IN THE SUPREME COURT OF FLORIDA

NORTH PORT ROAD & DRAINAGE DISTRICT, a dependent special district of the State of Florida

Petitioner,

v.

WEST VILLAGES IMPROVEMENT DISTRICT, an independent special district of the State of Florida,

Respondent.

Case No.: SC10-1220

Lower Tribunal No.: 2D09-2221

SCHOOL BOARD OF SARASOTA COUNTY'S AMICUS BRIEF IN SUPPORT OF RESPONDENT WEST VILLAGES IMPROVEMENT DISTRICT

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STATEMENT OF IDENTITY OF AMICUS CURIAE

The School Board of Sarasota County, Florida ("School Board") is the governing body of the Sarasota County School District. By constitutional mandate, the School Board operates, controls, and supervises all free public schools within the Sarasota County School District. See art. IX, § 4, Fla. Const.

The School Board owns approximately 1,924 acres of land, of which approximately 626 acres are located within the City of North Port. Petitioner North Port Road & Drainage District, together with its sister dependent districts, North Port Fire Rescue District and the North Port Solid Waste District, as authorized by the City of North Port, have levied non-ad valorem assessments against the real property owned by the School Board within the City of North Port. The 2008 assessments totaled $445,051.35, and the 2009 assessments totaled $616,840.36.

The School Board has sued the City of North Port and these dependent districts challenging these assessments. That lawsuit is currently pending before the Twelfth Judicial Circuit Court in Sarasota County. See School Board of Sarasota County, Florida v. City of North Port, et al., 2008-CA-20542-NC.

The West Villages case pending before this Court potentially could have far reaching consequences on the School Board's litigation against the City of North

Port and on the School Board's budget. Those consequences could have substantial negative ramifications on education within Sarasota County (and other school districts as well). Unlike most local governments, the School Board is legislatively restricted in its authority to impose additional ad valorem millage (taxation). A new requirement that the School Board pay taxes masquerading as non-ad valorem assessments necessarily will reduce the funds that otherwise would be used to support the classroom.

Currently, the City of North Port, through its dependent districts, is the only municipality within Sarasota County that has attempted to levy these purported assessments; the School Board, however, owns land within two other municipalities within the county, and Sarasota County is a charter county. Thus, if this Court were to permit the imposition of non-ad valorem assessments by a local government on land owned by sovereignly immune governments without an express legislative waiver, the School Board will be subject to an indeterminate amount for these so-called assessments.

SUMMARY OF THE ARGUMENT

Home rule authority did not bestow on municipalities the power to waive sovereign immunity. This Court has held that nothing in the 1968 revisions to Florida's Constitution or the Municipal Home Rule Powers Act impacted this

Court's existing precedent on sovereign immunity. Quite simply, home rule does not grant municipalities any authority to waive the State's sovereignty. The City of North Port's attempt, through its dependent districts, to impose non-ad valorem assessments, violates the core tenets of sovereign immunity, including the protection of the public treasury and the orderly administration of government. Florida's Legislature has not expressly waived sovereign immunity to permit North Port the ability to impose these non-ad valorem assessments; thus, the assessments against government property should be stricken.

STANDARD OF REVIEW

The School Board agrees that the appropriate standard of review is de novo. See City of Hollywood v. Mulligan, 934 So. 2d 1238, 1241 (Fla. 2006); Linn v. Fossum, 946 So. 2d 1032, 1036 (Fla. 2006).

ARGUMENT

"The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders." Article IX, §1(a), Fla. Const. Florida's Constitution also provides that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools . . . ." Id.

While the City of North Port is providing important but routine governmental services through these non-ad valorem assessments – instead of through traditional ad valorem millage – such services do not constitute constitutionally mandated paramount duties or fundamental values of the State, like the provision of a high quality education to our children.

