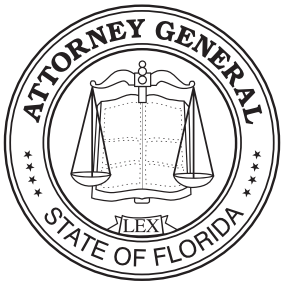
BIENNIAL REPORT

of the

ATTORNEY GENERAL
STATE OF FLORIDA

January 1, 2017, through December 31, 2018

ASHLEY MOODY
Attorney General



Tallahassee, Florida
2019

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
ASHLEY MOODY

May 23, 2019

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

Dear Governor DeSantis:

Pursuant to my constitutional duties and the statutory requirement that this office periodically publish a report on the Attorney General official opinions, I submit herewith the biennial report of the Attorney General for the two preceding years from January 1, 2017, through December 31, 2018.

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 the people of Florida with you.

Sincerely,

Ashley Moody
Attorney General

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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**
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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	**2011-2019**
Ashley Moody	**2019-**

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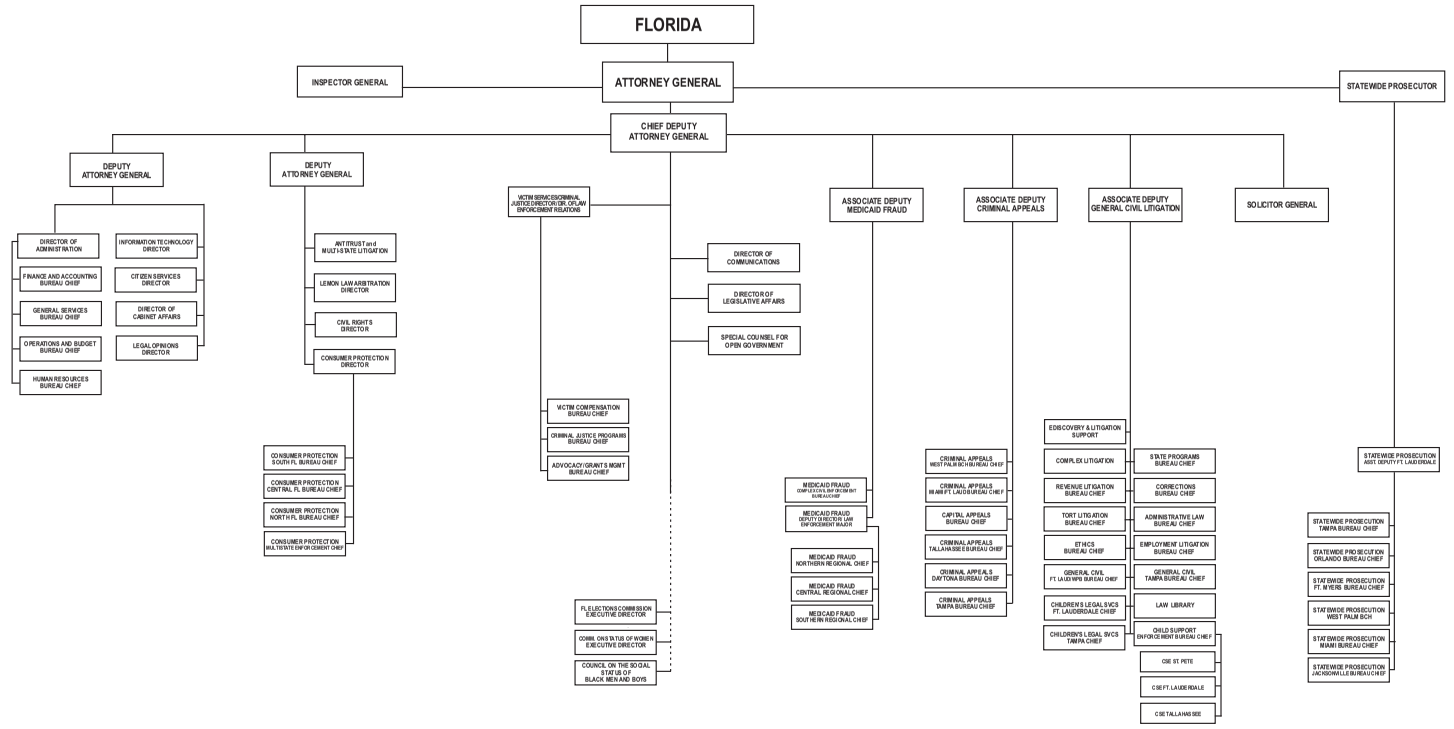
OFFICE OF THE ATTORNEY GENERAL
(as of December 31, 2018)



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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:

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

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

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.

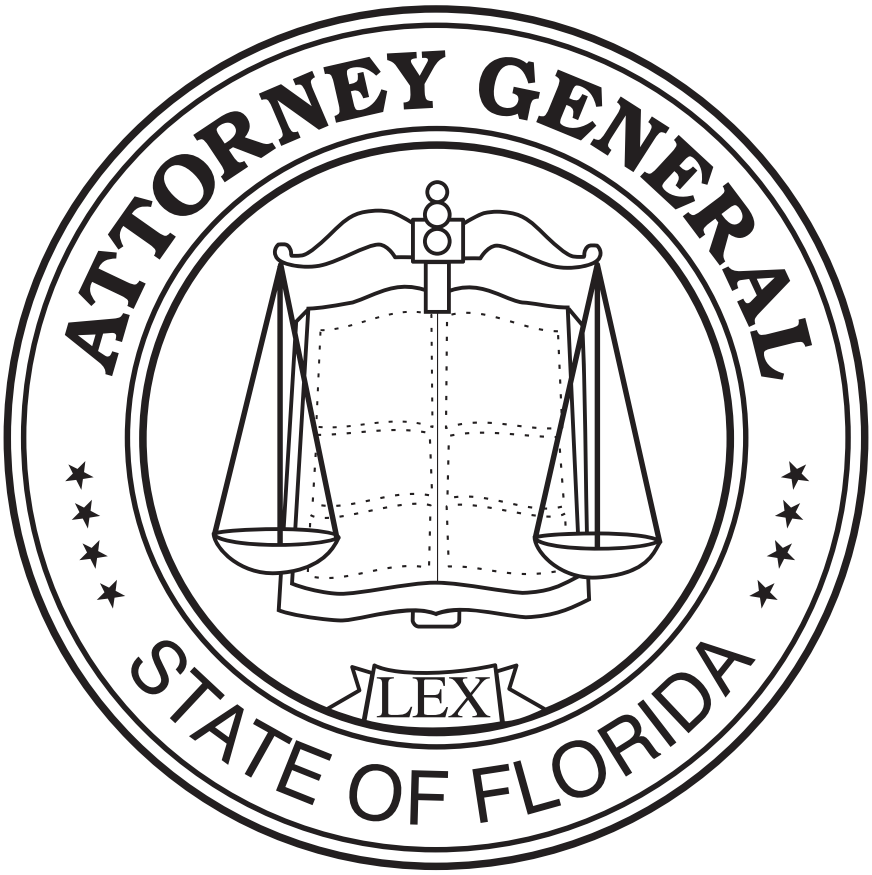
VI. Miscellaneous

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 Citizen Services Unit of the Attorney General's Office. Copies of informal opinions can be obtained from the Opinions Division of the Attorney General's Office.

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



Ashley Moody
The Capitol
Tallahassee

BIENNIAL REPORT

of the

ATTORNEY GENERAL

State of Florida

January 1, 2017, through December 31, 2017

AGO 2017-01 – March 9, 2017

GOVERNMENT IN THE SUNSHINE LAW–SPECIAL MAGISTRATE CODE ENFORCEMENT HEARINGS

INAPPLICABILITY OF SUNSHINE LAW REQUIREMENT THAT PUBLIC BE GIVEN REASONABLE OPPORTUNITY TO BE HEARD AT QUASI-JUDICIAL CODE ENFORCEMENT HEARINGS CONDUCTED BY SPECIAL MAGISTRATE; REQUIREMENT THAT OUTCOMES OF SUCH HEARINGS BE PRESENTED AT PUBLIC HEARING CONDUCTED BY SPECIAL MAGISTRATE. S. 286.0114, FLA. STAT. (2016), AND S. 162.07(4), FLA. STAT. (2016)

To: Mr. Lonnie N. Groot, Hearing Officer/Special Magistrate for Seminole County

QUESTIONS:

1. You ask whether section 286.0114, Florida Statutes, requires that members of the public be given a reasonable opportunity to be heard at hearings you hold as a special magistrate pursuant to authority delegated from the Seminole County code enforcement board;

2. As a follow-up to a prior informal opinion from this office,[1] you ask whether section 162.07(4), Florida Statutes (providing that the [special magistrate] "shall issue an order affording the proper relief consistent with powers granted herein") requires that you "announce the order in public at a subsequent public hearing" instead of "merely issu[ing] a written order[.]"

SUMMARY:

1. Section 286.0114, Florida Statutes, does not require that members of the public be given a reasonable opportunity to be heard at quasi-judicial code enforcement hearings held by a special magistrate pursuant to authority delegated from the county code enforcement board.

2. Section 162.07(4), Florida Statutes, contemplates that the outcomes of such code enforcement hearings will be presented at a public hearing conducted by the special magistrate.

QUESTION 1.

Pursuant to section 286.0114, Florida Statutes, members of the public "shall be given a reasonable opportunity to be heard on a proposition before a [county board.]"[2] But this requirement does not apply to "[a] meeting during which the board…is acting in a quasi-judicial capacity."[3]

A special magistrate who has been given "the authority to hold hearings and assess fines" resulting from local code violations has "the same status as an enforcement board under [Chapter 162, Florida Statutes]."[4] As the Fifth District Court of Appeal has recognized, the powers given to code enforcement boards by Chapter 162, Florida Statutes, are quasi-judicial.[5] Therefore, pursuant to the express exception provided in section 286.0114 (3)(d), Florida Statutes, the requirement that members of the public be "given a reasonable opportunity to be heard" does not apply to code enforcement hearings conducted by a special magistrate acting "in a quasi-judicial capacity" pursuant to delegated board authority. This exception "does not affect the right of a person to be heard as otherwise provided by law."[6]

QUESTION 2.

