

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-49

Lower Tribunal No.: 2D99-3196

SUN 'N LAKE IMPROVEMENT OF SEBRING
IMPROVEMENT DISTRICT,

Petitioner,

vs.

C. RAYMOND MCINTYRE, ET AL.

Respondents.

INITIAL BRIEF OF PETITIONER,

SUN 'N LAKE OF SEBRING IMPROVEMENT DISTRICT

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PRELIMINARY STATEMENT

Petitioner, Sun 'n Lake of Sebring Improvement District, will be referred to herein as the "District." Respondent, C. Raymond McIntyre, Property Appraiser for Highlands County, Florida, will be referred to as the "Property Appraiser."

Citations to the opinion of the Court of Appeal of Florida, Second District, (referred to as the "District Court") will be to *Sun 'n Lake of Sebring Improvement District v. McIntyre*, 800 So. 2d 715 (Fla. 2d DCA 2001).

The District's Statement of Case and the Facts will rely heavily on the District Court's decision. When facts not found therein are cited, the reference to the record will be as "R-#."

STATEMENT OF THE CASE AND THE FACTS

The District will rely primarily upon the statement of the case and facts found in the District Court's decision. Because of this reliance, the District will quote extensively from the opinion and, for this section of the brief only, will not present these quotations in double-indent, single-space format.

I. Statement of the Case

In 1995 through 1998, the District sought exemption from ad valorem taxation for certain properties under section 196.199(1)(c), Florida Statutes. In addition, beginning in 1998, the District sought exemption for property containing certain recreational facilities, including golf courses, tennis courts, pro shop, and restaurant. The Property Appraiser denied these requests. *Sun 'n Lake Improvement Dist. v. McIntyre*, 800 So. 2d 715, 719 (Fla. 2d DCA 2001). “The District initiated timely lawsuits challenging the Property Appraiser’s denial of the exemption for the tax years 1995, 1996, and 1998. These cases were consolidated by agreement and the parties in the trial court, and the trial court entered one final summary judgment resolving all three cases.” *Id.* “In its final summary judgment, the trial court ruled that the Property Appraiser had standing to challenge the constitutionality of chapter 97-255, section 4, Laws of Florida, and that the

legislation was, in fact, unconstitutional as an invalid attempt to create an exemption for special districts not permitted by the Florida Constitution. It further held that even if the District was treated as a municipality under chapter 97-255, section 4, the properties at issue were not held for a public purpose and therefore not exempt from taxation.” *Id.* at 719-20.

Petitioner timely appealed to the District Court, which reversed with respect to the Property Appraiser’s standing, certifying conflict with *Fuchs v. Robbins*, 738 So. 2d 338 (Fla. 3d DCA 1998). 800 So. 2d at 722. The court further reversed with respect to the circuit court’s finding that section 189.403(1), Florida Statutes, was unconstitutional, on the basis that the court should not have ruled on the issue because the Property Appraiser lacked standing to raise the question. *Id.*

On the issue of whether the properties were exempt from ad valorem tax, the District Court affirmed in part and reversed in part, finding that there was insufficient detail in the record to determine whether the “recreational” properties were servicing a public purpose and remanded for further determination. The District Court affirmed with respect to the remaining properties. *Id.* at 722-23.

The parties each filed notice of discretionary appeal to this Court, which has

postponed decision on jurisdiction and has ordered briefing on the merits. This is the Initial Brief of the District.

II. Statement of the Facts

“In 1974, Highlands County created the Sun ’N Lake of Sebring Improvement District in order to fund the construction and maintenance of infrastructure for property located within its boundaries. Art. V., Div. 1, § 9-81, Highland County Code. The District was created by Highlands County Ordinance 74-4. *See* § 125.01(1)(q), Fla. Stat. (1973) (granting counties authority to create such special districts). Pursuant to section 1.01(9), Florida Statutes (1973), the District is defined by statute as a political subdivision of the State of Florida. *See also* § 1.01(8), Fla. Stat. (2000).

