IN THE SUPREME COURT OF FLORIDA

CASE N0. SC07-1556

THE CROSSINGS AT FLEMING ISLAND
COMMUNITY DEVELOPMENT DISTRICT,

petitioner,

vs.

LISA ECHEVERRI, et al.,

respondents.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON MERITS

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PRELIMINARY STATEMENT

All references to the record are referred to herein by the letter "R" followed by the page number.

All references to the transcript are referred to herein by the letter "T" followed by the page number.

The Crossings At Fleming Island Community Development District, petitioner herein and plaintiff at the trial level, will be referred to as the "District." Wayne Weeks, Clay County Property Appraiser, respondent herein and defendant at the trial level, will be referred to as "Weeks."

SUMMARY OF ARGUMENT

Neither Weeks nor amici curiae cite a single case in which this Court expressly permitted a ministerial officer to defensively challenge the constitutionality of a statute that did not also involve either the public funds exception or a situation in which the officer will be injured in person, property or rights. This Court has previously weighed competing public policy considerations and concluded that the public interest would be best served by precluding ministerial officers from ignoring laws they are duty bound to observe and permitting constitutional challenges to be asserted by other proper parties.

The trial court's ruling striking Weeks's affirmative defenses challenging the constitutionality of Section 189.403(1) Florida Statutes should be affirmed.

The trial court and the First District Court of Appeal also properly held that certain parcels within the District were exempt from ad valorem taxation. The decision of the First District Court of Appeal on this issue should be affirmed.

ARGUMENT

I. WHETHER THIS COURT SHOULD APPROVE THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL IN SUN 'N LAKE OF SEBRING IMPROVEMENT DISTRICT V. MCINTYRE, 800 So. 2nd 715 (FLA. 2ND DCA 2001), DISAPPROVE THE HOLDING OF THE FIRST DISTRICT COURT OF APPEAL IN THE INSTANT ACTION, AND HOLD THAT THE PROPERTY APPRAISER DOES NOT HAVE STANDING TO DEFENSIVELY CHALLENGE THE CONSTITUTIONALITY OF SECTION 189.403(1) FLORIDA STATUTES

In his answer brief, the respondent Weeks broadly asserts that "numerous" cases have held that a property appraiser does have standing to defensively raise the constitutionality of a statute. (Weeks Brief at 14). In his discussion, Weeks then cites only to the First District's decision in Department of Revenue v. City of Gainesville, 859 So.2d 595 (Fla. 1st DCA 2003) (Gainesville I), and this Court's decision in Department of Revenue v. City of Gainesville, 918 So.2d 250 (Fla. 2005)(Gainesville II) as support for this broad statement.[1] Those decisions help Weeks not at all.

First, in Gainesville, the City of Gainesville instituted the suit challenging the constitutionality of a statute. Second, in neither decision is there any discussion, much less a holding, on the issue of the City's standing to challenge the constitutionality of a statute. It is not apparent from those

[1] Weeks does string cite a number of cases in his summary of argument (Weeks Brief at 9), all allegedly standing for this proposition. Those cases will be discussed shortly.

opinions whether that issue was ever even raised. Since the Gainesville case was a constitutional challenge initiated by the City of Gainesville, it is evident that no one equated a municipality with a constitutional or ministerial officer charged with faithfully executing the laws of the State, nor could anyone take such a contention seriously. This Court has on previous occasions detailed its public policy concerns should executive officers be permitted to ignore (or brazenly disobey) and then challenge the constitutionality of laws they are obliged to administer and enforce. For example, in Barr v. Watts, 70 So.2d 347 (Fla. 1954) this Court noted the chaos and confusion that would result if officers were permitted to disobey the laws of the State and then attempt to challenge their constitutionality. This Court further observed that the people of this State have a right to expect that state agencies will promptly carry out and effect the will of the people expressed in legislative acts, and remarked that the State's business cannot come to a standstill while boards contest the validity of a statute. Barr, 351. See, also, State ex rel. Atlantic Coast Line R. Co. v. State Board of Equalizers, 94 So. 681 (Fla. 1922).

