IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF
REVENUE,

Appellant,

v.

CASE NO. SC03-2273

L.T. Case No. ID02-1582

THE CITY OF GAINESVILLE,

Appellee.
_____/

ON PETITION FOR REVIEW OF A
DECISION OF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

Initial Brief of Amicus Curiae
Ed Crapo, as Property Appraiser of Alachua County, Florida

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STATEMENT OF FACTS

Amicus Curiae, Ed Crapo, assumes that the parties to this case will accurately state the detailed facts of the case. However, in connection with his argument, he would point the Court to the following facts, that were before the trial court when it considered the City's Motion for Summary Judgment.

The subject property was used to provide governmental services, but was also used as a proprietary business venture. This was shown by the Start-Up GRUCom Business Plan filed by the Department of Revenue in opposition to the City's Motion for Summary Judgment. (R.324). In that document, the City acknowledges that its start-up business activities "may only marginally benefit the general population of Gainesville." (R.346).

Also, as discussed in the Business Plan, the City deliberately treats the competitive business activities of GRUCom just as it would treat the activities of any other private telecommunications company. Specifically, the City collects city taxes on telecommunications service purchases generated by GRUCom, and collects a franchise fee equivalent to the franchise fee that would be paid by a private telecommunications company providing similar services. (R.335). The City also keeps separate financial statements for the revenue and expenses generated by GRUCom's provision of services to non-governmental customers. (R.340).

The City's telecommunications business generates a positive cash flow. According to its Business Plan, the annual operating cost are approximately $200,000.00. (R.343). However, the Affidavit of Edgar Hoffman, which was filed in the trial court, establishes that GRUCom's gross revenues were $2,295,000.00 in 1999 and $3,305,000.00 in 2000. (R.80). That affidavit also acknowledges that a portion of the City's telecommunications network is leased to private telecommunications service providers. (R.78).

SUMMARY OF ARGUMENT

Regardless of whether or not section 166.047, Fla. Stat. is constitutional, the City of Gainesville's telecommunications property is subject to ad valorem taxation because it was not used exclusively for a municipal or public purpose, as required by the Florida Constitution. The First District Court of Appeal erroneously held that municipal property that is not leased to a private operator is automatically entitled to an ad valorem tax exemption, regardless of how the property is used. Municipal property is not immune from taxation, and is only exempt when used for a purely "governmental-governmental' purpose, as opposed to a "governmental-proprietary" purpose.

The City of Gainesville's telecommunications services business is a proprietary government venture that is intended to generate revenue for the City, while providing for the comfort and convenience of its citizens. The business serves a governmental-proprietary purpose, and thus the property used in that business is subject to ad valorem taxation, just as the property of all other telecommunications businesses is subject to ad valorem taxation.

ARGUMENT

I. PROPERTY OWNED AND OPERATED BY A MUNICIPALITY IS ONLY ENTITLED TO A PROPERTY TAX EXEMPTION IF IT IS USED EXCLUSIVELY FOR MUNICIPAL OR PUBLIC PURPOSES, AND NOT FOR THE PROPRIETARY GAIN OF THE MUNICIPALITY.

The Florida Constitution only exempts municipal property from ad valorem taxation if the property is used exclusively for a municipal or public purpose. *See Art. VII, §3, Fla. Const*. The Constitution does not distinguish between property that is owned and operated by a municipality, and property that is owned by a municipality but leased to a private operator. Regardless of the identity of the operator, the property must be used exclusively for a municipal or public purpose to qualify for an exemption. *See, e.g., Orlando Util. Comm'n v. Milligan*, 229 So.2d 262, 264 (Fla. 4th DCA 1968) (holding that in determining whether property owned and operated by a municipality is exempt, the court must look at the use of the property).

Although the courts have held that the term "municipal purpose" is synonymous with "public purpose", there is no hard-and-fast rule for determining what constitutes a municipal or public purpose for ad valorem tax pursposes. *See Maccabee Investments, Inc. v. Markham*, 311 So.2d 718, 721 (Fla. 4th DCA 1975). However, the courts have made an effort to distinguish between the governmental functions of a municipality, which are exempt from taxation, and the corporate,

business or proprietary actions of a municipality, which are taxable. In *State ex rel. Burbridge v. St. John*, 197 So. 131, 134 (Fla. 1940), this Court stated that "we have held that while the organic law intends that the governmental functions and property of municipalities shall not be taxed, the constitution does not exempt the corporate business or proprietary activities of municipalities, such as the generation and sale of electric light and power, from taxation; that the constitution exempts from taxation, not municipal corporations as such, but property that is held and used exclusively by them for municipal purposes."