The District is an independent special district as defined by the Uniform District Accountability Act of 1989. *See* ch. 89-169, Laws of Fla. (codified in §§ 189.401-.427, Fla. Stat. (2000)). *See* ch. 80-407, Laws of Fla. (codified in §§ 190.001-.049, Fla. Stat. (2000)). A district is authorized to issue bonds to fund the infrastructure of a community. The bonds are then secured by assessments on the property within the district. Developers often participate in the creation of special

districts because this framework reduces the amount of private investment required to develop a community. Prospective home-buyers benefit from lower purchase prices for the property. Although the home-buyer must pay assessments on their property commensurate with their pro rata share of the bonds issued to build infrastructure, these payments are treated as property taxes for tax purposes. Counties could fund such infrastructure as a public expense from their general budgets, but creating a district allows them to benefit by having the property owners in the district bear the cost of these improvements without an overall increase in the county's budget and tax rates.

In this case, the District issued several series of tax exempt capital improvement bonds, much like municipal bonds, and sold them to the public to finance the improvements. In 1991, however, the primary developer within the District, CFD, Incorporated, declared bankruptcy. CFD held title to thousands of lots that were subject to assessments necessary to pay the bond obligations of the District. As a result, the bankruptcy put in jeopardy the payment of outstanding bonds and the financial security of the entire District.

Faced with possible insolvency and struggling to fund services for existing

residents, the District began foreclosure proceedings against the lots owned by CFD. The foreclosure of the lots was permitted by the District's charter and required by the trust indenture agreements. Between 1992 and 1993, the District obtained title to over 3,000 lots by purchasing them at foreclosure sales. Many lots are vacant and unimproved, without water, sewage, or drainage, and are scattered throughout the District, making installation of infrastructure economically infeasible for individual private purchasers. The District does not lease or otherwise use any of these vacant lots for proprietary purposes.

Upon acquiring these lots, the District began active efforts to market and sell them. The District wanted to return the lots to private ownership so that the private owners could commence paying the special assessments necessary to repay the bonds. The District's only other alternative would have been to increase assessments against other owners in an amount that would have been disproportionate and cost prohibitive to those lot owners.

As part of its efforts to market the vacant lots and to further ease this financial quagmire, the District negotiated an agreement with bondholders of the Phase V bonds and a successor developer, Sun 'N Lake, Inc., the title owner of

1,851 lots. This agreement sought to protect bondholders by providing for the sale of lots and the disposition of the proceeds to satisfy the bond obligations.

In the agreement, Sun 'N Lake, Inc., agreed to pay to the District a total of \$700,000 and to convey title in 1,728 lots it owned to the District in lieu of foreclosure and as full satisfaction of liens for unpaid assessments. The agreement defined a 'lot pool' consisting of these lots and others the District held due to foreclosure. Sun 'N Lake, Inc., could buy lots from the lot pool, or sell them from the lot pool directly to third parties by paying the District \$1 per lot, plus approved sale costs, any installment due under a note, any outstanding assessments, foreclosure costs, and all county taxes delinquent or then due. The net proceeds from the sale of lots within the pool was to be remitted to the Phase V bondholders, resulting in the release of the lien of the Phase Five bond. The bondholders agreed to accept these payments and not to seek any further amounts.

Finally, the parties agreed that the District would not be responsible for county ad valorem taxes on any lots in the lot pool and would have no obligation to redeem those lots from a tax sale. Instead, Sun 'N Lake, Inc., agreed to pay the ad valorem taxes on the lots it transferred into the pool, and the District agreed to

notify the county of any statutory notices received from the county warning of an application for tax deed. In addition, the District agreed to apply for an exemption from ad valorem taxes. However, if the District's reasonable efforts in this regard were unsuccessful, the agreement provided that 'in no event shall the District in any way be responsible for the payment of any of the ad-valorem taxes imposed by Highlands County, Florida.'" *Sun 'n Lake*, 800 So. 2d at 717-19.

In its recitation of the facts, the District Court distinguishes the "over 3,000" lots acquired by the District through foreclosure and the 1,728 lots conveyed to the District under a special agreement. In addition, the District directs the Court's attention to the record evidence that the District has set aside some of the "over 3,000" lots acquired through foreclosure to offset wetland impacts, and others for future use as parks and recreational lands. R-811 (Depo. of Whittington), R-835, 863-64 (Depo. of Roepstorff).

SUMMARY OF ARGUMENT

The District argues three issues to the Court. First, the District Court incorrectly distinguished this Court's decision in *City of Sarasota v. Mikos*, 374 So. 2d 458 (Fla. 1979), which should have controlled the case and required that the Property Appraiser grant ad valorem tax exemptions requested by the District. Second, the District Court correctly followed its precedent and ruled that the Property Appraiser did not have standing to attack the constitutionality of section 189.403(1), Florida Statutes. Finally, should this Court reach the constitutional issue raised in the circuit court, it must find that in enacting section 189.403(1), the legislature acted within its constitutional authority.

