

**IN THE SUPREME COURT OF FLORIDA
CASE NO. 96,384**

**FRANKENMUTH MUTUAL INSURANCE
COMPANY, etc.,**

Plaintiff/Appellant,

vs.

ERNIE LEE MAGAHA, etc., et al.,

Defendants/Appellees.

**AMICUS CURIAE BRIEF
OF THE FLORIDA ASSOCIATION OF COUNTY ATTORNEYS, INC.**

**CAROLE SANZERI
Senior Assistant County Attorney
PINELLAS COUNTY ATTORNEY'S**

OFFICE

**315 Court Street
Clearwater, FL 33756
(727) 464-3354
FL Bar #0986770
Attorney for Amicus Curiae**

CERTIFICATE OF TYPE AND STYLE

The size and style of type to be used in this Amicus Curiae Brief of the Florida Association of County Attorneys will be 12-point Courier New.

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STATEMENT OF THE CASE AND FACTS

Amicus, the Florida Association of County Attorneys, Inc. (FACA), adopts the Statement of the Case and Facts in Appellees’ Answer Brief.

SUMMARY OF ARGUMENT

Amicus adopts the brief of the appellees, Escambia County, in its entirety. The Amicus urges this Court to uphold the District Court's ruling in part and deny it in part. Specifically the Amicus argues that enforcing the non-substitution clause against the County violates public policy and urges this Court to accept the District Court's ruling relating to the non-enforceability of such clause. The Amicus further argues that the District Court erred in finding ratification. The Amicus argues that the lease could not be ratified in the manner suggested because the requirements of § 286.011, Fla. Stat. were not fulfilled. To allow ratification in this instance is inconsistent with the public policy of the state as set forth in the Sunshine Law. Therefore, the Amicus urges this Court to overrule that portion of the District Court's ruling finding that the County ratified the lease.

ARGUMENT

I. THE NON-SUBSTITUTION CLAUSE IS VOID AS AGAINST PUBLIC POLICY

This Court should refuse to enforce the non-substitution clause in the lease purchase agreement, which was not approved by referendum of the voters, against the County. The non-substitution clause imposes a severe penalty against the County for exercising its power and duty to budget and denies it the budgetary flexibility in future budget years that is necessary. Such penalties should be recognized as contrary to public policy.

Counties in Florida are given broad home rule powers by Article VIII, Section 1(g), Fla. Const.; specifically all powers of local government not inconsistent with general law. General law, specifically Chapter 129, Fla. Stat. (1997), requires counties to budget for upcoming fiscal years in accordance with the provisions contained therein. Chapter 129 requires counties to prepare and execute annual balanced budgets. § 129.01, Fla. Stat. (1997). Pursuant to Chapter 129 counties are permitted to include in their budgets only those expenditures contemplated for the next fiscal year. Any commitment of funds beyond the fiscal year budgeted is void and unenforceable. Op. Att'y Gen. Fla. 62-136 (1962).

The restriction of budgeting for only one fiscal year is necessary because county budgets are based on the millage which is set only once annually for the upcoming fiscal year. § 200.065, Fla. Stat.(Supp.1998). Only after the millage has been ascertained and fixed and the tax valuations final, may the County budget be adopted. See, Op. Att’y Gen. Fla. 62-136 (1962). Until there is a county budget adopted for a fiscal year, no county expenditures are authorized. Therefore, any attempt by a county to authorize expenditures for a fiscal year for which no budget has been adopted must fail for creating an illegal fixed charge against future years’ revenue in contravention of Florida Statutes Chapters 129 and 200.

