equality of treatment established in the 1968 Constitution for local governmental units" (at 459). In so doing, it noted that requiring active use of land was not a prerequisite for exemption, and

that holding unimproved land for future use or open space, is a use of land for a public purpose. In balancing the provisions of the Constitution, the Court stated at page 461

> If the contentions of the property appraiser were adopted, the tax burden of county residents would be reduced at the expense of city taxpayers. This result is contrary to the purpose of our present constitution which provides that each local governmental entity shall have the same basic taxing authority, shall pay its own way, and shall not receive benefits at the expense of another local governmental unit. This philosophy is illustrated by Article VII, § 9(b), which specifies that counties, school boards, and municipalities may tax up to a maximum of ten mills each; by Article VII, § 1(h), which prohibits the taxation of residents of municipalities for services rendered by the county exclusively for the benefit of residents in unincorporated areas; *and by Article VII, § 3(a), which provides that the legislature may require a municipality owning property outside the municipality to make payment to the taxing unit in which the property is located. Each of these provisions is designed to assure a fair tax structure for the taxpayers residing in each local government's jurisdiction and to prevent one local government from being unjustly benefited at the expense of another.*

This illustrates the crux of the issue of this case. It is not up to the Courts to upset the balance between local governmental units, and provide Brevard County with an ad valorem tax benefit at the expense of the citizens and taxpayers of the City of Orlando, without unquestioned authority to do so, which is absent in this case. Rather, since there is no clear and unambiguous general law which sanctions the denial of the exemption by the Petitioner, Property Appraiser, in this case, as required by this Court in Gwin v. City of Tallahassee, it is up to the Legislature to implement the second sentence of Article VII, § 3(a) of the Constitution, if it so desires. Until it does so, Respondent's property in Brevard County is not subject to ad valorem taxation, and the certified question must be answered in the affirmative.

POINT II. THE TRIAL COURT CORRECTLY ENTERED ITS ORDER ON MOTION FOR SUMMARY JUDGMENT, DETERMINING THAT PETITIONER FORD COULD NOT BACK ASSESS PROPERTY PREVIOUSLY DETERMINED TO BE EXEMPT.

In Count II of its Amended Complaint in Case No. 90-2558-CA-S, which challenged Petitioner Ford's denial of exemption with regard to the 1989 tax year, Respondent alleged that Petitioner's attempt to revoke ad valorem tax exemption for the property of OUC, which had been determined to be exempt from taxation on the tax rolls of Brevard County for the tax years 1986, 1987, and 1988, was void. The property in question, which was made subject to the back assessment, was identified on the exhibits to the Amended Complaint and included all of the property at issue in the case, including that property known as the "Apollo Campground".

Other than the Motion for Summary Judgment as to this Count, and the trial court's Order on the Motion granting Summary Judgment, there were no pleadings addressing the property known as the "Apollo Campground", nor facts adduced in the record as to the date or circumstances of acquisition of this property, or as to character or nature of the use of this property by Respondent. Respondent did choose not to seek exempt status for that particular property for the tax years now in question, 1989 and 1990. Despite this lack of factual basis in the record, Petitioners wish to infer that the use of the Apollo Campground property is identical to that property described in Orlando Utilities Commission v. Milligan, supra, and to therefore assert that the "Apollo Campground" property, since it is presumably being used in the same manner as the property which was the subject matter of that case, is not entitled to exemption.

There are numerous reasons that could now be put forth by Respondent for its choosing not to contest denial of exemption for the Apollo Campground property for the tax years 1989 and 1990, but since they are not contained in the record, it will not do so. Likewise, Petitioners assumption that the character and nature of the use of this property for the tax years 1986, 1987, and 1988 was the same as that for the property described in Orlando Utilities Commission v. Milligan in 1965 cannot be supported by the record. Petitioner Ford, during his direct examination, referred to "the park property" as one of the factors in his determination to deny exemption beginning with the tax year 1989 (R:190). On cross examination however, Mr. Ford admitted that he had never seen the OUC park property referred to in Orlando Utilities Commission v. Milligan, nor had he actually inspected the "Apollo Campground" property of Respondent in Brevard County (R:192). Therefore, there is no factual basis for the assertions made by Petitioners, and no basis for the allegations in their Brief, that Respondent knew the property was taxable and did not advise the Property Appraiser's office.