A ministerial officer such as Weeks, who has a duty to faithfully execute the laws of the State (indeed, whose reason for existence is to faithfully execute such laws), is obviously

within the class of executive officers contemplated by Barr. Just as obviously, the City of Gainesville is not. Clearly, the public policy concerns expressed by this Court are not triggered when a municipality, which is not charged by law with faithfully executing the laws of this State, institutes a constitutional challenge.

Virtually all of the other cases included within Weeks's string cites can be easily disposed of. In Sebring Airport Authority v. McIntyre, 783 So.2d 238 (Fla. 2001), the issue before the trial court was whether the property at issue was being used for a public purpose. The trial court held that it was not and entered judgment in favor of the county. The constitutionality of the statute was apparently not even at issue at the trial level, so certainly the issue of the property appraiser's standing would not arise. In any event, this Court's opinion contains no discussion of, or holding on, the issue of a property appraiser's standing to defensively challenge the constitutionality of a statute.

In State v. Frontier Acres Community Dev. Dist. Pasco County, 472 So.2d 455 (Fla. 1985), this Court was presented with an appeal from a bond validation proceeding. There, the State, as opposed to a ministerial officer, challenged the constitutionality of Chapter 190 Florida Statutes. There is nothing in the opinion to indicate that the State's standing to

challenge the constitutionality of a statute was ever raised, and there is no discussion or holding in the opinion with respect to the issue of standing.

Weeks also cites to Archer v. Marshall, 355 So.2d 781 (Fla. 1978). There, this Court affirmed a trial court ruling finding a special act unconstitutional. Archer contains no detail regarding the procedural history of the case, and one is left to speculate as to exactly how the issue of the constitutionality of the statute arose. One is left to speculate further whether, assuming the property appraiser raised a defensive constitutional challenge, the taxpayers waived the issue of the property appraiser's standing. Clearly, standing is an issue that can be waived. Sunset Harbour Condominium Assn. v. Robbins, 914 So.2d 925, 928 (Fla. 2005). In any event, there is no discussion or holding whatsoever in the opinion with respect to the issue of standing.

In Dickinson v. Stone, 251 So.2d 268 (Fla. 1971), this Court briefly noted that Dickinson, a state officer, had standing to defensively challenge the constitutionality of a portion of an appropriations bill. Dickinson, at 270. However, the appropriations bill clearly involved expenditure of public funds which Dickinson, as State Comptroller, would be required to disburse. Dickinson, at 272 (Act provided moneys to pay salaries, other expenses, capital outlay-buildings and

improvements). This case falls squarely within the public funds exception previously enunciated by this Court and already discussed at some length in the District's Initial Brief at pages 21 through 24. This opinion does not stand for the proposition that a constitutional or executive officer can challenge the constitutionality of a statute merely because the officer is in a defensive litigation posture.

Three other cases string cited by Weeks for a defensive posture exception also involved the public funds exception. Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962), was a tort action against the county which would require expenditure of public funds to satisfy any judgment. Both Harrell v. Cone, 177 So. 854 (Fla. 1938) and Green v. City of Pensacola, 108 So.2d 897 (Fla. 1st DCA 1959), as with Dickinson, dealt with challenges by state comptrollers to acts requiring direct disbursement of public funds. Again, these opinions do not stand for the proposition that a constitutional or executive officer can challenge the constitutionality of a statute merely because the officer is in a defensive litigation posture. Additionally, Harrell was limited by Barr v. Watts.

Two of the cases cited by Weeks, Fuchs v. Robbins, 818 So.2d 460 (Fla. 2002) as well as Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982), go to the heart of the issue in this appeal and were discussed at great length in the

District's Initial Brief. That discussion will not be unnecessarily repeated here, except to reiterate that in neither case was this Court presented with a defensive constitutional challenge, this Court's statements regarding a defensive posture exception were dicta, and that the earlier decisions cited in Lewis for such a proposition all implicated the public funds exception already well established by this Court.

