SUPREME COURT OF FLORIDA

CASE NO.: 81,440

JIM FORD, Brevard County
Property Appraiser, et al.,

Petitioners,

vs.

ORLANDO UTILITIES COMMISSION,
etc., et al.,

Respondents.
_____/

PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT

This cause is before this court on a question certified by the Fifth District Court of Appeal as a question of great public importance. The petitioners herein are Jim Ford, Brevard County Property Appraiser, and James Northcutt, Brevard County Tax Collector. Petitioner Jim Ford will be referred to herein as the "Property Appraiser" and the petitioner James Northcutt will be referred to herein as the "Tax Collector." The Respondent is the Orlando Utilities Commission, which is a commission created by special act as part of the government of the City of Orlando, and will be referred to herein as "OUC."

References to the record on appeal will be delineated as (R:) followed by the appropriate page number.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This is a case of first impression. The Fifth District Court of Appeal certified the following issue to this Court as a matter of great public importance:

> 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, IS SUCH MUNICIPALLY OWNED PROPERTY EXEMPT FROM AD VALOREM TAXATION?

Ford v. Orlando Utilities Commission, 18 Fla. L. Weekly D521 (Fla. 5th DCA Feb. 19, 1993) at D523.

This case involves the taxable status of certain real and tangible personal property including an electric power generating plant, owned by OUC of Orange County, Florida, and physically located in Brevard County, Florida, pursuant to a special act, Chapter 61-2589, Laws of Florida, Special Acts 1961. It involves an interpretation of pertinent provisions of the Florida Constitution and Florida Statutes and, specifically, the second sentence of Article VII, Section 3(a), Florida Constitution. Said provision provides in part:

> (a) 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. . . .

(Emphasis added.) A description of said property is attached to the complaint and amended complaint. (R: 373-423; 503-559)

The Property Appraiser assessed said plant and property owned by OUC and physically located in Brevard County. Such properties included the plant and the machinery and equipment, the transmission right-of-ways, and a parcel of property which was used as a recreational area for employees of OUC. OUC paid taxes on the recreational area and on the property under the transmission corridors. After an unsuccessful appeal to the property appraisal adjustment board, OUC filed a complaint challenging the assessment of taxes for tax year 1989 against the power plant located in Brevard County, and subsequently filed suit for 1990. (R: 373-423)

After the filing of an amended complaint (R: 503-559), and after several motions were heard, the petitioners filed answers. (R: 610-611; 612-613; 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. (R: 634-635; 652-653; 654-655) The court denied the motion for summary judgment as to count III but granted the motion as to count II. (R: 902-903; 918-919) Count II had challenged back assessment of the property used as a recreational area, and the trial court ruled the back assessment impermissible.

The parties entered into a joint stipulated statement of facts with exhibits and a non-jury trial was held in October, 1991. (R: 939-949; 950-951) After trial the court entered final judgment for OUC, finding that the utility plant was not taxable in Brevard County. (R: 304-328)

OUC makes no payment of any kind to Brevard County in the form of payment of taxes or in the form of a payment in lieu of taxes. (R: 327; 948) However, OUC does make a payment to Orange County yearly. In 1989 and 1990, the amount of such payments was $605,953 and $627,127 respectfully. (R: 327; 948) The equity or retained earnings from the electrical segment of OUC for 1989 was $230,935,651.00, and for 1990 was $248,394,117.00. (R: 327; 948)

Under the terms of the special act authorizing the location of the utility plant in Brevard County, OUC does not serve any customers with electricity in Brevard County, and does not supply electricity to residents or property owners in Brevard County. (R: 322; 943) OUC only furnishes electricity directly to customers in Orange County and the City of Orlando. OUC sells electricity either by retail sales or bulk sales, which also are referred to as sales for resale, but does not supply electricity to any retail customers outside of Orange County. It has bulk sales which are sales of electricity to other utilities throughout the State of Florida. For the fiscal year ending September 30, 1990, OUC's resales of electricity totalled $47,179,821.00 which was approximately 16.6 percent of the total sales of electricity. In 1989, the total resales represented 17.8 percent of the sales of electricity. (R: 322; 943)

After the proceedings commenced, OUC paid taxes on a recreation or park area located in Brevard County consisting of approximately six and one-half acres and also paid taxes for 1989

on the real property adjacent to the transmission lines which ran from the plant west towards the City of Orlando. However, OUC did not pay taxes on the real property adjacent to the transmission lines for 1990.

A stipulated statement of facts consisting of 11 pages was introduced as a joint exhibit at the trial level. (R: 939-949). The specific property involved is set forth and described on the second and third pages of the stipulation. These properties are described on page 2 of the trial court's final judgment as follows:

> The Plaintiff was created as a statutory commission as part of the Government of the City of Orlando, a municipal corporation. For the purposes of this litigation, it is a municipality. It owns several types of property in Brevard County, including (1) a campground, (2) a fuel storage tank and appurtenances, fencing and pavement all located on a piece of property it leases from the Canaveral Port Authority, (3) certain real property on which is located its electrical generating and transmission plant, (4) real estate consisting of a transmission corridor and "buffer zone" which runs from its generating/transmission facility to the Brevard County/Orange County line, and (5) the tangible personal property consisting of the towers and transmission lines, etc., located on the transmission corridor to the County line. It also has a leasehold interest in the real estate on which its storage tank is located.
>
> The parties stipulated that the campground is subject to ad valorem taxation by Brevard County and that the taxes thereon have been paid. The campground is no longer at issue in this litigation.
>
> The parties further stipulated, that as to the land which constitutes the transmission corridor and buffer zone, the

> taxes thereon were paid for 1989 and prior years but were not paid for 1990. This land remains at issue in this case as does the tangible personal property situated thereon, i.e., the transmission towers and lines, etc.

