IN THE SUPREME COURT OF FLORIDA

PINELLAS COUNTY, FLORIDA

Petitioner,

v.

GARY JOINER, ETC., ET AL.

Respondent.

CASE NO.: SC19-1819
DCA CASE NO.: 2D17-1040
LT CASE NO.: 15-CA-1376

PETITIONER PINELLAS COUNTY'S REPLY BRIEF

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CHRISTY DONOVAN PEMBERTON, BCS
Managing Assistant County Attorney
Florida Bar No.: 0046183
cpemberton@pinellascounty.org
eservice@pinellascounty.org
DONALD S. CROWELL, BCS
Chief Assistant County Attorney
Florida Bar No.: 0176230
dcrowell@pinellascounty.org
eservice@pinellascounty.org
Pinellas County Attorney's Office
315 Court Street, 6th Floor
Clearwater, Florida 33756
Phone: 727-464-3354
Fax: 727-464-4147
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

ARGUMENT

Sovereign immunity of Florida counties has not been expressly waived for ad valorem taxation. The Property Appraiser sets forth policy considerations for waiving sovereign immunity from taxation when a Florida county owns property outside of its boundaries.[1] However, absent an express waiver by the Legislature, governmental sovereign immunity in Florida is the rule rather than the exception.

This case is not factually intensive; Pinellas County's intrastate sovereign immunity from ad valorem taxation depends upon property ownership, not use. Though the Property Appraiser attempts to analogize cases involving exemptions from taxation; interstate disputes; and issues of federal, foreign nation, and tribal law and power, these are false equivalents. At its essence, the issue before this court is whether a Florida county loses sovereign immunity by owning property in another Florida county. Pinellas County urges this Court to answer the Certified Question, in the affirmative (or the suggested rephrased question in the negative) and reverse the decision below.

---

[1] For purposes of this brief, all references to property outside a county's geographic boundaries should be presumed to refer only to property held within the State of Florida.

I. IMMUNITY FROM AD VALOREM TAXATION IS NOT LIMITED TO THE GEOGRAPHIC BOUNDARY OF THE COUNTY.

The Property Appraiser asserts Pinellas County's sovereign immunity from ad valorem taxation "cannot continue to exist" when the county's property is owned in and taxed by another county. (A.13)[2]. Much like the county in *Manatee Cnty. v. Town of Longboat Key*, Pinellas enjoys sovereign immunity absent a clear and unambiguous waiver. 365 So. 2d 143, 147 (Fla. 1978). This Court agreed with the county that "[t]he Constitution . . . requires specific, clear, and unambiguous language in a statute to constitute a waiver of sovereign immunity . . . and [the county] enjoys the state's sovereign immunity unless the Legislature provides otherwise by general law. This . . . waiver must be clear and unequivocal." *Id.; see Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 310 (Fla. 2006) (finding the Legislature can within constitutional limits waive a county's ad valorem immunity); *see also Keggin v. Hillsborough Cnty.*, 71 So. 372, 372 (Fla. 1916) (finding that counties "partake of the State's immunity from liability.")

[2] References to the Answer Brief on the Merits are delineated as (A.page #).

Immunity belongs to the sovereign, not the real property itself. The state and its constitutional subdivisions are immune from ad valorem taxation. *Canaveral Port Auth. v. Dep't of Revenue*, 690 So. 2d 1226, 1228 (Fla. 1996). The issue, therefore, is not "whether real property owned by one county but located in another county retains its immunity from ad valorem taxation" (A.9, emphasis added); the issue is whether a county's immunity ceases to exist when the property it owns lies within another Florida county.

A. Pinellas County, a political subdivision of the state, enjoys the state's immunity from taxation.

It is undisputed that "the state and its political subdivisions are immune from taxation." (A.14). However, the Property Appraiser argues "[t]he general rule that counties are immune from ad valorem taxation should not extend to situations where the county is seeking tax immunity for property located beyond its jurisdictional boundary." (A.15, emphasis added). The Second District agreed, finding that "Pinellas and Pasco cannot both be sovereign on the same matter in the same place." *Joiner v. Pinellas Cnty.*, 279 So. 3d 860, 866 (Fla. 2d DCA 2019).

