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IN THE SUPREME COURT OF FLORIDA

CITY OF LARGO,

Petitioner,

v.

AHF-BAY FUND, LLC,

Respondent.

Case No. SC2015-1261
Second DCA Case No. 2D14-408

ON DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, City of Largo (the City), seeks review of the Second District Court of Appeal's opinion, a copy of which is attached as Appendix A. This case is about a PILOT ("payment in lieu of taxes") agreement entered into by the City and RHF Brittany Bay, LLC (RHF), the predecessor in interest to Respondent, AHF-Bay Fund (AHF) as owner of an affordable housing development. The facts of this case, as set forth in the opinion below, are as follows:

> In December 2000, RHF acquired the subject property. RHF was a tax exempt 501(c)(3) organization as defined by the Internal Revenue Code. See 26 U.S.C. § 501(c)(3) (200). RHF planned to develop the property to provide affordable housing for persons with low to moderate income pursuant to chapter 420, Florida Statutes. As set forth in section 196.1978, Florida Statutes (2000), affordable housing projects owned by a 501(c)(3) organization are exempt from ad valorem taxation.
>
> To finance the project, RHF reached an agreement with the City wherein the City would arrange for the issuance of tax-exempt bonds[1] that carried a considerably lower interest rate than RHF could have obtained using traditional bank financing. In exchange for the issuance of the bonds, RHF entered into the PILOT agreement, thereby agreeing to make annual payments to the City "in an amount equal to the portion of ad valorem taxes to which the City would otherwise be entitled to receive for the [p]roperty as if the [p]roject were fully taxable in accordance with standard taxing procedures." The PILOT agreement provided that the amount of the payments would be determined by multiplying the property's assessed value by the millage rate established by the City each year. The PILOT agreement also provided that "the City has and will provide

[1] The City entered into an interlocal agreement with the Capital Trust Agency to permit the Agency to issue tax-exempt bonds.

> services to [RHF] as a result of [RHF's] status as a tax-exempt entity."
>
> The PILOT agreement specified that it was binding on any subsequent owners of the subject property as long as certain conditions were met, though it made no mention of a covenant running with the land. The PILOT agreement was not recorded in the official public records. However, simultaneously with the execution of the PILOT agreement, the parties executed a memorandum of agreement that was recorded in the public records. The memorandum indicated that the PILOT agreement was available for inspection in the city clerk's office and that it imposed certain covenants running with the land.
>
> RHF made the payments as required by the PILOT agreement for the years 2001 through 2005. AHF, also a nonprofit affordable housing provider, acquired the property in November 2005. AHF has continued to own and operate the property as an affordable housing community since the purchase. However, when the City did not receive the annual payment that was due on December 31, 2006, it contacted AHF. AHF denied knowledge of either the PILOT agreement or the memorandum of agreement, asserting that neither has been shown to be an exception to coverage in its title insurance policy and that neither had been referenced in the special warranty deed by which AHF took title.
>
> Based upon AHF's refusal to make payments under the PILOT agreement, the City filed suit in 2010. The City sought a summary judgment and the trial court granted the motion in part. Ultimately, the trial court entered a final judgment in favor of the City, awarding $695,158.23 in damages and prejudgment interest.

On appeal, the Second District rejected AHF's argument that the PILOT agreement was not a covenant running with the land. However, the Second District reversed the trial court's final judgment, finding the PILOT Agreement contrary to

Florida law and public policy, and in violation of article VII, section 9(a) of the Florida Constitution.

In its opinion, the Second District noted that PILOT agreements like the one at issue in this case "abound in municipalities throughout Florida" and that the magnitude of its opinion may pose a significant hardship on municipalities. Therefore, the Second District certified to this Court the following question to be of great public importance:

> DO PILOT AGREEMENTS THAT REQUIRE PAYMENTS EQUALING THE AD VALOREM TAXES THAT WOULD OTHERWISE BE DUE BUT FOR A STATUTORY TAX EXEMPTION VIOLATE SECTION 196.1978, FLORIDA STATUTES (2000), AND ARTICLE VII, 9(a) OF THE FLORIDA CONSTITUTION?

The City moved for rehearing and clarification, in part requesting the court clarify the effect of its decision on the PILOT Agreement's provision calling for an alternative method of calculating the payments if the agreed-upon method was declared invalid. The Second District denied the motion. The City then timely filed its Notice to Invoke the Discretionary Jurisdiction of this Court under both Fla. R. App. P. 9.030(a)(2)(A)(v)(certified question of great public importance) and Fla. R. App. P. 9.030(a)(2)(A)(ii)(express construction of the state constitution).

SUMMARY OF ARGUMENT

This is a case of first impression in Florida, and one that has been addressed by only one court outside Florida. PILOT agreements similar to the one in this case abound in Florida. Accordingly, the Second District's opinion will substantially affect many outside the two parties to this case. The Second District's opinion declaring PILOT agreements unconstitutional likely will pose significant hardship on those many municipalities that have relied on PILOT agreements and their ability to enter into such agreements with private parties who voluntarily agree to make payments in lieu of taxes. It may indeed subject them to claims for reimbursement of past payments made under PILOT agreements.

Additionally, the Second District expressly construed article VII, Section 9(a) of the Florida Constitution concerning the taxing power of local governments. In doing so, the Second District has dangerously equated free and voluntary agreements between parties with the compulsory imposition of taxes. This construction will have vast effects on the ability of local governments and private parties to voluntarily contract. Therefore, this Court should exercise its discretionary jurisdiction to review the Second District's opinion.