Weeks gamely attempts to buttress his position on appeal by arguing that the public funds exception applies to this case. (Weeks Brief at 16). However, as noted by the District in its Initial Brief at page 24, the officer of the Property Appraiser does not involve expenditure of public funds. This was recognized by the Second District in Turner v. Hillsborough County Aviation Auth., 739 So.2d 175 (Fla. 2nd DCA 1999), a decision approved by this Court.

As with Weeks, the briefs filed by amici curiae fail to cite a single case in which this Court expressly permitted a ministerial officer to defensively challenge the constitutionality of a statute that did not also involve either the public funds exception or a situation in which the officer will be injured in person, property or rights.

All three amicus briefs attempt to ennoble Property Appraisers as the guardians of the Constitution by speciously asserting that they alone can serve as a check on the

Legislature by bringing the constitutionality of statutes before the courts. This argument ignores this Court's previous balancing of public policy considerations and this Court's rejection of the same argument.

For example, in State ex rel. Atlantic Coast Line R. Co. v. State Board of Equalizers, 94 So. 681 (Fla. 1922), the dissent by Justice Whitfield argued that"[i]n many cases, unless the validity of a statute is challenged by an officer, the question cannot be presented to or decided by the courts, and the state suffers in consequence." Atlantic Coast Line, at 616, 617. Obviously aware of this argument, this Court concluded that the balancing of competing public policy considerations dictated that ministerial officers should not be allowed to refuse enforcement of the law and challenge the constitutionality of statutes they are required to administer.

This Court has already stated that to avoid the chaos and confusion that would result if ministerial officers were permitted to ignore laws they are required to administer, and to then challenge their constitutionality after ignoring those laws, the public interest would be best served by channeling all such attacks on the validity of statutes through the duly-elected public officer whose duty it is to protect the public interest, the Attorney General. Barr v. Watts, 70 So.2d 347, 351 (Fla. 1953).

This Court and lower courts have also held that individual citizens and taxpayers, including ministerial officers acting in their individual capacities, can mount constitutional statutory challenges without showing special injury. Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972); Jones v. Department of Revenue, 523 So.2d 1211 (Fla. 1st DCA 1988); Reinish v. Clark, 765 So.2d 197 (Fla. 1st DCA 2000). Clearly, Property Appraisers, if hearing a special call to challenge the constitutionality of statutes they question, can serve the public interest as required by this Court by enforcing the law while bringing an action in their individual capacities. It is a mis-direction to state that ordinary taxpayers will not bring suit to challenge a statute such as the one at issue herein because they benefit from the statute. (See, for example, Brief of Florida Assoc. of Property Appraisers, page 9). Such a statement ignores taxpayers outside the District who allegedly suffer an undue tax burden when certain property within the county is declared exempt from ad valorem taxation. Certainly, the individual taxpayers in Reinish v. Clark, supra, were sufficiently motivated to challenge Florida's homestead exemption on equal protection and other grounds.

Although there is much discussion in the briefs of amici curiae detailing the history of various enactments by the

Florida legislature, such discussion is beside the point. The constitutionality of Section 189.403(1) Florida Statutes is not before this Court, nor should it be. Dickinson v. Stone, 251 So.2d 268 (Fla. 1971)(constitutionality of a statute should first be determined by the trial court). The only possible purpose of such a lengthy discussion is to concoct a witches' brew sufficiently distasteful to cause this Court to re-think its previously articulated public policy statements, re-weigh competing policy considerations, and overturn its precedent. However, it is evident from numerous past judicial decisions that it was not unknown for the Legislature to pass laws of questionable constitutionality, yet this Court concluded that public policy, and the effective operation of government, would be better served leaving constitutional challenges to persons other than ministerial officers in their official capacities. Nothing has changed, and there is no reason for the Court to overturn its precedent.

II. THE FIRST DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S RULING ON THE TAX EXEMPT STATUS OF CERTAIN PARCELS WITHIN THE DISTRICT

This Court accepted jurisdiction of this case after the First District Court of Appeal certified a conflict between the instant case and the Second District Court of Appeal's decision in Sun 'N Lake of Sebring Improvement District v. McIntyre, 800

So.2d 715 (Fla. 2nd DCA 2001) on the issue of whether a property appraiser has standing to raise the constitutionality of a statute. Nonetheless, Weeks wishes to expand the scope of the issues to be argued before this Court by revisiting the holding of both the trial court and the First District that the properties owned by the District are exempt from ad valorem taxation under Section 189.403(1), Florida Statutes.

