Case No. 4D23-3141
LT Case No. 50-2023-CA-009882XXXXMB

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

PALM BEACH COUNTY,

Appellant,

v.

FLORIDA PACE FUNDING AGENCY,

Appellee.

ANSWER BRIEF

AMBER S. NUNNALLY (FBN 109281)
ELISE M. ENGLE (FBN 1025077)
SHUTTS & BOWEN LLP
215 South Monroe Street,
Suite 804
Tallahassee, Florida 32301
anunnally@shutts.com
eengle@shutts.com

JAMES C. DINKINS, B.C.S.
(FBN 103521)
CIVFORGE LAW, PA
P.O. Box 141148
Orlando, Florida 32814
jamy@civforgelaw.com

Counsel for Florida PACE Funding Agency

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STATEMENT OF THE CASE AND FACTS

The Florida PACE Funding Agency (FPFA) is a local government entity created under section 163.01(7), Florida Statutes. This statute—called the Florida Interlocal Cooperation Act of 1969—"permit[s] local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities" to provide services and facilities in a manner that addresses "the needs and development of local communities." § 163.01(1)-(2), Fla. Stat.

FPFA was established in 2011 by an Interlocal Agreement between Flagler County and the City of Kissimmee to operate a PACE program[1] in Florida. (App'x 8, 21-53).[2] FPFA's purpose is to finance energy conservation and storm hardening improvements for residential and commercial properties. *Fla. PACE Funding Agency v. Pinellas Cnty.*, No. 2D23-985, 2024 WL 1288194, at *1 (Fla. 2d DCA

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[1] PACE stands for "Property Assessed Clean Energy." (App'x 9). The legislature has authorized PACE programs in Florida to assist property owners in making energy efficient and wind resistance improvements to their homes and businesses. *See* § 163.08(1), Fla. Stat.

[2] Citations to the Appendix are to the Appendix filed by Appellant Palm Beach County on May 3, 2024.

Mar. 27, 2024); *see* § 163.08(1), Fla. Stat. Property owners may use FPFA financing to cover 100% of the costs for eligible improvements done by FPFA-approved companies and contractors. *Id.*; *see* § 163.08(4), Fla. Stat. FPFA then levies non-ad valorem assessments to collect the cost of those improvements from the property owner over time. *See* § 163.08(3), Fla. Stat. These assessments are included on a property owner's tax bill each year. *See* § 163.08(4) (cross-referencing § 197.3632, Fla. Stat.).

I. FPFA's Operations in Palm Beach County

In August 2017, FPFA and Palm Beach County (County) entered into an Interlocal Agreement, authorizing FPFA to operate a PACE program in the County. (App'x 67-84). As part of the Interlocal Agreement, FPFA agreed to comply with all County ordinances regulating PACE programs. (App'x 72).

In October 2022, a Leon County circuit court validated a series of FPFA bonds worth approximately $5 billion (2022 Bond Validation). (App'x 115-60); *see also Fla. PACE Funding Agency*, 2024 WL 1288194, at *2. The final judgment in the 2022 Bond Validation proceeding confirmed FPFA's ability to operate statewide without

being bound by municipal or county ordinances purporting to regulate PACE programs.[3] *Id.*

Pursuant to the 2022 Bond Validation and the general law it relies on, FPFA notified the County in January 2023 that it was terminating the Interlocal Agreement effective immediately. (App'x 107-08). FPFA then began offering its PACE program to property owners in the County in the manner outlined in the 2022 Bond Validation from the Leon County Circuit Court. *See* (App'x 108).

