SUPREME COURT OF FLORIDA

CASE NO: **SC07-1556**

O R I G I N A L

THE CROSSINGS AT FLEMING ISLAND COMMUNITY DEVELOPMENT DISTRICT,

Petitioner,

vs.

LISA ECHEVERRI, as Executive Director of the Florida Department of Revenue; **WAYNE WEEKS**, as Clay County Property Appraiser; et al,

Respondents.
_____/

Lower Tribunal Case Nos:
1D06-2026
1D06-2158

ANSWER BRIEF OF RESPONDENT WAYNE WEEKS CLAY COUNTY PROPERTY APPRAISER

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PRELIMINARY STATEMENT

Petitioner, The Crossings at Fleming Island Community Development District will be referred to herein as the "district." Respondent, Lisa Echeverri, Executive Director of the Florida Department of Revenue, will be referred to herein as the "department." Respondent Wayne Weeks, Clay County Property Appraiser, will be referred to herein as the "property appraiser." Jimmy Weeks, Clay County Tax Collector, will be referred to herein as the "tax collector." References to the record on appeal will be delineated as (R-Volume #-Page #). Because counsel for the property appraiser could not match up the clerk's page numbers from the index to the record with the actual number of pages in the hearing and trial transcripts, references to those documents will include the page number from the transcripts. References to the district's initial brief will be delineated as (IB-page #).

STATEMENT OF CASE

The property appraiser does not dispute the Statement of Case as set forth in the Initial Brief of Petitioner.

STATEMENT OF FACTS

The district is a community development district (CDD) created at the instance of Champion Realty, a division of Champion International Paper Company. (R-III-352) Champion Realty was the owner of the involved property that subsequently became property included within the newly created district. (Id.) Champion Realty approached East West Partners, which was a development company based in Midlothian, Virginia, concerning development of the property. (R-III-352) Roger Arrowsmith is one of the partners in East West Partners. (Id.)

The procedure used by East West Partners in developing property at various locations is to establish single-asset entities anytime a development is done and create limited partnerships for that purpose. (R-III-354) The general partner is East West Partners which is based in Virginia, and the partner in Florida is East West Partners of Jacksonville. (R-III-354)

After being contacted by Champion Realty about a possible development involving the property, a joint venture was formed of Champion Realty and East West Partners of Jacksonville. (Id.) Champion Realty previously had decided to use the creation of a CDD as a development vehicle. (R-III-354)

When the development was begun, a large portion of the land was conveyed by Champion Realty to the Joint Venture. (R-III-355) Champion Realty had already seen to the creation of the CDD at the time when the joint venture partnership was entered into with Northwest Crossings which was a company created by Champion Realty for the purpose of being involved in the joint venture with East West Partners of Jacksonville. (R-III-354-357) Thus, the joint venture is between Northwest Crossings and East West Partners of Jacksonville. (Id.)

According to Roger Arrowsmith, President of East West Partners Florida Division and Project Manager, these various matters began in approximately 1991, and culminated with the creation of the CDD and the entering into of the various agreements mentioned herein. (R-III-352-357) The purpose of the formation of the joint venture and the creation of the CDD was to sell the lots that were within the district and various amenities were created to facilitate the sale of the lots. (R-III-358) Such amenities included swimming pools and tennis courts, but not the golf course. (R-III-359) The joint venture developer paid for the golf course. (Id.) Special assessments or non-ad valorem assessments were levied to fund the bonds issued for the funding of the infrastructure of the district which included roadways, master drainage, widening of Highway 17, widening of Route 220, and the various recreational facilities mentioned. (R-III-359) The special assessments were not used to fund the construction of the golf course. (Id.)

Similarly, the clubhouse and restaurant were paid for by the developer. The water and sewer system within the district was funded through the issuance of bonds secured by the user fees paid for by the users of the utilities and water and sewer services. (R-III-360-361)

At a later juncture, approximately 1998, the developer decided to see about disposing of the golf course. (R-III-298-299; 361-363) In his deposition, Mr. Arrowsmith explained this decision by stating that the district always had an exit strategy to dispose of the amenities and offered them for sale. The district showed an interest and an agreement was reached to sell these for $6.5 million, but they would be managed by the developer's management company. (R-III-361-364) At the time of trial, the management company was owned by Eagle Harbor at Fleming Island Joint Venture which was the name used by the joint venture crated by Northern Crossings and East West Partners of Jacksonville, the developer. (R-III-354-355; 370) All employees used in the operation of the golf course, restaurant and bar, clubhouse and pro shop are employees of the management company and not the district. (R-III-369-370)

