247

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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CONSTITUTION:

FLORIDA STATUTES:

OTHER AUTHORITIES:

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." The various amici curiae who filed a brief in support of the respondent will be referred to as the "Amicus."

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

STATEMENT OF FACTS AND STATEMENT OF THE CASE

These have been adequately set forth in previous briefs and need not be readdressed. However, the preliminary statement filed by the amicus contains numerous statements of fact which may or may not be accurate and which are not part of the record of the case on appeal.

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.

Two misstatements of law found in the brief of OUC at page 13 and the brief of the amicus at page 9 require correction. At page 13 of its brief OUC states that the generation and transmission of electricity is a "governmental" purpose and cites the cases of Saunders v. City of Jacksonville, 25 So.2d 648 (Fla. 1946) and Gwin v. City of Tallahassee, 132 So.2d 273 (Fla. 1961). Neither of these cases held that such was a "governmental" purpose. Both only recognized that the generation of electricity was a proprietary purpose. A proprietary purpose and a governmental purpose are totally different. See Williams v. Jones, 326 So.2d 425 (Fla. 1975). Both Saunders and Gwin only recognized that a municipality could, if authorized by law, perform the proprietary function of providing electricity to their consumers. The word "governmental" imports some part of the sovereign power while a proprietary function is one which can just as easily be performed by a private entity. The amicus states in its brief on page 9 that Florida law provides sovereign immunity to counties and municipalities and this is an incorrect statement of the law. Sovereign immunity does not apply to municipalities but applies only to the state, counties, and school districts. See Dickinson

v. City of Tallahassee, 325 So.2d 1 (Fla. 1975) and Hillsborough County Aviation Authority v. Walden, 210 So.2d 193 (Fla. 1968). In fact, most of the "parade of horribles" which the amicus hypothetically addresses are premised upon the erroneous statement that the taxation of municipal property is protected by sovereign immunity. That is not the case. Municipal property is only permitted exemption as authorized by the constitution and an exemption is not the same as immunity. However, sovereign immunity of the state and counties may be waived by general law so that county and state property will be treated the same as municipal property, as has been done in section 196.199(1), Florida Statutes (1991).

OUC's brief does not address the basis for the Appraiser's contention until the bottom of page 20 where OUC states:

> 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.

Respondent's Brief, at 20, 21. The Appraiser has consistently argued that for municipal power to be exercised extraterritorily to

the jurisdiction of the city, it must be provided by the legislature and, without legislative authorization, anything which a municipality may do outside its jurisdictional boundaries would be corporate and no different for any other private corporation. In fact, OUC fixes its rates just like a private utility as was recognized in Rosalind Holding Co. v. Orlando Utilities Commission, 402 So.2d 1209 (Fla. 5th DCA 1991), at page 1214:

> However, experts for the OUC testified that the OUC's operations are more comparable to the private utilities in Florida because of its size and the fact that it has a substantial generating capacity. The municipal utilities in the Federal Power Commission's Report were considerably smaller than the OUC and may had no generative capacity. At least one public service commission allowed a city utility a rate of return on equity comparable to private industry, and the courts in our jurisdiction frequently equate municipal utilities with privately owned utilities.

402 So.2d at 1214 (emphasis added). The furnishing of electricity is a proprietary function which may be engaged in by a municipality if legislatively authorized. All authorities seem to be in total agreement on this. The converse of this then must also be true which is that if a municipality is not authorized to furnish electricity or operate a power plant, then it could not do so as a municipality, but if it did do so it would not be a legislatively authorized municipal function.

Both Saunders and Gwin, as OUC has now acknowledged, dealt with specific statutes which conferred extraterritorial power and jurisdiction on the involved cities to engage in the municipal function of furnishing electricity to residents and consumers

outside the jurisdiction of the respective cities. In the case at bar, no such statute exists, and to the contrary, the performance of the municipal proprietary purpose of generating and supplying electricity to the residents in the jurisdiction where the electric plant is located is specifically prohibited. The cases are readily distinguishable based on both the facts and the underlying law. Both Gwin and Saunders had specific legislative extraterritorial authority conferred by statute. OUC does not. The cities in Gwin and Saunders were actually supplying the electrical needs of the inhabitants and residents of the adjacent counties. OUC is not.

On pages 25 and 26 of its brief OUC cites several cases decided at a time when the test for determining exemption was whether the involved property served a predominant public purpose and whether exemption would be lost by an incidental use which was not of this character. All of these cases were either expressly or impliedly overruled by the cases of Williams v. Jones, supra, and Volusia County v. Daytona Beach Racing and Recreational Facilities Dist., 341 So.2d 498 (Fla. 1976). See footnote 4 on page 501 in Volusia County. These cases, and the cases cited on page 27 of OUC's brief are irrelevant and to not bear on the issues involved in the case at bar.