Sovereign immunity remains today a compelling and necessary doctrine that preserves the public treasury and promotes the orderly administration of government. North Port's assessments threaten these long-standing tenets. In the case of school districts across Florida, these assessments also interfere with the Legislature's regulation and duty to provide uniformity in public education.

I. Municipalities are powerless to impose charges against governments that enjoy sovereign immunity, regardless of whether denominated as "taxes" or "special assessments."

Absent express legislative waiver, the state and its agencies enjoy absolute sovereign immunity. See Circuit Court of Twelfth Judicial Circuit v Dep't of Natural Resources, 339 So. 2d 1113, 1114-15 (Fla. 1976). This Court has expressly held that school boards enjoy sovereign immunity. See Canaveral Port Authority v. Dep't of Revenue, 690 So. 2d 1226, 1228 (Fla. 1996); Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975). Importantly for this case, ***nothing*** in the adoption of the 1968 Constitution revisions waived or otherwise eroded the

protection afforded by sovereign immunity. See Dickinson, 325 So. 2d at 3; Orlando v. Broward County, 920 So. 2d 54, 57 (Fla. 4th DCA 2005).

Sovereign immunity precludes municipalities from taxing immune governments. This Court has reminded – after the 1968 revisions – that sovereign immunity includes protections against ad valorem taxation, see Canaveral Port Authority, 690 So. 2d at 1228, and a consumption tax on utilities, see Dickinson, 325 So. 2d at 1, 4, among other things. As explained, sovereign immunity promotes a more orderly and logical approach to intergovernmental finance. See Canaveral Port Authority, 690 So. 2d at 1227-28; Dickinson, 325 So. 2d at 4.

A. The historical justifications for sovereign immunity.

Sovereign immunity "has been a fundamental tenet of Anglo-American jurisprudence for centuries." American Home Assurance Co. v. National R.R. Passenger Corp., 908 So. 2d 459, 471 (Fla. 2005). Sovereign immunity was part of the English common law when Florida was founded, which was codified into Florida law by virtue of section 2.01, Florida Statutes. See id. Three important policy considerations justify sovereign immunity: separation of powers; protection of the public treasury; and the orderly administration of government. See id.

These policy considerations remain as valid today as they have been in the previous centuries. "There are compelling policy reasons for the doctrine in terms

of fiscal management and constitutional harmonization." Dickinson, 325 So. 2d at 4. Should sovereignly immune governments be subject to tax from municipalities, "the State [and other governments] would have no way to anticipate revenue needs or appropriate funds sufficient to meet those variant tax burdens." Id.

In the School Board's case, that problem is even more acute. School boards have little discretion to increase ad valorem millage; the Legislature substantially regulates this power. See Florida Dep't of Educ. v. Glasser, 622 So. 2d 944, 946 (Fla. 1993); §§ 1011.62(4), (5), 1011.71, Fla. Stats. The School Board cannot just raise taxes to cover the new expense of a municipality's, or many municipalities', decision to enact a wide variety of assessments. North Port's dependent districts' 2009 annual assessment of School Board land alone totaled over $600,000.[1]

If the Court concludes this assessment is valid, the School Board, and some or all the school boards in Florida, could see many other local governments follow North Port's lead and impose millions of dollars of additional expenses on school boards, which boards would have no mechanism themselves to raise the additional revenue necessary to pay these charges. Instead, these expenses would be paid

[1] Currently, only North Port, through its dependent districts, imposes non-ad valorem assessments on School Board land. The School Board owns land in two other municipalities – i.e., the City of Sarasota and the City of Venice. Sarasota County is a charter county, and it may claim authority under the same "home rule" theory to impose assessments on all of the School Board's land in the county.

from general revenue, making certain even fewer dollars would be available for school boards to meet the "paramount" duty of providing an adequate education to the children of this State.

