IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

CASE NO.: 4D18-0183
LOWER TRIBUNAL CASE NO.: 502013CA010144XXXXMB AH

CITY OF WEST PALM BEACH,
Appellant,
v.

THE SCHOOL BOARD OF PALM BEACH COUNTY,
Appellee,

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT, CITY OF WEST PALM BEACH

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PREFACE

For purposes of this Initial Brief, the City of West Palm Beach, Florida utilizes the following:

Appellant, City of West Palm Beach, is referred to as the "City."

Appellee, School Board of Palm Beach County, is referred to as the "School Board."

All references to the Record on Appeal (the "Record") will be in the form of (R.). The page numbers cited match the page numbers for both the paper record and the electronic PDF of the Record.

The lower tribunal from which this appeal arose shall be referred to as the "lower court," "lower tribunal," or "trial court."

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment (the "Final Judgment") entered after the trial court decided the parties' case-dispositive cross-motions for summary judgment concerning the applicability of the doctrine of sovereign immunity. (R. 842-44.) Specifically, below, in the School Board's Motion for Partial Summary Judgment, it contended that, pursuant to the doctrine of sovereign immunity, it is immune from suit for collection of the City's stormwater utility fees. (R. 421-42.) In the City's competing Motion for Partial Summary Judgment, it argued the opposite, contending that the School Board was not immune from suit pursuant to the doctrine of sovereign immunity. (R. 553-72.) Rather, the City contended that sovereign immunity did not protect the School Board from suit because the Florida Legislature, under the provisions of the "Florida Air and Water Pollution Control Act" ("FAWPCA") (i.e., Chapter 403, Florida Statutes), has expressed a clear, specific, and unequivocal intent to waive sovereign immunity for the collection of stormwater utility fees from government entities, like the School Board. (R. 553-72.)

The trial court, however, decided the sovereign immunity issue in the School Board's favor. More specifically, incorporated in the Final Judgment is the trial court's Order Granting the School Board's Motion for Partial Summary Judgment and Denying the City's Motion for Partial Summary Judgment (the "Order"). (R. 780-84, 842-44.) In the Final Judgment and Order, the trial court held that the

School Board enjoys sovereign immunity from suit by the City for non-payment of stormwater utility fees (notwithstanding the fact that the School Board is a direct beneficiary of the City's stormwater management system). (R. 842.)

On appeal, the City contests that conclusion, contending that the Florida Legislature did, in fact, express a clear, specific, unequivocal waiver of sovereign immunity by way of the FAWPCA's plain language (i.e., through the FAWPCA's definitions of "beneficiary" and "person," which includes government entities, like the School Board). Such a conclusion is required under Florida Supreme Court precedent wherein the court previously held that a similar statutory definition of a "person" (which included government entities) constituted a clear, specific, and unequivocal waiver of sovereign immunity by the Florida Legislature. Indeed, a contrary result is simply inequitable, as it would enable the School Board to directly benefit from the City's stormwater services without paying its fair share for said services because it's a sovereign.

Notably, not at issue before the trial court was whether the School Board is *exempt* from paying stormwater fees in the future. The matter below hinged only on whether the School Board enjoyed sovereign immunity from suit for collection of stormwater utility fees. Hence, any decision by this Court should rest squarely on whether there was, in fact, a waiver of sovereign immunity under Chapter 403, Florida Statutes, and not address whether the School Board (or any other

government entity) is exempt from paying such stormwater utility fees in the future.

I. "FAWPCA" – The Florida Legislature Mandates the Creation of Stormwater Management Programs and Provides the Mechanism for Funding Such Programs by Providing for Stormwater Utilities and Stormwater Utility Fees.

"Stormwater runoff may cause flooding and threatens water quality in urban areas." *City of Gainesville v. State* ("*Gainesville II*"), 863 So. 2d 138, 141 (Fla. 2003). "Therefore, stormwater must be collected, conveyed, treated, and disposed of." *Id.* To that end, "Florida law requires local governments to establish stormwater management programs." *Id.* (citing § 163.3202(2)(d), Fla. Stat. and § 403.0891, Fla. Stat.). Specifically, under the FAWPCA, the Florida Legislature has authorized the City to create stormwater utilities, § 403.0893(1), Fla. Stat., and to charge stormwater utility fees to the "beneficiaries" of the utility, § 403.031(17), Fla. Stat. Indeed, "[t]he purpose of these laws is to control flooding and to prevent pollution—the later being deemed by the Legislature as 'a menace to public health and welfare.'" *City of Key West v. Key West Gold Club Homeowners'*, 228 So. 3d 1150, 1152 (Fla. 3d DCA 2017) (quoting § 403.021(1), Fla. Stat.).

"To fund such [stormwater management] programs, local governments may '[c]reate one or more stormwater utilities and adopt stormwater utility fees sufficient to plan, construct, operate, and maintain stormwater management systems set out in the local program required pursuant to s. 403.0891(3).'"

Gainesville II, 863 So. 2d at 141 (quoting § 403.0893(1), Fla. Stat.) More specifically, section 403.0891, Florida Statutes, which is part of the FAWPCA, charges the City with the responsibility to develop and manage stormwater through stormwater management programs, stating: "The department, the water management districts, and local governments shall have the responsibility for the development of mutually compatible stormwater management programs." § 403.0891, Fla. Stat. Section 403.0893, Florida Statutes, then provides the City with the mechanism to manage and fund a stormwater management program, providing the following:

> In addition to any other funding mechanism legally available to local government to construct, operate, or maintain stormwater systems, a county or municipality may:
>
> (1) ***Create one or more stormwater utilities and adopt stormwater utility fees sufficient to plan, construct, operate, and maintain stormwater management systems*** set out in the local program required pursuant to s. 403.0891(3).

§ 403.0893, Fla. Stat. (emphasis added).

