BIENNIAL REPORT

of the

ATTORNEY GENERAL
STATE OF FLORIDA

January 1, 2019 through December 31, 2020

ASHLEY MOODY
Attorney General

Tallahassee, Florida
2021

CONSTITUTIONAL DUTIES OF THE ATTORNEY GENERAL

The 1968 Florida Constitution provides, in article IV, section 4, subsection (b), that the Attorney General shall be "the chief state legal officer."

By statute, the Attorney General is head of the Department of Legal Affairs, and supervises the following functions:

Serves as legal advisor to the Governor and other executive officers of the State and state agencies;

Defends the public interest;

Represents the State in legal proceedings; and

Keeps a record of his or her official acts and opinions.

STATE OF FLORIDA
OFFICE OF ATTORNEY GENERAL
ASHLEY MOODY

April 16, 2021

The Honorable Ron DeSantis
Governor of Florida
The Capitol
Tallahassee, Florida 32399-0001

Dear Governor DeSantis:

Pursuant to my constitutional duties and the statutory requirement that this office periodically publish a report on the Attorney General official opinions, I submit herewith the biennial report of the Attorney General for the two preceding years from January 1, 2019 through December 31, 2020.

This report includes the opinions rendered, an organizational chart, and personnel list. The opinions are alphabetically indexed by subject, with a table of constitutional and statutory sections cited in the opinions.

It is an honor to serve the people of Florida with you.

Sincerely,

Ashley Moody

Ashley Moody
Attorney General

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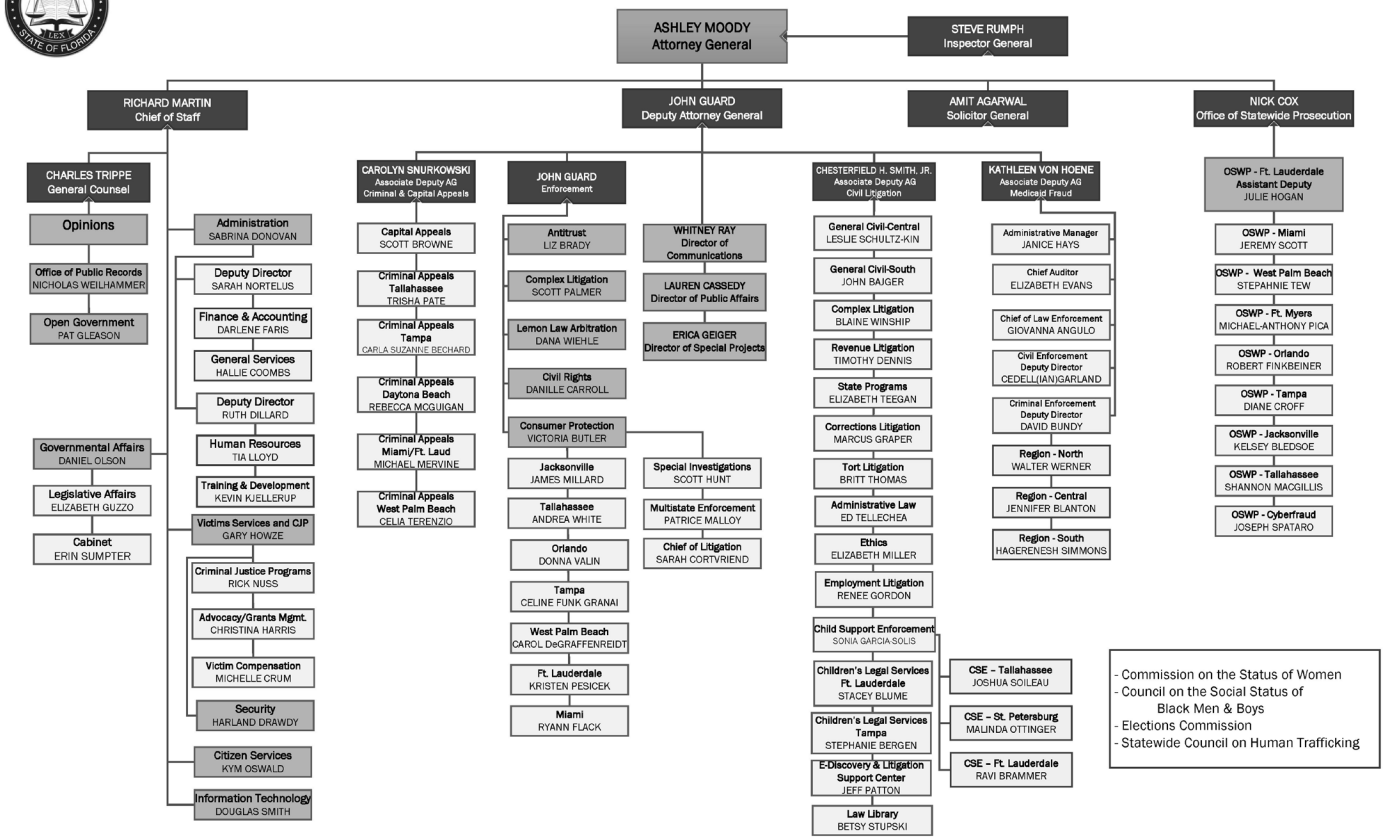
STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL



OFFICE OF THE ATTORNEY GENERAL

(as of December 31, 2020)
The Capitol, Tallahassee, Florida 32399-1050
(850) 245-0140

ASHLEY MOODY
ATTORNEY GENERAL

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STATEWIDE PROSECUTOR

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DEPARTMENT OF LEGAL AFFAIRS

Statement of Policy Concerning Attorney General Opinions

I. General Nature and Purpose of Opinions

Issuing legal opinions to governmental entities has long been a function of the Office of the Attorney General. Attorney General Opinions serve to provide legal advice on questions of statutory interpretation and can provide guidance to public bodies as an alternative to costly litigation. Opinions of the Attorney General, however, while generally regarded as highly persuasive, are not binding in a court of law. Attorney General Opinions are intended to address only questions of law, not questions of fact, mixed questions of fact and law, or questions of executive, legislative, or administrative policy.

Attorney General Opinions are not a substitute for the advice and counsel of the attorneys who represent governmental agencies and officials on a day-to-day basis. They should not be sought to arbitrate a political dispute between agencies or between factions within an agency or merely to buttress the opinions of an agency's own legal counsel. Nor should an opinion be sought to provide leverage to one side in a dispute between agencies.

Particularly difficult or momentous questions of law should be submitted to the courts for resolution by declaratory judgment. When deemed appropriate, this office will recommend this course of action. Similarly, there may be instances when securing a declaratory statement under the Administrative Procedure Act will be appropriate and will be recommended.

II. Types of Opinions Issued

There are several types of opinions issued by the Attorney General's Office. All legal opinions issued by this office, whether formal or informal, are persuasive authority and not binding.

Formal numbered opinions are signed by the Attorney General and published in the Annual Report of the Attorney General. These opinions address questions of law which are of statewide concern.

This office also issues a large body of informal opinions. Generally these opinions address questions of more limited application. Informal opinions may be signed by the Attorney General or by the drafting assistant attorney general. Those signed by the Attorney General are generally issued to public officials to whom the Attorney General is required to respond. While an official or agency may

request that an opinion be issued as a formal or informal opinion, the determination of the type of opinion issued rests with this office.

III. Persons to Whom Opinions May Be Issued

The responsibility of the Attorney General to provide legal opinions is specified in section 16.01(3), Florida Statutes, which provides:

> **Notwithstanding any other provision of law, [the Attorney General] shall, on the written requisition of the Governor, a member of the Cabinet, the head of a department in the executive branch of state government, the Speaker of the House of Representatives, the President of the Senate, the Minority Leader of the House of Representatives, or the Minority Leader of the Senate, and may, upon the written requisition of a member of the Legislature, other state officer, or officer of a county, municipality, other unit of local government, or political subdivision, give an official opinion and legal advice in writing on any question of law relating to the official duties of the requesting officer.**

The statute thus requires the Attorney General to render opinions to "the Governor, a member of the Cabinet, the head of a department in the executive branch of state government, the Speaker of the House of Representatives, the President of the Senate, the Minority Leader of the House of Representatives, or the Minority Leader of the Senate . . . ."

The Attorney General may also issue opinions to "a member of the Legislature, other state officer, or officer of a county, municipality, other unit of local government, or political subdivision." In addition, the Attorney General is authorized to provide legal opinions to the state attorneys and to the representatives in Congress from this state. §§ 16.08, 16.52(2), Fla. Stat. (2021).

Questions relating to the powers and duties of a public board or commission (or other collegial public body) should be requested by a majority of the members of that body. A request from a board should, therefore, clearly indicate that the opinion is being sought by a majority of its members and not merely by a dissenting member or faction.

IV. When Opinions Will Not Be Issued

Section 16.01(3), Florida Statutes, does not authorize the Attorney General to render opinions to private individuals or entities, whether their requests are submitted directly or through governmental officials. In addition, an opinion request must relate to the requesting officer's own official duties. An Attorney General Opinion will not, therefore, be issued when the requesting party is not among the officers specified in section 16.01(3), Florida Statutes, or when an officer falling within section 16.01(3), Florida Statutes, asks a question not relating to his or her own official duties.

In order not to intrude upon the constitutional prerogative of the judicial branch, opinions generally are not rendered on questions pending before the courts or on questions requiring a determination of the constitutionality of an existing statute or ordinance.

Opinions generally are not issued on questions requiring an interpretation only of local codes, ordinances, or charters rather than the provisions of state law. Instead such requests will usually be referred to the attorney for the local government in question. In addition, when an opinion request is received on a question falling within the statutory jurisdiction of some other state agency, the Attorney General may, in the exercise of his or her discretion, transfer the request to that agency or advise the requesting party to contact the other agency. For example, questions concerning the Code of Ethics for Public Officers and Employees may be referred to the Florida Commission on Ethics; questions arising under the Florida Election Code may be directed to the Division of Elections in the Department of State.

However, as quoted above, section 16.01(3), Florida Statutes, provides for the Attorney General's authority to issue opinions "[n]otwithstanding any other provision of law," thus recognizing the Attorney General's discretion to issue opinions in such instances.

Other circumstances in which the Attorney General may decline to issue an opinion include:

- **questions of a speculative nature;**
- **questions requiring factual determinations;**
- **questions which cannot be resolved due to an irreconcilable conflict in the laws (although the Attorney General may attempt to provide general assistance);**
- **questions of executive, legislative, or administrative policy;**

- **matters involving intergovernmental disputes unless all governmental agencies concerned have joined in the request;**

- **moot questions;**

- **questions involving an interpretation only of local codes, charters, ordinances, or regulations; or**

- **matters where the official or agency has already acted and seeks to justify the action.**

V. Form In Which Request Should Be Submitted

Requests for opinions must be in writing and should be addressed to:

Ashley Moody
Attorney General
Department of Legal Affairs
PL01 The Capitol
Tallahassee, Florida 32399-1050

The request should clearly and concisely state the question of law to be answered. The question should be limited to the actual matter at issue. Sufficient elaboration should be provided so that it is not necessary to infer any aspect of the question or the situation on which it is based. If the question is predicated on a particular set of facts or circumstances, these should be fully set out.

This office attempts to respond to all requests for opinions within three to six months of their receipt in this office. To facilitate responses to opinion requests, this office requires that the attorneys for public entities requesting an opinion provide a memorandum of law with the request. The memorandum should include the opinion of the requesting party's own legal counsel, and a discussion of the legal issues involved, with references to relevant constitutional provisions, statutes, charter provisions, administrative rules, judicial decisions, etc.

Input from other public officials, organizations, or associations representing public officials may be requested. Interested parties may also submit a memorandum of law and other written material or statements for consideration. Any such material will be made a part of the permanent file of the opinion request to which it relates.

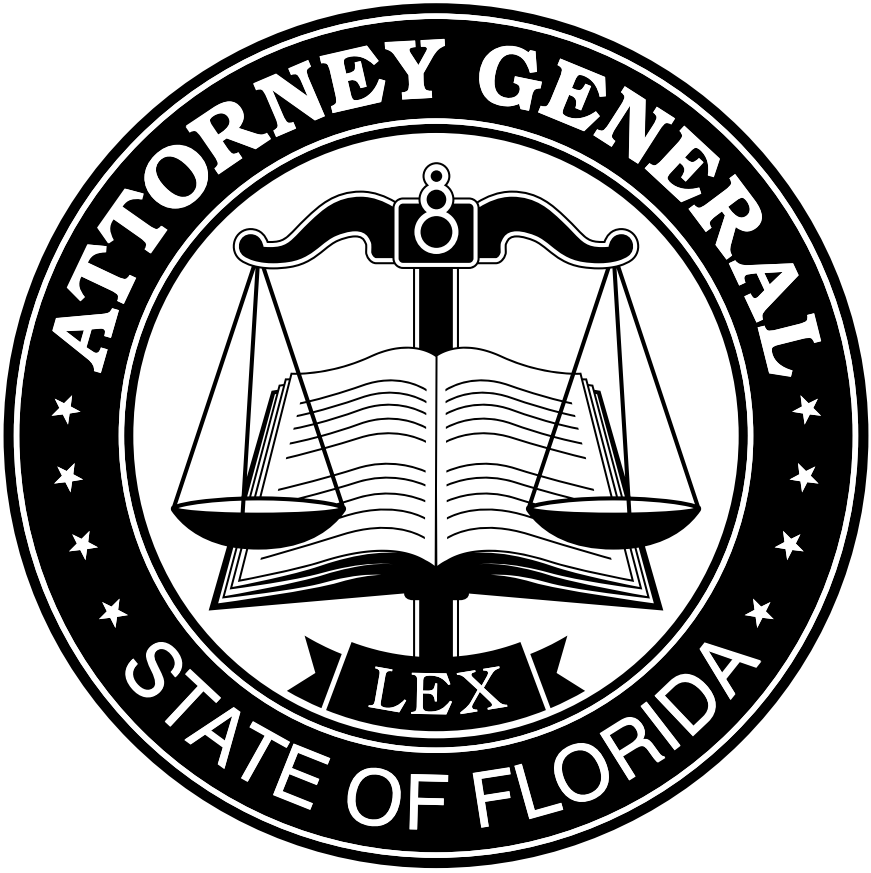
VI. Miscellaneous

This office provides access to formal Attorney General Opinions through a searchable database on the Attorney General's website at:

myfloridalegal.com

Persons who do not have access to the Internet and wish to obtain a copy of a previously issued formal opinion should contact the Citizen Services Unit of the Attorney General's Office. Copies of informal opinions can be obtained from the Opinions Division of the Attorney General's Office.

As an alternative to requesting an opinion, officials may wish to use the informational pamphlet prepared by this office on dual office-holding for public officials. Copies of the pamphlet are available on the Attorney General's website and can be obtained by contacting the Opinions Division of the Attorney General's Office. In addition, the Attorney General, in cooperation with the First Amendment Foundation, has prepared and annually updates the Government-in-the-Sunshine Manual which explains the law under which Florida ensures public access to the meetings and records of state and local government. Copies of this manual are available on the Attorney General's website and can be obtained through the First Amendment Foundation.



Ashley Moody
The Capitol
Tallahassee

BIENNIAL REPORT

of the

ATTORNEY GENERAL

State of Florida

January 1, 2019 through December 31, 2020

Opinions - 2019

AGO 2019-01 – January 8, 2019

FLORIDA CONSTITUTION AND CHAPTER 1001, FLORIDA STATUTES – SUPERINTENDENT OF SCHOOLS – APPOINTMENT OR ELECTION – TERM OF INCUMBENT

WHETHER THE FLORIDA CONSTITUTION, ARTICLE IX, SECTION 5, AUTHORIZES REMOVAL OF SUPERINTENDANT FROM OFFICE BEFORE THE END OF AN EXISTING TERM FOLLOWING A VOTE OF ELECTORS MAKING THE OFFICE APPOINTIVE RATHER THAN ELECTIVE

To: Paul D. Gibbs, Esquire, School Board Attorney, Marion County Public Schools

REPHRASED QUESTIONS:

1. What effect, if any, does the decision of the electors in November 2018 to make the office of the superintendent of schools appointive have upon the term of the incumbent superintendent who was elected in November 2016 to serve a four-year term?

2. If the incumbent superintendent is not required or permitted to complete her four-year term, does the School Board have an obligation to pay her for the loss of emoluments for the remainder of the term?

Background

In the general election this past November 2018, the electors of Marion County voted to change the office of superintendent of schools from elective to appointive, as authorized by article IX, section 5 of the Florida Constitution, which provides:

> SECTION 5. **Superintendent of schools**.—In each school district there shall be a superintendent of schools who shall be elected at the general election in each year the number of which is a multiple of four for a term of four years; or, when provided by resolution of the district school board, or by special law, approved by vote of the electors, the district school superintendent in any school district shall be employed by the district school board as provided by general law. The resolution or special law may be rescinded or repealed by either procedure after four years.

A majority of the electors in Marion County voted "yes" to the following:

> Should the office of superintendent of schools of The School Board of Marion County, Florida be appointed and employed by The School Board of Marion County, Florida, as authorized by the Florida Constitution?

Analysis

You inquire whether the incumbent Superintendent's position has thus been terminated, allowing the School Board to immediately appoint a new Superintendent, and, if so, whether there is no duty to pay the incumbent for the loss of emoluments. Based upon pertinent case law, it appears that the current superintendent is entitled to complete her elective term of office.

Section 1001.461, Florida Statutes (2018), sets forth the procedure for changing the office from elective to appointive. Section 1001.47, Florida Statutes (2018), provides the salary of an elected district school superintendent. Section 1001.50, Florida Statutes (2018), sets forth provisions applicable to the employment contract required between the School Board and an appointed superintendent. None of these provisions addresses whether the term of an elected superintendent is terminated when the position is thus changed.

There are several judicial decisions and Attorney General Opinions that have, over the years, addressed variations of the issue you raise based upon changes in the applicable constitutional provisions and statutes. It is useful to review this history.

In 1955, the Florida Constitution, article VIII, section 6, provided for a county Superintendent of Public Instruction, to be elected for a term of four years.[1] In 1956, article XII, section 2A of the Constitution was amended to allow the voters in Duval, Sarasota, Dade, and Pinellas Counties (or the Legislature by special act) to change the superintendent position from elective to appointive. In 1957, the Attorney General was asked whether a county superintendent would be able to serve out the balance of his (or her) four-year term if county electors voted during

such term to change the position to appointive. The Attorney General concluded in Attorney General Opinion 57-13 that "the term of office of the incumbent school superintendent would terminate at once upon an affirmative vote of the electors at a special election as provided in the amendment," and thus the superintendent could not serve out his elective term.

The Florida Supreme Court reached a different result eight years later. In 1962, section 2B was added to article XII, allowing 15 additional counties, including Charlotte, to vote to make the position appointive. Soon after, the Florida Supreme Court considered the effect of the change from election to appointment in *Hancock v. Board of Public Instruction of Charlotte County*, 158 So. 2d 519 (Fla. 1963). The Charlotte County Superintendent of Public Instruction, W. S. Hancock, was elected to a four-year term to run until January 1965. Voters changed the office to appointive as of December 29, 1962. Mr. Hancock sought declaratory relief regarding the effect of amendment 2B, and the circuit court determined that the referendum had the effect of abolishing his elected office and creating an appointive office, and thus his term had expired on the effective date of the referendum and he was not entitled to the emoluments of his office thereafter.

The Florida Supreme Court reversed, finding that the office had not been abolished, but instead the method of selecting a superintendent had simply been changed by the electors of the county. The Court concluded that the change from elective to appointive did not affect the fact that the superintendent would serve four years either way. The changeover to appointed office would take effect upon the expiration of the incumbent's elective term (or if the office became vacant because of death, resignation, or removal). The Court observed that "amended Article XII, although self-executing, is clearly designed to be prospective only in its operation."[2]

The following year, 1964, sections 2C and 2D were added to article XII, allowing eight more counties to make the switch. These provisions, however, also included a subsection (4) that had not been included in 2A or 2B, and which provided:

> In the event a referendum election results in a change in the method of selecting a county superintendent, the incumbent shall be permitted to serve the remainder of the term of office to which he was duly elected or appointed.

In 1966, section 6A was added to article VIII, effectively removing the requirement that an appointed superintendent serve a four-year term:

> **Appointive county superintendents of public instruction; terms and employment**.—In those counties authorized to appoint a superintendent of public instruction under Article

> XII of the state constitution the superintendent shall serve at the pleasure of the board provided that the board may enter into a contract of employment with such appointed county superintendent . . . .

The Board could thereafter determine the length of an appointed superintendent's term by having the officer serve at the Board's pleasure or for a particular term of years by contract.

In 1967, the Attorney General was asked to determine the effect of section 6A on the elected incumbent's four-year term after a referendum changed the office in Broward County from elective to appointive under article XII, section 2B (which covered Broward County). Floyd Christian had been elected county superintendent in November 1964, to serve until November 1968. After the enactment of section 6A in 1966, voters in Broward County made the office appointive in November 1967, and incumbent superintendent Christian asked the Attorney General what effect this would have on his term of office.

The Attorney General observed in Attorney General Opinion 67-76 that because of the addition of section 6A to the Constitution, dealing with the terms of *appointed* superintendents, "[n]ow . . . a situation exists which did not exist at the time of the Hancock decision." The Attorney General concluded that when a superintendent's term is changed from elective to appointive, section 6A declares that the term is no longer for four years, "but on the contrary his service is at the pleasure of the county school board." Accordingly, the incumbent's term had expired as of the recent election.

Again, the Florida Supreme Court subsequently decided a case in a manner contrary to the Attorney General Opinion. In *State ex rel. Reynolds v. Roan*, 213 So. 2d 425 (Fla. 1968), W. D. Reynolds was elected Superintendent of Public Instruction in Collier County to successive four-year terms commencing in January 1953, 1957, and 1961, with the latter term expiring in January 1965. In November 1963, pursuant to Article XII, section 2B (which covered Collier County), the electors voted to make the position appointive. Omitting details of the situation that are provided in the opinion, suffice it to say that after the change to appointment in 1963, the Board of Public Instruction appointed Mr. Reynolds to what ended up being a four-year term following the expiration of his elective term, so that the appointive term would end in January 1969.

After the Constitution was amended in November 1966 to add Article VIII, section 6A, providing that an appointed superintendent would serve at the pleasure of the Board of Public Instruction or pursuant to a contract of employment, the Board in August 1967 declared the office of superintendent to be vacant and appointed John D. Roan as the new superintendent. Reynolds filed an action in circuit court to determine

which man was entitled to hold the office. The Court approved the validity of the summary removal of the incumbent, Mr. Reynolds, and the appointment of Mr. Roan.