II. The County Files Suit Against FPFA

Several months after termination of the Interlocal Agreement, the County sent a letter to FPFA in which it asserted that FPFA could not operate in the County unless it complied with all County ordinances regulating PACE programs. (App'x 161). The County

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[3] In October 2023, a group of state attorneys, counties, and tax collectors sought untimely post-judgment relief arguing that the circuit court erred in ruling that FPFA can operate "independently and concurrently . . . without interference or regulation from other local government[s]." (App'x 155-56); Motions for Relief from Final Judgment, *Fla. PACE Funding Agency v. State*, No. 2022-CA-1562 (Fla. 2d Cir. Ct. Oct. 4 & 5, 2023). An appeal of the circuit court's order denying post-judgment relief is pending at the Florida Supreme Court. *See State Attys. for Second, Seventh, & Ninth Jud. Circs. v. Fla. PACE Funding Agency*, No. SC24-652.

demanded that FPFA cease and desist its operations in Palm Beach County. *Id.*

Then, in April 2023, the County filed a two-count complaint against FPFA in Palm Beach County circuit court. (App'x 7-14). *Count One* seeks a declaratory judgment stating that the County may enforce its ordinances regarding PACE programs against FPFA, notwithstanding the 2022 Bond Validation. (App'x 16-17). The County also asks for a declaration that so-called "collateral issues" in the 2022 Bond Validation are not binding on Palm Beach County. (App'x 17). *Count Two* seeks injunctive relief and asks the lower court to enjoin FPFA from conducting any business in the County unless and until it enters into a new Interlocal Agreement and complies with local law. (App'x 18-19).

III. The County's Case is Dismissed for Improper Venue

FPFA moved to dismiss the County's complaint for improper venue, arguing that FPFA can only be sued in its home venue of Sarasota County. (App'x 185-88). The County responded that FPFA cannot assert home venue privilege because it is not "the state or one of its agencies or subdivisions." (App'x 317). Nevertheless, the County argued that the sword-wielder exception to the home venue privilege

applies because FPFA's operation in the County after termination of the Interlocal Agreement is an "unlawful invasion of Palm Beach County's constitutional rights." (App'x 318-20). Although not addressed in the written response to FPFA's motion to dismiss, the County also argued at the hearing on the motion that the venue selection clause in the now-terminated Interlocal Agreement requires its lawsuit to be litigated in Palm Beach County. (App'x 410-11).

In a brief written order, the trial court granted FPFA's motion to dismiss for improper venue and ordered the case to be transferred to the circuit court in Sarasota County. (App'x 5). The whole of the trial court's reasoning is as follows:

> This case raises serious questions about the propriety of two local governments and a bond validation being able to create a separate legal entity that is essentially immune from regulation [of] all other local entities. It is unclear that the legislature ever intended Flagler County and the City of Kissimmee to have such power. Nonetheless, the Court is bound by precedent to acknowledge Defendant's right to home venue. Although the policies supporting the sword-shield exception support its application, the case law does not.

Id.

This is the County's appeal of the non-final order regarding venue.

SUMMARY OF ARGUMENT

The trial court correctly concluded that the proper venue for Palm Beach County's suit against FPFA is in FPFA's home venue of Sarasota County. The County provides no valid legal basis to reverse that ruling.

First, the venue selection clause in the Interlocal Agreement between the County and FPFA did not survive FPFA's termination of that Agreement. Therefore, the venue selection clause does not control the question of the proper forum in which to litigate this case. The narrow language in the venue selection clause makes it clear it applies only to disputes that arise out of the Interlocal Agreement. That is not the case here.

Second, FPFA is a government defendant that is entitled to assert the common law home venue privilege. The County's suggestion that the home venue privilege applies to only certain types of government defendants is not supported by Florida law.

Finally, the sword-wielder exception to the home venue privilege does not apply in this case. That exception may only be invoked by individuals and private-party plaintiffs to protect personal, fundamental constitutional rights. It cannot be used in a "showdown

between governmental parties." *Fla. PACE Funding Agency*, 2024 WL 1288194, at *5. Likewise, the exception cannot be used to allow the County to launch a collateral attack on the 2022 Bond Validation.

This Court should affirm.