(R: 305-306)

The trial judge recognized at page 8 of his final judgment that OUC provided no appreciable benefits to the inhabitants of Brevard County and made no contribution in money or payment in kind to help pay for the benefits it receives from Brevard County. As the court stated:

> The cases cited by the Plaintiff are tied together by the common thread that the geographic area of the taxing authority receives some benefit from the entity which is exempted from taxation by that taxing authority. The benefit in service at least partially offsets the loss to the taxing authority caused by the furnishing of all of the taxing authority's services (police, fire, etc.) to the property claimed to be exempt. In the present case, the Plaintiff receives all the benefits furnished to all property owners in Brevard County, but it gives no appreciable benefits in return by furnishing any appreciable service to the inhabitants of Brevard County and it makes no contribution in money or in kind to help pay for the benefits it receives. The only possible benefit the Plaintiff is furnishing to the inhabitants of Brevard County is the Plaintiff's contribution to the electrical grid system statewide network; this contribution, insofar as Brevard County is concerned, is de minimis at best, a contribution which the Plaintiff's own expert testified Brevard County would receive whether the Plaintiff's property were located in Brevard County or some other county. <u>The conclusion is inescapable in this case that the Plaintiff's properties in Brevard County are not used exclusively by the Plaintiff for municipal or public purposes insofar as Brevard County is concerned</u>. If the Plaintiff's properties in Brevard County were

> being used by the Plaintiff to furnish electrical power to the inhabitants of Brevard County, then the conclusion would be equally inescapable that the properties are but an extension of the Plaintiff's overall service of providing electricity to the inhabitants of Orlando and Orange County and the character of the use of the property would remain constant as a use for municipal or public purposes.

(R: 311-312, emphasis added.)

SUMMARY OF ARGUMENT

This is a case of first impression in Florida. It is the first case to arise involving a special act that prohibits the furnishing of electricity to resident consumers of a county by a municipally-owned electric plant physically located in said county, but owned by a municipality incorporated in an adjacent county.

It is also the first case to construe the second sentence of Article VII, Section 3(a), Florida Constitution, which states:

> 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.

(Emphasis added.)

Two cases exist which involved situations where the special acts were totally different from that at bar. See Saunders v. City of Jacksonville, 25 So.2d 648 (Fla. 1946) and Gwin v. City of Tallahassee, 132 So.2d 273 (Fla. 1961).

Both Saunders and Gwin involved special acts which

expressly authorized the municipally-owned electric utilities to furnish electricity to resident consumers in adjacent counties. In Gwin, special acts authorized the City of Tallahassee to supply the electrical power needs of Wakulla County resident consumers. This was expressly recognized in the special concurring opinion of Justice Stephen O'Connell:

> It cannot be questioned that providing electric power in the area of a city is a municipal function of that city if the city be authorized to do so by law.
>
> In the case of Saunders v. City of Jacksonville, 1946, 157 Fla. 240, 25 So.2d 648 this Court held that where authorized by statute the furnishing of electric power to the areas outside its boundaries was a municipal function of the city of Jacksonville. Therefore, that function which is authorized as a municipal function of a city when performed within its boundaries may also be a municipal function of that city when authorized by law to be performed outside its boundaries.
>
> In the case now before us the applicable statutes provide among other things that:
>
> > "The City of Tallahassee shall have the power and authority to supply water, electricity, gas and sanitary sewerage service for domestic and other purposes to individuals and corporations outside the corporate limits of said City, * * * "
>
> Thus the legislature has made the furnishing of electrical power to areas outside its boundaries a municipal purpose of the City of Tallahassee.

132 So.2d at 278 (emphasis added). Wakulla County had no other electricity supply source so it was only natural for the legislature to enact legislation in the form of special acts

conferring extraterritorial power and authority on the City of Tallahassee to perform municipal functions in Wakulla County.

A similar situation existed in Saunders. The City of Jacksonville had an electric power plant; surrounding counties did not. There, also, the legislature, through special acts, conferred extraterritorial power and authority on a city to supply the electrical needs of resident consumers in adjacent counties.

The general law at that time also specifically addressed the exact situation involved. Saunders recognized this at page 649:

> Article 9, Section 1, Florida Constitution, authorizes the legislature to exempt by law property for municipal purposes. Pursuant to Article 9, Section 1, the Legislature enacted Chapter 21985;
>
> "That the real and personal property of public utilities, owned, operated or controlled by any municipality in the State of Florida, situate, lying and being in the county other than the county in which such municipality is located shall not be subject to ad valorem or personal taxes in such county."

(Emphasis added).

Gwin arose because of an amendment to the general law as it existed at the time of Saunders, amending sections 192.06 and 192.52, Florida Statutes. Those amendments are found in the footnotes in Gwin. They provide:

> "Section 1. Subsection (2) of Section 192.06, Florida Statutes, is amended to read: (2) All public property of the several counties, cities, villages, towns and school districts in this state, sued or intended for

> public purposes, including both real and personal property of all fire, hose and hook and ladder companies, except lands 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*.
>
> Section 2. Section 192.52, Florida Statutes, is amended to read:
>
> 192.52 *Tax exemption, municipal public utilities*.--The real and personal property of municipally owned and operated public utilities held and used exclusively for municipal purposes shall not be subject to ad valorem or personal property taxes."

132 So.2d at 275 (emphasis added). The basic charter of Tallahassee had not changed and it authorized the City of Tallahassee to furnish electricity to residents in Wakulla County.