Both the trial court and the First District reviewed the specific services provided by the District and concluded that they passed the test for exemption set forth by this Court in Department of Revenue v. City of Gainesville, 918 So.2d 250 (Fla. 2005) (holding that exempt property must serve purposes that encompass activities that are essential to the health, morals, safety and general welfare of the people). Rather than expand the scope of these proceedings to include a third judicial review of the facts supporting the determination of exemption, the District respectfully requests that this Court limit the scope of its review to the purely legal issue of standing.

It is important to note that this Court in Gainesville did not engage in the fact-intensive analysis that Weeks is asking the Court to engage in here on the exemption issue. Unlike the procedural posture of the instant case, Gainesville involved a facial constitutional challenge. The City of Gainesville

sought to invalidate a law requiring payment by a municipality of ad valorem taxes on property owned and used exclusively by the municipality to provide telecommunications services to the public. This Court declined to strike down the law, finding that there were circumstances under which the statute would be valid; that is, circumstances where a particular municipality was not delivering telecommunications services that were essential to its residents. This Court did not determine whether the specific telecommunications services provided by the City of Gainesville met the exemption standard. Whether those circumstances existed on the property owned by the City of Gainesville was a question to be considered on remand by the trial court after a detailed review of the facts. In the instant case, the trial court and the district court have already conducted such a review.

However, in the event this Court desires to address the exemption issue, the District has set forth below the factual and legal basis for the lower courts' finding that the District's properties were exempt from ad valorem taxation.

The District owns seven properties (the "Recreational Facilities") that the trial court and the First District found to be exempt:

1. Golf Facility;

2. Southern Swim and Tennis Center;

3. Northern Swim Center;

4. Four Playgrounds. (R-XI-1782)

It is undisputed that none of the Recreational Facilities is leased to a private, profit-making entity. (T-62) The Recreational Facilities are owned and operated by a government (the District). (T-62) The District is run by a democratically elected Board of Supervisors (the "Board") who works on behalf of their constituents like any elected governmental body. (T-62) The Board is democratically elected pursuant to "one man-one vote" principles. Section 190.006(3)(a)2.b., Florida Statutes. Furthermore, because the Board is elected pursuant to "one man-one vote" principles rather than "one acre-one vote" principles, each Supervisor is subject to the conflict-of-interest laws of the State of Florida found in Section 112.3143, Florida Statutes. According to the trial testimony of the Vice-Chairman of the Board, Mr. Thomas Platt, the purpose of the District's Recreational Facilities is to provide a recreational opportunity to the residents of the District and members of the public who reside outside of the District. (T-63)

1. GOLF FACILITY

The Golf Facility is open to all members of the public, whether they live within or outside of the district's boundaries. (T-65) User fees for the Golf Facility are set by the Board. (T-87) The Board sets user fees at a level

sufficient to pay for the operation and maintenance of the Golf Facility and debt service as required by Section 190.035, Florida Statutes, which reads as follows:

> The rates, fees, rentals, or other charges prescribed shall be such as will produce revenues, together with any assessments, taxes, revenues, or funds available or pledged for such purpose, at least sufficient to provide for the items hereinafter listed, but not necessarily in the order stated:
> (a) To provide for all expenses of operation and maintenance of such facility or service;
> (b) To pay when due all bonds and interest thereon for the payment of which such revenues are, or shall have been, pledged or encumbered, including reserves for such purpose; and
> (c) To provide for any other funds which may be required under the resolution or resolutions authorizing the issuance of bonds pursuant to this act.

The Board never sets user fees with a "profit motive" in mind (as a private, profit-making entity would do). (T-87) Vice-Chairman Platt testified at trial as follows:

> Q: Where does the golf facility get its revenues?
> A: User’s fees.
> Q: And who determines the amount of the user's fees?
> A: The Board of Supervisors.
> Q: When determining where to set the amount of user's fees, what are you trying to accomplish?
> A: Well, the statute that I read said we've got the set user fees at a sufficient level to cover both the operation and maintenance costs as well as pay the debt service.