While in *Canaveral Port Auth.* this Court did state, "[i]mmunity

from ad valorem taxation . . . must be kept within narrow bounds," this Court was considering whether the immunity extended to a port authority. *Canaveral Port Auth.*, 690 So. 2d at 1227. In declining to extend such immunity, this Court stated that counties, unlike port authorities, are "expressly recognized in the Florida Constitution as performing a function of 'the state' comprise the state for purposes of immunity from ad valorem taxation." *Id.*

The Constitution does not restrict counties' status as political subdivisions of the state to each county's geographic boundaries. As a result, Florida counties remain immune from ad valorem taxation throughout the state, since "the authority to tax the State cannot be inferred. Such authority must be manifested by 'clear and direct expression of the State's intention to subject itself to' the tax." *Cason,* 944 So. 2d at 310 (Fla. 2006), *quoting Dickinson v. Tallahassee*, 325 So. 2d 1, 4 (Fla. 1975).

"The State's immunity from taxation is so well established in Florida's jurisprudence that little elaboration is needed here." *Dickinson*, 325 So. 2d at 3. As recognized in Justice Cantero's concurrence in *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, "under common law the state's immunity was total" prior to the

adoption of section 768.28, Florida Statutes, and its immunity "must be construed more broadly [than municipalities']" and, "therefore, affected the State and counties differently than it did municipalities." 908 So. 2d 459, 477-478 (Fla. 2005). Pinellas County must enjoy the same immunity from taxation as the state unless the Legislature waives sovereign immunity from taxation.

The Property Appraiser claims that policy reasons for immunity from ad valorem taxation are inapplicable here. However, the Property Appraiser misconstrues this Court's dicta in *Park-N-Shop Inc. v. Sparkman* as the rationale underpinning taxation immunity. Only after finding the county immune did this Court decline to "hold that it should assess taxes against its own land . . . ." 99 So. 2d 571, 574 (Fla. 1957). As addressed in the Amicus brief, significant policies <u>are</u> impacted by the imposition of a geographic restriction on a county's sovereignty within the state. "[T]he State enjoys sovereign immunity unless immunity is expressly waived. Thus, the Legislature's inaction does not constitute a waiver of sovereign immunity." *City of Key West v. Fla. Keys Cmty. College*, 81 So. 3d 494, 498 (Fla. 3d DCA 2012); *see also Am. Home Assur.,* 908 So. 2d at 471 (stating that waivers of

sovereign immunity must be legislative, clear and unequivocal, strictly construed, and not inferred or implied.) Only the Legislature is empowered to limit immunity and it has not done so.

B. Statewide sovereign immunity from taxation does not erode the sovereignty of any other political subdivision of the state.

Pinellas County's immunity from ad valorem taxation within Pasco County does not erode Pasco's sovereignty any more than the state's immunity erodes the sovereignty of its political subdivisions. Although utility fees are distinguishable from taxes, the immunity considerations in C*ity of Key West* were similar to those asserted here. There, a state college asserted immunity from the city's stormwater utility fee adopted pursuant to a Florida statute expressly authorizing local governments to adopt such fees. C*ity of Key West*, 81 So. 3d at 497. The court rejected the city's contention that the college was subject to the fee stating, "[b]ecause Chapter 403, which specifically relates to stormwater utility fees, does not expressly waive sovereign immunity for stormwater utility fees, it is clear that the State has not waived sovereign immunity in Chapter 403." *Id.* at 498. Similarly, section 125.016, Florida Statutes, authorizing counties to levy ad valorem tax "upon all property in the

county" cannot serve as the basis to tax counties, or any other immune entity, absent an express waiver of sovereign immunity. Ironically, if section 125.016 waives sovereign immunity, Pasco County's property would be subject to taxation within Pasco. Instead, each county has equal intrastate sovereignty and statutory authority to impose tax only upon entities that are not immune.

Although the Property Appraiser cites to federal cases to argue that the sovereignty of Pinellas County must yield to the sovereignty of Pasco County, such cases deal with distinctly different types of governmental entities and rely upon issues of federalism and federal powers not applicable here. "[T]he Florida Constitution sets forth the structure of state government . . . ." *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 670 (Fla. 2010). Therefore, the Equal Sovereignty Principle of *Shelby Cnty. v. Holder*, is inapplicable. *Shelby County* involved a challenge to the Voting Rights Act which required some states to obtain preclearance from federal authorities and relied upon the limited power of the federal government and reserved state powers. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013). Those federal issues are not applicable here; this case does not involve disparate treatment of Florida counties, or the

purchase of land outside of Florida. Given the legislative intent of statewide uniformity of ad valorem taxation, a decision affecting one property appraiser can, and usually does, affect each property appraiser throughout the state. §§ 195.0012, 195.027, Fla. Stat. (2021); *Dep't. of Revenue v. Ford*, 438 So. 2d 798, 800 (Fla. 1983). A reversal of the Second District preserves sovereign immunity for every Florida county when it owns property in another.