To pay for the acquisition of the golf course, the district sold bonds to cover the purchase price of approximately $6.5 million secured by fees and monies received for the operation of the golf course. (R-III-300) The bond instruments provide that the bondholders cannot require the district to levy additional special

assessments in the event the payment of the bonds becomes in jeopardy or is in default. (R-III-321-322; 476) The management agreement is for a period of 9 years and 9 months. (R-III-367) The management company employs directors for the four departments managed by the company. (R-III-293-296) The restaurant and bar, swim and tennis facilities, and the pro shop are all managed by the management company which employs directors for each. (Id.) In accounting practices, the funds for the operations for each of these were kept separate and apart and only the golf course funds were used for the retirement of the debt created when the golf course, restaurant and bar, and clubhouse were acquired. (R-III-368-371) At the time of acquisition, legal title to the golf course, restaurant and bar, and clubhouse transferred to the district, but management and operation of all the facilities and the control necessary to facilitate same remained with the management company that was owned by the developer. (Id.)

The management company sets the hours of operation of the various facilities, which generally begins in the morning at 7:00 a.m., in the summer and either 7:30 or 8:00 a.m., during the rest of the year. (R-III-309) The clubhouse, restaurant and pro shop are open about the same time. (R-III-309-310; 377-378) The district has no employees who supervise the operation of any of the facilities and no employees who work at any of the facilities. (R-III-292)

The management company receives a management fee for the services performed. (R-III-385) For the operation of the golf course, the fee is $50,000 per year to be paid in 12 monthly installments plus $130,000 as an additional amount, with the understanding that if there is insufficient money to make the $130,000 payment in any one year the amount shall accrue and remain due and owing into the following year or years. (R-III-366-367) The term of the agreement was for 9 years and 9 months. (Id.) The management fees were paid from the income stream generated through the operation of the golf course, and would be listed in the budget as an operating expense of the golf course. (R-III-369)

None of the debt associated with the acquisition of the golf course is tied to the funds generated through the operation of the swim and tennis facilities. The Facility Assessment of the Eagle Harbor Golf Club prepared for the Board of Supervisors Crossings At Fleming Island Community Development District by NGF Consulting dated April 30, 2002, introduced at trial as Defendants' Exhibit 2, states as follows:

> Due to the number of patrons (memberships) the club operates more closely to a private club than a daily fee facility and although the club remains open to the public, the majority of the revenue is associated with patrons (memberships) fees and charges.

(Facility Assessment at p. 2, emphasis added.) It does not charge "membership fees," but does charge patron fees. It also charges an initiation fee which,

according to the Facility Assessment "range from $2,500 to $3,500 depending on the type of patron (membership)." The club also charges monthly dues that "range from $155 for a resident family patron (membership) and $140 for a resident single patron (membership) to $188 for a non-resident family and $163 for non-resident single. (Facility Assessment at 21) When asked about the number of non-resident patrons at the golf course, Mr. Arrowsmith testified that he did "not know the exact number but I would say it's probably around 75 to a hundred, I would think." (R-III-381)

Residents of the district are issued "Fun Cards" in order to use the swim park, waterfront part and tennis park, and are not allowed to get into the facilities without a card. Information posed on the Eagle Harbor website advises residents how to obtain their "Fun Card." Ms. Pam Whetzel, who is employed by East West Partners as the Membership and Special Events Coordinator testified in her deposition that non-residents could use the swim and tennis center facilities by completing an application and paying an $1,800 per year fee. (R-III-400) Ms. Whetzel further testified that, at that time, there were about 7 non-resident individuals who had paid the $1,800 annual fee to use the swim and tennis facilities. (R-III-401)

Mr. Arrowsmith in his deposition explained the arrangements for use of the golf course. He explained that anyone can become a patron by paying the

fee, whether a resident or non-resident of the district. (R-III-379-380) Thereafter, he explained how the fees are set with the approval of the district board. He explained that the management company prepared fee proposals that are then approved by the district's supervisors within ranges, so the management company can change the fees as the need arises within the range. (R-III-381-382) A non-resident, however, cannot use the swim and tennis facilities unless he/she become a patron and pays the $1,800 annual fee. (R-III-400-406) Like the golf course, the swim and tennis facilities have operating budgets but they are funded through the maintenance fees, and special assessments are not used to fund same.

The maintenance assessment is levied against everyone residing within the district. (R-III-385) The swim and tennis facilities sell soft drinks and the bar at the restaurant sells alcoholic beverages pursuant to a license and the license is in the name of the operator/management company and not the district. (R-III-371) According to Mr. Arrowsmith, to market the lots in the district, advertisements are placed in the community and elsewhere to advise of all of the amenities that exist. (R-III-387-388)

SUMMARY OF ARGUMENT

By virtue of this Court accepting jurisdiction, all issues decided by the First District Court of Appeal in Zingale v. The Crossings at Fleming Island Community Dev. Dist., 960 So.2d 20 (Fla. 1st DCA 2007), are before the Court. See Cantor v. Davis, 489 So.2d 18 (Fla. 1986); Trushin v. State, 425 So.2d 1126 (Fla. 1982).

