
IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-822

CITY OF GAINESVILLE, FLORIDA,
a municipal corporation,

Petitioner,

v.

ED CRAPO, as PROPERTY APPRAISER
FOR ALACHUA COUNTY, FLORIDA, VON
FRASER; as TAX COLLECTOR FOR
ALACHUA COUNTY, FLORIDA; JIM
ZINGALE, as DIRECTOR of the
FLORIDA DEPARTMENT OF REVENUE,

Respondents.

On Review from the First District Court of Appeal
Case No. 1D05-4253

**CITY OF GAINESVILLE'S
BRIEF ON JURISDICTION**

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BRIEF ON JURISDICTION

Under Article VII, Section 3(a) of the Florida Constitution, property used by a municipality exclusively for a public purpose is exempt from ad valorem taxation. In this exceptionally important case, a divided panel below erroneously determined that the Alachua County Property Appraiser could tax a network of nine communications towers owned by the City of Gainesville, even though the record was undisputed, and the panel acknowledged, that the towers were built and owned and continue to be used by the City for a public purpose (A. 16). Over a well-reasoned dissent, the majority determined leasing a small amount of excess space on its tower network to private telecommunications providers rendered the *entire network of nine towers taxable* – not just the portions of the tower licensed to the private providers. The majority reached this conclusion even though:

- There was no dispute that the City's tower network was built and used and continues to be used for critical public purposes such as fire, police, and EMS communications;
- The lease of excess space on the tower network to private providers itself furthered a public purpose because it eliminated the need for private providers to build redundant tower networks throughout the City and allowed for service in areas where there was no room for another tower. This enhanced competition by enabling more providers to enter the market and lessened the blight of cell tower proliferation;
- This Court has ruled that telecommunication is an "essential" public service, and that a City's entry into the telecommunications market serves a public tax-exempt purpose when its activities are

designed to enhance competition and improve the level of service enjoyed by its citizens; and

- This Court has ruled that the sale of excess capacity by a City-owned utility furthers a public purpose and does not convert the City's public use of the property into a taxable use.

As shown below, this Court should accept jurisdiction to resolve the conflict and confusion concerning the application of Article VII, Section (3)(a) illustrated by the divided panel below. The issues presented by this case are of great concern to the taxpayers in every municipality in this state who will be asked to shoulder an excess and unfair tax burden as a result of the errant decision below. Municipal property used for a public purpose should not be subjected to ad valorem taxation.

STATEMENT OF THE CASE AND FACTS

Gainesville built a network of nine communications towers spaced strategically around the City (A. 4-6). Since the construction of the network, the City has used the towers for internal City communications and for critical public safety communications. The towers are used by local police and fire departments and EMS services to communicate with each other and with other City and County emergency personnel. The towers are also used by a multitude of City and County departments for inter-governmental communications (A. 4-6). No one disputes that these are public tax-exempt purposes (A. 16).

Because of advances in communications, the City does not presently need all of the space on its towers for City and public safety communications. Thus, it

allows private cell phone providers to use space on these towers in building out their networks (A. 4). These providers need towers spaced at strategic locations throughout the City to enable them to provide seamless coverage. If space was not available on the City's network, these providers would have to build expensive (not to mention unattractive and unpopular) redundant tower networks of their own – assuming there were space for another tower at all. Indeed, federal and state statutes and local ordinances recognize this important public purpose by *requiring* co-location on the same tower whenever possible.¹

The Property Appraiser began imposing ad valorem taxes on the City's tower network (A. 3). The Property Appraiser taxes the *full value* of the towers, not just the small portion leased to private providers (A. 1). The private providers also pay taxes on their equipment on the tower and on the ground, and the assessment of their private equipment is not challenged here.

Also at issue is the City's use of its fiber optic network which the City uses for internal communications. The City also uses the network to provide high-speed internet services to the public (A. 6). The record reveals that the City entered this market because high-speed internet service was not otherwise available to its citizens – private providers build out major markets before coming to smaller

¹ See 47 U.S.C. § 224(f) (requiring non-discriminatory access to poles and other right of ways); § 365.172(ii)(a), Fla. Stat. (encouraging “co-location” among wireless telephonic service providers).

communities. Gainesville made the judgment that a government center and college town filled with high tech industries could not afford to lag behind in its telecommunications infrastructure (A. 7). The Property Appraiser ignored this public purpose and taxed the City's *entire* fiber optics network, including that portion of the equipment used for the City's own communications.