The issue before this court is:

> Whether municipally-owned property located in an adjacent county can be exempt if such municipality is prohibited by law from furnishing municipal services (electricity) to the residents of the other county?

OUC contends that it can. They Appraiser and Collector contend

that it cannot.

The effect of an exemption to such property in the adjacent county cannot be disputed; taxpayers in that county pay higher taxes to subsidize the exemption. Thus, a government exemption exists where no government service or benefit flows to the taxpayers supporting the exemption.

Cases cited in the petitioners' initial brief involved situations where cities through enlargement or annexation attempted to extend their boundaries so as to include properties not receiving, and, in some instances, not capable of receiving benefits or services from the involved cities. See 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). These cases uniformly invalidated such annexation or expansion because no benefit or services were provided to the inhabitants of the expanded area on the grounds that such invasion constituted a due process right infringement protected by the Florida Constitution. In City of Stuart the court stated that such an extension "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."

In all these cases the legislature had specifically authorized the municipal extension challenged, but this court held that the legislature's determination was not absolute and not

beyond judicial review, emphasizing the protections assured under the Declaration of Rights provision of the Florida Constitution (1885). Thus, the court was reading section 1, Declaration of Rights, in para materia with, Article III, Section 1, which conferred legislative power, and Article VIII, Section 8, Florida Constitution (1885). Although Article VIII, Section 8, supra, conferred the power on the legislature ". . . . to establish . . . . municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend same . . . .," this court held that such power was not unrestricted, and if arbitrarily exercised so as to offend the basic rights provision of the Declaration of Rights, such legislative exercise of power would be invalidated.

The Appraiser and Collector submit that in the case at bar this court should not isolate Article VII, Section 3(a), Florida Constitution (1968), as OUC contends, but should also consider Article VIII, Section 2(c), Florida Constitution (1968), and its restrictions on the exercise of extraterritorial powers by municipalities, and the basic rights provisions found in sections 2 and 9 of Article I, the Declaration of Rights. Section 2 provides:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right

> because of race, religion or physical handicap.

The taxpayers of Brevard County are treated differently from taxpayers in Orange County, in that they are required to fiscally support the furnishing of necessary government services to OUC's property in Brevard County without any general benefit or specific service flowing to Brevard County residents. This is patent discrimination.

The fundamental premise for public property exemption is that a government needn't tax itself on its property which is used for the public good, because this would simply amount to using taxpayer's money it collected through the levy of taxes to pay taxes to itself on property used for the benefit of, and providing services to the taxpayers of the taxing unit. Thus, the taxpayers subsidizing the exemption received the benefits and services flowing from the property's use.

This fundamental premise is violated in the case at bar because no benefit or service flows to Brevard County taxpayers and thus they are subsidizing the taxpayers of the City of Orlando, whose tax burden is reduced by the funds generated through the operation of the electrical facility. This violates the basic fundamental rights of Brevard County residents secured by the Florida Constitution's basic rights provision. The effect is that their taxes are increased to support the City of Orlando.

The situation is even more onerous because OUC pays no "franchise fee" or other payment in lieu of taxes to Brevard County as it does to Orange County and the City or Orlando. See Rosalind

at page 1211:

> Rosalind argued that certain payments made by the OUC to Orange County "in lieu of taxes" and payments in the nature of franchise fees paid by the OUC to the City or Orlando were improper operating expenses, and if disallowed as operating expenses, the results would substantially increase the OUC's income, and therefore its rate of return on capital, far above what other municipal utilities and private utilities are allowed to earn.

402 So.2d at 1211 (emphasis added). Also at page 1211 the court stated:

> The record established that the OUC made payments totaling approximately $1,114,000 to Orange County from 1973 through 1978. The amount of each annual payment was based on 1% of the retail sales of electricity to the OUC's customers outside the City of Orlando, but within Orange County. 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 1211, 1212 (emphasis added.) At page 1212 expert witnesses for OUC acknowledged that failure to make such payments would have the effect of discriminating against the county taxpayers stating:

> 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 (emphasis added). If failure to make such

payments constituted discrimination against Orange County residents why doesn't it also operate to discriminate against Brevard County residents? No payment of any kind is made to Brevard County.