With respect to the issue of whether the subject property is exempt from taxation, section 189.403(1) provides that “[f]or the purpose of s. 196.199(1), special districts *shall* be treated as municipalities” (emphasis added). By operation of statute, then, the governmental exemption precedents applying to municipalities must *a fortiori* apply to special districts. Under *Mikos*, this Court has squarely held that unused vacant land, whether or not dedicated to a specific use, qualifies for the public purpose exception. 374 So. 2d at 460. The property for which the District has sought exemption is all vacant, excepting the “recreational” property upon which the District Court ruled separately. Some portions have been dedicated to public purpose, that is, wetland mitigation and public parks, some have

no dedication, but are nonetheless vacant and not dedicated to any non-governmental function. Consequently, the lots at issue qualify for exemption from ad valorem taxation.

As to the question of the Property Appraiser's standing to challenge the constitutionality of section 189.403(1), the well-established principle is that a public official may not challenge a statute which he or she is pledged to administer. The court in *Fuchs v. Robbins* mistakenly applied *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982) to recognize an exception to the general rule where an official raises constitutionality as a defense to a plaintiff's complaint. The true "defense" exception to the general rule is, rather, that if a plaintiff attempts to force an official to act under a statute in way that would require the official to expend public funds, then the official may defend by attacking the constitutionality of the statute. This Court has held more than once that property appraisers do not have such standing. Consequently, the District Court correctly ruled that the Property Appraiser in this case did not have standing to attack the constitutionality of section 189.403(1), Florida Statutes.

Finally, should the Court reach the issue of the constitutionality of section 189.403(1), precedents of this Court establish that the legislature may indeed grant special districts exemption for ad valorem taxation. The Constitution does not prohibit such statutes as long as they do not conflict with or attempt to modify the

Constitution, and public policy requires that such permitted statutes exist and be given effect.

ARGUMENT

I. The District Court Erred in Affirming the Circuit Court's Determination that Vacant Land Owned by the District was not Held for a Public Purpose.

Section 189.403(1) expressly provides that for the purposes of tax exemptions delineated in section 196.199(1), special districts are to be treated as municipalities. The circuit court held that this provision was unconstitutional, a holding which leads to the conclusion that there is no basis for the exemptions requested by the District. The circuit court went on to rule, however, that even if the District were to be treated as a municipality for the purpose of tax exemption, the vacant property it held by virtue of foreclosure actions was not being used for a public purpose. *Sun 'n Lake*, 800 So. 2d at 720.

The District Court reacted as follows:

Whether the vacant lots are held for a public purpose is controlled by this court's opinion in *City of Bartow v. Roden*, 286 So. 2d 228 (Fla. 2d DCA 1973). In *Roden*, this court held that vacant tracts of land held by the city of Bartow in an industrial park complex which were being held out and marketed for lease to private entities were not held exclusively for a public purpose. We can find no meaningful distinction between the land held out and marketed for lease to private interests for use in private ventures in *Roden* and the land held out and marketed for sale as homesites in this case. In both cases, the sale or

lease of the land will confer a financial benefit upon the District or city. Nevertheless, the property is neither being used for a public purpose nor sitting idle in anticipation of a future, undetermined public use. The District has made an affirmative decision to market this land for use as a residential development.

We recognize that in *City of Sarasota v. Mikos*, 374 So. 2d 458, 460 (Fla. 1979), decided after *Roden*, the supreme court held that there is a presumption that vacant land held by a municipality is in use exclusively for a public purpose if it is not actually in use for a private purpose on tax assessment day. In *Mikos*, however, the city was holding the vacant land to meet the future needs of the public and to preserve natural open spaces. The city was not actively marketing the land for sale or lease to private interests. *Mikos* recognized and cited *Roden* without limiting or overturning its holding. Therefore, reading the two cases together and applying them to this case, ***the active marketing of lots to private interests for use as private homesites overcomes the presumption that vacant land is held exclusively for a public purpose.*** See also *Page v. City of Fernandina Beach*, 714 So. 2d 1070 (Fla. 1st DCA 1998) (distinguishing *Roden* when municipality held vacant lots out for sale, but did not actively market them). This seems particularly clear when the marketing is done, as in this case, through an agreement with private entities such as developers and bondholders that confers benefits upon the private enterprises. Although the District perceives this marketing as necessary to preserve its solvency and, thus, as providing a much-needed public benefit, the decision to actively market the lots for residential development results in the land no longer being held exclusively for a public purpose.

