

BIENNIAL REPORT

of the

**ATTORNEY GENERAL
STATE OF FLORIDA**

January 1, 2013, through December 31, 2014

PAM BONDI
Attorney General



**Tallahassee, Florida
2015**

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 27, 2015

**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, 2013, through December 31, 2014.

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,

A handwritten signature in black ink that reads "Pam Bondi".

**Pam Bondi
Attorney General**

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**ATTORNEYS GENERAL OF FLORIDA
SINCE 1845**

Joseph Branch	1845-1846
Augustus E. Maxwell	1846-1848
James T. Archer	1848-1848
David P. Hogue	1848-1853
Mariano D. Papy	1853-1860
John B. Galbraith.....	1860-1868
James D. Wescott, Jr.....	1868-1868
A. R. Meek.....	1868-1870
Sherman Conant.....	1870-1870
J. P. C. Drew	1870-1872
H. Bisbee, Jr.....	1872-1872
J. P. C. Emmons	1872-1873
William A. Cocke.....	1873-1877
George P. Raney	1877-1885
C. M. Cooper.....	1885-1889
William B. Lamar.....	1889-1903
James B. Whitfield.....	1903-1904
W. H. Ellis	1904-1909
Park Trammell.....	1909-1913
Thomas F. West	1913-1917
Van C. Swearingen.....	1917-1921
Rivers Buford	1921-1925
J. B. Johnson	1925-1927
Fred H. Davis.....	1927-1931
Cary D. Landis.....	1931-1938
George Couper Gibbs	1938-1941
J. Tom Watson	1941-1949
Richard W. Ervin.....	1949-1964
James W. Kynes.....	1964-1965
Earl Faircloth.....	1965-1971
Robert Shevin.....	1971-1979
Jim Smith.....	1979-1987
Robert A. Butterworth	1987-2002
Richard E. Doran.....	2002-2003
Charlie Crist	2003-2007
Bill McCollum.....	2007-2011
Pam Bondi.....	2011-

OFFICE OF THE ATTORNEY GENERAL
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Karen Brodeen	Cornelius Demps	Fulvio Gentili
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Lawrence Harris	Norman Levin	Luke Napodano
Virginia Harris	Gillian Leytham	Bill Navas
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		Michael Williams

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 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.

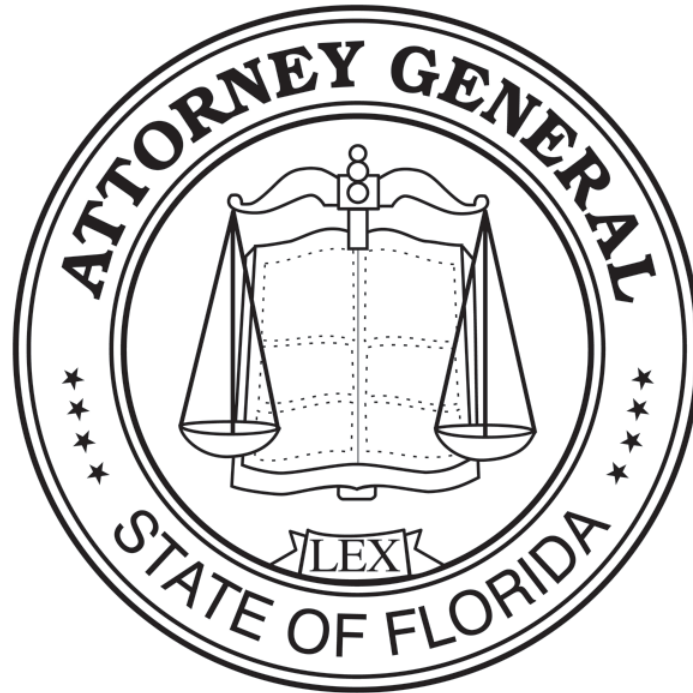
VI. Miscellaneous

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 office-holding 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, 2013, through December 31, 2014

AGO 13-01 – January 29, 2013

**MUNICIPALITIES – FARM BUILDINGS – SIGNS – FENCES –
LAND DEVELOPMENT REGULATIONS**

**REGULATION OF NONRESIDENTIAL FARM BUILDING BY
MUNICIPALITIES**

*To: Mr. Michael D. Cirullo, Jr., Town Attorney for the Town of
Loxahatchee Groves*

QUESTION:

Does section 604.50, Florida Statutes, exempt nonresidential farm buildings, farm fences, and farm signs from land development regulations adopted pursuant to Chapter 163, Florida Statutes?

SUMMARY:

Section 604.50, Florida Statutes, exempts nonresidential farm buildings, farm fences, and farm signs from land development regulations adopted by the Town of Loxahatchee Groves pursuant to Chapter 163, Florida Statutes.

Section 604.50, Florida Statutes, makes provision for nonresidential farm buildings, farm fences, and farm signs:

(1) Notwithstanding any provision of law to the contrary, any nonresidential farm building, farm fence, or farm sign is exempt from the Florida Building Code and any county or municipal code or fee, except for code provisions implementing local, state, or federal floodplain management regulations. A farm sign located on a public road may not be erected, used, operated, or maintained in a manner that violates any of the standards provided in s. 479.11(4), (5)(a), and (6) (8).

The statute defines the terms used in the section for purposes of statutory construction.¹

Prior to the adoption of Chapter 2011-7, Laws of Florida, this statute provided that “[n]otwithstanding any other law to the contrary, any nonresidential farm building is exempt from the Florida Building Code and any county or municipal *building* code.”² (e.s.) The Legislature’s removal of the term “building” from the language of the statute relating to county or municipal codes has resulted in your request for an opinion from this office.

The Town of Loxahatchee Groves has adopted land development regulations pursuant to Chapter 163, Florida Statutes, entitled the “Unified Land Development Code.” The town’s land development regulations contain typical setback requirements for properties in the town. Subject to consistency with the Right to Farm Act, the town has sought to enforce setback requirements upon nonresidential farm buildings, such as shade houses, corrals, and barns.³ However, the change to section 604.50(1), Florida Statutes, which exempts nonresidential farm buildings, farm fences, and farm signs from “any county or municipal code” would prevent the town from enforcing its zoning regulations, such as setbacks for nonresidential farm buildings, farm fences, and farm signs if it is determined that section 604.50, Florida Statutes, provides an exemption for nonresidential farm buildings and farm fences and signs from the town’s land development regulations.

It is a general rule of statutory construction, frequently expressed by Florida courts that:

When a statute is clear, courts will not look behind the statute’s plain language for legislative intent or resort to rules of statutory construction to ascertain intent. Instead, the statute’s plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent.⁴

Section 604.50(1), Florida Statutes, clearly states that “[n]otwithstanding any provision of law to the contrary, any nonresidential farm building, farm fence, or farm sign is exempt from . . . any county or municipal code or fee[.]” The Legislature has maintained an exception for code provisions implementing local, state, or federal floodplain management regulations. Applying the rule of construction set forth above compels the conclusion that the Town of Loxahatchee Groves has no authority to enforce “any county or municipal code or fee” provision on any nonresidential farm building, farm fence, or farm sign.

Further, a review of the legislative history surrounding the enactment of CS/HB 7103 during the 2010 and 2011 legislative sessions, suggests that this was the legislative intent. Staff analysis of the bill by both the House and the Senate states that the amendment to section 604.50, Florida Statutes, will exempt farm fences from the Florida Building

Code and farm fences and nonresidential farm buildings and fences from county or municipal codes and fees, except floodplain management regulations. It provides that a nonresidential farm building may include, but not be limited to, a barn, greenhouse, shade house, farm office, storage building, or poultry house.⁵

The intent of the Legislature is the primary guide in statutory interpretation.⁶ Where the language used by the Legislature makes clear its intent, that intent must be given effect.⁷ Thus, absent a violation of a constitutional right, a specific, clear and precise statement of legislative intent will control in the interpretation of a statute.⁸

Your memorandum of law suggests that the word “code” as used in section 604.50(1), Florida Statutes, may not include the Town of Loxahatchee Groves’ “Unified Land Development Code.” While the Florida Statutes contain a number of definitions for the word “code,”⁹ the fact that the Legislature provided no definition for purposes of section 604.50(1), or Chapter 604, Florida Statutes, requires that the word be understood in its common and ordinary sense.¹⁰ “Code” is generally defined as:

3. any set of standards set forth and enforced by a local government agency for the protection of public safety, health, etc., as in the structural safety of buildings (building code), health requirements for plumbing, ventilation, etc. (sanitary or health code), and the specifications for fire escapes or exits (fire code).
4. a systematically arranged collection or compendium of laws, rules, or regulations.¹¹

Black’s Law Dictionary defines “code” as “[a] complete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules, or regulations[.]”¹²

The term “land development regulations” is defined in section 163.3164, Florida Statutes, as:

“Land development regulations” means ordinances enacted by governing bodies for the regulation of any aspect of development and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land, except that this definition does not apply in s. 163.3213.¹³

You have advised that the Town of Loxahatchee Groves developed its land development code pursuant to Chapter 163, Florida Statutes. You state that while a collection of land development regulations would appear to fall within the general definition of “code,” section 604.50, Florida Statutes, applies solely to “nonresidential farm buildings” and “farm fences.” You contrast this with land development regulations

which apply to “the development of land,” but which include, as set forth in the definition above, such matters as zoning, building construction, and sign regulations.

I cannot draw such a distinction. The Town of Loxahatchee Groves “Unified Land Development Code” appears to be a “code” within the scope of that term as used in section 604.50(1), Florida Statutes. The Legislature clearly intended to exempt nonresidential farm buildings, farm fences, and farm signs from “any county or municipal code.” Thus, recognizing the Legislature’s intent, it is my opinion that nonresidential farm buildings, farm fences, and farm signs are exempted from regulation under the land development regulations of the town.¹⁴

In sum, it is my opinion that section 604.50, Florida Statutes, exempts nonresidential farm buildings, farm fences, and farm signs from land development regulations adopted by the Town of Loxahatchee Groves pursuant to Chapter 163, Florida Statutes.¹⁵

¹ Section 604.50(2), Fla. Stat., defines these terms as follows:

- (a) “Farm” has the same meaning as provided in s. 823.14.
- (b) “Farm sign” means a sign erected, used, or maintained on a farm by the owner or lessee of the farm which relates solely to farm produce, merchandise, or services sold, produced, manufactured, or furnished on the farm.
- (c) “Nonresidential farm building” means any temporary or permanent building or support structure that is classified as a nonresidential farm building on a farm under s. 553.73(10)(c) or that is used primarily for agricultural purposes, is located on land that is an integral part of a farm operation or is classified as agricultural land under s. 193.461, and is not intended to be used as a residential dwelling. The term may include, but is not limited to, a barn, greenhouse, shade house, farm office, storage building, or poultry house.

² See s. 604.50, Fla. Stat. (2002).

³ See Ops. Att’y Gen. Fla. 09-26 (2009) and 01-71 (2001) in which this office concluded that a county could enforce land development regulations pursuant to s. 823.14, Fla. Stat., Florida’s Right to Farm Act, so long as those regulations did not limit the operational activities of a bona fide farm operation inconsistent with the Right to Farm Act. Both of these opinions addressed s. 823.14, Fla. Stat., and were issued prior to the amendment to s. 604.50, Fla. Stat., in 2011 by CS/HB 7103.

⁴ See e.g., *State v. Burris*, 875 So. 2d 408 (Fla. 2004); *State v. Egan*, 287 So. 2d 1 (Fla. 1973); *Van Pelt v. Hilliard*, 78 So. 693 (Fla. 1918); *Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County*, 642 So. 2d 1081 (Fla. 1994); *Goddard*

v. State, 438 So. 2d 110 (Fla. 1st DCA 1983); *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); 93-2 (1993) (since it is presumed that the Legislature knows the meaning of the words it uses and to convey its intent by the use of specific terms, courts must apply the plain meaning of those words if they are unambiguous); and 92-93 (1992).

⁵ See The Florida Senate Veto Message Bill Analysis for CS/HB 7103, dated July 12, 2010, and House of Representatives Staff Analysis, CS/HB 7103, dated April 14, 2010, and stating that section 6 of the bill “exempts farm fences from the Florida Building Code, and exempts farm fences and nonresidential farm buildings from county or municipal codes and fees, except for code provisions implementing local, state, or federal floodplain management regulations.”

⁶ See, e.g., *State v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071 (Fla. 1982); *Barruzza v. Suddath Van Lines, Inc.*, 474 So. 2d 861 (Fla. 1st DCA 1985); *Philip Crosby Associates, Inc. v. State Board of Independent Colleges*, 506 So. 2d 490 (Fla. 5th DCA 1987).

⁷ *Barruzza and Philip Crosby Associates, Inc.*, *supra*.

⁸ *Carawan v. State*, 515 So. 2d 161 (Fla. 1987).

⁹ See s. 320.822, Fla. Stat. (uniform standard code for recreational vehicles and park trailers), and s. 553.955, Fla. Stat. (providing that the word “code” is defined for purposes of those statutes as the Florida Energy Efficiency Code for Building Construction).

¹⁰ See *Southeast Fisheries Association, Inc. v. Department of Natural Resources*, 453 So. 2d 1351 (Fla. 1984); *Millazzo v. State*, 377 So. 2d 1161 (Fla. 1979) (when a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense).

¹¹ Webster’s New Universal Unabridged Dictionary (2003), p. 397.

¹² Black’s Law Dictionary (8th ed. 2004), p. 273.

¹³ Section 163.3164(26), Fla. Stat.

¹⁴ Your letter states that “if Section 604.50 is intended to expand the exemption for nonresidential farm buildings, fences and signs to all municipal regulations, then Section 823.14, Florida Statutes, would be superfluous as to nonresidential farm buildings, fences and signs, since an exemption from a code means there cannot be duplication of codes.” However, s. 604.50 and s. 823.14, Fla. Stat., the Florida Right to Farm Act, can be read in such a manner as to give effect to both. See *Ideal Farms Drainage District et al. v. Certain Lands*, 19 So. 2d 234 (Fla. 1944); *Mann v. Goodyear Tire and Rubber Company*, 300 So. 2d 666 (Fla. 1974), for the proposition 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, that construction should be adopted which harmonizes and reconciles the statutory provisions so as to preserve the force and effect of each. Section 604.50, Fla. Stat., is the more specific statute and completely exempts nonresidential farm buildings, farm fences, and farm signs from regulation under the town's codes. Section 823.14, Fla. Stat., is intended by the Legislature to "protect reasonable agricultural activities conducted on farm land from nuisance suits." The Right to Farm Act would accommodate other types of land development regulation undertaken in compliance with the terms of the act, but the more specific subjects of s. 604.50, Fla. Stat., would be excluded from the terms of the act. Thus, these two statutes, both related to farming, can be read to give a scope of operation to each.

¹⁵ I would note that the Office of General Counsel, Florida Department of Agriculture and Consumer Services, has submitted a letter on this issue concluding that "it is the opinion of the Department of Agriculture and Consumer Services that this legislation applies to all local codes including land development regulations." See letter from Carol A. Forthman, Office of the General Counsel, Florida Department of Agriculture and Consumer Services, to Mr. Michael D. Cirullo, Jr., dated November 20, 2012.

AGO 13-02 – January 29, 2013

**SOUTH FLORIDA REGIONAL TRANSPORTATION
AUTHORITY – MUNICIPALITIES – DUAL OFFICE-HOLDING**

**CITY COMMISSIONER MAY SERVE AS MEMBER OF
GOVERNING BOARD OF SPECIAL DISTRICT TRANSPORTATION
AUTHORITY**

*To: Mr. David K. Wolpin, Ms. Laura K. Wendell, City Attorneys for the
City of Aventura*

QUESTION:

May a city commissioner simultaneously serve as a member of the governing board of the South Florida Regional Transportation Authority without violating the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution?

SUMMARY:

A city commissioner may simultaneously serve as a member of the governing board of the South Florida Regional Transportation Authority without violating the dual office-holding prohibition in section (5)(a), Article II of the Florida Constitution, because the authority is a special district.

Article II, section 5(a), Florida Constitution, provides in part that “[n]o person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein” While the constitutional provision does not define the term “office” or “officer,” the Supreme Court of Florida 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.¹

The constitutional dual office-holding prohibition, however, refers only to state, county, and municipal offices. There is no reference in the constitutional prohibition to special district offices, such that both the courts and this office have therefore concluded that the dual office-holding prohibition does not apply to the officers of an independent special district. In *Advisory Opinion to the Governor--Dual Office-Holding*,² the Supreme Court of Florida reiterated that special district officers are not included within the dual office-holding prohibition, concluding that a member of a community college district board of trustees is not included within the dual office-holding prohibition. This office in Attorney General Opinion 94-83 stated that membership on the Panama City-Bay County Airport Authority, created as an independent special district, did not constitute an office for purposes of Article II, section 5(a), Florida Constitution. The authority was created by law to perform a limited function and its members were appointed by a diverse group of governmental agencies that had no oversight or control over the functions or actions of the authority.

This office has cautioned that care must be taken in determining the nature and character of a district or authority to determine whether the governmental entity is an agency of the state, county, or municipality such that its officers may be considered state, county, or municipal officers for purposes of dual office-holding. For example, in Attorney General Opinion 84-90, this office considered whether a member of the Volusia County Health Facilities Authority was an officer of the county. While the authority was created and organized under Part III, Chapter 154, Florida Statutes, as a public body corporate and politic, it was created by the county by passage of an ordinance or a resolution. The governing body of the county appointed the authority members, was empowered to remove the members, and was authorized to abolish the authority at any time. This office, therefore, concluded that the authority was an instrumentality of the county and its officers were county officers. Thus, the constitutional prohibition against dual office-holding prohibited a mayor from also serving on the governing body of the county health facilities authority.

Similarly, in Attorney General Opinion 91-79, this office concluded that the Fort Walton Beach Area Bridge Authority, created as a dependent special district within the county, was an instrumentality of the county for dual office-holding purposes. Under the act creating the district, the county commission was charged with approving the

authority's annual budget and for filling vacancies on the authority.³

There is no question that a city commissioner is an officer of the city for purposes of the dual office-holding prohibition. However, to the extent the South Florida Regional Transportation Authority (authority) is a special district, a member of its governing board is not subject to the constitutional dual office-holding prohibition.

The authority is created as “a body politic and corporate, an agency of the state” in section 343.53(1), Florida Statutes. Pursuant to its enabling legislation, the authority has the right to own, operate, maintain, and manage a transit system in the tri-county area of Broward, Miami-Dade, and Palm Beach counties.⁴ Its governing board is appointed as follows: each of its member counties selects one of its county commissioners; the secretary of the Department of Transportation selects one of the district secretaries (or his or her designee) from the districts within the authority's service area “who shall serve ex officio as a voting member[;]” and the Governor appoints three members who are residents and qualified electors in the service area, but not residents of the same county.⁵ The authority is authorized to “plan, develop, own, purchase, lease, or otherwise acquire, demolish, construct, improve, relocate, equip, repair, maintain, operate, and manage a transit system and transit facilities.” Moreover, the Legislature states its intent that the authority “shall have overall authority to coordinate, develop, and operate a regional transportation system within the area served.”⁶

While the enabling legislation describes the authority as an “agency of the state,” the authority is designated as an independent special district by the Department of Economic Opportunity,⁷ operates within a limited geographical area, and is specifically authorized to perform a limited governmental activity to fulfill its purpose. The nature and purpose of the authority would appear more closely aligned with that of a special district carrying out its limited powers. Membership on the authority's governing board, therefore, is more in the nature of a district office which is not subject to the constitutional prohibition against dual office-holding.

Accordingly, it is my opinion that a city commissioner may serve as a member of the governing board of the South Florida Regional Transportation Authority without violating the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution, since the authority is a special district.

¹ *State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919); *see also State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

² 630 So. 2d 1055, 1058 (Fla. 1994).

³ *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* Op. Att’y Gen. Fla. 01-28 (2001), in which this office determined that regional planning council member was a public officer subject to the dual office-holding prohibition, based on *Orange County v. Gillespie*, 239 So. 2d 132 (Fla. 4th DCA 1970), *cert. denied*, 239 So. 2d 825 (Fla. 1970) (planning council member was subject to Florida’s Resign-to-Run Law which at that time only applied to state, county or municipal offices, as councils act on behalf of the state in implementing state policies regarding growth management). The AGO notes, however, that regional planning councils were not (and are still not) listed as special districts by the Department of Community Affairs (now Department of Economic Opportunity). Questions regarding the resign-to-run law should be addressed to the Division of Elections, Florida Department of State.

⁴ Section 343.54(1)(a), Fla. Stat.

⁵ Section 343.53(2), Fla. Stat.

⁶ Section 343.54(1)(b), Fla. Stat.

⁷ *See* <http://dca.deo.myflorida.com/fhcd/sdip/OfficialListdeo/report.cfm>.

AGO 13-03 – January 30, 2013

**PUBLIC RECORDS – ELECTRONIC RECORDS – COPIES –
E-MAIL**

**CHARGES FOR PROVIDING COPIES OF PUBLIC RECORDS BY
E-MAIL**

To: Ms. Sonja K. Dickens, City of Miami Gardens Attorney

QUESTION:

May the City of Miami Gardens impose a fee when documents are downloaded and submitted by electronic mail, in lieu of photocopying, to the requestor?

SUMMARY:

The City of Miami Gardens may charge the “actual costs of duplication” for electronic mail forwarded to a public records requestor in lieu of photocopying those records. When calculating the “actual costs of duplication,” charges may not

be made for labor costs or associated overhead costs. However, section 119.07(4)(d), Florida Statutes, provides that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the City of Miami Gardens may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge.

According to your letter, a public records request was made to the records custodian for the City of Miami Gardens for data which the city compiles and maintains in an electronic format. A further request was made to deliver the records by electronic mail to avoid the payment of copying costs. The requestor objected to the payment of any fees for costs associated with transmitting the documents by way of electronic mail.

Section 119.01(2)(f), Florida Statutes, requires:

Each agency that maintains a public record in an electronic recordkeeping system shall provide to any person, pursuant to this chapter, a copy of any public record in that system which is not exempted by law from public disclosure. *An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium, and the agency may charge a fee in accordance with this chapter.* For the purpose of satisfying a public records request, the fee to be charged by an agency if it elects to provide a copy of a public record in a medium not routinely used by the agency, or if it elects to compile information not routinely developed or maintained by the agency or that requires a substantial amount of manipulation or programming, must be in accordance with s. 119.07(4). (e.s.)

The statute clearly provides that if an agency maintains a record in a particular medium and that medium is requested for the copy, the agency “must provide a copy of the record in the medium requested[.]”¹ The statute also provides that “the agency may charge a fee in accordance with this chapter.”

Section 119.07, Florida Statutes, provides for the inspection and copying of records and for the fees which may be charged for inspecting and copying. Subsection (4) makes general provision for fees for copying when not otherwise prescribed by law:

(4) The custodian of public records shall furnish a copy or a

certified copy of the record upon payment of the fee prescribed by law. If a fee is not prescribed by law, the following fees are authorized:

(a)1. Up to 15 cents per one sided copy for duplicated copies of not more than 14 inches by 8 1/2 inches;

2. No more than an additional 5 cents for each two sided copy; and

3. *For all other copies, the actual cost of duplication of the public record.*

(b) The charge for copies of county maps or aerial photographs supplied by county constitutional officers may also include a reasonable charge for the labor and overhead associated with their duplication.

(c) An agency may charge up to \$1 per copy for a certified copy of a public record.

(d) If the nature or volume of public records requested to be inspected or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both.

(e)1. Where provision of another room or place is necessary to photograph public records, the expense of providing the same shall be paid by the person desiring to photograph the public records.

2. The custodian of public records may charge the person making the photographs for supervision services at a rate of compensation to be agreed upon by the person desiring to make the photographs and the custodian of public records. If they fail to agree as to the appropriate charge, the charge shall be determined by the custodian of public records. (e.s.)

As no charge has been established by law for providing copies by electronic mail in lieu of photocopying, section 119.07(4)(a)3., Florida Statutes, authorizes "the actual cost of duplication of the public record" to be charged. "Actual cost of duplication" is defined in section

119.011(1), Florida Statutes, to mean “the cost of the material and supplies used to duplicate the public record, but does not include labor cost or overhead cost associated with such duplication.” You have not advised me of and I am not aware of any “actual costs of duplication” involved in forwarding copies of electronic mail in lieu of photocopying and the definition does not allow for the imposition of labor costs or associated overhead costs.

Section 119.07(4)(d), Florida Statutes, does provide that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the agency may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. When the special service charge is warranted, it applies to requests for both the inspection of and copies made of public records.² For purposes of the Public Records Law, “[i]nformation technology resources” means “data processing hardware and software and services, communications, supplies, personnel, facility resources, maintenance, and training.”³ The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge; rather, an extensive use of such resources is required before the special service charge is authorized.⁴

The statute does not identify the Legislature’s intent as to what may constitute “extensive use” and provides no definition of the term.⁵ However, in light of the lack of clear direction in the statute as to the meaning of the term “extensive,” this office has suggested that agencies implement the service charge authorization in a manner that reflects the purpose and intent of the Public Records Act and does not represent an unreasonable infringement upon the public’s statutory and constitutional right of access to public records. While you have not advised me whether the City of Miami Gardens has adopted a public records procedure which includes provisions for imposing the special service charge, this office would strongly encourage the adoption of such a policy for accommodating public records requests.

Your letter suggests that a request for the production of public records by electronic mail may appear to be time saving and cost effective for both the requestor and the city. However, you are concerned that an individual could make several requests a day for the production of public records by electronic mail and, in responding to each request, the city could be required to utilize an exorbitant amount of staff time to respond to such public records requests. While this office acknowledges your concerns, these are issues which arise regardless of the format in which public records are maintained or produced. Providing access to public records is a statutory duty imposed by the Legislature on all records custodians and must be accomplished in a manner that is consistent with the purpose and intent of the Public Records Law and

that does not unreasonably infringe upon the public's statutory and constitutional right of access to public records.

Subsequent conversations with your office indicate that the City of Miami Gardens is currently contracting with a private entity for the storage and maintenance of certain public records, requests for proposal (RFP's) in this instance, and has been requiring that copies of the city's RFP's be obtained from the private company at a price established by that company. A request has been received by the city for copies of these public records at the price established in the Public Records Law for public records. This is the fact situation which has prompted your question. This office has opined, in Attorney General Opinion 2002-37, that an agency may not abdicate its duty to produce public records for inspection and copying by requiring those seeking public records to do so only through its designee and then paying whatever fee that company may establish for its services. Rather, the agency is the custodian of its public records and, upon request, must produce such records for inspection and copy such records at the statutorily prescribed fee.⁶

In sum, it is my opinion that the City of Miami Gardens may charge the "actual costs of duplication" for electronic mail forwarded to a public records requestor in lieu of photocopying those records. When calculating the "actual costs of duplication," charges may not be made for labor costs or associated overhead costs. However, section 119.07(4)(d), Florida Statutes, provides that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the City of Miami Gardens may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge.

¹ *And see* Op. Att'y Gen. Fla. 91-61 (1991) (custodian of public records must, if asked for a copy of a computer software disk used by an agency, provide a copy of the disk in its original format; a typed transcript of the disk would not satisfy the requirements of the Public Records Law).

² *See Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

³ Section 119.011(9), Fla. Stat.

⁴ *See* Op. Att'y Gen. Fla. 99-41 (1999).

⁵ However, Florida courts have approved a local government's formula for calculating its special service charge based on a determination that it would take more than 15 minutes to locate, review for confidential information, copy, and refile the requested material. *See Florida*

Institutional Legal Services, Inc. v. Florida Department of Corrections, 579 So. 2d 267 (Fla. 1st DCA 1991), review denied, 592 So. 2d 680 (Fla. 1991) (court upheld hearing officer's order rejecting inmates' challenge to Department of Correction's rule defining "extensive" for purposes of special service charge to mean it would take more than 15 minutes to locate, review, copy, and refile requested material); and Op. Att'y Gen. Fla. 99-41 (1999).

⁶ *And see* Op. Att'y Gen. Fla. 05-34 (2005) (while the property appraiser may provide public records, excluding exempt or confidential information, to a private company, the property appraiser may receive only those fees that are authorized by statute and may not, in the absence of statutory authority, enter into an agreement with the private company where the property appraiser provides such records in exchange for either in-kind services or a share of the profits or proceeds from the sale of the information by the private company).

AGO 13-04 – March 21, 2013

**VIRTUAL CHARTER SCHOOLS – PUBLIC EDUCATION –
SCHOOL DISTRICTS**

**PAYMENT OF COSTS OF STATE-WIDE ASSESSMENTS OF
VIRTUAL CHARTER SCHOOL STUDENTS INCLUDED WITHIN
ADMINISTRATIVE FEE RETAINED BY SCHOOL DISTRICT**

*To: Mr. Brady J. Cobb, South Florida Virtual Charter School Board,
Inc., and Florida Virtual Academy at Palm Beach*

QUESTION:

Must a virtual charter school pay for access to school district testing facilities and the technology for taking state-wide assessment tests for students enrolled in the virtual charter school which the school district has sponsored?

SUMMARY:

The school district sponsoring a virtual charter school is required to provide certain administrative services to the school, including test administration services, which includes payment of the costs of state-required or district-required student assessments. The school district may withhold a fee of up to 5 percent of the funding from the Florida Education Finance Program and the General Appropriations Act to be received by a virtual charter school to cover the cost of the administrative services provided to the charter school, including the cost of virtual charter school students' access to and use of district

testing facilities.

Initially, it should be acknowledged that this office has previously issued a legal opinion to a charter school. In Attorney General Opinion 2004-67, this office determined that charter schools are part of the state's program of public education and shall be funded "the same as" other schools in the public school system. In light of the subject matter of your request, this office sought, received, and considered the views of the School District of Palm Beach County on the question presented here.

Section 1002.33(1), Florida Statutes, authorizes a charter school to operate as a virtual charter school. The sponsor of a charter school is required to provide certain administrative and educational services to a charter school, including "test administration services, including payment of the costs of state-required or district-required student assessments[.]"¹ Each student enrolled in a virtual charter school must "[t]ake state assessment tests within the school district in which such student resides, *which must provide the student with access to the district's testing facilities.*"² (e.s.)

The sponsor of a virtual charter school is authorized to withhold a fee of up to 5 percent, which "shall be used to cover the cost of services provided under [section 1002.33(20),] subparagraph 1 . . . or other technological tools that are required to access electronic and digital instructional materials."³ This plain language requires no further interpretation in its directive that a school district, as the sponsor of a virtual charter school, may retain up to 5 percent of the funds payable to a virtual charter school and that such funds cover the provision of testing facilities for state-wide assessments. Where the Legislature has prescribed the manner in which something is to be accomplished, it in effect operates as a prohibition against its being done in any other manner.⁴

Accordingly, it is my opinion that the administrative services required to be provided by a school district sponsoring a virtual charter school include the payment of the costs of state-required or district-required student assessments, including the cost of virtual charter school students' access to and use of district testing facilities, and that such costs are contained within the fee of up to 5 percent retained by the school district.

¹ Section 1002.33(20)(a)1., Fla. Stat.

² Section 1002.45(6), Fla. Stat.

³ Section 1002.33(20)(a)8., Fla. Stat.

⁴ See *Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (where Legislature

prescribes the mode, that mode must be observed).

AGO 13-05 – April 1, 2013

**MUNICIPALITIES – CHARTERS – ELECTIONS – TERMS OF
OFFICE – QUALIFICATIONS – REFERENDUM**

**AMENDMENT OF CHARTER TO CHANGE ELECTION DATES
AND TERMS OF OFFICE**

To: Mr. Thomas J. Wohl, City Attorney for the City of Arcadia

QUESTIONS:

1. May the Arcadia City Council, pursuant to sections 100.3605 and 166.021(4), Florida Statutes, amend the Arcadia City Charter by ordinance to move the dates of city elections from the first Tuesday after the third Monday of September of each odd year to the first Tuesday after the first Monday of November of each even year to coincide with federal, state, and county elections, and to extend the terms of the sitting municipal officers resulting from said date change?

2. May the Arcadia City Council, pursuant to section 166.021(4), Florida Statutes, amend the Arcadia City Charter by ordinance to include term limits to the qualifications to be eligible to hold office on the Arcadia City Council?

SUMMARY:

1. The Arcadia City Council, acting pursuant to sections 100.3605 and 166.021(4), Florida Statutes, may amend the Arcadia City Charter by ordinance and without referendum for the purpose of changing municipal election dates and qualifying periods for candidates and for the adjustment of terms of office necessitated by such date changes.

2. The Arcadia City Council, may not, pursuant to section 166.021(4), Florida Statutes, amend the Arcadia City Charter by ordinance to include term limits to the qualifications for eligibility for holding office on the city council as such a change constitutes a change in the municipal charter which would affect “the terms of elected officers[,]” and, as provided in the statute, must be accomplished by approval by referendum pursuant to section 166.031, Florida Statutes.

QUESTION 1.

According to your letter, the Charter of the City of Arcadia, Florida, was adopted by Chapter 5080, Laws of Florida 1901, and has not been readopted. The Arcadia City Council is considering amending the city charter by ordinance to move the dates of city elections from September of each odd year to November of each even year to coincide with federal, state, and county elections to avoid the expense of a special election and to take advantage of increased voter turnout for those elections. You are aware that this office has issued a number of opinions on sections 100.3605 and 166.021(4), Florida Statutes, advising that such a change is authorized, but are particularly concerned that the proposed change in the Arcadia City Charter would have the effect of extending the terms of sitting municipal officers by more than one year.

Section 166.031, Florida Statutes, sets forth the procedures to be followed in amending municipal charters and requires that a proposed amendment shall be subject to referendum approval by the voters. For charters adopted prior to July 1, 1973, and not subsequently readopted, section 166.021, Florida Statutes, repealed or changed into ordinances many of the limitations contained in such charters.¹ Subsection (4) of the statute, however, provided that nothing in Chapter 166, Florida Statutes, the Municipal Home Rule Powers Act, was to be construed as permitting any changes in a special law or municipal charter that affected certain subject matters set forth therein, including “the terms of elected officers,” without referendum approval as provided in section 166.031, Florida Statutes.

Thus, for charters adopted after July 1, 1973, and for charter provisions relating to the terms of elected officers adopted prior to that date and not subsequently readopted, any amendment of those provisions would be subject to the procedures in section 166.031, Florida Statutes. Accordingly, this office concluded in Attorney General Opinion 94-31 that the city commission of the City of Tallahassee could not amend its charter by ordinance to provide for a change in the date on which municipal elections would occur and extend the terms of the sitting officers affected by the change.

However, in response to this opinion, the Florida Legislature, during the 1995 legislative session, introduced legislation to amend section 166.021, Florida Statutes. Section 1 of Chapter 95-178, Laws of Florida, amended section 166.021(4) to read in pertinent part:

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

In addition, Chapter 95-178, *supra*, created section 100.3605, Florida Statutes, relating to the conduct of municipal elections.² Subsection (2) of section 100.3605 provides:

The governing body of a municipality may, by ordinance, change the dates for qualifying and for the election of members of the governing body of the municipality and provide for the orderly transition of office resulting from such date changes.³

Accordingly, this office in Attorney General Opinion 2000-61 concluded that a city may amend its city charter by ordinance to move the dates of city elections from April to November to coincide with federal, state, and county elections, and to extend the terms of the sitting commissioners to November.⁴

Thus, as discussed above, prior to the 1995 amendment to section 166.021(4), Florida Statutes, and the creation of section 100.3065, Florida Statutes, a change in the charter prescribing the qualifying and election dates for municipal officers, and the resulting change in the term of office for sitting officers, required amendment according to the provisions of section 166.031, Florida Statutes, regardless of when such provisions were adopted. The legislative history of the 1995 legislation amending section 166.021(4) and creating section 100.3065, however, indicates an intent that municipalities are authorized to amend their charters, whether those charters were adopted before or after July 1, 1973, to change the election dates and qualifying periods for candidates, including any changes in terms of office necessitated by such amendment, without a referendum. Nothing in these statutes or in the legislative history related to their enactment places a restriction on this authority based on the increase in term required for the “orderly transition of office” affected by the ordinance.

Accordingly, I am of the opinion that pursuant to sections 166.021(4) and 100.3605, Florida Statutes, the Arcadia City Council may amend its city charter by ordinance to move the dates of city elections from the first Tuesday after the third Monday of September of each odd year to the first Tuesday after the first Monday of November of each even year to coincide with federal, state, and county elections, and to extend the terms of the sitting municipal officers resulting from this date change without voter approval by referendum. The date upon which the city charter was adopted or the length of the extension of terms of officers affected by the ordinance do not suggest a different conclusion.

QUESTION 2.

However, while the Arcadia City Council may amend its city charter by ordinance to move the dates of city elections and to extend the terms of the sitting municipal officers resulting from this date change, a charter amendment to impose term limits on the future officers serving on the

Arcadia City Council would not come within the statutory exceptions discussed above and would require voter approval by referendum.

In Attorney General Opinion 2001-81, the City of Punta Gorda proposed to change the term of office for city council members from two years to three years. The opinion, construing sections 166.021(4) and 100.3605, Florida Statutes, relied on the exception for “orderly transition of office resulting from such date changes” to conclude that a provision relating to sitting officers falls within the exception.⁵ (e.s.) That opinion recognized, however, that a proposed charter amendment proposing to lengthen official terms of office and applying to future city council members would not come within the exception recognized in sections 166.021(4) and 100.3605, Florida Statutes, and would require referendum approval.

Likewise, I do not read the exception in sections 166.021(4) and 100.3605, Florida Statutes, to authorize a municipality by ordinance to adopt term limits applying to future city council members without a referendum. Section 166.021(4), Florida Statutes, requires that charter amendments outside the scope of the exception be submitted to voters for approval in accordance with section 166.031, Florida Statutes. In addition, section 166.021(4), Florida Statutes, requires referendum approval of any pre-1973 charter provisions affecting the terms of elected officers.⁶

Therefore, I am of the opinion that while voter approval by referendum is not required for the City of Arcadia to change the date of municipal elections and extend the terms of sitting officers resulting from this date change, the city must seek referendum approval for an amendment to the Arcadia City Charter to impose term limits on city council members in the future.

¹ *And see* Op. Att’y Gen. Fla. 03-52 (2003), in which this office concluded that the City of Lauderdale Lakes, with a charter possibly adopted prior to adoption of the Municipal Home Rule Powers Act and not readopted after the effective date of the act, was authorized by ss. 166.012(4) and 100.3605, Fla. Stat., to amend its city charter by ordinance to move the dates of city elections from March to November.

² Section 2, Ch. 95-178, Laws of Fla.

³ *See* House of Representatives Committee on Ethics and Elections Final Bill Analysis & Economic Impact Statement on HB 2209 (passed by the Legislature as Ch. 95-178, Laws of Fla.), dated May 10, 1995, stating:

HB 2209 authorizes amendment of a municipal charter or special act without referendum for the purpose of changing municipal election dates and qualifying period for candidates and for the adjustment of terms of office necessitated by such

date changes. . . .

And see the title for Ch. 95-178, Laws of Fla., stating in pertinent part:

An act relating to municipal elections; amending s. 166.021, F.S.; authorizing amendment of a special law or municipal charter for the purpose of changing election dates and qualifying periods for candidates, including any changes in terms of office necessitated thereby, without referendum; creating s. 100.3605, F.S.; . . . providing for change of qualifying periods and election dates by ordinance and for the orderly transition of office; providing an effective date.

⁴ *Compare* Op. Att’y Gen. Fla. 01-81 (2001), in which this office was asked whether the exception afforded by ss. 166.021(4) and 100.3065, Fla. Stat., applied to a change in the dates of the qualifying period as well as the terms of office for council members from two years to three years. This office noted that in Op. Att’y Gen. Fla. 00-61 (2000), only the sitting officers’ terms were extended due to the change in the date of the election; the term of office of future officers, however, remained the same; however, in Op. Att’y Gen. Fla. 01-81 (2001), the city was interested in changing the term of office for future council members. This office concluded that the change in term of city council members from two years to three years did not fall within the exception recognized in ss. 166.021(4) and 100.3605; thus, such a change would have to be submitted to the voters for approval.

⁵ *See* Op. Att’y Gen. Fla. 01-81 (2001), *and see* Op. Att’y Gen. Fla. 00-61 (2000).

⁶ Section 166.021(4), Fla. Stat., provides:

The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes in a special law or municipal charter which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality or any changes in a special law or municipal charter which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election except for the selection of election dates and qualifying periods for candidates and for changes in terms of office necessitated by such changes in election dates,

the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, any change in the form of government, or any rights of municipal employees, without approval by referendum of the electors as provided in s. 166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.

AGO 13-06 – April 1, 2013

CHARTER SCHOOLS – MUNICIPALITIES

WHETHER MUNICIPALITY AUTHORIZED TO APPLY FOR
CONVERSION CHARTER SCHOOL

To: Mr. Fred L. Koberlein, Attorney for the Town of White Springs

QUESTION:

Whether a municipality is authorized by section 1002.33(3), Florida Statutes, to apply for a conversion charter school?

SUMMARY:

Section 1002.33(3)(b), Florida Statutes, limits the entities authorized to make an application for a conversion charter school to the district school board, the principal, teachers, parents, and/or the school advisory council at an existing public school that has been in operation for at least two years prior to the application to convert. Municipalities have been excluded by the Legislature from that list and thus, are not authorized to apply for a conversion charter school under section 1002.33(3)(b), Florida Statutes, although municipalities may apply for a new charter school under section 1002.33(3)(a), Florida Statutes.

According to your letter, South Hamilton Elementary School is the only school located in the southern portion of Hamilton County and serves the citizens of the Town of White Springs, Florida. The Hamilton County School Board announced its intention to close South Hamilton Elementary School during the 2011-2012 calendar year. Following this announcement, the Town of White Springs decided to apply for permission to convert South Hamilton Elementary School to a charter school. Subsequently, the school board decided to continue to operate the South Hamilton Elementary School. Your letter states that the school board has advised the Town of White Springs that a municipality may not apply for a conversion charter school and you suggest that this position may be based on the language of section 1002.33(3), Florida

Statutes. You have asked for this office's assistance in determining whether a municipality can apply for a conversion charter school under the provisions of section 1002.33(3), Florida Statutes.