STANDARD OF REVIEW

This court reviews *de novo* orders addressing the transfer of venue pursuant to the home venue privilege. *See, e.g.*, *Fla. Div. of Pari-Mutuel Wagering v. Fla. Standardbred Breeders & Owners Ass'n*, 983 So. 2d 61, 62 (Fla. 4th DCA 2008).

ARGUMENT

I. The Venue Selection Clause in the Interlocal Agreement Did Not Survive FPFA's Termination of the Agreement.

The County first argues that the order transferring this case to Sarasota County must be reversed because the trial court erred when it implicitly concluded that the venue selection clause in the Interlocal Agreement did not survive FPFA's termination of that Agreement. The case law cited by the County does not support its position. The venue order should be affirmed.

As a threshold matter, FPFA does not disagree that "[g]enerally, dispute-related provisions, such as forum selection clauses are enforceable beyond the expiration of the contract if they are otherwise applicable to the disputed issue and parties have not agreed otherwise." *Fla. Woman Care LLC v. Nguyen*, 329 So. 3d 146, 151 (Fla. 4th DCA 2021) (quoting *Baker v. Econ. Rsch. Servs., Inc.*, 242 So. 3d 450, 453 (Fla. 1st DCA 2018)). In other words, for a venue

selection clause to survive, the post-termination dispute must arise out of or be related to the substantive provisions of the contract. *See Baker*, 242 So. 3d at 453; *see also Nguyen*, 329 So. 3d at 151 (citing *Baker* and reasoning that dispute resolution provisions are procedural and survive the termination of a contract). That is not the case here.

After service of the Initial Brief, the County filed a notice of a related case from the Second District, stating that it is "related to this matter because it arises from identical facts, where a County sued the Florida PACE Funding Agency, and a contractual venue provision was held to be determinative of venue." The flaw in that argument is that the facts in *Florida PACE Funding Agency v. Pinellas County*, 2D23-985, 2024 WL 1288194 (Fla. 2d DCA Mar. 27, 2024), are *not* "identical." Instead, there is an important factual distinction in that case that renders it inapplicable to this one.

The language in the venue selection clauses in the Palm Beach County Interlocal Agreement and the Pinellas County Interlocal Agreement is not the same. In the Pinellas County Interlocal Agreement, the venue selection clause covers "*any* legal or equitable action involving the County . . . [FPFA] or its program in Pinellas

County." *Id.* at *5 (emphasis in original) (quoting Pinellas County Interlocal Agreement). As the Second District recognized, the Pinellas venue selection clause is "broad" and "not limited just to claims 'arising under' the interlocal agreement or to claims requiring interpretation of the agreement's substantive provisions." *Id.* Based on that broad language, the Second District concluded that the venue selection clause trumped FPFA's home venue privilege and that Pinellas County was permitted to litigate its case outside of FPFA's home venue. *Id.* at *5-6.

In contrast, the venue selection clause in the Palm Beach County Interlocal Agreement is narrow. It states: "The venue of any legal or equitable action that *arises out of or relates to this Agreement* shall be in the appropriate state court in Palm Beach County, Florida." (App'x 82) (emphasis added). Based on the plain language of this clause, it can only be enforced for claims directly related to the County's Interlocal Agreement with FPFA. *See Fla. PACE Funding Agency*, 2024 WL 1288194, at *5 (citing *Antoniazzi v. Wardak*, 259 So. 3d 206, 209 (Fla. 3d DCA 2018)). That brings us to the next point that requires the trial court's order to be affirmed.

Here, the County's claims do not arise under the Interlocal Agreement nor do they require an interpretation of any substantive provision of that agreement. This is not a dispute about how the parties are supposed to perform under the Interlocal Agreement. Indeed, unlike in Pinellas County, there are no predicate allegations of a breach of the Interlocal Agreement in Palm Beach County's complaint. *See id.* at *3.