800 So. 2d at 722-23 (emphasis added).

A. *City of Sarasota v. Mikos* Controls This Case.

In *Mikos*, this Court made a clear holding: ***“We hold that vacant land held by a municipality is presumed to be in use for a public purpose if it is not***

actually in use for a private purpose on tax assessment day. This holding eliminates the need for a city to designate a use and prove a public purpose for all vacant land each year” 374 So. 2d at 460 (emphasis added).

Section 189.403(1), Florida Statutes, expressly provides that special districts are to be treated as municipalities for the purposes of section 196.199 (1), Florida Statutes. Section 196.199(1)(c) expressly provides for exemption from ad valorem taxation for property owned by a municipality or any political subdivision of the state and used for a public purpose. With respect to the issue of exemption raised here, therefore, special districts equal municipalities, and this Court’s holding in *Mikos* is controlling, as the District Court has recognized.

Notwithstanding, the court reasoned that since *Mikos* cited its *Roden* decision, the Supreme Court had left the authority of *Roden* intact. The District Court’s error lies in its perception that *Mikos* would have disapproved or modified *Roden* if *Roden* were wrongly decided. In fact, the parenthetical used by the *Mikos* court in citing *Roden* is instructive: “land leased to a private enterprise for nonaeronautical activities is not in use for a public purpose.” 374 So. 2d at 461. Clearly, this Court agreed in *Mikos* that “property owned by a municipality is not

exempt if used for a private purpose.” *Id.* The Court cited *Roden*, as the parenthetical indicates, not for the proposition that *Roden* ruled correctly on the issue of exemption for vacant lands, but that *Roden* was correctly decided with respect to private leases. In *Roden*, the city had leased property to private concerns which clearly was used for a private purpose, but wished to distinguish property in the same commercial development which was available to be leased but was not actually under lease. The *Roden* court concluded that the city had used the property to create an “industrial park.” 286 So. 2d at 230. Thus, all of the “industrial park” was land in use for nonpublic purpose, whether or not the property was presently under lease. The decision turned, therefore, on the “use” of the property, that is, as a complex dedicated to private commercial use. The facts were quite different from those in *Mikos*. The *Mikos* court’s citing *Roden* cannot be taken as approval of *Roden* as a “vacant land” decision. When the *Sun ’n Lake* court followed *Roden* rather than *Mikos*, it created express and direct conflict.

Indeed, in *Page v. City of Fernandina Beach*, cited by the *Sun ’n Lake* court as supportive of its effort to distinguish *Mikos*, the First District expressly cited this Court’s holding in *Mikos* as controlling on the issue of “vacant lots,”

which were acquired by the city through foreclosure and might eventually be offered for sale. *Id.* at 1077. The facts of *Page*, not the facts of *Roden*, are the same as those in the present case, and, as the *Page* court realized, *Mikos* controls the exemptions afforded vacant land. Under *Mikos*, it is the “unused,” that is, vacant quality of the property which is definitive. The District does not have to announce the public purpose for which the property is to be used. While the District might be eager to sell the lots, nonetheless, it has not put the lots to any use. As long as the District has unrestricted ownership of a vacant lot, the lot may be presumed to be available for any public purpose in the future, and to the extent that this condition exists on tax day, *Mikos* holds that the lot is exempt from taxation. There is simply nothing in *Mikos* to suggest that the mere making of vacant lots available for sale constitutes a non-public “use” of the property.

B. The Lots in Question are Held for Public Purpose.

There is no dispute that the District owns the lots in question within its District boundaries. The District Court, to be sure, distinguished in its discussion of the facts between the “over 3,000 lots” acquired in foreclosure and the 1,728 lots in the Phase V lot pool deeded to the District in lieu of foreclosure by the holder of

the lots. These latter lots are subject to an agreement whereby the former owner, Sun 'n Lake, Inc., was able to repurchase any of the lots for resale. 800 So. 2d at 718. The “over 3,000” lots are not subject to the Phase V bond agreement. Some are set aside for wetlands mitigation, others designated for recreational areas, most the District considers saleable to home-buyers, but none is the subject of any “buy back” provision. R-811 (Depo. of Whittington), R-835, 863-64 (Depo. of Roepstorff). The District’s existence requires that it have private land owners as sources of assessment revenue and that it generate income to meet its obligations. *See Sun 'n Lake*, 800 So. 2d at 717-18. The District has not, however, placed any land in private hands, much less created an “industrial park” such as the District Court had dealt with in *Roden*. To repeat the holding in *Mikos*, “We do not believe municipalities are required to dedicate land for a particular purpose, construct buildings, or otherwise be active on their land in order to maintain tax exempt status of property. . . . This holding eliminates the need for a city to designate a use and prove a public purpose for all land each year, as demanded by the tax appraiser.” 458 So. 2d at 460. It is just such a designation that the District Court’s decision would force in this case.