In order to supplement the educational opportunities of children, the Florida Legislature, in 1996, authorized the creation of charter schools.¹ The statute, now codified at section 1002.33, Florida Statutes, allows for both the creation of new charter schools and the conversion of existing public schools to charter status.² Section 1002.33 provides for the creation of such charter schools as part of the state's program of public education.³

Section 1002.33(3), Florida Statutes, sets forth the application process for both new charter schools and for conversion charter schools. As provided in that statute, an application for a new charter school may be made by "an individual, teachers, parents, a group of individuals, a municipality, or a legal entity organized" in Florida.⁴ The application process for "conversion" charter schools, however, is specifically described in subsection (3)(b) and is limited by the terms of the statute:

An application for a conversion charter school *shall be made by the district school board, the principal, teachers, parents, and/or the school advisory council* at an existing public school that has been in operation for at least 2 years prior to the application to convert. . . . (e.s.)

The statute names those persons and entities that may make an application for a conversion charter school; municipalities are not among those recognized by the Legislature in section 1002.33(3)(b), Florida Statutes. It is a well-recognized 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.⁵ Section 1002.33(3)(b), Florida Statutes, specifically provides which entities are authorized to make an application for a conversion charter school and that legislative designation implies the exclusion of any other entities. Further, the Legislature has used the word "shall" in subparagraph (b) which is normally used to connote mandatory requirements.⁶

In construing statutes, the intent of the Legislature is to be determined initially from the language of the statute itself.⁷ Thus, where the language of a statute is plain and definite in meaning without ambiguity, it fixes the legislative intention such that interpretation and construction are not needed.⁸ The Legislature has excluded municipalities from section 1002.33(3)(b), Florida Statutes, and, in plain and definite terms limited those entities that may apply for a conversion charter school.⁹

Thus, in light of the express legislative designation of those entities that are authorized to apply for the conversion of an existing public school to a conversion charter school and the exclusion of municipalities from section 1002.33(3)(b), Florida Statutes, it is my opinion that the Town of White Springs is not authorized to apply for a conversion charter school.

¹ See s. 1, Ch. 96 186, Laws of Fla.

² Section 1002.33(3), Fla. Stat.

³ Section 1002.33(1), Fla. Stat.

⁴ Section 1002.33(3)(a), Fla. Stat.

⁵ See *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Ideal Farms Drainage District v. Certain Lands*, 19 So. 2d 234 (Fla. 1944).

⁶ See *Drury v. Harding*, 461 So. 2d 104 (Fla. 1984); *Holloway v. State*, 342 So. 2d 966 (Fla. 1977); *Neal v. Bryant*, 149 So. 2d 529 (Fla. 1962). Compare the use of the word “may” in subparagraph (a) which, when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word “shall.” *Fixel v. Clevenger*, 285 So. 2d 687 (Fla. 3d DCA 1973); *City of Miami v. Save Brickell Ave., Inc.*, 426 So. 2d 1100 (Fla. 3d DCA 1983).

⁷ See, e.g., *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); *Osborne v. Simpson*, 114 So. 543 (Fla. 1927) (where statute’s language is plain, without ambiguity, it fixes legislative intention and interpretation and construction are not needed); *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984).

⁸ See Ops. Att’y Gen. Fla. 00-46 (2000), 99-44 (1999), and 97-81 (1997).

⁹ Compare s. 1002.33(3)(a), Fla. Stat., which includes municipalities as an entity that can apply for a new charter school. The express mention of municipalities in subsection (3)(a) and the exclusion of municipalities from subsection (3)(b) would suggest that it was the Legislature’s express intention to limit municipalities to applying for new charter schools.

AGO 13-07 – April 1, 2013

PUBLIC RECORDS – MUNICIPALITIES – TRADE SECRETS –
ELECTRONIC RECORDS

ACCESS TO AGENCY DATABASE THROUGH EXTERNAL HARD
DRIVE

To: Ms. Eve Boutsis, Attorney for the Village of Palmetto Bay

QUESTION:

Must the Village of Palmetto Bay allow access to its copyrighted and licensed database which includes bank account information and social security numbers for copying directly to a hard drive provided by an individual requesting public records?

SUMMARY:

The village is not required to allow direct access to its electronic records through a hard drive provided by a requestor, but must allow inspection and copying of the requested records in a manner that protects exempt and confidential information from disclosure.

You state that an individual has brought his own hard drive onto which he wishes to download all financial information data maintained by the village. You indicate that licensed and copyrighted software is used by the village to input data, which includes exempt and confidential materials, and that the data is not extractable without revealing the copyrighted licensed programs.

Chapter 119, Florida Statutes, Florida's Public Records Law, provides a right of access to the records of the state and local governments. In the absence of a statutory exemption, the right of access applies to all materials made or received by an agency in connection with the transaction of official business which are used to perpetuate, communicate, or formalize knowledge.¹ Section 119.01(2)(f), Florida Statutes, requires:

Each agency that maintains a public record in an electronic recordkeeping system shall provide to any person, pursuant to this chapter, a copy of any public record in that system which is not exempted by law from public disclosure. An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium, and the agency may charge a fee in accordance with this chapter. For the purpose of satisfying a public records request, the fee to be charged by an agency if it elects to provide a copy of a public record in a medium not routinely used by the agency, or if it elects to compile information not routinely developed or maintained by the agency or that requires a substantial amount of manipulation or programming, must be in accordance with s. 119.07(4).

The statute clearly provides that if an agency maintains a record in a particular medium and that medium is requested for the copy, the agency “must provide a copy of the record in the medium requested if it is maintained in that medium[.]”² The statute also provides that “the agency may charge a fee in accordance with this chapter.” The courts of this state have determined that data stored in a computer is a public record subject to inspection and copying.³

Data processing software which has been obtained by an agency under a licensing agreement prohibiting its disclosure and which is a trade secret under section 812.081, Florida Statutes, is exempt from disclosure under Florida’s Public Records Law, Chapter 119, Florida Statutes.⁴ You also indicate that data stored in the village’s computer database contains exempt and confidential information. As you have represented, the village is unaware of a means to allow an individual to have direct access to its electronic database through the individual’s hard drive without compromising licensing agreements by divulging trade secrets and revealing exempt and confidential information.

While public agencies are required to provide reasonable access to records electronically maintained, such agencies must ensure that such records which are exempt or confidential are not disclosed, except as otherwise allowed by law.⁵ As the court in *Rea v. Sansbury*⁶ concluded, the authority of a public agency to facilitate the inspection and copying of public records by electronic means, “does not mean that every means adopted by the [agency] to facilitate the work of [agency] employees *ipso facto* requires that the public be allowed to participate therein.”⁷ Thus, while the village is obliged to provide the requested financial records in an electronic format with confidential and exempt information redacted, there is nothing in the Public Records Law requiring that the individual requesting the public records may dictate the manner in which the records are accessed or copied, such that the confidentiality and protection of licensed and protected material is compromised. As noted above, the custodian’s duty to allow inspection or copying of public records must be in a manner that will accommodate the requestor, but at the same time safeguard the records.⁸

Accordingly, it is my opinion that the Village of Palmetto Bay is not required to allow the requestor of public records to directly access the village’s computer records through a hard drive provided by the requestor, but must otherwise allow inspection and copying of such records in a manner which will accommodate the request, but protect from disclosure exempt or confidential materials.

¹ See ss. 119.011(12), Fla. Stat., defining “public records” and 119.07, Fla. Stat., requiring every custodian of a public record to permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian

of the public records. *See also Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980) (“public records” encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge).

² *And see* Op. Att’y Gen. Fla. 91-61 (1991) (custodian of public records must, if asked for a copy of a computer software disk used by an agency, provide a copy of the disk in its original format; a typed transcript of the disk would not satisfy the requirements of the Public Records Law).

³ *See Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983) (“There can be no doubt that information stored on a computer is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet”).

⁴ Section 119.071(1)(f), Fla. Stat. *And see* Ops. Att’y Gen. Fla. 90-104 (1990) and 90-102 (1990).

⁵ Section 119.01(2)(a), Fla. Stat., stating that agencies “must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law.” *And see* Rule 1B-26.003(6)(g)3., F.A.C., adopted by the Division of Library and Information Services of the Department of State.

⁶ 504 So. 2d 1315 (Fla. 4th DCA 1987).

⁷ *Id.* at 1318.

⁸ *Cf. s.* 119.01(2)(a), Fla. Stat., in part, expressing the policy of the state:

Automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law.

AGO 13-08 – April 18, 2013

**PUBLIC OFFICERS – DUAL OFFICE-HOLDING –
MUNICIPALITIES – LAW ENFORCEMENT**

TEMPORARY APPOINTMENT OF LAW ENFORCEMENT
OFFICER AS CITY MANAGER VIOLATES DUAL OFFICE-
HOLDING PROHIBITION WHEN CITY MANAGER IS AN
OFFICER

To: Ms. Julie O. Bru, City Attorney, City of Miami

QUESTION:

May a law enforcement officer serve as acting city manager when such appointment is of a limited and finite duration, without tenure or additional remuneration?

SUMMARY:

A law enforcement officer may not serve as acting city manager when the city manager's position constitutes an office, regardless of the limited duration or benefits attendant to the office, without violating the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.

You acknowledge that a law enforcement officer is an officer for purposes of the constitutional prohibition against dual office-holding in section 5(a), Article II, Florida Constitution, and state that the city manager for the City of Miami is also such an office. While you cite to Attorney General Opinion 2006-27, in which this office concluded that a city police chief could not serve as city manager until a successor was appointed without violating the dual office-holding prohibition, you question whether the fact that the appointment is temporary due to the city manager's being away from his or her office due to vacation or a medical procedure would affect the application of the dual office-holding prohibition.

Your letter indicates that the city manager is the appointed head of the administrative branch of city government and is empowered to exercise control over all departments and divisions of the city, execute contracts, and carry out policies adopted by the city commission. During temporary absences, the mayor, subject to the city commission's approval, may designate a qualified administrative officer to carry out the duties of the city manager.

Section 5(a), Article II 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 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.¹ 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.”²

A long recognized rule in this state, however, is that a legislative designation of an officer to perform *ex officio* the function of another office does not constitute holding two offices at the same time, provided the duties imposed are consistent with those being exercised.³ Rather, the legislatively assigned duties are considered an addition to the existing duties of the officer.⁴ It does not appear, nor have you proposed, that the law enforcement officer would be appointed to temporarily serve as city manager in an *ex officio* capacity.

The Florida Supreme Court in *Vinales v. State*,⁵ held that the constitutional dual office-holding prohibition did not apply to the appointment of municipal police officers as state attorney investigators since the appointment was temporary and no additional remuneration was paid to such municipal police officers for performing such additional criminal investigative duties. In *Vinales*, however, there was a statute which specifically authorized the appointment of municipal police officers for some purposes as investigators for the state attorney.⁶ The district court’s opinion, adopted by the Supreme Court, concluded that “the legislature has thus construed the applicable section of our state constitution as one which does not prohibit dual office holding on a temporary basis without remuneration for the purpose of criminal investigation.”⁷ In Attorney General Opinion 84-25, this office considered whether a member of a municipal board of adjustment could also serve as a part-time municipal police officer. Concluding that the *Vinales* exception would not apply to such a situation because the law enforcement duties were performed on a periodic and regular basis, not a temporary one, the opinion also observed that the *Vinales* case dealt “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 on a disparate municipal board exercising and performing quasi-judicial power[s] and duties.”

While the courts have enumerated “tenure, duration and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract” as noted above, I have found no discussion which imposes a minimum or maximum time on the duration of serving in an office which would otherwise affect the position’s characterization as such. While in the instance you have proposed, the law enforcement officer would be serving only for a limited time, he would be holding the office for a specified time and exercising the powers attendant thereto.⁸ Had the constitution considered temporary appointments to be an exception to the dual office-holding prohibition, the provisions in section 5(a), Article II, Florida Constitution, could have easily addressed such a

situation as an exemption.⁹

Accordingly, it is my opinion that a law enforcement officer may not be appointed to act as the city manager for the City of Miami, where the city manager's position is an office, without violating the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution.

¹ See, e.g., Op. Att'y Gen. Fla. 80-97 (1980).

² *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).

³ See *State v. Florida State Turnpike Authority*, 80 So. 2d 337, 338 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *City of Riviera Beach v. Palm Beach County Solid Waste Authority*, 502 So. 2d 1335 (Fla. 4th DCA 1987) (special act authorizing county commissioners to sit as members of county solid waste authority does not violate Art. II, s. 5(a), Fla. Const.); *City of Orlando v. State Department of Insurance*, 528 So. 2d 468 (Fla. 1st DCA 1988) (where the statutes had been amended to authorize municipal officials to serve on the board of trustees of municipal police and firefighters' pensions trust funds, such provision did not violate the constitutional dual office-holding prohibition).

⁴ See Webster's Third New International Dictionary *Ex officio*, p. 797 (unabridged ed. 1981) ("ex officio" means "by virtue or because of an office").

⁵ 394 So. 2d 993 (Fla. 1981).

⁶ See s. 27.251, Fla. Stat. (1978 Supp.).

⁷ 394 So. 2d at 994. And see *Rampil v. State*, 422 So. 2d 867 (Fla. 2d DCA 1982), following the *Vinales* exception and concluding that it did not violate the dual office-holding provision for a city police officer, in conducting a wiretap, to act in the capacity of a deputy sheriff, since that officer received no remuneration for such duties.

⁸ See Webster's Third New International Dictionary *Tenure*, p. 2357 (unabridged ed. 1981) ("tenure" means "the act, action, or a means of holding something").

⁹ Cf. s. 5(a), Art. II, Fla. Const., providing in pertinent part, "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."

AGO 13-09 – June 5, 2013

**PORT AUTHORITIES – PORTS – BONUSES – SEVERANCE
PAY – EMPLOYMENT CONTRACTS**

WHETHER PORT AUTHORITY IS A “UNIT OF GOVERNMENT”
FOR PURPOSES OF SECTION 215.425, FLORIDA STATUTES,
FOR EMPLOYEE SEVERANCE PAY

To: Mr. Damon Chase, Chairman, Seminole County Port Authority

QUESTION:

Is the Seminole County Port Authority, a dependent special district, a “unit of government” for purposes of section 215.425, Florida Statutes, which limits the amount of severance pay that can be authorized under an employment contract?

SUMMARY:

The Seminole County Port Authority, a dependent special district, is a “unit of government” for purposes of section 215.425, Florida Statutes, and employment contracts entered into by the authority after July 1, 2011, would be subject to the restrictions on severance pay contained therein.

The Seminole County Port Authority (the authority) is a dependent special district, a “body politic and corporate,” created to operate the Port of Sanford.¹ The port authority is empowered to “serve as a local governmental body within the meaning of Section 10(c) of Article VII of the State Constitution or as a local agency under part II of chapter 159, Florida Statutes[.]”²

Information supplied with your request indicates that after July 1, 2011, the authority entered into an employment agreement with its administrator which provided for six months severance pay. While this office will not comment on any particular contract to which the authority is a party, I understand your question to be whether a unit of local government such as the port authority may be a “unit of government” within the scope of section 215.425(4)(a), Florida Statutes, which limits the severance payments that can be authorized under an employment contract.

Your question specifically references section 215.425(4)(a), Florida Statutes, which requires 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(30), by the unit of government.³

The phrase “unit of government” as it is used in section 215.425, Florida Statutes, is not defined.⁴ However, the Legislature has not included qualifying or limiting language and, in the absence of any such language, the statute should not be read to include limitations that are not contained therein. Where the plain and ordinary meaning of statutory language is clear, that language should not be construed in a manner that would extend, modify, or limit its express terms or its reasonable and obvious implications.⁵

The Seminole County Port Authority is constituted by the Legislature as a body politic and corporate, created to operate the Port of Sanford. The port authority is a dependent district, defined by statute as a “local unit of special purpose, as opposed to general-purpose, government[.]”⁶ Section 215.425, Florida Statutes, applies broadly to “units of government” without limitation. Thus, section 215.425, Florida Statutes, would appear to apply to a local unit of government such as the Seminole County Port Authority.⁷

In sum, it is my opinion that the Seminole County Port Authority, a local unit of government, is a “unit of government” as that phrase is used in section 215.425, Florida Statutes, for the purpose of determining severance payments for its employees. I note that your attorney has reached the same conclusion⁸ and this office concurs in his determination.

¹ Section 1, Ch. 2010-240, Laws of Fla.

² Section 3(19), *id.*

³ 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 s. 215.425(5), Fla. Stat.

⁴ *But see* s. 1.01(8), Fla. Stat., stating that “[t]he 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.” (e.s.)

⁵ See *Department of Revenue ex rel. Smith v. Selles*, 47 So. 3d 916 (Fla. 1st DCA 2010) (where plain and ordinary meaning of statutory language is unambiguous, court cannot construe statute in manner that would extend, modify, or limit its express terms or its reasonable and obvious implications); *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998) (if statute is not ambiguous, unreasonable, or illogical, the court may not go beyond clear wording and plain meaning to expand its reach; to do so would extend or modify the express terms of the statute, which would be an improper abrogation of legislative power). And compare s. 215.322(5), Fla. Stat., relating to the acceptance of credit cards by state agencies, *units of local government*, and the judicial branch which states that “[a] unit of local government, including a municipality, special district, or board of county commissioners or other governing body of a county. . . .” may accept payment by credit card for financial obligations owed to that unit of local government.

⁶ See s. 189.403(1) and (2), Fla. Stat., defining “[s]pecial district” and “[d]ependent special district.”

⁷ Cf. s. 119.011(2), Fla. Stat., including “districts” within the definition of the term “[a]gency” along with other separate units of government created or established by law; s. 189.403(1), Fla. Stat., defining a “[s]pecial district” as “a local unit of special purpose, as opposed to general-purpose, government” and (2) defining a “[d]ependent special district” as a special district that meets certain specified criteria; and Ops. Att’y Gen. Fla. 12-35 (2012) (housing finance authority as local governmental unit) and 07-17 (2007) (water and sewer district, independent special district as a special district and a local unit of special purpose government).

⁸ See Memorandum of Law from Stephen H. Coover to Attorney General Pam Bondi, dated March 22, 2013.

AGO 13-10 – June 5, 2013

**OKALOOSA ISLAND FIRE DISTRICT – FIRE CONTROL
DISTRICTS – SPECIAL DISTRICTS**

DISTRICT CREATED BY COUNTY ORDINANCE NOT SUBJECT
TO GENERAL ACT COVERING DISTRICTS CREATED BY
SPECIAL ACT OR GENERAL LAW OF LOCAL APPLICATION

To: Mr. C. Jeffrey McInnis, Okaloosa Island Fire District Attorney

QUESTION:

Is the Okaloosa Island Fire District an independent fire district subject to the requirements in Chapter 191, Florida Statutes?

SUMMARY:

The Okaloosa Island Fire District, as an independent special fire district created by county ordinance, is not an independent fire control district subject to Chapter 191, Florida Statutes.

You state that the Okaloosa Island Fire District (district) was created by Okaloosa County Ordinance 77-4, which was approved by referendum in 1977. You indicate that the district was formed by county ordinance pursuant to the authority granted in section 125.01(5), Florida Statutes (1975)¹, authorizing counties to create special districts with the power to levy ad valorem taxes to provide general governmental services, including fire protection. The district's governing board is composed of five elected commissioners who are qualified electors residing within the district.²

You question the district's status as an independent special district subject to Chapter 191, Florida Statutes, in light of changes to Florida law which no longer authorize the creation of an independent special district by county ordinance.³ You state that Okaloosa County Ordinance 77-4 was never codified by the Florida Legislature and question whether a fire district which technically does not meet the definition of an independent special fire control district, as defined in Chapter 191, would be subject to that chapter's requirements.

Chapter 191, Florida Statutes, the "Independent Special Fire Control District Act," (the act) was enacted in 1997.⁴ The legislation was enacted for the following purposes:

- (1) Provide standards, direction, and procedures concerning the operations and governance of independent special fire control districts.
- (2) Provide greater uniformity in independent special fire control district operations and authority.
- (3) Provide greater uniformity in the financing authority of independent special fire control districts without hampering the efficiency and effectiveness of currently authorized and implemented methods and procedures of raising revenue.
- (4) Improve communication and coordination between special fire control districts and other local governments with respect to short-range and long-range planning to meet the demands for service delivery while maintaining fiscal responsibility.
- (5) Provide uniform procedures for electing members of the governing boards of independent special fire control districts to ensure greater accountability to the public.⁵

For purposes of the act, “Independent special fire control district” is defined as:

an independent special district as defined in s. 189.403, created by special law or general law of local application, providing fire suppression and related activities within the jurisdictional boundaries of the district. The term does not include a municipality, a county, a dependent special district as defined in s. 189.403, a district providing primarily emergency medical services, a community development district established under chapter 190, or any other multiple-power district performing fire suppression and related services in addition to other services.⁶

Thus, to be subject to Chapter 191, Florida Statutes, a fire control district must be an independent special district as defined in section 189.403, Florida Statutes, and it must be created by special or general law of local application.

Section 189.403(3), Florida Statutes, defines “[i]ndependent special district” as “a special district that is not a dependent special district as defined in subsection (2). . . .” Subsection (2) defines a “[d]ependent special district” as a special district that meets at least one of the following criteria:

- (a) The membership of its governing body is identical to that of the governing body of a single county or a single municipality.
- (b) All members of its governing body are appointed by the governing body of a single county or a single municipality.
- (c) During their unexpired terms, members of the special district’s governing body are subject to removal at will by the governing body of a single county or a single municipality.
- (d) The district has a budget that requires approval through an affirmative vote or can be vetoed by the governing body of a single county or a single municipality.

This subsection is for purposes of definition only. Nothing in this subsection confers additional authority upon local governments not otherwise authorized by the provisions of the special acts or general acts of local application creating each special district, as amended.⁷

The Okaloosa Island Fire District is characterized as an independent special district on the official list of special districts maintained by the Florida Department of Economic Opportunity⁸ and it fits within the definition of an independent special district contained in section

189.403, Florida Statutes. The district, however, was not created by special or general law of local application.⁹ It would not, therefore, by definition be subject to the provisions in Chapter 191, Florida Statutes. While the provisions in Chapter 191, Florida Statutes, are clear in their application only to those independent special fire control districts which are created by special act or general law of local application, a review of the legislative history of its enactment reveals that as originally drafted, the act would have covered independent special districts created by local ordinance.¹⁰ The bill was amended, however, to remove references to independent special fire control districts which are created by county ordinance.¹¹

Accordingly, it is my opinion that the Okaloosa Island Fire District, as an independent special fire control district created pursuant to a county ordinance is not subject to Chapter 191, Florida Statutes.

¹ Section 125.01(5), Fla. Stat. (1975), provided:

(a) To an extent not inconsistent with general or special law, the governing body of a county shall have the power to establish, and subsequently merge or abolish those created hereunder, special districts for any part or all of the county, including incorporated areas if the governing body of the incorporated area affected approves such creation by ordinance, within which may be provided municipal services and facilities from funds derived from service charges, special assessments, or taxes within such district only. Such ordinance may be subsequently amended by the same procedure as the original enactment.

(b) The governing body of such special district may be composed of representatives of both county government and the government of such participating municipalities.

(c) It is hereby declared to be the intent of the Legislature that this subsection is the authorization for the levy by a special district of any millage designated in the ordinance creating such a special district or amendment thereto and approved by vote of the electors under the authority of the first sentence of s. 9(b), Art. VII of the State Constitution.

But see s. 1, Ch. 80-407, Laws of Fla., amending s. 125.01(5)(b), Fla. Stat., to provide:

The governing body of such special district *shall* be composed of county commissioners and may include elected officials of the governing body of an incorporated area included in the boundaries of the special district with the basis of apportionment being set forth in the ordinance creating the special district. (e.s.)

² Appendix D, s. 2, Art. I, Okaloosa County, Florida, Code of Ordinances.

³ See s. 189.402(1), Fla. Stat., stating:

It is the intent of the Legislature through the adoption of this chapter to provide general provisions for the definition, creation, and operation of special districts. It is the specific intent of the Legislature that dependent special districts shall be created at the prerogative of the counties and municipalities and that independent special districts shall only be created by legislative authorization as provided herein.

⁴ See s. 1, Ch. 97-256, Laws of Fla.

⁵ Section 191.002, Fla. Stat., as created by s. 2, Ch. 97-256, Laws of Fla.

⁶ Section 191.003(5), Fla. Stat.

⁷ Section 189.403(1), Fla. Stat., provides:

“Special district” means 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. (e.s.)

⁸ See <http://dca.deo.myflorida.com/fhcd/sdip/OfficialListdeo/report.cfm>.

⁹ See s. 191.004, Fla. Stat., providing for the preemption of any “more specific provision of any special act or general law of local application *creating the charter of the district . . .*” and stating that “the provisions of this act supersede all special act or general law of local application provisions which *contain the charter of an independent special fire control district* and which address the same subjects as this act[.]” (e.s.) Cf. Inf. Op. to Mr. E. Allan Ramey, South Walton Fire District, dated November 12, 1997, in which this office observed that a fire district created by county ordinance, although the requestor was unable to advise whether such ordinance was adopted pursuant to a special law or general law of local application, did not fall within the definition of “Independent special fire control district” in Ch. 191, Fla. Stat. *And see State v. Leavins*, 599 So. 2d 1326 (Fla. 1st DCA, 1992), citing *State ex rel. Gray v. Stoutamire*, 179 So. 730 (1938) (statute relating to particular persons or things or other particular subjects is considered under the Florida Constitution to be a

special law; a local law or a general law of local application is a statute relating to particular subdivisions or portions of the state or to particular places of classified localities).

¹⁰ See House of Representatives Committee on Community Affairs Bill Analysis & Economic Impact Statement, PCB CA 97-01 (HB 1741), March 13, 1997, p. 6.

¹¹ Florida House of Representatives Committee on Community Affairs Meeting, March 18, 1997, PCB CA 97-01 (HB 1741), Tape 1 of 1 (amendment eliminates reference to districts created by local ordinance, clarifying term “independent special fire control district” to not include counties; amendment “eliminates substantial conflict between controlling law for fire districts created by county ordinance and districts created by special act.”).

AGO 13-11 – June 5, 2013

**MUNICIPALITIES – TAXATION – PUBLIC SERVICE TAX –
NATURAL GAS**

**WHETHER SALE OF NATURAL GAS OUTSIDE MUNICIPAL
BOUNDARIES IS TAXABLE UNDER SECTION 166.231, FLORIDA
STATUTES**

To: Mr. Fred A. Morrison, Leesburg City Attorney

QUESTIONS:

1. May a municipality in Florida impose the Public Service Tax authorized by section 166.231, Florida Statutes, against the charge levied by the city for the transportation of metered natural gas to a customer within the municipal limits, if the natural gas is purchased from a provider of natural gas located outside the municipality which is not affiliated in any way with the municipality, the gas is transported from the seller to the municipality’s gate station through pipelines owned by others, and the sole role of the municipality is to provide transportation of the natural gas from its gate station to the premises of the customer?

2. Under the same set of facts, may a municipality impose the Public Service Tax on the sale of the natural gas itself, independently of whether the service of transporting the gas is deemed taxable?

SUMMARY:

1. The City of Leesburg is not authorized by section 166.231,

Florida Statutes, to impose the public service tax authorized by that section against the charge levied by the city for the transportation of metered natural gas to a customer within the municipal limits, if the natural gas is purchased from a provider of natural gas located outside the municipality which is not affiliated in any way with the municipality, the gas is transported from the seller to the municipality's gate station through pipelines owned by others, and the sole role of the municipality is to provide transportation of the natural gas from its gate station to the premises of the customer.

2. Based on a determination of the nature of the contract for sale of the natural gas, that is, whether the contract for the natural gas is a shipment contract or a destination contract, the purchase of natural gas may be subject to the provisions of section 166.231, Florida Statutes. This office has no authority to review contracts on behalf of local governments and must rely on your assertion that the purchaser "takes title to the gas at the point of purchase" outside the municipality to conclude that no taxable event has taken place within the scope of section 166.231, Florida Statutes.

QUESTION 1.

According to your letter, the City of Leesburg has a contract with an industrial customer to transport natural gas to that customer and charges the customer for the transportation service rendered. The customer purchases the gas from a supplier located outside the city, unrelated either to the customer or the city, and takes title to the gas at the point of purchase. The gas is then transported through pipelines owned by other unrelated entities, to the point where those pipelines intersect with Leesburg's own natural gas gate station. At that point, Leesburg assumes responsibility for transporting the gas from its gate station to the customer's location within the municipal limits. Although Leesburg does operate its own natural gas utility, Leesburg is not a seller of the gas itself in this situation, either directly or indirectly, it only transports the gas and imposes a charge on the customer for that service.

You ask whether the city may impose the Public Service Tax authorized by section 166.231, Florida Statutes, against the charge the city levies for transportation of natural gas to the customer under the facts set out above.

Section 166.231, Florida Statutes, authorizes municipalities to levy a public service tax on purchases within the municipality of electricity, metered natural gas, liquefied petroleum gas (either metered or bottled), manufactured gas (either metered or bottled), and water service.¹ The statute provides in part:

[T]he tax shall be levied *only upon purchases within the municipality* and shall not exceed 10 percent of the payments received by the seller of the taxable item from the purchaser for the purchase of such service.² (e.s.)

Section 2, Article VIII, Florida Constitution, gives municipalities “home rule powers” which may be exercised for any valid municipal purpose, “except as otherwise provided by law[.]” however, the taxing power of municipalities is not derived from this constitutional provision. The origin of municipal taxing power and the limitations on its exercise are found in sections 1(a) and 9(a), Article VII, Florida Constitution, and such general or special laws relating to other taxes as the Legislature may enact.³ In the exercise of its taxing power, a municipality is limited to that taxing power conferred expressly, or by necessary implication.⁴ Generally, therefore, absent statutory authority, a municipality has no inherent power to impose taxes or to provide exemptions from such taxes.⁵

The statutory provision authorizes a municipality to levy the public service tax only “upon purchases within the municipality” and in the absence of any ambiguity in this language, it must be construed to mean exactly what it says.⁶ The power to tax by municipalities is limited by the Florida Constitution and section 166.231, Florida Statutes, provides an explicit limitation upon the public service tax. You have advised this office that the customer purchases the gas from a supplier located outside the city, unrelated either to the customer or the city, and takes title to the gas at the point of purchase.⁷ Thus, the transaction does not constitute a “purchase within the municipality” and I cannot conclude that the municipality has the authority under section 166.231, Florida Statutes, to tax this transaction. The statute does not authorize the municipality to impose a tax on the charge it currently imposes for transportation⁸ and the general rule of construction is that tax laws are to be construed strongly in favor of taxpayers and against government.⁹

You suggest that “[s]ince transportation of the gas is a service inseparable from the purchase of the gas,” section 166.231, Florida Statutes, should be read to include the transportation service as an element of purchase. To read the statute in this fashion would make the language of the statute requiring levies “only upon purchase within the municipality” meaningless as each of the services in section 166.231(1), Florida Statutes, requires transportation or delivery, whether that takes place within or outside the municipal limits.¹⁰

Therefore, it is my opinion that the City of Leesburg is not authorized by section 166.231, Florida Statutes, to impose the public service tax authorized by that section against the charge levied by the city for the transportation of metered natural gas to a customer within the municipal limits, if the natural gas is purchased from a provider of natural gas located outside the municipality which is not affiliated in

any way with the municipality, the gas is transported from the seller to the municipality's gate station through pipelines owned by others, and the sole role of the municipality is to provide transportation of the natural gas from its gate station to the premises of the customer.

QUESTION 2.

You have also asked whether the City of Leesburg may impose a public service tax on the sale of the natural gas. As related in your letter, the industrial customer involved in this matter purchases natural gas from a supplier located outside the city, unrelated either to the customer or the city, and takes title to the gas at the point of purchase. Although the city operates its own natural gas utility, Leesburg is not the seller of the gas itself in this situation, either directly or indirectly, it only transports the gas and it currently imposes a charge on the customer for that service.

This office, in Attorney General Opinion 82-06, considered the nature of the contract for sale and the point at which title passes in a particular transaction in determining whether fuel oil ordered from and shipped by common carrier by a fuel oil dealer or distributor within the City of Tampa to a purchaser located outside the corporate limits of the city was taxable as a "purchase" within the city under section 166.231, Florida Statutes. That opinion relied on provisions of the Uniform Commercial Code (Chapter 672, Florida Statutes, "Uniform Commercial Code – Sales") to differentiate between a shipment contract and a destination contract and advised that the answer to the question of taxability rested on the type of contract entered into in this transaction. The opinion concludes:

[I]f the contract for the fuel oil is a shipment contract, then the purchase takes place at the point of shipment within the corporate limits of the municipality and as such the purchase will be subject to the tax imposed by s. 166.231, F.S. However, if the contract is a destination contract (*i.e.*, F.O.B. Buyer's plant or specifically styled a destination contract), then the purchase takes place at the point the fuel oil is duly tendered at the destination which is specified in the contract, which may or may not be within the corporate limits of the municipality. In that case, the purchase may or may not be subject to the tax imposed by s. 166.231, F.S. If the destination specified in the contract is within the corporate limits of the municipality, then the purchase would be subject to the provisions of s. 166.231, F.S. Likewise, if the destination specified in the contract is outside the corporate limits of the municipality, then the purchase would not be subject to the provisions of s. 166.231, F.S.

In order to determine whether a shipment contract or a destination

contract may be involved in your situation, a review of the terms of the particular contract for purchase of the natural gas will be required. This office is not authorized to review contracts to make such a determination, but provides this discussion for your consideration. A review of the statutory provisions cited in Attorney General Opinion 82-06 indicates that the language of these statutes is substantially similar to that relied upon in the opinion.

In sum, based on a determination of the nature of the contract for sale of the natural gas, that is, whether the contract for the natural gas is a shipment contract or a destination contract, the purchase of natural gas may be subject to the provisions of section 166.231, Florida Statutes. However, this office has no authority to review contracts on behalf of local governments and must rely on your assertion that the purchaser “takes title to the gas at the point of purchase” outside the municipality. In reliance thereon, this office must conclude that no taxable event has taken place within the scope of section 166.231, Florida Statutes.

¹ See s. 166.231(1)(a), Fla. Stat.

² *Id.*

³ See Ops. Att’y Gen. Fla. 93-35 (1999), 87-45 (1987), 80-87 (1980), and 79-26 (1979), concluding that a municipality has no home rule powers with respect to the levy of excise or non ad valorem taxes and exemptions therefrom, as the exercise of all such taxing power must be authorized by general law.

⁴ See Op. Att’y Gen. Fla. 79-26 (1979).

⁵ See also Ops. Att’y Gen. Fla. 94-76 (1994) (statute does not permit town to place cap on dollar amount that may be taxed, creating an exemption from taxation) and 89-11 (1989) (municipality not authorized to establish a cap which would exempt from taxation that portion of the service generating tax revenue in excess of a maximum monetary cap).

⁶ See, e.g., *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); *Osborne v. Simpson*, 114 So. 543 (Fla. 1927) (where statute’s language is plain, without ambiguity, it fixes legislative intention and interpretation and construction are not needed); *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); and 97-81 (1997).

⁷ See also Op. Att’y Gen. Fla. 82-06 (1982), concluding that “if the contract for the fuel oil is a shipment contract, then the purchase takes place at the point of shipment within the corporate limits of the municipality and as such the purchase will be subject to the tax imposed by s. 166.231, F.S. However, if the contract is a destination contract . . . then the purchase takes place at the point the fuel oil is duly tendered at the destination which is specified in the contract, which may or may not be within the corporate limits of the municipality. In that case, the purchase may or may not be subject to the tax imposed by s. 166.231, F.S. If the destination specified in the contract is within the corporate limits of the municipality, then the purchase would be subject to the provisions of s. 166.231, F.S. Likewise, if the destination specified in the contract is outside the corporate limits of the municipality, the purchase would not be subject to the provisions of s. 166.231, F.S.”

⁸ Compare s. 203.01(1)(e)1., Fla. Stat., subjecting every distribution company that receives payment for the sale or transportation of natural or manufactured gas to a retail consumer in this statute to a tax on the exercise of this privilege.

⁹ See *Harbor Ventures, Inc. v. Hutches*, 366 So. 2d 1173 (Fla. 1979) (tax statutes must be construed in favor of taxpayers where any ambiguity exists); *State, Department of Revenue v. Ray Construction of Okaloosa County*, 667 So. 2d 859 (Fla. 1st DCA 1996) (tax laws are to be construed strongly in favor of taxpayers and against government); *Mikos v. Ringling Brothers - Barnum & Bailey Combined Shows, Inc.*, 475 So. 2d 292 (Fla. 2d DCA 1985), *opinion approved*, 497 So. 2d 630 (Fla. 1986) (taxing statute should be construed in favor of taxpayer and against government seeking to impose tax).

¹⁰ Compare s. 180.191, Fla. Stat., authorizing municipalities to furnish water service outside the boundaries of the municipality. And see Op. Att’y Gen. Fla. 75-20 (1975) (concluding that “[t]he point of sale for metered service, unless otherwise explicitly agreed, is the meter itself[.] [t]hus, if the meter is outside the corporate limits, there can be no tax imposed under s. 166.231, F.S.” You have specifically stated that the title to this natural gas passes outside the municipal limits and it is the “purchase” of the gas which is the taxable activity.

AGO 13-12 – June 6, 2013

**INDUSTRIAL DEVELOPMENT AUTHORITIES – ECONOMIC
DEVELOPMENT – COUNTIES**

WHETHER INDUSTRIAL DEVELOPMENT AUTHORITY IS
AUTHORIZED TO ENTER INTO CONTRACTS TO FOSTER
ECONOMIC DEVELOPMENT ASIDE FROM FINANCING OR
REFINANCING PROJECTS

To: Mr. Kenneth B. Evers, Hardee County Industrial Development Authority

QUESTION:

In light of the statutory mandate of liberal construction for the provisions of sections 159.44 and 159.53, Florida Statutes, does the Hardee County Industrial Development Authority created pursuant to Chapter 159, Florida Statutes, have the power to enter into contracts to foster the economic development of a county aside from, or without regard to, the financing or refinancing of a “project” as that term is defined?

SUMMARY:

The Hardee County Industrial Development Authority would appear to be authorized to enter into contracts to foster the economic development of a county aside from, or without regard to, the financing or refinancing of a “project” within the scope of the act pursuant to the provisions of section 159.46, Florida Statutes.

According to your letter, the Hardee County Industrial Development Authority (IDA) was created pursuant to section 159.45, Florida Statutes, and through the adoption of Hardee County Resolution 84-10. The IDA entered into a contract for the overall purpose of fostering economic development in the county. You have specifically indicated that this contract “would not qualify as financing/refinancing of a project, as that term is defined in Chapter 159.” In light of a statutory direction for liberal construction contained in section 159.53, Florida Statutes, you ask whether the IDA may enter into contracts which do not qualify as either the financing or refinancing of projects.

Initially, I must advise you that this office cannot pass on the validity of an existing contract and the discussion herein is not directed to any particular contract to which the IDA may be a party. Therefore, this discussion will be limited to a consideration of the powers and duties of industrial development authorities under Part III, Chapter 159, Florida Statutes, and other relevant legislative provisions.

Part III, Chapter 159, Florida Statutes, authorizing the creation of industrial development authorities, was enacted in 1970 as Chapter 70-229, Laws of Florida. The preamble to Chapter 70-229, Laws of Florida, expresses the concerns of the Legislature and sets forth the reasons necessitating the enactment of Part III, Chapter 159, Florida Statutes:

Whereas, there is an immediate need for the development, construction, expansion and rehabilitation of industrial or manufacturing plants in Florida for the purpose of increasing

opportunities for gainful employment, improving living conditions and otherwise contributing to the prosperity and general welfare of the state and its inhabitants; and

Whereas, Section 10 of Article VII of the Florida Constitution authorizes the legislature to enact laws providing for the issuance and sale by any county[,] municipality, special district or other local governmental body of revenue bonds to finance or refinance the cost of capital projects for industrial and manufacturing plants, when such revenue bonds are repayable solely from revenue derived from the sale, operation, or leasing of the capital projects; and

* * *

Whereas, the legislature by the enactment of chapter 69-104, Laws of Florida, known and cited as the Florida Industrial Development Financing Act, provided for the types of projects that may be so financed and criteria, terms and conditions under which such projects could be financed and refinanced by any county, municipality, special district or other local governmental body, but did not provide any method by which special districts or other local governmental bodies could be created for the issuance of such bonds; and

Whereas, many counties in Florida [do] not have in existence a local public industrial development authority having the power to promote the industrial development of the county through the issuance of industrial development bonds as authorized by the Constitution and are without funds to provide for industrial development and the acquisition and preparation of sites therefor and it is necessary and in the public interest to provide a method whereby such may be accomplished

Each industrial development authority is created as a public body and “[e]ach of the authorities is constituted as a public instrumentality for the purposes of industrial development, and the exercise by an authority of the powers conferred by ss. 159.44 - 159.53 shall be deemed and held to be the performance of an essential public purpose and function.”¹

The statutory provision describing the purposes of the act is section 159.46, Florida Statutes, which provides:

Industrial development authorities, as authorized by ss. 159.44 - 159.53, are created *for the purpose of financing and refinancing projects* for the public purposes described in, and in the manner provided by, the Florida Industrial Development Financing Act and by ss. 159.44 - 159.53 and *for the purpose of fostering the economic development of a county*. Each industrial

development authority shall study the advantages, facilities, resources, products, attractions, and conditions concerning the county with relation to the encouragement of economic development in that county, and shall use such means and media as the authority deems advisable to publicize and to make known such facts and material to such persons, firms, corporations, agencies, and institutions which, in the discretion of the authority, would reasonably result in encouraging desirable economic development in the county. In carrying out this purpose, industrial development authorities are encouraged to cooperate and work with industrial development agencies, chambers of commerce, and other local, state, and federal agencies having responsibilities in the field of industrial development. (e.s.)