The property appraiser submits that the district court's decision finding that the golf course, swim and tennis centers, and playgrounds are exempt as being used for an exempt purpose is incorrect based on the undisputed facts as a matter of law. The district court stated the basis for its holding as follows:

> Because the property, for exemption purposes, should be treated the same as parks and recreation opportunities traditionally provided by municipalities, which are explicitly recognized as exempt property by the Court in *Gainesville,* we agree and affirm the trial court's ruling on that issue. *See Sun 'N Lake of Sebring Improvement Dist. v. McIntyre,* 800 So.2d 175, 723 (Fla. 2d DCA 2001) (recognizing that '[i]t is possible that a golf course or tennis courts, owned by a municipality and held open to the public, and not operated in conjunction with a for-profit business, may serve an exclusively public purpose;' citing *Page v. City of Fernandina Beach,* 714 So.2d 1070 (Fla. 1st DCA 1998) (holding that operation of marina by city serves public purpose entitling city to tax exemption), and *Am. Golf of Detroit v. City of Huntington Woods,* 225 Mich.App. 226, 570 N.W.2d 469 (1997) (likening certain golf courses to public parks)).

Zingale, 960 So.2d at 26. The property appraiser submits that, at bar, the golf course and swim and tennis centers are not only operated in conjunction with a for-profit entity, but are operated by such entity. The property appraiser also submits that the district court's decision that the property appraiser has standing to challenge the constitutionality of section 189.403(1), Florida Statutes (1999), is correct because of this Court's decisions in Dep't of Revenue v. City of Gainesville, 918 So.2d 250 (Fla. 2005) (Gainesville II), Fuchs v. Robbins, 818 So.2d 460 (Fla. 2002), Sebring Airport Auth. v. McIntyre, 783 So.2d 238 (Fla. 2001) (Sebring Airport Auth. II), State v. Frontier Acres Community Dev. Dist. Pasco Co., 472 So.2d 455 (Fla. 1985), Dep't of Education v. Lewis, 416 So.2d 455 (Fla. 1982), Archer v. Marshall, 355 So.2d 781 (Fla. 1978), Dep't of Admin. v. Horne, 269 So.2d 659 (Fla. 1972), Dickinson v. Stone, 251 So.2d 268 (Fla. 1971), Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962), State ex rel. Green v. City of Pensacola, 108 So.2d 897 (Fla. 1st DCA 1959), aff'd, 126 So.2d 566 (Fla. 1961), and State ex rel. Harrell v. Cone, 177 So. 854 (Fla. 1937). In Harrell, the rule was stated as follows:

> Many cases hold that if an act requires a ministerial officer to perform duties particularly affecting him personally, as where he will violate his oath of office if he performs them, or where he is charged with the control and disbursement of public funds, his official capacity gives him such an interest in the matter that he may challenge the validity of the act in mandamus.

> The case under review falls easily within the rule last supported, and some of the cases cited go so far as to hold that when, in the performance of an act imposed by statute, an officer is required to violate his oath of office to support the Constitution, in any way jeopardizes the interest of the public, or otherwise render himself liable for breach of duty, he should, in justice to himself and the public, be entitled to raise the constitutional validity of the act in mandamus to compel performance.

177 So. at 856 (citations omitted).

In the instant case, public funds are directly involved and the only person in a position to ensure that that no improper and illegal exemption or avoidance from paying taxes constitutionally due is the property appraiser. The property appraiser has the duty of appraising all property and administering exemptions in the county to ensue that all constitutional requirements are met and that all property is properly assessed and is the only officer or person with that statutory duty. See §§ 193.023, 193.085, 193.114, 196.011, Fla. Stat. (2007). Simply put, if the property appraiser cannot do it, "it ain't gonna get done." See Horne; Kaulakis; Barr v. Watts, 70 So.2d 347 (Fla. 1953).

Suggesting a distinction between assessing and collecting is a distinction without a difference of the same type that the court noted in Horne where this Court noted as a distinction without a difference the argument that an "appropriation" was different from an "expenditure." The tax collector collects what the property appraiser extends and calculates on the tax roll. If the property

appraiser doesn't include it on the tax roll, the tax collector doesn't collect it. The fiscal interest that bottoms the exception to the general rule relating to officers challenging the validity of statutes is the same.

