

**IN THE SUPREME COURT OF FLORIDA**

CONSOLIDATED CASE NO.: SC2024-0652

On Appeal from the Second Judicial Circuit, Leon County, Florida  
Lower Court Case No.: 372022CA001562

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ALACHUA COUNTY, FLORIDA, et al.,  
Appellants

v.

FLORIDA PACE FUNDING AGENCY, et al.,  
Appellees

Case No.: SC2024-0681

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**AMICUS BRIEF**  
**FLORIDA ASSOCIATION OF COUNTIES, INC.**

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## **IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE**

As stated in its Motion for Leave to File Amicus Curiae Brief, Florida Association of Counties, Inc., (“FAC”) is a statewide association and not-for-profit corporation organized and existing under Chapter 617, Florida Statutes, for the purpose of representing county government, and protecting, promoting, and improving the mutual interests of all counties in Florida.

FAC’s interest in this appeal lies in the far-reaching implications of the Lower Tribunal’s findings that FPPA has home rule powers that, in effect, trump those of Florida’s counties, which findings will serve to unlawfully preempt the authority of counties to regulate or deny the operation of the PACE program in their jurisdictions.

## **SUMMARY OF ARGUMENT**

Florida PACE Financing Agency (“FPFA”) is a separate legal entity created by interlocal agreement pursuant to Fla. Stat. §§ 163.01 and 163.08. For purposes of Fla. Stat. § 163.08, also known as the Supplemental Act, separate legal entities are considered “local governments”, as are counties, municipalities, and dependent special districts. Fla. Stat. § 163.08(2)(a). In other words, counties, municipalities, dependent special districts and separate legal entities are all objects within the set of “local government” for purposes of the Supplemental Act. However, the objects are not each the same as the other. The Supplemental Act does not convert a county into a municipality, dependent special district, or separate legal entity any more than it converts a separate legal entity into one or all of the other objects in the set.

This distinction is important because the Florida Constitution grants home rule powers to counties and municipalities, and Fla. Stat. §§ 125.01 and 166.021 delineate those powers. Neither the Constitution nor Florida Statutes grants home rule powers to separate legal entities.

The lower court found that “all of the privileges, benefits, powers and terms of section 125.01 relating to counties, and section 166.021, relating to municipalities, are also fully applicable to [FPFA] in the conduct of its affairs, purpose and mission.” See Final Judgment at 4 and 5. However, Fla. Stat. §§ 125.01 and 166.021, are the delineated home rule powers of counties and municipalities, respectively, and do not apply to separate legal entities.

Fla. Stat. § 125.01(3)(b) reads:

The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the *counties* the broad exercise of home rule powers authorized by the State Constitution.

(*Emphasis added.*) Section 166.021(4) similarly reads in part:

The provisions of this section shall be so construed as to secure for *municipalities* the broad exercise of home rule powers granted by the constitution.

(*Emphasis added.*)

The Supplemental Act and the Interlocal Cooperation Act, upon which FPFA relies for its creation and existence, do not bestow upon separate legal entities like FPFA “all the privileges, benefits, powers and terms” of sections 125.01 and 166.021. In fact, the Supplemental Act does not reference chapters 125 or 166 at all. The

Interlocal Cooperation Act references them, but only in relation to public agencies controlled by counties and municipalities, and those whose purposes pertain to water facilities or utilities. See Fla. Stat. §§ 163.01(7)(d) and (e), and 163.07(g)7. According to its Charter, FPFA was created pursuant to Fla. Stat. § 163.01(7)(g), and it operates independently of the public agencies that created it, so Fla. Stat. §§ 163.01(7)(d) and (e) do not apply to FPFA. However, § 163.01(7)(g) also does not apply to FPFA because it was not created under or for the purposes of § 163.01(7)(g) despite what is Amended Charter purports.

Worse yet, the lower court found that the Supplemental Act “provides there is no requirement or necessity for [FPFA] to enter into any agreement or partnership beyond the general law provisions of the Charter Agreement<sup>1</sup> to serve any property owner.” Final Judgment at 13-14. Such provision does not exist in the Supplemental Act or the Interlocal Act. The lower court’s findings

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<sup>1</sup> Perplexingly, the lower court also found that the Charter Agreement is “black-letter law.” Final Judgment at 12.

amount to a preemption of the home rule powers of Florida's counties.

