LOCAL GOVERNMENT SOVEREIGN IMMUNITY 201: FLORIDA
By Amanda Coffey

“The King can do no wrong.”

One of the fundamental tenets of local governance is that the sovereign—whether in the form of a state, county, municipality, or government agency—is immune from liability or taxation. However, our modern concept of sovereign immunity has evolved significantly from the traditional (and anachronistic) English common law theory that “the king can do no wrong.” Instead, sovereign immunity now rests on policy considerations including separation of powers, the protection of public funds, and the efficient and uninterrupted administration of government functions.

This article will explore the basics of local government sovereign immunity in two areas: (1) immunity from suit or tort liability; and (2) immunity from property taxes. While these immunities are almost universal in American law, they are not applied uniformly to all local government agencies in all states, and they may be waived in a number of ways. Sovereign immunity is therefore a potentially complex issue that attorneys working or interacting with local governments must consider in a variety of legal tasks, from contract drafting to filing tort actions. Each state has unique variations on the rules of sovereign immunity. For practical purposes, this article focuses primarily on sovereign immunity as it applies under Florida law, as illustrative of many nationwide trends.

Immunity from Suit

Florida’s constitution grants states and their subdivisions “absolute sovereign immunity”—meaning that those local government entities are shielded from suit unless the legislature explicitly creates a statutory exception waiving immunity. Note that immunity from suit is not the same as immunity from liability. A government entity may in fact have tort liability under the common law for particular conduct of one of its agents, but remain immune from suit jurisdictionally. Sovereign immunity from suit serves not to dispel liability, but to deprive a court of subject matter jurisdiction despite potential liability, unless the fact pattern at issue falls under a statutory waiver.

There are several strong public policy arguments supporting sovereign immunity. First is the fundamental concept of separation of powers. Local governments, as legislative and executive bodies, must be free to make decisions—political and operational—for the orderly administration of government functions within the district. Sovereign immunity allows local governments to make those decisions without fear of excessive court entanglement. Also of public interest is the necessity to protect taxpayer funds from being expended on excessive litigation defending tort suits. Sovereign immunity ensures that one individual litigant will not receive a windfall settlement from government at the expense of local taxpayers, or to the detriment of government services. And, finally, although a local government has the duty to exercise reasonable care to protect its citizens, sovereign immunity allows local governments to administer government services without becoming liable for every foreseeable harm, which would be extraordinarily burdensome.

Of course, knowing as we do that the king can, in fact, do wrong, there must be limits on just how much protection local governments receive. To mitigate potential injustices that could result from absolute sovereign immunity, a state can choose to waive protection from liability in certain instances.
Statutory Waiver

Sometimes a state will expressly waive its sovereign immunity. Florida’s constitution provides that the legislature may, by general law, waive sovereign immunity. Pursuant to this provision, the legislature codified a limited waiver of tort liability for the state and its “agencies or subdivisions.” For purposes of sovereign immunity, a subdivision of the state includes counties, county constitutional officers, and municipalities, therefore, all local government entities are potentially liable for tort claims “in the same manner and to the same extent as a private individual.”

Statutory waiver of sovereign immunity may establish specific procedural requirements for filing suit, statutes of limitation, and a limitation on damages and attorney fees, in order to protect the public purse from being depleted by an individual claim.

Contractual Waiver

In other instances, waiver can be implied by contract. The potential for an inadvertent waiver of sovereign immunity is something that practitioners representing local governments must watch out for when reviewing contracts and agreements. Particularly dangerous are form contracts. A standard indemnification clause could operate as a waiver of sovereign immunity if left unmodified.

To avoid an inadvertent waiver, contract provisions can be restructured to indemnify solely for a County’s own negligence as established by statute, and to ensure that the value of indemnification is limited to the value of the contract amount or the limits set by statute (in Florida, this is done by Fla. Stat. § 768.28). Further, liability should be limited to actual damages, not attorney fees. If a contracting party refuses to agree to the removal or revision of a standard indemnification clause, the local government agency will need to make a policy decision, determining whether the value of the services being contracted for outweighs the risk created by the indemnification provision. This will often be a practical decision based on how necessary the services are; the availability of alternate contractors or providers; and the best interest of the agency and its constituents. As an attorney advising a local government agency, raising the issue and making the agency aware of potential consequences may be the only option if a contracting party refuses to budge.