As previously recognized, a special magistrate who has been delegated code enforcement board authority as allowed by Chapter 162, Florida Statutes, has "the same status as an enforcement board" under that chapter.[7] In prescribing code enforcement board hearing requirements, section 162.07(4), Florida Statutes ("Conduct of hearing"), provides, in pertinent part:

> (4) At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted herein. *The finding shall be by motion approved by a majority of those members present and voting*, except that at least four members of a seven-member enforcement board, or three members of a five-member enforcement board, must vote in order for the action to be official.

§ 162.07(4), Fla. Stat. (2016) (italicized emphasis added). Pursuant to this procedure, as a result of the board's public vote on its "finding," each outcome of the public hearing on alleged code violations is, necessarily, presented at a public hearing of the board.

The logistics involved when a special magistrate makes findings of fact

(including the ultimate finding of whether proven conduct constitutes a code violation) and arrives at conclusions of law are, pragmatically, not the same as those required for a collegial body. The collegial body must both deliberate, and vote to adopt the course of action it will follow,[8] in public. A special magistrate engages in no such public "vote."

On the one hand, as this office has previously stated, a "county choosing to create a code enforcement board under Chapter 162, Florida Statutes, is bound by the requirements or restrictions contained therein and may not alter or amend those statutorily prescribed procedures but must utilize them as they are set forth in the statutes."[9] On the other, as the Florida Supreme Court observed in City of *Tampa v. Brown*, "[i]t is necessary to fill the procedural gaps in [chapter 162] by the common-sense application of basic principles of due process."[10]

The question of whether a special magistrate is required to present each outcome of the code enforcement hearings at a public hearing appears to fall between these two guideposts. However, because the statutory provisions contemplate that the board will present the outcomes of code enforcement hearings at a public hearing of the board, it would be most consistent to implement a process whereby the special magistrate similarly presents the outcomes of code enforcement hearings at a public hearing of the special magistrate.

Therefore, I am of the opinion that section 286.0114 (3)(d), Florida Statutes, does not require that members of the public be given a "reasonable opportunity to be heard" at quasi-judicial code enforcement hearings conducted by a special magistrate pursuant to authority delegated by the county code enforcement board, and that section 162.07(4), Florida Statutes, contemplates that the outcomes of code enforcement hearings will be presented at public hearings conducted by the special magistrate.

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[1] See Informal Attorney General's Opinion dated November 15, 2016, to Mr. Lonnie N. Groot, Esquire (reflecting that § 162.074(4), Fla. Stat., neither specifically requires "that an oral pronouncement" be made regarding the special magistrate's "findings of fact…and conclusions of law," nor provides "a specified timeframe within which the order must be rendered").

[2] § 286.0114(1), Fla. Stat. (2016).

[3] § 286.0114(3)(d), Fla. Stat. (2016).

[4] § 162.03(2), Fla. Stat. (2016).

[5] *See Michael D. Jones, P.A. v. Seminole Cty.*, 670 So. 2d 95, 96 (Fla. 5th DCA 1996) ("The powers given by the Legislature to code enforcement

boards by Chapter 162 do not appear to us as having crossed the line between 'quasi-judicial' and 'judicial.'"); *accord, Verdi v. Metropolitan Dade County*, 684 So. 2d 870, 873-74 (Fla. 3d DCA 1996) ("[C]ode enforcement proceedings are quasi-judicial rather than judicial in nature and…the County's use of hearing officers in these proceedings is constitutionally authorized.").

[6] § 286.0114(3)(d), Fla. Stat. (2016) (italicized emphasis added).

[7] § 162.03(2), Fla. Stat. (2016).

[8] § 162.07(4), Fla. Stat. (2016).

[9] Op. Att'y Gen. Fla. 01-77 (2001).

[10] *City of Tampa v. Brown*, 711 So. 2d 1188, 1189 (Fla. 1998). In that case, the Court concluded that, because the violator had "received notice, had the opportunity to be heard, and was provided a copy of the final order from which an appeal could be taken[,]" the city was not required to serve the order on the violator by certified mail. *Id*.

AGO 2017-02 – March 9, 2017

CONSULTANTS' COMPETITIVE NEGOTIATION ACT – CCNA – CONTRACTS – CONSTRUCTION MANAGER AT RISK SERVICES

WHETHER S. 255.103, FLA. STAT. (2016), S. 255.20, FLA. STAT. (2016), AND S. 287.055, FLA. STAT. (2016), ALLOW A LOCAL GOVERNMENT TO USE A HYBRID PROCESS FOR COMPETITIVE SELECTION OF FIRMS WITH WHOM TO NEGOTIATE A CONSTRUCTION MANAGER AT RISK CONTRACT FOR A PUBLIC CONSTRUCTION PROJECT

To: Mr. John C. Randolph, Attorney for the Town of Palm Beach

QUESTION:

Whether the Town of Palm Beach, in procuring the negotiated services of a construction manager at risk ("CMAR") in connection with a planned underground utilities construction project, may use an alternative to the procedures set forth in section 287.055, Florida Statutes (the "Consultants' Competitive Negotiation Act,"[1]), in which the Town would consider price, as well as qualifications, in ranking and selecting those firms with whom the Town would competitively negotiate?[2]

SUMMARY:

Both individually and collectively, sections 255.103, 255.20, and 287.055, Florida Statutes[3] (pertaining to local government procurement of construction management services), do not authorize the use of a hybrid competitive selection process whereby the Town would evaluate both qualifications and price prior to selecting the firms with whom to negotiate a CMAR contract. As a result, the Town may not employ the proposed alternative, but must comply with the requirements of section 287.055, Florida Statutes, in its competitive procurement of a negotiated CMAR services contract in connection with its planned underground utilities construction project.

As described in section 255.103, Florida Statutes ("Construction management or program management entities"), a construction manager is "responsible for construction project scheduling and coordination in both preconstruction and construction phases and generally responsible for the successful, timely, and economical completion of the construction project."[4] The construction manager may also be at risk, as contemplated by the additional provision that "the construction management entity, *after having been selected and after competitive negotiations*, may be required to offer a guaranteed maximum price and a guaranteed completion date…in which case, the construction management entity must secure an appropriate surety bond pursuant to s. 255.05 and must hold construction subcontracts."[5] Although your letter does not detail the scope of construction management services the Town would seek, you indicate that the CMAR would not provide "professional engineering or architectural services," but "only…construction services[.]"[6]

As you have noted, under section 255.103, a "governmental entity"[7] "may select a construction management entity" "pursuant to the process provided by s. 287.055[,] [Florida Statutes]."[8] Section 255.103 also allows use of the procedures provided by section 255.20, Florida Statutes: "This section does not prohibit a local government from procuring construction management services…pursuant to the requirements of s. 255.20."[9] In section 255.103, no available processes other than those provided by sections 287.055 and 255.20, Florida Statutes, are described.

Section 255.20, Florida Statutes, pertains, in pertinent part, to "contracts for public construction works."[10] Although it also "expressly allows contracts for construction management services,"[11] it mandates, in subsection (1)(d)(3), that, when such contracts are "subject to competitive negotiations," they "*must* be awarded in accordance with section 287.055."[12]

The significance of these constraints lies in the timing authorized by statute for a procuring entity's consideration of price. Under all three statutes, when a governmental entity seeks to procure a contract for

CMAR services subject to negotiation, price may *not* be considered in the competitive selection--but only in the competitive negotiation--phase.

Section 255.103(2), Florida Statutes (2016), allows a local government to require the construction management entity to "offer a guaranteed maximum price [or a lump-sum price] and a guaranteed completion date[,]" but only "after having been selected and after competitive negotiations[.]" Section 287.055, Florida Statutes, allows a local government to "request, accept, and consider proposals for the compensation to be paid under the contract," but, similarly, "only during competitive negotiations under subsection (5)."[13]

Section 287.055, subsection (5), provides that a local government "shall *negotiate* a contract with the most qualified firm for professional services at compensation which the [local government] determines is fair, competitive, and reasonable. In making such determination, the [local government] shall conduct a detailed analysis of the cost of the professional services required in addition to considering their scope and complexity."[14] Section 255.20, Florida Statutes, reiterates these same requirements by mandating that construction management services contracts "subject to competitive negotiations" "must be awarded in accordance with s. 287.055."[15]

Within this framework, you have asked whether the Town is prohibited by statute from using a competitive process in which price as well as qualifi cations would be evaluated before selecting the firms with whom a potential CMAR services contract would be negotiated.[16] Observing that section 255.103(2), Florida Statutes, employs the word "may" [use the section 287.055 process] rather than the word "shall," you suggest that this permissive language appears to allow use of the competitive selection alternative proposed.

While section 255.103(2), Florida Statutes, does refl ect that a governmental entity "may" select a construction manager pursuant to the process provided by section 287.055, Florida Statutes, the remaining provisions of section 255.103 do not otherwise authorize the hybrid selection process you have described. Instead, the statute only provides: "This section does not prohibit a local government from procuring construction management services…*pursuant to the requirements of s. 255.20*."

The requirements of section 255.20(1)(d), Florida Statutes, in turn, bring the analysis back full circle to the Consultants' Competitive Negotiation Act. Based on the alternative selection method described in your letter, the proposed process would culminate in the Town's negotiation "with the highest ranked firm fi rst and, if necessary, [the Town would] proceed to the next highest ranking." This directly implicates the mandate in section 255.20(1)(d)3. that a contract "subject to competitive negotiations…must be awarded in accordance with s.

287.055[,] [Florida Statutes]."[17]

Based on the foregoing, I am of the opinion that, both individually and collectively, sections 255.103, 255.20, and 287.055, Florida Statutes, do not allow the proposed hybrid competitive selection process in which the Town would evaluate both qualifi cations and price prior to selecting the firms with whom to negotiate a potential CMAR contract.[18] Because the contract for CMAR services described in your letter would be subject to competitive negotiations, the Town must utilize the selection process provided for by section 287.055, Florida Statutes.