It is a basic canon of statutory construction that identical terms within an act must bear the same meaning.² In light of the parallel language in the two “purpose” phrases italicized above, the statute appears to describe two designated purposes for industrial development authorities. They are created for the purpose of financing and refinancing projects and for the purpose of fostering economic development in their counties. Section 159.46, Florida Statutes, provides that an IDA shall study conditions in the county with relation to “the encouragement of economic development in that county” and shall “use such means and media as the authority deems” would “reasonably result in encouraging desirable economic development in the county.”

In addition, section 159.53, Florida Statutes, requires that sections 159.44 - 159.53, Florida Statutes, “shall be liberally construed to effect the purposes thereof.” While this office will not read this language as a legislative authorization for the exercise of substantive powers not granted in Part III, Chapter 159, Florida Statutes,³ it appears that the language of section 159.46, Florida Statutes, authorizes industrial development authorities to foster economic development in their counties without tying that authority to particular projects. Further, other statutory provisions appear to suggest that an industrial development authority may operate more generally as an economic development agency in the county.⁴

In sum, it is my opinion that the Hardee County Industrial Development Authority is authorized to enter into contracts to foster the economic development of a county aside from, or without regard to, the financing or refinancing of a “project” within the scope of the act.

¹ Section 159.45(1), Fla. Stat.

² See, e.g., *Myers v. Too-Jay's Management Corp.*, 640 F.3d 1278 (C.A. 11 Fla. 2011); *Douglas v. Yates*, 535 F.3d 1316 (C.A. 11 Fla. 2008); *U.S. v.*

DBB, Inc., 180 F.3d 1277 (C.A. 11 Fla. 1999); *In re St. Laurent*, 991 F.2d 672 (C.A. 11 Fla. 1993), *corrected on rehearing*; and *see State v. Bradford*, 787 So. 2d 811 (Fla. 2001), *on remand*, 789 So. 2d 1206 (Fla. 2001); *Avila v. Miami-Dade County*, 29 So. 3d 401 (Fla. 3d DCA 2010).

³ *See, e.g., 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. G.A.C. Utilities, Inc., of Florida*, 281 So. 2d 493 (Fla. 1973) (an administrative agency or officer of the state possesses no power not granted by statute, and any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof).

⁴ *See, e.g., s. 125.045, Fla. Stat.*, which states:

For the purposes of this section, it constitutes a public purpose to expend public funds for economic development activities, including, but not limited to, developing or improving local infrastructure, issuing bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community.

and provisions of Part I, Ch. 288, Fla. Stat., dealing with commercial development and capital improvements such as s. 288.075(1)(a)2., Fla. Stat., defining an industrial development authority created pursuant to Part III, Ch. 159, Fla. Stat., as an “economic development agency” for purposes of that act, and s. 288.106(2)(b), Fla. Stat., defining an “authorized local economic development agency” as an entity defined in s. 288.075, Fla. Stat.

AGO 2013-13 – June 26, 2013

**GOVERNMENT IN THE SUNSHINE LAW – SETTLEMENT –
“CONCLUSION OF LITIGATION” – DERIVATIVE CLAIMS**

**WHETHER EXEMPTION FOR LITIGATION STRATEGY
MEETINGS WOULD EXTEND TO “DERIVATIVE CLAIMS”
BROUGHT IN SUBSEQUENT ACTION**

To: Mr. David M. Delaney, Attorney, Citrus County School Board

QUESTION:

Does the provision of section 286.011(8)(e), Florida Statutes, requiring the disclosure of transcripts of private meetings between a state entity and its attorney upon the conclusion of

litigation apply when the initial litigation has concluded, but a close relative of the initial plaintiff seeks information to assist in a subsequent derivative claim?

SUMMARY:

Section 286.011(8)(e), Florida Statutes, provides that transcripts of closed meetings to discuss settlement negotiations or strategy sessions related to litigation expenditures “shall be made part of the public record upon conclusion of the litigation.” The statute does not recognize a continuation of the exemption for “derivative claims” made in separate, subsequent litigation.

According to your letter, the Citrus County School Board was sued in federal court by three plaintiffs who alleged that they had been denied equal access to educational opportunities and that retaliatory action had been taken against them in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. ss. 1681 *et seq.* The allegations, as you have summarized them, were that the young women had been threatened and harassed by their high school soccer coaches after they complained of a hostile, sexually-harassing environment on their soccer team. While the litigation was pending, the Citrus County School Board held private meetings with its attorney to discuss settlement negotiations and a strategy of litigation expenditures as provided in section 286.011(8), Florida Statutes. There is no contention about the appropriate use of section 286.011(8), Florida Statutes, during the initial lawsuit. The matter was resolved between the parties and the complaint was dismissed with prejudice¹ by the court in September 2012.

In November of 2012, an attorney representing the parents of the three initial plaintiffs demanded payment from the Citrus County School Board in satisfaction of a claim that the parents, too, suffered retaliation in response to the young women’s assertion of their Title IX rights. You note that all of the claims directly derive from the same facts and circumstances litigated in the original lawsuit.

A request for the transcripts of the meetings between the school board and its attorney pursuant to section 286.011(8), Florida Statutes, was received from the father of two of the original plaintiffs in December 2012. Shortly after this request was received, a complaint against the Citrus County School Board was filed in federal court by the parents of the original plaintiffs alleging violations of Title IX and intentional infliction of emotional distress stemming from the complaints made by their daughters. The complaint in this second action has been served on the Citrus County School Board and you state that the “request for the transcripts of the attorney meetings from the previous lawsuit are clearly sought for use in the present lawsuit.” Thus, your question to this office is whether the language in section 286.011(8)(e), Florida

Statutes, requiring the release of transcripts of closed meetings held to discuss settlement negotiations and litigation expenditure strategy upon the “conclusion of the litigation” would apply in light of the filing of the subsequent, derivative claim.

While discussions between a public board and its attorney are generally subject to the requirements of the Government in the Sunshine Law,² section 286.011(8), Florida Statutes, provides a limited exemption for certain discussions of pending litigation between a public board and its attorney. As provided therein:

Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity’s attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

- (a) The entity’s attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.
- (b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- (c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter’s notes shall be fully transcribed and filed with the entity’s clerk within a reasonable time after the meeting.
- (d) The entity shall give reasonable public notice of the time and date of the attorney client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney client session and the names of the persons attending. At the conclusion of the attorney client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.
- (e) The transcript shall be made part of the public record *upon conclusion of the litigation.* (e.s.)

Florida courts have held that the Legislature intended a strict construction of section 286.011(8), Florida Statutes.³ Thus, for example, this office concluded that the exemption in subsection (8) does not apply when no lawsuit has been filed even though the parties involved believe that litigation is inevitable.⁴ However, when on going litigation has been temporarily suspended pursuant to a stipulation for settlement, this office has stated that the litigation has not been concluded for purposes of section 286.011(8) and, therefore, a transcript of meetings held between the city and its attorney to discuss such litigation may be kept confidential until the litigation is concluded.⁵

You have directed my attention to Attorney General Opinion 94-33 and suggest that the conclusion in that opinion may apply to your fact situation. Attorney General Opinion 94-33 involved a plaintiff who repeatedly filed lawsuits against a public authority and then voluntarily dismissed those actions after a year or two of litigation. The claims in these actions were similar and the members of the authority were concerned that the plaintiff would dismiss his suits, allege that the litigation was concluded, request a copy of the transcript of any strategy meeting held by the authority to discuss the litigation, and then refile the lawsuits to the disadvantage of the authority.

Based on the Florida Rules of Civil Procedure relating to *voluntary dismissals*, this office advised the authority that

A voluntary dismissal ends an action without prejudice, meaning that the action may be refiled at any time within the applicable statute of limitations. Thus, while the court is deprived of its jurisdiction to enter further orders once a voluntary dismissal is taken, the plaintiff's cause of action remains viable until the appropriate statute of limitations has run and the plaintiff retains control over the continuation of the suit.

Thus, the opinion notes that in a situation where the plaintiff takes a voluntary dismissal after a strategy or settlement meeting of the governing body and then seeks access to the record of such meeting, claiming the litigation has concluded, such action by the plaintiff could be interpreted by a court as a continuation of the litigation. To allow a plaintiff who has voluntarily dismissed a suit to gain access to transcripts of strategy or settlement meetings in order to obtain an advantage in the refiling of a lawsuit would subvert the purpose of the section 286.011(8), Florida Statutes.

Attorney General Opinion 94-33 suggests that "if a public records demand is made for the transcript of a strategy or settlement meeting by a plaintiff who has voluntarily dismissed the action which is the subject of such a meeting, it may be advisable to cite section 286.011(8), Florida Statutes, to maintain the confidentiality of such records. Furthermore, the public agency might inquire of the plaintiff to bar his or her claim

before receiving the record of the strategy or settlement meeting, in light of the fact that the statute contemplates that the litigation has concluded before such records must be released.”

Thus, Attorney General Opinion 93-44 concludes that, to give effect to the purpose of section 286.011(8), Florida Statutes, a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is *dismissed with prejudice* or the applicable statute of limitations has run.

Your factual situation involves transcripts of strategy sessions relating to a complaint that was *dismissed with prejudice*. In light of the language of section 286.011(8)(e), Florida Statutes, making the transcripts of strategy meetings held pursuant to that section public records “upon conclusion of the litigation,” it does not appear that the Legislature intended to recognize a continuation of the exemption for “derivative claims.”⁶

In sum, it is my opinion that section 286.011(8)(e), Florida Statutes, provides that transcripts of closed meetings to discuss settlement negotiations or strategy sessions related to litigation expenditures “shall be made part of the public record upon conclusion of the litigation.” A dismissal with prejudice constitutes the conclusion of that litigation. The statute does not recognize a continuation of the exemption for “derivative claims” made in separate, subsequent litigation and this office cannot read such an exemption into the statute.⁷

¹ See Fla. R. Civ. P. 1.420, and “dismissal with prejudice” Black’s Law Dictionary, p. 502 (8th ed. 2004) (“[a] dismissal, usu. after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim”).

² See *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (s. 90.502, Fla. Stat., providing for the confidentiality of attorney client communications under the Florida Evidence Code, does not create an exemption for attorney client communications at public meetings; application of the Sunshine Law to such discussions does not usurp Supreme Court’s constitutional authority to regulate the practice of law, nor is it at odds with Florida Bar rules providing for attorney client confidentiality). Cf. s. 90.502(6), Fla. Stat., stating that a discussion or activity that is not a meeting for purposes of s. 286.011, Fla. Stat., shall not be construed to waive the attorney client privilege.

³ See *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995); and see *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99 (Fla. 1st DCA 1996).

⁴ See Ops. Att’y Gen. Fla. 04-35 (2004) and 98-21 (1998). And see Ops. Att’y Gen. Fla. 06-03 (2006) (exemption not applicable to pre litigation

mediation proceedings) *and* 09-25 (2009) (town council which received pre suit notice letter under the Bert J. Harris Act, s. 70.001, Fla. Stat., is not a party to pending litigation for purposes of s. 286.011[8], Fla. Stat.).

⁵ Op. Att’y Gen. Fla. 94-64 (1994). *And see* Op. Att’y Gen. Fla. 94-33 (1994) (a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run). *Cf.* Op. Att’y Gen. Fla. 96-75 (1996) (disclosure of medical records to city council during closed door meeting under s. 286.011(8), Fla. Stat., does not affect requirement that transcript of such meeting be made part of public record at conclusion of litigation).

⁶ *See Ervin v. Peninsular Telephone Company*, 53 So. 2d 647 (Fla. 1951) (court has duty in construction of statutes to ascertain Legislature’s intention and effectuate it); *State v. Webb*, 398 So. 2d 820 (Fla. 1981) (legislative intent is the polestar by which the courts must be guided).

⁷ *See* Ops. Att’y Gen. Fla. 06-26 (2006) and 81-10 (1981) (this office is without authority to qualify or read into a statute an interpretation or define words in the statute in such a manner which would result in a construction that seems more equitable under circumstances presented by a particular factual situation; such construction when the language of a statute is clear would, in effect, be an act of legislation which is exclusively the prerogative of the Legislature); *cf. Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974).

AGO 13-14 – July 2, 2013

**MUNICIPALITIES – PUBLIC RECORDS LAW – GOVERNMENT
IN THE SUNSHINE LAW – CONTRACTS – EMPLOYMENT
CONTRACTS**

WHETHER DRAFT EMPLOYMENT CONTRACTS ARE REQUIRED
BY SUNSHINE LAW TO BE PRESENTED TO, CONSIDERED AND
APPROVED BY CITY COMMISSION AT PUBLIC MEETING

*To: Mr. Bradley Roger Bettin, Sr., P.A., Interim Town Attorney for the
Town of Inglis*

QUESTION:

In those situations where the Town Commission of the Town of Inglis, as the contracting authority, wishes to enter into an employment agreement which must be reduced to writing under applicable Florida law, does the Sunshine Law require that the proposed written contract be presented to, considered and approved by the Commission at a duly noticed Sunshine Law compliant meeting?

SUMMARY:

A written employment contract of the Town of Inglis, the terms of which have been approved at a public meeting, is a public record available for inspection and copying pursuant to Chapter 119, Florida Statutes. However, nothing in the Government in the Sunshine Law requires that such a proposed written contract be subsequently presented to, considered and approved by the Town Commission at a Sunshine Law compliant meeting.

Your letter states that the police chief for the Town of Inglis has, over the past few years, had his employment reduced to contract and the term of that employment extended by action of the town commission. The terms of these contracts regarding the chief's employment were discussed and approved at a public meeting. The town commission directed the town attorney to draft employment documents reflecting the terms and conditions discussed and approved at these public meetings. I note that the salary of the Inglis Chief of Police is set by the town's personnel policy and was not the subject of discussion at the commission meeting or in the employment documents drafted by the town attorney. The benefits and rights of the chief of police are those granted by the town's personnel manual which has been incorporated into the town's code of ordinances and were not the subject of discussion during the commission meeting. None of the written contract documents prepared by the town attorney were presented to or approved by the town commission after they were drafted. Rather, the town attorney drafted the documents as directed by the town commission and including those terms discussed and approved at a public meeting and they were then provided to and signed by the mayor of the Town of Inglis and the other contracting party, the chief of police.

You advise that the charter and ordinances of the Town of Inglis make the town commission the contracting authority and supervisor for the town's various department heads. With regard to the execution of instruments, Article III, section 3 of the town charter provides that the mayor is authorized to "sign all . . . instruments of writing to which the Town is a party, when authorized to do so by the Town Commission." In addition, Article IV, section 5 of the charter provides that "[t]he mayor shall execute contracts entered into by the Town Commission." Nothing in the charter or ordinances to which you have cited requires that written contracts to which the town is a party must be reviewed and discussed at public meetings. Thus, your question is whether such a requirement is imposed by the Government in the Sunshine Law, section 286.011, Florida Statutes.

Florida's Government in the Sunshine Law, section 286.011, Florida Statutes, provides a right of access to governmental proceedings of public boards and commissions, including those of municipal corporations.

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.¹ Meetings subject to the Sunshine Law are required by the statute to be noticed and minutes must be recorded. However, the Sunshine Law itself does not impose an open meetings requirement on particular types of governmental activity, it merely requires that when official action must be taken at a meeting, such a meeting must be open to the public.

Thus, to the extent that the Town of Inglis is required to discuss or consider the terms of the city's employment contracts at meetings of the town commission, the Government in the Sunshine Law would require those meetings to be held in compliance with section 286.011, Florida Statutes, that is, appropriate notice is required and minutes must be recorded. However, no provision of the town charter or ordinances to which you have brought my attention requires that a draft written contract be presented to, considered and approved by the town commission at a public meeting prior to the mayor signing such contract and no provision of section 286.011, Florida Statutes, imposes such a requirement.²

The Florida Statutes do contain examples of statutory requirements for public dissemination of information to be considered by municipal governments prior to formal action being taken. For example, section 166.041, Florida Statutes, provides a uniform method for the adoption and enactment of municipal ordinances and resolutions. Subsection (2) of that statute requires that each ordinance or resolution be introduced in writing and subsection (3)(a) requires that written copies be available for inspection. Subsection (6) allows municipalities to specifically add requirements for adoption or enactment of ordinances or resolutions or prescribe procedures in greater detail. Thus, based on the provisions of section 166.041(6), Florida Statutes, it appears that the Town of Inglis could adopt an ordinance requiring that written employment contracts authorized by the town commission and to be signed by the mayor must be presented for public inspection prior to execution or discussed at a public meeting prior to execution. The practice of the town commission not reviewing the final drafted product prior to execution raises concerns but no provision of the Government in the Sunshine Law, or any local ordinance of the Town of Inglis to which you have brought my attention, currently imposes such a requirement for considering draft employment contracts.

In addition, a written employment contract of the Town of Inglis would be a public record subject to inspection and copying pursuant to Chapter 119, Florida Statutes. There is no "unfinished business" exception to the public inspection and copying requirements of Chapter 119, Florida Statutes. As the Florida Supreme Court stated in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*,³ the term "public

record” means “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.” Such material is a public record regardless of whether it is in final form or the ultimate product of the agency. Accordingly, any agency record, if circulated for review, comment, or information is a public record regardless of whether it is an official expression of policy or marked “preliminary” or “working draft” or labeled similarly.

In sum, a written employment contract of the Town of Inglis, the terms of which have been approved at a public meeting, is a public record available for inspection and copying pursuant to Chapter 119, Florida Statutes. However, nothing in the Government in the Sunshine Law requires that such a proposed written contract be subsequently presented to, considered and approved by the Town Commission at a Sunshine Law compliant meeting.

¹ 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).

² Cf. Op. Att’y Gen. Fla. 01-29 (2001), concluding that once the county commission finds that an expenditure serves a county purpose and the clerk of court determines that the expenditure is not illegal, the clerk may issue a warrant without further action by the commission.

³ 379 So. 2d 633, 640 (Fla. 1980).

AGO 13-15 – August 6, 2013

MUNICIPALITIES – ATTORNEY’S FEES

REIMBURSEMENT OF ATTORNEY’S FEES FOR INDIVIDUAL COUNCILMEMBER WHO SUES FOR DECLARATORY JUDGMENT

To: Ms. Darcee S. Siegel, City Attorney, City of North Miami Beach

QUESTION:

May the city reimburse legal fees incurred by an individual councilmember for challenging a candidate’s qualifications to run for the city council when the suit was filed after discovery of credible evidence that the candidate was not a bona fide resident of the city as required by the city’s charter?

SUMMARY:

Reimbursement of a councilmember's legal fees may be authorized only when the litigation arises from the exercise of official duties and fulfills a public purpose. While a city has the authority to bring suit to fulfill a municipal purpose, such action must be taken by a majority of the governing body and not at the initiative of an individual councilmember.

You state that a routine investigation of candidates' qualifications by the city's police department was inconclusive as to one candidate's residency. An individual councilmember, thereafter, conducted an online search and discovered evidence that the candidate resided in another town within the 12 months prior to filing her qualifying papers. The councilmember filed suit to enjoin the counting of votes for the candidate and for declaratory judgment as to the candidate's qualification to run for office. After an expedited hearing, the court found the candidate's testimony to not be credible, the candidate failed to show evidence of the required residency, and that competent evidence showed that the candidate resided in another city. The city now wishes to reimburse the councilmember for the legal fees incurred and as support, asserts that it supports the filing of the declaratory action.

While the courts of this state have recognized a common law right of public officials to legal representation at public expense to defend themselves against charges arising from the performance of their official duties and while serving a public purpose,¹ I am not aware of, nor have you drawn my attention to, any statute or case law suggesting that an individual councilmember is entitled to reimbursement of legal expenses incurred in prosecuting an action against another party.

In Attorney General Opinion 91-59, this office considered whether a county was required to reimburse a county commissioner for legal fees incurred in defending the commissioner's qualifications to run for office. The opinion discusses a decision of the Supreme Court of Florida addressing the payment of attorney's fees incurred by public officials. In *Thorner v. City of Fort Walton Beach*,² the Court set forth the standard that "[f]or public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose." Applying this standard to the question presented, this office concluded that the charges against the county commissioner did not arise from misconduct while performing the official duties of the office, but rather occurred prior to the commissioner's election to that office. Accordingly, the commissioner was not entitled to reimbursement for attorney's fees incurred in defending an action challenging his or her qualifications to run for office.

You assert that the suit for declaratory judgment of a candidate's residency served a public purpose in assuring that the city's charter and ordinance, requiring residency in the city during the 12 months

prior to qualification, were not violated. While the enforcement of the city's charter and ordinances may fulfill a public purpose, the second prong of the standard for reimbursement of attorney's fees set forth in *Thornber* requires that the action arise out of or in connection with the performance of official duties. A legal challenge to the qualifications of a candidate brought by a sitting councilmember would not appear to satisfy the *Thornber* test requiring a nexus to the performance of the sitting councilmember's official duties.

The filing of suits is an action which may be initiated and pursued by the city commission as a collegial body.³ However, official action by a collegial body is taken by majority vote⁴ and not by the initiative of a single member.⁵

Accordingly, it is my opinion that the city may not reimburse legal fees incurred by a councilmember individually prosecuting an action challenging a candidate's qualifications to run for the city council when such action was not taken while performing the official duties of the office.

¹ See, e.g., *Markham v. State, Department of Revenue*, 298 So. 2d 210 (Fla. 1st DCA 1974); *Ferrera v. Caves*, 475 So. 2d 1295 (Fla. 4th DCA 1985). And see *Maloy v. Board of County Commissioners of Leon County*, 946 So. 2d 1260 (Fla. 1st DCA 2007) (analyzing interplay of doctrine of sovereign immunity and common law right of public officials to receive legal representation at taxpayer expense in defending themselves against litigation arising out of their official duties and while serving a public purpose).

² 568 So. 2d 914 (Fla. 1990).

³ See s. 166.021(1), Fla. Stat., recognizing that municipalities have "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law."

⁴ See s. 166.041(4), Fla. Stat., providing:

A majority of the members of the governing body shall constitute a quorum. An affirmative vote of a majority of a quorum present is necessary to enact any ordinance or adopt any resolution; except that two-thirds of the membership of the board is required to enact an emergency ordinance. On final passage, the vote of each member of the governing body voting shall be entered on the official record of the meeting. All ordinances or resolutions passed by the governing body shall become effective 10 days after passage or as otherwise provided therein.

⁵ *Cf.* Op. Att’y Gen. Fla. 97-61 (1997) (attorney for a school board represents the board as a collegial body and acts at the request of the board as a collegial body and not at the request of an individual member).

AGO 13-16 – August 6, 2013

HOSPITALS – COUNTIES

REFERENDUM REQUIREMENT FOR SALE OF COUNTY
HOSPITAL

*To: Mr. Bruce B. Blackwell and Mr. William J. Grant, Counsel for
Citrus County Hospital Board*

QUESTION:

Does section 155.40, Florida Statutes, require referendum approval of the sale of the Citrus County Hospital?

SUMMARY:

Absent a referendum requirement in the hospital’s enabling legislation, section 155.40, Florida Statutes, does not require referendum approval of the sale of the Citrus County Hospital.

Section 155.40, Florida Statutes, as amended by Chapter 2012-66, Laws of Florida, governs the sale or lease of county, district, or municipal hospitals. The statute authorizes the governing board of such a hospital to sell or lease it to a for-profit or not-for-profit Florida entity, if the board finds that the sale or lease is in the best interests of the affected community and states the basis for such a finding.¹ Pertinent to your question, subsection (10) of the act provides:

The sale or lease of the hospital or health care system is subject to approval by the Secretary of Health Care Administration or his or her designee, *except, if otherwise required by law*, approval of the sale or lease shall exclusively be by majority vote of the registered voters in the county, district, or municipality in which the hospital or health care system is located. (e.s.)

Thus, the plain language of the act states that the sale of a county hospital or health care system is subject to the approval by the Secretary of Health Care Administration, unless approval of the sale by majority vote of the registered voters in the county in which the entity is located is *otherwise required by law*. Where the language of a statute is clear, no need for statutory interpretation or evaluation of the history of a statute’s enactment is required.²

In your analysis, however, you state that the sale of the hospital requires voter approval, based upon three assertions: (1) the legislative history of section 155.40, requires a referendum;³ (2) absent voter approval, the sale would result in the disposal of a substantial public asset without a valid public purpose;⁴ and (3) sale of the hospital would eliminate the hospital board's taxing power, thereby amending the board's charter and abolishing the board without voter approval required under the Florida Constitution.⁵

Initially, I would reiterate that given the plain language of the statute, which constitutes the best evidence of the Legislature's intent, there is no need to resort to legislative history. However, in reviewing the bills which were introduced during the 2012 legislative session seeking to amend section 155.40, Florida Statutes, I would note that several different methods for the approval of the sale of a hospital or health care system were considered. For example, Senate Bill 464, as originally filed, required "approval by a majority vote of the registered voters in the county, district, or municipality or, in the alternative, approval from a circuit court[.]" The bill specifically granted jurisdiction to the circuit court to approve the sale or lease of a county, district, or municipal hospital.⁶

The original filed version of House Bill 711, which was ultimately adopted as Chapter 2012-66, contained the same language requiring a majority vote of registered voters or "in the alternative," approval from a circuit court.⁷ The first committee substitute for House Bill 711 restricted a governing board's authority to sell a hospital "without first receiving approval from a circuit court or, for any such hospital that is required by its statutory charter to seek approval by referendum for any action that would result in the termination of the direct control of the hospital by its governing board, approval by such referendum."⁸ In its third version, House Bill 711 required initial approval of the sale by a circuit court, unless the statutory charter required referendum approval.⁹ The Senate Amendment struck all language after the enacting clause and inserted language including a newly created subsection (10) requiring approval by the Secretary of Health Care Administration.¹⁰

It is noteworthy that the Senate Amendment appears to have had its genesis in Senate Bill 1568 which provided that the sale or lease would be subject to approval by the Chief Financial Officer, "unless a law (most likely a local charter) requires approval of the sale or lease exclusively by majority vote of the registered voters in the county, district, or municipality in which the hospital or health care system is located."¹¹ Despite language appearing in a Final Bill Analysis for House Bill 711 indicating a referendum requirement regardless of the district's charter requirements, the history of the bill is replete with references to referendum approval as an alternative if the hospital's charter requires a referendum for such a transaction. I am not aware of nor have you directed my attention to any other law which would

require referendum approval for the sale of the Citrus County Hospital.

Accordingly, in light of the clear expression of the Legislature's intent evidenced by the plain language in section 155.40, Florida Statutes, as amended by Chapter 2012-66, Laws of Florida, the sale or lease of a county, municipal, or district hospital is subject to approval by the Secretary of Health Care Administration, unless prescribed otherwise by law.

¹ Section 155.40(1), Fla. Stat.

² See, e.g., *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Osborne v. Simpson*, 114 So. 543 (Fla. 1927) (where statute's language is plain, without ambiguity, it fixes legislative intention and interpretation and construction are not needed); *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). And see *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990) (best evidence of intent of Legislature is generally plain meaning of statute); 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) and 99-44 (1999).

³ You cite language in the House of Representatives Final Bill Analysis, CS/CS/CS/HB 711, dated March 19, 2012, at p. 7, stating: "However, regardless of the terms of the charter, the transaction must be approved by a majority of the registered voters in the special hospital district."

⁴ Subsections 155.40(1) and (6), Fla. Stat., require the board of a hospital to make a determination that the sale or lease of the hospital is in the best interest of the affected community.

⁵ This office must presume the constitutionality of a duly enacted statute. Section 155.40(15), Fla. Stat., states: "If a county, district, or municipal hospital is sold, any and all special district tax authority associated with the hospital subject to the sale shall cease on the effective date of the closing date of the sale. Any special law inconsistent with this subsection is superseded by this act."

⁶ See s. 1, SB 464 (original filed version) (2012 Regular Legislative Session), by Senator Garcia, creating a new subsection (8) for s. 155.40, Fla. Stat.

⁷ See s. 1, HB 711 (original filed version) (2012 Regular Legislative Session), creating a new subsection (8) for s. 155.40, Fla. Stat.

⁸ See s. 1, CS/HB 711 (2012 Regular Legislative Session), creating a new subsection (8) for s. 155.40, Fla. Stat. See also s.1, CS/HB 711, stating that "[t]he sale or lease of such hospital is subject to approval by a circuit court unless otherwise exempt under subsection (14) or, for any such hospital

that is required by its statutory charter to seek approval by referendum for any action that would result in the termination of the direct control of the hospital by its governing board, approval by such referendum.”

⁹ See s. 1, CS/HB 711 (2012 Regular Legislative Session), creating a new subsection (9) for s. 155.40, Fla. Stat.

¹⁰ Senate Floor Amendment 408312, by Sen. Gaetz, adopted by the Florida Senate on March 7, 2012; concurrence by the House of Representatives on March 7, 2012.

¹¹ The Florida Senate, Bill Analysis and Fiscal Impact Statement, CS/CS/CS/SB 1568, dated February 28, 2012.

AGO 13-17 – August 8, 2013

**GOVERNMENT IN THE SUNSHINE LAW – PUBLIC
MEETINGS – MUNICIPALITIES**

**ABILITY TO MEET IN CLOSED MEETING WHEN PARTY TO
MANDATORY ARBITRATION**

To: Ms. Nicolle Shalley, City Attorney, City of Gainesville

QUESTION:

Does the exemption provided in section 286.011(8), Florida Statutes, allow a closed attorney-client session between the city commission and its attorney to discuss settlement negotiations or strategy related to expenditures for pending mandatory and binding arbitration to which the city is presently a party?

SUMMARY:

While the city may conduct a closed attorney-client session to discuss settlement negotiations or strategy relating to litigation expenditures when the city is a party to pending litigation before a court or an administrative agency, this office cannot say that mandatory and binding arbitration, absent an identifiable lawsuit, constitutes litigation for purposes of the exemption in section 286.011(8), Florida Statutes.

You state that the City of Gainesville (city), doing business as Gainesville Regional Utilities, is a party to a “Power Purchase Agreement” requiring that any controversy, dispute, or claim be settled finally and conclusively by arbitration, unless the parties agree otherwise. The agreement provides that any arbitration award will be final and enforceable in any court of competent jurisdiction. No appeal or adjudication before a court or administrative agency is contemplated.

A dispute has arisen and the city filed a demand for arbitration.

The city commission has asked the city attorney whether it may hold a closed meeting to discuss the pending arbitration.¹ The commission has been advised by the City Attorney that a strict construction of the Government in the Sunshine Law would preclude such a meeting.

Section 286.011(8), Florida Statutes, provides:

Notwithstanding the provisions of subsection (1),² any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently *a party before a court or administrative agency*, provided that the following conditions are met:

- (a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.
- (b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- (c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
- (d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.
- (e) The transcript shall be made part of the public record upon conclusion of the litigation. (e.s.)

It is well settled that the Sunshine Law was enacted for the benefit of the public and should be construed liberally to give effect to its public

purpose, while exceptions to its terms should be defined narrowly.³ Courts have concluded that the Legislature intended that the exemption in section 286.011(8), Florida Statutes, be strictly construed, as in *School Board of Duval County v. Florida Publishing Company*,⁴ where the district court found that the purpose of the exemption was to permit “any governmental agency, its chief executive and attorney to meet in private if the agency is a party to litigation and the attorney desires advice concerning settlement negotiations or strategy.” As noted in Attorney General Opinion 98-21, had the Legislature intended to extend the exemption to include impending or imminent litigation as well as pending litigation, it could have easily so provided as it has in section 119.071(1)(d)1., Florida Statutes. That section provides a limited work-product exemption for records “prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings,” and for records “prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings[.]”

The situation you pose is similar to the one considered in Attorney General Opinion 2006-03 where this office was asked whether a closed attorney-client session could be held to discuss settlement negotiations on an issue that was the subject of ongoing mediation pursuant to a partnership agreement between a water management district and others. After discussing the intent of section 286.011(8), Florida Statutes, and analyzing its terms, this office concluded that the statute did not apply to the mediation prescribed in the partnership agreement since no litigation had been filed in either the courts or before an administrative body.

More recently, in Attorney General Opinion 2009-14, this office considered whether a city could hold a closed meeting pursuant to section 286.011(8), Florida Statutes, to discuss the terms of mediation undertaken pursuant to the conflict resolution procedures set forth in Chapter 164, Florida Statutes. The opinion concludes that the exemption contained in section 286.011(8), Florida Statutes, is limited to the specific circumstances prescribed in the statute and does not extend to discussions between the city attorney and the city commission regarding settlement under the Florida Governmental Conflict Resolution Act.⁵

The basic question presented herein is whether mandatory and binding arbitration would be considered pending litigation before a court or an administrative agency for purposes of the statute. While a controversy between two parties may serve as the basis for litigation, absent the filing of a suit in a court of competent jurisdiction or application for consideration by an administrative agency, it would not appear that arbitration is litigation for purposes of the statute.⁶

Accordingly, it is my opinion that section 286.011(8), Florida Statutes, may not be used to conduct a closed meeting during a mandatory arbitration proceeding, when there is no pending legal proceeding in a

court or before an administrative agency.

¹ It should be noted that one of the conditions of a private meeting under s. 286.011(8), Fla. Stat., is the initiation by the entity's attorney that he or she desires advice.

² Section 286.011(1), Fla. Stat., provides:

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, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, 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.

³ See *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995) and *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969).

⁴ 670 So. 2d 99 (Fla. 1st DCA 1996). And see *City of Dunnellon v. Aran*, *supra*; *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998).

⁵ See also Inf. Op. to McQuagge, dated February 13, 2002 (absent expression of legislative intent that officials attending mediation sessions pursuant to s. 164.1055, Fla. Stat., are authorized to privately discuss among themselves the matters being considered at such a meeting, such meetings must be conducted openly and in accordance with the provisions of s. 286.011, Fla. Stat.).

⁶ Cf. s. 682.02, Fla. Stat., of the Florida Arbitration Code, recognizing the authority of two or more parties to agree in writing to submit to arbitration any controversy existing between them or to include in a written contract a provision for the settlement by arbitration of any controversy which might arise from their contractual relationship. See also Op. Att'y Gen. Fla. 96-75 (1996) (workers compensation proceeding operates as a means to adjudicate workers compensation claims before an administrative tribunal which would be considered litigation before an administrative agency within purview of s. 286.011[8], Fla. Stat.).

AGO 13-18 – September 11, 2013

**DUAL OFFICE-HOLDING – CODE ENFORCEMENT
BOARDS – TRAFFIC INFRACTIONS – RED LIGHT**

**CAMERAS – CIVIL TRAFFIC INFRACTION HEARING
OFFICER – LOCAL HEARING OFFICER**

WHETHER A LOCAL HEARING OFFICER AS DEFINED IN
SECTION 316.003(91), FLA. STAT., IS AN OFFICER FOR
PURPOSES OF DUAL OFFICE-HOLDING; WHETHER CIVIL
TRAFFIC INFRACTION HEARING OFFICERS CAN SERVE AS
LOCAL HEARING OFFICERS

To: The Honorable Steve Leifman, County Judge

QUESTIONS:

1. Whether a “local hearing officer” as defined in section 316.003(91), Florida Statutes, is an officer for purposes of Florida’s constitutional dual office-holding prohibition in Article II, section (5)(a), Florida Constitution?

2. Whether an individual may serve simultaneously as a civil traffic infraction hearing officer and a local hearing officer without violating Article II, section (5)(a), Florida Constitution, in light of the language contained in section 316.003(91), Florida Statutes?

SUMMARY:

1. A “local hearing officer” as that term is defined in section 316.003(91), Florida Statutes, is an officer for purposes of Article II, section (5)(a), Florida Constitution.

2. The language of section 316.003(91), Florida Statutes, appears to provide an *ex officio* exception to the constitutional dual office-holding prohibition for currently appointed code enforcement boards or special magistrates for charter county, noncharter county, or municipal code enforcement boards to also act as “local hearing officers” for purposes of conducting hearings related to violations of section 316.0083, Florida Statutes. However, civil traffic infraction hearing officers have not been included by the Legislature within the scope of this *ex officio* exemption and would violate Article II, section 5(a), Florida Constitution, by simultaneously serving in both offices.

As Associate Administrative Judge for the Miami-Dade County Criminal Division, you oversee the traffic court/infraction section of the circuit court. You advise that this includes matters involving the civil traffic infraction hearing officer program. Civil traffic infraction hearing officers are appointed as provided by the Florida Rules of Traffic Court and have the power to adjudicate civil traffic infractions including red light camera matters. Your questions arise because the Florida

Legislature amended section 316.003, Florida Statutes, during the 2013 legislative session to include a definition of “local hearing officer.” In light of the changes to the statute, local governments have been contacting the judicial circuit to determine whether they may hire civil traffic infraction hearing officers as “local hearing officers” to preside over their red light camera hearings pursuant to section 316.0083, Florida Statutes.

The “Mark Wandall Traffic Safety Program,” section 316.0083, Florida Statutes, provides that the Department of Highway Safety and Motor Vehicles, a county, or a municipality may authorize a traffic infraction enforcement officer¹ to issue traffic citations for violations of section 316.074(1) or section 316.075(1)(c)1., Florida Statutes. Any person who receives a notice of violation under the act “may request a hearing within 60 days following the notification of violation or pay the penalty pursuant to the notice of violation, but a payment or fee may not be required before the hearing requested by the person.”²

Procedures for conducting hearings under the act were adopted in section 5, Chapter 2013-160, Laws of Florida. In a local jurisdiction that elects to authorize traffic infraction enforcement officers to issue citations, the charter county, noncharter county, or municipality is required to “designate by resolution existing staff to serve as the clerk to the local hearing officer.”³ The act defines “local hearing officer” in what is now subsection (91) of section 316.003, Florida Statutes, as added by Chapter 2013-160, Laws of Florida:

LOCAL HEARING OFFICER. – The person, designated by a department, county, or municipality that elects to authorize traffic infraction enforcement officers to issue traffic citations under s. 316.0083(1)(a), who is authorized to conduct hearings related to a notice of violation issued pursuant to 316.0083. The charter county, noncharter county, or municipality may use its currently appointed code enforcement board or special magistrate to serve as the local hearing officer. The department may enter into an interlocal agreement to use the local hearing officer of a county or municipality.

Any petitioner who requests a hearing shall be scheduled for a hearing by the clerk to the local hearing officer.⁴ All testimony at the hearing is under oath and must be recorded. The hearing officer is required to take the testimony of the traffic infraction enforcement officer and the petitioner and is authorized to take testimony from others. Formal rules of evidence do not apply to these hearings, but “due process shall be observed and govern the proceedings.”⁵

At the conclusion of the hearing:

the local hearing officer shall determine whether a violation

under this section has occurred, in which case the hearing officer shall uphold or dismiss the violation. The local hearing officer shall issue a final administrative order including the determination and, if the notice of violation is upheld, require the petitioner to pay the penalty previously assessed under paragraph (1)(b), and may also require the petitioner to pay county or municipal costs, not to exceed \$250. The final administrative order shall be mailed to the petitioner by first class mail.⁶

The final administrative order may be appealed by an aggrieved party (including the local jurisdiction) as provided in section 162.11, Florida Statutes, which provides for appeals of orders of county or municipal code enforcement boards.⁷

Based on the duties and responsibilities exercised by “local hearing officers” under section 316.0083, Florida Statutes, it is my opinion that they would come within the scope of section (5)(a), Article II, Florida Constitution, for purposes of the dual office-holding prohibition. This office has, in several previously issued Attorney General Opinions, concluded that quasi-judicial actors such as special magistrates and hearing officers are officers for purposes of Florida’s constitutional prohibition on dual office-holding.⁸

The constitutional dual office holding prohibition limits an individual’s ability to serve in two offices simultaneously under the government of the state, counties, or municipalities. Section 5(a), Article II of the Florida Constitution, provides:

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.

In Attorney General Opinion 2010-19, this office was asked whether service as a code enforcement hearing officer for one city would preclude service as a special magistrate for another. Recognizing previous determinations that service as a special magistrate for a value adjustment board constitutes an office within the scope of Article II, section 5(a), Florida Constitution, and that service on a code enforcement board also constitutes an office for purposes of the prohibition on dual office-holding, it was concluded that an individual serving as a hearing

officer could not simultaneously serve as a special magistrate without violating the dual office-holding prohibition.⁹

Similarly, this office concluded in Attorney General Opinion 2012-17 that a special magistrate appointed to serve the county value adjustment board would violate the constitutional dual office-holding prohibition by serving as a city's hearing officer, without regard to whether the officer is simultaneously conducting hearings during the term of office.

However, it is a long-settled rule in this state that, assuming a particular officeholder is subject to the constitutional dual office-holding prohibition, a legislative designation of that officer to perform *ex officio* the function of another or additional office is not a holding of two offices at the same time in violation of the Constitution, provided the duties imposed are consistent with those being exercised.¹⁰ Section 4, Chapter 2013-160, Laws of Florida, includes what appears to be an *ex officio* designation within the definition of a "local hearing officer." As amended, the statute provides that the charter county, noncharter county, or municipality that elects to undertake a traffic infraction enforcement program "may use its currently appointed code enforcement board or special magistrate to serve as the local hearing officer." I read this language as related to the authority set forth in section 162.03(2), Florida Statutes, for "[a] charter county, a noncharter county, or a municipality" to "give[] code enforcement boards or special magistrates designated by the local governing body, or both, the authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances."¹¹ Based on the reference in Chapter 2013-160, Laws of Florida, to the procedures in section 162.11, Florida Statutes, for appeal of final administrative orders, it appears that the reference to "currently appointed code enforcement board[s] or special magistrate[s]" is a specific reference to those officers involved in county or municipal code enforcement pursuant to Chapter 162, Florida Statutes, rather than to hearing officers or special magistrates serving in other capacities.¹² Thus, in response to your second question, a civil traffic infraction hearing officer is not included within the scope of this *ex officio* exemption and would violate Article II, section 5(a), Florida Constitution, by simultaneously serving in both offices.¹³

In sum, it is my opinion that a "local hearing officer" as that term is defined in section 316.003(91), Florida Statutes, is an officer for purposes of Article II, section (5)(a), Florida Constitution, and thus, would be precluded from holding simultaneously any other state, county, or municipal office. The language of section 316.003(91), Florida Statutes, appears to provide an *ex officio* exception to the constitutional dual office-holding prohibition for currently appointed code enforcement boards or special magistrates for charter county, noncharter county, or municipal code enforcement boards to also act as "local hearing officers" for purposes of conducting hearings related to violations of section 316.0083, Florida Statutes. However, civil traffic infraction hearing

officers have not been included by the Legislature within the scope of this *ex officio* exemption and would violate Article II, section 5(a), Florida Constitution, by simultaneously serving in both offices.