The use of this property by Respondent, prior to 1989, is in any event irrelevant, since Mr. Ford's predecessor in office had exercised his judgment as Property Appraiser and granted exemption for all of the OUC property placed at issue in the case, including the Apollo Campground property for the tax years 1986, 1987, and 1988. Under the applicable statutory provisions, this judgment is made and exemption granted for municipal property without the requirement of an annual application. § 196.011(2) and (3), Fla. Stat. (1991). A Property Appraiser may of course examine entitlement to exemption on a yearly basis, again without regard to whether an application has been filed or not. Thus the basis for

Respondent's Motion for Summary Judgment was quite simple and was supported by Underhill v. Edwards, supra, which Respondent cited in its Motion, and argued at the hearing on the Motion was dispositive of the issue. The trial Court agreed and entered its Order granting the Motion. Petitioners only appeal the trial court's Order with regard to the Apollo Campground property, in their Brief.

In Underhill v. Edwards, the Brevard County Property Appraiser had in 1976 granted exemption to a hospital building facility in its entirety. In 1977, however, the Property Appraiser determined that a portion of the property was not entitled to exemption, and that that portion had been exempted erroneously in 1976 and should have been taxed, and he therefore back assessed it for the 1976 taxes on the 1977 tax roll pursuant to the "back assessment" statute, § 193.092, Florida Statutes. The Circuit Court upheld denial of exemption for the years subsequent to 1976, but determined that the back assessment for the year 1976 involved the circumstance of a difference in judgment by successive Tax Assessors (Property Appraisers) and was precluded by applicable Florida law, citing Korash v. Mills, 263 So. 2d 579 (Fla. 1972) and Markham v. Friedland, 245 So. 2d 645 (Fla. 4th DCA 1971), which also involved a back assessment by a successor property appraiser contrary to a decision made by his predecessor. The Court upheld the Circuit Court stating as follows at page 132:

> The trial court also correctly determined that the first floor of the new wing which has been assessed as "exempt" on the 1976 tax roll could not be back assessed,[1] (footnote omitted) because the property had not "escaped taxation" for that year. It had not been missed, overlooked or forgotten. *Okeelanta Sugar Refinery, Inc. v. Maxwell*, Fla. App. 1966, 183 So. 2d 567. Once the tax roll has been certified for a given tax year and the tax levied thereon is paid for a particular described property, that property cannot be taxed again for that particular year. *Okeelanta; Markham v. Friedland*, 245 So. 2d 645 (Fla. 4th

> DCA 1971). In the 1976 tax year it was the "judgment" of the property appraiser that the entire hospital property was exempt (which included the questioned first floor) and the property was so assessed on the tax roll. In *Korash v. Mills*, 263 So. 2d 579 (Fla. 1972), relied on by appellee here, the total improvement consisting of an oceanfront motel was omitted from the assessment by error. Thus, it was held that a back assessment under the subject statute was proper, because the improvements had been totally overlooked; they had in fact "escaped taxation." The court emphasized that it was not the judgment of the property appraiser that was involved; if a change in valuation had been attempted, it would have been stricken down. After certification of the tax roll a change "reevaluating" the amount of the valuation will not be allowed. *Korash, supra*. The determination that a parcel of property is exempt is as much a part of the assessment process as is the determination of its taxable value, and the judgment of the assessor must be applied in reaching that conclusion. We hold, therefore, that a determination in 1977 that the property should not have been exempted in 1976 is a change in judgment and is prohibited under the cited cases.

In addition, Rule 12D-8.006(1), Florida Administrative Code, defines "escape taxation" to mean get free of tax, to avoid taxation, to be missed from being taxed, or to be forgotten for tax purposes.