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[1] § 287.055(1), Fla. Stat. (2016).

[2] This opinion is expressly limited to addressing the question posed in your opinion request. While you have provided this office with a copy of a request for proposals for a CMAR which was apparently used by another local government, nothing in this opinion should be understood to address or comment on the competitive selection process used by another entity.

[3] These three statutes, which cross-reference each other, must be read together to properly address the question posed. *See generally Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1075 (Fla. 2011), as revised on denial of reh'g (Nov. 10, 2011) (reflecting that "statutes relating to the same subject matter must be read together, or in pari materia") (citing *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) ("The doctrine of in pari materia is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.")).

[4] § 255.103 (2), Fla. Stat. 2016).

[5] Id. (italicized emphasis added).

[6] It is therefore assumed, for purposes of this analysis, that, as posited, "only construction services are sought." Because a detailed description of the scope of services has not been provided, it is not otherwise possible to determine whether the proposed CMAR contract might comprise professional architectural or engineering services, or not. The potential professional architectural or engineering aspects of a construction manager's role are discussed in Brian A. Wolf, *Rights and Liabilities of Construction Managers*:

> In many states, a CM must obtain a license as a design professional or contractor, depending on the services rendered. *See Full Circle Diary, LLC v. McKinney*, 467 F. Supp. 2d 1343 (M.D. Fla. 2006). In Florida, an architectural license may be required, because many CM services are encompassed by the definition of "architecture" in F.S. 481.203(6), which includes planning, job-site inspection, and administration

> of construction contracts. Likewise, design preparation and supervision of construction may fall within the definition of "professional engineering" under F.S. 471.005(7). Verich v. Florida State Board of Architecture, 239 So. 2d 29 (Fla. 4th DCA 1970) (construing former F.S. 471.02(5)).
>
> CONSL FL-CLE 4-1 (2013); *cf. also City of Lynn Haven v. Bay Cty. Council of Registered Architects, Inc.*, 528 So. 2d 1244, 1245 (Fla. 1st DCA 1988) (enjoining the City, in connection with construction of a public building project, from circumventing the requirements of § 287.055, Fla. Stat., by allowing the low bidder to select and hire an architect to prepare, sign, and seal the architectural drawings and direct the projects); § 255.103(2), Fla. Stat. (2016) (reflecting that, after a construction management entity has been selected "pursuant to the process provided by s. 287.055," such entity "may retain necessary design professionals selected under the process provided in s. 287.055").

[7] *See* § 255.103 (1), Fla. Stat. (2016) ("As used in this section, the term "governmental entity" means a…political subdivision of the state.").

[8] § 255.103 (2), Fla. Stat. (2016).

[9] § 255.103 (5), Fla. Stat. (2016); *see also* CHARTER OF THE TOWN OF PALM BEACH, FLORIDA, Art. 6, § 2-566 ("Procedure for contracts, purchases, exceeding twenty-five thousand dollars.")("All exceptions from public bid requirements referenced herein are intended to be in compliance with state statutes, specifically, but not limited to, F.S. § 255.20 and to the extent any provision herein is in contravention of said statute, said exception shall not apply") (italicized emphasis added). However, the Charter of the Town of Palm Beach, Florida does not set forth the proposed procurement process described here.

10§ 255.20(1), Fla. Stat., provides that a "political subdivision of the state seeking to construct…other public construction works must competitively award to an appropriately licensed contractor each project that is estimated…to cost more than $300,000." *Id.* Because the Town currently estimates that the cost of the utility undergrounding project will be $90 million (see http://townofpalmbeach.com/index.aspx?nid=376, last visited February 10, 2017), it is assumed, for purposes of this analysis, that the CMAR contract cost would exceed $300,000.

[11] § 255.20(1), Fla. Stat. (2016).

[12] § 255.20(1)(d)(3) (italicized emphasis supplied).

[13] § 287.055 (4)(b), Fla. Stat. (2016). This restriction was added after the decision in *City of Jacksonville v. Reynolds, Smith & Hills, Architects, Engineers & Planners, Inc.*, 424 So. 2d 63, 64 (Fla. 1st DCA 1982). In that case, the court considered a city ordinance which had been invalidated as

inconsistent with the Consultants' Competitive Negotiation Act ("Act"). The ordinance established a process whereby respondents had to submit a quotation of fees which was "taken into consideration in determining the three most qualified firms before entering into competitive negotiations." At that time, the Act did not expressly restrict the request, receipt, and consideration of "proposals for the compensation to be paid under the contract" to the post-selection competitive negotiation phase, as it does now. Because the prior version of the Act made "no mention of fee quotation," the court concluded that, "[w]ithout an express prohibition,… such use of fee quotations [did not damage] the process established by the Act." 424 So. 2d at 64. The present version of the Act, in contrast, expressly prohibits consideration of price during the competitive selection phase.

[14] § 287.055 (5) (a), Fla. Stat.(2016)(italicized emphasis added); cf. Fla. Att'y Gen. Op. 2010-20 (2010) ("Nothing in section 287.055, Florida Statutes, authorizes an agency to include compensation rates as a factor in the initial consideration and selection of a firm to provide professional services.").

[15] § 255.20(1)(d)(3), Fla. Stat. (2016).

[16] As described in your letter, respondents would submit a qualifications proposal and, in a separate sealed envelope, would also submit a cost proposal for preconstruction services, construction services (CMAR fees), percentage of profit, cost of insurance and bond premium, general conditions, and recommended contingency. The selection committee would first rate the respondents based on their qualifications. After completing that assessment, the Purchasing Division would publicly open the separately-sealed CMAR Fee Proposals, and--prior to firm selection--would award points for each respondent's proposal based on a formula. These points would then be added to the evaluation committee member's scores for each respondent, and the resulting "final scores" would be tabulated and converted to rankings. The order of subsequent contract negotiation with respondents would depend upon the resulting relative rankings: "[t]he Town will then negotiate with the highest ranked firm first and, if necessary, proceed to the next highest ranking."

[17] *See generally Alsop v. Pierce*, 19 So. 2d 799, 805 (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.").

[18] *Cf.* Op. Att'y Gen. Fla. 11-21 (2011) (concluding that the Southwest Florida Water Management District was required to procure construction and construction management services contracts pursuant to the terms of § 255.20, Fla. Stat., and had "no authority to develop a 'hybrid' model for awarding construction projects in the absence of statutory authority").

AGO 2017-03 – April 4, 2017

MUNICIPALITIES – CHARTER AMENDMENT – REFERENDUM REGARDING DEVELOPMENT ORDERS AND COMPREHENSIVE PLAN AMENDMENTS

WHETHER S. 163.3167, FLA. STAT., ALLOWS A MUNICIPALITY TO AMEND ITS CITY CHARTER THROUGH AN INITIATIVE OR REFERENDUM PROCESS TO INCLUDE LANGUAGE RESULTING IN MANDATORY DENIAL OF CERTAIN DEVELOPMENT ORDERS AND REQUIRING AN INITIATIVE OR REFERENDUM TO IMPLEMENT LOCAL COMPREHENSIVE PLAN AMENDMENTS

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

QUESTION:

May the city charter be amended by referendum to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" be implemented only pursuant to "a vote arising from the initiative or referendum process"?[1]

SUMMARY:

The city charter may not, consistent with section 163.3167, Florida Statutes, be amended through an initiative or referendum process to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" be implemented only pursuant to "a vote arising from the initiative or referendum process."

Florida's Growth Policy Act, Chapter 163, Florida Statutes, provides a direct answer to your question. As amended in 2014, section 163.3167(8), Florida Statutes–which governs local government initiative or referendum processes in regard to any development order–currently provides that "[a]n initiative or referendum process in regard to any development order is prohibited." The Legislature expressly indicated its intent that this prohibition be "remedial in nature[,]" providing:

> (c) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b). Therefore, the prohibition

> on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process commenced or completed thereafter is deemed null and void and of no legal force and effect.[2]

In interpreting an earlier version of section 164.3167, Florida Statutes (which, at the time, prohibited an initiative or referendum process "in regard to any development order or in regard to any local comprehensive plan amendment or map amendment *that affects five or fewer parcels of land*"), the Second District Court of Appeal considered the validity of proposed city charter amendments which would require elector approval for any comprehensive plan or plan amendment affecting more than five parcels of land. *Citizens For Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1147–48 (Fla. 2d DCA 2006). The appellate court held that the proposed amendments were "inferentially permitted" by section 163.3167:

> Clearly, the Legislature has proscribed use of the initiative and referendum process in matters affecting five or fewer parcels of land. And just as clearly, the Legislature inferentially permitted use of the initiative and referendum process in development orders or comprehensive plans or amendments affecting six or more parcels.

Id. at 1149–50.[3]

While the court's reasoning in *Citizens For Responsible Growth* may have suggested that proposed ordinances or charter amendments might be authorized to the extent they complement, rather than conflict with, the Growth Policy Act's statutory framework, the basis for any such leeway has since been removed. By subsequent amendment to section 164.3167, Florida Statutes, the condition that the prohibited initiative or referendum process must involve local comprehensive plan amendments or map amendments "affecting five or fewer parcels of land" was eliminated.

Under the present version of the law, "except as specifically and narrowly allowed by paragraph (b)," the initiative and referendum process is prohibited in regard to any development order, local comprehensive plan amendment, or map amendment. Because your query concerns a prospective charter amendment, the exception provided by subsection (b) for processes "expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011[,]" would not apply.[4]

As applied to your question, you indicate that it has been proposed that the city charter be amended through an initiative or referendum process

to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" may be implemented only pursuant to "a vote arising from the initiative or referendum process." Were the proposed amendment to have the outcomes you describe, this would result in violations of the clear statutory proscriptions against implementation of the initiative or referendum process in regard to any development order or local comprehensive plan amendment.

Based on the foregoing, I am of the opinion that the city charter may not, consistent with section 163.3167, Florida Statutes, be amended through an initiative or referendum process to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" be implemented only pursuant to "a vote arising from the initiative or referendum process."