The general laws expressly providing exemption for municipal utility property located in another county were repealed but the general law still existed for municipal owned and operated utilities, and the special acts conferring extraterritorial authority on the cities of Tallahassee and Jacksonville to furnish electricity to resident consumers of adjacent counties still existed. See Attorney General's Opinion 072-228.

Unlike the statutory authority existing and relied on in Saunders and Gwin, the special act involved at bar expressly prohibits the furnishing of electricity to resident consumers of Brevard County by OUC. Chapter 61-2589 specifically provides in part that OUC:

> shall not serve any consumer outside the boundaries of Orange County, except:
>
> (a) Its own facilities or employees located on property owned, leased, managed or controlled by it, or by the City of Orlando, and used in conjunction with such facilities; and
>
> (b) Said Utilities Commission may connect with facilities of one or more privately owned public utilities and may enter into contracts with one or more privately owned public utilities whereby the said Utilities Commission shall agree to sell, purchase or interchange electric energy on a firm, scheduled, economy or emergency basis for otherwise through such connections or interchange facilities.

Chapter 61-2589, Laws of Florida, Special Acts 1961 at page 3102 (emphasis added). This was recognized by the trial court at page 7 of its final judgment.

The Property Appraiser's contention is that the prohibition found in Chapter 61-2589, supra, distinguishes this cause from Gwin and Saunders. Without a statute conferring extraterritorial power and authority on OUC (the City of Orlando), its property has no municipal existence in Brevard County. When a municipal corporation extends itself outside its boundaries, into the county or another county, and acquires property or engages in activities outside its boundaries, it loses its public municipal character and is no different from any other corporation, unless the legislature has conferred extraterritorial jurisdiction on it. Here, such is expressly withheld.

The lower court construed the second sentence of

Article VII, Section 3(a), Fla. Const., as applying to taxation. The trial judge held that a specific statute was necessary to allow the plant and property to be assessed in Brevard County. The Property Appraiser submits that this construction of the second sentence is incorrect. The Property Appraiser submits that the second sentence does not contemplate taxation but contemplates a payment in lieu of taxes for property exempt under the first sentence. If the involved property is taxable under the first sentence, the second sentence could have no application. It is only if the involved property is exempt under the first sentence that the second sentence could have application. Since only the first sentence uses the word "taxation" and the second sentence uses the word "payment" the second sentence logically applies only to a payment in lieu of taxation.

ARGUMENT

POINT I

THAT THE SUBJECT PROPERTY WAS NOT BEING USED EXCLUSIVELY FOR A MUNICIPAL PURPOSE IN BREVARD COUNTY SO AS TO BE ENTITLED TO EXEMPTION FROM AD VALOREM TAXATION.

A. The decisions in Gwin and Saunders do not control the taxable status of the subject property.

The trial court correctly recognized the difference in the statutes and facts at bar, and the underlying statutes and factual circumstances which bottomed the holdings in Gwin and Saunders stating:

> The key difference between Saunders and the present case is thus clear: in Saunders the City of Jacksonville was actually servicing Clay County, the very entity which sought to tax the means by which the service was being provided. The Court logically reasoned that, if the furnishing of electricity to the residents of Jacksonville and Duval County is a municipal purpose, it doesn't lose its character as a municipal purpose when the same service is furnished by the same means to persons outside the county. In the present case, however, we have no power being furnished by the Plaintiff to the residents of Brevard County; to the contrary, we have a prohibition against it in the enabling legislation discussed above.
>
> The same is true with the Gwin case. The Court logically stated, at page 275, that
>
> > If the furnishing of electric current to the inhabitants of towns in Clay County was a municipal purpose of the City of Jacksonville, which is located in Duval County, when the Saunders case was decided, then the furnishing of electricity to towns in Wakulla County by the City of Tallahassee is a municipal purpose of the City of Tallahassee today.
>
> Again it was the county receiving the municipal benefit, (i.e. the transmission of electrical power to its residents) that was seeking to impose the tax.

(R: 310; emphasis added.) The special acts involved in both cases conferred extraterritorial jurisdiction on the involved cities, and the facts were that services were being furnished pursuant to said statutes. Gwin's comments on these are stated at page 274:

> The City of Tallahassee, by virtue of a grant of authority of the Legislature of Florida, has been delegated the power and authority to supply public utility service

> for domestic and other purposes to its citizens and to individuals and corporations outside the limits of said city including the exclusive right to transmit and sell electrical energy and natural and manufactured gas within a zone three miles wide adjacent to and extending around and outside the corporate limits of the city.

(Emphasis added.) The special acts are referenced in the footnote. Chapter 8374, Laws of Florida 1919, was the basic charter of the City of Tallahassee, and section 113 thereof as amended by Chapter 13439, Laws of Florida 1927, Chapter 24910, Laws of Florida 1947, and Chapter 26247, Laws of Florida 1949, authorized the city to supply electrical service in Wakulla County.

Further therein it is stated:

> In 1934 the city extended its electrical distribution lines from its corporate limits southerly along State Road 363 to the community of St. Marks in Wakulla County for the purpose of supplying electrical energy for light and power to the inhabitants of said community at a time when no other supplier or distributor of electrical energy was able or willing to furnish such power to the said community. In 1948, the city acquired a tract of land lying adjacent to the St. Marks River in Wakulla County and thereafter constructed on sid land an electric current to the City of Tallahassee, its inhabitants, the area lying adjacent thereto under the exclusive right heretofore mentioned, the inhabitants of the City of St. Marks, Newport and users in close proximity to its lines along and adjacent to said State Road 363.