The Supreme Court reversed. As had the Court in *Hancock* with regard to article XII, section 6, the Court concluded that article XII, section 6A was "prospective in application."[3] The Court said that nothing in section 6A expressly or impliedly authorized county school boards that have changed from elective to appointive, "to cut short the tenure of office of the incumbent county school superintendents" who had been appointed to a four-year term as previously required, simply because the new amendment allowed the Board to enter into a contract with the superintendent for a term other than four years:

> Appellant was a duly appointed constitutional officer for a term ending in January, 1969, and his right to exercise the duties of the office and enjoy the emoluments thereof is a species of property which the law will protect and will also redress if wrongly deprived of it. Admittedly, the sovereign power creating the office—in this case, the people speaking through the Constitution—can abolish it at will, or the term of office may be shortened, including that of the incumbents, when this becomes necessary in making a fundamental change in the office. But we think that an intention to apply the shortened term of an office, or the changed qualifications thereof, to an incumbent, resulting in his ouster from the office before the end of his term, must be clearly expressed in the statute or constitutional amendment making the change before it will be given that effect.[4]

The Court concluded that the amendment was intended to "supplement the appointive powers" of the Board of Public Instruction. Absent express language allowing ouster of an incumbent, no Board could "arbitrarily vitiate" an incumbent's term.[5]

Although *Reynolds* dealt with a superintendent who had gone from an elective four-year term to an appointive four-year term, and the holding applies to the invalid termination of his appointive term, both *Hancock and Reynolds* demonstrate that a term of office is not terminated by a constitutional provision applicable to such office absent "clear and unequivocal" language authorizing the truncation of an incumbent's term.[6]

The current constitutional provision quoted at the beginning of this opinion, article IX, section 5, was enacted in the 1968 constitutional revision and replaced the provisions discussed above with regard to school superintendents. It provides two options. First, "there shall be a superintendent of schools who shall be elected at the general election in each year the number of which is a multiple of four for a term of four

years." In the alternative, "when provided by resolution of the district school board, or by special law, approved by vote of the electors, the district school superintendent in any school district shall be employed by the district school board as provided by general law." The two provisions are separated by the conjunction "or." There is no language therein that allows a new appointive term to cut off an elected four-year term.

As observed in *Reynolds*, a public officer has a property right to serve out his or her tenure of office and to receive the emoluments of such office, assuming the officer's continuing qualification for the office. When the Constitution creates the office, it can be shortened only by a constitutional provision clearly expressing such effect.[7]

You refer to section 1001.46, Florida Statutes (2018), as supporting a conclusion that the change from elective to appointive superintendent immediately terminates the incumbent's term. That statute provides:

> **District school superintendent; election and term of office.**—The district school superintendent shall be elected for a term of 4 years or until the election or appointment and qualification of his or her successor.

This provision, however, existed before the office of superintendent was permitted to be appointive. In 1955, when the term of the elective office was four years, section 230.19, Florida Statutes, provided that when a vacancy occurred on the county board of schools, it "shall be filled by appointment by the governor." Section 230.24, Florida Statutes, provided what section 1001.46 now provides, almost verbatim. Accordingly, the provision authorized an incumbent elected superintendent to remain in office until an elected successor was qualified for the position post-election, or, in the event of a vacancy due to relocation, death, resignation, retirement, etc., until the governor appointed a successor. This provision does not support early termination of an incumbent's elective term in the absence of express language authorizing such procedure in article IX, section 5.

Having concluded that article IX, section 5 does not authorize the removal from office of the elected Marion County Superintendent of Schools before the end of her term, we need not address the question of emoluments in the event of ouster.

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[1] *See also* §§ 230.03 and 230.24, Fla. Stat. (1955).

[2] *Hancock*, 158 So. 2d at 522. As stated in a different case by the First District: "A strict rule of statutory construction indulged in by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes or amendments enacted by it to operate prospectively only, and not retroactively." A statute operates

retrospectively or retroactively "if it takes away or impairs vested rights acquired under existing laws[.]" *Heberle v. P.R.O. Liquidating Co.*, 186 So. 2d 280, 282 (Fla. 1st DCA 1966); *accord Thayer v. State*, 335 So. 2d 815, 817-18 (Fla. 1976); *Seaboard System R.R., Inc. v. Clemente for and on Behalf of Metropolitan Dade Cty.*, 467 So. 2d 348, 357 (Fla. 3d DCA 1985).

[3] *Reynolds*, 213 So. 2d at 428.

[4] *Id*. (citations omitted).

[5] *Id.*

[6] *See also* Op. Att'y Gen. Fla. 78-153 (1978) (statutory amendment requiring Taylor County Board of County Commissioners to appoint hospital's governing board instead of the Governor did not operate to shorten the terms of incumbent members of the hospital board, citing *Hancock and Reynolds*).

[7] *See also DuBose v. Kelly*, 181 So. 11, 17 (Fla. 1938); *State ex rel. Landis v. Tedder*, 143 So. 148, 146 (Fla. 1932); *Piver v. Stallman*, 198 So. 2d 859, 862 (Fla. 3d DCA 1967).

AGO 2019-02 – March 12, 2019

SECTION 125.0104(5)(b), FLORIDA STATUTES – TOURIST DEVELOPMENT TAX REVENUE – SHOULDERS OF ROAD AS NATURE CENTER

WHETHER, UNDER SECTION 125.0104(5)(b), FLORIDA STATUTES, A COUNTY MAY USE TOURIST DEVELOPMENT TAX REVENUE TO CONSTRUCT SHOULDERS CONTIGUOUS TO A SCENIC PAVED ROAD

To: Melanie Marsh, County Attorney, Lake County

REPHRASED QUESTION:

Under section 125.0104(5)(b), Florida Statutes (2018), may the County use tourist development tax revenue to add contiguous shoulders to each side of a County-maintained road at the same time that the road is resurfaced, where the road is used by bicyclists in various competitive multi-day cycling events which draw tourists from all over Florida and the United States, and the County finds that the addition of the shoulders will primarily promote tourism in Lake County?

SUMMARY:

Because the proposed construction of shoulders contiguous to the described scenic paved road would not "construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote" a "nature center," the County may not, under section 125.0104(5)(b), use tourist development tax revenue to add contiguous shoulders to each side of the road.

Background

In your letter, you describe the relevant circumstances as follows:

At 312 feet, Sugarloaf Mountain, located in Lake County, is one of the highest points in Florida and provides a scenic overlook of the surrounding area. The County maintains a road, Sugarloaf Mountain Road (the Road), that traverses up and down Sugarloaf Mountain. The Road is paved and is twenty (20) feet wide and does not have any shoulders. The Road attracts many tourists, mainly bicyclists and other athletes, from all over Florida and the United States. Several competitive bicycling events spanning several days and triathlons that utilize the Road are held each year due to the enjoyment of the views and the challenge of traveling up Sugarloaf Mountain. These tourism events include, but are not limited to, the Mount Dora Bicycle Festival (up to 1,000 participants), the Horrible Hundred (approximately 500

participants), and the Great Floridian Triathlon (approximately 1,200 participants). Notably, the Road remains open to general traffic flow during these events, although at times there is additional traffic control to assist with the increased event traffic.

Section 125.0104(5)(b), Florida Statutes, permits a county of less than 750,000 in population to use tourist development tax dollars:

> to acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more zoological parks, fishing piers or nature centers which are publicly owned and operated or owned and operated by a not-for-profit corporation and open to the public.

Analysis

A Scenic Highway Is Not a "Nature Center"

The operative question, then, is whether, under section 125.0104(5)(b), construction of shoulders contiguous to Sugarloaf Mountain Road would "construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote" a "nature center." In its letter, the County posits that it could find that "the shoulders are part of a public recreational trail," and that such "recreational trail" would qualify as a "nature center."

The words used in a statute should be given their plain and ordinary meaning. *State v. Peraza*, 259 So. 3d 728, 731 (Fla. 2018). The Legislature has not defined the term "nature center." Where the Legislature has not defined a term, it is appropriate to interpret the term according to its common understanding, unless the term is used in a technical sense, and to refer to dictionary definitions. *Id.*

The common understanding of the term "nature center" does not include a road shoulder. In Florida Attorney General Opinion 94-12 (1994), this office, referring to the dictionary, observed that the "term 'nature' is defined as 'the aspect of the out-of-doors (as a landscape), natural scenery,'" and "[u]se of the word 'center' connotes 'a point around which things revolve: a focal point for attraction, concentration, or activity.'" This interpretation is consistent with the statute's use of the term "nature center" in a list of other focal points like "zoological parks" and "fishing piers." In Florida Attorney General Opinion 2016-18 (2016), the Attorney General observed that "authorizing use of tourist development tax revenues to 'acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote' a nature center, appear[ed] to allow the county to direct funds only to support the actual nature center facility and environs, including personnel to run the center." While, depending on the circumstances, constructing, extending, enlarging, remodeling, repairing, improving, or maintaining freestanding recreational trails[1] providing a network for pedestrians and bicyclists

to access public nature preserves might qualify under the statute, such activities pertaining to road shoulders will not.

The contiguous paved shoulders of a road—even when demarcated as "bicycle lanes"—are part of the local transportation facility[2] with which they are colocated. This is reflected in section 335.065(1)(a), Florida Statutes, which states that bicycle ways "shall be given full consideration in the planning and development of transportation facilities, including the incorporation of such ways into…local transportation plans and programs."[3]

This interpretation is also consistent with other parts of the statute which distinguish "nature centers" from "transportation facilities." Section 125.0104(5)(a)6, Florida Statutes, allows tourist development tax revenues to be used to "acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or finance" major capital improvements, "including…transportation…facilities," but such funds may be used for that purpose only if the additional conditions set forth in the statute are satisfied. For all these reasons, it is my opinion that tourist development tax revenue funds may not be used, under section 125.0104(5)(b), Florida Statutes, to construct shoulders contiguous to a scenic paved road.

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[1] *Cf*. Op. Att'y Gen. Fla. 2012-38 (2012) (discussing a project described by Walton County as an "18-mile multi-use pathway" adjacent to, *inter alia*, coastal dune lakes and coastal forests, and deemed comparable to the public recreational trail considered in Florida Attorney General Opinion 94-12).

[2] *See* § 334.03(30), Fla. Stat. (2018) (""Transportation facility' means any means for the transportation of people or property from place to place which is constructed, operated, or maintained in whole or in part from public funds.").

[3] Consistent with this concept, it has been recognized that "road purposes" are fulfilled by adjacent shoulders. *See Broward Cty. v. Bouldin*, 114 So. 2d 737, 739 (Fla. 2d DCA 1959) ("[I]t is well settled that when a public easement by prescription is acquired for road purposes, the width of the easement is not limited to that portion of the roadway actually traveled or paved. It includes also the land which is *needed and used for the support and maintenance of the paved or traveled portion. This includes shoulders* and ditches.") (emphasis added).

AGO 2019-03 – March 27, 2019

FLORIDA CONSTITUTION AND SECTIONS 124.01, 124.011, AND 125.01(1), FLORIDA STATUTES – NON-CHARTER COUNTY – AUTHORITY TO LIMIT TERMS OF COUNTY COMMISSIONERS THROUGH ORDINANCE OR SPECIAL LAW

WHETHER A NON-CHARTER COUNTY HAS CONSTITUTIONAL OR STATUTORY AUTHORITY TO ESTABLISH A LIMIT ON THE NUMBER OF TERMS A COUNTY COMMISSIONER MAY SERVE IN OFFICE, AND, IF NOT, WHETHER THE LEGISLATURE MAY ENACT A SPECIAL LAW AUTHORIZING THE COUNTY TO DO SO

To: Joy Cook Carmichael, County Attorney, Highlands County

QUESTIONS:

1. Whether article VIII, section 1(f) of the Florida Constitution or any other constitutional or statutory provision, authorizes a non-charter county to establish a limit on the number of terms a county commissioner may serve in office.

2. Whether the recent passage of Florida Amendment 10 to the Florida Constitution, which amended article VIII, section 1(d), affects the authority of a non-charter county to establish a limit on the number of terms a county commissioner may serve in office.

3. If a non-charter county is not authorized to establish a limit on the number of terms a county commissioner may serve in office, whether the county may obtain such authority through the legislature's enactment of a special law.

SUMMARY:

1. No constitutional or statutory authority grants a non-charter county the power to impose a term limit on the office of county commissioner.

2. The amendment to article VIII, section 1(d) does not affect the analysis of the issues herein, because it does not apply to county commissioners.

3. Article III, section 11(a)(1), prohibits special laws pertaining to elections, thus barring the Legislature from enacting a special law on the subject.

QUESTION 1: Whether a non-charter county may impose term limits for county commissioners.

Article VIII, section 1(e), of the Florida Constitution provides: "Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years." The text of the provision establishes no limit on the number of terms a county commissioner may serve.

Article VIII, sections 1(f) and 1(g), establish the constitutional authority of non-charter and charter counties:

> (f) NON-CHARTER GOVERNMENT. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.
>
> (g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

As the text makes clear, the powers granted to non-charter counties are "such power[s] of self-government as [are] provided by general or special law." Thus, non-charter counties may only enact ordinances in areas authorized by and consistent with general or special law. By contrast, charter counties have broader home rule power and may enact any ordinance not inconsistent with general or special law.

The Legislature has enacted general laws providing for the election of county commissioners, their staggered terms of office, and an alternate procedure for establishing single-member representation.[1] These statutes make no mention of term limits and may not be interpreted to extend to matters not expressly contemplated therein.[2] In section 125.01(1), Florida Statutes (2018), the Legislature enumerated some of the powers a county may exercise, stating that the "legislative and governing body of a county shall have the power to carry on county government[,]" including but not restricted to the powers listed in sections (1)(a) through (1)(c), "[t]o the extent not inconsistent with general or special law." None of these subsections grants the power to establish term limits or any other eligibility requirement for the office of county commissioner. In addition, you have not identified, and this office has not found, any other general or special law that would

authorize the county to do so.

The general "power to carry on county government" granted in section 125.01(1) cannot itself provide the necessary authorization to impose term limits on county commissioners,[3] because this general grant of power is circumscribed by the constitution's requirement that a non-charter county's power of self-government is only "as is provided by general or special law." The Florida Supreme Court concluded in *Telli v. Broward County*, 94 So. 3d 504, 513 (Fla. 2012), that charter counties are authorized to impose term limits for county commissioners by virtue of the "broad authority [that] has been granted to them by home rule power through the Florida Constitution[,]" not by statute. But the *Telli* decision does not apply to non-charter counties. The difference in home rule authority between charter counties and non-charter counties is rooted in the text of the constitution.

As a result, there is no constitutional or statutory authority that gives Highlands County, a non-charter county, the power to impose terms limits for county commissioners.

QUESTION 2: Whether the 2018 amendment to article VIII, section(d) of the Florida Consititution affects a non-charter county's authority to impose term limits.

Article VIII, section 1(d) of the Florida Constitution was amended in November 2018. The provision as amended requires five county officers – the sheriff, tax collector, property appraiser, supervisor of elections, and clerk of the circuit court – to be elected, and removes the option to use another method under a county charter or special law approved by county voters. The amendment did not affect article VIII, section 1(e), which authorizes county commissions, or section 1(f), which continues to authorize the Legislature to grant powers of self-government to non-charter counties by general or special law.[4]

QUESTION 3: Whether the legislature may enact a special law authorizing a non-charter county to impose term limits on country commissioners.

Although not set out in your letter, I understand you have also inquired of my staff whether a non-charter county could obtain authority from the Legislature to impose term limits on county commissioners by special law.[5] Article III, section 11, of the Florida Constitution, enumerates 21 categories of special laws that are prohibited. Section 11(a)(1) provides:

(a) There shall be no special law or general law of local application pertaining to:

(1) election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local government agencies[.]

"[A]ny inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language. If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written."[6] "Pertain" is defined in Black's Law Dictionary as: "To relate directly to; to concern."[7] A special law establishing an eligibility requirement for incumbent county commissioners in Highlands County would appear to "pertain to" the "election . . . of officers," and thus to be impermissible.[8] Although special laws pertaining to the election of officers of charter counties are explicitly excluded from the prohibition, there is no similar exclusion applicable to non-charter counties.

Accordingly, article III, section (11)(a)(1) precludes the Legislature from enacting a special law allowing Highlands County to impose term limits on county commissioners.[9]

It is therefore my opinion that there is no constitutional or statutory authority that would permit the Board of County Commissioners to impose term limits for county commissioners in Highlands County, a non-charter county, or that would permit the Legislature to do so by special law.

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[1] §§ 124.01, 124.011, Fla. Stat. (2018).

[2] *State v. Purdy*, 252 So. 3d 723, 729 (Fla. 2018).

[3] *See Gretna Racing, LLC v. Fla. Dep't of Bus. & Prof'l Reg.*, 225 So. 3d 759, 764 (Fla. 2017) (authority of a non-charter county to conduct a binding referendum regarding placement of slot machines in a pari-mutuel facility could not be based upon section 125.01(1) alone, granting non-charter counties "the power to carry on county government," but instead required "specific constitutional or statutory authority to act on a subject").

[4] I do not address that part of your request asking whether the amendment affects the authority of a charter county to impose term limits. The Attorney General is authorized by section 16.01(3), Florida Statutes (2018), to issue an opinion regarding "the official duties of the requesting officer[,]" which in this case is the Board of County Commissioners of a *non*-charter county.

[5] A special law applies to particular persons or things; a general law relates to subjects, persons, or things as a class. *Lawnwood Med. Ctr., Inc. v. Seeger,* 990 So. 2d 503, 509 (Fla. 2008).

[6] *Brinkmann v. Francois*, 184 So. 3d 504, 510 (Fla. 2016) (quoting *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986)).

[7] *Black's Law Dictionary* (10th ed. 2014).

[8] *See, e.g.*, Op. Att'y Gen. Fla. 79-106 (1979) (while the Legislature could

enact a general law of uniform application throughout the state making elections of non-charter county officers non-partisan, a special law on the same subject could not be enacted, because article III, section 11(a)(1) precludes a special law relating to the election of county officers).

[9] You have not asked, and I do not express any opinion concerning, whether the Legislature may impose term limits on county commissioners in non-charter counties by general law.

AGO 2019-04 – March 27, 2019

CHAPTER 205, FLORIDA STATUTES – AUTHORITY OF COUNTY TO CONDITION LOCAL BUSINESS TAX RECEIPTS ON COMPLIANCE WITH FEDERAL PROGRAM

WHETHER A COUNTY MAY ENACT AN ORDINANCE CONDITIONING ISSUANCE OF A BUSINESS TAX RECEIPT UPON COMPLIANCE WITH A FEDERAL PROGRAM WHERE NO GENERAL LAW AUTHORIZES SUCH ORDINANCE

To: Eden Bentley, County Attorney, Brevard County

QUESTION:

Whether Brevard County may enact an ordinance conditioning the issuance and renewal of a business tax receipt on compliance with the federal E-Verify program.

SUMMARY:

The county may not enact an ordinance requiring compliance with E-Verify to obtain a business tax receipt, because no general law authorizes such an ordinance.

Background

Chapter 205, Florida Statutes (2018), authorizes local governments to impose a local business tax as defined in section 205.022(5). Section 205.032 is specifically applicable to counties. Section 205.053 directs the county tax collector to collect the tax and thereupon to issue the taxpayer a "business tax receipt," and provides penalties and remedies for engaging in a business, occupation, or profession without having paid the tax.

Brevard County, a charter county, has enacted business tax provisions pursuant to chapter 205 within its code of ordinances.[1] You state that the county wishes to enact an ordinance that would make issuance and renewal of a "business license," formerly called an "occupational license," contingent upon an applicant's "participation and compliance in the federal E-Verify program." E-Verify is a voluntary federal program originally authorized by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996,[2] administered by the Department of Homeland Security, the Social Security Administration, and the United States Citizenship and Immigration Services. It is "'an internet-based system that allows an employer to verify an employee's work-authorization status.'"[3]

Analysis

Chapter 205, however, authorizes counties to levy a *tax*, not to grant a *license*. Until 2006, the tax was called a "local occupational license tax," and section 205.053(1) provided that the tax collector would issue the taxpayer an "occupational license." In 2006, the Legislature replaced this terminology because it was misleading. The Legislature was concerned that an "occupational license" could be interpreted as an imprimatur by the county that a person was qualified to engage in a particular occupation or that a business was qualified to operate.[4] Accordingly, the Legislature replaced the term "local occupational license" with "local business tax" throughout chapter 205, to more accurately communicate that chapter 205 authorizes a revenue-producing tax and not qualifications for licensure.

Because the local business tax is a tax rather than a license, it is subject to article VII, section 1(a) of the Florida Constitution which provides: "No tax shall be levied except in pursuance of law." In addition, article VII, section 9(a) provides: "Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes[.]" Local governments do not have the inherent power to tax, but derive such power from the state by enacted law. When a statute authorizes a tax, it may be levied, assessed, and collected only in the express manner provided.[5] *See, e.g., Collier Cty. v. State*, 733 So. 2d 1012, 1014 (Fla. 1999); *Belcher Oil Co. v. Dade Cty.*, 271 So. 2d 118, 122 (Fla. 1972). The Legislature has specified the conditions under which a county may levy and collect a business tax. §§ 205.032, 205.033, Fla. Stat. (2018). Those conditions do not include compliance with the E-Verify program.

There is no provision within chapter 205 that authorizes a county to require compliance with the E-Verify program before it will issue a business tax receipt to a business that has paid the tax. This office has concluded in prior opinions that the Legislature has the "exclusive prerogative" to regulate the levy and collection of the local business tax via chapter 205, and that local governments are prohibited from modifying existing regulation.[6]

It is therefore my opinion that Brevard County may not enact an ordinance requiring persons to comply with E-Verify as a condition of obtaining a business tax receipt.

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[1] Art. II, §§ 102-26 to 102-96, Business Tax Receipt, Brevard County Code of Ordinances.

[2] Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

[3] *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 590 (2011) (quoting *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 862 (9th Cir. 2009)). "An employer submits a request to the E-Verify system based on information that the employee provides . . . . In response to that request, the employer receives either a confirmation or a tentative nonconfirmation of the employee's authorization to work." *Whiting*, 563 U.S. at 590.

[4] *See* ch. 2006-152, Laws of Fla. (2006) (stating such concerns in the preamble).

[5] The definition of the business tax receipt in section 205.022(2) requires proof of compliance only with the laws within (and authorized by) chapter 205. The receipt "evidences that the person in whose name the document is issued has complied with the provisions of this chapter relating to the business tax."

[6] *See* Ops. Att'y Gen. Fla. 90-25 (1990) (no statute authorized Monroe County to establish a system requiring the county planning and zoning director to certify that a business was properly zoned before the taxpayer could be issued a business tax receipt); 84-91 (1984) (no statute authorized Hernando County to transfer by ordinance the duty of collecting the local business tax from the tax collector to the code enforcement board); 84-65 (1984) (no statute authorized Collier County to direct an entity other than the tax collector to collect the local business tax).

AGO 2019-05 – July 25, 2019

CHAPTER 190, FLORIDA STATUTES – COMMUNITY DEVELOPMENT DISTRICT – AUTHORITY TO CHANGE CRITERIA FOR VOTING AND MEMBERSHIP ON BOARD OF SUPERVISORS

WHETHER CHAPTER 190, FLORIDA STATUTES, AUTHORIZES A COMMUNITY DEVELOPMENT DISTRICT TO CREATE DISTRICT VOTING ZONES AND TO REQUIRE THAT ITS BOARD OF SUPERVISORS SHALL INCLUDE, FOR EACH SUCH ZONE, A BOARD MEMBER WHO IS AN ELECTOR RESIDING WITHIN THE ZONE WHO HAS BEEN ELECTED BY THAT ZONE'S QUALIFIED ELECTORS

To: Michael D. Chiumento III, Legal Counsel, Dunes Community Development District

QUESTIONS:

1. Are community development districts permitted to create voting zones within the district and to have an elector residing in each such zone be elected by the district's qualified electors to the Board of Supervisors?

2. If so, may the Community Development District take the administrative action of establishing such voting zones?

SUMMARY:

There are no provisions in chapter 190 that authorize a district to develop its own election procedures or modify the procedures set forth in section 190.006, Florida Statutes (2018). Section 190.006(3)(a)1 only requires elected board members to be "qualified electors of the district," whereas the procedure you propose would also require at least some of the board members to be qualified electors of a particular zone within the district, and therefore is not authorized.

Background

The Dunes Community Development District in Flagler County was created by administrative rule in 1985. It encompasses approximately 2,200 acres and contains four residential communities: Hammock Dunes, Ocean Hammock, Hammock Beach, and Yacht Harbor Village. You state that each community has its own homeowners' association, its own social characteristics, and distinct governmental service issues.

