

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not implicate any of the House principles.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

The City of Jacksonville and Duval County merged in 1968¹, creating a single consolidated government entity (City) governing all of Duval County with the exception of the beach communities (Atlantic Beach, Neptune Beach and Jacksonville Beach) and Baldwin. The City government operates under a mayor as head of the administrative branch and a 19-member City Council as the legislative branch.

Municipal Home Rule Power

Florida's Constitution grants municipalities "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services ... except as otherwise provided by law."² The Municipal Home Rule Powers Act recognizes these same powers of municipalities, limited only when "expressly prohibited by law."³ Given this broad grant of home rule power, the courts have held that municipalities may exercise any power for a municipal purpose "except when expressly prohibited by law."⁴

Municipalities have long possessed both the power to execute contracts and the concomitant liability for their breach.⁵ In executing contracts, municipalities are presumed to be acting within the broad scope of their authority.⁶ In 2005, the Florida Supreme Court concluded that, absent an express prohibition in law, a municipal agency has inherent authority to contract with a private party and enter into an indemnification agreement as part of the contract, and may not invoke sovereign immunity to defeat its obligations under the contract.⁷

Sovereign Immunity and Contractual Indemnification Clauses

The doctrine of sovereign immunity provides that a sovereign cannot be sued without its own permission. The doctrine was a part of the English common law when the State of Florida was founded and has been adopted and codified by the Legislature. Florida law has enunciated three policy considerations that underpin the doctrine of sovereign immunity: (1) preservation of the constitutional principle of separation of powers; (2) protection of the public treasury; and (3) maintenance of the orderly administration of government.⁸

Article X, s. 13 of the Florida Constitution authorizes the Legislature to waive the state's sovereign immunity, specifically providing that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.". Thus, the courts have long held that only the Legislature has authority to enact a general law that waives the state's sovereign immunity,

¹ Ch. 67-1320, L.O.F.

² Art. VIII, § 2(b), Fla. Const.

³ § 166.021(1), Fla. Stat. (1997).

⁴ See, e.g., *City of Ocala v. Nye*, 608 So.2d 15, 16-17 & n. 3 (Fla.1992); *City of Boca Raton v. Gidman*, 440 So.2d 1277, 1280 (Fla.1983); see also *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 133 (Fla.1957) (noting that "[t]he modern city is in substantial measure a large business institution").

⁵ *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

and that any waiver must be strictly construed.⁹ Further, any waiver of sovereign immunity must be clear and unequivocal, and will not be found as a product of inference or implication.¹⁰

Pursuant to its constitutional authority, in 1973 the Legislature authorized a limited waiver of state sovereign immunity in tort for personal injury, wrongful death, and loss or injury of property through the enactment of s. 768.28, F.S.¹¹ Today, the state, counties, and municipalities are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances subject to statutory limitations on the amount of liability.¹² Section 768.28(1), F.S., provides in pertinent part:

In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or of any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Under this statute, immunity is waived for "liability for torts" caused by "the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment."¹³ Additionally, subsection (5) of the statute limits state liability to \$100,000 per claimant and \$200,000 per accident.¹⁴

American Home Assurance Co. v. Nat'l Railroad Passenger Corp.,

In July 2005, the Florida Supreme Court issued its decision in the case of *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005), in which the court considered whether an indemnification agreement made by a municipal agency, Kissimmee Utility Authority (KUA) with CSX Corporation, Inc. (CSX) was enforceable. The court concluded that the indemnification agreement was binding and enforceable, finding that a municipal agency like KUA has the inherent authority to contract with private parties and enter into an indemnification agreement as part of a contract with a private party and may not invoke sovereign immunity to defeat its obligations under the contract.

In order to improve access to a power plant, the KUA entered into a contract with CSX whereby CSX granted KUA license to build, use, and maintain a private road grade crossing over CSX's railroad tracts. In exchange for the license, KUA agreed to an indemnity provision in the contract under which KUA "assumes all liability for, and releases and agrees to defend, indemnify, protect and save [CSX] harmless" for all loss of or damage to property of CSX or third parties at the crossing or adjacent to it, all loss and damage on account of injury to or death of any person on the crossing, and all claims and liabilities for such loss and damage. The contractual obligation applied regardless of cause and even if the injury, death, or property damage is caused solely by the negligence of CSX. Further, the contractual obligation extended to "companies and other legal entities that control, are controlled by, are subsidiaries of, or are affiliated with [CSX], and their respective officers, agents and employees."

⁹ *Manatee County v. Town of Longboat Key*, 365 So.2d 143, 147 (Fla.1978).

¹⁰ *Rabideau v. State*, 409 So.2d 1045, 1046 (Fla.1982); *Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla.1958).

¹¹ See ch. 73-313, § 1, Laws of Fla.

¹² *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (Fla.1979).

¹³ § 768.28(1), Fla. Stat. (1997); *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).