There are two ways these involved constitutional provisions can be construed. OUC suggests that this court should isolate Article VII, Section 3(a), supra, and hold that since no restriction as to location is found therein, that municipally-owned property is exempt wherever located.

The Appraiser suggests that all three provisions should be construed together, and the basic rights' provision especially cannot be ignored. No interpretation should be adopted which would lead to unconstitutionally support a constitutional basic rights infringement. Not only should a constitution be considered in its entirety, but all the provisions of a constitution should be interpreted with reference to each other. See Amos v. Mosley, 74 Fla. 555, 77 So.2d 619 (Fla. 1917), and Wheeler v. Meggs, 75 Fla. 687, 78 So.2d 685 (Fla. 1918).

Applying three principles, and construing the three provisions together, the petitioners suggest that a construction be adopted which recognizes all three provisions and results in no infringement of fundamental basic rights secured to the Brevard County inhabitants by section 2, Article I, Declaration of Rights.

At bar, the special act involved is Chapter 61-2589, Laws of Florida Special Acts 1961, and OUC argues that this statute, authorizing location of the facility in Brevard County, is sufficient to authorize exemption even though it expressly

prohibits supplying electricity to retail consumers in Brevard County. The result of this interpretation is that Brevard County residents are discriminated against and are required to pay taxes subsidizing the City of Orlando. In Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993), this court stated:

> If it is reasonably possible to do so, we are obligated to interpret statutes in such a manner as to uphold their constitutionality. *State v. Gale Distributors, Inc.*, 349 So.2d 150 (Fla. 1977).

613 So.2d at 452. Similarly, in State v. Cotney, 104 So.2d 346 (Fla. 1958), this court stated:

> Nor do we find Ch. 57-1226, supra, amenable to the attack here made upon it. It is our duty to resolve doubts as to constitutionality in favor of validity; and, if the Act admits of two interpretations, we should adopt that which leads to its constitutionality. Gray v. Central Florida Lumber Co., 104 Fla. 446, 140 So. 320, 141 So. 604.

104 So.2d at 349 (emphasis added).

The petitioners submit that no interpretation should be adopted which leads to an unconstitutional result or basic right infringement. OUC's interpretation does exactly that. It means that Brevard County residents' taxes are higher, Orlando residents' taxes are lower, and Brevard County residents receive no municipal benefit in return.

Between these two interpretations, the petitioners submit that this court should adopt that interpretation which recognizes the constitution in its entirety, which construes together the basic rights provision, Article VII, Section 3(a), and Article VIII, Section 2(c), supra, which supports the validity of the

special acts, and which leads to no unconstitutional result or basic rights infringement.

> 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.

Argument under this point was adequately made in petitioners' initial brief.

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.

OUC had exempt status for the "Apollo Campground," until 1989 and 1990 when it says it chose ". . . . not to seek exempt status for that particular property . . . ." (Respondent's brief at p. 35.) It states that there is no record of the use in this file, but that is because summary judgment was granted.

OUC states that Mr. Ford's predecessor ". . . . had exercised his judgment as property appraiser and granted exemption . . . ." in prior years. The Appraiser submits that this is not truly accurate since no applications were filed as required by section 196.011, Florida Statutes (1991). The city knew of its use of the playground and knew of the decision in Orlando Utilities Commission v. Milligan, 229 So.2d 262 (Fla. 4th DCA 1979), cert. denied, 237 So.2d 539 (Fla. 1980), and its holding. It had a duty

to properly return this property through application claiming exemption. A property appraiser should be able to expect good faith from municipalities and if doubt existed as to the exemption, which the city knew certainly did exist because of Milligan, application should have been made. If this playground was not taxable in prior years why did OUC not seek exemption on the playground beginning in 1989?

Conclusion

For the above and foregoing reasons the Appraiser and Collector respectfully submit that the district court's decision should be reversed and that this court should find that the property of OUC located in Brevard County is taxable.

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; **STEVEN R. BECHTEL, ESQUIRE**, Mateer, Harbert & Bates, P.A., Post Office Box 2854, Orlando, Florida 32802; **KRAIG A. CONN, ESQUIRE**, Florida League of Cities, Post Office Box 1757, Tallahassee, Florida 32302; **FREDERICK M. BRYANT, ESQUIRE**, Moore, Williams, Bryant, Peebles & Gautier, P.A., Post Office Box 1169, Tallahassee, Florida 32302; and **WILLIAM J. PEEBLES, ESQUIRE**, Moore, Williams, Bryant, Peebles & Gautier, P.A., Post Office Box 1169, Tallahassee, Florida 32302 on this the **18th** day of June, 1993.

Larry E. Levy