The factual background that is undisputed is that the golf course is being operated by a private entity pursuant to contract, essentially the same entity that had always operated it before it was transferred to the district. The golf course initially was a privately owned golf course and became titled in the district's name as part of the developer's exist strategy. (R-III-384-422, Platt depo. at 14-15, Arrowsmith at 14-16) Developers need a golf course to help sell its lots in the district and when its inventory of lots is sold out or almost sold, it can sell the golf course or persuade the development district to take title, and agree to keep operating it for an agreed to fee. That's what happened here. The management company essentially is the same operator as before--same employees, controlled by the management company, same restaurant management, same golf course maintenance people, etc, all of which are employees of the management company, not the district. The liquor license is in the name of the management company, and the district has no involvement in the day-to-day operation of the golf course, the swim center, restaurant, bar, or pro shop. (R-III-369-370) The management company sets the fees with a range approved by the district based on the budget prepared and annually approved by the district supervisors. The management

company receives a $50,000 per year fee paid in monthly installments plus $130,000 each year and although the latter amount may be deferred if funds are insufficient, the debt remains and must be paid. (R-III-366-367) The swim and tennis facilities, restaurant, bar and pro shop are all operated by the management company.

The property appraiser submits that the district court's holding that the properties are exempt is inconsistent with this Court's rationale in Gainesville II. The property appraiser submits that the entire operation is a private, for-profit operation, no different than it was before the legal title transfer, similar to the hotel operation in Greater Orlando Aviation Auth. v. Crotty, 775 So.2d 978 (Fla. 5th DCA 2000). There, the hotel was managed by the Hyatt Corporation pursuant to a management contract. Here, the management company has control and possession of the property for 9 years, 9 months, the duration of the contract and is paid $180,000. The district has only legal title, and the fiscal responsibility to pay off and retire the bonds used to obtain the funds to pay the developer, which come from golf course fees and earnings.

STANDARD OF REVIEW

I. THE DISTRICT COURT'S DECISION THAT THE PROPERTY APPRAISER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE PROVIDING FOR TAX EXEMPTION NOT PERMITTED IN THE FLORIDA CONSTITUTION IS CORRECT.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE GOLF COURSE AND SOUTHERN SWIM AND TENNIS CENTERS WERE ENTITLED TO AD VALOREM TAX EXEMPTION WERE IT NOT FOR THE STATUTE SECTION 189.403(1), FLORIDA STATUTES.

Whether the district court's decision that a property appraiser has standing to challenge the constitutionality of a statute is correct, and whether the district is entitled to ad valorem tax exemption are questions of law that are reviewed de novo. See Southern Baptist Hosp. of Florida, Inc. v. Welker, 908 So.2d 317 (Fla. 2005).

ARGUMENT

I. THE DISTRICT COURT'S DECISION THAT THE PROPERTY APPRAISER HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE PROVIDING FOR TAX EXEMPTION NOT PERMITTED IN THE FLORIDA CONSTITUTION IS CORRECT.

The property appraiser submits that the district court correctly ruled that the property appraiser has standing and that the Second District Court of Appeal's decision in Sun 'N Lake is incorrect. Fuchs v. Robbins, 818 So.2d 460

(Fla. 2002), and Turner v. Hillsborough Co. Aviation Auth., 739 So.2d 175 (Fla. 2d DCA 1999), are factually distinguishable because in both the property appraiser initiated the actions in court.

There are two situations in which a public official may challenge the constitutionality of a statute which are: (1) when the issue is raised in a defensive manner; and (2) to protect public funds. Each will be addressed herein.

(1) The property appraiser may defensively raise the constitutionality of a statute.

Although numerous cases that had held that a property appraiser does have standing to defensively raise the constitutionality of a statute were furnished to the trial court, he cited only Sun 'N Lake of Sebring Improvement Dist. v. McIntyre, 800 So.2d 715 (Fla. 2d DCA 2001), which had reversed a summary judgment entered in favor of the property appraiser. (R-IV-613; 615; 622) On remand, the trial court in Sun 'N Lake consolidated three subsequent tax year lawsuits that had been held in abeyance by agreement of the parties with the prior years' cases, and entered a Final Judgment finding that all of the improvement district's property involved in said cases were taxable. On remand, the trial court re-declared section 189.403(1) unconstitutional. Neither the improvement district, nor the Florida Association of Special Districts, an intervenor in the case, chose to appeal that decision.

The trial court in Sun 'N Lake cited Sebring Airport Auth. v. McIntyre, 783 So.2d 238 (Fla. 2001), which involved a situation where a property appraiser challenged the validity of a statute. Since that time, the First District Court of Appeal in Dep't of Revenue v. City of Gainesville, 859 So.2d 595 (Fla. 1st DCA 2003) (Gainesville I), and this Court in Gainesville II, considered and rendered decisions regarding the constitutionality of a state statute in suits filed by the public body, the city. In City of Gainesville, the city had filed suit challenging the constitutionality of section 166.047(3), Florida Statutes (1997), which provided that property owned and used by a city that would be in competition with a private business entity would be taxable the same as privately owned property.