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1 Based on the quoted language (taken directly from your letter), it is presumed that the proposed charter amendment, if adopted, would have the legal effect you have asserted. This office otherwise would not interpret the effect of any proposed charter amendment language. See Frequently Asked Questions About Attorney General Opinions (available at http:// myfloridalegal.com/pages.nsf/Main/dd177569f8fb0f1a85256cc6007b70ad) (last visited March 6, 2017).

2 § 163.3167(8)(c), Fla. Stat. (2016).

3 In later addressing a different question under the same provision, the Fourth District Court of Appeals determined that the statutory prohibition precluded a referendum to challenge a city ordinance which amended the City's comprehensive plan and provided for rezoning of a 4.02-acre parcel of land. *City of Lake Worth v. Save Our Neighborhood, Inc*., 995 So. 2d 1002, 1003–04 (Fla. 4th DCA 2008). In so doing, the appellate court rejected the challengers' argument that "affected" parcels comprised not only the parcel specifically described in the amendment, but "may also include other affected parcels" which were not directly subject to the amendment. Id. at 1003.

4 § 163.3167(8)(b), Fla. Stat., specifies that "[a]general local government charter provision for an initiative or referendum process is not sufficient.

AGO 2017-04 – August 9, 2017

MULTICOUNTY INDEPENDENT SPECIAL DISTRICT – SECTION 112.08

USE OF DISTRICT FUNDS, BOARD MEMBER COMPENSATION, OR BOARD MEMBER PERSONAL FUNDS TO PAY FOR DISTRICT

BOARD MEMBERS' PARTICIPATION IN THE DISTRICT'S GROUP HEALTH INSURANCE PROGRAM

To: Mr. Curtis L. Shenkman, Attorney for Loxahatchee River District

QUESTIONS:

1. Whether the Loxahatchee River Environmental Control District ("District") is authorized by section 112.08(2)(a), Florida Statutes (pertaining to group insurance for public officers, employees, and certain volunteers), or Chapter 2002-358, Laws of Florida (the enabling legislation for the District), to use District funds to pay for all or a portion of the cost for District board members to participate in the District's group health insurance program, in addition to the board member compensation which is provided as authorized by section 4(1) of Chapter 2002-358; and

2. Whether all or a portion of the compensation paid to board members under section 4(1) of Chapter 2002-358, Laws of Florida, or the private funds of the District board members may be used to pay for the board members' participation in the District's group health insurance program?

SUMMARY:

1. The District is authorized by section 112.08(2)(a), Florida Statutes, to use District funds to pay for all or a portion of the cost for District board members to participate in the District's group health insurance program, in addition to the board member compensation which is provided as authorized by section 4(1) of Chapter 2002-358.

2. Neither section 112.08(2)(a), Florida Statutes, nor Chapter 2002-358, Laws of Florida, appears to preclude use, at the board member's direction, of all or a portion of the compensation paid to District board members (under section 4(1) of Chapter 2002-358), or use of the board members' private funds, to pay for the members' participation in the District's group health insurance program.

The charter for the Loxahatchee River Environmental Control District is codifi ed at Chapter 2002-358, Laws of Florida. The District—whose geographical boundaries comprise portions of Palm Beach and Martin Counties, including the Town of Jupiter, Jupiter Inlet Colony, Juno Beach, and the Village of Tequesta (generally defi ned as the Loxahatchee River Basin)—is established as a multicounty independent special district of the state,[1] and is thus a local agency of government.[2] "The purpose of the District is to effectively achieve water quality

and water quantity management within the Loxahatchee River Basin through the management of water supply, wastewater, and storm water drainage."[3] In implementing this purpose, the District is governed by a five-member board.[4] The District board members, who are elected by the registered voters of the District,[5] act as officers of the District.[6] The District's operation and projects may be financed through issuance of bonds and collection of assessments and ad valorem taxes.[7]

As a general rule, special districts possess only the power and authority granted to them by their enabling legislation (whether expressly granted or necessarily implied to carry out expressly-granted powers).[8] Therefore, absent an additional, independent source of statutory authority, the District may only exercise the powers granted by its enabling legislation, either expressly or by necessary implication.

QUESTION ONE

The charter for the Loxahatchee River Environmental Control District provides that members of the board "shall serve with compensation in the amount of $100 per month per member, and shall be entitled to per diem and travel expenses as provided by section 112.061, Florida Statutes."[9] The charter does not address whether insurance can be provided for officers of the District (including board members). But section 112.08(2)(a), Florida Statutes—to which the District is also subject—does address this issue. Moreover, it specifies that its provisions apply "[n]otwithstanding any general law or special act to the contrary[.]"[10]

Section 112.08(2)(a), Florida Statutes, specifically authorizes a "local governmental unit" to "provide and pay out of its available funds for all or part of the premium for… health … insurance, or all or any kinds of such insurance, for the officers and employees of the local governmental unit and for health…insurance for the dependents of such officers and employees upon a group insurance plan…."[11] Section 112.08(1), in turn, defines the term "local governmental unit," as used in that section, to include special districts.[12] Section 112.08, Florida Statutes, also authorizes the District to enter into contracts with insurance companies or professional administrators to provide such insurance; to self-insure to provide any plan for health, accident, and hospitalization coverage; or to enter into a risk management consortium to provide such coverage.[13] Based on the statute's applicability notwithstanding "any general law or special act to the contrary,"[14] the independent statutory authority granted by section 112.08 may be invoked even where, as here, a district's enabling legislation does not address the matters comprised by section 112.08.

Neither Chapter 2002-358, Laws of Florida, nor section 112.08, Florida Statutes, requires that the District board member compensation be used to make insurance payments for the members' insurance coverage,

as described in section 112.08. Instead, section 112.08(2)(a) appears to grant the District the independent power to provide, and pay for, such insurance for its officers (including board members).

Therefore, assuming that the District's group health insurance program otherwise complies with the requirements of section 112.08, Florida Statutes,[15] the Loxahatchee River Environmental Control District is authorized by section 112.08(2)(a), Florida Statutes, to use District funds to pay for all or a portion of the cost for District board members to participate in the District's group health insurance program. Payment of such cost may be in addition to the board member compensation authorized by Chapter 2002-358, Laws of Florida.[16]

QUESTION TWO

You ask whether the authorized board member compensation, itself, may be used to pay the cost of all or a portion of the premiums for such insurance, and whether the board members may make such payments from their personal funds. I am aware of no provision of the charter for the Loxahatchee River Environmental Control District which would preclude the use, at a board member's direction, of a board member's compensation to pay for insurance provided by the District.[17] Nor am I aware of any limitation on the use of the board members' personal funds for such purposes.[18]

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[1] *See* § 1, Ch. 2002-358, Laws of Fla.

[2] *See* § 189.012(6), Fla. Stat. (2017) ("'Special district' means a unit of local government created for a special purpose…which has jurisdiction to operate within a limited geographic boundary and is created by general law, special act, local ordinance, or by rule of the Governor and Cabinet…."); see also § 112.08(1), Fla. Stat. (defining "local governmental unit" to mean, in pertinent part, "any…special district").

[3] Fla. Admin. Code R. 31-1.001(1); see generally § 6, Ch. 2002-358, Laws of Fla.

[4] *See* § 4, Ch. 2002-358, Laws of Fla.

[5] *See id*.

[6] *See* Fla. Admin. Code R. 31-1.002 (1) ("The Agency Head") ("The Agency Head is collectively the five (5) member Governing Board. Among themselves, the Governing Board selects a Chairman, Vice-Chairman, Secretary, Treasurer and Assistant Secretary/Treasurer annually.").

[7] *See* § 6, Ch. 2002-358, Laws of Fla.

[8] *See Forbes Pioneer Boat Line v. Board of Commissioners of Everglades*

Drainage District, 82 So. 346, 351 (Fla. 1919); Op. Att'y Gen. Fla. 89-34 (1989).

[9] § 4(10), Ch. 2002-358, Laws of Fla.

[10] § 112.08(2)(a), Fla. Stat. (2017).

[11] § 112.08(2)(a), Fla. Stat. (2017).

[12] § 112.08(1), Fla. Stat. (2017).

[13] § 112.08(2)(a), Fla. Stat. (2017).

[14] *Id*.

[15] Because your letter does not provide details regarding the District's group health insurance program, any comment regarding the program's compliance with the requirements of § 112.08, Fla. Stat., is beyond the scope of this opinion.

[16] *See* Op. Att'y Gen. Fla. 04-08 (2004).

[17] *See* § 112.11, Fla. Stat. (2017).

[18] *See* Op. Att'y Gen. Fla. 04-08 (2004).

AGO 2017-05 – November 22, 2017

PUBLIC RECORDS EXEMPTION – PROPERTY APPRAISER – NOTICE OF CODE VIOLATIONS

WHETHER A PROPERTY APPRAISER MAY RELEASE ADDRESSES EXEMPT FROM DISCLOSURE UNDER THE PUBLIC RECORDS LAW BUT NOT CONFIDENTIAL, TO THE MUNICIPAL CODE INSPECTOR SEEKING TO PROVIDE NOTICE REQUIRED BY STATUTE TO ALLEGED VIOLATORS OF LOCAL CODE PROVISIONS, PURSUANT TO A STATUTORY NOTICE PROVISION THAT AUTHORIZES NOTICE TO THE ADDRESS IN THE COUNTY PROPERTY APPRAISER'S DATABASE

To: Mr. Terry J. Harmon, Legal Counsel to Leon County Property Appraiser

QUESTION:

May a county property appraiser disclose property information from the property appraiser's database that is exempt from inspection under Florida's Public Records Act to a municipality seeking to provide notice to alleged code violators in accordance with section 162.12(1)(a), Florida Statutes?

SUMMARY:

A property appraiser may disclose the address of an alleged violator of the local code when a code inspector or code enforcement board is attempting to provide notice regarding the violation as required by section 162.06, Florida Statutes.

