IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 08-28977 CA 30

PALMER TRINITY PRIVATE SCHOOL, INC.,
a Florida not for profit corporation,

Plaintiff,

v.

VILLAGE OF PALMETTO BAY,
FLORIDA, a Florida municipal corporation,
CONCERNED CITIZENS OF OLD CUTLER,
INC., and JOAN LINDSAY, individually,

Defendants.
_____/

VILLAGE OF PALMETTO BAY'S MOTION TO DISMISS FIFTH AMENDED COMPLAINT

Defendant, VILLAGE OF PALMETTO BAY ("Village"), moves for entry of an order dismissing the Fifth Amended Complaint dated October 15, 2012 ("Complaint"), filed by the Plaintiff, PALMER TRINITY PRIVATE SCHOOL, INC. ("Palmer Trinity"), and states:

A. Introduction

1. Palmer Trinity generally alleges it was "delayed ... from exercising its rights as a property owner to expend its existing private school[.] " See Complaint at ¶ 2. The narrow issue is whether the claims framed in the Complaint are legally sufficient. The law in Florida is so well settled in favor of the Village in the area of land use regulation that the Court should dismiss Counts I, II, III, V, VI, VIII, IX, X, and XIV.

B. Argument

2. As to Counts I and II attacking section 2-106 of the Village Code, Palmer Trinity's claims cannot be reconciled with section 286.0115, Florida Statutes, which provides that ex parte

communications are expressly permitted in connection with quasi-judicial proceedings and that the disclosure of ex parte communications is simply not required:

> In a quasi-judicial proceeding on local government land use matters, a person may not be precluded from communicating directly with a member of the decisionmaking body by application of ex parte communication prohibitions. **Disclosure of such communications by a member of the decisionmaking body is not required**, and such nondisclosure shall **not** be presumed prejudicial to the decision of the decisionmaking body.

§ 286.0115(2)(c), Fla. Stat. (1995). Significantly, the "no disclosure" rule was first enacted in 1995, six years after the Third District decided Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991). Jennings is cited as the foundation of the Palmer Trinity's efforts to undermine section 2-106: "Section 2-106, which tries to allow ex-parte communications constitutes a violation of due process, is contrary to Jennings, and is an unlawful attempt by a legislative body to alter the requirements of due process." Id. at ¶ 151. In light of the clear wording of the statutory text, Palmer Trinity cannot establish any valid claim based upon an alleged failure to disclose ex parte communications occurring in 2008 or thereafter. The Florida legislature directly addressed the issue in 1995 and determined that "disclosure ... is not required." See § 286.0115(2)(c), Fla. Stat.

3. The procedural due process claims in Counts I, II, and VII also suffer from a more basic defect. According to the Complaint, no delay in expansion may be attributed to an alleged denial of due process. In paragraphs 71, 74, 77 and 79 of the Complaint, Palmer Trinity confirms it was still subject to delays in the expansion of its school based upon the conditions imposed by the Village on May 4, 2010. Significantly, the alleged delay attributed to the May 4, 2010, conditions involved no deprivation of procedural due process. Instead, Palmer Trinity's criticism target the absence of sufficient evidence and a departure from the applicable legal standard. See Complaint at

¶¶ 42, 77, 79, and 80. These allegations contrast dramatically with Palmer Trinity's claims of a violation of procedural due process back in 2008. See Complaint at ¶¶ 31, 148, 161. As a matter law, the alleged delay in construction attributed to 2010 proceedings eliminates Palmer Trinity's ability to frame any valid claim about a procedural due process violation in 2008. Specifically, any earlier delay had no legal impact if Palmer Trinity was still unable to proceed with construction as the result of a later delay which, according to the Complaint, involved issues which did not implicate any rights to procedural due process.

4. As to Count III, seeking damages for the alleged spoliation of evidence, the Court previously granted the Village's Motion to Dismiss by its Order dated August 8, 2012, and then denied Palmer Trinity's motion seeking rehearing on September 25, 2012. A third bite at the apple should be rejected since the Complaint offers no new allegations. Additionally, in light of section 286.0115, Florida Statutes (which confirms that the disclosure of ex parte communications is simply not required), Palmer Trinity cannot establish the requisite legal duty to preserve purported "evidence" or any underlying actionable wrong. See Complaint at ¶ 166.