When Immunity Is Waived: Discretionary vs. Operational Actions

When waiver of sovereign immunity is statutory, a distinction is often made between governmental or discretionary actions (basically policy or planning level decisions) and proprietary or operational actions (that is, the enactment of policies). A local government agency is immune from liability for its policy decisions; however, it can be held liable for the torts of its agents in the execution of policies.

Immune “discretionary” actions include governing and supervisory decisions, such as how much priority is placed on code enforcement, the allocation of resources, the number of staff assigned to a project, the timing or placement of traffic lights, and how laws are enforced. “Operational” actions, on the other hand, include the method of performing government functions. For example, the negligence of a municipal employee that results in injury can expose the municipality to tort liability. The waiver of sovereign immunity in such a case only opens the door to litigation; it does not change burdens of proof or elements of a tort. In order to prevail in a tort suit, a plaintiff must still demonstrate all the necessary elements of a tort: duty, breach, causation, and damage (as if any young lawyer needed a reminder of those elements).
In limited instances, a discretionary, planning level activity can result in liability, but only if the policy decision at issue creates a danger that the government agency knows about and that the public could not know about—that is, a “hidden danger or trap.”\textsuperscript{18} While merely approving effective plans, such as for a drainage ditch, does not expose a city to liability, the creation of a known dangerous condition raises an actionable duty to warn the public.\textsuperscript{19} For example, if a city-maintained right-of-way dangerously obstructs the vision of motorists, the city has a duty to correct the issue or warn the public.\textsuperscript{20}

\textbf{Immunity from Property Tax}

In Florida, the state and its political subdivisions (such as counties)\textsuperscript{21} are immune from property tax. This is premised, like immunity from suit, not on a constitutional or statutory provision, but on fundamental tenets of government law.\textsuperscript{22} This makes sense; it is illogical for a government agency that operates on tax revenue to pay property taxes; that’s tantamount to taking money from one pocket and putting it in the other. Immunity from taxation indicates an \textit{absence} of power to tax and is, therefore, much stronger than a statutory exemption from taxation, which may be granted, for example, to charitable or religious organizations. A Florida county-owned property is exempt from taxation regardless of the use to which the property is put.

Municipalities in Florida, on the other hand, are only \textit{exempt} from taxation; they are not immune because they are not subdivisions of the state.\textsuperscript{23} In Florida, municipalities are instead granted a statutory exemption from taxation, but only for property that is owned by the municipality \textit{and used} for municipal or public purposes.\textsuperscript{24} Municipal-owned property leased to a profit-making nongovernment entity must be taxed, unless the lessee uses the property to carry out some sovereign function—a public purpose—on the municipality’s behalf.\textsuperscript{25} The test of what constitutes a public purpose has been much debated in Florida law, but is generally agreed upon by the courts to include commonly recognized traditional municipal purposes, such as providing police protection or providing parks and recreational facilities for the public’s wellbeing.\textsuperscript{26}

A Florida attorney facing a question of taxation in relation to a government-owned property must answer two questions. First, the attorney must determine first whether the property owner is an immune “subdivision of the state” or is exempt under a statutory provision. Second, he or she must determine whether or not the property is used for an exempt public purpose.

\textbf{Conclusion}

Attorneys working for, with, or against local government agencies face many issues unique to government that do not arise when dealing with the private sector. Sovereign immunity is only one of these issues—but it is both an important and a potentially complex one. The devil is always in the details when determining whether or not, under a specific set of facts, the king can, in fact, do wrong.