The FAWPCA defines "stormwater management system" as "a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system." § 403.031(16), Fla. Stat.

The Florida Legislature, by way of the FAWPCA's definition of "stormwater utility," provided the City with the means to fund its stormwater management program. Specifically, the FAWPCA defines "stormwater utility" as "the funding of a stormwater management program by assessing the cost of the program to the ***beneficiaries*** based on their relative contribution to its need. It is operated as a typical utility which bills services regularly, similar to water and wastewater services." § 403.031(17), Fla. Stat. (emphasis added).

Hence, pursuant to the plain language of the FAWPCA, the Florida Legislature has mandated that the City create stormwater management programs and stormwater utilities. To fund this mandate, the Florida Legislature expressly provided that the City is to charge stormwater utility fees to the "beneficiaries" of that utility.

II. The City Enacts Its "Stormwater Utility Code"

Pursuant to section 403.0893, the City has enacted City Ordinance No. 2611-93, establishing a "Stormwater Utility Code" to construct, reconstruct, improve, and extend the City's stormwater utility systems and establish rates, fees, and charges for the services and facilities provided by the system. (R. 182.) The City's stormwater facilities consist of a system of canals, storm sewers, flood protection and water control structures that ultimately collect and convey stormwater to the Lake Worth Lagoon. (R. 10.) The City's stormwater system comprises of approximately 14.8 miles of canals, 9,850 manholes, and 210 miles

of storm sewers. (R. 10.) The operation and maintenance of this system consists of cleaning and repairing catch basins, manholes, culverts, canals and ditches, as required, and the performance of street sweeping activities. (R. 10.)

Pursuant to section 403.031(17), the City enacted City Ordinance No. 2645-93, implementing a monthly stormwater utility fee for each equivalent residential unit ("ERU") on a property. (R. 182.) This ensures that a beneficiary of the stormwater utility system pays their relative contribution to its need of the City's stormwater utility program. (R. 182.) Section 90-163 of the City's Stormwater Utility Code defines an ERU, in part, as the average impervious area of residential developed property per dwelling unit located within the City. (R. 182.) The ERU applies to both residential and non-residential properties within the City. (R. 182.)

III. Stormwater Utility Fees are "User Fees" Chargeable to Government Entities.

Like water and electric fees, stormwater fees are considered "user fees." *Gainesville II*, 863 So. 2d at 145-46. Like any other user of services, government users are required to pay user fees. *See id.*; *see also City of Gainesville v. State* ("*Gainesville I*"), 778 So. 2d 519, 530 (Fla. 1st DCA 2001). The Second District specifically applied this law to stormwater fees, holding that school boards must pay stormwater user fees and are ***not*** exempt therefrom. *See City of Clearwater v. Sch. Bd. of Pinellas County*, 905 So. 2d 1051, 1056 (Fla. 2d DCA 2005) ("*Because school districts are not exempt from payment of user fees for traditional utility services, the circuit court erred in ruling that the School Board was exempt from*

paying a user fee imposed by the City for stormwater management services."). In this case, (and as provided in a footnote below) the fact that the City's stormwater utility fees is a valid "user fee" chargeable to the School Board is undisputed by the School Board. (R. 10.)

IV. A "Beneficiary" of a "Stormwater Utility" May be Charged a Stormwater Utility Fee

"A stormwater utility fee is a special type of user fee. User fees must be voluntary in the sense that a payer must be able to avoid the fee by declining the benefit." *Key West Gold Club Homeowners'*, 228 So. 3d at 1155. "The law is well established, however, that a property owner elects to pay a stormwater utility fee when it elects to discharge stormwater rather than retain it." *Id.*; *see also Gainesville II*, 863 So. 2d at 146 ("Properties that are either undeveloped or implement ways to retain all stormwater on site are exempted. Therefore, property owners can avoid the fee either by not developing the property or by implementing a system to retain stormwater on site.").

"They cannot however, elect to discharge stormwater runoff and also refuse to pay for the programs which the legislature has determined are necessary to mitigate the 'flooding, overdrainage, environmental degradation and water pollution' generated by the discharges." *Key West Gold Club Homeowners'*, 228 So. 3d at 1155 (quoting § 403.031(16), Fla. Stat.). This is because, "[l]ike similar statutes, the statute at issue [i.e., § 403.031(17)] authorizes stormwater utility fees to be paid based upon a ratepayer's contribution to the need for, *and benefit from*,

the stormwater utility." *Id.* (emphasis added) (citing § 403.031(17)). Indeed, following the enactment of section 403.031(17), "the Florida Supreme Court has held, 'beneficiaries' of a municipal stormwater utility 'can be charged'" a user fee for said utility services. *Id.* (quoting *Gainesville II*, 863 So. 2d at 145). Hence, a "beneficiary" of a stormwater management system "can be charged" and is liable for a "utility fee" related to its use of a city's stormwater management system. *See id.*

V. The School Board is a "Beneficiary" of the City's Stormwater Management Program.

It is undisputed that the School Board is a "beneficiary" of the City's stormwater management program. Specifically, it is undisputed that the City's stormwater management program directly benefits the following School Board properties:

a. 816 11th St. # D (Palmview Elementary)

b. 400 40th St. (Northboro Elementary)

c. 5115 47th Pl. N (Egret Lake Elementary)

d. 1800 N Australian Ave. (Roosevelt Middle)

e. 1725 Echo Lake Dr. (Bak Middle School of the Arts)

f. 1101 Golf Ave. # C (Westward Elementary)

g. 3777 N Jog Rd. (Jeaga) (Jeaga Middle)

h. 1220 L A Kirksey (Roosevelt Elementary)

i. 7101 S Olive Ave. (South Olive Elementary)

j. 825 Palmetto St. (Palmetto Elementary)

k. 3000 Parker Ave. (Belvedere Elementary)

l. 3630 Parke Ave. (Connistion Community Middle)

m. 5801 Parker Ave. (Palmetto Elementary)

n. 6901 Parker Ave. (Forest Hill High School)

o. 501 S Sapodilla Ave. (Alex W Dreyfoos Jr School of Arts)

p. 3505 Shenandoah Dr. (Bear Lakes Middle)

q. 3505 Shiloh Dr. (Palm Beach Lakes High School)

r. 2222 Spruce Ave. (Pleasant City Elementary)

s. 1601 N Tamarind Ave. (Palm Beach School Board)

t. 4111 N Terrace Dr. (Northmore Elementary)