¹ See s. 316.640(5)(a), Fla. Stat., providing that “[a]ny sheriff’s department or police department of a municipality may employ, as a traffic infraction enforcement officer, any individual who successfully completes instruction in traffic enforcement procedures and court presentation . . . , but who does not necessarily otherwise meet the uniform minimum standards established by the Criminal Justice Standards and Training Commission for law enforcement officers or auxiliary law enforcement officers under s. 943.13.” Traffic infraction enforcement officers are authorized to issue traffic citations for certain non-criminal traffic infractions. The statute does not permit the carrying of firearms or other weapons and traffic infraction enforcement officers do not have arrest authority other than the authority to issue traffic citations as provided in subsection (5).

² Section 316.0083(1)(b)1.c., Fla. Stat., as amended by s. 5, Ch. 2013-160, Laws of Fla.

³ Section 316.0083(5)(b), Fla. Stat., as added by s. 5, Ch. 2013-160, Laws of Fla.

⁴ *Supra* n.3 at (5)(c).

⁵ *Id.* at (5)(d).

⁶ *Id.* at (5)(e).

⁷ Section 162.11, Fla. Stat., provides that:

An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed.

⁸ See, e.g., Ops. Att’y Gen. Fla. 12-17 (2012) (special magistrate for county value adjustment board may not also serve as city’s hearing officer); 10-19 (2010) (attorney who is city commissioner, member of a planning and zoning commission, code enforcement hearing officer or member of regional planning commission may not serve as special magistrate, hearing officer, or magistrate without violating dual office-holding prohibition); and Inf. Op. to Hinds, dated November 20, 2008 (general magistrate serving as civil traffic infraction hearing officer).

⁹ 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). *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).

¹⁰ *See State v. Florida State Turnpike Authority*, 80 So. 2d 337, 338 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *City of Riviera Beach v. Palm Beach County Solid Waste Authority*, 502 So. 2d 1335 (Fla. 4th DCA 1987) (special act authorizing county commissioners to sit as members of county solid waste authority does not violate Art. II, s. 5(a), Fla. Const.); *City of Orlando v. State Department of Insurance*, 528 So. 2d 468 (Fla. 1st DCA 1988) (where the statutes had been amended to authorize municipal officials to serve on the board of trustees of municipal police and firefighters' pensions trust funds, such provision did not violate the constitutional dual office holding prohibition). *And see* Ops. Att'y Gen. Fla. 00-72 (2000) (legislative designation that a representative from county government, the school district, the sheriff's office, the circuit court, and the county children's board serve on a Community Alliance constituted an *ex officio* designation of officers from the enumerated governmental entities); 80-97 (1980) (membership of elected municipal officer on metropolitan planning organization as prescribed by statute does not violate Art. II, s. 5, Fla. Const.); 02-44 (2002); and 03-20 (2003).

¹¹ *And see* CS/CS/HB 7125, House of Representatives Final Bill Analysis, dated June 18, 2013, p. 31, stating that "[t]o facilitate the hearings, local governments may use their currently appointed code enforcement board or special magistrate to serve as the local hearing officer."

¹² It is a well-recognized 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. *See Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Ideal Farms Drainage District v. Certain Lands*, 19 So. 2d 234 (Fla. 1944).

¹³ *And see* Op. Att'y Gen. Fla. 96-91 (1996), concluding that a person simultaneously serving as a value adjustment board special master and a civil traffic hearing officer would violate the constitutional dual office-holding provision.

AGO 13-19 – September 11, 2013

**DRUG TESTING – WORKERS' COMPENSATION –
MUNICIPALITIES – PUBLIC RECORDS**

CONFIDENTIALITY OF DRUG-TEST RESULTS FROM PROGRAM
ESTABLISHED UNDER CH. 440, FLA. STAT.

To: Mr. Thomas A. Cloud, Attorney for the City of Fort Meade

QUESTION:

Are drug test results obtained under a drug-free workplace program implemented pursuant to Chapter 440, Florida Statutes, subject to disclosure under the Public Records Law?

SUMMARY:

Drug test results obtained pursuant to a drug-testing program implemented pursuant to Chapter 440, Florida Statutes, are confidential and exempt from section 119.07(1) and section 24(a), Article I of the Florida Constitution.

You state that a public records request has been made for drug test results for city employees. The materials you have provided indicate that the city has implemented a drug-free workplace program pursuant to Chapter 440, Florida Statutes.¹

The Legislature has expressed its intent to promote drug-free workplaces in this state.² This office has determined that municipalities may use sections 440.101 – 440.102, Florida Statutes, to establish a drug-free workplace program.³ Section 440.102(8), Florida Statutes, provides for the confidentiality of drug test results or other information received as a result of a drug-testing program.⁴ With specific enumerated exceptions⁵ not applicable here, the statute precludes the disclosure of any information concerning drug test results obtained pursuant to Chapter 440, Florida Statutes, without a written consent form signed voluntarily by the person tested.⁶

Thus, the provisions in sections 440.101 – 440.102, Florida Statutes, clearly make any information received as a result of a drug-testing program implemented pursuant to Chapter 440, Florida Statutes, confidential and exempt from section 119.07(1), Florida Statutes, and section 24(a), Article I of the State Florida.⁷

Accordingly, it is my opinion that drug test results obtained by a municipality pursuant to a drug-testing program implemented under Chapter 440, Florida Statutes, are not subject to inspection or copying pursuant to a request under Chapter 119, Florida Statutes, Florida's Public Records Law.

¹ Attached to your request is copy of the city's application for the workers' compensation credit program for fiscal year 2013-14 indicating that the city implemented its drug-free program in 1995; a certificate designating the City of Fort Meade as a Drug-Free Workplace, issued by Public Risk Management of Florida; and a letter from The Department of Financial

Services, dated July 25, 2013, acknowledging the city's entitlement to a premium credit for assessments due the Workers' Compensation Administration Trust Fund and Special Disability Trust Fund.

² Section 440.101(1), Fla. Stat.

³ *See Op. Att'y Gen. Fla. 98-38 (1998).*

⁴ *Cf. Op. Att'y Gen. Fla. 94-51 (1994) (city may not remove consent forms or records of disciplinary action relating to city employees' drug testing from personnel records when drug testing was not conducted pursuant to s. 440.102, Fla. Stat.); and Inf. Op. to McCormack, dated May 13, 1997 (s. 440.102[8], Fla. Stat., applies to public employees and not to drug test results of public assistance applicants).*

⁵ Section 440.102(8)(b), Fla. Stat., acknowledges the release of drug-test result "compelled by an administrative law judge, a hearing officer, or a court of competent jurisdiction pursuant to an appeal taken under this section" or when "deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding."

⁶ Section 440.102(8)(b), Fla. Stat., states that the consent form must contain, at a minimum:

1. The name of the person who is authorized to obtain the information.
2. The purpose of the disclosure.
3. The precise information to be disclosed.
4. The duration of the consent.
5. The signature of the person authorizing release of the information.

⁷ Section 119.07(1), Fla. Stat., generally requires every person who has custody of a public record to permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records. Section 24(a), Art. I, Fla. Const., recognizes a right of access to all public records.

AGO 13-20 – September 12, 2013

IMPACT FEES – USER FEES – SCHOOLS – COUNTIES

**WHETHER COUNTY CAN LEVY SCHOOL IMPACT FEES FOR
PORTION OF COUNTY, BUT NOT ENTIRE COUNTY**

*To: Mr. Stephen W. Johnson, Attorney, School Board of Lake County
Ms. Leslie Campione, Chairman, Lake County Board of County
Commissioners*

QUESTION:

May the Lake County Board of County Commissioners levy school impact fees for one portion of the county and not the entire county?

SUMMARY:

The Lake County Board of County Commissioners may levy school impact fees for one portion of the county and not the entire county so long as the ordinance satisfies the dual rational nexus test and does not implicate Article IX, section 1, Florida Constitution.

Impact fees, which include connection fees, are the method by which a new user of a government-owned system pays his or her fair share of the costs that the new use of the system involves.¹ Impact fees are the accepted method of paying for public improvements to serve new growth.²

In Florida, impact fees are imposed pursuant to local legislation. As the Florida Legislature recognizes in section 163.31801, Florida Statutes, the “Florida Impact Fee Act”:

(2) The Legislature finds that impact fees are an important source of revenue for a local government to use in funding the infrastructure necessitated by new growth. The Legislature further finds that impact fees are an outgrowth of the home rule power of a local government to provide certain services within its jurisdiction. Due to the growth of impact fee collections and local governments’ reliance on impact fees, it is the intent of the Legislature to ensure that, when a county or municipality adopts an impact fee by ordinance or a special district adopts an impact fee by resolution, the governing authority complies with this section.

The act imposes minimum requirements for adoption of impact fees by local ordinance. Any such fee must, at a minimum:

- (a) Require that the calculation of the impact fee be based on the most recent and localized data.
- (b) Provide for accounting and reporting of impact fee collections and expenditures. If a local governmental entity imposes an impact fee to address its infrastructure needs, the entity shall account for the revenues and expenditures of such impact fee in a separate accounting fund.
- (c) Limit administrative charges for the collection of impact

fees to actual costs.

(d) Require that notice be provided no less than 90 days before the effective date of an ordinance or resolution imposing a new or increased impact fee. A county or municipality is not required to wait 90 days to decrease, suspend, or eliminate an impact fee.³

Impact fees, and issues related to their imposition, have been the subject of several Florida court cases. In *Hollywood, Inc. v. Broward County*,⁴ the Fourth District Court of Appeal considered the validity of a county ordinance that required a developer to dedicate land or pay a fee for the expansion of the county park system as a condition of plat approval. The court found that a reasonable dedication or impact fee requirement is permissible if (1) it offsets needs that are sufficiently attributable to the new development and (2) the fees collected are adequately earmarked for the benefit of the residents of the new development.⁵ This is the “dual rational nexus test” that the courts have applied to test the validity of impact fees. In order to show that the impact fee meets these requirements, the local government must demonstrate a rational nexus between the need for additional public facilities and the proposed development. Further, the local government must show that the funds are earmarked for the provision of public facilities to benefit the new residents.⁶ The Fourth District Court of Appeal in *Hollywood, Inc.*, determined that the ordinance at issue satisfied these requirements and affirmed the circuit court’s validation of the impact fee ordinance.⁷

The Florida Supreme Court, in *St. Johns County v. Northeast Florida Builders Association, Inc.*,⁸ addressed the assessment of impact fees on new residential construction for new school facilities. The county ordinance being challenged conditioned the issuance of a new building permit on the payment of an impact fee. The impact fees that were collected were placed in a trust fund for the school board to expend solely “to ‘acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development.’”⁹ The builders in *Northeast Florida Builders Association, Inc.*, argued that many of the residences located in the new development would have no impact on the public school system. The Florida Supreme Court found that the county’s determination that every one hundred residential units would result in the addition of 44 students in the public school system was sufficient and, therefore, concluded that the first prong of the dual rational nexus test had been met. However, the Court determined that the ordinance did not restrict the use of the funds to sufficiently ensure that such fees would be spent for the benefit of those who had paid the fees¹⁰ and on this basis, the ordinance did not satisfy the second prong of the test.

In *Volusia County v. Aberdeen at Ormond Beach*,¹¹ the owner of a

mobile home park with restrictive covenants prohibiting children from living in the park brought suit against the county to challenge the constitutionality of a public school impact fee assessed countywide on new homes. The Florida Supreme Court applied the dual rational nexus test to determine the constitutionality of the impact fee. The Court advised that the local government must demonstrate reasonable connections between: (1) “the need for additional capital facilities and the growth in population generated by the subdivision” and (2) “the expenditures of the funds collected and the benefits accruing to the subdivision.”¹² As the Court noted,

The language of the test itself belies the assertion that a countywide standard should be employed.¹³ The first prong of the test explicitly requires a nexus between the County’s need and the “growth in population generated by the subdivision.” (citation omitted) Similarly, the test’s second prong ensures that “benefits accru[e] to the subdivision.” Thus, the explicit references to subdivisions indicate that the standard is not tailored to countywide growth, but to growth of a particular subdivision.¹⁴

The Court determined that a broad reading of the dual rational nexus test would “obliterate the distinction between an unconstitutional tax and a valid fee.”¹⁵ As the Court explained:

Indeed, imposing a countywide standard would eviscerate the substantial nexus requirement. This nexus is significant because of the distinction between taxes and fees. As this Court noted in *Collier County*, “[T]here 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.” *Collier County*, 733 So.2d at 1016 (quoting *City of Boca Raton v. State*, 595 So.2d 25, 29 [Fla.1992]). Fees, by contrast, must confer a special benefit on feepayers “in a manner not shared by those not paying the fee.” *Id.* at 1019. We likewise noted in *State v. City of Port Orange*, 650 So.2d 1, 3 (Fla.1994), that “the power of a municipality to tax should not be broadened by semantics which would be the effect of labeling what the City is here collecting a fee rather than a tax.”¹⁶

The Court concluded that where there was no potential for student-generating housing to exist within the subdivision, as was the case in the age-restricted community,¹⁷ the subdivision may be exempt from paying public school impact fees.

In light of the Court’s discussion of the subdivision-based standard for the dual rational nexus test in *Volusia County v. Aberdeen at Ormond Beach*, it would appear that a geographically limited school impact fee

ordinance could be crafted so long as the ordinance satisfied the test.

In addition to a consideration of the dual rational nexus test, the Court has considered whether the school impact fee could constitute an unconstitutional user fee.¹⁸ In *St. Johns County v. Northeast Florida Builders Association, Inc.*,¹⁹ the county ordinance imposed an impact fee on new residential construction to be spent by the school board to “acquire, construct, expand and equip the education sites and educational capital facilities necessitated by new development.”²⁰ The ordinance was applicable to both unincorporated and incorporated areas of the county, except that it was not effective within the boundaries of any municipality until the municipality entered into an interlocal agreement with the county to collect the impact fees.

The St. Johns County ordinance allowed property owners who warranted that their children would attend private school to be exempted from the impact fee with the understanding that if a school child later occupied the home, the fee would have to be paid. Childless couples could also obtain an exemption. The Court noted that

[I]n a very real way the alternative mechanism of determining the impact fee . . . permits households that do not contain public school children to avoid paying the fee. This means that the impact fees have the potential of being user fees that will be paid primarily by those households that do contain public school children, thereby colliding with the constitutional requirement of free public schools.²¹

In order to avoid implicating a violation of Article IX, section 1, Florida Constitution, the Court severed the offending section to preserve the validity of the balance of the ordinance. The Court made a clear distinction between the developer of an adult retirement living facility who could avoid the payment of the impact fee because no children would ever be allowed to live in the facility and who would never receive a special benefit from payment of the impact fee and the property owners whose current situation did not involve children in the home using public school facilities, but whose property could, through the years, be home to school-age children who could take advantage of the impact-fee funded schools. Thus, by removing the provision for certain exemptions, the St. Johns County ordinance was determined to be an impact fee not a users fee and was constitutionally acceptable.

Likewise, the Court in *Volusia County v. Aberdeen at Ormond Beach*,²² determined that allowing an exemption from public school impact fees for age-restricted communities did not violate the provisions of Article IX, section 1, Florida Constitution (guaranteeing free public schools), by converting impact fees into school user fees:

[T]he logical conclusion is that where there is no potential for

student-generating housing to exist within the subdivision, the subdivision may be exempt from paying public school impact fees.²³

In sum, it is my opinion that the Lake County Board of County Commissioners may levy school impact fees for one portion of the county and not the entire county so long as the ordinance satisfies the dual rational nexus test and is drafted in such a way that it does not implicate Article IX, section 1, Florida Constitution.

¹ See *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976).

² See *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635 (Fla. 1991) (school impact fees to finance new schools); *Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983) (road impact fees upheld), *review denied*, 451 So. 2d 848 (Fla. 1984), *appeal dismissed*, 469 U.S. 976, 105 S.Ct. 376, 83 L.Ed.2d 311 (1984); *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA), *review denied*, 440 So. 2d 352 (Fla. 1983) (park impact fees upheld).

³ Section 163.31801(3), Fla. Stat.

⁴ 431 So. 2d 606 (Fla. 4th DCA 1983).

⁵ *Supra* n.4 at 611. *And see Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 at 134 (Fla. 2000), employing the *Hollywood, Inc. v. Broward County* standard and citing *St. Johns County v. Northeast Florida Builders Ass'n, Inc.*, *supra* n.2.

⁶ *Id.* at 611- 612.

⁷ *Id.* at 614.

⁸ 583 So. 2d 635 (Fla. 1991).

⁹ *Id.* at 637.

¹⁰ *Id.* at 639. The Court determined that because the county ordinance was not effective within a municipality in the absence of an interlocal agreement, there was the possibility that impact fees could be used to build a school within a municipality that would not be subject to the impact fee.

¹¹ 760 So. 2d 126 (Fla. 2000).

¹² Citing *St. Johns County*, *supra* n.9.

¹³ *Volusia County* argued that the dual rational nexus test required that needs and benefits should be assessed based on countywide growth. The

Court rejected this argument: “Thus, we expressly repudiated [in *Collier County v. State*, 733 So. 2d 1012 (Fla. 1999)] a countywide standard for determining the constitutionality of impact fees.”

¹⁴ *Volusia County*, *supra* n.11 at 134.

¹⁵ *Id.* at 135.

¹⁶ *Supra* n.15.

¹⁷ The mobile home park was an age-restricted community pursuant to restrictive covenants which were contained in a supplemental declaration of covenants, conditions, and restrictions. The supplemental declaration provided that the mobile home park owner retained the right to revoke or modify restrictions except those prohibiting minors from residing on the property.

¹⁸ Article IX, section 1 of the Florida Constitution, requires a uniform system of free public schools.

¹⁹ 583 So. 2d 635 (Fla. 1991).

²⁰ *Id.* at 637 citing St. Johns County, Fla., Ordinance 87-60 s. 10(B) (Oct. 20, 1987). The ordinance applied to residential building permits, permits for residential mobile home installations, and permits to make improvements to land reasonably expected to place additional students in St. Johns County public schools.

²¹ *Supra* n.19 at 640.

²² *Supra* n.11.

²³ *Id.* at 135.

AGO 13-21 – September 12, 2013

GOVERNMENT IN THE SUNSHINE LAW – MUNICIPALITIES –
EXEMPTIONS – “CONCLUSION OF LITIGATION”

EARLY RELEASE OF TRANSCRIPTS OF “SHADE” MEETINGS OF
CITY COUNCIL TO DISCUSS PENDING LITIGATION

To: Ms. Eve Boutsis, Village Attorney, Village of Palmetto Bay

QUESTION:

Would the release of attorney-client transcripts from meetings held pursuant to section 286.011(8), Florida Statutes, prior to the “conclusion of litigation” constitute a violation of that statute?

SUMMARY:

The release, by the Village Council of the Village of Palmetto Bay, of attorney-client transcripts from meetings held pursuant to section 286.011(8), Florida Statutes, prior to the “conclusion of litigation” would not constitute a violation of that statutory provision, but would represent a waiver of the limited exemption afforded to government agencies and their attorneys to discuss pending litigation issues.

According to your letter, the Village of Palmetto Bay has been involved in protracted litigation for the past five years. The village has held over 25 “shade sessions” pursuant to section 286.011(8), Florida Statutes, since 2008 to discuss “settlement negotiations or strategy sessions related to litigation expenditures” on pending litigation matters. You indicate that changes on the village council and the passage of time have resulted in a change in the council’s position on holding closed attorney-client “shade” sessions pursuant to section 286.011(8), Florida Statutes. Members of the village council have suggested that transcripts from this protracted litigation should be released by the council after settlement of the subject litigation, but prior to the “conclusion of litigation” as provided in section 286.011(8), Florida Statutes.¹ As a result of these discussions, you have asked whether the early release of transcripts of “shade” sessions by the village council² would subject the council to a charge of violating section 286.011(3), Florida Statutes.

Section 286.011(8), Florida Statutes, makes litigation strategy or settlement meetings private when they are held between a board and its attorney and the board is a party before a court or administrative agency. The statute requires the release of the record of such meetings when the litigation has been concluded. The statute provides:

(8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity’s attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

(a) The entity’s attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

(b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

(c) The entire session shall be recorded by a certified court

reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter(s) notes shall be fully transcribed and filed with the entity(s) clerk within a reasonable time after the meeting.

(d) The entity shall give reasonable public notice of the time and date of the attorney client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney client session and the names of the persons attending. At the conclusion of the attorney client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.

(e) The transcript shall be made part of the public record upon conclusion of the litigation.

Your question is whether the Village Council of the Village of Palmetto Bay may waive the provisions of the statute and release its record of these meetings prior to the conclusion of litigation. It is my opinion that the council, as the governing body of the village, may release these records prior to the conclusion of litigation and that such action would not constitute a violation of the Government in the Sunshine Law.³

This office has consistently read the Government in the Sunshine Law to assure the public's right of access to meetings of public boards or commissions. In order to place local governments and state agencies on equal footing with the other parties in a lawsuit, however, the Legislature has provided a specific exemption from the open meetings requirements by adopting section 286.011(8), Florida Statutes.⁴ The purpose of this exemption is to allow governmental agencies to protect their theories of litigation strategy or settlement negotiations from the opposing party during the pendency of a lawsuit, but there is no requirement of confidentiality expressed in section 286.011(8), Florida Statutes.⁵ In this regard, section 286.011(8)(e), Florida Statutes, should be seen as a tool which governmental boards or commissions may employ in their discretion but the statute should not be read as a prohibition against the release of such records prior to the conclusion of such litigation.⁶

Therefore, it is my opinion that the Village of Palmetto Bay, as the collegial body to which it applies, may waive the exemption provided in section 286.011(8), Florida Statutes, and release the transcripts of meetings held to discuss settlement negotiations or strategy sessions related to litigation expenditures prior to the conclusion of litigation.

The waiver of this exemption would not constitute a violation of section 286.011(3), Florida Statutes, as the early release of these transcripts would satisfy the requirement in subparagraph (8)(e) that the transcripts be made a part of the public record.

¹ See Op. Att’y Gen. Fla. 94-64 (1994), in which this office discussed whether a stipulation for settlement would constitute the conclusion of litigation for purposes of s. 286.011(8), Fla. Stat., and in which this office stated that “a stipulation does not, *except by its express terms*, operate to bring litigation to a conclusion.” (e.s.) This office has not been advised of the terms of any proposed stipulation, but would note that a stipulation could, by its express terms, operate to bring litigation to a conclusion and thus, satisfy the terms of s. 286.011(8), Fla. Stat. Cf. Op. Att’y Gen. Fla. 94-33 (1994), concluding that, although a voluntary dismissal of an action usually operates to end the action and to divest a trial court of jurisdiction, to avoid a subversion of the rules of procedure that would deprive an agency of its rights to a fair trial, a public agency could maintain the confidentiality of a record of a strategy or settlement meeting until the suit is dismissed with prejudice or the applicable statute of limitation has run.

² The discussion herein relates to a decision made by a collegial body in a public meeting to release transcripts of “shade” sessions held pursuant to s. 286.011(8), Fla. Stat.; prior opinions of this office suggest that the release and/or discussion of matters occurring in closed session to the public by individuals rather than by decision of the collegial body could be inappropriate or raise ethical issues. See, e.g., Ops. Att’y Gen. Fla. 03-09 (2003) and 91-75 (1991).

³ Section 286.011(3), Fla. Stat., provides:

(3)(a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding \$500.

(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(c) Conduct which occurs outside the state which would constitute a knowing violation of this section is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

⁴ See also Op. Att’y Gen. Fla. 94-33 (1994), applying the exemption in s. 286.011(8), Fla. Stat., to voluntary dismissals.

⁵ As this office and the courts have noted, if records are not made confidential but are simply exempt from the mandatory disclosure requirements of the law, the agency is not prohibited from disclosing the documents in all circumstances. *See, e.g., Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991); Op. Att’y Gen. Fla. 07-21 (2007) (while statute makes photographs of law enforcement personnel exempt rather than confidential, custodian, in deciding whether such information should be disclosed, must determine whether there is a statutory or substantial policy need for disclosure and in the absence of a statutory or other legal duty to be accomplished by disclosure, whether release of such information is consistent with the exemption’s purpose); Op. Att’y Gen. Fla. 08-24 (2008). *And compare* Op. Att’y Gen. Fla. 03-09 (2003), in which this office considered the disclosure of information discussed at a closed labor negotiation meeting pursuant to s. 447.605(1), Fla. Stat., making such meetings “closed and exempt from the provisions of s. 286.011.” The opinion concludes that this statutory language “does not specifically restrict the dissemination of information discussed at closed labor negotiation meetings, other than work product developed in preparation for negotiations and during negotiations.”

⁶ *And see* Op. Att’y Gen. Fla. 94-64 (1994).

AGO 13-22 – September 25, 2013

**MUNICIPAL PLANNING BOARD – REGIONAL PLANNING
COUNCIL – DUAL OFFICE-HOLDING – OFFICERS**

WHETHER CITY PLANNING BOARD MEMBER IS “OFFICER”
FOR PURPOSES OF DUAL OFFICE-HOLDING PROHIBITION

To: Mr. Steven M. Weaver, Sr., Fort Pierce Planning Board

QUESTION:

Is a member of the Fort Pierce Planning Board an officer for purposes of Article II, section 5(a), Florida Constitution, Florida’s dual office-holding prohibition?

SUMMARY:

A member of the Fort Pierce Planning Board is not an officer for purposes of Florida’s dual office-holding prohibition.

According to your letter, you have been serving as a member of the Fort Pierce Planning Board. Recently, you were appointed to the Treasure Coast Regional Planning Council. You are aware of Attorney General Opinion 2001-28 in which this office concluded that Regional Planning Council members are officers for purposes of Florida’s dual office-holding prohibition¹ and thus, your question is whether a member

of the Fort Pierce Planning Board is an officer for dual office-holding purposes.

Your letter also indicated that you are aware of the Florida Supreme Court decision which set forth the general rule that “[t]he acceptance of an incompatible office by one already holding office operates as a resignation of the first.”² Under the rationale of that decision, the action of an officer accepting another office in violation of the dual office-holding prohibition may create a vacancy in the first office.

Florida’s dual office-holding prohibition, found in Article II, section 5(a), Florida Constitution, provides that:

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.

While there is no definition provided for the terms “office” and “officer,” opinions of the Florida Supreme Court and the Attorney General’s Office have focused on the nature of the powers and duties of a particular position to determine whether it is an “office” or an “employment” that would fall outside the scope of the prohibition. As the Florida Supreme Court has stated:

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, while an ‘employment’ does not comprehend a delegation of any part of the sovereign authority. The 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. 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. . . .³

This office has considered whether a member of a municipal planning board may be an officer subject to the dual office-holding prohibition. In Attorney General Opinion 2006-13, it was noted that Article II, section 5(a), Florida Constitution, contains an exception to the dual office-holding prohibition for service on statutory bodies having only advisory

powers. This exception has been the subject of a number of Attorney General Opinions.

In Attorney General Opinions 89-25 and 90-33, this office found that local planning and zoning commissions possessing the power to grant variances that are approved without review or that are final unless appealed to the county commission did not fall within the exception for advisory bodies. As those opinions point out, only those statutory bodies possessing advisory powers are excepted; Article II, section 5(a), Florida Constitution, does not provide for or recognize an exception for statutory bodies whose powers are substantially or predominately advisory.⁴

Similarly, in Attorney General Opinion 2005-59, it was noted that “town committees that are given the authority to make factual determinations, review permit applications, issue permits, grant variances, or impose fines exercise sovereign powers [are] offices for purposes of the dual officeholding prohibition.” However, where a committee or board merely makes non binding recommendations and has not otherwise been delegated any powers to make factual determinations or exercise any portion of the municipality’s sovereign power, there would not appear to be an office subject to the constitutional prohibition against dual office-holding.

The city planning board for the municipality of Fort Pierce is a 10-member body appointed by the city commission.⁵ The members of the city commission and the city manager are designated *ex officio* members of the city planning board.⁶ Members of the board serve a two-year term of office.⁷

Section 2-223 of the Fort Pierce, Florida, Code of Ordinances, sets forth the powers and duties of the board which include the following:

- (4) *Disposal of city property.* No real property shall be leased by or disposed of by the city until proposal for the leasing or disposition of the same is submitted to the board for its *recommendation*, provided, however, the city commission shall have authority to overrule the disapproval of the board on any such proposal.
- (5) *Official city map.* Draft an official map of the city with the assistance of the director of public works.
- (6) *Neighborhoods.* Make and adopt plans for the improvement and development of neighborhoods.

* * *

- (8) *Budget.* Submit annually to the city manager, not less than

ninety (90) days prior to the beginning of the budget year, a list of *recommended* capital improvements which the board considers necessary or desirable to be constructed during the next ensuing three-year period and establish a priority of such *recommended* improvements for such period of time.

(9) *Recommend public buildings and lands.* Recommend the erection and use of a building or the use of premises in any zoning district when found to be necessary for the public health, convenience, safety or welfare for the following purposes: A public utility; any municipal purpose; community center; cemetery; golf course; educational, philanthropic, charitable or religious use; public or private school (except child nurseries and kindergartens); public or private parks or playgrounds.

* * *

(11) *Annexation.* Review applications for voluntary annexation to city and make *recommendation* to city commission. (e.s.)

These code provisions would suggest that the city planning board makes recommendations to the city commission and functions as an advisory body, making recommendations for final approval by the city commission.⁸ This is the case particularly when these code provisions are read together with Article II, section 2-223(10), Fort Pierce Code of Ordinances, which provides that “[a]ll *recommendations* from the planning board, for either approval or disapproval of *any measure, petition, plan, program or proposal of any nature*, shall be by a majority of the members serving on said board.” (e.s.) As provisions with a related purpose, these sections of the Fort Pierce Code of Ordinances should be read *in pari materia*, that is, together, to achieve a consistent and harmonious whole.⁹

Thus, the Fort Pierce city planning board appears to be merely a “statutory body having only advisory powers” rather than having been delegated the power to exercise a portion of the municipality’s sovereign power.¹⁰

Further, section 2-224 of the code of ordinances designates the city planning board as “the local planning agency for purposes of the Local Government Comprehensive Planning Act of 1975.”¹¹ Section 163.3161, Florida Statutes, the definitional section of the act, provides that the “[l]ocal planning agency” is “the agency designated to prepare the comprehensive plan or plan amendments required by this act.”¹²

Pursuant to the Community Planning Act, section 163.3164 *et seq.*, “adopted comprehensive plans shall have the legal status set out in the act and . . . 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.”¹³ As provided in section 163.3174(4), Florida Statutes, a local land planning agency has general responsibility for the conduct of the comprehensive planning program and, more specifically, the local planning agency shall:

(a) Be the agency responsible for the preparation of the comprehensive plan or plan amendment and shall *make recommendations* to the governing body regarding the adoption or amendment of such plan. During the preparation of the plan or plan amendment and prior to any recommendation to the governing body, the local planning agency shall hold at least one public hearing, with public notice, on the proposed plan or plan amendment. The governing body in cooperation with the local planning agency may designate any agency, committee, department, or person to prepare the comprehensive plan or plan amendment, but *final recommendation of the adoption of such plan or plan amendment to the governing body shall be the responsibility of the local planning agency.*

(b) Monitor and oversee the effectiveness and status of the comprehensive plan and *recommend* to the governing body such changes in the comprehensive plan as may from time to time be required, including the periodic evaluation and appraisal of the comprehensive plan required by s. 163.3191.

(c) Review proposed land development regulations, land development codes, or amendments thereto, and *make recommendations* to the governing body as to the consistency of the proposal with the adopted comprehensive plan, or element or portion thereof, when the local planning agency is serving as the land development regulation commission or the local government requires review by both the local planning agency and the land development regulation commission.

(d) Perform any other functions, duties, and responsibilities assigned to it by the governing body or by general or special law. (e.s)

This office has determined, based on the powers and duties assigned to the particular planning commissions established pursuant to Part II, Chapter 163, Florida Statutes, that those commissions which possessed only those powers contemplated by that part were “statutory bod[ies] having only advisory powers” for purposes of Article II, section 5(a), Florida Constitution, and thus, fell within the exception to dual office-holding. Where a planning council had not only the authority to act in an advisory role to the county commission regarding preparation and amendment of the county’s land use plan, but also to take final action concerning consistency reviews of land use plans and in adopting and amending the trafficway plan, this office concluded that the planning

council was more than merely an advisory body and did not fall within the exception for advisory bodies in the dual office-holding prohibition.¹⁴

The information you have provided to this office suggests that the city planning board, acting as the local planning agency, prepares periodic reports on the comprehensive plan which are sent to the city commission. The city commission may adopt any such report as submitted or may make changes or modifications to the report before adoption. Adoption of the report by the city commission amends the comprehensive plan or element or portion thereof.¹⁵ Based on the powers and duties of the land planning agency, it appears from the duties and responsibilities assigned to the local land planning agency by the city code that members of the city planning board, acting as the local land planning agency, are acting in an information-gathering and advisory role and would fall within the exception for advisory bodies in Article II, section 5(a), Florida Constitution.

Thus, it is my opinion that a member of the Fort Pierce Planning Board is not an officer for purposes of Article II, section 5(a), Florida Constitution, Florida's dual office-holding prohibition.

¹ *Cf. Orange County v. Gillespie*, 239 So. 2d 132 (Fla. 4th DCA 1970), cert. denied, 239 So. 2d 825 (Fla. 1970), in which the court held that regional planning council members were officers within the meaning of the resign-to-run law, which, at that time, applied only to state, county, or municipal offices; it would appear that the court considered such councils to be acting on behalf of the state in implementing state policies regarding growth management.

² *See Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970); *Gryzik v. State*, 380 So. 2d 1102 (Fla. 1st DCA 1980).

³ *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).

⁴ *And see* Op. Att'y Gen. Fla. 73-47 (1973) (if a parks, planning and zoning commission was granted more than mere advisory powers, that fact would exclude commission members from the exemption in s. 5(a), Art. II, Fla. Const.). *Accord* Op. Att'y Gen. Fla. 69-62 (1969).

⁵ Article XII, sec. 2-221, Fort Pierce, Fla., Code of Ordinances.

⁶ *Id.* A long recognized rule in this state is that a legislative designation of an officer to perform *ex officio* the function of another office does not constitute holding two offices at the same time, provided the duties imposed are consistent with those being exercised. *See State v. Florida State Turnpike Authority*, 80 So. 2d 337, 338 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *City of Riviera Beach v. Palm Beach County Solid Waste Authority*, 502 So. 2d 1355 (Fla. 4th DCA

1987) (special act authorizing county commissioners to sit as members of county solid waste authority does not violate Art. II, s. 5(a), Fla. Const.); *City of Orlando v. State Department of Insurance*, 528 So. 2d 468 (Fla. 1st DCA 1988) (where the statutes had been amended to authorize municipal officials to serve on the board of trustees of municipal police and firefighters' pensions trust funds, such provision did not violate the constitutional dual office-holding prohibition); *and see, e.g.*, Ops. Att'y Gen. Fla. 13-08 (2013), 12-28 (2012), and 07-43 (2007).

⁷ *Id.*

⁸ *See* Art. II, sec. 14(31), Fort Pierce, Fla., Code of Ordinances, providing that the official city map must be adopted and approved by the city commission, and Art. II, sec. 2-223(10), *id.*, which provides that “[a]ll *recommendations* from the planning board, for either approval or disapproval of any measure, petition, plan, program or proposal of any nature, shall be by a majority of the members serving on said board.” (e.s.)

⁹ *Cf. Ideal Farms Drainage District et al. 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).

¹⁰ *See* Op. Att'y Gen. Fla. 94-88 (1994); *and see* Op. Att'y Gen. Fla. 89-25 (1989) (county planning and zoning commission, possessing authority to grant variances without review by county commission, constitutes an office for purposes of dual office holding); 90-33 (1990) (membership on a planning commission which hears appeals and makes decisions which are final unless appealed to the county commission is not a statutory body possessing only advisory powers).

¹¹ The Local Government Comprehensive Planning Act of 1975, Ch. 75-257, Laws of Fla., is currently designated the “Community Planning Act.” *See* s. 163.3161(1), Fla. Stat.

¹² Section 163.3164(30), Fla. Stat.

¹³ Section 163.3161(6), Fla. Stat.

¹⁴ *See* Ops. Att'y Gen. Fla. 99-16 (1996); 94-88 (1994); *and see* Ops. Att'y Gen. Fla. 89-25 (1989) (county planning and zoning commission, possessing authority to grant variances without review by county commission, constitutes an office for purposes of dual office-holding); 90-33 (1990) (membership on a planning commission which hears appeals and makes decisions which are final unless appealed to the county commission is not a statutory body possessing only advisory powers).

¹⁵ Article XII, sec. 2-224, Fort Pierce, Fla., Code of Ordinances.

AGO 13-23 – October 1, 2013

PUBLIC OFFICERS – SUSPENSION – COUNTY OFFICERS

**RIGHT TO SALARY AND BENEFITS DURING PERIOD OF
SUSPENSION**

*To: Mr. George T. Reeves, Attorney for the Madison County Board of
County Commissioners*

QUESTION:

May a former county official who was suspended by the Governor due to a criminal indictment receive salary and benefits for the time of such suspension when no action was taken by the Senate, the underlying indictment was dismissed after the official's term of office ended, and the official has not been reinstated?

SUMMARY:

A county official suspended by the Governor, but not removed by the Senate, nor prosecuted for the underlying criminal indictment, is not statutorily entitled to back salary and benefits unless such official has been reinstated by affirmative action on the part of the Governor, the Senate, or a court.

You state that the Supervisor of Elections for Madison County for the term January 2009 through January 2013 was charged with various crimes in November 2011 and was suspended at that time by executive order of the Governor. The supervisor's term of office ended while the suspension was in place, the Senate has taken no action on the suspension, and a subsequent motion to dismiss the criminal charges was granted. To your knowledge, no request for reinstatement has been made to the Governor, nor has the suspension been rescinded. The former supervisor, however, has requested back pay and benefits for the time of her suspension.

Section 7, Article IV, Florida Constitution, provides:

(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 his 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.

(b) The senate may, in proceedings prescribed by law, remove from office or reinstate the suspended official and for such purpose the senate may be convened in special session by its president or by a majority of its membership.

(c) By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter.

Section 112.40, Florida Statutes, requires that an order of suspension by the Governor be delivered to the Department of State, which in turn must “forthwith deliver copies by registered mail, or otherwise as it may be advised, to the officer suspended, the Secretary of the Senate, and the Attorney General.” The suspension is effective upon its filing with the Department of State and no further communication by the Governor with the Senate is necessary to permit the Senate to act.¹ The order must specify facts sufficient to advise both the officer and the Senate of the charges forming the basis of the suspension.² Section 112.41(2), Florida Statutes, directs the Senate to conduct a hearing in the manner prescribed by Rules of the Senate.³ Should an official who has been suspended by the Governor not be removed by the Senate, section 112.44, Florida Statutes, states that “the officer shall be reinstated[.]” In the instant situation, however, this office has been advised that action by the Senate has been held in abeyance. As noted above, the Constitution recognizes that at any time prior to removal by the Senate, a suspended official may be reinstated by the Governor.⁴

Thus, the Constitution provides the manner in which a county official may be suspended by the Governor and should the Governor suspend an elected county official by filing the requisite executive order as prescribed in section 7(a), Article IV, Florida Constitution, the suspended official is not entitled to the pay and emoluments of the office for the period of the suspension unless and until he or she is reinstated by the Senate, by the Governor, or by a court.⁵

In Attorney General Opinion 72-222, this office was asked whether a suspended county official was entitled to back pay when the underlying criminal indictment was not prosecuted after the official’s term of office had ended and no action had been taken by the Senate. After discussing the constitutional procedure for suspension by the Governor and the provision for compensation of a suspended official in section 112.45, Florida Statutes,⁶ this office concluded that unless and until a suspended official has been reinstated by action of the Governor, the Senate, or a court, the suspended official has no right to the compensation accrued during his or her suspension, even though the criminal indictment

supporting the suspension is not prosecuted.

There have been no amendments to the relevant statutes which would alter the conclusion reached in Attorney General Opinion 72-222, nor has this office been informed that the suspended public official in the instant situation has been reinstated or the suspension rescinded such that she is presently entitled under Florida law to payment of salary and benefits for the period of her suspension.

Accordingly, it is my opinion that a suspended county official is not statutorily entitled to back salary and benefits unless such official has been reinstated by affirmative action on the part of the Governor, the Senate, or a court.

¹ Section 112.40, Fla. Stat.

² Section 112.41(1), Fla. Stat.

