BIENNIAL REPORT

of the

ATTORNEY GENERAL STATE OF FLORIDA

January 1, 2011, through December 31, 2012

PAM BONDI

 $Attorney\ General$



Tallahassee, Florida 2013

CONSTITUTIONAL DUTIES OF THE ATTORNEY GENERAL

The revised Constitution of Florida of 1968 sets out the duties of the Attorney General in Subsection (c), Section 4, Article IV, as: "...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. Keeps a record of his or her official acts and opinions. Serves as a reporter for the Supreme Court.



STATE OF FLORIDA OFFICE OF ATTORNEY GENERAL PAM BONDI

February 10, 2013

The Honorable Rick Scott Governor of Florida The Capitol Tallahassee, Florida 32399-0001

Dear Governor Scott:

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, 2011, through December 31, 2012.

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

It's an honor to serve with you for the people of Florida.

Sincerely,

an 1)

Pam Bondi Attorney General

TABLE OF CONTENTS

Page

OPINIONS

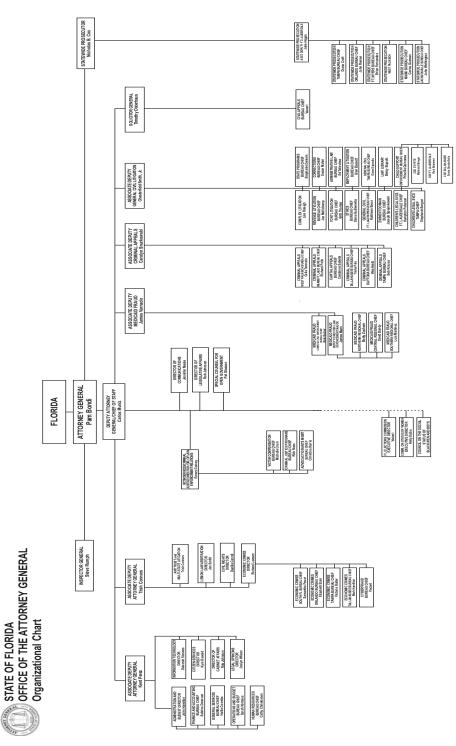
Opinions 2011	
Opinions 2012	

INDEX AND CITATOR

General Index	
Citator to Florida Statutes, Constitution,	
and Session Laws	357

ATTORNEYS GENERAL OF FLORIDA SINCE 1845

Joseph Branch1	845-1846
Augustus E. Maxwell1	846-1848
James T. Archer1	848-1848
David P. Hogue1	848-1853
Mariano D. Papy1	
John B. Galbraith1	860-1868
James D. Wescott, Jr1	868-1868
A. R. Meek1	868-1870
Sherman Conant1	
J. P. C. Drew	870-1872
H. Bisbee, Jr1	872-1872
J. P. C. Emmons1	872-1873
William A. Cocke1	873-1877
George P. Raney1	877-1885
C. M. Cooper1	885-1889
William B. Lamar1	889-1903
James B. Whitfield1	
W. H. Ellis1	904-1909
Park Trammell1	
Thomas F. West1	
Van C. Swearingen1	917-1921
Rivers Buford1	921-1925
J. B. Johnson1	
Fred H. Davis1	
Cary D. Landis1	
George Couper Gibbs1	938-1941
J. Tom Watson1	
Richard W. Ervin1	949-1964
James W. Kynes1	
Earl Faircloth1	
Robert Shevin1	
Jim Smith1	
Robert A. Butterworth1	
Richard E. Doran 2	
Charlie Crist 2	
Bill McCollum2	
Pam Bondi2	2011-



OFFICE OF THE ATTORNEY GENERAL The Capitol, Tallahassee, Florida 32399-1050 (850) 245-0140

PAMELA BONDI Attorney General NICOLAS COX

StatewideProsecutor

CARLOS MUNIZ Deputy Attorney General & Chief of Staff

KENT PEREZ Associate Deputy & General Counsel

CAROLYN SNURKOWSKI Associate Deputy Attorney General For Criminal Appeals

TIMOTHY OSTERHAUS Solicitor General

Danille Carroll Director of Civil Rights

Joslyn Wilson Director of Opinions

Jason Rodriguez External Affairs Director

Jill Adams **Rotem Adar** Stephen Ake Elizabeth Alsobrook Jeannette Andrews-Thompson Albert Arena Alexa Argerious William Armistead **Elizabeth Arthur** Adrian Ashton **Angeline** Attila Dana Baird John Bajger **Thomas Barnhart Glen Bassett** Marilyn Beccue Carla Bechard Kenneth Beck Stephanie Bergen Toni Bernstein Heidi Bettendorf

PATRICIA GLEASON Special Counsel For Open Government

EMERY GAINEY Director of Law Enforcement Victims & Criminal Justice Program

Richard Lawson Director of Economic Crimes

> Janet Smith Director of Lemon Law

Jennifer Meale Communications Director

Deborah Stevens Director of Information Services

Daniel Biggins Sofia Bilokryla Mitchell Bishop Katherine Blanco **Michelle Blume** Diana Bock Albert Bowden James Boyle James Boynton Jr **Cecilia Bradley** Lizabeth Brady Ravi Brammer William Branch Jamie Braun **Cheryl Brittle** Jerrett Brock Jacqueline Brown Scott Browne **Cindy Bruschi** David Bundy Christina Burden

Inspector General

STEVE RUMPH JR.

PATRICIA CONNERS Associate Deputy Attorney General

CHESTERFIELD SMITH JR. Associate Deputy Attorney General For General Civil Litigation

> JIM VARNADO Associate Deputy Attorney General For Medicaid Fraud

John Hamilton Director of Administration

Robert Johnson Director of Legislative & Cabinet Affairs

> Kimberli Oswald Director of Citizen Services

Shavne Burnham Victoria Butler Clarissa Cabreja Arabella Campbell Leslie Campbell James Carney Alicia Castillo Meredith Charbula **Carrol Cherry** Maria Chisholm Mary Clark **Rachel Clark Robert Clements Katherine** Cline **Robin Compton Cynthia Comras** Anne Conley **Bethany Connelly** Satu Correa **Carmen Corrente** Natalia Costea

James Cox Shelley Cridlin Summer Cruz **Ralph Damato Stephanie Daniel Kristen Davenport** Jason Davis **Jacqueline Davison Carol Degraffenreidt** Elizabeth Delgado Arielle Demby Berger **Timothy Dennis Diane Dewolf Robert Dietz** Joanne Diez Jeffrey Dikman Jennifer Dillon Frank Dimaggio Joey Dingess **Carol Dittmar Douglas Dolan** Kendrick Donnelly **Thomas Duffy** Susan Dunlevy Mark Dunn David Earl Mitchell Egber Alex Ershock Jacqueline Erwin **Diana Esposito Elizabeth Everson Charles Fahlbusch** Allison Finn Laura Fisher **Ryann Flack** Michael Flury David Flynn **Robert Follis** William Foster **Helen Fouse** Deborah Fraim **George Francis Timothy Fraser Timothy Freeland Timothy Frizzell** Anne Furlow William Gandy Jr Sonia Garcia-Solis Ana Gargollo Mcdonald **Cedell Garland** Fulvio Gentili **Donna Gerace** Jeanine Germanowicz **Douglas Glaid** David Glantz Lisa Glick Jonathan Glogau Anthony Golden **Ren'ee Gordon** Ashley Grafton

Ashley Grant Marcus Graper **Dayle Green** Melissa Green **David Grimes Diane Guillemette** Maria Guitian Barker Lee Gustafson Melody Hadley Lori Hagan Meredith Hall Mark Hamel **Mark Hamilton** Gerry Hammond Christi Hankins Julia Harris Virginia Harris Kellye Hayashi Wesley Heidt Joshua Heller Angela Hensel Donna Hernandez Nikole Hiciano O'neil Meredith Hinshelwood **Phillippa Hitchins** Benedict Hoffman **Ronald Honick III** Sonya Horbelt Mary Howard **Christopher Hunt Brian Hunter** Jonathan Hunter Jonathan Hurley Martha Hurtado Elmer Ignacio Sandra Jaggard **Clark Jennings** Georgina Jimenez-Orosa **Caroline Johnson Levine Daniel Johnson Daniel Jones** Bryan Jordan Keri Joseph **Moises Jrade** Michael Karpinski Samantha Katen Linda Katz **Brent Kelleher** Sue-Ellen Kenny **Russell Kent** Ann Keough **Denise Kim** Katherine Kiziah John Klawikofsky Donna Koch Pamela Koller Dean Kowalchyk Jill Kramer **Robert Krauss** Jay Kubica

Jacqueline Kurland Donna Laplante Nancy Lawler Lisa Lee Boemmel Lisa-Marie Lerner Norman Levin Eric Lipman **Deborah Loucks** Andrea Luedecker **Giselle** Lylen Sara Macks Susan Maher **Patrice Malloy** Daryl Manning Luz Maria-Montero Elba Martin Luis Martinez Linda Matthews James McAuley Allison McCabe Erin McCarthy Patricia McCarthy Katrina McCormick Charles McCoy Morgan McDonald Anne McDonough Andrew McElroy III Rebecca McGuigan Katherine McIntire James McNamara III **Carrie McNamara Caroline McNulty Bernal** Donna McNulty Melynda Melear Joseph Mellichamp III Nicholas Merlin **Michael Mervine** John Mika Charmaine Millsaps Tamara Milosevic Zahan Mistry Jacqueline Moody Audrey Moore Jennifer Moore **Michael Moore** Allison Morris **Melvin Mosier** Thomas Munkittrick Bill Navas Lance Neff Eric Neiberger Betty Nestor Kellie Nielan Erin Nobles Rachel Nordby Lynette Norr Kenneth Nunnelley Grainne O Sullivan Nicole Orr Mary Ottinger

Robert Palmer Helene Parnes Bonnie Parrish Trisha Pate Charlyne Patterson Joi Pearsall James Peavyhouse **Ivy Pereira Rollins Charles Pereny** Stacy Perez James Peters Hampton Peterson Ann Phillips **Richard** Polin **Phillip Quaschnick Priscilla Quinones** Lisa Raleigh Amy Ramke Wendy Reed Linton **Brittany Rhodaback** Charles Rivenbark **Priscilla Roberts** Magaly Rodriguez Don Rogers Susan Rogers Monique Rolla Aimee Rosenblum **Heather Ross** Seth Rubin **Candance Sabella** Jennifer Sarmiento Alfred Saunders Kathleen Savor **Richard Schiffer** Samantha Schosberg Feuer

Carolyn Schwarz Susan Shanahan **Tiffany Short** Jay Silver David Silverstein Holly Simcox Darlene Simmons **Hagerenesh Simmons** Carol Simpson Rebecca Sirkle **Gregory Slemp** Matthew Smith Joshua Soileau Mary Soorus Lindsey Sowder Joseph Spejenkowski **Douglas Squire Elizabeth Starr** Jessica Stephans **Marlene Stern** Julie Stewart Monica Stinson Joy Stubbs **Betsy Stupski Melanie Surber** Matthew Tannenbaum Kaylee Tatman **Cerese Taylor Edward Tellechea** Celia Terenzio Theresa Therilus **Britt Thomas Timothy Thomas** Dawn Tiffin **Eric Tilton**

Joseph Tringali Mimi Turin Jason Vail **Richard Valuntas** Keith Vanden Dooren Algeisa Vazquez-Pagano Ann Vecchio **Tonja Vickers** Matthew Vitale Kathleen Von Hoene Rebecca Wall **Gretchen Wallace** Erica Waxman Nicholas Weilhammer Anne Weiner Katie Welch **Carissa Wheeler Stephen White Enoch Whitney** Dana Wiehle Jaakan Williams Kenneth Wilson **Blaine Winship** Elaine Winslow James Young Lana Zabriskie Betty Zachem Colleen Zaczek Barbara Zappi Genny Zhu Christina Zuccaro

ASSISTANT STATEWIDE PROSECUTORS

Melissa Checchio Diane Croff Katherine Diamandis Paul Dontenville Kelly Eckley Brian Fernandes Robert Finkbeiner Jeremy Franker Ocar Gelpi Kathleen George David Gillespie Julie Hogan Stephen Immasche Margery Lexa Sasha Lohn-Mcdermott John Maceluch Shannon Macgillis Cathy McKyton Michael Nieman Michael-Anthony Pica Pricilla Prado Stroze Edward Pyers John Roman Michael Schmid Joseph Spataro Stephanie Tew Anne Wedge-Mcmillen Daniel Weisman John Wethington III Michael Williams Sarah Willis

DEPARTMENT OF LEGAL AFFAIRS

Attorney General Opinions

I. General Nature and Purpose of Opinions

Issuing legal opinions to governmental agencies 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, are not law. They are advisory only and 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 as a weapon by only 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, 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, 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 advice to the state attorneys and to the representatives in Congress from this state. Sections 16.08 and 16.52(1), Florida Statutes.

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
- 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:

Pam Bondi 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.

The response time for requests for Attorney General Opinions has been substantially reduced. This office attempts to respond to all requests for opinions within 30 days of their receipt in this office. However, in order to facilitate this expedited response to opinion requests, this office requires that the attorneys for public entities requesting an opinion supply this office with a memorandum of law to accompany the request. The memorandum should include the opinion of the requesting party's own legal counsel, a discussion of the legal issues involved, together with references to relevant constitutional provisions, statutes, charter, 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 or statements for consideration. Any such material will be attached to and made a part of the permanent file of the opinion request to which it relates.

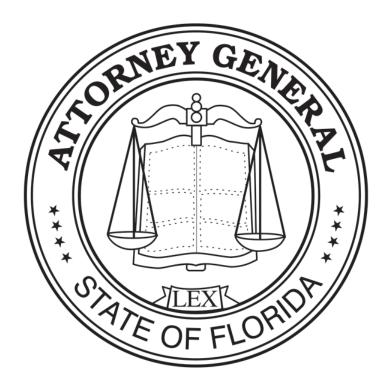
VI. Miscellaneous

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 Florida Legal Resource Center 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 officeholding for public officials. Copies of the pamphlet 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 can be obtained through the First Amendment Foundation.



Pam Bondi The Capitol Tallahassee

BIENNIAL REPORT

of the

ATTORNEY GENERAL

State of Florida

January 1, 2011, through December 31, 2012

AGO 11-01 – February 7, 2011

PUBLIC RECORDS LAW – GOVERNMENT IN THE SUNSHINE LAW – MEETINGS – NON-PROFIT CORPORATIONS – FOUNDATIONS – MUNICIPALITIES

WHETHER NOT-FOR-PROFIT FOUNDATION IS SUBJECT TO SUNSHINE AND PUBLIC RECORDS LAWS

To: Mr. John J. Hearn, Village Attorney for the Village of Biscayne Park

QUESTIONS:

1. Is the Biscayne Park Foundation, Inc., a not-for-profit foundation created by the Village of Biscayne Park, subject to Florida's Public Records Law, Chapter 119, Florida Statutes?

2. Is the Biscayne Park Foundation, Inc., a not-for-profit foundation created by the Village of Biscayne Park, subject to Florida's Government in the Sunshine Law, section 286.011, Florida Statutes?

SUMMARY:

1. The Biscayne Park Foundation, Inc., is an "agency" for purposes of Chapter 119, Florida Statutes, and subject to the inspection and copying requirements thereof.

2. The Biscayne Park Foundation, Inc., is subject to and must comply with the requirements of section 286.011, Florida Statutes.

The Biscayne Park Foundation, Inc. ("the foundation"), is a 501(c)(3) charitable foundation and a not-for-profit organization that is described on the village's website and in village publications as "the Village's fundraising arm."¹ The foundation is intended to enhance the village's opportunities to raise monies through special events, sponsorships, donations, and grants for the Village of Biscayne Park.

As provided in its Articles of Incorporation, the foundation is

"organized exclusively for charitable and educational purposes." The articles describe the purposes for which the corporation was formed:

1. To raise the educational and social levels of the residents of the Village of Biscayne Park, Florida, to foster and promote community-wide interest and concern for the history and preservation of the Village of Biscayne Park.

2. To aid, support, and assist by gifts, contributions, or otherwise, other corporations, community chests, funds and foundations organized and operated exclusively for charitable, educational or scientific purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

3. To do any and all lawful activities which may be necessary, useful, or desirable for the furtherance, accomplishment, fostering, or attaining of the foregoing purposes, either directly or indirectly, and either alone or in conjunction or cooperation with others, whether such others be persons or organizations of any kind or nature, such as corporations, firms, association, trusts, institution, foundations, or governmental bureaus, departments or agencies.

4. All of the foregoing purposes shall be exercised exclusively [sic] charitable and educational purposes in such a manner that the Corporation will qualify as an exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 or the corresponding provision of any future United States Internal Revenue law.²

According to information you have supplied, the foundation was created by the village, the village manager was the foundation's incorporator, and the principal office of the foundation is located at the village's administrative offices. The sole member of the foundation is the village commission.³ The village commission nominates and appoints the foundation's board of directors and has the power to remove any member of the board.⁴ In addition, vacancies occurring on the board during any term will be filled by the village commission.⁵ However, once the board is appointed, the foundation's board exercises full control over the operations of the foundation.⁶ The board appoints its own officers.⁷ You state that the foundation receives no public funding.

Question 1. - Public Records Law

Chapter 119, Florida Statutes, the Public Records Law, provides

11-01

the public access to certain governmental documents.⁸ The law is to be construed liberally in favor of openness.⁹ When there is any doubt, Florida's courts find in favor of disclosure.¹⁰ The Public Records Law applies to all agencies, including any "business entity acting on behalf of any public agency."¹¹ The only agency records that are exempt from inspection and copying under the act are those that are provided confidentiality by statute or those that are expressly exempted by a statute or general or special law.¹²

Resolution of the question of whether a private entity is required to disclose records under the Public Records Law depends on consideration of a number of factors delineated by the Florida Supreme Court in News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.¹³ Moreover, notwithstanding consideration of these individual factors, it is the totality of factors that controls the determination.¹⁴ A review of the factors described in the Schwab case and application of the facts relating to creation and operation of the Biscayne Park Foundation, Inc., support the conclusion that the foundation is an "agency," such that it must comply with Florida's Public Records Law.

In News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.,¹⁵ the Florida Supreme Court adopted a totality of factors test, which had been utilized by several district courts in determining whether a private entity was subject to Chapter 119, Florida Statutes. The test developed by the Schwab Court involved identifying links between the governmental agency and the private entity which should be considered in making the determination; however, no single factor is controlling on the question of whether an entity is subject to the Public Records Law. Rather, all of these factors must be reviewed and weighed in order to determine whether a private organization is an agency for purposes of Chapter 119, Florida Statutes:

1. Creation – did the public agency play a part in the creation of the private entity?

The Biscayne Park Foundation, Inc., was created by the Village of Biscayne Park to act on behalf of the village in financing and administering certain charitable, educational and scientific programs.

2. Funding – has the public agency provided substantial funds, capital or credit to the private entity or is it merely providing funds in consideration for goods or services rendered by the public entity?

You have advised that the foundation receives no funding from the village. Operation of the foundation appears to be conducted using funds generated through the foundation's fund-raising activities and through the receipt of grants and gifts to the corporation.

3. Commingling of Funds – whether there is a commingling of funds.

The only funds available to the Biscayne Park Foundation, Inc., are those received by the foundation from its own fundraising activities or through grants and donations.

4. Public Property – whether the activity is conducted on publicly-owned property.

While you have advised that the foundation "plans not to use Village facilities, equipment, materials or supplies," it appears that the village manager (so identified in the articles of incorporation for the foundation) is the incorporator and registered agent for the foundation; the principal office of the corporation is located at the administrative offices of the village and the foundation's mailing address is the village hall. Further, the email address for the foundation is that of the village clerk of Biscayne Park.

5. Decision-making process – does the private entity play an integral part in the public agency's decision-making process?

The foundation plays no apparent role in the village's decision-making process.

6. Governmental Function – "whether the private entity is performing a governmental function or a function which the public agency otherwise would perform."¹⁶

The foundation acts as the village's "fundraising arm" in financing and administering certain charitable, educational, and scientific programs of the municipality – a municipal function.

7. Regulation – does the public agency regulate or otherwise control the private entity's professional activity or judgment?

The village is the sole member of the foundation and retains considerable control, including the right to remove board members and fill vacancies on the board. Changes to the foundation's articles or bylaws must be approved by the village.

8. Financial Interest – whether the governmental agency has a substantial financial interest in the private entity.

The village has no financial interest in the foundation as an investor, but has a substantial interest in the foundation and its activities in accomplishing the purposes of the foundation.

9. Goals – is the goal of the private entity to help the public

agency and the citizens served by the agency?

The expressed goal of the foundation is the enhancement of opportunities for village residents through fundraising on the village's behalf.

A review of the Schwab factors as applied to the Biscayne Park Foundation, Inc., would put the foundation squarely in line with a number of Florida cases and Florida Attorney General Opinions¹⁷ concluding that nonprofit entities such as the foundation are subject to the inspection and copying requirements of the Public Records Law.

Among the district court decisions relied on by the *Schwab* Court was that of the Second District Court of Appeal in *Sarasota Herald Tribune Company v. Community Health Corporation, Inc.*,¹⁸ in which the court held that a nonprofit corporation created and funded by the public hospital district to operate as a side-by-side corporation to enhance the services provided by the public hospital was subject to the provisions of Chapter 119, Florida Statutes. However, both Schwab and the Sarasota Herald-Tribune cases considered private business concerns with a governmental agency as one of their clients.

Your factual situation is more analagous to those court cases that have considered the agency status of private entities providing services that would otherwise be provided by the government such as *Memorial Hospital-West Volusia*, *Inc. v. News - Journal Corporation*,¹⁹ *Putnam County Humane Society*, *Inc. v. Woodward*,²⁰ *Prison Health Services*, *Inc. v. Lakeland Ledger Publishing Company*,²¹ and *Stanfield v. Salvation Army*.²² These cases were not business entities with a broad client base that were performing an isolated contract for a government client. These cases illustrate the principle that when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Public Records Law to the same extent that the government would be.²³

Finally, the fact that a private entity is incorporated as a nonprofit corporation is not dispositive on the issue of its status under Chapter 119, Florida Statutes. The relevant question is whether the entity is "acting on behalf of" an agency. In the instant inquiry, the Biscayne Park Foundation, Inc., was created by the Village of Biscayne Park to act as an instrumentality on behalf of the village in financing and administering certain charitable, educational, and scientific programs. The village is the sole member of the foundation and retains considerable control, including the right to remove board members and fill vacancies on the board. The goals of the foundation are directed toward enhancing the quality of life in the community through fundraising on behalf of the Village of Biscayne Park which appears to constitute a municipal governmental purpose.

In light of the above and applying the "totality of factors" analysis

developed by the Florida Supreme Court, I am of the opinion that the Biscayne Park Foundation, Inc., is an "agency" for purposes of Chapter 119, Florida Statutes, and subject to the inspection and copying requirements thereof.

Question 2. – Government in the Sunshine Law

Section 286.011, Florida Statutes, the Government in the Sunshine Law, provides in pertinent part:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times

In determining which entities may be covered by the Sunshine Law, the courts have stated that it was the Legislature's intent to extend application of the law so as to bind "every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control."²⁴ In addition, when interpreting the Sunshine Law, the law should be liberally construed to give effect to its public purpose.²⁵

Although private organizations are generally not subject to the Sunshine Law, open meetings requirements can apply if a public entity has delegated "the performance of its public purpose" to a private entity.²⁶ The Supreme Court of Florida recognized, in *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*,²⁷ the "natural tension between the privatization of traditionally public services and this State's constitutional commitment to public access to records and meetings concerning public business"²⁸ and found, in that case, that the delegation of the performance of its public purpose by a public hospital to a private entity would result in the private actor being subject to section 286.011, Florida Statutes, and Article I, section 24(b), Florida Constitution.²⁹

In a factual situation similar to the one you have presented, this office considered whether the Pace Property Finance Authority, Inc., which was created by a county and in which the county prescribed the duties of the authority and appointed its initial board of directors, was subject to the Government in the Sunshine Law. In Attorney General Opinion 94-34, the county retained control of the structure and organization of the authority, including, among other things, the power to remove and replace directors, amend the articles of incorporation, and approve any changes in the by-laws. The opinion noted that the authority and its board of directors were clearly subject to the dominion and control of the county and concluded that "as an authority created by the county and subject to its control, the Pace Property Finance Authority, Inc., and its board of directors are subject to the Government in the Sunshine Law." Like the Pace Property Finance Authority, Inc., the Biscayne Park Foundation, Inc., was created as a nonprofit corporation to act as an instrumentality on behalf of the Village of Biscayne Park and for its benefit in financing and administering certain charitable, educational, and scientific projects. The village commission created the authority, approved its articles of incorporation, and must approve any changes to the articles or the bylaws. The village appointed the members of the board of directors of the authority and continues to control removal and replacement of the board members. There is only one member of the corporation and it is the village itself. The combination of these factors leads me to conclude that the foundation is subject to the Government in the Sunshine Law.³⁰

Accordingly, I am of the opinion that the Biscayne Park Foundation, Inc., is subject to and must comply with the requirements of section 286.011, Florida Statutes.

- ⁴ Id. ss. 1, 3, and 5, Bylaw II: Board of Directors.
- ⁵ See s. 4, Bylaw II, supra n.3.
- ⁶ Bylaw II: Board of Directors, *supra* n.3.
- ⁷ Bylaw III: Officers, *supra* n.3.
- ⁸ Sections 119.01 and 119.07, Fla. Stat.

⁹ Woolling v. Lamar, 764 So. 2d 765 (Fla. 5th DCA 2000), review denied, 786 So. 2d 1186 (Fla. 2001); Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302 (Fla. 3d DCA 2001).

¹⁰ City of St. Petersburg v. Romine, 719 So. 2d 19 (Fla. 2d DCA 1998).

¹¹ Section 119.011(2), Fla. Stat.

¹² Section 119.071, Fla. Stat.; Wait v. Florida Power & Light Co., 372 So.
 2d 420 (Fla. 1979); Miami Herald Publishing Co. v. City of North Miami,
 452 So. 2d 572 (Fla. 3d DCA 1984).

¹³ 596 So. 2d 1029 (Fla. 1992).

¹ See http://www.biscayneparkfl.gov/index.asp, Biscayne Park Foundation, and Village of Biscayne Park, Biscayne Park Foundation Board Member Application.

² "Corporate Purposes," Articles of Incorporation of Biscayne Park Foundation, Inc., executed April 10, 2007.

³ See Bylaw I: Membership, Amended Bylaws of Biscayne Park Foundation, Inc., adopted September 14, 2010.

¹⁴ Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 379 (Fla. 1999) (citing Schwab, id. at 1031-32).

- ¹⁵ 596 So. 2d 1029 (Fla. 1992).
- ¹⁶ Schwab, *id.* at 1031.

¹⁷ See, e.g., Op. Att'y Gen. Fla. 94-34 (1994) (Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County as an instrumentality of the county to provide assistance in funding and administration of certain governmental programs subject to Ch. 119, Fla. Stat.); Inf. Op. to Ellis, dated March 4, 1994 (rural health networks, established as nonprofit legal entities organized to plan and deliver health care services on a cooperative basis pursuant to s. 381.0406, Fla. Stat., subject to Ch. 119, Fla. Stat.); Op. Att'y Gen. Fla. 95-17 (1995) (South Florida Fair and Palm Beach County Expositions, Inc., created pursuant to Ch. 616, Fla. Stat., subject to Ch. 119, Fla. Stat.).

- ¹⁸ 582 So. 2d 730 (Fla. 2d DCA 1991).
- ¹⁹ 729 So. 2d 373 (Fla. 1999).
- ²⁰ 740 So. 2d 1238 (Fla. 5th DCA 1999).
- ²¹ 718 So. 2d 204 (Fla. 2d DCA 1998).
- ²² 695 So. 2d 501 (Fla. 5th DCA 1997).

²³ See Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302 (Fla. 3d DCA 2001).

²⁴ See, e.g., Times Publishing Company v. Williams, 222 So. 2d 470, 473
 (Fla. 2d DCA 1969); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971).

²⁵ See Board of Public Instruction Of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969); Wood v. Marston, 442 So. 2d 934 (Fla. 1983) (statute should be broadly construed to effect its remedial and protective purposes). Cf. Cape Coral Medical Center, Inc. v. News-Press Publishing Company, Inc., 390 So. 2d 1216, 1218, n.5 (Fla. 2d DCA 1980) (inasmuch as the policies behind Ch. 119, Fla. Stat., and s. 286.011, Fla. Stat., are similar, they should be read together); Wood v. Marston, 442 So. 2d 934, 938 (Fla. 1983); Krause v. Reno, 366 So. 2d 1244, 1252 (Fla. 3d DCA 1979), for the proposition that when attempting to apply the open government laws to private organizations, the courts look to Ch. 119 to determine the applicability of the Sunshine Law.

²⁶ Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, 729 So. 2d 373 (Fla. 1999). And see Mae Volen Senior Center, Inc. v. Area Agency on Aging, 978 So. 2d 191 (Fla. 4th DCA 2008), review denied, 1 So. 3d 172 (Fla. 2009) (area agencies on aging which are public or private nonprofit organizations designated by the Department of Elder Affairs to coordinate and administer department programs and to provide, through contracting agencies, services for the elderly within a planning and service area are subject to Ch. 119 and s. 286.011, Fla. Stat., when considering any contracts requiring the expenditure of public funds).

- ²⁷ 729 So. 2d 373 (Fla. 1999).
- ²⁸ Id. at 376.
- ²⁹ Supra n.27 at 383.

³⁰ And see Op. Att'y Gen. Fla. 04-44 (2004) (Sunshine Law applies to Prison Rehabilitative Industries and Diversified Enterprises [PRIDE], the nonprofit corporation established by state law to manage correctional work programs of the Department of Corrections). *Cf.* Inf. Op. to Martelli, dated July 20, 2009 (State Fair Authority created by statute as a public corporation, is subject to s. 286.011, Fla. Stat.). *See also* Ops. Att'y Gen. Fla. 98-55 (1998) (meetings of the board of directors of the Council on Aging of St. Lucie, Inc., a nonprofit organization incorporated pursuant to the "Community Care for the Elderly Act," must comply with the Sunshine Law); 98-42 (1998) (Florida High School Activities Association, Inc., having been legislatively designated as the governing organization of athletics in Florida public schools, is subject to the Sunshine Law); and 98-01 (1998) (Sunshine Law applies to board of trustees of insurance trust fund created pursuant to collective bargaining agreement between city and employee union).

AGO 11-02 – February 25, 2011

SPECIAL DISTRICTS-WATER CONTROL DISTRICTS-MOSQUITO CONTROL

AUTHORITY OF WATER CONTROL DISTRICT TO PROVIDE ARTHROPOD CONTROL

To: Mr. William J. Nielander, Attorney to the Board of Supervisors of the Spring Lake Improvement District

QUESTION:

Is the Board of Supervisors of the Spring Lake Improvement District statutorily authorized under Chapter 2005-342, Laws of Florida, or Chapter 298,¹ Florida Statutes, to use district funds for the control of arthropods?

SUMMARY:

The Board of Supervisors of the Spring Lake Improvement District does not appear to be statutorily authorized under

Chapter 2005-342, Laws of Florida, or Chapter 298, Florida Statutes, to use district funds for the control of arthropods.

According to your letter, the Spring Lake Improvement District initiated mosquito spraying in 1980 and has owned and operated mosquito control equipment and supplies since that time. Recently, however, outside counsel for the district advised the board of supervisors for the district that in light of the district's enabling legislation, the district did not have the authority to assess and conduct mosquito control. The board of supervisors, therefore, has requested this office's opinion on this issue.

You have not identified the types of expenditures in question; therefore, any comments must be general in nature. Moreover, this office cannot pass upon the validity of actions previously taken by a public body, nor can this office validate any such action taken. Accordingly, this office will not comment upon the past actions of the Spring Lake Improvement District in utilizing district funds to provide for the control of arthropods, but rather is expressly limited to a consideration of the requirements of, and the authority granted by, the existing statutes which relate to the special district.

The Spring Lake Improvement District (district) was created by Chapter 71-669, Laws of Florida,² and authorized to exercise the powers conferred upon drainage and water control districts by Chapter 298, Florida Statutes.³ In 2005, pursuant to a legislative mandate, all of the special acts relating to the district were codified, in order to provide a single, comprehensive special act charter for the district, which included all current legislative authority granted to the district by its several legislative enactments and any additional authority granted by the act.⁴ Section 3 of Chapter 2005-342, Laws of Florida, in codifying the special acts, authorizes the district to exercise any and all other powers conferred upon drainage districts by Chapter 298, Florida Statutes.⁵ The special act authorizes the board of supervisors, as the governing body for the district, to access and impose an ad valorem tax, an annual drainage tax, and a maintenance tax as provided therein.⁶

As a statutorily created entity, the district may only exercise such powers as have been expressly granted by statute or must necessarily be exercised in order to carry out an express power.⁷ Moreover, any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof.⁸

A review of the enabling legislation for the district, as well as Chapter 298, Florida Statutes, failed to reveal a provision authorizing the expenditure of district funds for arthropod control. Section 298.22, Florida Statutes, in setting forth the powers of the board of supervisors of a water control district, provides that the board "has full power and authority to construct, complete, operate, maintain, repair, and replace any and all works and improvements necessary to execute the water control plan[,]" which is defined as

the comprehensive operational document that describes the activities and improvements to be conducted by a water control district authorized under this chapter and includes any district "plan of reclamation," "water management plan," or "plan of improvement" that details the system of water management improvements implemented by a water control district.⁹

Similarly, the charter for the district relates to the implementation of a water control plan and the improvement and maintenance of water and sewer systems.¹⁰ While the charter does authorize the district to expend funds for other purposes such as roads, parks and recreational facilities, and street lighting, there is no provision for the control of arthropods.¹¹

You refer to the minutes for a meeting of the board of supervisors for April 15, 1980, which indicate that a motion was passed "to approve Spring Lake as a Mosquito Control District."¹² You also refer to the provisions of section 388.031, Florida Statutes (1979), as providing a possible basis for such action. That statute provided for a petition signed by not less than 15 percent of the registered electors of the territory to be submitted to the board of county commissioners for the creation of a mosquito control district.¹³ Pursuant to section 388.041, Florida Statutes (1979), the board of county commissioners was required to determine the feasibility of creating such a district, and pursuant to section 388.051, Florida Statutes (1979), to submit the issue of creating such a district to the electorate for approval.¹⁴ This office has no information that such a procedure was utilized. In the absence of statutory authorization, however, a special district would not possess the authority to amend the terms of its enabling legislation.¹⁵

Moreover, the Legislature in 2010 enacted Chapter 10-266, Laws of Florida, which sought to amend the district's enabling legislation to specifically authorize the district to provide arthropod control.¹⁶ The act, however, was contingent upon approval by the electorate of the district.¹⁷ It appears that the act failed to gain the approval of the electorate at the general election in November 2010.¹⁸

Accordingly, in light of the above, the Board of Supervisors of the Spring Lake Improvement District does not appear to be statutorily authorized under Chapter 2005-342, Laws of Florida, or Chapter 298, Florida Statutes, to use district funds for the control of arthropods.

¹ While your letter referred to Ch. 289, Fla. Stat., it appears that you intended to refer to Ch. 298, Fla. Stat.

 $^2\,$ As this office noted in Attorney General Opinion 09-13 (2009), the Spring Lake Drainage District was created pursuant to Ch. 298, Fla. Stat. The name of the district was changed to the Spring Lake Improvement District by Ch. 71-669, Laws of Fla., which broadened the scope of the powers and duties of the district as they related to the construction of roads and highways, drainage and water control systems, water and sewage facilities, and recreational facilities. *And see* Chs. 77-563, 88-461, and 90-434, Laws of Fla., which subsequently amended Ch. 71-669, Laws of Fla.

³ See s. 9(24), Ch. 71-669, Laws of Fla.

⁴ Section 1, Ch. 2005-342, Laws of Fla.

⁵ See s. 10(27) of the district charter, as amended by s. 3, Ch. 2005-342, Laws of Fla. But see s. 4, Ch. 2005-342, Laws of Fla., stating that while the provisions of Ch. 298, Fla. Stat., are applicable to the district to the extent not inconsistent with the special act with the exception of certain enumerated sections of Ch. 298, Fla. Stat. Cf. s. 298.01, Fla. Stat., stating that it is the legislative intent that those water control districts established prior to July 1, 1980, pursuant to the process formerly continued in ss. 298.01, 298.02, and 298.03, may continue to operate as outlined in Ch. 298, Fla. Stat.

 $^6~See$ s. 10(10) of the district charter as provided in s. 3, Ch. 2005-342, Laws of Fla. And see s. 17 of the charter providing for the assessment of land for reclamation.

⁷ See Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 82 So. 346 (Fla. 1919); Halifax Drainage District of Volusia County v. State, 185 So. 123, 129 (Fla. 1938); State ex rel. Davis v. Jumper Creek Drainage District, 153 Fla. 451, 14 So. 2d 900, 901 (1943) (because the districts are creatures of statute, each board of supervisors must look entirely to the statute for its authority); Roach v. Loxahatchee Groves Water Control District, 417 So. 2d 814 (Fla. 4th DCA 1982). And see Ops. Att'y Gen. Fla. 89-34 (1989), 96-66 (1996), 98-20 (1998), and 04-26 (2004).

⁸ Halifax Drainage District of Volusia County v. State, supra; State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493 (Fla. 1973). And see, e.g., Ops. Att'y Gen. Fla. 02-30 (2002) and 04-48 (2004).

⁹ Section 298.005(3), Fla. Stat. And see Roach v. Loxahatchee Groves Water Control District, supra, stating that the Legislature, in providing for the organization of water control districts (then commonly known as drainage districts) by the enactment of a general law, now codified as Ch. 298, Fla. Stat., conferred certain limited powers on these statutory entities for the purpose of reclaiming and draining swamps and overflowed lands.

¹⁰ See s. 3 of Ch. 2005-342, Laws of Fla., reenacting s. 10 of the Spring Lake Improvement District's charter. *And see* ss. 15 and 16 of the charter providing for the adoption of a water control plan.

¹¹ See, e.g., ss. 10(17) (maintenance of roads), 10(22) (operation and maintenance of parks and facilities for indoor and outdoor recreation, cultural, and educational uses), and 10(24) (streetlights) of the district's charter. And see s. 10(25) and (26) of the district charter, respectively authorizing the district to require underground utilities and to require landowners within the district to maintain their respective properties "in a neat and attractive condition."

¹² Book 13, page 125, Minutes for a Meeting of the Board of Supervisors, April 15, 1980. You have also enclosed a letter from the Clerk of Courts, Highlands County, stating that no additional information regarding this motion was located. *See* Letter to Joseph DeCerbo, District Manager, from Pamela Nava, Deputy Clerk, dated January 10, 2011.

 $^{\rm 13}$ $\,$ Section 388.031, Fla. Stat. (1979), was repealed by s. 12, Ch. 80-281, Laws of Fla.

¹⁴ These procedures for creating a mosquito control district were also repealed by Ch. 80-281, Laws of Fla.

¹⁵ As noted *supra*, special districts possess only such powers as are expressly granted by statute or necessarily implied therefrom. See n.7, supra. Cf. Ops. 97-57 (1997), 93-05 (1993), 90-27 (1990), 81-55 (1981), 81-7 (1981), and 74-121 (1974) (county has no authority to amend or alter the provisions of a special act passed by the state Legislature). I note that s. 2, Ch. 2005-342, Laws of Fla., in ratifying and approving the creation of the district in 2005, provides in part that "[a]ll lawful debts, bonds, obligations, contracts, franchises, promissory notes, audits, minutes, resolutions, and other undertakings of the Spring Lake Drainage District are hereby validated and shall continue to be valid and binding on the Spring Lake Improvement District in accordance with their respective terms, conditions, covenants, and tenor." This language, which is identical to that contained in the district's original enabling legislation. Ch. 71-669, Laws of Fla., appears to be a ratification of actions taken when the district was the Spring Lake Drainage District.

¹⁶ See s. 1, Ch. 10-266, Laws of Fla., amending and renumbering s. 10 of the charter as s. 8 and providing in paragraph (1)(o) that the district has the power "[t]o construct and maintain facilities for and take measures to control mosquitoes and other arthropods of public health importance."

¹⁷ See s. 4, Ch. 10-266, *supra*, stating that the "act shall take effect only upon its approval by a majority vote of those qualified electors of the district voting in a referendum conducted in accordance with the provisions of law relating to elections currently in force, except that this section and section 3 shall take effect upon this act becoming a law." ¹⁸ See http://www.votehighlands.com/ for the results of the 2010 general election, including the referendum on the proposed amendment to the district charter.

AGO 11-03 – February 25, 2011

E911 – PUBLIC SAFETY TELECOMMUNICATORS – AIRPORTS – EMERGENCIES – SAFETY – TRAINING – DEPARTMENT OF HEALTH

COMMUNICATION SPECIALISTS AS PUBLIC SAFETY TELECOMMUNICATORS SUBJECT TO TRAINING REQUIREMENTS

To: Mr. Charles D. Bailey, Jr., general counsel to the Sarasota Manatee Airport Authority

QUESTION:

Does section 401.465(2)(a), Florida Statutes, require communication specialists within the Sarasota Bradenton International Airport's communications center to be trained and certified as "911 public safety telecommunicators" when they do not take E911 calls and they are not employed at a 911 "answering point?"

SUMMARY:

Section 401.465(2)(a), Florida Statutes, does not require communication specialists within the Sarasota Bradenton International Airport's communications center to be trained and certified as "911 public safety telecommunicators."

The Sarasota-Manatee Airport Authority is a special district in Manatee and Sarasota Counties created for the purpose of "acquiring, constructing, improving, financing, operating, and maintaining airport facilities."¹ The authority has been designated a public instrumentality by the Legislature and is deemed to be exercising an essential governmental function.² You have advised this office that the authority owns and operates the Sarasota Bradenton International Airport ("SRQ") which serves scheduled passenger air carriers in Sarasota and Manatee Counties. The airport straddles the county line between the two counties, and a portion of the airport is located in the City of Sarasota. You question whether communication specialists working for the Sarasota Bradenton International Airport's communications center are required by section 401.465(2)(a), Florida Statutes, to be trained and certified as "911 public safety telecommunicators." Amendments made during the 2010 legislative session to section 401.465(2)(a), Florida Statutes, the "Denise Amber Lee Act," require that, effective October 1, 2010, any person employed as a 911 public safety telecommunicator at a public safety answering point, as that term is defined in section 365.172(3)(a), Florida Statutes,³ must be certified by the Florida Department of Health.⁴ Certification requires the telecommunicator to receive training of no less than 232 hours and to pass an exam.⁵ Every two years, the telecommunicator must receive 20 additional hours of training for certificate renewal.⁶ The law also recognizes certain "grandfather" exceptions.⁷

Section 401.465, Florida Statutes, was amended by Chapter 2010-188, Laws of Florida, and those changes became effective July 1, 2010.⁸ The bill described the situation regarding Florida's E911 system prior to enactment of Chapter 2010-188, Laws of Florida:

Emergency dispatchers are often the initial point of contact for the public when emergency assistance is required. Emergency dispatchers receive emergency calls from the public requesting police, fire, medical or other emergency services. These personnel determine the nature and location of the emergency, determine the priority of the emergency, and communicate the nature of the call to police, fire, ambulance, or other emergency units as necessary and in accordance with established procedures. Emergency dispatchers receive and process 911 emergency calls, maintain contact with all units on assignment, and maintain status and location of police, fire, and other emergency units, as necessary. Emergency dispatchers may be trained to enter, update, and retrieve information from a variety of computer systems to assist callers.⁹

The bill also notes that a variety of training programs existed to train and certify emergency dispatchers including in-house training and certificate courses from private vendors.¹⁰

Chapter 2010-188, Laws of Florida, amended section 401.465, Florida Statutes, to expand the definition of a "public safety telecommunicator," formerly designated an "emergency dispatcher," to read as follows:

"911 public safety telecommunicator emergency dispatcher" means a person employed by a state agency or local government as a public safety dispatcher or 911 operator whose duties and responsibilities include <u>the</u> answering, <u>receiving</u>, <u>transferring</u>, <u>and dispatching functions related to</u> 911 calls; dispatching law enforcement officers, fire rescue services, emergency medical services, and other public safety services to the scene of an emergency; providing real-time information from federal, state, and local crime databases; or supervising or serving as the command officer to a person or persons having such duties and responsibilities. However, the term does not include administrative support personnel, including, but not limited to, those whose primary duties and responsibilities are in accounting, purchasing, legal, and personnel. (Underscored text was added by the amendment; text stricken through was deleted by the amendment.)

The intent of the Legislature in adopting Chapter 2010-188, Laws of Florida, appears to have been the professionalization of E911 service by creating a mandatory statewide system for the certification and training of these personnel;¹¹ expanding the duties and functions of public safety telecommunicators;¹² adopting penalties for violations of the act;¹³ and extending funding options for implementing the provisions of the act.¹⁴

According to your letter, in Sarasota County, the central dispatch 911 answering point is the Public Safety Communications ("PSC") Center. The PSC is a joint venture between the Sarasota County Sheriff's Office and the Public Safety Communications Services section of the Sarasota County Emergency Services Business Center. The PSC provides full communications services for the police and fire departments in the area. In Manatee County, the county operates the Emergency Communications Center ("ECC") which serves as the 911 answering and dispatch center for Manatee County Emergency Medical Service and eleven local fire agencies. The ECC is also the call processing center for the Manatee County Sheriff's Office and the City of Bradenton Beach Police Department.

You advise that the SRQ has implemented, as required by federal law,¹⁵ an airport emergency plan for responding to aircraft incidents and accidents, bomb incidents, structural fires, and other emergencies solely on the airport grounds. These functions are provided through SRQ's aircraft rescue and firefighting department. In addition, pursuant to federal law,¹⁶ the airport employs its own police department, staffed by 15 law enforcement officers. These officers are authorized to make arrests for violations of state or federal law or applicable county or municipal ordinance if the violation occurs on airport grounds.

The firefighting, rescue, and law enforcement functions at SRQ are supported by an Airport Communications Center ("AIRCOM") located in the main airport terminal. Communication specialists within that department dispatch only airport emergency calls to SRQ firefighters, rescue, or law enforcement to various points of the airport where they may be needed. You state that AIRCOM utilizes two internal emergency telephone numbers: a "hotline" linking the air traffic control tower, aircraft rescue and firefighting department, and the communications center; and an internal emergency line that is only accessible to airport tenants, staff, and holders of security badges. Neither of these lines is capable of receiving calls placed to the telephone number "911" and E911 calls coming into the Sarasota and Manatee call centers are never transferred to AIRCOM or to SRQ firefighters, rescue, or police units. You state that when "911" is dialed from any pay phone, outgoing tenant or airport phone, or cell phone, the call goes to either the Sarasota PSC or Manatee ECC depending on the location of the caller. No "911" calls are routed to or transferred to AIRCOM communication specialists although Sarasota PSC and Manatee ECC do notify AIRCOM's communication specialists of any emergencies occurring on airport grounds once they have dispatched county units to the scene. Thus, the airport communications center would not appear to be an "answering point" for purposes of section 365.172(3)(a), Florida Statutes, which defines that term to mean "the public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to the calls."

While SRQ's communication specialists may be seen to be a type of public safety dispatcher, these employees of the airport do not answer, receive, transfer, or dispatch 911 calls. Nor does it appear that the airport serves as a public safety answering point as that term is defined in section 365.172(3)(a), Florida Statutes.

In sum, based upon the information you have provided and in view of the Legislature's intent that section 401.465, Florida Statutes, result in the professionalization of the E911 service, it is my opinion that section 401.465(2)(a), Florida Statutes, does not require communication specialists within the Sarasota Bradenton International Airport's communications center to be trained and certified as "911 public safety telecommunicators."

³ Section 365.172(3)(a), Fla. Stat., defines a public safety "[a]nswering point" as "the public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to the calls."

- ⁴ Section 401.465(2)(a), Fla. Stat.
- ⁵ See Rule 64J-3.002, Fla. Admin. C.
- ⁶ Rule 64J-3.003, Fla. Admin. C.
- ⁷ See s. 401.465(2), Fla. Stat.
- ⁸ See s. 5, Ch. 2010-188, Laws of Fla.

⁹ See The Florida Senate Bill Analysis and Fiscal Impact Statement on CS/CS/CS/SB 742, dated April 8, 2010, by the Committee on Health and Human Services Appropriations.

¹ Section 3(1), Ch. 2003-309, Laws of Fla.

 $^{^{2}}$ Id.

 10 *Id*.

¹¹ See Item III, s. 3, p. 7, The Florida Senate Bill Analysis and Fiscal Impact Statement for CS/CS/CS/SB 742 prepared by the Health and Human Services Appropriations Committee, dated April 8, 2010. And see Op. Att'y Gen. Fla. 10-27 (2010).

- ¹² Section 3, Ch. 2010-188, Laws of Fla.
- ¹³ Section 2, Ch. 2010-188, Laws of Fla.

¹⁴ Section 1, Ch. 2010-188, Laws of Fla., amends s. 365.172, Fla. Stat., to add dispatching functions to uses of E911 fees.

¹⁵ 14 C.F.R. s. 139.325.

¹⁶ Title 49 C.F.R. Parts 1542 and 1544.

AGO 11-04 – March 15, 2011

GOVERNMENT IN THE SUNSHINE – CRIMINAL JUSTICE COMMISSIONS – COUNTIES – SHERIFFS – STATE ATTORNEYS

EFFECT OF APPOINTMENT OF OTHER TO SERVE ON COMMISSION INSTEAD OF SHERIFF OR STATE ATTORNEY ON COMMUNICATION BETWEEN SHERIFF AND STATE ATTORNEY

To: The Honorable Michael F. McAuliffe, State Attorney, Fifteenth Judicial Circuit

QUESTION:

Would section 286.011, Florida Statutes, apply to communications between the state attorney and the sheriff when, as authorized by ordinance, each elects to appoint an individual in each officer's place to serve as a member of the Palm Beach County Criminal Justice Commission?

SUMMARY:

When the state attorney and the sheriff elect to appoint individuals to serve on the Palm Beach County Criminal Justice Commission in the place of each officer, as authorized by county ordinance, neither the state attorney nor the sheriff would appear to be a member of the commission such that communications between the two officials would be subject to section 286.011, Florida Statutes.

You state that the Palm Beach County Criminal Justice Commission (commission) is an advisory board established by county ordinance. The commission functions to make recommendations to the county commission on policies and programs designed to: coordinate law enforcement and crime prevention efforts; provide an efficient, cost effective, and timely county criminal justice system; and permanently reduce crime.¹ The county ordinance creating the commission currently provides that the sheriff and the state attorney are members of the commission.² There has been concern that in numerous instances when the sheriff and the state attorney communicate regarding pending criminal investigations and prosecutions that there may be discussion involving matters which may foreseeably come before the commission for official business. To address these concerns, the county is contemplating amending the ordinance to enable constitutional officers to either serve as members of the board or to appoint others to serve in their places. The question arises, therefore, whether communications between two such officers who have appointed individuals to serve on the commission would be subject to section 286.011, Florida Statutes.

Section 286.011, Florida Statutes, commonly referred to as the "Sunshine Law," provides a right of access to governmental proceedings of public boards and commissions. The law applies equally to elected or appointed boards and covers any gathering, whether formal or casual, of two or more members of the same board to discuss a matter upon which foreseeable action will be taken by the board.³

There is no question that the Palm Beach County Criminal Justice Commission, a collegial commission created by county ordinance to advise the county commission on criminal justice matters, is a public board or commission subject to the Sunshine Law.⁴ In Attorney General Opinion 93-41, this office determined that communications between the sheriff and state attorney, as members of the county's criminal justice commission, were subject to the Sunshine Law when such discussions involved matters which foreseeably could come before the commission. The opinion noted, however, that to the extent that the discussions related to an ongoing criminal case or investigation or related to factual inquiries or matters upon which the commission was not required to act, the discussions would not fall within the scope of the Sunshine Law.

In the factual situation you have presented, the proposed county ordinance states that the sheriff and the state attorney will have the option of serving on the commission or each may designate an individual to serve on the board in his or her stead. As you have recognized, the Sunshine Law does not allow a board or commission to delegate its business to an alter ego in order to escape application of the law.⁵ This would apply equally to an individual who serves on a board or commission. It does not appear, however, that in appointing an individual to serve on the commission as provided by county ordinance, the sheriff or state attorney would be delegating authority to an alter ego; rather, to the extent the appointment of the individual removes the sheriff or the state attorney from any connection with the commission, the appointed individual becomes a member of the commission in his or her own right subject to the restrictions of the Sunshine Law.

As you note, should the sheriff and state attorney appoint individuals to serve on the commission, they (the sheriff and the state attorney) should not serve as a liaison between the appointed commission members on matters that may foreseeably come before the commission.⁶

Accordingly, it is my opinion that the sheriff or the state attorney who, as authorized by county ordinance, appoints an individual to serve on the Palm Beach County Criminal Justice Commission, is not a member of the commission such that communications between the sheriff and the state attorney would be subject to the Sunshine Law.

³ See Hough v. Stembridge, 278 So. 2d 288 (Fla. 3d DCA 1973); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); and Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969).

⁴ See Op. Att'y Gen. Fla. 93-41 (1993) (Hillsborough County Criminal Justice Commission created by county ordinance and serving a countywide agency developing and making recommendations on criminal justice issues is subject to, and must comply with the requirements of, the Government-in-the-Sunshine Law).

⁵ See IDS Properties, Inc. v. Town of Palm Beach, 279 so. 2d 353, 359 (Fla. 4th DCA 1973), certified question answered sub. nom., Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974). See also News-Press Publishing Company, Inc. v. Carlson, 410 So. 2d 546, 547-548 (Fla. 2d DCA 1982) (when public officials delegate *de facto* authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, delegates stand in the shoes of such public officials under the Sunshine Law).

⁶ See Op. Att'y Gen. Fla. 74-47 (1974) (city manager who is not member of city commission may meet with individual council members, but may not act as liaison for council members to circulate information and thoughts of individual members).

¹ Section 2-217, Div. 5, Art. 5, Ch. 2, Palm Beach County Code of Ordinances (Ord. No. 88-16, s. 2, 8-16-88), setting forth the objectives of the Palm Beach County Criminal Justice Commission.

 $^{^{2}}$ See Sec. 2-216, Div. 5, Art. 5, Ch. 2, Palm Beach County Code of Ordinances.

AGO 11-05 - March 15, 2011

OFFICERS – CLERK OF COURT – DUAL OFFICE-HOLDING – INCOMPATIBILITY – DEPUTY CLERK

WHETHER DEPUTY CLERK OF COURT MAY SIMULTANEOUSLY HOLD OFFICE OF COUNTY COMMISSIONER WITHOUT VIOLATING DUAL OFFICE-HOLDING PROHIBITION AND COMMON LAW RULE OF INCOMPATIBILITY

To: The Honorable James B. Jett, Clay County Clerk of the Circuit Court

QUESTION:

May a deputy clerk of court, employed in the recording department within the Clerk of Court's office, also hold an elected position as a county commissioner without violating the dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution?

SUMMARY:

A deputy clerk of court, employed in the recording department within the Clerk of Court's office as the Director of Special Projects, may also hold an elected position as a county commissioner without violating the dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution.

As the Clay County Clerk of the Circuit Court, responsible for the operation of the Clerk of Court's office, you have asked whether an employee of that office who works in the recording department may simultaneously hold the position of county commissioner without violating the constitutional dual office-holding prohibition. You advise that as a deputy clerk of court this employee is not vested with any powers in his own right, but merely acts as an agent of the elected clerk of courts in fulfilling his duties and responsibilities. These duties are ministerial and he performs them as they are assigned to him by the clerk of courts. As the head of the agency, you are concerned that the acceptance of an office by a member of your staff may result in a vacancy in the position of deputy clerk in light of the constitutional prohibition against dual office-holding.¹

Article II, section 5(a), Florida Constitution, provides in part:

No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except . . . any officer may be a member of a . . . statutory body having only advisory powers.

This constitutional provision prohibits a person from serving simultaneously in more than one state, county, or municipal office. The prohibition applies to both elected and appointed offices.² It is not necessary that the two offices be located within the same governmental unit or local jurisdiction. Thus, for example, a municipal officer is precluded from holding not only another municipal office within his or her municipality, but also a municipal office in another jurisdiction. Likewise, a municipal officer is precluded from simultaneously holding a state or county office within or outside his home county.

While the term "office" is not defined by the Constitution, the Supreme Court of Florida has stated that the term "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office "³ In the absence of any definition of the term "office" or "officer" for purposes of interpreting the constitutional dual officeholding prohibition, the issue becomes whether a particular undertaking constitutes an "office" or is instead an "employment." Employment does not subject the holder of the position to dual office-holding considerations since the courts have determined that employment does not involve the delegation of any of the sovereign power of the state.⁴

The Florida Supreme Court has stated that a person in government service, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature and defined by rules prescribed by government and not by contract, consisting of the exercise of important public powers, trusts, or duties, as part of the regular administration of the government is a public officer.⁵ Every "office," as that term is used in the constitution, implies an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws.⁶ Thus, it is the delegation of any part of the authority of the sovereign that distinguishes an officer from an employee.

Service on the governing body of a governmental entity, such as a city or county, clearly constitutes an office.⁷ Thus, as an elected county commissioner your employee is or will be an officer for purposes of the constitutional provision. The issue, then, is whether service as a deputy clerk of court is an office.

This office has stated previously that the constitutional prohibition against dual office-holding does not generally apply to those persons who are not vested with official powers in their own right, but merely exercise certain powers as agents of governmental officers. Thus, in Attorney General Opinion 88-56, this office focused on the nature of the duties performed by a deputy clerk in determining whether he was an officer or an employee. Finding that the deputy clerk performed largely ministerial duties as an assistant to the clerk rather than the substitute duties of a true deputy, this office concluded that the position of deputy clerk under those circumstances evinced an employment rather than an office.⁸

You have stated in your letter that this position is not vested with any powers in its own right. Rather, the deputy clerk performs ministerial duties and responsibilities as those are assigned by the clerk of courts. A copy of the job description provided by your office indicates that the Director of Special Projects works within the Clerk's recording department to supervise the office's move to a paperless court work environment:

He/she serves as a supervisor for the special projects team with primary responsibilities of developing procedures, evaluate methods, organize and implement the scanning, linking, and subsequent destruction of court cases paper files to create a total electronic court case environment.

The purpose of this special projects team is to achieve the goal of the Clerk of Court's office in providing a total paperless court system and eliminate all paper files by converting them to electronic case files.⁹

While the Director of Special Projects is obviously a significant part of the Clerk of Court's team, I cannot say from this description that this position constitutes an office subject to the dual office-holding prohibition.

Therefore, it is my opinion that a deputy clerk of court, employed in the recording department within the Clerk of Court's office as the Director of Special Projects, may also hold an elected position as a county commissioner without violating the dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution.

Finally, I would note that while the viability of a common law rule of incompatibility is questionable in this state following the Florida Supreme Court's holding in *State ex rel. Clayton v. Board of Regents*,¹⁰ for many years Florida courts and this office recognized such a rule. The purpose of the common law rule of incompatibility was to assure not only the actuality of undivided loyalty, but also the appearance of undivided loyalty.¹¹ As one court stated:

Incompatibility exists "where in the established governmental scheme one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another." ... If the duties of the two offices are such that when "placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions it is sufficient to declare them legally incompatible."¹²

Thus, this office stated that a conflict between the duties and functions of the two offices exists where one was subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one had the power to appoint or remove or set the salary or the other, or where the duties clash, inviting the incumbent to prefer one obligation over the other.¹³ The common law rule was also applicable to an officer seeking employment that was incompatible with the duties and functions of his or her office.¹⁴

With regard to any incompatibility in the two positions involved in your request, you have advised this office that the Clay County Clerk of Courts has been eliminated from the county budgetary process through changes to the Florida Constitution requiring clerks' offices to be funded through fees and service charges collected by that office and handled by the State of Florida and the Clerks of Court Operations Corporation.¹⁵ The deputy clerk about whom you inquire is paid from fees generated from within the recording department of your office. His position as a deputy clerk of court does not appear to be subordinate or subject in any way to the office of county commissioner to which he seeks election. Thus, while the common law rule of incompatibility no longer appears to be a concern for governmental officers in Florida, in the situation you have presented, application of that rule would not preclude the accomplishment of these two positions by one individual.

¹ See In re Advisory Opinion to the Governor, 79 So. 874 (Fla. 1918) (when a person holding one office is appointed to and accepts another office, such appointment and acceptance vacates the person's right and status to the first office); and Ops. Att'y Gen. Fla. 06-27 (2006), 06-13 (2006), 94-40 (1994), and 77-63 (1977). *Cf. Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970) (acceptance of an incompatible office by one already holding office operates as a resignation of the first).

² See Ops. Att'y Gen. Fla. 69-2 (1969) and 80-97 (1980).

³ See State ex rel. Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919).

⁴ See State ex rel. Holloway v. Sheats, 83 So. 508 (Fla. 1919) ("An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes perhaps the most decisive difference between an employment and an office, and between an employee and an officer"). *And see*, e.g., Ops. Att'y Gen. Fla. 96-91 (1996) (special master of county value adjustment board an officer); 84-93 (1984) (legal counsel to local government code enforcement board an employee); and 73-332 (1973) (attorney for county commission an employee).

⁵ State ex rel. Clyatt v. Hocker, 22 So. 721 (Fla. 1897).

⁶ See State ex rel. Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919) ("An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office, and between an employe[e] and an officer."). And see Ops. Att'y Gen. Fla. 10-19 (2010), 96-91 (1996), and 84-93 (1984) (legal counsel to local government code enforcement board an employee).

⁷ See Ops. Att'y Gen. Fla. 08-15 (2008), 05-59 (2005), 72-348 (1972), and 74-73 (1974).

⁸ And see Op. Att'y Gen. Fla. 96-48 (1996).

⁹ See Clay County Clerk of Court Job Description for Director of Special Projects.

¹⁰ 635 So. 2d 937 (Fla. 1994).

¹¹ See Ops. Att'y Gen. Fla. 93-42 (1993) and 88-56 (1988).

¹² Gryzik v. State, 380 So. 2d 1102, 1104 (Fla. 1st DCA 1980), petition for review denied, 388 So. 2d 1113 (Fla. 1980).

¹³ See, e.g., Ops. Att'y Gen. Fla. 72-348 (1972) (city council may not appoint one of its own members as chief of police); 72-102 (1972) (board of trustees of hospital district should not appoint one of its members to the position of consulting pharmacist at a nominal fee); 73-359 (1973) and 80-17 (1980) (board of county commissioners may not appoint one of its own members to serve on governing board of special district); and 75-60 (1975) (county commission should not appoint one of its members to county industrial authority).

¹⁴ See Op. Att'y Gen. Fla. 70-46 (1970).

¹⁵ See ss. 28.35 - 28.37, Fla. Stat.

AGO 11-06 – March 15, 2011

MOSQUITO CONTROL DISTRICTS - OFFICES - VACANCIES

APPOINTMENT TO FILL VACANCY ON FLORIDA KEYS MOSQUITO CONTROL DISTRICT BOARD OF COMMISSIONERS TO BE MADE BY THE GOVERNOR

To: Ms. Lorena Holley, General Counsel, Florida Department of Agriculture and Consumer Services

QUESTION:

Does section 388.111, Florida Statutes, or section 3(3), Chapter 2002-346, Laws of Florida, control the manner in which a vacancy is filled on the board of commissioners for the Florida Keys Mosquito Control District?

SUMMARY:

Section 3(3), Chapter 2002-346, Laws of Florida, as the more recent and specific legislative directive, controls the manner in which a vacancy is filled and calls for the Governor to appoint an individual to fill a vacancy on the board of commissioners for the Florida Keys Mosquito District.

You state that the recent death of a commissioner for the Florida Keys Mosquito Control District, creating a vacancy on the board, has highlighted an apparent conflict between section 388.111, Florida Statutes, under which the Commissioner of Agriculture fills a vacancy on the board of a mosquito control district, and section 3(3), Chapter 2002-346, Laws of Florida, providing that the Governor appoints an individual to fill a vacancy on the board of the Florida Keys Mosquito Control District.¹

Chapter 388, Florida Statutes, generally addresses the creation and operation of mosquito control districts in this state.² Section 388.111, Florida Statutes, states that "[i]n the event of a vacancy due to any cause in any board of commissioners, the same shall be filled by appointment by the Commissioner of Agriculture for the unexpired term." Thus, for those mosquito control districts created and operating under the provisions of Chapter 388, Florida Statutes, the controlling statute directs that the Commissioner of Agriculture fills by appointment any vacancy on the board of commissioners of the district.

The Florida Keys Mosquito District was created by special act.³ A board of five elected commissioners governs the district.⁴ Upon election to the board, a commissioner is required to make and execute to the Governor a surety bond, conditioned on the faithful execution of his or her office.⁵ Relative to vacancies on the board, the special act provides that "[v]acancies created by the resignation, death, or removal from said board of commissioners shall also be filled by appointment by the Governor."⁶

It is a general rule of statutory construction that a specific statute governing a certain subject will control over a general statute relating to the same subject matter.⁷ Moreover, the last expression of the Legislature takes precedence over earlier enactments on the same subject.⁸ As the more specific and later in time, the provisions in section 3(3), Chapter 2002-346, Laws of Florida, would apply to the appointment of individuals to fill vacancies on the Florida Keys Mosquito Control District. $^{\rm 9}$

Accordingly, it is my opinion that the Governor has the authority to appoint individuals to fill vacancies which may occur on the board of commissioners for the Florida Keys Mosquito Control District, under section 3(3), Chapter 2002-346, Laws of Florida.

³ See Ch. 2002-346, Laws of Fla., codifying all previous special acts relating to the Monroe County Mosquito Control District and stating the Legislature's intent to "provide a single, comprehensive special act charter for the district, including all current legislative authority granted to the district by its several legislative enactments and any additional authority granted by this act."

⁴ Section 3(1), Ch. 2002-346, Laws of Fla.

⁵ See s. 3(3), Ch. 2002-346, Laws of Fla. Use of the term "also" relates to the previous sentence in subsection (3) directing that should a newly elected commissioner fail to make and file the required surety bond with 60 days of his or her election or appointment, a vacancy occurs which shall be filled by the Governor.

 6 Id.

⁷ See McKendry v. State, 641 So. 2d 45 (Fla. 1994) (specific statute covering a particular subject area will control over a statute covering the same and other subjects in more general terms); *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984) (when a special act and a general law conflict, the special act will prevail).

⁸ See Florida Association of Counties, Inc. v. Department of Administration, Division of Retirement, 580 So. 2d 641 (Fla. 1st DCA 1991), approved, 595 So. 2d 42 (Fla. 1992) (general rule is that in cases of conflicting statutory provisions, latter expression will prevail over former).

⁹ Section 388.111, Florida Statutes, was created by s. 2, Ch. 59-195, Laws of Fla. (1959), and provided that "[i]n the event of a vacancy due to any cause in any board of commissioners, the same shall be filled by appointment by the governor for the unexpired term." Section 388.111, Fla. Stat., was amended by s. 3, Ch. 92-203, Laws of Fla., to direct the Commissioner of Agriculture to make the appointment to fill vacancies on the boards of mosquito control districts.

¹ A response to your inquiry necessarily requires comment upon the authority of the Governor. The Governor's Office has advised that it has no objection to this office commenting on the issue.

² See ss. 388.021-388.4111, Fla. Stat.

AGO 11-07 - April 20, 2011

TAX DEEDS – TAX CERTIFICATES – TAXATION

REDEMPTION OF TAX CERTIFICATES ISSUED AFTER APPLICATION FOR TAX DEED, BUT PRIOR TO TAX DEED SALE

To: Mr. Daniel S. McIntyre, St. Lucie County Attorney

QUESTIONS:

1. Is a tax certificate sold to a non-governmental party following a tax deed application, but prior to the subsequent tax deed sale, a lien of record for purposes of disbursing overbid monies resulting from the tax deed sale pursuant to section 197.582, Florida Statutes?

2. Should the amount necessary to redeem a tax certificate sold under the conditions in Question One be included in the minimum opening bid for the tax deed sale?

3. If the answer to Question Two is negative, should the Clerk of Court use tax deed overbid monies to reimburse the purchaser of a tax deed who subsequently redeems the tax certificate sold after the tax deed application date but prior to the tax deed sale?

SUMMARY:

1. A tax certificate sold to a non-governmental party following a tax deed application, but prior to the subsequent tax deed sale, constitutes a first lien on the property subject to disbursement under the terms of Chapter 197, Florida Statutes. In light of the lack of clear direction regarding such a lien, however, it may be advisable to seek legislative clarification on the matter.

2. The amount necessary to redeem a tax certificate issued after application for a tax deed has been made may not be included in the minimum opening bid pursuant to section 197.502(6), Florida Statutes.

3. In light of the discussion in Question One, no response is necessary.

The questions you pose are based upon a situation where a tax certificate is sold after an application for a tax deed has been filed with the tax collector. The subsequently issued tax certificate apparently is not included in the sums that were paid by the person applying for the tax deed and the governing statutes do not clearly specify how the lien created by such a certificate is to be extinguished. The following discussion is presented in the progression from application and purchase of a tax certificate to application for a tax deed and the subsequent sale and distribution of the proceeds in order to address the three interrelated questions.

Section 197.122, Florida Statutes, states that "[a]ll taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed and shall continue in full force from January 1 of the year the taxes were levied until discharged by payment or until barred under chapter 95."¹ Should a property owner fail to pay the tax due on real property and such tax becomes delinquent, "on or before June 1 or the 60th day after the date of delinquency, whichever is later, the tax collector shall advertise once each week for 3 weeks and shall sell tax certificates on all real property with delinquent taxes."²

A tax certificate is and represents:

a legal document, representing unpaid delinquent real property taxes, non ad valorem assessments, including special assessments, interest, and related costs and charges, issued in accordance with this chapter against a specific parcel of real property and *becoming a first lien thereon, superior to all other liens*, except as provided by s. 197.573(2). (e.s.)

Section 197.432(1), Florida Statutes, provides the framework to be followed for the sale of tax certificates for unpaid taxes:

On the day and approximately at the time designated in the notice of the sale, the tax collector shall commence the sale of tax certificates on those lands on which taxes have not been paid, and he or she shall continue the sale from day to day until each certificate is sold to pay the taxes, interest, costs, and charges on the parcel described in the certificate. In case there are no bidders, the certificate shall be issued to the county. The tax collector shall offer all certificates on the lands as they are assessed.³

The statute further states that the lien created through the sale of a tax certificate may not be enforced in any manner except as prescribed in Chapter 197, Florida Statutes.⁴ The tax collector is directed to make a "list of tax certificates sold" indicating the date of the sale, the number of each certificate, the name of the owner as returned, a description of the land within each certificate, the name of the purchaser, the interest rate bid, and the amount for which the sale was made.⁵

Thus, the plain language of the statute makes a tax certificate superior

to all other liens, with a stated exception in section 197.573(2), Florida Statutes, not applicable to the instant situation.⁶ Section 197.432(2), Florida Statutes, however, states that "[a] lien created through the sale of a tax certificate may not be enforced in any manner except as prescribed in this chapter."

Section 197.502, Florida Statutes, sets forth the requirements of applying for a tax deed by the holder of a tax certificate:

(1) The holder of any tax certificate, other than the county, at any time after 2 years have elapsed since April 1 of the year of issuance of the tax certificate and before the expiration of 7 years from the date of issuance, may file the certificate and an application for a tax deed with the tax collector of the county where the lands described in the certificate are located. The application may be made on the entire parcel of property or any part thereof which is capable of being readily separated from the whole. The tax collector shall be allowed a tax deed application fee of \$75.

(2) Any certificateholder, other than the county, who makes application for a tax deed shall pay the tax collector at the time of application all amounts required for redemption or purchase of all other outstanding tax certificates, plus interest, any omitted taxes, plus interest, any delinquent taxes, plus interest, and current taxes, if due, covering the land.⁷ (e.s.)

The tax collector must then deliver to the clerk of the circuit court a statement that payment has been made for all outstanding certificates.⁸

When a tax certificate holder applies for a tax deed, the statute contemplates that all outstanding tax certificates will be redeemed or purchased and omitted taxes, delinquent taxes, and current taxes which are due will be paid. At such time, there would be no taxes due and no unpaid taxes for which a tax certificate could be issued. During the period between the application for the tax deed and the execution of the tax deed sale, however, it is feasible that taxes may become due and delinquent. For instance, an application for a tax deed might be made prior to the November 1 due date of a taxable year. The taxes become delinquent on April 1 of the following year. If the tax deed sale for the particular piece of property does not occur before April 1 of the subsequent year in which the taxes became due, a tax certificate could be sold for the delinquent taxes.

Section 197.502(6), Florida Statutes, sets forth the opening bids for a particular property subject to a tax deed sale and pertinent to your questions, subsections (b) and (c) provide:

(b) The opening bid on an individual certificate on nonhomestead

11-07

property shall include, *in addition to the amount of money paid to the tax collector by the certificateholder at the time of application*, the amount required to redeem the applicant's tax certificate and all other costs and fees paid by the applicant.

(c) The opening bid on property assessed on the latest tax roll as homestead property shall include, in addition to the amount of money required for an opening bid on nonhomestead property, an amount equal to one-half of the latest assessed value of the homestead. Payment of one-half of the assessed value of the homestead property shall not be required if the tax certificate to which the application relates was sold prior to January 1, 1982.⁹ (e.s.)

Thus, there is a statutory scheme directing the clerk of the circuit court to include certain amounts in the opening bid for a tax deed sale. There is no mention of taxes that have become due after the application for the tax deed sale or of tax certificates that may have been sold after the application for the tax deed sale being included in the opening bid for the property. Where the Legislature has prescribed the manner in which something is to be done, it effectively operates as a prohibition against its being done in any other way.¹⁰ Thus, I cannot conclude that the opening bid for a tax deed sale may contain any amounts other than those set forth in section 197.502(6), Florida Statutes. Accordingly, the amount of a tax certificate issued after an application for a tax deed has been made may not be included in the minimum opening bid pursuant to section 197.502(6), Florida Statutes.

Section 197.582, Florida Statutes, prescribes the manner in which proceeds from a sale of a tax deed will be disbursed:

(1) If the property is purchased by any person other than the certificateholder, the clerk shall forthwith pay to the certificateholder all of the sums he or she has paid, including the amount required for the redemption of the certificate or certificates together with any and all subsequent unpaid taxes plus the costs and expenses of the application for deed, with interest on the total of such sums for the period running from the month after the date of application for the deed through the month of sale at the rate of 1.5 percent per month. The clerk shall distribute the amount required to redeem the certificate or certificates and the amount required for the redemption of other tax certificates on the same land with omitted taxes and with all costs, plus interest thereon at the rate of 1.5 percent per month for the period running from the month after the date of application for the deed through the month of sale, in the same manner as he or she distributes money received for the redemption of tax certificates owned by the county.

(2) If the property is purchased for an amount in excess of the statutory bid of the certificateholder, the excess shall be paid over and disbursed by the clerk. If the property purchased is homestead property and the statutory bid includes an amount equal to at least one-half of the assessed value of the homestead, that amount shall be treated as excess and distributed in the same manner. The clerk shall distribute the excess to the governmental units for the payment of any lien of record held by a governmental unit against the property. In the event the excess is not sufficient to pay all of such liens in full, the excess shall then be paid to each governmental unit pro rata. If, after all liens of record of the governmental units upon the property are paid in full, there remains a balance of undistributed funds, the balance of the purchase price shall be retained by the clerk for the benefit of the persons described in s. 197.522(1)(a), except those persons described in s. 197.502(4) (h), as their interests may appear. The clerk shall mail notices to such persons notifying them of the funds held for their benefit. Any service charges, at the same rate as prescribed in s. 28.24(10), and costs of mailing notices shall be paid out of the excess balance held by the clerk. Excess proceeds shall be held and disbursed in the same manner as unclaimed redemption moneys in s. 197.473. In the event excess proceeds are not sufficient to cover the service charges and mailing costs, the clerk shall receive the total amount of excess proceeds as a service charge. (e.s.)

This statutory language recognizes the existence of "other tax certificates" in addition to the ones purchased by the certificateholder and directs the clerk to distribute such amounts in the same manner as he or she would for county owned tax certificates. The "other tax certificates," however, are "other certificates on the same land with omitted taxes" which would appear to apply to tax certificates held by the county. When there are no bidders on the sale of a tax certificate, the certificate is issued to the county which is not required, as private individuals, to pay the taxes in order to receive the certificate.¹¹ Such taxes become "omitted taxes" which must be added to the required minimum bid.¹² Thus, while there is mention of "other tax certificates" in the disbursement of tax deed sale proceeds, it is not clear that the term would apply to a tax certificate issued after the application for the tax deed has been made.

This office has recognized under a predecessor statute to section 197.582, Florida Statutes (section 194.22, Florida Statutes), that outstanding tax certificates held by persons other than a county or municipality should be treated in the same manner as tax liens held by a county or municipality.¹³ The opinion observed that the purchaser of a tax lien or certificate obtains the tax lien of the county and "holds the same in that capacity." In Attorney General Opinion 62-59, it was

posited that such a tax certificate or lien is on parity with that of other like certificates held by the county and that privately held certificates may be redeemed "through the clerk of the circuit court of the respective counties wherein such lands are situated."¹⁴ It was concluded that the distribution of the proceeds of a tax deed sale is, in effect, a redemption of the tax liens as the proceeds will allow.

While the statutes have been amended and renumbered, there would appear to be no change which would preclude the application of the same rationale set forth in the 1962 opinion. I would note that Rule 12D-13.065, Florida Administrative Code, governing the disbursement of proceeds from a tax deed sale, states:

(2) If the property is purchased for an amount in excess of the minimum bid of the tax deed applicant, the excess shall be distributed to governmental units for the payment of any lien of record held by a governmental unit against the property. If the excess is not sufficient to pay all of such liens in full, then the governmental units shall be paid the excess on a pro rata basis. *Liens of governmental units not satisfied in full shall survive the issuance of the tax deed.*¹⁵

(3) Any remaining funds held by the clerk shall be distributed to those persons described in Section 197.502(4), F.S., except persons listed in Section 197.502(4)(h), F.S., as their interests may appear. Therefore, the distribution scheme must observe the priorities of recordation of the liens or interests in the public records of the County. The excess funds must be used to satisfy in full to the extent possible each senior mortgage or lien in the property before distribution of any funds to any junior mortgage or lien. Any valid lien in the property is entitled to payment before any payment is made to the titleholder of record. (e.s.)

The rule further provides for the clerk to send notices to the persons listed in section 197.502(4), Florida Statutes, which, in pertinent part, alerts lienholders that funds derived from the sale will be used to satisfy in full, to the extent possible, each senior mortgage or lien on the property before distribution of any funds to any junior mortgage or lien.

While the statutory scheme today recognizes that any person may redeem a tax certificate after the certificate is issued, but before a tax deed sale, in the situation you have posed, the tax deed sale would not appear to cover the tax certificate which is issued after the application for the tax deed has been made. There is no provision in the statutes or attendant administrative rules which specifically addresses the inclusion of such a tax certificate in the minimum bid required for the sale of a tax deed or the redemption of a subsequently issued tax certificate from the proceeds of such a sale. The existence of an outstanding tax certificate which was not included in the sale, however, is not extinguished by the tax deed sale and apparently operates as a first lien after the proceeds of the tax deed sale have been disbursed pursuant to the statute. As such, it would appear that any excess or overbid funds derived from the sale of the tax deed may be used to initially extinguish any governmental held liens, then as a priority lienholder, any privately held tax certificates of record.¹⁶ It may be advisable for the purchaser of a tax deed to determine whether there are outstanding tax certificates on the purchased property and to redeem such certificates in order to obtain clear ownership of the property.¹⁷

As noted above, however, it does not appear that the Legislature contemplated that the situation you have posed would occur. It may be advisable, therefore, to seek legislative clarification of this matter.

³ See also Rule 12D-13.045, Fla. Admin. C., providing direction for the sale of tax certificates for unpaid taxes.

- ⁴ Section 197.432(2), Fla. Stat.
- ⁵ See s. 197.432(8), Fla. Stat.
- ⁶ Section 197.573(2), Fla. Stat., provides:

This section shall apply to the usual restrictions and covenants limiting the use of property; the type, character and location of buildings; covenants against nuisances and what the former parties deemed to be undesirable conditions, in, upon, and about the property; and other similar restrictions and covenants; but this section shall not protect covenants creating any debt or lien against or upon the property, except one providing for satisfaction or survival of a lien of record held by a municipal or county governmental unit, or requiring the grantee to expend money for any purpose, except one that may require that the premises be kept in a sanitary or slightly condition or one to abate nuisances or undesirable conditions.

⁷ Section 197.102(2), Fla. Stat., defines "Omitted taxes" as "those taxes which have not been extended on the tax roll against a parcel of property after the property has been placed upon the list of lands available for taxes pursuant to s. 197.502." These are parcels of property on which the county holds the tax certificate and for which there were no bidders at the

¹ See also Rule 12D-13.011, Fla. Admin. C., reiterating that on January 1 of each year, all taxes levied pursuant to the constitution and laws of this state become a first lien on the taxable property, superior to all other liens on the property and continuing in full force and effect until discharged by payment or until barred by Ch. 95 or 197, Fla. Stat.

² Section 197.402(3), Fla. Stat.

tax deed sale.

⁸ Section 197.502(4), Fla. Stat.

⁹ Section 197.502(8), Fla. Stat., provides that taxes are not to be extended against property listed as "lands available for taxes," but in each year the taxes that would have been due are treated as omitted taxes and added to the required minimum bid for a tax deed sale. See also s. 197.542(1), Fla. Stat., stating:

The amount required to redeem the tax certificate, plus the amounts paid by the holder to the clerk of the circuit court in charges for costs of sale, redemption of other tax certificates on the same lands, and all other costs to the applicant for tax deed, plus interest thereon at the rate of 1.5 percent per month for the period running from the month after the date of application for the deed through the month of sale and costs incurred for the service of notice provided for in s. 197.522(2), shall be considered the bid of the certificateholder for the property.

¹⁰ See Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); and Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

¹¹ See s. 197.432, Fla. Stat.

¹² See s. 197.502(8), Fla. Stat.

- ¹³ See Op Att'y Gen. Fla. 62-59 (1962).
- ¹⁴ Section 194.01, Fla. Stat. (1961).

¹⁵ See s. 197.552, Fla. Stat., stating in pertinent part that "a lien of record held by a municipal or county governmental unit, special district, or community development district, when such lien is not satisfied as of the disbursement of proceeds of sale under the provisions of s. 197.582, shall survive the issuance of a tax deed."

¹⁶ See Rule 12D-13.065, Fla. Admin. C., regarding disbursement of proceeds of a tax deed sale and providing that if the property is purchased for an amount in excess of the minimum bid of the tax deed applicant, the excess is to be distributed first to pay governmental held liens of record and then to those persons described in s. 197.502(4), Fla. Stat., as their interests may appear; the distribution scheme must observe the priorities of recordation of the liens or interests in the public records of the county, with excess funds used to satisfy in full to the extent possible each senior mortgage or lien on the property before distribution of any funds to any junior mortgage or lien. Any valid lien on the property is entitled to payment before any payment is made to the titleholder of record.

¹⁷ See Rule 12D-13.051, Fla. Admin. C., setting forth the rules governing redemption, purchase, or transfer of tax certificates; the term "redemption"

refers to the procedure by which the legal titleholder of property, or someone acting on behalf of the legal titleholder, pays to the tax collector the amount required to cancel and invalidate a tax certificate or portion thereof (as allowed by these rules) which is otherwise valid.

AGO 11-08 – April 20, 2011

SEARCH AND SEIZURE – TRUANTS – MINORS – RUNAWAYS – LAW ENFORCEMENT OFFICERS – PAT-DOWN – REASONABLE SUSPICION – TRANSPORTATION

AUTHORITY OF LAW ENFORCEMENT OFFICER TO CONDUCT PAT-DOWN OF TRUANT IN ABSENCE OF REASONABLE SUSPICION OF PRESENCE OF WEAPON PRIOR TO TRANSPORTING

To: Mr. Donald P. Gibson, Legal Advisor, St. Petersburg Police Department

QUESTION:

Is it lawful for a law enforcement officer to conduct a pat-down for weapons for officer safety purposes, without reasonable suspicion said person is armed, prior to transporting a child who is not arrested, but is otherwise lawfully detained and involuntarily being transported pursuant to section 984.13, Florida Statutes?¹

SUMMARY:

Based on the increased threat to officer safety involved in transporting offenders in a patrol vehicle, a law enforcement officer who has taken a minor into custody pursuant to section 984.13, Florida Statutes, and is transporting that minor may perform a limited frisk or pat-down for weapons before placing the minor in a law enforcement vehicle in order to ensure that the minor possesses no weapons or other dangerous instrumentalities.

According to your letter, there are occasions when it is incumbent upon an officer to transport an individual, usually a juvenile, in the officer's vehicle, for reasons unrelated to a crime or a criminal investigation. Your examples include individuals "going involuntarily" such as truants or runaways. You ask whether a law enforcement officer, who must transport a truant or run-away minor pursuant to Florida law, is authorized to conduct a pat-down for weapons for officer safety reasons before placing the minor in the patrol car. The Fourth Amendment to the United States Constitution, made applicable to the states through the due process clause of the Fourteenth Amendment,² guarantees to all persons the right to be secure from unreasonable searches and seizures. Further, the Florida Constitution provides protection from unreasonable searches and seizures in Article I, section 12, which parallels those protections in the federal constitution:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.³

The basis for the proscriptions in the Fourth Amendment and, by extension, in Article I, section 12 of the Florida Constitution, is to impose a reasonableness standard upon the exercise of discretion by government officials, including law enforcement officers, "to safeguard the privacy and security of individuals against arbitrary invasions[.]"⁴ Thus, the courts, in judging the permissibility of a particular law enforcement practice, will balance its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.⁵

Florida's statute on truancy, which provides generally for children in need of services, is section 984.13, Florida Statutes. Under the statute, a law enforcement officer is directed to take into custody and transport a child believed to be truant or who has run away or voluntarily requests certain services. As provided in this statute, a child may be taken into custody:

(a) By a law enforcement officer when the officer has reasonable grounds to believe that the child has run away from his or her parents, guardian, or other legal custodian.

(b) By a law enforcement officer when the officer has reasonable grounds to believe that the child is absent from school without authorization or is suspended or expelled and is not in the presence of his or her parent or legal guardian, for the purpose of delivering the child without unreasonable delay to the appropriate school system site....

* *

(d) By a law enforcement officer when the child voluntarily agrees to or requests services pursuant to this chapter or placement in a shelter.

An officer taking a child into custody pursuant to this provision is charged by statute with transporting the minor and releasing the child to a parent, guardian, legal custodian, or responsible adult relative or to a services provider if there are reasonable grounds to believe the child has run away, is truant, or is beyond the control of his or her parents, guardian, or legal custodian.⁶ While truancy is not a crime in this state and Florida courts have recognized that "[c]ircumstances that allow a juvenile to be taken into custody under section 984.13 are not crimes[,]"⁷ the statute does empower a law enforcement officer to take a truant into custody.

You have asked whether an officer, transporting a child pursuant to section 984.13, Florida Statutes, is authorized to pat-down that minor prior to placing him or her in the officer's patrol car in the absence of any suspicion that the child is armed. The appellate courts of this state have addressed the authority of law enforcement officers to pat-down a juvenile offender suspected of committing a crime prior to transporting him or her in a patrol car.⁸ However, I am aware of only one recent appellate decision in this state analyzing the validity of the search or pat-down of a truant and that case did not directly address the validity of the *pat-down* under these circumstances, but speaks to a search done under these circumstances in the absence of a pat-down.