More, the constitution commands that a "uniform system" of public schools be maintained. If the local governments of some school districts, but not others, choose to levy assessments, it could create a situation where, because of the disparity in expenditures forced by these assessments and the resulting reduction in funds available to some school boards to actually operate their schools, that uniformity could be imperiled. Perhaps this is why, as is discussed infra at section II, the Legislature has seen fit to grant Florida's school boards an exemption from paying special assessments even were it to ever specifically waive immunity.

B. Immunity differs from exemption.

Sovereign immunity should not be confused with exemption. "Exemption presupposes the existence of a power to tax whereas immunity connotes the absence of that power. The state and its political subdivisions . . . are immune from taxation since there is no power to tax them." Dickinson, 325 So. 2d at 3 (internal citations omitted). The fact that the Legislature sometimes enacts statutes identifying that governmental lands are "exempt" does not alter immunity from taxation. See Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571, 573-74 (Fla. 1958).

This is so because immunity results from the "fundamentals of government" and not any statutory or constitutional provision. See Alford v. State, 107 So. 2d 27, 29 (Fla. 1958).

C. North Port's arguments rest entirely on a flawed proposition.

In an effort to end run sovereign immunity, North Port through its dependent special districts are attempting to do indirectly that which they cannot do directly – tax sovereignly immune governments to fund North Port governmental services – by labeling the tax a "special assessment." The services provided by the dependent districts are normal services provided by municipalities; road, drainage, fire, and ambulance services.[2] As this Court previously has recognized, municipalities from time to time try to claim various charges are fees and not taxes, even though in reality they are taxes. See State v. City of Port Orange, 650 So. 2d 1, 4 (Fla. 1994) (concluding transportation utility fee in reality was an unauthorized tax).

North Port's main argument – and that of amicus League of Cities – rests upon the contention that the 1968 revision to Florida's constitution followed by the 1973 Municipal Home Rule Powers Act[3] granted municipalities broad home rule authority; thus, municipalities such as North Port may now impose these

[2] The Fire Rescue District is not a party here but is in the School Board's lawsuit.

assessments on sovereignly immune governments ***unless*** specifically prohibited from doing so by the Legislature. See I.B. *passim*; Amicus League Brief *passim*. North Port advocates a fundamental and whole-scale revision to the sovereign immunity doctrine, from a paradigm where the Legislature must expressly waive immunity to a paradigm where the Legislature must act to prevent a municipality from waiving the sovereign immunity of other governments. In other words, North Port advocates that it has the power under home rule to waive the sovereign immunity of the State of Florida and all sovereignly immune governments. North Port and the League of Cities simply are wrong; the advent of home rule authority did ***not*** grant municipalities any authority to waive sovereign immunity.

This Court previously has rejected the argument that the revisions to the 1968 Constitution eroded sovereign immunity in any way or gave to municipalities the power to waive sovereign immunity. This Court has specifically held that the pre-1968 Constitution precedent on sovereign immunity continued to be controlling under the 1968 Constitution "since the principle of immunity is not constitutionally dependent." Dickinson, 325 So. 2d at 3, n.6. Continuing, this Court then held that nothing in the 1968 Constitution or the Municipal Home Rule

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[3]Chapter 73-129, Laws of Florida; codified in chapter 166, Florida Statutes.

Powers Act waived sovereign immunity from municipal taxation. See id. at 3.[4]

North Port's and amicus League of Cities' reliance on "home rule authority" is an insufficient basis from which it may lawfully impose any tax or assessment on a sovereignly immune government. Whatever authority municipalities possess through home rule, such authority does not affect the sovereign immunity enjoyed by the School Board. Unless a municipality can point to a law that expressly and unequivocally waives sovereign immunity, such municipality may not impose any assessment on sovereignly immune governments. Here, North Port has not identified any such statutes, nor can it, as no such statute exists.