For example, Ocean Hammock and Hammock Beach are forced to

resolve unique stormwater management and dune preservation issues, and Hammock Beach is more commercial than the other communities.

Two-thirds of the population of the District resides in the southern communities of Hammock Dunes and Yacht Harbor Village, and one-third resides in the northern communities of Ocean Hammock and Hammock Beach. As a result, the southern communities have an advantage over the northern communities in being able to elect their own candidates to the District's Board of Supervisors. Because of this, the District would like to establish voting zones. Qualified electors from each zone would elect a supervisor to represent that zone. This would ensure fair representation of all residents, regardless of the neighborhood in which they reside.

Analysis

Section 190.003(6), Florida Statutes (2018), defines a "community development district" as:

> [A] local unit of special-purpose government which is created pursuant to this act and limited to the performance of those specialized functions authorized by this act; *the governing head of which is a body created, organized, and constituted and authorized to function specifically as prescribed in this act* for the purpose of the delivery of urban community development services; and the formation, powers, *governing body*, operation, duration, accountability, requirements for disclosure, and termination of which *are as required by general law*. (Emphasis supplied.)

Section 190.006(1), Florida Statutes (2018), provides: "The board of the district shall exercise the powers granted to the district pursuant to this act."

The District's Board of Supervisors consists of five members. Section 190.006 provides detailed procedures for electing members of a board of supervisors. These procedures make clear that, after an initial period of time, board members must be elected by "qualified electors," which is defined to mean "any person at least 18 years of age who is a citizen of the United States, a legal resident of Florida and of the district, and who registers to vote with the supervisor of elections in the county in which the district land is located." §§ 190.006(3), 190.003(17), Fla. Stat. (2018). Section 190.006(3), Florida Statutes, provides in subsection (a)1: "All elected board members must be qualified electors of the district." Subsection (3)(b) provides: "Elections of board members by qualified electors held pursuant to this subsection . . . shall be conducted in the manner prescribed by law for holding general elections."

The general rule regarding the powers of special districts is that such

districts may exercise only those powers the Legislature has delegated to them, either expressly or by necessary implication.[1] You suggest that sections 190.011(5) and (15) provide the necessary authority to the District to adopt voting zones. Section 190.011, Florida Statutes, sets forth the general powers of a district, such as to sue and be sued, to contract for various services, to borrow money, etc. Sections 190.011(5) and (15) provide:

> The district shall have, and the body may exercise, the following powers:
>
> * * *
>
> (5) To adopt rules and orders pursuant to the provisions of chapter 120 prescribing the powers, duties, and functions of the officers of the district; the conduct of the business of the district; the maintenance of records; and the form of certificates evidencing tax liens and all other documents and records of the district. The board may also adopt administrative rules with respect to any of the projects of the district and define the area to be included therein. The board may also adopt resolutions which may be necessary for the conduct of district business.
>
> * * *
>
> (15) To exercise all of the powers necessary, convenient, incidental, or proper in connection with any of the powers, duties, or purposes authorized by this act.

You contend that the express power to conduct the business of the district implies the administrative authority to make "the express power effective," which would encompass the power to establish voting zones to "alleviate the suggested voting disparity" between the northern and southern communities. On the contrary, the quoted provisions authorize the District to adopt rules and exercise powers to implement the existing voting procedures articulated in section 190.006, but the District may not by rule alter the structure of political accountability of its board established by the Legislature in the act. Each board member must be elected by the "qualified electors" residing in the district, and those qualified electors are permitted to vote for each board member who governs the District. The creation of voting zones would contravene the district-wide procedure established by the law. Any change to that procedure is a matter for the Legislature.

To qualify to run for the Board of Supervisors, a person must be 18 years old, a resident of the district and of the state, a citizen of the United States, and registered to vote in the county where the community development district is located. §§ 190.003(17), 190.006(1) & (3)(a)1, Fla. Stat. (2018). To establish a new qualification – to be a resident of

a particular voting zone – would exceed the legislative powers expressly granted in section 190.011, Florida Statutes.

You also contend that section 190.046(4)(b), Florida Statutes (2018), essentially creates voting zones when two or more community development districts merge, and that this "effectively authorizes" a single district to create voting zones. Generally, section 190.046 details the procedures to be followed when a community development district wishes either to contract or expand its boundaries, or to merge with one or more other districts. Subsection (4) provides that up to five districts that were established by the same government may merge into one district, and that the resulting district will still have only five members in its Board of Supervisors. One member must be from within the boundaries of each of the former districts involved in the merger, and any remainder within the allowable total of five will be at-large members from anywhere within the entire geographic area of the resulting district. The Legislature expressly outlined the new voting procedure to be followed in the case of a merger but did *not* authorize a change in voting procedure under any other circumstance. When the Legislature directs how a certain thing shall operate, "it is ordinarily to be construed as excluding from its operation all those not expressly mentioned."[2]

It is my opinion that the grant of powers in chapter 190 does not encompass an implied administrative authority to create zones within the District and to require supervisor candidates to reside in particular zones in order to qualify for election to the Board of Supervisors.

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[1] *See Hernandez v. Trout Creek Dev. Corp.*, 779 So. 2d 360, 362 (Fla. 2d DCA 2000). *See also Halifax Hosp. Med. Ctr. V. State*, 2019 WL 1716374, at 1 (Fla. 2019).

[2] *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). *See also* Op. Att'y Gen. Fla. 78-115 (1978) (statute authorized the county commission to appoint five members to Industrial Development Authority, and thus it could not instead choose to appoint seven members).

AGO 2019-06 – July 25, 2019

ARTICLE VII, SECTION 3(a), FLORIDA CONSTITUTION – CERTAIN USES OF MUNICIPAL AIRPORT LEASEHOLD INTERESTS EXEMPT FROM AD VALOREM TAX

WHETHER CITY-OWNED AIRPORT HANGARS LEASED TO PRIVATE AIRCRAFT OWNERS ARE EXEMPT FROM AD VALOREM TAXATION PURSUANT TO ARTICLE VII, SECTION 3(a) OF THE FLORIDA CONSTITUTION SO LONG AS SUCH LESSEES USE THEM FOR A NONCOMMERCIAL AVIATION PURPOSE, WITH NO FOR-PROFIT ACTIVITY

To: Tammi E. Bach, City Attorney, City of Fernandina Beach
J. Christopher Woolsey, Legal Counsel, Nassau County Property Appraiser

REPHRASED QUESTION:

Whether City-owned and operated hangars at the Fernandina Beach Municipal Airport are exempt from ad valorem taxation pursuant to article VII, section 3(a) of the Florida Constitution (2018), when spaces inside the hangars are periodically leased to private aircraft owners to store airplanes?

SUMMARY:

The leasehold interests owned by Fernandina Beach and leased to private aircraft owners are exempt from ad valorem taxation under section 196.199(2)(a), Florida Statutes (2018), so long as the lessees are using the leaseholds for a noncommercial aviation or airport purpose or operation with no engagement in for-profit activity.

Background

The City of Fernandina Beach owns and operates the Fernandina Beach Airport. There are over 50 T-hangars and bulk hangars for housing aircraft on the property. The City rents or leases individual bays directly to private aircraft owners to engage in "noncommercial activities, *i.e.*, storage of aircraft." Generally, property owned and operated by a municipality is exempt from taxation. Article VII, section 3(a) of the Florida Constitution (2018), provides: "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation." But a leasehold interest in municipal property held by a nongovernmental lessee may be taxed unless exempt. Section 196.001 provides: "Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law: … (2) All leasehold interests in property of

the United States, of the state, or any political subdivision, municipality, agency, authority, or other public body corporate of the state."

Analysis

The Legislature has established conditions by which nongovernmental leasehold interests of governmental properties may be exempt. Section 196.199(2), Florida Statutes (2018), exempts such leasehold interests "only when the lessee serves or performs a governmental, municipal, or public purpose or function, as defined in s. 196.012(6)." The first sentence of section 196.012(6) establishes the general rule:

> Governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of . . . any municipality . . . is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds.

This is followed by multiple sentences that describe specific classes of property or uses of property legislatively "deemed" to serve a governmental, municipal, or public purpose or function, with the second and third sentences addressing certain leasehold interests in airports:

> For purposes of the preceding sentence, an activity undertaken by a lessee which is permitted under the terms of its lease of real property designated as an aviation area on an airport layout plan which has been approved by the Federal Aviation Administration and which real property is used for the administration, operation, business offices and activities related specifically thereto in connection with the conduct of an aircraft full service fixed base operation which provides goods and services to the general aviation public in the promotion of air commerce shall be deemed an activity which serves a governmental, municipal, or public purpose or function. Any activity undertaken by a lessee which is permitted under the terms of its lease of real property designated as a public airport as defined in s. 332.004(14) by municipalities . . . subject to a leasehold or other possessory interest of a nongovernmental lessee that is deemed to perform an aviation [or] airport purpose or operation shall be deemed an activity that serves a governmental, municipal, or public purpose.

Multiple statutes and judicial opinions through the years have addressed exemptions from taxation for nongovernmental entities leasing municipal property. Many of the cases, however, involve statutes that have since been repealed or analyses that have been supplanted.

Although the supreme court stated in *Walden v. Hillsborough County Aviation Authority*, 375 So. 2d 283, 286 (Fla. 1979), that the exemptions codified in section 196.199(2) and in what is now section 199.012(6) serve a governmental, municipal, or public purpose, the court has concluded in subsequent case law that the definitions of "public purpose" in the statute may not necessarily be determinative. In *Sebring Airport Authority v. McIntyre*, 783 So. 2d 238 (Fla. 2001), the court concluded that a 1994 amendment to section 199.012(6) itself violated article VII, section 3(a), because the provision improperly exempted private, profit-making activities from ad valorem taxation.[1]

Accordingly, to be eligible for exemption, the use of leased property from a government entity must be shown to serve a "governmental-governmental" function as opposed to a "governmental-proprietary" function. *See, e.g., Sebring*, 783 So. 2d at 247-48; *Williams v. Jones*, 326 So. 2d 425, 433 (Fla. 1975). "Under this test, a tax exemption is constitutionally permitted only if the use by the private entity 'could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds,'" as opposed to "profitmaking endeavors." *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 260 (Fla. 2005) (quoting *Sebring*, 783 So. 2d at 246-48).

The courts have consistently concluded that airport property owned by a municipality cannot be exempt from ad valorem taxation when used for a commercial, for-profit purpose. *See Sebring*, *supra* (property leased by private enterprise from Sebring Airport Authority and used for a raceway operated for profit); *Walden, supra* (in airport owned and operated by aviation authority, space leased in airport buildings for various food services, newspaper and tobacco sales, and a duty-free shop, were all used for "commercial, profit-making purposes"); *Greater Orlando Aviation Auth. v. Crotty*, 775 So. 2d 978 (Fla. 5th DCA 2000) (hotel built and operated by airport authority "for private, profit-making purposes" on property owned by municipality).

In a case involving hangar space at your airport, *Page v. City of Fernandina Beach*, 714 So. 2d 1070 (Fla. 1st DCA 1998), *rev. den.*, 728 So. 2d 201 (Fla. 1998), the First District concluded that certain hangars did not qualify for the ad valorem tax exemption because they were leased by nongovernmental entities and used for commercial, for-profit activities. The first lessee used its hangars in the operation of a fixed-base operation for profit;[2] the second lessee used its hangars to store and maintain aircraft it used to put on air shows throughout the country; and the third lessee used its hangars for the manufacture and testing of unmanned aircraft. The court concluded: "Undertaken by private entities for profit, these uses of City land do not qualify the leased real estate for the exemption[.]" *Id*. at 1075.

Two additional cases the City relies upon bear mentioning. In *Nikolits v. Runway 5-23 Hangar Condominium Association, Inc.*, 847 So. 2d 1054 (Fla. 4th DCA 2003), the Fourth District affirmed a summary judgment against the Palm Beach County Property Appraiser who sought to assess an ad valorem tax on the leasing of airplane hangars to a private entity at the Boca Raton Airport. The case does not address the issue herein, however, because the airport and hangars were on land owned by the state of Florida, which the court concluded was "therefore not taxable." *See Canaveral Port Auth. v. Dep't of Revenue*, 690 So. 2d 1226, 1227-28 (Fla. 1996) (the state is immune from ad valorem taxation).

Nolte v. Paris Air, Inc., 975 So. 2d 627 (Fla. 4th DCA 2008), is a two-paragraph opinion that contains no facts. The court simply affirmed a trial court judgment finding that property owned by a municipal airport and leased "to full service, fixed base operators who provide goods and services to the general aviation public in the promotion of air commerce" served a governmental, municipal, or public purpose, tracking the language and citing the definition of such purpose in section 196.012(6).

It appears from the authorities cited herein that leases of hangars at the Fernandina Beach Airport by nongovernmental entities are exempt from ad valorem taxation so long as the activity undertaken by lessees using the hangars constitutes a governmental, municipal, or public purpose. The Property Appraiser acknowledges that the hangars at issue are being used solely for noncommercial storage of private aircraft. There has been no representation that the hangars are used for the conduct of any commercial, for-profit activity.

Fernandina Beach Airport is federally assisted and is thus subject to regulations of the Federal Aviation Administration (FAA).[3] The *FAA Airport Compliance Manual*, in chapter 9, addresses various aspects of an airport owner's "responsibility to make the airport available on reasonable terms."[4] Paragraph 9.7, dealing with "Availability of Leased Space," provides in part: "Sponsors [public agencies or private owners of a public-use airport] are also obligated to make space available to support aeronautical activity of noncommercial aeronautical users (i.e., hangars and tie-down space for individual aircraft owners)."[5]

Accordingly, by leasing hangars to private aircraft, the Fernandina Beach Airport is ensuring the provision of a basic airport purpose which "could properly be performed or served by an appropriate governmental unit" under section 196.012(6), that does not involve commercial or for-profit use by the nongovernmental lessees. Therefore, it is my opinion the hangars are not subject to ad valorem taxation.

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[1] The court found the following provision to be unconstitutional: "The use by a lessee, licensee, or management company of real property or a portion thereof as a convention center, visitor center, sports facility

with permanent seating, concert hall, arena, stadium, park, or beach is deemed a use that serves a governmental, municipal, or public purpose or function when access to the property is open to the general public with or without a charge for admission."

[2] The case involved the tax years preceding, and thus not subject to, the 1993 amendment to section 196.012(6), which added the language dealing with aircraft full-service fixed base operations serving a governmental, municipal, or public purpose. *Page*, 714 So. 2d at 1073 & n.3.

[3] *See Mission Statement of the Fernandina Beach Municipal Airport*, https://www.fbfl.us/806/Airport-Mission-Statement.

[4] *FAA Airport Compliance Manual*, Order 5190.6B (Sept. 30, 2009), https://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b.pdf., at 9.1, p. 9-1.

[5] *Id*. at 9.7, pp. 9-8 to 9-9.

AGO 2019-07 – July 25, 2019

SECTION 509.032(7)(b), FLORIDA STATUTES – GRANDFATHERED PROTECTION AND PREEMPTION OF CERTAIN AMENDMENTS TO LOCAL GOVERNMENT ORDINANCE REGULATING VACATION RENTALS

WHETHER AMENDING A CITY ORDINANCE ENACTED BEFORE JUNE 1, 2011, THAT REGULATES VACATION RENTALS WOULD INVALIDATE PROVISIONS GRANDFATHERED PURSUANT TO SECTION 509.032(7)(b), FLORIDA STATUTES, AND WHETHER AMENDED PROVISIONS REGULATING THE DURATION OR FREQUENCY OF VACATION RENTALS WOULD BE PROHIBITED EVEN IF LESS RESTRICTIVE THAN THE GRANDFATHERED PROVISIONS

To: Jennifer C. Rey, The Hogan Law Firm, as City Attorney, City of Crystal River

QUESTION:

May a City change its table of permitted uses for zoning districts to allow vacation rentals within districts in which they were not allowed under the City's pre-2011 ordinance, and still preserve the "grandfathered" status of its pre-2011 ordinance under section 509.032(7)(b), Florida Statutes (2018)?

SUMMARY:

Amending an ordinance that was enacted prior to June 1, 2011, will not invalidate the grandfathering protection for those provisions that are reenacted, but new provisions would be preempted if they revise such language in a manner that would regulate the duration or frequency of rental of vacation rentals, even when such regulation would be considered "less restrictive" than the prior local law.

Background

You indicate that the table of permitted uses in the City's Land Development Code enacted in 2005 permits resort housing units only in the City's Commercial Waterfront zoning district.[1] "Resort housing units" are defined in section 1.07.00 as dwelling units that are made available for occupancy for less than three months. Section 5.05.13 describes the permitted use as follows:

A. Resort housing units are permissible in the CW zoning district, subject to the district standards and the supplemental standards set forth below.

B. Nightly rentals or rentals of less than a one-week period are not permitted.

C. Density for resort housing units shall not exceed twelve (12) units per acre.

D. Resort housing units may be managed by the individual unit owner or by a property management company. An occupational license is required for the manager, whether an individual owner with a single unit, or a property management company.

Analysis

Section 509.032(7)(b), Florida Statutes, provides:

> A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.

Section 509.032(7)(b) allows the City to regulate vacation rentals so long as such regulation does not prohibit them or limit the duration or frequency of rental.[2] You ask, however, whether enactment of a less restrictive ordinance that would permit vacation rentals where they are now prohibited, by allowing resort housing units in other zoning districts, would eliminate the grandfathered protection of remaining ordinances that deal with vacation rentals.

When a law is amended, provisions of the original law that are essentially and materially unchanged are considered to be a continuation of the original law. "The provisions of the original act or section reenacted by amendment are the law since they were first enacted, and provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the original act which are reenacted are not affected by amendment."[3] As stated by the Florida Supreme Court, this general rule "'sometimes becomes important, where rights had accrued before the revision or amendment took place.'"[4]

"[W]here a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect."[5]

This principle was operative in a recent case involving vacation rentals, *City of Miami v. Airbnb*. In the course of deciding the case, the Third

District observed that a 2017 resolution interpreting zoning ordinances that prohibited short-term rentals in a suburban/residential zone was not preempted, because it was "identical in its material provisions" to the zoning code the City had enacted in 2009. In contrast, "to the extent the City's 2015 Zoning Interpretation goes beyond the restrictions in [the 2009 ordinance], the Interpretation is preempted under section 509.032(7)(b)."[6]

Provisions in your amended ordinances that are essentially unchanged from the prior ordinances are deemed to have been in operation since 2005 and, thus, continue to be exempt from the preemption provision of section 509.032(7)(b), Florida Statutes. New provisions that act to prohibit vacation rentals that were not previously prohibited, or that "regulate"[7] the duration and frequency of vacation rentals, even if such provisions are less restrictive than the earlier provisions, are preempted by the statute. Changing the table of permitted uses to reflect that "resort housing units" would also be permitted in other zoning districts would conceivably expand the areas in which vacation rentals could be operated. But the duration and frequency restrictions in section 5.05.13(B), which would then apply to those zoning districts, would "regulate" resort housing units operated as vacation rentals.[8] Because the "resort housing unit" land use classification expressly regulates, and restricts, the duration or frequency of rentals of residential property that could be considered "vacation rentals," amending the City's table of permitted uses to permit resort housing units in other zoning districts would violate section 509.032(7)(b).

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[1] Section 2.03.02, Code of Ordinances, City of Crystal River, Florida, Appendix A – Land Development Code.

[2] *See* Op. Att'y Gen. Fla. 2016-12 (2016) (quoting from House of Representatives Final Bill Analysis, CS/CS/CS/HB 883, dated June 28, 2011).

[3] Norman Singer, 1A *Sutherland Statutory Construction* §22:33 (7th ed. Nov. 2018 update).

[4] *Perry v. Consolidated Special Tax School Dist.* No 4, 89 Fla. 271, 276, 103 So. 639, 641 (1925) (quoting *Cooley's Const. Lim.*, at 96-97 (7th ed.)). *accord Orange County v. Robinson*, 111 Fla. 402, 405, 149 So. 604, 605 (1933).

[5] *McKibben v. Mallory*, 293 So. 2d 48, 53 (Fla. 1974); *accord Venice HMA, LLC v. Sarasota Cty.*, 228 So. 3d 76, 83 (Fla. 2017).

[6] *City of Miami v. Airbnb*, 260 So. 3d 478, 482 (Fla. 3d DCA 2018).

[7] Black's Law Dictionary defines the word "regulate" to mean, in pertinent part: "To control (an activity or process) esp. through the implementation of rules." *Black's Law Dictionary* (11th ed. 2019).

[8] I note that section 5.05.13(A) of the City's Land Development Code also expressly restricts resort housing units to the CW zoning district.

AGO 2019-08 – July 25, 2019

SECTION 119.071(4), FLORIDA STATUTES – CITY POLICE & FIREFIGHTERS' RETIREMENT SYSTEM – INCIDENTAL DISCLOSURE OF CONFIDENTIAL INFORMATION TO CYBERSECURITY VENDOR TO CONDUCT PENETRATION TESTING OF ELECTRONIC DATA STORAGE SYSTEMS

WHETHER INCIDENTAL DISCLOSURE OF EXEMPT INFORMATION ABOUT LAW ENFORCEMENT PERSONNEL AND FIREFIGHTERS TO A CYBERSECURITY VENDOR CONDUCTING PENETRATION TESTING OF A PENSION FUND DATA STORAGE SYSTEM UNDER A CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT VIOLATES SECTION 119.071(4), FLORIDA STATUTES

To: Robert A. Sugarman, Legal Counsel, Pompano Beach Police & Firefighters' Retirement System Board of Trustees

QUESTION:

Does chapter 119 preclude "an agency covered by that chapter" from engaging a "vendor to conduct penetration testing of the agency's electronic data storage systems for the purpose of detecting and remedying vulnerabilities" where such testing would potentially allow the vendor "to have access to information that is exempt from disclosure under sections 119.071(4)(d)2.a & d, Florida Statutes (2018), and confidential under section 119.071(4)(a)l., Florida Statutes" (pertaining to social security numbers)?

SUMMARY:

If the Trustees determine that the vendor penetration testing will be "for the purpose of the administration of a pension fund" within the meaning of section 119.071(5), then it appears that any incidental disclosure to the cybersecurity vendor conducting penetration testing under a confidentiality and non-disclosure agreement would not violate chapter 119, Florida Statutes. Additionally, potential access to or incidental release of exempt information about law enforcement personnel and firefighters to a vendor under a confidentiality agreement, for the purpose of ascertaining and ensuring its cybersecurity, would not appear to be inconsistent with the purpose underlying the exemption (i.e., ensuring the safety of such personnel), if the Trustees determine there is a "substantial policy need" to undertake the vendor penetration testing (as ultimately proposed to be implemented).

Background

In asking this question, you have briefly described the proposed vendor services:

> In order to protect the sensitive and confidential information described above and otherwise protect the integrity of [its] computer data systems, the Retirement System, at the recommendation of its computer consultant, desires to engage a third-party cybersecurity vendor to conduct penetration testing. This testing will determine the security of the information stored in the Retirement System's database. In conducting such testing, the third party will attempt to penetrate ("hack") the Retirement System's electronic data storage systems. The purpose of the penetration testing is to detect any system vulnerabilities and remedy them, thereby ensuring the safeguarding of the sensitive and confidential information. However, if the vendor is successful in penetrating the Retirement System's database security measures, the vendor will be able to inspect and copy the sensitive and confidential information protected by the statutory sections cited above. The vendor will sign a confidentiality and non-disclosure agreement. Nevertheless, the vendor will have access to this exempt and confidential information about the Retirement System's members and families.[1]

You have advised that the database is maintained by the Trustees on computers maintained by the Trustees, separate from the computer networks of the City of Pompano Beach. You have also advised the database contains personal information of current and former agency employees, including their social security numbers.