5. As to Count V, alleging an unconstitutional deprivation of Palmer Trinity's alleged rights to equal protection, new federal case law confirms the absence of a valid claim. In Amour v. City of Indianapolis, 132 S. Ct 2073 (2012), the United States Supreme Court significantly restricted the scope of claims for which an equal protection challenge can be advanced and confirmed that no such challenge is valid as a matter of law if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 2081 (citations omitted). In rejecting a claim advanced by property owners who were subjected to charges approximately 30 times greater than their neighbors for the same municipal sewer service, id. at 2085, the court observed that the

"classification is presumed constitutional" and that the "**the burden is on the one attacking** the legislative arrangement to negate **every conceivable basis** which might support it." Id. at 2080-81 (emphasis added; citations omitted).

6. Despite Palmer Trinity's suggestion to the contrary, Florida law classifies public schools and private schools differently and treats them differently. See, e.g., § 1001.30, Fla. Stat. (addressing public school districts); § 1001.32, Fla. Stat. (addressing the management and operation of public school districts); §1001.41, Fla. Stat. (addressing the powers of school boards within public school districts); § 1013.33, Fla. Stat. (addressing the coordination of planning between public school boards and local governing bodies); § 1013.36, Fla. Stat. (addressing the process of site selection and planning for the building of schools). No such legislative provisions are imposed upon private schools like Palmer Trinity. As a result, the Village's different treatment of public schools and private schools is rational.

7. Moreover, sections 1013.33(10), 1013.33(11), 1013.36(2), and 1013.36(3), Florida Statues, directly address the method by which the Village (and any other local government) is required to address proposed development of a public school. These state requirements create the same kind of rough uniformity that the Village's land development code imposes upon private land owners, including landowners seeking to construct buildings for use as private schools. Accordingly, because Florida law affirmatively requires the Village to treat public schools differently (and more restrictively) than private schools, as a matter of law, the Village's application of the state statutory scheme cannot serve as a foundation for Palmer Trinity's equal protection claim. See Amour, 132

S. Ct. at 2082 ("[T]he Constitution does not require the City to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line.").

8. As to Count VI, claiming a violation of the Miami-Dade County Bill of Rights, Palmer Trinity's claim involves only economic losses for which sovereign immunity has not been waived. See County of Brevard v. Miorelli Engineering, Inc., 677 So. 2d 32, 34 (Fla. 5th DCA 1996), quashed on other grounds, 703 So. 2d 1049 (Fla. 1997). The Complaint does not assert that the Village's conduct caused a personal injury, physical damage to property, or a wrongful death. Id. Moreover, under Florida law, even the arbitrary denial of a building permit does not give rise to a claim for damages against a governmental entity. See Akin v. City of Miami, 65 So. 2d 54 (Fla. 1953); Paedae v. Escambia County, 709 So. 2d 575 (Fla. 1st DCA 1998). Finally, no language set forth in the text of the Miami-Dade County Bill of Rights provides an explicit private claim for damages against a governmental entity. See Aramark Uniform & Career Apparel, Inc. v. Easton, 894 So. 2d 20, 23 (Fla. 2004).

9. As to Count VII, the Village will file an answer and defenses establishing the absence of any public records violation upon the disposition of its Motion to Dismiss.