Instead, the dispute is centered around whether the County has the authority to regulate PACE programs within its boundaries which FPFA must follow or whether the general law authorizing PACE programs allows FPFA to operate within any jurisdiction in the state regardless of any local law to the contrary. These questions cannot be answered by looking to the now-terminated Interlocal Agreement between the two parties. Therefore, the venue selection clause in the Interlocal Agreement does not apply in this case.

The County also relies on this Court's decision in *Nguyen* to argue that the venue selection clause is still enforceable despite the agreement being terminated. *See* (IB at 10). In *Nguyen*, this Court reversed an order denying a motion to compel arbitration, holding that an arbitration clause in an employment contract survived the

employee's firing because the employee's claims related to substantive provisions of the employment contract. 329 So. 3d at 148, 151. For the same reasons discussed above, *Nguyen* adds nothing to the County's position. Unlike in *Nguyen*, the County's action for declaratory and injunctive relief against FPFA does not arise out of the terminated Interlocal Agreement and the venue selection clause did not survive termination.

Finally, County's assertion that the trial court's order is *per se* reversible because the trial court did not address the applicability of the venue selection clause in the Interlocal Agreement is without merit. The County cites no authority for this proposition nor could it. In *Florida PACE Funding Agency*, the trial court also failed to address Pinellas County's argument that the venue selection clause applied. 2024 WL 1288194, at *3. Nevertheless, the Second District reviewed and affirmed the denial of the motion to dismiss based on that exact argument made by Pinellas County. *Id.* at *7.

Because the venue selection clause in the Interlocal Agreement does not apply to the County's complaint, the trial court properly determined that FPFA is entitled to assert its home venue privilege.

II. FPFA is Entitled to Assert the Home Venue Privilege.

Next, the County argues that FPFA is not the type of government entity that is permitted to invoke the home venue privilege when it is sued. (IB at 12-18). This point also fails because in Florida all levels and types of government defendants are entitled to the home venue privilege.

As this Court has explained:

> When the defendant is a *governmental agency*, it maintains the privilege of being sued only in the county of its headquarters. The only time that privilege is not enforced is when an agency waives it or an exception to the privilege applies.

Fla. Div. of Pari-Mutuel Wagering, 983 So. 2d at 62-63 (emphasis added) (citations omitted). Other districts use similarly broad language when discussing government entities and the home venue privilege. *See, e.g.*, *Jacksonville Elec. Auth. v. Clay Cnty. Util. Auth.*, 802 So. 2d 1190, 1192 (Fla. 1st DCA 2002) ("Governmental defendants in Florida have a common law 'home venue privilege' . . . ."); *Boca Raton Housing Auth. v. Carousel Dev., Inc.*, 482 So. 2d 543, 545 (Fla. 3d DCA 1986) (describing a local housing authority as a "public body of a political subdivision of the state"); *Lee Mem'l Health Sys. v. Martinez*, 338 So. 3d 350, 354 (Fla. 3d DCA 2022) ("With

respect to Lee Health, which is a political subdivision of the state, venue is controlled by the home venue privilege.").

The County attempts to apply a much narrower definition of government defendant by selectively quoting from case law that uses the language "the State or an agency or subdivision of the state." According to the County, this means only "the State of Florida, Florida State agencies, and Subdivisions of the State of Florida," can assert the home venue privilege, "[p]eriod." (IB at 14). The County goes on to contend that because FPFA is a special district and therefore a limited purpose local government, it is separate and distinct from a subdivision of the state. (IB at 14-16). Under the County's theory, the home venue privilege applies only to "general purpose governmental bodies." (IB at 15).

Tellingly, the County cites no authority to support its position and, in fact, its position is belied by the ample case law on this topic. Cases addressing the common law home venue privilege—including case law from this Court—establish that the privilege applies broadly to *all* government defendants regardless of the type or purpose of the government body. *See, e.g.*, *Shands Teaching Hosp. & Clinics, Inc. v. Sidky*, 936 So. 2d 715, 719-20 (Fla. 4th DCA 2006) (using the

descriptor "state or one of its agencies or subdivisions" when applying home venue privilege to a teaching hospital).