Analysis

Potential Vendor Access to Social Security Numbers

As observed in your request, under section 119.071(4)(a)l, "[t]he social security numbers of all current and former agency employees which are held by the employing agency are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution."

"If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute."[2] However, section 119.071(5), Florida Statutes, provides certain exceptions to this general rule of confidentiality. As applicable here, it provides that "[s]ocial security numbers held by an agency may be disclosed if:…[t]he disclosure of the social security number *is for the purpose of the administration of a pension fund* administered for the agency employee's retirement fund,

deferred compensation plan, or defined contribution plan."[3]

"Administration" is defined as the "management or performance of the executive duties of a government, institution, or business; collectively, all the actions that are involved in managing the work of an organization." *Black's Law Dictionary* (10th ed. 2014). While you have cited no statute addressing the proposed cybersecurity testing of the subject computer systems as applied to the Pompano Beach Police & Firefighters' Retirement System, there are statutory and rule provisions affecting state agencies and Supervisors of Elections which contemplate cybersecurity risk assessments to identify threats to information technology resources.

For example, section 282.318(4)(d), Florida Statutes—which establishes information technology services management requirements for state agencies—provides, among other things, that each "state agency head shall, at a minimum:…(d) Conduct, and update every 3 years, a comprehensive risk assessment, which may be completed by a private sector vendor, to determine the security threats to the data, information, and information technology resources, including mobile devices and print environments, of the agency. The risk assessment must comply with the risk assessment methodology developed by the Agency for State Technology[.]" Although the promulgated risk assessment regulations do not specifically mention penetration testing, they do require that state agencies "[i]dentify and document asset vulnerabilities." Fla. Admin. Code R. 74-2.002.

Further, rule 1S-2.004 of the Florida Administrative Code, which applies to Supervisors of Elections, does identify "penetration testing" as an "appropriate" security procedure. It provides that the "Supervisor of Elections or a governing body may use a certified voting system in an assessment to examine or evaluate the system's security procedures, access control, system reliability and accuracy." It also requires Supervisors of Elections to "implement appropriate procedures," which "may be conducted as a routine test, a system audit or an examination of the functionality of the software and firmware, including penetration testing." The rule also provides that, "although the Supervisor of Elections is responsible for the conduct of an assessment, he or she may use the services of an independent professional person or entity. The services of an appropriate skill assessment team who are educated and experienced in assessments and whose credentials have been approved by the governing body may be used."

Penetration testing is a "specialized type of assessment conducted on information systems or individual system components to identify vulnerabilities that could be exploited by adversaries."[4] Pursuant to the Federal Information Security Act, 40 U.S.C. § 1331, the National Institute for Standards and Technology ("NIST") has published standards that provide minimum information security requirements

for non-defense federal information systems maintained by federal agencies.[5] These minimum security requirements include "seventeen security-related areas with regard to protecting the confidentiality, integrity, and availability of federal information systems and the information processed, stored and transmitted by those systems." *Id*. at 2. Among those security recommendations are "access control," "audit and accountability," "certification, accreditation and security assessments," "risk assessment," and "system and information integrity." *Id*. at 2-3. In conjunction with federal defense and intelligence agencies, and to implement these minimum security standards, NIST has published NIST Special Publication 800-53, which sets forth information security controls. *See NIST SP 800-53*. Penetration testing is among the recommended controls for implementing the minimum security standards. *See id*. at appx. F-CA, p. F-42. Among the "control enhancements" recommended by NIST is the use of independent penetration testing agents, which are independent groups who conduct impartial penetration testing of the organization's information systems. It would thus appear that penetration testing by independent agents is a widely recognized and prudent measure to detect and remediate any vulnerabilities in government information systems.

If the Trustees determine the vendor penetration testing will be "for the purpose of the administration of a pension fund" within the meaning of section 119.071(5), then it appears that any incidental disclosure to the cybersecurity vendor conducting penetration testing under a confidentiality and non-disclosure agreement would not violate chapter 119, Florida Statutes.

Potential Vendor Access to Exempt Employee Information

Section 119.071 also provides, in subsection (4)(d)2, that the "home addresses, telephone numbers, dates of birth, and photographs of active or former sworn…law enforcement personnel" and the "home addresses, telephone numbers, dates of birth, and photographs of current or former firefighters certified in compliance with s. 633.408" are "exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution."[6] Under section 119.071(4)(d)3., Florida Statutes, an agency that is not the employer of, but is the custodian of records pertaining to, one of the persons enumerated in section 119.071(4)(d), Florida Statutes, is required to maintain such person's exemption if the person or his or her employing agency submits a written request to the custodian.[7] In your letter, you have indicated that "[t]he employing agencies of the members have submitted a written request for maintenance of the exemption under subsection 119.071(4)(d)3 of the Florida Statutes."

Notwithstanding these statutory provisions, a distinction is made between public records that are "exempt" from disclosure and records that are "confidential."[8] "If records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the

showing of such information."[9] Based upon this distinction, this office has concluded that, in cases when there is a statutory or substantial policy need to disclose exempt information to a requesting agency or entity, the information may be disclosed.[10]

For example, in Florida Attorney General Opinion 96-36, the City of North Miami Police Department was interested in contracting with a company that compiled, integrated, synthesized, and summarized raw police and other data from a variety of sources and provided informational reports to law enforcement in a format that was "helpful and user friendly." As explained by the Department, it "would enter into an agreement with the entity in which the entity would agree to maintain the confidentiality of such information." The Department further indicated that it believed "that the police department's relationship with such an entity is both necessary and appropriate." Observing that the "release of exempt criminal investigative information to a company that compiles and summarizes raw police data and provides informational reports to law enforcement in a format that is helpful and user friendly" was "not inconsistent with the purpose underlying the exemption for active criminal investigative information," this office concluded "that the police department may release active criminal investigative information exempted by section 119.07(3)(b) [now 119.071(2)(c)1], Florida Statutes, to the company for the purpose of compiling, synthesizing, and summarizing such information for the police department."

As applied here, information about law enforcement personnel and firefighters is exempt from disclosure in the interest of ensuring the safety of such personnel. Potential access to or incidental release of such information to a vendor under a confidentiality agreement, for the purpose of ascertaining and ensuring its cybersecurity, would not appear to be inconsistent with the purpose underlying the exemption, if the Trustees determine there is a "substantial policy need" to undertake the vendor penetration testing (as ultimately proposed to be implemented).

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[1] It is beyond the scope of this analysis to address whether the Trustees are generally authorized to enter into vendor agreements for services, and whether the procurement process, ultimate description of services, specific contract provisions addressing the security of penetration testing operations, or consideration of alternative cybersecurity assessment tools (matters this description does not disclose) might provide additional safeguards for exempt or confidential information.

[2] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

[3] § 119.071(5)(a)(6)(g), Fla. Stat. (2019) (emphasis added).

[4] *See National Institute for Standards and Technology, Special Publication 800-53 Revision 4, "Security and Privacy Controls for Federal Information*

Systems and Organizations", at appx. F-CA, p. F-62, available at http://dx.doi.org/10.6028/NIST. SP.800-53r4 (Last Visited May 15, 2019) (hereinafter "NIST SP 800-53").

[5] *See* FIPS PUB 200 "Minimum Security Requirements for Federal Information and Information Systems", available at https://nvlpubs.nist.gov/nistpubs/FIPS/NIST.FIPS.200.pdf (Last Visited May 15, 2019).

[6] § 119.071(4)(d)2.a, d, Fla. Stat. (2019).

[7] *See* Ops. Att'y Gen. Fla. 2014-07 (2014); 2010-37 (2010); 2005-38 (2005).

[8] *See Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. 5th DCA 2010) ("[T]he Public Records Act is construed liberally in favor of openness, and exemptions from disclosure are construed narrowly and limited to their designated purpose.").

[9] *Id*.

[10] *See* Op. Att'y Gen. Fla. 90-50 (1990); *see also* Inf. Op. to Hon. Don R. Amunds, Chair of Okaloosa Bd. of County Commissioners (June 8, 2012).

AGO 2019-09 – July 25, 2019

WATER CONTROL DISTRICT – ABSENTEE BALLOTS, CHAPTER 298, FLORIDA STATUTES – USE OF ABSENTEE BALLOTS IN WATER CONTROL DISTRICT BOARD ELECTIONS

WHETHER CHAPTER 298, FLORIDA STATUTES, OR ANY SPECIAL ACT, AUTHORIZES WATER CONTROL DISTRICT LANDOWNERS TO VOTE BY MAIL IN ELECTIONS FOR DISTRICT BOARD SUPERVISORS

To: John. J. Fumero, Legal Counsel, Central County Water Control District

QUESTION:

Does chapter 298, Florida Statutes, or general Florida law, authorize or otherwise permit the use of absentee ballots by landowners voting for seats of the District Board at the annual landowners' meeting?

SUMMARY:

There is no language in the District's charter or in the statutes that control District elections that authorizes voting by mail in District landowner elections.

Background

The Central County Water Control District (the "District") was established in 1970 by special act in chapter 70-702, Laws of Florida (1970). All subsequent special acts related to the District were codified in chapter 2000-415, Laws of Florida (2000), as amended by chapter 2007-315, Laws of Florida (2007).

Pursuant to chapter 2007-315, the governing Board of Supervisors consists of five persons, three of whom are elected by landowners of the District and two by qualified electors. According to your research, the District has been allowing landowners – more than 50 percent of whom are absentee landowners – to vote by mail, although you point out that there is no authority for voting by mail in the District's Charter or chapter 298, Florida Statutes.

Chapter 2007-315, dealing with membership and qualifications, provides in section 9(1):

> Three board members shall be elected by district landowners pursuant to chapter 298, Florida Statutes, on a one-acre, one-

> vote basis, and two board members shall be elected by qualified electors, as defined in section 97.041, Florida Statutes, who are residents of the district.

Under section 9(3), dealing with election procedures at the annual meetings:

> Landowners' meetings held in October of even-numbered years shall elect supervisors pursuant to chapter 298, Florida Statutes, as specified by this act. Supervisors to be elected by qualified electors shall qualify and run as nonpartisan candidates pursuant to general law.

Analysis

Section 298.11 sets forth the procedures for the initial election of supervisors in a landowners' meeting, and section 298.12(1) provides that subsequent annual meetings shall be conducted as provided in section 298.11.[1] Section 298.11(2) provides:

> The landowners, when assembled, shall organize by the election of a chair and secretary of the meeting, who shall conduct the election. At the election, each and every acre of assessable land in the district shall represent one share, and *each owner shall be entitled to one vote in person or by proxy in writing duly signed*, for every acre of assessable land owned by him or her in the district, and the three persons receiving the highest number of votes shall be declared elected as supervisors. (Emphasis added.)

Although proxy voting is generally permissible for water control districts, the Legislature foreclosed proxy voting for the District by the special act governing the District. Proxy voting was permitted in District elections until 2000, when the Legislature removed the authority for proxy voting in chapter 2000-415, section 8: "Proxy voting eliminated. – Proxy voting is prohibited in elections of the district board of supervisors."

Accordingly, the only operative language in section 298.11 that addresses the actual casting of ballots by landowners provides that each is "entitled to one vote in person" per acre of assessable land.

Statutes creating special districts have only the powers the Legislature has granted to them. Accordingly, supervisors must manage a district within the limitations of the authorizing legislation. *See State ex rel. Davis v. Jumper Creek Drainage Dist.*, 153 Fla. 451, 453, 14 So. 2d 900, 901 (Fla. 1943); *Roach v. Loxahatchee Groves Water Control Dist.*, 417 So. 2d 814, 816 (Fla. 4th DCA 1982).

This office has previously stated that water control districts possess

no inherent or home rule powers and thus they are limited to electing supervisors in the manner provided by sections 298.11 and 298.12 and may not adopt procedures that are not set forth therein.[2]

It is therefore my opinion that the Central County Water Control District may not permit landowners to use absentee ballots when voting for District members at the annual landowners' meetings.[3]

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[1] *See* Ops. Att'y Gen. Fla. 90-63 (1990) (under section 298.12, landowners meet annually to elect supervisors in the same manner as provided in section 298.11); 76-138 (1976).

[2] *See* Op. Att'y Gen. Fla. 90-63 (1990) (there was no statutory language authorizing landowners to establish a procedure to recall a supervisor of the water control district).

[3] This opinion does not address whether absentee ballots may be used by qualified electors for the two board members so elected pursuant to chapter 2007-315, Laws of Florida, which elections are conducted by the supervisor of elections rather than pursuant to chapter 298.

AGO 2019-10 – August 23, 2019

SECTION 212.055(11)(d), FLORIDA STATUTES – TRIGGER OF PERFORMANCE AUDIT REQUIREMENT WHERE DURATION OF NEWLY ADOPTED DISCRETIONARY SURTAX DIFFERS FROM THAT OF SUPERSEDED SURTAX

WHETHER, UNDER SECTION 212.055(11)(d), FLORIDA STATUTES, THE EXEMPTION FROM A PERFORMANCE AUDIT APPLIES WHERE THE NEWLY ADOPTED DISCRETIONARY SURTAX VARIES IN ANY MATERIAL RESPECT FROM THE SUPERSEDED SURTAX

To: Janette S. Knowlton, County Attorney, Charlotte County

REPHRASED QUESTION:

Does section 212.055(11)(d), Florida Statutes, which exempts a county from obtaining a performance audit when voters are being asked to adopt "the same discretionary surtax" as the surtax being replaced, require only the surtax *rate* to be the same, or does it also require the *duration* of the surtax as described in the enacting ordinance and ballot question to be the same?[1]

SUMMARY:

To be exempt from the requirement of a performance audit pursuant to section 212.055(11)(d), Florida Statutes, the proposed discretionary sales surtax being voted upon must be the same as the immediately preceding surtax in all material respects, which would include the duration of the tax if duration was included in the preceding surtax.

Background

You state that Charlotte County enacted a one percent discretionary sales surtax in 1998 pursuant to section 212.055(2), Florida Statutes, and has extended it multiple times. In 2014, voters approved a new surtax at one percent to apply through 2020 in the following ballot measure:

> **Title**: Extension of the one percent (1%) local option sales tax from January 1, 2015, to December 31, 2020. **Question**: Should the one percent local option sales tax be extended for six (6) years from January 1, 2015, to December 31, 2020, with the proceeds to be used for infrastructure as defined

> by law, including school security and technology improvements; road improvements; and public safety and service buildings; and libraries, parks and recreational facilities.

Analysis

Section 212.055(11) provides that when a referendum is held to "adopt a discretionary sales surtax under this section," the county must submit a copy of its proposed surtax to the Office of Program Policy Analysis and Government Accountability, which in turn must retain a certified public accountant to conduct a performance audit of the program associated with the surtax. No audit is required, however, when the following condition is met:

> (d) This subsection does not apply to a referendum held *to adopt the same discretionary surtax* that was in place during the month of December immediately before the date of the referendum. (Emphasis added.)

Therefore, a performance audit is required before a surtax referendum unless the same surtax is being adopted as was previously in place. The phrase "the same discretionary surtax that was in place," is not defined in chapter 212, and thus the words must be given their plain and ordinary meaning.[2] Black's Law Dictionary (11th ed. 2019), defines "same" as: "Identical or equal; resembling in every relevant respect."[3] Although section 212.055, Florida Statutes does not require any of the discretionary sales surtaxes authorized therein to include a duration, the statute does require that an enactment specify "the maximum length of time the surtax may be imposed, if any." You point out that the County included both the surtax rate and its duration in its ballot question.

The duration of time during which taxpayers will pay a discretionary surtax is a material and relevant aspect of the surtax to be approved or rejected by voters. For example, in *Florida Department of State v. Slough*, 992 So. 2d 142 (Fla. 2008), the Florida Supreme Court found the ballot title and summary for a proposed constitutional amendment addressing certain ad valorem taxation issues to be fatally misleading because they omitted the one-year duration of the amendment. This omission could lead voters to believe that the surtax would be "permanent and continuous" rather than limited in time. Thus, a referendum proposing to extend the length of time taxpayers must pay a discretionary surtax would not be "the same" as the existing surtax which may expire sooner.

It is therefore my opinion that a local government is exempt from obtaining a performance audit pursuant to section 212.055(11)(d), Florida Statutes, when the discretionary sales surtax being voted upon is the same in all material respects as the prior surtax, which would encompass duration of the tax if such is included in the prior surtax.

[1] The Legislature enacted chapter 2019-64, Laws of Florida, in the 2019 legislative session, adding a new section 212.055(10), and redesignating the former subsection (10) as a new subsection (11), with some changes to the provision. Former subsection (10)(d), now (11)(d), is unchanged.

[2] *See*, *e.g.*, *Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 961 (Fla. 2005).

[3] *See also American Heritage Dictionary of the English Language* (5th ed. 2018) ("[s]imilar in kind, quality, quantity, or degree"; "[c]onforming in every detail").

AGO 2019-11 – November 6, 2019

SECTIONS 100.3605(2), 101.75(3), AND 166.021(4), FLORIDA STATUTES – HOW CITY MAY ALIGN ELECTION OF MUNICIPAL OFFICERS WITH STATE GENERAL ELECTION

WHETHER, UNDER SECTIONS 100.3605(2), 101.75(3), AND 166.021(4), FLORIDA STATUTES, THE CITY OF DESTIN MAY, BY ORDINANCE AND WITHOUT REFERENDUM, ALIGN THE ELECTION OF MUNICIPAL OFFICERS WITH THE STATE GENERAL ELECTION

To: Kyle S. Bauman, Legal Counsel, City of Destin
Kimberly R. Kopp, Legal Counsel, City of Destin

REPHRASED QUESTION:

Does the City Council of the City of Destin possess the legal authority to move its election day, by ordinance and without referendum, from a date in March of even-numbered years to a date on the first Tuesday following the first Monday in November of even-numbered years to align the election of the City's municipal officers with the state general election?

SUMMARY:

Pursuant to sections 100.3605(2), 101.75(3), and 166.021(4), Florida Statutes (2019), the Destin City Council is authorized to align the election of the City's municipal officers, by ordinance and without referendum, with the state general election.

Background

Section 3.03 of the Destin City Charter, adopted in 1990, provides that the "regular election of the mayor and city council members shall be held on the day of the State General Election in even-numbered years." In 1992, however, the Legislature passed a special law, chapter 92-270, Laws of Florida, that provided for uniform filing and election dates for seven municipalities located in Okaloosa County, Florida, including the City of Destin.[1] In pertinent part, it establishes that "[a]ny election relating to a municipal officer" in those municipalities is set for the "second Tuesday in March."[2] Because "municipal ordinances must yield to state statutes,"[3] the City's irreconcilable charter provision was effectively preempted by the controlling requirement of chapter 92-270 at that time.[4] The City, consistent with chapter 92-270, has since held its municipal elections on the second Tuesday in March. In 2006, the City of Destin adopted Ordinance Number 06-03-CC, codified at section 9.04 of the City of Destin Code of Ordinances, which provides: "Elections

for members of the city council and for the office of mayor shall be held on the second Tuesday in March in each even numbered year."

The City now proposes to align its municipal elections by ordinance to be concurrent with the state general election, and asserts that, pursuant to sections 166.021(4), Florida Statutes, and 100.3605(2), Florida Statutes, it may do so. Counsel for the Okaloosa County Supervisor of Elections has expressed a concern about the potential conflict between these generally applicable statutes and chapter 92-270.[5]

Analysis

In 1995, the Legislature enacted chapter 95-178, Laws of Florida, which created section 100.3605, Florida Statutes, which provides:

> (1) The Florida Election Code, chapters 97-106, shall govern the conduct of a municipality's election in the absence of an applicable special act, charter, or ordinance provision. No charter or ordinance provision shall be adopted which conflicts with or exempts a municipality from any provision in the Florida Election Code that expressly applies to municipalities.
>
> (2) The governing body of a municipality may, by ordinance, change the dates for qualifying and for the election of members of the governing body of the municipality and provide for the orderly transition of office resulting from such date changes.

Thus, absent a conflicting special act, charter or ordinance provision, the Florida Election Code governs, and a municipality may by ordinance change its election date for members of its governing body.

Chapter 95-178 also amended section 166.021(4)—which defines municipal powers—to read in pertinent part:

> [N]othing in this act shall be construed to permit any changes in a special law or municipal charter which affect...the terms of elected officers and the manner of their election *except for the selection of election dates and qualifying periods for candidates and for changes in terms of office necessitated by such changes in election dates*, . . . without approval by referendum of the electors as provided in s. 166.031.

(Emphasis added.)

Then, in section 23 of chapter 2008-95, Laws of Florida, the Legislature amended section 101.75(3), Florida Statutes, which now provides:

> (3) Notwithstanding any provision of local law or municipal charter, the governing body of a municipality may, by

> ordinance, move the date of any municipal election to a date concurrent with any statewide or countywide election. The dates for qualifying for the election moved by the passage of such ordinance shall be specifically provided for in the ordinance. The term of office for any elected municipal official shall commence as provided by the relevant municipal charter or ordinance.

Thus, this office has opined that a change in election dates permitted by sections 100.3605 and 101.75(3) may be accomplished by ordinance without referendum. Op. Att'y. Gen. Fla. 2013-05 (2013).

The question raised by the City, and by the counsel for the Okaloosa County Supervisor of Elections, is whether the previously enacted special law, chapter 92-270, precludes the application of these later enacted statutes of general applicability to the municipalities that fall within the scope of the special law.

Where there exists a genuine conflict which cannot be harmonized between a special law and general law, a special law or local law will control over a later general law unless provisions of the general law show an intent to supersede the local law and are not merely inconsistent with it.[6] Such an intent is plain from the language of section 101.75(3), Florida Statutes, adopted in 2008, which permits municipalities to, "by ordinance, move the date of any municipal election to a date concurrent with any statewide or countywide election", "[n]otwithstanding any provision of local law or municipal charter." If chapter 92-270 is a "local law," then the City is authorized, by section 101.75(3), to align the election of the City's municipal officers with the state general election.

A "local law" is one "relating to, or designed to operate only in, a specifically indicated part of the state."[7] Because chapter 92-270 operates only in seven municipalities in Okaloosa County, it is a "local law." Because the City is authorized to move the date of its municipal election notwithstanding this local law, sections 100.3605, 101.75(3), and 166.021(4) all permit the City to do so by ordinance and without referendum.

Accordingly, I am of the opinion that, pursuant to sections 100.3605(2), 101.75(3), and 166.021(4), the Destin City Council is authorized to align the election of the City's municipal officers with the state general election by ordinance and without referendum

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[1] Section 1 of chapter 92-270 reflects this intent to establish uniform filing and election dates:

> It is the intent of this act to provide for uniform filing and election dates for all municipal elections to elect municipal

officers in the Cities of Cinco Bayou, Crestview, Destin, Fort Walton Beach, Laurel Hill, Mary Esther, and Shalimar in Okaloosa County. It is not the intent of this act to determine the length of term of any such municipal office.

[2] Ch. 92-270, § 3, Laws of Fla.

[3] *Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014). "Although municipalities and the state may legislate concurrently in areas that are not expressly preempted by the state, a municipality's concurrent legislation must not conflict with state law." *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993).

[4] "Such 'conflict preemption' comes into play 'where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute.'" *City of Palm Bay v. Wells Fargo Bank*, N.A., 114 So. 3d 924, 928 (Fla. 2013) (quoting 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012)).

[5] See letter dated May 31, 2019, from Mike Chesser, Attorney for the Supervisor of Elections, to Mr. Paul Lux, Okaloosa County Supervisor of Elections, Re: Time for Holding City of Destin Municipal Elections.

[6] *See City of St. Petersburg v. Siebold*, 48 So. 2d 291, 292-93 (Fla. 1950); *State ex rel. D'Alemberte v. Sanders*, 85 So. 333, 335-36 (Fla. 1920).