Municipalities are primarily incorporated to perform governmental functions such as the maintenance of streets and other functions related to the public health, safety and welfare. *See City of Lakeland v. Amos*, 143 So.2d 744, 875 (Fla. 1932). Municipalities have been authorized to perform additional proprietary and business functions for the convenience, health and pleasure of their inhabitants. However, while such functions are legitimate public purposes, when a municipality engages in such activities, the same regulations that are by law applicable to such business activities or occupations when engaged in by private corporations are also applicable to the municipality. *See id.* at 745-46.

This is similar to the law of sovereign immunity, which is somewhat analogous to the law applicable to the exemption of governmental property. The law of governmental immunity provides that when a municipal operation serves a

governmental function, it is immune from damages in tort, but where the municipal operation serves a proprietary purpose, it is liable for its torts. *See City of Miami v. Oates*, 10 So.2d 721, 723 (Fla. 1942). In determining whether a municipality is serving a governmental or proprietary function, the courts consider "whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit." *Bolster v. City of Lawrence*, 114 N.E. 722, 724 (Mass. 1917); *see also Hannan v. City of Waterbury*, 136 A. 876, 877 (Ct. 1927). In *Chardkoff Junk Company v. City of Tampa*, 135 So. 457, 459 (Fla. 1931), this Court explained that:

> A municipal corporation in its private or quasi-private capacity enjoys the powers and privileges conferred for its own benefit. *In respect of its purely business relations as distinguished by those that are governmental, a municipal corporation is held to the same standard of just dealing that the law prescribes for private individuals or corporations.* Then the municipality [sic] act for the private advantage of the inhabitants of the city and to a certain extent for the city itself. *In such case it is not acting in its governmental capacity as sovereign, or in a legislative capacity, but is acting in a proprietary capacity, acting only in a quasi-public capacity.* It is performing a function not governmental, but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal, but the method may not be. It leads to profit, which is the object of the private corporation.

In *Chardkoff*, this Court held that the operation of an incinerator was not an exclusive governmental function.

In *Williams v. Jones*, 326 So.2d 425, 433 (Fla. 1976), the Supreme Court of Florida considered whether a leasehold of governmental property, used by private companies for various commercial enterprises such as barber shops, laundrys, rental cottages and campgrounds was entitled to an exemption from ad valorem taxation pursuant to former §196.199(2)(a), Florida Statutes (1979). Section 196.199(2)(a) provided an exemption to leasehold interests in governmental property if the lessee served or performed a governmental, municipal or public purpose. This Court explained that the exemptions contemplated by that statute relate to "governmental-governmental" functions, as opposed to "governmental-proprietary" functions. *See id.* The Court explained that the commercial establishments in that case were purely proprietary and for-profit, and were thus not entitled to an exemption. *See id.*

The lower court erroneously concluded that the "governmental-governmental" standard set forth in *Williams v. Jones* only applies to municipal property that is leased to a private operator. While the *Williams* case did involve leased property, the lower court's interpretation is unduly restrictive. First, the lower court relied primarily on its earlier decision in *Page v. Fernandina Beach*, 714 So. 2d 1070, 1076 (Fla. 1st DCA 1998), wherein the First District stated *in dicta* that "when a city operates a marina it owns, marina property it has not leased to a nongovernmental entity is exempt from ad valorem taxation." The dissent in

the lower court decision correctly noted that, from this statement, it is impossible to determine whether the First District based its decision on the mere ownership of the marina by the city, or the fact that it was being used for an exclusively governmental purpose.

Moreover, this Court is not bound by the *dicta* in the *Page* case, and Amicus would encourage this Court to take this opportunity to clarify the standard to be used in determining whether municipally owned and operated property is exempt. Amicus believes that there is no basis for the First District's differentiation between the standard to be used for municipally-operated property, and the standard to be used for leased municipal property.

Unlike a county, a municipal corporation is not immune from taxation. A municipal corporation's property tax exemptions are based solely on the corporation's use of the property. While a municipality may be legally authorized to engage in profit-making activities, it does not follow that property used for such activities is exempt from taxation. The Florida Constitution does not support such a result, and neither do the historical decisions of this Court, as discussed *supra*.

No public policy is served by allowing municipal property owners an exemption for property used to operate a business, particularly when the municipality's business competes with other taxpaying businesses in the community. While municipalities may properly decide to operate such a business,

the law does not allow them to do so tax-free. The municipal business's property must be taxed in the same manner as the property of other businesses.

II. IRRESPECTIVE OF § 166.047, FLA. STAT., THE PROVISION OF TELECOMMUNICATIONS SERVICES BY A MUNICIPALITY IS A GOVERNMENTAL-PROPRIETARY FUNCTION, RENDERING THE PROPERTY SUBJECT TO TAXATION.