³ While this office does not interpret Rules of the Senate, I would note that Rule 12.9 addresses the procedure to be followed when the Senate has received an executive suspension:

An executive suspension of a public official who has pending against him or her criminal charges, or an executive suspension of a public official that is challenged in a court shall be referred to the Ethics and Elections Committee, other appropriate committee, or special master; however, all inquiry or investigation or hearings thereon shall be held in abeyance and the matter shall not be considered by the Senate, committee, subcommittee, or special master until the pending charges have been dismissed, or until final determination of the criminal charges at the trial court level, or until the final determination of a court challenge, if any, and the exhaustion of all appellate remedies from any of the above. The committee, subcommittee, or special master shall institute action within three (3) months after the conclusion of any pending proceedings. In a suspension case in which the criminal charge is a misdemeanor, the committee, subcommittee, or special master and the Senate may proceed if the written consent of counsel for the Governor and of the suspended official is obtained.

⁴ See s. 7(a), Art. IV, Fla. Const.

⁵ See Ops. Att’y Gen. Fla. 76-51 (1976) and 72-222 (1972).

⁶ Section 112.45(2), Fla. Stat., relates to the effect of an order by the Senate as to the removal or reinstatement of a suspended official, stating “should the official be reinstated [by the Senate], he or she shall be

entitled to reimbursement for such pay and emoluments of office from the date of suspension to that date, as though he or she had never been suspended, and the order of the Senate, or a certified copy thereof, shall constitute the authority of the county, district, or state, to make such payment for reimbursement.”

AGO 13-24 – October 9, 2013

LAW ENFORCEMENT – MUNICIPALITIES – INTERLOCAL AGREEMENTS

TRANSFER OF LAW ENFORCEMENT POWERS TO OTHER MUNICIPALITY

To: Mr. Keith M. Poliakoff, Town Attorney, Town of Southwest Ranches

QUESTIONS:

1. May a municipality enter into an interlocal agreement, pursuant to section 163.01, Florida Statutes, with a neighboring municipality within the same county for the provision of law enforcement services?¹

2. Does section 166.0495, Florida Statutes, obviate the need for dual referenda when one municipality transfers its law enforcement powers to another municipality?

SUMMARY:

Section 166.0495, Florida Statutes, provides the general law authorization for extra-territorial exercise of police powers enabling a municipality to enter into an interlocal agreement to obtain law enforcement services from an adjoining municipality within the same county, without requiring dual referenda for approval.

Section 2(c), Article VIII, Florida Constitution, provides, that the “exercise of extra-territorial powers by municipalities shall be as provided by general or special law.” In response to a number of previously issued Attorney General Opinions concluding that municipalities were not authorized to grant extra-territorial law enforcement powers to their officers, absent a grant by special or general law from the Legislature, section 166.0495, Florida Statutes, was enacted. Section 166.0495, Florida Statutes, specifically addresses the use of interlocal agreements for a municipality to provide law enforcement services to another municipality:

A municipality may enter into an interlocal agreement pursuant

to s. 163.01² 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.

Passage of section 166.0495, Florida Statutes, therefore, provides the general law authority required by section 2(c), Article VIII, Florida Constitution, for a municipality to exercise its law enforcement powers outside its jurisdictional boundaries through an interlocal agreement with adjoining municipalities within the same county. While there is a general requirement in section 4, Article VIII, Florida Constitution, for dual referenda when a municipality, county, or special district contracts for or transfers a function or power to another governmental entity, the section recognizes that such a transfer or contract may be effected “as otherwise provided by law.” Nothing in the plain language of section 166.0495, Florida Statutes, its legislative history,³ or section 163.01, Florida Statutes, indicates dual referenda requirement for approval of such an interlocal agreement.

Accordingly, in light of the authority granted in section 166.0495, Florida Statutes, for municipalities to enter into contracts for the provision of law enforcement services, it is my opinion that the Town of Southwest Ranches may enter into an interlocal agreement for the provision of law enforcement services with an adjoining municipality within the same county, as provided in section 166.0495, Florida Statutes, without approval by dual referenda.

¹ This office has also received a request from the Town of Davie for an analysis and resolution of an apparent conflict between Op. Att’y Gen. Fla. 96-78 (1996) and s. 166.0495, Fla. Stat. *See* Letter from Mr. John C. Rayson, dated July 15, 2013.

² Section 163.01, Fla. Stat., the Florida Interlocal Cooperation Act of 1969, authorizes public agencies to enter into interlocal agreements in order to exercise any “power, privilege, or authority which such agencies share in common and which each might exercise separately.”

³ *See* Final Bill Research & Economic Impact Statement, CS/HB 1075, House of Representatives, as revised by the Committee on Community Affairs, dated October 24, 1997, stating the Legislature’s intent:

This bill provides the general law authorization, required by section 2, Article VIII, State Constitution, for the extra-

territorial exercise of police powers by municipalities. The bill creates section 166.0495, F.S., to authorize a municipality to enter into an interlocal agreement, pursuant to section 163.01, F.S., with an adjoining municipality or municipalities within the same county to provide law enforcement services within the territorial boundaries of the adjoining municipality or municipalities.

The bill requires that the agreement specify its duration and clarifies that this new authority is an expansion of, rather than a limitation on, a municipality's authority to enter into agreements for law enforcement services or conduct law enforcement services outside its own territorial boundaries. Any transfer of functions between municipalities does not affect the rights of law enforcement officers in any retirement or pension fund.

I would note also that the bill analysis reflects that there would be no fiscal impact by passage of the bill and that the bill "does not require the expenditure of funds by counties or municipalities."

AGO 13-25 – November 4, 2013

**BUILDING CODE INSPECTOR – INTERLOCAL AGREEMENT –
COUNTIES – MUNICIPALITIES – DUAL OFFICE-HOLDING**

**WHETHER SIMULTANEOUS SERVICE AS COUNTY AND
MUNICIPAL BUILDING OFFICIAL PURSUANT TO INTERLOCAL
AGREEMENT VIOLATES DUAL OFFICE-HOLDING
PROHIBITION**

*To: Ms. Marilyn W. Miller, Town Attorney for the Town of Fort Myers
Beach*

QUESTION:

May the Town Council of the Town of Fort Myers Beach enter into an interlocal agreement, pursuant to section 163.01, Florida Statutes, with the Lee County Board of County Commissioners whereby Lee County will provide, for a fee, building code inspection, plans review, and building code administration services for the Town of Fort Myers Beach or would such an agreement violate the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution?

SUMMARY:

An interlocal agreement relating to a building code inspector

which is entered into by the Town Council of the Town of Fort Myers Beach and the Lee County Board of County Commissioners, pursuant to section 163.01, Florida Statutes, and following the provisions of section 468.617, Florida Statutes, would not violate the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution, as it appears that the Legislature has provided an *ex officio* exemption from Article II, section 5(a), Florida Constitution, in section 468.617, Florida Statutes.

According to your letter, the Town of Fort Myers Beach has limited staff and resources and would like to enter into an interlocal agreement with Lee County, pursuant to the provisions of section 163.01, Florida Statutes (the Florida Interlocal Cooperation Act of 1969).¹ The interlocal agreement would provide for the delegation by the town to the county the authority to conduct building code plans review, building code inspections, and building official oversight services for property within the jurisdictional limits of the Town. You recognize that this office has concluded that a building official, charged with issuing permits and certificates of occupancy and administering a local government's building code, is an "officer" for purposes of Florida's constitutional dual office-holding prohibition² and ask whether the simultaneous service of the county's building official as the town's building official under the provisions of an interlocal agreement would violate Article II, section 5(a), Florida Constitution.³

Section 163.01, Florida Statutes, the "Florida Interlocal Cooperation Act of 1969" authorizes local governmental units to enter into cooperative agreements

to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.⁴

The statute authorizes any public agency⁵ of this state to exercise jointly with any other public agency of this state, of another state, or the federal government, any power, privilege, or authority that those agencies "share in common and which each might exercise separately."⁶ The statute requires that any joint exercise of power pursuant to the act must be made by contract in the form of an interlocal agreement and may provide for such things as the purpose of the interlocal agreement and the method by which that purpose will be accomplished; the duration of the agreement and the method by which it may be rescinded or terminated; the manner of financial support for the purpose set forth in the agreement; the manner of employing, engaging, compensating, transferring or discharging necessary personnel; and the manner of

responding for liabilities that may be incurred through performance of the interlocal agreement and insuring against any such liability.⁷ The interlocal agreement may provide that one or more parties to the agreement will administer or execute the agreement and that one or more parties to the agreement may agree to provide all or a part of the services set forth in the agreement. Further, the act authorizes the creation of a separate legal or administrative entity to administer or execute the agreement in the form of a commission, board, or council constituted under the terms of the agreement.⁸ The act also provides:

This section is intended to authorize the entry into contracts for the performance of service functions of public agencies, but shall not be deemed to authorize the delegation of the constitutional or statutory duties of state, county, or city officers.⁹

Similarly, section 468.617, Florida Statutes, recognizes that local jurisdictions may enter into and carry out contracts with other local jurisdictions for a joint building code inspection department:

(1) Nothing in this part shall prohibit any local jurisdiction, school board, community college board, state university, or state agency from entering into and carrying out contracts with any other local jurisdiction or educational board under which the parties agree to create and support a joint building code inspection department for conforming to the provisions of this part. In lieu of a joint building code inspection department, any local jurisdiction may designate a building code inspector from another local jurisdiction to serve as a building code inspector for the purposes of this part.

(2) Nothing in this part shall prohibit local governments, school boards, community college boards, state universities, or state agencies from contracting with persons certified pursuant to this part to perform building code inspections or plan reviews. An individual or entity may not inspect or examine plans on projects in which the individual or entity designed or permitted the projects.

(3) Nothing in this part shall prohibit any county or municipal government, school board, community college board, state university, or state agency from entering into any contract with any person or entity for the provision of building code inspection services regulated under this part, and notwithstanding any other statutory provision, such county or municipal governments may enter into contracts.

(4) Nothing in this part prohibits any building code inspector, plans examiner, or building code administrator holding a limited certificate who is employed by a jurisdiction within a

small county as defined in s. 339.2818¹⁰ from providing building code inspection, plans review, or building code administration services to another jurisdiction within a small county.

Thus, local jurisdictions may, by contract, create and support a joint building code inspection department. Further, a local jurisdiction may designate a building code inspector from another local jurisdiction to serve as a building code inspector for purposes of Part XII, Chapter 468, Florida Statutes, relating to building code administrators and inspectors.¹¹

As specifically provided in section 468.619, Florida Statutes, building code enforcement officials exercise police powers and, based on their powers and duties, have been determined by this office to be officers subject to the provisions of the constitutional dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution.¹² That constitutional provision states that no person shall simultaneously hold more than one office in state, county, and municipal government. However, the statutes discussed above appear to operate in the nature of an *ex officio* designation by the Legislature of certain officials to act simultaneously as officials in another jurisdiction without violating the provisions of Florida's dual office-holding prohibition. Florida courts have held that the Legislature may constitutionally impose additional or *ex officio* duties and responsibilities upon a public officer. Such a legislative designation of public officers to perform *ex officio* the functions of another or second office does not violate the constitutional dual office-holding prohibition.¹³

Thus, it is my opinion, until legislatively or judicially determined to the contrary, that an interlocal agreement relating to a building code inspector which is entered into by the Town Council of the Town of Fort Myers Beach and the Lee County Board of County Commissioners, pursuant to section 163.01, Florida Statutes, and following the provisions of section 468.617, Florida Statutes, would not violate the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution.

¹ The Lee County Attorney's Office has joined in this request.

² See Ops. Att'y Gen. Fla. 04-07 (2004) and 80-97 (1980).

³ Article II, s. 5(a), Fla. Const., provides:

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.

⁴ Section 163.01(2), Fla. Stat.

⁵ “Public agency” is defined in s. 163.01(3)(b), Fla. Stat., to include counties and cities in Florida.

⁶ Section 163.01(4), Fla. Stat.

⁷ See s. 163.01(5), Fla. Stat.

⁸ Section 163.01(7)(a), Fla. Stat. *And see* s. 163.01(7)(b), Fla. Stat., setting forth additional powers that may be provided to a separate legal or administrative entity created by interlocal agreement.

⁹ Thus, the entry into interlocal agreements pursuant to the terms of s. 163.01, Fla. Stat., for the performance of service functions of public agencies would avoid implicating Art. IV, s. 4, Fla. Const., which requires dual referenda for the transfer of powers from one governmental entity to another. See *Broward County v. City of Fort Lauderdale*, 480 So. 2d 631 (Fla. 1985) (Art. VIII, s. 1(g), Fla. Const., permits regulatory preemption by counties, while Art. VIII, s. 4 requires dual referenda to transfer functions or powers relating to services.); *and* Ops. Att’y Gen. Fla. 07-41 (2007), 02-33 (2002), and 95-49 (1995).

¹⁰ A “small county” for these purposes is defined as one “that has a population of 150,000 or less as determined by the most recent official estimate pursuant to s. 186.901.” I note that Lee County’s population for the year 2011 is listed as 631,330, and thus, Lee County would not be authorized to operate as provided in subsection (4).

¹¹ See s. 468.603(1), Fla. Stat., for a definition of “[b]uilding code administrator” or “building official” *and* (2) for a definition of “[b]uilding code inspector.”

¹² See Op. Att’y Gen. Fla. 04-07 (2004) (position of building official for City of Moore Haven constitutes an office for purposes of Art. II, s. 5(a), Fla. Const., and thus, member of city council may not simultaneously serve as building official for city).

¹³ See *Bath Club, Inc. v. Dade County*, 394 So. 2d 110, 112 (Fla. 1981); *State v. Florida State Turnpike Authority*, 80 So. 2d 337 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *Amos v. Mathews*, 126 So. 308 (Fla. 1930); Op. Att’y Gen. Fla. 13-18 (2013). Compare s. 166.0495, Fla. Stat., authorizing interlocal agreements to provide law enforcement services between municipalities.

AGO 13-26 – November 4, 2013

LOCAL HEARING OFFICER – DUAL OFFICE-HOLDING

WHETHER A LOCAL HEARING OFFICER MAY
SIMULTANEOUSLY SERVE AS A RED LIGHT TRAFFIC CAMERA
HEARING OFFICER FOR MULTIPLE JURISDICTIONS

To: Mr. Usher L. Brown, City Attorney for the City of Winter Park

QUESTION:

Can a “local hearing officer,” as defined in section 316.003(91), Florida Statutes, be employed to provide service on behalf of more than one municipality or county without a violation of the prohibition against dual office-holding?

SUMMARY:

The exemption for *ex officio* service as a local hearing officer for a local government pursuant to section 316.003(91), Florida Statutes, must be read strictly and extends only to service in that capacity for the local government for which the local hearing officer currently acts as a code enforcement board or special magistrate. The exception does not extend to service as a local hearing officer for other local governmental jurisdictions and such simultaneous service would violate the prohibition contained in Article II, section 5(a), Florida Constitution.

You are aware of Attorney General Opinion 2013-18 which concludes that service as a red light traffic infraction hearing officer is an “office” for purposes of Article II, section 5(a), Florida Constitution, the dual office-holding prohibition. That opinion also states that “[t]he language of section 316.003(91), Florida Statutes, appears to provide an *ex officio* exception to the constitutional dual office-holding prohibition for currently appointed code enforcement boards or special magistrates for charter county, noncharter county, or municipal code enforcement boards to also act as ‘local hearing officers’ for purposes of conducting hearings related to violations of section 316.0083, Florida Statutes.” You ask whether, in light of the *ex officio* exception, a local hearing officer as defined in section 316.003(91), Florida Statutes, may serve in that capacity for multiple jurisdictions without violating the constitutional dual office-holding prohibition. For the following reasons, I conclude that they may not.

Section 316.003(91), Florida Statutes, as added by Chapter 2013-160, Laws of Florida, provides the Legislature’s definition of a “local hearing officer:”

LOCAL HEARING OFFICER.—The person, designated by a department, county, or municipality that elects to authorize traffic infraction enforcement officers to issue traffic citations under s. 316.0083(1)(a), who is authorized to conduct hearings related to a notice of violation issued pursuant to 316.0083. *The charter county, noncharter county, or municipality may use its currently appointed code enforcement board or special magistrate to serve as the local hearing officer.* The department may enter into an interlocal agreement to use the local hearing officer of a county or municipality. (e.s.)

The statute provides that the local government may use its¹ own currently appointed magistrate to serve as the local hearing officer. Nothing in the statute extends the exemption to allow a local hearing officer currently appointed as the code enforcement board or special magistrate for a jurisdiction to serve for other municipalities or counties outside the jurisdiction which has appointed him or her. The language of the statute is clear.²

Legislative history surrounding the enactment of the language in section 316.003(91), Florida Statutes, supports this reading. The House of Representatives Final Bill Analysis of CS/CS/HB 7125 which brought this language into the statute states, in explaining the effect of the changes resulting from the bill, that “[t]o facilitate the hearings, local governments may use their currently appointed code enforcement board or special magistrate to serve as the local hearing officer.”³ Further, in the fiscal comments on the bill, the legislative analysis states that “[t]he local government that has issued the notice of violation may use its currently appointed code enforcement board or special magistrate to serve as the local hearing officer for purposes of conducting the hearing.”⁴

It is a well-recognized 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.⁵

Finally, provisos and exceptions in statutes are to be narrowly and strictly construed.⁶ Thus, as an exception to the constitutional dual office-holding prohibition, the language in section 316.003(91), Florida Statutes, must be read narrowly and strictly construed to preclude its extension.

In sum, it is my opinion that the exemption for *ex officio* service as a local hearing officer for a local government pursuant to section 316.003(91), Florida Statutes, must be read strictly and extends only to service in that capacity for the local government for which the local hearing officer currently acts as a code enforcement board or special

magistrate. The exception does not extend to service as a local hearing officer for other local governmental jurisdictions and such simultaneous service would violate the prohibition contained in Article II, section 5(a), Florida Constitution.

¹ See Webster's New Universal Unabridged Dictionary (2003), p. 1017 ("its" is a pronoun and the possessive form of "it") and The American Heritage Dictionary (Office Edition 1983), p. 371 ("its" is the possessive form of "it," used as a modifier before a noun).

² The general rule is that where language is unambiguous, the clearly expressed intent must be given effect, and there is no room for construction. *Fine v. Moran*, 77 So. 533, 536 (Fla. 1917); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

³ See 2013 Florida House of Representatives Final Bill Analysis of CS/CS/HB 7125, p. 31, dated June 18, 2013.

⁴ *Id.* at p. 34.

⁵ See, e.g., *Young v. Progressive Southeastern Insurance Company*, 753 So. 2d 80 (Fla. 2000); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341 (Fla. 1952) (where statute sets forth exceptions, no others may be implied).

⁶ See *Samara Development Corporation v. Marlow*, 556 So. 2d 1097 (Fla. 1990); *Farrey v. Bettendorf*, 96 So. 2d 889 (Fla. 1957) (proviso to be strictly construed); *State v. Nourse*, 340 So. 2d 966 (Fla. 3d DCA 1976) (any statutory exception to general prohibition is normally strictly construed against one attempting to take advantage of exception); Ops. Att'y Gen. Fla. 99-11 (1999), 97-89 (1997), and 93-17 (1993).

AGO 13-27 – November 20, 2013

**CHARTER SCHOOLS – PROSPECTIVE – RETROACTIVE –
GOVERNING BOARD**

CONSTRUCTION AND APPLICATION OF STATUTE
PROHIBITING EMPLOYEE OF CHARTER SCHOOL OR SPOUSE
FROM SERVING ON GOVERNING BOARD OF CHARTER
SCHOOL

To: Ms. Dolores D. Menendez, City of Cape Coral Attorney

QUESTIONS:

1. Is section 1002.33(26)(c), Florida Statutes, applicable to municipal charter schools?

2. Does section 1002.33(26)(c), Florida Statutes, apply to a Municipal Charter School Authority governing board member that was appointed prior to the effective date of the statute and whose term commenced before the effective date of the statute?

3. Does section 1002.33(26)(c), Florida Statutes, operate prospectively or retroactively?

SUMMARY:

1. Section 1002.33(26)(c), Florida Statutes, is applicable to all charter schools. The statute contains no language limiting its application.

2. and 3. Section 1002.33(26)(c), Florida Statutes, is a substantive statute and applies prospectively. Thus, a governing board member, appointed prior to the effective date of the statute and whose term commenced prior to the effective date of the statute, may complete his or her term of office, but may not be reappointed to the governing board so long as his or her spouse is employed by the charter school as such reappointment is prohibited by section 1002.33(26)(c), Florida Statutes.

According to your letter, the City of Cape Coral operates a municipal charter school system under the authority of section 1002.33(15), Florida Statutes. This system consists of two elementary, one middle, and one high school and operates through a charter with the Lee County School District. The Charter and ordinances of the City of Cape Coral prescribe the governance and operations of the municipal charter school system. These municipal charter schools are governed by a governing board made up of seven voting members appointed by the city council and three non-voting members appointed by the parent organizations of the three school levels (elementary, middle, and high school). You advise that two members of the charter school governing board have spouses that are employees of the charter school system. Your questions are based on concerns about legislation adopted by the 2013 Florida Legislature which became effective July 1, 2013, relating to standards of conduct and financial disclosure for charter schools.

In order to supplement the educational opportunities of Florida's children, the Legislature authorized the creation of charter schools in 1996.¹ The statute, now codified at section 1002.33, Florida Statutes, allows for both the creation of new charter schools and the conversion of existing public schools to charter status.² Section 1002.33 provides for the creation of such charter schools as part of the state's program of public education.³

Section 1002.33(26), Florida Statutes, establishes standards of conduct and financial disclosure for charter school governing boards

and employees. The statute provides:

(26) STANDARDS OF CONDUCT AND FINANCIAL DISCLOSURE.—

(a) A member of a governing board of a charter school, including a charter school operated by a private entity, is subject to ss. 112.313(2), (3), (7), and (12) and 112.3143(3).

(b) A member of a governing board of a charter school operated by a municipality or other public entity is subject to s. 112.3145, which relates to the disclosure of financial interests.

(c) An employee of the charter school, or his or her spouse, or an employee of a charter management organization, or his or her spouse, may not be a member of the governing board of the charter school.

Subparagraph (26)(c) was created by section 1, Chapter 2013-250, Laws of Florida, with an effective date of July 1, 2013.⁴ This is the language about which you have inquired.

QUESTION 1.

Section 1002.33(26)(c), Florida Statutes, provides that an employee of a charter school or the spouse of that employee may not be a member of the governing board of the charter school. Nothing in this subparagraph limits its application to certain charter schools. The Legislature clearly identified “charter school[s] operated by a municipality” in other provisions of subsection (26), but did not include limiting language in subparagraph (c).⁵ Thus, if the legislative intent was to limit application of subparagraph (c), the Legislature could have used language similar to that of other related provisions.⁶ Based on the absence of any language limiting application of section 1002.33(26)(c), Florida Statutes, this office cannot read such a limitation into the statute.⁷

Thus, it is my opinion that section 1002.33(26)(c), Florida Statutes, is applicable to municipal charter schools.

QUESTIONS 2. & 3.

Your second and third questions deal with the prospective or retroactive operation of section 1002.33(26)(c), Florida Statutes. These questions are related and will be discussed together.

Section 1002.33, Florida Statutes, appears to be a substantive statute, that is, one which creates or imposes new obligations or duties or impairs or destroys existing rights.⁸ It is the general rule that a substantive statute, in the absence of an express command that the statute is to be

applied retroactively, operates prospectively.⁹ Nothing in the text of the statute or in the legislative history created during consideration of the statute reflects a legislative intent that this statutory provision be applied retroactively. In the absence of a clear legislative expression to the contrary, a law is presumed to operate prospectively, particularly in those instances in which retroactive operation of the law would impair or destroy existing rights.¹⁰

The courts of this state and this office have recognized that public officers have a property right in their offices,¹¹ thus, suggesting that the statute should be read to operate prospectively in order to avoid impairing an existing right. The board member of concern took office on April 1, 2013, and will serve a three-year term. Because the board member was appointed prior to the effective date of the act and the prohibition applies prospectively, it is my opinion that this board member may serve out his or her term. However, this board member may not be reappointed to the governing board of the charter school so long as his or her spouse is employed by the school.

In sum, it is my opinion that section 1002.33(26)(c), Florida Statutes, is a substantive statute and applies prospectively. Further, it is my opinion that a governing board member, appointed prior to the effective date of the statute and whose term commenced prior to the effective date of the statute, may complete his or her term of office, but may not be reappointed to the governing board so long as his or her spouse is employed by the charter school as such reappointment is prohibited by section 1002.33(26)(c), Florida Statutes.

¹ See s. 1, Ch. 96-186, Laws of Fla.

² Section 1002.33(3), Fla. Stat.

³ Section 1002.33(1), Fla. Stat.

⁴ Section 11, Ch. 2013-250, Laws of Fla.

⁵ See s. 1002.33(26)(b), Fla. Stat., providing that “[a] member of a governing board of a charter school operated by a municipality . . . is subject to s. 112.3145, which relates to the disclosure of financial interests.” Compare s. 1002.33(26)(a), Fla. Stat., the provisions of which specifically include “a charter school operated by a private entity[.]”

⁶ It is a well-recognized 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. See *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Ideal Farms Drainage District v. Certain*

Lands, 19 So. 2d 234 (Fla. 1944).

⁷ This office is without authority to qualify or read into a statute an interpretation or define words in a statute in such a manner which would result in a construction that seems more equitable under circumstances presented by a particular factual situation; such construction when the language of a statute is clear would in effect be an act of legislation which is exclusively the prerogative of the Legislature. *Cf. Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974); and *Ops. Att’y Gen. Fla. 81-10* (1981) and *06-26* (2006).

⁸ See *Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc.*, 683 So. 2d 609 (Fla. 1st DCA 1996); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994).

⁹ See, e.g., *Alamo Rent-A-Car, Inc. v. Mancusi*, *supra* (substantive statute is presumed to operate prospectively rather than retroactively unless clear expression of legislative intent to the contrary); *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985); *Fogg v. Southeast Bank, N.A.*, 473 So. 2d 1352 (Fla. 4th DCA 1985) (statutes generally operate only prospectively); *VanBibber v. Hartford Accident & Indemnity Insurance Company*, 439 So. 2d 880 (Fla. 1983) (in absence of clear legislative intent to make them retroactive, substantive statutes are prospective only).

¹⁰ *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983) (in absence of clear legislative expression to contrary, law is presumed to operate prospectively, particularly in those instances in which retroactive operation of law would impair or destroy existing rights); *Hotelera Naco, Inc. v. China*, 708 So. 2d 961 (Fla. 3d DCA 1998) (if new law impairs vested rights, creates new obligations, or imposes new penalties, court may refuse to apply it retroactively notwithstanding clear evidence of legislative intent to the contrary).

¹¹ See *Holley v. Adams*, 238 So. 2d 401 (Fla. 1970); *Piver v. Stallman*, 198 So. 2d 859 (Fla. 3d DCA 1967); and *Op. Att’y Gen. Fla. 78-153* (1978). *And see CJS Officer s. 187* (“The right to hold public office, either by election or appointment, is one of the valuable rights of citizenship, the exercise of which should not be declared prohibited or curtailed except by plain provisions of law.”).

AGO 13-28 – December 12, 2013

**CONSULTANTS’ COMPETITIVE NEGOTIATION ACT –
CCNA – CONTRACTS – DESIGN SERVICES – PROFESSIONAL
SERVICES – CONSTRUCTION**

WHETHER CONTRACT FOR WORK OF SPECIFIED NATURE
WITH COST ESTIMATE EXCEEDING \$2 MILLION IS
“CONTINUING CONTRACT” FOR PURPOSES OF CCNA;
WHETHER “CONSTRUCTION COSTS” INCLUDE DESIGN

SERVICES

To: Mr. Usher L. Brown, Attorney for the School Board and the Superintendent of Schools of Osceola County

QUESTIONS:

1. Is it compliant with CCNA for a government entity to award a contract for continuing services for professional services of a specified nature as outlined in the contract, with the contract being for a fixed term or with no time limitation, except that the contract must provide a termination clause, even if the estimated construction cost of an individual project exceeds \$2,000,000.00?

2. In determining the \$2,000,000.00 threshold under section 287.055(2)(g), Florida Statutes, should the School Board of Osceola County include only the estimated cost of construction exclusive of the professional fees for the design of the project?¹

SUMMARY:

1. The Legislature intended, by amending the CCNA in 1988, to include monetary limitations on “continuing contracts” and to extend those monetary limitations to “continuing contracts” for individual construction projects within the scope of the act. A contract “for professional services of a specified nature as outlined in the contract” and exceeding \$2 million would, therefore, be outside the scope of the “continuing contract” exception of section 287.055(2)(g), Florida Statutes, and any such contract would be subject to the other competitive procedures of the CCNA.

2. Section 287.055(2)(g), Florida Statutes, requires that a “continuing contract” for professional services involve “projects in which the estimated construction cost” of each individual project does not exceed \$2 million. The statute limits consideration to “construction costs” and would not include professional fees for such things as design services.

QUESTION 1.

The CCNA, section 287.055, Florida Statutes, sets forth requirements for the procurement and contracting of professional architectural, engineering, landscape architectural, or land surveying services by governmental agencies.² The act creates a two-step process for agencies or political subdivisions to use when hiring architects and engineers. The first is competitive selection, the second is competitive negotiation with those firms selected in the first step. Under the act, an agency,

including a special district, must competitively select and negotiate with the most qualified firm to provide these professional services for a project.³

In opinions applying the CCNA, this office has noted that the CCNA was designed to provide procedures for state and local governmental agencies to follow in the employment of professional service consultants to make the contracting for professional services more competitive and to require the employment of the most qualified and competent individuals and firms at fair, competitive, and reasonable compensation.⁴ The statute provides that “[n]othing in this act shall be construed to prohibit a continuing contract between a firm and an agency.”⁵

A “continuing contract” is defined in section 287.055(2)(g), Florida Statutes, in relevant part as:

[A] contract for professional services entered into in accordance with all the procedures of this act between an agency and a firm whereby the firm provides professional services to the agency for projects in which the estimated construction cost of each individual project under the contract does not exceed \$2 million, for study activity if the fee for professional services for each individual study under the contract does not exceed \$200,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except that the contract must provide a termination clause.

While nothing in section 287.055, Florida Statutes, purports to regulate the terms of a continuing contract, the continuing contract provision of section 287.055, Florida Statutes, represents an exception to the general competitive bidding provisions of the act and should be read narrowly and utilized sparingly in order to avoid an appearance of circumventing the requirements of the statute.⁶

By its terms, section 287.055(2)(g), Florida Statutes, distinguishes: 1) construction costs for individual projects which do not exceed \$2 million; 2) a study activity when the fee for the individual project does not exceed \$200,000; or 3) work of a specified nature as outlined in the contract with no time limitation except for a termination clause. The word “or” is generally construed in the disjunctive when it is used in a statute or rule and normally indicates that alternatives were intended.⁷

You have asked whether the school board may enter into a “continuing contract” for a construction project with costs in excess of the \$2,000,000.00 monetary limit if that project is characterized as a continuing contract “for work of a specified nature” My review of the legislative history developed during consideration and passage of the amendment suggests that these monetary limitations would apply

to such a contract.

As related in the Final Staff Analysis & Economic Impact Statement on HB 270 (Chapter 88-108, Laws of Florida, which amended section 287.055[2][g], Florida Statutes):

House Bill 270 amends the definition of the term “continuing contract” (as contained in s. 287.055(2)(g), F.S.) by placing a monetary limit on projects which fall within the definition. The sponsor’s intent is that construction projects costing more than \$500,000 or studies costing more than \$25,000 may not be covered by a continuing contract. However, firms retained under continuing contract could perform as many different projects as a given agency wishes so long as the individual project cost is below the \$500,000 / \$25,000 limit. Thus, large or major construction or study projects requiring engineering/architectural type services would need to be competitively selected and negotiated as set out in the statute and could not be covered by a continuing contract. This limitation would apply to architectural, engineering, landscape architectural, and land surveying services contracted for by any state or local governmental agency⁸

The staff analysis recognizes the potential ambiguity which you have identified in your question and reiterates that “the monetary limitations be added to the existing limitations in the law” and that “the bill intends, and does make it clear, that monetary limits are to be applied in cases involving construction projects or study activity”:

An apparent ambiguity exists in the bill as to the effect of the monetary limitations on continuing contracts. This is caused by use of the word “or” on page 1, line 22 of the bill. It would appear that in addition to the two parallel phrases containing monetary limitations, a third parallel phrase is set up which describes a “continuing contract”. Thus, “continuing contracts” can be “. . . for projects . . . not exceed(ing) \$500,000, OR for stud(ies) . . . not exceed(ing) \$25,000, OR for work of a specified nature as outlined in the contract. . .”, (s. 287.055(2)(g), F.S., Emphasis added). However, the sponsor intended that the monetary limitations be added to the existing limitations in the law.

On the other hand, the problem may be misinterpretation of the current statutory phrase “. . . for work of a specified nature as outlined in the contract . . .” as used to describe a “continuing contract”. Despite two Attorney General’s opinions that shed light in this area (AGO 075-131, May 5, 1975; AGO 076-142, June 18, 1976), the term “continuing contract” may have simply been misinterpreted by some governmental entities

allowing them to circumvent the competitive selection process. If that is true, then the primary shortcoming in this area of the CCNA (even as amended by the bill) may be a lack of judicial interpretation and enforcement. However, the bill intends, and does make it clear, that monetary limits are to be applied in cases involving construction projects or study activity.⁹

Thus, it appears that the Legislature intended, despite ambiguity in the language employed, to impose monetary limitations on “continuing contracts” involving construction projects coming within the scope of section 287.055(2)(g), Florida Statutes. To read the exception for “continuing contracts” for work of a specified nature as subject to no monetary limitation would allow the circumvention of the CCNA and would vitiate the language of the exceptions imposing such monetary caps.

Thus, it is my opinion that the Legislature intended, by amending the CCNA in 1988, to include monetary limitations on “continuing contracts” in cases involving construction projects and to extend those monetary limitations to such “continuing contracts” within the scope of the act. A construction contract “for professional services of a specified nature as outlined in the contract” and exceeding \$2 million in the estimated construction cost of any individual project would, therefore, be outside the scope of the “continuing contract” exception of section 287.055(2)(g), Florida Statutes, and would then be subject to the other competitive procedures of the CCNA.

QUESTION 2.

You also ask whether, in computing the \$2,000,000.00 threshold amount in section 287.055(2)(g), Florida Statutes, for a “continuing contract,” the Osceola County School District should exclude or include professional fees for design of the construction work. Your letter suggests that you are concerned with “design fees for architects and engineers and other professional services that are not related to construction but instead are related to appraising property, surveying the land, and other professional fees that are not specifically tied to the purchase of materials to be incorporated into the project and the purchase of labor or services directly tied to incorporating materials into the project and building the project”

The statute itself distinguishes “professional services” from the definition of a “continuing contract.” The term “[p]rofessional services” is defined in subparagraph (2)(a) of the statute as

those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer,

landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice.

By its terms, a “continuing contract,” as defined in section 287.055(2)(g), Florida Statutes, is a contract for “professional services,” but those services are provided based on the estimated construction cost of each individual project. Moreover, the text of the CCNA explicitly distinguishes between “design” and “construction.”¹⁰ The clearly expressed intent of the statutory language must given effect.¹¹

The CCNA, section 287.055, Florida Statutes, sets forth requirements for the procurement and contracting of professional architectural, engineering, landscape architectural, or land surveying services by governmental agencies.¹² The act creates a two-step process for agencies or political subdivisions to use when hiring architects and engineers. The first is competitive selection of the most qualified firms, the second is competitive negotiation with those firms selected in the first step. Under the act, an agency, including a special district, must competitively select and negotiate with the most qualified firm to provide these professional services for a project.¹³ The CCNA is specifically designed to preclude a consideration of the fees for “professional services” (defined to include architecture, professional engineering, landscape architecture, or registered surveying and mapping) until the competitive negotiation phase of this process. To include such fees within the initial calculation of a project would defeat the provisions of the act.

Thus, based on the language of the statute itself requiring that a “continuing contract” for professional services involve “projects in which the estimated construction cost” of each individual project does not exceed \$2 million, and the intent of the CCNA, it is my opinion that the statute limits consideration to “construction costs” and would not include professional fees for such things as design services.

¹ You have asked two additional questions dependent upon my answers to your first two questions. In light of the conclusions to Questions One and Two, no discussion of your other two questions is necessary. In addition, I would note that this office cannot rule on the reasonableness of an agency’s interpretation or construction of a statute - that is a judicial matter.

² See s. 287.055(2)(b), Fla. Stat., which defines “[a]gency” as “the state, [or] a state agency, [or] a municipality, [or] a political subdivision, [or] a school district, or a school board[;]” and s. 1.01(8), Fla. Stat., defining “political subdivision” to include “all other districts in this state.” *And see* s. 287.055(4) and (5), Fla. Stat.

³ Section 287.055(4) and (5), Fla. Stat.

⁴ See, e.g., *Ops. Att’y Gen. Fla.* 73-216 (1973), 74-308 (1974), and 75-56

(1975); and see “Whereas” clauses, Ch. 73-19, Laws of Fla. The CCNA was enacted for the public benefit and should be interpreted most favorably to the public. *Cf. Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260, 263 (Fla. 1973); *Op. Att’y Gen. Fla. 74-308* (1974).

⁵ Section 287.055(4)(d), Fla. Stat.

⁶ *Cf. City of Lynn Haven v. Bay County Council of Registered Architects, Inc.*, 528 So. 2d 1244, 1246 (Fla. 1st DCA 1988), in which the court determined that the city’s procedures contravened the legislative intent and undermined the effectiveness of the CCNA. Specifically, the city’s bidding procedure would not have effectuated an equitable distribution of contracts among the most qualified firms pursuant to s. 287.055(4), Fla. Stat.

⁷ *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986). *And see Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers*, 334 So. 2d 563, 564 (Fla. 1976) (word “or” when used in a statute is generally to be construed in the disjunctive); *Kirksey v. State*, 433 So. 2d 1236, 1237 (Fla. 1st DCA 1983) (generally, use of disjunctive in statute indicates alternatives and requires that such alternatives be treated separately); *Linkous v. Department of Professional Regulation*, 417 So. 2d 802 (Fla. 5th DCA 1982).

⁸ See s. I.B., “Effect of Proposed Changes,” House of Representatives, House Commerce Committee, Final Staff Analysis & Economic Impact Statement on HB 270, dated June 6, 1988.

⁹ See s. IV, “Comments,” House of Representatives Commerce Committee Staff Analysis for HB 270, dated April 18, 1988.

¹⁰ See, e.g., s. 287.055(2)(I), Fla. Stat.

¹¹ See, e.g., *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Osborne v. Simpson*, 114 So. 543, 544 (Fla. 1927).

¹² *Supra* n.2.

¹³ *Supra* n.3.

AGO 13-29 – December 30, 2013

TOURIST DEVELOPMENT TAX – TAXATION – COUNTIES – TOURISM

COUNTY WITH POPULATION OF LESS THAN 750,000 MAY USE
TOURIST DEVELOPMENT TAX REVENUES FOR IMPROVING,
REPAIRING, AND MAINTAINING A NATURALLY OCCURRING
CORAL REEF

To: Ms. Cynthia L. Hall, Monroe County Attorney

QUESTION:

Whether local option tourist development taxes can be used to fund a coral outplanting project to repair or improve a naturally occurring reef under the language contained in section 125.0104(5)(b), Florida Statutes?

SUMMARY:

The use of Monroe County tourist development tax revenues for a coral outplanting project to repair or improve a naturally occurring reef is permissible under section 125.0104(5)(b), Florida Statutes, as the repair, improvement, or maintenance of a zoological park or nature center if the county makes the appropriate findings.

Section 125.0104, Florida Statutes, known as the Local Option Tourist Development Act¹ (the act), authorizes a county to impose a tax on short term rentals of living quarters or accommodations within the county unless such activities are exempt pursuant to Chapter 212, Florida Statutes.² The purpose and intent of section 125.0104, Florida Statutes, is to “provide for the advancement, generation, growth and promotion of tourism, the enhancement of the tourist industry, and the attraction of conventioners and tourists from within and without the state to a particular area or county of the state.”³

Subsection (5) of the act sets forth various purposes for which revenues from the tax may be used. Relevant to the question you have posed, section 125.0104(5)(b), Florida Statutes, authorizes the expenditure of tax revenues for the following purpose:

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.

You advise this office that the population of Monroe County qualifies it

to take advantage of this provision.⁴

Where a statute enumerates those things upon which it will operate or forbids certain things, it is ordinarily construed as excluding from its operation all things not expressly mentioned.⁵ Thus, the specific provisions of section 125.0104(5)(a) and (b), Florida Statutes, limit the expenditure of tourist development tax revenues to those enumerated and imply the exclusion of all others.⁶ This office has consistently determined that tourist development tax revenues may only be used for the purposes enumerated in section 125.0104(5)(a) and (b), Florida Statutes.⁷

In Attorney General Opinion 97-48, this office was asked to consider 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 center within the scope of section 125.0104(5)(b), Florida Statutes, it was 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.”

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.”⁸ Relying on a general definition of the term “nature center”⁹ 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.

Like the counties in the opinions discussed above, Monroe 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, which include the repair, improvement, or maintenance of a zoological park or nature center as described in section 125.0104(5)(b), Florida Statutes.

The Florida Keys National Marine Sanctuary is one of 14 sanctuaries created pursuant to the National Marine Sanctuary Act.¹⁰ The act designates “as national marine sanctuaries areas of the marine environment which are of special national significance and provides authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them[.]”

The Florida Reef Tract stretches for approximately 150 miles on the eastern or Atlantic Ocean side of the Florida Keys, from north of Miami to the Tortugas Banks, and is approximately 4 miles wide. All but a small portion of the Florida Reef Tract at its northern end lies within the boundaries of the Florida Keys National Marine Sanctuary. Approximately 60% of the Florida Keys National Marine Sanctuary lies within State of Florida waters and the sanctuary is jointly managed by the National Oceanic and Atmospheric Administration and the State of Florida under a co-trustee agreement.