## **ARGUMENT**

### **I. FPPA is a Local Government in the Context of the Supplemental Act, but is not a County, Municipality or Dependent Special District.**

The Supplemental Act permits local governments to, among other things, provide funding for certain qualifying improvements, and to assess non-ad valorem assessments to repay the funding provided. The Supplemental Act defines “local government” as “a county, a municipality, a dependent special district as defined in s. 189.012, or a separate legal entity created pursuant to s. 163.01(7).” Fla. Stat. 163.08(2). This definition applies only in the context of the Supplemental Act. *Id.*

Just as including dependent special district in the definition does not recharacterize one as a county, municipality or separate legal entity, it does not recharacterize a separate legal entity as a county, municipality, or dependent special district. All four entity types are objects within the set of “local government”.

The fact that § 163.08(16) acknowledges two of the entity types – counties and municipalities – as having home rule powers, but not the other two entity types – dependent special districts and separate legal entities – clearly shows that the Legislature did not intend for

separate legal entities and dependent special districts to be recharacterized as counties or municipalities for purposes of the Supplemental Act. The Legislature could have written as follows: “This section is additional and supplemental to local government home rule authority and not in derogation of such authority or a limitation upon such authority.” (Underlined portion replaces actual wording.) But the Legislature did not write that; it wrote, “This section is additional and supplemental to *county and municipality* home rule authority and not in derogation of such authority or a limitation upon such authority.” (*Emphasis added.*) Fla. Stat. § 163.08(16). In *Maddox v. State*, 923 So.2d 442, 446 (Fla. 2006), this Court wrote:

Another principle of statutory construction ... is the rule which recognizes that “[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.”

*Citing State v. Mark Marks, P.A.*, 698 So.2d 533, 541 (Fla.1997) (*quoting Dep't of Prof'l Regulation v. Durrani*, 455 So.2d 515, 518 (Fla. 1st DCA 1984)); *see also Beach v. Great W. Bank*, 692 So.2d 146, 152 (Fla.1997) (*quoting Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So.2d 911, 914 (Fla.1995) (“When the legislature has used a term ...

in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.”)).

If the Legislature had intended for subsection § 163.08(16) to apply to dependent special districts and separate legal entities, it would have included those entities in that subsection. However, the Legislature chose not to include those entities in subsection § 163.08(16), and it would be improper to imply those missing entities where the Legislature has obviously intended they be omitted. See *Maddox* at 447. See also *Smith v. Smith*, 224 So.3d 740, 747 (Fla. 2017), quoting (*BellSouth Telecomm., Inc. v. Meeks*, 863 So.2d 287, 291 (Fla. 2003)), holding that:

when the [L]egislature includes a provision in one section of a statute but excludes it in another, courts will deem the difference intentional and will assign meaning to the omission.

When the Supplemental Act was first enacted in 2010, the definition of local government included only counties, municipalities and dependent special districts. Fla. Stat. § 163.08(2)(a) (2010). But, § 163.08(16) had the same language in 2010 that it has today. Then, in 2012, the Legislature expanded the definition of local government for purposes of the Supplemental Act to include separate legal

entities. Fla. Stat. § 163.08(2)(a) (2012). However, it did not alter subsection 163.08(16). Clearly, the Legislature intended that the express authorities provided to separate legal entities are not to be exercised in derogation of the home rule authorities of counties and municipalities. Fla. Stat. § 163.08(2)(a) (2012).

**II. The Supplemental Act and the Interlocal Cooperation Act Do Not Imbue Home Rule Powers Upon Separate Legal Entities Like FPPA.**

The Florida Constitution endows counties and municipalities with home rule powers. Fla. Const. Art. VIII, §§ 1 and 2. Sections 125.01 and 166.021 of the Florida Statutes delineate, respectively, the home rule powers of counties and municipalities.

The Supplemental Act makes no reference to Fla. Stat. §§ 125.01 or 166.021. In the Interlocal Cooperation Act, the only references to §§ 125.01 and 166.021 are found in §§ 163.01(7)(d) and (e), and 163.01(7)(g)7. Sections 163.07(d) and (e) pertain only to entities that are controlled by one or more counties or municipalities of this state. FPPA is not controlled by one or more counties or municipalities of this state, therefore, §§ 163.01(7)(d) and (e) do not apply to FPPA. As it has repeatedly asserted, FPPA is a separate legal entity that acts independently of the entities that created it, and that

it was created for purposes of Fla. Stat. § 163.01(7)(g). Tr. 02/02/24 at 275, 280; FPFA Closing Arg. at 16, Final Judgment at 3, 6, 30-31, 32; FPFA Amd. Charter, §§ 2.01(E) and (I).