Indeed, even if the holding of property for eventual sale were a “use,” it would certainly be a public use. The vacant lots in question are not generating revenue through rent payments from private parties in competition with other for profit businesses. Any sale, even the sale of “Phase V” lots, will result in the District’s meeting a portion of its bond obligations, and, incidentally, in back taxes being paid. The Supreme Court of Arkansas addressed a nearly identical situation in *Pulaski County v. Carriage Creek Property Owner’s Improvement District No. 639*, 888 S.W.2d 652, 654 (Ark. 1994):

The levee district only held the lands that it acquired at levee tax sale until it was practical to dispose of them again. They were not held for any purpose of gain or as income producing property. When sold the proceeds took the place of the levee taxes, for the enforcement of which and the expenses incident thereto, they were sold, and in this way we think the lands were directly and immediately used exclusively for public purposes within the meaning of the Constitution, and were not subject to taxation.

See, also, Klien Indep. School Dist. v. Appraiser Review Bd., 843 S.W.2d 201 (Tex. Ct. App. 1992).

C. Established Public Policy with Respect to Tax Exempt Bonds Requires that the District’s Vacant Lots are Tax Exempt.

In *Mikos*, the Court provided the policy basis for its holding, noting that to allow the property appraiser to tax the vacant lots at issue would unfairly shift the burden of taxation from one local governmental unit to another against the purposes of Article VII and Article VIII of the Florida Constitution. 374 So. 2d at 461. Quite analogously, to allow the vacant lots owned by the District to be taxed by the County would run counter to other public policies established by the State.

Specifically, the bonds issued by the District were tax exempt bonds, “much like municipal bonds.” *Sun 'n Lake*, 800 So. 2d at 717. Relating to such bonds, section 159.15, Florida Statutes, states:

It is hereby found and determined that all of the purposes for which revenue bonds are authorized to be issued by this part ***constitute essential governmental purpose***, and ***all of the properties***, revenues, moneys and other assets ***owned and used in the operation of such projects***, and all revenue bonds issued thereunder and interest thereon shall be exempt ***from all taxation by the state or by any county***, municipality, political subdivision, agency, or instrumentality thereof.

(emphasis added).

Section 159.15 strongly implies to the holders of revenue bonds that they can expect the property connected with the project by which the bonds are funded and secured will remain free of taxation. If that is not the case, the rating of Florida tax exempt bonds threatens to be affected downward, since bondholders will have greater difficulty assessing the probable ability of the issuing

authority to meet its bond obligations owing to uncertainty of the issuing authority having to assume ad valorem tax expenses down the road in addition to its other obligations.

Moreover, if the bonds sold to finance the project are tax exempt, as they are in this case, then the project must be for a public purpose. For the District to use the property directly to protect the project and hence the public purpose, as it is doing when it holds foreclosed lots for sale in order to generate income to meet its obligations, must be to hold the property for a public purpose.

II. The District Court Correctly Held that the Property Appraiser Does not Have Standing to Challenge the Constitutionality of section 189.403(1).

The Property Appraiser will ask the Court to reverse the District Court and find that the Property Appraiser has standing to attack the constitutionality of section 189.403(1). Indeed, the *Sun 'n Lake* court certified conflict on this issue with *Fuchs v. Robbins*.

In *Robbins*, the court acknowledged the general rule that “government officials and constitutional officers do not have standing to challenge the constitutionality of a statute.” 738 So. 2d at 339-40. Relying on *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982), however, the court found that “where operation of a statute is brought into issue by another party in the litigation, the officer may, in defense, question the validity of the statute.” *Id.* The Third District later heard the case en banc, analyzing only the constitutionality issue. However, Judge Sorondo wrote a concurring opinion to the en banc decision to address the standing issue. He cited *Department of Education v. Lewis*, as did the original panel decision (738 So. 2d at 348), but went on to assert that the “expenditure of public funds” exception should also apply (*id.* at 349-50). In this

regard, he noted that “[a]lthough, I have been unable to find a case that equates the ‘disbursement’ of public funds with the ‘collection’ of same for purposes of establishing standing in the present context, it is absurd to conclude that standing would exist for one and not for the other.” *Id.* In fact, courts have not found such a proposition absurd. Judge Sorondo was right to focus on expenditure of funds, for that is the real exception, not a “defense” exception. However, courts have had no trouble distinguishing between “collection” and “disbursement.”