As the District Court correctly held, the non-substitution clause renders the non-appropriation clause and the non-renewal clause illusory. Frankenmuth Mutual Insurance Corporation v. Magaha, 10 Fla. L. Weekly Fed. D340, 342 (N.D. Fla. Aug. 30, 1996). In order to satisfy Chapters 129 and 130 of the Florida Statutes, and avoid implicating the restrictions of Art VII, Section 12 of the Florida Constitution, a local government must include a non-appropriation clause when entering into a multi year contract. Such a clause guarantees the government the flexibility to respond to ever changing needs and economies in a way that the elected officials of a county deem to be in the best interests of that county. If the Court enforces the non-substitution clause in the instant case, the County will be deprived of its right to not appropriate money for

the lease payments required under the agreement for future years since a severe penalty would be imposed for that choice.

Enforcing the non-substitution clause would create a fixed charge against future years' revenue in contravention of Chapters 129 and 200 of the Florida Statutes. A fixed charge against future revenues can impair the flexibility of planning and the ability of future legislature to avoid a tax increase. If this Court allows the non-substitution clause to stand, the County will not only be impaired in its future planning and budgeting, but may also be forced to increase ad valorem taxes giving the clause the effect of forcing a pledge of ad valorem taxes.

Since the future is uncertain and the revenue is, therefore, impossible to quantify, such a result should not be allowed. Because millage rates are set only once annually, neither the County nor the Court can know with any degree of certainty what level of funding the County may have for years beyond the upcoming fiscal year for which millage is set. The County must maintain full budgetary flexibility in order to be able to deal with changing economies. Should the millage be approved at a lower rate than anticipated in future years, or the value of the millage decrease, the County must be able to readjust and reprioritize its spending in order to balance a budget with less than expected receipts.

The occurrence of such events is not hard to imagine. By way of example, an

economic depression could have a disastrous result on a county's revenues, as history has shown us. Should a depression occur decreasing the value of property upon which the millage is imposed, revenues will decrease. Likewise, should a depression make it impossible to collect the revenue property taxes would raise, if collected, revenue would decrease. A natural disaster, such as a hurricane, could impact the tax roll, with devastating consequences.

It is also likely that laws or policies regarding the right to, or application of, tax exemptions could change in future years increasing either the amount of an exemption or the number of people entitled to claim an exemption. Many Florida counties are currently evaluating the impact of the local option senior homestead exemption, and will have to decide before December 1, 1999 whether to exercise the option. The resulting erosion of the tax base is hard to predict. If a county exercised that option, its revenue could substantially decrease. The amount by which it could decrease in such an event is not readily ascertainable, even after a law effecting an exemption is passed.

The actual effect will not be known until it is time for taxes to be paid and those attempting to avail themselves of the exemption come forward to do so.

Additionally, counties continue to be faced with ever changing federal and state mandates which whittle away at funds available for other county uses. Where, as here, no particular stream of revenue is identified as the source for the lease payments, the

revenue must come from the general fund. As illustrated, where the amount in the general fund decreases, or the demands on the general fund increase without an equivalent increase in the sources of those funds, the enforcement of a provision fixing charges against future years revenue violates the public policy in favor of allowing public officials to exercise budgetary flexibility to meet changing circumstance and act in the best interests of the public they serve.

If the non-substitution clause is enforced, the County could be forced to divert money from other more critical needs to cover the cost of the lease payments. No flexibility is therefore preserved with regard to the money necessary to pay the lease payments. The public policy of the state should be to consistently disallow restraints, including contractual restraints, on a local government's full budgetary flexibility.

**II. THE LEASE AGREEMENT ENTERED INTO OR RATIFIED
IN VIOLATION OF THE SUNSHINE LAW CANNOT BE
ENFORCED AGAINST THE COUNTY BECAUSE IT IS
VOID AB INITIO.**

This court should not rule that the lease purchase agreement is enforceable against Escambia County because any ratification of the agreement was not made pursuant to the requirements of § 286.011, Fla. Stat.(1997), the Government in the Sunshine Law. As this court has

previously held, in Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974), any action taken in violation of the Sunshine law is void *ab initio*. Although the County was under a duty to fund the budget from which the lease payments were made, this Court should find any ratification is void *ab initio* and the contract may not be enforced under the authority of Gradison and §286.011, Fla. Stat.