The First District Court of Appeal, in a 2-1 decision, held that the city's contention was well taken and struck that part of the statute holding that the city's property so used would be taxable. Gainesville I. This Court reversed that decision on separate grounds. Gainesville II. The point is that the city, which is a public body like a property appraiser is a public officer, was permitted to place in issue the validity of a state statute. It is true that in City of Gainesville, the city was the taxpayer but it is also a creature of the legislature, and the legislature determines its existence and taxable status. The legislature has the authority to waive tax immunity for counties so it certainly could determine in what situations a city's property should be taxable.

A long line of cases support the property appraiser's position. In Lewis, this Court stated the principle as follows:

> If, on the other hand, the operation of a statute is brought into issue in litigation brought by another against a state agency or officer, the agency or officer may defensively raise the question of the law's constitutionality.

416 So.2d at 458. In several recent cases, this Court and district courts have addressed the validity of statutes raised by property appraiser. See Fuchs; Sebring Airport Auth. II.

In Sebring Airport Auth. II, this Court issued what is considered a landmark opinion holding invalid parts of a statute that, by definition, permitted ad valorem tax exemption for property not permitted by the Florida Constitution. Although the standing issue was raised in the lower court in Sebring Airport Auth., this Court did not address it. There have been statements made by Supreme Court Justices in dissents that disagree with this Court's previous pronouncements on a property appraiser's standing to raise constitutional issues, but these were not part of the majority holding.

(2) The property appraiser may raise the constitutionality of a statute to protect public funds.

The second exception is where the public official raises the constitutionality of a statute to protect public funds. The property appraiser has the duty under Florida law of appraising all property in the county and administering

exemptions. See §§ 193.023, 193.085, 193.114, 196.011, Fla. Stat. (2007). The property appraiser must ensure that all taxable property is appropriately assessed and that any property receiving exemption is lawfully entitled, both constitutionally and statutorily, to receive the exemption. The property appraiser ensures that an equitable tax treatment is available for the levy of taxes for the support of local government including the county, school district, and municipalities.

Unconstitutional statutory exemptions erode the tax base of these entities. Whenever constitutionally unauthorized exemptions are granted within the county, moreover, the result is that the tax burden for that year is shifted to other taxpayers. In tax exemption cases, a "newly-created tax exemption necessarily involves a direct shift in tax burden from the exempt property to other, non-exempt properties." Sebring Airport Auth. II, 783 So.2d at 250. One person's exemption from tax is an increase in another person's tax.

This Court set forth the basis for the exception to standing where public funds are involved in Barr; accord, Kaulakis (in tort action against county, county commissioners had right and duty to challenge validity of home rule charter).

Similarly, the state comptroller is a proper party to challenge the constitutionality of a statute when public funds are at issue. See Green; Dickinson. The instant case fits squarely within these pronouncements.

The fact that this case involves a situation in which the property appraiser is protecting the county tax base, as opposed to guarding against the expenditure of county funds, does not require a contrary result. This Court in Horne, made "short shift" of the state's argument that "standing" should be limited to situations involving "expenditures" of funds only, stating:

> Appellees cite Florida and sister state authorities allowing taxpayer attacks upon 'unlawful *expenditures*.' Appellants accept these authorities insofar as efforts to stop actual expenditures or levying of a tax is concerned but would diminish 'expenditure' and 'appropriation' (as in the General Appropriations Act) which appellants see as only a 'cutting of the pie' and not at all as 'eating' it by the ultimate expenditures of funds. This seems to be a 'distinction without a difference.' We do not view the matter as turning upon whether or not it constitutes a direct 'expenditure.'

269 So.2d at 660 (emphasis added).

In the instant case, drawing a distinction between a "post tax reduction" by way of refund, and a "pre tax reduction" by way of exemption is a "distinction without a difference." Whether diluting the tax base so as to provide for a special tax exemption thereby saving the taxpayer money, or by way of an improper payment to the taxpayer, the result is the same; a taxpayer receives a

monetary benefit at the expense of the remainder of the property owners in the county and the public coffers are directly affected.

If a statute were drawn that would have the effect of making a direct payment to the property owner, under prior case law the expenditure of such money pursuant to said law would provide the necessary standing or interest for the public official to challenge the constitutionality of the statute requiring such expenditure. Thus, there certainly is no logical reason why the same legitimate fiscal interest would not apply to an illegal exemption resulting in non-collection of money. In either situation, the amount of money would be the same and the preferential treatment would be identical.

An argument that the expenditure of public funds exception does not apply because property appraisers do not collect taxes is meritless. In Florida, the collection of ad valorem taxes is a two-step process involving two independent constitutional officers. The duty falls upon the property appraiser to assess all taxable property and administer exemptions and to include all property on the assessment rolls for each year. This is the first step in the overall process of collecting the county's money.