(R. 614-44.) In fact, it remains undisputed, and was conceded by the School Board, that its "facilities rely on the City's Stormwater System for flood control and protection," and that the plugging of that system would "result in a loss of flood control and protection and increase both frequency and magnitude of flooding of School Board's properties." (R. 12.) Indeed, since the implementation of the City's stormwater management system, until on or about April 2012, the School Board voluntarily paid all amounts the City billed the School Board for the School Board Properties' relative contribution to its need of the City's stormwater management program. (R. 153, 183.)

VI. School Board Discontinues Payment for Stormwater Services

Notwithstanding the School Board's continued receipt of the benefits of the City's stormwater management program, the School Board notified the City, on or about May 18, 2012, of its intent to discontinue payment for said stormwater services. (R. 153.) This was based on the School Board's mere belief that it enjoyed sovereign immunity from suit for collection of the City's stormwater utility fees (and not that it was exempt from such user fees). (R. 153.) The School Board's notification to the City regarding such termination of payment (the "Termination Notice") was as follows:

> Enclosed please find a copy of the 3rd District Court of Appeal's recent decision in the *City of Key West v. Florida Keys Community College* case, which held that state entities enjoy sovereign immunity from liability for municipal stormwater fees.
>
> Based on information provided by the School District's utilities manager, the City of West Palm Beach has for a period of time been charging the School District stormwater utility fees as a part of its monthly water and sewer utility bill. Consistent with the holding in the *Key West* case, this letter is to notify you that beginning with the invoices paid by the School District on April 27, 2012, the School District has stopped paying the municipal stormwater utility fees and all future payments will deduct any amount reflected on the utility invoice associated with stormwater fees.

(R. 153.)

Hence, as shown in the Termination Notice, the School Board ceased payment not because it discontinued using the City's stormwater management program (or that it believed it was "exempt" from payment of such fees); but

rather, because it believed, pursuant to the doctrine of sovereign immunity, that it was not liable for non-payment of the stormwater utility fees. Notwithstanding the School Board's nonpayment, it continues to benefit from the City's stormwater management system.

Notably, because of the School Board's discontinuation of payment for the stormwater services it receives, the City has been forced to increase rates for other beneficiaries. Specifically, the City has adopted City Resolution 277-16 authorizing a stormwater utility fee rate increase of approximately twenty-four percent, effective October 1, 2017, with annual three percent rate increases beginning October 1, 2018. (R. 645-46.) However, if the School Board were paying for the stormwater services provided, the rate increase would have only been approximately twenty-one percent followed by the annual three percent rate increases. (R. 645-46.) In addition, pursuant to City Resolution 240-93, the City issued bonds to pay for the costs of building and improving the City's stormwater management system. (R. 645-46.) As set forth in City Resolution 240-93, the City is bound by its bond covenants to repay its bondholders for this project from the City's stormwater utility fees. (R. 645-46.)

VII. School Board Files for Declaratory and Injunctive Relief

After the School Board discontinued payment of its stormwater utility fees, because it feared that the City would exercise its authority to discontinue water or

sewer services due to nonpayment, it filed an action for temporary and permanent injunctive relief. (R. 9.) Therein, it contended:

> This is an action seeking a temporary injunction and, ultimately, a permanent injunction prohibiting the City, its agents, servants and employees, from disconnecting, plugging, blocking, or otherwise modifying, the stormwater management systems or stormwater flows, including outfalls and other drainage features, that serve the School Board's educational facilities within the municipal boundaries.

(R. 10.) The School Board included as a basis for injunctive relief its contention that the School Board was immune from suit for nonpayment of stormwater utility fees. (R. 12.)

The School Board subsequently amended its Complaint. (R. 143.) In the School Board's Amended Complaint, in addition to the previously requested injunctive relief, the School Board sought a declaratory judgment stating that the School Board enjoys sovereign immunity from any suit by the City for nonpayment of the City's stormwater utility fees. (R. 146-48.) The City counterclaimed for declaratory relief, seeking "judgment declaring whether School Board must pay its relative contribution to its need of City's stormwater management program." (R. 185.) In addition, as its First Affirmative Defense in its Answer to the Amended Complaint, the City also alleged that the "City has statutory authority to collect fees from beneficiaries of its stormwater management program pursuant to Fla. Stat. § 403.031(17) and School Board is a beneficiary of City's stormwater management program." (R. 175.)

VIII. Cross-Motions for Partial Summary Judgment, Order, and Final Judgment

Subsequent to the filing of the School Board's Amended Complaint and the City's Counterclaim, both parties filed cross-motions for summary judgment (the "Motions for Summary Judgment") in which they sought a declaratory judgment from the trial court pertaining to the issue of sovereign immunity. In the School Board's Motion, it sought a declaration that "it enjoys sovereign immunity from City's suit for unpaid stormwater utility fees authorized by Chapter 403, Florida Statutes, in the absence of a written contract between the parties" (it is undisputed that there is no written contract between the School Board and the City requiring the School Board to pay stormwater utility fees). (R. 422.) In the City's Motion, it sought a declaration that the School Board does not enjoy sovereign immunity from suit for collection of the stormwater utility fees because the Florida Legislature has expressed a clear, specific, and unequivocal intent to waive sovereign immunity. (R. 561.) More specifically, the City contended that "because section 403.031's definition of 'beneficiary' includes a 'person,' with 'person' being defined in subsection 403.031(5) to include a sovereign like the School Board, the Florida Legislature has expressed a clear, specific, and unequivocal intent to waive sovereign immunity for the School Board regarding the collection of the utility fees charged for the School Board's use of the City's stormwater management system." (R. 561.)