In *L.C. v. State*,⁹ police officers stopped L.C. believing she was truant, confirmed that fact, and determined to transport her back to school. Before placing her in the police car, the officers searched her pockets and discovered drugs. At trial, the officer who conducted the search testified that he saw nothing to indicate the presence of a weapon, but that the search of L.C. prior to placing her in the police car was standard police procedure.

The court reviewed the terms of section 984.13(1)(b), Florida Statutes, noting that truancy is not a criminal offense. Because there was no possibility of arrest in this case, the court rejected the "search incident to arrest" exception to the requirement of a warrant for a search and determined that the search was not valid.¹⁰ The court stated that "we are aware of no case that stands for the proposition officers can search an individual without having performed a pat-down simply because the individual is being placed in a police vehicle."¹¹ The court recognized that "case law consistently indicates the officer must have a reasonable

belief his safety is in danger **and** must first perform a pat-down."¹² (emphasis in original)

In rejecting the validity of the full search of L.C., the court "save[d] for another day the not inconsequential question whether [the officer] would have had the authority to perform a pat-down of L.C."¹³ Although the *L.C.* court did not directly address the issue central to your inquiry, the court referenced *United States v. McCargo*,¹⁴ a 2006 federal second circuit court case, cited with approval by the court in *L.C.*, that may provide direction.

In *McCargo*, the defendant had been stopped by police officers who intended to return him to the scene of a crime for identification purposes. Because the officers planned to transport him in the back of their patrol car, they frisked McCargo for weapons pursuant to a departmental policy requiring officers "to pat down all persons before placing them in the back of a police car to protect the officers' safety."¹⁵ At trial, McCargo moved to suppress the handgun discovered during the pat-down arguing that the frisk of his person, without a reasonable suspicion that he was armed, violated his Fourth Amendment rights.

As the federal court in *McCargo* noted, *Terry v. Ohio*¹⁶ specifically authorized a pat-down where, following a stop, the officers believed that the person detained was armed.¹⁷ However, the pat-down in McCargo was performed pursuant to a policy of the police department that required pat-downs before transporting any person in a police car to ensure officer safety. Thus, "the question we must answer is whether a suspect may be frisked in certain circumstances as part of a *Terry* stop without officers' relying on a reasonable suspicion that he is armed."¹⁸

Based upon the rationale of the *Terry* decision, the court held that the pat-down of McCargo did not violate his Fourth Amendment rights. The court reiterated that *Terry* held that police may frisk a person if they have a reasonable belief that the person is armed and dangerous. As the Second Circuit continued in its analysis of *Terry*:

Paramount in the Court's reasoning was that the Fourth Amendment should not require the police to investigate crime with their safety unduly at risk. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. . . . We cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." (citation omitted) Weighing this important interest in police and public safety against the "brief, though far from inconsiderable," intrusion on an individual's privacy (citation omitted), the Court concluded that a frisk for weapons was permissible.¹⁹ The court noted that "[an] [sic] interest in officer safety has been the justification for *Terry* stops from their inception"²⁰ and that transporting a suspect in the back of a police car as part of a *Terry* stop was markedly different from a typical *Terry* stop involving the detention of a suspect on the street:

The officers are less able to protect themselves from the possibility of violence. The officers cannot depart or remove themselves temporarily from the situation and call in additional officers as backup. The suspect and the officers are in close proximity to each other for the duration of the transportation; the suspect sits behind them, a few feet away in the rear of the car, frequently separated by only a wire grate. And the suspect is not subject to the officers' immediate physical control or restraint: if the suspect turns out to be armed, the police are at his mercy.²¹

The court concluded that the dangers posed to police officers in situations where a suspect, who may be armed, is placed in the rear of a police car are substantially different and greater than those posed in the typical *Terry* stop. "The increased threat to police safety informs the balance to be struck between the safety interests of the police and the privacy interests of individuals."²² The court held that permitting a limited frisk for weapons prior to placing a suspect in a police car, pursuant to an established policy, represented an appropriate balancing of the interests at stake. However, the *McCargo* court emphasized the limited nature of its ruling:

Our holding in this case is a narrow one. We are not holding that the police are entitled to pat down a person, absent reasonable suspicion that he is armed, simply because they have stopped that person pursuant to a lawful *Terry* stop. However, in cases where the police may lawfully transport a suspect to the scene of the crime in the rear of a police car, the police may carry out a departmental policy, imposed for reasons of officer safety, by patting down that person. Because the police must have *a legitimate law-enforcement reason to transport a suspect*, we see little danger that policies such as these might be used as a pretext for a suspicionless frisk.²³ (e.s.)

Thus, based largely on the language in *Terry* concerning officer safety, the *McCargo* court approved the limited frisk of the suspect prior to placing him in the back of the police car pursuant to a departmental policy.

The reasoning of *McCargo* and its application of the Fourth Amendment principles is highly instructive in answering your inquiry. Though truancy and the other custodial offenses identified in section 984.13, Florida Statutes, are not crimes in Florida, these are offenses for which the Legislature authorizes a law enforcement officer to take the offender into custody and transport and deliver that individual to designated persons or sites.²⁴ Because section 984.13, Florida Statutes, authorizes the officer to transport the child after the officer's inquiry has established that section 984.13, Florida Statutes, is implicated, there would appear to be justification for a protective frisk or pat-down prior to placing the child in the police car, in order to ensure that the child possesses no weapons or other dangerous instrumentalities.²⁵

It is my opinion that a law enforcement officer, who has taken a truant or other minor into custody pursuant to section 984.13, Florida Statutes, and is transporting that minor as required by the statute, is authorized to perform a limited frisk for weapons before placing the minor in a police car. As was the case in McCargo, police departments may wish to consider implementing standardized policies on limited pat-down searches for weapons to be performed on anyone being transported in a police vehicle including truants and other minors in custody pursuant to section 984.13, Florida Statutes. The McCargo court found the existence of a departmental policy important in at least two respects: the policy both bolstered the officer safety rationale for the pat-downs and, by requiring universal application, eliminated selective-use concerns.

I would also note that Louisiana's statutory truancy scheme, which is substantially similar to Florida's, has been judicially construed to support pat-down searches of truant minors who must be transported. In terms similar to those of section 984.13, Florida Statutes, the Louisiana Children's Code authorizes a law enforcement officer to "briefly detain" any child whom the officer reasonably believes to be absent from school during normal school hours and the officer may question the child about his or her reasons for being absent. The code then requires that, based on the officer's inquiry and reasonable belief that the child is absent without justification, "the officer may release the child to his parents or transport the child to the appropriate administrator of the child's assigned school or to a receiving center designated by the parish school board for acceptance of such children." As is the case in Florida, the officer, after determining that the juvenile is truant, may either release the juvenile to his or her parents or transport him or her to school or to a receiving center.²⁶

In State of Louisiana In the Interest of R.D.,²⁷ a police officer, who knew R.D. to be a student at a local junior high school, stopped R.D. to verify that he was truant and then determined to transport him back to school or to his parents. The officer executed a pat-down search prior to placing R.D. in his patrol car and discovered drugs. The appellate court considered the validity of the pat-down in light of Louisiana's characterization of truancy as a non-criminal offense. The court observed that truancy in Louisiana is not a crime, but that it is an offense that authorizes a law enforcement officer to take a minor into custody and

transport him. The court reasoned that at this point the juvenile "was in full custodial detention" and was not free to go. Further, because Louisiana's statute authorized the officer to transport the child after his inquiry established reasonable cause to believe the child truant, the court found justification for a protective frisk prior to placing the child in the police car, in order to ensure that the child had no weapons or other dangerous instrumentalities.

Like Florida's statute, the Louisiana Children's Code provision does not make the offense of truancy a crime subjecting the minor to arrest. However, in both states' statutes, once the officer has determined that the minor is violating the compulsory school attendance laws, an officer may take the minor into custody. Further, because each state's statutory scheme authorizes the transportation of a truant minor by the officer after his inquiry establishes a probable violation, it would appear reasonable to assume that Florida courts, like Louisiana's, would recognize the validity of a protective frisk, undertaken by the officer prior to placing a minor in a police car for the purpose of transporting him or her, to ensure that the minor possesses no weapons or other dangerous instrumentalities.

In sum, it is my opinion that based on the increased threat to officer safety involved in transporting offenders in a patrol vehicle, a law enforcement officer who has taken a minor into custody pursuant to section 984.13, Florida Statutes, and is transporting that minor may perform a limited frisk or pat-down for weapons before placing the minor in a law enforcement vehicle in order to ensure that the minor possesses no weapons or other dangerous instrumentalities. In addition, as was the case in McCargo, a law enforcement agency may wish to consider adopting a departmental policy requiring the pat-down of anyone being transported in a police vehicle to ensure officer safety, including minors taken into custody pursuant to section 984.13, Florida Statutes.

¹ While your question is phrased more broadly, your examples and discussion involve juveniles suspected of being truant, runaway, or generally in need of assistance and transportation pursuant to s. 984.13, Fla. Stat., and my consideration and response will be limited to the factual premise of minors taken into custody pursuant to s. 984.13, Fla. Stat., who must be transported pursuant to that section.

² Mapp v. Ohio, 367 U.S. 643 (1961), rehearing denied, 368 U.S. 871 (1961).

³ Article I, s. 12, Fla. Const., was amended in 1982 by H.J.R. No. 31-H, adopted by the electorate at the November 1982 general election, which provides that the right to be free from unreasonable searches and seizures shall be construed in conformity with the 4th Amendment to the United States Constitution and provides that illegally seized articles or

information are inadmissible if decisions of the United States Supreme Court make such evidence inadmissible.

⁴ Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), citing Marshall v. Barlow's, Inc., 436 U.S. 307, 312, 98 S.Ct. 1816, 1829 (1978), quoting Camara v. Municipal Court, 387, U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L. Ed. 2d 930 (1967).

⁵ Id. at 654. See Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177, 187-188, 124 S.Ct. 2451, 159 L. Ed. 2d 292 (2004); see also United States v. Knights, 534 U.S. 112, 118, 122 S.Ct. 587, 151 L. Ed. 2d 497(2001) ("The touchstone of the Fourth Amendment is reasonableness...").

⁶ Section 984.13(2)(a), Fla. Stat.

⁷ See A.B.S. v. State, — So. 3d —, 2010 WL 5381757 (Fla. 2d DCA 2010); L.C. v. State, 23 So. 3d 1215 (Fla. 3d DCA 2009); C.G. v. State, 689 So. 2d 1246, 1247 (Fla. 4th DCA 1997); see also Kazanjian v. School Board of Palm Beach County, 967 So. 2d 259, 263 (Fla. 4th DCA 2007) (stating that the primary purpose of Florida's truancy laws is to promote academic success); J.M.J. v. State, 389 So. 2d 1208, 1210 (Fla. 1st DCA 1980) ("It is apparent that the legislature, in deliberate wisdom, chose to classify... habitual truants only as dependent children, providing the court with a flexible range of placement options to meet the child's need for supervision."); 78A C.J.S. Schools and Districts s. 1028 (2009) ("An 'arrest' by an officer under a truancy statute is a severely limited type of arrest, the sole purpose of which is to quickly place the minor in a school setting, and the arresting officer may not use the truancy arrest as a pretext for investigating criminal matters.").

⁸ Compare A.J.M. v. State, 746 So. 2d 1222 (Fla. 3d DCA 1999) and T.L.M. v. State, 371 So. 2d 688 (Fla. 1st DCA 1979), involving criminal juvenile defendants who were subjected to searches or pat-downs incident to arrest and concluding that a police officer may validly pat-down a juvenile criminal offender prior to transporting him or her.

⁹ 23 So. 3d 1215 (Fla. 3d DCA 2009).

¹⁰ *Cf. State v. Mejia*, 579 So. 2d 766 (Fla. 3d DCA 1991) (finding a search of a person incident to arrest as a recognized exception to the search warrant requirement). *Compare E.P. v. State*, 997 So. 2d 1240 (Fla. 3d DCA 2008), which was cited by the court in *L.C.* and in which the court found that "no error has been demonstrated in the denial of a motion to suppress drug paraphernalia found on the juvenile's person after a pat down which followed a *Terry* stop justified under section 984.13, Florida Statutes (2007)... and justifiably preceded placing him in the police car for the purpose of taking him to school as the statute requires."

¹¹ Citing Knowles v. Iowa, 525 U.S. 113, 117, 119 S.Ct. 484, 142 L. Ed. 2d 492 (1998) (recognizing the concern for officer safety as a justification

for additional "minimal" intrusion of ordering driver and passengers out of the car where officer stopped motorist for speeding and issued him a citation rather than arrest him, but stating greater intrusion of full fieldtype search not justified).

¹² See Ybarra v. Illinois, 444 U.S. 85, 93, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) stating that a law enforcement officer "for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted." And see A.B.S. v. State, — So. 3d —, 2010 WL 5381757 (Fla. 2d DCA 2010) (involving a runaway pursuant to section 984.13, Fla. Stat., and responding to the officer's admission that he searched A.B.S. solely because it was his policy to search people before transporting them in his cruiser with a statement from L.C. that "we are aware of no case that stands for the proposition officers can search an individual without having performed a pat-down simply because the individual is being placed in a police vehicle").

¹³ But see E.P. v. State, 997 So. 2d 1240 (Fla. 3d DCA 2008), an earlier Third District case that was cited by the court in *L.C.*, but that the court apparently did not consider dispositive of the question. In *E.P.*, the court found that "no error has been demonstrated in the denial of a motion to suppress drug paraphernalia found on the juvenile's person after a pat down which followed a Terry stop justified under section 984.13, Florida Statutes (2007) . . . and justifiably preceded placing him in the police car for the purpose of taking him to school as the statute requires."

- ¹⁴ 464 F.3d 192 (N.Y. 2d Cir. 2006).
- ¹⁵ *Id.* at 196.
- ¹⁶ 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968).
- ¹⁷ *Id.* at 27.
- ¹⁸ Supra n.19 at 199.
- ¹⁹ *Id.* at 200.
- 20 *Id*.
- 21 Id.
- ²² Supra n.23 at 201.
- 23 Id. at 202.

 24 And see ss. 1002.20(2)(a) and 1003.21, Fla. Stat., which provide for compulsory school attendance.

²⁵ *Cf. E.P. v. State*, 997 So. 2d 1240 (Fla. 3d DCA 2008) (involving denial of a motion to suppress drug paraphernalia found on the juvenile's person

"after a pat down which followed a *Terry* stop justified under section 984.13, Florida Statutes (2007)... and justifiably preceded placing him in the police car for the purpose of taking him to school as the statute requires").

²⁶ LSA-Ch.C. Art 733.1 (Louisiana Children's Code Article 733.1).

²⁷ 749 So. 2d 802 (La. 5th Cir. 1999).

AGO 11-09 - June 16, 2011

PROPERTY APPRAISER – TAXATION – AD VALOREM TAXATION – REAL PROPERTY – TRUSTS – DEEDS – "COMMON LAW PURE TRUST" – "LAND PATENT"

WHETHER PROPERTY APPRAISER MUST REMOVE PRIVATE REAL PROPERTY FROM AD VALOREM TAX ROLLS IF IT HAS BEEN TRANSFERRED INTO A "COMMON LAW PURE TRUST" OR IS SUBJECT OF A "LAND PATENT"

To: Mr. Loren E. Levy, Attorney for Mr. C. Raymond McIntyre, Highlands County Property Appraiser

QUESTIONS:

1. Whether privately-owned property should be removed from the tax rolls and no longer subjected to ad valorem taxation because the owner has recorded a Declaration of Land Patent?

2. Whether privately-owned property should be removed from the tax rolls and no longer subjected to ad valorem taxation because the owner has transferred such property into a Common Law Pure Trust?

SUMMARY:

1. Florida law does not provide an exemption from ad valorem taxation for privately-owned property which is the subject of a recorded Declaration of Land Patent.

2. No provision of Florida law provides an exemption from ad valorem taxation for privately-owned property transferred by the owner of such property into a Common Law Pure Trust.

According to your letter, the Highlands County Property Appraiser has received several assertions from different property owners claiming that his office lacks the legal authority to assess certain parcels of real property located in Highlands County. A number of property owners have recorded "Declaration of Land Patent" notices in the public records. Another property owner has placed its property into a "Common Law Pure Trust." In each of these circumstances, the property owners assert that their action requires the property appraiser to remove the parcels from the assessment roll because they are no longer subject to ad valorem taxation. You have requested assistance from this office regarding the property appraiser's duties and responsibility in this regard. While this office has no authority to resolve mixed questions of law and fact and cannot, therefore, comment specifically on the facts of these cases, I offer the following general legal analysis to assist you.

All property in Florida is subject to taxation unless expressly exempted.¹ The specification of permissible exemptions to ad valorem taxation in the Florida Constitution excludes any other exemptions.² Implementing these constitutional directives is section 196.001, Florida Statutes, entitled "Property subject to taxation," which provides:

Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:

(1) All real and personal property in this state and all personal property belonging to persons residing in this state; and

(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.

In claiming an exemption from taxation, the burden is on the claimant to show clearly any entitlement to tax exemption.³ The rule is that all property is subject to taxation unless expressly exempted and such exemptions are strictly construed against the party claiming them.⁴

Neither the Declaration of Land Patent nor the Common Law Pure Trust documents included with your letter contain any citation to a Florida statutory or constitutional exemption upon which these claimants base an exemption of their property from ad valorem taxation.

QUESTION 1.

The term "land patent" is defined as "[a]n instrument by which the government conveys a grant of public land to a private person."⁵ A patent is a government conveyance transferring title to portions of the public domain. A "patent" is the conveyance by which the federal government passes its title to portions of the public domain.⁶ It is generally the case that a federal land patent conveys fee simple ownership to the patentee⁷ and serves in the same capacity as a deed.⁸

You advise that the parcel referenced in the declaration attached to

the purported "land patent" is located in a residential subdivision in Highlands County known as Placid Lakes. The property was purchased from a private construction company in 2004 by the current owners and the lot is improved with a residential home built in 2004. The residential subdivision in which the property is located was first platted in Highlands County in 1958 and the final plat was recorded in 1970. Information you have supplied indicates that this property has been held in private hands for nearly 100 years. The transfer of this land into private hands occurred nearly a century ago and at that time these lands ceased to be public and became private lands subject to taxation by the state, adverse possession, or assignment of interest.⁹

Self-prepared land patent documents do not affect title to property¹⁰ and would not render the property described therein exempt from state ad valorem taxes. I find no authority for an individual to "patent" land to himself or herself. Further, a patent is not an exemption. The mere statement by a private owner that real property is subject to a "Declaration of Land Patent" and the recording of such a statement is not enough to invest that property with any of the indicia of federal land patent.¹¹

A 1969 Florida title dispute case addressed the nature of federal land patents and advised that the issuance of a land patent by the United States is in the nature of a quitclaim deed. In *Whaley v. Wotring*,¹² a patentee's heirs were precluded from asserting any claim they might have had under an 1897 land patent, since it appeared that the property had been the subject of private transactions based on a 1908 deed in the plaintiffs' chain of title. As the court stated:

Public lands cease to be public and become private lands after they have been entered at a land office and a certificate of entry or patent certificate is issued. At that point such lands are subject to taxation by the state, subject to adverse possession, or assignment of interest. . . . The patent is in the nature of a quitclaim, passing whatever interest the United States possessed in the premises.¹³

Thus, a federal land patent issued to a private party by the federal government acts as a quitclaim by the government of its interest in that property and passes that property into private hands where it is subject to taxation and alienation.

Recent out-of-state cases have considered the tax consequences of a "Declaration of Land Patent" in light of concerns that this is a method of tax avoidance and a possible foreclosure fraud scheme. In *Taylor* v. *Davis*,¹⁴ the State Tax Commission of Missouri was presented with an appeal to determine whether the subject property was exempt from taxation under the Missouri statutes and constitution. The property owner presented a number of documents upon which he based his claim

of exemption from taxation based upon his property being in "Patent at Law Status," including a quitclaim deed and a declaration of land patent. The declaration of land patent documents filed in the Missouri case contained citations to six early legal cases which are also cited in the Florida documents which have been presented to Mr. McIntyre. The Missouri tax commission stated:

[A] review of those cases failed to provide any basis upon which the exemption claim can be established. It is unnecessary to provide a recitation of the facts of each case. None of the cases involve a claim by a citizen to exemption from state ad valorem taxation as is the present case. Therefore, the holdings of the various courts in these cases are not applicable to and provide no support for the claim advanced by Complainant.¹⁵

The court noted that no state or federal case could be found "which stands for the proposition advanced by Mr. Taylor that his actions in recording a Quitclaim Deed and a Declaration of Land Patent created an exemption from ad valorem taxation under the laws of the United States or of Missouri." The court noted that "all land now held by private individuals or entities, at some point in the legal history of the land, received a Patent or a Military Warrant from the United States government whereby the federal government divested itself of title and granted title to some private person or entity." Further, after noting that a patent for land is nothing more than a quit claim deed of the federal government conveying such interest as the United States possessed in the land, the court stated that "[t]he recording of Mr. Taylor's Declaration of Land Patent and Quitclaim Deed was an act of no consequence." In the absence of any state constitutional or statutory authority to grant an exemption as claimed by the taxpayer, the court found that the claim had "no foundation in law" and it was denied.

An Illinois appellate court in Britt v. Federal Land Bank Association of St. Louis,16 considered "land patents" signed and recorded by the property owners which were alleged to convey or vest title superior to that acquired by a bank in foreclosure proceedings against the property. The court dismissed the Britt's claims as a "compilation of disjointed and nonsensical claims and legal conclusions totally unsupported by citations to the record or relevant legal authority." However, the court considered the legal significance of "land patents" on land titles as a potentially recurring issue. Neither party presented any state authority on whether the filing of what was alleged to be a "land patent" by the former mortgagors of property had any legal effect. However, the legal sufficiency of "land patents" has been addressed by courts of other states and federal courts and the Britt court found these instructive.¹⁷ The court noted the absence of state case law "on what appears to be a procedure without legal foundation in Illinois" and turned to the analysis of a land patent in a federal tax case:

The "patent" involved here is not a grant by the United States; it is a grant by the plaintiffs. The "patent" here is not a grant to some other holder so as to pass title on to another party; it is a self-serving document whereby the plaintiffs grant the patent to themselves. This "patent" does not involve or concern "public land;" it relates to plaintiffs' private property. The court cannot conceive how these federal provisions are implicated here, and thus federal question jurisdiction is absent. Of course, the purported 'land patent' in this case fails for reasons independent of jurisdiction. As was noted before, the "land patent" attached to plaintiffs' various filings is a grant of a land patent from the plaintiffs to the plaintiffs. It is, guite simply, an attempt to improve title by saying it is better. The court cannot conceive of a potentially more disruptive force in the world of property law than the ability of a person to get "superior" title to land by simply filling out a document granting himself a "land patent" and then filing it with the recorder of deeds. Such self-serving, gratuitous activity *does not*, *cannot* and will not be sufficient by itself to create good title.¹⁸ (emphasis in original)

The court determined that the documents upon which the Britts relied were legal nullities.

In this state, the assessment of property is mandated by the Florida Constitution.¹⁹ The authority for counties, school districts, and municipalities to levy ad valorem taxes, and the authority for the Legislature to authorize special districts to levy ad valorem taxes, likewise emanates from the Florida Constitution.²⁰ The Florida Supreme Court has stated that "[e]xemptions from taxation must be authorized by the Constitution[.]"²¹ Article VII, section 3 of the Florida Constitution delegates authority to the Florida Legislature to provide for exemptions of property used for specific purposes. The Florida Constitution makes no provision to exempt private property subject to a self-prepared "Declaration of Land Patent" for ad valorem taxation.²² Such a declaration does not appear to present any constitutional or statutory exemption from state taxes such that the Property Appraiser may remove such property from the tax rolls.

In sum, it is my opinion that privately-owned property may not be removed from the tax rolls for ad valorem taxation purposes based on an owner prepared and recorded Declaration of Land Patent.

QUESTION 2.

Your second question involves real property subject to a "Common-Law Pure Trust." The trust claims that its property is not taxable because it was transferred into the "Common Law Pure Trust." According to your letter, the Highlands County Property Appraiser has not been provided the instruments of the trust. This office is not authorized to review the terms of trust documents to determine their validity and none have been provided for our review. However, the following general comments are offered to assist the Property Appraiser in determining whether to remove real property subject to a "Common Law Pure Trust" from the tax rolls.

As discussed in Question One above, the Florida Constitution and state statutes provide that all property in Florida is subject to taxation unless it has been expressly exempted.²³ Further, under Florida law, property taxes are levied against the realty itself and not against the property owner.²⁴

It appears that the basis upon which the exemption from taxation for Common Law Pure Trust property is asserted is Article I, section 10 of the United States Constitution.²⁵ This provision states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" I understand the premise of the "Common Law Pure Trust" to be that this federal constitutional provision should be read to provide that any contract is absolutely unassailable and that these contracts (trusts) cannot be challenged in any state or federal court or regulated by the laws of any state because the trust is guaranteed by the United States Constitution. No contract contrary to public policy, however, is protected by Article I, section 10 of the United States Constitution.²⁶

These arrangements, variously described as "family trusts," "ABC trusts," "constitutional trusts", "contract trusts", "family estate trusts," "sovereign trusts," and, as discussed above "pure trusts," have been determined to be "a time-worn tool of tax avoidance, the legitimacy of which has been repeatedly and overwhelmingly rejected in every context that the courts have considered these arrangements."²⁷ While I am aware of no Florida court cases discussing the ad valorem tax consequences of property held in a "Common Law Pure Trust," a United States Tax Court reviewed several "Common Law Pure Trusts" and determined that they were shams lacking economic or legal substance and were to be disregarded for Federal income tax purposes.²⁸ The court then concluded that the net income of the business interests purportedly made the subject of the trust were properly taxable to the taxpayers.²⁹

In light of the absence of any exemption for "Common Law Pure Trusts" contained in the Florida Constitution or Florida Statutes, it is my opinion that the Highlands County Property Appraiser may not remove privately-owned property from the tax rolls and exempt that property from ad valorem taxation based on the owner of such property transferring it into a "Common Law Pure Trust."

¹ See Art. VII, ss. 3 and 4, Fla. Const.; s. 196.001, Fla. Stat.; Colding v. Herzog, 467 So. 2d 980 (Fla. 1985).

² See Art. VII, s. 3, Fla. Const.; Sebring Airport Authority v. McIntyre, 718 So. 2d 296 (Fla. 2d DCA 1998), affirmed, 783 So. 2d 238 (Fla. 2001).

³ Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 at 501(Fla. 1976), appeal dismissed, 98 S.Ct. 32, 434 U.S. 804, 54 L. Ed. 2d 61 (1977).

⁴ See State ex rel. Wedgworth Farms, Inc. v. Thompson, 101 So. 2d 381 (Fla. 1958), Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 (1976), appeal dismissed 98 S.Ct. 32, 434 U.S. 804, 54 L. Ed. 2d 61 (1977); Williams v. Jones, 326 So. 2d 425 (1975), appeal dismissed, 97 S.Ct 34, 429 U.S. 803, 50 L. Ed. 2d 63 (1976).

⁵ "Land Patent," Black's Law Dictionary (8th ed. 2004), p. 1156.

⁶ U.S. v. Shumway, 199 F.3d 1093 (9th Cir. 1999). 73B C.J.S. Public Lands s. 199.

⁷ In re Johnson, 61 B.R. 858 (Bankr. D. S.D. 1986), Murphy v. Burch, 46 Cal. 4th 157, 92 Cal. Rptr. 3d 381, 205 P.3d 289 (2009).

⁸ In re Mauk, 56 B.R. 445 (Bankr. N.D. Ohio 1985).

⁹ And see Robberts v. Northville Township, 22 Fed. Appx. 527, 528, 2001 WL 1450817 (C.A.6 (Mich.) 2001) (once federal land is sold to a private person the land is subject to ad valorem property taxation as part of the general mass of property in the state), *citing Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 353, 69 S.Ct. 561, 93 L.Ed. 721 (1949); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 676-77, 94 S.Ct. 772, 39 L. Ed. 2d 73 (1974); *Irwin v. Wright*, 258 U.S. 219, 228-29, 42 S.Ct. 293, 66 L.Ed. 573 (1922); *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355, 1357 (9th Cir. 1993).

¹⁰ Hilgeford v. Peoples Bank, 607 F. Supp. 536 (N.D. Ind. 1985).

¹¹ It appears that the federal statute authorizing land patents was repealed in 1976. *See* Act of Oct. 21, 1976, Pub. L. No 94-579, Title VII, s. 702.

¹² 225 So. 2d 177 (Fla 1st DCA 1969).

¹³ Whaley at p. 180-181.

¹⁴ http://stc.mo.gov/2008/Taylor07-62532.htm (March 4, 2008).

¹⁵ The cases cited and discussed in the *Taylor* case and which are also cited in the letter to Mr. McIntyre are: *Wilcox v. Jackson*, 38 U.S. 498, 1839 WL 4329 (U.S. Ill. 1839), *Litchfield v. The Register and Receiver*, 76 U.S. 575, 1869 WL 11460 (U.S. Iowa1869), *Wineman v. Fastrell*, 54 F. 819, 4 C.C.A. 596 (C.A. 5th 1893), *Cage v. Danks*, 13 La. Ann. 128, 1858 WL 5069 (La. 1858), *United States v. Steenerson*, 50 F. 504 (C.A. 8th 1892); *Jenkins v. Gibson*, 3 La. Ann. 203, 1848 WL 3756 (La. 1848).

¹⁶ 505 N.E. 2d 387 (Ill. App. 2d Dist. 1987).

¹⁷ See Hilgeford v. Peoples Bank, 776 F.2d 176 (C.A. 7th Ind.1985); Hilgeford v. Peoples Bank, 607 F.Supp. 536 (N.D. Ind. 1985); Nixon v. Phillipoff, 615 F.Supp. 890 (N.D. Ind. 1985); Federal Land Bank v. Gefroh, 390 N.W. 2d 46 (N.D. 1986); Timm v. State Bank, 374 N.W. 2d 588 (Minn. App. 1985); Wisconsin v. Glick 782, F.2d 670 (C.A. 7th Wis. 1986).

¹⁸ Hilgeford v. Peoples Bank, 607 F.Supp. 536 (N.D. Ind. 1985).

¹⁹ See Art. VII, s. 4, Fla. Const., and s. 192.011, Fla. Stat.

²⁰ See Art. VII, s. 9, Fla. Const.

²¹ Dade County v. Pan American World Airways, Inc., 275 So. 2d 505, 516 (Fla. 1973).

²² See "taxpayer advisement" from John Felton, Florida Department of Revenue, to William Rudge, dated Jan. 9, 1997, stating that privately owned property which is the subject of a declaration of land patent is subject to ad valorem taxation.

²³ See Art. VII, ss. 3(a) and 10(c), Fla. Const.; Volusia County v. Daytona Beach Racing and Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1976), Colding v. Herzog, 467 So. 2d 980 (Fla. 1985), and s. 196.001, Fla. Stat.

 24 See ss. 192.011 and 192.032, Fla. Stat. (property assessed according to its situs).

²⁵ See Letter from Louis E. Vient' 3rd, for the American Constitutional Law Society, to Mr. C. Raymond McIntyre, dated October 11, 2010.

²⁶ See Clay v. Sun Insurance Office, Ltd., 377 U.S. 179, 84 S.Ct. 1197, 12
 L. Ed. 2d 229.

²⁷ See Itz v. U.S., 1985 WL 1310 (W.D. Tex. 1985) ("family trust") citing Holman v. United States, 728 F.2d 462 (10th Cir. 1984); O'Donnell v. Commissioner, 726 F.2d 679 (11th Cir. 1984); Hanson v. Commissioner, 696 F.2d 1232 (9th Cir. 1983); Schulz v. Commissioner, 686 F.2d 490 (7th Cir. 1982); Vnuk v. Commissioner, 621 F.2d 1318 (8th Cir. 1980); Markosian v. Commissioner, 73 T.C. 1235 (1980).

²⁸ Itz, supra n.28.

 29 *Id*.

AGO 11-10 – June 16, 2011

STATE AGENCIES-MUNICIPALITIES-FALSE CLAIMS ACT

11-10

APPLICABILITY OF FLORIDA FALSE CLAIMS ACT TO MUNICIPALITIES

To: Mr. Paul J. Nicoletti, Stuart City Attorney

QUESTION:

Does the Florida False Claims Act encompass false or fraudulent claims presented to a municipality?¹

SUMMARY:

The Florida False Claims Act does not encompass false or fraudulent claims presented to a municipality.

The Florida False Claims Act, sections 68.081-68.09, Florida Statutes, authorizes civil actions to be brought by individuals and the state against persons who file or conspire to file false claims for payment or approval with a state agency.² The purpose of the act is to "deter persons from knowingly causing or assisting in causing state government to pay claims that are false or fraudulent, and to provide remedies for obtaining treble damages and civil penalties for state government when money is obtained from state government by reason of a false or fraudulent claim." ³

The Florida False Claims Act was enacted in 1994 and was patterned after the federal False Claims Act, 31 U.S.C. 3729, *et seq.*⁴ While I am not aware of any appellate decision addressing the applicability of the Florida act to municipalities, I would note that this office has taken the position in litigation that local governments are not included within the definition of state government as defined in section 68.082, Florida Statutes.⁵

Section 68.082(1)(a), Florida Statutes, defines "Agency" for purposes of the act to mean "any official, officer, commission, board, authority, council, committee, or department of *the executive branch of state government*." (e.s.) "State government" is defined to mean "the government of the state or any department, division, bureau, commission, regional planning agency, board, district, authority, agency, or *other instrumentality of the state*."⁶ (e.s.) You inquire whether a municipality constitutes an instrumentality of the state within the contemplation of section 68.082, Florida Statutes, and its definition of "state government."

The term "instrumentality" is not defined in the act, nor is the term defined elsewhere in the Florida Statutes.⁷ The operative provisions of the act, however, refer to claims presented to an agency.⁸ Thus, in determining the applicability of the act, the definition of "State government" may not be read in isolation, but must be considered together with the definition of "Agency."⁹ That term refers to the

"executive branch of state government," a phrase that does not commonly encompass local governments.¹⁰ In addition, the act itself appears to recognize a distinction between state and local government.¹¹

A review of the legislative history surrounding the adoption of the Florida False Claims Act provides some insight into the legislative intent.¹² A bill to create a state false claims act was introduced during the 1993 legislative session, but failed to pass.¹³ At that time, the bill defined "Agency" to mean "any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative, and any department, division, bureau, commission, authority, or political subdivision thereof or any public school, community college, or state university."¹⁴ Thus, the 1993 proposed legislation clearly included local governments.¹⁵ The 1994 legislation was drafted to be more limited in scope. As stated during one committee hearing, the 1994 bill, unlike the 1993 bill, is limited to state agencies.¹⁶ The staff analysis for a bill seeking to create a false claims act which contained the same definition of "State government" as is contained in section 68.082, Florida Statutes, only referred to actions involving executive branch state agencies among the types of false claims actions that might be brought under the legislation.¹⁷

This office is aware that several local governments have adopted local false claims acts.¹⁸ Moreover, an examination of other states that have adopted their own false claims act indicates that when local governments are included within its terms, the statute clearly so provides.¹⁹

In light of the above, it appears that the term "instrumentality" as used in section 68.082(1)(d), Florida Statutes, does not include a municipality. Rather, the term would appear to refer to those entities created by statute which are designated as instrumentalities of the state, such as the Florida Housing Finance Corporation.²⁰ Nor would the term "agency" appear to include a municipality.

Accordingly, I am of the opinion that municipalities are not covered under the definition of "agency" or "state government" in section 68.082(1), Florida Statutes, for purposes of the Florida False Claims Act, section 68.081, *et seq.*, Florida Statutes.

¹ You also ask whether counties are included within the definition of "state government" in s. 68.082(1)(d), Fla. Stat. This office, however, is authorized to issue opinions to public officials on questions relating to their own official duties under state law. *See* s. 16.01(3), Fla. Stat. In the absence of a request from a county on this issue, this office's comments are directed to municipalities only.

² See s. 68.082(2), Fla. Stat., which provides that any person who:

(a) Knowingly presents or causes to be presented to an officer or employee of an agency a false or fraudulent claim for payment or approval;

(b) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by an agency;

(c) Conspires to submit a false or fraudulent claim to an agency or to deceive an agency for the purpose of getting a false or fraudulent claim allowed or paid;

(d) Has possession, custody, or control of property or money used or to be used by an agency and, intending to deceive the agency or knowingly conceal the property, delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;

(e) Is authorized to make or deliver a document certifying receipt of property used or to be used by an agency and, intending to deceive the agency, makes or delivers the receipt without knowing that the information on the receipt is true;

(f) Knowingly buys or receives, as a pledge of an obligation or a debt, public property from an officer or employee of an agency who may not sell or pledge the property lawfully; or

(g) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to an agency,

is liable to the state for a civil penalty of not less than \$5,500 and not more than \$11,000 and for treble the amount of damages the agency sustains because of the act or omission of that person.

And see s. 68.083(2), Fla. Stat., authorizing a person to bring a civil action for a violation of s. 68.082, Fla. Stat., for the person and for the affected agency. See also s. 68.082(3), Fla. Stat., authorizing treble damages under certain circumstances.

³ Section 68.081, Fla. Stat.

⁴ See CS/HB 551, 1994 Regular Session, enacted as Ch. 94-316, Laws of Fla. And see United States ex rel. Heater v. Holy Cross Hospital, Inc., 510 F.Supp.2d 1027, 1033 (S.D. Fla. 2007), quoting United States ex rel. Mueller v. Eckerd Corporation, 1998 U.S. Dist. LEXIS 23500 at *3 (M.D. Fla. Oct. 2, 1998) (Order of United States Magistrate Judge affirmed by 35 F.Supp.2d 896 [M.D. Fla. 1999]), stating that "[t]he Florida FCA, is modeled after and tracks the language of, the federal False Claims

Act. "See also United States v. Aggarwal, 2005 WL 6011259 at *4 (M.D. Fla. 2005) (Plaintiff brought claims under both the federal and state false claims acts; "[t]hese statutes are similar, with the Florida version modeled on the Federal statute").

The federal act has been subsequently amended in 2009; 31 U.S.C. 3732 was amended by adding subsection (c). See PL 111-21 (2009), s. 4, 123 Stat. 1625. Subsections (b) and (c) provide:

(b) Claims under state law.--The district courts shall have jurisdiction over any action *brought under the laws of any State* for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) Service on State or local authorities.--With respect to any State or local government that is named as a co-plaintiff with the United States in an action *brought under subsection (b)*, a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action. (e.s.)

The amendment, which was enacted after the adoption of the Florida act, would not appear to affect resolution of the issue under consideration, i.e., whether the Florida False Claims Act encompass municipalities.

⁵ See, e.g., Notice of Voluntary Dismissal with Prejudice, State ex rel. Sherwin v. Office Depot, Inc., Case No. 2008-CA-002309 (Fla. 2d Jud. Cir. Leon Co. June 4, 2010) (overcharging allegations involving local governmental entities are not within the scope and provisions of the Florida False Claims Act).

⁷ This office is aware that some courts have referred to municipalities as instrumentalities of the state for purposes of the administration of local government. *See Turk v. Richard*, 47 So. 2d 543 (Fla. 1950) (municipal corporation is instrumentality of state established for more convenient administration of local government); *State v. City of Auburndale*, 85 So. 2d 611 (Fla. 1956). The current Florida Statutes, however, appear to utilize the term in a manner separate and distinct from that of "municipality" or "political subdivision," a term that generally includes a municipality. *See, e.g.*, s. 116.34(2)(a), Fla. Stat. (referring to state or by any of its

⁶ Section 68.082(1)(d), Fla. Stat.

departments, agencies, public bodies, or other instrumentalities or by any of its political subdivisions); s. 812.035(7), Fla. Stat. ("state, including its agencies, instrumentalities, subdivisions, or municipalities"); s. 443.036(35), Fla. Stat. (definition of "Public employer" for purposes of unemployment compensation); s. 380.031(6), Fla. Stat. ("Governmental agency" for purposes of the Florida Environmental Land and Water Management Act of 1972); s. 163.3164(10), Fla. Stat. ("Governmental agency" for purposes of the Local Government Comprehensive Planning and Land Development Regulation Act); s. 215.58(12), Fla. Stat. (State Bond Act); and s. 961.06(5) and (6), Fla. Stat. (claims for unlawful incarceration).

⁸ See s. 68.082(2), Fla. Stat., set forth in n.2, *supra*. See also s. 68.083(2), Fla. Stat., also cited in n.2, authorizing a person to bring a civil action for a violation of s. 68.082, Fla. Stat., for the person and for the affected agency. And see s. 68.082(1)(b), Fla. Stat., defining "Claim."

⁹ Alonso v. State, 17 So. 3d 806, 808 (Fla. 3d DCA 2009); Acosta v. Richter, 671 So. 2d 149, 153-154 (Fla. 1996), quoting Jackson v. State, 634 So. 2d 1103, 1105 (Fla. 4th DCA 1994).

¹⁰ See, e.g., Art. IV, s. 6, Fla. Const.; s. 20.04, Fla. Stat., setting forth the structure of the "executive branch of state government."

¹¹ For example, s. 68.087, Fla. Stat., in setting forth exemptions to civil actions, provides that no court has jurisdiction over an action brought under the act against a senior executive branch official, defined as "any person employed in the executive branch of government holding a position in the Senior Management Service as defined in s. 110.402[,]" or against a local government, defined for the purposes of the subsection to mean any county or municipality. *See* s. 68.087(1) and (6), Fla. Stat., respectively.

¹² See generally Alexdex Corporation v. Nachon Enterprises, Inc., 641 So. 2d 858 (Fla. 1994) (legislative history of a statute may be used to clarify ambiguity and illuminate legislative intent).

¹³ See SB 1598, 1993 Regular Session of the Florida Legislature.

¹⁴ Section 2(1)(a), SB 1598, *supra*.

¹⁵ See s. 1.01(8), Fla. Stat., generally defining the term "public body" or "political subdivision" to include "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state."

¹⁶ See Tape, House Judiciary Committee, March 8, 1994, in which Representative Warner, stated that while he had had concerns with the breadth of the previous year's bill, the 1994 bill "narrowly limited it [the False Claims Act] to state agencies. " Representative Warner had offered the amendment to HB 551 which created the False Claims Act. See 1994 Journal of the Florida House of Representatives, April 8, 1994, pp. 15171520. *Cf. Ellis v. N.G.N. of Tampa*, 561 So. 2d 1209 (Fla. 2d DCA 1990), *quashed on other grounds*, 586 So. 2d 1042 (Fla. 1991) (legislative intent may be illuminated by consideration of comments made by proponents of bill or amendment).

¹⁷ See House of Representatives Committee on Judiciary Bill Analysis and Economic Impact Statement for HB 1185, dated February 22, 1994, which lists fraud against the Department of the Lottery and the Department of Transportation as well as Medicaid fraud as the types of cases that might be addressed by the false claims act. The bill, sponsored by Representative Warner, contains the identical definition of "State government" as is contained in HB 551, as amended by Representative Warner and subsequently enacted as Ch. 94-316, Laws of Fla.

¹⁸ See, e.g., Ch. 21, Art. XV, Miami-Dade County Code of Ordinances; and Ch. 1, Art. XIV, of the Broward County Code of Ordinances.

¹⁹ For example, Delaware defines "Government" for purposes of the Delaware False Claims and Reporting Act to include all departments, boards or commissions of the executive branch of the State and all political subdivisions of the State. See Title 6, s. 1202(2), Del. Code. And see 740 Ill. Comp. Stat. 175/2; s. 17-8-402, Mont. Code. Ann.; and s. 9-1.1-2, R.I. Gen. Laws. California, in defining claims for purposes of the California act, refers to the state and to political subdivisions. Section 12650, Cal. Gov. Code. And see Ch. 12, s. 5A, Mass. Ann. Laws; s. 15C.01 Subd. 2., Minn. Stat.; N.Y. St. Fin., Title XIII, s. 188, subsec. 1, Laws of N.Y.; s. 357.020, Nev. Rev. Stat.; s. 4-18-102, Tenn. Code; and Title 8.01, Ch. 3, s. 8.01-216.2, Va. Code. Several states, by restricting application of their acts to health care or Medicaid claims, are limited to the state. See, e.g., s. 25.5-5-304 et seq., Colo. Rev. Stat.; ss. 400.601 et. seq., Mich. Comp. Laws; s. 63-5053 et seq., Okla. Stat.; s. 36.001 et seq., Tex. Hum. Res. Code. Indiana expressly excludes political subdivisions. See 5-11-5.5-1, s. 1(7), Ind. Code. Hawaii and North Carolina do not define "state" within their acts. See s. 661-21 et seq., Haw. Rev. Stat.; and Ch. 1, Art. 51, s. 1-605 et seq., N.C. Gen. Stat., respectively.

New Mexico defines "state" for purposes of its Fraud Against Taxpayers Act to mean the state of New Mexico "or any of its branches, agencies, departments, boards, commissions, officers, institutions or instrumentalities " Section 44-9-2.E. N.M. Rev. Stat. This office has been informed by the New Mexico Attorney General's Office that it is unaware of any interpretation that would apply the above definition to the political subdivisions of the state.

²⁰ See, e.g., s. 420.504(2), Fla. Stat., designating the Florida Housing Finance Corporation as an instrumentality of state. And see s. 348.0002(2), Fla. Stat., providing that an expressway authority established pursuant to the Florida Expressway Authority Act is an instrumentality of the state; and s. 616.251, Fla. Stat., designating the State Fair Authority as an instrumentality of the state.

AGO 11-11 – June 24, 2011

AIRPORTS – COUNTIES – SALE OF PROPERTY – REVERTER CLAUSES – COMPETITIVE BIDDING

ABILITY OF COUNTY TO SELL COUNTY-OWNED AIRPORT TO PRIVATE PARTY FOR AIRPORT PURPOSES

To: Mr. Mark F. Lapp, Hendry County Attorney

QUESTIONS:

1. May Hendry County sell its county-owned airport to a private party?

2. If so, must it sell the property using the competitive process prescribed in Chapter 125, Florida Statutes?

SUMMARY:

1. Hendry County is authorized to sell the county-owned airport to a private party if the county commission makes a determination that the county no longer needs the property for aeronautic purposes. While such a determination apparently would trigger the reverter clause applicable to the property, it has been represented to this office that the federal government will consent to the transfer of the property and not enforce the reverter clause.

2. In light of the federal government's consent to the transfer of the airport property and waiver of the reverter clause, the county must follow the competitive process prescribed in section 125.35, Florida Statutes, in selling the county airport.

You state that Hendry County owns and operates Airglades Airport, a parcel of 2,560 acres formerly owned and used by the United States government as a military base. Pursuant to the Federal Aviation Administration's Airport Privatization Pilot Program, authorized under 49 United States Code section 4713, the county wishes to sell or lease the property to a private entity for development of the airport as an "air cargo trans-shipment center." The program allows governmentowned airports to be sold or leased to the private sector. You indicate that the county obtained the property from the State of Florida, which had received it from the United States government in 1948. The deed transferring the property to the state reflects that the land was being conveyed for public airport purposes and contains a reverter clause should the property cease to be used for anything other than airport purposes without the consent of the United States government. In further communications with this office you have indicated that the federal government will consent to the transfer of the airport property to a private entity and, therefore, waive enforcement of the reverter clause.

No comment is expressed herein regarding the terms of the original deed to the State of Florida or the implications of federal law on the transfer of the property.

QUESTION 1.

Pursuant to section 332.08, Florida Statutes, a county¹ may lease airport property to private parties for operation and lease or assign to private parties a space, area, improvement, or equipment on such airport for a limited period and for use consistent with the act.² The statute further authorizes a county to sell any part of such airport to any municipal or state government or the United States for aeronautical purposes.³ Section 332.08(4), Florida Statutes, however, speaks specifically to the authority of a county to sell or lease airport property "which, in the judgment of its governing body, may not be required for aeronautic purposes[.]"

Thus, it would appear that the provisions in section 332.08, Florida Statute, limit a county's authority to sell part of its airport property for aeronautical purposes only to another municipality (county), the state government, or the United States, but imposes the requirement that the sale of the entire airport, without regard to whether the buyer is public or private, be conditioned upon a finding by the county's governing body that the airport property is no longer required for aeronautical purposes.

You have cited two previous opinions of this office to assert that the provisions in Chapter 125, Florida Statutes, governing the disposition of property by a county would control the sale of airport property by the county, since pertinent provisions in Chapter 125^4 were enacted later in time than section 332.08, Florida Statutes. Both opinions, however, consider the ability of a county to enter into a lease for the non-aviation portion of an airport to a private developer.

In Attorney General Opinion 94-96, this office was asked whether a county commission was authorized to grant a lease in excess of 30 years to a private party for the purpose of operating and developing the non-airfield portion of a county airport. The opinion contrasted section 332.08(3), Florida Statutes, limiting the lease of airport property to a period not exceeding 30 years, with section 125.35, Florida Statutes, authorizing the lease of airport property for any period a county commission deems appropriate when such action is in the best interest of the county and the improved leasehold has an appraised value in excess of \$20 million. As the later in time and more specific to the lease of airport property and facilities under specified conditions, section 125.35, Florida Statutes, was found to authorize the county to lease county airport property for a term determined by the commission to be in the best interest of the county. It was concluded that pursuant to section 125.35, Florida Statutes, the county was authorized to grant a lease in excess of 30 years to a private party for the operation and development of the non-airport portion of the county airport. The opinion stressed, however, that the factors set forth in the statute must be met, that is, the county commission must determine that such a lease is in the best interest of the county, it must be an airport operation or facility lease, and the improved leasehold must have an appraised value in excess of \$20 million.

Subsequently, this office was presented with the question of whether a county could lease the non-aviation portion of an airport site to a private developer without competitive bid. In Attorney General Opinion 99-35, it was noted that the provisions in section 125.35, Florida Statutes, were amended in 1999 to clarify that counties are authorized to negotiate the lease of airport and seaport facilities.⁵ As the later in time and more specific to the leasing of airport property, the provision in section 125.35, Florida Statutes, was found to control. The opinion concluded, therefore, that counties are not required to use a competitive bidding procedure for the lease of the county's airport facility and that pursuant to section 125.35, Florida Statutes, such a lease may be granted for a term in excess of 30 years.

There is a distinction, however, between the leasing of airport property and the sale of such property. When the Legislature in 1999 clarified local governments' authority relating to the lease of airport property under Chapter 125, Florida Statutes, and exempted such leasing from the competitive bid requirements of the act, it could easily have addressed the sale of airport property also.6 The Legislature did not do so. This office cannot add language where the Legislature has chosen to remain silent, nor may it extend the reach of Chapter 125, Florida Statutes, to the sale of airport property when there are specific provisions in section 332.08, Florida Statutes, governing such transactions.⁷ The conclusions in Attorney General Opinions 94-96 and 99-35 are based upon application of the rule of statutory construction that legislation later in time controls. Such rationale may not be applied to the sale of airport property, since the more specific provisions relating to the sale of airport property are located in section 332.08, Florida Statutes.⁸

Section 332.08, Florida Statutes, speaks specifically to the sale of airport property and constitutes the Legislature's direction as to the manner in which such a sale will be accomplished.⁹ As noted above, subsection (3) of the statute, authorizes the sale of airport property for aeronautical purposes to public entities. Subsection (4) authorizes the sale of such property when the county no longer needs the property for aeronautical purposes, without restriction as to whether the purchaser

is a public or private entity.

Section 332.08, Florida Statutes, was enacted prior to sections 125.35 and 125.39, Florida Statutes.¹⁰ There is no indication that the more specific provisions in section 332.08 relating to the sale of airport property by a county, however, were amended or repealed by the enactment of the later statutes governing the general purchase or sale of county property.¹¹ The more specific terms of section 332.08, Florida Statutes, would control over the general grant of authority to purchase and dispose of real property in Chapter 125, Florida Statutes.

Accordingly, it is my opinion that section 332.08(4), Florida Statutes, authorizes the county to sell its county-owned airport to a private party when the governing body of the county has determined that the county no longer needs the property for airport purposes. Such a determination in this instance, however, would according to your letter trigger the reverter clause in the original deed transferring ownership of the property from the United States government. You have advised this office, however, that the federal government consents to the sale of the property to a private entity, thereby waiving operation of the reverter clause.

QUESTION 2.

Generally, a board of county commissioners is authorized to sell or convey any real or personal property and to lease real property to the highest and best bidder when the board determines that it would be in the county's best interest.¹² The statutes governing such disposition, however, specifically exempt the lease of an airport from the competitive bidding and best interest requirements.¹³

Section 125.39, Florida Statutes, further creates an exception from the general competitive bidding provisions in Chapter 125, Florida Statutes, governing the disposition of real and personal property as follows:

The provisions of this law shall not be construed to cover the sale or disposition of any land conveyed to any county for a specific purpose and containing a reversionary clause whereby said land shall revert to the grantor or grantors upon failure to use said real property for such purpose.

This section originated during the 1947 Legislative Session in the same act as the general provisions governing the sale or disposition of property by competitive bid in section 125.35, Florida Statutes.¹⁴ The section originally included an exemption for the sale or disposition of lands acquired by the county for delinquent taxes.¹⁵ The portion relating to the disposition of lands acquired for delinquent taxes was deleted in 1973, at the same time that section 197.302, Florida Statutes,¹⁶ was

11-11

amended to cover such lands.¹⁷

The only Florida court considering the effect of section 125.39, Florida Statutes, on the transfer of county-owned property subject to a reversion clause found the exemption "clear on its face, and intended to apply only in *limited circumstances*."¹⁸ (e.s.) The court stated that "[a]s long as a conveyance to the county includes a valid special purpose and reverter clause, the competitive bidding requirements do not apply to county dispositions." ¹⁹

While there is no available legislative history explaining the exemptions created in 1947 by section 125.39, Florida Statutes, the title to the act states that it is:

AN ACT Relating to the Disposition of Real and Personal Property Belonging to Any County in the State of Florida Not Needed for County Purposes by the Board of County Commissioners and Providing for the Procedure in Making Any Sale or Lease Thereof and Limiting the Application of This Act.²⁰ (e.s.)

This clear intent in the title premises the exercise of the county's authority to dispose of real and personal property upon the fact that the property is no longer needed for county purposes. A logical interpretation of section 125.39, Florida Statutes, therefore, is that disposition of property subject to a reverter clause is controlled by the reverter clause since the property is no longer needed for county assumed ownership of the property. There would be no need for competitive bidding when by the terms of the deed the property is returned to the grantor when the county no longer needs the property for such use. In this instance, as discussed in Question One, the disposition of the airport property by the county is dependent upon the county's determination that the property is no longer needed by the county.

You assert that since the airport property is subject to a reverter clause, the competitive bidding requirements in section 125.35, Florida Statutes, do not apply and the county is allowed to sell the airport property pursuant to the general expression of a county's authority to sell or exchange real or personal property recognized in section 125.01(3), Florida Statutes. In light of the discussion in Question One, this would presume that the reverter clause is not triggered by the disposition of the property. This office does not interpret contracts and deeds, nor may it make a factual determination of whether the sale of the property to a private entity constitutes the continued use of the property for a public airport. Nevertheless, the mere presence of a reverter clause would not appear to be sufficient to exempt the sale or disposition of property from competitive bidding requirements in section 125.35, Florida Statutes. The exemption in section 125.39, Florida Statutes, simply recognizes that property subject to a reverter clause which is determined to be no longer needed for county purposes would revert to the grantor. No competitive bidding would be needed or required under such circumstances.

The courts of this state have recognized that competitive bidding protects the public's interest. As stated in *Wester v. Belote*,²¹ competitive bidding laws

serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated.²²

The competitive bid requirements in Chapter 125, Florida Statues, ensure that the public's interest is protected when a county disposes of its property. As a statute enacted to protect the public's interest, section 125.35, Florida Statutes, should be broadly construed to effectuate the purpose of the law and any exemption narrowly applied.²³ In light of the protections afforded by the competitive bid statutes, I am unable to read the exemption in section 125.39, Florida Statutes, so broadly that it would apply to an inoperative reverter clause.

Accordingly, where the federal government consents to the sale of the county airport and waives the operation of the reverter clause, it is my opinion that the county must comply with the competitive bid requirements in section 125.35, Florida Statutes, in the sale of such property.

¹ Section 332.01(1), Fla. Stat., defines "[m]unicipality" to include "any county, city, village, or town of this state" for purposes of Ch. 332, Fla. Stat.; clearly, therefore, the provisions in section 332.08, Fla. Stat., would apply to an airport owned by a county.

² See s. 332.08(3), Fla. Stat.

 $^{^{3}}$ Id.

⁴ Section 125.01(3), Fla. Stat., recognizes the general authority of a county to purchase, lease, sell, or exchange real or personal property; s. 125.35, Fla. Stat., sets forth a more detailed procedure for counties to sell and convey property by competitive bid; and s. 125.39, Fla. Stat., recognizes that the provisions in Ch. 125, Fla. Stat., do not cover the sale or disposition of land conveyed to a county for a specific purpose

and containing a reversionary clause whereby such land reverts to the grantor upon failure to use the land for such purpose.

⁵ See Title to SB 1534, Ch. 99-190, Laws of Fla., stating that it is an act relating to local government "clarifying that counties are authorized to negotiate leases with airport and seaport facilities."

 $^6~See$ SB 1534, 1999 Regular Session, enacted as Ch. 99-190, Laws of Fla.

⁷ See, e.g., Ops. Att'y Gen. Fla. 82-80 (1982) (Attorney General is not free to add words to a statute to support a conclusion that the plain wording of the statute does not supply); 94-09 (1994); 87-43 (1987); 86-32 (1986); and 82-20 (1982). And see Chaffee v. Miami Transfer Company, Inc., 288 So. 2d 209 (Fla. 1974) (Attorney General's Office has no authority to supply additional words to or modify the meaning of a duly enacted statute).

⁸ See McKendry v. State, 641 So. 2d 45 (Fla. 1994) (specific statute covering a particular subject area will control over a statute covering the same and other subjects in more general terms); Rowe v. Pinellas Sports Authority, 461 So. 2d 72 (Fla. 1984) (when a special act and a general law conflict, the special act will prevail).

⁹ See Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (legislative direction constitutes an implicit prohibition against its being done in any other manner).

 10 See s. 8, Ch. 22846, General Laws of Fla. (1945), creating s. 332.08, Fla. Stat., and ss. 1 and 5, Ch. 23829, General Laws of Fla. (1947), respectively creating ss. 125.35 and 125.39, Fla. Stat. See also n.4, supra.

¹¹ See State ex rel. Quigley v. Quigley, 463 So. 2d 224 (Fla. 1985); State v. J.R.M., 388 So. 2d 1227 (Fla. 1980). Cf. Kligfeld v. Office of Financial Regulation, 876 So. 2d 36, 38 (Fla. 4th DCA 2004); Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001); State v. Digman, 294 So. 2d 325 (Fla. 1974), providing that implied repeals are disfavored and will not be upheld in cases of doubt.

¹² See s. 125.35, Fla. Stat.

¹³ Section 125.35(1)(b), Fla. Stat.

 14 See ss. 1 and 5, Ch. 23829, Gen. Laws of Fla. (1947), respectively creating ss. 125.35 and 125.39, Fla. Stat.

¹⁵ Section 5, Ch. 23829, Gen. Laws of Fla. (1947), states:

The provisions of the Act shall not be construed to cover the sale or disposition of those lands acquired by any County for delinquent taxes and which are described in the book designated "County Lands Acquired for Delinquent Taxes", on file in the office of the Clerk of the Circuit Court of any County, or any land conveyed to any County for a specific purpose and containing a reversionary clause whereby said land shall revert to the grantor or grantors upon failure to use said real property for such purpose.

 16 Subsequently renumbered as s. 197.592, Fla. Stat., by s. 197, Ch. 85-342, Laws of Fla.

¹⁷ Section 29, Ch. 73-332, Laws of Fla., deletes the provisions relating to lands acquired by any county for delinquent taxes from section 125.39; s. 23, Ch. 73-332, Laws of Fla., was amended to address the method and procedure to be used for the sale of lands acquired by any county for delinquent taxes.

¹⁸ Rolling Oaks Homeowner's Association, Inc. v. Dade County, 492 So. 2d 686 (Fla. 3d DCA 1986).

- ¹⁹ *Id.* at 690.
- ²⁰ Chapter 23829, Gen. Laws of Fla. (1947).
- ²¹ 138 So. 721, (Fla. 1931).

²² Id. at 724. See also Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988), stating:

Although not required by common law, competitive bidding has been statutorily mandated for the protection of the public. In addition to providing a means by which goods or services required by public authorities may be acquired at the lowest possible cost, *Hotel China & Glassware Co. v. Board of Public Instruction*, 130 So. 2d 78, 81 (Fla. 1st DCA 1961), the system of competitive bidding protects against collusion, favoritism, and fraud in the award of public contracts. *Liberty County* [v. *Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982)]; *Wester v. Belote*, 103 Fla. 976, 981-82, 138 So. 721, 723-24 (1931).

²³ Cf. Sarasota Citizens for Responsible Government, et al., v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010) (Sunshine Law, enacted in the public interest to protect public from "closed door" politics, must be broadly construed to effect its remedial and protective purpose); and *Florida Farm Bureau Casualty Insurance Co. v. Cox*, 943 So. 2d 823, 835 (Fla. 1st DCA 2006) (statutes governing insurance contracts to be construed to protect the public, *citing Praetorians v. Fisher*, 89 So. 2d 329, 333 (Fla. 1956), stating that statutes governing insurance contracts be liberally construed to protect the public).

AGO 11-12 – July 19, 2011

SPECIAL DISTRICTS – HOSPITALS – MALFEASANCE – CHARTERS – OVERSIGHT

CHARTER OVERSIGHT DUTIES OF HOSPITAL DISTRICT'S BOARD OF COMMISSIONERS; NON-INTERFERENCE CLAUSE

To: Mr. Samuel S. Goren, Attorney, North Broward Hospital District

QUESTIONS:

1. How are the members of the North Broward Hospital District's Board of Commissioners able to exercise their "charter oversight duties," if at all, given the "explicit segregation of duties between the functions of operational management of the district and oversight by the board," as stated in the district charter, as amended?

2. Are the board members of the North Broward Hospital District permitted to utilize their prerogative to give direction to or interfere with employees, officers, or agents under the direct or indirect supervision of the district's President/CEO for the limited purpose of "inquiry or information" as individuals, or must they exercise such option as a whole collegial body?

3. Since violations of the non-interference provision of the 2007 act specifically constitute "malfeasance within the meaning of Article IV, s. 7(a) of the Florida Constitution," how is this section to be enforced and what are the penalties for violations thereof?

SUMMARY:

1. The Legislature has expressed its intent that members of the board of commissioners refrain from operating in a management role while also performing charter oversight duties in what appears to be policy language in section 5(2), Chapter 2007-299, Laws of Florida. In the directory language of the amendment, members of the board are required to refrain from giving direction to or interfering with employees or others under the supervision of the President/CEO, with the exception of inquiry and information gathering.

2. An individual member of the board of commissioners of the North Broward Hospital District may ask questions or request information of district employees, agents, and officers who are supervised, directly or indirectly, by the President/CEO of the district, but may not otherwise give direction to or interfere

with any such employee.

3. The provisions of section 5(2) of the charter specifically make a violation of the "non-interference" clause an occasion of malfeasance within the meaning of Article IV, section 7(a) of the Florida Constitution. The constitutional provision must be read together with the statutory implementation language set forth in Part V, Chapter 112, Florida Statutes, which sets forth the procedure for disposition of an order of suspension by the Governor.

The North Broward Hospital District (the "district") is an independent special taxing district created in 1951 by chapter 27438, Laws of Florida, to meet the health care needs of the people of the district.¹ The district is governed by a seven member board of commissioners (the "board") appointed by the Governor.² The enabling legislation for the district and subsequent amendments were recently recodified in Chapter 2006-347, Laws of Florida, which is the district's charter. In 2007, the charter was amended to include a "non-interference" provision and to require that the board adopt a code of conduct and ethics.³ As provided in the district's bylaws:

The Board shall guide the North Broward Hospital District and all of its facilities, common divisions and wholly owned entities toward the efficient and effective provision of quality health care, education and research. The powers of the Board of Commissioners shall be employed so as to ensure that the welfare and health of the patients and the best interests of the hospitals and facilities of the District are at all times served.⁴

You have requested this office's assistance in determining how the board of commissioners of the North Broward Hospital District may comply with the legislative directive expressed in section 5(2), Chapter 2007-299, Laws of Florida, which provides:

It is the finding of the Legislature that it is not in the public interest for any member of the board of commissioners to operate in the perceived role of management while simultaneously exercising the *charter oversight duties* contemplated by creation of this special act. It is therefore the intent of the Legislature that the board of commissioners only exercise its *oversight function* as a whole body and not through the actions of any individual commissioner. It is also the intent of the Legislature that there be an explicit segregation of duties between the functions of operational management of the district and *oversight* by the board of commissioners. Except for the purposes of inquiry or information, a member of the board of commissioners shall not give direction to or interfere with any employee, officer, or agent under the direct or indirect supervision of the President/ CEO. Such action shall be malfeasance within the meaning of Art. IV, s. 7(a) of the Florida Constitution. Nothing contained herein shall prevent a commissioner from referring a citizen complaint to the President/CEO or to the board of commissioners or providing information about any issue to the President/CEO or to the board of commissioners. (e.s.)

QUESTION 1.

This office is authorized to provide legal opinions on questions of state law; we have no authority to provide district boards or commissions with detailed suggestions as to how they may accomplish the work of the district for which they were appointed. As such, I must advise you that this office cannot direct how members of the board of the North Broward Hospital District should accomplish their duties.

Your first question relates to the scope of the oversight duties of the North Broward Hospital District's board of commissioners as limited by Chapter 2007-299, Laws of Florida. The language of section 5(2), Chapter 2007-299, Laws of Florida, which has prompted your question appears to be language reflecting the intent of the Legislature rather than language directing the board to perform some action:

It is the finding of the Legislature that it is not in the public interest for any member of the board of commissioners to operate in the perceived role of management while simultaneously exercising the charter oversight duties contemplated by creation of this special act. It is therefore the intent of the Legislature that the board of commissioners only exercise its oversight function as a whole body and not through the actions of any individual commissioner. It is also the intent of the Legislature that there be an explicit segregation of duties between the functions of operational management of the district and oversight by the board of commissioners. (e.s.)

As demonstrated above, these sentences are phrased in terms of legislative findings and intent, but these statements do not require any particular action by the board or provide any direction as to how such action should be accomplished.⁵ The operative provision is the sentence stating that "[e]xcept for the purposes of inquiry or information, a member of the board of commissioners shall not give direction to or interfere with any employee" It is through this provision that the Legislature chose to accomplish its stated intent of separating the management and oversight of the district.⁶

QUESTION 2.

Your second question requires consideration of the language of the 2007 amendment of the charter/special act which provides:

It is . . . the intent of the Legislature that the board of commissioners only exercise its oversight function as a whole body and not through the actions of any individual commissioner. . . . Except for the purposes of inquiry or information, a member of the board of commissioners shall not give direction to or interfere with any employee, officer, or agent under the direct or indirect supervision of the President/ CEO.⁷

Concerns have been expressed that this language would restrict the ability of individual board members to directly engage district staff working under the supervision of the President/CEO for purposes of inquiry or for informational purposes.

While this office recognizes that section 5(2), Chapter 2007-299, Laws of Florida, provides that "the board of commissioners [should] only exercise its oversight function as a whole body and not through the actions of any individual commissioner[;]" the act also specifically authorizes individual members of the board to give direction to district employees within the supervision of the President/CEO for purposes of inquiry and information seeking. As discussed more fully in my response to Question One, the legislative intent/policy language suggesting that the oversight function of the board should only be exercised "as a whole body" is not expressed in terms requiring particular action by the board. Rather, this language appears to constitute a statement of intent by the Legislature as to the purpose and construction of the operative provisions of the 2007 legislation that an individual member may not direct or interfere with these employees except for inquiry and information purposes.

The charter clearly gives individual members of the board the authority to ask questions or request information from staff of the district or others who may come within the supervisory authority of the President/CEO. Members of the board may not otherwise, without committing malfeasance, give directions to or interfere with these employees of the district. This legislative prohibition would appear to be directed toward the "functions of operational management" mentioned elsewhere in section 5, Chapter 2007-299, Laws of Florida. Thus, in order to accomplish the legislatively declared object of segregating the oversight function from the operational management of the district, these provisions should be read together and harmonized.8 Further, courts are bound to ascribe reasonableness to the intention of the Legislature and a reasoned construction to its enactments.⁹ Staff analysis for the 2007 legislation appears to support this reading of the act and states that "[a] board member that gives direction or interferes with any employee under the supervision of the President/CEO, except for inquiry, will have conducted malfeasance "¹⁰

Therefore, it is my opinion that an individual member of the board

of commissioners of the North Broward Hospital District may directly ask questions or request information of district employees, agents, and officers who are supervised, directly or indirectly, by the President/CEO of the district. In asking questions or seeking information, the board members need not act as a collegial body. However, section 5, Chapter 2007-299, Laws of Florida, makes clear the Legislature's intent that no individual member of the board may give direction to or interfere with any such employee outside the scope of inquiry and information seeking without violating the charter.

QUESTION 3.

Finally, you have asked for direction in determining enforcement options and penalties for violations of section 5(2) of the charter. The language of the special act specifically provides that violations of this section "shall be malfeasance within the meaning of Art. IV, s. 7(a) of the Florida Constitution."

Article IV, section 7 of the Florida Constitution provides for suspensions by the Governor and filling of any vacancy created by such a suspension:

(a) By executive order stating the grounds and filed with the custodian of state records, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor.

If the officer is not reinstated by the Governor, the Senate may remove him or her from office or reinstate the suspended official.¹¹ The provisions of Part V, Chapter 112, Florida Statutes, set forth procedures for the disposition of the order of suspension by the Governor implementing the constitutional provision¹² and specifying such matters as the contents of such a suspension order¹³ and the prosecution of the suspension before the Senate.¹⁴

Moreover, Article I, section 18, Florida Constitution, provides that "[n]o administrative agency . . . shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." As the court recognized in *Broward County v. La Rosa*,¹⁵ the phrase "by law" contemplates an enactment of the Legislature.¹⁶ Thus, the district, as an administrative agency,¹⁷ has no authority to prescribe penalties for violations of its charter except those the Legislature has adopted. Section 5, Chapter 2007-299, Laws of Florida, contains no other provision for penalties or enforcement for violations of the "non-interference" provision. $^{\rm 18}$

In sum, it is my opinion that the provisions of section 5(2) of the charter specifically make violation of the "non-interference" clause an occasion of malfeasance within the meaning of Article IV, section 7(a) of the Florida Constitution. The constitutional provision must be read together with the statutory implementation language set forth in Part V, Chapter 112, Florida Statutes, which provides the procedure for disposition of an order of suspension by the Governor.

¹ See s. 3, Ch. 2006-347 and s. 1, Ch. 2007-299, Laws of Fla.

² See s. 3, Ch. 2006-347, Laws of Fla.; Art. I, s. 1-2, Bylaws of the North Broward Hospital District and Broward General Medical Center, North Broward Medical Center, Imperial Point Medical Center, Coral Springs Medical Center.

³ This office is aware that the district's bylaws were last revised in 1991. See Bylaws of the North Broward Hospital District, Editor's note, p. 37. The board may wish to update the district's bylaws to reflect the more recent legislative directives considered herein and more fully delineate the operational management duties and charter oversight duties of the President/CEO and the board. This office has no information regarding the situation existing in the district which gave rise to the adoption of Ch. 2007-299, Laws of Fla., which could provide guidance, but would suggest that some investigation into the situation surrounding the amendments could be helpful in effectuating the legislative intent expressed in the act. *See, e.g., Singleton v. Larson*, 46 So. 2d 186 (Fla. 1950) (in construing a statute, court will consider its history, evil to be corrected, intention of Legislature, subject to be regulated, objects to be obtained and will be guided by legislative intent); *State v. Webb*, 398 So. 2d 820 (Fla. 1981); *State v. Anderson*, 764 So. 2d 848 (Fla. 3d DCA 2000).

⁴ Art. I, s. I-4, Bylaws *supra*.

⁵ See Bledsoe v. Palm Beach Soil and Water Conservation Dist., 942 F.Supp. 1439, reversed 133 F.3d 816, rehearing and suggestion for rehearing denied, 140 F.3d 1044, certiorari denied, 119 S.Ct. 72, 525 U.S. 826, 142 L. Ed. 2d 57 (in ascertaining plain meaning of statute, court should look not only to discrete portion of statute at issue, but to design of statute as whole and to its object and policy).

⁶ Cassoutt v. Cessna Aircraft Co., 742 So. 2d 493 (Fla. 1st DCA 1999) (When construing a statutory provision, court is guided by the rule that the intent of the Legislature is the overriding consideration.); *State, Dept.* of *Revenue v. Kemper Investors Life Ins. Co.*, 660 So. 2d 1124 (Fla. 1st DCA 1995) (When construing statutes, primary purpose designated should determine force and effect of words used, and no literal interpretation should be given that leads to unreasonable ridiculous conclusion or purpose not intended by Legislature).

⁷ Section 5, Ch. 2007-299, Laws of Fla.

⁸ See Ideal Farms Drainage District v. Certain Lands, 19 So. 2d 234 (Fla. 1944); Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452 (Fla. 1992) (all parts of a statute must be read together in order to achieve a consistent whole); State v. Haddock, 140 So. 2d 631 (Fla. 1st DCA 1962).

⁹ City of Boca Raton v. Gidman, 440 So. 2d 1277 (Fla. 1983); Wakulla County v. Davis, 395 So. 2d 540 (Fla. 1981); City of Dania v. Hertz Corporation; 518 So. 2d 1387 (Fla. 4th DCA 1988).

¹⁰ See House of Representatives Local Bill Staff Analysis, CS/HB 1391, p.2, dated April 11, 2007.

- ¹¹ Section 7(b), Art. IV, Fla. Const.
- ¹² Section 112.40, Fla. Stat.
- ¹³ Section 112.41, Fla. Stat.
- ¹⁴ Section 112.43, Fla. Stat.

¹⁵ 484 So. 2d 1374 (Fla. 4th DCA 1986). And see Broward County v. Plantation Imports, Inc., infra, in which the court struck down a provision of the Broward County Consumer Protection Code which authorized the county Consumer Protection Board to determine if there were violations of the Code and impose civil penalties for violation of any cease and desist orders. The court held the provision authorizing an administrative agency to impose a penalty, without such authority being provided by legislative act, was unconstitutional.

¹⁶ See Grapeland Heights Civic Association v. City of Miami, 267 So. 2d 321, 324 (Fla. 1972); Broward County v. Plantation Imports, Inc., 419 So. 2d 1145 (Fla. 4th DCA 1982); Ison v. Zimmerman, 372 So. 2d 431 (Fla. 1979); Op. Att'y Gen. Fla. 79-109 (1979).

¹⁷ See, e.g., Ops. Att'y Gen. Fla. 09-53 (2009) (mosquito control district is administrative agency for purposes of Art. I, s. 18, Fla. Const.); 09-29 (2009) (county precluded from adopting ordinance imposing civil penalty); 01-77 (2001) (city code enforcement board may not alter statutory provisions to authorized imposition of fine).

¹⁸ Section 5(3)(a), Ch. 2007-299, Laws of Fla., also makes failure to comply with the provisions of the district's code of conduct "malfeasance within the meaning of Art. IV, s. 7(a) of the Florida Constitution."

AGO 11-13 – July 19, 2011

HOUSING FINANCE AUTHORITIES - CONFLICT - SPOUSE

WHETHER LEGAL REPRESENTATION OF "QUALIFIED HOUSING DEVELOPMENT" BY SPOUSE MAY CONSTITUTE DIRECT OR INDIRECT INTEREST OF MEMBER OF HOUSING FINANCE AUTHORITY

To: Mr. Morris G. (Skip) Miller, General Counsel to the Housing Finance Authority of Palm Beach County, Florida

QUESTION:

Does section 159.606, Florida Statutes, prohibit a person from being a member of a housing finance authority if the member's spouse is a partner in a law firm that provides legal services to the developers of one or more "qualifying housing developments" requesting financing from the authority?

SUMMARY:

Section 159.606, Florida Statutes, does not prohibit a person from being a member of a housing finance authority if the member's spouse is a partner in a law firm that provides legal services to the developers of one or more "qualifying housing developments" requesting financing from the authority.

You state that the Housing Finance Authority of Palm Beach County was created by the Board of County Commissioners of Palm Beach County in 1979 pursuant to Part IV of Chapter 159, Florida Statutes. A primary function of the authority is to issue bonds to finance "qualifying housing developments" as defined in section 159.603(6), Florida Statutes. Such bonds are repayable solely from the revenues or receipts of the qualifying housing development.¹

Your letter indicates that a person has recently been appointed to the housing finance authority whose spouse is a partner in a law firm that represents a number of affordable housing developers with respect to all legal needs including, but not limited to, acquisition and financing of qualifying housing developments. Several developers represented by the spouse's law firm currently have applications pending before the authority requesting the authority to issue bonds on their behalf. You have further informed us that the new authority member has acknowledged that her spouse's position as a partner in this law firm will present a voting conflict of interest under section 112.3143, Florida Statutes, if the law firm's clients are seeking action from the authority and she has indicated that she intends to declare a voting conflict when those situations arise. I understand your question to be whether a contractual relationship for legal services between the board member's spouse and the developers of housing developments requesting financing from the housing finance authority could produce a conflict of interest for the board member by producing a "direct or indirect" interest in violation of section 159.606, Florida Statutes, and if such an interest exists, whether the board member is then disgualified from holding office.

Section 159.606, Florida Statutes, describes conflicts of interest for members or employees of a housing finance authority and sets forth disclosure requirements:

No member or employee of a housing finance authority shall acquire any interest, direct or indirect, in any qualifying housing development or in any property included or planned to be included in such a development, nor shall a member or employee have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any qualifying housing development. If any member or employee of a housing finance authority owns or controls an interest, direct or indirect, in any property included or planned to be included in any qualifying housing project, the member or employee shall immediately disclose the same in writing to the housing finance authority. Such disclosure shall be entered upon the minutes of the housing finance authority. Failure so to disclose such interest shall constitute misconduct in office.

Nothing in Part IV, Chapter 159, Florida Statutes, defines or otherwise describes what may be meant by "direct or indirect" interests.

I am aware of no court cases construing the provisions of section 159.606, Florida Statutes, and the lone Attorney General Opinion construing the statute sheds no light on the question presented here. However, the Florida Commission on Ethics has, on multiple occasions, addressed potential conflicts of interest arising from a spouse's employment or contractual relationships. In those cases, the Commission determined that it is the business relationships of the public officer – not those of the spouse – that are controlled by the relevant ethics laws.²

Additionally, as the Florida Supreme Court stated in *City of Miami Beach v. Galbut*, a 1993 nepotism case,³ provisions of Florida's ethics code, like the conflict of interest provisions in section 159.606, Florida Statutes, are penal in nature and any doubts relating to the meaning of such a statute must be resolved in favor of a narrow construction.⁴ The court determined that this narrow construction was consistent with the conflict of interest provisions of the Ethics Code providing that it is essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve.⁵

This reasoning would appear to be equally applicable to conflict of interest provisions elsewhere in the Florida Statutes.

Based on the failure of section 159.606, Florida Statutes, to extend application of the conflicts of interest provision to specifically cover or include the spouse of a public officer, this office will not read such an extension into the statute. In addition, a strict construction of this statute is appropriate due to its penal nature.⁶ Those covered by a penal statute must have clear notice of what the statute proscribes and I cannot say that this language would have put a member of a housing finance authority on notice that his or her spouse's economic/ professional pursuits would be limited by the member's service on a housing finance authority.⁷ The plain language of section 159.606, Florida Statutes, indicates that only members or employees of a housing finance authority are prohibited from acquiring "any interest, direct or indirect" in any qualifying housing development or having any interest in a contractual relationship to be used in connection with a qualifying housing development.⁸ I believe that this result is consistent with the Ethics Commission's handling of comparable issues arising under Florida's Code of Ethics.

In sum and in response to your question, it is my opinion that section 159.606, Florida Statutes, does not prohibit a person from being a member of a housing finance authority if the member's spouse is a partner in a law firm that provides legal services to the developers of one or more "qualifying housing developments" requesting financing from the authority.

¹ See s. 159.62, Fla. Stat.

² See, e.g., CEO's 92-19 (1992), 91-06 (1991), 89-28 (1989), 88-43 (1988), and 85-52 (1985) (no prohibited conflict of interest exists where the spouse of a county commissioner is a member of a law firm which represents clients before the board of county commissioners).

³ Section 112.3135(2)(a), Fla. Stat. (1993).

⁴ City of Miami Beach v. Galbut, 626 So. 2d 192, 193 (Fla. 1993).

⁵ Id. at 194, citing s. 112.311(2), Fla. Stat. (1991).

⁶ City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993).

⁷ Id. at 194.

⁸ A statute's plain and ordinary meaning must be given effect unless to do so would lead to an unreasonable or ridiculous result. *In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *City of Miami Beach v. Galbut, supra*.

AGO 11-14 – July 19, 2011

GAMBLING—SLOT MACHINES—VETERANS' ORGANIZATIONS

APPLICABILITY OF PROHIBITION OF SLOT MACHINES TO MACHINES OPERATED BY VETERANS' ORGANIZATION

To: The Honorable Glenn Hess, State Attorney , 14th Judicial Circuit of Florida

QUESTION:

Does the electronic game operated by a veterans' organization as described in your letter constitute an illegal slot machine or device?

SUMMARY:

Based upon the information you have provided regarding the electronic machine in question, such a machine would appear to constitute an illegal slot machine or device.

You state that a local veterans' organization has acquired electronic games which appear to be slot-type machines. This office has been advised that the veterans' organization considers these games to involve an element of skill and thus be permitted under section 849.161, Florida Statutes, which provides an exception to the state's gambling laws for arcade amusement centers and truck stops. The Parker Chief of Police has directed the organization to turn the games off and your office has met with the organization and the games' distributor regarding the use of such games.

According to your letter, the games operate as follows:

1. A player inserts a card containing purchased credits into the machine and is assigned points.

2. The player then wagers a number of points against the game.

3. When a button is pushed, images on the screen mimic the rotation of drums on a mechanical slot machine.

4. When the images come to rest, the order of their appearance on the machine shows whether the player has won (gained points) or lost.

5. At the conclusion of play, accumulated (or remaining) points are converted to a monetary amount and placed on a Visa card; the card cannot be cashed out by the machine or at the VFW (Veterans of Foreign Wars) Post establishment. However, players can use the card to purchase merchandise at retail stores, much like a gift card.

From the information you have provided, it appears that the machines in question are operated by the insertion of an object into the machine, *i.e.*, a card containing purchased credits, which permits the player to place a wager and play a game on the machine involving an element of chance. Points are gained or lost based upon the outcome of the game. At the conclusion of play, the points are converted into a monetary amount and placed on a card which may be used to purchase merchandise at retail stores. Based upon such a description, the machines in question would appear to constitute slot machines as defined in section 849.16(1), Florida Statutes.

Pursuant to section 849.15, Florida Statutes, it is unlawful to possess or permit the operation of any machine or device that satisfies the description provided in section 849.16, Florida Statutes. Section 849.16 describes the prohibited machines or devices in the following terms:

(1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, may:

(a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or

(b) Secure additional chances or rights to use such machine, apparatus, or device, even though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.¹ (e.s.)

Thus, if the receipt of a prize is dependent on any element of chance, the machine would fall within the above definition of a slot machine proscribed by section 849.15, Florida Statutes.² As stated by the Supreme Court of Florida in *Deeb v. Stoutamire*³ in considering the statutory definition of a slot machine:

The law denouncing slot machines defines them as devices so adapted that "as a result of the insertion" of a coin they are "caused to operate or may be operated, and by reason of *any element of chance or of other outcome of such operation unpredictable by him*, the user may receive or become entitled to receive any * * * thing of value" or anything which may be exchanged for something of value, such as money or merchandise, "or the user may secure additional * * * rights" to play, "even though [the machine] may, in addition to *any element of chance or unpredictable outcome*" deliver merchandise or entertainment. (emphasis supplied by Court)

The Court defined slot machines by referring to the chance or unpredictability of the mechanism, not of the player.

While the statutory definition of slot machines has been subsequently amended, such amendments do not appear to have affected the operative language of the Court's holding in Deeb relating to chance. More recently, the district court in *State, Department of Business and Professional Regulation, Division of Alcoholic Beverages v. Broward Vending, Inc.*,⁴ relied on *Deeb* in reversing the lower court's ruling that a game machine in which skill was a significant factor in operating and winning did not violate the statute. Instead, the district court held that where chance is an element of the game, section 849.15, Florida Statutes, is violated.

An exception to the proscription against slot machines is contained in section 849.161, Florida Statutes, for arcade amusement centers which have certain coin-operated amusement games or machines in which skill is present. The statute provides:

Nothing contained in this chapter shall be taken or construed as applicable to an arcade amusement center having amusement games or machines which operate by means of the insertion of a coin and which by application of skill may entitle the person playing or operating the game or machine to receive points or coupons which may be exchanged for merchandise only, excluding cash and alcoholic beverages, provided the cost value of the merchandise or prize awarded in exchange for such points or coupons does not exceed 75 cents on any game played.

* * *

Nothing in this subsection shall be taken or construed as applicable to a coin-operated game or device designed and manufactured only for bona fide amusement purposes which game or device may by application of skill entitle the player to replay the game or device at no additional cost, if the game or device: can accumulate and react to no more than 15 free replays; can be discharged of accumulated free replays only by reactivating the game or device for one additional play for such accumulated free replay; can make no permanent record, directly or indirectly, of free replays; and is not classified by the United States as a gambling device in 24 U.S.C. s. 1171, which requires identification of each device by permanently affixing seriatim numbering and name, trade name, and date of manufacture under s. 1173, and registration with the United States Attorney General, unless excluded from applicability of the chapter under s. 1178. This subsection shall not be construed to authorize video poker games, or any other game or machine that may be construed as a gambling device under Florida law.⁵

The term "arcade amusement center" as used in section 849.161 means "a place of business having at least 50 coin-operated amusement games or machines on premises which are operated for the entertainment of the general public and tourists as a bona fide amusement facility."⁶ Subsection (1)(a)2. of the statute creates a similar exemption for amusement games or machines located in a truck stop as defined therein.⁷ Thus, section 849.161, Florida Statutes, provides an exemption for machines that would otherwise be prohibited by Chapter 849, Florida Statutes, if those machines are located in an arcade amusement center or truck stop, as those terms of defined by statute, *and* if, by the application of skill, the player receives a prize as prescribed therein.⁸

This office, however, has no information that would indicate that the veterans' organization qualifies for either exception. In fact, you have advised this office in a subsequent letter that the veterans' organization does not have 50 machines on its premises and that it is open only to its members and their guests. Accordingly, it would not fall within the exception afforded arcade amusement center as that term is defined by statute.

Nor do the machines in question constitute games that charitable or nonprofit organizations would be authorized to conduct as an exemption to the general prohibition against gambling under Chapter 849, Florida Statutes. Such machines do not fall within the terms of section 849.0931, Florida Statutes, which authorizes certain nonprofit organizations to conduct bingo games or instant bingo,⁹ or section 849.0935, Florida Statutes, which authorizes specified nonprofit organizations to conduct drawings by chance.¹⁰ Accordingly, I am of the opinion that the electronic games operated by a veterans' organization as described in your letter constitute illegal slot machines or devices.

 1 Cf. s. 551.102(8), Fla. Stat., defining "Slot machine" for purposes of Ch. 551, Fla. Stat., which authorizes slot machine gaming under certain conditions in Miami-Dade County or Broward County.

