IN THE COUNTY OF EIGTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

201 East University Avenue
Gainesville, Florida 32601
(352) 374-3636

Case No.:01-2014-SC-004051

James J. Konish
Individually, and
James J. Konish
As Personal Guarantor,
President and Manager
of 625 Northeast First
Street LLC, 619 Northeast
First Street LLC, and
120 Southeast 7th Street LLC
PLAINTIFF

Division: Small Claims

v.
City of Gainesville and
Gainesville Regional Utilities (GRU)
DEFENDANTS

CLOSING ARGUMENT

The Florida Constitution, Article VII, Section 9. Local Taxes – Provides:

> a) "Counties, school districts, and municipalities shall, and special districts may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this Constitution" (emphasis added).

As acknowledged by the City's expert witness tax attorney Amanda Swindle, there can be no City of Gainesville utility tax without §166.231, Fla. Stat., i.e., the City's home rule powers do not provide inherent authority to impose this tax.

A Florida Attorney General Opinion AGO-2013-11, dated June 7, 2013 (attachment 1) advised the Leesburg City Attorney that the §166.231 utility tax would not be applicable to "the charge levied by the city for the transportation of metered natural gas to the customer".

This opinion is the only discoverable authority construing the §166.231 (1)(a) & (b) repeated use of the word "purchase". On Page 4 the opinion explains:

> To read the statute in this fashion would make the language of the statute requiring levies "only upon purchase within the municipality" meaningless as each of the services in section 166.231(1), Florida Statutes, requires transportation or delivery, whether that takes place within or outside the municipal limits.

On page 3 of this opinion, the local §166.231 utility tax was found confined "to that taxing power conferred expressly, or by necessary implication":

> Section 2, Article VIII, Florida Constitution, gives municipalities "home rule powers" which may be exercised for any valid municipal purpose, "except as otherwise provided by law (,) " however, the taxing power of municipalities is not derived from this constitutional provision. The origin of municipal taxing power and the limitations on its exercise are found in sections 1(a) and 9(a), Article VII, Florida Constitution, and such general or special laws relating to other taxes as the Legislature may enact. In the exercise of its taxing power, a municipality is limited to that taxing power conferred expressly, or by necessary implication. Generally, therefore, absent statutory authority, a municipality has no inherent power to impose taxes or to provide exemptions from such taxes.

The utility tax scheme outlined in §166.231, Fla. Stat. is clear and unambiguous.

The four (4) operative sentences in §166.231 (1)(a) & (b) are as follows:

> 166.231 Municipalities; public service tax. –
> (1)(a) A municipality may levy a tax on the purchase of electricity, metered natural gas, liquefied petroleum gas either metered or bottled, manufactured gas either metered or bottled, and water service. ....the tax shall be levied only upon purchases within the municipality and shall not exceed 10 percent of the payments received by the seller of the taxable item from the purchaser for the purchase of such service. .... Purchase of electricity means the purchase of electric power by a person who will consume it within the municipality.
> (b) The tax imposed by paragraph (a) shall not be applied against any fuel adjustment charge, and such charge shall be separately stated on each bill. The term "fuel adjustment charge" means all increases in the cost of utility services to the ultimate consumer resulting from an increase in the cost of fuel to the utility subsequent to October 1, 1973.

In paragraph (1)(a), "purchase of electricity" is narrowly defined. In paragraph (1)(b) "fuel adjustment charge" is broadly defined. The word "purchase" or "purchaser" is used five (5) times as a limit on the scope of the local §166.231 utility tax.

The §166.231 (1)(a) phrase "payments received by the seller" is likewise limited to "purchases", and purchase is further limited to "a person who will consume it". The only plausible necessary implication is that a purchased item must be consumable and paid for by the end user.

Strictly construing the clear, unambiguous and penal language of §166.231 (1)(a) & (b) in conformity with the attached caselaw (attachment 2), the following statutory directives are to be found:

1) The utility tax only applies to "purchases" – which are defined by statute (§166.231 (1)(a)).
2) The utility tax only applies to an item purchased by a person "who will consume it". (§166.231 (1)(a))

3) The utility tax "shall not exceed 10 percent of the payments received by the seller of the taxable item from the purchaser "for the purchase" of such service. (emphasis added) (§166.231 (1)(a))

4) The "fuel adjustment charge" shall not be taxed, and includes "all increases in costs" to the ultimate consumer (emphasis added).

The City of Gainesville asks this Court to read the §166.231 (1)(a) language "payments received by the seller" separate and apart from the qualifying language "for the purchase".

The Court cannot do this. Meaning is to be accorded all words and phrases used in §166.231 (1)(a) & (b). (Attachment 3)

Nowhere in §166.231 (1)(a) or (b) is there legislative authorization to tax either the GRU utility "customer charge", or the separately stated §203.01 state gross receipts tax on utilities providing utility services.