C. The taxability of foreign nations is irrelevant to Florida counties' intrastate sovereign immunity.

The interface between foreign nations and domestic law within the United States is primarily the subject of international law implemented through the federal treaty powers under the U.S. Constitution and congressional legislative action to implement such international law principles. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 111, 113 (Am. Law Inst. 1987). Despite this, the Property Appraiser seeks to draw inferences and analogies to the effects of these dramatically distinguishable principles to the inner workings of Florida constitutional and statutory law within the bounds of Florida. In attempting to connect these disparate frameworks, the Property Appraiser quotes large portions of *Cayuga*

Indian Nation of N.Y. v. Seneca Cnty., 978 F.3d 829 (2d Cir. 2020), to support the proposition that, "[p]roperty owned by foreign nations is subject to taxation absent treaty." (A.30). Reliance on this case – particularly the quoted dicta – is misplaced.

D. The taxability of Native American tribes is irrelevant to Florida counties' intrastate immunity.

Tribal immunity is only similar to Florida intrastate sovereign immunity in that it is subject to legislative limitation. See *Id.*, citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (stating, "we adhere to the settled principle that 'it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.'") The principal holding of *Cayuga* was that while Seneca County New York, could assess real property taxes against the Indian Nation, the county was unable to bring suit to enforce the tax lien. *Cayuga,* 978 F.3d at 841. Immunity prevented foreclosure and the court found it was not, "free to alter this legal analysis based on Seneca County's dark predictions that . . . tribes will 'buy large swaths of property within the County,' and the County, in turn, will be left remediless if and when those tribes refuse to pay property taxes." *Id.* at 842. While Seneca argued similar policy

concerns as the Property Appraiser here, the court recognized that the U.S. Supreme Court had rejected similar concerns stating, "that the State could, among other things, enter into an agreement with the tribe 'to adopt a mutually satisfactory regime for the collection of this sort of tax . . . .' And if that failed, the Court continued, [the state] could 'of course seek appropriate legislation from Congress.'" *Id.*, *citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). As the U.S. Supreme Court has recognized, as "domestic dependent nations," federally recognized tribes possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan*, 572 U.S. at 788. Should this Court be inclined to draw any inference or analogy from this body of law, it should be restricted to the principle that waiver of immunity is a legislative function. "Courts must be cautious about drawing lines in areas best suited for legislative action." *Manatee Cnty.,* 365 So. 2d at 148.

E. Although tax immunity is a subset of sovereign immunity, eminent domain and tort law evidence that sovereignty is not limited to a County's geographic boundaries.

Eminent domain is a delegated sovereign power which, subject

to legislative restriction, counties are authorized to exercise outside their geographic boundaries within the state. § 127.01(2), Fla. Stat. (2021). Therefore, Pinellas County is statutorily authorized to condemn property in Pasco County through eminent domain. Moreover, as more fully addressed in the Amicus brief, the legislative limited waiver of sovereign immunity in tort contains no geographic limitation within the state. § 768.28, Fla. Stat. (2021). Contrary to this, applying the Second District's reasoning, if a Property Appraiser employee negligently caused an accident in Pasco with a Pinellas County vehicle, which in turn struck another vehicle, the Property Appraiser would have sovereign immunity, but Pinellas would not, because "Pinellas and Pasco cannot both be sovereign on the same matter in the same place." *Joiner*, 279 So. 3d at 866.

II. LEASEHOLD INTERESTS ON COUNTY-OWNED PROPERTY MAY BE SUBJECT TO AD VALOREM TAXATION.

Pinellas does not dispute that non-exempt leasehold interests on county owned property can be subject to ad valorem taxation. However, the Property Appraiser's reliance on the "function by utilization" test set forth in 1974 in *Straugh v. Camp,* 293 So. 2d

689 (Fla. 1974) to assert the taxability of the Subject Property is misplaced. (R.B. p. 49). *Straugh* is one of numerous cases relating to the taxability of leasehold interests on Santa Rosa Island. This body of cases demonstrates not only that more than one Florida county owns real property outside its geographic borders, but also establishes that ad valorem taxes can be imposed on non-government lessees of county owned property. *Accardo v. Brown*, 139 So. 3d 848 (Fla. 2014). The equitable owner analysis determines not whether fee interest in the property is taxable, but whether the leasehold is.