FPFA's Amended Charter claims that FPFA is created:

for purposes set forth in Section 163.01(7)(g), Florida Statutes, ... to facilitate, administer, implement and assist in providing funding and financing for Qualifying Improvements, enter into Subscription Agreements and other agreements, and otherwise serve or provide its services to facilitate agreements and non-ad valorem assessments only on properties subjected to same by the record owners thereof, develop funding and financing markets, develop structures and procedures to finance Qualifying Improvements, and to take any actions associated therewith or necessarily resulting therefrom, as contemplated by the Supplemental Act and general law.

FPFA Amd. Charter, § 2.01(E).

FPFA's Amended Charter defines "Qualifying Improvement" as:

those improvements for energy efficiency, renewable energy, and/or wind resistance or any such similar purposes described or authorized in the Supplemental Act or any amendment thereto, to be affixed or installed by the record owner of an affected property. Until subsequently determined by the Board of Directors of the Agency once the Agency's programs have become established, Qualifying Improvements shall not include improvements completed before the property has received an initial certificate of occupancy.

*Id.* at 1.01. FPFA's own Amended Charter contradicts itself. It claims FPFA is created pursuant to § 163.01(7)(g), but asserts its purpose pertains solely to qualifying improvements as defined in the Supplemental Act.

Separate legal entities created pursuant to § 163.01(7)(g) are created to:

acquire, own, construct, improve, operate, and manage public facilities, or finance facilities on behalf of any person, relating to a governmental function or purpose, including, but not limited to, wastewater facilities, water or alternative water supply facilities, and water reuse facilities, which may serve populations within or outside of the members of the entity.

Fla. Stat. § 163.01(7)(g)1. A reading of § 163.01(7)(g) in its entirety makes it clear that such entities are not permitted to finance qualifying improvements under the Supplemental Act; it does not mention the Supplemental Act's qualifying improvements. The Supplemental Act's qualifying improvements are:

1. Energy conservation and efficiency improvement, which is a measure to reduce consumption through conservation or a more efficient use of electricity, natural gas, propane, or other forms of energy on the property, including, but not limited to, air sealing; installation of insulation; installation of energy-efficient heating, cooling, or ventilation systems; building modifications to increase the use of daylight;

replacement of windows; installation of energy controls or energy recovery systems; installation of electric vehicle charging equipment; and installation of efficient lighting equipment.

2. Renewable energy improvement, which is the installation of any system in which the electrical, mechanical, or thermal energy is produced from a method that uses one or more of the following fuels or energy sources: hydrogen, solar energy, geothermal energy, bioenergy, and wind energy.

3. Wind resistance improvement, which includes, but is not limited to:

- a. Improving the strength of the roof deck attachment;
- b. Creating a secondary water barrier to prevent water intrusion;
- c. Installing wind-resistant shingles;
- d. Installing gable-end bracing;
- e. Reinforcing roof-to-wall connections;
- f. Installing storm shutters; or
- g. Installing opening protections.

Fla. Stat. § 163.08(2)(b). The list of qualifying improvements makes no mention of water facilities or utilities that serve populations.

A court cannot imply that a section of a statute includes a section from another statute when that term has been specifically excluded.

As to the Interlocal Cooperation Act specifically, this Court has stated:

... we cannot give the Interlocal Act a greater effect than its provisions establish. *See Holly*, 450 So.2d at 219 (explaining that this state's courts are "without

power to construe an unambiguous statute in a way which would extend ... its express terms or its reasonable and obvious implications.”)

*Halifax Hospital Medical Center v. State*, 278 So.3d 545, 550 (Fla. 2019) at 550, *citing Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)<sup>2</sup>, and *quoting Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So.2d 777, 778 (Fla. 1<sup>st</sup> DCA 1968)(emphasis omitted).

Section 163.01(7)(g) clearly and unambiguously states its purposes, and likewise clearly and unambiguously omits any reference to the Supplemental Act or its “qualifying improvements”. The lower court improperly construed § 163.01(7)(g) in a way that extends its express terms and reasonable, obvious implications. Section 163.01(7)(g) does not permit separate legal entities to finance

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<sup>2</sup> *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). While not quoted here, the *Holly* maxim, “[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction,” was abrogated by this Court in *Conage v. United States*, 346 So.3d 594 (Fla. 2022). This Court found that the maxim may be misleading because trial courts had to first determine whether a term was clear and unambiguous. In *Conage*, this Court provided the following maxim to help courts over that threshold question: “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Citing Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)

the qualifying improvements delineated in the Supplemental Act. The lower court cannot find that it does.

Because FPFA cannot legally claim it was created under or for the purposes of § 163.01(7)(g), it cannot claim to have the home rule powers delineated in §§ 125.01 and 166.021 under § 163.01(7)(g)7. This Court should void any findings that FPFA was created under or for the purposes of § 163.01(7)(g), and any findings that FPFA has the home rule powers delineated in Fla. Stat. §§ 125.01 and 166.021.