132 So.2d at 274 (emphasis added).

Five members of the court were of the view that Saunders still controlled, and that the amendments to sections

193.06(2) and 192.52, Florida Statutes, in 1957 did not alter the result. Both amendments are set forth in the footnote on page 275. Both expressly exempt property of "municipally owned and operated public utilities held and used exclusively for municipal purposes." Neither of the statutes exist today.

In rejecting the contention of the county Gwin stated:

> The use of the word "exclusively" does not change the meaning of the statute as it previously existed. This adverb was in the Constitution and in Section 192.52, Florida Statutes, of the Act as it existed prior to 1927. Adding it as an additional sentence to Section 192.06, Florida Statutes, along with the word *used* has no effect whatever on our interpretation in the Saunders case. Moreover, we think the record in this case clearly establishes that all of the property owned by the City of Tallahassee and being used in its generating and distribution system is being used under the Saunders decision *exclusively* for municipal purposes.

132 So.2d at 276 (emphasis added.) Thereafter the court stated:

> 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.

132 So.2d at 276 (emphasis added). In Gwin the city was actually servicing residents and consumers in Wakulla County by supplying their need for electricity, pursuant to the special act which expressly authorized the city to do so. At bar the special act expressly prohibits the exact same municipal purpose authorized in Gwin. Thus, in Gwin statutes conferring extraterritorial

municipal authority existed. Here, not only does no such authority exist, the special act prohibits extraterritorial municipal authority to serve the needs of Brevard County residents.

The importance of the special act conferring such authority on Tallahassee is emphasized in Justice O'Connell's special concurring opinion as follows:

> It cannot be questioned that providing electric power in the area of a city is a municipal function of that city if the city be authorized to do so by law.
>
> In the case of Saunders v. City of Jacksonville, 1946, 157 Fla. 240, 25 So.2d 648 this Court held that where authorized by statute the furnishing of electric power to the areas outside its boundaries was a municipal function of the city of Jacksonville. Therefore, that function which is authorized as a municipal function of a city when performed within its boundaries may also be a municipal function of that city when authorized by law to be performed outside its boundaries.
>
> In the case now before us the applicable statutes provide among other things that:
>
> > "The City of Tallahassee shall have the power and authority to supply water, electricity, gas and sanitary sewerage service for domestic and other purposes to individuals and corporations outside the corporate limits of said City, * * * "
>
> Thus the legislature has made the furnishing of electrical power to areas outside its boundaries a municipal purpose of the City of Tallahassee.

132 So.2d at 278 (emphasis added). Four times in the previously quoted language Justice O'Connell refers to the fact that the

City of Tallahassee had been authorized by the legislature to perform a municipal function outside municipal boundaries. He states that "the legislature has made the furnishing of electric power to areas outside its boundaries a municipal purpose . . . ."

He then emphasizes that the constitution does not forbid the legislature from so doing stating:

> Insofar as I can discover there is no constitutional provision which prohibits the legislature from doing so even though it be contrary to the basic purpose for formation of cities which is to furnish services to those areas within their respective boundaries.

132 So.2d at 278 (emphasis added). There can be no doubt that Justice O'Connell is addressing the special act conferring extraterritorial power on the city because he quotes directly from the City of Tallahassee Charter.

Thus, the following appears:

1) the statute authorizing the furnishing of electricity by the city applied both inside and outside the corporate limits; and

2) residents and consumers both inside and outside the corporate limits, including those in Wakulla County received the benefits of the electrical service furnished.

Thus, if the supplying of electric power was a proper municipal purpose inside the boundaries, the same function outside must be also because the same statute authorized both. Without statutory authorization the function could not be

municipal. A city can only act pursuant to duly authorized statutes. Every statute conferring power or authority on a city confers that power or authority to act only within the boundaries of the city, unless expressly conferred extraterritorial. Article VIII, Section 2(c) recognizes this limitation by stating:

> ANNEXATION. Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law.

(Emphasis added.) Extraterritorial power must be expressly conferred by general or special law.

No specific mention of extraterritorial power is made in the 1885 constitution, but it provided in Article VIII, Section 8, Florida Constitution (1885):

> **Establishing and abolishing municipalities.**-- The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors.

(Emphasis added.) The 1968 constitution is more specific because it effectively prohibits the exercise of extraterritorial power unless provided by general or special law. In the case at bar, no general law or special law exists authorizing OUC or the City of Orlando to perform a municipal function in Brevard County. Hence, that which it does in Brevard County cannot be a municipal function because it is not statutorily authorized to be a city in Brevard County. In fact, even stronger, the legislature

prohibited it from performing the municipal purpose of supplying the electricity needs of residents and consumers in Brevard County.

Saunders involved a direct attack on the constitutionality of Chapter 21985, Laws of Florida (Section 192.06, Fla. Stat.). The court quoted this provision at page 649:

> Article 9, Section 1, Florida Constitution, authorizes the legislature to exempt by law property for municipal purposes. Pursuant to Article 9, Section 1, the Legislature enacted Chapter 21985;
>
> "That the real and personal property of public utilities, owned, operated or controlled by any municipality in the State of Florida, situate, lying and being in the county other than the county in which such municipality is located shall not be subject to ad valorem or personal taxes in such county."

(Emphasis added). Clay County's taxing officials' contention is set forth at page 650:

> [2,3] The contention of Clay County then narrows to the claim that the property is not held and used for the benefit of the inhabitants residing within the corporate limits of the City of Jacksonville. This claim is untenable. Article 8, Section 8, our Constitution gives the legislature power to prescribe the jurisdiction and powers of municipalities and no limitation is found therein which might give aid to the county's claim. The whole scheme and purpose of our municipal law is to render service to the individual in areas where the population is congested. Questions of policy are delegated to the legislature. That body was doubtless well aware of the need for light, heat and power by those areas outside of municipalities. In granting the exemptions it was clearly within its constitutional

> power and in so doing it obviously encouraged the extensions of these regarded necessities to the people in adjoining areas.