After a hearing regarding the Motions for Summary Judgment, (R. 785-830), the trial court entered its Order in which it held the following:

> This Court finds there has been no statutory waiver of sovereign immunity from the payment of stormwater fees in Chapter 403, Florida Statutes, and there is no contract between School Board and City for the provision of stormwater fees; therefore, the School Board enjoys sovereign immunity from suit for non-payment of the City's stormwater fees.

(R. 782.) After the School Board voluntarily dismissed its claim for injunctive relief, the trial court entered the Final Judgment that is the subject matter of this appeal. (R. 842-45.) In the Final Judgment, the School Board incorporated the Order and, again, concluded that the School Board enjoys sovereign immunity from suit for collection of the City's stormwater utility fees. (R. 842-45.) Specifically, the trial court concluded:

FINDINGS OF FACT

1. Both School Board and City are subdivisions of Florida, who enjoy sovereign immunity absent a clear and express waiver by the Florida Legislature or a written agreement waiving sovereign immunity.

2. There is no written agreement between City and School Board obligating School Board to pay stormwater utility fees to City.

3. Both parties admitted the issuance of a judgment declaring whether School Board enjoys sovereign immunity from City suit for non-payment of stormwater utility fees shall fully resolve the present dispute.

CONCLUSIONS OF LAW

As stated more specifically in this Court's Order Granting School Board's Motion for Partial Summary Judgment And

Denying [City's] Motion for Partial Summary Judgment, which is attached, and made a part of order as ***Exhibit A,*** this Court finds there has been no statutory waiver of School Board's sovereign immunity from the payment of stormwater fees in Chapter 403, Florida Statutes. The decisions of *City of Gainesville v. Dept. of Transportation*, 920 So. 2d 53 (Fla. 1st DCA 2005), *rev. denied* 921 So. 2d 661 (Fla. 2006); *City of Key West v. Florida Keys Community College*, 81 So. 3d 494 (Fla. 3d DCA 2012), *rev. denied*, 105 So. 3d 518 (Fla. 2012); and *City of Clearwater v. School Board of Pinellas County*, No. 52199CA007479XXCICI (Fla. 6th Cir. Ct. May 23, 2008), *affirm.* 17 So. 3d 1287 (Fla. 2d DCA 2009), address the sovereign immunity of school boards and state agencies from suit for non-payment of stormwater fees adopted pursuant to Chapter 403, Florida Statutes. "The decisions of the district courts of appeal represent the law of Florida[.]" *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (internal citation omitted).

ORDER

It is hereby ORDERED AND ADJUDGED as follows:

Pursuant to this Court's December 22, 2017 Order granting the School Board's Motion and denying the City's Motion, **IT IS ORDERED AND ADJUDGED** that:

As to Count I of the School Board's Amended Complaint, the School Board enjoys sovereign immunity from suit by the City for the collection of the City's stormwater utility fees. The Court finds there has been no statutory waiver of School Board's sovereign immunity from the payment of stormwater fees in Chapter 403, Florida Statutes.

As to the City's Counterclaim, the Court finds sovereign immunity prevents the City from suing School Board for the non-payment of the City's stormwater utility fees as there is no written agreement between the parties regarding such payment, and because there is no "clear, specific, and unequivocal intent to waive sovereign immunity" found in Chapter 403, Florida Statutes.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida.

(R. 842-43.) This appeal followed. (R. 831-37.)

SUMMARY OF THE ARGUMENT

The City contends that the School Board, as a "beneficiary" of the City's stormwater management system, must pay for its use of the City's stormwater management system (a contrary result is simply inequitable, as it would enable the School Board to directly benefit from the City's stormwater services without paying its fair share for said services because it's a sovereign). The City contends that the veil of sovereign immunity does not protect the School Board from suit for such non-payment because the Florida Legislature, under the FAWPCA, has expressed a clear, specific, and unequivocal intent to waive sovereign immunity for government entities, like the School Board.

In particular, under the FAWPCA, the Florida Legislature has authorized the City to create stormwater utilities, § 403.0893(1), Fla. Stat., and to charge stormwater utility fees to the "beneficiaries" of the utility, § 403.031(17), Fla. Stat. The FAWPCA, however, does not define "beneficiary"; hence, the term's plain and ordinary meaning, as discerned through a dictionary, controls and is best indicative of the legislative intent behind that term. That term, as so defined in the dictionary, includes a "person." The term "person" is statutorily defined under the FAWPCA to include "the state or any agency or institution thereof," § 403.031(5), Fla. Stat., i.e., government entities, like the School Board.

Thus, as explained further in the Argument section of this Initial Brief, because the definition of "beneficiary" includes a "person," with "person" being statutorily defined by the Florida Legislature to include a government entity like the School Board, the Florida Legislature has expressed a clear, specific, and unequivocal intent to waive sovereign immunity for the School Board regarding the collection of stormwater utility fees. Such a conclusion is required under Florida Supreme Court precedent, as the Florida Supreme Court previously held in *Maggio v. Fla. DOL & Empl. Sec.*, 899 So. 2d 1074 (Fla. 2005) that a similar statutory definition of "person" (which included government entities) constituted a clear, specific, and unequivocal waiver of sovereign immunity. In addition, although *Maggio* concerned the Florida Civil Rights Act, it remains applicable, because the waiver of sovereign immunity in *Maggio* was based on the plain language (and plain meaning) of the Florida Civil Rights Act—***not*** its liberal construction.