In fact, §166.231 (1)(b) expressly prohibits local §166.231 utility taxation of anything that increases the amount of the fuel adjustment charge, which is what the state §203.01 gross receipts tax in fact does. If the §203.01 gross receipts tax is part of the §166.231 (1)(a) "purchase", then 2.5641% of the fuel adjustment charge becomes part of the purchase also, in violation of §166.231 (1)(b).

A companion state §203.01 gross receipts tax was indeed amended retroactively in 1991 (§203.01 (7)). "Customer " or "facility charges" were expressly made taxable. The legislative history explains an intent to thwart a utility industry $20 million dollar legal challenge to State Department of Revenue (DOR) Refund Denial for §203.01 gross receipts taxation of the electric customer charge (attachment 4). No such amendment of §166.231 has been enacted. Different words in different sections imply different meanings. (attachment 5)

The City's claim that this 1991 §203.01 statutory amendment somehow

extends by unnecessary implication to an entirely different local §166.231 utility tax is baseless.

§203.01 via DOR Rule 12B-6.0015 (4) (attachment 6) expressly prohibits pyramiding of the state gross receipts tax on either the local §166.231 utility tax, or the state §212 sales tax. Nevertheless, the City of Gainesville argued at trial that the legislature delegated authority to local governments to decide for themselves on the contours of the §166.231 (1)(a) & (b) utility tax.

Such an unconstitutional reading of §166.231 (1)(a) & (b) is not allowed. Beyond the express, Article VII, Sec. 9 constitutional limitation on local taxation, legislation is presumed to be constitutional (attachment 7). The legislature is presumed to know the law, including appurtenant judicial caselaw (attachment 8). A collorary of the Separation of Powers Doctrine known as nondelegation of legislative powers prohibits the delegation of the exclusively legislative power to authorize locally expanded §166.231 (1)(a) & (b) utility taxation. (attachment 9)

The Courts and the City are bound by the clear and unambiguous language of §166.231 (1)(a) & (b).

Rules of statutory construction do not apply to plain and unambiguous language (attachment 10). Such rules are to resolve not create ambiguity. (attachment 11)

Legislative intent is the polestar, and is ascertained primarily from the words used in the statute (attachment 12). Words cannot be added or omitted in the analysis of the §166.231 penal provision allowing for a discretionary local utility tax. (attachment 13)

In its own flow charts admitted into evidence, the City defines the GRU customer charge for electric, gas and water utility services as a charge imposed "whether or not any (electricity, gas or water) is used".

It is crystal clear that you pay a customer charge in addition to any purchases you make – even if there is no purchase at all. The GRU customer charge is in the nature of a membership fee, such as with a Sam's Club membership. You cannot make a GRU purchase unless you first pay a fixed, uniform membership fee imposed as a customer charge on all customers whether exempt from §166.231 utility taxation or not.

The §203.01 state gross receipts tax is indeed a component "separately itemized" (Rule 12B-6.0015(3)) part of the GRU utility bill. However, it is a charge in addition to the purchase price, not a part of it. Therefore, it simply is not taxable as a purchase, and additionally constitutes prohibited local §166.231 taxation of 2.5641% of the "fuel adjustment charge".

Finally, the city's argument that the §166.232 statutory provision for a "physical unit" basis of utility taxation implies that the local utility tax is not limited to what is actually purchased and consumed by the end user is likewise without merit.

This alternative methodology, which the City's expert testified is never used, allows a fixed amount of §166.231 utility tax per unit purchased derived from the total annual sales in the previous year divided by the total units sold. Any errors in the past local §166.231 utility taxation such as taxing the "customer charge" or the state gross receipts tax would simply get built in to the "physical unit" basis of utility taxation. No justification for the City's position is found here either.

The City's extension of the §166.231 utility tax to the GRU "customer charge" for electricity, gas and water, and state §203.01 gross receipts tax is an abuse of this local tax. If allowed, why not also arbitrarily construe "connection" and "disconnection charges", "late fees", charges for "special" services or equipment and so on as "purchases" and/or "payments received for services". This of course is also prohibited by DOR Rule 12B-6.0015 (2)(a)(b)(c) for the companion state §203.01 gross receipts tax.

This Court can and must provide the only available remedy for the City of Gainesville naked abuse of power – a refund and declaratory relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above AMENDED STATEMENT OF CLAIM has been furnished by email to the defendants, CITY OF GAINESVILLE, c/o City Attorney, waratukeea@cityofgainesville.org, and GAINESVILLE REGIONAL UTILITIES, c/o Utilities Attorney, whitecg@cityofgainesville.org, on the 26th day of June, 2015.

By: James J Konish, Attorney
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