Finally, the Property Appraiser taxed vacant land that the City purchased to serve as a buffer between its power plant and nearby neighborhoods (A. 4). When the City purchased this land, there was an existing timber operation on the land and a local group used the land for hunting. The City did not purchase the timber operation or hunting rights (A. 4). Although using the land as a buffer serves a public purpose under this Court's jurisprudence, the Property Appraiser applied the same "all or nothing" approach arguing that since private individuals were using the land, it was *entirely* taxable – even if the City did not own the timber or hunting rights and was using its portion of the property for a public purpose.

As to the tower network, the divided panel ruled that the lease of small amounts of space on the towers to private providers converted the entire network from a tax-exempt public purpose to a taxable purpose (A. 15-17). As to the fiber optics network and internet equipment, the court determined that the City's property might be exempt in light of this Court's decision that telecommunications serve an "essential" public purpose, but remanded for further evidentiary

development (A. 10-14). A divided panel also determined that the Deerhaven property was taxable because portions of the property not purchased by the City (the timber and hunting rights) were being used by private parties (A. 18-19).

SUMMARY OF THE ARGUMENT

This Court has jurisdiction over this case because the decision below turned on the interpretation of Article VII, Section (3)(a) of the Florida Constitution. Alternatively, the decision created conflicts with decisions of this Court and other District Courts of Appeal which hold that the use of a portion of municipal property by private individuals does not render the balance of the municipal property taxable, particularly when the City's lease to the private party itself serves a public purpose or is incidental to the City's public use of the property.

It is important that these varying interpretations of Article VII, Section (3)(a) and the conflict in the caselaw be resolved by this Court. The conflict and confusion illustrated by the majority and dissenting opinions below resulted in the taxation of historically exempt municipal property – property that was indisputably being used for "essential" public purposes. The result was an unfair and unconstitutional additional tax burden on city residents who already pay taxes to the county. *City of Sarasota v. Mikos*, 374 So. 2d 458, 461 (Fla. 1979). This case presents an excellent vehicle to address and resolve these conflicts.

ARGUMENT IN SUPPORT OF JURISDICTION

This Court Has Discretionary Jurisdiction

This Court has discretionary jurisdiction to accept this case on at least two grounds. First, the decision below expressly construes Article VII, Section (3)(a) of the Florida Constitution. *See* § 9.030(a)(2)(A)(ii). Indeed, the crux of this case is how to interpret the requirement that property be used "exclusively" for a public purpose. The property appraiser's erroneous interpretation, adopted by the panel below, is that once a small portion of the tower network is used by a private provider, the property is no longer used exclusively by the municipality for a public purpose and the entire network is taxable. This Court has jurisdiction to review the panel's errant interpretation of the Florida Constitution.

In fact, this erroneous interpretation creates the second basis for jurisdiction because it creates an express and direct conflict with cases from this Court and other district courts of appeal. *See* § 9.030(a)(2)(A)(iv). These cases reach the contrary conclusion that so long as the leases are incidental to the public purpose or further that same public purpose, the property remains exempt.

First, the majority created conflict by using the wrong test – it applied the narrow governmental-governmental test to the towers (A. 15) which this Court has already held does not apply to property owned and used by the City. *DOR v. City of Gainesville*, 918 So. 2d 250, 261 (Fla. 2005) (the "*DOR* decision"). Second, the

majority decision conflicts with clear authority that a city's sale of unused capacity (the excess tower space) to private providers does not convert an otherwise public use into a taxable one. *Northcutt v. Orlando Utilities Commission*, 614 So. 2d 612, 618 (Fla. 5th DCA 1993), approved in its entirety, *Ford v. Orlando Utilities Commission*, 629 So. 2d 845 (Fla. 1994). Third, the majority decision creates conflict by holding that the *entire* tower network and *all* of the Deerhaven property was taxable. Contrary authority holds that the property appraiser should distinguish between exempt and taxable property. *See Schultz v. Crystal River Three Participants*, 686 So. 2d 1391, 1393 (Fla. 5th DCA 1997).

This Court Should Accept this Case.

The issues presented by this case are exceptionally important as evidenced by the participation of amici on both sides of the case below.² The panel decision, if followed to its logical end, leads to extreme and unwarranted results. Consider just a few examples: A city allows a private provider to place an antenna on the city water tower or on City Hall. Is the water tower or City Hall now taxable? A municipal electric utility allows its poles to be used by a private cable provider to wire a cable TV network. Is the entire network of poles and wires now taxable? A municipal parking lot that would otherwise be empty on a Saturday morning is rented out as a farmer's market. Has the parking lot now become entirely taxable?

² Almost certainly this Court will have the benefit of amicus briefs by interested parties on both sides should it accept jurisdiction over this case.