What's more, the decisions in *City of Key West v. Florida Keys Community College*, 81 So. 3d 494 (Fla. 3d DCA 2012) and *City of Gainesville v. State DOT* ("*Gainesville III*"), 920 So. 2d 53 (Fla. 1st DCA 2005), as relied upon by the School Board (and by the trial court in the Order and Final Judgment), are inapplicable and do not control. That is because they are both factually distinguishable and, regarding the Third District's conclusion that the FAWPCA (i.e., Chapter 403, Florida Statutes) does not contain a waiver of sovereign

immunity, were incorrectly decided. In particular, *City of Key West* is distinguishable because the government entity claiming sovereign immunity was not, in fact, a "beneficiary" of the City of Key West's stormwater management system. By contrast, it is undisputed that the School Board is, indeed, a "beneficiary" of the City's stormwater management system.

But more importantly, in *City of Key West*, the Third District incorrectly held that there is no waiver of sovereign immunity under the FAWPCA. More specifically, the Third District never addressed whether the FAWPCA's definitions of "beneficiary" and "person" expressed a clear, specific, and unequivocal intent to waive sovereign immunity for a "beneficiary" of a stormwater management system. Rather, the Third District examined, generally, Chapters 403 and 180 of the Florida Statutes and incorrectly concluded that Chapter 403 did not provide for a waiver of sovereign immunity (please note that the City does *not* concede that there is no waiver of sovereign immunity under Chapter 180; however, its argument on appeal is confined to whether a waiver exists under the FAWPCA (i.e., Chapter 403), as that was what was argued before the trial court below).

Likewise, *Gainesville III* is distinguishable (and hence, inapplicable) because, like the Third District in *City of Key West*, nowhere in that decision did the First District address the FAWPCA's definitions of "beneficiary" and "person" and whether such definitions did, in fact, constitute a waiver of sovereign immunity. Rather, the foundation of legal reasoning in that decision was whether

the Florida Legislature waived sovereign immunity in Chapter 180 of the Florida Statutes (again, the City does *not* concede that there is no waiver of sovereign immunity under Chapter 180, as its argument on appeal is confined to whether a waiver exists under the FAWPCA (i.e., Chapter 403), as that was what was argued before the trial court below).

Hence, the City contends that when considering the legislative intent behind the FAWPCA's definitions of "beneficiary" and "person"—especially given the Florida Supreme Court's decision in *Maggio*, which concluded that a similar statutory definition of "person" constituted a waiver of sovereign immunity—the Florida Legislature has, in fact, waived sovereign immunity under the FAWPCA and any decision to the contrary is simply incorrect and, as a result, inapplicable.

In addition, the decision in *City of Clearwater v. School Board of Pinellas County*, 17 So. 3d 1287 (Fla. 2d DCA 2009), also relied on by the School Board and the trial court below, should be disregarded, as it is a per curiam affirmance without written opinion and, as such, has zero precedential value.

Accordingly, as explained further in the Argument section of this Initial Brief, because the School Board does not enjoy sovereign immunity from suit for collection of the stormwater utility fees (as the Florida Legislature has clearly, specifically, and unequivocally waived sovereign immunity for such), this Court should reverse the Final Judgment and remand with directions that Final Judgment

be entered in favor of the City with findings that the School Board does not enjoy sovereign immunity from suit for collection of the City's stormwater utility fees.

ARGUMENT

I. Standard of Review

"The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001). That is the case here, as there were no disputed genuine issues of fact below, and the trial court's decision on summary judgment hinged on a determination regarding sovereign immunity, which is a pure question of law. *See Beach Cmty. Bank v. City of Freeport, Fla.*, 150 So. 3d 1111, 1113 (Fla. 2014) ("In this case, the First District concluded that the City's claim to sovereign immunity rested on a pure question of law. We agree."). The trial court's decision also turned on a matter of statutory interpretation (i.e., whether the definitions of "beneficiary" and "person" constituted a waiver of sovereign immunity), which is also a question of law subject to de novo review. *See Daniels v. Florida Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005) ("The question before us is a matter of statutory interpretation and is a question of law subject to de novo review.").

II. Applicable Principles of Statutory Construction.

"When construing a statutory provision, legislative intent is the polestar that guides the Court's inquiry." *Maggio v. Fla. DOL & Empl. Sec.*, 899 So. 2d 1074,

1076 (Fla. 2005) (internal quotation marks omitted). "Legislative intent is determined primarily from the language of the statute. Thus, we first look to the language used in the Act." *Id.* at 1076-77 (citation omitted). In analyzing the wording of a statute, it is presumed that the Florida Legislature stated "what it meant, and meant what it said." *Klonis v. Fla. Dep't of Rev.*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000). "However, when a term is not otherwise defined within a statutory scheme, '[i]t is appropriate to refer to dictionary definitions when construing its meaning.'" *E.A.R. v. State*, 4 So. 3d 614, 632 (Fla. 2009) (alterations in original) (quoting *Barco v. Sch. Bd. of Pinellas County*, 975 So. 2d 1116, 1122 (Fla. 2008; *see also Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc.*, 982 So. 2d 628, 633 (Fla. 2008) (stating that when a term is not otherwise defined in a statute, it must be given its "plain and ordinary meaning," which courts may discern through reference to dictionary definitions). By contrast, when a term is defined within a statutory scheme, that statutory definition controls. *Ervin v. Capital Weekly Post, Inc.*, 97 So. 2d 464, 469 (Fla. 1957) ("A statutory definition of a word is controlling and will be followed by the Courts.").

III. Principles of Waiver of Sovereign Immunity – As Exemplified in the Florida Supreme Court's Decision in *Maggio*, Including a "State" or "Any Government Entity or Agency" in the Statutory Definition of a "Person" Constitutes "a Clear, Specific, and Unequivocal Intent to Waive Sovereign Immunity."