(Emphasis added). Continuing it stated:

> [4] We may assume that the legislature was deeply conscious of the desire and need for this service to the people in the adjoining areas. We are not justified in declaring the act invalid because it might enable the City to compete with private utilities required to pay taxes.

25 So.2d at 650 (emphasis added).

In Saunders, as in Gwin, special acts authorized the City of Jacksonville to supply the electricity needs of the people of adjoining counties. The court addressed this need for electrical service by persons residing in Clay County and the benefit they received from this service at page 651:

> 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. The framers of the Constitution intended that property held and used to afford municipal benefits were to benefit all the residents who might have access to them regardless of residence within the area of the city, Article 8, Section 8, makes the legislature the judge of the jurisdiction and powers of the city. If, by being tax free, the residents of Clay County are rewarded by a lower rate, then there is a municipal benefit accruing to them.

(Emphasis added).

The contention of Clay County is somewhat unusual. It contended that the city's property in Clay County should not be exempt, even if it was used pursuant to statutory authorization to supply the electrical needs of people in Clay County, because

this was of no municipal benefit to the City of Jacksonville.

The sole question presented and addressed by the court in Saunders was whether the constitution prohibited the legislature from enacting a statute exempting property owned by Jacksonville located in Clay County, which was used pursuant to statutory authorization, to supply electricity needs of the residents of Clay County. The court held in a 4-3 decision that the constitution did not prevent the enactment of such a statute. By furnishing electricity to residents of Clay County, the city was performing a municipal purpose, so factually the city was performing the same purpose in both Duval and Clay counties, and the residents received the same benefit from the service. Since the special acts expressly authorized the furnishing of electricity in Clay County by the City of Jacksonville, it became an authorized municipal purpose, and Article VIII, Section 8, Fla. Const. (1885), did not restrict the legislative power to exempt property so used. The question before the court in Saunders could be framed as follows:

> Does Article VIII, Section 8, supra, restrict the legislative power to enact a statute exempting property owned by the City of Jacksonville in Clay County, which such property is used pursuant to a duly authorized law, to furnish municipal electric service to residents both within Duval County and the City of Jacksonville, and Clay County?

Since (1) the service was being provided and (2) the involved special acts expressly authorized exactly what the city was doing, the general law exempting the property so used was

upheld.

The dissent of Chief Justice Chapman stated the question and position of the City of Jacksonville at page 652:

> Are the poles, cross arms, transformers, wires and other appliances composing the electric transmission lines of the respondent as situated in Clay County, and by it employed to transmit electricity from its generating plant in Jacksonville to its customers in Clay County, exempt from paying an ad valorem tax on its property situated in Clay County? It is the respondent's contention that under the charter of the municipality, designated provisions of our Constitution, Chapter 21985, Acts of 1943, and decisions of this Court, the City of Jacksonville is exempt from the levy and payment of an ad valorem tax on said property . . . .

(Emphasis added). In finding that the property should be taxable the dissents of Justice Chapman, concurred in by 2 other justices, emphasized the proprietary nature of supplying electric power.

Both Gwin and Saunders involved charter provisions conferring extraterritorial municipal power on the involved cities. OUC has no such charter or special act or authorization. The involved act prohibits it from providing any benefit to Brevard County or its residents. The 1968 constitution requires a specific statute, for a city to possess or exercise municipal power outside its municipal boundaries. No such statute exists in the case at bar.

In an opinion prepared by Winifred Wentworth, later a judge with the First District Court of Appeal, she notes the importance of a statute conferring extraterritorial power by

italicizing several words in the opinion. In Attorney General's Opinion 072-228 she stated:

> The authority, under the terms of Ch. 67-1569, Laws of Florida, appears to be an agency of the Consolidated Government of Jacksonville and a body politic and corporate expressly authorized to provide electric service in the Consolidated City of Jacksonville, as defined by its charter, Ch. 67-1535, Laws of Florida, *and in any or all counties adjacent thereto*.

AGO 72-228 at 391.

The Property Appraiser submits that when a city acquires property in another county it does so in its corporate capacity and that such property should be treated no differently than any other privately-owned corporate property, unless such property is used pursuant to a duly enacted statute in the performance of a municipal purpose in said county, expressly legislatively authorized.

This basic principle of municipal existence and power is recognized in 62 C.J.S. at page 283:

> As a general rule the powers of a municipal corporation cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits, at least as far as governmental functions are concerned, even though it may have acquired property outside of its geographical limits. Within and subject to its constitutional limitations, the legislature, however, may, and often does, authorize the exercise of powers beyond municipal limits, and in accordance with the terms of the authorization, a municipal corporation may operate beyond its boundaries.

(Emphasis added.) Further at page 283 it is stated:

> The rule that municipal corporations have no extraterritorial powers has been held to apply to proprietary functions, but, under the theory that a corporation in its proprietary capacity is bound by the same rules that govern private individuals or corporations, as considered supra § 110, a municipality may in its proprietary capacity exercise extraterritorial powers, as for instance, its power to contract.
>
> Statutes authorizing the exercise of municipal power beyond the municipal boundaries are strictly construed.

(Emphasis added.) Following at page 284 it is stated:

> Generally, the police power of a municipal corporation is coextensive with the corporation boundaries, and the boundaries mark the limit for the exercise of the police power by the corporation.