Under the Local Government Code Enforcement Boards Act, sections 162.01 through 162.13, Florida Statutes, when a code inspector for a county or municipality finds a code violation, the code inspector is required by section 162.06, Florida Statutes, to notify the alleged violator and give him or her time to correct the violation. The statute also requires notice of a hearing before the code enforcement board if the violation is not corrected, notice if there is a repeat violation, and notice if a violation is so serious as to call for an immediate hearing. These notice procedures are critical to ensuring that alleged violators receive due process from the code enforcement board.[1]

In the statute dealing with methods of providing notice under the Act, section 162.12(1), Florida Statutes, offers a variety of methods. The first method authorized in subsection (1)(a), is by "[c]ertified mail, and at the option of the local government return receipt requested, to the address listed in the tax collector's office for tax notices or *to the address listed in the county property appraiser's database*." (e.s.)

You indicate that the Leon County Property Appraiser has traditionally declined to disclose property information to the City of Tallahassee for code enforcement purposes when such information is protected from disclosure under a public records exemption. The City of Tallahassee has informed your office, however, that this policy has interfered with its ability to carry out its duty to provide the statutorily required notices. The Property Appraiser, thus, asks whether it may disclose an exempt address without violating the Public Records Act.

Section 119.071, Florida Statutes, contains multiple exemptions from disclosure under the mandatory access requirement of section 119.07(1), Florida Statutes. Under section 119.071(4)(d)3., Florida Statutes, an agency that is not the employer of, but is the custodian of records pertaining to, one of the persons enumerated in section 119.071(4)(d), Florida Statutes, is required to maintain such person's exemption if the person or his or her employing agency submits a written request to the custodian.[2]

Notwithstanding this, a distinction is made between public records that are "exempt" from disclosure and records that are "confidential."

> If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated

> in the statute.... If records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the showing of such information.[3]

Based upon this distinction, this office has concluded that when there is a statutory or substantial policy need for information that is otherwise exempt from disclosure under the Public Records Act, the information should be made available to the requesting agency or entity.[4]

For example, in Attorney General Opinion 2015-02, this office concluded that the City of Oviedo could disclose information that was exempt, but not confidential under section 119.071(4)(d)2., Florida Statutes – the names of law enforcement officers assigned to undercover duty that were part of a roster of all of the City's law enforcement officers – if the custodian determined there was a statutory or substantial policy need for the disclosure. In Attorney General Opinion 2007-21, this office drew the same conclusion with regard to disclosure of photographs of City of Venice law enforcement officers, which were exempt, but not confidential. And in an informal opinion to the Lake Worth Chief of Police, this office determined that information from the City's personnel files that revealed the home addresses of former law enforcement officers, which was exempt from mandatory disclosure, but not confidential, could be provided to the State Attorney's Office when it was seeking to serve a criminal witness subpoena by mail as authorized by section 48.031, Florida Statutes.[5]

Accordingly, the property appraiser may release an address that is exempt, but not confidential, of an alleged code violator to a code inspector who is seeking to comply with his or her duty under section 162.06, Florida Statutes, to provide notice of a code violation that initiates a procedure intended to lead to correction of such violation.

The Leon County Property Appraiser asserts that if disclosure of an exempt address is permitted, the exemption would remain in place, because the City is also required to maintain the exempt status of the information. Indeed, there is nothing in Chapters 119 or 162, Florida Statutes, indicating that an exempt address loses its exempt status by being shared with another agency.[6] "[T]he focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands."[7] The purpose for the exemptions in section 119.071, Florida Statutes, is to protect the safety and privacy of certain specified persons and their families.[8] The code inspector's statutory duty to notify an alleged code violator of a violation warrants use of an otherwise exempt address for the limited purpose of providing such notice, and does not authorize further disclosure of the address.

It is my opinion that a property appraiser may disclose addresses that are exempt from public records inspection, but are not cofidential,to

the code inspector seeking to provide notice of code violations pursuant to section 162.06, Florida Statutes.

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[1] *See, e.g., Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003).

[2] *See* Ops. Att'y Gen. Fla. 14-07 (2014), 10-37 (2010), and 05-38 (2005).

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

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

[5] *See* Inf. Op. to Lee Reese, Chief of Police (April 25, 1989).

[6] *See Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998) ("[I]f the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.").

[7] *Id*.

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

AGO 2017-06 – November 22, 2017

COUNTIES – TOURIST DEVELOPMENT TAX – TRANSIT SYSTEM OPERATED BY A PRIVATE COMPANY

WHETHER THE COUNTY MAY USE REVENUES RECEIVED FROM THE TOURIST DEVELOPMENT TAX TO FUND A TRANSIT SYSTEM TO BE OPERATED BY A PRIVATE COMPANY

To: Mr. Tim Norris, Chairman, Walton County Tourist Development Council

QUESTION:

Whether the county may use proceeds of the tourist development tax under section 125.0104(5)(a)3., Florida Statutes, to fund, in whole or in part, a transit system operated by a private company.

SUMMARY:

Section 125. 0104(5)(a)3., Florida Statutes, which authorizes use of tourist development tax revenues for "an activity, service, venue, or event" when one of its main purposes is to attract tourism, does not encompass funding to operate a transit system in general, but would support funding for specific transportation services that are clearly intended to attract tourism.

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

The projects that can be funded by the tourist development tax are enumerated in subsection (5) of the statute.[2] Each is related to the attraction of tourists to the county.[3] You suggest that section 125.0104(5)(a)3., Florida Statutes, provides the specific authority to fund the operation of a transit system. That provision states:

> (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:
>
> * * *
>
> 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[.] (e.s.)

This provision is specifically tailored to authorize funding for the promotion[4] and advertisement of various attractions within the county to tourists.

"Nothing in section 125.0104(5), Florida Statutes, suggests that the tourist development tax is a broad funding source. Rather, the tax revenues are a targeted funding source to directly and primarily promote tourism."[5] Thus, such revenues cannot be used to fund a public transit system for the citizens of Walton County that would incidentally benefit tourists. Instead, to warrant use of tourist development tax revenues for transportation services under subsection (5)(a)3., there must be a clear and direct relationship between the promotion of tourism and the

particular transportation service being offered.[6] Such transportation services should involve routes and schedules addressing the specific needs of tourists, and might include, for example, a shuttle connecting hotels and motels with county tourist attractions.

Although subsection (5)(a)3. does not restrict services eligible for funding to those which are publicly provided,[7] each qualifying service must clearly enhance the County's ability to attract tourists, and each must be promoted to tourists in a manner demonstrating that tourism is one of its central purposes. Therefore, before allocating revenues to any transportation service for which funding is sought, the Walton County Board of County Commissioners must make a case-by-case factual determination, based on a consideration of these factors, regarding whether a main purpose of the service is to attract tourists.

These principles are reflected in prior opinions discussing the use of tourist development funds. In Attorney General Opinion 2000-25, this office was asked about a county's use of tourist development funds (1) to cosponsor with a private corporation a bass fishing tournament at a county facility, and (2) to sponsor a two-day event at a private racetrack. This office concluded that tourist development funds could not be used to operate or promote a private sports facility, because subsection (5)(a)1. requires that sports facilities be publicly owned to receive tourist development tax dollars. Revenues could be used, however, pursuant to what is now subsection (5)(a)3., for the particular attraction or event being held, so long as the governing body made the legislative determination that one of the main purposes of the event was to attract tourists.

In an informal opinion provided to Circuit Court Clerk Scott Ellis of Titusville, this office was asked about using tourist development revenues for the day-to-day operations of a "county contracted arts and culture-focused nonprofit entity," the Brevard Cultural Alliance.[8] Such operations would include salaries of agency personnel, costs of marketing and printing, and insurance and employee benefits. This office concluded that under section 125.0104(5)(a)3., Florida Statutes, tourist development tax revenues could be used for particular events and activities put on by the organization to promote tourism, but not for its daily administrative expenses.

Therefore, it is my opinion that revenues from a tourist development tax may be used for specific tourist-oriented transportation services based upon a showing that one of the main purposes of each individual service provided is to attract tourists to Walton County.

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[1] Op. Att'y Gen. Fla. 83-18 (1983). *See also* Ops. Att'y Gen. Fla. 14-02 (2014) and 13-29 (2013).

[2] *See, e.g., Alachua County v. Expedia, Inc.*, 175 So. 3d 730, 736 (Fla. 2015); *Freni v. Collier County*, 588 So. 2d 291, 293 (Fla. 2d DCA 1991).

[3] "Tourist" means "a person who participates in trade or recreation activities outside the county of his or her permanent residence or who rents or leases transient accommodations as described in paragraph (3)(a)." §125.0104(2)(b)2., Fla. Stat.

[4] "Promotion" means "marketing or advertising designed to increase tourist-related business activities." § 125.0104(2)(b)1., Fla. Stat.

[5] Informal Opinion to Hon. Scott Ellis, December 16, 2014.

[6] *See* Ops. Att'y Gen. Fla. 15-14 (2015), 14-02 (2014), 12-38 (2012), 10-26 (2010), and 10-09 (2010).

[7] You have indicated that the transit system in question will be operated by a private company. Because Art. VII, § 10 of the Fla. Const. prohibits a county from using its taxing power to aid a private entity, even those projects authorized by § 125.0104, Fla. Stat., must be shown to "serve a paramount public purpose," with only "incidental benefits" accruing to a private party, to be eligible for funding. *State v. Osceola County*, 752 So. 2d 530, 539 (Fla. 1999) (affirming the validation of bonds issued to acquire a convention center from a private entity that would operate the facility, using revenues from a tourist development tax to pay the debt service, finding that "[t]he fact that the proposed project will be operated by a private entity does not negate the public character of the project").

[8] *See supra*, n.5.

AGO 2017-07 – November 22, 2017

FLORIDA CONTRABAND FORFEITURE ACT

CONTRABAND FORFEITURE TRUST FUNDS MAY BE USED TO PAY SHERIFF'S RECURRING CONTRACTUALLY ALLOCATED SHARE OF SCHOOL RESOURCE OFFICER PROGRAM PERSONNEL COSTS, BUT NOT TO DEFRAY PERSONNEL COSTS FOR CERTIFIED SCHOOL RESOURCE OFFICERS INCURRED APART FROM THEIR PARTICIPATION IN THE PROGRAM

To: The Honorable David Morgan, Sheriff, Escambia County

QUESTIONS:

1. Whether the Sheriff of Escambia County ("Sheriff") may use funds obtained pursuant to Florida's Contraband Forfeiture Act ("Act"), sections 932.701-.7062, Florida Statutes:

(a) to pay the pro rata costs of salary and benefits for deputies regularly assigned to perform school resource officer duties throughout the school year, even if such costs recur from year to year; and

(b) to pay the personnel costs incurred for such officers when they are not performing school resource officer duties because school is not in session?