 2 And see Op. Att'y Gen. Fla. 89-05 (1989), in which this office determined that a coin operated "crane game" having an unpredictable outcome or chance which is inherent in the machine qualifies as a slot machine or device within the meaning of Ch. 849, Fla. Stat.

³ 53 So. 2d 873, 874 (Fla. 1951).

⁴ 696 So. 2d 851 (Fla. 4th DCA 1997).

⁵ Section 849.161(1)(a)1. and (b), Fla. Stat. It should be noted that in order to qualify for the exemption afforded by s. 849.161(1)(a), Fla. Stat., the machine must be able to accept coins, not merely currency. *See Rowe v. County of Duval*, 975 So. 2d 526 (Fla. 1st DCA 2008).

⁶ Section 849.161(2), Fla. Stat.

⁷ The statute refers to a truck stop, as defined in Ch. 336, Fla. Stat., and which operates a minimum of 6 functional diesel fuel pumps.

⁸ *Cf.* Op. Att'y Gen. Fla. 95-27 (1995) (mere pushing of a button marked "skill" does not appear to constitute the application of skill for purposes of the exemption in s. 849.161, Fla. Stat.; rather, skill must be a factor with the player's superior knowledge and attention or superior strength, agility and practice as an element in the player's ability to win); Inf. Op. to Sen. James King, Jr., dated April 1, 2003 (while s. 849.161, Fla. Stat., requires that skill be a factor in determining whether the player is entitled to receive a prize, the outcome of the game be dependent solely on skill). Ultimately, however, the determination as to whether an amusement game involves the application of skill is a question of fact that cannot be resolved by this office. See, e.g., Op. Att'y Gen. Fla. 95-27 (1995); Inf. Op. to Gregory L. Coler, dated June 12, 2003, and Inf. Op. to Rep. Sandra L. Murman, dated October 6, 2003.

⁹ See s. 849.0931, Fla. Stat., authorizing a charitable, nonprofit, or veterans' organization, as defined therein, to conduct bingo games in which participants pay a sum of money for the use of one or more bingo cards and the numbers are drawn and announced, or instant bingo using tickets by which a player wins a prize by opening and removing a cover from the ticket to reveal a set of numbers, letters, objects, or patterns, some of which have been designated in advance as prize winners. But see Op. Att'y Gen. Fla. 08-35 (2008), stating that a machine or device comes within the scope of s. 849.16, Fla. Stat., if that machine dispenses an

instant bingo game ticket that may, dependent on the element of chance, entitle the recipient to a prize.

¹⁰ See s. 849.0935(1)(a), Fla. Stat., defining a drawing by chance as "an enterprise in which, from the entries submitted by the public to the organization conducting the drawing, one or more entries are selected by chance to win a prize."

AGO 11-15 – July 21, 2011

SMOKING – SPECIAL DISTRICTS – WORKPLACES WITHOUT TOBACCO SMOKE – TOBACCO – WATER MANAGEMENT DISTRICTS

AUTHORITY OF SPECIAL DISTRICT TO ADOPT SMOKING POLICIES

To: Mr. Kirby B. Green III, Executive Director, St. Johns River Water Management District

QUESTIONS:

1. May the St. Johns River Water Management District adopt a policy prohibiting smoking by all persons, including district employees, who may be present at any location on its headquarters and service centers property pursuant to its proprietary right as a landowner to manage its property, or does the Clean Indoor Air Act preempt such authority?

2. May the district adopt a policy prohibiting tobacco use by its employees while they are being paid by the district for their time regardless of physical location, including outdoor locations and property not owned by the district?

SUMMARY:

The regulation of smoking is preempted to the state pursuant to section 386.209, Florida Statutes, and the St. Johns River Water Management District may not adopt a policy prohibiting smoking or tobacco use that is broader than the terms of the "Florida Clean Indoor Air Act." Thus:

1. The St. Johns River Water Management District may not adopt a regulation prohibiting outdoor smoking by all persons on district property.

2. However, the St. Johns River Water Management District may adopt a personnel policy prohibiting tobacco use by its

11-15

employees while they are being paid by the District for their time regardless of physical location, including outdoor locations and property not owned by the district.

According to information supplied with your letter, the St. Johns River Water Management District is considering approving a policy that would prohibit tobacco use by all persons present at its headquarters and service centers, which would include the outdoor areas, such as sidewalks and parking lots. In addition, in an effort to promote wellness, the district is considering approving a personnel policy that would prohibit tobacco use by its employees during working hours regardless of physical location. This prohibition would extend outdoors while in the district's employ, but it would not prohibit smoking when an employee is not being paid for his or her time by the district. ¹

QUESTION 1.

You have asked whether section 386.209, Florida Statutes, precludes the district from adopting a policy that would prohibit smoking in outdoor areas that are district property, e.g., parking lots and walkways. Specifically, you have asked whether the district's proprietary authority to manage its property would support such a policy, notwithstanding section 386.209, Florida Statutes.

Prior to the most recent legislative session, section 386.209, Florida Statutes, provided:

Regulation of smoking preempted to state.—This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject.²

Effective July 1, 2011, section 386.209, Florida Statutes, as amended by Chapter 2011-108, Laws of Florida, has been amended to read as follows:

Regulation of smoking preempted to state.—This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject; <u>however</u>, <u>school</u> <u>districts may further restrict smoking by persons on school</u> <u>district property</u>. (underlined text represents amendment).

This amendment and others proposed during the 2011 legislative session were introduced to clearly express the Legislature's intent that the preemption contained in section 386.209, Florida Statutes, extends to indoor and outdoor smoking.³ Further, proprietary authority, such as the authority school districts undoubtedly possess to manage their own property, does not counter the broad preemption embodied in section 386.209, Florida Statutes.⁴ To conclude otherwise would make the 2011 amendment to section 386.209, Florida Statutes, by Chapter 2011-108,

Laws of Florida, pointless.⁵

In short, a legislative amendment to section 386.209, Florida Statutes, was necessary to authorize school districts to restrict outdoor smoking on school district property. In light of the Legislature's implicit recognition that a special district's proprietary powers would not overcome the preemption language of section 386.209, Florida Statutes, it is my opinion that a similar legislative change would be necessary to allow the district to adopt its proposed outdoor smoking policy. Thus, the St. Johns River Water Management District is not authorized to adopt a policy prohibiting outdoor smoking by all persons on district property.

QUESTION 2.

You have also asked whether the St. Johns River Water Management District may adopt a policy prohibiting tobacco use by its employees while they are being paid by the district for their time, regardless of physical location, including outdoor locations and property not owned by the district. Your letter suggests that the general employment power granted to the district by section 373.083, Florida Statutes, and implied powers attendant to that statute may provide the authority necessary for such a regulation.

Members of the governing board of Florida's water management districts must employ

[a]n executive director, ombudsman, and such engineers, other professional persons, and other personnel and assistants as it deems necessary and *under such terms and conditions as it may determine* and to terminate such employment.⁶ (e.s.)

In addition, section 373.083, Florida Statutes, providing the general powers and duties of water management district governing boards, specifically identifies several broad powers "[i]n addition to other powers and duties allowed it by law. . . ." These powers include the power to "appoint and remove agents and employees, including specialists and consultants."⁷ Section 373.044, Florida Statutes, authorizes the governing board of the district to adopt rules, pursuant to Chapter 120, Florida Statutes, to implement the provisions of Chapter 373, Florida Statutes, including rules "relating to personnel matters[.]" The district, as a statutorily created entity, is authorized to exercise such powers as are expressly granted by statute or necessarily implied to make the express power effective.⁸

You have suggested that the case of *Kurtz v. City of North Miami*,⁹ offers support for the district's authority to adopt the rule you propose as an employee regulation. In the *Kurtz* case, which predates the adoption of Article X, section 20, Florida Constitution, the Third District

11-15

Court of Appeal determined that the Florida Clean Indoor Air Act did not preempt a city regulation requiring all job applicants to sign an affidavit stating that they had not used tobacco or tobacco products for at least one year immediately preceding application. The objective of the city's regulation was to reduce health costs and the amount of lost productivity due to absenteeism. While acknowledging that the intent of the state act was to provide a uniform code restricting indoor smoking in public places and that it contained language preempting all local ordinances dealing with the restriction of indoor smoking, the court concluded that this municipal regulation "only attempts to regulate the City's employment practices and is not concerned with regulating indoor smoking" since employees were free to resume smoking after they were hired. Once the court determined that the regulation of smoking was not the intention of the rule and thus, preemption was not an issue, it considered whether a job applicant's privacy rights under the State Constitution were implicated when the city required her to refrain from smoking for a year prior to being considered for employment. The District Court of Appeal concluded that the city's interests were not sufficient to reach the private lawful conduct of potential employees. However, the court certified to the Florida Supreme Court the question of whether applicants seeking government employment have a reasonable expectation of privacy under Article I, section 23, Florida Constitution, regarding their smoking habits.

The Florida Supreme Court answered the certified question in the negative, stating that "[g]iven that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida's right of privacy is not implicated under these unique circumstances."¹⁰

The action the district proposes, *i.e.*, the prohibition of employee tobacco use while employed by the district, appears to represent a condition of employment, rather than a broader regulation applicable generally which, as discussed in Question One, would apply to district employees and the general public. In support of this conclusion, I note that the district possesses the express power to employ staff under the conditions it determines are appropriate.

In sum, it is my opinion that the St. Johns River Water Management District, as a public employer, is authorized by sections 373.079 and 373.044, Florida Statutes, to adopt personnel rules prohibiting tobacco use by its employees while they are being paid by the district for their time regardless of physical location, including outdoor locations and property not owned by the district.

¹ Conversations with the district general counsel's office indicate that

you have been delegated the authority of the governing board of the district pursuant to s. 373.079(4)(a), Fla. Stat., to develop policies for the terms and conditions of employment for district employees and for the management of district real property. Thus, this request is submitted in your capacity as executive director rather than on behalf of the governing board of the district. And see s. 373.083(5), Fla. Stat.

² Section 386.209, Fla. Stat. 2010.

³ This conclusion is consistent with Attorney General Opinions which similarly construed section 386.209 as preempting outdoor smoking prohibitions. This office has read this statute and the broad language of the act to preclude a school district from regulating smoking on school property other than as provided in the Florida Clean Indoor Air Act (Op. Att'y Gen. Fla. 10-53 [2010]); to prohibit a municipality from regulating smoking outdoors in a public park (Op. Att'y Gen. Fla. 05-63 [2005]); and to preclude counties and municipalities from enforcing the act in light of the preemption language and the comprehensive enforcement powers conferred upon state agencies in the act (Op. Att'y Gen. Fla. 92-89 [1992]).

⁴ *Cf.* Op. Att'y Gen. Fla. 97-44 (1997), discussing the powers of school districts and stating that while school districts are constitutional entities they are not immune from legislative control.

⁵ See, e.g., Sharer v. Hotel Corporation of America, 144 So. 2d 813, 817 (Fla. 1962) (it should never be presumed that the Legislature intended to enact purposeless and therefore useless, legislation); *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (in construing legislation, courts should not assume Legislature acted pointlessly); Ops. Atty Gen. Fla. 00-46 (2000), 98-83 (1998), 97-78 (1997).

⁶ Section 373.079(4)(a), Fla. Stat.

⁷ Section 373.083(1), Fla. Stat.

⁸ See State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So.
2d 628 (Fla. 1st DCA 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493 (Fla. 1973). Cf. Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

⁹ 625 So. 2d 899 (Fla. 3d DCA 1993).

¹⁰ See City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995).

AGO 11-16 - August 31, 2011

LAW ENFORCEMENT, DEPARTMENT – PUBLIC RECORDS – SEXUAL OFFENDERS – FLORIDA OFFENDER ALERT SYSTEM

APPLICABILITY OF NEWLY ENACTED EXEMPTION TO FLORIDA OFFENDER ALERT SYSTEM AND TO PUBLIC RECORDS REQUEST MADE PRIOR TO EXEMPTION'S EFFECTIVE DATE

To: Mr. Michael Ramage, General Counsel, Florida Department of Law Enforcement

QUESTIONS:

1. Are the email addresses and corresponding home, school, and other "watched addresses of concern" with the FDLE Offender Alert System exempt from disclosure under section 119.071(5)(j), Florida Statutes (Chapter 2011-85)?

2. If the response to the first inquiry is "Yes," then if a Public Records Request for such information was made prior to July 1, 2011, does the exemption apply under the provision in section 119.071(5)(j) that states that "this exemption applies to information held by an agency, before, on, or after the effective date of this exemption?

SUMMARY:

1. The email addresses and corresponding home, school, and other "watched addresses of concern" provided for participation in the FDLE Offender Alert System come within the scope of the exemption afforded by section 119.071(5)(j), Florida Statutes.

2. The exemption afforded by section 119.071(5)(j), Florida Statutes, applies to a pending public records request received prior to the statute's effective date.

QUESTION 1.

According to your letter, FDLE has received a public records request for the email addresses and physical addresses maintained in the "Florida Offender Alert System." Such a system was apparently created to comply with the mandate established in section 943.44353(1), Florida Statutes, which provides that "[n]o later than January 1, 2008, the department shall develop and maintain a system to provide automatic notification of registration information regarding sexual predators and sexual offenders to the public."¹ You state that the system allows individuals who wish to be notified when a registered sexual offender moves near an address of concern to submit their email address and the physical address of concern to FDLE.² A notice has been placed on the website where individuals register to receive such alerts stating that "[u]nder Florida law, e-mail addresses are public records."³ During the 2011 legislative session, the Legislature enacted section 119.071(5)(j)1., Florida Statutes, effective July 1, 2011, which provides in pertinent part:

Any information furnished by a person to an agency for the purpose of being provided with emergency notification by the agency, including the person's name, address, telephone number, e-mail address, or other electronic communication address, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption applies to information held by an agency, before, on, or after the effective date of this exemption.⁴

In setting forth the public necessity for passage of the above exemption,⁵ section 2 of Chapter 2011-85, Laws of Florida, provides:

The Legislature finds that it is a public necessity to exempt from public records requirements any information furnished by a person to an agency for the purpose of being provided with emergency notification by the agency. Through the use of current technology, agencies may contact members of the public by a variety of electronic means, including cellular telephones and electronic mail, to alert them of imminent natural and manmade disasters, medical emergencies, criminal emergencies, and other dangerous conditions. Public safety is significantly enhanced through the use of such emergency notification programs, and expansion of such programs further increases public safety. A public records exemption for information furnished to an agency for this purpose will encourage greater participation in emergency notification programs by alleviating concerns about disclosure of information that could be used for criminal purposes. For these reasons, the public records exemption provided in this act is necessary for the effective implementation of and broad participation in emergency notification programs conducted by agencies. (e.s.)

You suggest that notification under the "Florida Offender Alert System" constitutes an "emergency notification" within the meaning of section 119.071(5)(j)1., Florida Statutes, in light of the reference in the statement of necessity to "other dangerous conditions." In support thereof, you cite to several provisions of section 775.21, Florida Statutes, "The Florida Sexual Predators Act," in which the Legislature has expressed its concern regarding the threat sexual predators pose to public safety,⁶ and which requires law enforcement agencies to inform members of the community and the public of a sexual predator's presence.⁷ In recognition that the Florida Offender Alert System is not limited to alerts for sexual predators but also includes notification of sexual offenders, you refer to section 943.0435, Florida Statutes, which requires sexual offenders to register with FDLE, and which provides in part in subsection (12):

The Legislature finds that sexual offenders, especially those who have committed offenses against minors, often pose a high risk of engaging in sexual offenses even after being released from incarceration or commitment and that protection of the public from sexual offenders is a paramount government interest.... Releasing information concerning sexual offenders to law enforcement agencies and to persons who request such information, and the release of such information to the public by a law enforcement agency or public agency, will further the governmental interests of public safety....

Section 119.071(5)(j)1., Florida Statutes, does not identify any specific notification system other than to refer to "emergency" notifications. While section 943.44353(1), Florida Statutes, in providing for the creation of the Florida Offender Alert System, does not expressly label the system as an *emergency* notification system, this statute was enacted to implement the federal Adam Walsh Child Protection and Safety Act which contemplates an immediate notification to those individuals who have requested to be notified.⁸ Section 943.44353, as well as the provisions of sections 775.21 and 943.0435, Florida Statutes, recognizes the on-going threat posed by the location of sexual predators or sexual offenders within a community and contemplates notification in the interests of public safety.⁹

A review of the legislative history surrounding the enactment of Chapter 2011-85, Laws of Florida, fails to provide clear direction on this issue. The staff analysis for the bill, for example, refers to public health emergencies, boil water notices, missing child notices, and evacuation notices.¹⁰ In presenting the bill during the various committee meetings, the sponsors referred to the bill as relating to a reverse 911 notification system.¹¹

The Legislature has characterized the presence of a sexual predator in a community as an extreme threat to public safety requiring notification and the release of information relating to a sexual offender's presence in the community to be in furtherance of the governmental interests in public safety.¹² Moreover, as clearly reflected in the statement of necessity for section 119.071(5)(j), Florida Statutes, the Legislature was concerned with encouraging public participation in emergency notification programs by ensuring that the information submitted by the public to participate in such programs was protected. As stated therein:

A public records exemption for information furnished to an agency for this purpose will encourage greater participation in emergency notification programs by alleviating concerns about disclosure of information that could be used for criminal

purposes.13

The Florida Offender Alert System clearly addresses the Legislature's concern with the public safety threat posed by the presence of sexual predators and sexual offenders in the community by alerting persons who have requested notification of the immediate danger posed by such individuals moving into their neighborhoods. In the statement of necessity for Chapter 2011-85, Laws of Florida, the Legislature repeatedly expressed its intent that the bill is directed toward public safety and seeks to encourage public participation in such notification alert systems. Thus, the inclusion of the Florida Offender Alert System would appear to be consistent with the expressed legislative intent for the adoption of the exemption.

This office, in interpreting the scope of any exemption, must read the exemption to give effect to the expressed intent of the Legislature.¹⁴ Here, this office recognizes the Legislature's express intent to encourage greater participation in emergency notification programs and must take into consideration the concerns expressed by the Legislature in such statutes as section 775.21 and 943.0435, Florida Statutes, relating to the public threat posed by sexual predators and offenders. This office also recognizes that the information provided to FDLE for notification under the Florida Offender Alert System is for substantially the same purpose as for other emergency alert systems, *i.e.*, to notify the individual of a potentially threatening situation.

Accordingly, I am of the opinion that the email addresses and corresponding home, school, and other "watched addresses of concern" provided for participation in the FDLE Offender Alert System come within the scope of the exemption afforded by section 119.071(5)(j), Florida Statutes.

QUESTION 2.

You state that the request for the email addresses and physical addresses maintained in the "Florida Offender Alert System" was received by FDLE in June of this year, prior to the effective date of Chapter 2011-85, Laws of Florida, which created section 119.071(5)(j), Florida Statutes. You therefore ask whether the exemption afforded by section 119.071(5)(j) would apply to a request received prior to the exemption's effective date in light of the language stating that "this exemption applies to information held by an agency, before, on, or after the effective date of this exemption."

The Florida Supreme Court has recognized that access to public records is a substantive right and thus a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively.¹⁵ Therefore, generally the critical date in determining whether a document is subject to disclosure is generally the date the public records request is made; the law in effect on that date applies.¹⁶

If, however, the Legislature is "clear in its intent" that the statute apply retroactively, such intent will be given effect. For example, the court in *Campus Communications, Inc. v. Earnhardt*,¹⁷ stated that where the Legislature expressly provided that an exemption from disclosure (in that case, an exemption for autopsy photographs) is to be applied retroactively, the court will give effect to the legislative intent.¹⁸ While the language under consideration in *Earnhardt* was somewhat different than that contained in section 119.071(5)(j), Florida Statutes,¹⁹ it appears clear that the Legislature intended that the statute be retroactively applied to exempt information held by an agency, before, on, or after the effective date of the exemption.²⁰

In light of the above, I am of the opinion that the exemption afforded by section 119.071(5)(j), Florida Statutes, would apply to a pending public records request received prior to the statute's effective date.

² The FDLE's website at: http://www.floridaoffenderalert.com advises an individual that you may "use this website to subscribe for an e-mail alert in the event that an offender or predator moves close to *any* address in Florida you choose." (e.s.)

³ See s. 668.6076, Fla. Stat., requiring an agency, as defined in s. 119.011, Fla. Stat., or legislative entity that operates a website and uses electronic mail to post such a statement in a conspicuous location on its website. The statement, however, constitutes a recognition that all records received by an agency in connection with the transaction of official business are public records and is not dispositive of whether an exemption applies.

⁵ See Art. I, s. 24(c), Fla. Const., requiring the Legislature, in enacting an exemption from the open records requirements of subsection (a) thereof to "state with specificity the public necessity justifying the exemption" which

¹ The notification system was adopted to comply with the provisions of the federal Adam Walsh Child Protection and Safety Act of 2006, P.L. No. 109-248, 120 Stat. 587 (2007). See 42 U.S.C. 16921(b), providing that "immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to . . . [a]ny organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction." And see Florida Senate Professional Staff Analysis and Economic Impact Statement on CS/CS/SB 1604, dated April 11, 2007, stating that the bill (enacted as Ch. 2007-209, Laws of Fla.) was enacted to comply with the federal act.

⁴ See Ch. 2011-85, Laws of Fla.

"shall be no broader than necessary to accomplish the stated purpose of the law."

⁶ See, e.g., s. 775.21(3)(a), Fla. Stat., stating that "[r]epeat sexual offenders, sexual offenders who use physical violence and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety;" and s. 775.21(3)(b)4., Fla. Stat., providing for community and public notification due to the "high level of threat that a sexual predator presents to the public safety[.]"

- ⁷ See s. 775.21(7), Fla. Stat.
- ⁸ See n.1, supra.

⁹ *Cf.* s. 775.21(7)(a), Fla. Stat., providing that within 48 hours after receiving notification of the presence of a sexual predator, the sheriff of the county or the chief of police of the municipality where the sexual predator temporarily or permanently resides shall notify each licensed child care facility, elementary school, middle school, and high school within a 1-mile radius of the temporary or permanent residence of the sexual predator of the presence of the sexual predator. FDLE is responsible for the online maintenance of current information regarding each registered sexual predator and for maintaining hotline access for state, local, and federal law enforcement agencies to obtain instantaneous locator file and offender characteristics information on all released registered sexual predators for purposes of monitoring, tracking, and prosecution.

¹⁰ Final Bill Analysis on HB 597, dated June 29, 2011, available online at: http://myfloridahouse.gov/Sections/Documents/loaddoc.aspx? FileName= h0597z.SAC.DOCX&DocumentType=Analysis&BillNumber=0597&Sess ion=2011.

¹¹ See Representative Taylor's comments at House of Representatives Government Operations Subcommittee meeting, March 23, 2011, and House of Representatives State Affairs meeting, April 7, 2011, podcasts available at: http://myfloridahouse.gov/Sections/PodCasts/PodCasts. aspx. And see comments of representative for Senator Hays at Senate Community Affairs Committee, March 7, 2011, and Senate Governmental Oversight & Accountability Committee, April 5, 2011, on SB 874, the Senate companion bill, podcasts available at: http://www.flsenate.gov/ Committees/Show/CA/ and http://www.flsenate.gov/Committees/Show/ GO/, respectively.

¹² See s. 775.21(3)(a) and s. 943.0435(12), Fla. Stat., respectively.

¹³ Section 2, Ch. 2011-85, Laws of Fla.

¹⁴ See, e.g., Critical Intervention Services, Inc. v. City of Clearwater, 908 So. 2d 1195 (Fla. 2d DCA 2005), in which the court, in giving effect to the intent of the exemption, concluded that a list of applicants for burglar alarms could not be released under an exemption for records relating to security systems even though the exemption did not expressly mention these particular records. *See generally Ervin v. Peninsular Telephone Company*, 53 So. 2d 647 (Fla. 1951) (duty in construction of statutes is to ascertain Legislature's intention and effectuate it); Op. Att'y Gen. Fla. 94-37 (1994) (paramount rule of statutory construction is to ascertain the intent of the Legislature).

¹⁵ See Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, 784 So. 2d 438 (Fla. 2001).

¹⁶ See Baker County Press, Inc. v. Baker County Medical Services, 870 So. 2d 189, 192-193 (Fla. 1st DCA 2004).

¹⁷ 821 So. 2d 388, 396 (Fla. 5th DCA 2002), *review denied*, 848 So. 2d 1153 (Fla. 2003).

¹⁸ Compare Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, supra, in which the Court held that language in an exemption for records of a private corporation leasing a public hospital stating that it applied to existing leases did not clearly exempt records created prior to the effective date of the exemption. Section 119.071(5)(j), Fla. Stat., however, provides that the exemption applies to information held before, on, or after the effective date of the exemption.

¹⁹ In *Earnhardt*, the statute in question stated that the exemption applied retroactively rather than stating that the exemption applies to information held before, on, or after the effective date of the exemption.

²⁰ *Cf. City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (newly enacted exemption for attorney work product applied to an action accruing prior to the effective date of the exemption in light of the remedial nature of the exemption); *Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996) (applying capital collateral litigation work product exemption retroactively to a public records request that predated the effective date of the exemption).

AGO 11-17 – September 21, 2011

COUNTIES – FIREARMS – PREEMPTION – REGULATION

AUTHORITY OF COUNTY TO ENACT ORDINANCE REGULATING DISCHARGE OF FIREARMS

To: Mr. Lane Lynchard, Chairman, Santa Rosa County Board of Commissioners

QUESTIONS:

1. May Santa Rosa County regulate the recreational discharge of firearms in residentially zoned areas in light of section 790.33,

Florida Statutes?

2. May a county impose new regulations impacting a private shooting range if the shooting range is not in compliance with current "National Rifle Association gun safety and shooting range standards?"

3. Is the "NRA Range Source Book" (National Rifle Association) the relevant standard referenced in section 823.16(6), Florida Statutes?

SUMMARY:

1. Santa Rosa County may not regulate the recreational discharge of firearms in residentially zoned areas as the regulation of firearms is preempted to the state pursuant to section 790.33, Florida Statutes.

2. Pursuant to section 823.16(6), Florida Statutes, a sport shooting range that was lawful at the time of its construction loses any applicable exemption from a "new ordinance or an amendment to an existing ordinance" if the shooting range does not "continue[] to conform to current National Rifle Association gun safety and shooting range standards."

3. In the absence of clear guidance from the statutory text, and without any clarifying legislative history, this office is unable to opine on whether the "NRA Range Source Book" contains the applicable National Rifle Association Standards.

You have posed several questions "regarding the ability of a county or other municipality to regulate the recreational discharge of firearms in a residentially zoned area in light of F.S. 790.33." In answering your questions, I am mindful of local governments' concern for the safety and well-being of their residents and I note that this opinion is limited to the issue of preemption and a county's authority to expand on the protections already in the law. This opinion does not address the many statutory provisions regulating the discharge of firearms. In light of the interrelated nature of these issues, your questions are answered together.

Chapter 790, Florida Statutes, operates to regulate the entire field of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof.¹ Section 790.33(1), Florida Statutes, as amended by Chapter 2011-109, Laws of Florida,² states:

Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying

the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.

In section 790.33, Florida Statutes, the Legislature, in furtherance of its intent to "provide uniform firearms laws in the state[,]"³ has expressly stated that "it is occupying the whole field of regulation of firearms and ammunition." Moreover, in adopting Chapter 2011-109, Laws of Florida, the Legislature reaffirmed its intent to preempt the field of firearms regulation and mandated penalties for official acts that contravene state preemption.⁴

Particularly in light of its recent reaffirmation by the Legislature, section 790.33, Florida Statutes, provides a clear answer to your principal question: a county may not regulate the recreational discharge of firearms in residentially zoned areas when the discharge is not on a "shooting range," but merely recreational shooting on private property. In addition to being mandated by the plain language of section 790.33, Florida Statutes,⁵ this conclusion adheres to the position taken by this office in Attorney General Opinion 2005-40. That opinion concluded that section 790.33, Florida Statutes, prohibited Indian River County from adopting an ordinance that would have prohibited the discharge of firearms within 300 yards of a building or public road or right-of way. There is no material difference between the issue presented in your request and the issue addressed in Attorney General Opinion 2005-40.

Although it is not entirely clear, your request seems to ask whether local governments could regulate the use of firearms "any place where firearms are discharged" simply by couching an ordinance in terms of regulating "shooting ranges." Specifically, your request asserts that "[t]he definition of 'shooting range' provided in [section] 823.16(1)(c) essentially makes a 'shooting range' synonymous with any location where firearms are discharged." This office respectfully disagrees with that characterization of the Legislature's use of the term "shooting range." The definition of "Sport shooting range" set forth in section 823.16(1)(c), Florida Statutes,⁷ is nearly identical to the definition of "Sport shooting and training range" set out in section 790.333(3)(h), Florida Statutes.⁸ In section 790.333(1)(a) and (c), Florida Statutes, the Legislature noted the importance of shooting ranges for firearms training programs and adopted a finding that "in excess of 400 sport shooting and training ranges exist on public and private lands throughout this state." Clearly, the Legislature does not deem a "shooting range" to consist of any location where firearms are discharged.

Your request concludes with questions about section 823.16(6), Florida Statutes. Under that provision, a sport shooting range that was lawful at the time of its construction loses any applicable exemption from a "new ordinance or an amendment to an existing ordinance" if the shooting range does not "continue[] to conform to current National Rifle Association gun safety and shooting range standards." The statute provides protection from application of new or amended local ordinances for those shooting ranges which are in compliance with current "National Rifle Association gun safety and shooting range standards" and were not in violation of any law at the time the range was constructed. If a shooting range does not comply with current "National Rifle Association gun safety and shooting range standards," it falls outside the protections of section 823.16(6), Florida Statutes, and new county regulations governing shooting ranges would be effective as imposed on such property. Again, however, we note that the Legislature's intent is clear that a "shooting range" is not synonymous' with any place a firearm is discharged.

Finally, you ask whether the reference in section 823.16(6), Florida Statutes, to current "National Rifle Association gun safety and shooting range standards" is a reference to the "NRA Range Source Book." A review of the legislative history of this statute⁹ does not provide any clear direction on this issue and, in the absence of clear guidance from the statutory text and without any clarifying legislative history, this office is unable to opine on whether the "NRA Range Source Book" contains the applicable National Rifle Association standards.

⁴ See s. 1, Ch. 2011-109, Laws of Fla. The language of preemption contained in s. 790.33(1), Fla. Stat., providing that the Legislature has determined to occupy "the whole field" of firearms regulation is expansive. See National Rifle Association of America, Inc. v. City of South Miami, 812 So. 2d 504 (Fla. 3d DCA 2002), in which a city's firearms ordinance establishing safety standards for firearms was determined to be *ultra vires* based on the legislative preemption of "the entire field of firearm and ammunition regulation by enactment of section 790.33, Florida Statutes (2000)[,]" despite the absence of any mention of storage or safety within the scope of the statute.

⁵ See, e.g., In re McCollam, 612 So. 2d 572 (Fla. 1993) (when language of statue is clear and unambiguous and conveys a clear meaning, statute must be given its plain and ordinary meaning).

¹ Section 790.33(1), Fla. Stat.

² Effective October 1, 2011. See s. 2, Ch. 2011-109, Laws of Fla.

³ Section 1(2)(a), Ch. 2011-109, Laws of Fla.

⁶ Your letter suggests a conflict between Ops. Att'y Gen. Fla. 05-40

(2005) and 08-34 (2008). The 2008 opinion deals with shooting ranges and the regulation of new construction of such ranges. The 2005 opinion is concerned with the discharge of firearms under the provisions of s. 790.15, Fla. Stat., but does not discuss or comment on shooting ranges, which are regulated separately from the general provisions of s. 790.33, Fla. Stat. I see no conflict between these opinions.

⁷ Section 823.16(1)(c), Fla. Stat., defines a "sport shooting range" or "range" as "an area designed and operated for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar type of sport shooting."

⁸ Section 790.333(3)(h), Fla. Stat., defines "sport shooting and training range" or "range" to mean "any area that has been designed, or operated for the use of, firearms, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, BB guns, airguns, or similar devices, or any other type of sport or training shooting."

⁹ See, e.g., Senate Staff Analysis and Economic Impact Statement for SB 776, 1999 Florida Legislative Session, dated March 15, 1999. SB 776 was the companion bill to the house version which became s. 823.16, Fla. Stat., and generally discusses gun safety and shooting range standards.

AGO 11-18 – September 21, 2011

COUNTIES – INSURANCE – GROUP INSURANCE

ABILITY OF COUNTY TO REQUIRE PARTICIPATION IN COUNTY'S SELF-INSURED GROUP INSURANCE PROGRAM

To: Mr. Roman Gastesi, Monroe County Administrator

QUESTIONS:

1. May Monroe County require its employees and elected officials to participate in its self-insured health insurance program, regardless of whether a premium is charged?

2. If the answer is yes, then must the County allow employees, elected officials, and retirees the option to participate in group insurance programs (offering coverage for dental, vision, and accidental death or dismemberment) if the individuals elect not to participate in the self-insurance program?

SUMMARY:

1. Monroe County may not require its employees and elected officials to participate in its self-insured health insurance program. 2. There is no statutory requirement that Monroe County must allow employees, elected officials, and retirees to participate in optional group insurance programs, such as dental, vision, and accidental death or dismemberment plans, offered to county employees and elected officials when the individuals elect not to participate in the county's self-insured group program.

You state that Monroe County currently requires all employees and elected officials to participate in a self-insured health insurance plan which also has pharmacy benefits. Employees and elected officials are not charged a premium, with the county contributing \$790.00 monthly per employee for participation in the plan. The county provides nominal life insurance and accidental death and dismemberment plans at no charge to its employees and elected officials. Retirees have the option of continuing in the plan at their own expense. All participants have the option to enroll spouses and dependents in the plan at an additional premium cost paid by the employee, elected official, or retiree. Funding for the program and pharmacy benefits is derived from ad valorem taxes and premiums collected for coverage of retirees, spouses, and dependents.

The county offers optional insurance plans for vision, dental, and accidental death and dismemberment, available at the expense of employees or elected officials. While the self-insurance plan is mandatory, employees and elected officials may change their participation in all other group insurance programs during an opt-in/opt-out period each year.

QUESTION 1.

Section 112.08(2)(a), Florida Statutes, authorizes every local governmental unit to:

[P]rovide and pay out of its available funds for all or part of the premium for life, health, accident, hospitalization, legal expense, or annuity insurance, or all or any kinds of such insurance, for the officers and employees of the local governmental unit and for health, accident, hospitalization, and legal expense insurance for the dependents of such officers and employees upon *a group* insurance plan and, to that end, to enter into contracts with insurance companies or professional administrators to provide such insurance. . . . Each local governmental unit may selfinsure any plan for health, accident, and hospitalization coverage or enter into a risk management consortium to provide such coverage, subject to approval based on actuarial soundness by the Office of Insurance Regulation; and each shall contract with an insurance company or professional administrator qualified and approved by the office to administer such a plan. (e.s.)

The authority for local governmental units to provide group insurance to their employees originated in 1941.¹ Officers were added as eligible participants in 1972.² As originally enacted, the act stated that participation in such group insurance by any employee "shall be entirely voluntary at all times."³ The act further required a written request from the public employee before the employer could deduct the costs of premiums from the employee's wages.⁴ While the language in section 112.08, Florida Statutes, was substantially reworded in 1976, the only significant alteration was to provide local governing units authority to "self-insure any plan for health, accident and hospitalization coverage[.]"⁵ The provisions in the act recognizing participation is voluntary and the requirement of written authorization from the officer or employee for deductions to be made from his or her wages for premiums present in the original act remain intact today and are contained in section 112.11, Florida Statutes, which states:

The participation in *such group insurance* by any officer or employee shall be entirely voluntary at all times. Any officer or employee may, upon any payday, withdraw or retire from such group insurance plan, upon giving the employer written notice thereof and directing the discontinuance of deductions from wages in payment of such premiums. (e.s.)

The plain language of the statute relates to voluntary participation in "group insurance," not a particular plan that may be provided through an insurance company, a professional administrator, or self-insurance. The term "group insurance plan" is not defined for purposes of the act, but the intent of the Legislature in the enactment of the law is clearly stated in section 112.14, Florida Statutes:

It is hereby declared to be the purpose and intent of this law to make available upon a voluntary participation basis to the several officers and employees aforesaid, the economics, protection and benefits of *group insurance* not available to each officer and employee as an individual. It is also the purpose and intent of this law to provide authority for the payment of premiums or charges for group insurance for county officers whose compensation is fixed by chapter 145 in addition to the compensation provided in chapter 145. (e.s.)

It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis.⁶ While the authorized means for a local government to provide group insurance were expanded to include self-insurance or participation in a risk management consortium,⁷ there is nothing in the language of the statute or the legislative history of section 112.08, Florida Statutes, to indicate a change in the Legislature's intent that employees and officers voluntarily participate in the group insurance offered by local governing units.

Accordingly, it is my opinion that Monroe County may not require its officers and employees to participate in its self-insured group health insurance plan.

QUESTION 2.

As noted above, section 112.08, Florida Statutes, authorizes local governmental units to provide all or part of the premium for life, health, accident, hospitalization, legal expense, or annuity insurance, or "all or any kinds of such insurance" for their officers and employees. The governmental unit may also provide and pay for health, accident, hospitalization, and legal expense insurance for the dependents of such officers and employees. In providing such insurance, each local governmental unit "may determine the portion of the cost, if any, of such fund, plan, or program to be paid by officers or employees of the local governmental unit and fix the amounts to be paid by each such officer or employee as will best serve the public interest."⁸

The discretionary authority for local governmental units to provide and pay for group insurance, however, does not appear to carry with it an obligation to provide group insurance, nor does it require the offering of additional types of insurance, such as optional insurance plans for vision, dental, and accidental death and dismemberment or require the county to allow participation by those who have opted out of the group insurance.⁹ Section 112.0801, Florida Statutes, provides:

Any state agency, county, municipality, special district, community college, or district school board which provides life, health, accident, hospitalization, or annuity insurance, or all of any kinds of such insurance, for its officers and employees and their dependents upon a group insurance plan or self-insurance plan shall allow all former personnel who retired before October 1, 1987, as well as those who retire on or after such date, and their eligible dependents, the option of continuing to participate in such group insurance plan or self-insurance plan. Retirees and their eligible dependents shall be offered the same health and hospitalization insurance coverage as is offered to active employees at a premium cost of no more than the premium cost applicable to active employees. For retired employees and their eligible dependents, the cost of continued participation may be paid by the employer or by the retired employees....

When a statute enumerates the things upon which it operates, it is ordinarily construed as excluding from its operation all things not expressly mentioned.¹⁰ Thus, the Legislature in section 112.0801, Florida Statutes, has prescribed those instances in which a local governing unit is required to allow others than its officers and employees, in this case retirees, to participate in a group insurance plan offered by the unit. It is beyond the authority of this office to read additional requirements into the statute or to extend its application to other types of group insurance offered by a governmental unit.¹¹

There is nothing in sections 112.08 or 112.0801, Florida Statutes, nor has any other statutory provision been brought to my attention, requiring the county to allow participation in its optional dental, vision, and accidental death or dismemberment group plans by anyone other than those who are designated by the county as eligible to do so. While, as discussed in Question One, participation in the group insurance provided by the county is voluntary, nothing in the applicable statutes mandates the types of insurance which must be offered.

Accordingly, it is my opinion that Monroe County is not required to allow employees, elected officials, and retirees to participate in optional group insurance programs, such as dental, vision, and accidental death or dismemberment plans, offered to county employees and elected officials, if the individuals elect not to participate in the county's selfinsured group program.

- ² See Ch. 72-338, Laws of Fla. (1972).
- ³ Section 4, Ch. 20852, Laws of Fla. (1941).
- ⁴ Section 3, Ch. 20852, Laws of Fla. (1941).

⁵ See s. 1, Ch. 76-208, Laws of Fla. (1976), substantially rewording section 112.08, Fla. Stat., to its present form allowing local governmental units to self-insure its group insurance plan.

⁶ See State v. Rife, 789 So. 2d 288, 292 (Fla. 2001); McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998).

⁷ See House Commerce Committee, Tape 1 of 2, Side B, April 27, 1976, reflecting that the purpose of authorizing local governmental units to self-fund group insurance is to lower rates and allow local governmental units to receive the interest that accrues on the premiums paid into the fund, rather than the private insurance company; further reiterating that the bill is merely permissive, not mandatory.

- ⁸ Section 112.08(3), Fla. Stat.
- ⁹ See n.7, supra.

¹⁰ See Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (enumeration of specific items implies the exclusion of others not mentioned).

¹¹ See, e.g., Board of County Commissioners of Monroe County v.

11-18

¹ See Ch. 20852, Laws of Fla. (1941), authorizing all governmental units in Florida to set up group insurance plans for employees.

Department of Community Affairs, 560 So. 2d 240 (Fla. 3d DCA 1990) (in construing a statute, courts cannot attribute to the legislature an intent beyond that expressed).

AGO 11-19 – September 21, 2011

SCHOOL BOARDS – PERSONNEL – ASSESSMENTS – SUPERINTENDENT – PUBLIC RECORDS

PERSONNEL ASSESSMENT AS PUBLIC RECORD WHEN NOT CREATED IN COMPLIANCE WITH STATUTE

To: Mr. Stephen W. Johnson, Counsel for the School Board of Lake County, Florida

QUESTION:

May the School Board of Lake County remove from a personnel file or destroy an assessment of professional performance standards for an assistant superintendent that was not filed by the school superintendent in accordance with the requirements of section 1012.34(3)(c), Florida Statutes?

SUMMARY:

An Assessment of Professional Performance Standards, District Administrative Appraisal I for an Assistant Superintendent that was not filed in accordance with the requirements of section 1012.34(3)(c), Florida Statutes, is a public record and part of the assistant superintendent's personnel file which may not be removed from public view or destroyed.

According to your letter, in November of 2008, the Superintendent of Schools for Lake County prepared an Assessment of Professional Performance Standards, District Administrative Appraisal I for an Assistant Superintendent, and, without discussing the assessment with him, filed the assessment with the human resources department. This was done on the Superintendent's last day of her elected term. The employee has objected to this assessment being placed in his personnel file in light of the superintendent's failure to comply with section 1012.34(3)(c), Florida Statutes, which requires that such an evaluation be discussed with the employee. The school district's human resources department has attached a memo to the assessment explaining the situation, but the employee is not satisfied with this remedy and has requested that the assessment be removed from the personnel file or destroyed. You have acknowledged that this evaluation meets the criteria to be considered a public record and that if this record is uniquely applicable to an employee, it must remain part of that employee's

personnel file. I concur in your determination.

For purposes of Florida's Public Records Law, the term "public records" is defined in section 119.011(12), Florida Statutes:

"Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.¹

The Florida Supreme Court has determined that the definition of "public records" encompasses all material received by an agency in connection with official business that is used to perpetuate, communicate, or formalize knowledge.² All such material, regardless of whether it is in final form, is open for public inspection and copying unless the Legislature has exempted it from disclosure.³

The record prepared by the superintendent relating to the assistant superintendent is clearly a public record. It was prepared by a school system officer pursuant to law in connection with the transaction of official business of the school district. As a public record, this material must be maintained by the school district for inspection and copying subject to rules promulgated by the Division of Library and Information Services for retention and disposal.⁴

Florida law requires that public school system employee personnel files⁵ be maintained as prescribed in section 1012.31, Florida Statutes, which states that employee personnel files are subject to the provisions of Florida's Public Records Law with certain specific exceptions.⁶ In addition, section 1012.31(2)(a), Florida Statutes, requires that "[m] aterials relating to work performance... must be reduced to writing and signed by a person competent to know the facts or make the judgment." The definition of "personnel file" is broad and includes:

all records, information, data, or materials maintained by a public school system, in any form or retrieval system whatsoever, with respect to any of its employees, which is uniquely applicable to that employee whether maintained in one or more locations.⁷

Regardless of whether this material constitutes an "Assessment of Professional Performance Standards, District Administrative Appraisal I" for the assistant superintendent, this material is uniquely applicable to a particular employee or officer and, as such, it is part of the assistant superintendent's personnel file and subject to the Public Records Law whether it is maintained in a file in the human resources department or elsewhere. In Attorney General Opinion 94-54, this office considered the removal of material from employee personnel files pursuant to collective bargaining agreements. The opinion concludes that such material as counseling slips and written reprimands could not be placed and maintained in separate disciplinary files to remove them from public access. The general rule regarding personnel records of public employees is the same as that for other public records. That is, unless the Legislature has expressly exempted an agency's personnel records from disclosure or authorized an agency or public entity to limit access to such records, personnel records of public employees are subject to public inspection under section 119.07(1), Florida Statutes.⁸ Moreover, a public agency may not remove or delete material or information from a public record in the absence of express statutory authorization.⁹

Therefore, while you have advised this office that the assessment for the assistant superintendent which is currently in his personnel file was not submitted in full compliance with the statutory requirements of section 1012.34(3)(c), Florida Statutes, the record itself appears to be no less a public record for this failure and may not be removed from public view or destroyed in the absence of statutory authority. Further, the definition of "personnel file" in section 1012.31(4), Florida Statutes, is so broad that any material maintained by the school system with respect to the assistant superintendent which is uniquely applicable to that employee "whether maintained in one or more locations" is a part of his personnel file and removing such material to another location would not result in its removal from the personnel file.

I would note that section 1012.34(3)(c), Florida Statutes, provides a remedy for school district employees who wish to respond to written performance assessments. The statute states that "[t]he employee shall have the right to initiate a written response to the evaluation, and the response shall become a permanent attachment to his or her personnel file." While it appears that the Lake County School District itself has attached a memo to the assessment explaining the circumstances, the school district may wish to advise the employee that he may also include a statement in response to the assessment to be included in his personnel file.

In sum, it is my opinion that an Assessment of Professional Performance Standards, District Administrative Appraisal I for an Assistant Superintendent that was not filed in accordance with the requirements of section 1012.34(3)(c), Florida Statutes, is a public record and part of the assistant superintendent's personnel file which may not be removed from public view or destroyed.

¹ See s. 119.011(2), Fla. Stat., defining the term "[a]gency" to mean "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."

² See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980).

³ See Wait v. Florida Power & Light Company, 372 So. 2d 420 (Fla. 1979).

⁴ Section 119.021(2)(a), Florida Statutes, requires the Division of Library and Information Services of the Department of State to adopt rules establishing retention schedules and a disposal process for public records.

⁵ Pursuant to s. 1012.31(4), Fla. Stat., the term "personnel file" means "all records, information, data, or materials maintained by a public school system, in any form or retrieval system whatsoever, with respect to any of its employees, which is uniquely applicable to that employee whether maintained in one or more locations."

- ⁶ See s. 1012.31(3)(a), Fla. Stat.
- ⁷ Section 1012.31(4), Fla. Stat.

⁸ See Michel v. Douglas, 464 So. 2d 545 (Fla. 1985). And see Alterra Healthcare Corporation v. Estate of Shelley, 827 So. 2d 936, 940n.4 (Fla. 2002) ("only the custodian of such records can assert any applicable exemption; not the employee").

⁹ See Op. Att'y Gen. Fla. 90-104 (1990) (data processing company's desire to maintain "privacy" of certain materials filed with the Department of State has no effect unless such materials fall within a legislatively created exemption to Ch. 119, Fla. Stat.).

AGO 11-20 – September 21, 2011

BUSINESS LICENSE TAX – TAXATION – OCCUPATIONS – FIREARMS – MUNICIPALITIES – ORDINANCES

VALIDITY OF MUNICIPAL BUSINESS LICENSE TAX ORDINANCE INCLUDING GUNSMITHS AND GUN DEALERS

To: Mr. Lonnie Groot, City Attorney, City of Sanford

QUESTION:

In light of the enactment of Chapter 2011-109, Laws of Florida, may the City of Sanford continue to impose a local business tax as authorized by Chapter 205, Florida Statutes, upon gun dealers and gunsmiths?

SUMMARY:

While Chapter 2011-109, Laws of Florida, preempts to the state the entire field of regulation of firearms, it does not affect the authority of a municipality to impose a local business tax as authorized by Chapter 205, Florida Statutes, upon businesses, professions, or occupations including gun dealers and gunsmiths.

According to your letter, the city is proceeding to amend the City Code of the City of Sanford to bring the code into compliance with Chapter 2011-109, Laws of Florida. You advise that you are in doubt whether the city may continue to impose the local business tax, as authorized by Chapter 205, Florida Statutes, upon gun dealers and gunsmiths. The city's code provisions setting forth a schedule of license taxes states that "[t]he amount of license [sic] tax¹ levied and imposed upon every person that shall engage in or manage any occupation, business or profession mentioned in this section within the City is hereby fixed, graded and determined as to the following occupations, businesses or professions at the following amounts" and specifically includes gun dealers and gunsmiths within its scope. As you are aware, this office will not comment on the validity of the terms of local legislation but is limited to addressing questions of state law.²

Chapter 205, Florida Statutes, is the "Local Business Tax Act."³ Section 205.042, Florida Statutes, authorizes the governing body of a municipality to levy, by appropriate resolution or ordinance, a local business tax (formerly referred to as an occupational license tax) for the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction. Any such tax must be based upon reasonable classifications and must be uniform throughout any class.⁴ The statute provides that the occupational license tax may be levied on:

(1) Any person who maintains a permanent business location or branch office within the municipality, for the privilege of engaging in or managing any business within its jurisdiction.

(2) Any person who maintains a permanent business location or branch office within the municipality, for the privilege of engaging in or managing any profession or occupation within its jurisdiction.

(3) Any person who does not qualify under subsection (1) or subsection (2) and who transacts any business or engages in any occupation or profession in interstate commerce, if the business tax is not prohibited by s. 8, Art. I of the United States Constitution.⁵

Adoption of a business tax ordinance or resolution requires public notice and such notice must contain "the proposed classifications and rates applicable to the business tax."⁶

As defined in the statute, the term "[l]ocal business tax" refers to

... the fees charged and the method by which a local governing authority grants the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction. It does not mean any fees or licenses paid to any board, commission, or officer for permits, registration, examination, or inspection. Unless otherwise provided by law, these are deemed to be regulatory and in addition to, but not in lieu of, any local business tax imposed under the provisions of this chapter.

This definition clearly distinguishes the "local business tax" from fees or licenses which may be regulatory and which may be levied in addition to the local business tax imposed pursuant to Chapter 205, Florida Statutes.

The local business tax authorized to be levied by municipalities by Chapter 205, Florida Statutes, is not directed at regulating firearms or those whose businesses may involve firearms such as gunsmiths or gun dealers. This tax is a license or privilege tax levied on the privilege of conducting business in a jurisdiction and applies equally throughout classifications of businesses.⁷ As the local business license tax is not a regulation or a regulatory tax, it would not constitute a "regulation" of gunsmiths or gun dealers.

Chapter 2011-109, Laws of Florida, amended provisions of Chapter 790, Florida Statutes, and is specifically intended to preempt "the entire field of regulation of firearms." As stated in section 790.33(1), Florida Statutes:

PREEMPTION. —Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.⁸

The language of preemption contained in section 790.33(1), Florida Statutes, providing that the Legislature has determined to occupy "the whole field" of firearms regulation is expansive. The statute specifically includes "the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation" of firearms, but does not limit its application to those activities. The clear statement that the Legislature is occupying the whole field of firearms regulation and the use of the term "includes" to imply a broad reading of the activities covered rather than limiting those to a specific list suggest a comprehensive preemption. However, while the preemption is broad, "the whole field of regulation," is, by its terms, limited to *firearms regulation*.

As discussed herein, a local business tax levied pursuant to Chapter 205, Florida Statutes, is not a regulation or regulatory tax and it is my opinion that a municipality may impose a local business tax upon classifications of businesses which may include gunsmiths or gun dealers. However, in drafting local business tax ordinances, municipalities must be mindful that the provision of a local business tax may only impose restrictions or burdens on firearms-related businesses to the same extent that any other similar business may be burdened.

In sum, it is my opinion that while section 790.33, Florida Statutes, as amended by Chapter 2011-109, Laws of Florida, preempts the entire field of regulation of firearms to the state, it does not affect the authority of a municipality to impose a local business tax as authorized by Chapter 205, Florida Statutes, upon businesses, professions, or occupations which may include gun dealers and gunsmiths.

- ³ Section 205.013, Fla. Stat.
- ⁴ Section 205.043(1)(a), Fla. Stat.
- ⁵ Section 205.042, Fla. Stat.
- 6 Id.

⁷ See, e.g., the City of Tallahassee's Code of Ordinances which in section 18-55, establishes such business classifications as "automobile and other vehicular activities," "banking and lending institutions," "entertainment/ amusement," "merchant," "professional," "schools," and "services." For purposes of section 18-56 of the Tallahassee Code establishing a business tax rate schedule, business classifications such as those imposed on merchants are based on the square footage of the business location plus a

¹ Chapter 2006-152, Laws of Fla., changed the name of the "local occupational license tax act" to the "local business tax act."

² Section 16.01(3), Fla. Stat. Based on the material included with your opinion request, I would direct the city's attention to s. 790.335, Fla. Stat., which prohibits any local governmental agency from keeping or causing to be kept "any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms."

fee based on the number of workers employed.

⁸ And see s. 790.33(4), Fla. Stat., containing exceptions to the section and making it clear that the statute does not prohibit zoning ordinances which encompass firearms businesses along with other businesses. However, zoning ordinances which are designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition are in conflict with the statute and are prohibited.

AGO 11-21 – October 4, 2011

SPECIAL DISTRICTS – COMPETITIVE BIDS – PUBLIC CONSTRUCTION – WATER MANAGEMENT DISTRICTS – CONSULTANTS COMPETITIVE NEGOTIATION ACT

WHETHER SPECIAL DISTRICT IS AUTHORIZED TO DEVELOP HYBRID BIDDING PROCEDURE FOR PUBLIC CONSTRUCTION PROJECTS

To: Mr. H. Paul Senft, Jr., Chair, Southwest Florida Water Management District

QUESTION:

Whether the Southwest Florida Water Management District may lawfully use a "hybrid" process to award construction projects, including construction and construction management services, when that process combines a request for bids or proposals with competitive negotiation such that the lowest or best responsive bidder is selected and then competitive negotiations are begun in an effort to arrive at a final project or service cost?

SUMMARY:

The Southwest Florida Water Management District is limited to utilizing the procedures set forth in the statutes for public construction works and for construction management services. The district has no authority to develop a "hybrid" model for awarding construction projects in the absence of statutory authority.

The Southwest Florida Water Management District was created by section 373.069(1)(d), Florida Statutes, as an independent special district¹ controlled by a governing board of 13 members.² Your letter advises that the governing board of the district has been reviewing the process the district uses to procure construction projects and construction management services. The district is considering adopting a policy which would combine sealed bids (or requests for proposals) and competitive negotiations in a process that would allow selection of the lowest responsive bidder and then authorize competitive negotiations to arrive at a final project or service cost.³ Your attorney has opined that the statutes governing procurement methods for construction projects and construction management services (sections 255.20 and 287.055, Florida Statutes), while containing provisions which would provide some flexibility in the process, would not allow competitive negotiations to be combined with another method of procurement such as requests for sealed bids. I concur in that conclusion.

It is the general rule with regard to competitive bidding by public agencies that, in the absence of any legislative requirements regarding the method of awarding public contracts, public officers may exercise reasonable discretion, and a contract may be made by any practicable method that will safeguard the public interest.⁴ The statutory directives requiring special districts to competitively award contracts for public construction projects are contained in sections 255.20 and 287.055, Florida Statutes.

Section 255.20(1), Florida Statutes, provides that:

A... special district as defined in chapter 189,⁵ or other political subdivision⁶ of the state seeking to construct or improve a public building, structure, or other public construction works must competitively award to an appropriately licensed contractor each project that is estimated in accordance with generally accepted cost accounting principles to cost more than \$300,000.⁷

.... As used in this section, the term "competitively award" means to award contracts based on the submission of sealed bids, proposals submitted in response to a request for proposal, proposals submitted in response to a request for qualifications, or proposals submitted for competitive negotiation. This subsection expressly allows contracts for construction management services, design/build contracts, continuation contracts based on unit prices, and any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution, or by state law. For purposes of this section, cost includes the cost of all labor, except inmate labor, and the cost of equipment and materials to be used in the construction of the project. Subject to the provisions of subsection (3),⁸ the county, municipality, special district, or other political subdivision may establish, by municipal or county ordinance or special district resolution, procedures for conducting the bidding process.

Section 255.20(1)(d), Florida Statutes, provides further direction:

If the project:

1. Is to be awarded based on price, the contract must be awarded to the lowest qualified and responsive bidder in accordance with the applicable county or municipal ordinance or district resolution and in accordance with the applicable contract documents. The county, municipality, or special district may reserve the right to reject all bids and to rebid the project, or elect not to proceed with the project. This subsection is not intended to restrict the rights of any local government to reject the low bid of a nonqualified or nonresponsive bidder and to award the contract to any other qualified and responsive bidder in accordance with the standards and procedures of any applicable county or municipal ordinance or any resolution of a special district.

2. Uses a request for proposal or a request for qualifications, the request must be publicly advertised and the contract must be awarded in accordance with the applicable local ordinances.

3. Is subject to competitive negotiations, the contract must be awarded in accordance with s. 287.055.

The statute requires that a special district "must" competitively award these contracts. The word "must" generally does not allow for any choice when used in a statute and denotes compulsion, obligation, or requirement.⁹ The general rule is that where language is unambiguous, the clearly expressed intent must be given effect, and there is no room for construction.¹⁰ Where the statutory language is plain, definite in meaning without ambiguity, it fixes the legislative intention and interpretation and construction are not needed.¹¹ Thus, the Southwest Florida Water Management District is required by statute to competitively award such contracts pursuant to the terms of section 255.20, Florida Statutes.

The statute contains flexibility within its terms regarding the type of procedure to be used in competitively awarding such contracts, that is, the definition of "competitively award" contains several options. In addition, section 255.20, Florida Statutes, authorizes a special district to establish procedures for conducting the bidding process, but the district is limited to using the competitive award process outlined in section 255.20, Florida Statutes, for construction works. The power of a special district to adopt such resolutions is limited by the nature of special districts to those powers and duties set forth by the Legislature in the enabling legislation of the district and the statutes.¹²

The Legislature has directed that these procedures are to be used separately and distinctly based on the type of negotiations involved in bidding the project: competitive negotiations, requests for proposal or requests for qualifications, or lowest qualified and responsive bidder. Except to the extent authorized by the statute itself, each of these distinct procedures for selecting a contractor for public construction works should be utilized to secure bids for the particular types of projects to be awarded, that is, contracts for professional services as described in section 287.055, Florida Statutes, are subject to competitive negotiations, while construction contracts for public works must be competitively awarded.

With regard to the selection of construction management or program management entities to provide services to a special district, section 255.103, Florida Statutes, states that

A governmental entity¹³ may select a construction management entity, pursuant to the process provided by s. 287.055, which is to be responsible for construction project scheduling and coordination in both preconstruction and construction phases and generally responsible for the successful, timely, and economical completion of the construction project. The construction management entity must consist of or contract with licensed or registered professionals for the specific fields or areas of construction to be performed, as required by law. The construction management entity may retain necessary design professionals selected under the process provided in s. 287.055. At the option of the governmental entity, the construction management entity, after having been selected and after competitive negotiations, may be required to offer a guaranteed maximum price and a guaranteed completion date or a lump sum price and a guaranteed completion date, in which case, the construction management entity must secure an appropriate surety bond pursuant to s. 255.05 and must hold construction subcontracts. If a project, as defined in s. 287.055(2)(f), solicited by a governmental entity under the process provided in s. 287.055 includes a grouping of substantially similar construction, rehabilitation, or renovation activities as permitted under s. 287.055(2)(f), the governmental entity, after competitive negotiations, may require the construction management entity to provide for a separate guaranteed maximum price or a separate lump sum price and a separate guaranteed completion date for each grouping of substantially similar construction, rehabilitation, or renovation activities included within the project.

The statute also recognizes that "[t]his section does not prohibit a local government from procuring construction management services, including the services of a program management entity, pursuant to the requirements of s. 255.20."

Sections 255.103, 255.20, and 287.055, Florida Statutes, must be

read to work together to provide direction relating to the particular type of construction related service being bid. While these statutes provide flexibility within their terms as to procedures for conducting the bidding process, the district has no authority to develop a process for awarding public construction works outside the statutory direction of section 255.20, Florida Statutes, in the absence of any other statutory authority. It is the rule that a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way.¹⁴

As a statutorily created entity, the Southwest Florida Water Management District has only such power as is expressly or by necessary implication granted by the legislative enactment creating the district.¹⁵ Unlike counties or municipalities which have been granted home rule powers, special districts possess no inherent or home rule powers. Created by statute for a specific, limited purpose, the Southwest Florida Water Management District may exercise only such power and authority as it has been granted by law.¹⁶ Thus, the district is limited to utilizing the procedures outlined by the Legislature for public construction works in section 255.20, Florida Statutes, and to section 287.055, Florida Statutes, when proposing to acquire professional services. Section 255.103, Florida Statutes, contemplates the use of section 255.20 or 287.055, Florida Statutes, to select a construction management firm. While sections 255.20 and 255.103, Florida Statutes, both contemplate the use of the CCNA for certain construction projects, the statutory direction as to how the CCNA must be used in these circumstances would preclude the district from developing a hybrid model distinct from the statutory models.

Thus, it is my opinion that the Southwest Florida Water Management District has no authority to develop a "hybrid" model for awarding construction projects in the absence of statutory authority.

¹ See Florida Department of Community Affairs, Official List of Special Districts Online, Southwest Florida Water Management District.

² Section 373.073(1)(a), Fla. Stat.

³ This opinion is expressly limited to a consideration of your authority as a special district to develop a bidding process involving the procedures you have described in your opinion request. While you have provided this office with a copy of an article from a business publication discussing a bidding procedure utilized by another governmental entity, nothing in this opinion should be understood to address or comment on the bidding process utilized by another agency.

⁴ See, e.g., Volume Services Division of Interstate United Corporation v. Canteen Corporation, 369 So. 2d 391 (Fla. 2d DCA 1979) (in the absence of specific constitutional or statutory requirements, a public agency has

no obligation to establish a bidding procedure and may contract in any manner not arbitrary or capricious), *and see* Ops. Att'y Gen. Fla. 96-28 (1996), 93-28 (1993), and 93-83 (1993) and the cases cited therein.

⁵ Section 189.403(1), Fla. Stat., defines "[s]pecial district" as

a local unit of special purpose, as opposed to general purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers. For the purpose of s. 196.199(1), special districts shall be treated as municipalities. The term does not include a school district, a community college district, a special improvement district created pursuant to s. 285.17, a municipal service taxing or benefit unit as specified in s. 125.01, or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

The Southwest Florida Water Management District would fall within the scope of this definition.

⁶ A "political subdivision" is defined in s. 1.01(8), Fla. Stat., as follows: "The words 'public body,' 'body politic,' or ' political subdivision' include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state."

⁷ As you have cited specifically to s. 255.20, Fla. Stat., in your letter I assume that the projects proposed to be awarded are within the financial amounts described in the statute.

⁸ Section 255.20(3), Fla. Stat., requires the use of Florida forest products and timber for construction projects if such products are available and their price, fitness, and quality "are equal."

⁹ See Mallory v. Harkness, 895 F.Supp. 1556 (S.D. Fla. 1995); Op. Att'y Gen. Fla. 07-42 (2007).

¹⁰ *Fine v. Moran*, 77 So. 533, 536 (Fla. 1917); M.W. v. Davis, 756 So. 2d 90 (Fla. 2000).

¹¹ McLaughlin v. State, 721 So. 2d 1170 (Fla. 1998); Osborne v. Simpson, 114 So. 543 (Fla. 1927); Ops. Att'y Gen. Fla. 00-46 (2000) (where language of statute is plain and definite in meaning without ambiguity, it fixes the legislative intention such that interpretation and construction are not needed); 99-44 (1999); and 97-81 (1997).

¹² See State ex rel. Vans Agnew v. Johnson, 150 So. 111 (Fla. 1933), for the proposition that the powers of a water control district are restricted to those deemed essential by the Legislature to effect its purpose; *State* ex rel. Davis v. Jumper Creek Drainage District, 14 So. 2d 900 (Fla. 1943), affirmed, 21 So. 2d 459 (Fla. 1945); Rabin v. Lake Worth Drainage District, 82 So. 2d 353 (Fla. 1955), cert. denied, 350 U.S. 958 (1956); Roach v. Loxahatchee Groves Water Control District, 417 So. 2d 814 (Fla. 4th DCA 1982), affirmed, 421 So. 2d 49 (Fla. 4th DCA 1982), indicating that a water control district has only those powers which the Legislature has delegated to it by statute. *Cf.* Ops. Att'y Gen. Fla. 04-48 (2004) (as entity created pursuant to legislative act, water control districts may only exercise such powers as have been expressly granted by that act or must necessarily be exercised in order to carry out an express power); and 83-44 (1983).

¹³ See s. 255.103(1), Fla. Stat., defining "governmental entity" to include special districts as defined in Ch. 189, Fla. Stat., or political subdivisions of the statute.

¹⁴ Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976). In this regard you have cited Attorney General Opinion 96-28, in which this office concluded that the provisions of s. 255.20, Fla. Stat., should be read together with the minimum procedures for letting contracts for works and improvements by drainage and water control districts set forth in s. 298.35, Fla. Stat. However, s. 298.35, Fla. Stat., was repealed in 1997 and no provision of Ch. 373, Fla. Stat., establishes bidding requirements for the Southwest Florida Water Management District.

¹⁵ See Lee v. Division of Florida Land Sales and Condominiums, 474 So. 2d 282 (Fla. 5th DCA 1985); Ops. Att'y Gen. Fla. 09-40 (2009) and 91-93 (1991).

¹⁶ Cf. Op. Att'y Gen. Fla. 90-63 (1990). And see Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 82 So. 346 (Fla. 1919).

AGO 11-22 - October 26, 2011

AIRPORTS - COUNTIES - LEASE OF COUNTY PROPERTY

AUTHORITY OF COUNTY TO LEASE AIRPORT PROPERTY FOR A TERM IN EXCESS OF 30 YEARS

To: Mr. Mark F. Lapp, Hendry County Attorney

QUESTION:

Pursuant to section 125.35(1)(b)1., Florida Statutes, may the county negotiate a lease of its airport property to a private party for use as a public airport for a term in excess of 30 years, notwithstanding section 332.08(3), Florida Statutes?

SUMMARY:

Section 125.35(1)(b)1., Florida Statutes, authorizes the county to negotiate a lease of its airport property to a private party for a length of term and under such conditions the board of county commissioners determines is in the best interest of the county.

You state that Hendry County has filed a preliminary application to participate in a federal airport privatization program, but that no final approval has been given.¹ In October 2010, the Federal Aviation Authority (FAA) accepted Hendry County's preliminary application into the Airport Privatization Pilot Program.² It is your understanding that the FAA will entertain a final application when it is filed by the county, but approval is not certain. The county questions, however, whether it may negotiate the lease of airport property for a term in excess of 30 years for the privatization of its airport.

Section 125.35(1), Florida Statutes, states:

(a) The board of county commissioners is expressly authorized to sell and convey any real or personal property, and to lease real property, belonging to the county, whenever the board determines that it is to the best interest of the county to do so, to the highest and best bidder for the particular use the board deems to be the highest and best, for such length of term and such conditions as the governing body may in its discretion determine.

(b) Notwithstanding the provisions of paragraph (a), the board of county commissioners is expressly authorized to:

1. Negotiate the lease of an airport or seaport facility;

2. Modify or extend an existing lease of real property for an additional term not to exceed 25 years, where the improved value of the lease has an appraised value in excess of \$20 million; or

3. Lease a professional sports franchise facility financed by revenues received pursuant to s. 125.0104 or s. 212.20;

under such terms and conditions as negotiated by the board. (e.s.)

Section 125.35(1)(b)1., Florida Statutes, has been interpreted by this office to allow a board of county commissioners to lease county airport property for a term determined by the commission to be in the best interest of the county.³ While section 332.08, Florida Statutes,⁴ makes provisions for the lease of airport property by municipalities,⁵

this office has concluded that the more recent and specific provisions in section 125.35, Florida Statutes, dealing particularly with the power of counties to lease airport facilities, apply when a county is contemplating the lease of such property.⁶

Thus, pursuant to section 125.35(1)(b)1., Florida Statutes, Hendry County is authorized to negotiate the lease of its airport property to a private party for a term in excess of 30 years and under such conditions as the board of county commissioners determines within its discretion is in the best interest of the county.

³ See Ops. Att'y Gen. Fla. 99-35 (1999) (board of county commissioners may negotiate lease for an airport facility without competitive bid for such length of term and under such conditions as the governing body in its discretion determines to be beneficial to the county) and 94-96 (1994) (section 125.35[1][a], Fla. Stat., authorizes the county to grant a lease of airport property to a private party for a term of more than 30 years).

⁵ Section 332.01(1), Fla. Stat., defines "[m]unicipality" for purposes of Ch. 332, Fla. Stat., to include "any county, city, village, or town of this state."

⁶ See Op. Att'y Gen. Fla. 94-96 (1994). And see s. 8, Ch. 22846, Gen. Laws of Fla. (1945), creating s. 332.08, Fla. Stat., and s. 1, Ch. 23829, Gen. Laws of Fla. (1947), creating s. 125.35, Fla. Stat. While s. 125.35, Fla. Stat., has been subsequently amended by Ch. 99-190, Laws of Fla., to clarify local governments' authority to lease airport property since the 1994 opinion was issued, such amendment does not alter the county's authority; compare to the latest amendment to section 332.08, Fla. Stat., which occurred in s. 231, Ch. 71-136, Laws of Fla., making violation of county-imposed airport regulations a misdemeanor of the second degree, punishable as provided in ss. 775.082 or 775.083, Fla. Stat. See also Florida Association of Counties, Inc. v. Department of Administration, Division of Retirement, 580 So. 2d 641 (Fla. 1st DCA 1991), approved, 595 So. 2d 42 (Fla. 1992) (general rule is that in cases of conflicting statutory provisions, latter expression will prevail over former).

¹ In Op. Att'y Gen. Fla. 11-11 (2011), this office concluded that Hendry County was authorized to sell the county airport to a private entity, but such sale would be subject to the competitive bidding process in s. 125.35, Fla. Stat. You have clarified that the federal government has not agreed to the sale, nor has it waived operation of a reversionary clause in the deed to the county. You do not ask, nor does this office express any comment on whether this clarification would affect the conclusion reached in Op. Att'y Gen. Fla. 11-11 (2011).

² See 49 U.S.C. s. 47134.

⁴ Section 332.08(3), Fla. Stat.

AGO 11-23 - December 5, 2011

COUNTIES – SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES – CHILDREN AND FAMILY SERVICES, DEPARTMENT OF – AUDITS – APPROPRIATIONS

COUNTY'S ROLE IN IMPLEMENTATION OF SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES REQUIREMENTS IN THE COUNTY'S DISTRICT

To: Mr. George G. Angeliadis, Sumter County Attorney

QUESTIONS:

1. What is the formula, and source of data represented therein, utilized to calculate the county's portion of "local matching funds" required by section 394.76, Florida Statutes?

2. Are "in-kind" contributions by the county considered in determining the county's contribution pursuant to section 394.76, Florida Statutes?

3. May the county require disclosure of financial reports and sources of other funding to validate data used in the formula to determine "local matching funds?"

4. Does the county possess oversight of an entity requesting "local matching funds," such as participation in the operational or budget review or approval process of such entity?

5. May "in-kind" contributions be used to offset the county's matching funds obligation?

6. Who is required to establish the level, source, or availability of other local matching funds when there is a dispute as to the level of funding to be provided by the county?

SUMMARY:

1. Section 394.76(3)(b), Florida Statutes, requires local participation on a 75-to-25 percent state-to-local ratio of funding for all contracted community alcohol and mental health services, except those programs specifically identified in the statute and those specified in section 394.457(3), Florida Statutes.

2. & 5. "In-kind" contributions are recognized by administrative rule as satisfying requirements for matching funds.

3. & 4. A local governing body is statutorily required to have an annual audit performed on the expenditure of public funds it has provided to carry out the provisions of the act to ensure that such funds are expended only for substance abuse or mental health purposes. No other statutory provision appears to grant local governing bodies oversight of the operation or other financial activities of a substance abuse or mental health services provider.

6. While the act contemplates that a county will have input into the development of a district plan for the provision of substance abuse and mental health services and is one of the enumerated parties that must approve the plan, ultimately, the legislative appropriation to the Department of Children and Family Services will determine the level of local match participation by a county. The district administrator is authorized to require changes to bring the district plan into compliance with the statutory requirements and any dispute between the district administrator and the district board, including the projected budget, is to be resolved by the department's secretary.

You state that Sumter County has received a request for funding from a non-profit provider of mental health, crisis stabilization, and Baker Act services to citizens of Sumter County and Lake County. Currently, such providers submit requests to the county, then await approval through the budget hearing process. Sumter County, however, is unable to determine whether its share of the funding amount to the provider is affected by other sources of funding such as its "in-kind" contribution of physical space to the provider, or by the fact that the provider's services are provided to residents of two counties. The county further believes that other forms of available local matching funds must be identified, accounted for, and considered prior to its committing any funds. Additionally, the county wishes to participate in the planning, evaluation, auditing, and implementation of the programs for which it provides funding.

QUESTIONS 1. & 6.

Part IV of Chapter 394, Florida Statutes, is "The Community Substance Abuse and Mental Health Services Act" (act).¹ Section 394.76, Florida Statutes, addresses the financing of district programs and services under the act and specifies the means to determine the local match funding level, if such level is not provided in the General Appropriations Act or the substantive bill implementing the General Appropriations Act. Section 394.76(9)(a), Florida Statutes, states:

State funds for community alcohol and mental health services shall be matched by local matching funds as provided in paragraph (3)(b). The governing bodies within a district or subdistrict shall be required to participate in the funding of alcohol and mental health services under the jurisdiction of such governing bodies. The amount of the participation shall be at least that amount which, *when added to other available local matching funds*, is necessary to match state funds. (e.s.)

The term "[l]ocal matching funds" is defined as "funds received from governing bodies of local government, including city commissions, county commissions, district school boards, special tax districts, private hospital funds, private gifts, both individual and corporate, and bequests and funds received from community drives or any other sources."² Generally, with enumerated exceptions that do not require local match funds,³ "[a]ll other contracted community alcohol and mental health services and programs, except as identified in s. 394.457(3),⁴ shall require local participation on a 75-to-25 state-to-local ratio."⁵

Thus, the plain language of the statute mandates that state funds appropriated for community alcohol and mental health services shall be matched by local governing bodies and directs that the formula for determining the local match funds is based upon the state providing 75% of the funding for programs subject to local matching funds, with the remaining 25% match provided by the local sources available for matching funds.

As referenced above, the governing bodies within a district or a subdistrict must participate in the funding of alcohol and mental health services under the jurisdiction of such governing bodies and the amount of their participation must be at least that amount which, *when added to other available local matching funds*, is necessary to match state funds. The statute, therefore, clearly acknowledges that there may be multiple sources for contributing to the local match amount and, in defining local matching funds, gives an open-ended range of sources that may be included.

Further, as in this instance where two counties within a service district are to be served by a provider, section 394.73(3), Florida Statutes, states:

When a service district comprises two or more counties or portions thereof, it is the obligation of the planning council to submit to the governing bodies, prior to the budget submission date of each governing body, an estimate of the proportionate share of costs of alcohol, drug abuse, and mental health services proposed to be borne by each such governing body.

The act, therefore, directs how the proportionate share of costs of a substance abuse or mental health program will be assessed when two or more counties receive services from such program, but does not appear to contemplate that an individual county has the authority to determine the amount it must pay. This is not to say that the county is without a voice in the overall process. Section 394.75, Florida Statutes, sets forth the procedure for establishing state and district substance abuse and mental health plans. Subsection (3) of the section directs the district "health and human services board"⁶ to prepare an integrated district substance abuse and mental health plan. The statute specifically provides that the plan shall include:

(a) A record of the total amount of money available in the district for mental health and substance abuse services.

(b) A description of each service that will be purchased with state funds.

(c) A record of the amount of money allocated for each service identified in the plan as being purchased with state funds.

(d) A record of the total funds allocated to each provider.

(e) A record of the total funds allocated to each provider by type of service to be purchased with state funds.

(f) Input from community-based persons, organizations, and agencies interested in substance abuse and mental health treatment services; local government entities that contribute funds to the public substance abuse and mental health treatment systems; and consumers of publicly funded substance abuse and mental health services, and their family members. The plan must describe the means by which this local input occurred.

The plan shall be submitted by the district board to the district administrator and to the governing bodies for review, comment, and approval. 7 (e.s.)

The district plan must also include:

a procedure for securing local matching funds. Such a procedure shall be developed in consultation with governing bodies and service providers.⁸

In developing the district plan, the statute requires that "optimum use shall be made of any federal, state, and local funds that may be available for substance abuse and mental health service planning. However, the department must provide these services within legislative appropriations."⁹

Thus, while a county has input in the development of a district plan for substance abuse and mental health services, it would appear that the county's level of participation by local matching funds is ultimately determined by the Legislature's appropriation for the Department of Children and Family Services (DCF) to provide such services. As reflected above, the county is involved in formulating the district plan for delivery of services. The district administrator, however, is required to make modifications to the district plan he or she deems necessary to bring it into compliance with the provisions of the act.¹⁰ If the district board and the district administrator are unable to agree on the plan, including the projected budget, the disputed issues are to be submitted directly to the department's secretary for immediate resolution.¹¹

QUESTIONS 2. & 5.

While section 394.76, Florida Statutes, does not specifically address "in-kind" contributions in relation to local match funds, Chapter 65E, Florida Administrative Code, administrative rules promulgated to implement operation of the statute, provide assistance in determining what constitutes a matching fund and how "in-kind" contributions are counted. Among those items recognized as satisfying matching requirements is "[t]he value of third-party funds and *in-kind contributions* applicable to the matching period[.]"¹² (e.s.) Moreover, the rules allow the donated use of space to an organization, with the value of the space as an allowable cost, and specifically recognize that "[t]he value of the donations may be used to meet matching requirements."¹³ In determining the value of a donation of equipment, building, and land, Rule 65E-14.006(4), Florida Administrative Code, states: "The fair market value at the time of donation of the equipment, building or land may be counted as matching."

This office has been advised by DCF that "in-kind" contributions may be considered in calculating a local government's contribution of matching funds. Thus, in light of the fact that "in-kind" contributions are recognized by the controlling administrative rules as a means to satisfy requirements for matching funds and DCF's acknowledgment that "in-kind" contributions may be used to meet matching funds requirements, it would appear that the county may use its "in-kind" contributions in meeting its share of local matching funds.

QUESTIONS 3. & 4.

Section 394.76(10), Florida Statutes, authorizes a local governing body to appropriate moneys, in lump sum or otherwise, from public funds for the purpose of carrying out the provisions of "The Community Substance Abuse and Mental Health Services Act."14 The paragraph further provides:

In addition to the payment of claims upon submission of proper vouchers, such moneys may also at the option of the governing body, be disbursed in the form of a lump-sum or advance

11-23

payment for services for expenditure, in turn, by the recipient of the disbursement without prior audit by the auditor of the governing body. Such funds shall be expended only for substance abuse or mental health purposes as provided in the approved district plan. *Each governing body appropriating and disbursing moneys pursuant to this subsection shall require the expenditure of such moneys by the recipient of the disbursement to be audited annually either in conjunction with an audit of other expenditures or by a separate audit. Such annual audits shall be furnished to the governing bodies of each participating county and municipality for their examination.*¹⁵ (e.s.)

Thus, the plain language of the controlling statute requires local governing bodies to have audits performed of the expenditure of public funds they have provided to carry out the provisions of the act to ensure that such funds are expended only for substance abuse or mental health purposes. Such audits may be in conjunction with audits of other expenditures or by a separate audit and must be furnished to the governing bodies of each county or municipality for their examination. I have not found, nor been referred to, any other provision in the act which expresses any further authority of local governing bodies in regard to audits of the operations of substance abuse and mental health providers.

Section 394.78, Florida Statutes, places administration of the act under DCF. The department is directed to adopt rules necessary for the act's administration and may adopt, among others, rules relating to "full disclosure of revenue funds and expenses." Thus, it may be advisable to work with DCF in further evaluating the performance and financial sources of mental health and substance abuse providers within your county.¹⁶

Residential and case management services which are funded as part of a deinstitutionalization project shall not require local matching funds and shall not be used as local matching funds. The state and federal financial participation portions of Medicaid earnings pursuant to Title XIX of the Social Security Act, except for the amount of general revenue equal to the amount appropriated in 1985-1986 plus all other general revenue that is shifted from any other alcohol, drug abuse, and mental health appropriation category after fiscal year 1986-1987 or substance abuse and mental health appropriation category after fiscal year 2000-2001, shall not require local

¹ Section 394.65, Fla. Stat.

² Section 394.67(13), Fla. Stat.

³ Section 394.76(3)(b), Fla. Stat., states:

matching funds and shall not be used as local matching funds. Local matching funds are not required for general revenue transferred by the department into substance abuse and mental health appropriations categories during a fiscal year to match federal funds earned from Medicaid services provided for mental health clients in excess of the amounts initially appropriated. Funds for children's services which were provided through the Children, Youth, and Families Services budget which did not require local match prior to being transferred to the Substance Abuse and Mental Health Services budget shall be exempt from local matching requirements....

⁴ Section 394.457(3), Fla. Stat., authorizes the Department of Children and Family Services to contract to provide, and be provided with, services and facilities in order to carry out its responsibilities under the "Florida Mental Health Act," with, among other entities, "counties, municipalities, and any other governmental unit, including facilities of the United States Government."

⁵ Section 394.76(3)(b), Fla. Stat.

⁶ A footnote relates that health and human services boards were abolished by s. 2, Ch. 2000-139, Laws of Fla., which substantially reworded s. 20.19, Fla. Stat. Section 20.19(6), Fla. Stat., requires the establishment of a community alliance in each county composed of stakeholders, community leaders, client representatives, and funders of human services "to provide a focal point for community participation and governance of communitybased services."

⁷ Section 394.75(3), Fla. Stat. *And see* s. 394.75(12), Fla. Stat, providing that "[e]ach governing body that provides local funds has the authority to require necessary modification to only that portion of the district plan which affects substance abuse and mental health programs and services within the jurisdiction of that governing body."

- ⁸ Section 394.75(4)(h), Fla. Stat.
- ⁹ Section 394.75(7), Fla. Stat.
- ¹⁰ Section 394.75(11), Fla. Stat.
- 11 Id.

¹² Rule 65E-14.005(1)(b), Fla. Admin. C. *Cf.* Rule 65E-14.005(2)(b), Fla. Admin. C., making "[c]osts or third-party funds and in-kind contributions that are used to satisfy a matching requirement of another State contract or Federal grant" unallowable for matching.

- ¹³ Rule 65E-14.017(4)(j)2., Fla. Admin. C.
- ¹⁴ Section 394.65, Fla. Stat., providing the title to Part IV of Ch. 394.

¹⁵ *Cf.* s. 394.76(5), Fla. Stat., stating: "The department [of Children and Family Services] is authorized to make investigations and to require audits of expenditures. The department may authorize the use of private certified public accountants for such audits. Audits shall follow department guidelines." *See also* Rule 65E-14.003, Fla. Admin. C., relating to audits of contractors participating in substance abuse and mental health programs.

¹⁶ While not posed in a question, your memorandum of law refers to Ch. 119, Fla. Stat., Florida's Public Records Law. I would note that the right of access to public records extends to records of private entities acting on behalf of a public agency. See s. 119.011(2), Fla. Stat. Where a private entity has contracted to provide services in place of a public agency, the records generated by the private entity's performance of that duty are public records, subject to disclosure (absent any applicable exemption or provision of confidentiality). See News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992). A copy of a standard contract used by DCF in securing services (CF Standard Contract 06/2011) requires a provider "[t]o allow public access to all documents, papers, letters, or other public records as defined in subsection 119.011(12), F.S. and as prescribed by subsection 119.07(1), F.S., made or received by the Provider in conjunction with this contract except that public records which are made confidential by law must be protected from disclosure."

AGO 11-24 - December 9, 2011

MUNICIPALITIES – INTERLOCAL AGREEMENTS – LAW ENFORCEMENT

AUTHORITY OF MUNICIPALITY TO PROVIDE LAW ENFORCEMENT SERVICES TO ADJOINING MUNICIPALITIES

To: Mr. Hayward Dykes, Jr., City Attorney, City of Fort Walton Beach

QUESTION:¹

Does section 166.0495, Florida Statutes, authorize the City of Fort Walton Beach to enter into an interlocal agreement to provide law enforcement services only to adjoining municipalities in the same county or may it enter into an interlocal agreement to provide law enforcement services to any municipality, adjoining or not, located within the same county in which the city is located?

SUMMARY:

Section 166.0495, Florida Statutes, authorizes a municipality to enter into an interlocal agreement for the provision of law

enforcement services with only those municipalities which adjoin the municipality and are located within the same county as the municipality.

Section 166.0495, Florida Statutes, provides:

A municipality may enter into an interlocal agreement pursuant to s. 163.01 with an *adjoining municipality or municipalities within the same county* to provide law enforcement services within the territorial boundaries of the other *adjoining municipality or municipalities*. Any such agreement shall specify the duration of the agreement and shall comply with s. 112.0515, if applicable. The authority granted a municipality under this section is in addition to and not in limitation of any other authority granted a municipality to enter into agreements for law enforcement services or to conduct law enforcement activities outside the territorial boundaries of the municipality. (e.s.)

Section 166.0495, Florida Statutes, was enacted by Chapter 97-62, Laws of Florida. The title to the act states that it relates to municipal government, "authorizing municipalities to enter into interlocal agreements to provide law enforcement services within the boundaries of adjoining municipalities within the same county[.]" While the title to an act is not dispositive of its effect, it may be considered in determining the intent of the Legislature.² The legislative history of Chapter 97-62, Laws of Florida, provides additional insight as to the Legislature's intent in its enactment.³ The sponsor of the bill, explaining its purpose, stated that the bill would allow municipalities to enter into an interlocal agreement with a neighboring law enforcement entity in an "adjoining community within the same county." Further, she explained that it applied to "adjoining municipalities within the same county only," then continued that the act did not authorize "skipping over . . .[;] it has to be an adjoining community."⁴ The language in the statute has not been amended since its enactment.

There is a rule of grammatical construction that a qualifying phrase will modify all items listed in a series unless there is no comma between the last of the series and the qualifying phrase.⁵ In this instance, however, there are two qualifying terms, "adjoining" and "within the same county," which modify the intervening terms "municipality or municipalities" which do not appear to qualify as a "series" of terms. A "series" is "a group of usu. [usually] three or more things or events standing or succeeding in order and having a like relationship to each other."⁶ The phrase "municipality or municipalities" appears to be in the nature of a phrase representing selectivity between the singular and plural, rather than a series of choices having a like relationship to each other. Thus, the phrase "adjoining municipality or municipalities within the same county" must be read in a common sense manner to mean that any municipality entering into an interlocal agreement for law enforcement services must meet the criteria of adjoining the municipality providing the law enforcement service and be located within the same county.⁷ The Legislature's intent as expressed in the title of the legislation and in the history surrounding enactment of the bill supports this interpretation.

Accordingly, it is my opinion that pursuant to section 166.0495, Florida Statues, the City of Fort Walton Beach is authorized to enter into an interlocal agreement for the provision of law enforcement services only with other municipalities which adjoin the city and are located within the same county.

³ See Reynolds v. State, 842 So. 2d 46, 49 (Fla. 2002) (legislative intent is the polestar that guides statutory construction analysis).