FPFA has found no Florida case stating that an entity created by an Interlocal Agreement and which is statutorily defined as a "public agency" and "local government," §§ 163.01(3)(b), 163.08(2)(a), Fla. Stat., cannot assert the home venue privilege when it is sued. On the contrary, the Second District in *Florida PACE Funding Agency* expressly determined that FPFA is entitled to assert home venue privilege, concluding that FPFA met its burden to prove entitlement to the privilege "by establishing, among other things, that it is a Florida *governmental defendant* based in Sarasota County." 2024 WL 1288194, at *4 (emphasis added). That conclusion is the same one implicitly drawn by the trial court in this case and is the only correct conclusion to be drawn from the record facts[4]. *See* (App'x 281-93).

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[4] Namely, the numerous exhibits proving the governmental status of FPFA: two successive bond validations, (App'x 207-80), in which FPFA, as Plaintiff in an action in which the County was a party defendant, was found to be a governmental entity entitled to issue bonds; an acknowledgment of the listing of FPFA as a special district by the Department of Economic Opportunity, (App'x 281-84); submission of audit reports to the state auditor general as required of governmental entities from an email address associated with

III. The Sword-Wielder Exception to the Home Venue Privilege Does Not Apply in this Case.

Finally, the County argues that even if FPFA can assert the home venue privilege, it does not apply in this case based on the sword-wielder exception. (IB at 18-20). This argument must be rejected for the same reasons discussed by the Second District in *Florida PACE Funding Agency* and other relevant cases.

There are four exceptions to the home venue privilege, only one of which is at issue here—the "sword-wielder" doctrine. The sword-wielder exception to the home venue privilege allows a suit to be litigated outside a government defendant's home county when there is a "real and imminent danger" of an invasion by the government defendant of a fundamental constitutional right of a private-party

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FPFA's web domain, www.floridapace.gov, (App'x 285-87); FPFA's Certificate of Exemption from sales and use tax listing "STATE GOVERNMENT" as FPFA's exemption category as issued by the Department of Revenue, (App'x 288-90); an email from the Department of Management Services acknowledging FPFA's participation in the Florida Retirement System, (App'x 291-93); and a recognition by the County in its interlocal agreement with FPFA that FPFA is "a separate legal entity and public body and unit of local government . . . ." (App'x 298).

plaintiff. *Jacksonville Elec. Auth.*, 802 So. 2d at 1192-93. These circumstances do not exist in this case.

The County is not the appropriate type of plaintiff to invoke the sword-wielder doctrine. Florida courts have consistently held that the sword-wielder doctrine applies only to individuals and private-party plaintiffs. *See, e.g.*, *Dep't of Community Affairs v. Holmes Cnty.*, 668 So. 2d 1096, 1102 (Fla. 1st DCA 1996) (explaining that the doctrine applies in the "limited circumstance" where a government defendant "directly threatens an individual's constitutional rights"); *see also Fla. PACE Funding Agency*, 2024 WL 1288194, at *4 (collecting cases). For example, in *Department of Community Affairs*, the First District concluded that Holmes and Washington Counties could not maintain a suit against the Department of Community Affairs outside of Leon County under the guise of the sword-wielder doctrine because the counties "are not 'individuals' within the meaning of that exception whose constitutional rights have been directly threatened by the state agency." 668 So. 2d at 1102; *see also Dickinson v. Fla. Nat'l Org. for Women, Inc.*, 763 So. 2d 1245, 1247 (Fla. 4th DCA 2000) (rejecting application of sword-wielder doctrine where the "violation

of a *personal* constitutional right" was not at issue). The same conclusion is required here.