The "Florida Constitution provides that the Legislature can abrogate the state's sovereign immunity." *Am. Home Assur. Co. v. Nat'l R. R. Passenger Corp.*,

908 So. 2d 459, 471 (Fla. 2005); *Klonis*, 766 So. 2d at 1189 ("*Unquestionably, the Florida Legislature has the constitutional power to enact laws waiving sovereign immunity*." (Emphasis added)). Specifically, article X, section 13 of the Florida Constitution states that: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Hence, even though a sovereign is generally immune from suit, that immunity is waived if the Florida Legislature, by statute, has shown the legislative intent, through a statute's express language, to waive such immunity. *See, e.g.*, *Maggio v. Fla. DOL & Empl. Sec.*, 899 So. 2d 1074, 1078-79 (Fla. 2005); *Jones v. Brummer*, 766 So. 2d 1107, 1108 (Fla. 3d DCA 2000); *Klonis*, 766 So. 2d at 1189-90. And, "[a]lthough a waiver of sovereign immunity by legislative enactment must be clear, specific, and unequivocal, no particular magic words are required." *Klonis*, 766 So. 2d at 1190 (citation omitted). All that must be demonstrated is a clear "legislative intent to allow suits against the State of Florida and any of its agencies." *Id.*

For example, in *Maggio*, the Florida Supreme Court held that the Florida Legislature demonstrated a "clear, specific, and unequivocal intent to waive sovereign immunity" in the Florida's Civil Rights Act (the "Act"). *Maggio*, 899 So. 2d at 1078. The basis for this holding was as follows:

> First, the Florida Civil Rights Act contains ***a waiver of sovereign immunity independent of the waiver contained in section 768.28***. . . . Under the Act, ***the term "employer" is defined to mean "any person*** employing 15 or more employees . . . and any agent of such

> person." § 760.02(7), Fla. Stat. (2003) (emphasis added). ***The Act further defines "person" to include "the state; or any governmental entity or agency***." § 760.02(6), Fla. Stat. (2003). ***The inclusion of the State in the definition of "person" and, hence, "employer" evidences a clear, specific, and unequivocal intent to waive sovereign immunity.***

Id. at 1078-79 (emphasis added). Both the First District in *Klonis* and the Third District in *Brummer* reached the same result. *See Klonis*, 766 So. 2d at 1190 (Fla. 1st DCA 2000) (stating that "the Florida Legislature intended to waive, and did waive, the State of Florida's sovereign immunity under Chapter 760" by including "the state" and "any governmental entity or agency" in the definition of "person" under the Act); *Brummer*, 766 So. 2d at 1108 (determining that the Act, by including "the state" and "any governmental entity or agency" in the definition of "person" under the Act, "evidences legislative intent that civil actions . . . under [the Act] be prosecuted against the state").

IV. Like *Maggio*, in this Case, Sovereign Immunity is Waived Because the Definition of a "Beneficiary" Includes a "Person," Which is Specifically Defined in Section 403.031(17), Florida Statutes to Include "the State or any Agency or Institution Thereof" (i.e., Government Entities, like the School Board).

It is undisputed that the School Board directly benefits and is, therefore, a "beneficiary" of the City's stormwater management system. As a result, the School Board is assessed a stormwater utility fee. However, at issue is whether the Florida Legislature, by way of section 403.031, expressly waived sovereign immunity for the School Board regarding a suit for collection of those stormwater utility fees. Specifically, whether the School Board is included in the definition of

"beneficiaries," as that term is used, understood, and defined in section 403.031(17). If the School Board is included in that definition, sovereign immunity is clearly, expressly, and unequivocally waived. In this case, because the definition of "beneficiary" includes a "person," which is statutorily defined to include government entities (like the School Board), the Florida Legislature, via section 403.031(17), has, indeed, expressed a clear, specific, and unequivocal intent to waive sovereign immunity for the collection of stormwater utility fees.

This is supported by the Florida Supreme Court's decision in *Maggio* where it was expressly held that because government entities were included in the definition of "person," it also fell within the definition of "employer," resulting in an express waiver of sovereign immunity. *See Maggio*, 899 So. 2d at 1078-79. More specifically, in *Maggio* the Florida Supreme Court concluded that the Florida Legislature, through the plain language of the Florida Civil Rights Act, clearly, specifically, and unequivocally waived sovereign immunity. *Id.* In particular, under the Florida Civil Rights Act, "employer" was defined to mean "person," and "person" was defined to include "the state; or any government or agency." *See id.* The Florida Supreme Court concluded that "[t]he inclusion of the State in the definition of 'person' and, hence, 'employer' evidences a clear, specific, and unequivocal intent to waive sovereign immunity" under the Florida Civil Rights Act. *Id.* at 1079.

Likewise, in this case, the definition of "beneficiary" includes a "person," and the definition of "person" in section 403.031 includes "the state or any agency or institution thereof," resulting in a clear, specific, and unequivocal intent to waive sovereign immunity for the collection of stormwater utility fees. In particular, section 403.031—and, hence, the FAWPCA—does not specifically define a "beneficiary." As a result, in discerning what the Legislature intended "beneficiary" to mean, the Court may turn to the plain and ordinary meaning of that term, as set forth in its dictionary definition. *See E.A.R.*, 4 So. 3d at 632; *Arnold, Matheny & Eagan, P.A.*, 982 So. 2d at 633. That dictionary definition includes "person." Specifically, Black's Law Dictionary defines "beneficiary" as: "A ***person*** who is designated to benefit from an appointment, disposition, or assignment." *Beneficiary*, *Black's Law Dictionary* 149 (7th ed. 1999). "Beneficiary" has also been defined as follows: "a ***person*** or group that receives benefits, profits, or advantages." *Beneficiary*, *Random House Webster's College Dictionary* 125 (2000 ed.). Hence, in accordance with the dictionary definition of "beneficiary," that term includes a "person."