2. Whether the Sheriff may use these funds to pay or reimburse the County for the salary and benefits of a deputy based on his or her designation as a "school resource officer," regardless of the amount of time such deputy is performing school resource officer duties?

SUMMARY:

1. Section 932.7055(5)(a) of the Act specifically provides that contraband forfeiture proceeds may be used for school resource officer programs; therefore, such funds may be used to pay the Sheriff's contractual share of personnel costs[1] resulting from assignment of school resource officers to schools throughout the school year, even if such costs recur from year to year. Such funds may not be used to pay for the personnel costs of such officers during periods when they are not performing school resource officer program duties (e.g., when school is not in session).

2. Section 932.7055(5)(a) of the Act specifies that trust fund proceeds may be used for school resource officer programs; therefore, such funds may not be used to offset personnel costs of certified school resource officers who are not regularly assigned to perform school resource officer duties pursuant to the Escambia County program.

QUESTION 1.

Section 932.7055, Florida Statutes, indicates the purposes for which Florida Contraband Forfeiture Act trust fund monies may be used. In general,[2] a law enforcement agency may use these funds for the specific purposes set forth in section 932.7055(5)(a), and for other extraordinary law enforcement programs and purposes, "beyond what is usual, normal or established."[3] The former comprise "school resource officer, crime prevention, safe neighborhood, [and] drug abuse education and prevention programs[.]"[4] By way of illustration, the latter may "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."[5] In authorizing the use of funds for these purposes, the Act vests discretion in the county or

municipal governing body to permit funds to be expended for any of the enumerated purposes.[6] While funds may, thus, be used to defray costs that recur in connection with the identified programs or purposes, in allocating trust fund monies to pay for "other law enforcement purposes," the funds must "not be used to meet normal operating expenses of the law enforcement agency."[7]

Consistent with these principles, in Attorney General Opinion 93-18, this office opined that contraband forfeiture 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."[8]

Later, in Attorney General Opinion 98-32, this office opined that contraband forfeiture trust funds could be used "to provide tuition for Bay County Sheriff's Office personnel for training and education[,]" to allow such full-time employees to "develop additional expertise in specific areas related to their job duties." None of the courses would apply towards the 40 hours of continuing education or training for law enforcement officers required by section 943.135(1), Florida Statutes; instead, the assistance would be used to "encourage employees to obtain additional education and expertise in areas that enhance job skills related to their Sheriff's Office careers."[9] (Emphasis added.)

In Attorney General Opinion 89-78, in contrast, the City of North Bay Village had asked whether contraband forfeiture trust funds could be used to provide supplements to tuition for recruits trained by the police academy, and to augment salaries to attract more qualified persons for employment with the City's police department. Because the recruitment of potential employees with enhanced skills appeared to be a "recurring and routine activity" related to the City's normal operating need to hire new personnel to perform regular, day-to-day law enforcement duties, this office opined that contraband forfeiture trust funds could not be used for such purpose.

As applied here, counsel for the Sheriff's Office suggests that these distinctions appear to dictate that contraband forfeiture trust funds can only be used for school resource officer programs if such programs involve "unbudgeted, special, non-recurring school resource officer special events or programs," and may not be used "for the salary and benefits of such officers, because salary and benefits are included in the normal operating expenses of the Sheriff." This necessarily reflects a view that the Legislature has placed a limitation on the use of trust funds which may effectively vitiate the statute's authorization to use those funds for the purposes expressly enumerated in the statute.

Key to this analysis, section 932.7055(5)(a), Florida Statutes, provides:

> (5)(a) If the seizing agency is a county or municipal agency, the remaining proceeds shall be deposited in a special law enforcement trust fund established by the board of county commissioners or the governing body of the municipality. Such 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*. (Emphasis added.)

To determine whether the Legislature intended the last sentence to be a further limitation (or, stated more accurately, a further *description*) applicable to the purposes specifically authorized in the prior sentence, we must look first "to the statute's plain language."[10] If that language can be variously interpreted, then we "cannot rely solely on [the statute's] plain language to discover the legislative intent[,]"[11] and must "look to canons of statutory construction."[12]

Here, the doctrines of *ejusdem generis* and noscitur a sociis provide insight into the Legislature's intent:

> An important canon is that of *ejusdem generis*, "which states that when a general phrase follows a list of specifics, the general phrase will be interpreted to include only items of the same type as those listed. "… "Distilled to its essence, this rule provides that where general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned."… A related canon of statutory construction is *noscitur a sociis*, which instructs that "a word is known by the company it keeps."[13]

Applying these principles, in section 932.7055(5)(a), the Legislature has described certain law enforcement purposes authorized for funding—some specified (i.e., school resource officer, crime prevention, safe neighborhood, and drug abuse education and prevention programs), and others illustrative[14] (i.e., "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")—*all* of which are not part of the "normal operating expenses of the law enforcement

agency." The fact that some of these programs may be funded annually does not change their status in the law. As stated in Op. Att'y Gen. Fla. 91-69 (1991):

> The Legislature, in specifically authorizing the use of forfeiture funds for school resource officers, has made the determination that the expenditure of trust funds for such a purpose is appropriate and does not constitute a source of revenue to meet normal operating needs of the law enforcement agency. Thus, the expenditure of special law enforcement trust fund monies for school resource officers would appear to be authorized even when such officers have previously been funded from other sources.

Moreover, with respect to school resource officer programs, such interpretation would be at odds with both the statutory framework provided to enable school districts to establish such programs, and with the special duties performed by school resource officers, which are not part of the "normal" operations of the Sheriff's office. Pursuant to section 1006.12(1), Florida Statutes, district school boards may establish school resource programs "through a cooperative agreement" between the district school board and the law enforcement agency. Section 1006.12(1). In fact, you have provided a copy of one such agreement as an enclosure with your letter. It describes the myriad duties fulfilled by those school resource officers who are regularly assigned to schools, some of which are particular to such officers.[15]

Further, pursuant to section 1006.12(1)(b), Florida Statutes, school resource officers "shall abide by district school board policies and shall consult with and coordinate activities through the school principal, but shall be responsible to the law enforcement agency in all matters relating to employment, subject to agreements between a district school board and a law enforcement agency. Activities conducted by the school resource officer which are part of the regular instructional program of the school shall be under the direction of the school principal."

These contractual and statutory responsibilities require additional skills and commitments which are not ordinarily part of a law enforcement officer's duties. For this reason, school resource officers are recognized as fulfilling a variety of roles: "Unlike police officers who respond to calls at schools, SROs traditionally adopt the 'triad model,' serving students and staff in three different roles: the law enforcer, the counselor, and the law-related educator."[16] Their mission has been judicially described as "unique,"[17] and they are to be treated as "part of the school administrative team and not as outside police officers entering school grounds to conduct an investigation."[18]

As the Florida Fifth District Court of Appeal has observed:

> [School resource officers] are certified law enforcement officers who are assigned to work at schools under cooperative agreements between their law enforcement agencies and school boards. § 1006.12(1)(a), (b), Fla. Stat. (2007). They are statutorily bound to "abide by district school board policies" and "consult with and coordinate activities through the school principal.... " *Id. In this capacity, resource officers are called upon to perform many duties not traditional to the law enforcement function*, such as instructing students, serving as mentors and assisting administrators in maintaining decorum and enforcing school board policy and rules. [19]

Consistent with these observations, this office has long recognized the unique role of the school resource officer in Florida's school system:

> The Attorney General's Office, in 1985, developed the first 40-hour Basic Training Course adopted by FDLE to train SRO's with the basic knowledge and skills necessary to implement crime prevention programming in a school setting. The definition of a School Resource Officer encompasses three major components of his/her job: that of law enforcement, education, and counseling, which is a pro-active approach to law enforcement through positive role modeling. These three components allow the SRO to promote positive relations between youth and law enforcement, which encourages school safety and deters juvenile delinquency.[20]

The fact that (as evidenced, in part, by the renewed agreements between the Sheriff's Office and the Escambia County School Board) the school resource program in Florida may be "flourishing"[21]—which the Legislature appears to have intended, in specifically authorizing use of trust fund monies to support it—would not reasonably appear to justify a conclusion that this "dynamic, innovative"[22] program has, thus, been converted into a "normal operating need" of the Sheriff's office, for which the specifically authorized use of trust fund monies is consequently prohibited.

Therefore, I am of the opinion that the Florida Contraband Forfeiture Act authorizes proceeds to be used for the Sheriff's share of personnel costs resulting from the school resource officer program in Escambia County, regardless of whether such program continues from year to year. However, such funds may not be used to pay for the personnel costs of such officers during periods when the officers are not performing school resource officer program duties (*e.g.*, when school is not in session).

QUESTION 2.

In the second part of your inquiry, the Sheriff's Office asks *not* whether law enforcement trust funds can be used to defray the cost

to enroll a deputy in the Basic School Resource Officer Course, but whether the Sheriff may use law enforcement trust funds "to pay or reimburse the County for the salary and benefits of a deputy based on his or her designation as a 'school resource officer,' regardless of the amount of time that such deputy is performing school resource officer duties." Citing Op. Att'y Gen. Fla. 91-69 (1991)—which, in pertinent part, addressed "whether funds already awarded to the county under the contraband forfeiture act may be used to fund or reimburse the county for the costs of a school resource officer"—Sheriff's counsel states that "[i]t would seem that the exception that is suggested by the Attorney General in Attorney General Opinion [91-69] would permit the Sheriff to pay the Deputy or reimburse the County for the personnel cost of the Deputy [who has achieved a School Resource Officer designation] *regardless of how much of the Deputy's time is devoted to school resource officer functions*." (Emphasis added.) But nothing in Attorney General Opinion 91-69 or section 932.7055(5)(a), itself, suggests or supports this surmise.