The public policy of the State is clearly expressed in § 286.011(1), which specifically states that no formal action shall be considered binding except as taken or made at a public

meeting. § 286.011(1), Fla. Stat. (1997). In this case, Escambia County never took any formal action at a public meeting to vote on the lease in any capacity. No motions were made and no discussion of ratifying or accepting the lease was had. Furthermore, no details of the lease were ever presented to the Board of County Commissioners at a public meeting which would have allowed them to make a decision to ratify and execute the lease.

The District Court erred in finding that the County ratified the lease without addressing whether the Sunshine Law requirements were satisfied. The District Court correctly stated that “in Florida, ratification requires the contract be adopted in the same manner as would have made it valid in the first instance,” Frankenmuth at D341, however, it failed to consider the implications and requirements of the Government in the Sunshine Law. Clearly, the lease in question could not have been entered into by the County outside of the sunshine without violating § 286.011(1), Fla. Stat. Consequently, the ratification could not have occurred outside of the sunshine. The Chairman would not have had the authority to sign a contract and bind the county without such a public vote.

Although Florida courts have held that Sunshine Law violations may be corrected, Monroe County v. Pigeon Key Historical Park, Inc., 647 So.2d 857 (Fla. 3d DCA 1994), the County in the instant case did nothing to effectuate such correction or even form a consensus to do so. Nevertheless, the District Court found ratification. Allowing that decision to stand is contrary to public policy because it defeats the purpose of the Sunshine Law which is to promote full and open government and to protect the public from closed door politics. Wood v. Marsten, 442 So.2d 934, 938 (Fla. 1983).

The Sunshine Law was enacted for the public benefit and should, therefore, be interpreted most favorably to the public. Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260, 262 (Fla. 1973). It cannot be said that enforcing a lease allegedly ratified without public scrutiny and without consideration by the county commissioners is in the public interest. In fact, the commission ultimately chose to non-appropriate at the first opportunity it had to do so.

If a county can be bound to a contract by ratification without ever having taken formal action in the sunshine, unscrupulous or merely careless public officials could bind their counties through

indirect, non-public actions. Florida law is clear: public entities may not be bound to a contract unless that contract was entered into in accordance with the strict letter of the law. See, City of Panama City v. T & A Utilities, 606 So.2d 744 (Fla. 1st DCA 1992), rev. denied, 618 So.2d 211 (1993), (citing Ramsey v. City of Kissimmee, 139 Fla. 107, 190 So.474 (Fla.1939)). Such a policy is required if the public is to be protected from malfeasance and permitted to participate in governmental decisions.

This Court should find that no formal ratification occurred and, therefore, the lease may not properly be enforced against the County. To allow otherwise undermines the important public policy espoused in the Sunshine Law.

CONCLUSION

In summary, the Florida Association of County Attorneys, Inc., urges this Court to uphold the District Court's decision regarding the invalidity of the non-substitution clause and overturning its decision holding that the County ratified the lease. Such a result is necessary to protect significant public interests impacted by the District Court's decision.

Respectfully submitted,

CAROLE SANZERI
Sr. Assistant County Attorney
PINELLAS COUNTY ATTORNEY'S OFFICE
315 Court Street
Clearwater, FL 33756
(727) 464-3354
FL Bar #0986770
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paula G. Drummond, Esquire, 120 S. Alcaniz Street, Pensacola, Florida 32501, J. Lofton Westmoreland, Esquire, Post Office Box 13290, Pensacola, Florida 32591-3290, and David Tucker, Esquire, Escambia County Attorney's Office, 14 West Government Street, Room 411, Pensacola, Florida 32501 by U.S. Mail this ____ day of October, 1999.

CAROLE SANZERI,
Senior Assistant County Attorney
PINELLAS COUNTY ATTORNEY'S OFFICE
315 Court Street
Clearwater, FL 33756
(727) 464-3354
FL Bar #0986770
Attorney for Amicus Curiae

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