### **III. FPFA's Lack of Home Rule Powers is Not Cured by the Interlocal Act and its Charter.**

FPFA's Amended Charter purports to bestow upon FPFA all the "privileges and immunities from liability and exemptions from laws, ordinances, rules and common law which apply to the municipalities and counties of the State." FPFA Amd. Charter § 3.05(B). Importantly, this imbuelement falls far short of the panoply of powers afforded counties and municipalities in §§ 125.01 and 166.021. But, to the extent FPFA asserts that Flagler County and the City of Kissimmee have bestowed upon FPFA their home rule powers, this

Court addressed such an assertion in *Halifax*:

We now turn to Halifax’s argument that any lack of authority is cured though the Interlocal Act and its interlocal agreement with the City of Deltona.

...

By its terms, the Interlocal Act requires that any “power, privilege, or authority” that an agency commits to perform be one that it “might exercise separately” in the absence of an interlocal agreement. See § 163.01(4). Because Halifax does not have the independent authority to establish and operate a hospital in Deltona, it does not gain this authority under the Interlocal Act.

*Halifax*, at 549. In other words, since FPFA did not have home rule powers in the absence of an interlocal agreement, it cannot be endowed with such powers by its Amended Charter.

The whole point of § 163.01 is interlocal cooperation, not a usurpation of one entity’s jurisdiction by another, especially when it comes to the home rule authority of counties and municipalities. Even if § 163.01(7)(g) is read to give created entities the power to act extraterritorially, it does not prevent a county from regulating or denying the created entity’s actions within the county’s jurisdiction. Any local ordinance can be read consistently with §§ 163.01 and 163.08; as long as ordinances are not inconsistent with the law, they’re permitted. It also would not mean that an interlocal

agreement between the created entity and the county in which it wants to operate is unpermitted. In fact, the Legislature intended that an interlocal agreement was required. See House of Representatives Final Bill Analysis, Bill #CS/CS/HB 7117 (CS/CS/CS/SB 2094), at 6, which reads:

The intent of the amended provision is to clarify that a partnership of local governments may enter into a financing agreement and that the separate legal entity may impose the voluntary special assessments.

Nothing in the statute removes the counties' and municipalities' authority to regulate FPFA's operation. The legislature effectively says, by 163.08(16), these programs are subject to local regulation. If it doesn't mean that, one is reading that language out of the statute. The language would be unnecessary. See *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, 13 (Fla. 2004).

#### **IV. The Trial Court Improperly Added Language to the Florida Constitution and the Florida Statutes When it Found that Sections 125.01 and 166.021 Fully Apply to FPFA.**

As shown above, Fla. Stat. §§ 125.01 and 166.021, delineate the home rule powers of Florida's counties and municipalities. By finding that "all of the privileges, benefits, powers and terms of section 125.01 relating to counties," fully apply to FPFA, the trial

court improperly added language to the first sentence of that provision so that it essentially reads: “The legislative and governing body of a county or a separate legal entity shall have the power to carry on county government,” some of which are to:

...

- (c) Provide and maintain county buildings.
- (d) Provide fire protection, including the enforcement of the Florida Fire Prevention Code, as provided in ss. 633.206 and 633.208, and adopt and enforce local technical amendments to the Florida Fire Prevention Code as provided in those sections and pursuant to s. 633.202.
- (e) Provide hospitals, ambulance service, and health and welfare programs.
- (f) Provide parks, preserves, playgrounds, recreation areas, libraries, museums, historical commissions, and other recreation and cultural facilities and programs.
- (g) Prepare and enforce comprehensive plans for the development of the county.
- (h) Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.
- (i) Adopt, by reference or in full, and enforce housing and related technical codes and regulations.

...

Fla. Stat. § 125.01(1) (Underlined portion added.) Of course, the above is only a partial list of a county’s powers. The trial court expanded the meaning and intent of § 125.01 to absurd effect. Clearly, the Supplemental Act, whose purpose is to finance qualifying

improvements to enhance energy conservation, and harden properties against wind damage, was not meant to grant a separate legal entity the powers in the above list.

This is to say nothing of the trial court's embellishment of Article VIII of the Florida Constitution, which addresses the structure, creation and powers of local government in Florida. Section 1 describes counties as a political subdivision whose officers and commissioners are elected by the electors of each county or district as applicable. Under section 2(b), municipal legislative bodies are also elected. Section 1(f) provides that non-charter counties "shall have such power of self-government as is provided by general or special law." Similarly, under section 1(g) charter counties "shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Municipalities, which are covered in section 2, Article VII, "shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." Clearly, a separate legal entity does not fall within the Florida Constitution's descriptions

of county and municipality, nor does it grant a separate legal entity the powers it grants to counties and municipalities. The trial court, in essence, enlarged Article VIII, sections 1 and 2, by bestowing upon FPFA the home rule powers granted to counties and municipalities.