The Board of County Commissioners has received a request from a not-for-profit corporation for tourist development funds levied and collected pursuant to section 125.0104, Florida Statutes. According to the request, tourist development taxes would be used to pay for outplanting nursery-grown staghorn coral fragments (which had been harvested and transferred to existing underwater nurseries) to reefs off Key Largo and nursery-grown elkhorn coral fragments to three Key Largo reefs. The corals in the project had been collected under permits issued by NOAA/Florida Keys National Marine Sanctuary and sprigs were then “cloned” at underwater nurseries operated by the not-for-profit organization. The nurseries had previously been built and/or expanded by the non-profit using money from other grants. According to the application, the funds, if awarded, would be used to take coral sprigs from the nurseries and outplant them by transporting the “reef ready” nursery-grown corals to the “restoration sites,” where they would be “strategically attached to the reef using underwater epoxy, cement, or cable ties.” The not-for-profit organization operates its coral nurseries, collection sites, and restoration sites in state and federal waters along and near the reef under permits by the National Oceanic and Atmospheric Agency including waters within the Florida Keys National Marine Sanctuary.

The Board of County Commissioners of Monroe County has issued a statement supporting and endorsing the “establishment of coral reef nurseries as zoological parks throughout the Florida Keys National Marine Sanctuary[.]”¹¹ The project under consideration has been characterized for purposes of section 125.0104(5), Florida Statutes, as the repair, improvement, or maintenance of a zoological park or nature center. The Florida Keys National Marine Sanctuary and the Florida Reef Tract are publicly owned, protected, and managed marine environments open to the public for recreational and educational activities including diving, swimming, snorkeling, and fishing.¹² Based

on previous opinions of this office and a consideration of what may constitute a nature center or a zoological park,¹³ it appears that this use of tourist development tax funds for the repair, improvement, or maintenance of this area would be within the scope of the statute. Ultimately, however, the governing body of the county must make the determination that the expenditure of tourist development tax revenues is for a purpose that falls within the enumerated authorized uses in section 125.0104(5), Florida Statutes.

In sum, it is my opinion that local option tourist development taxes can be used to fund a coral outplanting project to repair or improve a naturally occurring reef under the language contained in section 125.0104(5)(b), Florida Statutes, if the county makes the appropriate findings.

¹ Section 125.0104(1), Fla. Stat.

² See s. 125.0104(3)(a), Fla. Stat., which states that it is the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in “any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, roominghouse, mobile home park, recreational vehicle park, condominium, or timeshare resort for a term of 6 months or less is exercising a privilege which is subject to taxation under this section”

³ See Ops. Att’y Gen. Fla. 10-09 (2010), 95-71 (1995), 94-12 (1994), 87-16 (1987), and 83-18 (1983).

⁴ Your letter states that Monroe County had a population of under 74,000 according to the 2010 U.S. Census.

⁵ See *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). And see Op. Att’y Gen. Fla. 88-49 (1988) (the expenditure of tourist development tax revenues is limited to those purposes set forth in the statute).

⁶ And see *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) and *Alsop v. Pierce*, 19 So. 2d 799, 805 806 (Fla. 1944), for the proposition 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.

⁷ See Ops. Att’y Gen. Fla. 86-68 (1986) (tourist development tax revenues may be used for beach cleaning and maintenance) and 87-16 (1987) (tourist development tax revenues may be used to improve, maintain, renourish, or restore public shoreline or beaches of inland freshwater lake). Cf. Ops. Att’y Gen. Fla. 91-62 (1991) (construction of boat ramps and attendant parking facilities in proximity to inland lakes and rivers not a proper use of tourist development tax revenues); 90-55 (1990) (no authority to use tourist development tax revenues to construct beach parks, fund additional law enforcement patrols or lifeguards on the beach, or build and maintain sanitary facilities on or near the beach);

and 88-49 (1988) (no authority to use tourist development tax revenues to acquire real property for public beach access).

⁸ Section 125.0104(5)(b), Fla. Stat.

⁹ 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.’”

¹⁰ See Pub. L. No. 92-532 s. 301 (Oct. 23, 1972), now codified at 16 U.S.C. ss. 1431 - 1445b (2012).

¹¹ See Monroe County Resolution 211-2013.

¹² See Florida Keys National Marine Sanctuary website: http://floridakeys.noaa.gov/visitor_information/welcome.html?s=visit, for a description of the public activities and programs available in the sanctuary.

¹³ The statute does not define the term “zoological park,” but a common definition of the word “zoological” suggests that it relates to something concerned with animals or that it relates to the animal life of a particular area. See *The American Heritage Dictionary* (office ed. 1983), p. 794; and *Webster’s New Universal Unabridged Dictionary* (2003), p. 2212.

AGO 13-30 – December 30, 2013

SPECIAL MAGISTRATES – CODE ENFORCEMENT BOARDS – COMPETITIVE BIDS – PUBLIC MEETINGS – SUNSHINE LAW – MUNICIPALITIES

SPECIAL MAGISTRATE WHEN ACTING ON BEHALF OF
CODE ENFORCEMENT BOARD SUBJECT TO SUNSHINE LAW;
SEALED BIDS MUST BE OPENED AT A PUBLIC MEETING IN
COMPLIANCE WITH SUNSHINE LAW, REQUIRING MINUTES
TO BE TAKEN AND RECORDED

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

QUESTIONS:

1. Are code enforcement proceedings conducted by a special magistrate subject to section 286.011, Florida Statutes, such that minutes must be taken and transcribed?

2. Does section 255.0518, Florida Statutes, relating to the opening of public bids, require that minutes of such proceedings be taken and promptly recorded under section 286.011, Florida Statutes?

SUMMARY:

1. Section 286.011, Florida Statutes, applies to special magistrates when they are conducting a proceeding under their delegated authority to act as a code enforcement board pursuant to Chapter 162, Florida Statutes.

2. Section 255.0518, Florida Statutes, requires that the opening of public bids and announcement of the name of each bidder and the price submitted in each bid be done at a public meeting subject to the requirements of section 286.011, Florida Statutes, which would include the requirement that minutes be taken and promptly recorded.

QUESTION 1.

The Government in the Sunshine Law, section 286.011, Florida Statutes, requires that meetings of a public board or commission at which official acts are to be taken be open to the public and be reasonably noticed, and that minutes of the meeting be taken and promptly recorded. The test for whether the meetings of particular boards, commissions, or other entities are subject to section 286.011, Florida Statutes, has been judicially determined to be whether the board or other entity is subject to the dominion and control of the Legislature.¹ Code enforcement boards, created pursuant to Chapter 162, Florida Statutes, clearly are under the control of the Legislature.²

Section 286.011, Florida Statutes, applies to any meeting of two or more members of a board or commission “at which official acts are to be taken[.]”³ The statute has been held to extend to the discussions and deliberations of, as well as formal action taken by, a public board or commission.⁴ The courts of this state and this office, however, have consistently stated that there is no “government by delegation” exception to the Sunshine Law such that a public body may avoid application of the law by delegating the conduct of public business to an alter ego.⁵ Thus, while the statute would not ordinarily apply to an individual member of a public board or commission or to public officials who are not board or commission members, section 286.011, Florida Statutes, does apply when there has been a delegation of a board’s decision-making authority.

While a special magistrate is not a member of a code enforcement board, section 162.03(2), Florida Statutes, recognizes that a county or municipality may adopt an alternative code enforcement system giving code enforcement boards or special magistrates designated by the local governing body the authority to hold hearings and assess fines for code violations. The subsection also provides that a special magistrate “shall have the same status as an enforcement board under this chapter.” Thus, while a special magistrate is not a member of the code enforcement

board, there has been a delegation of the code enforcement authority to conduct hearings which if performed by the board would be subject to the Sunshine Law. The special magistrate, therefore, is subject to section 286.011, Florida Statutes, when he or she is carrying out that delegated authority.⁶

In contrast, in Attorney General Opinion 2008-63, this office determined that a training session held by a county for special magistrates hired to hear value adjustment board petitions was not subject to the Sunshine Law. While section 194.035(3), Florida Statutes, requires training sessions provided by the Florida Department of Revenue (DOR) to be open to the public, the legislative history attendant to the amendment which directs DOR to provide and conduct training for value adjustment board special magistrates recognized that counties did not consider training sessions to be meetings subject to public notice requirements.⁷ There was nothing to suggest that a special magistrate for a value adjustment board attending an orientation session conducted by a county would be exercising his or her delegated duty to conduct hearings. Thus, the mere attendance of a special magistrate at a training session provided by the county (which unlike DOR training sessions are not prescribed by statute to be open to the public) would not be subject to the requirements of section 286.011, Florida Statutes.

Accordingly, I am of the opinion that inasmuch as there has been a delegation of the county's code enforcement authority and responsibilities to the special magistrate which if performed by the code enforcement board would be subject to the Sunshine Law, the special magistrate conducting a hearing is subject to section 286.011, Florida Statutes.

QUESTION 2.

Section 255.0518, Florida Statutes, provides:

Notwithstanding s. 119.071(1)(b), the state or any county or municipality thereof or any department or agency of the state, county, or municipality or any other public body or institution shall:

- (1) When opening sealed bids or the portion of any sealed bids that include the prices submitted that are received pursuant to a competitive solicitation for construction or repairs on a public building or public work, open the sealed bids *at a public meeting conducted in compliance with s. 286.011*.
- (2) Announce at that meeting the name of each bidder and the price submitted in the bid.
- (3) Make available upon request the name of each bidder and the price submitted in the bid. (e.s.)

The plain language of the statute requires that when a county or municipality is opening sealed bids or any portion of any sealed bids that include the prices received as a result of a competitive solicitation, such must be conducted at a public meeting in compliance with section 286.011, Florida Statutes, and the names of each bidder and the price submitted in the bid must be announced. The section further recognizes that this requirement applies notwithstanding the provision in section 119.071(1)(b), Florida Statutes, which exempts sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation from the Public Records Law “until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.”⁸ The legislative history accompanying passage of section 255.0518, Florida Statutes, explains that “[a]s a result of the public records exemption, the components of a sealed bid other than a bidder’s name and price submitted are likely to remain exempt from disclosure until the agency provides notice of an intended decision or for 30 days after the meeting at which the bids are opened, whichever is earlier.”⁹

Where the Legislature has directed the manner in which something is to be accomplished, it operates as a prohibition against its being accomplished otherwise.¹⁰ Thus, the opening of sealed bids by a county or municipality must be conducted at a public meeting in compliance with section 286.011, Florida Statutes, which requires that minutes be taken and promptly recorded.

¹ See *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969).

² See *City of Tampa for Use and Benefit of City of Tampa Code Enforcement Board v. Braxton*, 616 So. 2d 554 (Fla. 2d DCA 1993) (once city opts for local government code enforcement board, it is prohibited from enforcing its ordinances by any means other than prescribed by statute authorizing such boards by constitutional limitation on administrative agency imposing penalties except as provided by law).

³ See *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969); *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973); Ops. Att’y. Gen. Fla. 93-79 (1993) and 81-88 (1981).

⁴ *Times Publishing Company*, *supra*.

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); *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 upon which

foreseeable action will be taken by the public officials, then delegates stand in the shoes of such public officials insofar as the Sunshine Law is concerned); Ops. Att’y Gen. Fla. 95-06 (1995), 83-78 (1983), 75-41 (1975), and 74-84 (1974).

⁶ Cf. Op. Att’y Gen. Fla. 10-15 (2010) (section 286.011, Fla. Stat., applicable to special magistrate for value adjustment board when exercising delegated authority to act on behalf of the board).

⁷ See Senate Bill Analysis and Fiscal Impact Statement, CS/CS/SB 2080 (companion bill), dated April 22, 2008.

⁸ Section 119.071(1)(b)2., Fla. Stat.

⁹ House of Representatives Final Bill Analysis, CS/CS/HB 897 (CS/SB 1202 – companion bill), Ch. 2012-211, dated May 9, 2012, p. 3.

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

AGO 13-31 – December 30, 2013

DUAL OFFICE-HOLDING – COUNTIES – ADVISORY BOARDS

SIMULTANEOUS SERVICE ON ADVISORY BOARDS DOES NOT VIOLATE DUAL OFFICE-HOLDING

To: Mr. Vaughan Kimberling

QUESTION:

Does simultaneous service as a member of the Port St. John Dependent Special District, the Port St. John Public Library Advisory Board, and the Brevard County Contractors’ Licensing Board violate the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.

SUMMARY:

While a service on the Brevard County Contractors’ Licensing Board would be an office, the Port St. John Dependent District and the Port St. John Public Library Advisory Board would appear to be advisory boards which fall within the exemption from the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.

Section Article II, section 5(a) of the Florida Constitution,

provides:

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*. (e.s.)

The constitutional provision prohibits a person from simultaneously holding more than one “office” under the government of the state, counties, and municipalities.¹ The prohibition applies to both elected and appointed offices.² It is not necessary that the two offices be within the same governmental unit. Thus, for example, a municipal officer is precluded from simultaneously holding not only another municipal office, but also a state or county office.³

The Constitution, however, does not define the terms “office” or “officer” for purposes of the dual office-holding prohibition and the Legislature has not attempted to define the term to clarify the parameters of this constitutional provision. Absent such clarification, the courts and the Attorney General’s Office have referred to several early decisions of the Supreme Court of Florida in determining what constitutes an “office” as opposed to an “employment.” The Supreme Court of Florida has stated:

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, while an “employment” does not comprehend a delegation of any part of the sovereign authority. The 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. 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 office⁴

It is, therefore, the nature of the powers and duties of a particular position which determines whether it is an “office” or an “employment.” Historically, this office has based its determination of whether a particular position is an office upon a review of the particular powers of a position and the language of the statute, charter, or ordinance creating the position.

In this instance, you acknowledge that the powers and duties of the Brevard County Contractors' Licensing Board would be consistent with those of an "office" subject to the dual office-holding prohibition in section 5(a), Article II, Florida Constitution. The board's jurisdiction over all matters pertaining to the examination, qualification, regulation, and control of any person or firm desiring to engage in business in the unincorporated area of Brevard County would appear to encompass an exercise of the sovereign power of the county which would make a position on the board an office subject to section 5(a), Article II, Florida Constitution.⁵

The materials you have provided indicate that the Brevard County Attorney's Office has opined that the activities of the Port St. John Dependent Special District (PSJDSD) and the Port St. John Public Library Advisory Board (PSJPLAB) are advisory in nature. The PSJDSD makes non-binding recommendations to the county commission and has not been delegated any portion of the county's sovereign power.⁶ You indicate that the PSJPLAB only advises the county commission on the establishment, operation, and maintenance of the Port St. John Public Library.⁷

As discussed above, statutory bodies having only advisory powers are exempt from the constitutional dual office-holding prohibition. This exception has been interpreted by this office. For example, in Attorney General Opinion 05-59, this office stated that a municipal committee that merely makes non-binding recommendations and has not otherwise been delegated any powers to make factual determinations or exercise any portion of the municipality's sovereign power did not appear to be an office. In Attorney General Opinion 08-15, this office concluded that a county advisory board could be considered a "statutory body having only advisory powers" within the constitutional exception if it has been created by legislative enactment of the governing body.

As this office noted in Attorney General Opinions 89-25 and 90-33, only those statutory bodies which possess exclusively advisory powers are excepted; Article II, section 5(a), Florida Constitution, does not provide for or recognize an exception for statutory bodies which exercise a portion of the sovereign powers, but whose powers may be substantially or predominately advisory.⁸

Inasmuch as neither the Port St. John Dependent Special District nor the Port St. John Public Library Advisory Board appears to exercise a portion of the sovereign power of the county and instead merely serve as advisory boards to the Brevard County Commission, the dual office-holding prohibition in section 5(a), Article II, Florida Constitution, would not preclude your simultaneously serving on either or both of the boards and as a member of the Brevard County Contractors' Licensing Board.

¹ Earlier state Constitutions contained limited prohibitions against dual office-holding. *See, e.g.*, Art. VI, s. 18, Fla. Const. 1838; Art. VI, s. 14, Fla. Const. 1861; and Art. VI, s. 14, Fla. Const. 1865. Article II, s. 5(a) of the 1968 Constitution substantially reproduces Art. XVI, s. 15 of the 1885 Constitution except that the 1968 Constitution includes municipal officers. Court decisions under the 1885 Constitution had excluded municipal officers from its coverage. *See, e.g., Attorney General ex rel. Wilkins v. Connors*, 9 So. 7, 8 (Fla. 1891).

² *See Blackburn v. Brorein*, 70 So. 2d 293, 296 (Fla. 1954), noting that “election by the people or the appointment by the Governor is not the true test in determining whether . . . an office exists and the individual filling the position is an officer [rather than] an employee[;]” *Ops. Att’y Gen. Fla.* 94-66 (1994), 80-97 (1980), and 69-2 (1969).

³ *See, e.g., Op. Att’y Gen. Fla.* 05-29 (2005) (special magistrate for a county value adjustment board could not simultaneously serve on city’s code enforcement board).

⁴ *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).

⁵ *Cf. Op. Att’y Gen. Fla.* 2004-07 (city’s building official who administered building code, issuing permits and certificates of occupancy, constitutes an office).

⁶ *See* s. 98-105, Brevard County Code of Ordinances.

⁷ *See* Resolution 90-081 enacted by Brevard County Commission on March 7, 1990; s. 1.3, Art. I, Port St. John Public Library Advisory Board By-laws.

⁸ *And see Op. Att’y Gen. Fla.* 98-36 (1998), concluding that membership on a city water resources advisory board which, despite its name, exercised substantive powers, constituted an “office.”

AGO 13-32 – December 31, 2013

LOCAL OPTION GAS TAX – MUNICIPALITIES

**WHETHER CITY MAY REIMPOSE OR EXTEND LOCAL OPTION
GAS TAX**

*To: The Honorable John R. Crescimbeni, City Councilman At-Large,
Group 2, City of Jacksonville*

QUESTIONS:

1. Does section 336.025(1)(a)1, Florida Statutes, prohibit the City of Jacksonville from releveling the current local option gas

tax?

2. What is the maximum period of time that a new or subsequent local option gas tax could be levied?

SUMMARY:

1. Pursuant to section 336.025(1)(a)1., Florida Statutes, the City of Jacksonville may reimpose or relevely the local option gas tax to commence following the expiration of the current local option gas tax on August 31, 2016.

2. A reimposition or relevely of the local option fuel tax pursuant to section 336.025(1)(a)1., Florida Statutes, following its expiration, appears to contemplate the imposition of the tax again subject to the same terms as the original tax, that is, for a period of up to, but not more than, 30 years.

You have advised this office that, pursuant to section 336.025, Florida Statutes, the Jacksonville City Council enacted Ordinance 1985-793 which authorized a six-cent local option gas tax upon every gallon of motor fuel and special fuel sold in the General Services District as provided in Chapter 206, Florida Statutes, for the 10-year period running from September 1, 1986, through August 31, 1996. Subsequently, on October 8, 1991, the Jacksonville City Council enacted Ordinance 1991-819 which extended the collection period from August 31, 1996, to August 31, 2016, thereby establishing a total collection period for the current tax of 30 years. Your questions relate to the expiration of the ordinance in 2016 and the authority of the city council to reenact or extend imposition of the local option gas tax and the terms of any such action.

QUESTION 1.

You have asked whether the City of Jacksonville may reimpose a local option gas tax pursuant to section 336.025(1)(a)1., Florida Statutes, following the expiration of the currently imposed local option gas tax. Based on the clear language of the statute, I conclude that the city is authorized by section 336.025(1)(a)1., Florida Statutes, to reimpose such a local option gas tax.

Section 336.025, Florida Statutes, authorizes the levy of local option fuel taxes on motor fuel and diesel fuel for local transportation system projects. The statute provides that “[c]ounty and municipal governments shall utilize moneys received pursuant to this paragraph only for transportation expenditures.”¹

As provided in section 336.025(1)(a)1., Florida Statutes:

All impositions and rate changes of the tax shall be levied before October 1 to be effective January 1 of the following year for a period not to exceed 30 years, and the applicable method of distribution shall be established pursuant to subsection (3) or subsection (4). However, levies of the tax which were in effect on July 1, 2002, and which expire on August 31 of any year may be reimposed at the current authorized rate effective September 1 of the year of expiration. *Upon expiration, the tax may be relevied provided that a redetermination of the method of distribution is made as provided in this section. (e.s.)*

It is well settled that where a statute is clear and unambiguous as it is here, a court will not look behind the statute's plain language for legislative intent² and there is no occasion for resorting to rules of statutory interpretation and construction as the statute must be given its plain and obvious meaning.³ The provisions under which the City of Jacksonville has adopted its local option gas tax, section 336.025(1)(a), Florida Statutes, clearly authorize the city to reimpose this tax following its expiration.⁴

Thus, it is my opinion that the City of Jacksonville may "reimpose" or "relevy" the local option gas tax it imposed pursuant to section 336.025(1)(a), Florida Statutes, following the expiration of the current local option gas tax.

QUESTION 2.

You also question the maximum period of time that the new or extended local option gas tax could be levied under section 336.021(1)(a), Florida Statutes.

The Legislature has provided no specific direction relating to the length of time for which the local option gas tax imposed under section 336.025, Florida Statutes, may be "reimposed" or "relevied" pursuant to subparagraph (1)(a). The statute states that "[a]ll impositions . . . shall be levied . . . for a period not to exceed 30 years" and a "reimposition" would, logically and in the absence of any legislative or judicial limitation, be subject to the same maximum period. The prefix "re-" means "again" or "again and again" to indicate repetition.⁵ Thus, it would appear that a relevy or reimposition of the local option gas tax pursuant to section 336.025(1)(a), Florida Statutes, would be accomplished subject to the same time constraints as the original tax, that is, a period not to exceed 30 years.

Thus, it is my opinion that a reimposition or relevying of the local option fuel tax pursuant to section 336.025(1)(a)1., Florida Statutes, appears to contemplate the imposition of the tax again, following its expiration, subject to the same terms as the original tax, that is, for a period of up to, but not more than, 30 years.

¹ Section 336.025(1)(a)2., Fla. Stat. The term “transportation expenditures” is defined in section 336.025(7), Fla. Stat. *And see*, e.g., Ops. Att’y Gen. Fla. 10-29 (2010), 02-02 (2002), 00-37 (2000), 99-70 (1999), 97-25 (1997), and 94-20 (1994), discussing appropriate uses of the local option fuel tax.

² *See*, e.g., *In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993); and *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

³ *See M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Osborne v. Simpson*, 114 So. 543 (Fla. 1927) (where statute’s language is plain, without ambiguity, it fixes legislative intention and interpretation and construction are not needed); *Holly v. Auld*, *id.*

⁴ *And see* s. 336.025(1)(b), Fla. Stat., authorizing levies of the tax imposed under subparagraph (b) “which were in effect on July 1, 2002, and which expire on August 31 of any year [to] be reimposed at the current authorized rate effective September 1 of the year of expiration.”

⁵ Webster’s New Universal Unabridged Dictionary, p. 1605.

AGO 2014-01 – February 13, 2014

COUNTIES – COUNTY FUNDS – SPECIAL DISTRICTS –
HILLSBOROUGH COUNTY CIVIL SERVICE BOARD

USE OF FUNDS TO HIRE LOBBYIST

To: Mr. Chip Fletcher, Hillsborough County Attorney

QUESTION:

Does the Hillsborough County Clerk of the Circuit Court have the legal authority to use county funds to pay expenditures incurred by the Hillsborough County Civil Service Board under a contract with a government relations business entity that will represent the interests of the Board in the State of Florida legislative process?

SUMMARY:

While the appropriation of funds by the Hillsborough County Commission for use by the Hillsborough County Civil Service Board to hire a lobbying firm to represent the interest of the Board may be considered by the clerk of courts as a reliable basis for the legality of such an expenditure, it would appear that the civil service board’s enabling legislation does not directly or by implication authorize the Board to contract with a lobbying

firm to represent its interest before the Florida Legislature.

You state that the Hillsborough County Civil Service Board (board) is considering the engagement of a lobbying firm to represent the interests of the board before the Florida Legislature under a contract with a cap of \$75,000.00 for such services. The funds would be appropriated by the Hillsborough County Commission. The Clerk of Court, in her pre-auditing function before approving payment, does not believe that expenditure of the funds for such a purpose is authorized under the board's enabling legislation.

In Attorney General Opinion 2001-29, this office found that a clerk of courts should be able to rely upon a county commission's determination that a county purpose will be served by its appropriation when he or she is evaluating the legality of a payment. In this instance, however, the county commission has also asked for this office's comments on the expenditure of funds for lobbying by the Board.¹

Chapter 2000-445, Laws of Florida, establishes the "Civil Service Act of 2000" for Hillsborough County, which applies to all classified personnel employed in specified agencies and authorities within the county, unless otherwise exempted.² The Hillsborough County Civil Service Board is created to conduct the business of the district, including the establishment of an annual budget and the expenditure of appropriated funds for the purposes of the act.³ The act further enumerates powers and duties of the board, specifically authorizing the board to "[e]mploy, discipline, and terminate a director and such other personnel as necessary to carry out the purposes of this act and within the scope of its budget."⁴ Moreover, the board has specific authority to "[e]mploy, discipline, and terminate or contract for legal counsel as may be needed and within the scope of its budget"⁵ and to contract for performance audits as required by law.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

This office previously determined that in light of a county's home rule powers, a board of county commissioners may expend county funds for lobbying provided that it first makes appropriate legislative findings as to the purpose of the expenditure and the benefits which would accrue to the county.⁹ Numerous opinions of the Attorney General, however, adhere to the general principle that public funds may not be expended by a district or other statutory entity unless there is a specific statutory provision authorizing such expenditure.¹⁰ More specifically, this office has stated that public funds may not be expended by public entities for lobbying purposes unless expressly and specifically authorized by state

law.¹¹

The stated purpose of Hillsborough County's civil service act is to "establish a system for the formulation and implementation of procedures to ensure the uniform administration of the classified service" for the county.¹² Considering this limited purpose, along with the distinction between who may be employed by the board and the ability to contract for a legal counsel, there is no direct or apparent authority for the board to contract for lobbying services.

Accordingly, it is my opinion that the Hillsborough County Civil Service Board is not authorized to contract with a government relations business entity that will represent the interests of the Board in the State of Florida legislative process.

¹ Memorandum to Hillsborough County Board of County Commissioners, December 6, 2013, reporting board approval of items A-1 through A-59 at December 4, 2013, meeting; Agenda Item A-13, Request an opinion from Florida Attorney General regarding appropriate use of County funds.

² Sections 3 and 4, Ch. 2000-445, Laws of Fla.

³ Section 7, Ch. 2000-445, Laws of Fla..

⁴ Section 7(2)(f), Ch. 2000-445, Laws of Fla.

⁵ Section 7(2)(g), Ch. 2000-445, Laws of Fla.

⁶ Section 7(2)(x), Ch. 2000-445, Laws of Fla.

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 (Fla. 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 See Op. Att'y Gen. Fla. 88-52 (1988).

¹⁰ See, e.g., Ops. Att'y Gen. Fla. 77-08 (1977), 75-120 (1975), 68-12 (1968), 71-28 (1971), 78-12 (1978), 73-148 (1973), 67-20 (1967), and 74-299

(1974). See also *Florida Development Commission v. Dickinson*, 229 So. 2d 6 (Fla. 1st DCA 1969), cert. denied, 237 So. 2d 530 (Fla. 1970) (to perform any function for the state or to expend any money belonging to the state, the officer seeking to perform such function or to incur such obligation against the state must find and point to a constitutional or statutory provision authorizing him to do so).

¹¹ See Op. Att’y Gen. Fla. 77-08 (1977) and authorities cited therein, wherein this office stated that this conclusion, that public funds may not be expended by a statutory entity for lobbying purposes unless expressly and specifically authorized by statute, is consistent with the weight of authority throughout the country.

¹² Section 2, Ch. 2000-445, Laws of Fla.

AGO 14-02 – March 4, 2014

COUNTIES – TOURIST DEVELOPMENT TAX – TAXATION

WHETHER TOURIST DEVELOPMENT TAX PROCEEDS MAY BE USED TO PROMOTE AND MARKET EVENTS HELD IN COUNTY BUT OUTSIDE SUBCOUNTY TAXING DISTRICT LEVYING TAX

To: The Honorable William Chapman, Chairman, Walton County Board of County Commissioners

QUESTION:

Is Walton County authorized by section 125.0104(5)(a)3., Florida Statutes, to use tourist development tax proceeds to promote and market events held in the county, but outside the subcounty taxing district in which the tourist development taxes are levied and collected?

SUMMARY:

Section 125.0104(5)(a)3., Florida Statutes, does not limit Walton County to using these funds within the boundaries of the subcounty special taxing district levying the tax in which they are levied and collected.

Section 125.0104, Florida Statutes, known as the “Local Option Tourist Development Act”¹ (the act), authorizes a county to impose a tax on short term rentals of living quarters or accommodations within the county unless such activities are exempt pursuant to Chapter 212, Florida Statutes.² The purpose and intent of section 125.0104, Florida Statutes, is to “provide for the advancement, generation, growth and promotion of tourism, the enhancement of the tourist industry, and the attraction of conventioners and tourists from within and without the

state to a particular area or county of the state.”³

The Local Option Tourist Development Act requires that construction of publicly owned facilities financed by proceeds from the tourist development tax be primarily related to the advancement and promotion of tourism. It is the governing body of the county that must make the factual determination of whether a particular facility or project is related to tourism and primarily promotes such a purpose. This determination must follow appropriate legislative findings and due consideration of the specific needs and conditions of the particular locality.⁴ Any such determination must show a distinct and direct relationship between expenditure of tourist development tax revenues and the promotion of tourism.⁵

Subsection (3) of the act provides legislative intent with regard to the privileges taxed by the act, exemptions from the tax, procedures for the levy of the tax, and the rate at which the tax may be imposed and collected. Subsection (3)(b) provides counties with the discretion to levy and impose a tourist development tax in “a subcounty special district” of the county. If the county elects to levy such a tax, it may only do so in a special district that “embrace[s] all or a significant contiguous portion of the county[.]” No definition of the phrase “subcounty special district” is given in Chapter 125, Florida Statutes, nor is a definition provided elsewhere in the statutes where that term is used.⁶ However, this office has opined that a “subcounty special district” for purposes of this statute would appear to refer to any special district that otherwise meets the requirements of the statute, that is, all or significant contiguity with the county.⁷

You have asked whether tourist development tax proceeds may be used to promote and market events held in Walton County, but outside the subcounty taxing district in which the tax is levied. As explained more fully in the discussion below, it is my opinion that section 125.0104(5)(a)3., Florida Statutes, does not limit Walton County to using these funds for activities within the boundaries of the subcounty special taxing district levying the tax although such a district must, by statute, encompass all or a significant portion of the county.

Section 125.0104(5), Florida Statutes, sets forth the authorized uses of tourist development tax revenues. As provided therein,

(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*:⁸

1. To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more:

a. Publicly owned and operated convention centers, sports

stadiums, sports arenas, coliseums, or auditoriums *within the boundaries of the county or subcounty special taxing district in which the tax is levied*; or

b. 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;

2. To promote zoological parks that are publicly owned and operated or owned and operated by not for profit organizations and open to the public;

3. To promote and advertise tourism in this state and nationally and internationally; however, if tax revenues are expended for an activity, service, venue, or event, the activity, service, venue, or event must have as one of its main purposes the attraction of tourists as evidenced by the promotion of the activity, service, venue, or event to tourists;

4. 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*, which may include any indirect administrative costs for services performed by the county on behalf of the promotion agency; or

5. 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. However, any funds identified by a county as the local matching source for beach renourishment, restoration, or erosion control projects included in the long range budget plan of the state's Beach Management Plan, pursuant to s. 161.091, or funds contractually obligated by a county in the financial plan for a federally authorized shore protection project may not be used or loaned for any other purpose. In counties of fewer than 100,000 population, up to 10 percent of the revenues from the tourist development tax may be used for beach park facilities. (e.s.)

The Legislature has specifically limited the use of tourist development tax revenues to projects located "within the boundaries of the county or subcounty special taxing district in which the tax is levied" in section 125.0104(5)(a)1., Florida Statutes. The statutory provision under which Walton County proposes to act is section 125.0104(5)(a)3., Florida Statutes, which contains no such limiting language.

When the Legislature has used a term in one section of a statute but omits it in another section of the same statute, the existence of the term will not be implied where it has been excluded.⁹ Thus, this office will not read into section 125.0104(5)(a)3., Florida Statutes, the limitation that tourist development tax revenues may only be expended for activities within the boundaries of the subcounty special taxing district in which the tax is levied, as the Legislature has clearly imposed such a limitation elsewhere in the statute, but not extended it to subsection (5)(a)3.

In sum, it is my opinion that section 125.0104(5)(a)3., Florida Statutes, does not limit Walton County to using tourist development tax funds for activities within the boundaries of the subcounty special taxing district levying the tax although such a district must, by statute, encompass all or a significant portion of the county.

¹ Section 125.0104(1), Fla. Stat.

² See s. 125.0104(3)(a), Fla. Stat., stating it is the intent of the Legislature that every person who rents, leases, or lets living quarters or accommodations in “any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, roominghouse, mobile home park, recreational vehicle park, condominium, or timeshare resort for a term of 6 months or less is exercising a privilege which is subject to taxation under this section”

³ See Ops. Att’y Gen. Fla. 10-09 (2010), 95-71 (1995), 94-12 (1994), 87-16 (1987), and 83-18 (1983).

⁴ See e.g., Ops. Att’y Gen. Fla. 94-12 (1994) (governing body of the county must make determination that expenditure of tourist development tax revenues for the acquisition of a railway right of way and construction of a public recreational trail falls within the scope of expenditures authorized by s. 125.0104, Fla. Stat.), 10-09 (2010), and 98-74 (1998).

⁵ And see Op. Att’y Gen. Fla. 00-50 (2000).

⁶ See ss. 212.0305(4)(e) and 213.053(10)(a), Fla. Stat., relating respectively to sales and use taxes and state revenue laws.

⁷ See Op. Att’y Gen. Fla. 10-26 (2010).

⁸ And see s. 125.0104(5)(d), Fla. Stat., which provides that “[a]ny 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.”

⁹ See *Metropolitan Dade County v. Milton*, 707 So. 2d 913 (Fla. 3d DCA 1998). And see *Thayer v. State*, 335 So. 2d 815 (Fla. 1976) (mention of one thing in statute implies exclusion of another; *expressio unius est exclusio*

alterius); *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898 (Fla. 1996).

AGO 14-03 – April 30, 2014

DUAL OFFICE-HOLDING – MUNICIPALITIES – PLANNING BOARD – ZONING BOARD

WHETHER ONE APPOINTED MUNICIPAL BOARD CAN HEAR MATTERS DELEGATED TO ANOTHER APPOINTED MUNICIPAL BOARD WHEN THE FIRST MUNICIPAL BOARD IS UNABLE TO TIMELY FULFILL ITS DUTIES

To: Ms. Maggie Mooney-Portale, Town of Longboat Key Attorney

QUESTION:

In light of Article II, section 5(a), Florida Constitution, the dual office-holding prohibition, can one appointed municipal board hear matters delegated to another appointed municipal board as an alternative when the first municipal board is unable to timely fulfill its duties?

SUMMARY:

The Town of Longboat Key would be precluded by Florida's constitutional dual office-holding prohibition from appointing the members of the city's planning board to serve concurrently as the city's zoning board, however, the city could provide legislatively that the city's planning board shall also perform *ex officio* the duties of the zoning board. Such an *ex officio* designation imposing the duties of one office on another office would not violate the provisions of Article II, section 5(a), Florida Constitution.

According to information you have supplied to this office, the Charter of the Town of Longboat Key provides that the town commission shall establish permanent boards by ordinance. The permanent boards of the town are designated by the charter to be the Planning and Zoning Board (the planning board), the Zoning Board of Adjustment (the board of adjustment) and the Code Enforcement Board. The duties and responsibilities of each of these boards are established by ordinance.

You advise that due to the seasonal residency of several members of the Zoning Board of Adjustment, it is often difficult for the zoning board to establish a quorum to do official business. This results in what appears to be serious delays in performing the duties of the board, *i.e.*, to review and approve or deny requests for variances. In one instance,

applications for variances were received by the town in May and a quorum could not be reached until the Zoning Board of Adjustment's October meeting. The board is charged by ordinance with meeting within 30 days after receipt of a matter requiring board action.

As a potential solution to the problem presented by the seasonal absence of members of the zoning board, the town commission is considering adopting an ordinance that would delegate the powers and duties of the zoning board to the town's Planning and Zoning Board for any matter which the zoning board is unable to timely address. Like the zoning board, the planning board is established in the town charter and its members are appointed by the town commission.

While the duties and responsibilities of these two boards appear to be similar, a review of the Longboat Key Code of Ordinances provides "[a] person appointed to this board (the zoning board) may not serve concurrently on any of the following town boards: Code enforcement board, ethics commission or planning and zoning board (or zoning board of adjustment)" in the ordinance creating the Planning and Zoning Board.¹ Thus, the Code of Ordinances contains a prohibition against members of either of these boards serving concurrently on the other.

This office cannot review and provide legal opinions on the language of local legislation as we are statutorily limited to reviewing and providing opinions on the Florida Statutes and the Florida Constitution.² Thus, your question is presented and will be addressed in terms of whether Florida's constitutional dual office-holding prohibition would preclude members of the planning board serving concurrently on the board of adjustment. The Town Attorney may wish to review the duties and responsibilities of each of these boards to determine whether the common law rule of incompatibility is implicated.

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 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.³ 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.”⁴

These two positions, that of a member of the planning board and a member of the zoning board, are quasi-judicial and exercise the sovereign power⁵ according to information supplied to this office. Both serve terms of office and the town ordinances prohibit an elected official or employee of the town from serving on either board. Thus, the holding of two separate offices by an individual serving concurrently on both boards would violate the provisions of Article II, section 5(a), Florida Constitution.

It has long been a settled rule in this state, however, that, assuming a particular officeholder is subject to the constitutional dual office-holding prohibition, a legislative designation of that officer to perform *ex officio* the function of another or additional office is not a holding of two offices at the same time in violation of the Constitution, provided the duties imposed are consistent with those being exercised.⁶ Rather, the newly assigned duties are viewed as an addition to the existing duties of the officer.⁷

For example, in *Advisory Opinion to the Governor*,⁸ the Florida Supreme Court determined that the chairman of the State Road Department could serve as an *ex officio* member of the State Planning Board. The Court pointed out, however, that while additional duties may be validly imposed by the Legislature on a state office *ex officio*, a legislative attempt to authorize the Governor to appoint a state official to another separate and distinct office would be ineffectual under the constitutional dual office-holding prohibition. Thus, there is a distinction between a statute or code provision imposing an *ex officio* position on the holder of another office and one authorizing the appointment of one officeholder to another distinct office.

This office has also recognized that when *ex officio* duties are imposed, Article II, section 5(a), Florida Constitution, is not violated. For example, in Attorney General Opinion 81-72, this office stated that a city council, as the legislative body of a municipality, could impose by ordinance the *ex officio* duties of the office of the city manager on the office of the city clerk. Similarly, this office in Attorney General Opinion 91-48 concluded that while the city commission could not appoint the city manager to simultaneously serve as the city clerk, the charter could impose the duties of the clerk as additional *ex officio* duties on the office of the city manager. Attorney General Opinion 93-42 concluded that a municipality could legislatively merge the offices of fire chief and community redevelopment director into one office and have the one officer perform *ex officio* duties of the other office.⁹

As mentioned above, a distinction has been drawn between a statute

imposing an *ex officio* position on the holder of another office and one authorizing the appointment of one officeholder to another distinct and separate office. For example, the Florida Supreme Court has pointed out while additional duties may validly be imposed by the Legislature on a state officer *ex officio*, a legislative attempt to authorize the Governor to appoint a state official to another separate and distinct office would be ineffectual under the constitutional dual office-holding prohibition.¹⁰ The Charter of the Town of Longboat Key establishes the Zoning Board of Adjustment and the Planning and Zoning Board as separate and distinct permanent entities and an attempt by the town to authorize simultaneous service on these two boards would appear to be questionable in the absence of an *ex officio* designation.

The information you have provided to this office suggests that the Town of Longboat Key is considering designating the members of the city's planning board to serve concurrently as the city's zoning board. Thus, the city contemplates adopting an ordinance which imposes such additional duties on the members of the planning board by virtue of their membership on that board.¹¹ Accordingly, the imposition and designation of such additional or *ex officio* duties on the members of the city's planning board would not violate the constitutional prohibition against dual office-holding contained in Article II, section 5(a), Florida Constitution.

I cannot advise you, however, of any instance in which this office or the courts have considered the sporadic *ex officio* delegation of duties resulting from the inability of an officer to timely perform his or her duties. It would appear that the town may be dealing with instances of misfeasance or vacancy in office¹² which could be addressed under the terms of those ordinances or statutes.

¹ See ss. 33.20(A) and 158.026(A)(1), Longboat Key, Fla., Code of Ordinances.

² See s. 16.01(3), Fla. Stat., and Department of Legal Affairs Statement Concerning Attorney General Opinions available at [www.myfloridalegal.com/LegalResources/AGOpinions/Frequently Asked Questions](http://www.myfloridalegal.com/LegalResources/AGOpinions/FrequentlyAskedQuestions).

³ See, e.g., Op. Att'y Gen. Fla. 80-97 (1980).

⁴ *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).

⁵ For discussions of the nature of these "offices," see Ops. Att'y Gen. Fla. 06-13 (2006) (simultaneous service as member of city board of adjustment, a quasi-judicial body, and city planning and zoning board, exercising powers of sovereign, constitutes prohibited dual office-holding); 85-21 (1985) (board of adjustment is an office); 86-105 (1986) (municipal building board of appeals is an office); 05-59 (2005) (town committees given

authority to make factual determinations, review permit applications, issue permits, grant variances, or impose fines exercise sovereign powers [and are] offices for purposes of dual office-holding prohibition. *But see* Op. Att’y Gen. Fla. 13-22 (2013) (member of Ft. Pierce planning board is not an officer for purposes of dual office-holding prohibition).