The general rule cannot be doubted. *See State ex rel. Atlantic Coast Line R. Co. v. State Bd. of Equalizers*, 84 Fla. 592, 94 So. 681 (containing an historical survey of evolution of the rule). The District notes that *Atlantic Coast Line* is an “appraiser” case, and this Court has ruled, consistent with its *Atlantic Coast Line* decision, that tax appraisers do not have standing to question the constitutionality of a statute affecting taxation by declaratory action. *Dept. of Revenue v. Markham*, 396 So. 2d 1120, 1121-22 (Fla. 1981). The *Markham* court did not apparently feel that the possible deprivation of the opportunity to collect revenue by virtue of the workings of an unconstitutional statute created the absurdity to which Judge Sorondo referred in his *Robbins* concurrence.

In addition, an examination of the *Department of Education v. Lewis* reveals

the mistaken reading of the *Robbins* court. The portion of *Lewis* relied upon by the *Robbins* court is the following:

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. *City of Pensacola v. King*, 47 So.2d 317 (Fla.1950); *State ex rel. Harrell v. Cone*, 130 Fla. 158, 177 So. 854 (1937); *State ex rel. Florida Portland Cement Co. v. Hall*, 129 Fla. 588, 176 So. 577 (1937).

416 So. 2d at 458. In that same paragraph, the *Lewis* court goes on to note that “[t]he comptroller, *as the state’s chief officer for disbursement of funds*, would have standing to challenge a proviso in an appropriations bill.” *Id.* at 459 (emphasis added). This comment and an examination of the cases cited by the Court shows clearly that the exception is in fact based upon the threat to the official of having to expend public money under the compulsion of an unconstitutional statute.

In each of the cited cases, the officer or official was pleading in the defensive only because he had been sued in his official capacity to compel the expenditure of public money. Two of the cases, *Portland Cement* and *Harrell* were mandamus actions; *King* was an action for writ of prohibition. In *Portland Cement*, the petitioner sought to force the state road department to comply with a statute, 129 Fla. at 590, 176 So. at 578, compliance with which would have required the road

department to expend public funds, and it was that threat that bestowed standing to challenge the statute, not the fact that the taxpayer had made a claim under a statute against which the department defended. *Id.* at 608, at 585. Likewise, in *Harrell*, the state comptroller had standing to defend against a mandamus action which would have required that he disperse public funds under the authority of a statute of suspect constitutionality. 130 Fla. at 163-64, 177 So. at 856-57. Finally, in *King*, the court made clear that the officer could challenge the statute only by showing threat of actual injury. 47 So. 2d at 319. As this Court has made clear, for example, in *Markham*, the Tax Appraiser cannot allege such injury.

In its analysis of the standing issue, the *Sun 'n Lake* court cited the relevant language from the decision in *Turner v. Hillsborough County Aviation Authority*, 739 So. 2d 175 (Fla. 2d DCA 1999), *review granted*, 761 So. 2d 332 (Fla. 2000), to support its holding that the Tax Appraiser did not have standing. 800 So. 2d at 721. In *Turner*, the court reasoned that the general rule could not be circumvented by the property appraiser's forcing the taxpayer to file suit solely to force the official to grant a required exemption. 739 So. 2d at 178. The court might just as well have observed what the District has demonstrated above, namely, that the "defense" exception must involve a defense

that prevents the official from suffering actual injury, specifically in the form of expending money under the compulsion of an unconstitutional law, not the mere fact that the official is the defendant in a suit. The tax appraiser is not so situated in the present case.