In posing the funding question involving school resource officers in AGO 91-69, the Volusia County Attorney did not indicate that the subject officers would not actually be serving as school resource officers. Nor has this office ever interpreted section 932.7055, Florida Statutes, to allow the personnel costs of officers who are not participating in a school resource officer program to be paid with contraband forfeiture funds. Instead, the statute specifies that school resource officer programs may be funded using such funds.[23] While the enrollment cost for a deputy to complete the Basic School Resource Officer Course would appear to fall within the Legislature's description of "law enforcement purposes" that are not part of the "normal operating expenses of the law enforcement agency," the ongoing personnel costs of an officer who has achieved school resource officer certification, but *does not serve in the school resource officer program* do not. Because such officer, despite his or her certification, is performing regular, day-to-day law enforcement duties and not performing the unique mission of officers actively assigned to a school resource officer program, it follows that such officer's ongoing personnel costs may not be paid using contraband forfeiture trust funds.

Based on the foregoing, I am of the opinion that the Florida Contraband Forfeiture Act authorizes proceeds to be used for the Sheriff's share of personnel costs (as allocated in the agreement between the Escambia County Sheriff's office and the School Board of Escambia County) resulting from the school resource officer program, regardless of whether such program continues from year to year. However, contraband forfeiture funds may not be used to offset the personnel costs of officers who are merely designated "school resource officers," but are not regularly assigned to perform duties as part of the Escambia County school resource officer program.

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[1] As an enclosure with your request, you provided this office with a copy of the 2016-17 agreement between the Escambia County Sheriff's office and the School Board of Escambia County, Florida. That agreement identifies the school resource officer program personnel costs (to be split 50/50 between the School Board and the Sheriff's office) as follows:

1. Salary
2. Longevity Pay
3. Pension and Retirement contributions
4. Disability Insurance
5. Incentive Pay
6. Life Insurance
7. Health Insurance
8. Equipment, Travel, etc.
9. Annual Training

[2] Pursuant to § 932.7055(4)(d), Fla. Stat., "for the 2017-18 fiscal year only, the funds in a special law enforcement trust fund established by the governing body of a municipality may be expended to reimburse the general fund of the municipality for moneys advanced from the general fund to the special law enforcement trust fund before October 1, 2001. This paragraph expires July 1, 2018."

[3] Op. Att'y Gen. Fla. 95-29 (1995); *see also* Att'y Gen. Op. Fla. 02-35 (2002) (citing Ops. Att'y Gen. Fla. 98-32 (1998) (reflecting that a program developed by the sheriff that reimburses employees for tuition for college level course work may be funded using contraband forfeiture trust funds when the purpose of that program is to develop additional expertise in these employees in specific areas related to their job duties); 91-84 (1991) (reflecting that a city police athletic league created to prevent crime by providing recreational programs for disadvantaged youths may be supported with contraband forfeiture funds, if the city's governing body determines that such activities are an appropriate law enforcement purpose)).

[4] § 932.7055(5)(a), Fla. Stat. (2017).

[5] § 932.7055(5)(a), Fla. Stat. (2017).

[6] *Id*.

[7] § 932.7055(5)(a), Fla. Stat. (2017); *see also* Op. Att'y Gen. Fla. 97-31 (1997) (refl ecting that the city could not use contraband forfeiture trust funds to build and maintain a stable for horses to be used in a mounted police patrol unit); Op. Att'y Gen. Fla. 83-09 (1983) (reflecting that contraband forfeiture trust funds could not be used to compensate a physician's assistant to render medical aid to county prisoners).

[8] Op. Att'y Gen. Fla. 93-18 (1993).

[9] Op. Att'y Gen. Fla. 98-32 (1998).

[10] Kasischke v. State, 991 So. 2d 803, 807 (Fla. 2008) (citing Borden v. East–European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006)).

[11] Kasischke, 991 So. 2d at 807.

[12] Id. at 811 (citing Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) ("[I]f the language of the statute is unclear, then rules of statutory construction control.").

[13] State v. Weeks, 202 So. 3d 1, 8 (Fla. 2016) (quoting State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007); Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1088–89 (Fla. 2005); Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 205 (Fla. 2003)) (additional citation omitted).

[14] See generally Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC, 986 So. 2d 1244, 1257 (Fla. 2008) (citing Fed. Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 100, 62 S.Ct. 1, 86 L.Ed. 65 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); see also Black's Law Dictionary (10th ed. 2014) (observing, in defining "include," that "[t]he participle including typically indicates a partial list").

[15] The supplied agreement provides, in pertinent part:

> C. Duties of School Resource Officers
> 1. The SRO shall coordinate all of his activities with the principal and staff members concerned and will seek permission, advice, and guidance prior to enacting any program within the school.
> 2. The SRO shall develop expertise in presenting various subjects to the students. Such subjects shall include a basic understanding of the laws, the role of the police officer, and the police mission.
> 3. The SRO shall encourage individual and small group discussions with students based upon material presented in class to further establish rapport with the students.
> 4. When requested by the principal, the SRO shall attend parent/faculty meetings to solicit support and understanding of the program. (Overtime: Refer to Article IV, C.)
> 5. The SRO shall make himself available for conferences with students, parents, and faculty members in order to assist them with problems of law enforcement or crime prevention nature. Confidential information obtained pursuant to Chapter 39, Florida Statutes (Proceedings Relating to Children), shall not be disclosed except as provided by law or court order.
> 6. The SRO shall become familiar with all community agencies which offer assistance to youth and their families such as mental health clinics, drug treatment centers, etc. The SRO shall make referrals to such agencies when necessary thereby acting as a resource person to the students, faculty, and staff of the school.

7. The SRO shall assist the principal in developing plans and strategies to prevent and/or minimize dangerous situations which may result from student unrest.
8. Should it become necessary to conduct formal police interviews with the students, the SRO shall adhere to School Board policy and legal requirements with regard to such interviews.
9. The SRO shall take law enforcement action as required. As soon as practicable, the SRO shall make the principal of the school aware of such action. At the principal's request, the SRO shall take appropriate law enforcement action against intruders and unwanted guests who may appear at the school and related school functions to the extent that the SRO may do so under the authority of the law. Whenever practicable, the SRO shall advise the principal before requesting additional police assistance on campus.
10. The SRO shall inform school personnel anytime he learns of another law enforcement officer conducting student interviews on school campuses.
11. The SRO shall give assistance to other police officers and deputy sheriffs in matters regarding his school assignment, whenever necessary. The SRO shall, whenever possible, participate in and/or attend school functions.
12. The SRO shall maintain detailed and accurate records of the operation of the School Resource Officer Program and shall submit other reports of an instructional nature as required by the principal or school staff.
13. The SRO shall not act as a school disciplinarian, as disciplining students is a school responsibility. However, if the principal believes an incident is a violation of the law, the principal may contact the SRO, and the SRO shall then determine whether law enforcement action is appropriate. SROs are not to be used for regularly assigned lunchroom duties, hall monitors, or other monitoring duties. If there is a problem area, the SRO may assist the school until the problem is solved.
14. SROs will be considered part-time non-degreed teachers and agree to complete the necessary requirements set forth in Section 1012.39, Florida Statutes.
15. SROs will be permitted eight (8) days per academic year absence from SRO duties at the school to attend ECSO training.
16. SROs will be allowed to have monthly meetings, as deemed necessary by the ECSO Community Services Officer in Charge. Whenever possible, such meetings will be held on a school campus that has an assigned SRO.
17. SROs will complete written offense reports pursuant to ECSO policy and procedure for any reports made to them by school teacher, administrators or other member of school staff for the incidents described in Article Ill.

[16] Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 Mich. J. Race & L. 147, 161 (2015) (citing Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84 The Clearing House 160, 161 (2011)).

[17] *C.M.M. v. State*, 983 So. 2d 704, 705 (Fla. 5th DCA 2008).

[18] *M.D. v. State*, 65 So. 3d 563, 565 (Fla. 1st DCA 2011).

[19] *C.M.M.*, 983 So. 2d at 705 (emphasis added).

[20] Florida Crime Prevention Training Institute webpage, "School Resource Officer Practitioner Designation" (available at http://www.fcpti.com/fcpti.nsf/pages/SROPD, last visited August 23, 2017). The Florida Crime Prevention Training Institute, which provides training for school resource officers, was established in the Office of the Attorney General in 1982 as part of the "HELP STOP CRIME" program. See § 16.54, Fla. Stat.

[21] *Id.*

[22] *Id.*

[23] § 932.7055(5)(a), Fla. Stat. (2017).

AGO 2017-08 – November 30, 2017

REGIONAL PLANNING COUNCIL – INTERLOCAL AGREEMENT – COUNTIES

WHETHER A COUNTY MAY WITHDRAW FROM ITS REGIONAL PLANNING COUNCIL

To: Ms. Margaret Wuerstle, Executive Director, Southwest Florida Regional Planning Council

QUESTION:

Must a county participate in its statutorily designated regional planning council, despite an interlocal agreement provision pertaining to procedures for terminating membership?

SUMMARY:

Section 186.504, Florida Statutes, mandates county participation in its regional planning council; therefore, a county may not withdraw as a member county.

In 1973, the counties of Charlotte, Collier, Glades, Hendry, Lee, and

Sarasota entered into an Interlocal Agreement creating the Southwest Florida Regional Planning Council ("Interlocal Agreement") pursuant to section 163.01, Florida Statutes.[1] There is a withdrawal provision in the Interlocal Agreement that allows a member county to withdraw its membership by resolution.[2] You indicate that Sarasota, Lee, and Charlotte counties have each passed resolutions to withdraw from the Southwest Florida Regional Planning Council within 12 months and to cease paying dues at that time.

In 1980, the Florida Legislature enacted the Florida Regional Planning Council Act, Chapter 80-315, Laws of Florida, originally codified at sections 160.01 through 160.08, Florida Statutes, and now at sections 186.501 through 186.513, Florida Statutes. In section 160.01(4), Florida Statutes, the Legislature expressly stated that membership in a regional planning council was not mandatory: "(4) Nothing contained in this act shall be construed to mandate local general-purpose government membership or participation in a regional planning council."