In the instant case, the lower court found that the provision of telecommunication services to individuals and private companies is a municipal function. However, as explained by the dissent, the provision of telecommunication services for a profit, in competition with other telecommunications service providers, cannot seriously be considered a governmental function. If it were provided for the common good, at a nominal charge only intended to cover the City's operational expenses, then it could possibly be considered a municipal function. However, in the instant case, the City's current operation generates revenue for the City, and thus is a proprietary operation, and the property used in that proprietary operation is not entitled to an ad valorem tax exemption.

The cases cited by the lower court addressed the propriety of municipal activities. In this case, the propriety of the City's activities are not at issue. The

only issue is whether the property used to carry on those activities is exempt from taxation.

In *Sebring Airport Authority v. McIntyre*, 642 So.2d 1072, 1073 (Fla. 1994) this Court explained the difference between a permissible but taxable proprietary function, and a tax-exempt governmental function. The Court held that the fee interest in property leased by the Sebring Airport Authority and used for a raceway was not exempt from taxation because the operation of a racetrack is not a public purpose, at least for ad valorem tax purposes. *See id*. at 1074. The Court explained that:

> Serving the public and a public purpose, although easily confused, are not necessarily analogous. A governmental-proprietary function occurs when a nongovernmental lessee utilizes governmental property for proprietary and for-profit aims. We have no doubt that Raceway's operation of the racetrack serves the public, but such service does not fit within the definition of a public purpose as defined by §196.012(6).

Id. at 1074. The Court also explained that "[p]roprietary functions promote the comfort, convenience, safety and happiness of citizens, whereas government functions concern the administration of some phase of government." *Id.* at 1072 n.1. Thus, according to the decisions of this Court, even though governmental property may serve the public by providing for the comfort, convenience, safety or

happiness of its citizens, the property is not exempt from taxation unless it is used exclusively for the administration of some phase of government.

Likewise, in *Greater Orlando Aviation Authority v. Crotty,* 775 So.2d 978 (Fla. 5th DCA 2001), the court held that a municipally owned and operated hotel was not exempt from ad valorem taxation. In *Crotty*, the airport hotel was owned by the City of Orlando, and operated by the Greater Orlando Airport Authority, a special district of the City created solely for the purpose of operating the airport. *See id.* at 979. Even though the hotel was owned and operated by the City, rather than a private entity, the trial court found that the hotel was not exempt because the City was using the hotel for private, profit-making purposes, because the hotel competed with other hotels in the vicinity, and because, in general, hotels are by their nature commercial enterprises. *See id.* at 980. The appellate court affirmed the trial court's decision, stating that: "the hotel's purpose was to make a profit and not to provide for the citizens of Orlando. The city might just as well have opened a pizzeria." *Id.* at 981.

Thus, while the city's operation of the hotel may have been a proper public purpose, so as to allow it to use public funds, the court nevertheless found that the property was not tax-exempt because its primary purpose was to generate a profit for the City. *See id.* at 981. *See also Sun 'N Lake of Sebring Improvement District v. McIntyre*, 800 So.2d 715, 723 (Fla. 2d DCA 2001) (questioning whether a

government-operated pro shop and restaurant could serve an exclusively public purpose). In the instant case, while the City may be justified in operating a telecommunications business, the business partakes of no aspect of sovereignty, but is merely a proprietary business venture, and thus, regardless of section 166.047, Fla. Stat., the property is subject to ad valorem taxation.

CONCLUSION

WHEREFORE, Amicus Curiae Ed Crapo respectfully requests that this Court reverse the First District Court of Appeal's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Robert Pass, Esq. and E. Kelly Bittick, Jr., Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., 215 South Monroe Street, P.O. Drawer 190, Tallahassee, Florida 32302-0190; Raymond O. Manasco, Jr., Esq., Gainesville Regional Utilities, P.O. Box 147117, Sta. A-138, Gainesville, Florida 32614-7117; Kenneth R. Hart Esq., and Jason B. Gonzalez, Esq., Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302-0391 and Nicholas Bykowski and Mark T. Aliff, Assistant Attorneys General, Office of the Attorney General, The Capitol – Tax Section, Tallahassee, Florida 32399-1050 on this 12th day of February, 2004.

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CERTIFICATE OF COMPLIANCE

Counsel for Attorneys for Amicus Curiae Ed Crapo, certifies that the Initial Brief of Amicus Curiae Ed Crapo, as Property Appraiser of Alachua County, Florida is typed in 14 point (proportionately spaced) Times New Roman font.

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