[7] *See Venice HMA, LLC v. Sarasota Cty.*, 228 So. 3d 76, 80 (Fla. 2017), *reh'g denied*, No. SC15-2289, 2017 WL 4545964 (Fla. Oct. 12, 2017) (*citing Fla. Dep't of Bus. & Prof'l Reg. v. Gulfstream Park Racing Ass'n*, 967 So. 2d 802, 807 (Fla. 2007), *quoting State ex rel. Landis v. Harris*, 120 Fla. 555, 163 So. 237, 240 (1934)).

AGO 2019-12 – November 1, 2019

CHAPTER 163, FLORIDA STATUTES – CITY COUNSEL TRANSFER OF AUTHORITY AS CITY COMMUNITY REDEVELOPMENT AGENCY TO INDEPENDENT BOARD

WHETHER CHAPTER 163, FLORIDA STATUTES, AUTHORIZES A CITY COUNCIL TO TRANSFER ITS EXISTING AUTHORITY AS THE CITY COMMUNITY REDEVELOPMENT AGENCY TO AN INDEPENDENT BOARD

To: Gerald T. Buhr, City Attorney, City of Avon Park

QUESTION:

Whether the city council, presently sitting as the governing board of the city community redevelopment agency, can transfer its authority to an independent board?

SUMMARY:

Chapter 163, Florida Statutes, does not authorize the city council to transfer its existing authority as the city community redevelopment agency to an independent board.

Background

The Community Redevelopment Act of 1969, codified in chapter 163, Florida Statutes, permits county and municipal governments to create community redevelopment agencies to redevelop and revitalize slum and blighted areas. A community redevelopment agency may only be created after the local government adopts a resolution making a finding of need.[1] Once created, a community redevelopment agency is a separate "public body corporate and politic"[2] from the local government. Generally, the Act provides that such a separate public agency when formed may be governed in two ways. First, the local government may, by ordinance, appoint a board of commissioners which may be comprised of members distinct from the members of the board of the local government.[3] Second, the local government's "governing body" may instead designate itself as the community redevelopment agency board.[4]

Consistent with chapter 163, Florida Statutes,[5] and its own Code of Ordinances,[6] the city council of the City of Avon Park, in creating a city community redevelopment agency, chose the latter structure and declared its members, by resolution, to be the commissioners of the community redevelopment agency. The city council now asks whether it can designate, as the community development agency acting in its stead, a public agency configured as set forth in section 163.356, Florida Statutes.

Analysis

Section 163.356(2), Florida Statutes, requires that a board of commissioners distinct from the city council be appointed "[w]hen the governing body adopts a resolution declaring the need for a community redevelopment agency." The statute is clear that the board of commissioners be established when the community redevelopment agency is established. There is no provision for transfer of governance of an established community redevelopment agency to a later constituted board of commissioners. Notably, the converse is not true. Section 163.357(1)(a), Florida Statutes, provides that, "[a]s an alternative to the appointment of not fewer than five or more than seven members of the agency, the governing body may, *at the time of the adoption of a resolution under s. 163.355, or at any time thereafter by adoption of a resolution*, declare itself to be an agency, in which case all the rights, powers, duties, privileges, and immunities vested by this part in an agency will be vested in the governing body of the county or municipality, subject to all responsibilities and liabilities imposed or incurred."[7] (Emphasis added.)

Therefore, I am of the opinion that the city council lacks statutory authority to transfer its authority as the community redevelopment agency of an existing agency to an independent board

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[1] § 163.355, Fla. Stat. (2019).

[2] § 163.356(1), Fla. Stat.

[3] §166.356(2), Fla. Stat.

[4] § 163.357(1)(a), Fla. Stat.; *see also* § 163.40(3), Fla. Stat. (defining "governing body" as "the council, commission, or other legislative body charged with governing the county or municipality").

[5] *See* § 163.357(1)(a), Fla. Stat. (2019).

[6] *See* Avon Park, Fla., Code of Ordinances ch. 74, § 74-76 ("The city council shall, by resolution, declare themselves to be the commissioners of the community redevelopment agency.").

[7] The reference in section 163.357(1)(a) to "not fewer than five or more than seven members of the agency" appears to be a cross-reference to section 163.356(2), which now provides for a board composition of "not fewer than five or more than nine commissioners." This language was added to section 163.357(1)(a) at the same time that identical language concerning the number of board members was added to section 163.356(2). *See* ch. 83-231, § 1-2, Laws of Fla.

AGO 2019-13 – November 1, 2019

SECTION 125.0104(5)(a), FLORIDA STATUTES – USE OF TOURIST DEVELOPMENT TAX FUNDS TO REPAIR OR IMPROVE PUBLICLY OWNED MUSEUM OPERATED BY FOR-PROFIT CORPORATION

WHETHER SECTION 125.0104(5)(a), FLORIDA STATUTES, AUTHORIZES THE USE OF TOURIST DEVELOPMENT TAX FUNDS TO REPAIR OR IMPROVE A PUBLICLY OWNED MUSEUM OPERATED BY A FOR-PROFIT CORPORATION

To: Robert B. Shillinger, County Attorney, Monroe County

QUESTION:

Whether, under section 125.0104(5)(a), Florida Statutes (2019), tourist development tax funds can be used to repair or improve a publicly owned museum which is operated by a for-profit corporation?

SUMMARY:

Section 125.0104(5)(a) does not authorize the use of tourist development tax funds to repair or improve a publicly owned museum which is operated by a for-profit corporation.

Background

Your letter reflects that this question arises from a proposal by the City of Key West, as a potential applicant for a grant funded by tourist development taxes, to upgrade and install a new fire sprinkler system at the Key West Shipwreck Museum. The museum is located on property owned by the city but operated by a for-profit corporation which leases the facility from the city.

Analysis

The Local Option Tourist Development Act, section 125.0104, Florida Statutes, authorizes counties to impose a tax on short-term rentals of living quarters or accommodations within the county (with certain exceptions not pertinent here). This office has often stated that "'the intent and purpose of the act was to provide for the advancement, generation, growth and promotion of tourism, the enhancement of the tourist industry, and the attraction of conventioneers and tourists from within and without the state to a particular area or county of the state.'"[1]

Subsection (5) of the act sets forth various purposes for which revenues from the tax may be expended. Pursuant to section 125.0104(5)(a)1.,

such funds may be used:

> 1. To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more:
>
> * * *
>
> c. Aquariums or *museums* that are *publicly owned and operated or owned and operated by not-for-profit organizations and open to the public*, within the boundaries of the county or subcounty special taxing district in which the tax is levied[.]

(Emphasis added.)

This language makes it clear that tourist development tax revenues may only be used for specified purposes related to the operation of museums that are either (1) publicly owned and operated and open to the public or (2) owned and operated by not-for-profit organizations and open to the public. The property you describe fits neither category. The statute makes no provision for the use of tourist development tax revenues for repair of publicly owned buildings leased to for-profit corporations operating a museum on the premises.

"[W]here a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned."[2] Further, "[w]hen the Legislature has prescribed the mode, that mode must be observed. When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way."[3] Given the statute's straightforward requirements, this office is unable to render a formal opinion which would further clarify the statute.

Therefore, it is my opinion that section 125.0104(5)(a) 1., Florida Statutes, does not authorize the use of tourist development tax funds to repair or improve a publicly owned building which is operated as a museum by a for-profit corporation

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[1] Op. Att'y Gen. Fla. 2017-06 (2017) (quoting Ops. Att'y Gen. Fla. 14-02 (2014); 13-29 (2013); 83-18 (1983)).

[2] *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

[3] *Alsop v. Pierce*, 19 So. 2d 799, 805–06 (Fla. 1944).

AGO 2019-14 – November 22, 2019

CHAPTERS 119, 120, AND 286, FLORIDA STATUTES – AGENCY STATUS OF EDUCATION PRACTICES COMMISSION

WHETHER, FOR PURPOSES OF CHAPTERS 119, 120, AND 286, FLORIDA STATUTES, THE EDUCATION PRACTICES COMMISSION ACTS AS AN AGENCY OF STATE GOVERNMENT IN EXERCISING POWERS AND FULFILLING DUTIES

To: Gretchen Kelley Brantley, Executive Director, Education Practices Commission

QUESTION:

Whether the Education Practices Commission is a state agency under certain statutory provisions?

SUMMARY:

Until legislatively or judicially determined otherwise, it is my opinion that the Education Practices Commission is an agency of state government for the purposes contained in the statutes discussed herein, found in chapters 119, 120, and 286.

Background

The Legislature created the Education Practices Commission (hereinafter "EPC" or "Commission") in 1980.[1] Its essential powers and duties are currently set forth in sections 1012.79 through 1012.799, Florida Statutes (2019). Under section 1012.79, the EPC consists of 25 members appointed by the State Board of Education, subject to Senate confirmation. Members serve staggered four-year terms for up to eight years and may be removed by the State Board of Education for misconduct.

The duties of the EPC are stated in section 1012.79(7) as follows:

(a) to interpret and apply the State Board of Education's standards of professional practice;

(b) to impose discipline upon teachers and school administrators;

(c) to annually meet with the State Board of Education; and

(d) to adopt rules to implement the laws applicable to the EPC.

Its quasi-judicial role under paragraph (b) is set forth more specifically in sections 1012.795 and 1012.796, Florida Statutes. Under section 1012.796, the Department of Education ("Department") investigates an

initial complaint against a teacher or administrator. If the Department finds probable cause that there has been a violation of law under section 1012.795(1)(a) through (p), it files a formal complaint against the teacher or administrator and prosecutes the action pursuant to chapter 120. After a hearing, the administrative law judge issues a recommended order to the Commission. A panel of the Commission then conducts "a formal review of such recommendations and other pertinent information" and issues a final order either dismissing the complaint or imposing any of the penalties enumerated in section 1012.796(7), Florida Statutes.

The Role of the Education Practices Commission Within the Executive Branch

Chapter 20 of the Florida Statutes sets forth the organizational structure of the executive branch. Section 20.02(2), Florida Statutes, provides, in part: "The agencies in the executive branch should be integrated into one of the departments of the executive branch to achieve maximum efficiency and effectiveness as intended by s. 6, Art. IV of the State Constitution." Article IV, section 6 provides that all executive-branch functions must be allotted among up to 25 departments, each "under the direct supervision of the governor, lieutenant governor, governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor," with two exceptions. Exception (b) applies to: "Boards authorized to grant and revoke licenses to engage in regulated occupations [which] shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause."

Consistent with article IV, section 6(b), and with section 20.02, Florida Statutes, the Legislature assigned the EPC to the Department of Education, but granted it a measure of independence from the Department in section 1012.79(6), as follows:

> (6)(a) The [Education Practices Commission] shall be *assigned to* the Department of Education for administrative purposes. The commission, in the performance of its powers and duties, *shall not be subject o control, supervision, or direction by the Department of Education*.[2]
>
> (b) The property, personnel, and appropriations related to the specified authority, powers, duties, and responsibilities of the commission shall be provided to the commission by the Department of Education. (Emphasis added.)

Section 20.03, Florida Statutes, contains definitions applicable to the executive branch, "[t]o provide uniform nomenclature throughout the structure of the executive branch." The statute contains no language limiting its definitions to chapter 20.

Section 20.03(10) defines "commission":

> (10) "Commission," unless otherwise required by the State Constitution, means a body created by specific statutory enactment within a department, the office of the Governor, or the Executive Office of the Governor and exercising limited quasi-legislative or quasi-judicial powers, or both, independently of the head of the department or the Governor.

This definition encompasses the EPC.

Section 20.03(11) defines "agency":

> (11) "Agency," *as the context requires*, means an official, bureau, board, section, or another unit or entity of government. (Emphasis added.)

Under this definition, a "commission" like the EPC may thus be considered an agency for some purposes. Whether the EPC is an "agency" for the purposes set forth in individual statutes depends on how those statutes use or define the term.

Analysis

I. Chapter 119, Florida Statutes – Public Records

Under section 119.07(1)(a), Florida Statutes, every "agency" must facilitate the inspection of its public records by any person wishing to do so, under the supervision of the agency's custodian of public records. Section 119.011(2), Florida Statutes, defines "agency" as used throughout the chapter:

> (2) "Agency" means any state, county, district, authority, or municipal officer, *department*, division, board, bureau, *commission*, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

(Emphasis added.)

You observe that, if EPC is an "agency" under chapter 119, it must ensure that policies and protocols are in place to comply with the requirements of chapter 119 regarding proper disclosure and protection of public records. Because the plain language of the definition of agency in section 119.011(2) encompasses the EPC and applies chapter-wide, the provisions you cite from chapter 119 do apply to the EPC.[3]

You also ask about the applicability of section 119.0701, Florida Statutes, which deals with public-records law compliance by persons and entities that enter into contracts with "public agencies." Section 119.0701(1)(b) defines "public agency" as "a state, county, district, authority, or municipal officer, or department, division, board, bureau, *commission*, or other separate unit of government created or established by law." (Emphasis added.) Under the plain language of this definition, the EPC is a "public agency" and must comply with the provisions of section 119.0701 when contracting for services.

II. Chapter 120, Florida Statutes – Administrative Procedure Act

Chapter 120 provides procedures agencies must follow when conducting meetings, hearings, rulemaking, and other actions. The definition of "agency" in section 120.52(1) applies throughout chapter 120:

> (1) "Agency" means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:
>
> (a) The Governor; each state officer and *state department, and each departmental unit described in s. 20.04*; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only if a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and s. 186.504.
>
> (b) *Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county*.

(Emphasis added.)

The EPC is not one of the specific departmental units set forth in section 20.04, Florida Statutes (which are division, bureau, section, or subsection), but it is a "governmental entity" with "statewide jurisdiction" granted by statute. It therefore comports with the definition of "agency" in section 120.52(1)(b).

Additional terms in section 120.52 further support the EPC's role as an "agency." The Legislature gave the EPC the authority to adopt rules in sections 1012.79(7)(d) and 1012.795(6)(b), Florida Statutes, and to issue final orders following disciplinary hearings in sections 1012.79(8) and 1012.796(7), Florida Statutes. These actions constitute "agency action" according to section 120.52(2). The collegial body in a governmental unit statutorily responsible for final agency action is the "agency head" under section 120.52(3). Finally, a "rule" is defined in section 120.52(16) as an "agency statement of general applicability." Accordingly, the EPC

is an agency for purposes of chapter 120.

You raise various issues regarding the interplay between chapter 120 and the statutes that govern EPC proceedings. Those matters are better left for the EPC to resolve in consultation with the Department of Education. You also raise some issues regarding various functions in the EPC's adjudicatory process that are handled by the Department of Education. Those matters are better addressed jointly by the EPC and the Department.

III. Chapter 286, Florida Statutes – Public Business: Miscellaneous Provisions

You state that the EPC is "its own entity and not an agency of the Department of Education" for purposes of complying with four provisions in chapter 286. The text of the statutes makes plain that the distinction makes no difference. The definitional terms of each provision apply to "commissions" like the EPC:

- Section 286.0105, regarding information about preserving a record for appeal that must be included in notices of meetings and hearings, applies to "[e]ach board, commission, or agency of this state."
- Section 286.011, dealing with public meetings and records, applies to "any board or commission of any state agency."
- Section 286.0114, dealing with the public's opportunity to be heard at a public meeting, applies to meetings of "a board or commission of any state agency."
- Section 286.012. which provides requirements for voting on official decisions, rulings, or acts at governmental meetings, applies to a member of "a state, county, or municipal governmental board, commission, or agency who is present."

Therefore, the Education Practices Commission is authorized by the provisions discussed above to exercise the powers granted therein to an agency or commission, as the context requires.

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[1] *See* ch. 80-190, § 6, Laws of Fla. (CS/HB 97) (creating § 231.555, Florida Statutes).

[2] In section 20.15, Florida Statutes (2019), which sets forth the structure of the Department of Education, subsection (6) provides: "COUNCILS AND COMMITTEES. — Notwithstanding anything contained in law to the contrary, the commissioner [of Education] shall appoint all members of all councils and committees of the Department of Education, except the Commission for Independent Education and the Education Practices Commission." (Emphasis added.)

[3] You specifically cite sections 119.021 (how records must be maintained); 119.071 (general exemptions from inspection); 119.0714 (records that have been made part of a court file); 119.084 (copyright protection for data processing software); 119.10 (penalties for violating chapter 119); 119.105 (disclosure of police reports); 119.11 (hearings regarding violations of chapter 119); and 119.12 (attorney's fees in a civil action for violation of chapter 119).

Opinions - 2020

AGO 2020-01 – February 4, 2020

SECTION 197.582, FLORIDA STATUTES – EFFECT OF FAILURE TO SUBMIT TIMELY REQUEST FOR SURPLUS FUNDS ON PRIORITY OF GOVERNMENTAL LIENHOLDER CLAIMS

WHETHER, UNDER SECTION 197.582, FLORIDA STATUTES, THE CLERK OF COURT IS OBLIGATED TO PAY SURPLUS FUNDS TO GOVERNMENTAL LIENHOLDERS OF RECORD BEFORE PAYING NONGOVERNMENTAL CLAIMANTS WHERE THE GOVERNMENTAL LIENHOLDERS DO NOT SUBMIT A TIMELY REQUEST FOR SURPLUS FUNDS

To: Scott R. Harlowe, Legal Counsel, Clerk of Court for St. Lucie County

QUESTIONS:

1. Under section 197.582, Florida Statutes (2019), are governmental lienholders barred from obtaining tax deed surplus funds if they fail to submit a timely request for surplus funds?

2. If a request is not required, what effect does the failure of a governmental entity to submit a request for surplus funds have upon the Clerk's determination of how the surplus funds should be distributed?

SUMMARY:

1. Under section 197.582:

- **a timely request for payment from surplus funds is not a prerequisite to the Clerk's obligation to "distribute the surplus to the governmental units for the payment of any *lien of record held by a governmental unit* against the property, including any tax certificates not incorporated in the tax deed application and omitted taxes, if any," prior to distributing the balance of undistributed funds to other persons specified in section 197.582;**
- **a *non-governmental unit holder of any recorded governmental lien* (other than a federal government lien or ad valorem tax lien) is barred from obtaining tax deed surplus funds if such lienholder fails to submit a timely written claim for surplus funds.**

2. Because governmental units holding "liens of record... against the property" are not required to submit a request for surplus funds, the Clerk is required to distribute funds to governmental units holding such liens before disbursing the balance of undistributed surplus funds to claimants, following the process outlined in subsections (2) through (9) of section 197.582.

Background

When a property is sold at public auction in a tax deed sale, Florida law provides the statutory minimum bid of the tax certificate holder. § 197.582(1), Fla. Stat. (2019). If the property sells for a price in excess of this amount, section 197.582 specifies the procedure the clerk must use to distribute the surplus.

You have identified, and expressed concern about, a possible conflict between certain provisions in section 197.582 regarding disbursements of excess tax deed sale proceeds in payment of governmental liens. Both subsection 197.582(2)(a) and subsection 197.582(7) require a clerk administering a tax deed sale to "distribute the surplus to… governmental units for the payment of any lien of record held by a governmental unit against the property" subject to the tax deed sale prior to disbursing the balance to nongovernmental "claimants."[1] In contrast, the first sentence of subsection (7) provides that "[a] holder of a recorded governmental lien, other than a federal government lien or ad valorem tax lien, must file a request for disbursement of surplus funds within 120 days after the mailing of the notice of surplus funds." You contend that the statute is "ambiguous" as to whether (1) a "governmental lienholder" must submit a timely claim to be eligible for surplus funds or (2) the clerk is required to distribute funds to governmental lienholders regardless of whether they file a claim.

Analysis

As observed by the Florida Supreme Court in *State v. Peraza*, the "starting point for any statutory construction issue is the language of the statute itself—and a determination of whether that language plainly and unambiguously answers the question presented."[2] "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning,…the statute must be given its plain and obvious meaning."[3]

Ambiguity occurs when an "uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy…gives rise to any of two or more quite different but almost equally plausible interpretations."[4] Absent ambiguity, "there is no occasion for resorting to rules of statutory interpretation and construction."[5] When a statute "is subject to more than one interpretation," however, "the rules of statutory construction should be applied to resolve the ambiguity."[6]

The statute's plain text is ambiguous.

Here, a "studied analysis of what [the] statute actually says"[7] fails to plainly and unambiguously answer the Clerk's question about how liens held by governmental units must be treated following a tax lien sale. Instead, section 197.582 reflects a number of apparent inconsistencies.

For example, in the first sentence of section 197.582(2)(a), the statute provides that "the surplus" resulting from a tax lien sale "must be paid over and disbursed by the clerk as set forth in subsections (3), (5), and (6)." If applied literally, this would ignore procedures contained in the third and fourth sentences of subsection (2) itself. Those provisions require the clerk to "distribute the surplus to the governmental units for the payment of any lien of record held by a governmental unit against the property," and thereafter, if "there *remains a balance* of undistributed funds," to retain such balance "for the benefit of persons described in s. 197.522(1)(a), except those persons described in s. 197.502(4)(h), as their interests may appear."[8] The directive in subsection (2)(a) to pay governmental units holding liens of record is not conditioned on receipt of any request or claim, and this office has interpreted previous iterations of this process (first directing the clerk to distribute the tax deed sale surplus to governmental units) as allowing the statutorily identified liens "to be *automatically satisfied* from the excess proceeds of a tax sale."[9] In fact, it is only after this initial distribution in payment to "governmental unit" lien holders that a "balance of undistributed funds" will "remain" and the notice and claim provisions set forth in subsections (2) through (6) can be implemented. By contrast, subsection (5) provides broadly that "[a] person other than the property owner, who fails to file a proper and timely claim is barred from receiving any disbursement of the surplus funds." Because a "person" can include some governmental entities, *see* § 1.02, Fla. Stat. (2019), this provision would appear to require the filing of a claim.

Additionally, the exclusive reference to subsections (3), (5), and (6) in the first sentence of subsection (2)(a) ignores subsections (7), (8), and (9) of the statute. Those subsections contain provisions specifying when and how payments shall be made to "holders[s] of a recorded governmental lien, other than a federal government lien or ad valorem tax lien;" to "tax deed recipient[s]" who "directly pay off all liens to governmental units that could otherwise have been requested from surplus funds"; and (when no claims are made) to the "legal titleholder of record described in s. 197.502(4)(a)."

Subsection (7) directs the clerk to "disburse payments to each governmental unit to pay any lien of record held by a governmental unit against the property, including any tax certificate not incorporated in the tax deed application and any omitted taxes, before disbursing the surplus funds to nongovernmental claimants." In so doing, subsection (7) distinguishes between a "holder of a recorded governmental lien" and a "governmental unit" holding "a lien of record against the property." Where the Legislature

uses different language to refer to these classes of lienholders, it must be presumed that a different meaning was intended. The term "holder of a recorded governmental lien" is broader than a "governmental unit" holding a "lien of record," and may include a nongovernmental holder of a governmental lien by assignment, such as an investor. While such nongovernmental claimants (unlike the tax deed recipient, as set forth in subsection (8)) do not receive payment "in the same priority as the original lienholder," they are also not required to file a "timely *claim* under subsection (3)," but only to file a "*request* for disbursement of surplus funds within 120 days after the mailing of the notice of surplus funds,"[10] as a precondition to payment. In contrast, the directive to pay governmental lienholders prior to nongovernmental "claimants" is not conditioned upon the governmental lienholder filing either a "claim" or a "request for disbursement."

As the statute is ambiguous, canons of statutory interpretation must be applied.