III. Section 189.403(1) Does Not Offend The Florida Constitution.

Because the circuit court found section 189.403(1) to be unconstitutional, the Property Appraiser will doubtless join this issue in his brief. The *Sun 'n Lake* court observed that “[i]n light of the supreme court’s holdings in *Archer*, 355 So.2d 781, and *Sebring Airport Authority*, 783 So.2d 238, this argument [Property Appraiser’s challenge to constitutionality of § 189.403(1)] may have merit.” 800 So. 2d at 715. The court was led to this statement by its view of *Archer v. Marshall*, 355 So. 2d 781 (Fla. 1978) and *Sebring Airport Authority v. McIntyre*, 783 So. 2d 238 (Fla. 2001), which it cites to support the statement, “The Florida Supreme Court, however, has determined that the legislature is without authority to grant an exemption from ad valorem taxes where the exemption has no constitutional basis.” 800 So. 2d at 720-21 (leading to the conclusion “used for public purpose” in § 196.199(1)(c) must be read to mean “exclusively for public purpose to comport with the requirement of Art. VII, § 3, Fla. Const.). In fact, examination of these and other precedents of this Court are shown to support rather impugn the constitutionality of section 189.403(1).

A. Immunity is not Exemption.

As the *Sun 'n Lake* court noted, “the District concedes that it is not entitled to immunity from ad valorem taxes.” 800 So. 2d at 720. *Canaveral Port Authority v. Department of Revenue*, 690 So. 2d 1226 (Fla. 1996) requires this concession. While

the District would wish that the Court revisit its *Canaveral Port Authority* decision to adopt Justice Overton's dissent, of course the District recognizes that for now the Court has spoken on the issues raised in that case. What the *Canaveral Port Authority* decision does support, however, is the validity of legislatively created exemptions for districts.

In its ruling, the Court specifically held that Canaveral Port Authority property leased to others and put to a governmental use was exempt under the terms of section 196.199(2), Florida Statutes. 690 So. 2d at 1229. That section of the statute grants exemptions to property owned by "political subdivisions" and "authorities" which is leased to others and put to governmental use. Now neither "authorities" nor "political subdivisions" are expressly mentioned in Art. VII, § 3, Fla. Const., and yet the right of the legislature to grant either exemption, when property is put to a governmental use, is reaffirmed by the reasoning of the Court. What the legislature is forbidden to do under the *Canaveral Port Authority* decision is to label authorities or political subdivisions immune, and thus beyond the reach of ad valorem taxation no matter to what use the property is put. 690 So. 2d at 1228. As noted here, the decision supports, rather than undermines as the District Court implies, the legislature's authority to exempt property owned by a political subdivision, provided it is not used for a non-governmental purpose.

B. This Court has Consistently Confirmed the Power of the Legislature to Enact Statutes Providing for Ad Valorem Tax Exemptions.

Canaveral Port Authority is hardly unique. In *Port of Palm Beach District v. Department of Revenue*, 684 So. 2d 188 (Fla. 1996), the Court affirmed *Department of Revenue v. Port of Palm Beach District*, 650 So. 2d 700 (Fla. 4th DCA 1995), in which the court held that the district in question was not immune from ad valorem taxation, but remanded to the trial court on the issue of its exemption.

In addition to *Canaveral Port Authority*, this Court has examined the relation of Art. VII, § 3, Fla. Const. to statutes affecting taxing status in the following cases: *Sebring Airport Authority v McIntyre*, 783 So. 2d 238 (Fla. 2001); *Capital City Country Club, Inc. v. Tucker*, 613 So. 2d 448 (1993); *Archer v. Marshall*, 355 So. 2d 781 (Fla. 1978); *Williams v. Jones*, 326 So. 2d 425 (Fla. 1976); *Presbyterian Homes of the Synod of Florida v. Wood*, 297 So. 2d 556 (Fla. 1974); *Straughn v. Camp*, 293 So. 2d 689 (Fla. 1974). While in these cases the Court has found specific statutes unconstitutional, none of the cases has suggested that the legislature may never legislate in this area.

For example, in *Williams v. Jones*, a seminal case regarding the limit of the legislature's right to grant ad valorem tax exemptions, the Court expressly noted that while the legislature was not free to create special classifications of tax exempt

property owned by local government and leased to commercial interests, the legislature was free to create reasonable classifications that caused an equitable distribution of the tax burden. In doing so the court held that:

The limitation imposed by the foregoing section [Art. VII, § 4, Fla. Const.] was clearly intended to be a check upon the Legislature so as to prohibit it from classifying property for ad valorem taxation in such a manner as to result in a valuation of any class of property at less than just value. . . .

The practical effect of Section 196.001(2) and Section 196.199, Florida Statutes, is to withdraw exemption from certain users of property and to impose an ad valorem real property tax upon them consistent with the tax imposed upon persons who make similar uses of property.