10. As to Count VIII, alleging a violation of procedural due process under 42 U.S.C. § 1983, the claim is barred by City of Pompano v. Yardarm Restaurant, Inc., 834 So. 2d 861 (Fla. 4th DCA 2002), which is factually and legally indistinguishable. As recognized in Yardarm, a procedural due process claim that relates to efforts in "delaying and obstructing [a claimant's] attempts to obtain building permits" or which relates to "actions on building permits without advanced notice or

hearing, [a] pattern of dilatory litigation, [or] secret discussion on repeal of [a] special use exception" must be rejected where the claimant "was afforded and actually utilized full judicial procedures to challenge these administrative decisions." 834 So. 2d at 866. The identical conduct and the identical procedural due process claim being asserted by Palmer Trinity was addressed in Yardarm. Id. Here, the Complaint demonstrates that Palmer Trinity was treated in the same manner as the claimant in Yardarm and, like that claimant, Palmer Trinity took advantage of the judicial procedures needed to address its concerns. See Complaint at ¶¶ 27-31, 46, 73, 74, 80, and 102. Despite the trial court's finding of liability in Yardarm, the Fourth District reversed and found, as a matter of law, that the availability of a remedy through judicial review rendered the independent procedural due process claim invalid as a matter of law. Id. at 870. Significantly, under Florida law an "adequate remedy does **not** mean an immediate, convenient, or economical remedy." Bill Kasper Constr. Co. v. Morrison, 93 So. 3d 1061, 1063(Fla. 5th DCA 2012)(Torpy, J. concurring)(emphasis added). The court should apply the Yardarm analysis here and dismiss Count VII.

11. As to Count IX, alleging an abuse of process, the facts alleged in the Complaint cannot be legally distinguished from the facts under consideration in Paedae v. Escambia County, 709 So. 2d 575, 578 (Fla. 1st DCA 1998), which held: "Thus, there has never been and there is no present state tort liability imposed for peculiarly governmental functions such as permitting." Moreover, Palmer Trinity previously requested a remedy for the same conduct asserted in Count IX, and the Third District rejected that request on September 18, 2012, in Case No 3D12-190 (copy of appellate Order attached). The Court should take judicial notice of the Third District's rejection of Palmer Trinity's claim, recognize that Palmer Trinity in splitting its cause of action, and dismiss Count IX.

12. As to Count X, alleging civil conspiracy, the Complaint alleges that the Village acted "wilfully, wantonly, and maliciously" in paragraphs 247 and 248. As a matter of law, the Village is immune from such claims by operation of section 768.28(9)(a). The statute categorically prevents the assertion of any tort alleged by "committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." See Williams v. City Minneola, 619 So. 2d 983, 987 (Fla. 5th DCA 1993)(finding that a claim involving willful and wanton conduct as contemplated under section 786.28(9), Florida Statutes, was barred against the City as a matter of law). Here, the Complaint affirmatively alleges conduct which triggers the application of sovereign immunity.

13. As to Count XIV, alleging the need for injunctive relief, the Complaint merely asserts the textbook legal elements without any facts. To obtain an extraordinary remedy like an injunction, Palmer Trinity must affirmatively plead facts establishing (1) irreparable harm, (2) a clear legal right, (3) an inadequate remedy at law, and (4) a benefit to the public interest. St. Lucie County v. Town of St. Lucie, 603 So. 2d 1289 (Fla. 4th DCA 1992). Irreparable harm is not even alleged. Instead, the issue is posed conditionally in paragraph 286, suggesting only that there is a "likelihood of irreparable harm to the Plaintiff[.]" See Complaint at ¶ 268. Although Palmer Trinity also claims that it has "no adequate remedy at law," id. at ¶ 287, this legal conclusion is directly contradicted by its pending claims for damages. An injunction cannot be issued where there is a choice between the ordinary processes of law and the injunction. Liza Danielle, Inc. v. Jamko, Inc., 408 So. 2d 735, 738 (Fla. 3d DCA 1982). Moreover, the Plaintiff's alternative pleading technique with respect to a claim

for injunctive relief is improper. See Dichristopher v. Board of County Commissioners, 980 So. 2d 492 (Fla. 5th DCA 2005); Mary Dee's, Inc. v. Tartamella, 492 So. 2d 815, 816 (Fla. 4th DCA 1986). With respect to a substantial likelihood of success, the Complaint makes uncertain what particular relief is being requested as a preliminary matter. No specific permit, work restriction, or decision is cited in the Complaint. Moreover, injunctive relief infringes upon the separation of powers between the administrative and judicial branches by requiring the Court to second guess the Village's application of its land use regulations and permitting requirements. See Trianon Park Condominium Association, Inc., v. City of Hialeah, 468 So. 2d 912 (Fla. 1985) (holding that judicial intervention through private suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the decisions of the other branches of government and violate the separation of powers doctrine). Finally, the Complaint simply omits any allegations addressing either the precise nature of the "injury" being claimed or the "harm to the Village" that will be outweighed by the injury. Both the Village and the Court are left to speculate about the interests allegedly being balanced. As a result, Count XIV fails to assert a valid claim for preliminary injunctive relief and should be dismissed.