In *Accardo*, this Court addressed the taxability of certain leasehold interests on properties owned by Escambia County on Navarre Beach in Santa Rosa County. *Id.* at 850 (Fla. 2014). The land at issue in *Accardo* was conveyed to Escambia County then leased to Santa Rosa County and further leased to private entities for development purposes. *Accardo v. Brown*, 63 So. 3d 798, 799 (Fla. 1st DCA 2011), *aff'd*, 139 So. 3d 848 (Fla. 2014). Lessees argued Escambia County was immune from taxation and the court stated, "[w]hether Escambia County is immune from taxation has no bearing on this issue . . . ." *Id.* at 801. This Court concluded

"that the taxpayers are the equitable owners of the real property at issue" and that "for ad valorem tax purposes, the 'owner' of the property is not a governmental entity." *Accardo,* 139 So. 3d at 857. At the time it decided *Accardo*, this Court also decided a related case regarding improvements on leaseholds located in Escambia County and acquired by the county in like manner. *Id.* at 858. In *1108 Ariola, LLC v. Jones*, this Court determined that the leaseholders were the equitable owners of the improvements that were subject to ad valorem taxation. 139 So. 3d 857, 858 (Fla. 2014). While this body of law supports the taxability of non-exempt leaseholds on government owned property, it does not support the power to tax an immune government.

Although section 196.199(2), Florida Statutes, sets forth when leasehold interests on property owned by governmental entities but used by nongovernmental lessees are exempt from taxation, this provision has been found not to affect the underlying fee holder's immunity from ad valorem taxation. *See Markham v. Broward Cnty.*, 825 So. 2d 472, 473 (Fla. 4th DCA 2002) (rejecting the appraiser's argument that Chapter 196 waived the County's immunity when the property was leased for non-governmental

purposes.) Moreover, section 196.001, Florida Statutes, has been found to "evidence[] the legislative intent that, unless expressly exempted, the holders of leases of publicly-owned land shall bear the same tax burden as private property owners who devote their land to the same uses." *Walden v. Hillsborough Cnty. Aviation Auth.*, 375 So. 2d 283, 285 (Fla. 1979) (emphasis added). As *Capital City Country Club v. Tucker* demonstrates, not all governmental entities are treated the same regarding ad valorem exemptions, noting in that case, "it is a municipality which owns the property rather than some other governmental entity." 613 So. 2d 448, 450 (Fla. 1993); *see also Am. Home Assur.* 908 So. 2d at 477, (distinguishing between state and municipal immunities).

Municipalities, unlike counties and other constitutional political subdivisions, do not enjoy the state's constitutional sovereign immunity, but rather have only been granted exemptions from taxation by statute. "[A city's freedom from taxation] is an 'exemption' only, not an 'immunity' from taxation . . . . The state and its political subdivisions, like a county, are immune from taxation since there is no power to tax them." *Dickinson* 325 So. 2d at 3 (internal quotations omitted).

CONCLUSION

Sovereign immunity is a critical and fundamental element of Florida governmental law. Constitutional political subdivisions of the State of Florida are imbued with the state's sovereign immunity unless waived by the Florida Legislature. The majority below erred in creating a sweeping novel limitation on Florida counties' sovereign immunity. For the reasons stated by Pinellas County, the Amici, and by Judge Black in his dissent below, Pinellas County respectfully asks this Court to answer the certified question in the affirmative, or the suggested rephrased question in the negative, and reverse the opinion below. Should this Court instead agree with the Second District, rather than allowing the legislature to craft any such limitation, this Court should expressly restrict its geographic limitation on sovereign immunity to the issue of ad valorem taxation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 25, 2022, I filed a copy of the foregoing through the Florida Courts E-Filing Portal, which causes electronic service to all counsel of record, including:

Loren E. Levy, Esq.
1828 Riggins Road
Tallahassee, Florida 32308-4885
(850)-219-0220
eservice@levylawtax.com
gsmith@levylawtax.com
Attorney for Respondent, Pasco County Property Appraiser

Edward G. Guedes, Esq.
2800 Ponce de Leon Blvd.
Suite 1200
Coral Gables, Florida 33134
(305) 854-0800
eguedes@wsh-law.com
szavala@wsh-law.com
Attorney for Amicus, Fla. Assoc. of County Attorneys

/s/ Christy Donovan Pemberton
CHRISTY DONOVAN PEMBERTON
Managing Assistant County Attorney
Florida Bar No.: 0046183
cpemberton@pinellascounty.org
eservice@pinellascounty.org
Pinellas County Attorney's Office
315 Court Street, 6th Floor
Clearwater, Florida 33756
Phone: 727-464-3354
Fax: 727-464-4147
Attorney for Petitioner, Pinellas County

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 2,905 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size and type face requirements of Rule 9.045, Florida Rules of Appellate Procedure by using Bookman Old Style 14-point font.

/s/ Christy Donovan Pemberton
CHRISTY DONOVAN PEMBERTON
Florida Bar No.: 0046183