A city owns a performing arts center which is occasionally rented out to private profit-making art organizations. Is the center now taxable? A city rents out space for a privately-held snack shop in City Hall or rents out a few empty offices in City Hall to commercial businesses. Is City Hall now taxable?

As the dispute between the majority and dissenting opinions illustrate, there are dramatically differing approaches to these questions. The majority below thought that it was compelled by this Court's decision in *Sebring Airport Authority v. McIntyre*, 783 So. 2d 238 (Fla. 2001) to hold that the lease of *any* property to a private party rendered *all* of the property taxable. (A. 15). Under the majority's approach, each of these uses described above would be subject to taxation despite the clear use of the property for traditional tax exempt public purposes.

But *Sebring* compels no such holding. Here, the City continues to own and use the tower network exclusively for public purposes, such as public safety communications. Indeed, this Court confirmed in its recent DOR decision that telecommunications is an "essential" public service. 918 So. 2d at 253. Moreover, as the dissent points out, the lease of space on the tower to private companies itself serves a public purpose by facilitating competition, reducing tower proliferation and improving service (A. 20-21). Thus, in this case, unlike *Sebring*, the Property Appraiser is taxing the tower network, which is still *owned and used by the City*, rather than simply taxing the property owned and used by the private providers

(i.e., the value of the leasehold interest and the private providers' equipment). This is dramatically different from *Sebring* in which only the property actually leased to the private taxpayer and used by the taxpayer – the raceway – was taxed.

By applying the *Sebring* paradigm to property used by the municipality, the panel also placed itself in conflict with cases holding that a municipal utility that sells excess capacity does not render its public tax-exempt property taxable. In *Northcutt*, 614 So. 2d 612, the Property Appraiser attempted to tax the Orlando Utilities Commission's (OUC) plant in Brevard. The Property Appraiser, applying the same logic as the panel here, argued that the plant was not used exclusively for municipal purposes because OUC sold 16-17 percent of its electricity to a private electric utility, which presumably resold the electricity to its customers at a profit. According to the Property Appraiser, the "wholesaling" of a portion of Brevard's electrical capacity, much like Gainesville's "wholesaling" of a small portion of its telecommunications capacity, rendered the entire property taxable because the property was no longer exclusively used by the municipality.

The Fifth District rejected the argument, holding that the property continued to be used for a public purpose and *none of it was taxable*. The Court recognized that the question was not whether the property was used exclusively by the City. The proper question was whether the property was being used exclusively for a public purpose. *Id.* at 618. The Court held that the property continued to be used

exclusively for a public purpose, the generation and supply of electricity. The property remained fully exempt. This Court affirmed, approving of the decision in its entirety. *Ford*, 629 So. 2d 845.

The Fifth District discussed an alternative basis for reaching the same conclusion holding that the sale of 16-17 percent of OUC's electricity was merely "incidental" to the public purpose. *Id.* at 618. The Second District reached exactly this conclusion in *City of Tampa v. Walden*, 323 So. 2d 58 (Fla. 2d DCA 1975) where the City owned and operated a park. Portions of the park property, however, were leased to private entities that operated amusement facilities for profit. These leaseholds were incidental to the overall public purpose of the park and the property, even the property leased to private providers, remained exempt.

The panel decision could not be in sharper conflict with these cases. Not only did the panel tax the property being leased, it taxed the entire property apparently concluding that the character of the remaining property became taxable rather than public. But in *Walden* and *Northcutt*, the entire property, including that portion being leased or sold to the private entity, remained exempt. The simplistic invocation of the *Sebring* paradigm to property used by a municipality was error.

CONCLUSION

For all these reasons, this Court should accept jurisdiction over this case and resolve the conflict and confusion in the caselaw illustrated by the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction was furnished via regular U.S. Mail delivery to: **Nicholas Bykowsky, Esq.**, Office of the Attorney General, The Capitol – Tax Section, Tallahassee, FL 32399-1050, **John C. Dent, Jr., Esq.**, and **Sherri L. Johnson, Esq.**, P.O. Box 3259, Sarasota, FL 34240, **Raymond O. Manasco, Jr., Esq.**, Gainesville Regional Utilities, P.O. Box 147117, Station A-138, Gainesville, FL 32614-7117, **William E. Harlan, Jr., Esq.**, Alachua County Attorneys Office, P.O. Box 2877, Gainesville, FL 32602 and **Donna E. Blanton, Esq.**, Radey Thomas Yon & Clark, P.A., 301 South Bronough Street, Suite 200, Tallahassee, FL 32301 on this _____ day of May, 2007.

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, City of Gainesville, Florida, certifies that this Jurisdictional Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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