ARGUMENT

I. THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION BECAUSE THE SECOND DISTRICT HAS CERTIFIED THAT ITS DECISION FINDING PILOT AGREEMENTS CONTRARY TO FLORIDA LAW IS OF GREAT PUBLIC IMPORTANCE

While there is no requirement to provide a jurisdictional brief when a district court has certified a question of great public importance, as the Second District has done here, the City seeks to invoke the discretionary jurisdiction of this Court under both Fla. R. App. P. 9.030(a)(2)(A)(v)(certified question of great public importance) and Fla. R. App. P. 9.030(a)(2)(A)(ii)(express construction of the state constitution).

The Second District specifically recognized that this case is one of first impression in Florida and that the magnitude of holding that PILOT agreements violate Florida law would pose “a significant hardship on municipalities that rely on such payments to meet their budget.” (A6, A9). The effects will be even further reaching.

As the Second District recognized, PILOT agreements abound throughout Florida. PILOT agreements are often used as tools by municipalities and private entities to accomplish projects that serve and promote interests of the communities. For example, in this case, the PILOT Agreement between RHF and the City enabled the property to be converted from taxable, residential apartments to affordable housing. The Second District recognized the public policy to promote affordable housing, citing *Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989), but ignored the role that the PILOT agreement had as a catalyst to providing affordable housing. If the City and RHF were operating under a state of the law where PILOT agreements were known to be void and unenforceable, the project would likely not have occurred. Other projects will be similarly stifled if cities and private parties no longer have this useful tool. As municipalities struggle throughout Florida to find ways to balance their budget, the legality of their ability to enter into PILOT agreements with private parties is of extreme importance to Florida's cities. Furthermore, the Second District's decision places the validity of existing PILOT agreements in question, and potentially subjecties municipalities to claims of refunds of payments previously made under such agreements.

II. THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION BECAUSE THE SECOND DISTRICT EXPRESSLY CONSTRUED ARTICLE VII, SECTION 9(A) OF THE FLORIDA CONSTITUTION CONCERNING THE TAXING POWER OF LOCAL GOVERNMENTS

This Court has jurisdiction to review the Second District's decision pursuant to Fla. Const. art. V, § 3(b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(ii). These authorities provide this Court with discretionary jurisdiction to review decisions of district courts of appeal that expressly construe a provision of the state constitution.

In its opinion, the Second District expressly construed article VII, §9(a) of the Florida Constitution:

> …[W]e hold that a PILOT agreement that requires a party to make payments that are the equivalent of ad valorem taxes that would otherwise be due but for a statutory exemption violates article VII, §9(a) of the Florida Constitution, which permits municipalities to impose taxes only as authorized by law.

(A. 9). The Second District's opinion erroneously construes this provision as prohibiting parties from freely and voluntarily entering into contracts with certain calculation methods by equating voluntary, non-compulsory agreements with imposing taxes.

A voluntary obligation undertaken by a party to a mutually beneficial agreement entered into with a municipality does not invoke the municipality's article VII, section 9(a) power to impose taxes. Unlike property taxes, which a local government assesses without regard to any benefit to any particular property, *City of Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992), the promise to make PILOT payments induced the City to do something that benefitted the other party to the PILOT agreement. That party voluntarily agreed that the method of calculation of its payments fairly compensated the City for the benefit conferred.

Furthermore, the Second District denied the City's request for clarification that the matter should be remanded for the limited purpose of re-calculating the payments under the alternative method provided in the PILOT agreement. The

PILOT agreement provides that if it was ever determined that using the amount of taxes under the current millage as the calculation of the PILOT payments was unenforceable, the parties would determine an alternative method for calculating the payment in lieu of taxes. By rejecting the City's request to invoke this provision, the Second District essentially determined that **<u>any</u>** method of calculating a payment under a PILOT agreement is an unconstitutional tax. Under the current holding, this would include using the method for calculating PILOT payments expressly contemplated by section 423.02, Florida Statutes. The lower opinion jeopardizes the validity of PILOT agreements entered into by housing authorizes under the authority of section 423.02. It also runs contrary to bankruptcy cases in Florida, which have recognized the validity of debts under PILOT agreements. *See In re Atl. Cmty. Care, Inc*., 325 B.R. 661, 662 (Bankr. M.D. Fla. 2005).

Accordingly, this Court should accept jurisdiction to consider and correct this construction because it will have long reaching effects on local governments' home rule powers and erodes parties' freedom to contract.

CONCLUSION

This is a case of first impression in Florida. The issues in this case, as the Second District recognized, have significance beyond this case and to many entities not a party to this case. It likely will affect many municipalities and may even affect the validity of section 423.02, Florida Statutes. Moreover, it involves the interpretation of constitutional powers. Based on the foregoing, this case presents an issue of great public importance and involves a question regarding the application of a constitutional provision that will have far-reading effects. Therefore, this Court should invoke its discretionary jurisdiction to review the decision below under Fla. R. App. P. 9.030(a)(2)(A)(v)(certified question of great public importance) and Fla. R. App. P. 9.030(a)(2)(A)(ii)(express construction of the state constitution).

Respectfully submitted this 31st day of July, 2015,

/s/Nicole C. Nate

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CERTIFICATE OF SERVICE

I certify that on July 31, 2015, this document was filed electronically with the Clerk of Court via the Florida Courts E-Filing Portal and a copy was served on the following counsel of record by email:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing was word-processed using Times New Roman, 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/Nicole C. Nate_______
Nicole C. Nate, Esq.