

Interlocal agreement, indemnification provisions

Number: INFORMAL

Date: November 19, 1996

Mr. Leonard G. Rubin
Assistant City Attorney of Coral Springs
9551 West Sample Road
Coral Springs, Florida 33065

Dear Mr. Rubin:

According to your letter, the City of Coral Springs wishes to enter into an interlocal agreement with the Broward County School Board. The agreement would set forth the duties and obligations of the city and the school board with regard to "the implementation of municipal school concurrency review." As part of this cooperative effort, the school board and the city will jointly review proposed development to ensure that school concurrency requirements are met.

You have provided a copy of a draft of the interlocal agreement. In two separate provisions the city agrees to bear the responsibility for the defense of and cost incurred in defending the school board from any and all liability resulting from the city's own actions. You have asked for this office's comment on the validity of these indemnification provisions.

While this office will not pass on the validity of particular contractual provisions,[1] the following informal comments may be of assistance in resolving this matter.

Section 768.28, Florida Statutes (1996 Supp.), serves to waive the sovereign immunity of the state and its agencies and subdivisions to the extent specified in that section. Monetary limitations are specified allowing payment of a judgment against the state or its agencies or subdivisions by any one person not to exceed \$100,000 for any claim or judgment which, when totaled with all other claims paid by the state arising out of the same incident or occurrence, does not exceed \$200,000.[2] Punitive damages are excluded.[3]

State agencies or subdivisions within the scope of section 768.28, Florida Statutes, are defined to include "counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities . . . "[4] This office has consistently advised governmental entities that it is impermissible for them to become a party to a contract that includes an indemnification or hold harmless provision in the absence of legislative authorization.[5]

For example, this office, in Attorney General's Opinion 80-77, concluded that the Governor, in the absence of a statute, was not authorized to waive the sovereign immunity of the state by agreeing that the state would waive certain defenses and would hold the United States harmless from any violations of the regulations prescribed by the United States Department of the Interior that the state or its employees may commit. More recently, this office determined that the Department of Corrections could not by contract agree to indemnify and hold a private company

harmless for any damage, loss, or injury caused by the department, its employees or agents.[6] Similarly, in Attorney General's Opinion 95-12, this office advised the Department of Health and Rehabilitative Services that it could not contractually indemnify and hold harmless the Board of County Commissioners of Collier County for any damage, loss, or injury arising out of the negligent provision of services by HRS or its employees at a county health unit.

A limited waiver of the state's immunity in tort has already been accomplished by section 768.28, Florida Statutes (1996 Supp.). Subsection (1) of section 768.28 provides in part:

"In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies . . . to recover damages in tort for money damages against the state or its agencies . . . for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency . . . while acting within the scope of his office or employment under circumstances in which the state or such agency . . . if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act."

Subsection (18) of the statute, however, expressly provides:

"Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence. This does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance."

In Attorney General's Opinion 95-12 this office considered the argument that subsection (18), above, only prohibits a clause in which one agency would indemnify another or would assume liability for the other agency's negligence. The opinion concludes that "[w]hile the second sentence of section 768.28(18), Florida Statutes (1994 Supp.), does prohibit such a clause, the first sentence of the statute clearly provides that a state agency may not waive any defense of sovereign immunity or increase the limits of its liability when entering into a contract with a political subdivision of the state."

Thus, it is the position of this office that the City of Coral Springs is not authorized to waive any defense of sovereign immunity or increase the limits of its liability by contract. This conclusion would not preclude a contractual provision in the interlocal agreement which would clearly provide that each party will be liable for any losses or damages for which that party may be found legally responsible, however, it would appear to preclude any indemnity or hold harmless provisions in this contract.

I trust that these informal comments will assist you in resolving this matter.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

Enclosure

[1] See Department of Legal Affairs Statement of Policy Concerning Attorney General Opinions (copy enclosed).

[2] Section 768.28(5), Fla. Stat. (1996 Supp.).

[3] *Id.*

[4] Section 768.28(2), Fla. Stat. (1996 Supp.).

[5] See, e.g., Ops. Att'y Gen. Fla. 95-61 (1995), 93-24 (1993), 90-21 (1990), 89-61 (1989), and 85-66 (1985).

[6] See Op. Att'y Gen. Fla. 90-21 (1990).