Therefore, Petitioners argument that the property in question "escaped taxation" is without merit. Nor can it be said that to now allow the Property Appraiser to back assess to correct an error of omission or commission is applicable, since the statutory section providing for such correction, § 197.122, Florida Statutes, has been repeatedly construed to apply only to property which had been "missed, overlooked, or forgotten", or to which some ministerial mistake had been made, and not to property which was subject to the exercise of judgment of the Property Appraiser by way of a grant of exemption.

The cases cited by Petitioners, McNeil Barcelona Associates, Ltd. v. Daniel, 486 So. 2d 628 (Fla. 2d DCA 1986), and Straughn v. Thompson, 354 So. 2d 948 (Fla. 1st DCA 1978), illustrate this, and are readily distinguishable from Underhill v. Edwards. In McNeil

Barcelona Associates Ltd. v. Daniel, the Property Appraiser corrected the tax roll to remedy a mistake involving the multiplication of the square footage of apartment buildings by a certain factor. The Court deemed this to be a ministerial or administrative type of correction not involving a matter of judgment, and therefore, statutorily authorized. In Straughn v. Thompson, the Property Appraiser sought to correct a computer error in a tax bill which omitted a zero from the stated assessed value of improvements on the property in question, and again it was found that this type of correction was permissible.

The distinction between the exercise of the Property Appraiser's judgment and the correction of an error is also discussed in a recent Attorney General's Opinion, AGO-091-31, which cites Underhill v. Edwards.

Again, it can not be assumed, as Petitioners wish to do, that the use of Respondent's "Apollo Campground" property in 1986, 1987, and 1988, did not qualify it for exemption, as there is no basis in the record for such a position. The judgment of the then Brevard County Property Appraiser determining that the property was entitled to exemption for those years is now fixed and cannot be revoked by his successor, Petitioner Ford, for the reasons stated in Underhill v. Edwards. Therefore, the trial Court's Order granting the Summary Judgment was correct, and was properly affirmed by the District Court.

CONCLUSION

Respondent submits that its property in Brevard County, which is the subject of these actions, is exempt from ad valorem taxation by Brevard County, for the following reasons:

First, the property is owned by Respondent and the City of Orlando, a municipal entity, and is located in Brevard County pursuant to specific legislative authority.

Second, the property is used exclusively for the generation and transmission of electricity, a municipal or public purpose.

Third, there is no general law specifically subjecting Respondent's property in Brevard County to ad valorem taxation, as required by the second sentence of Article VII, § 3(a) of the Florida Constitution.

Fourth, in the absence of such a general law, the location of municipal property outside of its boundaries, is irrelevant to entitlement to exemption.

Fifth, the fact that a percentage of the electricity generated and transmitted by Respondent's Indian River Plant, may be sold to and used by customers of other utility companies, is irrelevant to the entitlement to exemption, but is nevertheless pursuant to a municipal or public purpose.

Sixth, Article VII, § 3(a) of the Florida Constitution, Chapter 196.199(1)(c), Florida Statutes, case law, and numerous Attorney General's Opinions, provide ample authority for granting the exemption.

Respondent further submits that the District Court was correct in affirming the Summary Judgment granted by the trial court as to the attempt of Petitioner Ford, to back assess certain of its property, which had previously been determined to be exempt.

Therefore, the certified question should be answered in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent, Orlando Utilities Commission was served by U.S. Mail to Joe Teague Caruso, Esquire, Florida Federal Bank Building, 800 East Merritt Island Causeway, Suite 200, Merritt Island, Florida 32954-1721, and Larry E. Levy, First Florida Bank Building, 215 S. Monroe Street, Suite 803, Tallahassee, Florida 32302, Attorneys for Petitioner, Jim Ford, Brevard County Property Appraiser; and Frank J. Griffith, Jr., Esquire, Cianfrogna, Telfer & Reda, P.A., 815 S. Washington, City Square Professional Center, Titusville, Florida, 32782, Attorney for Petitioner, James Northcutt, Brevard County Tax Collector, this 26 day of May, 1993.

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