

Local laws relating only to unincorporated areas of a county on the effective date of this article *may be amended or repealed* by county ordinance. (Emphasis supplied.)

Section 2 of Ch. 30830, *supra*, as well as the title thereof, evidences the fact that that law is applicable to or relates to the *unincorporated* areas of Hillsborough County. This is reinforced in the title and §1 of Ch. 65-1646, *supra*.

Under Art. X, §12(g), State Const., "special law" means a special or local law. As stated in *Davis v. Gronemeyer*, 251 So.2d 1 (Fla. 1971), at p. 4, "It follows that at least one definition of a local law is a 'special law'; that is, a special act of the Legislature" Thus, Ch. 30830 as amended should qualify as a local law, under Art. VIII, §6(d), State Const., which may be amended or repealed by ordinance, unless that law establishes an autonomous statutory entity or special district, in which case it would not come within the constitutional provision. See AGO's 072-149, 071-154, 071-146, and 069-99.

An analysis of the subject district indicates that it is not autonomous. The board of county commissioners levies the special assessments, not the district as a separate entity; and upon the enforcement of delinquent assessments, the affected lands become vested in the county, not the district. Also, any special assessments made are equalized by the board of county commissioners sitting as a board of equalization. Moreover, these statutes are simply enabling legislation, that is, permissive legislation authorizing the county to establish such districts for special improvements and to levy special assessments to defray the cost of such improvements. The districts, once established, would thus appear to be agencies or instrumentalities of the county, carrying out essential county functions and purposes.

It therefore appears that the county does have the power to amend or repeal the special law in question. It would be appropriate therefore to amend the statute so as to establish the districts by action of the board of county commissioners and eliminate altogether the referendum or election requirements. As it now stands, Ch. 30830, Laws of Florida, does not require any referendum election approving the levy of the annual special assessment or the amount of such assessments. In fact, the voters, in the election presently required by §3, Ch. 30830, do not vote on the amount of special assessments, only on the question of the establishment of the district, the making of the specified improvements, and the financing of such improvements by special assessments.

In the alternative, since Ch. 30830, as amended, is enabling legislation as noted above, the county might choose to proceed under §125.01(1)(q), F. S., in establishing the district and ignore Ch. 30830, as amended. *Cf.*, *State v. Collier County*, 171 So.2d 890 (Fla. 1965); *Herbert v. City of Daytona Beach*, 163 So. 565 (Fla. 1935); and no referendum is required to create such a district.

No referendum would be required for any special assessments in such a special purpose district, although a referendum would be required to levy ad valorem taxes in such districts. See AGO 072-162.

073-463—December 13, 1973

SALTWATER FISHING

REGULATION OF SPEARFISHING—STATE PREEMPTION

To: Bill Fulford, Representative, 40th District, Orlando

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QUESTIONS:

1. What is meant by the term "immediate area" in §370.172(3), F. S.?

2. Does §370.172, F. S., prohibit spearfishing in all areas beneath all bridges and jetties?
3. Does the term "spearfishing" in §370.172, F. S., include the spearing of fish by persons who are not physically in the water?
4. Does Ch. 73-141, Laws of Florida, repeal local ordinances and special acts relating to spearfishing?
5. Does Ch. 73-141, Laws of Florida, repeal local ordinances and special acts relating to skindiving?

SUMMARY:

Chapter 73-141, Laws of Florida [§370.172, F. S.], superseded all former local and special laws, administrative regulations, and ordinances affecting spearfishing. It prohibits spearfishing in such close proximity to specified places as is likely to produce injury to persons or interfere with fishing activity conducted from such places. The statute does not apply to the spearing of fish by persons who are not in the water, nor does it regulate the sport of skindiving. Chapter 73-208, Laws of Florida, reserves to the state the power to regulate the taking and possession of saltwater fish and repeals all county ordinances purporting to regulate such taking and possession.

The term "immediate area" is not defined in Ch. 73-141, Laws of Florida [§370.172, F. S.]. Accordingly, pursuant to well-established rules of statutory construction, "[w]ords of common usage, when used in a statute, should be construed in their plain and ordinary sense." [See] 30 Fla. Jur. *Statutes* §81. Further, "it is proper to take into consideration the particular evils at which the legislation is aimed, or the mischief sought to be avoided." [See] 30 Fla. Jur. *Statutes* §100.