¹⁴ § 768.28(5).

In finding the indemnification clause binding and enforceable, the court reasoned that, by its plain language, s. 768.28, F.S., applies only to "actions at law against the state or any of its agencies or subdivisions to recover damages in tort."¹⁵ The court noted that the indemnification provision at issue in the case was based on a contract between KUA and CSX. As such, the court concluded that the statutory provision governing tort recovery actions was not applicable, and that the contract between KUA and CSX was not controlled by the restrictions on the waiver of sovereign immunity found in s. 768.28, F.S.

Further, the court reasoned that KUA possessed the authority of the City of Kissimmee to enter into contracts for municipal services, including the contract with CSX that contained the indemnification clause and which ensured access to the power plant. The court stated that the parties in the case failed to identify any law prohibiting KUA from executing the contract containing the indemnification provision. In fact, the court found that although KUA did not need an express statutory grant of authority to execute the contract in light of its broad home rule powers, s. 163.01, F.S., grants specific authority to KUA to contract with private parties regarding electrical projects.¹⁶

The court concluded that the contract requiring the KUA to indemnify CSX was not controlled by statutory restrictions on the waiver of sovereign immunity and was binding and enforceable against KUA.

Effect of Proposed Changes

This bill amends the charter of the City of Jacksonville contained in ch. 92-341, L.O.F., to prohibit the City or any independent agency of the City from agreeing to waive sovereign immunity for tortious conduct of the City or of any such independent agency beyond the limitations of the legislative waiver of sovereign immunity established in section 768.28, F.S. The City charter defines "independent agencies" as the Duval County School Board, the Jacksonville Port Authority, the Jacksonville Transportation Authority, the Jacksonville Electric Authority, the Jacksonville Downtown Development Authority, and the Jacksonville Police and Fire Pension Board of Trustees.¹⁷ This provision of the bill appears to be consistent with existing general law regarding legislative waivers of sovereign immunity, the Florida Constitution which requires legislative waiver of sovereign immunity, and case law interpreting the constitutional requirement.

In addition, the bill provides that a contract of the City or any independent agency may not agree to indemnify, defend, or hold harmless another party for the tortious conduct of any party other than the city or the independent agency, respectively. Any contractual provision for an indebtedness or liability contracted for in violation of this provision is void and must be severed from the contract.

Lastly, the bill provides that it is effective upon becoming law, and does not contain explicit expression of a legislative intent to apply the provisions retroactively. It is a well-established rule of construction that, in the absence of clear legislative intent to the contrary, a law is presumed to act prospectively only.¹⁸ The basis for retrospective interpretation must be unequivocal and leave no doubt as the legislative intent.¹⁹ Therefore, the courts may consider the provisions of the bill applicable only to contracts entered into on or after this bill's effective date.

C. SECTION DIRECTORY:

¹⁵ § 768.28(1), Fla. Stat. (1997) [emphasis added]; see also *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So.2d 481, 486 (Fla.2001) (concluding that section 768.28 "applies only when the governmental entity is being sued in tort"; thus, limitations of section 768.28 did not apply to restrict award of damages against governmental entity for the erroneous issuance of a temporary injunction).

¹⁶ Section 163.01, F.S., expressly authorizes public agencies to contract with private parties regarding electrical projects.

¹⁷ ch. 92-341, L.O.F. (Art. 18, s. 18.07)

¹⁸ *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *State v. Zukerman-Vernon Corp.*, 354 So.2d 353 (Fla. 1977), *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977).

¹⁹ *Larson v. Independent Life & Acc. Ins. Co.*, 158 Fla. 623 (Fla. 1947).

Section 1. Amends the City of Jacksonville charter in ch. 92.341, L.O.F., prohibiting waiver of sovereign immunity and limiting the City's authority to execute certain contractual indemnification agreements.

Section 2. Provides that the bill is effective upon becoming a law.

II. NOTICE/REFERENDUM AND OTHER REQUIREMENTS

A. NOTICE PUBLISHED? Yes No

IF YES, WHEN? October 26, 2005

WHERE? Daily Record, Jacksonville, Duval County, Florida

B. REFERENDUM(S) REQUIRED? Yes No

IF YES, WHEN?

C. LOCAL BILL CERTIFICATION FILED? Yes, attached No

D. ECONOMIC IMPACT STATEMENT FILED? Yes, attached No

III. COMMENTS

A. CONSTITUTIONAL ISSUES: Article X, section 13 of the Florida Constitution provides that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Based upon this section, it may be argued that a general bill must be enacted, rather than a local bill, to limit the City's authority to contractually agree to indemnify third parties for the tortious conduct of any party other than the city or an independent agency of the City. On the other hand, the bill may be characterized not as a law regarding bringing suit against the state but as a law expressly limiting the City's inherent authority to contract.

B. RULE-MAKING AUTHORITY: Rule-making authority is not addressed in this local bill.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.