D. Municipalities may not impose non-ad valorem assessments on sovereignly immune governments.

Now that North Port's and amicus League of Cities' main argument has been disproven, the balance of their arguments fall. For example, amicus League of Cities contends that the pre-1968 Constitution precedent must be read with the "home rule concepts unleashed by the 1968 constitutional revision" in mind, and such pre-1968 precedent is "fundamentally suspect and of minimal precedential

[4] Although not reached by this Court in the light of its holding that sovereign immunity remained unaffected by the 1968 Constitution revisions, this Court noted that if the position advanced by the cities were correct, then portions of the Municipal Home Rule Powers Act likely would have been constitutionally invalid because the title of the Act gave no indication that the State was relinquishing its immunity from tax. See Dickinson, 325 So. 2d at 4, n.8.

value[.]" Amicus League of Cities Br. at 7. Yet, as noted above, this Court has already held that the pre-1968 Constitution decisions on sovereign immunity remain controlling, as the revisions to the 1968 Constitution did not impact sovereign immunity at all. See Dickinson, 375 So. 2d at 3, n.6. The same holds true of North Port's and Amicus League of Cities' frontal assault on this Court's decision in Blake v. City of Tampa, 156 So. 97 (Fla. 1934), which held that the Legislature must expressly authorize a municipality to impose an assessment on a local school district's property before it may do so. Blake, 156 So. at 100-101. As the Second District noted in the decision under review, Blake continues to be good law for this point. See West Villages Improvement District v. North Port Road and Drainage District, 36 So. 3d 837, 841 (Fla. 2d DCA 2010).

North Port's non-ad valorem assessments violate a core tenet of sovereign immunity, the protection of the public treasury. See American Home Assurance Co., 908 So. 2d at 471. There is no qualitative difference between funds taken from the public treasury to pay taxes and funds taken to pay non-ad valorem assessments; both require expenditures of public funds from the public treasury to pay another government. None of the cases involving sovereign immunity limit the doctrine to taxes only; instead the cases all talk in terms of protecting the ***public treasury*** from indeterminate expenditures. The protections provided by

sovereign immunity would be virtually eliminated – and render one government liable for indeterminate expenditures to other governments – if municipalities successfully impose through non-ad valorem assessments against sovereignly immune governments the requirement to pay for routine government services.

North Port's assessments also violate another core tenet of the sovereign immunity doctrine, the orderly administration of government. See American Home Assurance Co., 908 So. 2d at 471. Under North Port's construction, local governments could substantially shift the funding of major government services away from ad valorem taxation to non-ad valorem assessments, resulting in sovereignly immune governments being required to pay such assessments. In the case of the School Board, this might result in at least three separate municipalities and Sarasota County seeking to impose such non-ad valorem assessments. Due to legislatively imposed timing requirements for the adoption of the annual millage rate, the School Board may not even know what the assessments are prior to the School Board finalizing what little discretion it does have to set the millage rate. This uncertainly undermines the orderly administration of government because the School Board may be required to reduce funds designated to support the classroom in order to pay those assessments. This is the precise danger this Court warned about when it prophetically wrote that without sovereign immunity governments

"would have no way to anticipate revenue needs or appropriate funds sufficient to meet those variant tax burdens." Dickinson, 325 So. 2d at 4.

North Port falls back on the truism that the law draws a distinction between a tax and a special assessment. See Collier County v. State, 733 So. 2d 1012, 1014 (Fla. 1999). While true, it does not address the long-standing doctrine of sovereign immunity. North Port seems to neglect the fact that sovereign immunity is derived from the common law and not any statute or constitutional provision. See Dickinson, 325 So. 2d at 3, n.6. Thus, North Port's attempt to finely splice the nomenclature of its revenue sources is meritless for sovereign immunity purposes.

North Port also cites Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995), for the alleged proposition that even if an entity is exempt from ad valorem taxation it still may be subject to non-ad valorem assessments. See I.B. at 21. That case is wholly distinguishable and not analogous to this case.