\begin{itemize}
  \item \textsuperscript{1} Amanda Coffey is the Deputy for Government Affairs and Staff Counsel for the Pinellas County, Florida, Property Appraiser, and acts as the Local Government Liaison to the Stetson Law Review’s \textit{Local Government Law Symposium} for the Florida Bar’s City, County, and Local Government Law Section.
  \item \textsuperscript{2} \textit{Hargrove v. Cocoa Beach}, 96 So. 2d 130, 132 (Fla. 1957)
  \item \textsuperscript{3} Most state laws espouse very similar principles and rules in relation to sovereign immunity, particularly in the case of immunity from liability. For a general starting point for research on sovereign immunity in other states, see:
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57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 1 et seq.; 71 Am. Jur. 2d State and Local Taxation § 242 et seq.; 20 C.J.S. Counties §§275–296 (Liability for Torts); 20 C.J.S. Counties §§369–384 (Taxation); 63 C.J.S. Municipal Corporations § 884 (Governmental or Sovereign Immunity in General). This article does not attempt to address distinctions between sovereign immunity in state vs. federal courts, tribal sovereign immunity, or immunity from debt interest, as these topics exceed the introductory scope of the article. There is a vast library of case law and scholarship on sovereign immunity, in all of its permutations, for those who wish to explore the topic in greater detail.


5 The line between these two concepts, understandably, is not always clear. To illustrate, in a recent Florida Supreme Court opinion that thoroughly explores the concept of sovereign immunity, two justices separately concurred with the majority opinion in result only, stating that the majority had improperly “equate[d] ‘immune from suit’ with ‘not liable.’” Rodriguez v. Miami-Dade Co., 117 So. 3d 400, 410 (Fla. 2013) (Canady, J. & Polston, C.J., concurring in result only). In theory, immunity from suit (as opposed to liability) should be a complete bar to court action. The immunity protects a county or municipality from having to become entangled in a lawsuit in the first place; therefore, there is no potential remedy if the lawsuit is allowed to proceed incorrectly because the government entity has already become entangled in the suit.

6 Wallace v. Dean, 3 So. 3d 1035, 1044 (Fla. 2009).


8 Fla. Const. art. X, s. 13.


10 Id. The Constitution of Florida, § 1, Article 8, specifically designates counties as political subdivisions of the state. Section 8, Article 8, of the constitution authorizes the legislature to establish municipalities, which it does in Title XII of the Florida Statutes. Municipalities, unlike counties, are creatures of statute. The legislature explicitly includes municipalities as “political subdivisions” in the statute waiving sovereign immunity; however, because of their provenance, municipalities may or may not be “political subdivisions” under different statutes or for different purposes. County constitutional officers (such as elected Tax Collectors or Clerks of Circuit Court) are also individually deemed to be subdivisions of the state for purposes of sovereign immunity. Beard v. Hambrick, 396 So. 2d 708, 711 (Fla. 1981).


14 Hargrove, 96 So. 2d at 132; Commercial Carrier Corp. v. Indian River Co., 371 So.2d 1010 (Fla. 1979).

15 Carter v. City of Stuart, 468 So. 2d 955, 957 (Fla. 1985).


17 Lake Parker Mall, Inc. v. Carson, 327 So.2d 121 (Fla. 2d Dist. App. 1976); Smiley v. Court, 243 So.2d 643 (Fla. 4th Dist. App. 1971).

18 Payne v. Broward Co., 461 So. 2d 63, 65 (Fla. 1984); City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982).

19 City of St. Petersburg, 419 So. at 1084; Castano v. City of Miami, 840 So.2d 412 (Fla. 3d Dist. App. 2003); Leon v. City of Miami, 312 So.2d 518 (Fla. 3d Dist. App. 1975).


21 See supra n. 10 (explaining “political subdivisions” of the State).

22 Id.; Dickinson v. City of Tallahassee, 325 So.2d 1, 3 (Fla. 1975).

23 Fla. Dept. of Revenue v. City of Gainesville, 918 So. 2d 250 (Fla. 2005).


25 Page v. City of Fernandina Beach, 714 So. 2d 1070 (Fla. 1st Dist. App. 1998).
See, e.g., Fla. Dept. of Revenue v. City of Gainesville, 918 So. 2d 250 (Fla. 2005); City of Miami Beach v. Hogan, 63 So. 2d 493 (Fla. 1953); Page v. City of Fernandina Beach, 714 So. 2d 1070 (Fla. 1st Dist. App. 1998); Mikos v. City of Sarasota, 636 So. 2d 83 (Fla. 2d Dist. App. 1994).