IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502011CA017953XXXXMB
DIVISION: AO

TOWN OF GULF STREAM, et al.,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision,

Defendant.
_____/

SHARON R. BOCK, in her Official Capacity as the Clerk & Comptroller of Palm Beach County, Florida,

Intervenor.
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR OCTOBER 10, 2013 MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, TOWN OF GULF STREAM, et al. (the "Municipalities"), hereby file this memorandum of law in support of their argument that the County's efforts to force them to pay for the countywide IG Program are barred by the doctrine of sovereign immunity as a matter of law.

SOVEREIGN IMMUNITY GENERALLY

The doctrine of sovereign immunity provides that a sovereign governmental entity cannot be sued or have money taken from its coffers without its permission. See Cauley v. City of Jacksonville, 403 So. 2d 379, 381 (Fla. 1981). Sovereign immunity from suit derives exclusively from the separation of powers provision found in Article II, Section 3 of the Florida Constitution, and not from the absence of a duty of care or from any statutory basis. Wallace v. Dean, 3 So. 3d 1035, 1045 (Fla. 2009); see also Comm. Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1019-1022 (Fla. 1979) (the separation of powers principle prevents certain legislative and executive discretionary decisions from being "subjected to scrutiny by judge or jury as to the

wisdom of their performance"). Thus, a key function of the doctrine of sovereign immunity is to prevent a litigant from employing the court system to second guess discretionary decisions of government. Other policy considerations underpinning this doctrine include the "protection of the public treasury" against "profligate encroachments" and the "maintenance of the orderly administration of government." Am. Home Assur. Co. v. Nat'l Railroad Passenger Corp., 908 So. 2d 459, 471 (Fla. 2005).

Sovereign immunity relates to jurisdiction and may be raised at any time. E.g., Sebring Utilities Comm'n v. Sicher, 509 So. 2d 968, 969 (Fla. 2d DCA 1987). While sovereign immunity is traditionally raised as an affirmative defense to suit, it also may be raised by a governmental entity seeking a declaration that it is entitled to sovereign immunity protections as a matter of law. E.g., Pagan v. Sarasota County Public Hospital Board, 884 So. 2d 257, 260-261 (Fla. 2d DCA 2004) (declaratory judgment action brought by hospital board and physician's group to determine group doctors entitlement to sovereign immunity protection from malpractice actions); City of Haines City v. Allen, 509 So. 2d 982, 983 (Fla. 2d DCA 1987) (declaratory judgment action brought by city to determine applicability of sovereign immunity under section 768.28). Section 86.011, Fla. Stat., in fact, provides that declaratory judgment actions are appropriate to determine the existence or non-existence of "any *immunity*, power, privilege or right." (emphasis added).

WAIVERS OF SOVEREIGN IMMUNITY GENERALLY

Sovereign immunity is the rule, rather than the exception. Pan-Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4, 5 (Fla. 1984). Owing to its critical importance, sovereign immunity is not easily waived. Florida law provides that it can be waived only by (1) statute[1] or (2) written

[1] The Florida Constitution gives the Legislature the authority to waive state, county and municipal sovereign immunity by statute. See Art. X, § 13, Fla. Const (waiver by general law). The Legislature has exercised this authority on limited occasions. E.g., Cauley, 403 So. 2d at 381 (limited waiver in tort under F.S. § 768.28); Royal World Metro., Inc. v. City of Miami Beach, 863 So. 2d 320, 322 (Fla. 3d DCA 2004) (waiver for Bert J. Harris claims under F.S. § 70.001).

contract.[2] E.g., Cauley, 403 So. 2d at 381; Am. Home Assur. Co., 908 So. 2d at 474. Any waiver must be express, clear and unequivocal and cannot be found by mere inference or implication. E.g., Am. Home Assur. Co., 908 So. 2d at 472; citing Spangler v. Fla. State Tpk. Auth., 106 So. 2d 421, 424 (Fla. 1958) (general statutory authority of entity to "sue and be sued" is insufficient to waive sovereign immunity); City of Key West v. Florida Keys Comm. College, 81 So. 3d 494, 498 (Fla. 3d DCA 2012) (Florida Legislature's inaction to legislate on a particular subject matter does not constitute a waiver of sovereign immunity). Courts must strictly construe any language that is alleged to create a waiver in favor of the governmental entity seeking to avoid payment. E.g., City of Gainesville v. State of Fla. Dep't of Transp., 920 So. 2d 53, 54 (Fla. 1st DCA 2005). Also, a waiver of sovereign immunity cannot be accomplished by any law other than one enacted by the State Legislature. E.g., Arnold v. Shumpert, 217 So. 2d 116, 120 (Fla. 1968).