(Emphasis added.) These general principles are consistent with Article VIII, Section 2(c), supra, which requires specific legislation for a city to exercise extraterritorial power. Also see State ex rel. Clyatt v. Hocker, 22 So. 721 (Fla. 1897), which dealt with jurisdiction of officers. The term "municipal corporation" is defined in 62 C.J.S. at page 61:

> While there have been many attempts to define a municipal corporation, the definition set out in Corpus Juris, which has been accepted and approved, is that a municipal corporation is a legal institution formed by charter from sovereign power, erecting a populous community of prescribed area into a body politic and corporate with corporate name and continuous succession and for the purpose, and with the authority, of subordinate self-government and improvement and local administration of affairs of state.

(Emphasis added.) Outside the prescribed area, a city has no municipal existence or power in Florida, unless such is conferred

by law. Florida's constitution requires it. Thus, outside Orange County OUC has no municipal existence or power to perform municipal functions.

Although not directly on point, the Supreme Court's decisions in State ex rel. Davis v. City of Stuart, 120 So. 335 (Fla. 1929) and State ex rel. Davis v. City of Homestead, 130 So. 28 (Fla. 1930), supply some insight into the importance of ability to furnish a benefit to residents in a prescribed area as a condition precedent to the exercise of municipal power in said area. In both cases legislative acts had extended the corporate limits to include additional property, and affected persons within the additional area, when the Attorney General filed an action to oust the city's authority over said additional property. In City of Stuart, the city responded contending that the legislature had fixed the boundaries and that such was beyond the power of the judiciary to inquire into. The Attorney General and the corelator contended that the additional property would receive no benefit from inclusion as part of the city.

In a lengthy and thorough opinion authored by Justice Brown, holding against the city it was stated at page 349:

> But much that is said on this subject by the advocates of unlimited legislative power is beside the mark, and confuses individual inequality with territorial inequality. The mere fact that it is not practically possible to avoid some inequalities in burdens and benefits as between the taxpayers within the legitimate bounds of a city, where all receive at least some benefit, is no reason for upholding the Legislature in arbitrarily extending the city limits so as to take in a large district of territory which will not be

> benefited at all, at least not in any substantial way. Purely speculative and shadowy benefits, which amount to no more than a mere pretext for arbitrary action, are not to be considered.

(Emphasis added.) At page 352 it was stated:

> There is in this case no question of estoppel by acquiescence for any considerable period. See McQuillin, § 306. We conclude, therefore, that the information makes out a prima facie case for the relief sought, and that on the facts therein stated, the act (chapter 11750 of Laws of 1925 [Ex. Sess.]) extending the boundaries of the city of Stuart, so as to include the considerable body of rural lands owned by the corelators some distance to the northeast of the actual city and beyond the range of municipal benefits, would appear to contravene those provisions of our Declaration of Rights protecting the rights of private property such as those which prohibit the taking of private property without just compensation and guarantee the equal protection of the laws and the right to acquire, possess, and protect private property.

(Emphasis added.) In its answer in the quo warranto proceeding the city had alleged:

> The answer alleges that respondent is exercising municipal powers over the territory described in the information by virtue of the two legislative acts referred to therein, and makes a general denial of any unconstitutionality of either of said acts;

(Emphasis added.) The decision addresses this at page 353:

> It was therefore emphatically the duty of the respondent to answer the allegations of the information fully and specifically, showing just exactly what the city had done or failed to do or planned to do with respect to furnishing municipal benefits to the described territory owned by the relators.

(Emphasis added.) This case recognizes that furnishing of

municipal benefits within the area must exist for the city to be able to exercise municipal power within the area, and that without the furnishing of benefits no municipal power could be exercised in the involved territory.

At bar, the legislature has forbade the providing of a municipal benefit in the territory, Brevard County, and thus no municipal power can be exercised in said county.

Also see Consolidated Land Co. v. Tyler, 88 Fla. 14, 101 So. 280 (Fla. 1924), and Richmond v. Town of Largo, 19 So.2d 791 (Fla. 1944).

The necessity of the existence of municipal services and benefits is recognized in Town of Malabar v. State, 195 So.2d 43 (Fla. 4th DCA 1967), in which numerous municipal benefits and municipal services were being furnished and hence the exercise of municipal power in the area was upheld. The court noted at page 44:

> The record reveals that no ad valorem taxes are presently being levied and that none were planned for the future. Available for all land and land owners were the services provided by the town of a building inspector, electrical inspector, plumbing inspector, town marshal, zoning board and fire department. The land in question has also received the benefit of zoning promulgated by the town. The property on the north of appellees' property had been used for keeping pigs, chickens and goats. Other residents in the area had thrown garbage on their premises causing an unsightly condition and a health hazard. The town had zoned this area commercial and residential and thereby eliminated the mentioned objectionable conditions. It was undisputed that the fire department had responded to a fire call in the immediate vicinity of the Nelson property

> five weeks prior to trial and that the town had erected street signs in and abut the appellees' property within the past twelve months. It further appeared that the town planned to construct a recreation and civic center for the use and benefit of its inhabitants within the near future. The town had recently constructed a new fire house.

(Emphasis added.) No municipal service or benefit is furnished in Brevard County. Hence no municipal power is exercised. Furthermore, no statute authorizes the exercise of municipal power in Brevard County. Thus, the property may be municipally owned but it is not municipally used, and hence not entitled to exemption.

OUC has previously acknowledged the necessity of providing municipal services and benefits beyond its municipal boundary, but within the geographic area of its legislative authorized authority to supply electricity, as a condition of receiving the benefits of tax exemption.