When thus faced with an apparent ambiguity or conflict within a statute, the canons of statutory interpretation must be applied. It is elemental that "all parts" of the statute "must be read together in order to achieve a consistent whole," and, where possible, "full effect" must be given "to all statutory provisions" and related provisions must be construed "in harmony with one another."[11] Further, "significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage."[12] Where separate provisions of the same statute are susceptible of two different constructions—one which harmonizes both provisions, and one which creates an irreconcilable conflict between them—a "rational, sensible construction" that avoids such conflict and leads to a "more reasonable" result will be adopted.[13]

Applying these principles here, section 197.582 should be interpreted to give effect to as much of its language as logically possible. To conclude that liens of record held by governmental units not be paid unless such entities file claims pursuant to the process set forth in subsections (2) through (6) of section 197.582 would ignore both the payment directives set forth in subsection (2)(a) (providing for automatic payment of such liens before the notice and claims process applicable to the "balance of undistributed funds" is even commenced) and the distinction in subsection (7) between a "holder of a recorded governmental lien", which "must file a request for disbursement of surplus funds" and a "governmental unit" holding a "lien of record" to whom payments must be disbursed before "nongovernmental claimants." Instead, it is most reasonable to conclude that governmental units holding liens of record must be paid first from any surplus resulting from a tax deed sale, without the prerequisite of filing a claim; whereas, nongovernmental holders of a recorded governmental lien must file a "request for disbursement."

Based on the foregoing, it is my opinion that, until legislatively or judicially determined otherwise, governmental units holding "liens of record…against the property" are not required to submit a request for surplus funds as a prerequisite to payment. Nongovernmental holders of recorded government liens are required to file a request for disbursement of surplus funds. Because of the mandatory nature of the disbursement under subsection (2)(a) and the second sentence of subsection (7), the failure of a governmental unit holding a lien of record to submit a request for disbursement does not bar the governmental unit from entitlement to payment. Therefore, section 197.582 requires the Clerk to distribute funds to governmental units holding such liens of record before disbursing the balance of surplus funds to claimants that are not governmental unit lienholders, as their interests may appear.

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[1] *See generally Rahimi v. Glob. Discoveries, Ltd., LLC*, 252 So. 3d 804, 807–08 (Fla. 3d DCA 2018) (outlining the process for distributing surplus funds after a tax deed sale; although portions of the 2014 statute were later amended, the provisions construed remain substantially the same).

[2] 259 So. 3d 728, 730–32 (Fla. 2018) (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

[3] *Holly*, 450 So. 2d at 219 (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931)).

[4] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 425 (2012).

[5] *Holly*, 450 So. 2d at 219 (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (1931)).

[6] *Smith v. Smith*, 224 So. 3d 740, 745 (Fla. 2017) (citing *Greenfield v. Daniels*, 51 So. 3d 421, 425 (Fla. 2010)).

[7] *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 316 (Fla. 2017) (Lawson, J., concurring in part and dissenting in part).*See* Ch. 83-231, § 1-2, Laws of Fla.

[8] Section 197.522(1)(a) requires the clerk to notify "the persons listed in the tax collector's statement pursuant to s. 197.502(4)" of an application for tax deed. Section 197.502(4) requires the tax collector to provide the clerk with a list of persons to be notified of the tax deed sale, including the legal title holder, mortgagees, and lienholders.

[9] Op. Att'y Gen. Fla. 76-168 (1976) (emphasis added); *see also* Op. Att'y Gen. Fla. 2006-14, n.1 (2006).

[10] *§* 197.582(7), Fla. Stat. (2019).

[11] *Knowles v. Beverly Enterprises-Fla., Inc.*, 898 So. 2d 1, 6 (Fla. 2004) (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)) (emphasis omitted).

[12] *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009).

[13] *See Wakulla Cty. v. Davis*, 395 So. 2d 540, 543 (Fla. 1981).

AGO 2020-02 – March 12, 2020

SECTION 125.0104(9)(C), FLORIDA STATUTES – USE OF TOURIST DEVELOPMENT TAX REVENUE TO PAY TRAVEL COSTS INCURRED BY TRAVEL WRITERS, OR OTHER PERSONS CONNECTED WITH THE TOURIST INDUSTRY TO ATTEND COUNTY PROMOTIONAL EVENTS

WHETHER SECTION 125.0104(9)(C), FLORIDA STATUTES, AUTHORIZES THE USE OF TOURIST DEVELOPMENT TAX REVENUE TO PAY THE COST OF TRAVEL TO AND FROM THE COUNTY INCURRED BY TRAVEL WRITERS, OR OTHER PERSONS CONNECTED WITH THE TOURIST INDUSTRY TO ATTEND COUNTY PROMOTIONAL EVENTS

To: A. Bryant Applegate, County Attorney, Seminole County

REPHRASED QUESTION:

May the County expend tourist development tax revenue to pay the cost of travel to the County, including airfare, incurred by travel writers, tour brokers, and other persons connected with the tourist industry in connection with such persons' attendance at promotional activities or events put on by the Seminole County Economic Development Office, acting as the County's tourism promotion agency?

SUMMARY:

Section 125.0104(9)(c), Florida Statutes, does not authorize the agency's payment of the cost of travel to and from the County incurred by travel writers, tour brokers, or other persons connected with the tourist industry to attend promotional activities or events put on by the County's tourist promotion agency.

Backgroud

The Local Option Tourist Development Act, section 125.0104, Florida Statutes, authorizes counties to impose a tax on short-term rentals of living quarters or accommodations within the county (with certain exceptions not pertinent here). With respect to the use of tourist development tax funds to pay for travel expenses, the first sentence of section 125.0104(9)(a), Florida Statutes, authorizes a tourism promotion agency to "[p]rovide, arrange, and make expenditures for transportation, lodging, meals, and other reasonable and necessary items and services for such persons, as determined by the head of the agency, in connection with the performance of promotional and other duties of the agency." "Promotion" is defined, in section 125.0104(2)(b)1., to mean "marketing

or advertising designed to increase tourist-related business activities." Section 125.0104(9) further provides that travel expenses other than those described as exceptions in that subsection "shall be as provided in s. 112.061."

With respect to travel paid for with public funds, section 112.061, Florida Statutes, establishes a generally applicable statutory framework reflecting the Legislature's expressed intent to "establish standard travel reimbursement rates, procedures, and limitations, with certain justifiable exceptions and exemptions, applicable to all public officers, employees, and authorized persons whose travel is authorized and paid by a public agency." Subsection (1)(b) of section 112.061 provides that, to "preserve the standardization established by this law," its provisions "shall prevail over any conflicting provisions in a general law, present or future, to the extent of the conflict; but if any such general law contains a specific exemption from this section, including a specific reference to this section, such general law shall prevail, but only to the extent of the exemption."[1] Section 125.0104(9), to the extent of its terms, provides such an exemption. Thus, to the extent section 125.0104(9) conflicts with section 112.061, the former's provisions govern the latter. Because of the interplay between section 125.0104(9) and 112.061 and because they are closely related, the two statutes should be read *in pari materia*.[2]

Against this backdrop. The County has asked whether section 125.0104(9)(a) authorizes payment of transportation expenses, including airfare, to bring tourist industry representatives to attend County tourism activities (when such travelers are neither performing agency duties nor serving as agency consultants or advisers).

Analysis

It is clear the transportation expenses for tourist industry representatives would not be authorized under section 112.061 because such individuals are not public employees and are not performing agency duties. Thus, tourist development tax funds may only be used for such expenses if authorized by section 125.0104.

Paragraph (9)(a) provides a tourism development agency is authorized to:

> Provide, arrange, and make expenditures for transportation, lodging, meals, and other reasonable and necessary items and services for such persons, as determined by the head of the agency, in connection with the performance of promotional and other duties of the agency. However, entertainment expenses shall be authorized only when meeting with travel writers, tour brokers, or other persons connected with the tourist industry. All travel and entertainment-related expenditures in excess of $10 made pursuant to this subsection shall be substantiated

> by paid bills therefor. Complete and detailed justification for all travel and entertainment-related expenditures made pursuant to this subsection shall be shown on the travel expense voucher or attached thereto. Transportation and other incidental expenses, other than those provided in s. 112.061, shall only be authorized for officers and employees of the agency, other authorized persons, travel writers, tour brokers, or other persons connected with the tourist industry when traveling pursuant to paragraph (c). All other transportation and incidental expenses pursuant to this subsection shall be as provided in s. 112.061.

(Emphasis added.) The fifth sentence authorizes the payment of transportation and other incidental expenses, other than those provided in section 112.061, for a series of enumerated categories of persons. Paragraph 9(a) is clear that travel expenses may only be incurred for "other persons connected with the tourist industry" when those persons are "traveling pursuant to paragraph (c)". To answer your question as to travel writers and tour brokers, one must determine whether the qualifying words at the end of the fifth sentence, "when traveling pursuant to paragraph (c)," apply only to "other persons connected with the tourist industry," or to all travelers enumerated in the series.

"The starting point for any statutory construction issue is the language of the statute itself – and a determination of whether the language plainly and unambiguously answers the question presented." *State v. Peraza*, 259 So. 3d 728, 731 (Fla. 2018). Where possible, effect must be given to all statutory provisions and related provisions must be construed in harmony with one another. *Id.* Here, there are two plausible readings of the fifth sentence of section 125.0104(9)(a). Under one reading, the qualifying phrase limiting expenses to those "traveling pursuant to paragraph (c)" would only apply to the last category of persons enumerated in the series, "other persons connected with the tourist industry." Under that reading, tourist development tax funds could be used for "transportation and other incidental expenses" of travel writers and tour brokers if compliant with the remainder of paragraph 9(a), regardless of whether the travelers were traveling pursuant to paragraph 9(c). This reading would permit the payment of expenses that are the subject of your request.

Under the second plausible reading, the qualifying phrase would apply to all categories of persons enumerated in the series. Under such a reading, expenditure of tourist development tax funds for payment of travel expenses for any category of persons in the series would not be permitted unless the traveler was traveling pursuant to paragraph 9(c). Paragraph 9(c) provides a tourism development agency is authorized to:

> Pay by advancement or reimbursement, or by a combination thereof, the actual reasonable and necessary costs of travel,

> meals, lodging, and incidental expenses of officers and employees of the agency and other authorized persons when meeting with travel writers, tour brokers, or other persons connected with the tourist industry, and while attending or traveling in connection with travel or trade shows. With the exception of provisions concerning rates of payment, the provisions of s. 112.061 are applicable to the travel described in this paragraph.

Subsection 9(c) thus authorizes payment for two categories of persons—"officers and employees of the agency" and "other authorized persons"—where two conditions are met. First, those persons must be "meeting with travel writers, tour brokers, or other persons connected with the tourist industry". Second, the travel must occur "while attending or traveling in connection with travel or trade shows." The phrase "other authorized persons" uses a term, "authorized person," defined in section 112.061(2) to include persons "other than a public officer or employee . . . who is authorized by an agency head to incur travel expenses in the performance of official duties" and "a person who is called upon by an agency to contribute time and services as a consultant or adviser." § 112.061(2)(e), Fla. Stat. (2019). It is thus, in theory, possible that a travel writer or tour broker could be authorized by a tourist development agency to travel to a travel or trade show on behalf of the agency to meet with other travel writers, tour brokers or persons connected with the tourist industry, to promote tourism in the agency's locale. Under those circumstances, the travel writer or tour broker would be acting with the agency's authorization or as the agency's consultant and performing official duties.

Because either reading is plausible based on the plain language, it is appropriate to apply the canons of statutory interpretation. Two competing interpretive canons could apply.

The doctrine of the last antecedent. The last antecedent canon applies when, "following an enumeration in series, a qualifying phrase will be read as limited to the last of the series when it follows that item without a comma or other indication that it relates as well to those items preceding the conjunction."[3] Thus (for example), absent some "other indication," the qualifying phrase contained in paragraph (9)(a)—"when traveling pursuant to paragraph (c)"—would apply only to "other persons connected with the tourist industry." While the last-antecedent rule[4] "'is another aid to discovery of intent or meaning,'" and "construing a statute in accord with the rule is 'quite sensible as a matter of grammar,'"[5] it "'is not inflexible and uniformly binding'";[6] "is not an absolute";[7] and "can assuredly be overcome by other indicia of meaning."[8] Nor can "the doctrine…be applied in a way that ignores the plain reading of the language."[9] Thus, "'[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands

that the clause be read as applicable to all.'"[10]

The "series-qualifier canon." This canon applies the "presumption that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."[11] For example, in *Mendelsohn v. State Dep't of Health*, the First District held the phrase "relating to the Medicaid program", when separated by a comma, applied to all items in the series.[12] Applying this canon, if the post-positive adverbial qualifying phrase contained in paragraph (9)(a)—"when traveling pursuant to paragraph (c)"—is equally applicable to all the enumerated persons when incurring expenses "other than as provided in s. 112.061," then the modifier would apply to all of them.

While the insertion of a comma before the post-positive modifier in the fifth sentence of paragraph 9(c) would make the disposition clearer, applying the series-qualifier canon is more appropriate here, given the context. There are several indications in subsection (9) that the subject sentence in paragraph (a) contains a parallel series of nouns, and that the post-positive modifier, "when traveling pursuant to paragraph (c)," should apply to all items in the series.

First, in its three other uses in section 125.0104 of the grouping "travel writers, tour brokers, or other persons connected with the tourist industry," the Legislature appears to have placed all these tourist industry participants on a parallel footing. It is reasonable to apply a consistent interpretation to them all. It would seem illogical to apply the limitation only to "other persons connected to the tourist industry" and not to travel writers or tour brokers.

Second, the use of the limiting phrase in the sentence "shall only be authorized" prior to the enumeration in the series makes clear the sentence is to be a limitation. Applying the limiting post-positive modifier to all items in the series furthers this purpose.

Third, the qualifier appears to be equally applicable to each category of persons in the entire series of nouns because, with respect to all such persons, "the actual reasonable and necessary costs" of travel and incidental expenses expressly authorized in paragraph (9)(c) meet the description, in paragraph 9(a), of not being otherwise "provided" under section 112.061. In fact, the Legislature appears to have underscored this intent in paragraph (9)(a) by admonishing, in the very next sentence, that "[a]ll other transportation and incidental expenses pursuant to this subsection shall be as provided in s. 112.061." Thus, it is my opinion that the County may only use tourist development tax funds to pay for transportation and other incidental expenses not otherwise permitted by section 112.061 for "travel writers, tour brokers or other persons connected with the tourist industry" when such persons are traveling pursuant to section 125.0104(9)(c).

Paragraph (9)(c) does not allow a tourist promotion agency to use tourist development tax funds to pay for the cost of travel to and from the County incurred by travel writers, tour brokers, or other persons connected with the tourist industry (when such travelers are neither performing agency duties nor serving as agency consultants or advisers) to attend promotional activities or events put on by the County's tourist promotion agency. The cost of shared transportation used by agency officers, employees, and other authorized persons when meeting with one or more travel writers, tour brokers, or other persons connected with the tourist industry may be paid with tourist development tax funds. The cost of airfare and other transportation expenses incurred by travel writers, tour brokers, or other persons connected with the tourist industry to attend such meetings (who, in undertaking that travel, are not, themselves, fulfilling duties in furtherance of the official business of the local tourist development agency) may not.

Based on the foregoing, it is my opinion that the County may not expend tourist development tax revenue to pay the cost of travel to and from the County, including airfare, incurred by travel writers, tour brokers, and other persons connected with the tourist industry in connection with such persons' attendance at promotional activities or events put on by the County's tourist promotion agency.

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[1] The remaining applicable provisions of section 112.061 specify, among other things, that no request for travel to be paid for by the agency shall be authorized or approved "unless it is accompanied by a signed statement by the traveler's supervisor stating that such travel is on the official business of the state and also stating the purpose of such travel." § 112.061(3)(a), Fla. Stat. (2019). Additionally, "[t]ravel expenses of travelers shall be limited to those expenses necessarily incurred by them in the performance of a public purpose authorized by law to be performed by the agency and must be within the limitations prescribed by this section." § 112.061(3)(b), Fla. Stat. (2019).

[2] *Bank of New York Mellon v. Glenville*, 252 So. 3d 1120, 1128 (Fla. 2018).

[3] *State ex rel. Owens v. Pearson*, 156 So. 2d 4, 6 (Fla. 1963).

[4] *Kasischke v. State*, 991 So. 2d 803, 812 (Fla. 2008) (quoting 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47:33 (7th ed. 2007)).

[5] *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (quoting *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993)).

[6] *Kasischke*, 991 So. 2d at 812 (quoting 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47:33 (7th ed. 2007)).

[7] *Barnhart*, 540 U.S at 26.

[8] *Id*.

[9] *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1007 (Fla. 2010).

[10] *Kasischke*, 991 So. 2d at 812 (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).

[11] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012); *Black's Law Dictionary* (11th ed. 2019). The series-qualifier canon is also termed the "prepositive/postpositive-qualifier canon" or the "prepositive/postpositive-modifier canon." *Id*.

[12] 68 So. 3d 965 (Fla. 1st DCA 2011).

AGO 2020-03 – March 19, 2020

STATUTORY PHYSICAL QUORUM AND MEETING PLACE REQUIREMENTS – USE OF COMMUNICATIONS MEDIA TECHNOLOGY DURING DECLARED STATE OF EMERGENCY DUE TO COVID-19 PANDEMIC TO CONVENE LOCAL GOVERNMENT MEETINGS AND TO PROVIDE PUBLIC ACCESS

WHETHER, DURING A DECLARED STATE OF EMERGENCY, AND IN THE ABSENCE OF A LAWFUL SUSPENSION OF APPLICABLE STATUTORY PHYSICAL QUORUM AND MEETING PLACE REQUIREMENTS, A LOCAL GOVERNMENT CAN USE COMMUNICATIONS MEDIA TECHNOLOGY TO CONSTITUTE A QUORUM AND TO PROVIDE PUBLIC ACCESS

To: The Honorable Ron DeSantis, Governor

QUESTION:

Whether, and to what extent, local government bodies may utilize teleconferencing and/or other technological means to convene meetings and conduct official business, while still providing public access to those meetings?

SUMMARY:

It is my opinion under existing law that, if a quorum is required to conduct official business, local government bodies may only conduct meetings by teleconferencing or other technological means if either (1) a statute permits a quorum to be present by means other than in person, or (2) the in-person requirement for constituting a quorum is lawfully suspended during the state of emergency. If such meetings are conducted by teleconferencing or other technological means, public access must be afforded which permits the public to attend the meeting. That public access may be provided by teleconferencing or technological means.

Background

You state that, as a result of the dangers of COVID-19, public safety directives encourage citizens to engage in "social distancing" and to avoid public gatherings, where possible. As a result, your office "has been contacted by numerous county and local government bodies regarding concerns for public meetings held in light of the COVID-19 public health emergency. These entities raise issues involving Florida Statutes and Attorney General Advisory Opinion interpretations that limit the ability to hold public meetings using communications media

technology."[1]

Analysis

Article I, Section 24(b) of the Florida Constitution provides that "[a]ll meetings…of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public[.]" Florida's Sunshine Law, found in chapter 286, Florida Statutes, provides that "[a]ll meetings of any… agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution,…at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken at such meeting." § 286.011(1), Fla. Stat. (2019). Section 286.0114, Florida Statutes, also provides, with respect to certain "propositions" before a board or commission, that an opportunity for public comment must be afforded.

Though the Florida Constitution and the Sunshine Law both require that, unless exempt by law, meetings of a local government body must be "public meetings" that are "open to the public," the text of neither provision requires that members of the public body be physically present during the meeting. Nor does either provision prescribe any particular means of holding meetings. Since 1997, Florida law has allowed many state agencies to conduct public meetings, hearings and workshops by "communications media technology" in full compliance with the Sunshine Law, and they regularly do so. *See* § 120.54(5)(b)2., Fla. Stat. (2019); ch. 28-109, Fla. Adm. Code. No reported judicial decision has held that meetings conducted by such means violate the Florida Constitution or the Sunshine Law. The Legislature has also, by statute, permitted certain public entities other than state agencies to conduct meetings using communications media technology.[2]

When asked similar questions by local government bodies in the past, the Attorney General's office has made it clear that any requirement for physical presence of members derives from other law specifying that a quorum be present to lawfully conduct public business or that the meeting of a local government body be held at a place within the body's jurisdiction. *See* Ops. Att'y Gen. Fla. 1983-100 (1983), 1998-28 (1998), 2006-20 (2006). How a quorum is lawfully constituted, or where a meeting is "held," are questions distinct from the Sunshine Law and governed by other law.[3]

Some statutes governing the conduct of business by local government bodies (such as section 166.041, Florida Statutes) specifically include the requirement of a "quorum" or that a quorum be "present" to conduct certain kinds of public business, such as the adoption of ordinances or resolutions. *See* § 166.041(4), Fla. Stat. (providing that,

for municipalities, a majority of members constitutes a quorum and an affirmative vote of a "majority of a quorum present" is necessary to adopt an ordinance or resolution). Other statutes require that meetings be held in a place within the jurisdiction of the local government body. For example, section 125.001(1), Florida Statutes, requires that meetings of a board of county commissioners "may be held at any appropriate place in the county." These statutes have not defined the term "quorum" or what it means to be "present." Nor have they defined what it means for a meeting to be "held" in a place.

Absent any statutory definition of these terms, the Attorney General's office has, in prior opinions, relied upon the plain meanings of the terms "quorum" and "present" by resorting to legal dictionaries and dictionaries of common usage. *See* Op. Att'y Gen. Fla. 2010-34 n. 5-6 (referring to unabridged dictionary and legal dictionary for definition of term "quorum," which included the word "present," and concluding that "a quorum requirement, in and of itself, contemplates the physical presence of the members of a board or commission at any meeting subject to the requirement."). Doing so is a universally accepted mode of interpretation repeatedly endorsed by Florida courts. *See Lee Mem. Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1043 (Fla. 2018); *Berkovich v. Casa Paradiso North, Inc.*, 125 So. 3d 938, 941 (Fla. 4th DCA 2013) ("The common usage of the term 'quorum' requires the presence of individuals.") (citing *Black's Law Dictionary* 1284 (8th ed. 2004)).

The term "quorum" is defined as "who must be present for a deliberative assembly to legally transact business." *Black's Law Dictionary* (11th ed. 2019). The word "present," is defined as "in attendance; not elsewhere." *Black's Law Dictionary* (11th ed. 2019); *see also* Webster's Third New International Dictionary Unabridged 1793 (2002 ed.) (defining "present" as "being before, beside, with, or in the same place as someone or something <both men were present at the meeting>.").

Thus, in the absence of a statute to the contrary, the Attorney General's office historically has taken a conservative approach, out of concern for the validity of actions taken by the public body, concluding that any statutory quorum requirement to conduct public business requires the quorum of members to be physically present and that members present by electronic means could not count toward establishing the quorum. A long line of opinions by my predecessors contain conclusions to that effect.

For example, in Attorney General Opinion 83-100, Attorney General Smith concluded that a county could not conduct a meeting unless members constituting a quorum were physically present (and, even then, that a physically absent member could not participate by telephone). Op. Atty' Gen. Fla. 83-100 (1983). In Attorney General Opinion 92-44, Attorney General Butterworth concluded that a county

commissioner physically unable to attend a meeting because of medical treatment could participate and vote in commission meetings where a quorum of other commissioners was physically present. Op. Att'y Gen. Fla. 92-44 (1992). In Attorney General Opinion 98-28, Attorney General Butterworth concluded that a school board member could attend a meeting by electronic means, so long as a quorum was physically present at the meeting site. Op. Att'y Gen. Fla. 98-28. In Attorney General Opinion 2002-82, Attorney General Doran concluded that physically disabled members of a city board could participate and vote on matters as long as a quorum was physically present. Op. Att'y Gen. Fla. 2002-82 (2002). In Attorney General Opinion 2003-41, Attorney General Crist concluded that a member of a city human rights board who was physically absent from a board meeting but participated by telephone conference could not be counted toward the presence of a quorum. Op. Att'y Gen. Fla. 2003-41 (2003). And in Attorney General Opinion 2010-34, Attorney General McCollum concluded that the Coral Gables City Commission could not adopt an ordinance for the city's retirement board declaring that the requirements to create a quorum would be met if members of the board appeared via electronic means, because doing so would conflict with the statutory requirement in section 166.041, Florida Statutes that a quorum be present. Op. Att'y Gen. Fla. 2010-34 (2010).