Williams v. Jones, 326 So. 2d at 430, 432.

In the present case, the legislature's determination to classify special district property as equivalent to municipal property for the administration of ad valorem tax exemptions is consistent with good public policy. It is not an attempt to create a preferred classification of privately owned or leased property taxed at less than full market value. It is rather the intention of the legislature to broadly but reasonably define special districts in a manner consistent with the definition of municipalities in an effort to provide a tax structure that avoids inequitable results.

Burdening any local government with county taxes on land it owns but that generates no income to support the taxes would unfairly result in the local government passing those taxes on to its property owners, thereby requiring these owners to pay twice for county services, services they may not even use.

Indeed, the “head note” language used by the Court from time to time, that is, “The Legislature is without authority to grant an exemption from taxes where the exemption has no constitutional basis,” (*see Archer v. Marshall*, 355 So. 2d at 784)) has, the District asserts, created confusion. This statement has never been used in the context of “if it’s not expressly found in the constitution, it’s not permitted.” Rather, “[w]here a statute does not *violate* the federal or state Constitution, the legislative will is supreme, and its policy will not be subject to judicial review.” *Sebring Airport Authority*, 783 So. 2d at 244-45 (quoting *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769 (1914)(emphasis added)). In every case decided under this rubric, the issue has not been the absence of an express statement authorizing the substance of the statute in question, but the fact the statute was in fact repugnant to the constitution because it was contrary to the constitution either directly or because its effect would be to modify a constitutional provision.

C. Exemption for Special Districts is Consistent with the Constitution and Public Policy Underlying their Formation.

Florida's Constitution clearly contemplates the place of special districts. *See Canaveral Port Authority*, 690 So. 2d at 1232-33 (Overton, J. dissenting). One needs to look no further than section 196.199 to confirm that the legislature has provided certain exemptions that are not expressly provided for in the constitution. That statute provides certain exemptions for "political subdivisions," which include special districts. *See* § 1.01(8), Fla. Stat. (definition of "political subdivision"). Section 189.403(1) provides no more than a clarification of status with respect to the treatment of special district. It does not purport to make special districts into municipalities, nor does it propose to alter or enlarge the provisions of Art. VII, § 3, Fla. Const. Its chief effect, in view of the fact that section 196.199(1) grants the same exemptions to municipalities and to political subdivisions, which include special districts, is to make expressly applicable to special district tax cases the precedents, such as *Mikos*, which are applicable to municipalities.

By the same token, it defies common sense and practicality that the Florida Constitution intends to prevent the legislature from establishing exemptions that

prevent ad valorem taxation of airports, public wharves, and property used by mosquito control districts to house their equipment, to identify but a few consequences flowing from the proposition that simply because Art. VII, § 3, Fla. Const. does not mention special districts, the legislature is forbidden from adopting statutes providing ad valorem tax exemptions to special districts. In 1996, Justice Overton counted 922 special districts in the state. *Canaveral Port Authority*, 690 So. 2d at 1231 (Overton, J. dissenting). There are even more today. This Court has examined the workings of Art. VII, § 3, Fla. Const. since 1974. It has had many chances to declare that ad valorem tax exemptions for special districts are unconstitutional. For obvious reasons, it will not do so now.

CONCLUSION

The decision of the District Court should be affirmed with respect to its holding that tax appraisers do not have standing to oppose the constitutionality of statutes related to ad valorem taxation and its remand of the issue of golf course and other recreational facilities. That court's decision holding that vacant land held by the District was not in use for a public purpose should be reversed. If the Court should reach the question of the constitutionality of section 189.403(1), Florida Statutes, the Court should affirm its constitutionality.

Respectfully submitted this 11th day of February, 2002.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Larry E. Levy, Esquire**, The Levy Law Firm, 1828 Riggins Road, Tallahassee, FL 32308, **Thomas L. Nunnallee, Esquire**, 325 North Commerce Avenue, Sebring, FL 33870, and **Joseph C. Mellichamp, III, Esquire**, Senior Assistant Attorney General, Office of the Attorney General, Tax Section, Capitol Building, Tallahassee, FL 32399-1050, by U.S. Mail, this 11th day of February, 2002.

WALTER E. FOREHAND

CERTIFICATE OF COMPLAINE

I HEREBY CERTIFY that the foregoing has been submitted in Times Rome New Roman 14-point font.

WALTER E. FOREHAND