These rules of waiver are well-established in the common law of this state, and in federal common law. E.g., Gulden v. United States, 2007 WL 3202480, * 2 (M.D. Fla. 2007); Arnold, 217 So. 2d at 120. These requirements have been consistently applied in cases involving municipalities. E.g., Sebring, 509 So. 2d at 969 (in suing municipal utility, plaintiff was required to prove how utility's sovereign immunity had been clearly and unequivocally waived); West Orange Country Club, 9 So. 3d at 1272-1273 (municipality not liable in implied contract where no express written contract was approved by municipality). These requirements have even been applied to waivers of tribal sovereign immunity. E.g., Seminole Tribe of Florida v. Ariz, 67 So. 3d 229, 231-232 (Fla. 2d DCA 2010).

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[2] Implied contracts are not sufficient to trigger a waiver. E.g., County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049, 1051 (Fla. 1997). Written contracts waive sovereign immunity only where they are properly enacted by the governing body of the entity seeking to be held liable. E.g., Am. Home Assur. Corp., 908 So. 2d at 476; City of Orlando v. West Orange Country Club, Inc., 9 So. 3d 1268, 1273 (Fla. 5th DCA 2009) (waiver for written contracts only applies if the written contract is properly approved by the entire council or commission for a governmental entity). No other persons or entities (i.e. voters in a referendum) can enter into a written contract on the governmental entity's behalf. See id.

MUNICIPAL SOVEREIGN IMMUNITY BARS THE COUNTY'S DEMAND FOR PAYMENT IN THIS CASE

The County contends that the Municipalities do not have sovereign immunity as to the subject matter of this case and therefore, they must pay for the IG Program. See County's Ans. to Am. Complaint at Aff. Def. # 1. In reality, the County argues that it can force the Municipalities to pay for whatever County program it wants whenever it wants and the Municipalities have no immunity to avoid such charges. The County's argument has no merit and wholly ignores Florida law on this issue.

Municipal Sovereign Immunity In Florida

Municipal sovereign immunity is well-recognized in common law. In fact, prior to 1776, the common law doctrine of sovereign immunity applied equally and without distinction between governmental entities. Cauley, 403 So. 2d at 381; accord Brown v. City of Vero Beach, 64 So. 3d 172, 177 (Fla. 4th DCA 2011). Under common law, if a city function was perceived to be purely governmental, then that function was protected by sovereign immunity. E.g., Elrod v. City of Daytona Beach, 180 So. 378, 380-381 (Fla. 1938) ("There was a time when all municipal functions were governmental and therefore municipal corporations were wholly free from responsibility for torts or civil wrongs, by the common law."); Comm. Carrier Corp., 371 So. 2d at 1015-1016 (sovereign immunity "was always deemed to have existed for" purely governmental functions such as the "legislative, quasi-legislative, judicial and quasi-judicial acts" of municipalities).

The Municipalities' decisions relating to the budgeting and spending of municipal tax dollars have always been considered purely governmental and/or legislative functions for which they are sovereignly immune. E.g., Estes v. City of North Miami Beach, 227 So. 2d 33, 35 (Fla. 1969) (city council properly exercised its discretion in paying out funds to special counsel for litigation purposes; suit to enjoin city council from making such payments was discharged); Crowe v. City of Jacksonville Beach, 167 So. 2d 753, 755-756 (Fla. 1st DCA 1964) (city

council's decision to spend bond funds to buy property and construct improvements thereon was an act lying with the discretion of the council for which courts are reluctant to interfere; court held that "this immunity from judicial control embraces the exercise of all municipal powers, whether legislative or administrative, which are strictly discretionary"). Therefore, common law clearly recognized that the Municipalities cannot face liability or suit for making certain budgetary decisions or for deciding what programs to fund.

Prior to the 1970s, Florida courts began to whittle down municipal sovereign immunity in tort. Cauley, 403 So. 2d at 382. Specifically, Florida courts came to accept the view that municipalities were akin to private corporations in some circumstances, and therefore, "bifurcated municipal activities into governmental functions and proprietary or corporate functions." Id. As to the governmental functions such as legislative acts, courts determined that cities remained immune from suit, "but, as to proprietary acts, immunity [in tort] was abolished." Id.