The "entities" in question in Sarasota County were various churches or other religious organizations, not governments. See 667 So. 2d at 182. Thus, there was no moment for the Court to discuss sovereign immunity; in fact, the Court did not mention sovereign immunity at all in that decision. Moreover, Florida's Constitution expressly provides that the Legislature may by general law exempt property owned by religious organizations from taxation, which the Legislature

had affirmatively provided for purposes of taxation but not from assessments. See art. VII, §3(a), Fla. Const.; §196.192(1), Fla. Stat. (1993). Importantly this statute and constitutional provision in no way affected the existence of sovereign immunity. Nothing in that case informs on the separate issue of sovereign immunity, and thus that case is inapplicable here.

E. Only the Legislature by express enactment may waive sovereign immunity.

This Court has articulated the test to find a waiver of sovereign immunity. See American Home Assurance Co., 908 So. 2d at 471-72. Specifically, this Court has held that "[o]nly the Legislature has authority to enact a general law that waives the state's sovereign immunity." Id. at 471. "Further, any waiver of sovereign immunity must be clear and unequivocal." Id. at 472. "In interpreting such legislative waivers of sovereign immunity, this Court has stated that it must strictly construe the waiver. Moreover, waiver will not be found as a product of inference or implication." Id.

In this case, North Port points to no statutes enacted by the Legislature that purport to waive sovereign immunity. Nor can North Port, as no such statutes exist. Instead, under the already rejected home rule contention, North Port and amicus League of Cities would turn the sovereign immunity doctrine on its head

and require the Legislature to affirmatively prevent a municipality from imposing non-ad valorem assessments in order to preserve sovereign immunity. This position contravenes this Court's precedent on sovereign immunity.

F. The Gainesville trilogy demonstrates the importance of sovereign immunity.

North Port complains about the Gainesville trilogy of cases, those cases' reliance on Blake, and the Second District's citation to those cases in the decision under review. See I.B. at 27-29. North Port's complaints are misplaced.

The Gainesville trilogy of cases resolved a multi-year fight between the City of Gainesville and the Florida Department of Transportation ("FDOT") concerning stormwater charges that Gainesville sought to impose on FDOT. Ultimately, in the third Gainesville decision, the court concluded that the FDOT was sovereignly immune from having to pay such charges. See City of Gainesville v State, 920 So. 2d 53, 54 (Fla. 1st DCA 2005) ("Gainesville III") ("Waiver of sovereign immunity will not be implied.").

The procedural posture of the Gainesville trilogy of cases is highly unusual, and understanding the procedural posture helps understand the decisions. Initially, the city filed a declaratory judgment proceeding claiming that it was permitted to assess fees on the FDOT's property pursuant to a special act and certain statutes.

The court in City of Gainesville v. State, 778 So. 2d 519 (Fla. 1st DCA 2001) ("Gainesville I"), reviewed the trial court's grant of a motion to dismiss that declaratory judgment lawsuit. While sovereign immunity was discussed, because of the procedural posture of the case, the court could not determine the correctness of that defense and remanded for a fuller development of facts. See id. at 530-31. The court did note that the city did not object to the rule of law articulated in Blake that special assessments on state property must expressly be authorized by state statute to be valid. See id. at 521-22.

Instead of proceeding in that lawsuit, the city dismissed it and filed a bond validation suit trying to validate bonds it was to issue that pledged the revenues from the stormwater fees. See City of Gainesville v. State, 863 So. 2d 138, 141, 143 (Fla. 2003) ("Gainesville II"). The Florida Supreme Court on direct appeal in that bond validation case evaluated eight factors and concluded that the charge in that case was a user fee and not a special assessment. See id. at 145. The court also explained that, due to the limited review afforded in bond validation suits, the court would not address FDOT's sovereign immunity claim; instead, the court held that FDOT was "free to assert those arguments in another forum." Id. at 148. This Court cited Blake and Gainesville I for the proposition that absent an express legislative waiver, the city could not impose a special assessment on the FDOT.