**V. The Far-Reaching Effect of the Lower Court’s Findings Is the Unlawful Preemption of County Home Rule Powers.**

There is no need to speculate on the far-reaching effect of the lower court’s findings on county home rule powers. Indeed, FPFA has already begun to tout the underlying Final Judgment as a declaratory judgment that counties have no home rule power that can regulate or deny FPFA’s operation within their boundaries. Once the Final Judgment was entered, FPFA began to operate in numerous counties without agreement from those counties. FPFA has recorded hundreds of assessment notices on property owners living in counties where no interlocal agreement between the county and FPFA exists. According to FPFA, the counties are powerless to stop them, and powerless to provide consumer protections to their constituents if those consumer protections conflict with FPFA’s purported “home rule powers.”

In effect, the lower court’s findings amount to a preemption of the counties’ authority to regulate or deny the operation of FPFA’s operation within their jurisdictions. The Legislature has not expressly or impliedly preempted the counties’ powers to do so.

In *Sarasota Alliance for Fair Elections v. Browning*, 28 So.3d 880 (Fla. 2010), this Court said:

A local government enactment may be inconsistent with state law if (1) the Legislature “has preempted a particular subject area” or (2) the local enactment conflicts with a state statute.

*Id.* at 886, citing *Lowe v. Broward County*, 766 So.2d 1199, 1206-07 (Fla. 4th DCA 2000). This Court explained that “[e]xpress preemption requires a specific legislative statement; it cannot be implied or inferred.” *Id.* As already shown above, the Supplemental Act and Interlocal Cooperation Act do not bestow upon FPFA the home rule powers enjoyed by counties and municipalities. Neither do those Acts expressly prohibit counties and municipalities from exercising the home rule powers delineated in §§ 125.01 and 166.021. While the Supplemental Act and Interlocal Act permit entities such as FPFA to operate the PACE program, those Acts do not expressly restrict regulation of such entities to the state or to the entities themselves.

Additionally, there is no express mandate in those Acts requiring counties to permit the PACE program in their jurisdictions. Therefore, there is no express preemption of counties' and municipalities' home rule authority to regulate or deny operation of PACE programs in their respective jurisdictions. In fact, the opposite is true. Fla. Stat. § 163.08(16), Fla. Stat., expressly states that the powers conferred by the Supplemental Act are supplemental to and “not in derogation of the home rule powers of counties and municipalities.” As already established above, this provision does not apply to separate legal entities such as FPFA.

The other method of preemption is implied preemption. In *Browning*, this Court stated that:

Preemption is implied “when ‘the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.

*Id.*, citing *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005) (quoting *Tallahassee Mem’l Reg’l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So.2d 826, 831 (Fla. 1st DCA 1996).

The Florida Statutes contain no legislative scheme so pervasive as to evidence an intent to preempt counties' authority to regulate, or deny the operation of the PACE program in their jurisdictions. Thus, this case fails the first prong of the implied preemption test articulated by this Court.

Despite the fact that the Legislature did not expressly or impliedly preempt the counties' authority to regulate or deny PACE operations in their jurisdictions, the lower court's findings, in effect, amounted to a preemption of county home rule powers. The lower court's findings are wielded as a sword and a shield by FPFA to act in derogation of the home rule powers of counties throughout the state.

### **CONCLUSION**

The Florida Constitution grants home rule powers to Florida's counties and municipalities. Florida Statutes delineate those powers. The lower court's erroneous findings that FPFA, a separate legal entity, enjoys home rule powers that trump those of counties and municipalities have the far-reaching effect of preempting the rights of counties and municipalities.

Therefore, this Court should reverse the circuit court and hold that the portions of the Final Judgment identified by the Appellants are void.

Respectfully submitted,

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June 17, 2024

**CERTIFICATE OF COMPLIANCE**

I certify, under Florida Rule of Appellate Procedure 9.045(e), that this brief complies with the applicable font and word-count requirements. It was prepared in Bookman Old Style 14-point font, and it contains 4,297 words.

/s/ Melissa A. Tartaglia  
Asst. Hernando County Attorney

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served by the Florida Courts E-Filing Portal, or by email, on June 17, 2024, to all counsel of record.

/s/ Melissa A. Tartaglia  
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