14. Counts I, II, III, V, VI, IX, and X all seek attorneys' fees against the Village in the absence of any allegations of a contractual or statutory basis for doing so. Each of those Counts, and additionally Count XIV, also requests awards of interest from the Village in violation of section 768.28(5), Florida Statues. The claims for attorneys' fees and interest must be dismissed as legally insufficient.

15. To avoid any possible suggestion that the Village has elected to abandon the arguments raised in its prior motions to dismiss, the Village hereby adopts and reasserts those arguments here by reference, including those addressed in detail in the Village's Motion to Dismiss dated October 31, 2011, and the Village's various supporting memoranda of law. To the extent the Court will permit additional argument on those matters despite the rulings reflected in the Order dated August 8, 2012, the Village requests such an opportunity.

C. Conclusion

16. With the exception of the public records claim in Count VII, each Count framed against the Village is defective and subject to dismissal.

WHEREFORE, the Defendant, VILLAGE OF PALMETTO BAY, requests entry of an order dismissing Counts I, II, III, V, VI, VIII, IX, X, and XIV, giving the Defendant leave to file an answer in response to the public records claim in Count VII, and providing such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished to: **Stanley B. Price, Esq.,** (sprice@bilzin.com, mwidom@bilzin.com, eservice@bilzin.com) Bilzin, Sumberg, Baena, Price & Axelrod, LLP, Attorneys for the Plaintiff, 1450 Brickell Avenue, Suite 2300, Miami, FL 33131, **Sean M. Cleary, Esq.,** (sean@clearypa.com, amanda@clearypa.com, kisha@clearypa.com), Law Offices of Sean M. Cleary, P.A., 19 West Flagler Street, Suite 618, Miami, FL 33130, co-counsel for Plaintiff, **Eve Boutsis, Esq., (eboutsis@fbm-law.com)** Figueredo & Boutsis, P.A., Attorneys for Defendant, 18001 Old Cutler Road, Suite 533, Miami, FL 33157; **W. Tucker Gibbs, Esq.,** (tucker@wtgibbs.com, wtglawoffice@att.net), W. Tucker Gibbs, P.A., Attorneys for Defendant, P.O. Box 1050, Coconut Grove, FL 33133; and **Benedict P. Kuehne, Esq.,** (ben.kuehne@kuehnelaw.com, bkuehne@bellsouth.net), Law Office of Benedict P. Kuehne, P.A., Miami Tower, Suite 3550, 100 S.E. 2nd Street, Miami, FL 33131, on this 9TH day of November 2012, by E-mail.

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2012

SEPTEMBER 18, 2012

THE VILLAGE OF PALMETTO BAY, FLORIDA,
Appellant(s)/Petitioner(s),

vs.

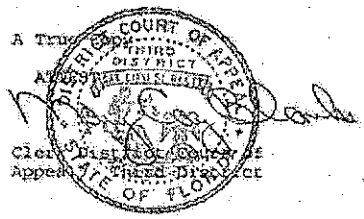
PALMER TRINITY PRIVATE SCHOOL, INC.,
Appellee(s)/Respondent(s).

CASE NO.: 3D12-190

LOWER TRIBUNAL NO. 10-259

Upon consideration, petitioner's motion for rehearing of order granting motion for attorney's fees and costs is hereby granted, and Respondent's motion for attorney's fees and costs is hereby denied.

WELLS, C.J., and LAGOA, J., and SCHWARTZ, Senior Judge, concur.



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