The nature, extent, and potential duration of the current emergency involving COVID-19 present unique circumstances. However, without legislative action, they do not change existing law. It is my opinion that, unless and until legislatively or judicially determined otherwise, if a quorum is required to conduct official business, local government bodies may only conduct meetings by teleconferencing or other technological means if either a statute permits a quorum to be present by means other than in-person, or the in-person requirement for constituting a quorum is lawfully suspended during the state of emergency.

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[1] Letter from Governor Ron DeSantis to Attorney General Ashley Moody dated March 17, 2020.

[2] *Compare, e.g.*, § 163.01, Fla. Stat. (2019) (authorizing any separate legal entity created under subsection (7) of the Florida Interlocal Cooperation Act of 1969 to conduct public meetings and workshops by means of "conference telephone, video conference, or other communications technology by which all persons attending a public meeting or workshop may audibly communicate;" providing specific requirements; and providing that the "participation by an officer, board member, or other representative of a member public agency in a meeting or workshop conducted through communications media technology constitutes that individual's presence at such meeting or workshop"); § 373.079(7), Fla. Stat. (2019) (authorizing the water management district "governing board, a basin board, a committee, or an advisory board" to "conduct meetings by means of communications media technology in accordance

with rules adopted pursuant to s. 120.54"); § 374.983(3), Fla. Stat. (2019) (authorizing the Board of Commissioners of the Florida Inland Navigation District to conduct board and committee meetings "utilizing communications media technology, pursuant to s. 120.54(5)(b)2"); § 553.75(3), Fla. Stat. (2019) (authorizing the use of communications media technology in conducting meetings of the Florida Building Commission or of any meetings held in conjunction with meetings of the commission); *and* § 1002.33(9)(p)3, Fla. Stat. (2019) (authorizing members of each charter school's governing board to attend public meetings to "in person or by means of communications media technology used in accordance with rules adopted by the Administration Commission under s. 120.54(5), and specifying other requirements) *with* § 349.04(8), Fla. Stat. (2019) (authorizing the Jacksonville Transportation Authority to "conduct public meetings and workshops by means of communications media technology, as provided in s. 120.54(5)," but specifying that "a resolution, rule, or formal action is not binding unless a quorum is physically present at the noticed meeting location, and only members physically present may vote on any item").

[3] Indeed, a quorum is not required to be present for a meeting to be otherwise subject to the Sunshine Law. *See Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973).

AGO 2020-04 – April 27, 2020

SECTION 115.07, FLORIDA STATUTES – MUNICIPAL EMPLOYER REQUIRING DOCUMENTATION TO SUPPORT OFFICER OR EMPLOYEE CLAIM OF LEAVE OF ABSENCE DUE TO MILITARY OR NATIONAL GUARD DUTY

WHETHER A CITY EMPLOYER MAY REQUIRE OFFICERS AND EMPLOYEES TO PROVIDE DOCUMENTATION OF HOURS ATTRIBUTED TO MILITARY OR NATIONAL GUARD DUTY TO SHOW ENTITLEMENT TO RIGHTS AND BENEFITS UNDER SECTION 115.07, FLORIDA STATUTES

To: Robert R. Rosenwald, Jr., Assistant City Attorney, City of Miami Beach

QUESTIONS:

1. When municipal officers and employees have taken leaves of absence for military, naval, or National Guard duties, may the municipality require such officers and employees to submit official documentation of the hours spent on duty for the purpose of properly compensating them for up to 240 working hours under section 115.07, Florida Statutes?

2. If so, what kind of documentation is appropriate (*e.g.*, official orders or an appropriate military or naval certification)?

SUMMARY:

1. The City of Miami Beach may require officers and employees to provide documentation of the hours spent on military or National Guard duty for the purpose of facilitating the provision of rights and benefits guaranteed by section 115.07, Florida Statutes.

2. This office cannot recommend the kind of documentation the City may request, but a Department of Defense regulation under federal law may be a useful model.

Background

Since 1937, multiple provisions in chapter 115, Florida Statutes, have provided officers or employees of state and local governments the right to return to such employment after completing military service. In addition, section 115.07, Florida Statutes, guarantees that when officers and employees take leaves of absence for military or National Guard duty, they are entitled to be paid for up to 240 hours annually. The statute provides, in part:

115.07 Officers and employees' leaves of absence for reserve or guard training.—

(1) All officers or employees of the state, of the several counties of the state, and of the municipalities or political subdivisions of the state who are commissioned reserve officers or reserve enlisted personnel in the United States military or naval service or members of the National Guard *are entitled to leaves of absence from their respective duties, without loss of vacation leave, pay, time, or efficiency rating, on all days during which they are engaged in training* ordered under the provisions of the United States military or naval training regulations for such personnel when assigned to active or inactive duty.

(2) Leaves of absence granted as a matter of legal right under the provisions of this section *may not exceed 240 working hours* in any one annual period. Administrative leaves of absence for additional or longer periods of time for assignment to duty functions of a military character shall be without pay and shall be granted by the employing or appointing authority of any state, county, municipal, or political subdivision employee and when so granted shall be without loss of time or efficiency rating.[1]

(Emphasis added.)

You state that the City would like to institute a policy requiring servicemembers to provide the City with documentation verifying the hours spent on duty to ensure they are properly paid under the statute. You indicate that time spent on military assignment or training can be "fluid," meaning that orders to report for duty can regularly change or be cancelled. For example, employees have notified the City of their scheduled dates for service-related leave but subsequently failed to inform the City that the orders had changed. In such situations, the hours originally scheduled as leave under section 115.07 may be incorrectly attributed to their 240-hour limit, although the servicemember did not actually take the leave of absence. Orders are apparently provided to servicemembers orally or by e-mail, and it may be difficult for them to reconstruct the hours they served if an issue arises many months later. Documenting the time spent on leave would alleviate this problem.

Analysis

QUESTION 1: Requesting Documentation of Leave

Federal law

An analysis of your request requires consideration of both federal and state law. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. Part III, chapter 43, a federal

law that applies to all employers, both public and private, provides that members of the uniformed services have the right of reemployment without loss of rights and benefits after being called away for military service, from short-term training to long-term military deployment.[2] The State of Florida has adopted USERRA in section 115.15, Florida Statutes.

USERRA does not require employers to pay servicemembers for time spent on leave. But the federal law does have provisions and regulations that are useful to review that address the documentation servicemembers are requested or required to provide when returning to employment following periods of duty or training. These apply only when such service has exceeded 30 days.[3] Notwithstanding this, a regulation promulgated by the Department of Defense regarding compliance with USERRA, 32 C.F.R. § 104.6(a)(2)(iii)(B)(2), provides:

> When the period of service exceeds 30 days from civilian employment, the Service member is required to provide documentation of service performed if requested by the employer.
>
> (i) As a matter of policy the Military Departments strongly recommend Commanders and Service members provide verification of uniformed service absence to civilian employers *regardless of the duration of service upon request*. Failure of an employee to comply with this recommendation[ ] does not[ ] affect the legal responsibilities of the employer under USERRA including prompt reemployment.
>
> (ii) Types of documentation satisfying this requirement are detailed in 20 CFR part 1002.

(Emphasis added.)

Under 38 U.S.C. § 4302, state and local governments may not impose a "policy, plan, practice, or other matter" that "reduces, limits, or eliminates" any right or benefit provided by USERRA, but they may enact one that provides a right or benefit that is "more beneficial to, or is in addition to," the rights provided under USERRA. You indicate that the City does not seek documentation for the purpose of reemployment but instead to ensure that servicemembers will be paid for time spent on military leave in compliance with state law. Accordingly, a local law, policy, plan, or practice seeking documentation to track servicemember absences to implement the added benefit of leave with pay under state law would not be a limitation or restriction of rights or benefits ensured by USERRA.

State law

It appears that a law or policy requiring documentation would also be permissible under state law, for the following reasons.

> Article VIII, section 2(b) of the Florida Constitution provides:
>
> Municipalities 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.*

(Emphasis added.) Section 166.021(3), Florida Statutes, provides that "the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except … (b) Any subject expressly prohibited by the constitution," or "(c) Any subject expressly preempted to state or county government by the constitution or by general law."

There is no explicit preemption language in the Constitution or in chapter 115 that would preclude a local government from establishing a recordkeeping procedure to fulfill its obligation to determine an employee's eligibility for the rights and benefits provided in section 115.07. For purposes of comparison, section 110.219, Florida Statutes, dealing with general policies regarding attendance and leave for state employees, provides:

> (4) Each agency shall keep an accurate record of all hours of work performed by each employee, as well as a complete and accurate record of all authorized leave which is approved. The ultimate responsibility for the accuracy and proper maintenance of all attendance and leave records shall be with the agency head.

In implementing the recordkeeping provision of section 110.219(4), the Department of Management Services has enacted a rule applicable to state agencies regarding state employees taking military leaves of absence. Under Florida Administrative Code rule 60L-34.0062(1) and (4), when the servicemembers enumerated therein are ordered to active military duty under section 115.09, Florida Statutes, which authorizes leaves of absence with pay for active military service for up to 30 days, the rule provides:

> The leave of absence shall be verified by official orders or appropriate military certification, which shall be filed in the employee's personnel file.

The existence of statutory and regulatory requirements for recordkeeping by state agencies with regard to military leaves of absence supports a conclusion that a municipality may enact a comparable ordinance or policy implementing section 115.07 without running afoul of any provisions within chapter 115. *See City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928 (Fla. 2013) ("[W]here concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, 'a municipality's concurrent legislation must not conflict with state law,'" quoting *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1992)). To preclude conflict with state law, an ordinance cannot defeat a servicemember's right to vacation leave, pay, time, or efficiency rating based upon failure to provide documentation when it is not readily available or does not exist. Such rights are guaranteed by section 115.07, Florida Statutes, and there is no language therein authorizing an employer to restrict or deny them.[4]

As an example, under USERRA, servicemembers are required to provide their employers with documentation to be eligible for reemployment after leaves of absence greater than 30 days. Notwithstanding this,

> (3)(A) [T]he failure of a person to provide documentation . . . shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person [is not eligible for reemployment, the employer] may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.
>
> * * *
>
> (4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

38 U.S.C. § 4312(f).

Accordingly, the City may establish a municipal policy or procedure to implement its statutory obligation to provide paid leave to servicemembers pursuant to section 115.07, Florida Statutes, by outlining the kind of documentation the servicemember must supply to establish eligibility under the statute.[5] The City cannot, however, condition the provision of rights guaranteed by the statute on compliance with a requirement for such documentation if the documentation is not readily available or does not exist.

QUESTION 2: What Documentation Might Be Requested

Although the City of Miami Beach may require documentation to support payment of servicemembers under section 115.07, Florida Statutes, it is not the role of this office to determine what documentation the City might request. It may be useful to look to Department of Labor regulations, which enumerate the kinds of documentation that can be used under USERRA to establish eligibility for reemployment after service of more than 30 days. *See* 20 C.F.R. Chapter IX, § 1002.123.

Conclusion

It is my conclusion that the City of Miami Beach may enact an ordinance or establish a policy requiring servicemembers to provide documentation to the City to facilitate compliance with the leave provisions of chapter 115, Florida Statutes.

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[1] In addition, section 250.48, Florida Statutes, applies to state-ordered duty and provides that members of the National Guard employed by the state or a county, municipality, or school district are entitled to up to 30 days leave "without loss of pay, time, or efficiency rating" when called to duty for an event, disaster, or operation under section 250.28 or 252.36. Under section 115.14, Florida Statutes, state, county, and municipal employers have the discretion to provide reservist employees with differential pay after the 240-hour ceiling has been reached, which refers to the difference between a servicemember's military pay and civilian pay.

[2] *See* 32 C.F.R. § 104.6(a)(2)(iii)(B)(2).

[3] *See* 38 U.S.C. § 4312(f).

[4] *See, e.g., Brennan v. City of Miami*, 146 So. 3d 119 (Fla. 3d DCA 2014). In that case, the City of Miami required employee veterans to submit Department of Defense service discharge records when seeking preference in promotion as a veteran permitted by section 295.09, Florida Statutes (2012). The City denied veteran preference to a former Marine Reservist because he did not provide a particular active-duty discharge record. The Third District concluded that he was wrongfully denied the veteran preference, observing that section 295.09 did not require documentation, nor did the applicable administrative rule. The court stated that a municipality may not enact legislation concurrent with a state statute if it conflicts with the statute, and that a local provision cannot "'stand as an obstacle to the execution of the full purposes of the statute.'" *Id*. at 124 (quoting *City of Palm Bay*, 114 So. 3d at 928 (citing 5 *McQuillin Mun. Corp.* § 15:16 (3d ed. 2012)).

[5] Other jurisdictions that have established policies requiring documentation for military leave with pay include Indiana (Ind. Military Leave Responsibilities & Procedures, p. 4: "Employees who are members of the Armed Forces Reserves of the Indiana National Guard are entitled

to not more than fifteen (15) calendar days leave in each calendar year in which military service . . . is performed, without loss of pay or vacation time. To receive pay, the employee is required to submit a written order or official statement requiring the military duty. Paid military leave is charged in accordance with the military orders for each day the employee is scheduled to work during the dates of the orders."); North Carolina (N.C. State Human Resources Manual, Military Leave, § 5, p. 91: "The employing agency shall require the employee, or an appropriate officer of the uniformed service in which such service is performed, to provide written or verbal notice of any service. For periods eligible for military leave with differential pay, the agency shall require the employee to provide a copy of the Leave and Earnings Statement or similar document covering the period eligible for differential pay."); and Virginia (Va. Dep't of Human Resource Mgmt. Policies & Procedure Manual 4.50, Agency Responsibilities, p. 13: "Agencies should establish guidelines for employees to follow for submitting requests for military leaves of absence and for monitoring such leaves to ensure that no more than 15 work days . . . with pay are granted for military training and active duty in a federal fiscal year.").

AGO 2020-05 – April 27, 2020

SECTION 509.032(7)(b), FLORIDA STATUTES – CITY'S PILOT PROGRAM PREEMPTED TO THE EXTENT IT WOULD REGULATE DURATION OR FREQUENCY OF VACATION RENTALS, BUT GRANDFATHERED REGULATIONS REMAIN VALID AS TO PROPERTIES UNAFFECTED BY THE PILOT PROGRAM

WHETHER, UNDER SECTION 509.032(7)(b), FLORIDA STATUTES, IF A CITY ENACTS A PILOT PROGRAM ALLOWING VACATION RENTALS, GRANDFATHERED REGULATIONS CONTINUE IN FORCE AS TO PROPERTIES UNAFFECTED BY THE PILOT PROGRAM

To: A. Kurt Ardaman, City Attorney, City of Belle Isle

REPHRASED QUESTIONS:

1. May the City of Belle Isle enact an ordinance establishing a pilot program to allow certain owner-occupied vacation rentals and upon expiration of the program, revert to its 2008 blanket prohibition of vacation rentals?

2. If the City were to adopt an ordinance that allows certain owner-occupied vacation rentals without a trial period or pilot program, would the prohibition of vacation rentals under the City's 2008 ordinance remain in effect as to all properties that are not allowed to be vacation rentals in the new ordinance?

SUMMARY:

1. Any provisions under a pilot program ordinance that would regulate the duration or frequency of vacation rentals would be expressly preempted by section 509.032(7)(b), Florida Statutes.

2. Amending an existing ordinance enacted prior to June 1, 2011, will not invalidate its protection under the grandfather clause with regard to provisions that are reenacted, but any new provisions that would regulate the duration or frequency of vacation rentals would be barred.

Background

Section 7-30 of the Belle Isle Code of Ordinances provides, in full: "Short-term rentals, i.e., rentals for a term of less than seven months, are prohibited." The provision was enacted March 4, 2008, and is therefore protected from state preemption under section 509.032(7)(b), Florida Statutes, which provides:

> A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.

The City is currently considering whether to adopt an ordinance creating a temporary pilot program to determine the feasibility of allowing certain vacation rentals. The program would allow "owner-occupied rentals," meaning that the homeowner could rent out one or two bedrooms in his or her home for periods of 30 days or less, so long as at least one of the primary residents would be living on-site throughout the visitor's stay.[1] The proposed ordinance establishes a licensing, inspection, and enforcement regime for authorized vacation rentals, along with safety and operational standards. The ordinance would be in effect for one year. The City would then have the option of taking several actions, including enacting a permanent ordinance or allowing the ordinance creating the pilot program to sunset. The City is concerned that if it wished to resume the total prohibition found in the existing section 7-30, it would be precluded from doing so under the preemption provision of section 509.032(7)(b).

Analysis

Municipalities have home-rule authority to exercise any power for municipal purposes unless prohibited by law.[2] Section 166.021(3)(c), Florida Statutes, grants each municipal governing body the power to enact legislation on any subject the state could also legislate, except, among other things, "[a]ny subject expressly preempted to state or county government by the constitution or by general law." Because section 509.032(7)(b) expressly preempts the power to prohibit altogether or to regulate the duration or frequency of vacation rentals, the City may not include any such provision in its pilot program ordinance. If the City were to allow vacation rentals by ordinance in the pilot program, it would be precluded from reverting to its pre-2011 prohibition ordinance, in part or in total. Accordingly, any ordinance provision sunsetting the pilot program or giving the City the ability to re-institute its prohibition on vacation rentals would run afoul of section 509.032(7)(b).

Regarding your second question, generally, when a civil statute or ordinance is amended, provisions of the original law that are essentially and materially unchanged are considered to be a continuation of the original law. "The provisions of the original act or section reenacted by amendment are the law since they were first enacted, and provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the original act which are reenacted are not affected by amendment."[3] As stated by the Florida Supreme Court, this general rule "'sometimes becomes important, where rights had accrued before the revision or amendment took place.'"[4]

It is my opinion that an ordinance amending the existing prohibition to allow certain vacation rentals would not violate section 509.032(7)(b), Florida Statutes, as long as it does not "regulate"[5] the duration or frequency of such rentals. The pre-2011 portion of the ordinance would remain in effect as to properties unaffected by the amendment.

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[1] City of Belle Isle Ordinance 18-10, proposed sections 7-50, 7-57, 7-67 & 7-69. The number of bedrooms that could be rented in a dwelling would be capped at two, with a maximum of two occupants per bedroom. If there is more than one dwelling on a lot, the maximum number of occupants for all dwellings combined would be capped at six.

[2] Art. VIII, §2(b), Fla. Const.; §166.021(1), Fla. Stat. (2019).

[3] Norman Singer, 1A *Sutherland Statutory Construction* §22:33 (7th ed., Nov. 2018 update).

[4] *Perry v. Consolidated Special Tax School Dist. No 4*, 89 Fla. 271, 276, 103 So. 639, 641 (1925) (quoting *Cooley's Const. Lim.*, at 96-97 (7th ed.)); *accord Orange County v. Robinson*, 111 Fla. 402, 405, 149 So. 604, 605 (1933). *See also City of Miami v. Airbnb*, 260 So. 3d 478, 482 (Fla. 3d DCA 2018) (concluding that a 2017 resolution prohibiting short-term rentals in a suburban zone was not preempted because it was "identical in its material provisions" to the City's 2009 zoning code, whereas provisions in a 2015 Zoning Interpretation that exceeded the restrictions in the 2009 ordinance were preempted).

[5] Black's Law Dictionary defines the word "regulate" to mean, in pertinent part: "To control (an activity or process) esp. through the implementation of rules." *Black's Law Dictionary* (11th ed. 2019).

AGO 2020-06 – April 27, 2020

SECTIONS 159.17 AND 695.01(3), FLORIDA STATUTES – FILING OF LIEN FOR UNPAID UTILITY SERVICES NOT A PREREQUISITE TO ENFORCEMENT OF LIEN AFTER TRANSFER OF SUBJECT PROPERTY TO NEW OWNER; APPLICABLE STATUTE OF LIMITATIONS

WHETHER, UNDER SECTION 695.01(3), FLORIDA STATUTES, A TOWN MAY ENFORCE AN EXISTING SECTION 159.17 LIEN FOR UTILITY SERVICES AS TO PROPERTY THAT HAS BEEN TRANSFERRED TO A NEW OWNER WITHOUT HAVING FILED ITS LIEN WITH THE COUNTY, AND WHAT STATUTE OF LIMITATIONS PERIOD APPLIES TO SUCH LIEN FORECLOSURE

To: Allan Weinthal, Town Attorney, Town of Davie

REPHRASED QUESTIONS:

1. After a new owner purchases property (other than in a tax deed sale)[1] to which unpaid utility services were provided from a system financed by municipal revenue bonds issued under chapter 159, can the Town enforce the lien provided by section 159.17 against the property for the full amount owed without filing a lien in the county's official records?

2. If the unpaid utility balance can be enforced against such property without filing a lien, what limitations period governs its enforcement?

SUMMARY:

1. Pursuant to section 695.01(3), Florida Statutes (2019), the Town may enforce its statutory liens for utility services from the new property owner without filing the liens with the county. 2. Because section 159.17 specifies that such utility liens, "when delinquent for more than 30 days, may be foreclosed by such municipality in the manner provided by the laws of Florida for the foreclosure of mortgages on real property," and the statute of limitations applicable to mortgage foreclosure actions, under section 95.11(2)(c), is five years, a five-year statute of limitations applies to foreclosure of the Town's utility liens.

Background

The Town has a water and sewer plant constructed and maintained with funds obtained through revenue bonds issued pursuant to section 159.08, Florida Statutes. Through this facility, the Town provides water and sewer utility services to certain residents. Some of its customers

receive just one of these services; others receive both. If a certain outstanding balance threshold is reached, water services are shut off. However, even when the water is shut off, the subject account in arrears continues to accrue a monthly base charge for equipment, as well as late fees. The base fee for sewer services also continues regardless of whether the Town receives any payments due on a particular account.

Town records showing outstanding balances for delinquent accounts are public records available upon request. These account records reflecting past due balances are not recorded in the county's official records. You have indicated that subsequent purchasers of property to which outstanding utility charges apply sometimes fail to request utility records from the Town. As a result, such purchasers may acquire properties subject to outstanding water or sewer service account balances from the prior owner without ensuring that such balances are paid at or prior to closing.

Analysis

QUESTION 1: Collecting a Past Due Balance After a New Owner Acquires the Property

Section 159.17 (enacted in 1967) provides, in pertinent part, that, when a municipality issues revenue bonds for water or sewer systems under chapter 159, the municipality shall have a "lien on all lands or premises served by" such system "for all service charges for such facilities until paid." The statute provides such liens with the same priority as liens for state, county, and municipal taxes. It provides, further, that "[s]uch liens, when delinquent for more than 30 days, may be foreclosed by such municipality in the manner provided by the laws of Florida for the foreclosure of mortgages on real property."

Prior to 2013, it was not clear whether such section 159.17 liens could be enforced without first recording them in the official records of the county. *Cf. City of Riviera Beach v. Reed*, 987 So. 2d 168, 169-70 (Fla. 4th DCA 2008) (stating that a city's recording of its lien for delinquent utilities was the "last element constituting the cause of action" for triggering commencement of the limitations period). In 2013, the Legislature amended section 695.01, Florida Statutes, to specify which liens are required to be recorded to be "valid and effectual." *See* ch. 2013-241, Laws of Fla. Section 695.01(3) now provides:

> (3) A lien by a governmental entity . . . that attaches to real property for an improvement, service, fine, or penalty, *other than a lien for taxes*, non-ad valorem or special assessments, or *utilities*, is valid and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration only if the lien is recorded in the official records of the county in which the property is located.