⁶ *See State v. Florida State Turnpike Authority*, 80 So. 2d 337, 338 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *City of Riviera Beach v. Palm Beach County Solid Waste Authority*, 502 So. 2d 1335 (Fla. 4th DCA 1987) (special act authorizing county commissioners to sit as members of county solid waste authority does not violate Art. II, s. 5[a], Fla. Const.); *City of Orlando v. State Department of Insurance*, 528 So. 2d 468 (Fla. 1st DCA 1988) (where the statutes had been amended to authorize municipal officials to serve on the board of trustees of municipal police and firefighters’ pensions trust funds, such provision did not violate the constitutional dual office-holding prohibition).

⁷ *See Webster’s Third New International Dictionary, Ex officio*, p. 797 (unabridged ed. 1981) (“*ex officio*” means “by virtue or because of an office”).

⁸ 1 So. 2d 636 (Fla. 1941).

⁹ *And see* Ops. Att’y Gen. Fla. 80-97 (1980) (membership of elected municipal officer on metropolitan planning organization as prescribed by statute does not violate Art. II, s. 5[a], Fla. Const.); 94-66 (1994) (designation by county ordinance that county commissioners would perform the functions of the board of adjustment appeared to be an *ex officio* designation and did not violate the dual office-holding prohibition); 94-98 (1994) (imposition of additional duties on the mayor or other city council members under the city code to serve on the board of trustees of the police officers’ and firefighters’ pension trust fund would not violate Art. II, s. 5[a], Fla. Const); and 00-72 (2000) (legislative designation that a representative from county government, the school district, the sheriff’s office, the circuit court, and the county children’s board serve on a Community Alliance constituted an *ex officio* designation of officers from the enumerated governmental entities). *Cf.* Op. Att’y Gen. Fla. 90-45 (1990), in which this office concluded that a member of the civil service board could not be appointed to the board of trustees of the general pension trust board since there was no *ex officio* designation imposing the duties of one office on the other.

¹⁰ *Advisory Opinion to Governor*, 1 So. 2d 636 (Fla. 1941). *And see* Ops. Att’y Gen. Fla. 76-92 (1976) (the action of a city council which did not abolish the office of town marshal, but merely authorized the mayor to perform the duties of that office would probably violate the dual office-holding prohibition) and 70-46 (1970) (it was doubtful that a city commissioner could also be a municipal judge where the charter created the office of municipal judge as a separate and distinct office; while the charter authorized the city commission to appoint one of its own members as municipal judge, it did not designate that office as an *ex officio* office to

be performed by the city commissioner).

¹¹ See Op. Att’y Gen. Fla. 94-66 (1994) (designation by ordinance of board of county commissioners to perform functions of board of adjustment is *ex officio* designation and thus would not violate dual office-holding prohibition).

¹² See s. 33.20(B), Longboat Key, Fla., Code of Ordinances, which provides that “[a]ny member who fails to attend three consecutive scheduled and called regular meetings shall automatically forfeit his appointment, and the town commission shall promptly fill the vacancy. Vacancies shall be filled by appointment for unexpired terms only” and s. 158.026(A) (2), Longboat Key, Fla., Code of Ordinances, providing similar language for the zoning board. *And see* s. 158.026(B), *id.*, requiring the board of adjustment to establish its own rules and regulations for the operation of the board.

AGO 14-04 – June 18, 2014

**MUNICIPALITIES – CODE ENFORCEMENT – SPECIAL
MAGISTRATES – COSTS**

WHETHER A MUNICIPALITY MAY RECOVER FROM THE
CODE VIOLATOR THE FEES PAID TO THE SPECIAL
MAGISTRATE FOR PERFORMING HIS OFFICIAL DUTIES;
WHETHER A MUNICIPALITY MAY RECOVER FROM THE CODE
VIOLATOR THE FEES PAID TO THE SPECIAL MAGISTRATE’S
ADMINISTRATIVE PERSONNEL FOR PERFORMING THEIR
DUTIES

To: Ms. Heather M. Ramos, Town of Windermere Attorney

QUESTIONS:

1. Do the provisions of section 162.07(2), Florida Statutes, permit the Town of Windermere to recover from the code violator the costs that the town pays to the special magistrate for his time for performing his services as a special magistrate?

2. Do the provisions of section 162.07(2), Florida Statutes, permit the Town of Windermere to recover from the code violator the costs that the town pays to the special magistrate’s assistant for her time spent assisting the special magistrate with the performance of his services as a special magistrate?

SUMMARY:

1. The provisions of section 162.07(2), Florida Statutes, which authorize the recovery of all costs incurred by a municipality

in prosecuting a violator before a code enforcement board or special magistrate do not authorize the award of compensation or fees as “costs” to the special master for his or her services incurred in such a prosecution.

2. Section 162.07(1), Florida Statutes, requires a local governmental body utilizing the services of a special magistrate as a code enforcement board, to provide clerical and administrative personnel as are reasonably required to accomplish the duties of the board. Nothing in Chapter 162, Florida Statutes, would authorize the inclusion of these administrative personnel charges within the “costs” assessed against a code violator.

According to information you have provided to this office, the Town of Windermere has created an alternate code enforcement system pursuant to subsection 162.03(2), Florida Statutes. The system gives a special magistrate designated by the town council the authority to conduct code enforcement hearings and impose and authorize the collection of fines and costs against pending or repeat violators of town codes and ordinances. The town's special magistrate has the same status as an enforcement board under Chapter 162, Florida Statutes. The special magistrate sits as an impartial hearing officer to determine, based on the evidence presented during the hearing, if a violation has occurred. The special magistrate does not initiate enforcement proceedings or inspect for code violations.

QUESTION 1.

You ask whether section 162.07(2), Florida Statutes, permits the Town of Windermere to recover the funds the town pays to the special magistrate for performing the official services of a special magistrate from a code violator.

Chapter 162, Florida Statutes, establishes administrative enforcement procedures and a means of imposing administrative fines by local governmental bodies for violations of local codes and ordinances for which no criminal penalty has been specified. This mechanism is necessary in light of the provisions of Article V, section 1, and Article I, section 18, Florida Constitution, which provide that while commissions established by law or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices, no administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty *except as provided by law*.¹ Thus, unless provided for in statute, no administrative penalty or fine may be imposed by an administrative agency such as a code enforcement board or a special master serving as the code enforcement board.²

Section 162.07(2), Florida Statutes, states:

Each case before an enforcement board shall be presented by the local governing body attorney or by a member of the administrative staff of the local governing body. *If the local governing body prevails in prosecuting a case before the enforcement board, it shall be entitled to recover all costs incurred in prosecuting the case before the board and such costs may be included in the lien authorized under s. 162.09(3).* (e.s.)

Thus, your question is whether the amounts paid to the special magistrate by the town for performing his services may be characterized as “costs” which are recoverable under the statute. It is my opinion that they may not as they constitute “fees” paid to a public officer for his services not “costs” incurred in prosecuting or defending an action.

Section 162.07(2), Florida Statutes, provides no definition for the term “costs” as used in that statute. However, “costs” are generally understood to be allowances to a party for the expenses incurred in prosecuting or defending a suit and are an incident to the judgment. The term “costs” is commonly understood in the legal sense to mean “[t]he charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees. – Also termed *court costs*.”³ (Emphasis in original) “Costs” are distinguishable from “fees” although the two terms are frequently used interchangeably.⁴ “Fees” are understood to be compensation to public officers for services rendered in the course of the case.⁵ “Fees” represent a charge for labor or services, especially professional services.⁶

Therefore, it is my opinion that the provisions of section 162.07(2), Florida Statutes, which authorize the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board or special magistrate do not authorize the award of compensation or fees as “costs” to the special master for his or her services incurred in such a prosecution.

QUESTION 2.

Your letter also advises that the special magistrate employs an assistant or paralegal who assists in providing services related to the special magistrate position. You ask whether, pursuant to section 162.07(2), Florida Statutes, the town may recover from a code violator the costs incurred by the town for the services of the special magistrate’s assistant.

Based on the discussion above relating to the fees paid special magistrates, I believe that your second question has been answered. The compensation paid to public officers for services rendered in the course of the case are not included within the term “costs” unless the Legislature has specifically included them. I am aware of no such legislative determination in section 162.07(2), Florida Statutes, and

thus, must conclude that these fees may not be included within those “costs.”

As support for this conclusion, I note that this office, in Attorney General Opinion 72-60, considered the assessment of court costs in criminal cases and stated:

Costs properly chargeable against a defendant on conviction generally do not include the general expense of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government. Under this principle the costs of jurors or other expenses in connection with jurors are not chargeable. Likewise, expenses of the trial judge are considered part of government expense and not chargeable as costs. As a general rule, fees and mileage of government witnesses are held taxable costs of prosecution against convicted defendants.

While your questions deal with quasi-judicial code enforcement procedures and not with criminal proceedings, it would appear that the same considerations would apply in determining whether the expenses of the special magistrate and his or her assistant or paralegal are chargeable as costs.

In fact, section 162.07(1), Florida Statutes, includes the following directive:

The local governing body shall provide clerical and administrative personnel as may be reasonably required by each enforcement board for the proper performance of its duties.

Thus, it appears that the local government is made responsible for providing the clerical and administrative personnel that may be required to accomplish the duties of the code enforcement board or a special magistrate serving as the code enforcement board.

In sum, it is my opinion that the provisions of section 162.07(2), Florida Statutes, which authorize the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board or special magistrate do not authorize the award of compensation of fees as “costs” to the paralegal or assistant to the special master for his or her services incurred in such a prosecution.

¹ See generally Op. Att’y Gen. Fla. 79-109 (1979) (governing body of charter county prohibited in absence of statutory authorization from providing by ordinance for imposition of civil penalties); *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145, 1148 (Fla. 4th DCA 1982) (holding that provisions of county ordinance authorizing assessment

of penalties by county agency was unconstitutional and agreeing with conclusion in Op. Att’y Gen. Fla. 79-109).

² See Op. Att’y Gen. Fla. 09-29 (2009) (a local government or its governing body derives no delegated authority from Ch. 162, Fla. Stat.; further, municipalities derive no home rule power from Art. VIII, s. 2(b), Fla. Const., or s. 166.021, Fla. Stat., to regulate code enforcement boards or otherwise regulate statutorily prescribed enforcement procedure); Ops. Att’y Gen. Fla. 85-84 (1985), 79-109 (1979); *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145 (Fla. 4th DCA 1982) (holding that the provisions of a county ordinance authorizing assessment of penalties by county agency was unconstitutional and agreeing with Op. Att’y Gen. Fla. 79-109).

³ See Black’s Law Dictionary *cost*, p. 372 (8th ed.).

⁴ See 20 C.J.S. *Costs* s. 3, “Distinctions” (1990).

⁵ See *Dade County v. Strauss*, 246 So. 2d 137 (Fla. 3d DCA 1971), *cert. denied*, 253 So. 2d 864 (Fla. 1971), *cert. denied*, 92 S.Ct. 1793, 406 U.S. 924, 32 L.Ed.2d 125 (1972) (“costs” and “fees” are different in their nature generally; “costs” are allowances to party of expenses incurred in successful transaction or defense of suit while “fees” are compensation to officer for services rendered in progress of cause). *And see Flood v. State*, 117 So. 385 (Fla. 1928) (“fee” is charge fixed by law for service or public officer of for use of privilege under government’s control); *and* 20 C.J.S. *Costs* s. 3, “Distinctions” (1990).

⁶ See Black’s Law Dictionary *fee*, p. 647 (8th ed.). *Cf.* Op. Att’y Gen. Fla. 09-07 (2009) (provisions of s. 162.07(2), Fla. Stat., which authorizes the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board would not authorize the board to award attorney’s fees to the municipality for attorney’s fees incurred in such a prosecution whether those fees are incurred directly or indirectly).

AGO 14-05 – June 18, 2014

**CONTRABAND FORFEITURE TRUST FUND – SHERIFF –
PILOT PROGRAM – PRIVATE SECURITY PERSONNEL**

USE OF CONTRABAND FORFEITURE TRUST FUND MONEYS
FOR PILOT CRIME PREVENTION PROGRAM USING PRIVATE
SECURITY PERSONNEL

To: The Honorable Jerry L. Demings, Orange County Sheriff

QUESTION:

Is the Orange County Sheriff’s Office authorized to use Florida Contraband Forfeiture Trust Fund monies to support a

pilot program designed to reduce crime and the fear of crime in high crime neighborhoods by creating a task force comprised of private security personnel?

SUMMARY:

Special law enforcement trust funds, which have been requested by and appropriated to the Orange County Sheriff's Office pursuant to the Florida Contraband Forfeiture Act, may be used to support a time-limited pilot program creating a task force comprised of private security personnel and designed to reduce crime and the fear of crime in high crime neighborhoods.

According to information you have submitted to this office, the Orange County Sheriff's Office is considering using Florida Contraband Forfeiture Trust Fund monies for a pilot program. The sheriff intends to identify certain high-crime, low-income residential neighborhoods and create a task force comprised of private security personnel to provide targeted patrols. This program will be conducted on a trial basis to determine the efficacy of using these types of resources. Areas targeted for the pilot program will have specific crime trends that may be tracked and be identified through crime analysis and historical knowledge of those areas. Other indicators such as high foreclosure or abandoned property rates may also be used. The sheriff's office will assess the success of the program by evaluating and tracking criminal activity through the sheriff's Crime Analysis Unit. Benchmarks will be established to provide objective, empirical data on crime statistics as well as the residents' perception and fear of crimes.

The private security personnel participating in this program would not be used to meet the normal day-to-day operating needs of the sheriff's office, such as responding to calls for service handled by deputies. Instead, their activities will be dedicated to a specific, identifiable area to conduct focused activities to prevent and identify crimes. Their activities would be supplemental to those services provided by sworn personnel and would be specifically aimed at the problems identified in the neighborhood. You advise that the Sheriff's allocation of sworn personnel to these areas would not be altered or supplanted by the private security officers.

The Florida Contraband Forfeiture Act (the Act), sections 932.701-932.707, Florida Statutes, authorizes the seizure and forfeiture of contraband articles, as well as the vessels, motor vehicles, aircraft, and other personal property used in transporting, concealing, or conveying contraband.¹ Under the Act, detailed procedures are set forth to effectuate such forfeitures and for the disposition of forfeited property.² The Act authorizes the law enforcement agency effecting a forfeiture of seized property to sell or otherwise salvage or transfer the property to any public or nonprofit organization rather than retaining it for the use

of the law enforcement agency.³ If forfeited property is sold, proceeds are first applied to any preserved lien balances, then to various costs incurred in connection with the forfeiture proceedings.⁴

For counties, the remaining proceeds are deposited in a special law enforcement trust fund established by the board of county commissioners.⁵ These funds may only be expended upon request of the sheriff to the board of county commissioners, accompanied by a written certification that the request complies with section 932.7055(5), Florida Statutes, and only upon appropriation to the sheriff's office by the board of county commissioners.⁶ Thus, in the instant case, any funds from the special trust fund for this program may only be expended at the request of the Sheriff of Orange County and upon appropriation to the sheriff's office by the board of county commissioners.

Further, the Act requires that

[s]uch proceeds and interest earned therefrom shall be used for school resource officer, crime prevention, safe neighborhood, drug abuse education and prevention programs, or for other law enforcement purposes, which include defraying the cost of protracted or complex investigations, providing additional equipment or expertise, purchasing automated external defibrillators for use in law enforcement vehicles, and providing matching funds to obtain federal grants. The proceeds and interest may not be used to meet normal operating expenses of the law enforcement agency.⁷

Section 932.7055(5)(a), Florida Statutes, prohibits the use of contraband forfeiture trust funds as "a source of revenue to meet normal operating needs of the law enforcement agency." Based upon identical language in a previous statute,⁸ this office has stated that the legislative intent expressed therein is that these trust funds should be used only for the expressly specified purposes or for other extraordinary programs and purposes, beyond what is usual, normal, regular, or established.⁹

While it is clear that combating crime is a normal duty of law enforcement agencies, you have stated that this pilot program would be supplemental to the sheriff's allocation of sworn personnel to the areas targeted. The act specifically authorizes the use of such proceeds for "crime prevention, safe neighborhood, drug abuse education and prevention programs, or other law enforcement purposes" and directs the use of these funds to defray the cost of "providing additional equipment or expertise[.]"

In Attorney General Opinion 93-18, this office concluded that special law enforcement trust funds could be used to pay current city police officers overtime to work on a new task force directed to preventing crimes involving tourists and drug trafficking:

While this office has recognized that detecting and combating drugs and drug abuse may be a normal duty of law enforcement agencies, participating in a task force concept for accomplishing these purposes would appear to be outside the regular or established approach to such law enforcement duties.

In a similarly reasoned opinion determining that participation in a multi-jurisdictional drug task force was an allowable expense under the Florida Contraband Forfeiture Act,¹⁰ this office also concluded that the funding of a law enforcement officer from contraband forfeiture funds was permissible when the officer was assigned full-time to the drug task force.¹¹

However, in Attorney General Opinion 95-29, this office cautioned that the special law enforcement trust fund, established under the Florida Contraband Forfeiture Act, could not be used to pay current police officers in the Vice, Intelligence and Narcotics Division of the City of Plantation Police Department who were engaged in carrying out their normal law enforcement functions. These officers were tenured employees, not new or temporary employees and filled regularly budgeted positions.

Thus, while this office has approved the use of contraband forfeiture trust funds to supplement the salaries of officers engaged in activities outside of the regular activities of such officers, those moneys may not be used to fund the normal operating budget of a police department.

The pilot program under consideration by your office would be of limited duration. It would be directed at reducing crime and the fear of crime in high crime neighborhoods. It would not supplant or alter the sheriff's allocation of sworn personnel to these areas such that it could be characterized as accomplishing the normal day-to-day activities of law enforcement personnel in the sheriff's department. The funding of crime prevention programs is expressly authorized by the Act.¹² The Legislature has made the determination that the expenditure of trust funds for crime prevention programs is appropriate and does not constitute a source of revenue to meet normal operating needs of the law enforcement agency.

Therefore, I am of the opinion that special law enforcement trust funds which have been requested by and appropriated to the Orange County Sheriff's Office may be used to support a time-limited pilot program creating a task force comprised of private security personnel and designed to reduce crime and the fear of crime in high-crime neighborhoods.

¹ Section 932.702, Fla. Stat.

² Sections 932.703 and 932.704, Fla. Stat.

³ Section 932.7055, Fla. Stat.

⁴ Section 932.7055(4), Fla. Stat.

⁵ Section 932.7055(5)(a), Fla. Stat.

⁶ *Id.* at (5)(b).

⁷ *Supra* n.5.

⁸ Section 932.704(3)(a), Fla. Stat. (1991), stated that these funds could be used “to defray the costs of protracted or complex investigations; to provide additional technical equipment or expertise . . .; to provide matching funds to obtain federal grants; or for school resource officer, crime prevention, or drug abuse programs or such other law enforcement purposes as the . . . governing body of the municipality . . . deems appropriate and *shall not be a source of revenue to meet normal operating needs of the law enforcement agency.*” (e.s.)

⁹ *See, e.g.*, Ops. Att’y Gen. Fla. 89-78 (1989) (payment of salaries of police personnel would appear to be a normal operating expense of the municipal police department and special law enforcement trust funds may not be used to augment such salaries); 83-09 (1983) (furnishing medical attention and treatment to county prisoners is a continuing and ongoing or regular duty of the sheriff’s office and forfeiture trust fund monies may not, therefore, be used for such purpose).

¹⁰ *See Op.* Att’y Gen. Fla. 93-06 (1993).

¹¹ *And see* Inf. Op. to Chief Wayland Clifton, Jr., dated September 17, 1990, stating that the City of Gainesville could use contraband forfeiture funds to pay the salary and benefits of a full time legislative liaison who was to develop statewide legislation for criminal justice assessment centers. This office concluded that such funds could be used in light of the nonrecurring limited duration of the position, provided that the position fell outside of the normal operating needs of the law enforcement agency and the municipal governing body determined that it fulfilled an appropriate law enforcement purpose.

¹² Section 932.7055(5)(a), Fla. Stat.

AGO 14-06 – June 18, 2014

PUBLIC RECORDS – CONTRACTS – PUBLIC AGENCIES

WHETHER STATUTORY PUBLIC RECORDS REQUIREMENTS
APPLY TO ALL PUBLIC AGENCY CONTRACTS OR APPLICATION
IS LIMITED

To: *The Honorable Wilton Simpson, Senator, District 18*

QUESTION:

Does the language of section 119.0701(1)(a), Florida Statutes, “. . . and is acting on behalf of the public agency . . .,” result in the nature of the services provided being the determining factor as to the applicability of Chapter 119, Florida Statutes, to a contractor; or does a contract for services with a public agency, regardless of the nature of the services, automatically result in that private contractor being subject to the requirements of the Public Records Law?

SUMMARY:

The requirements of section 119.0701, Florida Statutes, apply to “contractor[s]” who contract with public agencies and are acting on behalf of the public agency in providing those services. Thus, based on the terms of section 119.0701(1)(a), Florida Statutes, the nature and scope of the services provided by a private contractor determine whether he or she is acting on behalf of an agency and would be subject to the requirements of the statute.

Section 119.0701, Florida Statutes, was created by the Legislature during the 2013 Legislative Session as a component of a bill relating to governmental accountability.¹ Section 1 of CS/CS/HB 1309, which became section 119.0701, Florida Statutes (2013), “requires public agency contracts for services performed on behalf of the agency to contain contract provisions clarifying the public record responsibilities of the contractor.”² The language about which you inquire is found in section 119.0701(1)(a), Florida Statutes, defining a “contractor” for purposes of the statute:

“Contractor” means an individual, partnership, corporation, or business entity that enters into a contract for services with a public agency *and is acting on behalf of the public agency* as provided under s. 119.011(2). (e.s.)³

Thus, for those contractors who are subject to its provisions, the statute treats the private contractor as one taking the place of or standing in the shoes of the public agency, that is “acting on behalf of” the public agency, and requires that the private entity comply with the same public records requirements as the public agency.⁴

While I am aware that section 119.0701(2), Florida Statutes, provides that “each public agency contract for services must include” the provisions set forth in the statute, these requirements are imposed on contracts entered into by public agencies with certain “contractors.”

“Contractors” coming within the scope of the statute are defined as those “enter[ing] into a contract for services with a public agency and . . . acting on behalf of the public agency”⁵ Thus, the statutory requirements for contractual provisions relating to Florida’s Public Records Law apply to “contractor[s]” coming within the scope of the statute, that is, those who not only enter into a contract for services with a public agency, but are “acting on behalf of the public agency” in providing those services.⁶

This conclusion is supported by case law construing the language of section 119.011(2), Florida Statutes, addressing the definition of the term “agency” for purposes of the Public Records Law. The statute includes public or private agencies or persons “acting on behalf of any public agency” within the definition of an “agency.” As the court in *Parsons & Whittemore, Inc. v. Metropolitan Dade County* noted:

We are unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation acts “on behalf of” the agency.⁷

Thus, for example, a private entity, the Salvation Army,⁸ which had contracted with a county to provide all of the county’s probation services for misdemeanants was held by the court to have taken the place of the county as the provider of probation services. The Salvation Army was acting on behalf of the county and the private entity’s records “which would be public if the county were providing the . . . services” were public records when the Salvation Army performed these tasks. The courts will look to whether a private entity has been delegated that which would otherwise be an agency responsibility in order to determine whether the private entity is “acting on behalf of” the public agency within the scope of the statute.⁹

In sum, it is my opinion that the requirements of section 119.0701, Florida Statutes, apply to “contractor[s]” who contract with public agencies *and* are acting on behalf of the public agency in providing those services. Thus, based on the terms of section 119.0701(1)(a), Florida Statutes, the nature and scope of the services provided by a private contractor determine whether he or she is “acting on behalf of” an agency and thus, would be subject to the requirements of the statute.

¹ See CS/CS/HB 1309, Florida House of Representatives, 2013 Legislative Session, and the title of the act.

² See Summary Analysis, House of Representatives Final Bill Analysis for CS/CS/HB 1309, dated June 10, 2013.

³ Compare the definition of the term “contractor” in ss. 119.0701(1)(a) and 119.011(2), Fla. Stat., with the definition of “contractor” in s.

287.012(7), Fla. Stat.: “Contractor” means a person who contracts to sell commodities or contractual services to an agency.”

⁴ See Letter from Senator Don Gaetz to Attorney General Bondi dated June 13, 2013, discussing the crafting of the language of s. 119.0701(2), Fla. Stat., by the Senate and the inclusion of the language in HB 1309.

⁵ The definition provides that the contractor is “acting on behalf of the public agency as provided under s. 119.011(2).” Section 119.011(2), Fla. Stat., is a definitional section and provides the definition of “[a]gency” as follows:

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

⁶ When the language of the statute is clear and unequivocal, the legislative intent may be gleaned from the words used without applying incidental rules of construction. See *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc.*, 681 So. 2d 826 (Fla. 1st DCA 1996); Ops. Att’y Gen. Fla. 00-46 (2000), 99-44 (1999), and 97-81 (1997).

⁷ 429 So. 2d 343, at 346 (Fla. 3d DCA 1983). And see *News and Sun-Sentinel Co. v. Schwab, Twitty, Hanser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992).

⁸ *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997).

⁹ See *News and Sun-Sentinel Company*, *supra* n.8. And see *Booksmart v. Barnes & Noble*, 718 So. 2d 227, 229 n.4 (Fla. 3d DCA 1998) (privately owned on-campus bookstore, which kept university instructors’ course book list forms, was custodian of public records and agent of university and could not deny access to forms to others); *Sarasota Herald - Tribune Co. v. Community Health Corp., Inc.*, 582 So.2d 730 (Fla. 2d DCA 1991) (separate corporation created by county public hospital board was subject to Public Records Act as business entity acting on behalf of county board, in at least some of the corporation’s functions).

AGO 14-07 – August 19, 2014

**PUBLIC RECORDS – PROPERTY APPRAISER –
EXEMPTIONS – HOME ADDRESSES**

WHETHER PROPERTY APPRAISER MUST HONOR EXEMPTION
FOR HOME ADDRESS OF QUALIFYING INDIVIDUAL WHO IS
NOT OWNER OF PROPERTY; WHETHER PROPERTY APPRAISER
MUST REDACT SITE ADDRESS IF OTHER PERSONAL
IDENTIFYING INFORMATION IS REDACTED

To: The Honorable Pam Dubov, Pinellas County Property Appraiser

QUESTIONS:

Pursuant to section 119.071(4)(d), Florida Statutes:

1. Must the Property Appraiser protect the “home address” of a qualifying individual that does not own the property and is not referenced on the tax roll in connection with the property?

2. Must the Property Appraiser redact a property’s site address if the name of the qualifying individual and anything that could identify that person, is redacted from the records of the Property Appraiser?

SUMMARY:

1. Section 119.071(4)(d), Florida Statutes, makes the home addresses, telephone numbers, and other personal information relating to specified officers and employees exempt from inspection and copying without regard to whether or not they own the particular real property. If the property appraiser receives a request for application of the exemption from one of the designated officers or employees, the property appraiser is required to comply with that request as it applies to all public records maintained by that office.

2. The statute states that the “home address” is exempt and must be maintained by the custodian of the information as exempt if the officer or employee makes a written request for such treatment. In light of the intent of the Legislature for adopting these provisions, that is, the privacy and safety of specified individuals, the “site address,” which is the street or mailing address of the particular property, should be maintained as exempt if the property appraiser has received a written request for such treatment from that officer.

Your letter suggests that the exemptions in section 119.071(4), Florida Statutes, are written to apply to agencies that maintain personnel or other person-based records, where addresses are maintained only in association with individual employees. Property Appraiser records, according to the information you have submitted, are structured around the location of each parcel in the County, which is maintained on the

tax roll as required by sections 192.011 and 193.085, Florida Statutes. Based on the unique nature of property appraiser records, you have requested assistance in determining the applicability of the exemption from public inspection and copying set forth in section 119.071(4)(d), Florida Statutes.

QUESTION 1.

Section 119.071(4)(d)3., Florida Statutes, provides that

An agency that is the custodian of the information specified in subparagraph 2. and that is not the employer of the officer, employee, justice, judge, or other person specified in subparagraph 2. shall maintain the exempt status of that information only if the officer, employee, justice, judge, other person, or employing agency of the designated employee submits a written request for maintenance of the exemption to the custodial agency.

Subparagraph 2. sets forth the personnel whose home addresses, telephone numbers, and various other personal information is made exempt from inspection and copying under the statute. Included among these personnel are law enforcement personnel, firefighters, correctional officers, prosecutors, judges, code enforcement officers, human resource managers as well as certain employees of the Department of Health, Revenue, and Children and Families. The exemption protects not only these officials, but information about their spouses and children. Thus, the statute requires that an agency which has custody of this information but is not the employer of the officer specified must maintain the exempt status of this personal information if the agency is presented with a written request for such treatment by either the person specified in subparagraph 2. or his or her employer.

It is a general rule of statutory construction that when a statute is “clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.”¹ However, if a statute is susceptible of more than one meaning, legislative history may assist in determining legislative intent.² The courts will not ascribe to the Legislature an intent to create an absurd or harsh consequence.³ No literal interpretation of a statute should be used that leads to an unreasonable conclusion or a purpose clearly at variance with the legislative intent.⁴ In construing a statute, the act as a whole should be considered, along with the problem to be corrected, the language of the act and the state of the law already existing, and a construction should be given that comports with legislative intent.⁵

Legislative history relating to the adoption of the original exemption for law enforcement personnel suggests that the purpose of the amendment was to exempt from disclosure “certain personal information

relating to law enforcement personnel and their families.”⁶ Comments from committee members at the meeting in which the amendment was adopted indicate that it was the product of a consensus that the personal privacy of law enforcement officers and their families should be protected.⁷

The statute does not restrict or limit its application based on ownership of the real property which may be the “home address” of a specified individual; rather, the protection is extended based on the official title and duties assigned to that officer or employee. The statute identifies the “home address” of various officials as exempt from inspection and copying. As this office has noted previously, the legislative history for this provision clearly evinces an intent that information that would reveal the location of a specified individual’s home should be treated as exempt from the Public Records Law.⁸

In sum, section 119.071(4)(d), Florida Statutes, makes the home addresses, telephone numbers, and other personal information relating to specified individuals exempt from inspection and copying without regard to whether or not they own the real property at which they reside. If the property appraiser receives a request for application of the exemption from one of the specified individuals, the property appraiser is obliged to honor that request as it applies to all records containing exempt information maintained by that office.

QUESTION 2.

You have also asked whether the property appraiser must apply the exemption to a property’s “site address” if the name of the qualifying individual and anything that could identify that person is redacted from the record. Discussions with your office indicate that the “site address” is usually the mailing or street address of the particular property. You suggest that the appropriate method for protecting the “home addresses” of officers is to remove any data that would identify the property owner’s name *in connection with* the address – such as owner names and mailing addresses, grantor/grantee information, OR Book/Page numbers, and permit numbers. You argue that although the “site address,” may be the “home address” of the qualifying individual, it is the property’s association with the person that appears to be protected under the law.

As discussed above, this office has noted previously that the legislative history for this provision clearly evinces an intent that information that would reveal the location of a specified individual’s home should be treated as exempt from the Public Records Law. This office concluded in Attorney General Opinion 2004-20, that the property appraiser is precluded by section 119.07(3)(i)1. - 3., Florida Statutes (now section 119.071[4][d]2.a.[]), Florida Statutes), from making the technology available to the public that would enable a user to view a map on the

Internet showing the physical location of a law enforcement officer's home, even though the map did not contain the actual home address of the law enforcement officer's property, if the property appraiser has received a written request for application of the exemption from that officer.

Thus, a custodian who is not the employer of an individual whose personal information may be exempted from public disclosure pursuant to section 119.071(4), Florida Statutes, must maintain the exempt status of such information when requested to do so in writing by the protected person or his or her employing agency. The statute governs the protection of identifying information and does not differentiate among the documents or records in which the information may be found. The statute itself limits the exemption to "home addresses" and would appear to apply to any real property which the qualifying individual may currently utilize as a home or residence.⁹ A common definition of the word "home" includes "a house, apartment, or other shelter that is the usual residence of a person, family, or household[;]"¹⁰ and "[a] place where one lives; residence."¹¹

Accordingly, should the property appraiser receive a request pursuant to section 119.0701(4)(d)3., Florida Statutes, it is my opinion that the property appraiser is required to apply the exemption to all such identifying information in public records that is in or may come into his or her custody.¹² While this office recognizes the unique nature of records maintained by the Property Appraiser, the Attorney General is without authority to qualify or read into this statute an interpretation or define words in the statute in such a manner which would result in a construction that seems more equitable under circumstances presented by a particular factual situation; such construction when the language of a statute is clear would, in effect, be an act of legislation which is exclusively the prerogative of the Legislature.¹³

In sum, section 119.071(4)(d), Florida Statutes, states that the "home address" of a specified individual is exempt and must be maintained by the custodian of the information as exempt if the officer or employee makes a written request for application of the exemption. In light of the intent of the Legislature for adopting these provisions, that is, the privacy and safety of specified individuals, the "site address" for a specified individual's home, i.e., the actual street or mailing address of the property of an officer or employee, should be maintained as exempt from public inspection and copying if the property appraiser has received a written request for application of the exemption from that officer.

¹ *Van Pelt v. Hilliard*, 78 So. 693, 694 (Fla. 1918).

² *Rollins v. Pizzarelli*, 761 So. 2d 294, 295 (Fla. 2000); *State v. Jefferson*, 758 So. 2d 661 (Fla. 2000).

³ *City of St. Petersburg v. Siebold*, 48 So. 2d 291 (Fla. 1950); *Winter v. Playa del Sol, Inc.*, 353 So. 2d 598 (Fla. 4th DCA 1977).

⁴ *See, e.g.*, Ops. Att’y Gen. Fla. 99-71 (1999) and 86-24 (1986).

⁵ *Foley v. State ex rel. Gordon*, 50 So. 2d 179, 180 (Fla. 1951); *Dade Federal Savings and Loan Association v. Miami Title & Abstract Division of American Title Insurance Company*, 217 So. 2d 873 (Fla. 3d DCA 1969). *And see State v. Rodriguez*, 365 So. 2d 157 (Fla. 1978); *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992)

⁶ Senate Staff Analysis of HB 1531, dated May 16, 1979.

⁷ Audiotape of meeting of the Senate Governmental Operations Committee, May 15, 1979. *And see* Inf. Op. to Cindy A. Laquidara, dated July 17, 2003, which discusses the legislative history of this amendment at length.

⁸ *See* Op. Att’y Gen. Fla. 04-20 (2004), which concluded that the Property Appraiser is precluded by s. 119.07(3)(i), Fla. Stat., from making the technology available to the public that would enable a user to view a map on the Internet showing the physical location of a law enforcement officer’s home, even though this map does not contain the actual home address of the law enforcement officer’s property, if the property appraiser has received a written request for confidentiality from that officer.

⁹ *See, e.g.*, Op. Att’y Gen. Fla. 10-37 (2010).

¹⁰ Webster’s New Universal Unabridged Dictionary 2003, p. 913.

¹¹ The American Heritage Dictionary, office edition 1987, p. 332.

¹² *See* Op. Att’y Gen. Fla. 05-38 (2005).

¹³ *Cf. Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974); *and see* Ops. Att’y Gen. Fla. 06-26 (2006) and 81-10 (1981).

AGO 14-08 – August 19, 2014

**MUNICIPALITIES – UNIFORM TRAFFIC CONTROL –
FEDERAL HIGHWAYS**

**AUTHORITY OF MUNICIPALITY TO CONTROL TRAFFIC ON
HIGHWAY OUTSIDE OF MUNICIPAL JURISDICTION**

To: Mr. Derek A. Schroth, Attorney for the Town of Lady Lake

QUESTION:

May a town exercise traffic control over a federal highway or a county highway abutting, but not located within the town’s

jurisdictional limits?**SUMMARY:**

A town does not have traffic control jurisdiction on a federal highway or a county highway which is not located within the town's jurisdictional limits.

Section 316.006(2), Florida Statutes, sets forth the jurisdiction a municipality possesses over streets and highways:

(a) Chartered municipalities shall have original jurisdiction over all streets and highways *located within their boundaries*, except state roads, and may place and maintain such traffic control devices which conform to the manual and specifications of the Department of Transportation upon all streets and highways under their original jurisdiction as they shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic.

(b) A municipality may exercise jurisdiction over any private road or roads, or over any limited access road or roads owned or controlled by a special district, *located within its boundaries* if the municipality and party or parties owning or controlling such road or roads provide, by written agreement approved by the governing body of the municipality, for municipal traffic control jurisdiction over the road or roads encompassed by such agreement (e.s.)

The plain language of the statute limits a municipality's jurisdiction only to roads within the territorial boundaries of the municipality. Moreover, the "Florida Uniform Traffic Control Law"¹ makes clear that the provisions of the chapter are applicable and uniform throughout the state and that no local authority may enact or enforce any ordinance on a matter covered by the chapter unless expressly authorized to do so.²

Section 316.008, Florida Statutes, sets forth the powers of local authorities over the streets and highways under their jurisdiction, including "nonexclusive jurisdiction over the prosecution, trial, adjudication, and punishment of violations of this chapter when a violation occurs within the municipality and the person so charged is charged by a municipal police officer."³ This office has recognized that a municipality's jurisdiction over streets and highways is limited to those within its geographical boundaries.⁴

Accordingly, it is my opinion that a municipality does not have traffic control jurisdiction over a street or highway which is not located within the jurisdictional boundaries of the municipality.⁵

¹ Chapter 316, Fla. Stat.

² Section 316.007, Fla. Stat.

³ Section 316.008(2), Fla. Stat.

⁴ See Ops. Att’y Gen. Fla. 04-13 (2004), 01-06 (2001), 80-100 (1980) (municipality may not exercise police jurisdiction over a federal highway/state road which is contiguous to but not within the corporate limits of the city); 81-41 (1981) (municipality may provide police protection on federal highway/state roads which are physically located within the corporate boundaries of the municipality); 89-57 (1989) (city is authorized to enforce state traffic laws on a state road within the geographical limits of the city even though road itself is not annexed). *But see* Op. Att’y Gen. Fla. 89-36 (1989) (municipality may not enact “anti-cruising” ordinance enforceable on state roads within its boundaries as control and regulation of state roads is vested with DOT).

⁵ It is equally clear that a municipality has no authority to enforce traffic laws outside its jurisdictional limits, as discussed in *State v. Williams*, 303 So. 2d 74 (Fla. 3d DCA 1974), *case dismissed*, 314 So. 2d 591 (Fla. 1975).

AGO 14-09 – November 13, 2014

VACATION RENTALS – MUNICIPALITIES – LOCAL
GOVERNMENTS – LAND USE

REGULATION OF VACATION RENTALS BY MUNICIPALITIES

To: Mr. Kerry L. Ezrol, City Attorney, City of Wilton Manors

QUESTIONS:

1. Does section 509.032(7)(b), Florida Statutes, permit the city to regulate the location of vacation rentals through zoning?

2. May the city prohibit vacation rentals which fail to comply with the registration and licensing requirements in section 509.241, Florida Statutes?

SUMMARY:

1. Section 509.032(7)(b), Florida Statutes, as amended by Chapter 2014-71, Laws of Florida, allows a local government to regulate vacation rentals, but continues to preclude any local law, ordinance or regulation which would prohibit vacation rentals or restrict the duration or frequency of vacation rentals.¹

It would appear therefore, that zoning may not be used to prohibit vacation rentals in a particular area where residential use is otherwise allowed.

2. Section 509.032(1), Florida Statutes, makes the Division of Hotels and Restaurants of the Department of Business and Professional Regulation the regulatory agency for transient lodging facilities. Section 509.241(1), Florida Statutes, makes operation of such facilities without a license a misdemeanor of the second degree. The statute specifically recognizes that local law enforcement may provide immediate assistance in pursuing an illegally operating facility, but does not otherwise authorize a local government to prohibit the operation of a vacation rental without proper licensure by the state.

QUESTION 1.

Section 509.032(7), Florida Statutes, as amended by Ch. 2014-71, Laws of Florida, provides:

(a) The regulation of public lodging establishments and public food service establishments, including, but not limited to, sanitation standards, inspections, training and testing of personnel, and matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state. This paragraph does not preempt the authority of a local government or local enforcement district to conduct inspections of public lodgings and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code, pursuant to ss. 553.80 and 633.206.

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

(c) Paragraph (b) does not apply to any local law, ordinance, or regulation exclusively relating to property valuation as a criterion for vacation rental if the local law, ordinance, or regulation is required to be approved by the state land planning agency pursuant to an area of critical state concern designation.

Prior to its amendment, the statute, in relevant part, provided:

(b) A local law, ordinance, or regulation may not *restrict the use of vacation rentals*, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy. This paragraph does not apply to any local law,

ordinance, or regulation adopted on or before June 1, 2011.
(e.s.)