See id. at 142, n.3, 144. This Court did not question this rule of law or the continued viability of Blake. See Gainesville II, 863 So. 2d at 142, n.3, 144.

The court's decision in Gainesville III is the forum where FDOT's claim for sovereign immunity was definitively addressed. See Gainesville III, 920 So. 2d at 53-54. The court there held that FDOT was sovereignly immune from having to pay the stormwater charges as there had not been a clear and unequivocal waiver by the Legislature and because the FDOT had not entered into any contracts agreeing to pay those charge. See id. at 54

Thus, the Gainesville trilogy reminds that sovereign immunity precludes a municipality from imposing special assessments on an immune government where there is no express legislative waiver. Contrary to North Port's criticism that this Court and the First District did not consider home rule authority in these cases, see I.B. 28-29, these courts did not need to do so because the 1968 revisions to Florida's Constitution did not impact sovereign immunity at all. See Dickinson, 325 So. 2d at 3, n.6.

II. Even if this Court concludes there has been a waiver of sovereign immunity, there are specific statutes precluding a school board's obligation to pay the special assessments.

Even if the School Board's sovereign immunity has been waived by virtue of municipal home rule power, which no such power to do so exists, the School Board would be statutorily exempt from having to pay special assessments by virtue of sections 1013.371 and 1013.51, Florida Statutes. Chapter 1013 applies to public education in Florida; thus the exemptions contained within this chapter are limited to educational boards, including school boards, and do not apply to other governmental entities.

The Second District has held that sections 1013.371 and 1013.51 "generally speaking . . . protect local school districts from being required to pay special assessments for improvements made by governmental entities without the school district's consent or approval." City of Clearwater v. School Board of Pinellas County, 905 So. 2d 1051, 1055 (Fla. 2d DCA 2005).[5] Moreover, on account of these statutes, school districts are not required to pay impact fees or service availability fees. See id. at 1055. This is so even though a municipality had statutory authority to fund a stormwater management program through special assessments or user fees, because a school board's specific exemption from paying special assessments contained in sections 1013.371 and 1013.51 took priority over

[5] The Second District actually construed sections 235.26 and 235.34, Florida Statutes (1999). The court noted that in 2002 these statutes were re-codified as sections 1013.371 and 1013.51, respectively. See id. at 1053 n.1. There have been

the municipality's general statutory authorization. See id. at 1056.

It remains only to note then that the use of the word "exemption" in these statutes in no way undermines the viability of sovereign immunity protection. First, as this Court previously noted, sometimes the Legislature uses "exemption" where immunity exists. See Park-N-Shop, Inc., 99 So. 2d at 573-74. Second, should the Legislature in the future seek to waive sovereign immunity to governments, these statutes would provide exemption to the School Board from having to pay those assessments (unless, of course, the Legislature repealed sections 1013.371 and 1013.51).

The School Board addresses these statutes that are unique to school boards in Florida because of the School Board's existing lawsuit. If this Court concludes that sovereign immunity has been waived for all governments, the School Board requests, at a minimum, that this Court include language in its opinion that makes clear that the lower courts are not precluded from the consideration of these statutes in the School Board's lawsuit.

CONCLUSION

This Court should approve the decision under review. If necessary, this

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no substantive changes to the relevant portions construed.

Court should address sovereign immunity and hold that municipalities and their dependent special districts may not impose non-ad valorem assessments against the real property owned by sovereignly immune governments such as the School Board, in the absence of express legislative waiver. Here, there is no such express legislative waiver. Further, if necessary, this Court should hold that the statutes unique to school boards preclude municipalities from imposing non-ad valorem assessments on real property owned by school boards or, at a minimum, include language in its opinion that would not preclude the lower courts' consideration of this issue in the School Board's existing lawsuit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I FURTHER CERTIFY, this 1st day of February, 2011, that the type size and style used throughout this brief is Times New Roman 14-point font, which is compliant with Florida Rule of Appellate Procedure 9.210(a)(2).

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