> Q: So when you set user fees, is the board trying to set user fees at a level that has the CDD make a profit or is the CDD trying to make the expenses equal the revenue?
> A: The latter. We're trying to make expenses balance the revenues.
> Q: So the CDD is not in the business of making money?
> A: No. We're a governmental entity set up by the state legislature to serve the public. We serve the public and we're not—it's not our job to make money. We're to provide services to the public.
> Q: So if you're not in the business of making money, then why is the government, in this case the CDD, operating a golf course facility?
> A: To provide recreational opportunities for the public just like any other municipal golf courses in the state. (T-87-88)

If user fees are not sufficient to pay expenses and debt service, the Board has the statutory power to impose special assessments against the residents of the District. The power to impose special assessments is a taxing power that is possessed by governments such as the District. Section 190.021, Florida Statutes. Private entities do not possess this power. During 2000-2002, the Board began considering imposing special assessments on District residents to pay the expenses of the Golf Facilities because the user fees were not generating sufficient revenue to cover expenses. (T-82-83) Of course, if Weeks is successful in this litigation, the expenses will increase to include ad valorem taxes. Those taxes will ultimately be paid by the residents of the District, resulting

in a situation where District residents pay "taxes" twice: first, in the form of special assessments to support a recreational opportunity for non-district and district residents; and second, in the form of ad valorem taxes assessed by Weeks.

The Board controls and sets policy for the Golf Facility, and the Board hires a management company to implement the policy set by the Board. (T-82) The management company reports to the Board at its monthly public meetings. At trial, Vice-Chairman Platt testified as follows:

> Q: Now does the management company report to the Board of Supervisors at every meeting of the Board?
> A: Absolutely.
> Q: Who sets the policies for the operation of the golf facility and community center and who implements those policies?
> A: The Board of Supervisors establishes all policies and the management company is charged with the responsibility of implementing those policies and reporting back monthly on their accomplishments.
> Q: But the Board of Supervisors is still in control of the golf facility and community center?
> A: Yes. (T-82)

The members of the Board who unanimously voted to purchase the Golf Facility were democratically elected by the residents of the district. (T-77-82) The decision to purchase the Golf Facility, as well as every other decision regarding the Golf Facility since the purchase (including the annual budget), was

made at advertised public meetings with the opportunity for input from members of the public. (T-83-86)

2. SOUTHERN SWIM AND TENNIS CENTER AND NORTHERN SWIM CENTER

The Southern Swim and Tennis Center and the Northern Swim Center are maintained primarily by revenues that are generated by the imposition of special assessments against the residents of the district. (T-93) The Board also assesses user fees for non-residents. The level of special assessments and user fees that are imposed for the maintenance of these facilities are set by the Board. (T-93) The Board sets the level of special assessments at an amount that is sufficient to pay for the operation and maintenance of the facilities. (T-93) As with the Golf Facility, the Board never sets the level of special assessments with a "profit motive" in mind. (T-93) On page 7 of Weeks' Statement of Facts, Weeks incorrectly states that the "swim and tennis facility has an operating budget which is funded through the maintenance fees, and special assessments are not used to fund same." Contrary to this representation, the swim and tennis recreational facilities are funded by special assessments against the residents of the District.

3. FOUR PLAYGROUNDS

The Playgrounds are maintained by revenues that are generated by the imposition of special assessments against the residents of the district. (T-100) There are no user fees imposed for the use of the Playgrounds. (T-100) Both residents and non-residents of the district can access and use the Playgrounds at any time without paying user fees.

Both the trial court and the district court reviewed the evidence concerning the purpose of the District's Recreational Facilities and found them to be maintained by the District for the essential governmental purpose of providing recreational opportunities for its residents. Therefore, both courts found the Recreational Facilities to be exempt under the Gainesville standard. As stated by the First District in the instant case, the Recreational Facilities are "treated the same as parks and recreational opportunities provided by municipalities, which are explicitly recognized as exempt property by [the Florida Supreme] Court in Gainesville."