(Emphasis added.)

Thus, section 695.01(3) expressly excludes section 159.17 utility liens (as liens by a "governmental entity . . . for . . . utilities") from the recording requirement otherwise imposed for liens to be "valid and effectual in law or equity against . . . subsequent purchasers for a valuable consideration." The Town can thus enforce its utility lien against a subsequent purchaser of property served by its water and sewer system without recording such lien in the county's official records.

QUESTION 2: The Limitation Period Applicable to Enforcement

The Town submits that, because utility liens created under section 159.17 continue to apply "until paid," "shall be prior to all other liens on such lands or premises except the lien of state, county and municipal taxes," and "shall be on a parity with the lien of such state, county and municipal taxes," the twenty year statute of limitations for tax liens in section 95.091(1)(b) should apply.[2] But that reading of section 159.17 does not give effect to all its parts.[3] Rather, it is clear from use of the words "prior" and "parity"[4] in the same sentence that, rather than suggesting an appropriate statute of limitations, the Legislature intended to specify the priority to be accorded the described liens. Further, a plain reading of section 95.091(1)(b) makes clear that it does not apply to municipal utility liens. Section 95.091(1)(b) applies to tax liens granted "for any tax enumerated in s. 72.011 or any tax lien imposed under s. 196.161." Section 72.011 neither mentions municipal utility liens nor references chapter 159. Nor is a municipal utility lien a "tax lien imposed under s. 196.161."

Section 159.17 provides that a utility lien, "when delinquent for more than 30 days, may be foreclosed . . . in the manner provided by the laws of Florida for the foreclosure of mortgages on real property." In *Reed*, the district court determined that the five-year statute of limitations contained in section 95.11(2)(c), which is applicable to mortgage foreclosure actions, applies to an action to foreclose such utility lien.

Based on the foregoing, I am of the opinion that, pursuant to section 695.01(3), the Town may collect on its statutory liens for utility services from new property owners, under the circumstances described, without recording the liens in the official records of the county. And because section 159.17 specifies that liens created thereunder may be foreclosed in the manner provided "for the foreclosure of mortgages on real property," the five-year limitations period set forth in section 95.11(2)(c) (pertaining to actions to foreclose a mortgage) applies to enforcement of the Town's utility liens.

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[1] The Town did not ask, and this opinion does not address, how the Town's utility liens, if not recorded in the county official records, might be affected

in the event of a tax deed sale under chapter 197, Florida Statutes (2019). Nor does this opinion address the Town's collection of delinquent service charges pertaining to rental property. *See* § 180.135, Fla. Stat. (2019) ("Utility services; refusal or discontinuance of services for nonpayment of service charges by former occupant of rental unit prohibited; unpaid service charges of former occupant not to be basis for lien against rental property, exception").

[2] Section 95.091(1)(b), Florida Statutes (2019), provides:

> (b) Any tax lien granted by law to the state or any of its political subdivisions for any tax enumerated in s. 72.011 or any tax lien imposed under s. 196.161 expires 20 years after the last date the tax may be assessed, after the tax becomes delinquent, or after the filing of a tax warrant, whichever is later. An action to collect any tax enumerated in s. 72.011 may not be commenced after the expiration of the lien securing the payment of the tax.

[3] *See generally Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole.").

[4] "Prior" is defined as "[t]aking precedence <a prior lien>," and "parity" is defined as the "quality, state, or condition of being equal, esp. in pay, rights, or power." *Black's Law Dictionary* (11th ed. 2019).

AGO 2020-07 – June 5, 2020

SECTION 787.29(3)(b), FLORIDA STATUTES – HUMAN TRAFFICKING PUBLIC AWARENESS SIGNS IN TATOO ESTABLISHMENTS

WHETHER A TATTOO ESTABLISHMENT IS A BUSINESS OR ESTABLISHMENT THAT OFFERS "BODYWORK SERVICES FOR COMPENSATION" FOR PURPOSES OF SIGNAGE REQUIREMENTS IN SECTION 787.29(3)(b), FLORIDA STATUTES

To: Jennifer C. Rey, County Attorney, Sumter County

QUESTIONS:

Whether a tattoo establishment is a business or establishment that offers "bodywork services for compensation" for purposes of enforcing the signage requirements contained in section 787.29(3)(b), Florida Statutes?

SUMMARY:

A tattoo establishment is not a business or establishment that offers "bodywork services for compensation" for purposes of enforcing the signage requirements contained in section 787.29(3)(b), Florida Statutes.

This office has received your letter on behalf of the Sumter County Board of County Commissioners requesting an Attorney General opinion addressing whether a tattoo establishment is a business or establishment that offers "bodywork services for compensation" for purposes of enforcing the signage requirements contained in section 787.29(3)(b), Florida Statutes. That statute provides, in pertinent part:

> 787.29. Human trafficking public awareness signs
>
> * * *
>
> (3) The employer at each of the following establishments shall display a public awareness sign developed under subsection (4) in a conspicuous location that is clearly visible to the public and employees of the establishment:
>
> * * *
>
> (b) A business or establishment that offers massage or bodywork services for compensation that is not owned by a health care practitioner regulated pursuant to chapter 456 and defined in s. 456.001.
>
> * * *

> (5) The county commission may adopt an ordinance to enforce subsection (3). A violation of subsection (3) is a noncriminal violation and punishable by a fine only as provided in s. 775.083.

In turn, section 456.001(4), Florida Statutes, defines "health care practitioner" as "any person licensed under chapter 457; chapter 458; chapter 459; chapter 460; chapter 461; chapter 462; chapter 463; chapter 464; chapter 465; chapter 466; chapter 467; part I, part II, part III, part V, part X, part XIII, or part XIV of chapter 468; chapter 478; chapter 480; part II or part III of chapter 483; chapter 484; chapter 486; chapter 490; or chapter 491."[1] Based on the plain and ordinary meaning of "bodywork," which is compatible with concepts reflected in certain licensing statutes referenced in section 787.29, the answer to your question is "No."

Background

You state that, on August 10, 2019, as authorized by section 787.29(5), Florida Statutes, Sumter County adopted Ordinance No. 2019-20, implementing the human trafficking public awareness signage requirements specified in the statute. In the ordinance, the phrase "bodywork services" is defined to mean "services involving therapeutic touching or manipulation of the body using specialized techniques consistent with F.S. § 787.29, as may be amended."[2] "Massage services" is defined to mean "the manipulation of the soft tissues of the human body with the hand, foot, arm, or elbow, whether or not such manipulation is aided by hydrotherapy, including colonic irrigation, or thermal therapy; any electrical or mechanical device; or the application to the human body of a chemical or herbal preparation as provided for and consistent with the terms as defined in F.S. ch. 787.29, as may be amended."[3] And "business or establishment" is defined to mean "any place of business or any club, organization, person, firm, corporation or partnership, wherein massage or bodywork services are provided" that "is not owned by a health care profession regulated pursuant [to] F.S. Ch. 456, and defined in F.S. § 456.001, as may be amended."[4]

You further indicate that a question has arisen regarding whether a tattoo establishment constitutes a business or establishment offering "bodywork services" for compensation within the meaning of section 787.29 (and the County's ordinance implementing that provision).[5] As you observed in your letter, "bodywork" is not a specifically defined term in the statute.

Analysis

Where a word is not statutorily defined, it must be given its "plain and ordinary meaning,"[6] which "may be derived from dictionaries."[7] The Merriam-Webster Dictionary defines "bodywork," in pertinent part, to mean "therapeutic touching or manipulation of the body by using

specialized techniques." This dictionary definition is consistent with concepts found elsewhere in Florida administrative regulations relating to the licensure of certain therapeutic massage practitioners, such as acupuncturists and massage therapists.[8]

The dictionary meaning of "bodywork" also comports with the definition of massage contained in section 480.033(3), Florida Statutes. There, "massage" is defined as "the manipulation of the soft tissues of the human body with the hand, foot, arm, or elbow, whether or not such manipulation is aided by hydrotherapy, including colonic irrigation, or thermal therapy; any electrical or mechanical device; or the application to the human body of a chemical or herbal preparation."[9]

To the extent that the word "bodywork" might potentially be construed to comprise a broader range of services, applicable rules of statutory construction instruct otherwise. The operative statutory language requires the employer of a "business or establishment that offers *massage or bodywork* services for compensation that is not owned by a health care practitioner" to display a human trafficking public awareness sign in a conspicuous location.[10] Thus, this statutory provision conjoins an arguably more narrow concept, "massage," with the potentially broader concept, "bodywork," by use of the disjunctive "or." "[I]n its elementary sense the word 'or' is a disjunctive participle that marks an alternative generally corresponding to 'either' as 'either this or that'; a connective that marks an alternative." *Rudd v. State ex rel. Christian*, 310 So. 2d 295, 298 (Fla.1975) (citations omitted). Here, construing "bodywork services" to be an alternative analogous to "massage services" is consistent with the plain meaning of bodywork reflected in the dictionary: the "therapeutic touching or manipulation of the body."

Tattooing, in contrast, is not accomplished solely by touching or manipulating soft tissues. Instead, it involves creating "a mark or design…on or under the skin of a human being by a process of piercing and ingraining a pigment, dye, or ink in the skin."[11] Whereas, the licensing statutes regulating massage therapists and acupuncturists (chapters 480 and 457, respectively) are specifically referenced in section 456.001—which, in turn, is incorporated in the exception provisions of section 787.29—the licensing statute regulating tattoo artists (chapter 381) is not. All these considerations lead to a conclusion that tattooing is not a part of "bodywork services," as that term is used in section 787.29, Florida Statutes.

Based on the foregoing, it would appear that a tattoo establishment is not a business or establishment that offers "bodywork services for compensation" for purposes of enforcing the signage requirements contained in section 787.29(3)(b), Florida Statutes.

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[1] Of particular note here, Massage Practice is regulated under chapter 480, and Acupuncture is regulated under chapter 457.

[2] Sumter County Code of Ordinances, art. II, § 14-16.

[3] This description is consistent with the definition of "massage" found in section 480.033(3), Florida Statutes.

[4] *Id*.

[5] Questions requiring an interpretation of local codes or ordinances are left for resolution by the attorney for the local government. See Requesting an Attorney General Opinion, IV. When Opinions Will Not Be Issued (available at http://myfloridalegal.com/pages.nsf/Main/DD177569F8FB0F1A85256CC6007B70AD).

[6] *Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 214 (Fla. 2009).

[7] *State v. Peraza*, 259 So. 3d 728, 731 (Fla. 2018).

[8] *See* Fla. Admin. Code Rule 64B1-4.005 (defining "oriental massage" as including "all forms of oriental bodywork including acupressure, amma, anmo, guasha, hara, niusha, reiki, reflexology, shiatsu, tuina, traction and counter traction, vibration, and other neuro-muscular, physical and physio-therapeutic techniques used in acupuncture and oriental medicine for the promotion, maintenance, and restoration of health and the prevention of disease").

[9] *See* Fla. Admin. Code R. 64B7-25.001 (establishing licensure examination requirements for Massage Therapists, and reinforcing the interrelatedness of therapeutic "massage" and "bodywork" by approving, in pertinent part, the "National Certification Board for Therapeutic Massage and Bodywork Examination" and the "National Exam for State Licensure option administered by the National Certification Board for Therapeutic Massage and Bodywork").

[10] § 787.29 (3)(b), Fla. Stat. (2019) (emphasis added).

[11] § 381.00771(6), Fla. Stat. (2019).

AGO 2020-08 – June 5, 2020

SECTION 112.1816, FLORIDA STATUTES – CANCER BENEFIT ELIGIBILITY AS APPLIED TO PUBLIC SAFETY OFFICERS WORKING PART TIME AS FIREFIGHTERS

WHETHER PUBLIC SAFETY OFFICERS WHO WORK PREDOMINANTLY AS LAW ENFOREMENT OFFICERS ARE ELIGIBLE FOR CANCER BENEFITS FOR FIREFIGHTERS PURSUANT TO SECTION 112.1816, FLORIDA STATUTES

To: Lonnie N. Groot, City Attorney, City of Daytona Beach Shores

REPHRASED QUESTION:

Are the City's Public Safety Officers, who serve both as firefighters and law-enforcement officers, eligible for the benefits provided in section 112.1816, Florida Statutes?

SUMMARY:

The City's Public Safety Officers whose primary responsibilities are law enforcement rather than firefighting are not eligible for benefits provided to firefighters under section 112.1816, Florida Statutes.

The City of Daytona Shores employs Public Safety Officers who serve as both firefighters and law enforcement officers. The City has a Public Safety Department but not a Police Department or a Fire Department. You state that their law enforcement function is "predominant." The Public Safety Officers do not serve as full-time firefighters and their primary responsibilities are not the prevention and extinguishing of fires. Some of the Public Safety Officers are not yet certified as law enforcement officers and are working full-time as firefighters until such certification.

Effective July 1, 2019, the Legislature enacted section 112.1816, which makes firefighters diagnosed with certain cancers eligible to receive disability or death benefits in lieu of pursuing workers' compensation coverage. Chapter 2019-21, Laws of Fla. Section 112.1816(1)(c) defines "firefighter" as:

> an individual employed as a full-time firefighter within the fire department or public safety department of an employer whose primary responsibilities are the prevention and extinguishing of fires; the protection of life and property; and the enforcement of municipal, county, and state fire prevention codes and laws pertaining to the prevention and control of fires.

Terms in a statute that are not defined therein must be given their plain and ordinary meaning. *See Nehme v. Smithkline Beecham Clinical Labs.* 863 So. 2d 201, 204 (Fla. 2003).

The statutory definition as drafted sets forth a two-part test. The employee must: (1) be "employed as a full-time firefighter"; and (2) be employed "within the fire department or public safety department of an employer whose primary responsibilities are the prevention and extinguishing of fires; the protection of life and property; and the enforcement of municipal, county, and state fire prevention codes and laws pertaining to the prevention and control of fires." The first part of the test looks at the employee's duties. The second part of the test looks at the employer's primary responsibilities. A primary purpose of the City's Public Safety Department is firefighting and prevention. Thus, the employing agency appears to meet the second part of the test.

Public Safety Officers whose full-time duties are firefighting, fire safety, and fire code enforcement would satisfy the definition in section 112.1816(1)(c). If, however, the duties of public safety officers are law enforcement, and their firefighting duties are not full-time, by using the term "full-time firefighter," the Legislature appears to have excluded those employees from coverage under section 112.1816. The factual determination of a Public Safety Officer's full-time, primary responsibilities must be made by the employing agency.

The definition in section 112.1816(1)(c) does not affect the benefits available to firefighters under sections 112.18, Florida Statutes (conditions caused by tuberculosis, heart disease, or hypertension suffered in the line of duty), 112.18, Florida Statutes (conditions caused by hepatitis, meningococcal meningitis, or tuberculosis suffered in the line of duty), or 112.1815, Florida Statutes (diseases arising out of employment as a first responder).

AGO 2020-09 – October 21, 2020

SECTION 877.112, FLORIDA STATUTES – PREEMPTION OF CITY ORDINANCE BANNING THE SALE OF VAPOR GENETRATING DEVICES COMPLETELY OR TO PERSONS BETWEEN THE AGES OF EIGHTEEN AND TWENTY

WHETHER SECTION 877.112, FLORIDA STATUTES, WOULD PREEMPT A CITY ORDINANCE BANNING THE SALE OF VAPOR GENERATING ELECTRONIC DEVICES COMPLETELY, OR IN THE ALTERNATIVE, BANNING THE SALE OF SUCH DEVICES TO PERSONS BETWEEN THE AGES OF EIGHTEEN AND TWENTY

To: Samuel S. Goren, City Attorney, City of Pembroke Pines
Jacob G. Horowitz, Assistant City Attorney, City of Pembroke Pines

REPHRASED QUESTION:

Can the City of Pembroke Pines either completely ban the sale of vapor generating electronic devices within the geographical boundaries of the City, or, alternatively, prohibit the sale of such devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty?

SUMMARY:

Although a complete ban on the sale of vapor generating electronic devices would conflict with section 775.082, Florida Statutes, an ordinance prohibiting the sale of such devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty, would not conflict with that statute; provided, however, that the municipal ordinance penalties should not exceed state penalties for similar offenses.

Background

In your submittal letter, you indicate that, "[g]iven the recent proliferation of vaping in general, and among teenagers in particular, the City Commission has expressed an interest in banning the sale of vapor generating electronic devices within the City." This has prompted the City to ask whether, consistent with Florida law, it can ban the sale of such devices within City limits altogether. In the alternative, the City asks whether it can prohibit the sale of such devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty.[1]

Analysis

A municipality may exercise governmental power, "except as otherwise provided by law."[2] Municipalities are authorized to enact legislation concerning any subject matter upon which the state Legislature may act, except any "subject expressly preempted to state or county government by the constitution or by general law."[3]

Section 877.112, Florida Statutes, regulates the purchase and sale of nicotine products and nicotine dispensing devices. The regulatory framework contained in section 877.112 consists, briefly, of:

- Definitions of "nicotine product" and "nicotine dispensing devices;"
- Prohibitions on the sale or delivery of such products to persons under the age of 18, providing criminal penalties;
- Affirmative defenses when a buyer or recipient misrepresents his or her age;
- Prohibitions on possession of the products and non-criminal penalties;
- Signage requirements for dealers of the products; and
- A prohibition of self-service merchandising of the products unless they are under the direct control or line of sight of the retailer.

A "nicotine dispensing device" is defined in the statute to mean, in pertinent part, "any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product...or other similar device or product." Thus, the statute regulates the "vapor generating electronic devices" whose sale the City proposes to further restrict.

The threshold question is whether section 877.112, Florida Statutes, preempts local legislation in the area. Section 877.112 contains no provision expressly preempting county or municipal ordinances. But even in a field where both the State and local government can legislate concurrently, a municipality cannot enact an ordinance that directly conflicts with a state statute.[4] Generally, it is "not a conflict if an ordinance is more stringent than a statute."[5] Nor does conflict exist simply because the ordinance "regulates an area not covered by the statute."[6] However, a "municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden."[7]

Section 877.112, expressly prohibits the sale of vapor generating electronic devices to persons under the age of eighteen. The statute is silent regarding sales of such devices to persons between the ages of eighteen and twenty.

Nor will section 877.112 be construed to create any "right" or "privilege" to purchase such devices applicable to persons in those age groups, in light of federal law universally prohibiting the sale of such devices to anyone under the age of twenty-one.[8] Under the specific circumstances applicable here, one cannot conclude that the Legislature—in omitting the sale of nicotine dispensing devices to persons between the ages of eighteen and twenty from the ambit of unlawful acts[9] proscribed by section 877.112--has thereby made such transactions "lawful," or created any "right" or "privilege" to engage in them.[10] Instead, section 877.112 operates concurrently, and does not conflict, with federal law that makes the sale of such devices to persons under the age of twenty-one unlawful.[11]

Based on these principles, the City would not be precluded by state law from enacting an ordinance prohibiting the sale of vapor generating electronic devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty, within the geographical boundaries of the City of Pembroke Pines.[12] The same conclusion does not apply, however, to a proposed total ban on the sale of such devices.

A local law on a subject will conflict with any of the provisions of the state law on the same subject if a person acting to comply with one provision necessarily violates another.[13] If the City's proposed more restrictive ordinance (not a total ban) is carefully crafted, then, in conducting sales transactions, a retailer selling vapor generating electronic devices would be able to comply with both section 877.112 and the local law. The same cannot be said regarding an ordinance totally banning the sales of such devices, where a local retailer's compliance with section 877.112 would necessarily result in a violation of the City's ordinance.

Based on the foregoing, it is my opinion that the City would not be precluded by state law from enacting an ordinance prohibiting the sale of vapor generating electronic devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty, within the geographical boundaries of the City of Pembroke Pines. However, an ordinance imposing a total ban on the sale of such devices within the City's boundaries would conflict with section 877.112 and would thus not be authorized under Florida law.

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[1] This opinion does not address the effect of the express federal preemption provision for tobacco products contained in the Family Smoking Prevention and Tobacco Control Act ("Act") on the City's ability to regulate sales in this area. *See* 21 U.S.C. § 387p(a)(2)(A). However, in crafting its proposed ordinance (a copy of which was not provided to this office), the City should be mindful of the Act, which is codified at 21 U.S.C. § 301, *et seq*.

[2] Art. VIII, § 2(b), Fla. Const. (1968).

[3] § 166.021(3), Fla. Stat. (2019).

[4] *See Phantom of Brevard, Inc. v. Brevard Cty.*, 3 So. 3d 309, 314 (Fla. 2008); *accord Thomas v. State*, 614 So. 2d 468, 470 (Fla.1993) ("Municipal

ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute.").

[5] *Hoesch v. Broward Cty.*, 53 So. 3d 1177, 1181 (Fla. 4th DCA 2011); *accord City of Kissimmee v. Fla. Retail Fed'n, Inc.*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005).

[6] *Id.*

[7] *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla.1972).

[8] On December 20, 2019, the President signed into law legislation that raised the federal minimum age for sales of tobacco products from eighteen to twenty-one years. The Further Consolidated Appropriations Act, 2020 (H.R. 1865) included a provision amending section 906(d) of the Federal Food, Drug, and Cosmetic Act to increase the federal minimum age to purchase tobacco products from eighteen to twenty-one, and to add a provision making it unlawful for any retailer to sell a tobacco product to any person younger than twenty-one years of age. *See* 360,064 Guidance Ctp, April 30, 2020 – Enforcement Priorities for Electronic Nicotine Delivery Systems (ends) and Other Deemed Products On the Market Without Premarket Authorization (revised), Food Drug Cosm. L. Rep. P 360064 (available at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/enforcement-priorities-electronic-nicotine-delivery-system-ends-and-other-deemed-products-market).

[9] *Cf. Thomas v. State*, 614 So. 2d at 469-70 (concluding that a city could not enforce its ordinance requiring safety equipment on bicycles ridden in the city by arresting violators where the state statute imposed non-criminal penalties for similar conduct).

[10]Thus, section 743.07, Florida Statutes (pertaining to the "[r]ights, privileges, and obligations of persons 18 years of age or older"), is not implicated by a proposal to regulate by ordinance the sale of vapor generating electronic devices to persons between the ages of eighteen and twenty.

[11]"[S]tate laws are preempted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387, 399–400 (2012). "This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' . . . and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting from *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (additional citations omitted).

[12]However, this office has previously opined—and the Florida Supreme Court has agreed—that, in enacting concurrent municipal regulations, "ordinance penalties may not exceed state penalties for similar or identical offenses." *Thomas v. State*, 614 So. 2d 468, 473 (Fla. 1993) (citing Op. Att'y Gen. Fla. 089-24 (1989); Op. Att'y Gen. Fla. 081-76 (1981)); *see also Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1021 (Fla. 2d DCA 2005) ("The final sentence of this provision, however, which provides that the sanctions in section 62–82(1), as amended, 'are in addition to any criminal penalty which is available under the provisions of Chapter 791,' presents a conflict.").

[13] *See Laborers' Int'l Union of N. Am., Local 478 v. Burroughs*, 541 So. 2d 1160, 1161 (Fla.1989) ("Putting it another way, a conflict exists when two legislative enactments 'cannot co-exist.'") (quoting *Laborers' Int'l Union of N. Am., Local 478 v. Burroughs*, 522 So. 2d 852, 856 (Fla. 3d DCA 1987)) (citation omitted).

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