¹ You have posed two additional questions: whether the city and the Okaloosa County Airport may enter into an interlocal agreement for the city to provide law enforcement on the county airport property; and whether Florida law requires a city to provide law enforcement services to its citizens or whether it may rely upon county law enforcement only. You have been informed that the governing body of the Okaloosa County Airport must join in the request in order for this office to address your second question and that the sheriff would necessarily have to join in the request to have your third question considered; no communication to that effect has been received by this office.

² See Parker v. State, 406 So. 2d 1089 (Fla. 1981) (one indicator of the Legislature's intent is the title of the law enacting the statute); Finn v. Finn, 312 So. 2d 726 (Fla. 1975) (title of act is not part of basic act but has function of defining scope of act); Berger v. Jackson, 23 So. 2d 265 (Fla. 1945) (generally, title of an act may be considered in determining the intent of the Legislature; title of act is to be given due weight); Speights v. State, 414 So. 2d 574 (Fla. 1st DCA 1982) (although not part of statute, title is valuable aid in determining legislative intent); and Op. Att'y Gen. Fla. 57-314 (1957) (where heading is furnished by Legislature, consideration of heading is proper in determining intent of Legislature).

⁴ Senate Committee on Community Affairs, March 5, 1997, Sen. Virginia "Ginny" Brown-Waite, CS/SB 378, Tape 1 of 3. *See also* Senate Floor Debate, April 17, 1997, Sen. Virginia "Ginny" Brown-Waite, Tape 4 of 6 ("This bill gives municipalities the choice of contracting either with the sheriff's office or with an adjoining municipality for police services.").

⁵ See Mendelsohn v. State of Florida, Department of Health, Case No. 1D11-3278, August 31, 2011 (Fla. 1st DCA 2011), citing Kasischke v. State, 991 So. 2d 803, 812-13 (Fla. 2008) (citing 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction s. 47.33 [7th ed. 2007]).

 $^{\rm 6}~$ Webster's Third New International Dictionary (unabridged, 1981), p. 2073.

⁷ *Cf. Jarrett v. State*, 926 So. 2d 429 (Fla. 2d DCA 2006), in which the jurisdiction of a city police officer employed by the Town of Indian Shores rendering law enforcement services pursuant to an interlocal agreement with the Town of Redington Shores was challenged on technical grounds that the agreement had not been recorded in both jurisdictions; while the proximity of the towns was not at issue, the towns are geographically adjacent. *See* http://wms.mapwise.com/fmo2/.

AGO 11-25 - December 9, 2011

DUAL OFFICE-HOLDING – SPECIAL MAGISTRATES – MUSEUM TRUSTEES

WHETHER MEMBERS OF MUSEUM BOARD OF TRUSTEES MAY SIMULTANEOUSLY SERVE AS SPECIAL MAGISTRATE FOR VALUE ADJUSTMENT BOARD

To: Mr. Steven A. Schultz, PA, Attorney for the Miami-Dade County Value Adjustment Board¹ Mr. Carlton W. Cole, Member of the Miami-Dade County Vizcaya Museum and Gardens Trust

QUESTIONS:

1. Is an appointed member of the Board of Trustees of the Miami-Dade County Vizcaya Museum and Gardens Trust an appointed official or employee of the county or of a taxing jurisdiction or of the state for purposes of section 194.035(1), Florida Statutes?

2. Is an appointed member of the Board of Trustees of the Miami Dade County Vizcaya Museum and Gardens Trust an officer for purposes of the constitutional dual office-holding prohibition contained in section 5(a), Article II, Florida Constitution?

SUMMARY:

1. Members of the Board of Trustees of the Vizcaya Museum and Gardens Trust are appointed officials of the county for purposes of section 194.035(1), Florida Statutes.

2. In light of my answer to Question One, no response to your second question is necessary.

Mr. Cole has advised this office of his intention to apply for a position as a special magistrate with the Miami-Dade County Value Adjustment Board. This office has, on a number of occasions, concluded that such service constitutes an office for purposes of the dual office-holding prohibition in Article II, section (5)(a), Florida Constitution.² Thus, you ask whether a member of the Miami-Dade County Vizcaya Museum and Gardens Trust is an officer for purposes of the constitutional dual officeholding prohibition such that Mr. Cole is precluded from simultaneously serving in both offices. Further, section 194.035(1), Florida Statutes, contains a broader prohibition directed specifically to value adjustment board proceedings which would preclude an appointed or elected official or employee of the county from serving as a special magistrate. Mr. Cole's concern is that he may fall within the scope of one or both of these prohibitions which would preclude his serving as a special magistrate.

QUESTION 1. - Section 194.035(1), Florida Statutes

The Vizcaya Museum and Gardens Trust (the trust) was created by a Miami-Dade County ordinance as an agency and instrumentality of the county.³ The governing body of the trust is a board of trustees made up of 24 members, none of whom may be employees of the trust.⁴ As an agency and instrumentality of Miami-Dade County, the trust is accountable directly to the county "and subject to its Legislative and Executive powers."⁵ Members of the trust board are appointed by the county commission and by the executive mayor of Miami-Dade County and include the county manager (or a designee), and various officials involved with the Vizcaya and other cultural and historical bodies and include the director of the Miami-Dade Park and Recreation Department.⁶ Members of the trust serve without compensation, but are entitled to "reimbursement for necessary expenses incurred in the discharge of their duties."⁷

The trust is charged with making, adopting and amending by-laws, rules and regulations for its own governance and for the operation, governance, restoration, preservation and maintenance of designated facilities.⁸ Powers of the trust include:

• preparing a mission statement for the Vizcaya Museum and Gardens which, once approved, governs "all actions by Miami-Dade County and its agents and employees concerning Vizcaya Museum and Gardens."⁹

• establishing written schedules of rates, charges, and fees relating to Vizcaya, which are effective upon approval by the Board of County Commissioners.¹⁰

• developing policies regarding Vizcaya Museum and Gardens which are binding on all Miami-Dade County departments, agents, users, and employees once approved by the Board of County Commissioners.¹¹

the acceptance of grants and gifts.¹²

• the authority to negotiate and recommend contracts and agreements with support groups and the power (with Miami-Dade County) to inspect and audit books and records of support groups; and the accounting and disposition of fund raising proceeds.¹³

The trust is charged with developing additional appropriate plans and ordinance amendments for the transition of the operation of the museum and gardens to a public/private operating partnership.

With regard to contractual authority, "the Trust as agent and instrumentality of Miami-Dade County, shall be authorized to act for Miami-Dade County in the performance and enforcement of all contracts pertaining to the Trust and designated facilities . . . and shall additionally be empowered to negotiate and execute . . . such contracts as are properly within the powers and duties of the Trust[.]"¹⁴ The trust may not, without prior approval of the Board of County Commissioners, enter into or amend any contract requiring the expenditure of funds in excess of the amounts appropriated in the county budget and designated for the trust.¹⁵ The trust is authorized to purchase real property with the title to be vested in Miami-Dade County.¹⁶

The budget for the Vizcaya Museum and Gardens is to be prepared annually by the trust on "official county budget forms" and submitted directly to the county manager.¹⁷ Supplemental budget requests may be submitted to the County Commission and, if approved, constitute amendments to the official county budget.¹⁸

Section 194.035, Florida Statutes, authorizes value adjustment boards to appoint special magistrates to take testimony and make recommendations to the board. Section 194.035(1), Florida Statutes, provides that:

In counties having a population of more than 75,000, the (value adjustment) board shall appoint special magistrates for the purpose of taking testimony and making recommendations to the board, which recommendations the board may act upon without further hearing. *These special magistrates may not be elected or appointed officials or employees of the county* but shall be selected from a list of those qualified individuals who are willing to serve as special magistrates. Employees and elected or appointed officials of a taxing jurisdiction or of the state may not serve as special magistrates. (e.s.)

Section 194.035, Florida Statutes, does not contain a definition of

the term "official" for purposes of the prohibition. In the absence of a statutory definition, the general rule is that words of common usage are construed in their plain and ordinary sense and that, if necessary, the plain and ordinary meaning of the words can be ascertained by reference to a dictionary.¹⁹ Words in common use in a statute are to be construed in their plain and ordinary signification, unless they are used in their technical sense.²⁰

The word "official" is generally defined as: "a person appointed or elected to an office or charged with certain duties;²¹ "[o]ne who holds an office or position;"²² "[o]ne who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers."²³ Thus, an official would appear to be a person who holds an elected or appointed office or position and is invested with some of the government's sovereign powers.

As is clear from the plain language of the statute,²⁴ the prohibition in section 194.035(1), Florida Statutes, is more broadly encompassing than the dual office-holding prohibition of the Florida Constitution²⁵ which does not include employees or officers of special districts within its scope.²⁶ Section 194.035(1), Florida Statutes, clearly covers not only appointed and elected officials but employees of counties, the state and other taxing jurisdictions within the scope of the prohibition against service as a special magistrate.

Members of the Board of Trustees of the Vizcaya Museum and Gardens Trust cannot, pursuant to the terms of the ordinance creating the trust, be employees of the Trust.²⁷ Members of the trust board serve without compensation, but are entitled to reimbursement for necessary expenses incurred in the discharge of their duties.²⁸ Members of the board must abide by a code of ethics styled after the American Association of Museum's Code of Ethics and are subject to state open government and ethics laws.²⁹

The Vizcaya Museum and Gardens Trust is "created and established as an agency and instrumentality of Miami-Dade County" by the terms of the ordinance creating the trust.³⁰ The real property and facilities including personal property and art objects constituting the trust are the property of Miami-Dade County.³¹ The board of the trust includes county officers as members.³² Members of the board serve what are characterized by the ordinance as "staggered terms of office."³³ Members of the board are protected from personal liability by inclusion within the terms of county comprehensive general and professional liability insurance policies and are entitled to personal liability protection by the county "to the same extent that Miami-Dade employees and agents have such protection."³⁴ Board members are subject to "removal from office"³⁵ and exercise certain limited executive, legislative and administrative powers. As it appears that section 194.035(1), Florida Statutes, is to be read broadly to capture officials and employees who may not be subject to Article II, section 5(a), Florida Constitution, and in consideration of the duties and responsibilities of the board, it is my opinion that members of the board are appointed officials of the county for purposes of section 194.035(1), Florida Statutes, and would be precluded from service as special magistrates.

QUESTION 2. – Article II, section 5(a), Florida Constitution

You also ask whether a member of the board of the Vizcaya Museum and Gardens Trust is an officer for purposes of the dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution. In light of my response to Question One, which would preclude Mr. Cole from holding the office of special magistrate while simultaneously serving as a member of the board of the Vizcaya Museum and Gardens Trust, no response to your second question will be forthcoming.

³ See s. 2-1111, Art. LXXXI, Ch. 2, Part III, Miami-Dade County, Florida, Code of Ordinances.

- ⁴ Section 2-1113.A., *id*.
- ⁵ Section 2-1120., *supra* at n.3.
- ⁶ *Id*.

⁷ Section 2-1113.A., Art. LXXXI, Ch. 2, Part III, Miami-Dade County, Florida, Code of Ordinances.

- ⁸ Section 2-1113.E.1., *id*.
- ⁹ Section 2-1114.1., *supra* at n.7.
- ¹⁰ Section 2-1114.2., *supra* at n.7.

¹ Pursuant to s. 194.035(1), Fla. Stat., the value adjustment board must verify the special magistrate's qualifications before appointment. *And see* Rule 12D-9.010(5), Fla. Admin. C., "[t]he value adjustment board or board legal counsel must verify a special magistrate(s qualifications before appointing the special magistrate."

² See Op. Att'y Gen. Fla. 05 29 (2005) (service as special magistrate for value adjustment board constitutes an office within the scope of Art. II, s. 5(a), Fla. Const., and service on code enforcement board constitutes an office for purposes of dual office holding prohibition); Inf. Op. to Groot, dated June 24, 2011. See also Rodriguez v. Tax Adjustment Experts of Florida, Inc., 551 So. 2d 537 (Fla. 3d DCA 1989) (special masters for value adjustment boards are quasi judicial officers).

- ¹¹ Section 2-1114.3., *supra* at n.7.
- ¹² Section 2-1114.3.(e), *supra* at n.7.
- ¹³ Section 2-1114.4., *supra* at n.7.

¹⁴ Section 2-1115.2., Art. LXXXI, Ch. 2, Part III, Miami-Dade County, Florida, Code of Ordinances.

- ¹⁵ Section 2-1115.2.a., *id*.
- ¹⁶ Section 2-1115.3., *supra* at n.14.
- ¹⁷ Section 2-1117.2., *supra* at n.14.
- 18 Id.

¹⁹ Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000); Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000).

²⁰ State v. Tunnicliffe, 124 So. 279, 281 (Fla. 1929); Gasson v. Gay, 49 So. 2d 525, 526 (Fla. 1950); State v. Egan, 287 So. 2d 1, 4 (Fla. 1973).

- ²¹ Webster's New Universal Unabridged Dictionary (2003), p. 1345.
- ²² American Heritage Dictionary (office edition, 1983), p. 477.
- ²³ Black's Law Dictionary (8th ed. 2004), p. 1119.

²⁴ See M.W. v. Davis, 756 So. 2d 90 (Fla. 2000) (when language of statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction as statute must be given its plain and obvious meaning); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); Ops. Att'y Gen. Fla. 00-46 (2000) (where language of statute is plain and definite in meaning without ambiguity, it fixes the legislative intention such that interpretation and construction are not needed); 99-44 (1999); 97-81 (1997).

²⁵ Article II, s. 5(a), Fla. Const., provides:

SECTION 5. Public officers.-

(a) No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

²⁶ For examples of positions which constituted an "employment" not an "office," *see, e.g.*, Ops. Att'y Gen. Fla. 94-88 (1994) (charter review commission attorney); 94-40 (1994) (code enforcement officer under Ch. 162, Fla. Stat.); 73-332 (1973) (county commission attorney); and 77-31 (1977) (community college district comptroller). For examples of special district offices which were not subject to the constitutional prohibition, *see, e.g.*, Ops. Att'y Gen. Fla. 94-83 (1994) (person may serve on airport authority and on school board); 86-55 (1986) (member of Big Cypress Basin's governing board may serve as city mayor); 78-74 (1978) (municipal parking board member may serve as member of community college district board of trustees).

²⁷ Section 2-1113.A, Art. LXXXI, Ch. 2, Part III, Miami-Dade County, Florida, Code of Ordinances.

- ²⁸ Section 2-1113.A., *id*.
- ²⁹ Section 2-1113. E.4., *supra* at n.27.
- ³⁰ Section 2-1111., *supra* at n.27.
- ³¹ Section 2-1112, *supra* at n.27.
- ³² Section 2-1113, *supra* at n.27.
- ³³ Section 2-1113.D., *supra* at n.27.
- ³⁴ Section 2-1113.E.6., *supra* at n.27.
- ³⁵ Section 2-1113.E.7. and 8., *supra* at n.27.

AGO 11-26 - December 9, 2011

REGIONAL PLANNING COUNCILS – PUBLIC EMPLOYEE COMPENSATION – EXTRA COMPENSATION – UNITS OF GOVERNMENT

WHETHER REGIONAL PLANNING COUNCIL IS "UNIT OF GOVERNMENT" FOR PURPOSES OF PROVIDING SEVERANCE PAY FOR OFFICERS AND EMPLOYEES OF COUNCIL

To: Mr. Samuel S. Goren and Mr. Jacob G. Horowitz, Attorneys for the South Florida Regional Planning Council

QUESTION:

Is the South Florida Regional Planning Council considered a "unit of government" as that phrase is used in section 215.425, Florida Statutes, as amended by Chapter 2011-143, Laws of Florida, for the purpose of determining severance payments for its employees?

SUMMARY:

The South Florida Regional Planning Council is a "unit of government" for purposes of section 215.425, Florida Statutes, as amended by Chapter 2011-143, Laws of Florida, for determining severance payments for its employees.

You advise that the South Florida Regional Planning Council is currently negotiating an employment agreement with a prospective executive director and is seeking guidance regarding whether the regional planning council is subject to section 215.425(4)(a), Florida Statutes.

The South Florida Regional Planning Council was created pursuant to the "Florida Regional Planning Council Act," sections 186.501-186.513, Florida Statutes. The act authorizes the creation of regional planning councils in each of the several comprehensive planning districts of the state in order to effectively carry out a wide variety of federal and state program designations and to avoid a proliferation of overlapping, duplicating, and competing agencies.¹ The comprehensive planning districts are geographic areas within the state designated by the Executive Office of the Governor.²

The purpose of the act is

to establish a common system of regional planning councils for areawide coordination and related cooperative activities of federal, state, and local governments; ensure a broad based regional organization that can provide a truly regional perspective; and enhance the ability and opportunity of local governments to resolve issues and problems transcending their individual boundaries.³

As provided in the act, regional planning councils serve as the primary organizations to address problems and plan solutions that are of concern on more than a local level and it is through the regional planning councils that local governments may provide input into state policy development.⁴ While the councils do not act as a permitting or regulatory entity, they are recognized as the multipurpose regional entity that is in a position to plan for and coordinate intergovernmental solutions to growth related problems on greater than local issues, provide technical assistance to local governments, and meet other needs of the communities in each region.⁵

In order to accomplish these legislatively prescribed goals, regional planning councils have been given a number of specifically enumerated powers, including the power to enter into contracts and agreements; to sue and be sued in their own names; to accept funds, grants, and services from governmental or private sources; to adopt rules; and to participate with other organizations, public and private, in the coordination or conduct of their activities.⁶ Regional planning councils are authorized by section 186.505, Florida Statutes, to employ and compensate personnel, consultants, and technical and professional assistants as are determined to be necessary to perform the duties set forth in the act.⁷ Such councils constitute "agencies" for purposes of Chapter 120, Florida Statutes, the "Administrative Procedures Act."⁸

Regional planning councils must prepare and submit to the Executive Office of the Governor a proposed comprehensive regional policy plan, addressing significant regional resources, infrastructure needs, or other important issues within the region as well as specifying regional issues that may be used in reviewing a development of regional impact.⁹ This regional policy plan contains regional goals and policies regarding growth management and must be consistent with the adopted state comprehensive plan.¹⁰ The Executive Office of the Governor arbitrates disputes between or among the regional planning councils.¹¹

While Florida courts have not addressed the issue of regional planning councils as "units of government," they have considered the nature of regional planning councils and determined that board members are officers for purpose of Florida's Resign-to-Run Law and the constitutional dual office-holding prohibition. In *Orange County v. Gillespie*,¹² the court considered a regional planning council established under former Chapter 160, Florida Statutes.¹³ The court considered whether a voting member of the East Central Florida Regional Planning Council was a "public officer" within the meaning of Florida's Resign to Run Law, which required elected or appointed public officials to resign from office before seeking another public office. While it was argued that the council acted in an advisory capacity, the court held that the regional planning councils had been delegated and possessed the powers and attributes of sovereignty.

Thus, the court held that members of such councils constituted public officers for purposes of the resign to run law at that time applicable to state, county, or municipal offices.¹⁴ The court concluded that the member was ineligible to qualify as a candidate for the office of state representative in the primary prior to resigning from the planning council. Likewise, this office has, for purposes of dual office-holding considerations, determined that membership on a regional planning council constitutes an office within the meaning of Article II, section 5(a), Florida Constitution, Florida's dual office-holding prohibition.¹⁵

Section 215.425, Florida Statutes, prohibits extra compensation payments in the absence of a policy or contract. Subsection (1) of the statute, as amended by section 1, Chapter 2011-143, Laws of Florida, provides that:

No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is allowed by a law enacted by two thirds of the members elected to each house of the Legislature. However, when adopting salary schedules for a fiscal year, a district school board or community college district board of trustees may apply the schedule for payment of all services rendered subsequent to July 1 of that fiscal year.

The statute was amended during the 2011 legislative session to authorize certain limited types of extra compensation16 and to require that any policy, ordinance, rule or resolution crafted to implement a bonus scheme meet certain legislatively prescribed standards:

(3) Any policy, ordinance, rule, or resolution designed to implement a bonus scheme must:

(a) Base the award of a bonus on work performance;

(b) Describe the performance standards and evaluation process by which a bonus will be awarded;

(c) Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and

(d) Consider all employees for the bonus.¹⁷

You specifically inquire about subsection (4) which requires in subparagraph (a), that after July 1, 2011:

[A] unit of government that enters into a contract or employment agreement, or renewal or renegotiation of an existing contract or employment agreement, that contains a provision for severance pay with an officer, agent, employee, or contractor must include the following provisions in the contract:

1. A requirement that severance pay provided may not exceed an amount greater than 20 weeks of compensation.

2. A prohibition of provision of severance pay when the officer,

agent, employee, or contractor has been fired for misconduct, as defined in s. 443.036(29), by the unit of government.¹⁸

The phrase "unit of government" as it is used in section 215.425, Florida Statutes, is not defined. In the absence of a statutory definition, the plain and ordinary meaning of a word can be ascertained, if necessary by reference to a dictionary.¹⁹ The word "government" is commonly defined as "the political direction and control exercised over the actions of the members, citizens, or inhabitants of communities, societies, and states; direction of the affairs of a state, community, etc.; political administration[;]"²⁰ or "[a] system by which a political unit is governed[;] [a] governing body or organization."²¹ A "unit" is defined as "one of a number of things, organizations, etc., identical or equivalent in function or form[;]" and "[o]ne regarded as a constituent part of a whole" or "[a] part, device, or module that performs a particular function."²² Thus, a "unit of government" would appear to be a governing body or organization that constitutes a part of the political administration of this state.

Regional planning councils are the primary organizations in this state addressing intergovernmental planning problems and providing solutions and technical assistance. These planning councils act on behalf of the state in implementing state policies relating to growth management. Regional planning councils are statutorily authorized and regulated entities responsible for formulating regional planning processes. Board members or planning councils are subject to the Florida's Resign-to-Run Law and the dual office-holding prohibition.²³ Thus, it would appear that regional planning councils created pursuant to the "Florida Regional Planning Council Act" are a part of the political administration of this state and would constitute "units of government" for purposes of section 215.425, Florida Statutes, as amended by Chapter 2011-143, Laws of Florida.

In sum, it is my opinion that the South Florida Regional Planning Council is a "unit of government" as that phrase is used in section 215.425, Florida Statutes, as amended by Chapter 2011-143, Laws of Florida, for the purpose of determining severance payments for its employees.

- ³ Section 186.502(2), Fla. Stat.
- ⁴ Section 186.502(3), Fla. Stat.
- ⁵ See s. 186.502(4), Fla. Stat.

¹ See s. 186.502(1)(c), Fla. Stat.

² See s. 186.503(1), Fla. Stat.

- ⁶ See s. 186.505, Fla. Stat.
- ⁷ Section 186.505(4), Fla. Stat.

⁸ See s. 120.52(1), Fla. Stat., defining "Agency" for purposes of Ch. 120, Fla. Stat., the Administrative Procedure Act, to mean, among others, those entities described in s. 186.504, Fla. Stat.

- ⁹ Section 186.508(1), Fla. Stat.
- ¹⁰ Section 186.507(1), Fla. Stat.
- ¹¹ See s. 186.506(1), Fla. Stat.

¹² 239 So. 2d 132 (Fla. 4th DCA 1970), cert. denied, 239 So. 2d 825 (Fla. 1970).

¹³ See now ss. 186.501 186.513, Fla. Stat.

¹⁴ See s. 99.012, Fla. Stat. (1971), stating in subsection (2) that "[n]o individual may qualify as a candidate for public office who holds another elective or appointive office, whether state, county, or municipal, the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office" Section 99.012(2) was subsequently amended and now refers to district offices in addition to federal, state, county, and municipal offices; however, at the time the court reached its opinion in Orange County v. Gillespie, supra, the statute did not refer to district offices.

- ¹⁵ See Op. Att'y Gen. Fla. 01-28 (2001).
- ¹⁶ See s. 1(2), Ch. 2011-143, Laws of Fla.

This section does not apply to:

(a) A bonus or severance pay that is paid wholly from nontax revenues and nonstate appropriated funds, the payment and receipt of which does not otherwise violate part III of chapter 112, and which is paid to an officer, agent, employee, or contractor of a public hospital that is operated by a county or a special district; or

(b) A clothing and maintenance allowance given to plainclothes deputies pursuant to s. 30.49.

¹⁷ Section 215.425(3), Fla. Stat.

¹⁸ Further, any agreement or contract, executed on or after July 1, 2011, which involves extra compensation between a unit of government and an officer, agent, employee, or contractor may not include provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract pursuant to section 215.425(5), Fla. Stat.

¹⁹ See Green v. State, 604 So. 2d 471, 473 (Fla. 1992); Plante v. Department

of Business and Professional Regulation, 685 So. 2d 886, 887 (Fla. 4th DCA 1996); WFTV, Inc. v. Wilken, 675 So. 2d 674 (Fla. 4th DCA 1996); State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997).

²⁰ Webster's New Universal Unabridged Dictionary 2003, p. 826.

²¹ The American Heritage Dictionary (office ed. 1987), p. 303.

²² Webster's New Universal Unabridged Dictionary 2003, p. 2074; The American Heritage Dictionary (office ed. 1987), p. 741.

²³ See Art. II, s. 5(a), Fla. Const., providing a dual office-holding prohibition and s. 99.012, Fla. Stat., for resign-to-run requirements.

AGO 11-27 – December 21, 2011

E911 CALLS - EMERGENCY SERVICES - PUBLIC RECORDS

CONFIDENTIALITY OF IDENTIFYING INFORMATION IN OFFENSE REPORTS

To: Ms. Lisa H. Rubin, Agency Attorney, Palm Beach County Sheriff

QUESTION:

Is information regarding an individual who makes a 911 call contained in an offense report confidential and exempt pursuant to section 365.171(12), Florida Statutes, regardless of whether the offense report reflects that a 911 call was made or identifies the individual as having made the 911 call?

SUMMARY:

Information obtained from a 911 call by an agency for the purpose of providing service in an emergency which reveals the name, address, telephone number, or personal information about, or information which may identify any person requesting emergency services or reporting an emergency is confidential while in the custody of the agency. However, identifying information obtained or created independently of the 911 call, for example from a criminal investigation or offense report created as a result of such investigation, is not exempt under section 365.171(12), Florida Statutes.

While you recognize that the exemption clearly applies to the recording of 911 calls and computer aided dispatch records relating to such calls, you question whether an offense report which subsequently includes such information identifying an individual, but not indicating that he or she placed the 911 call or requested emergency assistance would be subject to the exemption. You also question whether the identifying information should be redacted from the offense report when the caller is also the victim, a suspect, or a witness to the incident, and no other exemptions would justify the redaction of such information.

Section 365.171, Florida Statutes, is the "Florida Emergency Communications Number E911 State Plan Act."¹ It is the Legislature's intent

to implement and continually update a cohesive statewide emergency communications number "E911" plan for enhanced 911 services which will provide citizens with rapid direct access to public safety agencies by accessing "911" with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services.²

Section 365.171(12), Florida Statutes, provides:

CONFIDENTIALITY OF RECORDS.—Any record, recording, or information, or portions thereof, obtained by a public agency or a public safety agency for the purpose of providing services in an emergency and which reveals the name, address, telephone number, or personal information about, or information which may identify any person requesting emergency service or reporting an emergency by accessing an emergency communications E911 system is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that such record or information may be disclosed to a public safety agency. The exemption applies only to the name, address, telephone number or personal information about, or information which may identify any person requesting emergency services or reporting an emergency while such information is in the custody of the public agency or public safety agency providing emergency services. . . . (e.s.)

Thus, application of the exemption hinges upon two conditions: the information was obtained by a public agency or a public safety agency for the purpose of providing services in an emergency; and the information reveals the identity of the person requesting emergency services or reporting the emergency. The Legislature has stated:

The Legislature finds that it is a public necessity that information received by the agency receiving a "911" call and an agency providing emergency services as a result of that "911" call be held confidential and exempt when it reveals the name, address, telephone number, or personal information about, or information which may identify the person requesting emergency service or reporting an emergency because if it

were otherwise, personal, sensitive information, including medical information, would be revealed to the public. The need for emergency services bespeaks a very personal and often traumatizing event. To have this information made publicly available is an invasion of privacy. Additionally, to have such information publicly available could jeopardize the health and safety of those needing emergency services in that people, other than emergency service providers, could actually gain access to the scene of the emergency and thereby impede the effective and efficient provision of emergency services. Furthermore, there are those persons, who, for personal, private gain and/or for business purposes, would seek to capitalize on individuals in their time of need. Those reporting or needing emergency services should not be subjected to this type of possible harassment. Furthermore, to allow such information to become public could chill the reporting of emergency situations to the detriment of public health and safety.³

While the Legislature's concern is to protect individuals using 911 to seek emergency assistance from unwanted and potentially detrimental contact, the exemption is couched in terms of information derived from the 911 call which would identify the individual as the one making the call or requesting emergency services. A study by the Florida Senate reviewing the exemption for purposes of reenactment summarized that the purpose of the exemption is "to shield the identity of any person requesting emergency services or reporting an emergency by accessing the emergency telephone number '911."⁴ The report noted, however, that the exempted information could be obtained from other official documents, albeit in some instances such information would be protected from disclosure by other statutory exemptions.⁵

The plain language of the statute makes the exemption applicable to any record or information obtained by a public agency for the purpose of providing services in an emergency and which may identify the person as one requesting emergency services or reporting an emergency situation. You have stated that the offense report is a document that may be created as a result of an inquiry or investigation following a 911 call. Such a report, however, does not appear to be a record or information obtained by the law enforcement agency from the 911 call, nor does it necessarily identify the individual as the one making the 911 call or requesting emergency services. While a law enforcement agency may be initially responding to an emergency situation as a result of the 911 call, a subsequent investigation of criminal activity resulting in the creation of an offense report would appear to be distinct from providing emergency services.

It is well settled that the Public Records Law is to be liberally construed in favor of open government and that an exemption from disclosure is to be strictly construed to effectuate its stated purpose.⁶ Thus, to shield the identity of one who makes a 911 call, only information obtained by an agency identifying an individual as the caller in a 911 call or one requesting emergency services is confidential. Information placed in an offense report which does not identify an individual as the caller or one requesting emergency services, however, does not meet the requirements set forth for the exemption from disclosure under section 365.171(12), Florida Statutes.

The clear language of the statute makes the exemption applicable to identifying information derived from a 911 call. Thus, the name of a 911 caller or one requesting emergency services that a law enforcement agency has obtained only from the 911 call remains confidential. Information, including names, collected from an investigation which is included in an offense report created as a result of a criminal investigation independent of the 911 call, however, is not protected by the exemption in section 365.171(12), Florida Statutes.

Accordingly, it is my opinion that identifying information derived from a criminal investigation and placed in an offense report by a law enforcement agency does not fall within the exemption in section 365.171(12), Florida Statutes. While information obtained from a 911 call by an agency for the purpose of providing service in an emergency which reveals the name, address, telephone number, or personal information about, or information which may identify any person requesting emergency services or reporting an emergency is confidential, such information obtained or created independently of the 911 call as a result of a criminal investigation is not exempt under section 365.171(12), Florida Statutes. Agencies creating documents which may contain identifying information, however, may wish to be sensitive to the purpose of the exemption in section 365.171(12), Florida Statutes, when placing such information in the documents.

⁴ *See* The Florida Senate, Committee on Comprehensive Planning, Local and Military Affairs, Interim Project Report 2001-036, November 2000.

⁵ *Id.* at p. 4. Such information may be confidential or exempt from disclosure if it is active criminal investigative information, active criminal intelligence information, or identifies certain victims of crime.

⁶ See Krischer v. D'Amato, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); Seminole County v. Wood, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (1988); Tribune Company v. Public Records, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., Gillum

¹ Section 365.171(1), Fla. Stat.

² Section 365.171(2), Fla. Stat.

³ Section 2, Ch. 96-229, Laws of Fla.

v. Tribune Company, 503 So. 2d 327 (Fla. 1987). And see Southern Bell Telephone and Telegraph Company v. Beard, 597 So. 2d 873, 876 (Fla. 1st DCA 1992) (Public Service Commission's determination that proprietary confidential business information exemption is to be narrowly construed and not applicable to company's internal self-analysis was "consistent with the liberal construction afforded the Public Records Act in favor of open government").

AGO 12-01 – January 12, 2012

GAMBLING – SLOTS – COUNTIES – BUSINESS AND PROFESSIONAL REGULATION, DEPARTMENT OF

AUTHORITY OF DEPARTMENT TO ISSUE SLOT MACHINE LICENSE IN COUNTY APPROVING SLOT MACHINES BY REFERENDUM

To: Mr. Ken Lawson, Secretary, Florida Department of Business and Professional Regulation

QUESTION:

Does the third clause of section 551.102(4), Florida Statutes, referring to the ability of voters to approve slot machines "at a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section," permit the Department of Business and Professional Regulation to grant a slot machine license to a pari-mutuel facility in a county which holds a countywide referendum to approve such machines, absent a statutory or constitutional provision enacted after July 1, 2010,¹ authorizing such referendum?²

SUMMARY:

The Department is not authorized to issue a slot machine license to a pari-mutuel facility in a county which, pursuant to the third clause of section 551.102(4), Florida Statutes, holds a countywide referendum to approve such machines, absent a statutory or constitutional provision enacted after July 1, 2010, authorizing such referendum. This conclusion is compelled by the plain language of the statute, canons of statutory construction, the statute's legislative history, and consideration of the statute in relation to the Legislature's contemporaneous ratification of the Seminole gaming compact.³

Section 551.104(1), Florida Statutes, provides in pertinent part that the Division of Pari-Mutel Wagering "may issue a license to conduct slot machine gaming in the designated slot machine gaming area of the *eligible facility*." (e.s.) The term "eligible facility" is defined for purposes of your inquiry to mean:

any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities *in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county*, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter.⁴ (e.s.)

The italicized language quoted above was added to the statute in 2009 by section 19, Chapter 2009-170, Laws of Florida.⁵ The amendment, however, was contingent upon ratification of the proposed gaming compact between the State and the Seminole Tribe of Florida and its approval by the U.S. Department of the Interior and was to take effect upon publication of the compact in the Federal Register.⁶ In Chapter 2010-29, Laws of Florida, the Legislature refused to ratify the compact considered in Chapter 2009-170. Instead, the Legislature approved a new compact and amended Chapter 2009-170 to make all of the parimutuel provisions in that chapter effective July 1, 2010.⁷

In light of the amendment to section 551.102(4), Florida Statutes, a question has arisen as to whether the statute's third clause contemplates that a county may now hold a referendum to authorize slot machines, or, alternatively, whether the statute contemplates the necessity of additional statutory or constitutional authorization before such a referendum may be held. Based on my review of the statute, I conclude that additional statutory or constitutional authorization is required to bring a referendum within the framework set out in the third clause of section 551.102(4).

It is important to note that at the time the Legislature considered the 2009 amendments to the definition of "eligible facility," no constitutional or statutory provision of Florida law provided for a referendum to approve slots in any county other than Miami-Dade and Broward. Those counties — and only those counties — gained the authority to hold slots-approval referenda when the voters in 2004 adopted what is now Article X, section 23 of the Florida Constitution. Indeed, subject to certain limited exceptions not relevant here, slot machines are generally prohibited by law.⁸ It is against this backdrop that the Legislature adopted the statutory language at issue here: "a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county."

A critical issue in construing the above-quoted statutory text is whether the phrase "after the effective date of this section" modifies the words "constitutional or statutory authorization." Applying standard rules of statutory and grammatical construction, it is clear that the phrase "after the effective date of this section" modifies the words immediately preceding it, *i.e.*, "a statutory or constitutional authorization."⁹ Specifically, under the last antecedent doctrine of statutory interpretation, qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to others more remote, unless a contrary intention appears.¹⁰ Here, all pertinent considerations confirm that the Legislature intended that any statutory or constitutional authorization for a slots-approving referendum must occur after July 1, 2010, the effective date of the relevant portion of section 551.102(4), Florida Statutes.

It is a maxim of statutory construction that a statute is to be construed to give meaning to all words and phrases contained within the statute and that statutory language is not to be assumed to be mere surplusage.¹¹ If the Legislature in section 551.102(4), Florida Statutes, had intended the phrase "after the effective date of this section" to qualify the time at which a slots-approving referendum would be held, such language would be superfluous. At the time it was considering the pertinent amendment to section 551.102(4), no provision of Florida law authorized a slots-approving referendum outside of Miami-Dade or Broward counties. Since the first clause of section 551.102(4) expressly references pari-mutuel facilities in Miami-Dade and Broward counties and the language under consideration in the instant inquiry refers to pari-mutuel facilities "in any other county," clearly the Legislature did not consider Miami-Dade and Broward counties to be included within the scope of the provision under consideration. Thus, there were no pre-effective date referenda to be excluded from the ambit of this clause of the statute. To read the language as qualifying the time at which a slots-approving referendum would be held would render the language superfluous.

Similarly, if a county's existing powers were sufficient to authorize a slots-approving referendum, there would be no need to include the phrase "pursuant to a statutory or constitutional authorization."¹² Had the Legislature simply been referring to a county's existing statutory or constitutional authority, the following stricken language could have been omitted without causing any change in the meaning of the statute:

any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter.

Instead, the Legislature chose to mandate that the referendum be held "pursuant to a statutory or constitutional authorization"— an explicit qualifier that appears to be unique in the Florida Statutes. Indeed, no other referendum provision in the Florida Statutes employs similar language.¹³ Thus, I cannot conclude that the language "statutory or constitutional authorization" merely recognizes a county's authority in existence as of the effective date of the act. Rather, the Legislature's chosen language requires the adoption of a statute or constitutional amendment specifically authorizing a referendum to approve slot machines.

Legislative intent, the cornerstone of all statutory interpretation, may be illuminated by the comments of the sponsor or proponents of a bill or amendment.¹⁴ The Senate bill sponsor, Senator Dennis Jones, gave the following explanation on second reading of the 2010 legislation in response to a question about the local referendum process for a county that wants to add slot machine gaming and how that process would work:

Should we want to expand in the future, a Legislature would come back and . . . let's just say we wanted to go to Class III slots, we could not do that as a local bill but we could come up here and file it as a general bill and should that bill pass to allow [a county] to have a referendum of the people and then the people vote on it, if it was passed, we could get Class III slots but it [would] also break the compact with the Indians.¹⁵

In further clarification, Senator Jones stated:

If they have a referendum in a county outside of Miami-Dade and Broward for the purpose of Class III gaming and the Legislature passes the legislation to allow that county to have the referendum, the county has the referendum and that referendum passes, then that would effectively break the payments of the compact.¹⁶ (e.s.)

The above explanation by a sponsor of the legislation clearly indicates that, under the pertinent language in section 551.102(4), Florida Statutes, a county referendum to approve slots must be specifically authorized by a statute or constitutional amendment enacted after July 1, 2010. Such an explanation is contrary to any assertion that the Legislature intended the provisions of section 551.102(4), in conjunction with a county's already-existing powers, to constitute authority for a county to hold a referendum on slot machine gaming.

Finally, the conclusion that additional legislative authorization is required for a slots-approving referendum gives due recognition to the context in which the Legislature adopted the relevant portion of section 551.102(4), Florida Statutes. The language in question took effect as part of legislation ratifying a gaming compact between the State and the Seminole Tribe of Florida, which contained provisions mandating a reduction or loss of revenue to the State in response to an expansion of slot machine gambling beyond that which existed at the time of the compact's adoption.¹⁷ To read the pertinent language in section 551.102(4) as allowing counties other than Miami-Dade and Broward by referendum to authorize slot machines, absent specific legislative or constitutional authority, would be at odds with the legislation as a whole. Specifically, that interpretation of the statute would eliminate the State's control over its continued entitlement to a substantial amount of revenue from the Seminole Tribe.¹⁸ In light of the intense consideration and debate that went into the Legislature's approval of the Seminole compact, it is virtually unthinkable that the Legislature would have intended to both undermine and ratify the compact in the same enactment. The basic canons of statutory interpretation require me to reject a reading of section 551.102(4) that would lead to such an absurd result.¹⁹

Based upon the foregoing analysis, I am of the opinion that the Department of Business and Professional Regulation is not authorized to issue a slot machine license to a pari-mutuel facility in a county which, pursuant to the third clause in section 551.102(4), Florida Statutes, holds a countywide referendum to approve such machines, absent a statute or constitutional provision enacted after July 1, 2010, authorizing such referendum.

³ In light of this conclusion, I need not address the other questions posed in your letter.

¹ The effective date of the amended statute is July 1, 2010. *See* ss. 4 and 5, Ch. 2010-29, Laws of Fla., amending s. 26, Ch. 2009-170, Laws of Fla.

² Section 551.102(4), Fla. Stat., defining "Eligible facility," contains three independent clauses: one relating to counties addressed in Art. X, s. 23, Fla. Const.; one relating to counties defined in s. 125.011, Fla. Stat.; and the one which is the subject of the instant inquiry. This opinion is limited to a consideration of the third clause in section 551.102(4); no comment is expressed regarding the interpretation of the first and second clauses.

⁴ Section 551.102(4), Fla. Stat.

⁵ The language in question was proposed by a conference committee which stated in pertinent part that the language "[a]uthorizes Class III slot machines in a county that has had a referendum approving slots or has had a *referendum approving slots that was approved by law or the Constitution* provided that such facility has conducted 2 years of racing

and complies with other requirements for slot licensure." (e.s.) Summary of Conference Committee Report on CS/CS/SB 788, dated May 6, 2009.

⁶ Section 26, Ch. 2009-170, Laws of Fla.

⁷ Sections 1 and 5, Ch. 2010-29, Laws of Fla.

 $^{\rm 8}~$ Section 849.15, Fla. Stat. And see s. 849.16, Fla. Stat., defining slot machine.

⁹ If the phrase "after the effective date of this section" does not modify the words "constitutional or statutory authorization," a question would still arise whether the Legislature intended to require a specific statutory or constitutional authorization, or whether a county's generic home rule power to hold a referendum would constitute sufficient "statutory authorization" for purposes of s. 551.102(4), Fla. Stat. *See* n.14 *infra*. In light of the conclusion reached in this opinion, it is not necessary to address this issue.

¹⁰ See Kasischke v. State, 991 So. 2d 803 (Fla. 2008); Jacques v. Dep't of Bus. & Prof. Reg., 15 So. 3d 793, 795–96 (Fla. 1st DCA 2009); City of St. Petersburg v. Nasworthy, 751 So. 2d 772 (Fla. 1st DCA 2000). And see Mendelsohn v. State, Dept. of Health, 68 So. 3d 965 (Fla.1st DCA 2011) (a qualifying phrase will be read as modifying all items listed in a series unless there is no comma between the last of the series and the qualifying phrase).

¹¹ See, e.g., Terrinoni v. Westward Ho!, 418 So. 2d 1143 (Fla. 1st DCA 1982); Unruh v. State, 669 So. 2d 242 (Fla. 1996) (as a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless); Op. Att'y Gen. Fla. 91-16 (1991) (operative language in a statute may not be regarded as surplusage).

¹² See s. 125.01, Fla. Stat., and Speer v. Olson, 367 So. 2d 207 (Fla. 1978), recognizing the home rule powers of a county. But see Art. VI, s. 5, Fla. Const. ("referenda shall be held as provided by law"); and Holzendorf v. Bell, 606 So. 2d 645 (Fla. 1st DCA 1992) ("Under the Constitution, the phrase 'as provided by law' means as passed 'by an act of the legislature"). Cf. s. 125.01(1)(y), Fla. Stat., authorizing a county to place questions or propositions on the ballot "to obtain an expression of elector sentiment with respect to matters of substantial concern within the county."

¹³ See, e.g., ss. 100.041, 100.201, 125.0104, 125.0108, 125.64, 125.901, and 153.53, Fla. Stat.

¹⁴ See, e.g., Ellis v. N.G.N. of Tampa, 561 So. 2d 1209 (Fla. 2d DCA 1990), quashed on other grounds, 586 So. 2d 1042 (Fla. 1991) (legislative intent may be illuminated by consideration of comments made by proponents of bill or amendment); Ops. Att'y Gen. Fla. 12-24 (2011), 12-16 (2011), 06-16 (2006), 05-42 (2005), 99-61 (1999), relying on sponsor's explanation of a bill or amendment to determine legislative intent. $^{\rm 15}$ April 8, 2010, Senate Floor Debate on CS/SB 622, 2010 Regular Session.

 16 Id.

¹⁷ See s. 2, Part XII, Ch. 2009-170, Laws of Fla., and Part XII of the compact entered into by the State and the Tribe on April 7, 2010, and ratified by the Legislature by Ch. 2010-29, Laws of Fla.

¹⁸ See statement of Senator Jones, April 15, 2010, Senate Floor Debate on CS/SB 622, 2010 Regular Session, recognizing that "[t]he tribe has exclusivity for class III gaming throughout the state" and that "[i]f new games are authorized and gaming is expanded, the tribe stops making payments or pays a reduced amount depending on the type of game and location."

¹⁹ See State v. Iacovone, 660 So. 2d 1371, 1373 (Fla.1995), quoting Williams v. State, 492 So. 2d 1051, 1054 (Fla.1986), to the effect that "[s]tatutes, as a rule, 'will not be interpreted so as to yield an absurd result."

AGO 12-02 – January 25, 2012

PROPERTY APPRAISERS – REAL PROPERTY – ADVERSE POSSESSION – TAX ROLLS

PROPERTY APPRAISER'S AUTHORITY TO REMOVE NOTATION OF ADVERSE POSSESSION CLAIM FROM TAX ROLL

To: The Honorable Pam Dubov, Pinellas County Property Appraiser Attn: Ms. Christina LeBlanc

QUESTION:

Is section 95.18(7), Florida Statutes, as amended by section 1, Chapter 2012-107, Laws of Florida, the exclusive method by which the property appraiser may remove an adverse possession notation from the legal description on the tax roll?¹

SUMMARY:

Section 95.18(7), Florida Statutes, as amended by section 1, Chapter 2012-107, Laws of Florida, constitutes the legislatively prescribed method by which the property appraiser may remove an adverse possession notation from the legal description on the tax roll for claims of adverse possession without color of title.

During 2009-10, the Florida Senate Committee on Judiciary reviewed Florida's statutory adverse possession framework and identified

12-02

potential reforms to the adverse possession process with a particular emphasis on landowners who had been subject to adverse possession claims.² Among the problems identified by the committee's report was the administration of adverse possession claims by Florida's property appraisers:

Property appraisers do not currently have guidance regarding how to administer the adverse possession return once it has been submitted by the adverse possessor. The report noted that the Legislature could explore the option of prescribing the process for adding the adverse possessor to the parcel information on the tax roll, as well as when a property appraiser may remove the adverse possessor from that parcel information and remove the adverse possession return from the official records.³ (e.s.)

The language of the statute upon which your question is based is the Legislature's attempt to provide guidance in administering an adverse possession return and to address the issue of when a property appraiser may remove the adverse possessor from the parcel information on the tax roll. Chapter 2012-107, Laws of Florida, amends section 95.18, Florida Statutes, the statutory process for gaining title to real property by an adverse possession claim without color of title. The bill amending section 95.18, Florida Statutes, made a number of changes to the statute; among those is the requirement that the property appraiser provide notice to the property owner of record that an adverse possession claim has been made.4 The amended statute also requires the Department of Revenue to develop a uniform adverse possession return to initiate the adverse possession claim and requires that the adverse possessor attest to the truthfulness of the information contained on the form under penalty of perjury.⁵ Thus, the statute now provides specific legislative direction as to when the property appraiser must add and remove the adverse possessor to and from the parcel information on the tax roll.

Section 95.18, Florida Statutes, relates to real property actions for adverse possession without color of title⁶ and, as amended by section 1, Chapter 2012-107, Laws of Florida, requires that the property appraiser add certain information relating to the adverse possession claim to the parcel information on the tax roll. This statute also prescribes conditions for the removal of that information:

(7) A property appraiser must⁷ remove the notation to the legal description on the tax roll that an adverse possession claim has been submitted and shall remove the return from the property appraiser's records if:

(a) The person claiming adverse possession notifies the property appraiser in writing that the adverse possession claim is withdrawn;

(b) The owner of record provides a certified copy of a court order, entered after the date the return was submitted to the property appraiser, establishing title in the owner of record;

(c) The property appraiser receives a certified copy of a recorded deed, filed after the date of the submission of the return, from the person claiming adverse possession to the owner of record transferring title of property along with a legal description describing the same property subject to the adverse possession claim; or

(d) The owner of record or the tax collector provides to the property appraiser a receipt demonstrating that the owner of record has paid the annual tax assessment for the property subject to the adverse possession claim during the period that the person is claiming adverse possession.

The statute requires the property appraiser to include "a clear and obvious notation in the legal description of the parcel information of any public searchable property database maintained by the property appraiser that an adverse possession return has been submitted to the property appraiser for a particular parcel."⁸ The amendments contained in Chapter 2012-107, Laws of Florida, became effective July 1, 2011, and the act specifically provides that the changes to section (7) set forth above "apply to adverse possession claims for which the return was submitted before, on, or after that date."⁹ Thus, the provisions relating to the duties and responsibilities of the property appraiser with regard to the notation of an adverse possession claim apply to claims submitted on tax returns before, on, or after July 1, 2011, and are retroactive as well as prospective.

As a county officer, the property appraiser's powers and duties are measured by the terms of his or her grant of constitutional or statutory authority and are limited to those powers expressly granted.¹⁰ Moreover, "under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another."¹¹ Thus, the authority of public officers to proceed in a particular way or only upon specific conditions implies a duty not to proceed in any manner other than that which is authorized by law.¹²

Section 95.18, Florida Statutes, as amended by section 1, Chapter 2012-107, Laws of Florida, is clear in its terms and provides authorization for the property appraiser to act as directed by the Legislature. Further, the Legislature has used the term "must" in its direction to the property appraiser in section 95.18(7), Florida Statutes, indicating a legislative mandate and obligation on the property appraiser to perform his duties and responsibilities as legislatively directed.

In construing a statute the courts will review the purpose of the

legislation, examining such things as the history of the act, the evil to be corrected, the intention of the law-making body, the subject regulated, and the object to be obtained by the legislation.¹³ As discussed above, the legislative committee considering the statutory adverse possession framework sought to rectify the lack of legislative guidance "regarding how to administer the adverse possession return" and to clarify "when a property appraiser may remove the adverse possessor from that parcel information and remove the adverse possession return from the official records." This suggests that the Legislature intended Chapter 2012-107, Laws of Florida, to be comprehensive in its treatment of adverse possession claims not founded upon a written instrument.

You ask whether section 95.18(7), Florida Statutes, represents the exclusive circumstances in which the property appraiser may remove the adverse possession notation or whether the statute may provide authority for the property appraiser to remove the notation under other circumstances. The Legislature's use of the term "must," rather than "may," in section 95.18(7) makes your question a difficult one. While "must" cabins the property appraiser's discretion in relation to the circumstances listed in section 95.18(7)(a) through (d), Florida Statutes, that term does not on its face preclude action in other circumstances. Nonetheless, I note that the Legislature in section 95.18(4)(c), Florida Statutes, mandates the addition of the tax roll notation "upon the submission of a return." Having issued that mandate, it is up to the Legislature to specify when the notation is no longer required. Intentionally or not, the Legislature simply did not address the circumstances spelled out in your letter. For that reason, and to preserve the certainty and uniformity that the Legislature sought to achieve in Chapter 2012-107, Laws of Florida, I conclude that a property appraiser may not remove an adverse possession notation in circumstances other than those listed in section 95.18(7), Florida Statutes.

In sum, it is my opinion that section 95.18(7), Florida Statutes, as amended by section 1, Chapter 2012-107, Laws of Florida, constitutes the legislatively prescribed method by which the property appraiser may remove an adverse possession notation from the legal description on the tax roll for claims of adverse possession without color of title.

¹ Your letter poses several mixed questions of law and fact. The Florida Attorney General is limited to addressing questions of law and your questions have been reframed to allow this office to comment. *See* s. 16.01(3), Fla. Stat., and Department of Legal Affairs Statement Concerning Attorney General Opinions.

² See The Florida Senate Bill Analysis and Fiscal Impact Statement for SB 1142, dated March 31, 2011.

⁴ Section 95.18(4), Fla. Stat. (2011).

⁵ See DR-452, Return of Real Property in Attempt to Establish Adverse Possession Without Color of Title and 12DER12-16, Fla. Admin. C., effective 8/11.

⁶ See title to s. 95.18, Fla. Stat.

⁷ The word "must" is defined as "to be obliged or bound to by an imperative requirement[,]" *see* Webster's New Universal Unabridged Dictionary p. 1269 (2003); and "[u]sed as an auxiliary to indicate: 1. Necessity or obligation[,]" The American Heritage Dictionary p. 452 (office ed. 1983). Thus, the word would appear to represent a legislative mandate.

⁸ Section 95.18(8), Fla. Stat. (2011).

⁹ Section 4, Ch. 2012-107, Laws of Fla.

¹⁰ See generally Art. II, s. 5(c), Fla. Const., stating that "[t]he powers [and] duties of . . . county officers shall be fixed by law."

¹¹ Young v. Progressive Southeastern Ins. Co., 753 So. 2d 80, 85 (Fla. 2000), quoting Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996).

¹² White v. Crandon, 156 So. 303, 305 (Fla. 1934); Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944).

¹³ Smith v. Ryan, 39 So. 2d 281 (Fla. 1949); State Board of Accountancy v. Webb, 51 So. 2d 296 (Fla. 1951); DeBolt v. Department of Health and Rehabilitative Services, 427 So. 2d 221 (Fla. 1st DCA 1983); Ops. Att'y Gen. Fla. 99-61 (1999) (in construing statute, court will consider its history, the evil to be corrected, the purpose of the enactment, and the state of the law already in existence), 98-82 (1998), and 96-07 (1996).

AGO 12-03 - January 25, 2012

COUNTIES – EMINENT DOMAIN – SURPLUS PROPERTY

COUNTY MUST FOLLOW REQUIREMENTS OF SECTION 73.013, FLORIDA STATUTES, IN DISPOSAL OF PROPERTY ACQUIRED THROUGH EMINENT DOMAIN

To: Mr. Andrew W. Mai, Osceola County Attorney

QUESTION:

May a county government which acquired a piece of property through eminent domain proceedings less than 10 years ago offer to sell the property back to the prior owner at a value less

12-03

than what the county spent to acquire the property due to a significant decline in the market value of the property?

SUMMARY:

Section 73.013(1)(f), Florida Statutes, directs that when less than 10 years have elapsed since property has been obtained through eminent domain proceedings, a county may sell such property prior to conducting a competitive bid sale to the previous owner from whom it was taken only for the amount which the owner received as a result of the condemnation.

You state that in 2006, as a result of a proposed road-widening project, the county acquired by eminent domain a 12,000 square foot parcel with a single family residence thereon. The appraised value of the property at the time of the taking was \$357,500.00. The property owner entered into a settlement agreement and received \$399,000.00 as full compensation for the taking. Subsequently, the county completed the project, but only a portion of the parcel was used by the county. The remaining portion of the parcel was recently assessed at \$102,300.00, due to declining market value. The county would prefer to offer the property to the former owner at the current market value, rather than the price for which it was acquired. You have advised the county that section 73.013, Florida Statutes, does not provide authority for the county to sell the parcel to the prior owner at a price other than that which the owner received and that the only method whereby the previous owner could acquire the property under these circumstances would be through a public competitive bidding process as prescribed in section 73.013(1)(f), Florida Statutes.

Section 73.013(1), Florida Statutes, provides:

Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, if the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated files a petition of condemnation on or after the effective date of this section regarding a parcel of real property in this state, ownership or control of property acquired pursuant to such petition may not be conveyed by the condemning authority or any other entity to a natural person or private entity, by lease or otherwise, except that ownership or control of property acquired pursuant to such petition may be conveyed, by lease or otherwise, to a natural person or private entity:

* * *

(f) Without restriction, after public notice and competitive bidding unless otherwise provided by general law, if less than

10 years have elapsed since the condemning authority acquired title to the property and the following conditions are met:

1. The condemning authority or governmental entity holding title to the property documents that the property is no longer needed for the use or purpose for which it was acquired by the condemning authority or for which it was transferred to the current titleholder; and

2. The owner from whom the property was taken by eminent domain is given the opportunity to repurchase the property at the price that he or she received from the condemning authority[.]

The plain language of the act prohibits the conveyance of property taken by eminent domain to a natural person or private entity, except within the limited conditions set forth therein. The section authorizes an authority to convey such property by competitive bid within 10 years of its being obtained through eminent domain to a natural person or private entity, only if two conditions are met. The authority must document that the property is no longer needed for the use or purpose for which it was acquired and the owner from whom the property was taken is given the opportunity to repurchase the property at the price received from the condemning authority. Legislative direction as to how a thing is to be done prohibits its being done in any other way.¹

Thus, in order to comply with section 73.013(1)(f), Florida Statutes, the county must initially make the proper determination that the condemned property is no longer needed for the use for which it was acquired by eminent domain and the former owner from whom the property was taken must be given the opportunity to repurchase the property "at the price he or she received from the condemning authority[.]" After these two conditions have been met, the county may offer the property for sale to a natural person or private entity through competitive bidding. I have not found, nor have you directed my attention to, any statutory authorization to sell the subject property to the former owner at a price other than that which the former owner received as a result of the eminent domain proceedings, prior to the condemned property being offered for sale by competitive bid.² I cannot say, however, that an authority would be precluded from selling the remaining portion of previously condemned property (when a portion of the property was not used for the public purpose) to the former owner at a pro-rated price, based upon the amount that the owner received as a result of the eminent domain proceeding, since to do so would not appear to be contrary to the intended purpose of the law.

Accordingly, it is my opinion that pursuant to section 73.013(1)(f), Florida Statutes, the county may not sell property it has obtained through eminent domain proceedings less than 10 years ago to the previous owner for an amount other than that which the previous owner received as a result of the taking. However, I cannot conclude that where only a portion of the property has been used for the intended public purpose, the county would be precluded from selling the remaining portion to the former owner at a pro-rated price based on the amount the previous owner received as a result of the eminent domain proceeding.

¹ See Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

 2 Cf. s. 73.013(2)(b), Fla. Stat., stating that property obtained by eminent domain less than 10 years ago which was transferred to a natural person or private entity under the specific provisions in the statute may be sold, after public notice and competitive bidding, to another natural person or private entity, if: the current titleholder documents that the property is no longer needed for the use or purpose for which the property was transferred to the current titleholder; and the owner from which the property was taken by eminent domain "is given the opportunity to repurchase the property at the price that he or she received from the condemning authority."

AGO 12-04 – January 25, 2012

PUBLIC HOUSING AUTHORITIES – MUNICIPALITIES – PUBLIC HOUSING

JURISDICTION OF CITY HOUSING AUTHORITY TO EXCLUSIVELY ADMINISTER PUBLIC HOUSING PROJECTS

To: Ms. Bonnie Hochman Rothell, Attorney for the Lauderhill Housing Authority

QUESTION:

Is the Lauderhill Housing Authority authorized by Florida law to exercise exclusive jurisdiction over the administration of all "housing projects" in the City of Lauderhill?

SUMMARY:

The Lauderhill Housing Authority is the exclusive agency under provisions of general law that has been authorized by the City of Lauderhill to exercise jurisdiction over the administration of "housing projects" within the city.

You advise that you represent the Lauderhill Housing Authority

and have joined with the authority's General Counsel, Alfreda D. Coward, Esq., to request an Attorney General Opinion on the issue of the authority's jurisdiction to serve as the public housing authority for the City of Lauderhill under Florida law. You have not asked about a particular housing program and my comments are, therefore, limited to a general consideration of Florida law on this subject.

Part I, Chapter 421, Florida Statutes, the "Housing Authorities Law"¹ provides for the identification and clearance of slum areas in the state and the provision of safe and sanitary dwelling accommodations for persons of low income.² The "area of operation" of an authority is prescribed in section 421.03(6), Florida Statutes, which states that:

(a) In the case of a housing authority of a city having a population of less than 25,000, [the area of operation] shall include such city and the area within 5 miles of the territorial boundaries thereof; and

(b) In the case of a housing authority of a city having a population of 25,000 or more [the area of operation] shall include such city and the area within 10 miles from the territorial boundaries thereof; provided however, that the area of operation of a housing authority of any city shall not include any area which lies within the territorial boundaries of some other city as herein defined; and further provided that the area of operation shall not extend outside of the boundaries of the county in which the city is located and no housing authority shall have any power or jurisdiction outside of the county in which the city is located.

Within its area of operation, a housing authority is empowered to exercise "the public and essential governmental functions" set forth in Chapter 421, Florida Statutes, which include, *inter alia*, the power to contract, to rent and lease dwellings, operate housing projects, and to invest funds not required for immediate disbursement in certain property or securities.³ Specifically, a housing authority, such as the Lauderhill Housing Authority, is empowered:

(2) Within its area of operation, to prepare, carry out, acquire, lease, and operate housing projects; to provide for the construction, reconstruction, improvement, alteration, or repair of any housing project or any part thereof.

(3) To arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works, or facilities for, or in connection with, a housing project or the occupants thereof

(4) To lease or rent any dwellings, houses, accommodations,

lands, buildings, structures, or facilities embraced in any housing project and, subject to the limitations contained in this chapter, to establish and revise the rents or charges therefor; to own, hold, and improve real or personal property; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any real or personal property or any interest therein; to acquire by the exercise of the power of eminent domain any real property; to sell, lease, exchange, transfer, assign, pledge, or dispose of any real or personal property or any interest therein; to insure or provide for the insurance of any real or personal property or operations of the authority against any risks or hazards; to procure or agree to the procurement of insurance or guarantees from the Federal Government of the payment of any such debts or parts thereof, whether or not incurred by said authority, including the power to pay premiums on any such insurance.

(6) Within its area of operation: to investigate into living, dwelling, and housing conditions and into the means and methods of improving such conditions; to determine where slum areas exist or where there is a shortage of decent, safe, and sanitary dwelling accommodations for persons of low income; to make studies and recommendations relating to the problem of clearing, replanning, and reconstruction of slum areas and the problem of providing dwelling accommodations for persons of low income; to administer fair housing ordinances and other ordinances as adopted by cities, counties, or other authorities who wish to contract for administrative services and to cooperate with the city, the county, the state or any political subdivision thereof in action taken in connection with such problems; and to engage in research, studies and experimentation on the subject of housing. (e.s.)

Based on the specific grant of authority to operate within its area of operation, this office, in Attorney General Opinion 2002-43, stated that "the Legislature has specified the manner in which a housing authority may operate outside its jurisdiction, thereby precluding the exercise of such powers in any other manner." That opinion concluded that a municipal housing authority and a county housing authority could, by resolution, join or cooperate with each other or enter into an interlocal agreement as a means to allow the county authority to assist the municipal authority in its continued operation.⁴

An administrative agency or officer possesses no power not granted by statute, either expressly or by necessary implication, and any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof.⁵ Implied powers accorded administrative agencies must be indispensable to powers expressly granted, that is, those powers which are necessarily or fairly or reasonably implied as an incident to those powers expressly granted.⁶ Section 421.08, Florida Statutes, specifically addresses the scope of the powers of housing authorities under Chapter 421, Florida Statutes, by providing that such authorities "constitute a public body corporate and politic, exercising the public and essential governmental functions set forth in this chapter..."

The Lauderhill Housing Authority was created by resolution of the City Commission of the City of Lauderhill in 2002.⁷ The area of operation for the Lauderhill Housing Authority is the City of Lauderhill and an extraterritorial area of 10 miles outside the territorial boundaries of the city.⁸ The authority is authorized by section 421.08, Florida Statutes, and by its local enabling document to exercise the "public and essential governmental functions" set forth in the "Housing Authorities Law."⁹ Among these is the authority, within its area of operation, to prepare, carry out and operate housing projects, and to arrange or contract for the furnishing of services, privileges, or facilities for housing projects or the occupants thereof.¹⁰ A "housing project" is defined in section 421.03(9), Florida Statutes, to include any work or undertaking:

(a) To demolish, clear, or remove buildings from any slum area; such work or undertaking may embrace the adaption of such area to public purposes, including parks or other recreational or community purposes; or

(b) To provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities and other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare or other purposes; or

(c) To accomplish a combination of the foregoing. The term "housing project" also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith.

Therefore, it is my opinion that the Lauderhill Housing Authority is the exclusive public body authorized by resolution of the City of Lauderhill and by Florida's "Housing Authorities Law" to exercise jurisdiction over the administration of "housing projects," as that term is defined therein, within that city.

12-04

¹ See s. 421.01, Fla. Stat., for the short title of the law.

- ² See s. 421.02, Fla. Stat.
- ³ Section 421.08(1) (5), Fla. Stat.

⁴ Section 421.27(3), Fla. Stat., provides that the area of operation of a county housing authority "shall include all of the county for which it is created except that portion of the county which lies within the territorial boundaries of any city as defined in the Housing Authorities Law, as amended."

⁵ State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493 (Fla. 1973).

⁶ See State v. Atlantic Coast Line R. Co., 47 So. 969, 974 (Fla. 1908); Keating v. State, 167 So. 2d 46, 51 (Fla. 1st DCA 1964); Gardinier, Inc. v. Department of Pollution Control, 300 So. 2d 75, 76 (Fla. 1st DCA 1974); St. Regis Paper Company v. State, 237 So. 2d 797, 799 (Fla. 1st DCA 1970); and Williams v. Florida Real Estate Commission, 232 So. 2d 239, 240 (Fla. 4th DCA 1970).

 7 See Resolution 02R-08-139 of the City Commission of the City of Lauderhill; and s. 421.04(1) and (2), Fla. Stat., providing for the creation of housing authorities and that the governing body may do so by resolution.

⁸ Section 421.03(6)(b), Fla. Stat. This 10-mile extraterritorial area cannot include "any area which lies within the territorial boundaries of some other city" and "shall not extend outside of the boundaries of the county in which the city is located[.]"

⁹ See s. 421.08, Fla. Stat., and Resolution 02R-08-139 of the City Commission of the City of Lauderhill.

¹⁰ Section 421.08(2) and (3), Fla. Stat.

AGO 12-05 – January 25, 2012

MUNICIPALITIES – PENSIONS – POLICE AND FIREFIGHTER PENSIONS – ORDINANCES – QUORUM

AMENDMENT OF CITY'S POLICE AND FIREFIGHTER PENSION PLAN BY ORDINANCE

To: Ms. Darcee S. Siegel, City Attorney, City of North Miami Beach, Florida

QUESTIONS:

1. Do sections 185.05 and 175.061(1)(a), Florida Statutes, preclude the amendment of the City of North Miami Beach's

Police and Firefighters Pension Plan ordinance to add criteria for selection of the Police and Firefighters Pension Plan Board's fifth member?

2. Do these statutes preclude amendment of the city's ordinance to add a provision defining what constitutes a quorum of the board?

SUMMARY:

1. The City of North Miami Beach may not, by ordinance, add criteria for selection of the Police and Firefighters Pension Plan board's fifth member.

2. No provisions of Chapter 175 or 185, Florida Statutes, would preclude amendment of the city's ordinance to add an interest-based or constituency-based provision defining what constitutes a quorum of the board of the Police and Firefighters Pension Plan Board.

Chapters 175 and 185, Florida Statutes, respectively, create a uniform pension and retirement system for firefighters and police officers in a municipality and establish minimum standards for the operation and funding of the trust funds.¹ In considering these chapters, the court in *Florida League of Cities, Inc. v. Department of Insurance and Treasurer*,² stated:

Both chapters authorize two types of retirement or pension plans. One type is known as "chapter plans" and the other as "local law plans." Chapter plans are those created under chapters 175 and 185, and the provisions of those chapters are controlling on the plans' terms, conditions, and benefits. Local law plans are those created either by special act of the legislature or by municipal ordinance and contain provisions relating to terms, conditions, and benefits that may substantially differ from many requirements found in chapters 175 and 185 for chapter plans.

The court determined that the individual sections in Chapters 175 and 185, Florida Statutes, are applicable to local law plans only if there is a specific provision expressly making them applicable to such plans.³ This conclusion was based on a recognition of a municipality's constitutional and statutory home rule powers.

Subsequent to the decision in *Florida League of Cities, Inc. v.* Department of Insurance and Treasurer,⁴ the Legislature amended Chapters 175 and 185, Florida Statutes, to address confusion over the application of the statutory standards in these chapters to local law plans.⁵ The expressed intention of this legislation was clearly stated in the staff analysis: "CS/HB 261, if enacted, would establish minimum standards and benefits for ALL plans receiving funding under Chapters 175 or 185, F.S."⁶ (emphasis in original) CS/HB 261 was enacted as Chapter 99-1, Laws of Florida, amending the provisions of both Chapter 175 and 185, and became effective March 12, 1999.⁷

QUESTION 1.

You have asked whether the Police and Firefighters Pension Plan Ordinance of the City of North Miami Beach may be amended to add criteria for the selection of the Police and Firefighters Pension Plan Board's fifth member. You advise that the "Retirement Plan for Police Officers and Firefighters of the City of North Miami Beach" is a "local law plan" and that it includes both police officers and firefighters in one plan as described in section 185.02(10), Florida Statutes.⁸ I would note that Ordinance 89-18, the ordinance creating the North Miami Beach retirement plan, states that the ordinance is intended to accomplish the "establishment of a new pension plan for police officers and firefighters pursuant to Chapters 175 and 185, Florida Statutes[.]"

Section 185.05(1), Florida Statutes, sets out the requirements for board of trustees of police pensions.⁹ The statute creates a board of trustees of the pension trust fund in each municipality and makes each board solely responsible for administering the trust fund. The statute also establishes the composition of the board if a local law plan covers both firefighters and police officers by referring to requirements that relate to chapter plans. Section 185.05(1)(b), Fla. Stat., provides that the "membership of boards of trustees for local law plans shall be as follows:

* * *

If a municipality has a pension plan for police officers and firefighters, the provisions of paragraph (a) apply, except that one member of the board shall be a police officer and one member shall be a firefighter as defined in s. 175.032, respectively, elected by a majority of the active firefighters and police officers who are members of the plan.

In more detail, subsection (a) provides:

The membership of the board of trustees for chapter plans consists of five members, two of whom, unless otherwise prohibited by law, must be legal residents of the municipality and must be appointed by the legislative body of the municipality, and two of whom must be police officers as defined in s. 185.02 who are elected by a majority of the active police officers who are members of such plan. . . . The fifth member shall be chosen by a majority of the previous four members, and

such person's name shall be submitted to the legislative body of the municipality. Upon receipt of the fifth person's name, the legislative body shall, as a ministerial duty, appoint such person to the board of trustees. The fifth member shall have the same rights as each of the other four members appointed or elected, shall serve as trustee for a period of 2 years, and may succeed himself or herself in office. Each resident member shall serve as trustee for a period of 2 years, unless sooner replaced by the legislative body at whose pleasure the member serves, and may succeed himself or herself as a trustee. Each police officer member shall serve as trustee for a period of 2 years, unless he or she sooner leaves the employment of the municipality as a police officer, whereupon a successor shall be chosen in the same manner as an original appointment. Each police officer may succeed himself or herself in office. The terms of office of the appointed and elected members of the board of trustees may be amended by municipal ordinance or special act of the Legislature to extend the terms from 2 years to 4 years. The length of the terms of office shall be the same for all board members.

Thus, section 185.05(1), Florida Statutes, does not impose any qualifications on the "fifth member" of a board of trustees of a local law plan.¹⁰

However, subsection (7) of section 185.05, Florida Statutes, specifically provides that "[t]he provisions of this section may not be altered by a participating municipality operating a chapter or local law plan under this chapter." Thus, the statutory scheme relating to the composition of the board of trustees for firefighter and police pensions may not be altered by a municipality participating in a local law plan such as the City of North Miami Beach.

Based on the clear language of section 185.05(7), Florida Statutes, which states that participating municipalities operating either a chapter or local law plan are precluded from altering the provisions of section 185.05, Florida Statutes, it is my opinion that the City of North Miami Beach may not by ordinance add criteria for selection of the Police and Firefighters Pension Plan board's fifth member to a municipal ordinance. The addition of such criteria would effectively "alter" the provisions of section 185.05, Florida Statutes, in contradiction of section 185.05(7). However, this would not preclude the board members who are choosing the fifth member from considering the particular qualifications of any potential board member.

QUESTION 2.

You also ask whether these statutes preclude amendment of the city's ordinance to add a provision defining what constitutes a quorum of the board. The proposed ordinance amendment you have provided suggests an interest-based or constituency-based quorum requirement.

The general powers and duties of boards of trustees for municipal firefighter and police pension plans are prescribed by section 185.06, Florida Statutes, which, by its terms applies to "any municipality, chapter plan, local law municipality, or local law plan under this chapter[.]"¹¹ Subsection (2) of the statute provides:

Any and all acts and decisions shall be effectuated by vote of a majority of the members of the board; however, no trustee shall take part in any action in connection with his or her own participation in the fund, and no unfair discrimination shall be shown to any individual employee participating in the fund.¹²

However, no provision of either Chapter 185 or 175, Florida Statutes, prescribes the composition of a quorum for purposes of conducting business. While the City of North Miami Beach may not alter the provisions of subsection (2) relating to voting, in the absence of any provision of these chapters delineating quorum requirements, it would appear that this is a subject upon which the city may legislate.¹³

A "quorum" is generally defined as "[t]he minimum number of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business."¹⁴ (e.s.) Thus, the most common statutory quorum requirements simply provide the number of members who must be present in order to conduct business. Included within the definitions of the term "quorum" is an "interestbased quorum" which is defined as "[a] quorum determined according to the presence or representation of various constituencies. — Also termed constituency-based quorum."¹⁵ The language of your proposed ordinance amendment appears to be in the nature of an interest-based or constituency-based quorum which would require that a city resident member of the board and a plan member of the board be present in order to constitute a quorum. While the Florida Statutes contain a few instances of "interest-based quorums," the vast majority of quorum requirements merely speak to the requirement of a majority of the members¹⁶ or prescribe a definite number of members¹⁷ necessary to constitute a quorum. Because the Florida Statutes do contain legislative examples of interest-based quorums,18 I am of the opinion that a municipality could legislate in a similar fashion.¹⁹

Thus, it is my opinion that these statutes do not preclude amendment of the city's ordinance to add a provision defining what constitutes a quorum of the board of the city's Police and Firefighters Pension Plan Board.

¹ See ss. 175.021 and 185.01, Fla. Stat.

- ² 540 So. 2d 850, 853 (Fla. 1st DCA 1989).
- 3 Id. at 859.
- 4 Id.

⁵ See 1999 Florida House of Representatives Staff Analysis on CS/HB 261, p. 2, dated 2/4/1999.

- ⁶ *Id.* at p. 4.
- ⁷ See s. 83, Ch. 99-1, Laws of Fla.

⁸ See Ordinance 89018, City of North Miami Beach and email from Darcee Siegel, City Attorney, dated November 10, 2011.

- ⁹ And see s. 175.061, Fla. Stat., relating to firefighter pensions.
- ¹⁰ This language parallels that of s. 175.061(1), Fla. Stat.
- ¹¹ See also s. 175.071, Fla. Stat.
- ¹² And see s. 175.071(2), Fla. Stat.

¹³ See Art. VIII, s. 2(b), Fla. Const., and s. 166.021, Fla. Stat., and *Florida* League of Cities, Inc. v. Department of Insurance and Treasurer, 540 So. 2d 850 (Fla. 1st DCA 1989).

- ¹⁴ See "quorum," Black's Law Dictionary, p. 1284 (8th ed. 2004).
- 15 Id.
- ¹⁶ See, e.g., ss. 14.29 and 43.291, Fla. Stat.
- ¹⁷ See, e.g., ss. 39.702, 69.021, and 106.24, Fla. Stat.

¹⁸ See, e.g., s. 194.015, Fla. Stat., relating to value adjustment boards and providing that "[a]ny three members shall constitute a quorum of the board, except that each quorum must include at least one member of said governing board, at least one member of the school board, and at least one citizen member and no meeting of the board shall take place unless a quorum is present[;]" s. 298.11(3), Fla. Stat., relating to water control districts and stating that "[t]he owners and proxy holders of district acreage who are present at a duly noticed landowners' meeting shall constitute a quorum for the purpose of holding such election or any election thereafter."

¹⁹ Section 166.021, Fla. Stat., recognizes that, under Florida's Municipal Home Rule Powers Act and s. 2(b), Art. VIII, State Const., a municipality has the power to enact legislation "concerning any subject matter upon which the state Legislature may act" with certain inapplicable exceptions.

AGO 12-06 - January 25, 2012

POWERS OF ATTORNEY – MILITARY

EFFECT OF CHANGES TO FLORIDA'S POWER OF ATTORNEY ACT ON VALIDITY OF MILITARY SPRINGING POWERS OF ATTORNEY

To: Colonel Paul E. Kantwill, U.S. Army, Office of the Under Secretary of Defense

QUESTION:

Does the second sentence of section 709.2108(3), Florida Statutes, limit the first sentence or will all "springing" powers of attorney prepared pursuant to 10 U.S.C. section 1044b¹ continue to be accepted in Florida?

SUMMARY:

The second sentence of section 709.2108(4), Florida Statutes, does not limit the first sentence of that statute and all "springing" powers of attorney prepared pursuant to 10 U.S.C. section 1044b will continue to be accepted in Florida.

Florida's Power of Attorney Act, Part II, Chapter 709, Florida Statutes, was substantially amended during the 2011 Legislative Session.² As described in the final bill analysis for Chapter 2012-210, Laws of Florida,

A power of attorney is a legal document in which a principal authorizes a person or entity (the agent or attorney-in-fact) to act on his or her behalf. There are three basic types of power of attorney: general power of attorney, which ceases when the principal becomes incapacitated; durable power of attorney, which continues once the person becomes incapacitated; and springing or contingent power of attorney, which power of attorney becomes effective upon the occurrence of a specified event.³

The bill was a comprehensive revision of the statutes that regulate powers of attorney in the State of Florida.⁴

Among the provisions of Part II, Chapter 709, Florida Statutes, as rewritten, is section 709.2108, Florida Statutes, providing that all powers of attorney become effective upon execution, with the exception of powers of attorney based on military deployment. Subsection (3) of this statute provides that a power of attorney that it is to become effective at a future date or upon the occurrence of a future event or contingency is ineffective with limited exceptions. The exceptions to this provision include those expressed in section 709.2106(4), Florida Statutes, which states that:

A military power of attorney⁵ is valid if it is executed in accordance with 10 U.S.C. s. 1044b, as amended.⁶ A deployment contingent power of attorney may be signed in advance, is effective upon the deployment of the principal, and shall be afforded full force and effect by the courts of this state.

The first sentence of this statute is a legislative acknowledgment of the broad language of the federal provisions relating to military powers of attorney and the second sentence reiterates that deploymentcontingent powers of attorney continue to be valid in Florida.

The language contained in the second sentence of section 709.2106(4), Florida Statutes, to the effect that a deployment-contingent power of attorney shall be afforded full force and effect in Florida courts was previously contained in section 709.11, Florida Statutes (2010), as an independent, stand-alone statute. The amendment of Part II, Chapter 709, by CS/SB 670, Florida 2011 Legislative Session, appears to have taken the language previously existing in section 709.11, Florida Statutes (2010), and added the language existing in the Uniform Power of Attorney Act which provides that a power of attorney executed other than in Florida is valid in this state if the execution of the power of attorney complied with the requirements for a military power of attorney pursuant to 10 U.S.C. section 1044b.7 Nothing contained in the legislative history of CS/SB 670, Florida 2011 Legislative Session, suggests that the Legislature intended that the second sentence of section 709.2106(4), Florida Statutes, would in any way limit application or construction of the first sentence.8

Based upon a review of the legislative history for Chapter 2012-210, Laws of Florida, it appears that the inclusion of the second sentence of this statute merely represents a consolidation of references to military powers of attorney into one statutory subsection and not a limitation on the provision expressed in the first sentence. Not all military powers of attorney may be deployment-contingent and the Florida Legislature intended to affirm the continued validity in this state's courts of deployment-contingent powers of attorney as well as other military powers of attorney executed in accordance with 10 U.S.C. section 1044b.

In sum, it is my opinion that the second sentence of section 709.2108(3), Florida Statutes, does not limit the first sentence of that statute and all "springing" powers of attorney prepared pursuant to 10 U.S.C. section 1044b will continue to be accepted in Florida.

¹ 10 U.S.C. s. 1044b provides that military powers of attorney are exempt

from any requirements of form, substance, formality, or recording that is provided for powers of attorney under the laws of any State and must be given the same legal effect as a power of attorney prepared and executed as required by the laws of that State.

² See Ch. 2012-210, Laws of Fla.

³ See Final Bill Analysis, CS/SB 670, Florida 2011 Legislative Session, May 4, 2011.

 4 Id.

⁵ A "military power of attorney" is defined in 10 U.S.C.A. s. 1044b as "any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law."

⁶ See n.1 supra.

⁷ See s. 106(c)(2), Uniform Power of Attorney Act, drafted by the National Conference of Commissioners on Uniform State Laws (2006).

⁸ See Final Bill Analysis, CS/SB 670, Florida 2011 Legislative Session, and Bill Analysis and Fiscal Impact Statement on CS/SB 670, dated April 1, 2011, The Florida Senate 2011 Session; audio podcasts of committee hearings of Florida Senate considering CS/SB 670: Judiciary Committee hearing of 03/14/11; Banking and Insurance Committee hearing of 03/29/11, and Rules Committee hearing of 04/05/11.

AGO 12-07 – January 25, 2012

SECURITY OF COMMUNICATIONS – LAW ENFORCEMENT – TELEPHONE CALLS – RECORDING – INTERCEPTION

CIRCUMSTANCES UNDER WHICH MUNICIPAL POLICE DEPARTMENT AUTHORIZED TO RECORD ALL INCOMING AND OUTGOING TELEPHONE CALLS

To: Chief J. Philip Thorne, Springfield Police Department

QUESTIONS:

1. Pursuant to Chapter 934, Florida Statutes, if a telephone call to the Springfield Police Department is initially answered with a verbal notice that the line is recorded, is a periodic, audible beep sufficient notice to a caller who has been transferred that the telephone line he or she is speaking on is recorded or is the police department obligated to further notify the caller that the transferred call is being recorded?

2. Pursuant to Chapter 934, Florida Statutes, is the Springfield

Police Department required, when an agency employee makes a call outside the department on agency equipment, to notify the person receiving the call that the line is recorded or must the department purchase and maintain non-recorded phone lines for outgoing calls?

SUMMARY:

1. Once a caller has been given notice that his or her telephone call into the Springfield Police Department is being recorded, a periodic, audible beep would appear to be sufficient notice to that caller that a transferred call continues to be recorded.

2. Pursuant to Chapter 934, Florida Statutes, the Springfield Police Department must request permission from the recipient of any outgoing call from the police department which the department intercepts and records unless such outgoing call is placed to the telephone number from which an emergency assistance call was made in order to obtain information required to provide requested emergency services.

According to your letter, the Springfield Police Department has a generally advertised telephone number for citizens to call and report crimes, ask questions, and seek service. This phone system consists of five sequential lines that automatically "roll-over" from the primary number to the next if the previous number is busy. All of these lines are digitally recorded. Although you state that life-saving information or evidence to further a criminal investigation may be relayed on these lines, you have not asked about or asserted that this is a 911 number or a public safety answering point.¹ Rather, your questions relate generally to the provisions of Chapter 934, Florida Statutes, Florida's Security of Communications law.

QUESTION 1.

Chapter 934, Florida Statutes, was enacted by the Florida Legislature in order to assure personal rights of privacy in oral and wire communications.² The legislative findings in section 934.01(4), Florida Statutes, reflect the Legislature's concern for protecting the privacy rights of the state's citizens. In enacting Chapter 934, the Legislature expressly undertook to "define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings."³ In enacting Chapter 934, Florida Statutes, the Legislature stated that

[t]o safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.⁴

Section 934.03(1), Florida Statutes, generally makes it unlawful to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication.⁵ "Oral communication" is defined by section 934.02(2), Florida Statutes, as

any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

The Florida Supreme Court has interpreted the test set forth in this definition as substantially the same test used in a Fourth Amendment right to privacy analysis.⁶ Thus, for a conversation to qualify as "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication and that expectation of privacy must be recognized by society as reasonable under the circumstances.⁷ As stated by the Florida Supreme Court in *State v. Inciarrano*,⁸

This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy as well as whether society is prepared to recognize this expectation as reasonable. Shapiro v. State, 390 So. 2d 344 (Fla. 1980), cert. denied, 450 U.S. 982, 101 S.Ct. 1519, 67 L.Ed.2d 818 (1981).

To prevail Inciarrano must not only have had a subjective expectation of privacy, but also his expectation under the circumstances must have been one that society is prepared to recognize as reasonable. (emphasis in original)

Such a determination, therefore, will depend upon the particular facts. The courts have considered such factors in determining whether intercepted communications qualify as "oral communication" protected under security of communication statutes to include the location in which the conversation or communication occurs, the manner in which the communication is made, and the kind of communication.⁹ Thus, the test to be applied in determining whether a conversation will qualify as an "oral communication," protected by Chapter 934, is two-pronged: the speaker must have an actual subjective expectation of privacy in his oral communication; and that expectation of privacy must be recognized by society as reasonable under the circumstances.¹⁰

Florida's Security of Communications law recognizes several exceptions to the general prohibition against interception of communications for law enforcement agencies. Section 934.03(2)(c), Florida Statutes, provides that:

It is lawful under ss. 934.03-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

The statute also recognizes that it is lawful under the act for an employee of "a law enforcement agency as defined by s. $934.02(10) \ldots$ with published emergency telephone numbers" or "[a]n agency operating an emergency telephone number '911' system established pursuant to s. 365.171"

to intercept and record incoming wire communications; however, such employee may intercept and record incoming wire communications on designated "911" telephone numbers and published nonemergency telephone numbers staffed by trained dispatchers at public safety answering points only. It is also lawful for such employee to intercept and record outgoing wire communications to the numbers from which such incoming wire communications were placed when necessary to obtain information required to provide the emergency services being requested.

However, you have not suggested that either of these exemptions applies to your situation and this office has not been presented with any factual material suggesting that either exemption applies.

The statute recognizes the authority of a law enforcement agency with published emergency telephone numbers or "911" capabilities to intercept and record incoming and certain outgoing wire communications so long as those answering the telephones are trained dispatchers at public safety answering points. As a penal statute, Chapter 934, Florida Statutes, must be narrowly construed such that the enumeration of limited exceptions to its coverage may be inferred to mean that no other exceptions are intended.¹¹

The statute also includes a consent exception to the prohibition against interception of wire communications. Section 934.03(2)(d), Florida Statutes, states that it is lawful under sections 934.03-934.09, Florida Statutes, "for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception." This provision would appear to control your situation. According to your letter, "[u]pon answering a call from any of the outside lines, employees answer with the following greeting: 'Springfield Police; this line is recorded; how may I help you?" Further, your system, after the transfer of the call to the requested party and during the course of the conversation with the citizen, provides an audible beep to alert the caller that the line continues to be recorded. It is my opinion that these notices to the caller may be sufficient to alert him or her that the communication in which they are involved is being recorded and to imply consent on their part to any continued interception and recording of the conversation.¹²

Thus, it is my opinion that, having alerted the caller that the call is being recorded, a periodic, audible beep is sufficient notice to a caller to the Springfield Police Department that a transferred call continues to be recorded and could be understood to constitute consent for the communication to be recorded as provided in section 934.03(2)(d), Florida Statutes.¹³

QUESTION 2.

You have also asked whether, when an employee of your agency makes an outgoing call on an intercepted and recorded telephone line, the police department is required to notify the recipient of that call that the line is a recorded line in order to comply with Chapter 934, Florida Statutes.