In Rosalind Holding Company v. Orlando Utilities Commission, 402 So.2d 1209 (Fla. 5th DCA 1981), a class action was brought against OUC challenging the "gift" of payments "in lieu of taxes" made by OUC to Orange County between 1973 and 1978 in the amount of $1,114,000. OUC's property outside the City of Orlando but within the geographic boundary of Orange County was exempt from taxation by virtue of the first sentence of Article VII, Section 3(a), Florida Constitution.

The court stated:

> Witnesses for the OUC testified that these payments were somewhat less than a private utility would have paid Orange County for ad

> valorem taxes based on the value of OUC's property located within Orange County, and that the payments were for police and fire protection and other services afforded the utility by the County.

402 So.2d at 1212 (emphasis added). The court further noted:

> Expert witnesses for the OUC testified that it was not an uncommon practice in other states for tax exempt utilities to make "tax-equivalent" payments to local governmental bodies providing them with valuable services. Failure to make such payments would have the effect of discriminating against the county taxpayers because they presumably would have to pay through higher taxes for the free services received by the utility.

402 So.2d at 1212.

OUC has previously admitted that even where municipal services are provided directly to the residents of the county (thereby rendering their property exempt from taxation) some tax equivalent payment is necessary to avoid the effect of discrimination against a segment of the taxpayers.

OUC provides no municipal services to the residents and taxpayers of Brevard County. OUC receives all of the benefits of governmental services of Brevard County including fire protection, police protection, ambulance service, etc. OUC makes no payment to Brevard County. OUC should not be permitted to discriminate against the taxpayers of Brevard County.

In City of Sarasota v. Mikos, 374 So.2d 458 (Fla. 1979), this court stated in construing Article VII, Section 3(a), supra, along with other taxing provisions of the constitution:

> . . . . 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.

374 So.2d at 461 (emphasis added.)

OUC provides no services to Brevard County, OUC receives services from Brevard County, OUC makes no payment to Brevard County. Under these circumstances, should OUC's Brevard County property be exempt from taxation resulting in discrimination against Brevard County taxpayers?

Thus, clear differences exist between Gwin and Saunders and the case at bar. As to Gwin and Saunders the following existed:

1) In both Gwin and Saunders, special acts authorized the exercise of municipal power extraterritorially;

2) In both Gwin and Saunders, municipal service was being furnished in the adjacent counties, Wakulla and Clay;

3) Because municipal service was being furnished, a municipal benefit resulted to the residents in the two counties;

4) Since the service was specifically authorized by the special acts, it was a legitimate, lawful "municipal-public" purpose; and

5) Specific general law expressly exempted municipal electrical plants and property.

As to OUC the following exists:

1) No special or general law authorizes OUC to exercise any municipal power in Brevard County. The special act prohibits it;

2) Since no municipal service is being furnished in Brevard County, no municipal benefit flows to the residents of Brevard County;

3) Public municipal existence, as distinguished from corporate existence, is dependent on a statute conferring municipal power in Brevard County;

4) Since none exists, that which OUC does in Brevard County is not municipal public within the purview of Article VII, Section 3(a), supra;

5) No general law specifically exempts municipally owned and operated electric plants and property. The language found in sections 192.06 and 192.52, Fla. Stat., 1945 and 1957, has long since been repealed; and

6) Hence, the property is not both owned and used by OUC for municipal purposes so as to be entitled to exemption.

B. The second sentence of Article VII, Section 3(a), Florida Constitution, does not apply to taxation but applies to a payment in lieu of taxes.

The appellate court and the trial court held that a general law was necessary under the second sentence of Article VII, Section 3(a), supra, to permit Brevard County to tax OUC's property in Brevard County. The Property Appraiser submits that this holding incorrectly construes the second sentence as applicable to taxation. It provides in part:

> (a) 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.

It is clear that the first sentence relates specifically to "taxation" only. The word "taxation" is used. The second sentence does not use the word "taxation" but uses instead the word "payment." Had the framers of the constitution intended the second sentence to apply to taxation why wasn't the word "taxation" used instead of the word "payment?"

If municipal property is taxable under the first sentence, it could still be required by general law to make payment to the involved taxing unit or units under the second sentence. For instance, there are situations in Florida where a city is located in two counties, and where two cities are located in close proximity to the border between two counties. If city "A" wished to locate its water tank inside the boundaries of city "B" in the adjacent county, or to purchase warehouses in city "B" for record storage, it could do so and the property could be taxable. Nevertheless, if provided by general law city "A" could be required to make payment to city "B". If city "B", through its zoning, could prevent city "A" from using the property as desired by city "A", a general law could be the compromise.

However, if the property is exempt from taxation under the first sentence, then payment in some form other than taxes could be required under the second sentence. To construe the sentence as was done by the lower courts the first two sentences

of Article VII, Section 3(a), supra, would read:

> (a) 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 pay property taxes to the taxing unit in which the property is located.

This rewrites the sentence totally.

At the same time of the adoption of the 1968 constitution, the revision commission knew of Gwin and Saunders and wanted to provide a mechanism whereby Wakulla and Clay counties could obtain some payment from the involved cities in lieu of taxes. It must be presumed that the framers chose the words "taxation" and "payment" advisedly. A presumption exists in favor of the natural and popular meaning in which words are usually understood by the people who have adopted them. See Jacksonville v. Continental Can Co., 113 Fla. 168, 151 So. 488 (Fla. 1933), Advisory Opinion to Governor, 156 Fla. 48, 22 So.2d 398 (Fla. 1945) and Wilson v. Crews, 160 Fla. 69, 34 So.2d 114 (Fla. 1948). Effect should be given to every part and every word of a constitution. State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771 (Fla. 1914), State ex rel. McKay v. Keller, 140 Fla. 346, 191 So. 542 (Fla. 1939).