The immediate area of a particular place or structure is clearly that space which surrounds the space occupied by the place or structure in question. The difficulty in defining the limits of an immediate area is not with the starting point (which is obviously adjacent to the surface or border of the place or structure in question), but is with the establishment of the most distant point. In construing the similar term "immediate vicinity," the court in *United States v. Chicago, M. & St. P. Ry. Co.*, 228 F. 554 (N.D. Idaho 1915), said that the term "may be somewhat elastic and indefinite"; and in *Vard v. Wilmington & W. R. Co.*, 13 S.E. 926 (N.C. 1891), the court held that "in the immediate vicinity" is an equivalent term with "close proximity."

Applying the foregoing to the statute in question, it appears that the intent of the legislature was to prohibit spearfishing in close proximity to the places and structures listed in §370.172(3), F. S. The determination of what constitutes close proximity will vary according to the circumstances of each case on the basis of what is reasonably necessary under those particular circumstances to avoid the mischief at which the statute is directed. It is without question that the mischief to be avoided by §370.172(3)(a) is the accidental spearing of unsuspecting swimmers; and the intent of that section would appear to be violated by any person engaged in spearfishing who carried out his sport so close to a public bathing beach as to pose a risk of accidental injury to persons bathing there. The intent of §370.172(3)(b) and (c) appears to be twofold: the prevention of accidental injury to persons engaged in spearfishing and the preservation of the pier, bridge, and jetty fishermen's opportunity to enjoy their sport. A person engaged in spearfishing cannot be expected to safely wind his way through the hooks and lines of those fishing from above the surface, nor can he be expected to do so without disturbing the fish population in the vicinity of the enumerated structures to the detriment of the above surface fishermen. The intent of the last-mentioned subsections would seem to require that a person engaged in spearfishing maintain a distance from the structures in question sufficient to avoid the area which is normally reached by the

paraphernalia of those fishing from such structures. The size of such area will, of course, vary from place to place depending upon the nature of the tides and currents in the vicinity of each structure.

AS TO QUESTION 2:

Section 370.172(3)(c), F. S., prohibits spearfishing "in the immediate area beneath any *bridge catwalk specifically designated for public fishing usage and all jetties*." (Emphasis supplied.) Thus, with respect to bridges, the prohibition only extends to those bridges which have a catwalk specifically designated for public fishing usage. The prohibition includes all jetties. Any area directly beneath such a bridge catwalk would clearly come within the prohibition. The question of the extent of the prohibition beyond the area perpendicularly beneath a bridge catwalk is one to be resolved on the basis of the considerations discussed above in answering question one.

AS TO QUESTION 3:

The term "spearfishing" is defined in §370.172(1), F. S., as

... the taking of any saltwater fish through the instrumentality of a spear, gig, or lance operated by a person *swimming at or below the surface of the water*. (Emphasis supplied.)

It follows from such definition that §370.172, F. S., does not apply to the spearing of fish by persons who are not in the water.

Question three is answered in the negative.

AS TO QUESTION 4:

In AGO 073-338, I expressed the following view in answer to a similar question:

In summary, the new spearfishing law will supersede all former local and special laws, administrative regulations and ordinances which heretofore restricted the areas in which spearfishing could be conducted. Those areas of our salt waters where spearfishing is forbidden are enumerated in new §370.172(3), *supra*. Any future additions or qualifications to this enumeration can be made only by general law or in accordance with §370.172(6), *supra*.

It should also be noted in this regard that Ch. 73-208, Laws of Florida [§370.102, F. S.], effective October 1, 1973, expressly reserves to the state the power to regulate the taking and possession of saltwater fish, as defined in §370.01, F. S.; and, by amendment to §125.01(4), F. S., denies such powers to the counties and repeals all county ordinances purporting to regulate in any manner the taking or possession of such fish.

Question four is answered in the affirmative.

AS TO QUESTION 5:

Spearfishing within the contemplation of §370.172, *supra*, involves the taking of saltwater fish with a spear, gig, or lance operated by a person swimming at or below the surface of the water. The statute does not purport to regulate "skindiving," which is generally understood to be a sport in which a swimmer equipped with a mask, foot fins, and/or breathing device dives under water for exploration, unless the skindiver is also operating a spear, gig, or lance for the purpose of taking saltwater fish. Accordingly, no local law pertaining solely to skindiving would conflict with or be repealed by Ch. 73-141, *supra*. It should be noted, however, that no local regulation of skindiving may be applied so as to limit or prohibit spearfishing in areas where it is lawful to spearfish under Ch. 73-141, *supra*. The same result obtains even in the absence of action by the Department of Natural Resources under §370.172(6).