As discussed above, in enacting Chapter 934, Florida Statutes, the Legislature expressly undertook to "define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings."¹⁴ Chapter 934 authorizes the interception and recording of outgoing wire communications "to the numbers from which such incoming wire communications were placed when necessary to obtain information required to provide the emergency services being requested[;]"¹⁵ and "when all of the parties to the communication have given prior consent to such interception."¹⁶

Thus, to be lawful under sections 934.03-934.09, Florida Statutes, the Springfield Police Department must request permission from the recipient of any outgoing call from the police department which the department intercepts and records unless such outgoing call is placed to the telephone number from which an emergency assistance call was made in order to obtain information required to provide requested emergency services.

Finally, I would note that any recordings of telephone conversations made by the Springfield Police Department in the usual course of business would be public records subject to the inspection, copying, and retention requirements of Chapter 119, Florida Statutes. Any such public records would likewise be subject to the exemption and confidentiality provisions of the Public Records Law.¹⁷

⁴ The Legislature also expressed its finding in s. 934.01(3), Fla. Stat., that "[o]rganized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." Toward that end, the Legislature has created certain exceptions for law enforcement agencies. *See, e.g.*, s. 934.03(2)(c), Fla. Stat., stating that "[i]t is lawful under ss. 934.03 934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act."

⁵ See s. 934.03(4), Fla. Stat., prescribing penalties for violations of the statute. Any criminal action would be brought by the state attorney for the judicial circuit where the incident occurred. And see s. 934.10, Fla. Stat., prescribing civil remedies. See also s. 934.06, Fla. Stat., prohibiting the use of such intercepted wire or oral communications as evidence. Cf. State v. Mozo, 655 So. 2d 1115 (Fla. 1995), citing United States v. Nelson, 837 F.2d 1519 (11th Cir.), cert. denied, 488 U.S. 829, 109 S.Ct.

¹ A "public safety answering point" is defined in s. 365.172(3)(a), Fla. Stat., as "the public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to the calls." I would note that the Florida Emergency Communications Number E911 State Plan indicates that the Panama City Police Department and the Bay County Sheriff's Department operate the primary safety answering points in Bay County with two secondary answering points (the Bay Medical Center EMS and the Bay County Emergency Operations Center) and that "[c]alls for law enforcement agencies are transferred or relayed by telephone or radio." *See* s. 9.3. p. 37, State of Florida E911 Plan, revised 10/18/2010.

 $^{^2}$ See s. 934.01, Fla. Stat., reflecting the legislative findings for enactment of Ch. 934, Fla. Stat.

³ Section 934.01(2), Fla. Stat.

82, 102 L.Ed.2d 58 (1988) (actual "interception" of a communication occurs not where the call is ultimately heard or recorded but where the communication originates).

⁶ See Mozo v. State, id. at n.5; Stevenson v. State, 667 So. 2d 410 (Fla. 1st DCA 1996).

⁷ *Id.* And see Jackson v. State, 18 So. 3d 1016 (Fla. 2009), cert. denied, 130 S.Ct. 1144 (2010); State v. Smith, 641 So. 2d 849, 852 (Fla. 1994). *Cf. State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981) (definition of "interception of private communications," in context of prohibition under Art. I, s. 12, Fla. Const., against such interception, is a function of one's reasonable expectation of privacy).

⁸ 473 So. 2d 1272, 1275 (Fla. 1985).

⁹ See Stevenson v. State, 667 So. 2d 410 (Fla. 1st DCA 1996). And see Department of Agriculture and Consumer Services v. Edwards, 654 So. 2d 628 (Fla. 1st DCA 1995) (finding no justifiable expectation of privacy in statements due to number of persons present when statements were made, place chosen for persons present when statements were made, place chosen for interview, and very nature of interview).

¹⁰ And see State v. Smith, 641 So. 2d 849 (Fla. 1994).

¹¹ Under the rule "expressio unius est exclusio alterius," a statute enumerating the things upon which it operates is ordinarily to be construed as excluding from its operation those things not expressly mentioned. *Thayer v. State*, 335 So. 2d 815 (Fla. 1976); *Ideal Farms Drainage District v. Certain Lands*, 19 So. 2d 234 (Fla. 1944). And see Copeland v. State, 435 So. 2d 842 (Fla. 2d DCA 1983), pet. for review denied, 443 So. 2d 980 (Fla. 1983), concluding that portions of the Security of Communications Act authorizing interception of wire or oral communications are statutory exceptions to federal and state constitutional rights of privacy and must be strictly construed. *And see* Ops. Att'y Gen. Fla. 02-56 (2002) and 76-195 (1976).

 12 This office would suggest that a distinction can be made between notifying a caller that their *entire call* is being recorded and that the particular *telephone line* is being recorded. The former would appear to more clearly alert a caller to the fact that a transferred call continues to be recorded.

 13 Cf. U.S. v. Horr, 963 F.2d 1124, 1126 (8th Cir. 1992) (defendant implicitly consented to monitoring by using the telephone after receiving notice of monitoring) and *McWatters v. State*, 36 So. 3d 613 (Fla. 2010) (no reasonable expectation of privacy in calls made after defendant was advised that call was subject to monitoring and recording).

¹⁴ Section 934.01(2), Fla. Stat.

¹⁵ Section 934.03(2)(g), Fla. Stat.

¹⁶ Section 934.03(2)(d), Fla. Stat. *And see* Op. Att'y Gen. Fla. 02-56 (2002).

¹⁷ See, e.g., s. 365.171(12), Fla. Stat., relating to recordings obtained by public agencies for providing services in an emergency and the information contained therein which may be confidential and exempt from the Public Records Law; s. 119.071(2)(c)1., Fla. Stat., exempting active criminal information and active criminal investigative information from public inspection; and s. 119.071(2)(j)1., Fla. Stat., authorizing certain victim information to be maintained as confidential if the victim of the crime requests, in writing, the confidentiality of that information.

AGO 12-08 - February 28, 2012

CONCEALED WEAPONS – COURTS – JUDGES

JUDGE'S AUTHORITY TO DETERMINE WHO MAY CARRY CONCEALED WEAPON IN COURTROOM

To: The Honorable Scott J. Silverman, Circuit Judge, Eleventh Circuit of Florida

QUESTION:

May a bailiff possessing a concealed weapons permit carry a concealed weapon in the county courthouse with the permission of the presiding judge?

SUMMARY:

A presiding judge may determine who will carry a concealed weapon in his or her courtroom and such determination necessarily allows the individual to proceed through the courthouse in order to access the courtroom.

You state that pursuant to section 790.06, Florida Statutes, you have authorized your bailiff to carry a concealed weapon in your courtroom. Your bailiff has a current concealed weapons permit and is certified by the National Rifle Association as a law enforcement firearms instructor.¹

Section 790.06, Florida Statutes, authorizes the Department of Agriculture and Consumer Services to issue licenses to carry concealed weapons or concealed firearms.² Any person in compliance with the licensure requirements may carry a concealed weapon, but must carry the license, along with valid identification, at all times while in possession of the concealed weapon.³

Section 790.06(12)(a), Florida Statutes, however, in pertinent part,

states:

A license issued under this section does not authorize any person to openly carry a handgun or carry a concealed weapon or firearm into:

4. Any courthouse;

5. Any courtroom, except that *nothing* in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom[.] (e.s.)

The plain language of section 790.06(12)(a)5., Florida Statutes, exempts from the prohibition against concealed weapons in a courtroom a judge and anyone who is determined by the judge to be authorized to carry a concealed weapon in his or her courtroom. The statute recognizes the authority of a judge to designate individuals who may carry a concealed weapon in his or her courtroom.

An express power duly conferred by statute may include the implied authority to use the means necessary to carry out the express power.⁴ Thus, where the plain language of the statute authorizes a judge to designate those individuals authorized to carry a concealed weapon in his or her courtroom and the statute acknowledges that nothing in the section will preclude such authority, logic would dictate that the individual so authorized would be able to carry the concealed weapon through the courthouse in order to access the courtroom in which he or she is authorized to carry the weapon.⁵

While I have been unable to locate a local court rule for Miami-Dade County relating to the carrying of concealed weapons, as an illustrative point, I would note that the Sixth Judicial Circuit in Pasco County has adopted a rule relating to court security which states: "Except for judges, *bailiffs*, and law enforcement officers as provided in this paragraph, no person possessing a firearm, taser, electronic control weapon, ammunition, knife, mace, pepper spray, or dangerous weapon may enter or occupy a court facility."⁶ (e.s.) Thus, other circuits have recognized that bailiffs are authorized to carry weapons in a courtroom or the court area of a courthouse.

Accordingly, it is my opinion that a presiding judge may determine who will carry a concealed weapon in his or her courtroom and such determination necessarily allows the individual to proceed through the courthouse in order to access the courtroom.

 $^{^{1}}$ It is presumed that since you indicate that your bailiff has a current concealed weapons permit, he or she is not acting as a certified law

enforcement officer for purposes of the exemption in s. 790.051, Fla. Stat., which exempts law enforcement officers from the licensing and penal provisions of the chapter "when acting at any time within the scope or course of their official duties or when acting at any time in the line of or performance of duty."

² Section 790.06(1), Fla. Stat.

³ *Id*.

⁴ *Cf. State ex rel. Greenburg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974), *cert. dismissed*, 300 So. 2d 900 (Fla. 1974); *City of Cape Coral v. GAC Utilities, Inc., of Florida*, 281 So. 2d 493 (Fla. 1973) (a statutorily created entity may only exercise such powers as have been expressly granted by law or may be necessarily implied therefrom in order to carry out an expressly granted power).

⁵ See Florida State University v. Jenkins, 323 So. 2d 597 (Fla. 1st DCA 1975) (implied power must be essential in order to carry out the expressly granted power or duty imposed); *Gardinier, Inc. v. Florida Department of Pollution Control*, 300 So. 2d 75 (Fla. 1st DCA 1974) (implied powers accorded administrative agencies must be indispensable to powers expressly granted).

⁶ Administrative Order No. 2009-083 PA-CIR, Sixth Judicial Circuit in and for Pasco and Pinellas Counties, Fla.

AGO 12-09 – February 28, 2012

COUNTIES – SPECIAL ASSESSMENTS –EMERGENCY MEDICAL SERVICES

LEVY OF COUNTY EMERGENCY MEDICAL SERVICE ASSESSMENT

To: Mr. CJ Thompson, Baker County Manager

QUESTION:

Pursuant to section 125.271, Florida Statutes, may Baker County levy a special assessment for emergency medical services?

SUMMARY:

Section 125.271, Florida Statutes, authorizes qualifying counties, including Baker County, to fund the costs of emergency medical services through the levy of a "county emergency medical service assessment" pursuant to sections 1 and 9 of

Article VII, Florida Constitution, which authorize local taxes as provided by general law.

You ask whether section 125.271, Florida Statutes, which authorizes "county emergency medical service assessments," would provide authority for Baker County to fund emergency medical services as set forth therein. The statute provides that:

(1) As used in this section, the term "county" means:

(a) A county that is within a rural area of critical economic concern as designated by the Governor pursuant to s. 288.0656;

(b) A small county having a population of 75,000 or fewer on the effective date of this act which has levied at least 10 mills of ad valorem tax for the previous fiscal year; or

(c) A county that adopted an ordinance authorizing the imposition of an assessment for emergency medical services prior to January 1, 2002.

Once a county has qualified under this subsection, it always retains the qualification.

(2) A county may fund the costs of emergency medical services through the levy of a special assessment that apportions the cost among the property based on a reasonable methodology that charges a parcel in proportion to its benefits.

(3) The authorization provided in this section shall be construed to be general law authorization pursuant to ss. 1 and 9 of Art. VII of the State Constitution.

(4) All special assessments for emergency medical services levied by a county prior to the effective date of this section are ratified and validated in all respects if they would have been valid had this section been in effect at the time they were levied; however, this subsection shall not validate assessments in counties with litigation challenging the validity of an assessment pending on January 1, 2002.¹

Baker County has been designated a part of the North Central Florida Rural Area of Critical Economic Concern by the Governor pursuant to section 288.0656, Florida Statutes.² Thus, Baker County would qualify as a "county" within the scope of section 125.271(1)(a), Florida Statutes, and is authorized to levy a "county emergency medical service assessment" as provided therein.

This office has received a memorandum of law from an interested

party in this matter suggesting that the issue of the imposition of a special assessment for emergency medical services has been resolved by the Florida Supreme Court and that such services cannot be funded by special assessment as they cannot be determined to provide a special benefit to the assessed property, a fundamental requirement of special assessments. The Florida Supreme Court addressed the question of whether a special assessment could be used to fund emergency medical services in *City of North Lauderdale v. SMM Properties, Inc.*, a 2002 Florida Supreme Court case.³ In that case the Court relied on a two-part test to review the validity of the city's special assessment⁴ and held that "emergency medical services did not provide a special benefit to the assessed property because such services benefit people, not property." Further, the Court suggested that "the emergency medical services portion of the special assessment has the indicia of a tax because it fails to provide a special benefit to real property."⁵

The situation you describe in Baker County is distinguishable from the decision in the *City of North Lauderdale*, however, in that the Legislature has specifically recognized that "[t]he authorization provided in [section 125.271, Florida Statutes] shall be construed to be general law authorization pursuant to ss. 1 and 9 of Art. VII of the State Constitution[,]"⁶ *i.e.*, a tax authorized by general law.⁷

The Florida Supreme Court has explained the distinction between special assessments and taxes in a number of cases including *City of Boca Raton v. State*,⁸ in which the Court explained that:

[A] legally imposed special assessment is not a tax. Taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment. . . . As explained in *Klemm v. Davenport*:⁹

A tax is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A special assessment is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax but it is inherently different and governed by entirely different principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefitted, is not governed by uniformity and may be

determined legislatively or judicially.¹⁰

While the Legislature has used the term "assessment" in section 125.271, Florida Statutes, the Legislature has identified the assessment as a general tax, authorized pursuant to Florida constitutional provisions and available to those counties falling within the scope of the definition of "county" in that statute.¹¹

In sum, it is my opinion that section 125.271, Florida Statutes, authorizes qualifying counties, including Baker County, to fund the costs of emergency medical services through the levy of a "county emergency medical service assessment" pursuant to sections 1 and 9 of Article VII, Florida Constitution, which authorize local taxes as provided by general law.

² See State of Florida, Office of the Governor, Executive Order Numbers 03-74 (2003) and 08-132 (2008).

³ 825 So. 2d 343 (Fla. 2002).

4 To be considered a valid special assessment, an assessment must satisfy a two-pronged test: first, "the property burdened by the assessment must derive a 'special benefit' from the service provided by the assessment" and second, "the assessment for the services must be properly apportioned." *Desiderio Corporation v. City of Boynton Beach*, 39 So. 3d 487, 493 (Fla. 4th DCA 2010) citing *Lake County v. Water Oak Management Corp.*, 695 So. 2d 667, 669 (Fla. 1997).

⁵ Id. at 350.

⁷ And see Senate Staff Analysis and Economic Impact Statement, CS/ SB 2178, s. III. "Effect of Proposed Changes," dated Feb. 26, 2002 ("The CS includes language providing that the authorization provided in this new section 'shall be construed to be general law authorization pursuant to ss. 1 and 9 of Art. VII, of the State Constitution' – a tax authorized by general law").

¹ A statute is presumptively valid and must be obeyed and given effect unless and until judicially declared invalid. *Falco v. State*, 407 So. 2d 203 (Fla. 1981); *Belk James, Inc. v. Nuzum*, 358 So. 2d 174, 177 (Fla. 1978); *Evans v. Hillsborough County*, 186 So. 193, 196 (Fla. 1938). The Attorney General cannot declare statute unconstitutional or invalid or advise any officer to disregard legislative direction or mandate. On the contrary, statute is presumed to be constitutional and must be given effect until judicially declared invalid. *Cf. Pickeril v. Schott*, 55 So. 2d 716 (Fla. 1951) and *State ex rel. Atlantic Coastline R. Co. v. State Board of Equalizers*, 94 So. 681, 682 (Fla. 1922).

⁶ Section 125.271(3), Fla. Stat.

⁸ 595 So. 2d 25 (Fla. 1992). See also City of North Lauderdale v. SMM Properties, Inc., 825 So. 2d 343 (Fla. 2002); Collier County v. State, 733 So. 2d 1012, 1016 17 (Fla. 1999).

⁹ 100 Fla. 627, 631 34, 129 So. 904, 907-908 (1930).

¹⁰ 595 So. 2d 25 at 29 (Fla. 1992).

¹¹ A statute is presumptively valid and must be obeyed and given effect unless and until judicially declared invalid. *Falco v. State*, 407 So. 2d 203 (Fla. 1981); *Belk-James, Inc. v. Nuzum*, 358 So. 2d 174, 177 (Fla. 1978); *Evans v. Hillsborough County*, 186 So. 193, 196 (Fla. 1938).

AGO 12-10 - February 28, 2012

DUAL OFFICE-HOLDING – SPECIAL OFFICERS FOR CARRIERS – RAILROADS – RESERVE OFFICERS – LAW ENFORCEMENT OFFICERS

SPECIAL OFFICER FOR RAILROAD SIMULTANEOUSLY SERVING AS RESERVE OFFICER WITHOUT PAY FOR LOCAL LAW ENFORCEMENT AGENCY

To: Mr. George Gingo, Attorney for Mr. Clifford Webster

QUESTION:

Whether a special officer for a carrier under Chapter 354, Florida Statutes, may serve simultaneously as an unpaid reserve deputy sheriff without violating the Florida constitutional prohibition against dual office-holding?

SUMMARY:

A special officer for a carrier under Chapter 354, Florida Statutes, may serve simultaneously as an unpaid reserve deputy sheriff without violating the Florida constitutional prohibition against dual office-holding expressed in Article II, section 5(a), Florida Constitution.

According to your letter, Mr. Webster has been a Brevard County deputy sheriff for the past 17 years and recently left the sheriff's office to take a position as a special officer for the Florida East Coast Railway Police Department. As described in section 354.01, Florida Statutes, Mr. Webster is a special officer for a carrier appointed by the Governor. Mr. Webster is considering volunteering his time with a local law enforcement agency as a reserve officer without remuneration, but is concerned that the Florida constitutional prohibition against dual officeholding could preclude his service in both positions. You have asked for my assistance in determining whether Mr. Webster may lawfully serve simultaneously in both capacities.

Chapter 354, Florida Statutes, provides for the appointment of special officers employed by railroads and other common carriers for the protection of the carrier's employees, passengers, freight, equipment, and properties.¹ Appointments of special officers for carriers are made by the Governor, and applicants are required to meet specified law enforcement qualifications.² While special officers are required to meet the standards of a certified law enforcement officer in order to be commissioned, certification is not granted to these officers.³ Section 354.02, Florida Statutes, provides for the powers of such special officers:

Each special officer shall have and exercise throughout every county in which the common carrier for which he or she was appointed, shall do business, operate, or own property, the power to make arrests for violation of law on the property of such common carrier, and to arrest persons, whether on or off such carrier's property, violating any law on such carrier's property, under the same conditions under which deputy sheriffs may by law make arrests, and shall have authority to carry weapons for the reasonable purpose of their offices.

These officers are required to provide a surety bond to the Governor for the faithful performance of their duties.⁴ The statutes prescribe a term of office for special officers and they may be removed by the Governor at any time.⁵ Compensation for special officers is paid by the carrier and they receive no fees or salary from the state or any county.⁶ Your question requires a determination of whether this position constitutes an "office" for purposes of Florida's dual office-holding prohibition.

Article II, section 5(a) of the Florida Constitution, provides in pertinent part:

No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

This constitutional provision prohibits a person from simultaneously serving in more than one "office" under the governments of the state, counties, or municipalities. This office has concluded that the constitutional prohibition applies to both elected and appointed offices.⁷ While the Constitution does not define the term "office," the courts have stated that the term "implies a delegation of a portion of the sovereign power . . . [and] embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract." $^{\!\!8}$

This office and the courts have long recognized that law enforcement officers are "officers" subject to the constitutional dual office-holding prohibition.⁹ The Florida Supreme Court has said:

It can hardly be questioned that a patrolman on a city police force is clothed with sovereign power of the city while discharging his duty.... True, he is an employee of the city but he is also an officer. It is the character of duty performed that must determine his status.¹⁰

It is the powers that a law enforcement officer may exercise, particularly the authority to arrest without a warrant and to carry firearms in carrying out his duties, not the salary or certification requirements, that characterize the law enforcement officer as an "officer."¹¹ Based on these considerations, this office has stated that a certified reserve police officer is an "officer" for purposes of section 5(a), Article II, Florida Constitution.¹²

However, the Supreme Court of Florida has recognized a limited exception to the constitutional dual office-holding prohibition in *Vinales v. State*,¹³ which concerned the appointment of municipal police officers as state attorney investigators pursuant to statute. Since the police officers' appointment was temporary and no additional remuneration was paid for performing the additional criminal investigative duties, the Court held that the officers were not simultaneously holding two offices and thus the constitutional dual office-holding prohibition did not apply. The Second District Court of Appeal in *Rampil v. State*,¹⁴ following the *Vinales* exception, concluded that it was not a violation of Article II, section 5(a), Florida Constitution, for a city police officer to act in the capacity of deputy sheriff since that officer received no remuneration for such duties.

The exception articulated in *Vilales* and *Rampil* has been applied only when both offices have related to criminal investigation or prosecution and not to the exercise of governmental power or performance of official duties on a disparate board or position. Thus, this office, in considering the *Vinales* and *Rampil* exception, has stated that the exception is limited and does not apply to a member of a municipal board of adjustment serving as a part time law enforcement officer or to a police officer who serves as a law enforcement officer.¹⁵ Likewise, in Attorney General Opinion 2006-27, this office concluded that the exception to dual office-holding recognized by the courts in *Vinales* and *Rampil* does not permit the police chief to serve as acting city manager without resigning his or her office.

Based upon the powers extended to special officers for carriers, I

conclude that these officers would come within the scope of the term "officers" for purposes of Florida's constitutional prohibition against dual office-holding, *i.e.*, they are commissioned by the Governor, serve terms of office, have powers of arrest, and carry firearms. However, based on the exception recognized in the *Vinales* case for law enforcement officers performing additional law enforcement duties without remuneration, it is my opinion that Mr. Webster may simultaneously serve as a special officer and volunteer his time with a local law enforcement agency as an unpaid reserve officer without violating Article II, section 5(a) of the Florida Constitution.¹⁶

In sum, it is my opinion that a special officer for a carrier under Chapter 354, Florida Statutes, may serve simultaneously as an unpaid reserve deputy sheriff without violating the Florida constitutional prohibition against dual office-holding expressed in Article II, section 5(a), Florida Constitution.

 2 Id.

³ As to training requirements, *see* s. 943.13(1) - (10), Fla. Stat. *And see* Sunset Review of Railroads, Chs. 351, 354, and s. 361.025, Fla. Stat., prepared by the Staff of the Florida House of Representatives Committee on Regulatory Reform, November 1991.

⁴ Section 354.03, Fla. Stat.

⁵ See s. 354.05, Fla. Stat., which provides that a special officer's commission shall continue so long as he or she is employed in that capacity by the railroad or other common carrier.

- ⁶ Section 354.04, Fla. Stat.
- ⁷ See, e.g., Op. Att'y Gen. Fla. 80-97 (1980).

⁸ State ex rel. Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919). And see State ex rel. Clyatt v. Hocker, 22 So. 721 (Fla. 1897).

⁹ See, e.g., Curry v. Hammond, 16 So. 2d 523, 524 (Fla. 1944); Maudsley v. City of North Lauderdale, 300 So. 2d 304 (Fla. 4th DCA 1974); Ops. Att'y Gen. Fla. 57-165 (1957), 58-26 (1958), 69-2 (1969), 71-167 (1971), 72-348 (1972), 76-92 (1976), 77-89 (1977), 86-11 (1986), and 89-10 (1989).

¹⁰ Curry v. Hammond, id.

¹¹ *Maudsley v. City of North Lauderdale*, 300 So. 2d 304 (Fla. 4th DCA 1974). *See State ex rel. Gibbs v. Martens*, 193 So. 835, 837 (Fla. 1940), in which the Court held that a probation officer was an "officer" since he had the right to arrest without a warrant for "no right is more sacred or

¹ Section 354.01, Fla. Stat.

more jealously guarded than the one that liberty shall not be infringed except by due process of law." *And see* Ops. Atty Gen. Fla. 89-10 (1989), stating that the absence of a requirement that police officers file financial disclosure forms required of "public officials" does not alter their status as "officers" for purposes of dual office-holding.

¹² See Op. Att'y Gen. Fla. 77-63 (1977). And see Op. Att'y Gen. Fla. 86-105 (1986) concluding that auxiliary police officers who did not have authority to make arrests but who were certified, carried firearms and assisted regular police officers in carrying out their duties were "officers." Compare Op. Att'y Gen. Fla. 89-10 (1989) concluding that an administrative law enforcement position, having no law enforcement certification requirements or arrest powers and not authorized to independently exercise the sovereign powers of the state, is an employment and not an office for purposes of dual office-holding.

- ¹³ 394 So. 2d 993 (Fla. 1981).
- ¹⁴ 422 So. 2d 867 (Fla. 2d DCA 1982).

¹⁵ See Op. Att'y Gen. Fla. 84 25 (1984). And see Op. Att'y Gen. Fla. 86-84 (1986) (Vinales and Rampil exceptions do not apply to a city council member simultaneously serving as a certified auxiliary law enforcement officer).

¹⁶ This office has stated that a part-time auxiliary or certified reserve police officer is an "officer" for purposes of s. 5(a), Art. II, Fla. Const. *See, e.g.*, Ops. Att'y Gen. Fla. 86-105 (1986) and 77-63 (1977).

AGO 12-11 – April 25, 2012

LEGAL NOTICE – NEWSPAPERS

NEWSPAPER MUST BE PUBLISHED WEEKLY OR MORE OFTEN FOR ONE YEAR PRIOR TO PUBLICATION OF LEGAL NOTICE

To: Mr. John B. Lynch, City Manager, City of Lynn Haven

QUESTION:

Is a local newspaper which published on a bi-weekly¹ basis for more than one year, but recently began publishing on a weekly basis qualified for publication of legal notices pursuant to Chapter 50, Florida Statutes?

SUMMARY:

A newspaper which has not been published on a weekly or more often schedule for one year prior to the first publication of

a legal notice would not qualify for publication of a legal notice pursuant to Chapter 50, Florida Statutes.

You state that the city is exploring ways in which to reduce the expense of publishing legal notices. Currently, there is only one newspaper in the county which will publish public legal notices and you feel the newspaper's rates for such publications are excessive. You have contacted a locally-owned newspaper with a circulation of 5000 which prior to July 2011, was published on a twice-monthly basis. Since July, 2011, the paper has been published on a weekly basis. The question has arisen whether a paper which has been publishing on a twice-monthly basis for more than a year, but publishing on a weekly basis only since July 2011, would meet the requirement of having been in existence for one year.

Section 50.011, Florida Statutes, provides that any statutorily prescribed legal notice, advertisement, or publication be published:

in a newspaper printed and published periodically once a week or oftener, containing at least 25 percent of its words in the English language, entered or qualified to be admitted and entered as periodicals matter at a post office in the county where published, for sale to the public generally, available to the public generally for the publication of official or other notices and customarily containing information of a public character or of interest or of value to the residents or owners of property in the county where published, or of interest or of value to the general public.² (e.s.)

In addition, section 50.031, Florida Statutes, requires, in part, that such newspapers

at the time of *such publication shall have been in existence for 1 year* and shall have been entered as periodicals matter at a post office in the county where published, or in a newspaper which is a direct successor of a newspaper which together have been so published; provided, however, that nothing herein contained shall apply where in any county there shall be no newspaper in existence which shall have been published for the length of time above prescribed. (e.s.)

While there is an exception provided in section 50.031, Florida Statutes, for counties in which there has been no newspaper in existence that has been published for the requisite time, it would not appear to be applicable to Bay County in which your city is located.³

In sections 50.011 and 50.031, Florida Statutes, the Legislature has prescribed detailed minimum requirements a newspaper must meet before it qualifies for publication of legal notices. This office has stated that strict compliance with these minimum requirements forecloses the prospect of a successful due process challenge to the notice provided.⁴ Moreover, this office has consistently maintained that the one-year requirement applies to both the existence of a newspaper within the scope of section 50.031, Florida Statutes, and to the length of time that such material must have been circulated as periodical material.⁵ This conclusion is supported by the statutory requirements for the uniform affidavit used to establish proof of publication which includes the statement that the newspaper "is a newspaper published at __, in said __ County, Florida, and that the said newspaper has heretofore been continuously published in said __ County, Florida, each __ and has been entered as periodicals matter at the post office in __, in said __ County, Florida, for a period of 1 year next preceding the first publication of the attached copy of advertisement[.]"⁶

In Attorney General Opinion 96-25, this office concluded that the joint publication of a city's legal notices in a weekly newspaper published and circulated within the city at no charge, but with no second class mailing permit, and in a neighboring city's weekly newspaper with limited circulation within the subject city, but with a second class mailing permit, did not satisfy the publication requirements of section 50.011, Florida Statutes. Citing the prescribed detailed minimum requirements in sections 50.011 and 50.031, Florida Statutes, that a newspaper must meet before it qualifies for publication of legal notices, the opinion found strict compliance with the minimum requirements was the only means to foreclose the prospect of a successful due process challenge to the notice provided.⁷ Neither of the papers used by the city independently met the requirements for publication of legal notice prescribed in Chapter 50, Florida Statutes.

In light of the potential legal consequences of insufficient legal notice and this office's previous opinions determining that strict compliance with the minimum requirements of the statute must be met, it would appear advisable to publish a legal notice in a newspaper that has complied with all of the minimum requirements for at least one year prior to the date of the first publication of a public legal notice.⁸

Accordingly, it is my opinion that a newspaper which has not been published on a weekly or more often schedule for one year prior to the first publication of a legal notice does not qualify for publication of a legal notice pursuant to Chapter 50, Florida Statutes.

¹ The term "bi-weekly" is used to denote a publication every two weeks.

² See Op. Att'y Gen. Fla. 90-67 (1990), stating that a newspaper which meets the requirements of ss. 50.011 and 50.031, Fla. Stat., may be utilized for the publication of notices of proposed municipal ordinances as required in s. 166.041(3)(a), Fla. Stat. And see Op. Att'y Gen. Fla. 96-25

(1996).

³ You indicate the Panama City News Herald, currently a daily newspaper published in Bay County, publishes legal notices.

⁴ See, e.g., Ops. Att'y Gen. Fla. 73-149 (1973) (publication in newspaper not meeting the requirements of s. 50.011, Fla. Stat., does not meet the requirements of due process of law); 94-24 (1994). And see Daytona Leisure Corporation v. City of Daytona Beach, 539 So. 2d 597, 599 (Fla. 5th DCA 1989) (measures passed in contravention of notice requirements are invalid if not strictly enacted pursuant to statutory requirements).

⁵ See Ops. Att'y Gen. Fla. 02-70 (2002) and 94-24 (1994). And see Ops. Att'y Gen. Fla. 41-38 (1941), at p. 70; 64-150 (1964); 73-149 (1973); and 74-125 (1974). The earlier opinions refer to "second class mail." Sections 21 and 22, Chapter 99-2, Laws of Florida, respectively amended ss. 50.011 and 50.031 to conform to the redesignation of second-class matter as periodicals by the United States Postal Service.

⁶ See s. 50.051, Fla. Stat.

 7 See Op. Att'y Gen. Fla. 73-149 (1973) (due process requirements are not met by publication in newspaper not meeting the requirements of s. 50.011, Fla. Stat.).

⁸ See Ideal Farms Drainage District v. Certain Lands, 19 So. 2d 234 (Fla. 1944); Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452 (Fla. 1992) (all parts of a statute must be read together in order to achieve a consistent whole); State ex rel. Ashby v. Haddock, 140 So. 2d 631 (Fla. 1st DCA 1962).

AGO 12-12 - April 25, 2012

AIRPORT AUTHORITY – PUBLIC PROPERTY – BONDS – LITTLE MILLER ACT – CONTRACTORS

WHETHER PAYMENT AND PERFORMANCE BOND MAY BE REQUIRED FOR CONSTRUCTION ON AIRPORT AUTHORITY PROPERTY

To: Mr. Kenneth W. Wright, Counsel for the Sanford Airport Authority

QUESTION:

Is a private for-profit party, which is occupying public land pursuant to a long term lease with the public land owner, the Sanford Airport Authority, in which the tenant is authorized to contract to construct a private building, required to obtain a performance and payment bond for such construction pursuant to section 255.05, Florida Statutes?¹

SUMMARY:

A private for-profit party occupying public land pursuant to a long term lease with the Sanford Airport Authority must obtain a performance and payment bond pursuant to section 255.05, Florida Statutes, for construction of improvements which will be owned by the airport authority.

The Sanford Airport Authority was created by special act of the Legislature as a dependent special district to the municipality.² Its members are appointed by the city commission which has the authority to remove the members for misfeasance, malfeasance or willful neglect of duty.³ In addition, the authority is required to submit its budget to the city commission for approval.⁴ In reviewing its duties and responsibilities, this office concluded that the Sanford Airport Authority was an agency of the city.⁵ You have asked whether the airport authority may amend its lease with a private party to remove a requirement that a payment and performance bond be obtained by the private party for construction on airport property and whether such action would expose the airport authority, and consequently the municipality, to potential liability for not requiring compliance with section 255.05, Florida Statutes.

Florida law has long recognized the rights of laborers, materialmen, and subcontractors to seek payment through statutory bonding requirements for a contractor's failure to furnish compensation.⁶ The current statutory mechanisms for enforcing that policy are payment and performance bonds for public works projects under section 255.05, Florida Statutes, and payment bonds and construction liens for private property under Part I, Chapter 713, Florida Statutes, Florida's "Construction Lien Law."⁷ The legislative scheme set out in section 255.05, Florida Statutes, is designed to provide protection for those providing work and materials on public projects because a mechanics' lien cannot be perfected against public property.⁸

Section 255.05(1)(a), Florida Statutes, about which you have specifically inquired, provides, in part, that:

Any person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority or private entity, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. Thus, the statute requires that a contractor for the construction of a public building or public works project generally guarantee the prompt payment of persons who furnish labor, services, or materials through the use of a payment bond.⁹

The statute relating to public contractors' bonds was patterned after the federal Miller Act¹⁰ and was intended to establish for Florida a little Miller Act whose general aim is to equate suppliers to public projects against which materialmen's liens are not available with those suppliers to private projects enjoying the security of a lien.¹¹ The statute is also designed to afford protection to both the surety on the project and the public. The bond itself protects the public, as project "owner," from two distinct defaults by a builder: the payment portion of the bond contains the insurer's undertaking to guarantee that all subcontractors and materialmen will be paid and the performance part of the bond guarantees that the contract will be fully performed.¹² Further, Florida court's have recognized that "section 255.05 places a corresponding duty on the public agency, as well as the contractor, to see that a bond is in fact posted for the protection of the subcontractors before construction commences."¹³

As a statute designed to protect various interests, including those of subcontractors, contractors, sureties, and the public, the straightforward language of the statute sets forth a clear and simple method of bonding payment for, and performance of, public construction projects.¹⁴ Florida's little Miller Act is remedial in nature and thus, is entitled to a liberal construction, within reason, to effect its intended purpose.¹⁵ The statute has existed as a part of the Florida Statutes since 1915.¹⁶

Your question is whether the construction project contemplated to be undertaken by the private for-profit party in this case involves construction of a public building or a public work or repairs to a public building or public work. Because it appears that the improvements made to property owned and leased by the Sanford Airport Authority are the property of the airport authority, it is my opinion that any such project is subject to section 255.05, Florida Statutes.

The terms "public building or public work" are not defined by section 255.05, Florida Statutes. You have indicated by the terms of your question that the construction contemplated is a building constructed for private use on public land owned by the Sanford Airport Authority. A "public work" within the scope of the federal Miller Act has been defined as "project[s] carried on either directly by public authority or with public aid to serve the interests of the general public." The Eleventh Circuit, in a recent federal Miller Act case,¹⁷ commented that the court had not yet defined what makes a construction project a "public work" within the meaning of the Miller Act, nor does the Miller Act itself provide a definition. In attempting to identify what may constitute a "public work" for Miller Act purposes, the Eleventh Circuit looked

to a U. S. Supreme Court case involving a project authorized under federal recovery legislation. In that earlier case, *United States ex rel. Noland Co. v. Irwin*,¹⁸ the U. S. Supreme Court concluded that a library constructed on the campus of Howard University was a "public work" within the meaning of the Miller Act because it was constructed with funds from the federal government and was established to serve the interest of the general public, despite the fact that Howard University was a private institution and held title to the land and the buildings.

There is no clearly articulated test identified by the courts for determining whether a project is a "public work of the United States," within the scope of the federal Miller Act, but several factors have been identified as indicia of such a project. Court cases suggest that factors relevant to this determination include: whether the United States is a contracting party, an obligee to the bond, an initiator or ultimate operator of the project; *whether the work is done on property belonging to the United States;* or whether the bonds are issued under the Miller Act.¹⁹

A number of these factors which have been identified by the courts are absent from the Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., project under consideration here. For example, you have indicated that this construction project is to be privately funded. However, government funding has never been the determinative factor in considering whether the Miller Act applies. Rather, "[i]t must be true that either (1) the subcontractors and suppliers of material could assert an action for equitable recovery against the United States or one of its agencies, or (2) normal state labor and material lien remedies are unavailable because of federal ownership of the lands."20 The terms of the lease between the Sanford Airport Authority and the lessee clearly make any improvements made, the property of the airport authority. As public property cannot be the subject of a labor and material lien remedy under Chapter 713, Florida Statutes, the assertion that this project is not a "public work" would appear to foreclose any claim a subcontractor or materialman might have against this property which is clearly owned by a governmental entity.

The terms of Ground Lease Number 2003-08 between the Sanford Airport Authority and the Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., clearly address the nature of improvements and alterations to airport authority property. Section 20 of the lease provides that:

All such improvements hereinafter made or placed on the Premises (including any fixtures purchased by Lessee) shall immediately become the property of the Lessor, subject to the terms of the Lease and shall remain upon and be surrendered with the Project as a part thereof at the termination, by lapse of time or otherwise, of the term hereby granted. Lessee shall not enter into any agreement whatsoever, nor do or permit the doing of anything, which would create, constitute or impose any cloud on the title to or lien upon the Land, the Project, or the Premises, or any part of or interest in any of them.

Thus, improvements to the leased property are the property of the Sanford Airport Authority, a dependent special district of the City of Sanford and a governmental entity. While section 22.J. of the Ground Lease specifically requires lessee Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., to provide a payment and performance bond in accordance with section 255.05, Florida Statutes, for any improvements it may make to the property, you advise that this provision may be eliminated from the lease. Regardless of the removal of the payment and performance bond requirement, however, section 20 of the lease appears to control the determination of the nature of the improvements made and whether this construction project is a "public work." In reading the little Miller Act liberally to effectuate its purpose to provide protection for those providing work and materials on projects involving public property and to protect public property from liens, I am compelled to conclude that section 255.05, Florida Statutes, would require a performance and payment bond for construction to be undertaken on land owned by the Sanford Airport Authority.

In sum, it is my opinion that a private for-profit party occupying public land pursuant to a long term lease with the Sanford Airport Authority must obtain a performance and payment bond for such construction under section 255.05, Florida Statutes, for construction of improvements which will be owned by the airport authority.

¹ I would note that you posed this question to my office in November 2011 and received an informal response concluding that the ground lease for this property, which contained a provision requiring the lessee Orlando Sanford Airport Southeast Ramp Hangar Development, Inc., to provide a payment and performance bond in accordance with s. 255.05, Fla. Stat., for any improvements made to the property, would control. *See* Inf. Op. to Wright, dated January 3, 2012. You have resubmitted your question and advised this office that the authority is considering a request to remove the provision requiring a performance bond from the lease. Thus, you ask for reconsideration of this question.

² See Ch. 71 924, Laws of Fla., as amended by Ch. 05-306, Laws of Fla.

³ See Ch. 71 924, Laws of Fla.

⁴ See s. 12, Ch. 71 924, supra.

⁵ See Inf. Op. to Rep. Starks, dated March 25, 1997, and concluding that, because the authority was an agency of the city, a position on the airport authority board would be subject to the constitutional dual office-holding

prohibition.

12-12

⁶ See, e.g., Art. XVI, s. 22, Fla. Const. (1885), which provided that "[t]he Legislature shall provide for giving to mechanics and laborers an adequate lien on the subject matter of their labor[,]"and "History," s. 255.05 and Part I, Ch. 713, Fla. Stat.

⁷ See s. 713.001, Fla. Stat., for the short title of Part I, Ch. 713, Fla. Stat. Projects involving real property and the improvements thereon owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision are excluded from coverage under Part I, Ch. 713, Fla. Stat. See s. 713.01(26), Fla. Stat., defining "real property" for purposes of this part to exclude governmental property.

⁸ See American Home Assurance Company v. Plaza Materials Corp., 908 So. 2d 360 (Fla. 2005), Coastal Caisson Drill Co. v. American Casualty Co. of Reading, Pa., 523 So. 2d 791, 793 (Fla. 2d DCA 1988), approved, 542 So. 2d 957 (Fla. 1989); William H. Gulsby, Inc. v. Miller Construction Inc., of Leesburg, 351 So. 2d 396, 397 (Fla. 2d DCA 1977).

⁹ The statute also provides that, in lieu of the bond required by s. 255.05, Fla. Stat., a contractor may file an alternative form of security which may include cash, a money order, a certified check, a cashier's check, or an irrevocable letter of credit. *See* s. 255.05(7), Fla. Stat.

¹⁰ See 40 U.S.C.A. ss. 3131 - 3134 (formerly codified as 40 U.S.C.A. ss. 270a - 270d).

¹¹ Delduca v. U.S. Fidelity & Guarantee Co., 357 F.2d 204, (5th Cir. Fla. 1966), rehearing denied, 362 F.2d 1012 (5th Cir. Fla. 1966). And see City of Ocala v. Continental Casualty Co., 127 So. 326 (Fla. 1930); Collins for Use and Benefit of Dixie Plywood Co. of Tampa v. National Fire Insurance Co. of Hartford, 105 So. 2d 190 (Fla. 2d DCA 1958).

¹² See American Home Assurance Company, supra n.8 at 363; and Coastal Caisson, supra n.8 at 793.

¹³ See Palm Beach County v. Trinity Industries, Inc., 661 So. 2d 942 (Fla. 4th DCA 1995) (county liable to subcontractor which had supplied materials for public guardrail project where estimated annual amount of guardrail contract was \$250,000, where county failed to ensure that contractor post a payment and performance bond before construction commenced, and where contractor had become insolvent, making it impossible for subcontractor to collect on default judgment against contractor) and citing *Warren v. Glens Falls Indem. Co.*, 66 So. 2d 54 (Fla. 1953) and *Pavex Corp. v. Broward County Board of County Commissioners*, 498 So. 2d 1317, 1318 (Fla. 4th DCA 1986), review dismissed, 509 So. 2d 118 (Fla. 1987).

¹⁴ American Home Assurance Company, supra n.8.

¹⁵ See, e.g., Aquatic Plant Management, Inc. v. Paramount Engineering,

Inc., 977 So. 2d 600 (Fla. 4th DCA 2007); Runyon Enterprises, Inc. v. S.T. Wicole Construction Corporation of Florida, Inc., 677 So. 2d 909 (Fla. 4th DCA 1996); Gergora v. R.L. Lapp Forming, Inc., 619 F.2d 387 (1980).

¹⁶ See s. 1, Ch. 6867, Laws of Fla. (1915).

¹⁷ Scarborough v. Carotex Const., Inc., 420 Fed. Appx. 870 (11th Cir. 2011).

¹⁸ United States ex rel. Noland Co. v. Irwin, 316 U.S. 23, 28-30, 62 S.Ct. 899, 902, 86 L.Ed. 1241 (1942).

¹⁹ Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 675 (9th Cir. 1998), cited by the 11th Circuit in Scarborough v. Carotex Const., Inc., 420 Fed. Appx. 870 (11th Cir. 2011).

²⁰ See United States ex rel. Mississippi Road Supply Co. v. H.R. Morgan, Inc., 542 F.2d 262, 265 (5th Cir. 1976), cert. denied, 434 U.S. 828, 98 S.Ct. 106, 54 L.Ed.2d 86 (1977), citing U.S. ex rel. Miller v. Mattingly Bridge Co., 344 F.Supp. 459, 462 (W.D. Ky. 1972), overruled on other grounds, 554 F.2d 164 (5th Cir. 1977); FMI Contracting Corp. v. Fed. Ins. Co., 829 S.W.2d 907 (Tex.App.-Fort Worth 1992) (under the two-pronged test of the Morgan case, this case falls under the Miller Act because of the impossibility of any remedy in state court due to the federal ownership of the land), citing F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 122, 94 S.Ct. 2157 at 2161, 40 L.Ed.2d 703 at 709 (1974).

AGO 12-13 – April 25, 2012

PERMITS – STATE OF EMERGENCY – GOVERNOR – MUNICIPALITIES – DEVELOPMENT

WHETHER MUNICIPALITY'S SITE PLAN APPROVAL CONSTITUTES DEVELOPMENT ORDER FOR PURPOSES OF TOLLING AND EXTENSION

To: Mr. Samuel S. Goren and Mr. Jacob G. Horowitz, Attorneys for the City of Tamarac

QUESTIONS:

1. Does a site plan approval by the City of Tamarac constitute a development order for purposes of section 252.363(1)(a)1., Florida Statutes?

2. If the answer to Question One is in the affirmative, does the City of Tamarac have an affirmative obligation to take action extending the site plan approval pursuant to section 252.363(1)(a), Florida Statutes, or does the extension occur as a matter of law without any municipal action or confirmation?

SUMMARY:

1. Section 252.363, Florida Statutes, contains no definition of the term "development order" and no statutory definition of the term "development order" includes a "site plan approval." In determining what may constitute a development order, Florida courts have looked to local codes. However, the City of Tamarac Code contains provisions which appear to be contradictory and this office cannot interpret local codes or resolve inconsistencies in local legislative language.

2. Section 252.363, Florida Statutes, contains no direction or authority to a municipality to take affirmative action to extend a permit or other authorization. Rather, the burden of seeking an extension falls to the holder of the permit who must provide written notification to the issuing authority of his or her intention to exercise the tolling and extension of a qualifying permit granted under the statute.

QUESTION 1.

Section 252.363, Florida Statutes, was created in section 494, Chapter 2011-142, Laws of Florida, and tolls and extends the expiration of development permits during and following a state of emergency declared by the Governor. The act became effective July 1, 2011,¹ and provides, in part:

(1)(a) The declaration of a state of emergency by the Governor tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 6 months in addition to the tolled period. This paragraph applies to the following:

1. The expiration of a development order issued by a local government.

2. The expiration of a building permit.

3. The expiration of a permit issued by the Department of Environmental Protection or a water management district pursuant to part IV of chapter 373.

4. The buildout date of a development of regional impact, including any extension of a buildout date that was previously

granted pursuant to s. 380.06(19)(c).

(b) Within 90 days after the termination of the emergency declaration, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.

(c) If the permit or other authorization for a phased construction project is extended, the commencement and completion dates for any required mitigation are extended such that the mitigation activities occur in the same timeframe relative to the phase as originally permitted.

(d) This subsection does not apply to:

1. A permit or other authorization for a building, improvement, or development located outside the geographic area for which the declaration of a state of emergency applies.

2. A permit or other authorization under any programmatic or regional general permit issued by the Army Corps of Engineers.

3. The holder of a permit or other authorization who is determined by the authorizing agency to be in significant noncompliance with the conditions of the permit or other authorization through the issuance of a warning letter or notice of violation, the initiation of formal enforcement, or an equivalent action.

4. A permit or other authorization that is subject to a court order specifying an expiration date or buildout date that would be in conflict with the extensions granted in this section. (e.s.)

Section 252.363, Florida Statutes, requires the tolling and extension of development orders following the declaration of a state of emergency by the Governor.

While the term "development order" is not defined for purposes of section 252.363, Florida Statutes, that phrase is defined elsewhere in the statutes for land development and building construction purposes. In the absence of specific direction by the Legislature, a definition of the phrase "development order" contained in other land development statutes may be helpful in delineating what may be considered a development order within the scope of section 252.363(1)(a)1., Florida Statutes.²

Part II, Chapter 163, Florida Statutes, is the "Community Planning

Act," the purpose of which is to

utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and manage future development consistent with the proper role of local government.³

In this context, the act defines a "development order" as "any order granting, denying, or granting with conditions an application for a development permit."⁴ A "[d]evelopment permit," for purposes of the "Community Planning Act"⁵ "includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land."⁶ Similarly, a "development order" is defined in "The Florida Environmental Land and Water Management Act of 1972,"⁷ as "any order granting, denying, or granting with conditions an application for a development permit."⁸ Section 380.031(4), Florida Statutes, defines a "[d]evelopment permit" as any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this chapter." None of these definitions specifically contains "site plan approval" within its terms.

In a recent case, the Fourth District Court of Appeal looked to local code definitions to determine whether a city's actions in approving a revised plat constituted a development order subject to challenge pursuant to the statute governing standing to enforce local comprehensive plans. In *Graves v. City of Pompano Beach*,⁹ a group of citizens brought a declaratory judgment action seeking a declaration that the city's revised plat approval was inconsistent with the city's comprehensive plan. The City of Pompano Beach land development code adopted the statutory definition for "development order," but also extended the definition of a "development permit" to include plat approval. The court relied on a review and consideration of the development rights consequent to a plat approval under the city's land development code, to find that the plat approval by the City of Pompano Beach was a "development order."¹⁰

The City of Tamarac code defines a "site plan" as a technical submission presented "prior to filing for any development permit[.]"¹¹ However, the code also includes, within this same section, a definition of the term "development permit" which specifically includes a "site plan approval."¹² Thus, the City of Tamarac code contains inconsistent provisions regarding whether a site plan approval may constitute a development order under the provisions of the code. This office has no authority to interpret local codes and cannot advise you which of these definitions would control a determination of whether a site plan approval under the City of Tamarac code would be a "development order"¹³ as that term is used in section 252.363(1)(a)1., Florida Statutes. Nor can this

office resolve mixed questions of law and fact and determine whether a "site plan approval" under the City of Tamarac code would, in effect, be an "official action . . . having the effect of permitting the development of land"¹⁴ for purposes of the code.¹⁵

QUESTION 2.

You have also asked whether the city has an affirmative obligation to take action extending development orders pursuant to section 252.363(1)(a), or whether the tolling and extension described in the statute operate as a matter of law.

Section 252.363(1), Florida Statutes, provides that

(b) Within 90 days after the termination of the emergency declaration, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.

(c) If the permit or other authorization for a phased construction project is extended, the commencement and completion dates for any required mitigation are extended such that the mitigation activities occur in the same timeframe relative to the phase as originally permitted.

Nothing in the statute imposes an obligation on the municipality to take any action extending development orders, rather, it appears that the Legislature intended to place that burden on the holder of the permit who must provide written notification to the issuing authority of his or her intent to exercise the tolling and extension of the statute.

As specifically provided in section 252.363(2), Florida Statutes, any permit or other authorization that is the subject of an extension is governed by the laws, administrative rules, and ordinances which were in effect when the permit was issued.

Thus, it is my opinion that the City of Tamarac has no affirmative obligation to take action extending the site plan approval pursuant to section 252.363(1)(a), Florida Statutes, rather, the extension occurs as a matter of law in response to a written notification of intent to exercise the tolling and extension granted by the statute.

¹ See s. 528, Ch. 2011-142, Laws of Fla.

² See Krause v. Reno, 366 So. 2d 1244 (Fla. 3d DCA 1979) (lack of definition for "agency" in Sunshine Law, s. 286.011, Fla. Stat., allows

court to look to similar or analogous statutory provisions which give effect to the same public policy underlying the Sunshine Law.); Ops. Att'y Gen. Fla. 09-38 (2009) and 95-14 (1995) (definitions of terms in related statutes may be reviewed to determine meaning).

- ³ Section 163.3161(2), Fla. Stat.
- ⁴ Section 163.3164(15), Fla. Stat.
- ⁵ See s. 163.3161, Fla. Stat., for the short title.
- ⁶ Section 163.3164(16), Fla. Stat.
- ⁷ Section 380.012, Fla. Stat., for the short title of the act.
- ⁸ Section 380.031(3), Fla. Stat.
- ⁹ Graves v. City of Pompano Beach, 74 So. 3d 595 (Fla. 4th DCA 2011).

¹⁰ And see Judge Gerber's dissent in Graves v. City of Pompano Beach, 74 So. 3d at 599, in which he argues that the statutory definition of "development permit" in s. 163.3164, Fla. Stat., which does not contain a plat approval within its scope, would not permit the development of land and would, thus, not constitute a "development order" within the scope of the statute. Judge Gerber's dissent argues that the statutory definition controls over the city's provision and that, by adding the city's definition of "development permit" to s. 163.3164's definition, the court has broadened the cause of action beyond that which the Legislature intended.

¹¹ See s. 10-1, Art. I, Part I, Code of Ordinances, City of Tamarac.

 12 Id.

¹³ See s. 16.01(3), Fla. Stat., prescribing the authority of the Attorney General to issue opinions on questions of state law.

¹⁴ See the definition of "development permit" for purposes of Part II, Art., I, s. 10-1, Code of Ordinances, City of Tamarac. And see Graves v. City of Pompano Beach, 74 So. 3d 595 (Fla. 4th DCA 2011).

¹⁵ *Cf. Graves v. City of Pompano Beach*, 74 So. 3d 595 (Fla. 4th DCA 2011) (in which the court, on rehearing, reviewed and considered the development rights consequent to a plat approval under the city land development code and found that the plant approval in that case did constitute a development order under provisions of s. 163.3215(3), Fla. Stat.).

AGO 12-14 – April 25, 2012

CODE ENFORCEMENT OFFICERS – COUNTIES – LAW ENFORCEMENT OFFICERS – FIREARMS

CODE ENFORCEMENT OFFICER NOT AUTHORIZED TO CARRY FIREARMS WITHIN SCOPE OF DUTY AS CODE ENFORCEMENT OFFICER; HOWEVER, LAW ENFORCEMENT OFFICER DESIGNATED AS A CODE ENFORCEMENT OFFICER MAY CARRY FIREARM IN CARRYING OUT LAW ENFORCEMENT DUTIES

To: Ms. Alison P. Rogers, Escambia County Attorney

QUESTIONS:

1. May Escambia County authorize its code enforcement officers acting pursuant to Chapter 162, Florida Statutes, to openly carry firearms in the scope of their employment?

2. If so, is permission of the sheriff also required?

3. If a code enforcement officer has been trained and registered as a law enforcement officer in the county's "Original Agency Identifier" account, may the county employ them with all the entitlements of a law enforcement officer under Florida law?

SUMMARY:

1. A code enforcement officer is not authorized to carry a firearm within the scope of his or her employment. Should a code enforcement officer also be certified as a law enforcement officer, the carrying of a firearm would be attendant to the individual's status as a law enforcement officer, not as a code enforcement officer.

2. In light of the answer to your first question, no further comment is necessary.

3. A law enforcement officer employed as a code enforcement officer is not acting as a law enforcement officer and would not, therefore, be entitled to the benefits extended to law enforcement officers under Florida Law.

In light of the interrelated nature of your questions, they will be addressed together.

You state that Escambia County is a non-charter county. The Escambia County Board of County Commissioners has a code enforcement division which employs several officers who enforce the county code and provide environmental code enforcement within the unincorporated portion of the county. The county has adopted the procedures in Chapter 162, Florida Statutes, for the enforcement of its code and employs a special magistrate to hear code enforcement cases. The code enforcement officers do not carry firearms at this time, but due to safety concerns, the board wishes to investigate the ability of such officers to do so.¹ According to your letter, the county uses the provisions of Chapter 162, Florida Statutes, particularly sections 162.21-162.30 to enforce its code provisions.

Chapter 162, Part I, Florida Statutes, authorizes cities and counties by ordinance to create code enforcement boards for the enforcement of their local codes.² The provisions in that part, however, are a supplemental means of obtaining compliance with local codes and "[n]othing contained in ss. 162.01-162.12 shall prohibit a local governing body from enforcing its codes by any other means."³ The chapter contemplates a procedure for the enforcement of local codes and ordinances through the imposition of administrative fines and other *noncriminal* penalties.⁴

A "code inspector" is defined as "any authorized agent or employee of the county or municipality whose duty it is to assure code compliance."⁵ It is the duty of the code inspector to initiate enforcement proceedings before the code enforcement board.⁶ The code inspector notifies a violator of a violation and gives him a reasonable time to correct it. If the violation continues, the inspector notifies the code enforcement board and requests a hearing. The remainder of the enforcement procedure is carried out by the code enforcement board.⁷

Chapter 162, Part II, Florida Statutes, sets forth further procedures for the enforcement of county or municipal codes. Section 162.21(2), Florida Statutes, provides:

A county or a municipality may designate certain of its employees or agents as code enforcement officers. The training and qualifications of the employees or agents for such designation shall be determined by the county or municipality. Employees or agents who may be designated as code enforcement officers may include, but are not limited to, code inspectors, *law enforcement officers*, animal control officers, or firesafety inspectors. Designation as a code enforcement officer does not provide the code enforcement officer with the power of arrest or subject the code enforcement officer to the provisions of ss. 943.085-943.255.... (e.s.)

The inclusion of law enforcement officers in the list of employees or agents who may be appointed as code enforcement officers indicates that there is a distinction between the positions.⁸ Furthermore, the statute makes it clear that designation as a code enforcement officer does not provide such individual with the power of arrest or subject him or her to the requirements of the Criminal Justice Standards and Training Commission.⁹

While this office does not interpret local codes and ordinances, I would note that the Escambia County Code of Ordinances states that a "[c]ode enforcement officer means any designated employee or agent of the county whose duty it is to enforce codes through the issuance of citations as provided in F.S. ch. 162, pt. II."¹⁰

As you have indicated, certain code enforcement officers employed by the county possess the qualifications for a law enforcement officer pursuant to section 943.13, Florida Statutes; however, it would appear that the job which they perform is enforcement of the county's code, the violation of which is a civil infraction subject to a civil penalty.¹¹ This office has recognized that a law enforcement officer is distinguishable from a code enforcement officer since the law enforcement officer is enforcing the criminal laws of this state.¹²

In Attorney General Opinion 97-12, this office was asked whether a city's designation of one of its police officers to also serve as a code enforcement officer authorized the officer to carry firearms and make arrests as a code enforcement officer. While municipalities do not have home rule powers to grant non-law enforcement personnel the power to make arrests, carry firearms, and conduct searches and seizures,¹³ the opinion recognized that code enforcement statutes do not prevent a law enforcement officer designated as a code enforcement officer from exercising his or her authority as a law enforcement officer. The opinion noted that if the police officer, while carrying out duties of a code enforcement officer, observes an offense for which an arrest may be made, he or she may make such an arrest. However, since a code enforcement officer has no authority to carry firearms or to make arrests, the officer in making an arrest or carrying a firearm while carrying out code enforcement duties "was doing so as a municipal police officer" and not as a code enforcement officer.14

The courts of this state and this office have recognized that the Legislature has preempted the field of firearms regulation.¹⁵ Any ordinance or regulation attempting to regulate firearms is stated to be null and void when enacted by jurisdictions other than the state or the federal government.¹⁶ Thus, the lawful possession of a firearm by a particular officer or employee in performing his or her duties must be authorized by the Legislature.

In light of the foregoing discussion, it is clear that a law enforcement officer employed as a code enforcement officer is not acting as a law enforcement officer when he or she is carrying out the duties of the code enforcement officer. Furthermore, section 162.21(2), Florida Statutes, as noted above, clearly indicates that designation as a code enforcement officer does not entitle the individual to the benefits extended to law enforcement officers under Florida law. I would also note that the Legislature has not included code enforcement officers in those positions specified as "special risk class" under the Florida Retirement System.¹⁷ Accordingly, it is my opinion that a code enforcement officer is not authorized to carry a firearm within the scope of his or her employment nor participate in benefits extended to law enforcement officers under Florida law. However, a code enforcement officer who is a certified law enforcement officer, carries a firearm attendant to his or her status as a law enforcement officer, not as a code enforcement officer.

- ² See s. 162.03, Fla. Stat.
- ³ Section 162.13, Fla. Stat.
- ⁴ See s. 162.02, Fla. Stat.
- ⁵ Section 162.04(2), Fla. Stat.
- ⁶ Section 162.06(1), Fla. Stat.
- ⁷ Sections 162.06-162.08, Fla. Stat.

⁸ See City of North Miami v. Miami Herald Publishing Co., 468 So. 2d 218, 220 (Fla. 1985) (in construing legislation, it is not assumed that the Legislature acted pointlessly or enacted useless legislation).

- ⁹ Section 162.21(2), Fla. Stat.
- ¹⁰ Section 30-4, Escambia County Code of Ordinances.

¹¹ See s. 30-64, Escambia County of Ordinances, Enforcement by citation, providing:

The county code or any ordinance may be enforced using the citation procedure. When the citation procedure is used to enforce county codes and ordinances, the following will apply:

(1) A violation of the code or ordinance is deemed a *civil* infraction.

(2) A maximum *civil penalty* not to exceed \$500.00 may be imposed.

(3) A civil penalty of less than the maximum civil penalty established by the board of county commissioners may be imposed if the person who has committed the civil infraction does not contest the citation.

(4) A citation may be issued by a code enforcement officer who has reasonable cause to believe that a person has committed an act in violation of a code or ordinance.

(5) A citation may be contested in county court.

¹ You indicate that previously some of the county's code enforcement officers were deputized by the sheriff and were certified law enforcement officers; however, the sheriff revoked the deputy privileges, but the officers continue to maintain their law enforcement training.

(6) Such procedures and provisions as are necessary to enforce county codes and ordinances. (e.s.)

¹² See Op. Att'y Gen. Fla. 94-40 (1994) (absent legislative authorization for code enforcement officers to possess law enforcement powers or allowing a municipality to delegate such powers to a non-law enforcement agent or employee, a municipality may not grant law enforcement powers to its code enforcement officers). See also s. 943.10(1), Fla. Stat., defining "[l]aw enforcement officer" as "any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with the authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state." (e.s.)

¹³ See Op. Att'y Gen. Fla. 81-38 (1981) (municipality has no home rule power to grant members of its fire department or its fire officials authority to serve summonses or criminal process, make arrests, carry firearms, and make searches and seizures, or make affidavits necessary to authorize arrests and searches and seizures, as a sheriff or his deputies may do, in connection with the enforcement of its fire prevention code or the enforcement of Ch. 633, Fla. Stat.). And see Op. Att'y Gen. Fla. 82-12 (1982) (power to create appointive office does not include power to vest officer with powers of a law enforcement officer).

¹⁴ See also Op. Att'y Gen. Fla. 94-40 (1994) (absent legislative authorization for code enforcement officers to possess law enforcement powers or allowing a municipality to delegate such powers to a nonlaw enforcement agent or employee, a municipality may not grant law enforcement powers to its code enforcement officers).

¹⁵ See Penelas v. Arms Technology, Inc., 778 So. 2d 1042 (Fla. 3d DCA 2011), review denied, 799 So. 2d 218 (Fla. 2001); National Rifle Association of America, Inc. v. City of South Miami, 812 So. 2d 504 (Fla. 3d DCA 2002); Ops. Att'y Gen. Fla. 11-20 (2011), 11-17 (2011), and 08-34 (2008).

¹⁶ Section 790.33(2)(a), Fla. Stat.

¹⁷ See s. 121.0515(3), Fla. Stat., designating law enforcement officers, firefighters, correctional officers, emergency medical technicians or paramedics, community-based correctional probation officers, select positions which require spending at least 75 percent of time performing duties involving contact with patients or inmates in a correctional or forensic facility or institution, youth custody officers, specified employees of the Department of Law Enforcement in the crime laboratory or the Division of State Fire Marshal in the forensic laboratory, and specified employees (and direct supervisors) of a local government law enforcement agency or medical examiner's office spending at least 65 percent of time performing duties involving the collection, examination, preservation, documentation, preparation, or analysis of human tissues or fluids or physical evidence having potential biological, chemical, or radiological

hazard or contamination, or using chemicals, processes, or materials that may have carcinogenic or health-damaging properties in the analysis of such evidence.

However, subsection (4) of the statute provides a procedure for designating a position as "special risk" by the Florida Department of Management Services, when any member of the Florida Retirement System employed by a county, municipality, or special district feels that his or her position meets the criteria set forth for membership in the Special Risk Class; the individual requests the employer to submit an application to the department requesting "special risk" designation. If the employer agrees that the member meets the requirements for Special Risk Class membership, the employer must submit an application to the department on behalf of the employee containing a certification that the member meets the criteria for Special Risk Class membership set forth in s. 121.0515, Fla. Stat., and such other supporting documentation as may be required by administrative rule. The department shall, within 90 days, designate or refuse to designate the member as a special risk member. If the employer declines to submit the member's application to the department or if the department does not designate the member as a special risk member, the member or the employer may appeal to the State Retirement Commission, as provided in s. 121.23, Fla. Stat., for designation as a special risk member.

AGO 12-15 – April 25, 2012

PROPERTY APPRAISER – EDUCATIONAL PROPERTY – PERSONS

WHETHER TAX EXEMPTION FOR EDUCATIONAL PROPERTY IS AVAILABLE WHEN SCHOOL OWNED BY DIFFERENT PERSON THAN REAL PROPERTY

To: The Honorable Kenneth M. Wilkinson, Lee County Property Appraiser

QUESTION:

Is land deemed "owned by an educational institution" for purposes of an educational exemption from taxation under section 196.198, Florida Statutes, where the school is owned by a corporate entity and the land owned by a different corporate entity and the same two people are the sole members in both entities?

SUMMARY:

An educational exemption from taxation is not available pursuant to section 196.198, Florida Statutes, where the

educational institution is owned by a corporate entity and the real property is owned by a different corporate entity although the same two people are the sole members of both entities.

According to information submitted with your request, School, LLC, operates a private school on real property leased from Land, LLC. Mr. and Mrs. Jones are the sole members of School, LLC, and Land, LLC. The property is used exclusively for educational purposes. Land, LLC, has applied for an educational exemption from ad valorem taxation. The Lee County Property Appraiser does not believe Land, LLC, qualifies for the exemption because the school is not owned by the "identical persons who own the property" since Land, LLC, owns the property, but owns no part of the school. As discussed more fully herein, this office concurs in Mr. Wilkinson's determination.

All property in this state is subject to taxation unless it is expressly exempted.¹ The specification of permissible exemptions to ad valorem taxation in the Florida Constitution excludes any other exemptions.² Section 196.001, Florida Statutes, implements these constitutional directives. The statute is entitled "Property subject to taxation," and states:

Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:

(1) All real and personal property in this state and all personal property belonging to persons residing in this state; and

(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.

In claiming an exemption from taxation, the burden is on the claimant to show clearly any entitlement to tax exemption.³ The rule is that all property is subject to taxation unless expressly exempted and such exemptions are strictly construed against the party claiming them.⁴

Section 196.198, Florida Statutes, provides the exemption from taxation for educational property. In relevant part, the statute provides:

Educational institutions within this state and their property used by them or by any other exempt entity or educational institution exclusively for educational purposes shall be exempt from taxation . . . Property used exclusively for educational purposes shall be deemed owned by an educational institution if the entity owning 100 percent of the educational institution is owned by the identical persons who own the property. . . . You ask whether this statutory language would allow the granting of a property tax exemption to the private school property operated by School, LLC, and owned by Land, LLC. While it is clear from your letter that the same two people are the sole members of both School, LLC, and Land, LLC, the statute requires that the entity owning 100 percent of the educational institution, School, LLC, must be owned by the identical persons who own the property, that is Land, LLC.

"Persons" in this context may mean not only individuals but corporations and other business entities. The term "persons" is not defined for use in Chapter 196, Florida Statutes. However, section 1.01, Florida Statutes, provides a general definition of the term "person," as it may be used throughout the statutes (in the absence of a more specific definition), which "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."⁵ Thus, section 196.198, Florida Statutes, requires the identical business entity to own the educational institution and the property upon which it is located.

In the fact situation you have described, Land, LLC, and School, LLC, are not the identical "person" but are individual, independently incorporated entities. While the same two people are the sole members of both limited liability corporations, the corporations or "persons" are separate and distinct and not "the identical persons" as required by section 196.198, Florida Statutes. Exemptions to taxation statutes are strictly construed against the party claiming them, that is, Mr. and Mrs. Jones, and I cannot conclude, based on the information you have presented, that an educational exemption may be granted under these circumstances.

Thus, it is my opinion that an educational exemption from taxation is not available pursuant to section 196.198, Florida Statutes, where the educational institution is owned by a corporate entity and the real property is owned by a different corporate entity although the same two people are the sole members of both entities.

¹ See Art. VII, ss. 3 and 4, Fla. Const.; s. 196.001, Fla. Stat.; Colding v. Herzog, 467 So. 2d 980 (Fla. 1985).

² See Art. VII, s. 3, Fla. Const.; Sebring Airport Authority v. McIntyre, 718 So. 2d 296 (Fla. 2d DCA 1998), affirmed, 783 So. 2d 238 (Fla. 2001).

³ Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 at 501 (Fla. 1976), appeal dismissed, 98 S.Ct. 32, 434 U.S. 804, 54 L. Ed. 2d 61 (1977).

⁴ See State ex rel. Wedgworth Farms, Inc. v. Thompson, 101 So. 2d 381 (Fla. 1958); Volusia County v. Daytona Beach Racing and Recreational

Facilities District, 341 So. 2d 498 (1976), *appeal dismissed*, 98 S.Ct. 32, 434 U.S. 804, 54 L. Ed. 2d 61 (1977); *Williams v. Jones*, 326 So. 2d 425 (1975), *appeal dismissed*, 97 S.Ct 34, 429 U.S. 803, 50 L. Ed. 2d 63 (1976).

 5 And see ss. 198.01(3) and 211.01(15), Fla. Stat., both of which define "person" for purposes of taxation statutes and include business entities within those definitions.

AGO 12-16 – April 25, 2012

PROPERTY APPRAISER – TAXATION – EXEMPTIONS – VETERANS

DOCUMENTATION REQUIRED FOR VETERAN'S ELIGIBILITY FOR TOTAL EXEMPTION

To: Ms. Ana C. Torres, Attorney for the Suwannee County Property Appraiser

QUESTIONS:

1. What documentation certifies that a veteran is "totally and permanently" disabled due to a service-connected disability, which is necessary to establish prima facie evidence of eligibility for the exemption under section 196.081(1)?

2. Because the Department of Veterans' Affairs only issues letter VAFL 27-333 to certify that a veteran is "totally and permanently" disabled due to a service-connected disability and eligible for the exemption under section 196.081(1), does a property appraiser have any authority to rely on documentation other than letter VAFL 27-333?¹

3. If the answer to question 2 is in the affirmative, what documentation, other than letter VAFL 27-333, is sufficient to certify that a veteran is "totally and permanently" disabled due to a service-connected disability and eligible for the exemption under section 196.081(1)?

SUMMARY:

The VAFL 27-333 letter issued by United States Department of Veterans Affairs certifying that a veteran is "totally and permanently" disabled due to a service-connected disability is not the only documentation that may be accepted by a property appraiser in determining the eligibility of a veteran for the exemption afforded by section 196.081(1), Florida Statutes. While this office cannot list what documents may or may not be acceptable to establish eligibility, the statute requires that there must be a letter from the United States Government or from the Department of Veterans Affairs (or its predecessor) certifying that the veteran is totally and permanently disabled from a service-connected disability. Whether a letter provided by the United States Government or the United States Department of Veterans Affairs in any given instance is sufficient to satisfy such a requirement is a determination that must be made by the property appraiser on a case-by-case basis.

As your questions are interrelated, they will be answered together.

Section 196.081(1), Florida Statutes, provides:

Any real estate that is owned and used as a homestead by a veteran who was honorably discharged with a *service-connected total and permanent disability* and for whom a letter from the United States Government or United States Department of Veterans Affairs or its predecessor has been issued certifying that the veteran is totally and permanently disabled is exempt from taxation, if the veteran is a permanent resident of this state on January 1 of the tax year for which exemption is being claimed or was a permanent resident of this state on January 1 of the year the veteran died.² (e.s.)

The process for applying for an exemption under this section is described in section 196.011, Florida Statutes.³ During the 2012 regular session, legislation was passed that would permit an applicant for the exemption under this section to apply for the exemption before receiving the necessary documentation from the United States Government or the United States Department of Veterans Affairs or its predecessor.⁴

To implement the provisions of section 196.081, Florida Statutes, the Department of Revenue has adopted Rule 12D-7.004, Florida Administrative Code, which provides in pertinent part:

The veteran, his or her spouse, or surviving spouse must have a letter from the United States Government or from the United States Department of Veterans Affairs or its predecessor certifying that the veteran has a service-connected total and permanent disability or that the death of the veteran resulted from service-connected causes while on active duty.⁵

You note that the Department of Revenue has stated that an identification card issued by the State of Florida Department of Veterans' Affairs could not be used as proof of eligibility for the disability exemption afforded by section 196.081, Florida Statutes.⁶ The letter notes the language of section 196.081 referring to a letter from the *United States* Government or *United States* Department of

Veterans Affairs or its predecessor as well as the language of section 295.17, Florida Statutes, which provides that the state card "may be used by the veteran as proof of eligibility for any benefit provided by state law for 100-percent, service-connected permanently and totally disabled veterans *except those benefits provided by ss. 196.081*, 196.091, and 196.24."⁷ (e.s.)

You refer to VAFL 27-333, which you state is the only letter issued by the Department of Veterans' Affairs to certify that a veteran is "totally and permanently" disabled with a service-connected disability.⁸ You, therefore, question whether a property appraiser may accept any documentation other than VAFL 27-333 in granting an exemption for a total and permanent service-connected disability.

As noted above, both the statute and the rule refer to a letter certifying the veteran's service-connected total and permanent disability from the "the United States Government or United States Department of Veterans Affairs or its predecessor." (e.s.) Had the Legislature intended to require that only such certification letters be issued by the U.S. Department of Veterans Affairs, it could have easily done so, but it did not. The word "or" is generally construed in the disjunctive when used in a statute or rule and normally indicates that alternatives were intended.⁹ Moreover, statutory language is not to be assumed to be surplusage; rather a statute is to be construed to give meaning to all words and phrases contained within statute.¹⁰ To read the phrase "United States Government" as referring only to the United States Department of Veterans Affairs would render the phrase meaningless. The statute thus recognizes that a letter certifying a veteran's serviceconnected total and permanent disability may come from the United States Government as well as from the United States Department of Veterans Affairs or its predecessor.

Accordingly, I am of the opinion that the VAFL 27-333 letter issued by the United States Department of Veterans Affairs to certify that a veteran is "totally and permanently" disabled due to a service-connected disability is not the only documentation that may be accepted by a property appraiser in determining the eligibility of a veteran for the exemption afforded by section 196.081(1), Florida Statutes.

Your first and third questions concern the documentation necessary to establish evidence of eligibility for the exemption under section 196.081(1), Florida Statutes. The statute requires a letter from the United States Government or from the United States Department of Veterans Affairs (or its predecessor) certifying that the veteran is totally and permanently disabled from a service-connected disability.¹¹ Pursuant to section 196.081(2), Florida Statutes, the production by a veteran or the spouse or surviving spouse of a letter of total and permanent disability from the United States Government or United States Department of Veterans Affairs or its predecessor before the property appraiser is prima facie evidence of the fact that the veteran or the surviving spouse is entitled to the exemption. This office, however, cannot list what documents may or may not be acceptable to establish eligibility. Moreover, whether a letter from the United States Government or the United States Department of Veterans Affairs (or its predecessor) presented to the property appraiser contains sufficient information to constitute a certification of "total and permanent disability" is a determination that must be made by the property appraiser on a case-by-case basis.

² See Art. VII, s. 3(b), Fla. Const., which provides in pertinent part that "[t]here shall be exempt from taxation . . . to every widow or widower or person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five hundred dollars." This provision contemplates that legislative implementation be done by general law. Section 196.081, Fla. Stat., constitutes such an implementation of this constitutional provision. See Op. Att'y Gen. Fla. 76-228 (1976).

³ See s. 196.011, Fla. Stat., which provides:

Every person or organization who, on January 1, has the legal title to real or personal property, except inventory, which is entitled by law to exemption from taxation as a result of its ownership and use shall, on or before March 1 of each year, file an application for exemption with the county property appraiser, listing and describing the property for which exemption is claimed and certifying its ownership and use. The Department of Revenue shall prescribe the forms upon which the application is made. Failure to make application, when required, on or before March 1 of any year shall constitute a waiver of the exemption privilege for that year, except as provided in subsection (7) or subsection (8).

The provisions of s. 196.011, Fla. Stat., are clearly applicable to veterans claiming an exemption under s. 196.081, Fla. Stat. *See, e.g.*, s. 196.011(1)(b), Fla. Stat.

⁴ See s. 19, HB 7097 (2012 regular session) which provides that upon receipt of the documentation, the exemption shall be granted as of the date of the original application, and the excess taxes paid shall be refunded. Any refund of excess taxes paid shall be limited to those paid during the 4-year period of limitation set forth in s. 197.182(1)(e), Fla. Stat. The act was ordered engrossed, then enrolled on March 9, 2012, Fla. House Journal at 1651.

¹ While your letter states that the Florida Department of Veterans' Affairs issues VAFL 27-333, the letter is issued by the U.S. Department of Veterans Affairs, not the Florida Department of Veterans' Affairs. VAFL 27-333 is issued by the federal agency for use in Florida.

⁵ Rule 12D-7.004(2), Fla. Admin. C.

⁶ Florida Dept. of Revenue Property Tax Oversight Advisement Letter, OPN 93-0049, dated October 19, 1993.

⁷ And see Rule 55A-1.001(3), Fla. Admin. C., providing in part:

The following benefits require additional proof of eligibility and are *not* included in the benefits for which the identification card provides proof of eligibility:

(a) Real estate that is used and owned as a homestead by an eligible veteran that is exempt from taxation pursuant to the provisions of Section 196.081 or 196.091, Florida Statutes. (e.s.)

⁸ As noted *supra*, the VAFL 27-333 letter is issued by the U.S. Department of Veterans Affairs for use in Florida.

⁹ See, e.g., Sparkman v. McClure, 498 So. 2d 892 (Fla. 1986); Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers, 334 So. 2d 563 (Fla. 1976); Fort Walton Beach Medical Center, Inc. v. Dingler, 697 So. 2d 575 (Fla. 1st DCA 1997); Linkous v. Department of Professional Regulation, 417 So. 2d 802 (Fla. 5th DCA 1982); Ops. Att'y Gen. Fla. 00-06 (2000) (use of the term "or" in a statute is generally construed to be disjunctive, indicating that alternatives were intended).

¹⁰ See, e.g., Terrinoni v. Westward Ho!, 418 So. 2d 1143 (Fla. 1st DCA 1982); Unruh v. State, 669 So. 2d 242 (Fla. 1996) (as a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless); Ops. Att'y Gen. Fla. 95-27 (1995) and 91-11 (1991) (statute must be construed so as to give meaning to all words and phrases contained within that statute).

¹¹ This office has been advised by the Florida Department of Veterans' Affairs, Division of Benefits and Assistance, that, for example, in some cases a branch of the U.S. armed forces has provided such a certification to a veteran.

AGO 12-17 - May 17, 2012

DUAL OFFICE-HOLDING – SPECIAL MAGISTRATES – VALUE ADJUSTMENT BOARDS – HEARING OFFICERS – MUNICIPALITIES

VALUE ADJUSTMENT BOARD SPECIAL MAGISTRATE APPOINTED FOR CALENDAR YEAR MAY NOT HOLD OTHER OFFICE To: Ms. Rinky S. Parwani, Legal Counsel, Hillsborough County Value Adjustment Board

QUESTION:

May a special magistrate appointed for a calendar year for the county value adjustment board serve as a city's hearing officer without violating the constitutional dual office-holding prohibition in section 5(a), Article II, Florida Constitution, if the hearings for each governmental agency are conducted in different months of the year and not simultaneously?

SUMMARY:

A special magistrate appointed for a calendar year for the county value adjustment board may not also serve as a city's hearing officer, irrespective of whether the officer is simultaneously conducting hearings during the term of office, without violating the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.

You pose the situation where a value adjustment board special magistrate who is appointed by Hillsborough County for a calendar year would be appointed as a hearing officer for a city in a different county and the hearings for each governmental entity would be conducted in different months and, therefore, not simultaneously. In this scenario, the special magistrate for the value adjustment board would have completed all hearings for petitions for the contract year, then begin hearings for the city.¹

Initially, I would note that section 194.035(1), Florida Statutes, states that special magistrates may not be elected or appointed officials or employees of the county and further precludes employees and elected or appointed officials of a taxing jurisdiction or of the state from serving as special magistrates. This contemplates a broader prohibition than mere dual office-holding in that employees of a county, taxing jurisdiction, or the state may not serve as special magistrates for the value adjustment board. Your question, however, appears to pose a more particular distinction for a special magistrate who has completed the hearings for the value adjustment board for the year, but still holds the position of special magistrate.

Section 5(a), Article II, Florida Constitution, provides:

No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

This constitutional provision prohibits a person from simultaneously holding more than one "office" under the government of the state and the counties and municipalities. The terms "office" or "officer" are not defined and no distinction is made between part-time or full-time officers, nor is any exception made therefor.² The Florida Supreme Court in *State ex rel. Holloway v. Sheats*,³ stated that the term "office," "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office[.]"⁴

In the instant situation, the authority to conduct hearings as a special magistrate for the value adjustment board is inherent to the position and is held by the individual regardless of whether the special magistrate is in the process of conducting a hearing. Such authority does not cease to exist when the special magistrate concludes a hearing or conducts hearings on a part-time basis, but rather is attendant to holding the office and remains at the officer's disposal for the term of the office.⁵ The powers and duties of a special master, therefore, are not confined by the time period during which he or she is conducting hearings. Rather, a special magistrate is an officer at all times during his or her term of office.⁶ The same would hold true for an individual appointed as a municipal hearing officer.

While Florida courts have recognized a limited exception to the dual office-holding prohibition for law enforcement officers who are temporarily assigned to perform law enforcement duties without remuneration for another law enforcement agency,⁷ the exception deals with the performance of additional law enforcement functions and duties in a police capacity and not the exercise of governmental power or performance of official duties for another governmental board or entity exercising and performing quasi-judicial powers and duties. Moreover, the exemption only applies when the officer performs the additional duties without remuneration.

Accordingly, it is my opinion that a value adjustment board special magistrate who has been appointed for a calendar year may not also serve as a hearing officer for a municipality in another county, despite the fact that the individual in his or her capacity in each office would not be conducting hearings for both offices during the same time period.

¹ This office has determined that a special magistrate for a value adjustment board is an officer for purposes of the dual office-holding prohibition. See Op. Att'y Gen. Fla. 96-91 (1996) (special master appointed pursuant to s. 194.035, Fla. Stat., is an officer). It is assumed for purposes of this discussion that the hearing officer for the city is an officer subject to the prohibition. Cf. Inf. Op. to Ms. Susan H. Bingham,

dated April 12, 1999, in which it was advised that simultaneous service as a traffic court hearing officer and a municipal administrative hearing master would violate the dual office-holding prohibition.

² *Compare* s. 5(a), Art. II, *supra*, excepting from its terms notaries public, military officers, members of a constitutional revision commission, constitutional convention, or statutory body having only advisory powers.

- ³ 83 So. 508 (Fla. 1919).
- 4 Id. at 509.

⁵ *Cf.* Ops. Att'y Gen. Fla. 77-63 (1977) (non-salaried, part-time, certified auxiliary or reserve police officer is an "officer" within the purview of the constitutional dual office-holding prohibition); 86-105 (1986) (citizen trained and certified as an auxiliary law enforcement officer pursuant to Ch. 943, Fla. Stat., authorized to carry a firearm and assist regular police officers, is an "officer" for purposes of dual office-holding).

⁶ A contract or agreement for the hearing officer for the city has not been provided, but it is assumed for purposes of this opinion that the hearing officer is appointed for a term and, as discussed in the text regarding a special magistrate, is exercising his or her duties as an officer and would possess such authority throughout the term of the office.

⁷ Compare Vinales v. State, 394 So. 2d 993 (Fla. 1981) (section 5[a], Art. II, did not apply to appointment of municipal police officers as state attorney investigators, since appointment is temporary and with no additional remuneration), and *Rampil v. State*, 422 So. 2d 867 (Fla. 2d DCA 1982) (following Vinales exception, concluding that city police officer, in conducting a wiretap, could act in capacity as deputy sheriff, since officer received no remuneration for such duties). See also Op. Att'y Gen. Fla. 12-10 (2012) (special officer for a carrier under Ch. 354, Fla. Stat., may serve simultaneously as an unpaid reserve deputy sheriff without violating the Florida constitutional prohibition against dual office-holding in s. 5[a], Art. II, Fla. Const.).

AGO 12-18 – May 17, 2012

VALUE ADJUSTMENT BOARDS – ELECTIONS – TERMS OF OFFICE – MUNICIPALITIES – CITY COMMISSIONERS – TAXING AUTHORITY

REQUIREMENT THAT VALUE ADJUSTMENT BOARD MEMBER NOT SERVE AS MEMBER OF ANY TAXING AUTHORITY

To: Mr. Monroe D. Kiar, Attorney for the Broward County Value Adjustment Board

QUESTIONS:

1. Is a citizen board member of the Broward County Value Adjustment Board required to resign his position on the Value Adjustment Board prior to taking elected office under section 194.015, Florida Statutes?

2. If the response to Question One is in the affirmative, may that resignation take place anytime up to the moment that the citizen board member is sworn into local elected office?

SUMMARY:

1. A citizen member of a county value adjustment board is prohibited by section 194.015, Florida Statutes, from simultaneously serving on the value adjustment board and being a member or an employee of a municipality.

2. As required by section 194.015, Florida Statutes, a member of the value adjustment board must resign his or her office on the board on or before becoming a "member" of the city commission, that is, no later than commencement of his or her term of office as a city commissioner.

As special legal counsel for the Broward County Value Adjustment Board you have advised this office that a citizen member of the board is planning to file as a candidate for city commissioner of the City of Weston. Based on the language of section 194.015, Florida Statutes, you have questions relating to this member's potential candidacy and its effects on his or her service on the Broward County Value Adjustment Board.¹

QUESTION 1.

Section 194.015, Florida Statutes, creates a value adjustment board for each county and provides for the membership of the board. Two citizen members shall be appointed to each value adjustment board:

[O]ne of whom shall be appointed by the governing body of the county and must own homestead property within the county and one of whom must be appointed by the school board and must own a business occupying commercial space located within the school district.²

With regard to citizen members of the board, the statute provides that "[a] citizen member may not be a member or an employee of any taxing authority, and may not be a person who represents property owners in any administrative or judicial review of property taxes."

The statute does not specifically delineate what may constitute "any taxing authority" although this particular statute uses the term in several places.³ Neither this office nor the courts are authorized to amplify legislative requirements with their own notions of what might be appropriate.⁴ If additional requirements are to be imposed, they should be inserted by the Legislature.⁵

In the absence of statutory definition, words of common usage are construed in their plain and ordinary sense and, if necessary, the plain and ordinary meaning of a word can be ascertained by reference to a dictionary.⁶ Black's Law Dictionary defines the term "authority" as "[a] governmental agency or corporation that administers a public enterprise."⁷ A "tax" is defined as "a monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue."⁸ Similarly, Webster's New Universal Unabridged Dictionary defines a "tax" as "a sum of money demanded by a government for its support or for special facilities or services, levied upon incomes, property, sales, etc."⁹ An "authority" is defined as "a person or body of persons in whom authority is vested, as a governmental agency."¹⁰

Since section 194.015, Florida Statutes, does not define the phrase "taxing authority," it may also be helpful to consider a definition of "taxing authority" provided elsewhere in the Florida Statutes. Section 163.340, Florida Statutes, relating to community redevelopment defines the term "[t]axing authority" to mean "a public body that levies or is authorized to levy an ad valorem tax on real property located in a community redevelopment area."¹¹

Applying general rules of statutory construction and using other statutory definitions for support, it would appear that the term "taxing authority" as it is used in section 194.015, Florida Statutes, refers to a public body that levies or is authorized to levy taxes. It is without question that a municipality is a "taxing authority" within the scope of this general definition for purposes of the Florida Constitution and the Florida Statutes.¹²

Thus, it is my opinion that a citizen member of a county value adjustment board is prohibited by section 194.015, Florida Statutes, from serving on the value adjustment board and also being a member or an employee of a municipality.¹³

QUESTION 2.

