

portion of §171.04(1), *supra*, was invalidated by the Florida Supreme Court in *Auburndale v. Adams Packing Association*, 171 So.2d 161 (Fla. 1965), on the ground that the statute gave the court the power to substitute its will as to the advisability of annexation for that of the municipality's legislative body and was an unconstitutional delegation of legislative power to the judiciary. In these circumstances, it cannot validly be assumed that objectors to annexations made pursuant to §171.16, *supra*, may avail themselves of the procedure prescribed by §171.04(1), *supra*, and of the "stay" provisions of that section. Thus, unless the court has entered an order temporarily enjoining the furnishing of or extension of municipal services to the areas described in and annexed by the presumptively valid annexation ordinance, the city may extend such services to the annexed area, despite the pending litigation.

It might be noted, however, that the processes of the court are available to attack the validity of a municipal ordinance in a proper case, and that a temporary injunction may be issued by the court, enjoining the city from taking any action under the authority of the ordinance attacked in such proceedings, pending the final outcome of the case. *See Bass v. Addison*, 40 So.2d 466 (Fla. 1949), in which the court declined to overturn a temporary injunction issued by the lower court in a suit in equity brought by a taxpayer, challenging the validity of incorporation proceedings taken under the authority of a general law, Ch. 165, F. S.; and *Gillette v. City of Tampa*, 57 So.2d 27 (Fla. 1952), where the court entertained a suit for declaratory relief and an injunction to determine the validity of and to enjoin annexation proceedings taken under the authority of a special act providing an overall plan for extending the boundaries of the City of Tampa. *See also Smith v. Ayres*, 174 So.2d 727 (Fla. 1965); and *Town of Davie v. Hartline*, 199 So.2d 280 (Fla. 1967).

The proper method of seeking relief by way of a judgment of ouster where a municipality has undertaken unlawfully to exercise jurisdiction or control over land is a *quo warranto* proceeding. *See Caldwell v. Losche*, 108 So.2d 295 (2 D.C.A. Fla., 1959). However, the jurisdiction of equity may be invoked in a proceeding for declaratory relief and an injunction when the attorney general has refused to authorize the use of his name in such proceedings and the injured party would be without a remedy at law. *Bass v. Addison*, *supra*; *Farrington v. Flood*, 40 So.2d 462 (Fla. 1949). *See also Town of Davie v. Hartline*, *supra*, in which a suit for declaratory decree was brought to determine that properties were illegally annexed under §171.04, *supra*. And it may be that, even in a *quo warranto* proceeding, the court would enter a temporary restraining order under its constitutional "all writs" power, §5 of revised Art. V, State Const., to preserve the status quo pending a determination of the suit on the merits. *Cf. Stewart v. Thursby*, 137 So. 7 (Fla. 1931); *Astca Inv. Co. v. Lake County*, 98 So. 824 (Fla. 1922); *State ex rel. Pettigrew v. Kirk*, 243 So.2d 147 (Fla. 1970).

073-116—April 13, 1973

#### MUNICIPALITIES

#### APPLICABILITY OF REFERENDUM PROVISIONS OF CHARTER ACT OF CITY OF DAYTONA BEACH TO ACTION OF CITY COMMISSION

To: John C. Chew, City Attorney, Daytona Beach

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

#### QUESTIONS:

1. Does a motion duly adopted by the Daytona Beach City Commission to close the mayor's office in city hall and not to have a

mayor's assistant constitute a "measure" that is subject to referendum under the city's charter act provision?

2. If so, does the filing of an uncertified petition for referendum with the city clerk stay the operation of this motion?

#### SUMMARY:

A motion duly adopted by the city commission that the office maintained by the mayor in the city hall for his own personal use should be closed and that he should not have his own personal assistant appears to be an administrative determination under existing charter act provisions and not a legislative act of the commission that is subject to referendum.

The powers of initiative and referendum are granted to the qualified electors of the city by §§73 and 74 of the city's charter act (Ch. 67-1274, Laws of Florida). The power of initiative is granted by §73-1., *supra*, in the following language:

The qualified electors of the city shall have the power at their option to propose *ordinances*, including ordinances granting franchises or privileges, but not including the budget or capital program or any ordinance relating to appropriation of money, levy of taxes, or salaries of city officers or employees, and to adopt the same at the polls, such power being known as the initiative. . . . (Emphasis supplied.)

Section 73-5., *supra*, provides:

If the commission shall fail to pass *the proposed measure*, or shall pass it in a form different from that set forth in the petition, then the measure shall be submitted by the commission to the vote of the electors at the next city election . . . . (Emphasis supplied.)

Section 74-1., *supra*, provides for a referendum as follows:

The qualified electors of the city shall have power at their option to approve or reject at the polls *any measure* passed by the commission except ordinances involving the budget, capital program, appropriations of money, levy of taxes and salaries of city officers or employees . . . . *Measures submitted to the commission by initiative petition* and passed by the commission without change, or passed in an amendment form [,] shall be subject to the referendum in the same manner as other measures. . . . (Emphasis supplied.)

Section 74-3. provides that a referendum petition "need not contain the text of the measure designated therein and of which the repeal is sought but shall briefly describe *the ordinance* or part thereof sought to be repealed." (Emphasis supplied.) And subsection 5., *id.*, states:

If the petition be found sufficient, the commission shall proceed to reconsider such measure or such section thereof as the petition shall specify. If upon reconsideration such measure, or such part thereof, be not *repealed or amended* as demanded in the petition, the commission shall provide for submitting the same, by the method herein provided, to a vote of the electors, and such measure, or such part thereof, shall thereupon be suspended from going into effect until said election and shall then be deemed repealed unless approved by a majority of the qualified electors who participate in such elections. . . . (Emphasis supplied.)