The County tries to get around this hurdle by analogizing its constitutional home rule authority to an individual's fundamental constitutional right. But, as the Second District stated, that is a "bridge too far." *Fla. PACE Funding Agency*, 2024 WL 1288194, at *4. Simply put, the sword-wielder doctrine does not apply to "a showdown between governmental parties." *Id.*

The County's complaint against FPFA seeks a declaration that it can enforce its ordinances on PACE programs against FPFA and an injunction to enforce those ordinances. (App'x 10-13). The crux of the County's argument that they are entitled to this relief is that the 2022 Bond Validation entered by the Leon County circuit court is erroneous, and therefore FPFA cannot rely on it to get around the County's ordinances. *See* (App'x 11-13, 165-67, 172). However, the 2022 Bond Validation applies statewide and does not single out the County or its ordinances for "special condemnation." *Fla. PACE Funding Agency*, 2024 WL 1288194, at *4 (reasoning that Pinellas County was situated no differently than any other county that lacks an interlocal agreement with FPFA).

Further, the propriety of the 2022 Bond Validation is not before this Court. Nor can it be. The County's attempt to invoke its home rule authority against FPFA is really an improper collateral attack on the scope of the 2022 Bond Validation. "[A]ny contention by the County that FPFA is directly violating the County's constitutional rights is secondary at best." *Id.* at *5.

The Fifth District reached a similar conclusion when a school board raised the sword-wielder doctrine, alleging its constitutional rights were being violated by the state. *Sch. Bd. of Osceola Cnty. v. State Bd. of Educ.*, 903 So. 2d 963, 967 (Fla. 5th DCA 2005). The Fifth District recognized that the primary purpose of the school board's lawsuit was to determine the constitutionality of a statute, not to vindicate the school board's constitutional rights. *Id.* Thus, the court rejected the school board's argument and applied the home venue privilege in favor of the state. *Id.* This case is no different. The County cannot hide behind a claim of a constitutional violation to relitigate the 2022 Bond Validation on its home turf.

For each of these reasons, the trial court correctly concluded the case law does not support the application of the sword-wielder doctrine to the County's claims. (App'x 5). Therefore, the trial court

did not have discretion in applying the home venue privilege in favor of FPFA; it was required to do so. *Sch. Bd. of Osceola Cnty.*, 903 So. 2d at 966. The order granting FPFA's motion to dismiss for improper venue and transferring the case to Sarasota County should be affirmed.

CONCLUSION

The trial court's non-final order dismissing the County's complaint for improper venue should be affirmed.

Respectfully submitted,

/s/ Amber S. Nunnally
AMBER S. NUNNALLY (FBN 109281)
ELISE M. ENGLE (FBN 1025077)
SHUTTS & BOWEN LLP
215 South Monroe Street,
Suite 804
Tallahassee, Florida 32301
(850) 241-1717
anunnally@shutts.com
eengle@shutts.com

JAMES C. DINKINS, B.C.S.
(FBN 103521)
CIVFORGE LAW, PA
P.O. Box 141148
Orlando, Florida 32814
jamy@civforgelaw.com

Counsel for Florida PACE Funding Agency

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 15, 2024, a true and accurate copy of the foregoing was filed via the Florida Court's E-Filing Portal and served to the following counsel of record:

Helene C. Hvizd
Marianna R. Sarkisyan
Palm Beach County Attorney's Office
301 North Olive Avenue, Suite 601
West Palm Beach, Florida 33401
hhvizd@pbcgov.org
msarkisyan@pbcgov.org

Counsel for Palm Beach County

/s/ Amber S. Nunnally
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the typeface requirements of Florida Rule of Appellate Procedure 9.045(b) because it was prepared using 14-point Bookman Old Style font. This brief also complies with Florida Rule of Appellate Procedure 9.210(a)(2)(B) because it contains 4,079 words, excluding the parts of the brief exempted by Rule 9.045(e).

/s/ Amber S. Nunnally
Attorney