My response to your first question was in the affirmative and you have also asked when the citizen member must resign his or her value adjustment board office after being elected as an officer of the city in order to satisfy the terms of section 194.015, Florida Statutes.¹⁴ Because the statute states that "[a] citizen member may not be a member or an employee of any taxing authority," it would appear that resignation must occur no later than commencement of the term of office of the elected official.

Article VI, section 6 of the Florida Constitution provides that municipal elections shall be as provided by law. Section 166.021(4), Florida Statutes, requires referendum approval for matters prescribed by municipal charter relating to terms of office for municipal officers. The City of Weston adopted its charter by referendum on November 7, 2006.¹⁵

Article V of the City of Weston Charter provides that terms of office for the Mayor and Commissioners of the city "shall commence at the first regularly scheduled City Commission Meeting after receipt of certification of the election (the "Certification") or 20 days after the Certification is received, whichever is earlier."¹⁶ A term of office is generally defined as "[t]he period during which an elected officer or appointee may hold office, perform its functions, and enjoy its privileges and emoluments"¹⁷ and it is commencement of the term of office which determines when a commissioner becomes an active "member" of the commission.¹⁸

Thus, it is my opinion that, as required by section 194.015, Florida Statutes, a member of the value adjustment board must resign his or her office on the board on or before becoming a "member" of the city commission, that is, no later than commencement of his or her term as a city commissioner.

³ The statute also prohibits private counsel for the board from representing "any taxing authority[.]"

⁴ Johnson v. Taggart, 92 So. 2d 606 (Fla. 1957).

⁵ Id. at 608. And see Sarasota Herald Tribune Company v. Sarasota County, 632 So. 2d 606, 607 (Fla. 2d DCA 1993).

¹ Your questions have been rephrased to enable this office to comment. You have been advised that questions relating to Florida's Resign to Run Law must be addressed by the Division of Elections and that questions on the interpretation of administrative rules must be addressed by the agency promulgating those particular rules, in this case, the Department of Revenue.

 $^{^2~}And~see$ Op. Att'y Gen. Fla. 08-56 (2008), considering the qualification that a citizen member "own a business occupying commercial space located within the school district."

⁶ Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000); Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000); Green v. State, 604 So. 2d 471 (Fla. 1992).

⁷ Black's Law Dictionary (8th ed. 1999) at 143.

⁸ Id. at 1496.

- ⁹ Webster's New Universal Unabridged Dictionary (2003) at 1947.
- 10 Id. at 139.
- ¹¹ Section 163.340(24), Fla. Stat.

¹² See Art. VII, s. 9, Fla. Const. "Local Taxes," which provides the authority to levy ad valorem taxes; *and see, e.g.*, s. 193.0235, Fla. Stat. (ad valorem taxes and non ad valorem assessments against subdivision property); s. 200.065, Fla. Stat. (method for fixing millage by taxing authorities).

¹³ I would also note that the dual office-holding prohibition of the Florida Constitution would appear to preclude a value adjustment board member from simultaneously serving as an officer of the state, counties, or municipalities. *See* Ops. Att'y Gen. Fla. 06-13 (2006), 85-21 (1985), and 84-25 (1984).

¹⁴ As noted *supra*, questions involving the applicability of the Resign to Run Law, section 99.012, Fla. Stat., should be directed to the Division of Elections and no comment is expressed herein regarding the applicability of that statute.

¹⁵ See Charter of the City of Weston, as adopted by referendum on November 7, 2000, and amended by referenda on November 5, 2002, March 11, 2003, November 2, 2004, and November 7, 2006.

¹⁶ *Id.* at s. 5.01(g).

¹⁷ See Black's Law Dictionary (8th ed. 1999) at 1512.

¹⁸ And see s. 2.03(a), Charter of the City of Weston, which requires that "[e]ach Commissioner and the Mayor shall remain in office until his or her successor is elected and assumes the duties of the position."

AGO 12-19 - May 30, 2012

RE: MUNICIPALITIES – INFRASTRUCTURE – TAXATION – BEACHES – BEACH EROSION – SURTAX

WHETHER CITY MAY USE LOCAL GOVERNMENT INFRASTRUCTURE SURTAX TO FUND BEACH EROSION CONTROL PROJECTS AND STUDIES

To: Mr. D. Andrew Smith, III, City Attorney, City of Flagler Beach

QUESTIONS:

1. Is the City of Flagler Beach authorized by section 212.055(2), Florida Statutes, to use funds collected pursuant to that statute to fund studies and construction of public capital

projects relating to beach erosion control?

2. If the City of Flagler Beach is authorized to make such expenditures, is the Flagler County referendum ballot language sufficiently broad to permit the same expenditures?

SUMMARY:

1. To the extent that the City of Flagler Beach proposes to construct beach control mechanisms that would satisfy the terms of section 212.055(2), Florida Statutes, the statute would authorize the city to use surtax funds to fund the construction of beach erosion control mechanisms and to fund the design and planning costs associated with the project.

2. Expenditures of the Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements are limited to those public projects and types of projects which involve roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities. Expenditures for design and planning studies which are undertaken in association with an authorized project are appropriate expenditures of surtax funds.

Initially, I would note that this office has concluded in a number of previous opinions that section 212.055(2), Florida Statutes, requires that a general description of the projects to be funded by a local government infrastructure surtax must be placed on the ballot to approve the imposition of the surtax. Revenues from the surtax must be expended on projects that fall within the general description contained on the ballot.¹

According to your letter, Flagler County conducted a referendum in which county electors authorized the county to adopt the "Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements" (the "Flagler Surtax"). The ballot language read as follows:

To provide the funding for necessary public capital projects, Flagler County and its cities require additional revenue. The proposed revenue source is a ten (10) year 0.5 cent (0.5ϕ) per dollar sales surtax on taxable transactions occurring within Flagler County. These revenues would be used for funding public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County.

Flagler County subsequently adopted an ordinance implementing the surtax. The City of Flagler Beach is located within Flagler County and

currently receives funds collected via the Flagler Surtax.

You have not provided this office with specifics of the "beach erosion control mechanisms" proposed to be constructed by the city and my comments will, therefore, be general in nature and based on your assertion that these are "public capital projects" and "fixed assets consisting of fixtures and fixed equipment."

QUESTION 1.

Florida follows the general rule that taxes may be levied, assessed, and collected only as prescribed by statute.² Although a municipality is granted broad home rule powers by Article VIII, section 2(b), Florida Constitution, as implemented by section 166.021, Florida Statutes, its taxing power is derived from Article VII of the Florida Constitution, not Article VIII, Florida Constitution.³ Thus, this office has stated that a county or municipality has no home rule powers with respect to the levy of taxes, but must be able to point to constitutional or statutory authority in exercising its taxing power.⁴

Section 212.055(2), Florida Statutes, authorizes local governments to levy a discretionary sales surtax pursuant to an ordinance enacted by the members of the county governing body and approved by a majority of the county electors voting in a referendum on the surtax. The statute specifically addresses the purposes for which the surtax may be expended. Subsection (2)(d), states:

The proceeds of the surtax authorized by this subsection and any accrued interest shall be expended . . . to finance, plan, and construct infrastructure; to acquire land for public recreation, conservation, or protection of natural resources; or to finance the closure of county owned or municipally owned solid waste landfills that have been closed or are required to be closed by order of the Department of Environmental Protection. . . . The proceeds and any interest may not be used for the operational expenses of infrastructure . . .

1. For the purposes of this paragraph, "infrastructure" means:

a. Any fixed capital expenditure or fixed capital outlay associated with the construction, reconstruction, or improvement of public facilities that have a life expectancy of 5 or more years and any related land acquisition, land improvement, design, and engineering costs.

The terms "fixed capital expenditure" and "fixed capital outlay" are not defined for purposes of this section. Although the terms are not defined in Chapter 212, Florida Statutes, the term "[f]ixed capital outlay" is defined in Chapter 216, the statutory chapter that relates to state planning and budgeting. Pursuant to section 216.011(1)(p), Florida Statutes, a "[f]ixed capital outlay" is

the appropriation category used to fund real property (land, buildings, including appurtenances, fixtures and fixed equipment, structures, etc.), including additions, replacements, major repairs, and renovations to real property which materially extend its useful life or materially improve or change its functional use and including furniture and equipment necessary to furnish and operate a new or improved facility....

An "[e]xpenditure" is defined in section 216.011(1)(m), Florida Statutes, to mean "the creation or incurring of a legal obligation to disburse money."⁵

In the absence of a definition of these terms for purposes of Chapter 212, Florida Statutes, a common understanding or definition of the component parts of these phrases may also be useful in determining their scope.⁶ The term "fixed" is generally understood to mean something that is securely placed or established.⁷ "Fixed capital" has been defined to mean the capital invested in fixed assets (land, buildings, machinery)⁸ or capital that is durable in character (such as buildings and machinery) and can be used over an extended period of time.⁹

Thus, section 212.055, Florida Statutes, authorizes the expenditure of the proceeds of the surtax authorized by this subsection to finance, plan, and construct "infrastructure" as that term is defined in the statute. That definition includes, by its terms, "land improvement, design, and engineering costs" associated with the construction, reconstruction, or improvement of public facilities having a life span of 5 or more years.

You have provided me with no details of what types of beach erosion control projects may be under consideration, but have characterized proposed beach erosion controls constructed by the city as "fixed assets consisting of fixtures and fixed equipment that would improve public beach facilities by countering beach erosion and materially extending the useful life of the City's public beaches[.]" You also indicate that these permanent beach erosion control mechanisms erected by the city "would certainly be intended to have a life expectancy of more than five years." To the extent that the projects themselves satisfy the statutory criteria, I am of the opinion that the projects themselves and studies which involve planning, property design and engineering costs may be funded with local government infrastructure surtax revenues.

In Attorney General Opinion 94-79, this office considered whether land improvement or design expenses could properly be purchased with the proceeds of the discretionary sales surtax provided for in section 212.055(2), Florida Statutes. The opinion considered the definitions of "fixed capital expenditure" and "fixed capital outlay" as well as "infrastructure" to determine that such items as fencing, swings, lumber for bleachers and lighting fixtures, and the materials for landscape design and tree and shrubbery planting would not be appropriate expenditures of surtax proceeds. The opinion notes that these expenses are more in the nature of day-to-day operational expenses that may not be paid for with surtax funds. However, land improvement or design expenses that occur in conjunction with a fixed capital expenditure or fixed capital outlay associated with the construction, reconstruction or improvement of public facilities, or an expenditure for such things as materials for landscape design may be purchased with the proceeds of the surtax when a new public facility is being built or an existing public facility is being improved. The opinion concludes that these funds may not be used independently for landscape design and improvement in the absence of a related fixed capital outlay.

As you have described the City of Flagler Beach erosion control project, the project would involve the construction of fixtures and fixed equipment and the studies and plans involved in the construction of such capital projects. Based on the language of section 212.055(2), Florida Statutes, and previous opinions of this office, it is my opinion that section 212.055(2), Florida Statutes, would authorize the city to use surtax funds to fund the construction of beach erosion control mechanisms and to fund the planning and studies involved in planning this infrastructure project and the design and planning costs associated with the project.

QUESTION 2.

As noted above, this office has previously concluded that section 212.055(2), Florida Statutes, requires that a general description of the projects to be funded by a local government infrastructure surtax must be placed on the ballot to approve the imposition of the surtax.¹⁰ As required by section 212.055(2)(b), Florida Statutes, "[a] statement which includes a brief general description of the projects to be funded by the surtax and which conforms to the requirements of s. 101.161 shall be placed on the ballot[.]" Florida courts have recognized the general rule that tax revenues must be expended for the purposes for which they were collected, that is, funds raised by taxation for one purpose cannot be diverted to another use.¹¹ Thus, revenues from the surtax must be expended on projects that fall within the general description contained on the ballot.

Flagler County conducted a referendum in which county electors authorized the county to adopt the "Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements" (the "Flagler Surtax") with the following ballot language:

To provide the funding for necessary public capital projects, Flagler County and its cities require additional revenue. The proposed revenue source is a ten (10) year 0.5 cent (0.5ϕ) per dollar sales surtax on taxable transactions occurring within Flagler County. These revenues would be used for funding public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County.

I understand your second question to be whether the ballot language "funding public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County" would encompass public capital projects relating to beach erosion control and the studies attendant to these projects.

Under the doctrine of *noscitur a sociis*, the meaning of statutory terms, and the legislative intent behind them, may be discovered by referring to words associated with them in the statute.¹² Under this doctrine, words take their meaning based on their context or association with other words in the statute. Thus, the phrase "public projects and improvements" must be read in reference to the word associated with it in the ballot language, *i.e.*, "roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities[.]"

To read the ballot language providing for funding "public projects and improvements" without the qualifying language following it on the ballot would appear to present so broad a categorization as to deny the voters any genuine notice of what might be funded by the bond referendum. That is, to read the ballot language "public projects and improvements" without limitations expressed in the "such as" clause would effectively authorize expenditures for a wide variety of projects without providing the voters with a reasonable idea of what these projects might be. To conclude that the use of a general description such as "public projects" is sufficient to advise the voters of the purposes for which the surtax is to be levied would effectively defeat the statutory purpose of requiring such a description.

The referendum language limits use of these surtax funds for "public projects and improvements such as the renovation, reconstruction and construction of roads, streets, pedestrian safety projects, motor vehicles, public buildings and associated capital facilities throughout Flagler County." This office has been presented with no description of what types of projects may be under consideration. Thus, I cannot advise you whether the permanent beach erosion control mechanisms the City of Flagler Beach ultimately constructs would come within the scope of this referendum language. However, as was concluded in my response to Question One, to the extent that studies and design and planning costs are undertaken in conjunction with an authorized project, these expenses would constitute appropriate expenditures of surtax proceeds.

Thus, it is my opinion that expenditures of the Flagler County Ten (10) Year Sales Surtax to Fund Infrastructure Improvements are limited to those public projects and types of projects "such as" roads, streets, pedestrian safety projects, motor vehicles, public buildings, and associated capital facilities. Expenditures for design and planning studies which are undertaken in conjunction with an authorized project are appropriate expenditures of local surtax funds.

¹ See Op. Att'y Gen. Fla. 00-06 (2000) (s. 212.055[2], Fla. Stat., requires that a general description of the projects to be funded by local government infrastructure surtax be placed on the ballot to approve imposition of surtax; revenues from surtax must be expended on projects falling within general description contained on ballot); *cf.* Op. Att'y Gen. Fla. 08-08 (2008).

² See Walter E. Heller & Company Southeast, Inc. v. Williams, 450 So. 2d 521 (Fla. 3d DCA 1984), review denied, 462 So. 2d 1108 (Fla. 1985); State ex rel. Seaboard Air Line R. Co. v. Gay, 35 So. 2d 403 (Fla. 1948); Maas Brothers, Inc. v. Dickinson, 195 So. 2d 193 (Fla. 1967).

³ See generally Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So. 2d 314, 317 (Fla. 1976). See also City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1 (Fla. 1972) (municipality's power to tax is subject to the restrictions in Art. VII, s. 9, Fla. Const.). And see Art. VII, s. 9, Fla. Const., setting out taxing authority for counties.

⁴ See, e.g., Ops. Att'y Gen. Fla. 00-06 (2000) (county must expend revenues from surtax on projects within the general description on ballot); 90-23 (1990) (city may not provide for the rebate of ad valorem taxes collected on newly annexed property, in the absence of constitutional or statutory authority allowing such action); 87-45 (1987); and 84-65 (1984) (units of local government have no inherent power to impose taxes; the taxing power must be derived from the state).

⁵ And see Op. Att'y Gen. Fla. 03-17 (2003), considering these definitions in relation to s. 212.055(2), Fla. Stat.

⁶ Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning. *See Southeastern Fisheries Association, Inc. v. Department of Natural Resources,* 453 So. 2d 1351 (Fla. 1984).

⁷ See Webster's Third New International Dictionary "Fixed," p. 861 (unabridged ed. 1981); 36A C.J.S. "Fix" p. 583 ("Fixed" has been interpreted to mean established, firm, fastened, finally determined upon, immovable, securely placed); and see Webster's New Universal Unabridged Dictionary "fixed," p. 727 (2003) ("fastened, attached, or placed so as to be firm and not readily movable; firmly implanted; stationary; rigid").

⁸ See Black's Law Dictionary "Fixed capital," p. 221 (8th ed. 1999).

⁹ See Webster's Third New International Dictionary "Fixed capital," p. 861 (unabridged ed. 1981).

 10 See, e.g., Op. Att'y Gen. Fla. 08-08 (2008) and Attorney General Opinions cited therein.

¹¹ See, e.g., Supreme Forest Woodmen Circle v. Hobe Sound Co., 189 So. 249 (Fla. 1939); Ops. Att'y Gen. Fla. 00 29 (2000) and 77-26 (1977). Cf. Dickinson v. Stone, 251 So. 2d 268 (Fla. 1971). And see Oven v. Ausley, 143 So. 588, 589-590 (Fla. 1932), stating:

When an enforced contribution is exacted from the people by the power of taxation, it is for a specific public purpose, and the fund so raised is a trust fund in the hands of the legal custodians of it. There may exist circumstances in which the fund may be diverted to some other lawful purpose than that for which it was raised. Appropriation of public moneys for certain public purposes involves the power of taxation, and when the money is taken from a fund created by the levy of a tax and applied to some other purpose it is equivalent to the levy of a tax for such purpose. The limitation upon the rate of taxation is for the protection of taxpayers and to secure economy in the expenditure of public moneys.

And see Op. Att'y Gen. Fla. 02-55 (2002) (school capital outlay tax moneys collected to fund district school projects would not be an appropriate resource for funding projects on property no longer owned or controlled by the school district).

¹² See Turnberry Isle Resort and Club v. Fernandez, 666 So. 2d 254 (Fla. 3d DCA 1996); Cepcot Corporation v. Department of Business and Professional Regulation, Construction Industry Licensing Board, 658 So. 2d 1092 (Fla. 2d DCA 1995); Ops. Att'y Gen. Fla. 00-07 (2000) (while staff analysis refers to "invoices," that term should be construed in light of the other types of information referenced); 94-12 (1994); 90-55 (1990) (terms of section should be construed in connection with, and their meaning ascertained by reference to, other words and phrases of the section with which they are associated).

AGO 12-20 – June 27, 2012

GOVERNMENT IN THE SUNSHINE – WHISTLE-BLOWERS – PUBLIC RECORDS – OPEN MEETINGS – HILLSBOROUGH TRANSIT AUTHORITY

CONSIDERATION OF CONFIDENTIAL INFORMATION AT AUTHORITY MEETING

To: Mr. Charles Fletcher, General Counsel, Hillsborough Transit Authority

QUESTIONS:

12-20

1. May the HART board of directors be designated as an appropriate local official permitted to receive complaints and investigative documents under section 112.3188, Florida Statutes?

2. If so, is the board required to consider and take action upon such a complaint at a public meeting pursuant to section 286.011, Florida Statutes?

SUMMARY:

1. The HART board of directors may be designated as the appropriate local official to receive complaints and investigative documents under section 112.3188, Florida Statutes. In light of the discussion in Question Two, however, such designation may not be advisable.

2. The HART board of directors is a collegial public body which must comply with the public meeting requirements in section 286.011, Florida Statutes, when carrying out official business of the authority. Absent a statutory exemption, the handling of confidential information or records during the course of public meetings does not otherwise allow meetings of the board to be closed.

You state that the Hillsborough Transit Authority (HART) board of directors has adopted an interim procedure naming itself as the appropriate local official to receive certain whistle-blower complaints and to investigate such claims.¹ The board, however, questions whether it may carry out such functions and, if so, whether it must do so at an open meeting.

QUESTION 1.

The Whistle-blower's Act (act), sections 112.3187-112.31895, Florida Statutes, is intended to prevent agencies, or independent contractors of agencies, from taking retaliatory action against an employee who reports violations of law on the part of a public employer or an independent contractor.² It protects any individual "who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee."³

In order to qualify as a whistle-blower complaint, particular

information must be disclosed to certain statutorily designated officials.⁴ The act provides that for disclosures concerning a local governmental entity, such as a county, the information must be disclosed to a chief executive officer as defined in section 447.203(9), Florida Statutes, or "other appropriate local official."⁵

While the term "other appropriate local official" is not defined in the act, this office in Attorney General Opinion 96-40 considered whether a town's ethics commission could be considered within the scope of the term. Recognizing that the use of a singular noun could raise questions of its application to a collegial body, the opinion found that the legislation clearly contemplated that confidential information gathered during the processing of a complaint could be shared with others and still maintain its confidential status.⁶ The opinion stated that to read the act otherwise would render its confidentiality provisions useless and negate the protections afforded to individuals who come forward with complaints. Based upon the above, this office concluded that the town's ethics commission constituted an "other appropriate local official."⁷

Here, the board of directors has been named the "appropriate local official" to receive and consider certain whistle-blower complaints. Applying the analysis and conclusion in Attorney General Opinion 96-40 and finding nothing in the Whistle-blower Act that would preclude the appointment of a board to be the appropriate agency official to handle whistle-blower complaints, I would conclude that the HART board of directors may receive and act upon such complaints. In light of the discussion in Question Two, however, such a designation to a collegial body subject to the open meetings requirements in section 286.011, Florida Statutes, may not be advisable.

QUESTION 2.

Section 112.3188(1), Florida Statutes, provides:

(1) The name or identity of any individual who discloses in good faith to the Chief Inspector General or an agency inspector general, a local chief executive officer, or other appropriate local official information that alleges that an employee or agent of an agency or independent contractor:

(a) Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or

(b) Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty may not be disclosed to anyone other than a member of the Chief Inspector General's, agency inspector general's, internal auditor's, local chief executive officer's, or other appropriate local official's staff without the written consent of the individual, unless the Chief Inspector General, internal auditor, agency inspector general, local chief executive officer, or other appropriate local official determines that: the disclosure of the individual's identity is necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime; or the disclosure is unavoidable and absolutely necessary during the course of the audit, evaluation, or investigation.

Moreover, all information received in the course of a whistle-blower investigation is confidential and exempt, if the information is being received or derived from allegations as set forth in paragraph (1)(a) or paragraph (1)(b) of section 112.3188(1) and an investigation is active.⁸

Thus, the act protects the identity of employees and persons who disclose information that can serve as the basis for a whistle-blower complaint, as well as information received in the course of a whistleblower investigation. The act specifies those to whom confidential information may be disclosed and limits the disclosure of a whistleblower's identity to specific circumstances. You have not asserted that such circumstances are present.

As a collegial body of a public agency created by law or ordinance, however, the board of directors for HART must take official action at a public meeting which complies with the requirements of section 286.011, Florida Statutes, Florida's Government in the Sunshine Law.⁹ Only the Legislature, by general law passed by a two-thirds majority, may provide for the exemption of meetings from the Sunshine Law.¹⁰

The Supreme Court of Florida has held that in the absence of a statute exempting a meeting in which privileged material is discussed, section 286.011, Florida Statutes, may not be construed to contain any exceptions for such meetings.¹¹ Section 119.07(7), Florida Statutes, clearly provides that an exemption from the Public Records Law "does not imply an exemption from s. 286.011. The exemption from s. 286.011 must be expressly provided." Thus, exemptions from the Public Records Law do not by implication allow a public agency to close a meeting where exempt records are to be discussed in the absence of a specific exemption from the Sunshine Law.¹²

This office, in an opinion request with confidentiality concerns similar to those you have raised, concluded that a committee created by a public agency and charged with the responsibility of reviewing confidential files was subject to the requirements of section 286.011, Florida Statutes, in the absence of an exemption from the Sunshine Law. The committee involved in Attorney General Opinion 95-65 was established to provide for uniform case review and approval of treatment for emotionally disturbed children and adolescents. In reviewing individual cases, confidential information contained within the clinical files of patients was disseminated to the committee and case managers presented psychiatric and psychological evaluations of children and updated the committee on individual children's progress in treatment. While several statutory exemptions to the Sunshine Law for meetings or portions of meetings at which confidential records must be considered were cited, no exemption from section 286.011, Florida Statutes, was found for the review committees presented in the opinion. The opinion concluded that the meetings at which confidential records were discussed were subject to the Government in the Sunshine Law.

I would also note that in Attorney General Opinion 2010-04, this office declined to comment on particular procedures for conducting meetings of a school board at which confidential student records would be discussed, but suggested that the school board be sensitive to the confidentiality of such records reviewed during a meeting and protect the records to the extent that is possible to protect the privacy of the student involved. Similarly, the HART board must protect the confidential information it is considering at a meeting and must not disclose the name of the whistle-blower unless one of the specific circumstances listed in the statute is present.¹³

Several statutory provisions exempt meetings of various boards or committees from the Sunshine Law when confidential information is presented or discussed.¹⁴ You have not cited, nor have I found, any statutory provision that would close the meetings of the HART board of directors when it is considering a whistle-blower complaint. Absent a statutory exemption from section 286.011, Florida Statutes, for the HART board of directors when it is considering or acting upon a whistle-blower complaint, the board must otherwise comply with the public meetings requirements of the Sunshine Law and may not close its meetings.

¹ See HART Board of Directors, Interim Whistleblower Complaint Review Procedures, Doc. $551050 \cdot 1 - #2807895v3$, designates the HART board of directors as the appropriate official to receive and investigate whistle-blower complaints when a complaint alleges a violation by the chief executive officer (CEO) or a board member, or involves a conflict by the CEO that precludes the CEO from appropriately addressing the complaint.

² See s. 112.3187(3)(a), Fla. Stat., defining "Agency" as "any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university."

³ See s. 112.3187(2), Fla. Stat.

⁴ See Op. Att'y Gen. Fla. 93-80 (1993) in which it was concluded that a complaint filed with the Office of the Public Counsel did not come within the scope of the Whistle-blower's Act so that the protections of the act would be extended to the complainant, nor would transferring a copy of the complaint to the Chief Inspector General transform the complaint into one made within the terms of the statute.

⁵ Section 112.3187(6), Fla. Stat. *See* s. 447.203(9), Fla. Stat., stating that "[c]hief executive officer' for the state shall mean the Governor and for other public employers shall mean the person, whether elected or appointed, who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer."

⁶ See Op. Att'y Gen. Fla. 96-40 (1996) citing Senate Staff Analysis and Economic Impact Statement, Senate Bill 530, March 20, 1995, and comparing Op. Att'y Gen. Fla. 85-99 (1985), in which this office concluded that the term "chief executive officer" could include a duly appointed labor negotiating committee such that discussions between the committee and the governing body relative to collective bargaining negotiations would be exempt from the public meetings law as provided under state statute.

⁷ *Cf. Hutchison v. Prudential Insurance Co. of America*, 645 So. 2d 1047, 1049 (Fla. 3d DCA 1994) (sheriff's department determined to be an appropriate governmental agency to receive whistle-blower complaint, as it had authority to "otherwise remedy the violation or act"). *And see* Op. Att'y Gen. Fla. 10-48 (2010) (county's ethics commission designated to investigate whistle-blower complaints).

⁸ Section 112.3188(2)(b), Fla. Stat. *See also* s. 112.3188(2)(c), Fla. Stat., providing an exception for the release of confidential and exempt information, when it is determined that disclosure of the information is absolutely necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime, to persons who are in a position to prevent the public danger or to prevent the imminent commission of a crime based on the disclosed information.

⁹ Section 286.011, Fla. Stat., requires that all meetings of any board or commission of any state agency or authority or 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 or made at such meeting. The board or commission must provide reasonable notice of all such meetings and the minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection.

¹⁰ See s. 24, Art. I, Fla. Const.

¹¹ See City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971).

¹² See Ops. Att'y Gen. Fla. 04-44 (2004) (PRIDE), 95-65 (1995) (district case review committee), 93-41 (1993) (county criminal justice commission), 91-88 (1991) (pension board), and 91-75 (1991) (school board). And see Op. Att'y Gen. Fla. 05-03 (2005) (confidentiality provisions of cited federal law do not authorize child abuse death review committee to close its meetings although the committee should take steps to ensure that identifying information is not disclosed at such meetings).

 13 Cf. Op. Att'y Gen. Fla. 96-40 (1996) (town's ethics commission may not require an individual to sign a waiver of confidentiality as a condition of processing a complaint under the "Whistle-blower's Act," in light of the statute's terms making the identity of the complainant confidential as an integral part of the process).

¹⁴ See, e.g., s. 286.0113(1), Fla. Stat. (portion of meeting that would reveal a confidential security system plan or portion thereof is exempt from s. 286.011 and s. 24[b], Art. I, State Const.); s. 288.9551(3), Fla. Stat. (portion of meeting of board of directors of Scripps Florida Funding Corp. at which confidential information is presented or discussed is exempt from s. 286.011 and s. 24[b], Art. I, State Const., and records generated during any portion of an exempt meeting are confidential and exempt from s. 119.07[1] and s. 24[a], Art. I, State Const.); s. 383.412(3)(a), Fla. Stat. (portions of meetings of the State Child Abuse Death Review Committee or a local committee at which confidential information is discussed are exempt from s. 286.011 and s. 24[b], Art. I, State Const.); s. 627.0628(3)(f)2.a., Fla. Stat. (portion of meeting of the Florida Commission on Hurricane Loss Projection Methodology or of a rate proceeding on an insurer's rate filing at which a confidential trade secret is discussed is exempt from s. 286.011 and s. 24[b], Art. I., State Const.); s. 1004.226(8)(b)1., Fla. Stat. (portion of meeting of the Florida Technology, Research, and Scholarship Board at which confidential information is discussed is exempt from s. 286.011 and s. 24[b], Art. I, State Const.); and s. 1004.4472(4), Fla. Stat. (portion of meeting of the Florida Institute for Human and Machine Cognition, Inc., or a subsidiary at which confidential information is presented or discussed is exempt from s. 286.011 and s. 24[b], Art. I, State Const.).

AGO 12-21 – June 27, 2012

PUBLIC SERVANTS – PUBLIC CORRUPTION – BID TAMPERING – CRIME STOPPERS

NON-PROFIT CRIME STOPPERS NOT "PUBLIC SERVANT" FOR PURPOSES OF BID TAMPERING PROSECUTION To: The Honorable Jerry Hill, State Attorney, Tenth Judicial Circuit

QUESTION:

Is the executive director of the Heartland Crime Stoppers Program a public servant for purposes of alleged bid tampering under section 838.22, Florida Statutes?

SUMMARY:

The executive director of the Heartland Crime Stoppers Program, a private, non-profit corporation, does not fall within the definition of a "public servant" for purposes of prosecution under section 838.22, Florida Statutes.

As a result of an investigation by your office into the activities of the Heartland Crime Stoppers Program (HCS) and its executive director involving alleged bid tampering under section 838.22, Florida Statutes, you question whether the program is a public entity and its executive director a public servant subject to the provisions of the statute. You state that Polk County Crime Stoppers, Incorporated, d/b/a Heartland Crime Stoppers, is funded in large part by a grant from the Attorney General's Office,¹ but also receives donations from other law enforcement agencies and the public. Heartland Crime Stoppers is a registered non-profit corporation in Florida and qualifies as a 501(c)(3) corporation with the Internal Revenue Service. The HCS's website states that its program began in 1982 as a result of the combined efforts of the city commission and the city's police department, but now operates as an independent organization. The program provides a method for local law enforcement to receive information on crimes.²

Section 838.22, Florida Statutes, makes it unlawful for a public servant with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services.³ For purposes of the statute, section 838.014(6), Florida Statutes, defines "[p]ublic servant" as:

(a) Any officer or employee of a state, county, municipal, or special district agency or entity;

(b) Any legislative or judicial officer or employee;

(c) Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or

(d) A candidate for election or appointment to any of the

positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office.⁴

The plain language of the statute defines "public servant" in a manner that would appear to exclude officers or employees of a private entity. Neither section 838.014 nor section 838.22, Florida Statutes, has been interpreted by a court of this state for purposes of determining what constitutes a "public servant." The definition of a "public servant," however, was analyzed in an interim report prepared in 2010 by the Nineteenth Statewide Grand Jury on public corruption in Florida.⁵

Testimony heard by the grand jury indicated that impediments to prosecuting criminal violations under Chapter 838, Florida Statutes, were in large part due to the current definition of "public servant," as the "narrow definition . . . prevents numerous prosecutions of corrupt individuals who are serving a governmental function or service but are not within reach of the law as written."⁶ The report recognized that many governmental duties have been shifted to private or semi-private entities and actors who do not fall within the existing narrow definition, thereby escaping prosecution under the anti-corruption laws.⁷

The Grand Jury's first and "most critical" recommendation was to redefine "public servant" to include

[a]ny officer, director, partner, manager, representative, or employee of a nongovernmental entity, private corporation, quasi-public corporation, quasi-public entity or anyone covered under chapter 119 that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of the state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service.⁸

The report further suggested defining "governmental function" or "governmental service" for purposes of the act to mean "performing a function or serving 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."⁹

The present definition of "public servant" came into existence when the "Paul Mendelson Citizens' Right to Honest Government Act" was enacted.¹⁰ The original bill filed for enactment of the legislation proposed defining "public servant" to include:

[a]ny officer, director, partner, manager, representative, or employee of a nongovernmental entity that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of a state, county, municipal, or special district agency or entity to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service[.]¹¹

This language from the original bill was deleted and the present definition substituted, however, in a strike all amendment, which, as stated by the sponsor, "does not contain reference to non-governmental entities."¹² The sponsor further expressed concern "about bringing non-governmental folks potentially into that net; we didn't think that that was good public policy."¹³ As noted in the grand jury report, the amendment to the original bill has no reference to an agent of the government and it struck language which would have included non-governmental entities performing a governmental function or service. The report states that the amendment "managed to omit anyone who is not directly an 'officer or employee of a state, county, municipal, or special district agency or entity."¹⁴

Although the grand jury report was issued in 2010, it does not appear that the Legislature has modified the definition of "public servant" to accommodate the grand jury's recommendation.

In light of the grand jury's analysis of the present definition of "public servant" in section 838.014(6), Florida Statutes, and the fact that nongovernmental entities performing governmental acts or services are not included within the definition, I must conclude that the executive director of the Heartland Crime Stoppers Program is not a "public servant."

I would note, however, that you have indicated that alleged bid tampering activities by the Heartland Crime Stoppers Program and its executive director would be subject to prosecution if the executive director was a "public servant" under the bid tampering statute. It is regrettable that such an organization using public funds cannot be held accountable for actions that could be prosecuted if carried out by an individual meeting the technical definition of a "public servant." Consideration of this situation for possible legislative action to ensure accountability of the expenditure of public funds may be advisable.

¹ Section 16.555(5), Fla. Stat., provides:

⁽a) The [D]epartment [of Legal Affairs] shall be the disbursing authority for distribution of funding to units of local government, upon their application to the department for funding assistance.

(b) Funds deposited in the trust fund pursuant to paragraph (4)(b) shall be disbursed as provided in this paragraph. Any county may apply to the department for a grant from the funds collected in the judicial circuit in which the county is located under s. 938.06. A grant may be awarded only to counties which are served by an official member of the Florida Association of Crime Stoppers and may only be used to support Crime Stoppers and their crime fighting programs. Only one such official member shall be eligible for support within any county. In order to aid the department in determining eligibility, the secretary of the Florida Association of Crime Stoppers shall furnish the department with a schedule of authorized crime stoppers programs and shall update the schedule as necessary. The department shall award grants to eligible counties from available funds and shall distribute funds as equitably as possible, based on amounts collected within each county, when more than one county is eligible within a judicial circuit.

² See http://www.heartlandcrimestoppers.com/about.aspx.

³ The statute specifies instances in which unlawful activity occurs and provides penalties:

(1) It is unlawful for a public servant, with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services, to:

(a) Disclose material information concerning a bid or other aspects of the competitive bidding process when such information is not publicly disclosed.

(b) Alter or amend a submitted bid, documents or other materials supporting a submitted bid, or bid results for the purpose of intentionally providing a competitive advantage to any person who submits a bid.

(2) It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause unlawful harm to another, to circumvent a competitive bidding process required by law or rule by using a sole-source contract for commodities or services.

(3) It is unlawful for any person to knowingly agree, conspire, combine, or confederate, directly or indirectly, with a public servant to violate subsection (1) or subsection (2).

(4) It is unlawful for any person to knowingly enter into a contract for commodities or services which was secured by a public servant acting in violation of subsection (1) or subsection (2).

(5) Any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

⁵ See Nineteenth Statewide Grand Jury, Case No. SC 09-1910, First Interim Report, "A Study of Public Corruption in Florida and Recommended Solutions," dated December 17, 2010.

- ⁶ *Id.* at p. 17.
- ⁷ *Id.* at pp. 17-18.
- ⁸ *Id.* at pp. 16-17.
- ⁹ *Id.* at p. 17.
- ¹⁰ Chapter 2003-158, Laws of Fla.

¹¹ See HB 847, 2003 Regular Legislative Session, Original Filed Version, known as the "Citizens' Right to Honest Government Act." See also Florida Public Corruption Study Commission, Final Report, February 3, 2000, p. 8, proposing a comprehensive definition of "public servant" to include not only public employees but also specifically described nongovernmental entities performing "privatized" governmental services and functions authorized by law or contract.

¹² Subcommittee on Ethics and Elections, Florida House of Representatives, Rep. Goodlette, HB 847, March 27, 2003, Tape 2 of 2.

 13 *Id*.

 $^{14}\,$ Nineteenth Statewide Grand Jury, Case No. SC 09-1910, supra n.5 at p. 19.

AGO 12-22 – August 1, 2012

PUBLIC OFFICERS – TERMS OF OFFICE – SPECIAL DISTRICTS – TERM LIMITS – BAY MEDICAL CENTER

REAPPOINTMENT ELIGIBILITY OF INDIVIDUAL WHO HAS SERVED TWO FOUR YEAR TERMS WITH A BREAK OF SERVICE OF ONE YEAR BETWEEN TERMS

To: Mr. Terrell K. Arline, Bay County Attorney

QUESTION:

Under the provisions of Chapter 2005-343, Laws of Florida, may a person who has served two four-year terms on the Board of Trustees of Bay Medical Center, separated by a one-year absence, be reconfirmed to another four-year term?

⁴ Section 838.014(6), Fla. Stat.

SUMMARY:

An individual who has served one four-year term, followed by a one-year absence, then served another four-year term has not served two consecutive, full four-year terms which would render him or her ineligible for reappointment to the board.

Chapter 2005-343, Laws of Florida, codifies all previously enacted special acts relating to the Board of Trustees of Bay Medical Center (board) and provides a single comprehensive charter for the independent special district which was previously created.¹ The charter provides that the board shall consist of nine persons, each appointed to serve four-year terms.²

Relative to your question, the act states:

A person who has served two full, *consecutive terms* as a member of the board of trustees shall not be eligible for reconfirmation until the next regular appointment process occurring approximately 2 years after that person's termination of service.³ (e.s.)

You state that recently a nominee was presented for consideration who has served one four-year term as the county commission's appointee, followed by a one-year absence, then reappointed by the medical staff as its appointee to serve another four-year term. The member has now been nominated to serve another four-year term. Counsel for the special district has opined that the nomination may go forward because the member has not served two full, consecutive terms. The chairman of the county commission, however, is concerned that such a construction of the special act weakens the term limit provisions, by allowing a member to serve numerous terms by leaving the board between terms. This opinion is expressly limited to a consideration of the application of Chapter 2005-343, Laws of Florida, under the specific facts presented in your inquiry.

It is a generally established principle that the right to hold office is a valuable one which should not be curtailed in the absence of plain provisions of law.⁴ If ambiguity exists in construing provisions limiting the right to hold office, those provisions should be construed in favor of eligibility.⁵

The plain language of section 3(3) of Chapter 2005-343, Laws of Florida, states that a person must serve two, full consecutive terms before becoming ineligible for consideration to fill another term of office for a period of two years. It is a general rule of statutory construction that in the absence of a statutory definition, the plain and ordinary meaning of words can be ascertained if necessary by reference to a dictionary.⁶ The term "consecutive" is defined as "having no interval or

break: continuous."⁷ In the instant inquiry, the individual has served one four-year term with a break of one year before serving a second term. Under such facts, it does not appear that the individual has served two "consecutive" terms.

Accordingly, it is my opinion that an individual who has served one four-year term, followed by a one-year absence, then served another four-year term has not served two consecutive, full four-year terms which would render the individual ineligible for reappointment to the board.

⁴ See, e.g., Op. Att'y Gen. Fla. 71-324 (1971). And see Treiman v. Malmquist, 342 So. 2d 972 (Fla. 1977); Ervin v. Collins, 85 So. 2d 852 (Fla. 1956) (statutes and constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers); Vieira v. Slaughter, 318 So. 2d 490 (Fla. 1st DCA 1975), cert. denied, 341 So. 2d 293 (Fla. 1976).

⁵ Ervin, supra at 856.

⁶ See Green v. State, 604 So. 2d 471, 473 (Fla. 1992); Plante v. Department of Business and Professional Regulation, 685 So. 2d 886 (Fla. 4th DCA 1996); State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997).

⁷ Webster's Third New International Dictionary (1981, unabridged), p. 482.

AGO 12-23 – August 1, 2012

SPECIAL DISTRICTS – MOBILE HOME PARK RECREATION DISTRICTS – VACANCIES

REQUIREMENTS FOR FILLING VACANCIES ON BOARD OF TRUSTEES OF MOBILE HOME PARK RECREATION DISTRICT

To: Mr. Karl W. Bohne, Jr., General Counsel for the Port Malabar Holiday Park Mobile Home Park Recreation District

QUESTIONS:

1. In the event that a vacancy on the board of trustees of

¹ Section 1, Ch. 2005-343, Laws of Fla.

² Section 3(3), Ch. 2005-343, Laws of Fla.

 $^{^{3}}$ Id.

the Port Malabar Holiday Park Mobile Home Park Recreation District cannot be filled by appointment by the board, may the board continue to operate with less than nine members?

2. In the event that a vacancy on the board of trustees of the district cannot be filled by appointment of the board should such a vacancy in office for the unexpired term be filled pursuant to section 114.04, Florida Statutes?

3. If the answer to Question 2 is in the affirmative, then in the event that the Governor is unable to fill the vacancy in the office for the unexpired term pursuant to section 114.04, Florida Statutes, is the district required to hold a special election to fill the vacant office for the remaining unexpired term?

SUMMARY:

1. The board of trustees of the Port Malabar Holiday Park Mobile Home Park Recreation District is, by statute, constituted as a nine-member board. This office cannot advise the board that it may continue to do business indefinitely with less than the statutorily prescribed number of board members. However, the statute does not require the suspension of business upon the occurrence of a vacancy and would appear to allow the board to continue to function and conduct district business while seeking a person to fill the vacancy on the board.

2. The provisions of section 114.04, Florida Statutes, do not apply to the Port Malabar Holiday Park Mobile Home Park Recreation District as the Legislature has prescribed the method of filling vacancies on the board of trustees in section 418.302(5), Florida Statutes.

3. In light of my response to Question Two, no discussion of your third question is necessary.

The Port Malabar Holiday Park Mobile Home Park Recreation District was created in 1983 pursuant to Part II, Chapter 418, Florida Statutes, as a mobile home recreation district. The district operates as an independent special district.¹ Pursuant to section 418.304(3), Florida Statutes, the board of trustees of the district is authorized:

To acquire, purchase, construct, improve, equip, and maintain streets and lights, recreational facilities, and other common areas of all types, including real property and personal property, within the boundaries of the existing platted mobile home park to be acquired by the district; such acquisition may be by purchase, lease, or gift. The district may levy a special assessment known as a "recreation district tax" against all improved residential parcels situated within the district for the purpose of providing funds to implement the powers of the district.² In addition, the district may "issue bonds or notes to finance, in whole or in part, the cost of construction, acquisition, or improvement of common real property and personal property of the district."³ Thus, the Port Malabar Holiday Park Mobile Home Park Recreation District was created pursuant to section 418.30, Florida Statutes, as an independent special district authorized to levy special assessments against the taxable real estate within its boundaries for recreational purposes.

The statutes prescribe the composition and duties of the governing body of a mobile home park recreation district. Section 418.302, Florida Statutes, states that the governing body "shall consist of a ninemember board of trustees" who are elected by district electors and serve staggered two-year terms. Trustees may succeed themselves in office.⁴ As prescribed by statute:

Any vacancy on the board of trustees shall be filled for the unexpired term by the appointment of a successor from among the qualified electors of the district by the remaining trustees. Any trustee who fails to discharge her or his duties may be removed for cause by the board of trustees after due notice and an opportunity to be heard upon charges of malfeasance or misfeasance. A trustee who is not guilty of malfeasance or misfeasance in office is relieved of any personal liability for acts done by her or him while holding office. Except with respect to matters wherein it is adjudged that the trustee is liable for gross negligence or misconduct in the performance of her or his duties, a trustee who is made a party to any action, suit, or proceeding solely by reason of her or his holding office in the district shall be indemnified by the district against reasonable expenses, including attorney's fees, incurred by the trustee in defending such suit, action, or proceeding.⁵

Thus, the statute specifically provides that any vacancy on the board of trustees must be filled by the appointment of a successor to fill the remainder of the unexpired term. This successor must be appointed by the trustees from among the qualified electors of the district.⁶ According to your letter, "the District may not be able to fill vacancies⁷ for the unexpired term of an office as there appears to be no qualified elector willing to step up and fill the vacancy [sic] office."

QUESTION 1.

You ask whether, in the event that a vacancy on the board of trustees of the Port Malabar Holiday Park Mobile Home Park Recreation District cannot be filled by appointment by the board, the board may continue to operate with less than nine members. According to your letter, a quorum of members on the board of trustees for the district would continue to be present in order to conduct business.

Section 418.302(1), Florida Statutes, provides that "[t]he governing body of a recreation district created pursuant to s. 418.30 *shall consist of a nine-member board of trustees* elected by the electors of the district." (e.s.) And, section 418.302(5), Florida Statutes, says a vacancy shall be filled. It is the general rule that a legislative direction as to how a thing is to be done is, in effect, a prohibition against its being done in any other way.⁸

The district cannot contravene the statutory requirement of a ninemember board of trustees by conducting business in an on-going fashion with an eight-member board. However, the statute does not require the suspension of business upon the occurrence of a vacancy, but would appear to allow the board to continue to function and conduct district business while seeking a person to fill the vacancy on the board so long as a quorum is present.

QUESTION 2.

You have also asked whether the Governor may fill the vacancy pursuant to section 114.04, Florida Statutes, in the event that a vacancy on the board of trustees of the district cannot be filled by appointment of the board.

Section 114.04, Florida Statutes, makes provision for filling vacancies in district offices:

Except as otherwise provided in the State Constitution, the Governor shall fill by appointment any vacancy in a state, district, or county office, other than a member or officer of the Legislature, for the remainder of the term of an appointive officer and for the remainder of the term of an elective office, if there is less than 28 months remaining in the term; otherwise, until the first Tuesday after the first Monday following the next general election...

Despite the language in section 114.04, Florida Statutes, which authorizes the Governor to fill vacancies in district offices, the Legislature specifically provided in section 418.302(5), Florida Statutes, that vacancies on the board of trustees of mobile home park recreation districts would be filled by appointment by the remaining trustees.

In Attorney General Opinion 99-21, this office considered a similar question with regard to vacancies on the Board of Commissioners of the West Volusia Hospital Authority and concluded that it was the district's enabling legislation that controlled the filling of vacancies. The enabling legislation for the hospital authority required that the remaining members of the authority's board of commissioners fill any vacancies on the board. However, the commissioners questioned their authority to fill a vacancy in light of the language in section 114.04, Florida Statutes. The 1999 opinion noted that this office had earlier recognized that the language requiring that vacancies in a state, district or county office (other than a member of the Legislature) be filled by the governor was added by an amendment to the statutes in 1977.⁹ These earlier opinions, however, recognize that the Legislature has the authority to provide by general or special law for the filling of vacancies in special district offices and has done so outside the terms of section 114.04, Florida Statutes. Because this office must presume the validity of duly enacted legislation, Attorney General Opinion 99-21 concluded that the enabling legislation for the West Volusia Hospital Authority controlled the filling of vacancies on the board of commissioners and that section 114.04, Florida Statutes, did not apply.

Likewise, the Legislature, in adopting section 418.302, Florida Statutes,¹⁰ had the authority to provide for the filling of vacancies in office on the boards of trustees of mobile home park recreation districts and did so in subsection (5). This office cannot declare a statue repealed by implication, rather, the terms of the statute are presumed valid and effective until declared otherwise by a court of competent jurisdiction in an appropriate judicial proceeding. Furthermore, it is the last adopted expression of the Legislature that will generally prevail in the case of two statutory provisions that cannot be reconciled.¹¹ Section 418.302, Florida Statutes, is not only the more specific expression of legislative intent,¹² being directed specifically to mobile home park recreation districts rather than to special districts generally, but it is the later expression of the Legislature's intent having been adopted in 1983.¹³

Thus, it is my opinion that, in the event a vacancy on the board of trustees of the district cannot be filled by appointment of the board, the provisions of section 114.04, Florida Statutes, may not be utilized to fill a vacancy on the board.

QUESTION 3.

In light of my response to your second question, no discussion of your third question is necessary.

¹ See Official List of Special Districts Online - Directory, compiled by the Department of Economic Opportunity pursuant to s. 189.4035(1), Fla. Stat. And see s. 418.30, Fla. Stat., authorizing any municipality or county in the state to create one or more mobile home park recreation districts by ordinance approved by a vote of the electors residing in the proposed district.

- ² Section 418.304(4), Fla. Stat.
- ³ Section 418.304(5), Fla. Stat.
- ⁴ Section 418.302(3), Fla. Stat.
- ⁵ Section 418.302(5), Fla. Stat.

⁶ And see Art. VI, Port Malabar Holiday Park Mobile Home District Recreation District Board of Trustees by-laws which provides that "[i]f the office of any member of the Board of Trustees becomes vacant prior to the expiration, of such member's term of office, the Board of Trustees shall fit [sic] the vacancy by appointment of a successor from among the electors of the District. Such appointed shall hold office for the remainder of the term of the vacant office."

⁷ You have not indicated the nature of any vacancy, but Art. X, s. 3, Fla. Const., provides that a "[v]acancy in office shall occur upon the creation of an office, upon the death, removal from office, or resignation of the incumbent or the incumbent's succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term."

⁸ See Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

⁹ See s. 1, Ch. 77-235, Laws of Fla. The amendment removed language stating that a vacancy was created when "any office created or continued by the constitution or laws shall not have been filled by election or appointment under the constitution or law creating or continuing such office." The 1977 amendment changed the language to provide that an office shall be deemed vacant when created.

¹⁰ Section 418.302, Fla. Stat., authorizing the creation of mobile home park recreation districts was enacted in 1983 as s. 35, Ch. 83-204, Laws of Fla. Subsection (5) was a part of that original legislation and remains substantially unchanged.

¹¹ See Askew v. Schuster, 331 So. 2d 297 (Fla. 1976); Florida Association of Counties, Inc. v. Department of Administration, Division of Retirement, 580 So. 2d 641 (Fla. 1st DCA 1991), approved, 595 So. 2d 42 (Fla. 1992) (general rule is that in cases of conflicting statutory provisions, latter expression will prevail over former).

¹² A specific statute covering a particular subject area will control over a statute covering the same and other subjects in more general terms. See McKendry v. State, 641 So. 2d 45 (Fla. 1994); Gretz v. Florida Unemployment Appeals Commission, 572 So. 2d 1384 (Fla. 1991) (specific statute stating no fee for transcript preparation in unemployment compensation appeals controls over general statute requiring agency to provide transcripts at actual cost); Barnett Banks, Inc. v. Department of Revenue, 738 So. 2d 502 (Fla. 1st DCA 1999).

¹³ The language with which this opinion is concerned was added to s. 114.04, Fla. Stat., by amendment in 1977. See s. 1, Ch. 77-235, Laws of Fla.

AGO 12-24 - August 1, 2012

RE: SPECIAL DISTRICTS – AIRPORTS – CONTRACTS – COMMODITIES

WHETHER AIRPORT AUTHORITY IS "ELIGIBLE ENTITY" FOR PURPOSES OF PURCHASING COMMODITIES OR CONTRACTUAL SERVICES USING PURCHASING AGREEMENTS OF STATE AND OTHER SPECIAL DISTRICTS

To: Mr. Paul R. Pizzo, Counsel for the Sebring Airport Authority

QUESTION:

Is the Sebring Airport Authority an "eligible user" under section 287.056(1), Florida Statutes, authorized to purchase commodities and contractual services from state purchasing agreements and state term contracts as provided under section 287.057, Florida Statutes?

SUMMARY:

The Sebring Airport Authority is an "eligible user" under section 287.056(1), Florida Statutes, and is authorized to purchase commodities and contractual services from state purchasing agreements and state term contracts as provided under section 287.057, Florida Statutes.

The Sebring Airport Authority is a dependent special district of the City of Sebring exercising "powers relating to aviation conferred upon municipalities by general law, including the provisions of chapter 332, Florida Statutes, or the Federal Aviation Administration."¹ The charter of the district is codified in Chapter 2005-300, Laws of Florida, as amended by Chapter 2011-265, Laws of Florida. The Legislature has constituted the authority as a public instrumentality and stated that the exercise of the powers granted to the authority by its charter "shall be deemed and held to be the performance of essential governmental functions."2

The Sebring Airport Authority is authorized to exercise its powers

and jurisdiction over the "Sebring Regional Airport and Industrial Park"³ and the jurisdictional boundaries of the district are prescribed.⁴ Among the powers specifically granted to the airport authority is the power to adopt bylaws for the regulation of affairs of the authority and the conduct of its business⁵ and to acquire, lease, construct, reconstruct, improve, extend, repair, maintain, and operate "any airport and other facilities, including tire and automobile testing and racing, and commercial and industrial facilities, which may be located on the property of the authority."⁶ The authority is empowered to issue bonds to finance the acquisition, construction, reconstruction, improvement, extension, enlargement, or equipment needed for airport facilities.⁷ Contractual authority is extended to the district as may be "necessary or incidental to the performance of its duties and the execution of its powers under this act[.]"⁸

Administrative agencies, such as the airport authority, are creatures of statute and derive only the power specified therein.⁹ The powers of administrative agencies are measured and limited by statutes or acts in which such powers are expressly granted or implicitly conferred.¹⁰

In 2011, the Legislature amended the authority's charter to specifically authorize purchases as provided in section 189.4221, Florida Statutes:

The authority may purchase commodities or contractual services from the purchasing agreements of other special districts, municipalities, or counties as provided in section 189.4221, Florida Statutes.¹¹

While acknowledging that the airport authority may now purchase commodities or contractual services using the purchasing agreements of other special districts, municipalities, or counties, you question whether the authority may purchase commodities or contractual services using state term contracts and purchasing agreements under section 287.057, Florida Statutes. Legislative history relating to the amendment of section 189.4221, Florida Statutes, states that "special districts may purchase commodities and contractual services from the DMS purchasing agreements and state term contracts"¹² and you have asked for reassurance that this is indeed the state of the law.

Section 287.056(1), Florida Statutes, provides that "[a]gencies shall, and eligible users may, purchase commodities and contractual services from purchasing agreements established and state term contracts procured, pursuant to s. 287.057, by the department." The statute requires that each such agency agreement include

(a) A provision specifying a scope of work that clearly establishes all tasks that the contractor is required to perform.

(b) A provision dividing the contract into quantifiable,

measurable, and verifiable units of deliverables that must be received and accepted in writing by the contract manager before payment. Each deliverable must be directly related to the scope of work and specify the required minimum level of service to be performed and the criteria for evaluating the successful completion of each deliverable.¹³

An "eligible user," as that term is used in Part I, Chapter 287, Florida Statutes, is "any person or entity authorized by the department [Department of Management Services] pursuant to rule to purchase from state term contracts or to use the online procurement system."¹⁴ The Department of Management Services has promulgated Rule 60A-1.005, Florida Administrative Code, which provides that "eligible users" include "[a]ll governmental agencies, as defined in Section 163.3164, F.S., which have a physical presence within the State of Florida[.]" Listed among the governmental agencies in section 163.3164(21), Florida Statutes, the "Community Planning Act," is

(c) Any local government, as defined in this section, or any department, commission, agency, or other instrumentality thereof.

(d) Any school board or other special district, authority, or governmental entity.

As a dependent special district of the City of Sebring, the Sebring Airport Authority would fall within the scope of this definition and would constitute an "eligible user" for purposes of section 287.056(1), Florida Statutes.

Thus, as an administrative agency, the Sebring Airport Authority is empowered to contract and authorized, in its discretion, to utilize the provisions of section 287.056(1), Florida Statutes, to purchase from state term contracts or to use the online procurement system. This is the same conclusion presented to the Legislature by staff in 2009 when considering SB 712 which, following adoption, became section 189.4221, Florida Statutes.¹⁵

Further, nothing in the amendment of the Sebring Airport Authority's charter to allow the authority to take advantage of the provisions of section 189.4221, Florida Statutes, or in that amendment's legislative history would suggest that the Legislature intended to restrict the ability of the airport authority to utilize the provisions of section 287.056(1), Florida Statutes.¹⁶ Rather, the amendments made to the airport authority's charter in Chapter 2011-265, Laws of Florida, appear to have been intended as an expansion of the authority's power to purchase commodities or contractual services.¹⁷

Thus, it is my opinion that the Sebring Airport Authority is an "eligible

user" under section 287.056(1), Florida Statutes, and is authorized to purchase commodities and contractual services from state purchasing agreements and state term contracts as provided under section 287.057, Florida Statutes.¹⁸

¹ See s. 17, Ch. 2005-300, Laws of Fla.

² See s. 2, Ch. 2005-300, Laws of Fla.

³ See s. 3, Ch. 2005-300, Laws of Fla.

 $^4~$ Section 3, Ch. 2005-300, Laws of Fla., sets forth the boundaries of the Sebring Airport Authority.

⁵ Section 6(1), Ch. 2005-300, Laws of Fla.

 6 $\,$ Section 6(5), Ch. 2011-265, Laws of Fla., amending Ch. 2005-300, Laws of Fla.

⁷ Section 6(6), Ch. 2005-300, Laws of Fla.

 8 Section 6(10), *supra*. And see s. 8, Ch. 2005-300, Laws of Fla., requiring certain contracts for services or purchases over \$10,000 be awarded by sealed bids with notice.

⁹ Grove Isle, Ltd. v. State Dept. of Environmental Regulation, 454 So. 2d 571 (Fla. 1st DCA 1984).

¹⁰ Coastal Petroleum Co. v. State Dept. of Environmental Protection, 649 So. 2d 930 (Fla. 1st DCA 1995), review denied, 660 So. 2d 712, appeal after remand, 672 So. 2d 571, rehearing denied, review denied, Chiles v. Coastal Petroleum Co., 678 So. 2d 1287; State Dept. of Environmental Regulation v. Puckett Oil Co., Inc., 577 So. 2d 988 (Fla. 1st DCA 1991).

¹¹ See s. 8(2), Ch. 2011-265, Laws of Fla.

¹² See Florida Senate Bill Analysis and Fiscal Impact Statement on CS/ CS/SB 712, section II, "Agency Procurement of Personal Property and Services – Chapter 287, F.S.," dated April 21, 2009.

¹³ Section 287.056(1), Fla. Stat.

 14 Section 287.012(11), Fla. Stat.; and see subsection (9) thereof for the definition of "[d]epartment."

¹⁵ See Florida Senate Bill Analysis and Fiscal Impact Statement on CS/CS/SB 712, p. 2, "Agency Procurement of Personal Property and Services – Chapter 287, F.S.," dated April 21, 2009.

¹⁶ Cf. Mann v. Goodyear Tire and Rubber Co., 300 So. 2d 666 (Fla. 1974) (repeal of statutes by implication is disfavored in the law, and that

construction is favored which permits a separate field of operation for each statute validly enacted on the same subject); *Agency for Health Care Administration v. In re Estate of Johnson*, 743 So. 2d 83 (Fla. 3d DCA 1999).

¹⁷ See The Florida Senate website, CS/HB 1489: Sebring Airport Authority, Highlands County, 2011 Legislative Session, for the description of this local bill and providing that the bill "expands power to purchase commodities or contractual services."

¹⁸ However, the Sebring Airport Authority operates under a restriction, imposed in s. 8, Ch. 2011-265, Laws of Fla., that requires certain contracts involving expenditures of more than \$10,000 be awarded by sealed bids under the provisions set forth therein. The language of s. 8 provides that the authority is authorized to reject all bids.

AGO 12-25 – August 7, 2012

EDUCATION – SCHOOLS – SCHOOL ACHIEVEMENT AWARDS

TEACHERS CONSIDERED SCHOOL STAFF PARTICIPATING IN DETERMINATION OF USE OF SCHOOL ACHIEVEMENT AWARDS

To: Mr. Usher L. Brown, Attorney for the School Board of Osceola County

QUESTIONS:

1. Does section 1008.36, Florida Statutes, allow classroom teachers to participate in the joint determination by school staff and the school advisory council for the use of school recognition funds?

2. If classroom teachers outnumber other school staff engaged in the joint determination with the school advisory council regarding the distribution and use of school recognition funds, may the school develop a procedure by which the position of the school staff is decided by a vote of all of the staff at the school, including the teachers?

SUMMARY:

Absent a legislative intent limiting participation in the process, classroom teachers would be considered part of the school's staff participating in the joint determination by school staff and the school advisory council of the use of school recognition funds. There is nothing in the legislation which would appear to preclude the adoption of a procedure whereby

all of the staff, including teachers, may vote on the matter.

As your questions are interrelated, they will be answered together.

You state that the School Board of Osceola County allows the schools eligible for financial awards under section 1008.36, Florida Statutes, flexibility to decide at the school level how the awards will be distributed and that generally the individual school will make the determination in conjunction with its school advisory council. In light of the provisions in section 1008.36, Florida Statutes, stating that should the school's staff and the school advisory council fail to reach an agreement, the awards are distributed equally to all classroom teachers currently teaching in the school, you are concerned that teachers participating in the determination could purposely thwart an agreement in order to ensure such a distribution of the award. You, therefore, question whether the Legislature intended that teachers could participate in the joint decision-making process and, if so, whether there are limits on the extent of their participation.

Section 1008.36, Florida Statutes, characterizes the "Florida School Recognition Program" as a performance incentive program for "outstanding faculty and staff" in highly productive schools.¹ It was created to provide financial awards to all public schools, including charter schools, receiving a school grade of "A," making excellent progress, or demonstrating exemplary improvement due to innovation and effort by improving at least one letter grade or by improving more than one letter grade and sustaining the improvement the following school year.²

Section 1008.36(4), Florida Statutes, provides:

All selected schools shall receive financial awards depending on the availability of funds appropriated and the number and size of schools selected to receive an award. Funds must be distributed to the school's fiscal agent and placed in the school's account and must be used for purposes listed in subsection (5) as determined jointly by the school's staff and school advisory council. If school staff and the school advisory council cannot reach agreement by February 1, the awards must be equally distributed to all classroom teachers currently teaching in the school. If a school selected to receive a school recognition award is no longer in existence at the time the award is paid, the district school superintendent shall distribute the funds to teachers who taught at the school in the previous year in the form of a bonus.³ (e.s.)

Thus, the Legislature has used the term "school's staff" to identify the employees of the school who participate in the determination of the use of school recognition awards, without defining the term for purposes of the statute. Absent a statutory definition for the term "staff" or a legislative intent that it be defined in another manner, the plain and ordinary meaning of the term may be used.⁴ The term "staff" is commonly defined as "the personnel responsible for the functioning of an institution or the establishment or the carrying out of an assigned task under an overall director or head[,]" such as "the teaching and administrative personnel of an educational institution[.]"⁵ The Legislature's use of the term "school's staff" is broad enough to encompass classroom teachers. For instance, in other areas of the school code, "staff" has been used to refer to instructional personnel.⁶ Moreover, in defining certain positions, ranging from principals to educational support employees, the school code characterizes such positions as "staff members."⁷ Clearly, had the Legislature wished to restrict or exclude certain members of the school's staff from the process of participating in the determination of the use of financial awards, it could have easily stated its intent and done so.

While you have expressed concern that teachers could have a special interest in making sure there was no agreement between the school's staff and the school advisory council so that school recognition awards would be distributed only to teachers, there is nothing in section 1008.36, Florida Statutes, indicating that the participation of teachers in the process is to be limited, nor may this office read such a limitation where no such intent is present.⁸ Such matters should be addressed to your legislative delegation for clarification. While this office has recognized that school boards possess home rule powers, the exercise of such authority must be consistent with the provisions of state law.⁹ Accordingly, any action taken by the school must be consistent with the provisions of section 1008.36, Florida Statutes.

In light of the Legislature's use of the broad term "school's staff" in delineating those who are to participate in the process and the absence of any limitation on school employees included within that term, it is my opinion that classroom teachers are included as part of the school's staff which are allowed to participate in the joint determination by school staff and the school advisory council for the use of school recognition funds. Nothing in the legislation would appear to preclude the adoption of a procedure whereby all of the staff, including teachers, may vote on the matter. Due to the concerns you have expressed, however, it may be advisable to seek legislative clarification on this issue.

(a) Nonrecurring bonuses to the faculty and staff;

¹ Section 1008.36(1), Fla. Stat.

² See s. 1008.36(2) and (3), Fla. Stat.

³ Section 1008.36(5), Fla. Stat., states that school recognition awards must be used for the following:

(b) Nonrecurring expenditures for educational equipment or materials to assist in maintaining and improving student performance; or

(c) Temporary personnel for the school to assist in maintaining and improving student performance.

⁴ See, e.g., Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000) (absent statutory definition, words of common usage are construed in their plain and ordinary sense and, if necessary, plain and ordinary meaning of the word can be ascertained by reference to a dictionary); *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000); *In re McCollam*, 612 So. 2d 572 (Fla. 1993) (when language of statute is clear and unambiguous and conveys a clear meaning, statute must be given its plain and ordinary meaning); *Frankenmuth Mutual Insurance Company v. Magaha*, 769 So. 2d 1012 (Fla. 2000) (in ascertaining the plain and ordinary meaning of a term, a court may refer to a dictionary); Ops. Att'y Gen. Fla. 93-47 (1993) (in construing statute which is clear and unambiguous, the plain meaning of statute must first be considered) and 93-02 (1993) (it is presumed that the Legislature knows the meaning of the words it uses and conveys its intent by the use of specific terms, courts must apply the plain meaning of those words if they are unambiguous).

 $^{\scriptscriptstyle 5}\,$ Webster's Third New International Dictionary (unabridged, 1981), p. 2219.

⁶ See s. 1012.01(2), Fla. Stat., defining "Instructional personnel" as "any K-12 staff member whose function includes the provision of direct instructional services to students." The subsection further states that "Classroom teachers" are "staff members assigned the professional activity of instructing students in courses in classroom situations," and student personnel services, librarians/media specialists, and other instructional staff (primary specialists, learning resource specialists, instructional trainers, adjunct educators, and similar positions) as "staff members." (e.s.)

⁷ See s. 1012.01(3) and (6), Fla. Stat.

⁸ See, e.g., Ops. Att'y Gen. Fla. 82-80 (1982) (Attorney General is not free to add words to a statute to support a conclusion that the plain wording of the statute does not supply); 94-09 (1994); 87-43 (1987); 86-32 (1986); and 82-20 (1982). And see Chaffee v. Miami Transfer Company, Inc., 288 So. 2d 209 (Fla. 1974) (Attorney General's Office has no authority to supply additional words to or modify the meaning of a duly enacted statute).

⁹ See, e.g., Ops. Att'y Gen. Fla. 03-55 (2003) and 83-72 (1983); and see *W.E.R. v. School Board of Polk County*, 749 So. 2d 540 (Fla. 2d DCA 2000) (while school board has significant authority in matters not addressed specifically by the Legislature, it is prohibited from promulgating rules at variance with legislation).

AGO 12-26 – August 7, 2012

SPECIAL DISTRICTS – PUBLIC FUNDS – LAKE ASBURY MUNICIPAL SERVICE BENEFIT DISTRICT

AUTHORITY TO PURCHASE LAND WITH BOAT RAMP AND ALLOW PUBLIC USE

To: Mr. Wayne E. Flowers, Attorney for the Lake Asbury Municipal Services District

QUESTIONS:

1. May the Lake Asbury Municipal Services District acquire parcels of land with boat ramps which, in addition to providing access to lakes for district purposes, would provide access to lot owners within the district?

2. If so, must the district allow the general public to use the boat ramps?

SUMMARY:

1. The Lake Asbury Municipal Services District may acquire parcels of land with boat ramps should the district's governing board determine that such acquisition primarily facilitates the purpose of maintaining the lakes and dams under the district's jurisdiction.

2. While the incidental use of the boat ramps by the general public would not raise concerns regarding the propriety of acquiring and maintaining the property for district purposes, restricting the use to lot owners within the district could be seen as an expenditure of public funds in order to facilitate the private use of the boat ramps for select individuals and thus prohibited.

QUESTION 1.

Chapter 86-392, Laws of Florida (1986), creates the Lake Asbury Municipal Services District (district).¹ The purpose of the district is the "continuing maintenance of the lakes and dams known as Lake Asbury, South Lake Asbury, and Lake Ryan in Clay County, Florida."² Among the powers granted to the district's governing board is the authority to "purchase, hold, lease, sell, or otherwise acquire and convey such real and personal property and interest therein as may be *necessary or proper to carry out the purpose of this act*" and to "acquire, construct, operate, maintain, equip, improve, extend, and enlarge capital projects within or without the district for the *purposes of enabling the district to perform*

the specialized public functions or services as herein provided[.]"³ (e.s.)

The enabling legislation for the district grants authority to acquire property and expend district funds for capital projects in carrying out the purpose of the district, *i.e.*, maintaining the lakes and dams under the district's jurisdiction. This limitation reiterates the long-standing interpretation by Florida courts and this office that the exercise of such powers is limited to carrying out expressly stated purposes. As a statutorily created entity, the district has only such powers and authority as have been expressly granted by law or may be necessarily implied therefrom in order to carry out an expressly granted power.⁴ Any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof.⁵ The implied powers accorded to administrative agencies must be indispensable to powers expressly granted, that is, those powers that are necessary or fairly or reasonably implied as an incident to those powers.⁶

There is no doubt that the district has the authority to acquire property such as parcels of land and expend funds for capital projects such as boat ramps when such actions fulfill the district's purpose of maintaining the lakes and dams within the district. It would appear that access to the lakes would be necessary to facilitate their maintenance and that of the dams.⁷ Such a determination, however, must be made by the governing body of the district and cannot be delegated to this office.⁸

QUESTION 2.

The issue of whether boat ramps acquired and maintained by the district must be open to the general public or may be restricted to lot owners within the district requires a discussion of the appropriate expenditure of public funds.⁹ Article VII, section 10, Florida Constitution, prohibits the state and its subdivisions from using their taxing power or pledging public credit to aid any private person or entity. The purpose of this constitutional provision is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited."¹⁰ If the expenditure primarily or substantially serves a public purpose, however, the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, section 10.¹¹

In order to satisfy Article VII, section 10, Florida Constitution, the expenditure of district funds must be for a public purpose. This office, in determining whether public funds may be expended for improvements to private property such as private roads, has considered whether the governmental entity has a property right or interest in such property or whether the public has an easement or right to use the property.

For example, in Attorney General Opinion 79-14, this office concluded

that the expenditure of public funds by a municipality to repair or maintain private streets in which the municipality has no property rights or interest, and over which the public has no easement or right of use, would appear to contravene the public purpose requirements of Article VII, section 10, Florida Constitution.¹² Similarly, this office in Attorney General Opinion 85-101 concluded that public funds could not be used to maintain a private bridge that was not open to or set apart for the public and upon which the public had no right to travel.

In Northern Palm Beach County Water Control District v. State,¹³ the Supreme Court of Florida concluded that Article VII, section 10, Florida Constitution, did not prohibit the water control district from issuing bonds to finance on-site road improvements in a district created for the purpose of draining and reclaiming the land. In reaching its decision, the Court relied on the fact that the district's taxing power was not involved, there was no pledge of the district's credit, the Legislature had set forth a declaration of the public purpose to be served, and the district would retain ownership of the roadways in question.

The Court expressed concern that public access to the roads would be limited: "[T]he fact that public access to the roads will be limited raises a question of whether the stated public purposes are only incidental to a primary private purpose^{"14} The fact that the district retained ownership of the roadways in question, coupled with the legislative declaration of a public purpose, "leads us to the conclusion that the on-site road improvements serve a public purpose."¹⁵ The Court stated, however, that "[a] broad, general public purpose . . . will not constitutionally sustain a project that in terms of direct, actual use, is purely a private enterprise."¹⁶

The district's purchase of boat ramps and restriction of their use to only those members of the public owning lots within the district could raise concerns similar to those highlighted by the Court in *Northern Palm Beach County Water Control District, i.e.,* citing a broad general public purpose of maintaining the dams and lakes may not constitutionally sustain the use of the ramps by only those members of the public who own lots within the district. Such a limited use only by the lot owners would have the appearance of providing a privilege to specific private individuals to the exclusion of the general public.¹⁷ The incidental use of the boat ramps by the general public, however, would not raise similar concerns, since there would be no specific private individuals who would benefit from the expenditure of public funds.

Accordingly, it is my opinion that the district is authorized to purchase property and expend district funds for capital projects to fulfill the purposes of the district, *i.e.*, the maintenance of lakes and dams within the district and incidentally provide access to such property to the general public.

- ¹ Section 1, Ch. 86-392, Laws of Fla. (1986).
- ² Section 2(1), Ch. 86-392, Laws of Fla. (1986).
- ³ Section 2(4), Ch. 86-392, Laws of Fla. (1986).

⁴ See Halifax Drainage District of Volusia County v. State, 185 So. 123, 129 (Fla. 1938); Ops. Att'y Gen. Fla. 96-90 (1996) and 89-42 (1989).

⁵ See Halifax Drainage District at 129; State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493 (Fla. 1973). And see, e.g., Ops. Att'y Gen. Fla. 02-30 (2002) and 04-48 (2004).

⁶ See, e.g., Gardinier, Inc. v. Florida Department of Pollution Control, 300 So. 2d 75, 76 (Fla. 1st DCA 1974); Williams v. Florida Real Estate Commission, 232 So. 2d 239, 240 (Fla. 4th DCA 1970).

⁷ You state that the district and its contractors use the boat ramps to access the lakes to perform certain functions, such as, aquatic weed control, dam and water control structure inspection and maintenance, and water quality testing.

⁸ See, e.g., Ops. Att'y Gen. Fla. 86-35 (1986) and 90-74 (1990).

⁹ While the question of whether the district may acquire the boat ramps and prohibit their use by any members of the public has not been raised, such a prohibition would not alter the conclusion that the district may obtain the subject property upon an appropriate determination that such action fulfills a district purpose.

¹⁰ Bannon v. Port of Palm Beach District, 246 So. 2d 737, 741 (Fla. 1971).

¹¹ See, e.g., State v. Housing Finance Authority of Polk County, 376 So. 2d 1158, 1160 (Fla. 1979). If the county's taxing power or pledge of credit is involved, the improvements must serve a paramount public purpose. See Orange County Industrial Development Authority v. State, 427 So. 2d 174 (Fla. 1983). If, however, neither the taxing power nor a pledge of credit is involved, then it is enough to show only that a public purpose is involved. Linscott v. Orange County Industrial Development Authority, 443 So. 2d 97 (Fla. 1983).

¹² And see Padgett v. Bay County, 187 So. 2d 410 (Fla. 1st DCA 1966); Collins v. Jackson County, 156 So. 2d 24 (Fla. 1st DCA 1963); Op. Att'y Gen. Fla. 73-222 (1973) (expenditure of county funds to provide minor work or repair on private roads). *Cf. Brumby v. City of Clearwater*, 149 So. 203 (Fla. 1933), in which the Supreme Court of Florida voided a contract between a city and a private individual whereby the city financed the dredging of a channel leading to the private individual's place of business, because "the contract clearly required the appropriation of public money for the individual benefit of the appellant[.]"

- ¹³ 604 So. 2d 440 (Fla. 1992).
- ¹⁴ *Id.* at 443.
- 15 Id.

¹⁶ Id., quoting, Orange County Industrial Development Authority v. State, 427 So. 2d 174, 179 (Fla. 1983).

¹⁷ Cf. City of Maitland v. Orlando Bassmasters Association of Orlando, Florida, Inc., 431 So. 2d 178 (Fla. 5th DCA 1983), in which the district court found no rational basis in a municipal ordinance which prohibited nonresidents of the city from obtaining parking permits for boat trailer spaces in a municipal lakefront park; rather, the only basis for the ordinance was the fact that residents desired an assured parking space near the municipal boat ramp. See also Op. Att'y Gen. Fla. 76-124 (1976) (while municipality may charge a fee for individual use of a municipally owned park or other municipal recreational facility which is reasonably related to the expense incurred in operating and maintaining the park or facility, the municipality may not charge a higher fee to nonresidents than residents unless all relevant economic factors establish a rational foundation for such differentiation).

AGO 12-27 – August 7, 2012

BUILDING CONSTRUCTION STANDARDS – ARCHITECTS – ENGINEERS – PRIVATE PROVIDERS – LICENSURE – CERTIFICATION – BUILDING PLANS – INSPECTION

WHETHER BUSINESS ENTITY CAN BE "PRIVATE PROVIDER" FOR PURPOSES OF ALTERNATIVE PLANS REVIEW AND INSPECTION; QUALIFICATIONS FOR PRIVATE PROVIDERS

To: Mr. John C. Randolph, Attorney for the Town of Palm Beach

QUESTIONS:

1. Pursuant to section 553.791, Florida Statutes, can a company be considered a "private provider" if it hires an architect or engineer to provide inspection and plan review services?

2. Does a company that employs an architect or engineer and enters into a contract with an owner to provide inspection or plan review services where that architect or engineer will be the private provider meet the requirements of the private provider statute? 3. What is acceptable proof that the architect or engineer is a bona fide employee of the company within the meaning of section 553.791, Florida Statutes?

SUMMARY:

1. Pursuant to section 553.791, Florida Statutes, a business entity such as a corporation, partnership, or firm may be considered a "private provider" only if it is certified or licensed pursuant to Chapters 471 or 481, Florida Statutes. Thus, a company that hires an architect or engineer, but is not otherwise certified or licensed pursuant to Chapters 471 and/ or 481, Florida Statutes, is not a private provider. Further, a duly authorized representative of a private provider must be licensed or certified as an engineer or architect and must act as the agent for an individual or business entity that satisfies the statutory requirements for a "private provider."

2. A company that employs an architect or engineer and enters into a contract with an owner to provide inspection or plan review services where that architect or engineer will be the private provider may meet the requirements of the private provider statute by acting as a "private provider's firm" if it otherwise satisfies the requirements of section 553.791, Florida Statutes.

3. Section 553.791, Florida Statutes, authorizes a local government to develop a registration system for private providers and duly authorized representatives which requires proof of licensure as an engineer or architect and proof of insurance. The statue also requires that "duly authorized representatives" be entitled to receive unemployment compensation benefits under Chapter 443, Florida Statutes, and the criteria for employment set forth in that chapter may be reviewed.

According to your letter, a company has represented itself as a private provider of architectural or engineering services pursuant to section 553.791, Florida Statutes, but its officers are neither licensed engineers nor architects. Rather, the company has used an architect it has hired to sign and seal plans. Your client, the Director of Planning, Zoning and Building for the Town of Palm Beach, questions the circumstances under which a company may be considered a private provider.

QUESTION 1.

Your question requires consideration of section 553.791, Florida Statutes, which provides alternatives for building plans review and inspection. The statute authorizes the fee owner of a building or structure or the fee owner's contractor¹ to use a private provider to review

plans and provide building code inspection services as an alternative to such activities being performed by a local building official.² The fee owner may elect to use the private provider for plans review or required building inspections or both of these services. All such services must be memorialized in a written contract between the private provider, or the private provider's firm, and the fee owner.³

The statute defines a "[p]rivate provider" for purposes of section 553.791, Florida Statutes, as:

a person licensed as an engineer under chapter 471 or as an architect under chapter 481. For purposes of performing inspections under this section for additions and alterations that are limited to 1,000 square feet or less to residential buildings, the term "private provider" also includes a person who holds a standard certificate under part XII of chapter 468.⁴

Further, a private provider and any duly authorized representative⁵ of that provider "may only perform building code inspection services that are within the disciplines covered by that person's licensure or certification under chapter 468, chapter 471, or chapter 481"⁶ and must maintain insurance for professional liability covering all services performed as a private provider.⁷ When performing building code inspection services, a private provider is subject to the disciplinary guidelines of the applicable professional board with licensing or certification jurisdiction over that profession.⁸ Finally, the statutes contain a conflict provision prohibiting a private provider from providing building code inspection services on any building designed or constructed by the private provider or the private provider's firm.⁹

The statute does not provide a definition of "person," but a general definition of that term is contained in section 1.01, Florida Statutes, and includes "individuals . . . firms, associations, joint adventures, partnerships, . . . corporations, and all other groups or combinations." The term "person" at common law and apart from any statutory enactment limiting its meaning includes both natural and artificial persons.¹⁰

Section 553.791(2), Florida Statutes, directs that "all such services" provided to a fee owner or the fee owner's contractor shall be evidenced by a written contract "between the private provider, or the private provider's firm" and the fee owner. The definition of a "private provider" appears to accommodate both individuals and corporations or business partnerships.

You have suggested that "a company or other business entity cannot meet the licensure requirements of Chapters 471 and 481, Florida Statutes, and therefore cannot meet the statutory definition of a Private Provider." However, both Chapters 471 and 481, Florida Statutes, appear to recognize that licensed engineers and architects may be businesses that practice these professions in Florida as well as the individuals who are licensed to practice these professions.

Chapter 471, Florida Statutes, regulates the practice of engineering in Florida.¹¹ Section 471.005(8), Florida Statutes, defining "[llicense" for purposes of that chapter defines the term as "the licensing of engineers or certification of businesses to practice engineering in this state."¹² (e.s.) An "[e]ngineer" is "a person who is licensed to engage in the practice of engineering" and includes the terms "professional engineer" and "licensed engineer[.]"¹³ Finally, a "[c]ertificate of authorization" is itself defined as "a license to practice engineering issued . . . to a corporation or partnership."14 Section 471.003, Florida Statutes, sets forth the qualifications for practicing engineering and includes exemptions from licensure requirements. Among those who are not required to be licensed under the provisions of Chapter 471, Florida Statutes, as a licensed engineer are "[e]mployees of a firm, corporation, or partnership who are the subordinates of a person in responsible charge, licensed under this chapter."15 Thus, Chapter 471, Florida Statutes, authorizes both natural persons and businesses to be "licensed" within the scope of licensure as an engineer or engineering practice.

Chapter 481, Florida Statutes, provides Florida's statutory regulations on the practice of architecture. An "[a]rchitect" or "registered architect" is defined as "a natural person who is licensed under this part to engage in the practice of architecture." While it is clear that an architect may only be a natural person, a business entity may be certified to practice the profession of architecture. While the statutes provide for a "certificate of registration,"¹⁶ that is, a license issued "to a natural person" to engage in the practice of architecture, the statutes also provides a "certificate of authorization"¹⁷ which is issued by the department "to a corporation or partnership to practice architecture[.]"

The practice of architecture by licensees through a corporation, limited liability company, or partnership offering architectural services to the public, or by a corporation, limited liability company, or partnership offering architectural services to the public through licensees under this part as agents, employees, officers, or partners, is specifically authorized subject to the provisions of section 481.219, Florida Statutes.¹⁸ As provided in this statute, the Board of Architecture and Interior Design shall certify an applicant as qualified for a "certificate of authorization" to offer architectural services provided that:

(a) One or more of the principal officers of the corporation or limited liability company, or one or more partners of the partnership, and all personnel of the corporation, limited liability company, or partnership who act in its behalf in this state as architects, are registered as provided by this part; or (b) One or more of the principal officers of the corporation or one or more partners of the partnership, and all personnel of the corporation, limited liability company, or partnership who act in its behalf in this state as interior designers, are registered as provided by this part.

Any applicant who has been certified by the board as qualified and who has paid the statutory fee must be issued a certificate of authorization.¹⁹ A certificate of authorization is required for a corporation, limited liability company, partnership, or person practicing under a fictitious name, who offers architectural services to the public jointly or separately.²⁰

Thus, it does not appear to be the case that only natural persons may act as private providers as only natural persons are capable of licensure or certification.²¹ However, while it appears that business entities may come within the scope of section 553.791, Florida Statutes, not all business entities may qualify as private providers. A private provider must be an individual or business entity that is certified or licensed to provide engineering or architectural services or a duly authorized representative of that individual or entity and must maintain professional liability insurance. Further, as provided in section 553.791(1)(e), Florida Statutes, a "[d]uly authorized representative" is an agent of the private provider:

"Duly authorized representative" means an agent of the private provider identified in the permit application who reviews plans or performs inspections as provided by this section and who is licensed as an engineer under chapter 471 or as an architect under chapter 481 or who holds a standard certificate under part XII of chapter 468.

The duly authorized representative is the agent of the private provider and a private provider must come within the statutory definition in section 553.791(1)(I), Florida Statutes, that is, licensure or certification pursuant to Chapters 471 or 481, Florida Statutes, is required. The statute also requires that any duly authorized representative who is sent to a building site to perform the required inspections must be "an employee of the private provider entitled to receive reemployment assistance benefits under chapter 443."²²

Section 553.791(2), Florida Statutes, authorizes the fee owner of a building or structure, or his or her contractor, to choose to use a private provider for building code inspections services. All such services shall be rendered subject to a written contract between the private provider or the private provider's firm and the fee owner. The definition of a "[p]rivate provider" does not distinguish between natural and artificial persons and would, therefore, appear to include business entities as well as licensed individuals. Both Chapters 471 and 481, Florida Statutes, contemplate the licensure or certification of individuals as

well as business entities such as partnerships, corporations, or firms. However, as discussed herein, a private provider must be licensed and must maintain professional liability insurance.

In sum, it is my opinion that pursuant to section 553.791, Florida Statutes, a business entity such as a corporation, partnership, or firm may be considered a "private provider" only if it is certified or licensed pursuant to Chapters 471 or 481, Florida Statutes. Thus, a company that hires an architect or engineer, but is not otherwise certified or licensed pursuant to Chapters 471 and/or 481, Florida Statutes, is not a private provider. Further, a duly authorized representative of a private provider must be licensed or certified as an engineer or architect and must act as the agent for an individual or business entity that satisfies the statutory requirements for a "private provider."

QUESTION 2.

You also ask whether a company may come within the provisions of section 553.791, Florida Statutes, if the company employs an architect or engineer and enters into a contract with a property owner to provide inspection or plan review services in situations where the architect or engineer will be the private provider of building code inspection services.