The function of collecting the money is exactly that; a basic ministerial function since the tax collector has no authority to deviate from the

assessments as certified by the property appraiser and extended as taxes on the tax rolls.

The entire burden of ensuring that all properties in the county pay their proper share of the taxes for the operation of the budget entities rests on the property appraiser alone. Property appraisers have the constitutional duty to assess all taxable property at just value and any statutes that sanction deviation from just value prevent them from performing their constitutional duty.

As a purely practical matter, the only "watchdog" for the county in ensuring that all properties are assessed according to the mandates of the constitution is the property appraiser. The property appraiser has the function of ensuring on an annual basis that all property subject to tax in the county is properly identified, reported, and included on the county's assessment rolls. The average John Q. Citizen would have no way of knowing that the legislature had passed statutes providing special tax exemptions to select taxpayer thereby diluting the funds available for the local government operations performed by budget entities, such as the county, school board and municipalities.

When property appraisers are faced with a decision of whether to grant a statutory exemption which conflicts with the constitution and applicable case law, they should be permitted to deny the exemption and then have standing to assert that the statute is unconstitutional in court. Decisional law and the

constitution, without question, control over conflicting legislative enactments. This case falls squarely within this Court's pronouncements and analysis set forth in Harrell. The district would have this Court decide otherwise. The trial court's order striking the property appraiser's affirmative defense that section 189.403(1) was unconstitutional was in error, and the district court's decision reversing same was correct.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE GOLF COURSE AND SOUTHERN SWIM AND TENNIS CENTERS WERE ENTITLED TO AD VALOREM TAX EXEMPTION WERE IT NOT FOR THE STATUTE SECTION 189.403(1), FLORIDA STATUTES.

The district court reversed the trial court in its holding that the property appraiser did not have standing to challenge the validity of section 189.403, but held that the trial court was correct in holding the involved property exempt from taxation based on said statute. Zingale, 960 So.2d at 28. The effect of the district court's decision is that the trial court, on remand, could well hold section 189.403(1) invalid, and find the involved properties taxable, and strike the statutory basis for the exemption. That is what the people voted in November 1998 in rejecting proposed constitutional amendment No. 10. See Florida Dep't of State, *Proposed Constitutional Amendments and Revisions to Be Voted On November 3, 1998* 31 (June 23, 1998). The property appraiser submits that the district court erred in not holding that the involved properties were taxable even

without the provisions of section 189.403(1). The property appraiser submits that based on this Court's holding in City of Gainesville II, and the cases cited therein, the use of the involved properties does not qualify said properties for tax exemption under Florida law even without section 189.403(1).

The property appraiser submits that (1) the involved properties were not being used "exclusively" for a "municipal purpose" as required by Article VII, section 3, Florida Constitution, and (2) the initial operation of said properties was for the use of the developer, operated as a private entity competing with other private golf courses and this current use of the properties operated by the private management company is no different. The developer owned these properties before and they were not essential to the operation of the district, and the transfer of title to the district whereby the developer through a management company continuing to operate it the same as before did not change this. Through the management contract, the management company (developer) gets the financial benefit as before, and is the predominant beneficiary and user of the property. The trial court's conclusion elevates form over substance that the district court should have corrected.

It is significant that the golf course, restaurant and bar, and pro shop were not initially part of the district's property. All were owned and operated by the developer and this status continued until about 1998 when the developer

decided to dispose of the golf course. (R-III-284-422, Platt depo. at 14-15), Arrowsmith depo at 14-16) Mr. Arrowsmith referred to the plan of disposition as the developer's "exit strategy." (Id.) So it was a taxable, privately-owned and operated golf course. The property appraiser submits that the operation remained the same, under the control and management of a management company owned by the developer, and that the transfer of legal title to the district did not change its predominant use. It is still operated like a private, for-profit entity, as was the hotel in Greater Orlando Aviation Auth. v. Crotty, 775 So.2d 978, 981 (Fla. 5th DCA 2000). Moreover, since the district never owned it when the district was created, it certainly is not "essential" to the district. Now, it is open to the public at large like any private golf course upon payment of the monthly fees.

The developer's management company operates, controls and maintains the golf course, restaurant and bar, and pro shop just as the developer had previously done. The trial court held that the restaurant and bar, and pro shop were taxable and the district court did not disturb that holding. All employees are employees of the management company and the district has no employees operating any of these. The liquor license is in the name of the management company, and the district has no involvement in the day-to-day operations of the golf course, restaurant and bar, or pro shop. (R-III-369-370) The fees are set by

the management company and are within the range annually approved by the district supervisors. (R-III-379-382)

The management company receives a $50,000 per year fee paid in monthly installments plus $130,000 each year, but the latter amount may be deferred if there are insufficient funds. (R-III-366-367) The golf course, swim and tennis facilities, restaurant and bar, and pro shop are all operated and managed by the management company. The district has no employees who supervise the operation of any of these and none who work there. (R-III-366-367, 369, 385)

The property appraiser submits that the entire operation is a private, for-profit undertaking no different than it was before transfer of the legal title. It is similar to the hotel operation held taxable in Crotty, in which the district court stated:

> The question here is whether the hotel property provides for the comfort, convenience, safety, and happiness of the citizens of Orlando.