Next, the definition of "person" is specifically defined in section 403.031; hence, that statutory definition controls. *See*, *e.g.*, *Maggio*, 899 So. 2d at 1076-77; *see also Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000) ("When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute."). That statutory definition, as

provided in subsection 403.031(5), includes government entities, like the School Board, as it states:

> "Person" means ***the state or any agency or institution thereof***, the United States or any agency or institution thereof, or ***any municipality, political subdivision***, public or private corporation, individual, partnership, association, or other entity and includes any officer or governing or managing body of the state, the United States, any agency, any municipality, political subdivision, or public or private corporation.

403.031(5) (emphasis added).

Accordingly, like in *Maggio*, where the definition of "employer" included a "person," which was statutorily defined to include government entities; here, the definition of "beneficiary" includes a "person," which is statutorily defined to include government entities. As a result—as with the Florida Civil Rights Act in *Maggio*—the Florida Legislature, via section 403.031, has expressed a clear, specific, and unequivocal intent to waive sovereign immunity for the collection of stormwater utility fees.

Therefore, this Court should reverse and remand the Final Judgment with directions that the trial court enter a new final judgment concluding that the School Board does not enjoy sovereign immunity from suit for the collection of the stormwater utility fees assessed by the City for the School Board's use of the City's stormwater management system.

V. *Maggio* and its Principles of Waiver of Sovereign Immunity are Applicable, Notwithstanding the Fact that the *Maggio* Decision Concerned the Florida Civil Rights Act. This is Because the Waiver of Sovereign Immunity in *Maggio* was Based on the Plain Language (and Plain Meaning) of the Florida Civil Rights Act—Not Its Liberal Construction.

The School Board contended below (and will likely contend on appeal) that the Florida Supreme Court's decision in *Maggio* is distinguishable and, hence, inapplicable, because it did not concern the FAWPCA. Rather, the School Board may contend that *Maggio* is inapplicable because that decision concerned the application of the Florida Civil Rights Act, which "is a remedial statute that the Legislature expressly provided is to be 'liberally construed to further general purposes' of the Act and the particular provisions involved." *Maggio*, 899 So. 2d at 1077 (quoting § 760.01(3), Fla. Stat.).

However, "[t]he rule of liberal statutory construction in section 760.01(3) [i.e., the Florida Civil Rights Act]—like other rules of construction—*comes into play only when there is some ambiguity in the statutory text*." *Gallagher v. Manatee County*, 927 So. 2d 914, 919 (Fla. 2d DCA 2006) (emphasis added). Indeed, that "rule [of liberal construction] cannot be used to defeat the plain meaning of the statute. Instead, it guides the interpreter in making an interpretative choice when the text may *reasonably* be understood in more than one way." *Id.* In *Maggio*, when the Florida Supreme Court analyzed waiver of sovereign immunity, "[t]hat circumstance d[id] not present itself." *Id.*

More specifically, in *Maggio*, the Florida Supreme Court did not apply the Florida Civil Rights Act's rule of liberal construction in the context of that Act's express waiver of sovereign immunity. *Maggio*, 899 So. 2d at 1077. Rather, it applied the Act's rule of liberal construction in the context of "whether the Legislature intended a claimant who is suing a state agency for a civil rights violation to comply not only with the administrative presuit requirements of section 760.11, but also with the notice requirements of section 768.28." *Id.* In particular, the Florida Supreme Court held:

> ***We thus hold that when the Legislature enacted the Florida Civil Rights Act, it did not intend claimants to comply with the presuit notice requirements of section 768.28(6)***.
>
> ***This conclusion is bolstered by the Legislature's statement of intent that the provisions of the Act are to be "liberally construed to further the general purposes" of the Act***. § 760.01(3), Fla. Stat. (2003).

Id. at 1080 (emphasis added).

Indeed, in construing the plain language of the Florida Civil Rights Act, the Florida Supreme Court in *Maggio* did not find any ambiguity regarding that Act's plain language waiving sovereign immunity. *See id.* at 1077. Much rather, the court concluded, based on the plain meaning of the plain language of that statute (i.e., through the "inclusion of the State in the definition of 'person'") that the Florida Legislature had expressed a "clear, specific, and unequivocal intent to waive sovereign immunity." *Id.* at 1078. No reference to an ambiguity or liberal

rule of construction was stated or even alluded to in the context of waiver of sovereign immunity. *Id.*

Hence, based on the plain meaning of the Florida Civil Rights Act's plain language, and without ambiguity or resort to any rule of liberal construction, the Florida Supreme Court found a clear, express, and unequivocal waiver of sovereign immunity through that Act's definition of a "person," which, as with the definition of "person" under the FAWPCA, includes government entities. *Id.*

Accordingly, the decision in *Maggio*—and the principles of waiver of sovereign immunity it embodies—are applicable to this matter. As previously discussed, when those principles are so applied in this case, it results in a clear, specific, and unequivocal waiver of sovereign immunity for the collection of stormwater utility fees.

VI. The Decisions in *City of Key West* and *Gainesville III* are Inapplicable Because They Do Not Address Whether the Florida Legislature Waived Sovereign Immunity by Way of the FAWPCA's Definitions of "Beneficiary" and "Person." In Addition, the Decision in *Clearwater* Should be Disregarded, as It is a Per Curiam Affirmance Without Written Opinion and, as Such, has Zero Precedential Value.