Section 553.791, Florida Statutes, refers to a "private provider's firm" in several places but provides no definition. The statute requires that building code inspection services be the subject of a written contract between the "private provider, or the private provider's firm, and the fee owner or the fee owner's contractor."²³ The statute prohibits a private provider from providing building code inspection services "upon any building designed or constructed by the private provider or the private provider's firm."²⁴ And finally, the statute requires that a fee owner using a private provider for building code inspection services must provide notice to the local building official on a form to be adopted by the Florida Building Commission. This notice must include particular information including:

The name, firm, address, telephone number, and facsimile number of each private provider who is performing or will perform such services, his or her professional license or certification number, qualification statements or resumes, and, if required by the local building official, a certificate of insurance demonstrating that professional liability insurance coverage is in place for the private provider's firm, the private provider, and any duly authorized representative in the amounts required by this section.²⁵

Thus, the "private provider's firm" must be capable of securing professional liability insurance coverage.

In light of the Legislature's use of the phrase "private provider's firm," it would appear that a company that employs an architect or engineer and enters into a contract with an owner to provide inspection or plan review services where that architect or engineer will be the private provider may meet the requirements of the private provider statute so long as it is capable of otherwise meeting the statutory requirements.

QUESTION 3.

You have asked what may constitute acceptable proof that an architect or engineer is a *bona fide* employee of the private provider within the meaning of section 553.791, Florida Statutes.

Section 553.791(15), Florida Statutes, provides that:

(a) A local enforcement agency, local building official, or local government may not adopt or enforce any laws, rules, procedures, policies, qualifications, or standards more stringent than those prescribed by this section.

(b) A local enforcement agency, local building official, or local government may establish, for private providers and duly authorized representatives working within that jurisdiction, a system of registration to verify compliance with the licensure requirements of paragraph (1)(I) and the insurance requirements of subsection (16).

(c) This section does not limit the authority of the local building official to issue a stop work order for a building project or any portion of the project, as provided by law, if the official determines that a condition on the building site constitutes an immediate threat to public safety and welfare.

The statute authorizes the development at the local level of a "system of registration to verify compliance with the licensure requirements... and insurance requirements[.]" The statute precludes local officials from adopting or enforcing any qualifications or standards more stringent than those established by the statute.²⁶

Thus, it would appear that proof of licensure of the individual or the certification of the business entity (or both in the case of a "duly authorized representative") as an engineer or architect may be required pursuant to a duly adopted registration system under section 553.791, Florida Statutes, along with proof of insurance in the amounts specified in subsection (16):

A private provider may perform building code inspection services on a building project under this section only if the private provider maintains insurance for professional liability covering all services performed as a private provider. Such insurance shall have minimum policy limits of \$1 million per occurrence and \$2 million in the aggregate for any project with a construction cost of \$5 million or less and \$2 million per occurrence and \$4 million in the aggregate for any project with a construction cost of over \$5 million. Nothing in this section limits the ability of a fee owner to require additional insurance or higher policy limits. For these purposes, the term "construction cost" means the total cost of building construction as stated in the building permit application. If the private provider chooses to secure claims made coverage to fulfill this requirement, the private provider must also maintain coverage for a minimum of 5 years subsequent to the performance of building code inspection services. The insurance required under this subsection shall be written only by insurers authorized to do business in this state with a minimum A.M. Best's rating of A. Before providing building code inspection services within a local building official's jurisdiction, a private provider must provide to the local building official a certificate of insurance evidencing that the coverages required under this subsection are in force. (e.s.)

In addition, the statute requires that a "duly authorized representative" of a private provider "must be an employee of the private provider entitled to receive reemployment assistance benefits under chapter 443."²⁷ It would appear to be appropriate for a local government to determine compliance with this statutory requirement.

The statute makes private providers subject to the disciplinary guidelines of the applicable professional boards with jurisdiction over their license or certification under Chapters 471 or 481, Florida Statutes. Complaint processing, investigation, and discipline that may arise out of a private provider's performance of building code inspection services are to be conducted by the applicable professional board.²⁸ Local governments and building officials are provided immunity from liability "to any person or party for any action or inaction" by a fee owner of a building or by a private provider or its duly authorized representative in connection with the building code inspection services provided pursuant to the statute.

Thus, it is my opinion that section 553.791, Florida Statutes, authorizes a local government to develop a registration system for private providers and duly authorized representatives which requires proof of licensure of the individual or the certification of the business entity (or both in the case of a "duly authorized representative") as an engineer or architect and proof of insurance in the amounts specified in that statute. Appropriate inquiries may also be made to determine whether a "duly authorized representative" is an employee of the private provider entitled to receive reemployment assistance benefits under Chapter 443, Florida Statutes.

 $^1\,$ The statute requires that the fee owner's contractor have written authorization from the fee owner in order to act. See s. 553.791(2), Fla. Stat.

² See Florida House of Representatives Committee on Local Government & Veterans Affairs, Staff Analysis of HB 1307, dated February 5, 2002 (HB 1307 created s. 553.791, Fla. Stat.)

³ Section 553.791(2), Fla. Stat.

⁴ Part XII, Ch. 468, Fla. Stat., regulates the practice of building code administration and inspection in Florida. *See* s. 468.601, Fla. Stat. You have not indicated that you are concerned with private providers certified pursuant to Part XII, Ch. 468, Fla. Stat.

⁵ The term "[d]uly authorized representative" is defined in s. 553.791(1)(e), Fla. Stat., to mean "an agent of the private provider identified in the permit application who reviews plans or performs inspections as provided by this section and who is licensed as an engineer under chapter 471 or as an architect under chapter 481 or who holds a standard certificate under part XII of chapter 468."

- ⁶ Section 553.791(3), Fla. Stat.
- ⁷ Section 553.791(16), Fla. Stat.
- ⁸ Section 553.791(17), Fla. Stat.
- ⁹ *Id.* n.6.

¹⁰ See Op. Atty Gen. Fla. 85-99 (1985) citing City of Grand Rapids v. Harper, 188 N.W.2d 668, 671 (Ct. App. Mich. 1971); 18 Am. Jur. 2d Corporations s. 20 (stating that persons are divided by law into persons natural and persons artificial). Cf. City of St. Petersburg v. Carter, 39 So. 2d 804 (Fla. 1949) (definition of term "persons" dependent upon purpose of subject enactment, administrative construction of it, other legislative enactments, and attendant circumstances); Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978) (meaning of term "persons" solely one of legislative intent and must be resolved by taking into account totality of circumstances surrounding statute's enactment).

 11 See s. 471.001, Fla. Stat., for the Legislature's statement of purpose for the chapter.

¹² And see s. 471.005(3), Fla. Stat., providing that a "[c]ertificate of authorization" means "a license to practice engineering issued by the management corporation [Florida Engineers Management Corporation] to a corporation or partnership."

12-27

- ¹³ Section 471.005(5), Fla. Stat.
- ¹⁴ Section 471.005(3), Fla. Stat.
- ¹⁵ Section 471.003(2)(e), Fla. Stat.
- ¹⁶ Section 481.203(4), Fla. Stat.
- ¹⁷ Section 481.203(5), Fla. Stat.

¹⁸ *Cf. District Board of Trustees v. Morgan*, 890 So. 2d 1155 (Fla. 5th DCA 2004) (the purpose of s. 481.219, Fla. Stat., is to avoid a misrepresentation regarding the composition of architectural business entities that enter contracts for work on Florida projects; s. 481.219, Fla. Stat., is not intended by the Legislature to assure that all architects working in Florida are licensed).

- ¹⁹ Section 481.219(6), Fla. Stat.
- ²⁰ Section 481.219(2), Fla. Stat.

 21 I note that section 553.791, Fla. Stat., uses the term "individual," as distinguished from "person," where the intent seems to be to identify a natural person. *See* s. 553.791(1)(g), Fla. Stat., identifying the "[l]ocal building official" as an "individual."

²² Section 553.791(8), Fla. Stat. *And see* ss. 443.036 and 443.1216, Fla. Stat., delineating "employment" subject to Ch. 443, Fla. Stat., the "Unemployment Compensation Law."

- ²³ Section 553.791(2), Fla. Stat.
- ²⁴ Id. at subsection (3).
- ²⁵ Section 553.791(4)(b), Fla. Stat.

²⁶ It is the rule that a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way. *Alsop* v. *Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

- ²⁷ Section 553.791(8), Fla. Stat.
- $^{28}\,$ See s. 553.791(17), Fla. Stat.

AGO 12-28 – August 8, 2012

DUAL OFFICE-HOLDING – COUNTIES – EMERGENCY MANAGEMENT – MUNICIPALITIES – CITY COUNCIL

WHETHER COUNTY DIRECTOR OF COUNTY EMERGENCY MANAGEMENT IS OFFICER OR EMPLOYEE

To: Ms. L. Rebecca Behl-Hill, Assistant County Attorney, Brevard County

QUESTIONS:

1. May an elected member of a local city council simultaneously hold the position of County Director of the Emergency Operations Center without violating Florida's constitutional dual office-holding prohibition?

2. If the answer to Question One is that a violation will occur, can the Director designate someone else to vote in her place in an emergency; therefore removing any concern over the decision-making authority granted to the Director as a member of the policy group during a declared emergency?

SUMMARY:

1. The position of the Brevard County Director of the Emergency Operations Center is an office, not an employment, and is subject to the dual office-holding prohibition contained in Article II, section 5(a) of the Florida Constitution. Thus, a city councilwoman may not simultaneously hold that office and the office of county Director of the Emergency Operations Center without violating the constitutional dual office-holding prohibition.

2. A violation of the prohibition set forth in Article II, section 5(a), Florida Constitution, cannot be avoided by the abstention or recusal from certain votes by the director of a county emergency operations center.

QUESTION 1.

According to your letter, a Brevard County employee was recently appointed by the county manager to act as Interim Director of the Emergency Operations Center. This employee is also an elected member of a local city council. You recognize that the position of city councilwoman is a public office. However, you suggest that the Director of the Emergency Operations Center may be a county employee rather than an officer based on the duties of that position under section 252.38, Florida Statutes.

The constitutional dual office-holding provision is contained in Article II, section 5(a) of the Florida Constitution, and provides in part that:

No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

This provision of the constitution prohibits a person from simultaneously holding more than one "office" under the government of the state, counties, and municipalities. It is not necessary that the two offices be within the same governmental unit. Thus, for example, a municipal officer is precluded from holding not only another municipal office, but also a state or county office.

The prohibition applies to both elected and appointed offices.¹ There is no definition of the term "office" in the Constitution, although the Supreme Court of Florida has stated that the term "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office"² Within the scope of the term are the concepts of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law rather than by contract. By contrast, an "employment" does not "comprehend a delegation of any part of the sovereign power."³

Section 252.38, Florida Statutes, makes provision for the emergency management powers of political subdivisions. With regard to counties, the statute recognizes that "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state."⁴ To accomplish this responsibility, the Legislature has authorized counties to establish and maintain emergency management agencies. As defined in section 252.34(5), Florida Statutes, "[1]ocal emergency management agency" means "an organization created in accordance with the provisions of ss. 252.31 - 252.90 to discharge the emergency management responsibilities and functions of a political subdivision."

Each agency is required by statute to have a director, appointed by the board of county commissioners or the chief administrative officer of the county and serving at the pleasure of the appointing officer or officers.⁵ The statute provides an *ex officio* exception for county constitutional officers to serve as the county emergency management director and an employee of a county constitutional officer also may do so.⁶ Section 252.38(1)(b), Florida Statutes, provides that "[e]ach director has direct responsibility for the organization, administration, and operation of the county emergency management agency" and acts as liaison to the Florida Division of Emergency Management and to other local emergency management agencies and organizations. As discussed above, the county emergency management director is statutorily charged with discharging the emergency management responsibilities and functions of the county. Section 252.38(3), Florida Statutes, outlines the emergency management powers of political subdivisions. Among the powers political subdivisions may exercise in emergencies is the power:

1. To appropriate and expend funds; make contracts; obtain and distribute equipment, materials, and supplies for emergency management purposes; provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency; and direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.

2. To appoint, employ, remove, or provide, with or without compensation, coordinators, rescue teams, fire and police personnel, and other emergency management workers.

* * *

4. To assign and make available for duty the offices and agencies of the political subdivision, including the employees, property, or equipment thereof relating to firefighting, engineering, rescue, health, medical and related services, police, transportation, construction, and similar items or services for emergency operation purposes, as the primary emergency management forces of the political subdivision for employment within or outside the political limits of the subdivision.⁷

In addition, the political subdivision has the authority to waive the procedures and formalities otherwise required of political subdivisions for:

a. Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.

- b. Entering into contracts.
- c. Incurring obligations.
- d. Employment of permanent and temporary workers.
- e. Utilization of volunteer workers.
- f. Rental of equipment.

g. Acquisition and distribution, with or without compensation, of supplies, materials, and facilities.

h. Appropriation and expenditure of public funds.⁸

As the officer charged with discharging the emergency management responsibilities and functions of the county, the county emergency management director appears to have been delegated a substantial portion of the sovereign power of the county.

Based on the statutory enumeration of powers set forth in section 252.38, Florida Statutes, and exercisable by the director of the county emergency management agency on behalf of the county, it is my opinion that the director of a county emergency management agency is an officer rather than an employee. The county emergency management director acts in the service of the government and derives his or her position from a duly and legally authorized appointment. The duties of the emergency management director are continuous in nature and defined by rules prescribed by government and not by contract. The director of the county emergency management exercises important public powers, trusts, and duties, as part of the administration of the government.

In sum, it is my opinion that the position of the Brevard County Director of the Emergency Operations Center is an office, not an employment, and is subject to the dual office-holding prohibition contained in Article II, section 5(a) of the Florida Constitution. Thus, a city councilwoman may not simultaneously hold that office and the office of Director of the Emergency Operations Center without violating the constitutional dual office-holding prohibition.

QUESTION 2.

You also ask whether the constitutional prohibition can be avoided if the director of the emergency operations center designates an alternate to vote in her place during an emergency.

The dual office-holding prohibition is a limitation on the holding of two offices, it is not a conflict provision which could be avoided by abstention or recusal from a particular vote as is contemplated by section 112.3143(3), Florida Statutes. The dual office-holding prohibition cannot be overcome by delegating some of the duties of a second office to another while continuing in that office.

I would note that the Florida Supreme Court in *Holley v. Adams*,⁹ a 1970 decision, established the general rule that "[t]he acceptance of an incompatible office by one already holding office operates as a resignation of the first."¹⁰ Thus, an officer accepting another office in violation of the dual office-holding prohibition may create a vacancy in the first office.

In sum, it is my opinion that a violation of the prohibition set forth in Article II, section 5(a), Florida Constitution, cannot be avoided by the delegation of certain voting rights by the director of a county emergency operations center.

¹ See State ex rel. Holloway v. Sheats, 83 So. 508 (Fla. 1919) ("An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes perhaps the most decisive difference between an employment and an office, and between an employe[e] and an officer."). And see, e.g., Ops. Att'y Gen. Fla. 96-91 (1996) (special master of county value adjustment board an officer); 84-93 (1984) (legal counsel to local government code enforcement board an employee); and 73-332 (1973) (attorney for county commission an employee).

² Holloway v. Sheats, id.

³ See Ops. Att'y Gen. Fla. 05-15 (2005), 96-24 (1996), 80-97 (1980), and 69-2 (1969).

- ⁴ Section 252.38, Fla. Stat.
- ⁵ Section 252.38(1)(b), Fla. Stat.
- ⁶ Id.
- ⁷ Section 252.38(3)(a)1. 4., Fla. Stat.
- ⁸ Section 252.38(3)(a)5., Fla. Stat.
- ⁹ 238 So. 2d 401 (Fla. 1970).
- 10 Id. at 407

AGO 12-29 - September 18, 2012

FIREARMS - WEAPONS - CRIMES - DOMESTIC VIOLENCE

PLEA OF NOLO CONTENDERE WITH ADJUDICATION WITHHELD AS CONVICTION FOR BARRING POSSESSION OF A FIREARM

To: Major General Emmett R. Titshaw, Jr., Florida National Guard

QUESTION:

Does a plea of *nolo contendere* to a misdemeanor charge of domestic violence with adjudication of guilt withheld and a term of probation imposed constitute a conviction for purposes of barring an individual from possessing a firearm or weapon pursuant to 18 United States Code section 922(g)(9)?

SUMMARY:

An individual who has entered a plea of *nolo contendere* to a misdemeanor charge for domestic violence, with adjudication of guilt withheld and a term of probation imposed, would not be considered "convicted" for the purpose of permanently barring such individual from possessing a firearm pursuant to 18 United States Code section 922(g)(9).

You indicate that under 18 United States Code section 922(g)(9), the "Lautenberg Amendment," an individual who is "convicted" of a misdemeanor crime involving domestic violence is precluded from carrying or possessing a firearm.¹ Your letter states that in determining whether a "conviction" is a qualifying Lautenberg conviction, the controlling law is that of the state in which the proceedings for the domestic violence charge were held.

The pertinent provision in 18 United States Code section 922, states that it is unlawful for any person "who has been *convicted* in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."² (e.s.) As you have noted, and the federal act appears to indicate, the determination of whether an individual has been "convicted" of a misdemeanor crime of domestic violence for purposes of the act is made by the laws of the jurisdiction in which the proceedings were held.³

In Florida, the term "conviction" is generally recognized as a "determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court."⁴ An adjudication of guilt following a plea of no contest also qualifies as a "conviction."⁵ A no contest plea followed by withholding of adjudication of guilt, however, is not generally considered a conviction. In *Garron v. State*,⁶ the Supreme Court of Florida concluded there was no conviction or guilty plea where a defendant had pled no contest and adjudication of guilt was withheld, stating:

A nolo plea means "no contest," not "I confess." It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea.⁷

It has been recognized that the term "conviction" used in Florida law is "a 'chameleon-like' term that has drawn its meaning from the particular *statutory context* in which the term is used."⁸ (e.s.) As a result,

there have been departures from the general rule of no conviction when there is a *nolo contendere* plea with adjudication of guilt withheld. For instance, in Montgomery v. State,9 the Supreme Court of Florida found that an individual is considered "convicted" when he or she enters a nolo *contendere* plea and adjudication of guilt is withheld, in the context of determining whether an individual has a prior conviction for sentencing guidelines purposes. For sentencing purposes, the Montgomery Court noted that Chapter 921, Florida Statutes, for purposes of the sentencing statute, defines "conviction" as "a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld."¹⁰ (e.s.) The Court further noted that the Florida Rules of Criminal Procedure, used to implement the sentencing guidelines, define "conviction" as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended."11 (e.s.) Following the plain language of the statute, the Court concluded that a no contest plea is a conviction, regardless of adjudication being withheld, for sentencing guideline purposes.¹²

It should be recognized, however, that the *Montgomery* Court did not overrule *Garron*, but rather acknowledged that the Legislature had created an exception to the general rule in Florida and made a *nolo contendere* plea with adjudication of guilt withheld a conviction for purposes of sentencing matters. No such similar definition or language recognizing a *nolo contendere* plea with adjudication of guilt withheld as a conviction is found in the statutes relating to misdemeanor domestic violence. Clearly, had the Legislature wished to make the entry of a *nolo contendere* plea with adjudication of guilt withheld tantamount to a conviction in such matters, it could easily have done so.¹³

Absent statutory language which treats a *nolo contendere* plea with adjudication of guilt withheld in a proceeding for a misdemeanor crime of domestic violence as a "conviction," I cannot say that Florida law makes such a situation a "conviction" for purposes of permanently barring possession of a firearm under the federal law at issue here. Had the Legislature so intended, it could easily have defined "conviction" for purposes of a misdemeanor domestic violence charge to include withheld adjudications.

Accordingly, it is my opinion that Florida law does not treat a plea of *nolo contendere* to a misdemeanor charge for domestic violence with adjudication of guilt withheld and a term of probation imposed as a "conviction" which would permanently bar an individual from possessing a firearm pursuant to 18 United States Code section 922(g)(9).

¹ Your question is prompted by a situation in which a member of the Florida National Guard entered a plea of *nolo contendere* to misdemeanor battery under s. 784.03, Fla. Stat., and the court withheld adjudication and placed the service member on probation for 12 months. In this

instance, the guard member was charged in Flagler County and the victim was the member's child.

² See 18 U.S.C.A. s. 922(g)(9). See also 18 U.S.C.A. s. 922(d)(9), making it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person "has been convicted in any court of a misdemeanor crime of domestic violence."

³ See 18 U.S.C.A. s. 921(a)(20). See United States v. Willis, 106 F.3d 966 (11th Cir. 1997) (Federal law states that "conviction" with the meaning of s. 922[g][1] to be determined in accordance with the law of the jurisdiction in which the proceedings are held, citing 18 U.S.C. s. 921[a][20]).

⁴ See State v. Gazda, 257 So. 2d 242, 243-44 (Fla. 1971).

⁵ Raydo v. State, 696 So. 2d 1225 (Fla. 1st DCA 1997), approved in part and quashed in part, 713 So. 2d 996 (Fla. 1998).

⁶ 528 So. 2d 353 (Fla. 1988).

 7 Id. at 360.

⁸ See Raulerson v. State, 763 So. 2d 285, 291 (Fla. 2000), citing State v. Keirn, 720 So. 2d 1085, 1086 (Fla. 4th DCA, 1998).

⁹ 897 So. 2d 1282 (Fla. 2005). In *Montgomery*, the Court approved the appellate court's decision and disapproved a line of cases in which it was held that a no contest plea followed by a withhold of adjudication is not a "conviction" for sentencing purposes. *See Negron v. State*, 799 So. 2d 1126 (Fla. 5th DCA 2001); *Batchelor v. State*, 729 So. 2d 956 (Fla. 1st DCA 1999); *State v. Freeman*, 775 So. 2d 344 (Fla. 2d DCA 2000); and *Garron v. State*, 528 So. 2d 353 (Fla. 1988).

¹⁰ See s. 921.0021(2), Fla. Stat. (2002).

¹¹ 897 So. 2d at 1284. See Fla. R. Crim. P. 3.701(d)(2).

¹² The *Montgomery* Court found that its conclusion was consistent with the legislative intent of s. 921.0021(2), Fla. Stat., as expressed by the statute's plain language that a "conviction" is a "determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." 897 So. 2d at 1285.

 13 *Cf.* s. 784.03, Fla. Stat., providing that a person with a prior conviction for battery who commits a second or subsequent battery commits a felony of the third degree and defining "conviction" as "a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered;" s. 775.13(1), Fla. Stat., defining "convicted" as "a determination of guilt which is the result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld" for purposes of registration of convicted felons; s. 517.161(1)(j), Fla. Stat., allowing denial of registration of a securities dealer who "[h]as been convicted of, or has entered a plea of guilty or nolo contendere to, regardless of whether adjudication was withheld, a crime against the laws of this state or any other state or of the United States or of any other country or government which relates to registration as a dealer, investment adviser, issuer of securities, associated person, or branch office; which relates to the application for such registration;" and s. 458.331(1)(c), Fla. Stat., stating as a grounds for denial of a medical license or disciplinary action, "[b]eing convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine."

AGO 12-30 – September 18, 2012

SCHOOL DISTRICTS – TAXATION – MILLAGE – AD VALOREM TAXATION

AUTHORITY OF SCHOOL DISTRICT TO IMPOSE ADDITIONAL AD VALOREM TAX MILLAGE

To: Mr. Dirk M. Smits, Attorney for the School Board of Monroe County

QUESTION:

May voters approve additional funding pursuant to section 1011.73(1), Florida Statutes, for two years, without voiding a previously approved increase under section 1011.73(2), Florida Statutes?

SUMMARY:

Voters may approve additional school district tax millage pursuant to section 1011.73(1), Florida Statutes, for two years, without voiding a previously approved increase in tax millage under section 1011.73(2), Florida Statutes.

You state that on January 31, 2012, the voters of Monroe County approved a .5 mill tax increase pursuant to section 1011.73(2), Florida Statutes, for four years. The school board questions whether another referendum for additional tax revenues may be held pursuant to section 1011.73(1), Florida Statutes, without voiding the millage adopted pursuant to section 1011.73(2), Florida Statutes.

Section 9(a), Article VII, Florida Constitution, authorizes school districts to levy ad valorem taxes, and if authorized by general law to levy other taxes, for their respective purposes. Section 9(b) of Article

VII limits the levy of ad valorem taxes for school purposes to 10 mills, but specifically excludes "taxes levied for the payment of bonds and *taxes levied for periods not longer than two years* when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation" from the millage limitation. (e.s.) School boards are authorized by section 1011.73, Florida Statutes, to call for district millage elections. Subsection (2) of the statute provides:

The district school board, pursuant to resolution adopted at a regular meeting, shall direct the county commissioners to call an election at which the electors within the school district may approve an ad valorem tax millage as authorized under s. 1011.71(9). Such election may be held at any time, *except* that not more than one such election shall be held during any 12-month period. Any millage so authorized shall be levied for a period not in excess of 4 years or until changed by another millage election, whichever is earlier. If any such election is invalidated by a court of competent jurisdiction, such invalidated election shall be considered not to have been held. (e.s.)

Section 1011.71(9), Florida Statutes, provides:

In addition to the maximum millage levied under this section and the General Appropriations Act, a school district may levy, by local referendum or in a general election, additional millage for school operational purposes up to an amount that, when combined with nonvoted millage levied under this section, does not exceed the 10-mill limit established in s. 9(b), Art. VII of the State Constitution. Any such levy shall be for a maximum of 4 years and shall be counted as part of the 10-mill limit established in s. 9(b), Art. VII of the State Constitution. Millage elections conducted under the authority granted pursuant to this section are subject to s. 1011.73. Funds generated by such additional millage do not become a part of the calculation of the Florida Education Finance Program total potential funds in 2001-2002 or any subsequent year and must not be incorporated in the calculation of any hold-harmless or other component of the Florida Education Finance Program formula in any year. If an increase in required local effort, when added to existing millage levied under the 10-mill limit, would result in a combined millage in excess of the 10-mill limit, any millage levied pursuant to this subsection shall be considered to be required local effort to the extent that the district millage would otherwise exceed the 10-mill limit. (e.s.)

As you have indicated, Monroe County has approved an increase in ad valorem tax millage pursuant to section 1011.73(2), Florida Statutes, in January of this year. The plain language of the statute, therefore,

precludes another such election to alter the millage under the section for 12 months. Hence, the board wishes to investigate the possibility of imposing additional millage pursuant to section 1011.73(1), Florida Statutes. That section provides:

The district school board, pursuant to resolution adopted at a regular meeting, shall direct the county commissioners to call an election at which the electors within the school districts may approve an ad valorem tax millage as authorized in s. 9, Art. VII of the State Constitution. Such election may be held at any time, except that not more than one such election shall be held during any 12-month period. Any millage so authorized shall be levied for a period not in excess of 2 years or until changed by another millage election, whichever is the earlier. In the event any such election is invalidated by a court of competent jurisdiction, such invalidated election shall be considered not to have been held.

This section recognizes the school district's authority under section 9(b), Article VII of the Florida Constitution to have additional millage for up to two years approved by referendum which is not subject to the 10-mill cap.¹

Thus, it would appear that the Legislature has provided two distinct methods by which a school district may obtain *ad valorem* tax millage with voter approval. There is nothing in the statute which would indicate that the two subsections are mutually exclusive. In discussions with the Florida Department of Education, this office has been advised that the department is in agreement that subsections (1) and (2) of section 1011.73, Florida Statutes, operate independently.

It is a general rule of statutory construction that when two statutes relate to common things or have a common or related purpose, they are said to be *pari materia*, and where possible, the construction should be adopted that best harmonizes and reconciles the statutory provisions so as to preserve the force and effect of each.² It would appear, therefore, that section 1011.73(2), Florida Statutes, provides a means to impose tax millage in addition to the millage authorized under section 1011.73(1), Florida Statutes, rather than imposing a tax millage in its stead. Nothing within section 1011.73(1) or section 1011.73(2), Florida Statutes, references a limitation upon the millage proposed in the other.

In light of the above discussion, it is my opinion that the voters of a county may approve additional *ad valorem* tax millage pursuant to section 1011.73(1), Florida Statutes, without voiding a tax millage that has already been approved under section 1011.73(2), Florida Statutes. Obviously, this opinion expresses no view on the merits of a school district's decision to put such a matter before the voters.

 1 See s. 9(b), Art. VII, Fla. Const., excepting from the 10-mill cap taxes levied for periods not longer than two years when authorized by vote of the electors.

² See Ideal Farms Drainage Dist. v. Certain Lands, 19 So. 2d 234 (Fla. 1944); State ex rel. Ashby v. Haddock, 140 So. 2d 631 (Fla. 1st DCA 1962).

AGO 12-31 – September 19, 2012

MUNICIPALITIES – GOVERNMENT IN THE SUNSHINE – AUDITS

AUTHORITY TO RATIFY INVALID ACTION

To: Mr. James M. Messer, City Attorney, City of Pensacola

QUESTION:

Does an audit committee's ratification of a request for proposals which was created and issued by the county's financial officer and found to be defective validate the previously issued request for proposals?

SUMMARY:

An audit committee's statutorily prescribed function to exercise its discretion to create a request for proposals may not be delegated to a subordinate or other entity, absent statutory authorization. The committee may not, therefore, ratify a defective request for proposals which was created and issued by the county's financial officer contrary to the requirements of the law. A mere perfunctory or ceremonial acceptance of the previous action will not validate the defective request for proposals.

You state that the city's financial officer issued a request for proposals (RFP) for the city's annual financial audit required by section 218.39, Florida Statutes. You indicate that after the RFP had been issued an audit committee was created and the committee subsequently ratified it. The RFP issued by the financial officer apparently contained factors to use for the evaluation of the audit services which were not established by the audit committee, as required by the statute, but were ratified by the committee after the RFP was issued. According to your letter, the RFP also contained inaccurate information regarding the city's authority relating to the audit selection process.¹ Despite the irregularities, you indicate that you have advised the city council that the RFP was properly ratified by the audit committee and, therefore, it is valid and in compliance with the requirements of section 218.39, Florida Statutes, such that the selection process may proceed.

Section 218.39, Florida Statutes, requires a local governmental entity which has not been notified by the first day of the fiscal year that a financial audit will be performed by the Auditor General to have an annual financial audit of its accounts and records completed within nine months after the end of its fiscal year by an independent certified public accountant retained by it and paid from its public funds.² The statute specifically applies to any municipality with revenues or the total of expenditures and expenses in excess of \$250,000 (as reported on the fund financial statements) or any municipality with revenues or the total of expenditures and expenses between \$100,000 and \$250,000, as reported on the fund financial statements, which has not been subject to a financial audit pursuant to this subsection for the two preceding fiscal years.³

The procedures to be used to select an auditor are contained in section 218.391, Florida Statutes. The statute requires each local governmental entity to use specified auditor selection procedures when selecting an auditor to conduct the annual financial audit required in section 218.39, Florida Statutes.⁴ The governing body of the entity, however, must first establish an audit committee, the primary responsibility of which is to assist the governing body in selecting an auditor to conduct the annual financial audit.⁵ Moreover, the activities of the audit committee must be open to the public.⁶ As reflected in section 218.391(3), Florida Statutes, the audit committee *shall*:

(a) Establish factors to use for the evaluation of audit services to be provided by a certified public accounting firm duly licensed under chapter 473 and qualified to conduct audits in accordance with government auditing standards as adopted by the Florida Board of Accountancy. Such factors shall include, but are not limited to, ability of personnel, experience, ability to furnish the required services, and such other factors as may be determined by the committee to be applicable to its particular requirements.

(b) Publicly announce requests for proposals. Public announcements must include, at a minimum, a brief description of the audit and indicate how interested firms can apply for consideration.

(c) Provide interested firms with a request for proposal. The request for proposal shall include information on how proposals are to be evaluated and such other information the committee determines is necessary for the firm to prepare a proposal.

(d) Evaluate proposals provided by qualified firms. If

12-31

compensation is one of the factors established pursuant to paragraph (a), it shall not be the sole or predominant factor used to evaluate proposals.

(e) Rank and recommend in order of preference no fewer than three firms deemed to be the most highly qualified to perform the required services after considering the factors established pursuant to paragraph (a). If fewer than three firms respond to the request for proposal, the committee shall recommend such firms as it deems to be the most highly qualified.

Thus, the Legislature has provided a template which must be followed by a municipality for the creation of and performance of functions by an audit committee under section 218.391, Florida Statutes, before the municipality may choose an auditor. Where the Legislature has prescribed the manner in which something is to be done, it is, in effect, a prohibition against its being done in any other manner.⁷

You cite to *Frankenmuth Mutual Insurance Company v. Magaha*,⁸ however, for the proposition that the audit committee may ratify the RFP which was created and released by the county's financial officer. In *Frankenmuth*, the Supreme Court of Florida considered whether a county commission could approve or ratify a contract that had been executed without authority by the county's comptroller. Citing to several early cases and a general treatise on the power of municipal corporations, the Court determined that the board of county commissioners had the power to approve the agreement after it was executed.⁹

The *Frankenmuth* Court stated, however, "for a local government to properly ratify a previously executed, unauthorized agreement, the agreement must be ratified 'in the same manner . . . in which it might have been originally adopted."¹⁰

In this instance, section 218.391, Florida Statutes, contemplates the creation of an audit committee which is responsible for the formulation of factors to be used in evaluating a firm's ability to perform auditing functions and such a committee must carry out its functions at public meetings. The committee must publicly announce requests for proposals and provide interested firms with information on how proposals are to be evaluated and such other information as the committee determines is necessary for the firm to prepare a proposal. The committee must then rank and recommend in order of preference at least three firms it deems the most highly qualified to perform the required auditing services. After the audit committee has fulfilled these functions, the governing body may select one of the recommended firms and negotiate a contract.

A mere perfunctory ratification or approval of the financial officer's action which should have been performed by the audit committee at a public meeting would not appear to fulfill the audit committee's responsibilities and duties under the statute. It is questionable, moreover, whether the audit committee's statutorily prescribed functions may be delegated to the financial officer. Absent statutory authority, the discretionary authority of a public official or entity may not be delegated to a subordinate.¹¹

As the courts have found, independent final action taken at a public meeting is the only means to cure the defect created by action taken outside of the sunshine.¹² Moreover, there is a distinction between the ratification of a contract which should have been signed by a county commission and the approval of the unauthorized performance of statutorily prescribed duties which should have been undertaken at a public meeting.

Accordingly, it is my opinion that the audit committee may not ratify or approve the action taken by the financial officer, absent statutory authority authorizing the delegation of the committee's duties. A mere perfunctory or ceremonial acceptance of the previous action will not validate the defective request for proposals.

- ² Section 218.39(1), Fla. Stat.
- ³ Section 218.39(1)(b), Fla. Stat.
- ⁴ Section 218.391(1), Fla. Stat.
- ⁵ Section 218.391(2), Fla. Stat.
- ⁶ *Id*.

⁷ See Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944) ("When 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"); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

⁸ 769 So. 2d 1012 (Fla. 2000).

⁹ Id. at 1019-1029, citing Ramsey v. City of Kissimmee, 139 Fla. 107, 111-13, 190 So. 474, 476-477 (1939); Brown v. City of St. Petersburg, 111 Fla. 718, 720, 153 So. 140 (1933); cf. City of Panama City v. T&A Utility Contractors, 606 So. 2d 744, 747 (Fla. 1st DCA 1992) (city ratified city manager's unauthorized contract between city and third party); Tolar v. School Board of Liberty County, 398 So. 2d 427, 428-429 (Fla. 1981)

¹ You have provided a list of irregularities and misstatement of facts present in the RFP. This office will not address the impact of the alleged irregularities, as this office does not comment upon the provisions of local codes or contracts.

(school board's action taken in violation of Sunshine Law could be later ratified if taken in accordance with such law); 10A McQuillin, *The Law of Municipal Corporations*, s. 29.104 at 63 (3d ed. 1999) (general rule that whatever acts public officials may do or authorized to do in first instance may subsequently be adopted or ratified with the same effect as though properly done under previous authority).

¹⁰ 769 So. 2d at 1021, citing *Ramsey v. City of Kissimmee, supra* at 477, and *Broward County v. Conner*, 660 So. 2d 288, 290 (Fla. 4th DCA 1995) (if county could not enter into contract without taking action at a public meeting, it necessarily follows that actions of the county's attorneys could not bind the county in the absence of proper commission approval).

¹¹ See Op. Att'y Gen. Fla. 88-61 (1988), citing Op. Att'y Gen. Fla. 74-116 (1974) and 67 C.J.S. Officers s. 194). See also State v. Inter-American Center Authority, 84 So. 2d 9 (Fla. 1955), recognizing that absent statutory authority, public officer cannot delegate powers, even with court approval.

¹² See Finch v. Seminole County School Board, 995 So. 2d 1068, 1073 (Fla. 5th DCA 2008); Spillis Candela & Partners, Inc. v. Centrust Savings Bank, 535 So. 2d 694 (Fla. 3d DCA 1988) (only a full open hearing will cure a defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside the sunshine).

AGO 12-32 – September 19, 2012

COUNTIES – ZONING – PLANNED DEVELOPMENTS – COMMUNITY PLANNING ACT – CONSENT REQUIREMENTS

AUTHORITY OF COUNTY TO ADOPT ORDINANCE CONTAINING OTHER LANDOWNER CONSENT REQUIREMENT FOR APPLICATIONS FOR ZONING CHANGES

To: Mr. Mark H. Scruby, Clay County Attorney

QUESTIONS:

1. In the case of an application to revise the zoning for a portion of a planned development by the owner of said portion, do the provisions of the Community Planning Act, as codified in Part II of Chapter 163, Florida Statutes, authorize a local government to require in its zoning code the consent to the application by some or all of the other individual property owners within the planned development, or by an association of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development, before the application can be considered for approval?

2. If the answer to Question 1 is in the negative, then in the case of an application to revise the zoning for a portion of a planned development by the owner of said portion, does the common law or any other statutory law authorize a local government to require in its zoning code the consent to the application by some or all of the other individual property owners within the planned development, or by an association of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development before the application can be considered for approval?

3. In the case of an application to revise the zoning for a portion of a planned development by the owner of said portion, where the planned development is also subject to recorded covenants and restrictions (i) that are private in nature, (ii) that govern use rights and limitations and development standards for all lands within the planned development, and (iii) that give the individual owners of land within the planned development the right to vote on amendments to the covenants and restrictions, does the common law or any other statutory law authorize a local government to require such application to include the favorable outcome of a vote to approve the filing of the application by all or some fixed percentage of such individual members casting ballots?

SUMMARY:

1. & 2. I am not aware of nor have you drawn my attention to any provision of the "Community Planning Act" which would authorize a local governmental agency to delegate its legislative zoning authority to other land owners by requiring their consent prior to the acceptance of a request for rezoning. In the absence of concern for a particular statutory provision, however, this office will not undertake a broad review of multiple chapters of the Florida Statutes in an attempt to justify what the courts have clearly identified as a suspect practice. Finally, there is no common law right of local governments to impose a consent requirement such as the one you propose on applications for rezoning. Rather, the extent of the zoning power is circumscribed by the grant of power from the Legislature to local governments and contained in Chapters 125 and 166, Florida Statutes.

3. This office will not comment on the terms of private contracts or their enforcement. As addressed more fully herein, consent requirements such as the one you have proposed may constitute an unconstitutional delegation of legislative authority and are not favored in the law and may implicate a number of constitutional rights. According to your letter, the zoning article of Clay County's land development code provides for planned developments in addition to conventional use categories. The code requires that an application to rezone a tract of land into a planned development must be joined by all owners of the property within the boundaries of the proposed tract. Occasionally, a party owning a portion of a planned development may wish to modify some aspect of the plan as it was previously approved. In order for such party to apply for the modification, the code requires that the application be joined by all of the other owners of property within the boundaries of the planned development, not just the owners of the parcel for which the modification is sought. Without the joinder of all these owners, an application for modification will not be accepted.

The Board of County Commissioners has realized the difficulty of acquiring such third party joinder, especially as a development approaches build-out and hundreds or thousands of individual parcels have already been conveyed to third parties. In light of these concerns, the board is considering the adoption of an ordinance amending the joinder provision by reducing the percentage of joining owners from one hundred to some lesser figure or by eliminating it entirely.

As the county attorney, you have advised the board that the submission of an application to amend a portion of an approved planned development cannot lawfully be conditioned on the joinder or consent of third parties who have no ownership interest in the particular parcel, even if the third parties own other property within the planned development. However, community concerns with the reduction or elimination of these restrictions has led to the Clay County Board of County Commissioners requesting that an Attorney General Opinion be sought on these issues.

Initially, I must advise you that this office has no authority to comment on validly adopted provisions of the current zoning code of Clay County. This office, like the courts, must assume that a validly adopted statute or ordinance is lawful and effective until it is challenged and declared invalid in an appropriate court case.¹ Thus, my comments are provided to you for use by the commission in considering proposed legislation.

QUESTIONS 1. & 2.

Zoning is generally understood to be the regulation of land according to its nature and uses.² The power to restrict the use of land through zoning is delegated to local governments by the Legislature and is limited by the terms of the grant.³ The classification, regulation, prohibition, restriction, permitting, and determination of uses within districts constitutes an exercise of local governmental zoning and police power, possessed by counties and municipalities generally under zoning statutes.⁴ Thus, zoning enactments cannot validly be extended beyond the accomplishment of those purposes within their scope.⁵ In order to be valid, any zoning regulations that are adopted must be reasonable and nondiscriminatory and they must tend to promote the public health, safety, morals, or general welfare.⁶ As the Florida Supreme Court stated in *Griffin v. Sharpe*,⁷ an ordinance enacted under a theory of general police powers must not infringe on constitutional guarantees by invading personal or property rights unnecessarily or unreasonably, denying due process of law or equal protection of laws, or impairing obligations of contract. In addition, such an ordinance must not be inconsistent with the general laws of the state, must not discriminate unreasonably, arbitrarily or oppressively, and must not constitute a delegation of legislative or executive or administrative power.⁸

You have asked whether some statutory provision may authorize a local government to require in its zoning code that consent to an application for rezoning by some or all of the other individual property owners within a planned development is required before the application can be considered for approval. As a general proposition this office has previously concluded that such a requirement might, if enacted, result in an illegal delegation or abdication of legislative power.

In Attorney General Opinion 83-31, this office was asked by the Board of County Commissioners of Santa Rosa County whether an ordinance could be validly enacted which required the written consent of a majority of landowners and homeowners within a designated distance of proposed landing strips or runways of an airport facility prior to the construction of any additional airport facility in the county. A statutory provision, section 330.36, Florida Statutes, provided that no county or municipality could license airports or control their location except by zoning requirements. The statute made no exception for any other type of county ordinance other than regulation by a zoning ordinance. Thus, the opinion concluded that such an ordinance could not be validly enacted or enforced. The opinion goes on to caution against a possible illegal delegation or abdication of legislative power by the adoption of such an ordinance:

Additionally, the proposed ordinance, if enacted, might well result in an illegal delegation or abdication of legislative power. An airport or landing field constructed and operated in a proper manner is not a nuisance per se.⁹ Thus, the construction or maintenance and operation of an airport facility are not susceptible to regulation or proscription as a public nuisance by county legislative enactment.¹⁰ The proposed ordinance does not zone any lands or prohibit the use of designated or specific lands at specific locations for airport purposes or establish any safety regulations or standards in the interest of and to protect the public health, safety or welfare. It simply requires the airport owner or developer to obtain the written consent of the majority of the specified landowners and homeowners prior to commencing construction of any additional airport facility in the county, and the only limitation upon such property owners in exercising their power to consent or withhold their consent to "the construction of any additional airport facility" is their own free will and choice or their own whims or unbridled discretion. It permits the adjoining landowners to regulate property rights and deny a landowner his right to use his property, not otherwise restricted or regulated by law, for a lawful use or purpose. In effect, the affected landowners and homeowners are delegated the legislative power vested in the county commission to determine the public policy and regulate property rights and whether an airport facility may be located, maintained and operated at any particular location. The governmental powers of the legislative and governing body of a county cannot be delegated.¹¹

While consideration generally must be given to the rights of the individual landowner of the property involved as well as the interests of adjoining landowners and others in the adoption of zoning changes,¹² I must caution that an ordinance which delegates the legislative power vested in the county commission to determine the public policy and regulate property rights based on the written consent of all or a majority of the specified landowners and homeowners prior to accepting an application for rezoning might well be seen by a court as an invalid delegation of the legislative power of the county.¹³

Further, under Florida law generally, a property owner acquires no vested rights to the continuation of existing zoning.¹⁴ There is no general constitutional right to be free from all changes in land use laws.¹⁵ A landowner who plans to use his property in accordance with existing zoning regulations is entitled to assume only that such regulations will not be altered to his detriment, unless the change bears a substantial relation to the health, morals, welfare or safety of the public.¹⁶ As discussed above, an ordinance enacted under a theory of general police powers must not infringe on constitutional guarantees by invading personal or property rights unnecessarily or unreasonably, denying due process of law or equal protection of laws, or impairing obligations of contract. Nor may such an ordinance be inconsistent with the general laws of the state, discriminate unreasonably, arbitrarily or oppressively, or constitute a delegation of legislative or executive or administrative power.¹⁷ The adoption of an ordinance which includes a consent requirement as a condition precedent to the application process for rezoning could be seen to interject an element of arbitrariness into that application process.¹⁸ Again, the opinions of residents are not factual evidence and have been determined by the courts to not constitute a sound basis for denial of a zoning change application.¹⁹

You have specifically directed my attention to the Community Planning Act, sections 163.3164-163.3217, Florida Statutes, and associations of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development as potential sources of statutory authority for adopting an ordinance imposing a consent requirement to an application for rezoning.

The "Community Planning Act," codified in Part II, Chapter 163, Florida Statutes, was enacted to

utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and manage future development consistent with the proper role of local government.²⁰

The act specifically provides that "no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act."²¹ The comprehensive plan must provide

the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements. These principles and strategies shall guide future decisions in a consistent manner and shall contain programs and activities to ensure comprehensive plans are implemented. The sections of the comprehensive plan containing the principles and strategies, generally provided as goals, objectives, and policies, shall describe how the local government's programs, activities, and land development regulations will be initiated, modified, or continued to implement the comprehensive plan in a consistent manner. It is not the intent of this part to require the inclusion of implementing regulations in the comprehensive plan but rather to require identification of those programs, activities, and land development regulations that will be part of the strategy for implementing the comprehensive plan and the principles that describe how the programs, activities, and land development regulations will be carried out. The plan shall establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations.22

The act provides that it is the will of the Legislature that the public be involved in community planning:

It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible. Towards this end, local planning agencies and local governmental units are directed to adopt procedures designed to provide effective public participation in the comprehensive planning process and to provide real property owners with notice of all official actions which will regulate the use of their property. The provisions and procedures required in this act are set out as the minimum requirements towards this end.²³

To facilitate this public participation the act requires public hearings, the opportunity for written comments, and other public information opportunities.²⁴ As Florida courts have noted with regard to zoning decisions:

The role of the governmental entity is to arrive at sound decisions affecting the use of property within its domain. This includes receiving citizen input regarding the effect of the proposed use on the neighborhood, especially where the input is fact-based.²⁵

However, no provision of the "Community Planning Act" of which I am aware or to which you have drawn my attention would authorize a local governmental agency to delegate its legislative zoning authority to other land owners by requiring their consent prior to the acceptance of a request for rezoning.²⁶

You have also asked whether associations of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development may be potential sources of statutory authority for adopting an ordinance imposing a consent requirement to an application for rezoning. You are aware of no provisions in these laws which would bear directly on the validity of consent requirements prior to accepting a request for rezoning. Rather, these references, and your previous reference to Part II, Chapter 163, Florida Statutes, are intended to reflect more recent land development regulation and property owner rights laws. In the absence of concern for a particular statutory provision, this office will not undertake a broad review of multiple chapters of the Florida Statutes in an attempt to justify what the courts have clearly identified as a suspect practice.

Finally, the zoning power of Florida counties is statutory, not a common law power.²⁷ Local governments have no inherent right to restrict the use of land through zoning; such right is limited by the statute or ordinance creating the same.²⁸ The adoption of zoning ordinances and zoning maps is a legislative act²⁹ and zoning ordinances must find their justification in some aspect of the police power, asserted for the public welfare.³⁰ I am aware of, and you have brought to my attention, no common law right of local governments to impose a consent requirement such as the one you propose on applications for rezoning. Rather, the extent of the zoning power is circumscribed by the grant of power from the Legislature to local governments and contained in

Chapters 125 and 166, Florida Statutes.

QUESTION 3.

You have asked whether a local government may require an application for rezoning to include the favorable outcome of a vote to approve the filing of the application by all or some of the individual members voting on the matter when private recorded covenants and restrictions call for such a vote. This office will not comment on the terms of private contracts or their enforcement. As addressed more fully herein, consent requirements such as the one you have proposed may constitute an unconstitutional delegation of legislative authority and are not favored in the law and may implicate a number of constitutional rights.³¹

² See 7 Fla. Jur. 2d Building, Zoning, and Land Controls s. 53; and see Barefield v. Davis, 251 So. 2d 699 (Fla. 1st DCA 1971).

³ As a charter county, the zoning power of Clay County is derived from Art. VIII, s. 1(f), Fla. Const., and Part II, Ch. 125, Fla. Stat., particularly s. 125.66(4), Fla. Stat. *Cf. State ex rel. Henry v. Miami*, 158 So. 82 (Fla. 1934) (no such thing as a general legislative power on the part of municipal authorities to control and direct how the private properties of municipal inhabitants shall be held or enjoyed).

⁴ See Inf. Op. to Chiaro, dated January 24, 1997.

⁵ See Davis v. Sails, 318 So. 2d 214 (Fla. 1st DCA 1975); Prescott v. Charlotte County, 263 So. 2d 623 (Fla. 2d DCA 1972), cert. denied, 267 So. 2d 834 (Fla. 1972).

⁶ See City of Jacksonville v. Sohn, 616 So. 2d 1173 (Fla. 1st DCA 1993); Carter v. Town of Palm Beach, 237 So. 2d 130 (Fla. 1970); Op. Att'y Gen. Fla. 79-71 (1979); 62 C.J.S. Municipal Corporations ss. 128, 132-135

12-32

¹ See Evans v. Hillsborough County, 186 So. 193 (Fla. 1938) (a statute found on statute books must be presumed to be valid and must be given effect until it is judicially declared unconstitutional); White v. Crandon, 156 So. 303 (Fla. 1934) (county commissioners must obey statutes until in proper proceedings they are passed upon by the courts and declared invalid); State ex rel. Gillespie v. Thursby, 139 So. 372 (Fla. 1932), rehearing denied, 140 So. 775 (Fla. 1932); Falco v. State, 407 So. 2d 203 (Fla. 1981) (court has duty, if reasonably possible, and consistent with constitutional rights, to resolve all doubts as to validity of statute in favor of its constitutionality); State v. Jefferson, 758 So. 2d 661 (Fla. 2000); Ops. Att'y Gen. Fla. 92-02 (1992) (statutes are presumptively valid and must be given effect until determined otherwise by a court of competent jurisdiction in an appropriate judicial proceeding; 88-09 (1989); 87-36 (1987); cf. 90-47 (1990) (presumptive validity of municipal ordinance).

(1949); 7 Fla. Jur. 2d Building, Zoning, and Land Controls s. 102.

⁷ 65 So. 2d 751 (Fla. 1953), and see City of Port Orange v. Leechase Corp., 430 So. 2d 534 (Fla. 5th DCA 1983).

⁸ And see Miami Shores Village v. William N. Brockway Post No. 124 of American Legion, 24 So. 2d 33 (Fla. 1945); Wallace v. Town of Palm Beach, 624 F.Supp. 864 (S.D. Fla. 1985); Inf. Op. to Dellagloria, dated January 5, 2001.

⁹ See generally 2A C.J.S. Aeronautics and Aerospace s. 70 (1972); Brooks v. Patterson, 31 So. 2d 472, 474 (Fla. 1947); cf. Corbett v. Eastern Air Lines, Inc., 166 So. 2d 196 (Fla. 1st DCA 1964).

¹⁰ See Brooks v. Patterson, supra, and S.H. Kress and Co. v. City of Miami, 82 So. 775 (Fla. 1919).

¹¹ Crandon v. Hazlett, 26 So. 2d 638, 642 (Fla. 1946); State v. City of Tallahassee, 177 So. 719 (Fla. 1937); Dade County v. State, 116 So. 72 (Fla. 1928); see also Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); and see generally 16 C.J.S. Constitutional Law ss. 133, 137 (1956); 62 C.J.S. Municipal Corporations ss. 154, 226(10), 227(9) (1949); 101A C.J.S. Zoning and Land Planning s. 30 (1979). See also City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1974); Cassady v. Consolidated Naval Stores Company, 119 So. 2d 35 (Fla. 1960); Richey v. Wells, 166 So. 817 (Fla. 1936); Bailey v. Van Pelt, 82 So. 789 (Fla. 1919). Cf. Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Eubank v. City of Richmond, 226 U.S. 137 (1912); Grova v. Baran, 134 So. 2d 25 (Fla. 2d DCA 1961), appeal dismissed, 145 So. 2d 489 (Fla. 1962); Miller v. Ryan, 54 So. 2d 60 (Fla. 1951).

¹² See 101A C.J.S. Zoning and Land Planning s. 71; and see infra n.25 providing citations to Florida statutory provisions providing for the consideration of "affected person[s]" during the development process who may include owners of abutting real property.

¹³ See Pollard v. Palm Beach County, 560 So. 2d 1358 (Fla. 4th DCA 1990) (opinions of residents are not factual evidence and not sound basis for denial of zoning change application); *City of Apopka v. Orange County*, 299 So. 2d 657, 659-660 (Fla. 4th DCA 1974); and *Town of Ponce Inlet v. Rancourt*, 627 So. 2d 586 (Fla. 5th DCA 1993); *Marell v. Hardy*, 450 So. 2d 1207 (Fla. 4th DCA 1984) (it is the function of the legislative body charged with responsibility for protecting and enhancing the health, welfare, and safety of public to weigh the advantages and disadvantages of rezoning property).

¹⁴ See Villas of Lake Jackson, Ltd. v. Leon County, 884 F.Supp. 1544
(N.D. Fla. 1995), opinion modified on reconsideration, 906 F.Supp. 1509
(N.D. Fla. 1995), affirmed, 121 F.3d 610 (C.A. 11 Fla. 1997).

¹⁵ New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (C.A. 11 Fla.

1996), cert. denied, 117 S.Ct. 2514, 521 U.S. 1121, 138 L.Ed.2d 1016 (1997).

¹⁶ City of Miami Beach v. 8701 Collins. Ave., Inc., 77 So. 2d 428 (Fla. 1954).

¹⁷ And see Miami Shores Village v. William N. Brockway Post No. 124 of American Legion, 24 So. 2d 33 (Fla. 1945); Wallace v. Town of Palm Beach, 624 F.Supp. 864 (S.D. Fla. 1985); Inf. Op. to Dellagloria, dated January 5, 2001.

¹⁸ See, e.g, Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (C.A. 11 Fla. 1993), cert. denied, 114 S.Ct. 1400, 511 U.S. 1018, 128 L.Ed.2d 73, appeal after remand, 95 F.3d 1066, cert. denied, 118 S.Ct. 441, 522 U.S. 981, 139 L.Ed.2d 378 (restrictions government imposes on land must be substantially related to general welfare; if not, governmental action is arbitrary and capricious in violation of substantive due process); *Eide v. Sarasota County*, 908 F.2d 716 (C.A. 11 Fla. 1990), cert. denied, 111 S.Ct. 1073, 498 U.S. 1120, 112 L.Ed.2d 1179 (property owner may challenge zoning regulation by arguing that regulation is arbitrary and capricious, does not bear substantial relation to public health, safety, morals, or general welfare, and is therefore invalid exercise of police power; owner need only prove that government acted arbitrarily and capriciously either facially or as applied).

- ¹⁹ Pollard v. Palm Beach County, supra.
- ²⁰ Section 163.3161(2), Fla. Stat.
- ²¹ Section 163.3161(6), Fla. Stat.

²² Section 163.3177(1), Fla. Stat., *and see* the remainder of this statute for the required and optional elements of a comprehensive plan.

²³ Section 163.3181(1), Fla. Stat.

²⁴ See e.g., s. 163.3181(2), Fla. Stat.; s. 163.3174(1) and (4), Fla. Stat., requiring that the local planning agency prepare the comprehensive plan or amendment after public hearings; s. 163.3184(11), Fla. Stat., providing for public hearings during the process for adoption of comprehensive plans or plan amendments. However, I would also note that s. 163.3167(8), Fla. Stat., specifically prohibits "[a]n initiative or referendum process in regard to any development order or in regard to any local comprehensive plan amendment or map amendment[.]"

²⁵ See City of Dania v. Florida Power and Light, 718 So. 2d 813 at 816 (Fla. 4th DCA 1998), citing Grefkowicz v. Metropolitan Dade County, 389 So. 2d 1041 (Fla. 3d DCA 1980); Metropolitan Dade County v. Blumenthal, 675 So. 2d 598 (Fla. 3d DCA 1995).

²⁶ *Cf.* s. 163.3184, Fla. Stat., which defines "[a]ffected person" to include "owners of real property abutting real property that is the subject of a

proposed change to a future land use map" and authorizing any affected person to file a petition with the Division of Administrative Hearings to challenge whether the plan is in compliance with the statute; s. 163.3187(5)(a), Fla. Stat., providing a similar procedure for any "affected person" to challenge the compliance of a small scale development amendment; and s. 163.3215, Fla. Stat., providing standing for aggrieved or adversely affected parties to enforce local comprehensive plans through development orders. And cf. Preserve Palm Beach Political Action Committee v. Town of Palm Beach, 50 So. 3d 1176, 1179 (Fla. 4th DCA 2010) ("The right of the people to vote on issues they are entitled to vote on is one of utmost importance in our democratic system of government. But there are issues – such as the right of a small landowner to use his property subject only to government regulations - which should not be determined by popular vote. Section 163.3167(12) rightfully protects the small landowner from having to submit her development plans to the general public and ensures that those plans will be approved or not, instead, by the elected officials of the municipality in a quasi-judicial process.").

²⁷ See Penthouse, Inc. v. Saba, 399 So. 2d 456 (Fla. 2d DCA 1981), review denied, 408 So. 2d 1095 (Fla. 1981).

²⁸ See Florida Tallow Corp. v. Bryan, 237 So. 2d 308 (Fla. 4th DCA 1970).

²⁹ Pasco County v. J. Dico, Inc., 343 So. 2d 83 (Fla. 2d DCA 1977); and see Starkey v. Okaloosa County, 512 So. 2d 1040 (Fla. 1st DCA 1987) (rezoning is a legislative prerogative).

³⁰ *Flava Works, Inc. v. City of Miami, Fla.*, 800 F.Supp. 2d 1182 (S.D. Fla. 2011); *and see County of Volusia v. City of Deltona*, 925 So. 2d 340 (Fla. 5th DCA 2006), *rehearing denied* (2006), (because the zoning power is an aspect of the police power, a municipality may not enter into a private contract with a property owner for the amendment of a zoning ordinance subject to restrictions in an agreement to be executed between the city and the owner).

³¹ See Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610 (C.A. 11 Fla. 1997) (any constitutional right based upon zoning regulation governing specific use of real property, to extent claim is based upon deprivation of right to use property itself for that specific purpose is protectable, if it is right for which Constitution gives protection at all, only by procedural due process claim challenging procedures by which regulation was adopted, substantive due process claim based upon arbitrary and capricious action of government in adopting regulation, Takings Clause claim, or under some other constitutional provision that gives landowner protectable right, not specifically involved with real property right itself).

AGO 12-33 – September 19, 2012

PUBLIC FUNDS – PRIVATE PROPERTY – DECLARATION OF EMERGENCY

USE OF PUBLIC FUNDS; ENTRY ONTO PRIVATE PROPERTY

To: Mr. Hal A. Airth, Attorney, Suwannee County Board of County Commissioners

QUESTIONS:

1. May the County use public funds to repair washouts on private non-roadway property created by water run-off from a public road? Similarly, may the County enter private property and remove materials that were washed from the public roads onto the private property? May the County act in either case with or without a declared local state of emergency?

2. If a sink hole opens on private property then impacts public property, may the County enter the private property to seal the sink hole while repairing the public property? Similarly, if a sink hole opens on public property then runs on to private property, may the County enter and repair the damage to the private property? Is the response different if the work performed on private property is necessary to protect the public property? May the County act in either case with or without a declared local state of emergency?

SUMMARY:

1. In light of the broad language contained in the State **Emergency Management Act authorizing local governments** to act to protect county citizens and their property, it is my opinion that county resources may be utilized in this effort and that Suwannee County may dedicate county funds to the repair of washouts on private non-roadway property that have been caused by water run-off from a public roadway. Likewise, public funds could be dedicated to the repair of sinkholes on private property that impact public property. This conclusion is based on the extensive powers delegated to local governments under the State Emergency Management Act and such authority would not extend to the county in the absence of a declared local state of emergency. Further, the Suwannee County Commission must still independently determine that these emergency repairs accomplish a valid public purpose as is required in the State **Emergency Management Act.**

2. In light of potential for charges of violations of section

810.09, Florida Statutes, this office would suggest, should the Suwannee County Commission determine to commit county manpower to the repair of sinkholes and non-roadway property which affect public property, that the county secure consents from the landowners of such private property to enter and remain on the property while performing emergency repairs

While you have asked a number of questions relating to washouts and sinkholes, I understand all of these questions to involve two central issues: 1) whether the county is authorized to use public funds to repair private property damaged during an emergency and 2) whether the county may enter onto private property to effect these repairs. Therefore, this discussion is directed to these issues.

QUESTION 1. – Use of Public Funds

According to your letter, Tropical Storm Debby dumped massive amounts of rain in Suwannee County in a short period of time. As a result of that intense rainfall, water flowing off county roads has caused severe washouts on private property. You have drawn my attention to a previously issued opinion of this office, Attorney General Opinion 98-22, in which it was concluded that Citrus County could use county funds to keep private roads passable during a declared state of emergency under section 252.38, Florida Statutes, if the county commission determines that such an expenditure satisfied a county purpose. You have asked whether section 252.38, Florida Statutes, would authorize the county to make the proposed expenditures of public funds when the damage was caused by runoff from public roads. You also ask whether this statutory language would authorize the dedication of public funds to the repair of sinkholes that may have appeared on private property and that impact public property.

It is a basic proposition of Florida law that the expenditure of public funds must be used primarily for a public purpose.¹ Thus, the expenditure of county funds must meet a county purpose, rather than a private purpose.² The issue has most frequently occurred in relation to the repair of public roadways and the courts of this state and this office have concluded that public funds may only be spent for the construction, maintenance, or repair of public roads.³

The situation in Attorney General Opinion 98-22, like the situation you have described in Suwannee County, involved a local declaration of emergency pursuant to section 252.38, Florida Statutes, and the county's duties to protect lives and property under such a declaration. The situation presented to this office in Attorney General Opinion 98-22 was a case of first impression and involved Citrus County's attempt to keep private roads passable by supplying assistance to subdivision residents who had requested county assistance in the form of culverts, fill dirt, equipment, and manpower to keep these roads and streets open. In light of the local declaration of emergency and the specific terms of section 252.38, Florida Statutes, this office concluded that Citrus County was statutorily authorized to use county funds to keep private roads passable during a declared state of emergency.

Part I of Chapter 252, Florida Statutes, is the "State Emergency Management Act."⁴ The Legislature expressed its intent for the adoption of the act in part as follows:

It is the intent of the Legislature to reduce the vulnerability of the people and property of this state; to prepare for efficient evacuation and shelter of threatened or affected persons; to provide for the rapid and orderly provision of relief to persons and for the restoration of services and property; and to provide for the coordination of activities relating to emergency preparedness, response, recovery, and mitigation among and between agencies and officials of this state, with similar agencies and officials of other states, with local and federal governments, with interstate organizations, and with the private sector.

Pursuant to section 252.34(4)(c), Florida Statutes, specific emergency management responsibilities include "[r]esponse to emergencies using all systems, plans, and resources necessary to preserve adequately the health, safety, and welfare of persons or property affected by the emergency." More specifically, section 252.38(3)(a)1., Florida Statutes, authorizes political subdivisions such as counties "[t]o appropriate and expend funds [and to] provide for the health and safety of persons and property" Further, a political subdivision, in carrying out its emergency management powers, may "assign and make available for duty the offices and agencies of the political subdivision, including the employees, property, or equipment thereof relating to . . . transportation, construction, and similar items or services for emergency operation purposes" Again, all of these powers are tied to a declared state of emergency under Part I, Chapter 252, Florida Statutes.

In exercising its emergency management powers, a county "has the power and authority to waive the procedures and formalities otherwise required of the political subdivision by law pertaining to . . . [p]erformance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community;"⁶ and the "[a]cquisition and distribution, with or without compensation of supplies, materials, and facilities."⁷ The county is also authorized to suspend the usual procedures and formalities required for the "[a]ppropriation and expenditure of public funds."⁸

The "State Emergency Management Act" recognizes that "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state."⁹ Thus, the Legislature has made a determination that, under these extreme conditions, the safeguarding of private property and the expenditure of public funds to do so does satisfy a public purpose.

In light of the broad language contained in the State Emergency Management Act authorizing local governments to act to protect county citizens and their property, it is my opinion that county resources may be utilized in this effort and that Suwannee County may dedicate county funds to the repair of washouts on private non-roadway property that has been caused by water run-off related to a storm emergency. Further, this statutory language would also appear to authorize the dedication of public funds to the repair of sinkholes that may have appeared on private property and impact public property. As my conclusion is based on the extensive powers delegated to local governments under the State Emergency Management Act, this authority would not extend to the county in the absence of a declared local state of emergency. In addition, the Suwannee County Commission must still independently determine that these emergency repairs accomplish a valid public purpose as is required in the State Emergency Management Act.¹⁰ As this office noted in Attorney General Opinion 98-22, county funds may be expended to repair private roads during an emergency declared pursuant to section 252.38, Florida Statutes, "provided that the county first makes appropriate legislative findings as to the purpose of the expenditure and the benefits which would accrue to the county."

QUESTION 2. – Entry onto Private Property

Both your first and second questions require consideration of whether section 252.38, Florida Statutes, provides authorization for local governmental agents to enter onto private property in order to make emergency repairs. As you have provided me with no specifics regarding the location of the property in question or the ownership of any such property, my comments must be general in nature.

Section 252.38, Florida Statutes, provides for the emergency management powers of political subdivisions. Section 252.38(3), Florida Statutes, states that each political subdivision, in carrying out the provisions of sections 252.31-252.90, Florida Statutes, has the power and authority:

To request state assistance or invoke emergency related mutual aid assistance by declaring a state of local emergency in the event of an emergency affecting only one political subdivision. The duration of each state of emergency declared locally is limited to 7 days; it may be extended, as necessary, in 7 day increments. Further, the political subdivision has the power and authority to waive the procedures and formalities otherwise required of the political subdivision by law pertaining to: a. Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.

- b. Entering into contracts.
- c. Incurring obligations.
- d. Employment of permanent and temporary workers.
- e. Utilization of volunteer workers.
- f. Rental of equipment.

g. Acquisition and distribution, with or without compensation, of supplies, materials, and facilities.

h. Appropriation and expenditure of public funds.

Thus, the Legislature has granted local governments broad powers to deal with declared states of emergency by utilizing public resources. However, despite the broad powers granted, the entry onto private property by governmental agents presents several potential problems for governmental entities and agents.

Under common law theory, every man's land is deemed to be enclosed so that every entry thereon is, except by consent, a trespass.¹¹ The basis of the wrong lies in the disturbance of possession. This disturbance of possession may result from such acts as the unauthorized cutting and removal of trees¹² or the digging of a trench to carry utility pipes without having a right-of-way.¹³

As described in Florida's statutes relating to burglary and trespass, section 810.09, Florida Statutes, a person who enters upon or remains in any property other than a structure or conveyance¹⁴ without authorization may commit the offence of trespass on property other than a structure or conveyance. Trespass on property other than a structure or conveyance is a first degree misdemeanor. Thus, a local government might well be concerned that its agent's unauthorized entry onto private property either to retrieve public property or to perform repairs could subject both the agency and the agent to liability and criminal prosecution.

In light of possible trespass concerns, this office would suggest, should the Suwannee County Commission determine to commit county manpower to the repair of sinkholes and non-roadway property which affect public property, that the county secure consents¹⁵ from the landowners of such private property to enter and remain on the property while performing such emergency repairs or retrieving county property.

³ See Padgett v. Bay County, 187 So. 2d 410 (Fla. 1st DCA 1966); Collins v. Jackson County, supra; Ops. Att'y Gen. Fla. 75-309 (1975) and 73-222 (1973).

- ⁴ Section 252.31, Fla. Stat., contains the short title.
- ⁵ Section 252.38(3)(a)4., Fla. Stat.
- ⁶ Section 252.38(3)(a)5.a., Fla. Stat.
- ⁷ Id. at 5.g.
- ⁸ Section 252.38(3)(a)5.h., Fla. Stat.
- ⁹ Section 252.38, Fla. Stat.

¹⁰ See Ops. Att'y Gen. Fla. 98-22 (1998) and 88-52 (1988) (upon making the appropriate findings that an expenditure of county funds for lobbying serves a county purpose and is in the public interest, the board of county commissioners may expend county funds for lobbying); 86-87 (1987) and 74-227 (1974) (municipal funds may be used to support position on annexation).

¹¹ See Harris v. Baden, 17 So. 2d 608 (Fla. 1944), Leonard v. Nat Harrison Associates, Inc., 122 So. 2d 432 (Fla. 2d DCA 1960).

¹² National Rating Bureau, Inc. v. Florida Power Corp., 94 So. 2d 809 (Fla. 1956).

¹³ Okaloosa County Gas District v. Enzor, 101 So. 2d 406 (Fla. 1st DCA 1958).

¹⁴ The statute provides that it applies to a structure or conveyance:

1. As to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011; or

2. If the property is the unenclosed curtilage of a dwelling and the offender enters or remains with the intent to commit an offense thereon, other than the offense of trespass, commits the offense of trespass on property other than a structure or conveyance.

¹ See Art. VII, s. 1, Fla. Const., which by implication limits the imposition of taxes and the expenditure of tax revenue to public purposes.

 $^{^2}$ See Op. Att'y Gen. Fla. 73-222 (1973) and Collins v. Jackson County, 156 So. 2d 24 (Fla. 1st DCA 1963) (county not authorized to expend funds to maintain municipal roads which have not been designated as county roads).

¹⁵ Consent is an absolute defense to an action for trespass provided the consent is given by the possessor of the land or one competent and authorized to give such consent and provided further that the acts of the party accused of the trespass do not exceed, or are not in conflict with, the purposes for which such consent was given. See 55 Fla. Jur. 2d Trespass s. 9; Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976), cert. denied, 431 US 930, 53 L.Ed.2d 245, 97 S.Ct. 2634 (U.S. 1977); Florida Power Corporation v. Parker, 370 So. 2d 45 (Fla. 1st DCA 1979), cert. denied, 381 So. 2d 766 (Fla. 1980).

AGO 12-34 – September 19, 2012

SPECIAL DISTRICTS – COMPETITIVE BIDDING – PROCUREMENT – WATER MANAGEMENT DISTRICTS

WHETHER WATER MANAGEMENT DISTRICT IS AUTHORIZED TO ADOPT POLICY OF LOCAL PREFERENCE IN PROCUREMENT OF GOODS AND SERVICES

To: Mr. George T. Reeves, Attorney, Suwannee River Water Management District

QUESTION:

Is the Governing Board of the Suwannee River Water Management District authorized to enact a policy granting a local preference in the procurement of goods and services to businesses which are located within the boundaries of the Suwannee River Water Management District?¹

SUMMARY:

The Suwannee River Water Management District is limited to utilizing the procedures set forth in the statutes for the procurement of goods and services including the Consultants' Competitive Negotiation Act and has no authority to enact a policy granting a local preference to businesses located within the boundaries of the district except to the extent the district can identify a statutory authorization for local preference consideration.

The Suwannee River Water Management District is a multi-county special taxing district created pursuant to section 373.069, Florida Statutes² for the purpose of managing that geographical portion of Florida's water resources and managing those resources in a sustainable manner.³ The district is recognized as an independent special district by the Division of Community Development, Florida Department of Economic Opportunity.⁴ While established as an independent special district, the powers of a water management district as an administrative agency are measured by the terms of the act under which it is organized and it can exercise no authority that has not clearly been granted to it by the Legislature or which is necessarily implied from the powers conferred.⁵ Pursuant to sections 373.113 and 373.171(1)(c), Florida Statutes, the governing boards of water management districts are authorized to issue orders and adopt rules to implement the provisions of the act. Further, the governing board is authorized to provide for district works:

In order to carry out the works for the district, and for effectuating the purposes of this chapter, the governing board is authorized to clean out, straighten, enlarge, or change the course of any waterway, natural or artificial, within or without the district; to provide such canals, levees, dikes, dams, sluiceways, reservoirs, holding basins, floodways, pumping stations, bridges, highways, and other works and facilities which the board may deem necessary; to establish, maintain, and regulate water levels in all canals, lakes, rivers, channels, reservoirs, streams, or other bodies of water owned or maintained by the district; to cross any highway or railway with works of the district and to hold, control, and acquire by donation, lease, or purchase, or to condemn any land, public or private, needed for rights of way or other purposes, and may remove any building or other obstruction necessary for the construction, maintenance, and operation of the works; and to hold and have full control over the works and rights of way of the district.

Among the general powers and duties of the governing board of a water management district is the power to enter into contracts.⁶

It is the general rule with regard to competitive bidding by public agencies that, in the absence of any legislative requirements regarding the method of awarding public contracts, public officers may exercise reasonable discretion, and a contract may be made by any practicable method that will safeguard the public interest.⁷ You have not specified the types of goods and services to which the water management district's proposed policy may apply; however, the Florida Statutes contain extensive direction to special districts regarding bidding procedures for contractual services, goods and commodities, and personal property which would control and which contain local preference provisions upon which the district must rely.

The statutory directives requiring special districts to competitively award contracts for public construction projects are contained in sections 255.20 and 287.055, Florida Statutes. Section 255.20, Florida Statutes, requires counties, municipalities, special districts as defined in chapter 189, or other political subdivisions⁸ of the state that are seeking to construct or improve public construction works to competitively award these projects.⁹ Such projects must be competitively awarded to a licensed contractor when the project is estimated to have construction costs of more than \$300,000. The term "competitively award" is defined to mean "to award contracts based on the submission of sealed bids, proposals submitted in response to a request for proposal, proposals submitted for competitive negotiation."¹⁰ The statute expressly allows contracts for construction management services, design/build contracts, continuation contracts based on unit prices, "and any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution, or by state law."¹¹ Exceptions to the statute are recognized for emergency situations.¹²

Section 255.20, Florida Statutes, making provision for letting contracts for certain public projects, contains a local preference requirement in subsection (3):

All county officials, boards of county commissioners, school boards, city councils, city commissioners, and all other public officers of state boards or commissions that are charged with the letting of contracts for public work, for the construction of public bridges, buildings, and other structures must specify lumber, timber, and other forest products produced and manufactured in this state if such products are available and their price, fitness, and quality are equal. This subsection does not apply to plywood specified for monolithic concrete forms, if the structural or service requirements for timber for a particular job cannot be supplied by native species, or if the construction is financed in whole or in part from federal funds with the requirement that there be no restrictions as to species or place of manufacture.

This statute also makes reference to local preference legislation, *i.e.*, "[t]his subsection does not preempt the requirements of any smallbusiness or disadvantaged-business enterprise program or any localpreference ordinance." However, as discussed more fully herein, special districts, as limited purpose local governmental entities, have no home rule power to adopt ordinances.

The Consultants' Competitive Negotiation Act (CCNA), section 287.055, Florida Statutes, applies to political subdivisions¹³ such as the Suwannee River Water Management District and requires that certain professional services be acquired utilizing the competitive selection procedures set forth in the statute. The statute includes procedures for competitive selection and, in subsection (4)(b) sets forth the factors an agency may consider in determining whether a firm is qualified to perform the required services:

In determining whether a firm is qualified, the agency shall consider such factors as the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; *location*; recent, current, and projected workloads of the firms; and the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms. (e.s.)

Thus, the location of a firm may be considered by the agency in evaluating qualifications to perform the services under the CCNA.

The Suwannee River Water Management District is also subject to the provisions of section 287.084, Florida Statutes, which provides preference to Florida businesses in the purchasing of personal property:

(1)(a) When an agency, university, college, school district, or other political subdivision of the state is required to make purchases of personal property through competitive solicitation and the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in a state or political subdivision thereof which grants a preference for the purchase of such personal property to a person whose principal place of business is in such state, then the agency, university, college, school district, or other political subdivision of this state shall award a preference to the lowest responsible and responsive vendor having a principal place of business within this state, which preference is equal to the preference granted by the state or political subdivision thereof in which the lowest responsible and responsive vendor has its principal place of business. In a competitive solicitation in which the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state, the preference to the lowest responsible and responsive vendor having a principal place of business in this state shall be 5 percent.

Section 287.082, Florida Statutes, provides that commodities manufactured, grown, or produced in Florida are to be given preference in the sealed bidding process.

While this office has, on several occasions, recognized the authority of local governments to adopt ordinances or regulations establishing a local preference for procurement of goods and services, these opinions have related to the authority of local governments with home rule powers such as municipalities, counties, and, to a limited extent, school districts.¹⁴ Unlike counties or municipalities which have been granted home rule powers, special districts possess no inherent or home rule powers. Created by statute for a specific, limited purpose, the Suwannee River Water Management District may exercise only such power and authority as it has been granted by law. Thus, when presented with the issue of the authority of a water management district to adopt alternative or "hybrid" procedures for such things as public construction projects, this office has concluded that no such authority exists in the absence of statutory authority.¹⁵

In sum, it is my opinion that the Suwannee River Water Management District is limited to utilizing the procedures set forth in the statutes for the procurement of goods and services and has no authority to enact a policy granting a local preference to businesses located within the boundaries of the district except to the extent the district can identify a statutory authorization for local preference consideration.

³ Section 373.016, Fla. Stat., provides the declaration of policy for the "Florida Water Resources Act of 1972," *i.e.*, Ch. 373, Fla. Stat.

¹ I note that you have asked a second question premised on an affirmative response to your first question (set out above). In light of my response to your initial question, no consideration of your second question is necessary.

² See s. 373.069(1)(b), Fla. Stat.

⁴ *See* Suwannee River Water Management District, Official List of Special Districts Online, Division of Community Development, Florida Department of Economic Opportunity.

⁵ See Florida Elections Commission v. Davis, 44 So. 3d 1211 (Fla. 1st DCA 2010), State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), and e.g., Op. Att'y Gen. Fla. 08-02 (2008). Cf. Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 82 So. 2d 346 (Fla. 1919); Ops. Att'y Gen. Fla. 80-55 (1980), 83-44 (1983), and 74-169 (1974), recognizing that special districts possess only such powers as have been expressly granted by law or necessarily implied therefrom.

⁶ See s. 373.083(1), Fla. Stat.

 $^{^7}$ See, e.g., Ops. Att'y Gen. Fla. 93-28 (1993) and 93-83 (1993) and the cases cited therein.

 $^{^8~}See$ s. 1.01(8), Fla. Stat., defining "political subdivision" to include "all other districts in this state."

⁹ Section 255.20(1), Fla. Stat.

¹⁰ Section 255.20(1), Fla. Stat.

¹¹ Id.

¹² Section 255.20(1)(c)1., Fla. Stat.

¹³ The definition of "[a]gency" for purposes of the CCNA includes "a political subdivision" and, as discussed herein, the definition of "political subdivision" includes special districts. *See* n.8 *supra*.

¹⁴ See Ops. Att'y Gen. Fla. 02-03 (2002) and 01-65 (2001), discussing school boards and competitive bidding; Inf. Op. to the Hon. Dana Young, dated August 24, 2011, and Inf. Op. to the Hon. John Tobia, dated December 1, 2010, discussing local governments and local preference legislation generally; *and see City of Port Orange v. Leechase Corp.*, 430 So. 2d 534 (Fla. 5th DCA 1983) (legality of municipal bidding ordinance giving a local preference to bidders with principal place of business within municipality).

¹⁵ See Op. Att'y Gen. Fla. 11-21 (2011), concluding that the Southwest Florida Water Management District is limited to utilizing the procedures set forth in the statutes for public construction works and for construction management services and that the district has no authority to develop a "hybrid" model for awarding construction projects in the absence of statutory authority to do so.

AGO 12-35 – November 15, 2012

DUAL OFFICE-HOLDING – SPECIAL DISTRICTS – HOUSING AUTHORITIES – HOUSING FINANCE AUTHORITIES – DEPENDENT SPECIAL DISTRICTS – MUNICIPALITIES

HOUSING AUTHORITY AND HOUSING FINANCE AUTHORITY MEMBERS AS OFFICERS FOR PURPOSES OF DUAL OFFICE-HOLDING PROHIBITION

To: The Honorable Ira J. Raab (Retired), Justice, New York State Supreme Court

QUESTION:

Does simultaneous service on the West Palm Beach Housing Authority and the Housing Finance Authority of Palm Beach County violate the dual office-holding prohibition of the Florida Constitution?

SUMMARY:

Simultaneous service on the West Palm Beach Housing

Authority and the Housing Finance Authority of Palm Beach County would violate the dual office-holding prohibition of the Florida Constitution as service on either of these would represent holding an office within the scope of Article II, section 5(a), Florida Constitution.

According to your letter, you have been appointed to the West Palm Beach Housing Authority and the Housing Finance Authority of Palm Beach County, but have not accepted either appointment. You are concerned that simultaneous service on both agencies may violate Florida's constitutional dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution, and have requested direction from this office.

Article II, section 5(a), Florida Constitution, provides that:

No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, . . . constitutional convention, or statutory body having only advisory powers.

This provision of the Florida Constitution prohibits a person from simultaneously holding more than one "office" under the state, county, or municipal governments and applies to both elected and appointed offices.¹

The Constitution does not contain a definition of the terms "office" or "officer" for purposes of the dual office holding prohibition. However, Florida courts and this office have advised that it is the nature of the powers and duties of a particular position that determines whether it is an "office" within the scope of the dual office holding prohibition or an "employment" outside the scope of the provision.² The Florida Supreme Court has stated that an office "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office[.]"³ The term "office" encompasses the idea of tenure, duration, and duties in exercising a portion of the sovereign power, conferred or defined by law and not by contract, whereas an "employment" does not "comprehend a delegation of any part of the sovereign power."⁴ Unquestionably service on the governing body of a governmental entity, such as a city or county, constitutes an office.⁵ The issue for resolution here is whether your simultaneous service by appointment to the Palm Beach County Housing Finance Authority and the West Palm Beach Housing Authority represents an appointment to office which violates the dual office-holding prohibition of the Florida Constitution.

The dual office-holding prohibition refers only to state, county, and municipal offices. It is not applicable to independent special district

12-35

officers serving on governmental entities created by law to perform a special and limited governmental function. The Florida Attorney General's Office has concluded that there was no violation of the dual office-holding prohibition when a state, county, or municipal officer also served as an officer of an independent special district.⁶ In a Florida Supreme Court advisory opinion from 1994, the Court reiterated that special district officers are not included within the dual office-holding prohibition. In In re Advisory Opinion to the Governor – Dual Office-*Holding*⁷, the Court concluded that a member of a community college district board of trustees was an officer of a special district created to perform the special governmental function of operating a community college and was not a state, municipal, or county officer within the meaning of Article II, section 5(a), Florida Constitution. Thus, this office concluded that the dual office-holding prohibition did not keep a state, county, or municipal officer from serving on a community college board of trustees.

Although membership on the board of trustees of a community college district was determined to constitute a special district office and thus to be outside the parameters of Article II, section 5(a), Florida Constitution, the Florida Supreme Court in In re Advisory Opinion to the Governor – School Board Member – Suspension Authority⁸ rejected the designation of school board members as district officers. In that case, the Governor had requested that the Court determine whether school board members could be suspended under the constitutional provisions governing county officers or whether a suspension should be accomplished under the statutory provisions governing district officers. The Court concluded that school board members are county officers who have equivalent powers and authority to that of county commission members although their power is exercised in different local governmental spheres. As county officers, therefore, school board members are precluded from simultaneously holding another state, county, or municipal office.

The Supreme Court was advised that the Florida Attorney General's Office had previously considered school board members to be special district officers and outside the scope of Article II, section 5(a) of the Florida Constitution. Thus, a determination by the Court that school board members were county officers could result in potential dual office-holding violations for school board members who had relied on previously issued Attorney General Opinions. In response, the Court held that "[w]ith regard to those individuals who may be holding dual offices because of the attorney general's opinion 84-73, we conclude that this [*i.e.*, the Court's] opinion should be prospective in application. This prospective application should apply only until such time as the term of one of the dual offices expires."⁹

In light of the Florida Supreme Court's approach to the determination of an office, this office has cautioned that the nature and character of a district or authority must be reviewed to determine whether the governmental entity is an agency of the state, county or municipality so that its officers may be considered state, county or municipal officers for purposes of dual office-holding. In a situation very like the one you have presented, this office, in Attorney General Opinion 84-90, considered whether a member of the Volusia County Health Facilities Authority was a county officer. Although the health facilities authority was created and organized under Part III, Chapter 154, Florida Statutes, as a public body corporate and politic, it was created by county ordinance or resolution following a finding of necessity by the local governing body. The Volusia County governing body appointed the authority members, could exercise the power to remove the members, and was authorized to abolish the authority at any time. This office concluded under these facts that the authority was an instrumentality of the county and that its officers were actually county officers. Thus, the constitutional prohibition against dual office-holding precluded the mayor from also serving on the governing body of the county health facilities authority.