In 1973, the Florida Legislature adopted Section 768.28, F.S., in accordance with Article X, Section 13 of the Florida Constitution. The purpose of the statute was to waive sovereign immunity in tort for the State, its agencies and subdivisions, but only to the extent specified in the Act. In 1975, the Florida Legislature amended Section 768.28 to expressly include municipalities. Section 768.28, while termed a waiver statute, effectively gave municipalities back certain immunity in tort that had been taken away by the Florida courts. See Cauley, 403 So. 2d at 384. To this point, the Florida Supreme Court wrote:

> **Municipalities can no longer be identified as partial outcasts as opposed to other constitutionally authorized local governmental entities.** Our cities currently provide a substantial portion of our public services, funded in part with state and federal revenues ... In a similar light, our twenty-three-year-old statement that the 'modern city is in substantial measure a large business institution,' [Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957)], can no longer justify disparate treatment of our municipalities. Many of our metropolitan counties now function in an identical capacity ... It is our decision that, in this state, **sovereign immunity should apply equally to all constitutionally authorized**

> **governmental entities and not in a disparate manner.** We find that section 768.28 provides a responsible method for this equal application.

Id. at 386-387 (emphasis added); see also Vega v. City of Pompano Beach, 498 So. 2d 532, 533 (Fla. 4th DCA 1986) (confirming that the distinction between municipal and county sovereign immunity in suit has now been abolished).[3]

Municipalities Continue to Have Sovereign Immunity for Their Budgetary and Appropriation Decisions

Section 768.28 did not open the floodgates allowing municipalities to be sued for all forms of alleged misconduct. Nor did Section 768.28 modify the well-established common law separation of powers principle found in Article II, Section 3 of the Florida Constitution, which shields municipalities from suit when they exercise discretionary and purely governmental functions. Wallace, 3 So. 3d at 1045; Cauley, 403 So. 2d at 384. Rather, Section 768.28 upheld municipal sovereign immunity for executive and legislative functions that involve fundamental questions of policy and planning. Comm. Carrier Corp., 371 So. 2d at 1020 (governmental entities remain immune from suit for their "discretionary functions, certain policy-making, planning or judgmental governmental functions"). Therefore, when municipalities make discretionary, legislative, policy-making or planning-level decisions, sovereign immunity remains the rule, not the exception. E.g., Id. at 1019-1020 (allocation of limited governmental resources is a strategic, planning-level decision which is shielded by sovereign immunity); City of Delray Beach v. St. Juste, 989 So. 2d 655, 655-657 (Fla. 4th DCA 2008) (city's decision to not to impound dogs due to limited space and funds was discretionary decision for which city enjoyed immunity); Dennis v.

[3] After the passage of Section 768.28, the rules for sovereign immunity in tort were as follows: state, county and municipal sovereign immunity was waived within set limits for "operation-level" functions, but immunity for "planning," "discretionary" or "decision-making" functions remained intact. Cauley, 403 So. 2d at 384. A "discretionary" function involves an exercise of executive or legislative power such that, for the court to intervene by allowing a lawsuit to go forward against the government entity, "it inappropriately would entangle itself in fundamental questions of policy and planning." Kaisner v. Kolb, 543 So. 2d 732, 737 (Fla. 1989). An "operational" function, on the other hand, is one not necessary to or inherent in policy or planning, but merely reflects a secondary decision as to how those policies or plans will be implemented. Id.

City of Tampa, 581 So. 2d 1345, 1351 (Fla. 2d DCA 1991) (city council's decision to allocate scarce public resources for a park or similar public facility is a discretionary, policy-making decision, which is not actionable under the defense of sovereign immunity).