This earlier provision was interpreted by this office to preempt local regulation of the rental of vacation homes. This office also advised that a local zoning ordinance for single-family homes adopted prior to June 1, 2011, could not now be interpreted to restrict the rental of such homes as vacation rentals, when the ordinance did not restrict the rental of such property and the county had no regulations governing vacation rentals prior to June 1, 2011.²

As originally introduced, Senate Bill 356, repealed the provisions in paragraphs (b) and (c) of section 509.032(7), Florida Statutes (2013), prohibiting local laws, ordinances, or regulations affecting vacation rentals.³ The bill was amended, however, to reinstate the prohibition against local action which would prohibit vacation rentals or regulate the duration or frequency of vacation rentals.⁴ The legislative analysis attendant to the amendment states that the amendment “maintains the current prohibition against local laws, ordinances, or regulations that prohibit vacation rentals.”⁵ Finally, the staff analysis prepared for an identical bill proposed in the House of Representatives, for which Senate Bill 356 was substituted, reflects that the bill “removes the preemption to the state for the regulation of vacation rentals” and recognizes that “[l]ocal governments may regulate vacation rentals, provided those regulations do not prohibit vacation rentals or restrict the duration or frequency of vacation rentals.”⁶

It is clear that municipalities may zone land to pursue a number of legitimate objectives related to the health, safety, morals, or general welfare of the community.⁷ Municipalities have the power to regulate the use of land and buildings within prescribed districts through zoning.⁸ Zoning is generally defined as the legislative division of a region into districts with different regulations within the districts for land use, building size, and the like.⁹ While a municipality may enact zoning ordinances and regulations, a legislative enactment on the same subject matter controls.¹⁰ Therefore, to the extent a municipal ordinance conflicts with a state statute in regard to the prohibition against any local act which seeks to prohibit vacation rentals, the municipal ordinance must fail.¹¹

Thus, while a local government may regulate vacation rentals, it may not enact a local law, ordinance, or regulation which would operate to prohibit vacation rentals. To the extent a zoning ordinance addresses vacation rentals in an attempt to prohibit them in a particular area where residences are otherwise allowed, it would appear that a local government would have exceeded the regulatory authority granted in section 509.032(7)(b), Florida Statutes.

QUESTION 2.

A municipality has home rule powers to enact legislation on any subject upon which the State Legislature may act, except, among other things, any subject that is expressly prohibited by the Constitution or any subject that is expressly preempted to state or county government by the Constitution or by general law.¹²

Section 509.261(1), Florida Statutes, provides:

Any public lodging establishment or public food service establishment that has operated or is operating in violation of this chapter or the rules of the division, *operating without a license*, or operating with a suspended or revoked license may be subject by the division to:

- (a) Fines not to exceed \$1,000 per offense;
- (b) Mandatory completion, at personal expense, of a remedial educational program administered by a food safety training program provider approved by the division, as provided in s. 509.049; and
- (c) The suspension, revocation, or refusal of a license issued pursuant to this chapter. (e.s.)

Moreover, section 509.241(1), Florida Statutes, makes it a misdemeanor of the second degree to operate a public lodging establishment without a license. The statute further provides that local law enforcement shall provide immediate assistance in pursuing an illegally operating establishment. Where the Legislature has prescribed the manner in which something is to be accomplished, there is an implied prohibition against its being done any other way.¹³

This office has recognized that a municipality has the authority to prescribe penalties for violations of its ordinances, but derives no authority from its home rule powers to exceed penalties prescribed by law.¹⁴ Section 509.271, Florida Statutes, provides that “[a] municipality or county may not issue an occupational license to any business coming under the provisions of this chapter until a license has been procured for such business from the [D]ivision [of Hotels and Restaurants].” Clearly, therefore, a municipality may require through its licensing tax ordinance that a vacation rental obtain a license in order to conduct business within the municipality.¹⁵ This would appear to be an appropriate regulation which the city could impose upon vacation rentals within its jurisdiction.

Section 205.053, Florida Statutes, provides the manner in which business tax receipts are to be sold, penalties which may be imposed for delinquent taxes, and penalties which may be imposed for failure to obtain a local business tax receipt. The section further provides that

any person who engages in any business covered by the chapter who does not pay the required tax within 150 days after the initial notice of tax due “is subject to civil actions and penalties, including court costs, reasonable attorneys’ fees, additional administrative costs incurred as a result of collection efforts, and a penalty of up to \$250.”¹⁶ Where the Legislature has prescribed a penalty for violation of a particular act, a city may not impose more severe sanctions.

When discussing the effect of the amendment to section 509.032, Florida Statutes, an example of how such regulation might be implemented was a local ordinance requiring that the name and contact information for a local representative be posted in a vacation rental owned by out-of-state individuals.¹⁷ The sponsor of the amendment addressed the committee and emphasized that the changes would remove the preemption on local government regulation of vacation rentals and allow local ordinances to address local concerns.¹⁸

Accordingly, while the amendment of section 509.032(7), Florida Statutes, by Chapter 2014-71, Laws of Florida, allows a local government to regulate vacation rentals, such regulations may not impose penalties which conflict with those prescribed by law.

¹ The statute continues to grandfather in any local law, ordinance, or regulation adopted on or before June 1, 2014.

² See Inf. Op. to Mr. Albert J. Hadeed, Flagler County Attorney, dated October 22, 2013.

³ See SB 356, filed November 5, 2013.

⁴ See 486775 - Strike All Amendment by Rep. Hutson, adopted April 29, 2014.

⁵ See The Florida Senate House Message Summary, SB 356, 1st Eng., House Amendment 1 – 486775, dated April 30, 2014.

⁶ See House of Representatives Staff Analysis, Local & Federal Affairs Committee, CS/HB 307, dated April 11, 2014.

⁷ See *Scurlock v. City of Lynn Haven, Florida*, 858 F.2d 1521, 1525 (11th Cir. 1988). And see *Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So. 2d 57 (Fla. 1978) (zoning is a legislative function which reposes ultimately in the governing authority of a municipality).

⁸ See s. 2(b), Art. VIII, Fla. Const., granting municipalities the authority to exercise any power for municipal purposes except as otherwise provided by law.

⁹ Black’s Law Dictionary (8th ed.), “zoning,” p. 1649.

¹⁰ See *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972) (municipality may not forbid what the Legislature has expressly authorized, nor may it authorize what the Legislature has expressly forbidden).

¹¹ See *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981) (municipal ordinances are inferior to state law and must fail when conflict arises).

¹² See s. 166.021, Fla. Stat.

¹³ See *Alsop v. Pierce*, 19 So. 2d 799 (Fla. 1944) (express statutory direction as to how a thing is to be done is implied prohibition of its being done in any contrary manner).

¹⁴ See Op. Att’y Gen. Fla. 81-76 (1981) (exercise of municipal home rule power in setting severity of penalties is limited by those prescribed by statute).

¹⁵ See s. 205.042, Fla. Stat., authorizing a municipality to levy, by appropriate resolution or ordinance, a business tax for the privilege of engaging in or managing a business, profession, or occupation within its jurisdiction.

¹⁶ Section 205.053(3), Fla. Stat.

¹⁷ See Senate Committee on Community Affairs, discussion of SB 356, dated February 4, 2014. Other discussion included parking controls and limitation on the number of unrelated persons occupying a house.

¹⁸ *Id.* Sen. John Thrasher discussing circumstances in Flagler County which gave rise to need for amendment and return home rule power to local governments.

AGO 14-10 – November 13, 2014

GOVERNMENT IN THE SUNSHINE – PUBLIC RECORDS – STRATEGIC PLANS – PUBLIC HOSPITALS

WHETHER EVALUATION OF PUBLIC HOSPITAL FOR POSSIBLE SALE OR LEASE WOULD QUALIFY AS “STRATEGIC PLAN” WHICH WOULD BE CONFIDENTIAL AND EXEMPT FOR OPEN MEETINGS AND PUBLIC RECORDS LAWS

*To: Mr. Marlin M. Feagle, Attorney for Lake Shore Hospital Authority of
Columbia County*

QUESTIONS:

**1. Would evaluations conducted pursuant to section 155.40(5),
Florida Statutes, constitute a “strategic plan” as described in**

section 395.3035(5), Florida Statutes, for the purpose of keeping the plan confidential and exempt from section 119.07(1), Florida Statutes, the Public Records Law, and Article I, section 24(a) of the Florida Constitution?

2. Would evaluations conducted pursuant to section 155.40(5), Florida Statutes, constitute a “strategic plan” as described in section 395.3035(4)(a), Florida Statutes, for the purpose of holding a closed meeting exempt from section 286.011, Florida Statutes, the Government in the Sunshine Law, and Article I, section 24(b) of the Florida Constitution?

SUMMARY:

An evaluation conducted pursuant to section 155.40(5), Florida Statutes, for purposes of the sale or lease of a public hospital may not be characterized as a “strategic plan” for the operation of a hospital as that term is used in section 395.3035, Florida Statutes, for purposes of confidentiality and exemption from the Government in the Sunshine Law and the Public Records Law.

According to information you have submitted, the Lake Shore Hospital Authority board of trustees is involved in the evaluation process legislatively required by section 155.40(5), *et seq.*, Florida Statutes. That statute requires the governing board of the hospital to perform an evaluation of the possible benefits to an affected community of the sale or lease of hospital facilities owned by the board to a not-for-profit or for-profit entity. The authority has complied with the statute and desires to hold a meeting to discuss the evaluations and information received by the board including how the board should proceed to make and receive offers regarding the possible sale or lease of the authority’s facilities. The board of trustees asks whether these evaluations undertaken pursuant to section 155.40, Florida Statutes, would constitute a “strategic plan” as that term is described in section 395.3035(4)(a), Florida Statutes, such that the portions of the meeting to discuss the strategic plan would be exempt from the Government in the Sunshine Law and whether, under section 395.3035(5), Florida Statutes, any public records of such meetings would be confidential and exempt. Thus, I understand your question to be whether evaluations conducted pursuant to section 155.40(5), Florida Statutes, could be considered “strategic plans” as that term is used in section 395.3035, Florida Statutes.

Section 155.40, Florida Statutes, provides for the sale or lease of county, district, or municipal hospitals to a profit-making or a non-profit entity for the purpose of operating the hospital and its facilities. Subsection (5) of the statute requires the governing board of the hospital to commence an evaluation of the possible benefits of such a sale to the community no later than December 31, 2012. The governing board of

the hospital must find that the sale, lease, or contract of the hospital is in the best interests of the affected community and is required to substantiate its finding.¹

Specifically, subsection (5) states that in the course of evaluating the benefits of the sale or lease of hospital facilities, the board shall:

(a) *Conduct a public hearing* to provide interested persons the opportunity to be heard on the matter.

(b) *Publish notice* of the public hearing in one or more newspapers of general circulation in the county in which the majority of the physical assets of the hospital or health care system are located and in the Florida Administrative Register at least 15 days before the hearing is scheduled to occur.

(c) Contract with a certified public accounting firm or other firm that has substantial expertise in the valuation of hospitals to render an independent valuation of the hospital's fair market value.

(d) Consider an objective operating comparison between a hospital or health care system operated by the district, county, or municipality and other similarly situated hospitals, both not for profit and for profit, which have a similar service mix, in order to determine whether there is a difference in the cost of operation using publicly available data provided by the Agency for Health Care Administration and the quality metrics identified by the Centers for Medicare and Medicaid Services Core Measures. The comparison must determine whether it is more beneficial to taxpayers and the affected community for the hospital to be operated by a governmental entity, or whether the hospital can be operated by a not for profit or for profit entity with similar or better cost efficiencies or measurable outcomes identified by the Centers for Medicare and Medicaid Services Core Measures. The comparison must also determine whether there is a net benefit to the community to operate the hospital as a not for profit or for profit entity and use the proceeds of the sale or lease for the purposes described in this section.

(e) *Make publicly available* all documents considered by the board in the course of such evaluation.

1. Within 160 days after the initiation of the process established in this subsection, the governing board shall publish notice of the board's findings in one or more newspapers of general circulation in the county in which the majority of the physical assets of the hospital are located and in the Florida Administrative Register.

2. This evaluation is not required if a district, county, or municipal hospital has issued a public request for proposals for the sale or lease of a hospital on or before February 1, 2012, for the purpose of receiving proposals from qualified purchasers or lessees, either not for profit or for profit. (e.s.)

Clearly, the Legislature was concerned that this process be open and transparent to the public and sought to ensure that it was by requiring public notice and public hearings.

Chapter 395, Florida Statutes, relates to hospital licensing and regulation. Section 395.3035(1), Florida Statutes, provides that

All meetings of a governing board of a public hospital and all public hospital records shall be open and available to the public in accordance with s. 286.011 and s. 24(b), Art. I of the State Constitution and chapter 119 and s. 24(a), Art. I of the State Constitution, respectively, unless made confidential or exempt by law.

Thereafter, the statute provides for a number of exemptions and for the confidentiality of certain hospital records and meetings. Subsection (2)(b) makes a strategic plan “the disclosure of which would be reasonably likely to be used by a competitor to frustrate, circumvent, or exploit the purpose of the plan before it is implemented and which is not otherwise known or cannot otherwise be legally obtained by the competitor” confidential and exempt from the provisions of the Public Records Law and Article I, section 24(a) of the Florida Constitution. Any portions of a board meeting at which a written strategic plan that is confidential under subsection (2) is discussed, reported on, modified, or approved by the governing board is exempt from the open meetings law, section 286.011, Florida Statutes, and Article I, section 24(b), Florida Constitution. All portions of the board meeting which are closed must be recorded by a certified court reporter. The content of the closed meeting shall be restricted “to discussion, reports, modification, or approval of a written strategic plan.”²

The statute specifically defines the term “strategic plan” for purposes of section 395.3035, Florida Statutes:

- (6) For purposes of this section, the term “strategic plan” means any record which describes actions or activities to:
- (a) Initiate or acquire a new health service;
 - (b) Materially expand an existing health service;
 - (c) Acquire additional facilities by purchase or by lease;

- (d) Materially expand existing facilities;
- (e) Change all or a material part of the use of an existing facility or a newly acquired facility;
- (f) Acquire another health care facility or health care provider;
- (g) Merge or consolidate with another health care facility when the surviving entity is an entity that is subject to s. 24, Art. I of the State Constitution;
- (h) Enter into a shared service arrangement with another health care provider; or
- (i) Any combination of paragraphs (a)-(h).

The term “strategic plan” does not include records that describe the existing operations of a hospital or other health care facility which implement or execute the provisions of a strategic plan, unless disclosure of any such document would divulge any part of a strategic plan which has not been fully implemented or is a record that is otherwise exempt from the public records laws. Such existing operations include, without limitation, the hiring of employees, the purchase of equipment, the placement of advertisements, and the entering into contracts with physicians to perform medical services. Records that describe operations are not exempt, except as specifically provided in this section.

Thus, it appears that a “strategic plan” as described in section 395.3035(6), Florida Statutes, refers to operational business decisions necessary to market the services of public hospitals and provide them with an opportunity to compete with private for-profit hospitals.³ The evaluation required by the Legislature in section 155.40, Florida Statutes, seeks to determine whether the sale, lease, or contract of the public hospital to another business entity would serve the best interests of the affected community. These two separate undertakings of hospital boards do not appear to be similar in focus and direction such that an evaluation conducted pursuant to section 155.40(5), Florida Statutes, would constitute a “strategic plan” as described in section 395.3035(5), Florida Statutes.

Further, section 395.3035(4)(b), Florida Statutes, specifically limits the content of a closed board meeting to consider strategic plans to “discussion, reports, modification, or approval of a written strategic plan.” As an exception to the general requirement in subsection (1) that “[a]ll meetings of a governing board of a public hospital and all public hospital records shall be open and available to the public[.]” this language must be read narrowly. Where a statute sets forth exceptions, no others may be implied to be intended.⁴ Thus, I cannot extend the

confidentiality provisions of section 395.3035, Florida Statutes, for a strategic plan for the operation of the hospital to cover an evaluation for purposes of the sale or lease of a public hospital under section 155.40, Florida Statutes.

Similarly, section 395.3035(5), Florida Statutes, makes public records generated at a closed meeting held to consider a strategic plan confidential and exempt from the Public Records Law only if they are “generated at [a meeting] . . . pursuant to this section[.]” A strict reading of this language would not permit the extension of the confidentiality to a meeting held to discuss an evaluation pursuant to section 155.40, Florida Statutes.

In sum, it is my opinion that an evaluation conducted pursuant to section 155.40(5), Florida Statutes, for purposes of the sale or lease of a public hospital may not be characterized as a “strategic plan” for the operation of a hospital as that term is used in section 395.3035, Florida Statutes, for purposes of confidentiality and exemption from the Government in the Sunshine Law and the Public Records Law.

¹ Section 155.40(1), Fla. Stat.

² Section 395.3035(4)(b), Fla. Stat.

³ See Justice Overton’s concurrence and dissent in *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 at 571 (Fla. 1999) (in which the majority found s. 395.3035, Fla. Stat., unconstitutional because it did not contain a definition of the term “strategic plan”). Justice Overton was providing his view of the meaning of the phrase “strategic plan” prior to the Legislature’s amendment of s. 395.3035, Fla. Stat., to include a definition of the term.

⁴ See, e.g., *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Biddle v. State Beverage Department*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966); *Williams v. American Surety Company of New York*, 99 So. 2d 877, 880 (Fla. 2d DCA 1958).

AGO 14-11 – November 13, 2014

**TAXATION – BUSINESS TAX – OCCUPATIONAL LICENSE
TAX – MUNICIPALITIES**

**AUTHORITY OF MUNICIPALITY TO INCREASE RATE OF
OCCUPATIONAL LICENSE TAX**

*To: Mr. Mitchell A. Bierman, Village Attorney for the Village of
Pinecrest*

QUESTIONS:

In light of sections 205.0315 and 205.0535, Florida Statutes, is the Village of Pinecrest authorized to:

1. Increase its business tax rates by up to 5% every other year upon no less than a majority plus one vote of the Village Council?

2. Increase its business tax rates pursuant to the authority set forth in section 205.043(1)(b), Florida Statutes?¹

SUMMARY:

1. The Village of Pinecrest is not authorized to increase its business tax rates by up to 5% every other year upon no less than a majority plus one vote of the Village Council as it does not appear that the village has complied with the requirements of section 205.0535, Florida Statutes, which would provide the village with the authority to make revisions to its business tax ordinance.

2. Section 205.043, Florida Statutes, provides an alternative scheme for the levy of a business tax. The Village of Pinecrest has implemented the procedure in sections 205.0315 and 205.0535, Florida Statutes, and may not rely on section 205.043(1)(b), Florida Statutes, as authority to revisit its business tax ordinance.

QUESTION 1.

The Village of Pinecrest, Florida, was established as a municipal corporation and the village charter was adopted by the electors of the village on March 12, 1996. On May 6, 1997, the village adopted a local business tax ordinance pursuant to section 205.0315, Florida Statutes. That statute provides:

Beginning October 1, 1995, a county or municipality that has not adopted a business tax ordinance or resolution may adopt a business tax ordinance. The business tax rate structure and classifications in the adopted ordinance must be reasonable and based upon the rate structure and classifications prescribed in ordinances adopted by adjacent local governments that have implemented s. 205.0535. If no adjacent local government has implemented s. 205.0535, or if the governing body of the county or municipality finds that the rate structures or classifications of adjacent local governments are unreasonable, the rate structure or classifications prescribed in its ordinance may be based upon those prescribed in ordinances adopted by local

governments that have implemented s. 205.0535 in counties or municipalities that have a comparable population.

The business tax ordinance adopted by the Village of Pinecrest relied on a rate structure and business classifications adopted by an adjacent local government as provided in section 205.0315, Florida Statutes. The village has not adopted a single business tax rate increase since the ordinance was adopted in 1997. You ask whether, in light of the time limitations and requirements of section 205.0535, Florida Statutes, the Village of Pinecrest is now authorized to increase the business tax rates set forth in its ordinance.

The authority of a municipality to impose a tax is derived from Article VII, section 9, Florida Constitution.² While section 166.021, Florida Statutes, secures the broad exercise of home rule powers for municipalities granted by Article VIII, section 2(b), Florida Constitution, municipalities possess no home rule powers to levy taxes.³ Thus, a municipality must be able to point to constitutional or statutory authority to exercise the taxing power. In exercising its taxing power, a municipality is limited to that authority expressly, or by necessary implication, conferred.⁴ Thus, as a general rule, “a municipality . . . has no inherent power to exempt from taxation property which it is authorized by statute or charter to tax, since, with some exceptions, delegation of power to tax does not include power to exempt from taxation or power to remit or compromise taxes . . .”⁵

Section 205.0535(1), Florida Statutes, states that “[b]y October 1, 2008, any municipality that has adopted by ordinance a local business tax after October 1, 1995, may by ordinance reclassify businesses, professions, and occupations and may establish new rate structures, if the conditions specified in subsections (2) and (3) are met.” Subsection (2) requires the establishment of an equity study commission to recommend a classification system and rate structure for local occupational license taxes prior to adoption of the ordinance. Subsection (3) sets parameters for the new license tax in terms of the amount that may be imposed and the maximum amount of revenue that may be generated. The intention of the Legislature in adopting section 205.0535, Florida Statutes, was to provide local governments with an opportunity to revise their occupational license tax ordinances by a time certain and the continued opportunity to undertake a limited revision every other year thereafter.⁶ According to information you have provided to this office, it does not appear that the village acted by October 1, 2008, to establish new rate structures or otherwise comply with the conditions specified in the statute.

Section 205.0535(4), Florida Statutes, recognizes that changes may occur and necessitate the reconsideration of such ordinances:

After the conditions specified in subsections (2) and (3) are met,

municipalities and counties may, every other year thereafter, increase or decrease by ordinance the rates of business taxes by up to 5 percent. However, an increase must be enacted by at least a majority plus one vote of the governing body.

Thus, the statutory scheme authorizes the increase or decrease of rates of business taxes by a maximum of five percent and a complete repeal of any business tax imposed pursuant to Chapter 205, Florida Statutes. However, the statute limits any such consideration to “every other year thereafter,” compliance with the time limit of October 1, 2008, and the conditions specified in subsections (2) and (3).

Where the Legislature has directed how a thing shall be done, it effectively operates as a prohibition against its being done in any other manner.⁷ The Legislature has provided specific directions to local governments regarding occupational license tax rate revisions in section 205.0535(4), Florida Statutes. Nothing in that section authorizes a municipality to revisit a validly enacted rate structure ordinance prior to its scheduled biennial review or to make upward or downward adjustments to individual classifications in excess of five percent.

You suggest that the fact that the adjacent local government upon whose business tax ordinance the Village of Pinecrest modeled its ordinance *has* complied with the requirements of section 205.0535, Florida Statutes, that is, the other jurisdiction satisfied the equity study commission and maximum rate and revenue requirements of subsections (2) and (3) of section 205.0535, Florida Statutes, that the Village of Pinecrest is authorized to likewise revisit its business tax ordinance based on this other jurisdiction’s compliance. Nothing in the statute appears to authorize this type of piggybacking. As discussed above, in matters of taxation, a municipality is limited to that authority expressly, or by necessary implication, conferred.

Therefore, it is my opinion that the Village of Pinecrest is not authorized to increase its business tax rates by up to 5% every other year upon no less than a majority plus one vote of the Village Council as it does not appear that the village has complied with the requirements of section 205.0535, Florida Statutes, which would provide the village with the authority to make revisions to its business tax ordinance.

QUESTION 2.

You have also asked whether the Village of Pinecrest may rely on section 205.043(1)(b), Florida Statutes, to revisit its business tax ordinance.

Section 205.043(1), Florida Statutes, provides conditions for the levy of a business tax by municipalities:

(1) The following conditions are imposed on the authority of a municipal governing body to levy a business tax:

(a) The tax must be based upon reasonable classifications and must be uniform throughout any class.

(b) *Unless the municipality implements s. 205.0535 or adopts a new business tax ordinance under s. 205.0315*, a business tax levied under this subsection may not exceed the rate in effect in the municipality for the year beginning October 1, 1971; however, beginning October 1, 1980, the municipal governing body may increase business taxes authorized by this chapter. The amount of the increase above the tax rate levied on October 1, 1971, for taxes levied at a flat rate may be up to 100 percent for business taxes that are \$100 or less; 50 percent for business taxes that are between \$101 and \$300; and 25 percent for business taxes that are more than \$300. Beginning October 1, 1982, an increase may not exceed 25 percent for taxes levied at graduated or per unit rates. Authority to increase business taxes does not apply to receipts or licenses granted to any utility franchised by the municipality for which a franchise fee is paid. (e.s.)

It is clear that the provisions of section 205.043(1)(b), Florida Statutes, do not apply in cases where a municipality has implemented section 205.0535, Florida Statutes, or adopted a new business tax ordinance under section 205.0315, Florida Statutes. The information you have supplied this office reflects that the business tax ordinance adopted by the Village of Pinecrest relied on a rate structure and business classifications adopted by an adjacent local government as provided in section 205.0315, Florida Statutes. The adjacent local government implemented section 205.0535, Florida Statutes. Thus, the plain language of the statute would preclude the Village of Pinecrest from utilizing the provisions of section 205.043(1)(b), Florida Statutes, to increase business taxes authorized in Chapter 205, Florida Statutes.

In sum, it is my opinion that section 205.043, Florida Statutes, provides an alternative scheme for the levy of a business tax. The Village of Pinecrest has implemented the procedure in sections 205.0315 and 205.0535, Florida Statutes, and, therefore, is precluded from relying on section 205.043(1)(b), Florida Statutes, as authority to revisit its business tax ordinance.

¹ Based on my response to your other questions you have also asked whether there may be any existing authority for the Village to ever increase its business tax rates by any amount. This office issues opinions in response to specific legal questions and does not provide legal research services.

² Article VII, s. 9(a), Fla. Const., provides:

Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

³ See, e.g., Ops. Att’y Gen. Fla. 00-01 (2000) (city may not exempt business from occupational license requirement except as provided in Ch. 205, Fla. Stat.); 90-23 (1990) (city may not provide for rebate of ad valorem taxes collected on newly annexed property, in absence of constitutional or statutory authority allowing such action); 80-87 (1980); and 79-26 (1979) (municipality has no home rule powers with respect to levy of excise or non ad valorem taxes and exemptions therefrom, as all such taxing power must be authorized by general law).

⁴ See Op. Att’y Gen. Fla. 79-26 (1979).

⁵ 16 McQuillin Municipal Corporations s. 44.65 (3rd rev. ed. 1994), p. 243. See also Op. Att’y Gen. Fla. 99-72 (1999) (city or county has no home rule power to levy taxes or provide exemptions therefrom).

⁶ See Florida Senate Staff Analysis and Economic Impact Statement on SB 364, dated March 4, 1993. Cf. Op. Att’y Gen. Fla. 95-46 (1995), discussing the amendment of municipal occupational license tax ordinances; Op. Att’y Gen. Fla. 96-83 (1996).

⁷ See, e.g., *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).

AGO 14-12 – November 13, 2014

COMMON ELEMENT – PROPERTY APPRAISER – TAXATION

TAXATION OF COMMON ELEMENT IN SUBDIVISION

To: The Honorable Bob Henriquez, Hillsborough County Property Appraiser

QUESTION:

Does section 193.0235, Florida Statutes, prohibit the separate taxation of property where the parcel in question is identified on the plat as, “. . . dedicated for private common recreational use, and shall remain privately owned, maintained, repaired and replaced and is specifically not dedicated to the use of the public in general” and where the facilities within the parcel

are available to any member of the general public who pays a membership fee to use the facilities?

SUMMARY:

In order to qualify as a “common element” for purposes of section 193.0235, Florida Statutes, a subdivision lot must not be subject to private sale or have been sold to a private party, must be designated on the plat or approved site plan as a common element for the exclusive benefit of the lot owners and must be used exclusively by such lot owners.

According to your letter, the property under consideration is located in a master planned residential community and essentially consists of a clubhouse, two pools and a marina with boat slips. The developer of the property has sold the parcel to a private, limited liability company, and this third party operates the facilities. You state that the property is not designated as a “common element” on the plat or approved site plan for the subdivision.

You have included reference to a document entitled “amenities declaration” relating to this property which allows for “non-deeded users” to use the parcel. “Non-Deeded Users” are described in the document as:

. . . individuals who are entitled to use the Amenities on an annual basis (as result of payment of an annual fee and other applicable charges to the Amenities Owner) or as otherwise permitted from time to time by the Amenities Owner. A Non-Deeded User may be permitted to use the Amenities as determined by the amenities Owner in its discretion from time to time. Non-Deeded Users shall include, among others, the users of boat slips in the Marina who are not also owners of Lots, Units or Parcels in the Community.

While I have included this information for purposes of clarity, this office does not interpret contractual provisions nor is it a fact finder. Mixed questions of law and fact are most appropriately addressed to the judiciary, where they can receive a definitive resolution.¹ However, the following discussion may prove helpful to you in considering the application of section 193.0235, Florida Statutes.

Section 193.0235, Florida Statutes, was adopted by the Legislature in 2003 and is entitled “[a]d valorem taxes and non-ad valorem assessments against subdivision property.”² The statute provides that:

(1) Ad valorem taxes and non ad valorem assessments shall be assessed against the lots within a platted residential subdivision and not upon the subdivision property as a whole.

An ad valorem tax or non ad valorem assessment, including a tax or assessment imposed by a county, municipality, special district, or water management district, may not be assessed separately against common elements utilized exclusively for the benefit of lot owners within the subdivision, regardless of ownership. The value of each parcel of land that is or has been part of a platted subdivision and that is designated on the plat or the approved site plan as a common element for the exclusive benefit of lot owners shall, regardless of ownership, be prorated by the property appraiser and included in the assessment of all the lots within the subdivision which constitute inventory for the developer and are intended to be conveyed or have been conveyed into private ownership for the exclusive benefit of lot owners within the subdivision.

(2) As used in this section, the term “common element” includes:

(a) Subdivision property not included within lots constituting inventory for the developer which are intended to be conveyed or have been conveyed into private ownership.

(b) An easement through the subdivision property, not including the property described in paragraph (a), which has been dedicated to the public or retained for the benefit of the subdivision.

(c) Any other part of the subdivision which has been designated on the plat or is required to be designated on the site plan as a drainage pond, or detention or retention pond, for the exclusive benefit of the subdivision.

Thus, pursuant to section 193.0235, Florida Statutes, ad valorem taxes or non-ad valorem assessments by a county, municipality, special district, or water management district may not be assessed separately against common elements that are utilized exclusively for the benefit of lot owners within the subdivision. The value of parcels of land that are part of a platted subdivision that are designated on the plat or on the approved site plan as a common element for the exclusive benefit of lot owners must be prorated by the property appraiser and added to the assessment of all the lots within the subdivision.

As this office noted in Attorney General Opinion 2003-63, the statute defines a “common element” as subdivision property not included in the inventory of lots intended to be sold or that have been sold to private owners, easements that have been dedicated to the public or retained for the benefit of the subdivision, and any other part of the subdivision designated on the plat or the site plan as a drainage pond, or detention or retention pond, for the exclusive use of the subdivision. In plain terms

the statute includes as a common element any subdivision property *not already sold or that is intended to be sold into private ownership, that is designated on the plat or plan as a common element.*

Information you have provided states that this subdivision property has been sold into private ownership and is not designated on the plat or plan of the subdivision as a common element.

Further, this office has previously considered whether property must actually be used exclusively by the lot owners of the subdivision or whether the designation of the property as a “common element for the exclusive benefit of lot owners” is sufficient to claim the entitlement to prorated taxes or assessments. In Attorney General Opinion 2003-63, this office addressed whether a common element includes any property in a subdivision plat or site plan intended to benefit lot owners that is not a lot either sold into private ownership or held by the developer as inventory for sale, regardless of the ownership of such property. Citing the plain language of section 193.0235, Florida Statutes, prohibiting separate assessments against common elements used exclusively for the benefit of lot owners within a subdivision and the need to refer to the subdivision plat or site plan to determine whether property is a common element, this office concluded that a property appraiser must be able to determine that property is used exclusively for the benefit of lot owners, regardless of ownership, before prorating the assessment among all lot owners within a subdivision.

Subsequently, in Attorney General Opinion 2004-31, this office considered whether a golf course for which a user fee is charged (regardless of whether the users are property owners within a subdivision) could be classified as a common element under section 193.0235, Florida Statutes. As that opinion notes, “[f]or purposes of assessing the property in the instant situation. . . section 193.0235(1), Florida Statutes, requires that such property be used exclusively for the benefit of lot owners within the subdivision before it may be assessed as a common element with the assessment prorated among all lot owners within the subdivision.” The opinion recognizes that taxing statutes are strictly construed against taxing authorities, while exemptions are strictly construed against taxpayers.³ An exemption that has been claimed must be proved by clear evidence.⁴ While the provisions of section 193.0235, Florida Statutes, do not represent an exemption from taxation, they do involve a shifting of the burden of paying a tax or assessment, and the rationale for requiring clear evidence of compliance with the statute’s provisions would apply. Thus, the 2004 opinion states that “it would appear that before the golf course may be assessed on a prorated basis among all of the individual lot owners within the subdivision, it must be shown that its use is exclusively for the benefit of lot owners within the subdivision.” To conclude otherwise would place the burden of taxation or special assessments upon individual lot owners when the property is used and enjoyed by others. Attorney

General Opinion 2004-31 concludes that “a golf course that is open to the general public for play for a fee may not be classified as a common element of a subdivision for the exclusive benefit of the lot owners within the subdivision for purposes of prorating assessments among the lot owners.”

This office continues to be of the opinion that, before a lot within a platted residential subdivision may be assessed on a prorated basis and that assessment imposed on all of the individual lot owners within a subdivision, it must be shown that it is used exclusively for the benefit of the lot owners within the subdivision. That is, in order to qualify as a “common element” for purposes of section 193.0235, Florida Statutes, a subdivision lot must not only be designated on the plat or approved site plan as a common element for the exclusive benefit of the lot owners, but be used exclusively by those lot owners.⁵

Pursuant to section 193.0235, Florida Statutes, ad valorem taxes or non-ad valorem assessments by a county, municipality, special district, or water management district may not be assessed separately against common elements that are utilized exclusively for the benefit of lot owners within the subdivision. Where the Legislature has prescribed the manner in which a thing is to be done or, as here, specified the manner in which a property is to be assessed by the property appraiser, it operates, in effect, as a prohibition against its being done in any other manner.⁶ Likewise, where a statute sets forth exceptions, no others may be implied to be intended.⁷

The parcel in question is not designated as a “common element” for the exclusive benefit of lot owners on the plat or the approved site plan. It is subdivision property which has been conveyed into private ownership and use of the property is available to any member of the general public paying a membership fee. Thus, the subdivision lot would not appear to satisfy the requirements of section 193.0235, Florida Statutes.

In sum, it is my opinion that in order to qualify as a “common element” for purposes of section 193.0235, Florida Statutes, a subdivision lot must not be subject to private sale or have been sold to a private party, must be designated on the plat or approved site plan as a common element for the exclusive benefit of the lot owners and must be used exclusively by such lot owners.

¹ See Department of Legal Affairs Statement Concerning Attorney General Opinions, available at: <http://myfloridalegal.com/pages.nsf/Main/dd177569f8fb0f1a85256cc6007b70ad>.

² See s. 4, Ch. 2003-284, Laws of Fla.

³ See *Department of Revenue v. Bank of America, N.A.*, 752 So. 2d 637

(Fla. 1st DCA 2000), *review denied*, 776 So. 2d 274 (Fla. 2000) (statutes authorizing tax refunds or exemptions must be strictly construed); *Consumer Credit Counseling Service of the Florida Gulf Coast, Inc. v. State, Department of Revenue*, 742 So. 2d 259 (Fla. 2d DCA 1997); *State, Department of Revenue v. Anderson*, 403 So. 2d 397 (Fla. 1981).

⁴ See *Green v. Pederson*, 99 So. 2d 292 (Fla. 1957) and *United States Gypsum Company v. Green*, 110 So. 2d 409 (Fla. 1959) (person seeking exemption bears the burden of establishing by clear evidence and law that he or she qualifies for the exemption, with all doubt resolved against the existence of the exemption).

⁵ *And see* Op. Att’y Gen. Fla. 09-23 (2009), in which this office read the language of the statute to include the use of such property by the guests and relatives of lot owners as a benefit to the lot owners which did not jeopardize the exclusivity of such use.

⁶ See, e.g., *Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (where Legislature prescribes the mode, that mode must be observed).

⁷ See, e.g., *Young v. Progressive Southeastern Insurance Company*, 753 So. 2d 80 (Fla. 2000); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341 (Fla. 1952).

AGO 14-13 – November 21, 2014

SCHOOLS – SECURITY – SCHOOL BOARDS – FIREARMS

HIRING OF ARMED PRIVATE SECURITY GUARDS PURSUANT TO S. 790.115, FLA. STAT.

To: Mr. Rick Mills, Superintendent, School District of Manatee County

QUESTION:

May a school district employ private security guards who carry firearms pursuant to section 790.115, Florida Statutes?

SUMMARY:

Section 790.115, Florida Statutes, operates as an exemption from the prohibition against the possession of firearms and weapons on school property and specifically provides that firearms may be allowed in support of an approved school sanctioned activity, but does not define what constitutes “in support of” or an “approved school sanctioned activity.” Absent a legislative definition of these terms, it would appear to be within the authority of a school district to make a determination of whether the use of armed private security guards would be in support of an approved school sanctioned activity.

District school boards are constitutionally and statutorily charged with the operation and control of public K-12 education within their school districts.¹ Among other duties, district school boards must provide for “proper attention to health, safety, and other matters relating to the welfare of students[.]”²

On several occasions, this office has commented upon the home rule authority of school boards.³ In Attorney General Opinion 86-45, this office discussed the variant of home rule power conferred on school boards and stated that “it has been the position of this office that the 1983 amendment (now section 1001.32[2], Florida Statutes) conferred on school boards a variant of ‘home-rule power,’ and that a district school board may exercise any power for school purposes in the operation, control, and supervision of the free public schools in its district except as expressly prohibited by the State Constitution or general law.”⁴

The Legislature, however, has preempted the entire area of firearms regulation⁵ and generally prohibits the possession of weapons on school property. Section 790.115(2)(a), Florida Statutes, states:

A person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in s. 790.001(13), including a razor blade or box cutter, *except as authorized in support of school-sanctioned activities*, at a school-sponsored event or on the property of any school, school bus, or school bus stop; however, a person may carry a firearm:

1. In a case to a firearms program, class or function which has been approved in advance by the principal or chief administrative officer of the school as a program or class to which firearms could be carried;
2. In a case to a career center having a firearms training range; or
3. In a vehicle pursuant to s. 790.25(5); except that school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges.

For the purposes of this section, “school” means any preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic. (e.s.)

The plain language of the statute prohibits the possession of a firearm on school property unless: it is in a case and being carried to an approved firearms program, class, or function; or in a case and being carried to a firearms training range; or in a vehicle pursuant to section

790.25(5), Florida Statutes, which recognizes the right of a person 18 years of age or older to possess a weapon within the interior of a private conveyance, without a license, if the weapon is securely encased or is otherwise not readily accessible for immediate use; or when authorized in support of school-sanctioned activities.

I am not aware of, nor has my attention been drawn to, a legislative definition of “school-sanctioned activities.” Absent a statutory definition or legislative intent that it be defined in another manner, the plain and ordinary meaning of the term may be used.⁶ The term “school” is defined to mean “an organization of students for instructional purposes on an elementary, middle, or junior high school, secondary or high school, or other public school level authorized under rules of the State Board of Education.”⁷ To “sanction” is “explicit permission or recognition by one in authority that gives validity to the act of another person or body.”⁸

Given the school board’s authority to operate and control the public schools within the school district, it would appear that a school board may determine those activities which are to be considered “in support of an approved school-sanctioned activity” and grant the authority to possess weapons in support of the such activities.⁹ Regrettably, this office may not make such a determination on behalf of the school board.

Section 1006.12, Florida Statutes, prescribes the program whereby a school district may have school resource officers and/or school safety officers present on school campuses to provide security. The statute provides that school resource officers shall be certified law enforcement officers under Chapter 943, Florida Statutes, who are employed by a law enforcement agency, with the powers of the law enforcement officer continuing throughout the officer’s tenure as a school resource officer.¹⁰ A school safety officer also must be a certified law enforcement officer, but may be employed either by a law enforcement agency or by the district school board.¹¹ If a school safety officer is employed by the district school board, then the district school board is the employing agency for purposes of Chapter 943, Florida Statutes, and must comply with the provisions of that statute.¹² The statute specifically provides that a school safety officer may carry weapons when performing his or her official duties.¹³

Thus, the Legislature has provided authority for school districts to work with local law enforcement in providing school resource officers and school safety officers, recognizing that in both instances such officers must be certified law enforcement officers. Both are allowed to carry firearms on a school campus. Section 790.115, Florida Statutes, operates as an exemption from the prohibition against the possession of weapons and firearms on campus when authorized in support of approved school-sanctioned activities. There is no restriction in section 790.115, Florida Statutes, that such authorized use may only be by certified law enforcement officers, school resource officers or school safety officers.¹⁴

While the programs in section 1006.12, Florida Statutes, serve as a means to provide armed security personnel on a school campus, I cannot conclude that it prohibits a school board from making the determination that the hiring of armed security guards for school campuses within the district is in support of school-sanctioned activities.

Accordingly, it is my opinion that a school district may exercise its home rule authority to determine whether the use of armed security guards may be “in support of an approved school-sanctioned activity.”

¹ See s. 4, Art. IX, Fla. Const., and s. 1003.02, Fla. Stat.

² See s. 1003.02(1), Fla. Stat.

³ See Ops. Att’y Gen. Fla. 86-45 (1986), 84-95 (1984), and 84-58 (1984).

⁴ See s. 1001.32(2), Fla. Stat., stating: “In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law.”

⁵ See Ch. 2011-109, Laws of Fla., amending s. 790.33, Fla. Stat., to clarify and reorganize the provisions of that statute preempting to the state the entire field of regulation of firearms. Section 790.33(1), Fla. Stat., provides:

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.

⁶ 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).

⁷ Section 1003.01(2), Fla. Stat.

⁸ Webster’s Third New International Dictionary (1981 unabridged ed.), p. 2009.

⁹ *See also* s. 1001.30, Fla. Stat., recognizing that school officials of the district are delegated the responsibility for the actual operation and administration of all schools within a district.

¹⁰ Section 1006.12(1)(a), Fla. Stat.

¹¹ Section 1006.12(2)(a), Fla. Stat.

¹² *Id.*

¹³ Section 1006.12(2)(c), Fla. Stat.

¹⁴ Section 790.115(3), Fla. Stat., states that the section does not apply to law enforcement officers, so to read the exemption for authorized use to only apply to certified law enforcement officers would render the language in subsection (3) meaningless.

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