Similarly, in Attorney General Opinion 08-61, this office concluded that membership on the Volusia Growth Management Commission constituted an office for purposes of the constitutional dual office-holding The commission was designated a dependent special prohibition. district and was created by county charter to review comprehensive plan amendments. The council's budget was approved and funded by the county. The commission was made up of voting members appointed by the municipalities located within the county as well as by the county and included nonvoting members appointed by a number of other governmental entities. The commission's determinations of consistency were binding on the submitting governmental agency and actions of the council appeared to this office to be an exercise of the sovereign powers of the state. The opinion concluded that the Volusia Growth Management Commission appeared to be a part of county government and its members would be county officers.¹⁰

The Housing Finance Authority of Palm Beach County (the authority) is designated a dependent special district by the Division of Community Development.¹¹ Information supplied to the division by the authority indicates that Palm Beach County is the local governing authority which appoints the members of the authority.¹² Enabling documents for the housing finance authority are a series of county ordinances.¹³ The "Florida Housing Finance Authority Law," Part IV, Chapter 159, Florida Statutes, provides statutory authority for this entity and indicates that the purpose for adoption of Part IV, Chapter 159, Florida Statutes, is

[t]he financing, acquisition, construction, reconstruction, and rehabilitation of housing and of the real and personal property and other facilities necessary, incidental, and appurtenant thereto are exclusively public uses and purposes for which public money may be spent, advanced, loaned, or granted and

are governmental functions of public concern.14

In addition, in its "finding and declaration of necessity" for adoption of this legislation, the statute states that "[t]he Congress of the United States has . . . found and determined that housing may be financed by means of obligations issued by any state or local governmental unit . . . and has thereby provided a method to aid state and local governmental units to provide assistance to meet the need for housing."¹⁵ The law specifically provides that

[t]he county for which the housing finance authority is created may, at its sole discretion, and at any time, alter or change the structure, organization, programs, or activities of any housing finance authority, including the power to terminate such authority, subject to any limitation on the impairment of contracts entered into by such authority and subject to the limitations or requirements of this act.¹⁶

Among the powers of each housing finance authority is the power to "[c]reate or assist in creating corporations that qualify as not for profit corporations under s. 501(c)(3) of Internal Revenue Code of 1986, as amended, and under the laws of this state, and that are engaged in acquiring, constructing, reconstructing, or rehabilitating qualifying housing developments."¹⁷ The authority itself is legislatively declared to "constitute a public body corporate and politic, exercising the public and essential governmental functions" described in the act.¹⁸ The authority can sue and be sued;¹⁹ own real and personal property;²⁰ borrow money through the issuance of bonds;²¹ and purchase or make loans and take assignments of mortgage loans and promissory notes.²² County housing authorities can also "own, maintain, operate, control, and capitalize a limited purpose savings and loan association to provide low cost loans and related services to eligible persons to obtain affordable housing[;]²³ and make loans or grant surplus funds of the authority to corporations that qualify as not for profit corporations to support the development of affordable housing.²⁴ Authorities are authorized to issue revenue bonds and may issue refunding bonds to pay, retire, or refund the bonds issued by another housing finance authority.²⁵

Based on the substantial powers and duties imposed on a county housing finance authority set forth in Part IV, Chapter 159, Florida Statutes, as well as the county's role in appointing its members and enacting ordinances controlling the actions of such an authority, it is my opinion that a member of the Housing Finance Authority of Palm Beach County is a county officer for purposes of Florida's dual office holding prohibition.²⁶

Similarly, the West Palm Beach Housing Authority is designated a dependent district under the control of the City of West Palm Beach. The housing authority is created pursuant to Part I, Chapter 421, Florida Statutes, by approval of a city resolution. The purpose of Florida's "Housing Authorities Law," Part I, Chapter 421, Florida Statutes, is to address the existence of unsanitary or unsafe dwelling accommodations for low income Floridians through

[t]he clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income, including the acquisition by a housing authority of property to be used for or in connection with housing projects or appurtenant thereto, are exclusively public uses and purposes for which public money may be spent and private property acquired and are governmental functions of public concern.²⁷

Housing authorities are constituted by the Legislature as public bodies corporate and politic.²⁸ Commissioners of a municipal housing authority are appointed by the mayor of the controlling municipality with the approval of the governing body.²⁹ Commissioners may be removed by the mayor "[f]or inefficiency or neglect of duty or misconduct in office[.]"³⁰

Among the powers extended to a municipal housing authority by Part I, Chapter 421, Florida Statutes, is the power to invest funds and issue bonds;³¹ to prepare, carry out, acquire, lease, and operate housing projects;³² to lease or rent houses, lands, buildings, or structures "embraced in any housing project" and to establish rents for those properties.³³ A housing authority is also authorized within its area of operation to investigate living conditions and housing conditions for purposes of improving these conditions and can conduct examinations and investigations and issue subpoenas.³⁴ The statutes authorize a housing authority to create for-profit or not-for-profit corporations, limited liability companies, or other similar business entities in which the housing authority may hold an ownership interest.³⁵

Recognizing the substantial powers and duties exercised by a commissioner of a municipal housing authority under Part I, Chapter 421, Florida Statutes, and the relationship of these entities to the municipality, it is my opinion that the commissioners of a municipal housing authority are municipal officers and subject to the dual office-holding prohibition set forth in Article II, section 5(a), Florida Constitution.³⁶

Thus, in answer to your question, it is my opinion that simultaneous service on the West Palm Beach Housing Authority and the Housing Finance Authority of Palm Beach County would violate the dual officeholding prohibition of the Florida Constitution as service on both of these would represent holding dual offices within the scope of Article II, section 5(a), Florida Constitution. ¹ See, e.g., Ops. Att'y Gen. Fla. 69-2 (1969), 80-97 (1980), 94-66 (1994), and 08-15 (2008).

² See State ex rel. Holloway v. Sheats, 83 So. 508 (Fla. 1919); Ops. Att'y Gen. Fla. 99-34 (1999) (membership on the Florida State Fair Authority constitutes an office for purposes of Art. II, s. 5[a], Fla. Const.) and 91-80 (1991) (insurance fraud investigator is "office" for purposes of dual office holding prohibition).

³ State ex rel. Holloway v. Sheats, id. at 509 (term "office" embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract; and employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature). See also State ex rel. Clyatt v. Hocker, 22 So. 721 (Fla. 1897).

 4 Id.

⁵ See Ops. Att'y Gen. Fla. 72-348 (1972) and 74-73 (1974).

 6 See, e.g., Ops. Att'y Gen. Fla. 08-06 (2008) (mosquito control district); 02-49 (2002); 02-83 (2002) (water control district); and 02-22 (2002) (fire protection district).

- ⁷ 630 So. 2d 1055, 1058 (Fla. 1994).
- ⁸ 626 So. 2d 684 (Fla. 1993).
- ⁹ *Id.* at 690.

¹⁰ And see Op. Att'y Gen. Fla. 91-79 (1991) (Fort Walton Beach Area Bridge Authority, dependent special district within the county, determined to be an instrumentality of the county for dual office holding purposes). *Cf.* Op. Att'y Gen. Fla. 90-91 (1990), concluding that the Hillsborough County Hospital Authority, created by special act with all powers of a body corporate, whose members are appointed by the Hillsborough County Commission which possesses the power to fill vacancies on the authority, remove members for misfeasance, malfeasance or willful neglect of duty, and approve the authority's budget, was a county agency. *And see* Inf. Op. to the Honorable Bob Starks, dated March 25, 1997, stating that the Sanford Airport Authority, created by special act of the Legislature as a dependent special district to the municipality, was an agency of the city and thus subject to the dual office holding prohibition.

¹¹ See Division of Community Development Special District Information Program, Official List of Special Districts Online.

 12 And see s. 159.605(1), Fla. Stat. Enabling documents for the housing finance authority are a series of county ordinances.

¹³ See Palm Beach County Ordinances 79-3, 91-7, 98-53, 01-016, and 02-22.

- ¹⁴ Section 159.602(3), Fla. Stat.
- ¹⁵ Section 159.602(4), Fla. Stat.
- ¹⁶ Section 159.604(3), Fla. Stat.
- ¹⁷ Section 159.605(2)(b)4., Fla. Stat.
- ¹⁸ Section 159.608, Fla. Stat.
- ¹⁹ Section 159.608(1), Fla. Stat.
- ²⁰ Id. at (2).
- ²¹ Section 159.608(4), Fla. Stat

²² Section 159.608(3), Fla. Stat. And see Ops. Att'y Gen. Fla. 09-17 (2009) (Housing Finance Authority of Palm Beach County may loan funds to for profit developers for development of qualifying housing or construction, purchase, reconstruction, or rehabilitation of qualifying housing under provisions of Part IV, Ch. 159, Fla. Stat., if such housing fulfills purposes of the act) and 00-14 (2000) (Housing Finance Authority of St. Johns County authorized by s. 159.608[3], Fla. Stat., to make mortgage loans to individuals for purchase of qualifying housing developments, such as a small apartment complex to be rented to low income families or individuals).

²³ Section 159.608(9), Fla. Stat. *But see* Op. Att'y Gen. Fla. 90-64 (1990) (housing authorities created pursuant to Ch. 159, Fla. Stat., not authorized to establish, wholly own, and operate state chartered savings bank).

²⁴ Section 159.608(10)(a), Fla. Stat.

²⁵ Section 159.612(1), Fla. Stat. *And see* Op. Att'y Gen. Fla. 96-73 (1996) (Housing Finance Authority of Monroe County is an agency or subdivision of state and, as agency that may employ professional service consultants, it falls within scope of Consultants' Competitive Negotiation Act and must follow requirements of that act when developing real property; further, authority must comply with s. 255.20, Fla. Stat., in those cases where authority owns the public building, structure, or other public construction work).

- ²⁶ And see Op. Att'y Gen. Fla. 09-48 (2009).
- ²⁷ Section 421.02(3), Fla. Stat.
- ²⁸ Section 421.08, Fla. Stat.
- ²⁹ Section 421.05(1), Fla. Stat.

- ³⁰ Section 421.07, Fla. Stat.
- ³¹ Section 421.08(5), Fla. Stat.
- 32 Id. at (2).
- ³³ Section 421.08(4), Fla. Stat.
- ³⁴ *Id.* at (6) and (7).
- ³⁵ Section 421.08(8)(a), Fla. Stat.

³⁶ Compare Op. Att'y Gen. Fla. 99-49 (1999), in which this office advised that a commissioner of a county housing authority, appointed by the Governor and subject to removal by the Governor "in the same manner and for the same reasons as other officers appointed by the Governor," was not subject to the dual office-holding prohibition as he or she was an officer of an independent special district; *and compare* Op. Att'y Gen. Fla. 96-73 (1996) (Housing Finance Authority of Monroe County is an agency or subdivision of state and, as agency that may employ professional service consultants, it falls within scope of Consultants' Competitive Negotiation Act and must follow requirements of that act when developing real property; further, authority must comply with s. 255.20, Fla. Stat., in those cases where authority owns the public building, structure, or other public construction work).

AGO 12-36 – November 15, 2012

ECONOMIC DEVELOPMENT AGENCIES – AIRPORT AUTHORITIES – COUNTIES – MUNICIPALITIES – PUBLIC RECORDS

WHETHER AVIATION AUTHORITY IS AN ECONOMIC DEVELOPMENT AGENCY

To: Mr. Douglas N. Burnett, General Counsel, St. Augustine - St. Johns County Airport Authority

QUESTIONS:

1. Is the St. Augustine – St. Johns County Airport Authority an "economic development agency" as defined in section 288.075, Florida Statutes?

2. If not, is the airport authority's development activity protected from public disclosure?

SUMMARY:

The St. Augustine – St. Johns County Airport Authority is not an "economic development agency" as defined in section 288.075, Florida Statutes, and, therefore, may not avail itself of the confidentiality provisions provided within the statute.

You indicate that the St. Augustine – St. Johns County Airport Authority (authority) is an independent special taxing district. The authority's charter is codified in Chapter 2002-347, Laws of Florida. Pursuant to section 3(5) of the act, the authority is, among other things, empowered to engage in the "promotion of aeronautical development." You question, therefore, whether the authority is an economic development agency (EDA) which may avail itself of the confidentiality provisions in section 288.075, Florida Statutes.

Section 288.075(1)(a), Florida Statutes, defines "[e]conomic development agency" to mean:

1. The Department of Economic Opportunity;

2. Any industrial development authority created in accordance with part III of chapter 159 or by special law;

3. Space Florida created in part II of chapter 331;

4. The public economic development agency of a county or municipality or, if the county or municipality does not have a public economic development agency, the county or municipal officers or employees assigned the duty to promote the general business interests or industrial interests of that county or municipality or the responsibilities related thereto;

5. Any research and development authority created in accordance with part V of chapter 159; or

6. Any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county.

This office has been advised that St. Johns County has established an economic development agency.¹ By the terms of paragraph 4 in subsection (1)(a) of the statute, the authority would not be in a position to be designated as the county's economic development agency.

Section 288.075, Florida Statutes, makes certain records of a private corporation, partnership, or person held by an EDA confidential and exempt from section 119.07(1), Florida Statutes, and Article I, section 24(a), Florida Constitution.² Pursuant to section 288.075(2)(a), Florida Statutes,

If a private corporation, partnership, or person requests in writing before an economic incentive agreement is signed that an economic development agency maintain the confidentiality of information concerning plans, intentions, or interests of such private corporation, partnership, or person to locate, relocate, or expand any of its business activities in this state, the information is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution for 12 months after the date an economic development agency receives a request for confidentiality or until the information is otherwise disclosed, whichever occurs first.³

The Legislature's designation of those entities which are considered economic development agencies for purposes of section 288.075, Florida Statutes, precludes any other entities from falling under the definition.⁴ Where a statute enumerates the things on which it is to operate, it is ordinarily to be construed as excluding from its operation all things not expressly mentioned therein.⁵ Moreover, exemptions from the public records requirements of Chapter 119, Florida Statutes, are to be strictly construed in light of the public purpose for adoption of the statute, *i.e.*, to open public records to the state's citizens to discover the actions of their government.⁶

While you posit that the governing authorities of St. Johns County or the City of St. Augustine would be authorized to designate the authority as an economic development authority, section 288.075(1) (a)6., Florida Statutes, the provision upon which you base your position, relates to "private" agencies which may be authorized by the state, county, or municipality to carry out economic development activities. It does not appear, nor have you asserted, that the authority is a private agency. Moreover, there is no indication in the authority's enabling legislation that the authority has been given the power to promote the general business interests or industrial interests of the county or the municipality.

Accordingly, it is my opinion that the St. Augustine – St. Johns County Airport Authority does not fall within the definition of an "economic development agency" as defined in section 288.075, Florida Statutes, and, therefore, may not utilize the confidentiality provisions set forth therein.

¹ Ordinance No. 2011-39, St. Johns County Code of Ordinances, amending Ordinance No. 2006-99, St. Johns County Code of Ordinances, recognizing the establishment of the St. John County Economic Development Agency, as defined in s. 288.075, Fla. Stat.

² See s. 288.075(2), (3), (4), (5), and (6), Fla. Stat., making confidential and exempt the following: plans, intentions, and interests; trade secrets;

proprietary confidential business information; identification, account, and registration numbers; and information regarding the administration of an economic incentive program.

³ And see s. 288.075(2)(a)2., Fla. Stat., providing that an economic development agency may extend the period of confidentiality for up to an additional 12 months upon written request and upon a finding by the economic development agency that the private corporation, partnership, or person is still actively considering locating, relocating, or expanding its business activities in this state. The request for an extension, however, must be received prior to the expiration of any confidentiality originally provided under this section.

⁴ See Op. Att'y Gen. Fla. 95-52 (1995) (community redevelopment district not within the entities enumerated in s. 288.075, Fla. Stat., as an economic development agency).

⁵ Ideal Farms Drainage District v. Certain Lands, 19 So. 2d 234 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So. 2d 341 (Fla. 1952); Thayer v. State, 335 So. 2d 815 (Fla. 1976).

⁶ See Henderson v. State, 745 So. 2d 319, 324 (Fla. 1999); Christy v. Palm Beach County Sheriff's Office, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997); citing City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1136, (Fla. 4th DCA 1994), review denied, 651 So. 2d 1192 (Fla. 1995).

AGO 12-37 – November 16, 2012

COMMUNICATIONS AND DATA PROCESSING – PRIMARY DATA CENTER – BOARD OF TRUSTEES – MINORITIES – MINORITY REPRESENTATION

WHETHER BOARD OF TRUSTEES OF PRIMARY DATA CENTER IS "DECISIONMAKING AND REGULATORY BOARD" WITHIN SCOPE OF STATUE AND MUST PROVIDE REPORTS

To: Mr. Gerard T. York, General Counsel Southwood Shared Resource Center/Northwood Shared Resource Center

QUESTIONS:

1. Whether the board of trustees for the Northwood Shared Resource Center and the Southwood Shared Resource Center is the "appointing authority" for each of these primary data centers?

2. Whether each of these primary data centers has reporting obligations under section 760.80(8), Florida Statutes?

SUMMARY:

1. The boards of trustees of the Northwood Shared Resource Center and the Southwood Shared Resource Center are the "appointing authority" for the "at-large" member of those boards.

2. As an "appointing authority," the boards of trustees of the Northwood Shared Resource Center and the Southwood Shared Resource Center appear to come within the scope of the reporting requirement of section 760.80(8), Florida Statutes.

Section 760.80, Florida Statutes, was enacted in 1994 with the expressed legislative intent

to recognize the importance of balance in the appointment of minority and nonminority persons to membership on statutorily created decisionmaking and regulatory boards, commissions, councils, and committees, and to promote that balance through the provisions of this section. In addition, the Legislature recognizes the importance of including persons with physical disabilities on such panels. Furthermore, the Legislature recognizes that statutorily created decisionmaking and regulatory boards, commissions, councils, and committees play a vital role in shaping public policy for Florida, and the selection of the best qualified candidates is the paramount obligation of the appointing authority.¹

The statute defines the term "minority person" to include African Americans, Hispanic Americans, Asian Americans, Native Americans, and women.²

Legislative history for CS/SB 340, enacted as Chapter 94-213, Laws of Florida, recognizes that "[n]umerous boards, commissions, councils, and committees are created by statute within the executive, legislative, and judicial branches of government." As examples of the types of boards and commissions within the scope of the statute, the Legislature identified the Board of Regents, the Public Service Commission, and the Florida Parole Commission.³ As mentioned in the legislative history for CS/SB 340, which would become section 760.80, Florida Statutes, "[b]oards of trustees and commissions, by definition in ch. 20, F.S., are generally decisionmaking and regulatory bodies"⁴

The statute requires that, when appointing members to any statutorily created decisionmaking or regulatory board, commission, council, or committee of the state, the appointing authority should select those persons whose appointment will ensure that the membership of the board accurately reflects the proportion that each minority group represents in the state population represented by the board.⁵ The

composition of local boards should reflect the population of the area represented by the board as determined by the most recent federal census.⁶ The statute provides:

If there are multiple appointing authorities for the board, commission, council, or committee, they shall consult with each other to ensure compliance with this section.⁷

The statute requires that each appointing authority submit a report to the Secretary of State which reflects the number of appointments made during the preceding year from each minority group and the number of nonminority appointments in both numerical terms and as a percentage of the total membership of the board.⁸ Each such report shall include details on the number of physically disabled persons appointed to these boards in the previous calendar year.⁹ The report is to be submitted to the Governor, the Speaker of the House of Representatives, and the President of the Senate.¹⁰ The appointing authority is charged with designating "a person responsible for retaining all applications for appointment, who shall ensure that information describing each applicant's race, ethnicity, gender, physical disability, if applicable, and qualifications" is available for public inspection.¹¹

Thus, section 760.80, Florida Statutes, establishes state policy with respect to appointing members of statutorily-created decisionmaking or regulatory boards, commissions, councils, and committees in a manner that ensures proportionate minority representation on such bodies.¹² As a statutory scheme enacted in the public interest, section 760.80, Florida Statutes, is entitled to a liberal construction favoring a construction which would accomplish its purpose.¹³

Part I, Chapter 282, Florida Statutes, is entitled the "Enterprise Information Technology Services Management Act".¹⁴ The Legislature's discussion of the purpose of the act is contained in section 282.201(1), Florida Statutes:

The Legislature finds that the most efficient and effective means of providing quality utility data processing services to state agencies requires that computing resources be concentrated in quality facilities that provide the proper security, infrastructure, and staff resources to ensure that the state's data is maintained reliably and safely, and is recoverable in the event of a disaster. Efficiencies resulting from such consolidation include the increased ability to leverage technological expertise and hardware and software capabilities; increased savings through consolidated purchasing decisions; and the enhanced ability to deploy technology improvements and implement new policies consistently throughout the consolidated organization. Unless otherwise exempt by law, it is the intent of the Legislature that all agency data centers and computing facilities be consolidated into a primary data center by 2019.

To facilitate the provision of data processing services to state agencies, a state data center system is created that includes all primary data centers, other nonprimary data centers, and computing facilities. This service is designed to provide an "enterprise information technology service."¹⁵

The Northwood Shared Resource Center and the Southwood Shared Resource Center (the "centers") are created in Part I, Ch. 282, Florida Statutes, to facilitate the provision of data processing services to state agencies. Both centers are primary data centers created pursuant to section 282.203, Florida Statutes. For purposes of the act, a "[p]rimary data center" is defined to mean "a data center that is a recipient entity for consolidation of nonprimary data centers and computing facilities and that is established by law."¹⁶

The statutes creating both centers provide that each is "an agency established within the Department of Management Services for administrative purposes only."¹⁷ Both sections 282.204 (Northwood Shared Resource Center) and 282.205 (Southwood Shared Resource Center) contain substantially similar enabling language:

(1) The center is a primary data center and *is a separate budget entity that is not subject to control, supervision, or direction of the department in any manner*, including, but not limited to, purchasing, transactions involving real or personal property, personnel, or budgetary matters.

(2) *The center shall be headed by a board of trustees* as provided in s. 282.203, who shall comply with all requirements of that section related to the operation of the center and with the rules of the Agency for Enterprise Information Technology related to the design and delivery of enterprise information technology services.¹⁸ (e.s.)

Each primary data center is headed by a board of trustees as defined in section 20.03, Florida Statutes. That statutory section provides:

"Board of trustees," . . . means a board created by specific statutory enactment and appointed to function adjunctively to a department, the Governor, or the Executive Office of the Governor to administer public property or a public program.¹⁹

The duties of the board are statutorily prescribed and include the employment of an executive director to handle the day-to-day operations of the primary data center; establishment of budgeting, accounting, and operating procedures; providing customer entities with information concerning plans for service requirements; approving a portfolio of services offered by the data center; coordination with other primary data centers to consolidate purchases of goods and services to lower costs; and to contract with other primary data centers or with the agency within which the primary data center is housed to provide administrative services.²⁰ In the absence of legislative clarification as to the scope of section 760.80, Florida Statutes, and the entities subject thereto, I cannot state that the boards of trustees of primary data centers do not constitute decisionmaking boards that would come within the scope of section 760.80, Florida Statutes.

The members of the boards of trustees of primary data centers are appointed by the agency head or chief executive officer of the representative customer entities of the primary data center and serve at the pleasure of the appointing customer entity.²¹ However, "[a] single trustee . . . shall represent those customer entitles that represent less than 4 percent of the total usage. The trustee shall be selected by a process determined by the board."²² Bylaws of the Southwood Shared Resource Center and the Northwood Shared Resource Center provide that this at-large position is selected by the other trustees.²³ Thus, the boards of trustees of these primary data centers are the appointing authorities for the "at-large" trustee of the primary data centers.

Primary data centers are designated "agencies" for purposes of accomplishing limited statutorily specific duties. A review of the duties and responsibilities of the boards of trustees of primary data centers suggests that the boards of trustees act as decisionmaking and regulatory bodies for purposes of section 282.203, Florida Statutes, and would fall within the intent of the Legislature to cover "boards of trustees" subject to section 760.80, Florida Statutes. As the appointing authority of a trustee pursuant to section 282.203(2)(a)4.e., Florida Statutes, the boards of trustees would be subject to the reporting requirements of section 760.80(4), Florida Statutes, for that trustee as are the other appointing authorities for the other trustees of the Northwood and Southwood Shared Resource Centers.

Thus, it is my opinion that the board of trustees of the Northwood and Southwood Shared Resource Centers are "appointing authorities" within the scope of section 760.80(4), Florida Statutes, for purposes of the trustee each of these boards selects. In light of this conclusion, the boards of directors of the Northwood Shared Resource Center and the Southwood Shared Resource Center are subject to the reporting requirements of section 760.80, Florida Statutes.

320

¹ Section 760.80(1), Fla. Stat.

² Section 760.80(2)(a) - (e), Fla. Stat.

³ See Senate Staff Analysis and Economic Impact Statement for CS/SB

340, dated February 2, 1994.

 4 Id.

- ⁵ Section 760.80(3), Fla. Stat.
- ⁶ Supra at n.5.
- 7 Id.
- ⁸ Section 760.80(4), Fla. Stat.
- ⁹ *Id*.
- 10 Id.
- 11 Id.

¹² See Summary, Senate Staff Analysis and Economic Impact Statement for CS/SB 340, dated February 2, 1994.

¹³ See Department of Environmental Regulation v. Goldring, 477 So. 2d 532 (Fla. 1985); *Ideal Farms Drainage District v. Certain Lands*, 19 So. 2d 234 (Fla. 1944); *Wolfson v. State*, 344 So. 2d 611 (Fla. 2d DCA 1977) (statutes enacted for public benefit, such as public meetings or records laws, should be construed liberally in favor of the public).

¹⁴ Section 282.003, Fla. Stat.

¹⁵ "Enterprise information technology service" is defined in s. 282.0041(11), Fla. Stat., to mean "an information technology service that is used in all agencies or a subset of agencies and is established in law to be designed, delivered, and managed at the enterprise level."

¹⁶ Section 282.0041(17), Fla. Stat.

- ¹⁷ See ss. 282.204 and 282.205, Fla. Stat.
- ¹⁸ Section 282.204, Fla. Stat.
- ¹⁹ Section 282.203(12), Fla. Stat.
- ²⁰ Section 282.203(3)(a)-(l), Fla. Stat.
- ²¹ Section 282.203(2)(a), Fla. Stat.
- ²² Section 282.203(2)(a)4.e., Fla. Stat.

²³ See Art. I, s. 101(b), Southwood Shared Resource Center Bylaws, and s. 2.2.1, Northwood Shared Resource Center Bylaws.

AGO 12-38 - November 16, 2012

TOURIST DEVELOPMENT TAX – TAXATION – BEACHES – BRIDGES – TRAILS – MULTI-USE PATHWAY

USE OF TOURIST DEVELOPMENT TAX FOR MULTI-USE PATHWAY, BRIDGES, AND PURCHASE OF REAL PROPERTY FOR PARKING FOR BEACH PARKS

To: The Honorable Scott A. Brannon, Chairman, Walton County Board of County Commissioners

QUESTIONS:

1. May Tourist Development Tax proceeds be used to maintain, repair, improve, and expand a multi-use pathway which is part of the recreational network in the southern area of Walton County along County Highway 30-A?

2. As part of the improvement of the multi-use pathway, may Tourist Development Tax proceeds be used to build pedestrian bridges to connect the multi-use pathway so as to not require users of the pathway to travel onto the road surface when the pathway crosses over water bodies?

3. May Tourist Development Tax proceeds be used to acquire land and adjacent right-of-way which would be used to provide public parking facilities to serve beach access areas and other beach park facilities?

SUMMARY:

1. & 2. The use of Walton County tourist development tax revenues for the maintenance, repair, improvement and expansion of a multi-use pathway used by tourists for biking, hiking, walking and running which is part of the recreational network of Walton County is permissible if these projects are determined by the county to satisfy the statutory requirement that they constitute an extension, enlargement, remodeling, or improvement of a nature center. Because pedestrian bridges over inland lakes and other water bodies would appear to serve as extensions and improvements of the multi-use pathway, making it safer and more useful, it is my opinion that the expenditure of tourist development tax proceeds for such purposes is also authorized by section 125.0104(5)(b), Florida Statutes, if the county makes the appropriate findings.

3. Tourist development tax proceeds may be used by the county to acquire land and adjacent rights-of-way to provide

public parking facilities to serve beach access areas and other beach park facilities upon making the appropriate legislative findings.

Your letter states that Walton County has created the Walton County Tourist Development Council as provided in section 125.0104, Florida Statutes. The county has also, through various ordinances, levied and collected the tourist development tax authorized by section 125.0104, Florida Statutes.

You have requested an opinion from this office concerning the authority of the county to use the proceeds of these taxes for various proposed uses. The specific uses related in your letter are for the maintenance, repair, improvement and expansion of a multi-use pathway in the South Walton County area and the acquisition of property and rightsof-way which would be used to provide public parking facilities to serve beach access areas and other beach park facilities. The particular area in which these improvements will be made is located in South Walton County, adjacent to County Road 30-A. You state that this area includes a high concentration of tourists who seek to utilize and enjoy the various natural resources located within the county and in that area.

QUESTIONS 1. & 2.

You advise that Walton County has constructed an 18 mile multiuse pathway along County Road 30-A which is adjacent to state parks, beaches, coastal dune lakes, coastal forests, and the Gulf of Mexico. The multi-use pathway is widely used by tourists for biking, hiking, walking, and running and generally provides access to the beach area and these other nature attractions. As you note, an increasing number of visitors to the South Walton area are bringing bicycles to take advantage of the county's network of multi-use pathways as part of their recreational enjoyment on their vacation. The availability of the multi-use pathway as a recreational amenity for tourists is promoted on Walton County's tourism website. You have asked whether Tourist Development Tax proceeds may be used to maintain, repair, improve, and expand the multi-use pathway as part of the county's recreational network.

Section 125.0104, Florida Statutes, the Local Option Tourist Development Act (the act), authorizes any county of this state to levy and impose a "tourist development tax."¹ This office has previously determined that the purpose of the act is 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."² Thus, the construction of publicly owned facilities financed by the proceeds from a tourist development tax must be primarily related to the advancement and promotion of tourism. The determination of whether a particular facility or project is tourist related and primarily promotes such a purpose is a factual determination that must be made by the governing body of the county. This factual determination must be based on appropriate legislative findings and due consideration of the peculiar and prevailing local conditions and needs.

The act sets forth the uses for which tourist development tax revenues may be used in section 125.0104(5), Florida Statutes, which provides:

(a) All tax revenues received pursuant to this section by a county imposing the tourist development tax shall be used by that county for the following purposes only:

1. To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more publicly owned and operated convention centers, sports stadiums, sports arenas, coliseums, auditoriums, 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. Tax revenues received pursuant to this section may also be used for promotion of zoological parks that are publicly owned and operated or owned and operated by not for profit organizations and open to the public. . . .

2. To promote and advertise tourism in the State of Florida and nationally and internationally;

3. To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with the chambers of commerce or similar associations in the county,

4. To finance beach park facilities or beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, cleanup, or restoration of inland lakes and rivers to which there is public access as those uses relate to the physical preservation of the beach, shoreline, or inland lake or river. . . . In counties of less than 100,000 population, no more than 10 percent of the revenues from the tourist development tax may be used for beach park facilities.³

(b) Tax revenues received pursuant to this section by a county of less than 750,000 population imposing a tourist development tax may only be used by that county for the following purposes in addition to those purposes allowed pursuant to paragraph (a): 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 not for profit organizations and open to the public. All population figures relating to this subsection shall be based on the most recent population estimates prepared pursuant to the provisions of s. 186.901. These population estimates shall be those in effect on July 1 of each year.⁴

* * *

(d) Any use of the local option tourist development tax revenues collected pursuant to this section for a purpose not expressly authorized by paragraph (3)(l) or paragraph (3)(n) or paragraph (a), paragraph (b), or paragraph (c) of this subsection is *expressly prohibited*. (e.s.)

Thus, the statute itself limits the collection and expenditure of tourist development tax revenues to those purposes specifically set forth therein.⁵

In Attorney General Opinion 94-12, this office determined that expenditures from tourist development tax revenues for the acquisition of a railway right-of-way and construction of a public recreational trail would appear to be within the scope of expenditures authorized by section 125.0104, Florida Statutes. The opinion considered the provision in section 125.0104(5) allowing counties with a specified population to use tourist development tax revenues "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 not-for-profit organizations and open to the public."6 Relying on a general definition of the term "nature center"⁷ and the use of that term along with zoological parks and fishing piers, the opinion concludes that tourist development tax revenues in counties with populations of less than 600,000 (now 750,000) persons could be used to acquire property for a project similar to a nature trail or preserve open to the public.

The project you describe, an 18-mile multi-use pathway that has been constructed along County Road 30-A adjacent to state parks, beaches, coastal dune lakes, coastal forests, and the Gulf of Mexico is comparable to the public recreational trail considered in Attorney General Opinion 94-12. Like the county in the 1994 opinion, Walton County has a population of less than 750,000 and may take advantage of the additional purposes authorized in section 125.0104(5)(b), Florida Statutes.⁸ The multi-use pathway is a recreational amenity for tourists that is promoted on the county's tourism website. It is used by tourists for biking, hiking, walking, and running in addition to providing an access point to nature activities and opportunities.

Thus, it appears that the expenditure of Walton County tourist

development tax revenues for the maintenance, repair, improvement and expansion of a multi-use pathway used by tourists for biking, hiking, walking and running which is part of the recreational network of Walton County is permissible if these projects are determined by the county to satisfy the statutory requirement that they constitute an extension, remodeling or improvement of a nature center. Because pedestrian bridges over inland lakes and other water bodies would appear to serve as extensions and improvements of the multi-use pathway, making it safer and more useful, it is my opinion that the expenditure of tourist development tax proceeds for such purposes is also authorized by section 125.0104(5)(b), Florida Statutes, if the county makes the appropriate legislative findings.

QUESTION 3.

You also ask whether Walton County may expend tourist development tax revenues pursuant to section 125.0104(5), Florida Statutes, to acquire land and adjacent rights-of way to provide public parking facilities to serve beach access areas and other beach park facilities.

Section 125.0104(5)(a)4., Florida Statutes, provides specific authorization for the use of tourist development tax funds

[t]o finance beach park facilities or beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, cleanup, or restoration of inland lakes and rivers to which there is public access as those uses relate to the physical preservation of the beach, shoreline, or inland lake or river. . . . In counties of less than 100,000 population, no more than 10 percent of the revenues from the tourist development tax may be used for beach park facilities.

Prior to its amendment in 1996, section 125.0104(5)(a)4., Florida Statutes, authorized the use of tourist development tax funds:

To finance beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, cleanup, or restoration of inland lakes and rivers to which there is public access.

Based on this more limited language, this office, in Attorney General Opinion 91-62, determined that the statute did not authorize the use of these tax funds for "beach facilities" such as parking facilities or boat ramps.⁹ Attorney General Opinion 90-55 considered whether the language of the statue would authorize the construction of artificial structures, such as sanitary facilities, upon the beach. That opinion concluded that the terms "beach improvement, maintenance, renourishment, restoration, and erosion control" related to the actual, physical nature of the beach rather than authorizing the construction of artificial structures upon the beach or authorizing other activities which did not protect or enhance the physical nature of the beach.

However, in 1996, the Legislature amended this statute to include the financing of "beach park facilities,"¹⁰ thus clearly authorizing the use of tourist development tax funds for the construction of certain "facilities." A review of the definition of this term indicates that such things as public parking facilities may well come within the scope of the statute. The word "facility" is defined as "something designed, built, installed, etc., to serve a specific function affording a convenience or service. . . ."¹¹

Attorney General Opinion 97-48 considered whether a county could use tourist development tax dollars to construct an artificial reef to provide diving and snorkeling opportunities in waters bordering the county. Information provided with the opinion request suggested that the proposed artificial reef was to be part of a larger scheme to develop an aquatic nature center. After determining that an aquatic nature center could be characterized as a nature facility within the scope of section 125.0104(5)(b), Florida Statutes, the opinion concluded that tourist development taxes could be used for its development. The opinion notes that "[u]ltimately, however, the determination of whether a particular expenditure satisfies the requirements of section 125.0104, Florida Statutes, is the responsibility of the governing body of the county and cannot be delegated to this office."

Similarly, based on a determination by Collier County that the purchase of real property would promote tourism or that the purchase of an "out parcel" would improve, maintain or restore a beach park, Attorney General Opinion 01-42 concluded that tourist development tax revenues could be used to fund such a project. That opinion also suggests that the beach park area might well be characterized as a nature center that was publicly owned within the scope of section 125.0104(5)(b), Florida Statutes, and that Collier County, as a county with a population of less than 600,000 (now 750,000), could use tourist development tax revenues to "acquire, . . . extend, enlarge, . . . [or] improve" such a center.

Thus, it is my opinion that tourist development tax proceeds may be committed by Walton County to be used by the county to acquire land and adjacent rights-of-way to provide public parking facilities to serve beach access areas and other beach park facilities if the county commission makes the requisite findings that such expenditures will promote tourism within the county or that the purchase of this property will improve, maintain, or restore beach park facilities. ¹ See section 125.0104(3)(b), Fla. Stat.

² See Ops. Att'y Gen. Fla. 83-18 (1983), 00-15 (2000), 10-09 (2010), and Inf. Op. to Johnson, dated March 13, 2012.

³ Research indicates that the population of Walton County, Florida, is under 100,000. *See* www.googlepublicdata, reflecting information from the U.S. Census Bureau updated as of July 31, 2012.

 4 Id.

⁵ See Thayer v. State, 335 So. 2d 815 (Fla. 1976), Dobbs v. Sea Isle Hotel, 56 So. 2d 341 (Fla. 1952), Ideal Farms Drainage District v. Certain Lands, 19 So. 2d 234 (Fla. 1944), for the principle of statutory construction that the mention of one thing implies the exclusion of another – expressio unius est exclusio alterius. Thus, when a statute enumerates the things upon which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all things not expressly mentioned.

⁶ Section 125.0104(5)(b), Fla. Stat.

⁷ See Op. Att'y Gen. Fla. 94-12 (1994), stating that the "term 'nature' is defined as 'the aspect of the out-of-doors (as a landscape): natural scenery.' Use of the word 'center' connotes 'a point around which things revolve: a focal point for attraction, concentration, or activity."

⁸ Supra n.3.

 9 Cf. Op. Att'y Gen. Fla. 90-55 (1990), in which this office concluded that the statute would not authorize the expenditure of these funds for the construction of artificial structures such as those authorized in s. 125.0104(5)(a)1., Fla. Stat., relating to convention centers, sports stadiums, etc.; as that opinion notes "the Legislature has provided for using tourist development tax revenues to construct certain facilities which do not include beach parks."

¹⁰ See s. 44, Ch. 96-397, Laws of Fla.

¹¹ Webster's New Universal Unabridged Dictionary (2003), p. 690.

AGO 12-39 - November 20, 2012

MOBILE HOMES – MOBILE HOME RELOCATION – MOBILE HOME PARKS

ELIGIBILITY OF MOBILE HOME OWNER TO RECEIVE RELOCATION COMPENSATION WHEN THE MOBILE HOME PARK IS NO LONGER SUBJECT TO REGULATION

BY DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

To: Mr. Terry J. Harmon, General Counsel, Florida Mobile Home Relocation Corporation

QUESTION:

Does the decision by the Florida Department of Business and Professional Regulation to no longer regulate Hollywood Mobile Estates impact the rights of mobile home owners in the mobile home park to apply for and obtain abandonment and relocation assistance from the Florida Mobile Home Relocation Corporation?

SUMMARY:

A mobile home owner who submits the appropriate application for payment for relocation of a mobile home pursuant to Chapter 723, Florida Statues, and has not received payment otherwise from the mobile home park owner, is entitled to payment if there are sufficient funds in the Florida Mobile Home Relocation Corporation Trust Fund to make such payment.

You state that Hollywood Mobile Estates (Hollywood Estates) is located on land owned by the Seminole Tribe of Florida (Seminole Tribe) and since approximately 1985 has been operated under an agreement with a private corporation as a mobile home park with 10 or more lots regulated by the Florida Department of Business and Professional Regulation (DBPR). In August 2012, the Seminole Tribe notified DBPR that it had cancelled its lease with the private corporation which previously operated Hollywood Estates and that the tribe had assumed control of the mobile home park. The Seminole Tribe further advised DBPR that it was not subject to regulation under Chapter 723, Florida Statutes. You indicate that in mid-September, the Seminole Tribe notified mobile home owners in Hollywood Estates that effective June 30, 2013, the park would be closed and no leases would be renewed.

Your letter further indicates that DBPR has determined that it no longer has jurisdiction over Hollywood Estates. As such, this office does not comment, nor have we been asked to comment, upon whether the Seminole Tribe would be required to reimburse the trust fund for payments made to mobile home owners. This office has been advised that several applications for payment have been received by FMHRC. The materials you have provided, however, indicate that the Seminole Tribe has offered an assistance grant of \$3,000.00 for relocation expenses to eligible owners of mobile homes in the park. It may be advisable, therefore, to explore the possibility of working with the Seminole Tribe to disburse the funds it has offered to mobile home owners in the park. The Florida Mobile Home Act¹ applies to "any residential tenancy in which a mobile home is placed upon a rented or leased lot in a mobile home park in which 10 or more lots are offered for rent or lease."² The Legislature recognizes that unique factors are created by the relationship that develops between a mobile home owner and the mobile home park owner once occupancy has commenced and that such factors may affect the parties' bargaining positions and the operation of market forces, *i.e.*, basic property rights of a mobile home owner must be protected while considering the legitimate business interest of the park owner.³ The act provides:

This chapter is created for the purpose of regulating the factors unique to the relationship between mobile home owners and mobile home park owners in the circumstances described herein. It recognizes that when such inequalities exist between mobile home owners and mobile home park owners as a result of such unique factors, regulation to protect those parties to the extent that they are affected by the inequalities, while preserving and protecting the rights of both parties, is required.⁴

Section 723.0611, Florida Statutes, creates the Florida Mobile Home Relocation Corporation, which is authorized to adopt a plan of operation to administer the provisions of sections 723.06115, 723.06116, and 723.0612, Florida Statutes.⁵ Section 723.06115, Florida Statutes, establishes the Florida Mobile Home Relocation Trust Fund (fund) within DBPR "to be used by the department for the purpose of funding the administration and operations of the Florida Mobile Home Relocation Corporation." The fund is funded by moneys collected by DBPR under section 723.06116, Florida Statutes, from mobile home park owners who change the use of their mobile home parks, a surcharge collected by the department pursuant to section 723.007, Florida Statutes, a surcharge collected by the Department of Highway Safety and Motor Vehicles, and by other appropriated funds. The funds may be used only for the payment of the administrative costs of the corporation and to carry out the purposes and objectives of the corporation "by making payments to mobile home owners under the relocation program."6

Pursuant to the mobile home relocation statute, a mobile home park owner subject to the act may evict a mobile home owner, mobile home tenant, a mobile home occupant, or a mobile home only on one or more of several enumerated grounds, one of which is, a change in use of the land from mobile home lot rentals to some other use.⁷ Section 723.06116(1), Florida Statutes, provides:

If a mobile home owner is required to move due to a change in use of the land comprising a mobile home park as set forth in s. 723.061(1)(d), the mobile home park owner shall, upon such change in use, pay to the Florida Mobile Home Relocation Corporation for deposit in the Florida Mobile Home Relocation Trust fund \$2,750 for each single-section mobile home and \$3,750 for each multisection mobile home for which a mobile home owner has made application for payment of moving expenses. The mobile home park owner shall make the payments required by this section and by s. 723.0612(7) to the corporation within 30 days after receipt from the corporation of the invoice for payment. Failure to make such payment within the required time period shall result in a late fee being imposed.

The section further states:

A mobile home park owner is not required to make the payment prescribed in subsection (1), nor is the mobile home owner entitled to compensation under s. 723.0612(1), when:

(a) The mobile home park owner moves a mobile home owner to another space in the mobile home park or to another mobile home park at the park owner's expense;

(b) A mobile home owner is vacating the premises and has informed the mobile home park owner or manager before the change in use notice has been given; or

(c) A mobile home owner abandons the mobile home as set forth in s. 723.0612(7).

(d) The mobile home owner has a pending eviction action for nonpayment of lot rental amount pursuant to s. 723.061(1)(a) which was filed against him or her prior to the mailing date of the notice of change in use of the mobile home park given pursuant to s. 723.061(1)(d).

You have not indicated that the mobile home owners in Hollywood Estates would be ineligible to receive compensation due to one of the conditions enumerated above. In order to receive payment from the FMHRC, the act requires a mobile home owner to submit an application for payment which contains a copy of the notice of eviction due to change in use and a contract with a moving or towing contractor for the moving expenses for the mobile home.⁸ When the Legislature has prescribed the manner in which something is to be accomplished, it generally operates as a prohibition against its being done in any other way.⁹

As a statute designed to protect the public's interest, the provisions in Chapter 723, Florida Statutes, should be liberally construed in favor of the public.¹⁰ Applying a broad construction to protect the interests of the mobile home owners who are being forced to move due to a change in the use of the mobile home park and absent any showing that the affected mobile home owners have failed to meet the requirements of the statute, the mobile home owners in Hollywood Estates would not be disqualified from applying for and receiving relocation benefits provided by the FMHRC under Chapter 723, Florida Statutes. As noted above, if a mobile home owner in Hollywood Estates accepts compensation from the Seminole Tribe for relocation compensation, the home owner would be precluded from receiving compensation from FMHRC.

Accordingly, it is my opinion that a mobile home owner who submits the appropriate application for payment for relocation of a mobile home pursuant to Chapter 723, Florida Statues, and has not received payment otherwise from the mobile home park owner is entitled to payment if there are sufficient funds in the Florida Mobile Home Relocation Corporation Trust Fund to make such payment.

- ² Section 723.002(1), Fla. Stat.
- ³ Section 723.004(1), Fla. Stat.
- 4 Id.
- ⁵ Section 723.0611(3), Fla. Stat.
- ⁶ Section 723.06115(2), Fla. Stat.
- ⁷ See s. 723.061(1)(d), Fla. Stat.
- ⁸ Section 723.0612(3), Fla. Stat.

⁹ Alsop v. Pierce, 19 So. 2d 799, 805-806 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

¹⁰ See Department of Environmental Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1985) (provisions of statutes enacted in the public interest should be given a liberal construction in favor of the public).

¹ Section 723.001, Fla. Stat.

INDEX AND CITATOR

GENERAL INDEX

Subject

Opinion No.

-A-

AD VALOREM TAXATION Private property transferred to common law pure trust or subject of a land patent, taxability of11-09
School districts, imposition of additional millage12-30
ADVERSE POSSESSION Property Appraisers, authority to remove adverse possession claim notation from tax roll12-02
AIRPORTS Communication specialists not subject to public safety telecommunicators' training requirements11-03
Economic Development Agency, airport authority does not qualify as12-36
Lease of county airport property, permissible terms
Municipal airport as "eligible user" under statute authorizing use of state contracts12-24
Payment and performance bond requirements for construction on airport authority property12-12
Sale of county-owned airport, competitive bid requirements
ARCHITECTS Business entity qualifying as "private provider" for purposes of reviewing plans and providing building code inspection services
AUDITS County's funding of substance abuse and mental health act's implementation11-23
Sunshine Law, effect of audit committee's ratification of financial officer's invalid action12-31
-B-

BEACHES

Local Government Infrastructure Surtax, proceeds
used for beach erosion projects/studies12-19

Tourist Development Tax, proceeds used for multi-use pathway, bridges, and purchase of real property for parking for beach parks12-38
BID TAMPERING Nonprofit crime stoppers not "public servant" for purposes of bid tampering statute12-21
BOARD OF TRUSTEES Primary Data Center board of trustees as "appointing authority" required to report under minority representation statute12-37
BONDS Airport authority, payment and performance bond requirements for construction on airport property12-12
BRIDGES Tourist Development Tax, proceeds used for multi-use pathway, bridges, and purchase of real property for parking for beach parks12-38
BUILDING CONSTRUCTION STANDARDS Business entity qualifying as "private provider" for purposes of reviewing plans and providing building code inspection services12-27
BUILDING PLANS Business entity qualifying as "private provider" for purposes of reviewing plans and providing building code inspection services
BUSINESS LICENSE TAX Guns dealers/gunsmiths, municipality's authority to impose tax on11-20
BUSINESS AND PROFESSIONAL REGULATION, DEPARTMENT OF Issuance of slot machine license to pari-mutuel facility in county with referendum approving slot machines, unauthorized
Mobile home relocation, owner's eligibility for compensation
-C-

CERTIFICATION Business entity qualifying as "private provider" for

purposes of reviewing plans and providing building code	
inspection services1	2-27

CHARTERS Hospital District Board, oversight duties in light of noninterference charter provision11-12
CHILDREN AND FAMILY SERVICES, DEPARTMENT OF County's funding of implementation of substance abuse and mental health act
CLERK OF COURT Dual Office-Holding/Incompatibility, deputy clerk serving as county commissioner11-05
CODE ENFORCEMENT OFFICERS Firearms, authority to carry12-14
COMMODITIES Municipal airport as "eligible user" under statute authorizing use of state contracts12-24
COMMUNICATIONS AND DATA PROCESSING Primary Data Center board of trustees as "appointing authority" required to report under minority representation statute12-37
COMMUNITY PLANNING ACT Zoning, authority of county to require landowner consent before zoning change12-32
COMPENSATION Mobile home relocation, owner's eligibility for compensation12-39
Regional Planning Council, authority to provide severance pay11-26
COMPETITIVE BIDS Consultants' Competitive Negotiation Act, special district's authority to adopt hybrid bidding procedure
County-owned airport, sale of11-11
Disposal of eminent domain property12-03
Special districts, authority to adopt local preference policy12-34
COMMUNITY SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ACT
County's role in implementation of Act11-23

CONFLICT OF INTEREST Housing Finance Authority, spouse's representation of qualified housing development11-13
CONCEALED WEAPONS Judges, authority to permit concealed weapons in courtroom and passage through courthouse to access courtroom12-08
CONSULTANTS' COMPETITIVE NEGOTIATION ACT Special district, authority to adopt hybrid bidding procedure
CONTRACTORS Airport authority, payment and performance bond requirements for construction on airport property12-12
CONTRACTS Municipal airport as "eligible user" under statute authorizing use of state contracts12-24
CORPORATIONS Crime Stoppers not "public servant" for purposes of bid tampering statute12-21
Sunshine/Public Records Law, applicability to city-created nonprofit foundation11-01
COUNTIES Code enforcement officer, authority to carry firearm
Discharge of firearms, regulation of11-17
Dual office-holding, city council member serving as county director of emergency operations center12-28
Economic development agency, airport authority does not qualify as12-36
Emergency medical services assessment, levy by county12-09
Eminent domain property, disposal of12-03
Group insurance, county employees/officers required to participate11-18
Lease of county airport property, permissible terms11-22

Referendum approving slot machines; issuance of

slot machine license by Department of Business and Professional Regulation to pari-mutuel facility in county, unauthorized12-01
Sale of county-owned airport, competitive bid requirements
Substance abuse and mental health services, county's role in implementation of11-23
Sunshine Law, discussions between officers who each appoint criminal justice commission member11-04
Zoning, authority of county to require landowner consent before zoning change12-32
COURTS Judges, authority to permit concealed weapons in courtroom and passage through courthouse to access courtroom
CRIME STOPPERS Bid tampering, definition of public servant
CRIMES Nonprofit crime stoppers not "public servant" for purposes of bid tampering statute12-21
Weapon possession, effect of nolo contendere plea with adjudication withheld12-29
CRIMINAL JUSTICE COMMISSIONS Sunshine Law, discussions between officers who each appoint commission member11-04
-D-
DEEDS Ad valorem taxation of property transferred to common law pure trust or subject of land patent11-09
Reverter clause, sale of county-owned airport11-11
Tax Deeds, redemption of tax certificates issued after application for tax deed, but prior to tax deed sale11-07
DEPENDENT SPECIAL DISTRICT Airport authority, payment and performance bond requirements for construction on authority

property.....12-12

Dual office-holding, housing authority and housing finance authority as dependent special district subject to	12-35
Municipal airport as "eligible user" under statute authorizing use of state contracts	12-24
DEPUTIES Dual Office-Holding/Incompatibility, deputy clerk serving as county commissioner	11-05
Railroad special officer serving as unpaid reserve deputy sheriff permissible	12-10
DEVELOPMENT Site plan approval, tolling of development order expiration date by declared state of emergency	12-13
DOMESTIC VIOLENCE Weapon possession, effect of nolo contendere plea with adjudication withheld	12-29
DUAL OFFICE-HOLDING County director of emergency operations center constitutes office	12-28
Deputy clerk serving as county commissioner	11-05
Housing authority and housing finance authority	12-35
Railroad special officer serving as unpaid reserve deputy sheriff permissible	12-10
Special magistrate for value adjustment board serving as city hearing officer	12-17
Special magistrate serving on museum board	11-25
-Е-	
ECONOMIC DEVELOPMENT AGENCIES Airport authority does not qualify as	12-36
EDUCATION – See also SCHOOLS School Achievement Awards, participation by teachers in determining use	12-25

Taxation, exemption for educational property when school and real property held by different entities......12-15

EMERGENCY MANAGEMENT Declaration of Emergency, public funds to repair

private road; sinkholes affecting public property, authority to enter onto private property12-33
Dual office-holding, director of county emergency management12-28
EMERGENCY SERVICES Airport communication specialists not subject to public safety telecommunicators' training requirements
Emergency medical services assessment, authority of county to levy12-09
Identifying information regarding E911 caller contained in offense report, access to11-27
EMINENT DOMAIN Counties, disposal of eminent domain property12-03
ENGINEERS Business entity qualifying as "private provider" for purposes of reviewing plans and providing building code inspection services12-27
- F -

FIREARMS Code enforcement officer, authority to carry Counties, regulation of discharge of firearms11-17 Gun dealers/gunsmiths, imposition of business license tax by municipality11-20 Judges, authority to permit concealed weapons in courtroom and passage through courthouse to access Weapon possession, effect of nolo contendere plea with adjudication withheld......12-29 FIREFIGHTERS Police/Firefighter pension plan, authority to add criteria for selection of fifth board member and to define quorum......12-05 FALSE CLAIMS ACT Municipality, applicability of Act to......11-10

FLORIDA OFFENDER ALERT SYSTEM Public Records Law, applicability of exemption to request made before exemption's effective date11-16
FOUNDATIONS Sunshine/Public Records Law, applicability to city-created nonprofit foundation11-01
-G-
GAMBLING Issuance of slot machine license by Department of Business and Professional Regulation to pari-mutuel facility in county with referendum approving slot machines, unauthorized12-01
Veterans' organizations, applicability of slot machine prohibition11-14
GOVERNMENT IN THE SUNSHINE LAW Audit committee's ratification of financial officer's invalid action, effect of12-31
Confidential information considered at meeting, effect of12-20
Criminal Justice Commission, discussions between officers who each appoint commission member11-04
Nonprofit foundation created by city, applicability of law to11-01
GOVERNOR Site plan approval, tolling of development order expiration date by declared state of emergency12-13
GROUP INSURANCE County's authority to require county employees' and officers' participation in11-18
-H-
HEALTH, DEPARTMENT OF Airport communication specialists not subject to public safety telecommunicators' training requirements

HEARING OFFICERS

HILLSBOROUGH TRANSIT AUTHORITY

Sunshine Law, confidential information considered at meeting12-20
HOSPITALS Hospital District Board, oversight duties in light of noninterference charter provision11-12
HOUSING AUTHORITIES Dual office-holding, dependent special district housing authority subject to12-35
HOUSING FINANCE AUTHORITIES Conflict of interest, spouse's representation of qualified housing development11-13
Dual office-holding, dependent special district housing finance authority subject to12-35
-I-
INCOMPATIBILITY Deputy clerk serving as county commissioner, dual office-holding11-05
Conflict of interest, spouse's representation of qualified housing development11-13
INFRASTRUCTURE Local Government Infrastructure Surtax, proceeds used for beach erosion projects/studies12-19
INSPECTION Business entity qualifying as "private provider" for purposes of reviewing plans and providing building code inspection services12-27
INSURANCE Counties, required participation in group insurance by county employees/officers11-18
INTERLOCAL AGREEMENTS Law enforcement services provided by municipality to adjoining and non-adjoining municipalities11-24
INTERCEPTION OF COMMUNICATIONS Law Enforcement, conditions for recording of telephone calls12-07

-J-

JUDGES

Concealed weapons in courtroom and passage

through courthouse to access courtroom, authority to permit12-08
-К-
-L-
LAND PATENT Ad valorem taxation of property transferred to common law pure trust or subject of a land patent11-09
LAW ENFORCEMENT Interlocal agreement authorizing provision of law enforcement services to adjoining and non-adjoining municipalities11-24
Recording of telephone calls, conditions12-07
Truants, pat-down prior to transporting11-08
LAW ENFORCEMENT, DEPARTMENT OF Florida Offender Alert System, applicability of public records exemption to request made before exemption's effective date11-16
LAW ENFORCEMENT OFFICERS Code enforcement officer, authority to carry firearm
Dual office-holding, railroad special officer serving as unpaid reserve deputy sheriff permissible12-10
Police/Firefighter pension plan, authority to add criteria for selection of fifth board member and to define quorum12-05
Truants, pat-down prior to transporting11-08
LEASES County airport property, permissible terms11-22
LEGAL NOTICE Newspaper requirements for publication of12-11
LICENSURE Business entity qualifying as "private provider" for purposes of reviewing plans and providing building code inspection services12-27
LITTLE MILLER ACT Airport authority, payment and performance bond requirements for construction on authority

property12-12
-M-
MALFEASANCE Hospital District Board, oversight duties in light of noninterference charter provision charter11-12
MEETINGS – See GOVERNMENT IN THE SUNSHINE LAW
MENTAL HEALTH County's role in implementation of substance abuse and mental health services act11-23
MILITARY Power of Attorney Act amendments, effect on military springing powers of attorney12-06
MILLAGE School districts, authority to impose additional millage12-30
MINORITIES Primary Data Center board of trustees as "appointing authority" required to report under minority representation statute
MINORS Truants, pat-down by law enforcement officer prior to transporting11-08
MOBILE HOME PARK RECREATION DISTRICTS Vacancies, requirements for filling12-23
MOBILE HOMES Mobile home relocation, owner's eligibility for compensation12-39
MOSQUITO CONTROL Vacancy on district board filled pursuant to special act
Water Control District, authority to provide arthropod control11-02
MUNICIPALITIES Airport authority does not qualify as economic development agency12-36
Dependent special districts, housing authority and housing finance authority subject to dual office-holding prohibition12-35

Dual office-holding, city council member serving as county director of emergency operations center
Dual office-holding, special magistrate for value adjustment Board serving as city hearing officer12-17
Florida False Claims Act, applicability11-10
Guns dealers/gunsmiths, authority to impose municipal business license tax on11-20
Housing authority, exclusive jurisdiction over housing projects12-04
Legal notices, newspaper requirements for publication of12-11
Local Government Infrastructure Surtax, proceeds used for beach erosion projects/studies12-19
Interlocal agreement, provision of law enforcement services to adjoining and non-adjoining municipalities11-24
Municipal airport as "eligible user" under statute authorizing use of state contracts12-24
Police/Firefighter pension plan, authority to add criteria for selection of fifth board member and to define quorum12-05
Site plan approval, tolling of development order expiration date by declared state of emergency12-13
Sunshine Law, effect of audit committee ratifying financial officer's invalid action12-31
Sunshine/Public Records Law, applicability to city-created nonprofit foundation11-01
Value Adjustment Board, resignation of member required prior to commencing term of office as city commissioner; citizen member may not serve as municipal employee or member12-18
MUNICIPAL SERVICE BENEFIT DISTRICT Public Funds, authority to purchase boat ramp, public use thereof12-26

MUSEUMS Dual Office-Holding/Incompatibility, special magistrate serving on museum board11-25 -N-**NEWSPAPERS** Legal Notice, requirements for publication12-11 NON-PROFIT CORPORATIONS - See CORPORATIONS -0-**OCCUPATIONS** Guns dealers/gunsmiths, authority to impose municipal business license tax on11-20 **OFFICERS - See PUBLIC OFFICERS AND EMPLOYEES OPEN MEETINGS - See GOVERNMENT IN THE** SUNSHINE LAW **ORDINANCES** Discharge of firearms, regulation by county......11-17 Guns dealers/gunsmiths, imposition of municipal business license tax on11-20 Police/Firefighter pension plan, authority to add criteria for selection of fifth board member and to define quorum......12-05 -P-PARI-MUTUEL FACILITIES Issuance of slot machine license by Department of Business and Professional Regulation to pari-mutuel facility in county with referendum approving slot machines, unauthorized......12-01 PENSIONS Police/Firefighter pension plan, authority to add criteria for selection of fifth board member and to define guorum......12-05 PERMITS Site plan approval, tolling of development order expiration date by declared state of emergency12-13

PLANNED DEVELOPMENTS Zoning, authority of county to require landowner

consent before zoning change12-32
POWERS OF ATTORNEY Military springing powers of attorney, effect of amendments to state's Power of Attorney Act on
PREEMPTION Code enforcement officer, authority to carry firearms
Counties, regulation of discharge of firearms11-17
PRIMARY DATA CENTER Board of trustees as "appointing authority" required to report under minority representation statute
PRIVATE PROPERTY Public Funds used to repair private road; sinkholes affecting public property, authority to enter onto private property12-33
PRIVATE PROVIDERS Business entity qualifying as "private provider" for purposes of reviewing plans and providing building code inspection services12-27
PROCUREMENT Special districts, authority to adopt local preference policy12-34
PROPERTY APPRAISERS Ad valorem taxation of property transferred to common law pure trust or subject to land patent11-09
Adverse possession claim notation, authority to remove from tax roll12-02
Educational property exemption, inapplicable when school and real property held by different entities12-15
Veteran's total exemption, required documentation12-16
PUBLIC CONSTRUCTION Consultants' Competitive Negotiation Act, special district's authority to adopt hybrid bidding procedure

PUBLIC CORRUPTION

Nonprofit crime stoppers not "public servant" for purposes of bid tampering statute12-21
PUBLIC EMPLOYEES – See PUBLIC OFFICERS AND EMPLOYEES
PUBLIC FUNDS Repair of private road; sinkholes affecting public property, authority to enter onto private property
Municipal services benefit unit, authority to purchase boat ramp, public use thereof12-26
PUBLIC HOUSING AUTHORITIES Public housing projects, exclusive jurisdiction over
PUBLIC OFFICERS AND EMPLOYEES County director of emergency operations center constitutes office12-28
Dual office-holding, special magistrate serving on museum board11-25
Dual Office-Holding/Incompatibility, deputy clerk serving as county commissioner11-05
Group Insurance, participation by county employees and officers required by county11-18
Housing Finance Authority, no conflict presented by spouse's representation of qualified housing development11-13
Mobile home park recreation districts, requirements for filling vacancies12-23
Mosquito Control District, vacancy filled pursuant to special act11-06
Nonprofit crime stoppers not "public servant" for purposes of bid tampering statute12-21
Personnel assessment improperly filed, status as public record11-19
Police/Firefighter pension plan, authority to add criteria for selection of fifth board member and to define quorum12-05

Railroad special officer serving as unpaid reserve

deputy sheriff permissible12-10	0
Severance pay, authority of regional planning council to provide11-20	6
Special magistrate for value adjustment board serving as city hearing officer12-1'	7
Term limits, applicability to individual with break in service12-2:	2
PUBLIC PROPERTY	
Airport Authority, payment and performance bond requirements for construction on airport property12-12	2
Counties, disposal of eminent domain property12-03	3
PUBLIC RECORDS Airport authority does not qualify as economic development Agency for purposes of exemption12-30	6
E911 calls, identifying information in offense report	7
Florida Offender Alert System records, applicability of exemption to request made before exemption's effective date11-10	6
Nonprofit foundation created by municipality, applicability of11-02	1
Personnel assessment improperly filed, status as public record11-19	9
Sunshine Law, confidential information considered at meeting12-20	0
PUBLIC SAFETY TELECOMMUNICATORS Airport communication specialists not subject to public safety telecommunicators' training requirements	3
PUBLIC SERVANTS Nonprofit crime stoppers not "public servant" for purposes of bid tampering statute12-2	1
-Q-	
QUORUM	

-R-

RAILROADS Dual office-holding, railroad special officer serving as unpaid reserve deputy sheriff permissible12-10
REAL PROPERTY Ad valorem taxation of property transferred to common law pure trust or subject to land patent common law pure trust/land patent11-09
Lease of county airport property, permissible terms11-22
Property Appraisers, removal of adverse possession claim notation from tax roll12-02
Sale of county-owned airport, competitive bid requirements11-11
RECORDS – See PUBLIC RECORDS
REGIONAL PLANNING COUNCILS Severance pay, authority to provide11-26
RESERVE OFFICERS Dual office-holding, railroad special officer serving as unpaid reserve deputy sheriff permissible12-10
- S -
SAFETY Airport communication specialists not subject to public safety telecommunicators' training requirements
Additional millage, authority to impose12-30
SCHOOLS Educational property exemption, inapplicable when school and real property held by different entities
School Achievement Awards, participation by teachers in determining use12-25
Public Records Law, applicability to improperly filed personnel assessment11-19
Teachers' participation in determining use of school achievement awards12-25

SEARCH AND SEIZURE Truants, pat-down by law enforcement officer prior to transporting11-08
SECURITY OF COMMUNICATIONS Law Enforcement, conditions for recording of telephone calls12-07
SEXUAL OFFENDERS Florida Offender Alert System, applicability of public records exemption to request made before exemption's effective date11-16
SHERIFFS Sunshine Law, discussions between officers who each appoint criminal justice commission member11-04
SINKHOLES Affecting public property, authority to enter onto private property; use of public funds to repair private road
SLOT MACHINES Gambling, applicability of slot machine prohibition to machines operated by veterans' organizations
Issuance of slot machine license by Department of Business Regulation to pari-mutuel facility in county with referendum approving slot machines, unauthorized12-01
SMOKING Special district's authority to regulate11-15
SPECIAL ASSESSMENTS Emergency medical services assessment, authority of county to levy12-09
SPECIAL DISTRICTS Airport authority, payment and performance bond requirements for construction on authority property
Consultants' Competitive Negotiation Act, authority to adopt hybrid bidding procedure11-21
Dual office-holding, housing authority and housing finance authority as dependent special districts subject to12-35
Hospital District Board, oversight duties in light

of noninterference charter provision11-12
Local preference policy, authority to adopt12-34
Mobile home park recreation district, filling vacancies12-23
Municipal airport as "eligible user" under statute authorizing use of state contracts12-24
Municipal services benefit unit, authority to purchase boat ramp, public use thereof12-26
Smoking, authority of special district to regulate
Term limits, applicability to individual with break in service12-22
Vacancy on mosquito control district filled pursuant to special act11-06
Water Control District, authority to provide arthropod control11-02
SPECIAL MAGISTRATES Dual office-holding, special magistrates for value adjustment board serving as city hearing officer12-17
Dual office-holding, special magistrates serving on museum board11-25
SPOUSES Housing Finance Authority, no conflict presented by spouse's representation of qualified housing development
STATE ATTORNEYS Sunshine Law, discussions between officers who each appoint criminal justice commission member
STATE OF EMERGENCY Public Funds to repair private road; sinkholes affecting public property, authority to enter onto private property
Site plan approval, tolling of development order expiration date by declared state of emergency12-13
SUNSHINE LAW - See GOVERNMENT IN THE SUNSHINE LAW

SURPLUS PROPERTY Counties, disposal of eminent domain property12-03
SURTAX Local Government Infrastructure Surtax, proceeds used for beach erosion projects/studies12-19
- T -
TAX CERTIFICATES Redemption of tax certificates issued after application for tax deed, but prior to tax deed sale11-07
TAXATION Ad valorem taxation of property transferred to common law pure trust or subject to land patent11-09
Business license tax imposed on guns dealers/gunsmiths11-20
Dual office-holding, special magistrates for value adjustment board serving as city hearing officer12-17
Dual office-holding, value adjustment board's special magistrate serving on museum board11-25
Educational property exemption, inapplicable when school and real property held by different entities12-15
Local Government Infrastructure Surtax, proceeds used for beach erosion projects/studies12-19
Property Appraisers, removal of adverse possession claim notation from tax roll12-02
Redemption of tax certificates issued after application for tax deed, but prior to tax deed sale11-07
School districts, imposition of additional millage12-30
Tourist Development Tax, proceeds used for multi-use pathway, bridges, and purchase of real property for parking for beach parks12-38
Veteran's total exemption, required documentation12-16
TELEPHONE CALLS E911 calls, identifying information in offense report

Law Enforcement, conditions for recording of

telephone calls12-07
TERMS OF OFFICE Public Officers, applicability of term limit to individual with break in service12-22
Value Adjustment Board member must resign office prior to commencement of term as city commissioner
TOBACCO Special district's authority to regulate smoking11-15
TOURIST DEVELOPMENT TAX Proceeds used for multi-use pathway, bridges, and purchase of real property for parking for beach parks
TRAILS Tourist Development Tax, proceeds used for multi-use pathway, bridges, and purchase of real property for parking for beach parks12-38
TRUANTS Law enforcement officer's pat-down of truant prior to transporting11-08
TRUSTS Property Appraiser, taxability of private property transferred to common law pure trust or subject of a land patent
-U-
UNITED STATES Amendments to state's Power of Attorney Act, effect on military springing powers of attorney12-06
Taxation, documentation required for veteran's total exemption12-16
Weapon possession, effect of nolo contendere plea with adjudication withheld12-29
UNITS OF GOVERNMENT Regional Planning Council, authority to provide severance pay
-V-

VACANCIES

Mobile home park recreation districts, requirements

for filling12-23
Mosquito Control District, vacancy filled pursuant to special act
VALUE ADJUSTMENT BOARDS Dual office-holding, special magistrate serving as city hearing officer12-17
Dual office-holding, special magistrate serving on museum board11-25
Resignation of member required prior to commencing term of office as city commissioner; citizen member may not serve as municipal employee or member12-18
VETERANS Taxation, documentation required for total exemption12-16
VETERANS' ORGANIZATIONS Gambling, applicability of slot machine prohibition to machines operated by veterans' organizations11-14
-W-
WATER CONTROL DISTRICTS Arthropod control, authority to provide11-02
WATER MANAGEMENT DISTRICTS Consultants' Competitive Negotiation Act, adoption of hybrid bidding procedure11-21
Local preference policy, authority to adopt12-34
Smoking, authority to regulate11-15
WEAPONS Code enforcement officer, authority to carry firearm
Counties, regulation of discharge of firearms11-17
Gun dealers/gunsmiths, imposition of business license tax by municipality11-20
Judges, authority to permit concealed weapons in courtroom and passage through courthouse

Weapon possession, effect of nolo contendere plea

with adjudication withheld12-29
WHISTLE-BLOWERS Sunshine Law, confidential information considered at meeting12-20
WORKPLACE WITHOUT TOBACCO SMOKE Smoking, authority of special district to regulate11-15
-X-
-Y-
-Z-
ZONING Counties, authority to require landowner consent before zoning change32

CITATOR

CITATOR TO FLORIDA STATUTES, STATE CONSTITUTION, AND LAWS OF FLORIDA CONSTRUED IN OPINIONS RENDERED FROM JANUARY 1, 2011, THROUGH DECEMBER 31, 2012

CITATOR TO FLORIDA STATUES

Subject	Opinion No.	Subject	Opinion No.	
1.01	12-15	69.021	12-05	
	12-27		12-03	
	12 - 34		12-03	
1.01(8)11-10		73.013(1)(f)12-03		
	11-21	73.013(2)	(b)12-03	
	12-03	95.18	12-02	
14.29		95.18(4) (2011)12-02		
16.01(3)		95.18(4)(c	e)12-02	
	11-20	95.18(7)	12-02	
	12-02	95.18(7)(a	a)-(d)12-02	
	12-13	95.18(8) (2	2011)12-02	
16.555(4)(b)		99.012	11-26	
16.555(5)12-21			12-18	
20.03		99.012 (19	071)11-26	
20.04		99.012(2)	(1971)11-26	
20.1911-23		100.041	12-01	
20.19(6)		100.201	12-01	
28.24(10)	11-07	101.161	12-19	
28.35-28.37	11-05	106.24	12-05	
		110.402	11-10	
30.49		112.0515	11-24	
39.702		112.08	11-18	
43.291		112.08(2)	(a)11-18	
50.031		112.08(3).	11-18	
50.051		112.080111-18		
50.11		112.11	11-18	
68.081-68.09		112.14	11-18	
68.082		112.311(2) (19	112.311(2) (1991)11-13	
68.082(1)11-10		112.3135(2)(a)) (1993)11-13	
68.082(1)(a)11-10		112.3143	11-13	
68.082(1)(1	b)11-10	112.3143(3)12-28	
68.082(1)(0	d)11-10	112.3187-112.3189512-20		
68.082(2)		112.3187(2)12-20		
68.082(3)	11-10	112.3187(3)(a)12-20	
68.083(2)11-10		112.3187(6)12-20		
68.08711-10		112.318812-20		
68.087(1)11-10		112.3188(1)12-20		
68.087(6)	11-10	112.3188(1)(a)12-20	
		1		

Subject	Opinion No.	Subject	Opinion No.
112.3188(1)(b)	12-20	125.010	4(5)(a)412-38
			4(5)(b)12-38
	12-20		4(5)(c)12-38
112.40		125.0108	
112.41	11-12	125.011	
$112.43\ldots$	11-12		
114.04		125.271	(1)(a)12-09
116.34(2)(a)			(3)12-09
119.01		125.35	
119.011	11-16		11-22
	11-19		1)11-22
119.011(2)	11-01		1)(a)11-22
	11-19		1)(b)11-11
	11-23		1)(b)111-22
119.011(12)	11-19		
	11-23		
119.021(2)(a)			
119.07			
	11-19		
119.07(1)			
	11-19		
	11-23		
	11-27		
	12-20		
			b)412-35
119.071			
			5 (1)12-35
			5 (2)12-35
			(3)12-35
120.52(1) 121.0515			8(4)12-35 8(9)12-35
	12-14 12-14		6(10)(a)12-35
	12-14		
121.0315(4)			
121.25			1212-14
120.01	11-21		
	12-01		
125.01(1)(y)			2)12-14
			0812-14
125.0104	11-22		1)12-14
	12-01		
	12-38		3012-14
125.0104(3)(b)			
			2)12-14
)12-38		
			51(2)12-13
		•	. ,

112.3188(2)(b)	
112.3188(2)(c)	12-2
112.40	11-12
112.41	11-12
112.43	11-12
114.04	12-2
116.34(2)(a)	11-1
119.01	11-0
119.011	11-1
119.011(2)	11 0
119.011(2)	11-1
	11-13
119.011(12)	
119.011(12)	11-13
119.021(2)(a)	11-2
119.021(2)(a)	11-1
119.07	11-0
119.07(1)	11-19
119.07(1)	
	11-19
	11-23
	11-2
	12-2
119.07(7)	
119.071	11-0
119.071(2)(c)1	
119.071(2)(j)1	12-0
119.071(5)(j)	11-1
119.071(5)(j)1	11-1
120.52(1)	11-2
121.0515	12-14
121.0515(3)	12-1
121.0515(4)	12-1
121.23	12-14
125.01	
	11-2
	12-0
125.01(1)(y)	12-0
125.01(3)	11-1
125.0104	11-2
	12-0
	12-3
125.0104(3)(b)	12-3
125.0104(3)(l)	12_3
125.0104(3)(n)	19_9
125.0104(5)(11)	10 0

~ • •	
Subject	Opinion No.
186.502(4	4)11-26
186.503(1	1)11-26
	4)11-26
	1)11-26
	1)11-26
	l)11-26
194.015	
104.005	12-18
194.035	
104.005/1	12-17
194.035()	12-17
104.99	12-17 11-07
190.001	
106 011	
	L)(b)12-16
	7)12-16
	3)12-16
	1)12-16
	2)12-16
	12-16
	11-11
197.402(3)	
197.432	
197.432(1	1)11-07
	2)11-07
197.432(8	3)11-07
197.473	
197.502(4	4)11-07

Subject	Opinion No.
	12 - 32
163.3161(6)	12-32
163.3164 -163.3217	
163.3164	
	12 - 24
163.3164(10)	
163.3164(15)	12-13
163.3164(16)	
163.3164(21)	
163.3167(8)	
163.3167(12)	
163.3174(1)	12-32
163.3174(4)	
$163.3177(1)\ldots$	
163.3181(1)	
163.3181(2)	
163.3184	
163.3184(11)	
163.3187(5)(a).	
163.3215	
163.3215(3)	
163.340	
163.340(24)	
166.021	12-05
	12-19
166.021(4)	
166.0495	
175.021	
175.032	
175.061	
175.061(1)	
175.061(1)(a)	
175.071	
175.071(2)	
185.01	
185.02	
185.02(10)	
185.05	
185.05(1)	12-05
185.05(1)(a)	12-05
185.05(1)(b)	
185.05(7)	
185.06	12-05
185.06(2)	
	11-26
186.502(1)(c)	
186.502(2)	11-26
100 500(9)	11-26

C 1 1 .	
Subject	Opinion No.
252.363(1)(a)12-13
	1)(a)112-13
	2)12-13
252.38	12-28
	12-33
252.38(1))(b)12-28
252.38(3))12-28
	12-33
)(a)1
	$(a)14. \dots 12-28$
252.38(3)	$(a)4. \dots 12-33$
)(a)512-28)(a)5.a12-33
252.38(3)	
	$(a)5.g. \dots 12-33$ $(a)5.h. \dots 12-33$
200.00	12-12
255.05(1))(a)12-12
)12-12
	1)11-21
	12 - 34
	12 - 35
255.20(1))12-34
255.20(1))(c)112034
)(d)11-21
255.20(3))11-21
	12-34
282.201(1)	
	12-37 2)(a)12-37
	2)(a)4.e12-37
	3)(a)-(l)12-37
	12)12-37
286.011	11-01
	11-04
	12-20
286.0113(1)	12-20
	12-24
287.012(9)12-24
	11)12-24
287.055	11-21
	12-34

Subject **Opinion** No. 197.502(4)(h).....11-07 197.502(6)11-07 197.502(6)(b).....11-07 197.502(6)(c)11-07 197.502(8)11-07 197.522(1)(a)11-07 197.542(1)11-07 197.55211-07 197.573(2)11-07 198.01(3)12-15 205.01311-20 205.04211-20 205.043(1)(a)11-20 212.055.....12-19 212.055(2)12-19 212.055(2)(b).....12-19 212.055(2)(d).....12-19 212.2011-22 215.425.....11-26 215.425(1)11-26 215.425(3)11-26 215.425(4)11-26 215.425(4)(a)11-26 215.425(5).....11-26 216.011(1)(m).....12-19 216.011(1)(p)12-19 218.39(1)12-31 218.39(1)(b).....12-31 218.391(1)12-31 218.391(2)12-31 218.391(3)12-31 252.31-252.90......12-28 12 - 33252.31.....12-33 252.34(4)(c)12-33 252.34(5).....12-28 252.363.....12-13 252.363(1)12-13

Subject	Opinion No.
365.172	11-03
	(a)11-03
(-)	12-07
373.016	
	11-15
	(b)12-34
373.073(1)(a)	
	11-15
373.079(4)	(a)11-15
373.083	
373.083(1)	
(-)	12-34
373.083(5)	
380.012	
380.031(3)	
	1111-06
	979)11-02
	979)11-02
	979)11-02
	11-23
394.73(3)	11-23
	11-23
	11-23
	n)11-23
394.75(11)	11-23
	11-23
	11-23
394.76(3)(1	o)11-23
394.76(9)(a	a)11-23
	11-23
	11-03
	11-03
	(a)11-03

Opinion No. 287.055(2)(f).....11-21 287.055(4)(b).....12-34 287.056.....12-24 287.056(1).....12-24 287.057.....12-24 287.082.....12-34 287.084.....12-34 288.0656.....12-09 288.075.....12-36 288.075(1)(a)12-36 288.075(1)(a)4.12-36 288.075(1)(a)6.12-36 288.075(2)12-36 288.075(2)(a).....12-36 288.075(2)(a)2.12-36 288.075(3)12-36 288.075(4)12-36 288.075(5)12-36 288.075(6)12-36 288.9551(3).....12-20 298.005(3)11-02 298.0211-02 298.0311-02 298.2211-02 332.01(1)11-11 11 - 22332.0811-11 11 - 22332.08(3)11-11 11 - 22332.08(4)11-11 348.0002(2)11-10 354.0312-10 354.0512-10 365.171.....11-27 12-07365.171(2)11-27 365.171(12).....11-27 12-07

361

Subject

Oninion No.

Opinion No.

Subject

551.102(4).....12-01 551.102(8).....11-14

551.104(1).....12-01

418.301	
418.3021	2-23
418.302(1)1	2-23
418.302(3)1	2-23
418.302(5)1	
418.304(3)1	
418.304(4)1	
418.304(5)1	2-23
420.504(2)1	
421.011	2-04
421.021	
421.02(3)1	2-35
421.03(6)1	2-04
421.03(6)(b)1	2-04
421.03(9)1	2-04
421.04(1)1	
421.04(2)1	
421.05(1)1	
421.071	
421.081	
	2-35
421.08(1) (5)1	
421.08(2)1 421.08(4)1	4-00 0.95
421.08(5)1	
421.08(6)1	
421.08(7)1	
421.08(8)(a)1	2-35
421.27(3)1	2-04
443.0361	2-27
443.036(291	
443.036(35)1	
443.12161	2-27
447.203(9)1	2-20
458.331(1)(c)1	2-29
468.6011	
471.0011	2-27
471.0031	
471.003(2)(e)1	2-27
471.005(3)1	
471.005(5)1	
471.005(8)1	
481.203(4)1	4-21 0 07
481.203(5)1	
481.2191	
481.219(2)1	
481.219(6)1	2-27
517.161(1)(j)1	2-29

JJ1.104(1)12-01
553.79112-27
553.791(1)(e)12-27
553.791(1)(g)12-27
553.791(1)(i)12-27
553.791(2)12-27
553.791(3)12-27
553.791(4)(b)12-27
553.791(8)12-27
553.791(15)12-27
553.791(16)12-27
553.791(17)12-27
616.25111-10
627.0628(3)(f)2.a12-20
668.607611-16
000.007011-10
709.11 (2010)12-06
709.2106(4)12-06
709.210812-06
709.2108(3)12-06
709.2108(4)12-06
713.00112-12
713.01(26)12-12
723.00112-39
723.00212-39
723.002(1)12-39
723.00412-39
723.004(1)12-39
723.00712-39
723.061(1)(a)12-39
723.061(1)(d)12-39
723.061112-39
723.0611(3)12-39
723.0611512-39
723.06115(2)12-39
723.0611612-39
723.06116(1)12-39
723.061212-39
723.0612(1)12-39
723.0612(1)12-39
723.0612(3)12-39
760.80
760.80(1)12-37
760.80(2)(a)-(e)12-37
760.80(3)12-37
760.80(4)12-37
760.80(8)12-37

Subject	Opinion No.
775.082	11-22
	12 - 21
775.083	
	12 - 21
775.084	
775.13(1)	
775.21	
775.21(3)(a)	11-16
775.21(3)(b)4	11-16
775.21(7)	
784.03	
790.051	
790.06	
	12-29
790.06(1)	
	12-08
	512-08
790.065	
790.15	
790.233	
790.33	
	11-20
790.33 (2000)	11-17
	11-20
790.33(2)(a)	
790.333(1)(a)	
790.333(1)(c)	
790.333(3)(h)	
790.335	
810.011	
810.09	
812.035(7)	
823.16	
823.16(6)	
838.014	
838.22	
838.22(1)	
849.0931	
849.0932	
849.0935(1)(a)	
849.15	
	12-01
849.16	

Subject	Opinion No.
	12-01
849.16(1)	
849.161	
849.161(1)(a	a)11-14
	a)111-14
849 161(1)(2	a) $2. \dots 11 - 14$
849 161(1)(b	b)11-14
921.0021(2)	
921.0021(2) (200	12 20
934.01	
934.02(2)	
934.02(10)	
934.03 934.09	
	12-07
	12-07
938.06	
943.0435	
)11-16
943.085-943.255	
	12-14 12-14
	12-14 12-14
940.10	12-14 0)12-10
943.13(1)-(1	0)12-10 11 10
943.44353(1) 961.06(5)	11-10 11 10
961.06(5) 961.06(6)	
984.13	
1002.20(2)(a)	
1003.21 1004.226(8)(b)1.	10 00
1004.226(8)(0)1.	10.00
1004.4472(4) 1008.36	12-20
1011.71	
1011.71(9)	

Subject	Opinion No.	Subject	Opinion No.
1011.73 1011.73(1) 1011.73(2) 1012.01(2) 1012.01(3) 1012.01(6) 1012.31 1012.31(2)(a). 1012.31(3)(a).	12-30 12-30 12-30 12-25 12-25 12-25 12-25 11-19 11-19 11-19 11-19 11-19	Suoject	Opinion No.
	11-19		

CHAPTER, FLORIDA STATUTES

Subject	Opinion No.
20	12-37
50	12-11
95	11-07
112, Part III	11-26
112, Part V	11-12
119	11-01
	11-19
	11-23
	12-07
	12 - 21
	12 - 36
120	11-15
	11-26
125	11-11
	12 - 32
125, Part II	12-32
145	11-18
154, Part III	12-35
159	
159, Part III	
159, Part IV	11-13
	12 - 35
159, Part V	12-36
162	
162, Part I	12-14
162, Part II	
163, Part II	12-13
	12 - 32
166	
175	
185	
189	11-21
	12 - 34
197	
205	
212	
216	
252, Part I	12-33
282, Part I	
287	
287, Part I	12-24
298	
331, Part II	
332	11-11

Subject	Opinion No.
	11-22
	12-24
336	
351	
354	12-10
	12-17
373	11-15
	11-21
	12-34
386, Part II	
388	
394, Part IV	11-23
418, Part II	
421	
421, Part I	
	12 - 35
443	
468	
	[I12-27
471	
481	
551	
616	
633	
709, Part II	
713	
718	
719	
720	
723	
790	11-17 11-20
838	
849	
921	
934	
943	
U IU	·····

STATE CONSTITUTION

Subject	Opinion No.
I, s. 8 I, s. 12 I, s. 18 I, s. 23 I, s. 24 I, s. 24(a)	11-08 11-12 11-15 12-20
I, s. 24(b) I, s. 24(c) II, s. 5(a)	12-20 12-36 11-01 12-20 11-16
11, s. 5(a)	$ \begin{array}{r} 11-05\\ 11-25\\ 11-26\\ 12-10\\ 12-17\\ 12-28\\ 12-35\\ \end{array} $
II, s. 5(c) IV, s. 6 IV, s. 7 IV, s. 7(a) IV, s. 7(b) VI, s. 5	
VI, s. 6 VII, s. 1 VII, s. 3 VII, s. 3(a) VII, s. 3(b)	12-09 12-33 11-09 12-15 11-09
VII, s. 5(0) VII, s. 4	11-09 12-15
VII, s. 9(a) VII, s. 9(b) VII, s. 10 VII, s. 10(c) VIII, s. 1(f)	12-30 12-30 12-30 12-26 11-09

Subject	Opinion No.
VIII, s. 2(b)	
	12-19
X, s. 3	
X, s. 20	
X, s. 23	
XVI, s. 22 (1885))12-12

SESSION LAWS

Subject	Opinion No.
20852 (1941)	
20852, s. 3 (194	
20852, s. 4 (194	
22846, s. 8 (1945)	
, c (,	11-22
23829 (1947)	11-11
23829, s. 1 (194	7)11-11
	11 - 22
23829, s. 5 (194	7)11-11
27438 (1951)	11-12
6867, s. 1 (1915)	
59-195, s. 2	
71-136, s. 231	
71-669	
71-669, s. 8(1)(e	
71-669, s. 9(24)	
71-669, s. 10	
71-669, s. 10(10	
71-669, s. 10(17	
71-669, s. 10(22	
71-669, s. 10(24	
71-669, s. 10(25	
71-669, s. 10(26	
71-669, s. 10(27	
71-669, s. 15	
71-669, s. 16 71-669, s. 17	
71-924	
71-924 71-924, s. 12	
71-924, S. 12	
73-332, s. 23	
73-332, s. 29	
76-208, s. 1	
77 235, s. 1	
77-563	
80-281	
80-281, s. 12	
85-342, s. 197	
86-392	
86-392, s. 1	
86-392, s. 2(1)	
86-392, s. 2(4)	
88-461	
90-434	

Subject	Opinion No.
92-203, s. 3	11-06
94-213	
94-316	
	12-38
99-1	
99-1, s. 83	312-05
99-2, s. 21	12-11
99-2, s. 22	12-11
99-190	
	11-22
00-139, s. 2	
	3(1)11-06
	3(3)11-06
02-347	
	3(5)12-36
)11-03
	212-24
	312-24
	6(1)12-24
05-300, s.	6(6)12-24
	6(10)12-24
05-300, s.	812-24
	1712-24
	111-02
	211-02
	311-02
	411-02
	112-22
	3(3)12-22
	3
	111-12
07-299, s.	511-12
07-299, s.	5(2)11-12

Opinion No.

Subject	Opinion No.	Subject
07-299, s. §	5(3)(a)11-12	
	12-01	
	2, Part XII12-01	
	1912-01	
09-170, s. 2	2612-01	
10-29	12-01	
	12-01	
	12-01	
	12-01	
	11-03	
10 188, s. 1	111-03	
10 188, s. 2	211-03	
	311-03	
· · · ·	511-03	
	11-02	
	111-02	
	311-02	
	411-02	
	112-02	
	412-02	
	712-02	
11-109		
	11-20	
	111-17	
	1(2)(a)11-17	
	211-17	
	111-26	
	$ \begin{array}{c}12-24 \\ 6(5) \dots 12-24 \end{array} $	
	812-24	
	8(2)12-24	
11-200, 8. (0(4)14-44	