Below, the School Board (and the trial court in its Final Judgment and Order below) relied primarily on the Third District's decision in *City of Key West v. Florida Keys Community College*, 81 So. 3d 494 (Fla. 3d DCA 2012), for its position that it is not liable for payment of the City's stormwater utility fees. That decision, however, is distinguishable from this case and, hence, inapplicable. Specifically, in *City of Key West*, unlike in this case, the sovereign being charged

(i.e., the Community College) was not a "beneficiary" of the City of Key West's stormwater system. More specifically, "[t]he City ha[d] no operational stormwater system on the College's property, and ha[d] not identified any of the City's facilities that collect or treat stormwater generated by the College's property." *City of Key West*, 81 So. 3d at 496. In fact, the College property at issue was situated in a way in which stormwater ran off on its own into the Gulf of Mexico and, hence, was not in need of a stormwater management system. *See id.* By contrast, in this case, it is undisputed that the sovereign entity (i.e., the School Board) is a "beneficiary" of the City's stormwater system, as over twenty School Board Properties directly benefit therefrom.

More importantly, the decision in *City of Key West* is simply incorrect in its holding that sovereign immunity has not been waived under the FAWPCA. That is because nowhere in that decision did the Third District address the FAWPCA's definitions of "beneficiary" and "person." Specifically, the Third District never addressed whether, via those definitions, the Florida Legislature expressed a clear, specific, and unequivocal intent to waive sovereign immunity for a "beneficiary" of a stormwater system. Rather, the Third District examined whether Chapters 403 and 180, generally, contained a waiver of sovereign immunity for the collection of stormwater utility fees. *See id.* at 497 ("The City contends that the College is not protected by sovereign immunity because Chapter 403 does not 'exempt' state-owned property from payment of stormwater utility fees."). The Third District

concluded that Chapters 403 and 180 did not provide for such a waiver of sovereign immunity. *See id.* at 497-500. But again, the Court never decided, as the City requests this Court to decide, whether, via the definitions of "beneficiary" and "person" in section 403.031, the Florida Legislature expressed a clear, specific, and unequivocal intent to waive sovereign immunity under the FAWPCA (which the City, based on the Florida Supreme Court's decision in *Maggio*, categorically contends it does). As such, the City contends that *City of Key West* and its holding that the Florida Legislature did not waive sovereign immunity under Chapter 403 was simply incorrect.

The School Board (and the Final Judgement and Order below) also relies on the First District's decision in *City of Gainesville v. State DOT* ("*Gainesville III*"), 920 So. 2d 53 (Fla. 1st DCA 2005). That decision is also inapplicable because, like the Third District in *City of Key West*, nowhere in that decision did the First District address the FAWPCA's definitions of "beneficiary" and "person." Indeed, like the Third District in *City of Key West*, the First District in *Gainesville III* never addressed whether, via those definitions, the Florida Legislature expressed a clear, specific, and unequivocal intent to waive sovereign immunity for a "beneficiary" of a stormwater system. In fact, the foundation of legal reasoning in that decision was whether the Florida Legislature waived sovereign immunity in Chapter 180 of the Florida Statutes. The First District never addressed whether such a waiver existed in section 403.031.

Hence, the City contends that when considering the legislative intent behind the FAWPCA's definitions of "beneficiary" and "person"—especially given the Florida Supreme Court's decision in *Maggio*, which concluded that a similar statutory definition of "person" constituted a waiver of sovereign immunity—the Florida Legislature has, in fact, waived sovereign immunity under the FAWPCA and any decision to the contrary is simply incorrect and, as a result, inapplicable.

Accordingly, for these reasons, the Third District's decision in *City of Key West* and the First District's decision in *Gainesville III* do not control and the Court, in accordance with the analysis provided in this Initial Brief, should conclude that there is, in fact, a waiver of sovereign immunity under the FAWPCA.

In addition, the Court should disregard any reliance by the School Board (or the trial court) on the per curiam affirmance without written opinion in *City of Clearwater v. School Board of Pinellas County*, 17 So. 3d 1287 (Fla. 2d DCA 2009), and the reasoning of the lower court in that matter. This is because that decision, as a per curiam affirmance without written opinion, and the reasoning of the lower tribunal from which arises, has *zero* precedential value. *See Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist.*, 434 So. 2d 310, 311 (Fla. 1983) ("The issue is whether a per curiam appellate decision with no written opinion has any precedential value. We hold that it does not."). This includes the reasoning and conclusions of the lower court from which the per curiam decision arises. *See*

id. at 312 (stating that "[a] per curiam affirmance without opinion does not bind the appellate court in another case to accept the conclusion of law on which the decision of the lower court was based," and rejecting the proposition that a per curiam without opinion is an approval of the judgment of the lower court (internal quotation marks omitted)). Thus, "because such decisions have no precedential value, a court may take the view that it desires not to consider such cases in any circumstance, and it may properly disregard such a reference in briefs or arguments presented to it." *Id.* at 313. Accordingly, in accordance with the Florida Supreme Court's pronouncement that a per curiam decision without written opinion has no precedential value for it or its lower court's reasoning, this Court should disregard any reference to the decision in *Clearwater*, the lower court's reasoning for that decision, and any arguments in reliance therewith.

CONCLUSION

Therefore, the Florida Legislature, by way of the statutory definitions of a "beneficiary" and "person" under the FAWPCA, has expressed a clear, specific, and unequivocal waiver of sovereign immunity for the collection of stormwater utility fees. Accordingly, because the School Board does not enjoy sovereign immunity from suit for collection of stormwater utility fees, this Court should reverse the Final Judgment and remand with directions that Final Judgment be entered in favor of the City with findings that the School Board does not enjoy sovereign immunity from suit for collection of the City's stormwater utility fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 26th day of June, 2018 to the Service List below:

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CERTIFICATE OF COMPLIANCE

City, by and through undersigned counsel, hereby certifies that this brief complies with Fla. R. App. P. 9.210(a)(2) and that this brief is prepared in Times New Roman 14-point font.

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