When the provisions of §§73 and 74, *supra*, are read as a whole, the

conclusion is inescapable that the "measures" referred to therein are ordinances duly adopted by the city commission. It is noteworthy also that §74 speaks of a "measure" that has not been "repealed or amended as demanded in the petition" and of a measure "passed by the commission." These are words of art that are ordinarily used in connection with the legislative acts of a legislative body. And I have the view that the "measures" that are subject to initiative and referendum under the charter are those ordinances of the city commission adopted in the exercise of its legislative power.

This conclusion is in accord with the statement in McQuillin, *Municipal Corporations*, Vol. 5, §16.53, quoted (apparently with approval) in *City of Coral Gables v. Carmichael*, 256 So.2d 404, 411 (3 D.C.A. Fla., 1972), as follows:

"Referendum is the right of the people to have an act passed by the legislative body submitted for their approval or rejection. It is essentially a referral to the voters of a municipality for their direct vote on an existing ordinance, or at least one that has been passed by the municipal legislative body and that is or may become law except for the successful intervention of referendum procedure."

See also *State v. City of St. Petersburg*, 61 So.2d 416 (Fla. 1952), holding that an ordinance which increased the rates for sewer charges was not within the purview of the initiative provision of the city charter. The court said:

The rule is uniformly accepted that initiative and referendum do not apply to executive or administrative matters of the kind covered by this Ordinance. We approve the following quotation from McQuillin's *Municipal Corporations* Volume 5 (3rd ed.), Section 16.55:

"The power of initiative or referendum usually is restricted to legislative ordinances, resolutions or measures, and is not extended to executive or administrative action."

The question then becomes: Is the "measure" in question a legislative matter that should have been adopted by ordinance of the city commission? If so, it would be subject to the referendum provisions of the city's charter act.

It has been said that the distinction between a legislative and an administrative act is that the former is concerned with subjects of permanent and general character, and the latter with subjects of a temporary and special character. See *State v. City of St. Petersburg*, *supra*, quoting McQuillin's *Municipal Corporations*, *supra*, §16.55. The location of public buildings is generally considered to be of such a permanent and lasting nature as to be within the purview of a city's initiative and referendum provisions. See *Scott v. City of Orlando*, 173 So.2d 501 (2 D.C.A. Fla., 1965) (theater and convention hall); *Burdick v. City of San Diego*, 84 P.2d 1064 (Cal. App. 1938) (police station and city hall site). Here, however, the action of the city commission in question was not concerned with the permanent location of a public building but with the allocation of space in the city hall and a personnel matter. In the *Burdick* case, *supra*, the court said that, if the resolution designating the site "was merely executive or administrative in character and was only a procedural step in carrying out the municipal policy established by prior legislative enactments, no referendum of that resolution can be had. . . ." [84 P.2d at 1065.]

In allocating space in a public building to meet the needs of city officials in carrying out their official duties, a city commission is not "legislating" concerning a matter of permanent and general character but is taking official action on a matter that is necessarily subject to change to meet changing needs and is thus of a temporary or special character; and it seems clear that, in adopting the motion in question, the commissioners simply made an administrative or executive determination that the maintenance of an office in the city hall for the personal use of the mayor, staffed by his own personal assistant (who was

not a city employee), was not an appropriate use of the space in light of the respective duties of the mayor, city commission, and the city manager, as prescribed by the city's charter act. This is shown by the minutes of the meeting at which the motion was adopted and confirmed by a resolution, subsequently adopted by the city commission, allocating space in the city hall for a "City Commission Chambers" for the use of any member of the commission, including the mayor.

Accordingly, unless and until it should be judicially determined to the contrary, question 1 is answered in the negative. A negative answer makes unnecessary an answer to your second question.

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#### INTERGOVERNMENTAL PROGRAMS AND RELATIONS

##### FIRE FIGHTERS NOT MEMBERS OF CRIMINAL JUSTICE AGENCIES

To: *Edward J. Trombetta, Secretary, Department of Community Affairs,  
Tallahassee*

Prepared by: *Joseph C. Mellichamp III, Assistant Attorney General and Molly J.  
Tasker, Legal Intern*

#### QUESTION:

Are fire fighters, as defined in §163.470(1), F. S., members of "criminal justice agencies" for the purpose of obtaining fingerprint identification records from the Federal Bureau of Investigation?

#### SUMMARY:

By definition, fire fighters are not law enforcement officers in the State of Florida. Florida law does not vest fire fighters with the powers of law enforcement officers; and fire fighting agencies are not recognized as criminal justice or law enforcement agencies for the purpose of obtaining fingerprint identification records from the Federal Bureau of Investigation.

Your question is answered in the negative.

Section 163.470(1), F. S., defines a fire fighter as any person who is employed as a full-time professional fire fighter by any employing agency, as defined by §163.470(2), F. S., whose primary responsibilities are the prevention and extinguishment of fires, the protection of life and property, and the enforcement of state and local fire prevention codes and any laws pertaining to the prevention and control of fires.

Section 23.061(1), F. S., defines a police officer as anyone employed full time by any municipality, the state, or any political subdivision of the state, whose primary responsibilities are the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state. To carry out these primary responsibilities, police officers are vested with the power of arrest and are authorized to carry concealed weapons.

Since the Florida Statutes do not bestow the same responsibilities or powers on fire fighters as they do on law enforcement officers, then it cannot be said that under the laws of Florida a fire fighter is a law enforcement officer. Attorney General Opinion 072-335.

The Identification Division of the Federal Bureau of Investigation has approximately two million sets of fingerprints on file; and these prints are maintained in separate criminal and applicant files. The Identification Division