Here, the County's Charter Amendment and Sections 2-429(1) and (7) of the Implementing Ordinance require that the Municipalities budget and pay for the IG Program. This mandate attacks the very heart of municipal authority by dictating what programs the Municipalities must spend money on. As stated above, the Municipalities' decisions regarding what programs to budget for, and how to allocate their resources are purely discretionary acts. Therefore, their decision not to fund the IG Program is protected by the doctrine of sovereign immunity. This means the County cannot sue the Municipalities or seek damages against them in order to reverse their decision not to fund. If the County were allowed to haul the Municipalities into court for these types of decisions, then the central purpose underlying the doctrine of sovereign immunity—the preservation of separation of powers—would be violated. See Am. Home Assur. Co., 908 So. 2d at 471.[4]

There Is No Statute or Written Contract Waiving the Municipalities' Sovereign Immunity With Respect to Payments for the IG Program

There is no statute obligating the Municipalities to pay for the IG Program. Instead, the Florida Legislature has stated that if County wants to charge a municipality for one of its services or programs, then it must do so by mutually agreed upon contract. See F.S. § 125.0101. A forced imposition is not permitted. See id. ("This section shall not be construed to authorize the county to

[4] A referendum does not transform the Municipalities' discretionary powers to set their own budgets and allocate scarce public resources into operational acts. A charter amendment, even if approved by referendum, is unconstitutional if it interferes with the Municipalities' budgeting authority. E.g., Charlotte County Bd. of County Comm'n v. Taylor, 650 So. 2d 146, 147-149 (Fla. 2d DCA 1995) (amendment to home rule county charter invalid on grounds that it was inconsistent with general law requirements that the county commission, not the electors, establish a budget and levy ad valorem taxes based upon certain statutory requirements); State ex rel. Keefe v. City of St. Petersburg, 145 So. 175, 175-177 (1933) (court held that initiative and referendum provisions of city's charter were not applicable to appropriations ordinances because such provisions would "materially obstruct, if not entirely defeat, the purpose of having a budget system"; city's budgeting and appropriation functions are "to be regarded as legislative in character").

impose any service charge or special assessment or to levy any tax within the municipality ...."); see also, City of Key West, 81 So. 3d at 496-497 (college not required to pay city's stormwater fees imposed by ordinance because no statute expressly waived college's sovereign immunity with respect to payment of the fees). When the Legislature proscribes the manner of doing a thing, it cannot be done another way. E.g., Bush v. Holmes, 919 So. 2d 392, 408 (Fla. 2006) (general principle of statutory construction is "expressio unius est exclusio alterius" or "the expression of one thing implies the exclusion of another"); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (same). Therefore, if the County wants to charge the Municipalities for the IG Program, then it can do so only by entering into a voluntary and mutually agreeable contract with the individual Municipalities. E.g., St. Lucie County v. City of Fort Pierce, 676 So. 2d 35 (Fla. 4th DCA 1996) (city and county entered into interlocal agreement whereby county granted city the right to dispose of its garbage and trash at county landfill in exchange for city paying the county tipping fees).

The County concedes that it has not entered into a contract with the Municipalities for payment of the IG Program. See Ans. at ¶ 56. Therefore, there has been no waiver of municipal sovereign immunity in this case. See e.g., City of Gainesville, 920 So. 2d at 54 (DOT not required to pay stormwater fees imposed by city; no statute or contract expressly waived DOT's sovereign immunity with respect to payment of the fees; court held that if city wanted to collect the fee, "it must have a written contract" allowing it to do so).[5]

The Referendum, the County's Charter Amendment, and the County's Implementing Ordinance Did Not Waive the Municipalities' Sovereign Immunity

Despite the County's contention, the referendum, the Charter Amendment, and the Implementing Ordinance did not waive the Municipalities' sovereign immunity regarding payment

[5] The County's imposition of charges on the Municipalities without a written agreement in place conflicts with Section 125.0101, F.S., and therefore, is unenforceable. See Art. VIII, Section 1(g), Fla. Const. ("Counties operating under county charters shall have all powers of local self-government not inconsistent with general law ....).

for the IG Program. See Ans. at Aff. Def. # 2. There is no statute or constitutional provision in Florida allowing sovereign immunity to be waived by referendum vote. Also, Florida courts have consistently held that local laws, such as the ones being relied upon by the County here, cannot waive sovereign immunity. E.g., Arnold, 217 So. 2d at 120 (special act was equivalent of local law and therefore, insufficient to waive county's sovereign immunity; only general law can waive immunity); Donisi v. Trout, 415 So. 2d 730, 730-731 (Fla. 4th DCA 1982) (sovereign immunity may only be waived by general law; since power to waive sovereign immunity is vested exclusively in the Legislature, a city may not waive such immunity by local ordinance).[6]