Here, the management company has control and possession of the premises for 9 years, 9 months, the duration of the management agreement and by contract is paid $180,000 per year to operate the facilities for the district. The district receives no benefit and holds only legal title, and has the obligation to retire the bonds issued to pay the developer for the purchase of the facilities. The district's residents pay patron fees ranging from $2,500 to $3,800, and pay monthly dues. Non-residents

pay the same patron fees for use of the facilities. Public tournaments can be scheduled and the restaurant and bar can be rented for parties.

District residents have "fun cards" permitting access to the swim and tennis facilities, while non-residents must pay $1,800 per year. (R-III-400) Pam Whetzel testified that, at the time of her deposition, there were only about 7 non-resident members who paid the $1,800 annual fee. (Id.)

The management company competes with other golf courses for golf events and pays the district for a given number of rounds, $50,000 worth at $25 per round, which primarily is used by employees. It also acquires rounds by paying $20,000 in market fees that are marketing rounds used for public relation purposes. (R-III-373)

The property appraiser submits that the operation is a purely proprietary operation and not essential to the well being of the district. The district simply has elected to engage itself in a purely commercial undertaking not essential to the health, welfare or safety of the district, engaging in business in competition with other such facilities and open to the public at large. The district's residents could have just as easily not bought the golf course, restaurant and bar, and pro shop and continued to use same as they had when they were owned and operated by the developer. In fact, nothing has really changed.

The trial court's decision cites City of Gainesville and concluded that the golf course, swim and tennis centers, and various playgrounds are exempt from taxation concluding the same "encompass activities that are essential to the health, morals, safety and general welfare of the people within the District." (R-XI-1782) But these golf courses are open to the general public upon payment of the fees and so are the swim and tennis facilities. The $1,800 charged to non-residents to use the swim center equals the same amount paid by residents through maintenance fees.

A community development district (CDD) possesses no government police power and cannot exercise municipal power for the health, welfare and safety of the district residents. See Frontier Acres. Even if the golf course facilities and swim and tennis facilities were for residents' use only, which they are not, they are not essential. The district just went into the golf course ownership and operation business through a management company.

CDD's and districts of similar purpose primarily are financial vehicles for developers who use the governmental cloak to obtain favorable federal tax interest exemptions on bonds or other types of certificates to pay for infrastructure. These are not governmental entities in the same sense as counties and municipalities as this Court recognized in Frontier Acres.

The nomenclature of the term "special district" generally has been used to describe many different created entities, some of which actually are state agencies--flood control districts. Similarly, county or city created entities sometimes referred to as non-ad valorem benefit units frequently are referred to as "special districts." All districts provided for in chapter 190, Florida Statutes (2007), are for development purposes. Sun 'N Lake of Sebring Improvement District, which was the special district involved in Sun 'N Lake, was a county-created special improvement district. The point it, in the case at bar, and typically, improvement districts are not governmental units possessing any governmental powers, including police power, to regulate for the health, welfare and safety. They are vehicles to facilitate the financing of infrastructure--roads, walking trails, etc., to further the marketing of the developer's lots for the use of the private owners. Review of the trial court's decision on remand in Sun 'N Lake discloses that the trial court there rejected the claim for exemption for virtually identically used properties.

If a special district's property is to be considered exempt, it must be used "exclusively" for municipal or public purposes. See Art. VII, § 3(a), Fla. Const. There is no question but that the purpose of the golf course, swim and tennis centers, and playgrounds was to benefit the developer. That was the enticement to buy lots and homes in the district. The effect of the statute

challenged by the property appraiser is to add the "special district" to article VII, section 3(a). Even if that were the case, however, these properties were not exclusively for municipal use. In fact, on remand from a prematurely filed appeal, the trial court acknowledged that in refusing to grant exemption to additional properties stating that the "bar, restaurant, and pro shop; a 620-acre Wetlands Conservation Area; the Pine Lake Recreation/Green Belt; the Second Wetlands Conservation Area; the Third Wetlands Conservation Area; the First Pine Lake Retention Pond" do not "encompass activities that are essential to the health, morals, safety and general welfare of the people within the District and are not exempt from taxation." (R-XI-1782-83) Here, the trial court observed that these were more for the developer's benefit.