The fundamental object in construing a constitutional provision is to ascertain and give effect to the intentions of the framers and adopters, and constitutional provisions must be interpreted in such a manner as to fulfill this intention rather than to defeat it. State ex rel. West v. Gray, 74 So.2d 114

(Fla. 1954).

The framers knew of Gwin and Saunders and sought to provide a means of payment to the host county other than taxes on the property. If this is not so why did not the framers use the word "taxation" instead of "payment" or provide that a municipality may be required by general law "to pay property taxes or payment in lieu of taxes?" Had the framers intended this, they would have said so. Taxation and payment are two distinct forms of charges. Taxation is a sovereign power while payment is generally proprietary and ex contractu. See Turner v. State, 168 So.2d 192 (Fla. 3d DCA 1964). Construed as the lower court suggests, the two sentences would be interconflicting. The first sentence exempts and the second taxes. If that was the intent why wasn't the word "taxation" used in the second sentence.

Significantly, in the case at bar, by agreement with Orange County, OUC makes a payment to that county yearly for the right to own and locate its property in the county. In 1989 and 1990 those payments in lieu of taxes were $605,953 and $627,127 respectfully. OUC makes no payment to Brevard County.

POINT II

THAT THE LOWER COURT ERRED IN GRANTING OUC'S MOTION FOR SUMMARY JUDGMENT FINDING THAT THE APPRAISER WAS NOT AUTHORIZED TO BACK ASSESS THE PROPERTY WHICH WAS OWNED BY OUC AND USED FOR THE RECREATIONAL PURPOSES OF ITS EMPLOYEES.

Although this issue was decided by the trial court and raised on appeal by the Property Appraiser, the district court did not address it in its decision. Inasmuch as this is the first time this issue has arisen in Florida, and because the statute does not require an application for exemption for cities, it will be addressed.

The Property Appraiser is well aware of previous courts' determinations holding that each tax year stands on its own and that an exemption once granted cannot be revisited in a subsequent year and back assessed, if it is determined that such exemption was granted in error. See Underhill v. Edwards, 400 So.2d 129 (Fla. 5th DCA 1981). However, the Property Appraiser submits that such rule should not be applicable in a situation such as that in the case at bar where a municipality, which is exempted from the requirement of having to file an application for exemption knows that such recreational property is subject to tax and should be assessed because it had litigated the same identical issue previously in Orange County and the court had held such property so used taxable.

Under Section 196.011(2), Fla. Stat., municipalities are not required to file applications on property owned and used exclusively by a municipality for municipal or public purposes.

Said section provides:

> However, application for exemption will not be required on public roads rights-of-way and borrow pits owned, leased, or held for exclusive governmental use and benefit or on property owned and used exclusively by a municipality for municipal or public purposes in order for such property to be released from all ad valorem taxation.

(Emphasis added.) Since the Fourth District Court's decision in Orlando Utilities Commission v. Milligan, 229 So.2d 262 (Fla. 4th DCA 1979), cert denied, 237 So.2d 539 (Fla. 1970), OUC has known that the recreational property is not entitled to exemption because it is not held and used by a municipality exclusively for municipal or public purposes. Yet for 19 years it has failed to bring that matter to the attention of the Property Appraiser and has never filed an application which would be required if such property was not held and used exclusively for municipal purposes. Since the court held that such property in Orange County was not used for a legitimate municipal purpose which would entitle it to exemption, OUC or the City or Orlando would have been required under Section 196.011(1), Fla. Stat., to file an application if it claimed exemption, and a property appraiser should be entitled to rely on the good faith and integrity of public bodies. The fact that OUC paid taxes on such property for 1989 and thereafter clearly demonstrates that it knows full well that such property is taxable and should have been taxed all along. Under these circumstances such property should be considered as property which had escaped taxation under the provisions of Section 193.092(1), Fla. Stat., which provides in

part:

> When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of 3 years next preceding the year in which it is assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property as may have escaped taxation . . . .

(Emphasis added.) The property could have been lawfully assessed, but wasn't because OUC failed to perform its statutory duty.

The Property Appraiser also submits that since under Florida law all owners of property are held to know that taxes are due and payable annually and charged with the duty of ascertaining the amount of current taxes and paying them before April 1, and since OUC not only is statutorily held to know, but actually knew that such property was subject to tax, the Property Appraiser should be able to correct the assessment as a legitimate act of omission or comission brought about by the failure of the public body, OUC, to properly perform the duty imposed by law and either bring the matter to the attention of the property appraiser and pay taxes thereon, or apply for exemption as required by law. See sections 197.142 and 197.332, Fla. Stat., now embodied in Section 197.122, formerly Section 197.056, Fla. Stat. (1973), et seq. Correction of errors of omission or comission have been upheld by the courts in several

situations, where the error was a clear administrative error. See 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).

CONCLUSION

For the reasons stated the Property Appraiser and Tax Collector submit that the decision of the district court should be reversed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **THOMAS B. TART, ESQUIRE**, Orlando Utilities Commission, Post Office Box 3193, Orlando, Florida 32802; **LEON H. HANDLEY, ESQUIRE, and ROBERT S. GREEN, ESQUIRE**, Gurney & Handley, P.A., Post Office Box 1273, Orlando, Florida 32802; and **STEVEN R. BECHTEL, ESQUIRE**, Mateer, Harbert & Bates, P.A., Post Office Box 2854, Orlando, Florida 32802 on this the **6th** day of May, 1993.

Larry E. Levy