The County's "Home Rule" Powers Do Not Waive Municipal Sovereign Immunity

Despite the County's contention, its "home rule" powers under Chapter 125, F.S., and Article VIII, Section 1(g), Fla. Const., do not waive the Municipalities' sovereign immunity regarding payment for the IG Program. See Ans. at Aff. Def. # 2 and # 3. Chapter 125 and Section 1(g) do not mention waiver of municipal sovereign immunity, or that counties can force municipalities to pay for county programs. Instead, Fla. Stat. § 125.0101 provides the exact opposite and states that a county can charge municipalities for a program or service only if they agree by contract. This language evidences a clear legislative intent to keep municipal sovereign immunity intact rather than to waive it. Section 1(g) only makes one mention of municipalities by requiring county charters to state when county ordinances prevail over municipal ordinances on the same subject matter. This Section in no way contains an express, clear and unequivocal waiver of municipal sovereign immunity. To hold otherwise, would impermissibly allow a waiver by inference or implication. See Spangler, 106 So. 2d at 424.

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[6] The referendum vote, the Charter Amendment and the Implementing Ordinance would not be sufficient to waive the County's sovereign immunity. Yet, the County asks this Court to use those things to find a waiver here. The County, in effect, is asking this Court to apply a different set of rules to waivers of municipal sovereign immunity than to waivers of state and county sovereign immunity, which is the very thing the Legislature sought to preclude with the adoption of Section 768.28. E.g., Cauley, 403 So. 2d at 387 (sovereign immunity shall apply equally to all constitutionally authorized governmental entities and no longer in a disparate manner).

Further, no authority exists for the proposition that county home rule powers under Article VIII, Section 1(g) somehow negate municipal sovereign immunity. Such a finding would effectively render Article X, Section 13, Fla. Const., superfluous. See Article X, Section 13 (only provision of general law can waive sovereign immunity). Separate provisions of the constitution must be read to coexist in harmony, and not to negate one another. Bush, 910 So. 2d at 406 (constitutional provisions must be read "*in pari materia*, rather than as distinct and unrelated obligations"). The County's argument that its home rule powers override municipal sovereign immunity violates this basic tenant of constitutional interpretation.

Section 166.221, F.S., Does Not Waive the Municipalities' Sovereign Immunity

Despite the County's contention, Section 166.221, F.S., does not waive the Municipalities' sovereign immunity regarding payment for the IG Program. See Ans. at Aff. Def. # 3. Section 166.221 only discusses a governmental entity's ability to impose regulatory fees on certain "classes of businesses, professions, and occupations." It in no way states that one governmental entity can impose a regulatory fee on another government entity. Instead, the plain terms expressly differentiate between the governmental entities imposing the fee and the "businesses, professions, and occupations" paying the fee. This distinction indicates that the Legislature never intended to subject municipalities to regulatory fees under this statute. For this reason, Section 166.221 does not contain an express, clear and unequivocal waiver of municipal sovereign immunity.

CONCLUSION

The Municipalities' sovereign immunity for budgetary and appropriations decisions is an essential protection that must not be overcome by anything other than an express, clear and unequivocal waiver by the Florida Legislature. That has not happened in this case. Therefore, the County's efforts to force the Municipalities to pay for the IG Program are barred by municipal sovereign immunity as a matter of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent, via email service this 8th day of November, 2013, to the following persons: marty.alexander@hklaw.com, Martin Alexander, Esquire, Holland & Knight, LLP, 222 Lakeview Avenue, Suite 1000, West Palm Beach, FL 33401 and Nathan.adams@hklaw.com, Nathan A. Adams, IV, Esquire, Holland & Knight, LLP, Post Office Drawer 810, Tallahassee, FL 32302, Counsel for the Palm Beach County Clerk & Comptroller Sharon R. Bock; amcmahon@pbcgov.org, Andrew J. McMahon, Esquire, Chief Assistant County Attorney, Palm Beach County Attorney's Office, and pmugaver@pbcgov.org, Philip Mugavero, Esquire, Assistant County Attorney, Palm Beach County Attorney's Office, Attorneys for Palm Beach County, 300 N. Dixie Highway, Suite 359, West Palm Beach, FL 33401; and hpeterson@mypalmbeachclerk.com, Hampton C. Peterson, Esquire, General Counsel for Palm Beach County Clerk & Comptroller Sharon R. Bock, 301 N. Olive Ave., 9th Floor, West Palm Beach, FL 33401.

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