Some review into the nature of CDD's and the history and evolution of the district is in order. CDD's generally are created at the instance of the developer or owner of large tracts of land in a county seeking the creation of a district that would allow for the advantage of the levy of a special assessment or other charges solely within the district to pay for the infrastructure needed to refinance the improvements. CDD's may also be created pursuant to chapter 190. However created, the general course of events is that the county is assured that only the district property and property owners will be required to pay for the

improvements within the district and that the county will have no financial obligation with regard to same.

In fact, the statutes recognize in chapter 190 that the obligations of the district are not in anyway to become a financial burden to the county. Section 190.002(3), Florida Statutes (2007) states:

> It is the legislative intent and purpose, based upon, and consistent with, its findings of fact and declarations of policy, to authorize a uniform procedure by general law to establish an independent special district as an alternative method to manage and finance basic services for community development. It is further the legislative intent and purpose to provide by general law for the uniform operation, exercise of power, and procedure for termination of any such independent district. It is further the purpose and intent of the Legislature that a district created under this chapter not have or exercise any zoning or development permitting power, that the establishment of the independent community development district as provided in this act not be a development order within the meaning of chapter 380, and that all applicable planning and permitting laws, rules, regulations, and policies control the development of the land to be serviced by the district. It is further the purpose and intent of the Legislature that no debt or obligation of a district constitute a burden on any local general-purpose government without its consent.

(Emphasis added.)

The district's position is that, upon its creation, the properties in the district that originally were owned by the developer and, more specifically, the amenity properties such as the golf course, pro shop, restaurant and bar, etc., that

are the hub and enticement for the development, become exempt because title was moved to the district. The net effect of this is that the financial burden and responsibilities of the district are shifted to the county and school board to be borne by other properties within the county because an exemption from taxation has the effect of removing that property from the taxable core of property that serves in funding the operations of the schools and the county. The net effect of the district's contention is that if the district holds title to property such property is exempt. This Court in Sugar Bowl Drainage Dist. v. Miller, 162 So.2d 707 (Fla. 1935), rejected a similar contention where title was transferred through foreclosure "[b]ut a drainage district can no more acquire the unencumbered [sic] fee by foreclosing its drainage tax lien than a mortgagee can do so by foreclosing his mortgage. If appellant's contention be true, then it can acquire title to the lands in the drainage district and relieve them of all other forms of taxation." 162 So. at 708. The district, once created, became the alter ego of the developer and the district contends that by title being held by it all such property, including the amenity properties, golf course, pro shop, restaurant and bar, swim and tennis facilities, are exempt. This is pure and simply a contention that results in the shifting of the tax burden to the remaining properties located in the county contrary to the statutory admonition cited previously in chapter 190.

In Gainesville II, this Court held that providing telecommunications services to municipal residents was not an "essential service." No doubt influencing this holding was this Court's recognition that such was different than furnishing electrical power and public parks because historically tele-communication services were provided by the private sector, while parks traditionally are provided for the population. Some cities have municipal golf courses and, traditionally, golf courses are commercial ventures by private owners. As in the case at bar, developers commonly include a golf course in their venture to facilitate the sale of lots with the ultimate plan of disposing of it when the sell-out of lots is completed. This enables entities offering lots to enhance desirability and, most importantly, price. In fact, a City of Tallahassee golf course that is operated by a private entity is taxable. See Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993).

Significantly, this court noted that different functions are served by article VII, section 2(b), and article VII, section 3(a), Florida Constitution. Many municipal activities permitted under the former and/or legislatively authorized and recognized, would not necessarily qualify for tax exemption under article VII, section 3(a). See Sebring Airport Auth. v. McIntyre, 642 So.2d 1072 (Fla. 1994) (Sebring Airport Auth. I). A city may choose to provide golf facilities, swimming accommodations and tennis courts and such may be lawful activities under article

VII, section 2(b), as appropriate for that particular city. For instance, a city located on either ocean or body of water may operate a beach for its residents use. Similarly, however, the cities of Crawfordville, St. Marks, or Apalachicola would hardly find a golf course an essential activity for their residents because golf is of little need to mullet fishermen or oyster shuckers.

The property appraiser submits that this Court in Gainesville II did not mandate that a privately operated golf course should be exempted as "essential" any more so than the golf course involved in Capital City Country Club. To suggest that the type of agreement employed--lease versus management agreement--controls when determining tax exempt status is baseless and elevates form over substance.

CONCLUSION

The property appraiser respectfully submits that the district court's decision on standing should be upheld but that its holding that the golf course, swim and tennis centers, and playgrounds managed and operated by a private, for-profit entity 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 the following addressees on this the **29th** day of February 2008:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the respondent, Wayne Weeks, Clay County Property Appraiser, certifies that the font size and style used in the foregoing answer brief is 14 Times New Roman and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a).

_____
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