In Gainesville, this Court explicitly states that "the traditional municipal function of providing parks for the municipal population" is an essential function performed by governments which is entitled to exemption. Id. This Court is clear and unequivocal in its conclusion that, when a government uses its property to provide an "opportunity for recreation" to

its citizens, then that government is providing an essential function entitled to exemption. Id. The Court quotes from one of its prior cases (City of Miami Beach v. Hogan, 63 So.2d 493, 496 (Fla. 1953)) for the proposition that "in all heavily populated municipalities the police power should be exercised by municipal officials to afford all of the people light, air, [and] an opportunity for recreation." The District is providing its citizens with "an opportunity for recreation" by owning and maintaining the Recreational Facilities. Weeks' attempt to characterize Gainesville as a dramatic "sea change" in ad valorem tax jurisprudence is a classic red herring. In reality, Gainesville supports the long standing proposition that government owned property that provides traditional governmental services like recreation is exempt from ad valorem taxation.

When considering the local government's role in providing recreational opportunities for its residents, it is important to understand and acknowledge that, under Florida's Growth Management Act (Chapter 163 of the Florida Statutes), recreation is a vital component of public infrastructure on the same level as sanitary sewer, solid waste, drainage, potable water, schools and transportation. Section 163.3180(1)(a), Florida Statutes. Local governments are required to develop a "Comprehensive Plan" which provides for the construction of public facilities to properly service its residents. Section 163.3177, Florida

Statutes. Included in these requirements is a requirement that local governments provide sufficient recreational opportunities for its residents. Section 163.3177(6)(e), Florida Statutes.

In the instant case, the District, rather than the county government, is providing recreational opportunities to its residents. By doing so, the District is fulfilling both the mandates of Chapter 163 and Chapter 190 by providing needed recreational opportunities to its residents "without overburdening other governments and their taxpayers." Section 190.002(1)(a), Florida Statutes. The District, through its democratically elected Board of Supervisors, chooses to finance and maintain the Golf Facilities, the Northern Swim Center, the Southern Swim and Tennis Center, and Playgrounds in order to meet its governmental obligations to its residents.

Weeks fails to recognize the essential truth that the District has "stepped into the shoes" of the local county government in this case to provide recreational opportunities to its residents. By doing so, the taxpayers outside of the District are relieved from having to finance and maintain recreational opportunities within the District. There is simply no public policy reason to deny a government tax exemption to a government who is performing an essential government function as is present here. This is particularly true when the county taxpayers for whom Weeks professes to be serving as a "watchdog"

have already received a financial benefit by avoiding the expenditure of county funds for recreation within the District boundaries.[2]

In the instant case, the trial court and the district court have already conducted a detailed review of the facts. Both courts concluded that the Recreational Facilities are exempt under the Gainesville standard. Rather than review the facts for the third time in this case, the District respectfully suggests that the Court should remain focused on the purely legal issue of standing.

[2] Of course, the residents of the district pay county ad valorem taxes which are used to finance and maintain recreational opportunities outside of the district. Therefore, county taxpayers receive the additional financial benefit of receiving tax dollars from district residents to support county recreational opportunities without having to reciprocate by sending county tax dollars into the district to support district recreational opportunities.

CONCLUSION

On the issue of the property appraiser's standing to defensively challenge the constitutionality of Section 189.403(1) Florida Statutes, the District respectfully requests this Court to approve the decision in Sun 'N Lake of Sebring Improvement District v. McIntyre, 800 So.2d 715 (Fla. 2nd DCA 2001), disapprove the decision in Zingale v. Crossings at Fleming Island Community Development District, 960 So.2d 20 (Fla. 1st DCA 2007), and affirm the trial court's order striking the property appraiser's affirmative defense challenging the constitutionality of Section 189.403(1).

In the event this Court determines to analyze the tax exempt status of certain parcels within the District, the District respectfully requests that the Court affirm the rulings of the trial court and the First District.

Dated this 25th day of March, 2008, at Jacksonville, Florida.

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CERTIFICATE OF FONT AND FONT SIZE

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