In 1984, however, the Legislature amended section 160.01(4), now 186.504(5), to mandate county membership:

> Nothing contained in this act shall be construed to mandate municipal ~~local general-purpose~~ government membership or participation in a regional planning council. However, each county shall be a member of the regional planning council created within the comprehensive planning district encompassing the county.[3]

In 2015, the Legislature expressly designated the composition of each regional planning council in section 186.512, Florida Statutes, assigning every county in Florida to a council:

> (1) The territorial area of the state is subdivided into the following districts for the purpose of regional comprehensive planning. The name and geographic area of each respective district must accord with the following:
>
> * * *
>
> (h) Southwest Florida Regional Planning Council: Charlotte, Collier, Glades, Hendry, Lee, and Sarasota Counties. (e.s.)

Thus, the Legislature has created regional planning councils with mandatory county membership and has designated the particular council to which each county must belong. There is nothing in the Florida Regional Planning Council Act, sections 186.501 to 186.513, Florida Statutes, that allows a county to decline to participate in its council.[4] Moreover, one of the statutory powers and duties of a regional

planning council enumerated in § 186.505(12), Florida Statutes, is to "fix and collect membership dues, rents, or fees when appropriate." Thus, a member county would be subject to any dues imposed by the regional planning council under this provision.

Your second question regarding whether a county may withdraw from the Interlocal Agreement and cease paying dues pursuant to that document is beyond the purview of this office to decide. This office is not the appropriate forum for determining rights and obligations under the agreement that may be in dispute under such circumstance.

It is my opinion that the counties of Sarasota, Lee, and Charlotte are mandatory members of the Southwest Florida Regional Planning Council and may not refuse their statutory obligation to participate.

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[1] Found at http://www.swfrpc.org/content/SWFRPC_Interlocal_Agreement.pdf.

[2] *Id*. at 2.d., Effective Date, Duration, Termination and Withdrawal.

[3] Ch. 84-257, Laws of Fla., § 11.

[4] § 163.01(9)(b), Fla. Stat., provides, in part: "An interlocal agreement does not relieve a public agency of any obligation or responsibility imposed upon it by law[.]" As this office observed in Op. Att'y Gen. Fla. 95-47 (1995), regarding whether a county could withdraw from the Withlacoochee Regional Planning Council if there were a provision in its interlocal agreement authorizing withdrawal: "In light of the legislative directive as to how a regional planning district will be designated and the subsequent designation of the membership of District 5 by the Executive Office of the Governor, it would appear that any alteration to the district's designation and the composition of its membership would need to be addressed by that office or the Legislature."

AGO 18-01 – January 25, 2018

AD VALOREM TAXATION – FIRE AND EMERGENCY DISTRICT – SPECIAL ACT – RESOLUTION

WHETHER A FIRE RESCUE AND EMERGENCY MEDICAL SERVICES DISTRICT MAY LEVY AN AD VALOREM TAX AT A RATE ABOVE THE EXPRESSLY AUTHORIZED 1 MILL BY RESOLUTION RATHER THAN REFERENDUM

To: Mr. Matthew S. Francis, Counsel for the Key Largo Fire Rescue and Emergency Medical Services District

QUESTION:

May the Key Largo Fire Rescue and Emergency Medical Services District, after holding a referendum to raise the millage rate above 1 mill, thereafter annually fix the millage rate at or below such new millage rate by resolution of the district board without further approval by the electors?

SUMMARY:

Pursuant to chapter 2005-329, section 6, Laws of Florida, and section 191.009(1), Florida Statutes, any year in which the Key Largo Fire Rescue and Emergency Medical Services District wants to levy an ad valorem tax that exceeds the 1 mill authorized in chapter 2005-329, such tax must be approved in a referendum rather than by board resolution.

The Key Largo Fire Rescue and Emergency Medical Services District was created by chapter 2005-329, Laws of Florida. Under subsection 5(2), the District's Board of Commissioners is authorized to annually levy ad valorem taxes against taxable property within the district in an amount that does not exceed the limit provided in chapter 191, Florida Statutes. That limit is 3.75 mills, unless a higher amount has been authorized by law and approved by referendum.[1]

Subsection 6(1) specifically authorizes the board to levy an annual ad valorem tax in an amount not to exceed 1 mill. Under subsections 6(2) and (3), a majority of the electors in the district must approve the initial levy of such tax by referendum, but each year thereafter, the board may fix the rate of taxation by resolution so long as the rate does not exceed 1 mill.[2] If the board seeks a millage rate above 1 mill but below the 3.75 mill limit, it must obtain approval by a majority of electors in a referendum.[3]

The preceding language of the special act expressly authorizes renewal by resolution only when the rate of taxation is 1 mill or below. There is no such provision with regard to rates above 1 mill. The same result follows from application of section 191.009, Florida Statutes, a general law that addresses the levy of ad valorem taxes in independent special fire control districts in subsection (1):

> The levy of ad valorem taxes pursuant to this section must be approved by referendum called by the board when the proposed levy of ad valorem taxes exceeds the amount authorized by prior special act, general law of local application, or county ordinance approved by referendum. Nothing in this act shall require a referendum on the levy of ad valorem taxes in an amount previously authorized by special act, general law of local application, or county ordinance approved by referendum.

As applied to the Key Largo Fire Rescue and Emergency Medical Services District, the first sentence quoted above requires a referendum when the board seeks an ad valorem tax at a rate above the 1 mill authorized by the special act that created the district. Under the second sentence, no further referenda are necessary for an ad valorem tax of 1 mill or less when there has been a referendum approving such rate which was authorized in the special act, chapter 2005-329.[4]

Had the Legislature intended to allow the fire district to levy by resolution an ad valorem tax at a rate greater than 1 mill, so long as such rate was initially approved in a referendum, it would have included a provision expressing such intent in chapter 2005-329, Laws of Florida.

Accordingly, it is my opinion that under the current facts and law, the Key Largo Fire Rescue and Emergency Medical Services District must obtain approval by referendum every year in which it seeks to assess an ad valorem tax above 1 mill.

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[1] Section 191.009(1), Fla. Stat.

[2] "Upon the approval of a majority of the electors voting at the initial election or at an election called by the board, the rate of taxation shall thereafter be fixed annually by resolution of the board without further approval by the electors, provided the rate of taxation shall not exceed 1 mill." Section 6(3), Ch. 2005-329, Laws of Fla.

[3] "The board shall have the authority to increase the millage rate above 1 mill only if a majority of the electors voting in a referendum election approve the increased millage rate in an amount not to exceed the limit provided in chapter 191, Florida Statutes." *Id*.

[4] In contrast, in subsection 191.009(2), dealing with non-ad valorem assessments, no annual referendum is required unless a fire control district wishes to increase the assessment by a certain amount (as formulated in the provision) above the rate set the previous year or the rate previously set by special act or county ordinance, "whichever is more recent." See Op. Att'y Gen. Fla. 99-30 (1999). The Legislature chose not to include such language in subsection 191.009(1) dealing with ad valorem assessments.

AGO 18-02 – May 31, 2018

REAL PROPERTY ASSESSMENTS, VALUE ADJUSTMENT BOARD

AUTHORITY TO HEAR TAXPAYER APPEAL FROM ASSESSMENT VALUATION BASED ON DISPUTED STATUS OF IMPROVEMENT TO REAL PROPERTY AS SUBSTANTIALLY COMPLETED

To: Mr. Aaron B. Thalwitzer, Legal Counsel, Volusia County VAB

QUESTIONS:

1. Whether a value adjustment board ("VAB") has authority to hear taxpayer petitions appealing whether, under section 192.042(1), Florida Statutes (2017), improvements to property were "substantially completed" as of January 1, and if so, what is the source of the VAB's legal authority?

2. If the answer to question 1 is yes, whether a petition to a VAB appealing whether, under section 192.042(1), improvements to property were "substantially completed" as of January I must be heard by an attorney special magistrate, or a valuation special magistrate?

SUMMARY:

1. Pursuant to section 194.011(3)(d), because the issue of whether improvements to property were "substantially completed" as of January 1 is part of the valuation appraisal process, a value adjustment board has authority to hear the petitions of taxpayers appealing whether, under section 192.042(1), improvements to real property were "substantially completed" as of January 1.

2. Pursuant to sections 193.1555 and 194.035, a petition to a value adjustment board appealing whether, under section 192.042(1), improvements were "substantially completed" as of January 1 must be heard by an attorney special magistrate if, pursuant to the challenged assessment, the subject improvement increases the just value of the real property by at least 25 percent; improvements effecting an increase in an amount below that threshold percentage pursuant to the challenged assessment should be heard by a valuation special magistrate.

QUESTION 1.

Section 192.042(1), Florida Statutes, provides that all property "shall be assessed according to its just value as follows":

> Real property, on January 1 of each year. Improvements or portions not substantially completed on January 1 shall have no value placed thereon. 'Substantially completed' shall mean that the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed.

Under this statute, if a taxpayer's improvement (or self-sufficient unit within it) is not "substantially completed" on January 1 of the

subject year, "the assessment valuation for that year is to consist solely of the value of [the taxpayer's] land as if it were vacant."[1] "Although the improvement is not taxed under such a circumstance, this is not an exemption from taxation; rather it is a part of the valuation appraisal process."[2]

Section 194.011(3)(d) establishes the procedure by which a taxpayer may challenge, before the value adjustment board, decisions of the property appraiser "as to valuation issues." Therefore, read in pari materia, sections 192.042(1) and 194.011(3)(d) supply the VAB's legal authority to hear the petitions of taxpayers appealing whether improvements to property were "substantially completed" as of January 1.

QUESTION 2.

You next ask whether such an appeal should be heard by an attorney special magistrate or a valuation special magistrate. Sections 193.1555(5)(a) and 194.035, Florida Statutes, answer this question.

Section 194.035(1) provides, in pertinent part, that a "special magistrate appointed to hear…determinations that a…qualifying improvement has occurred shall be a member of The Florida Bar with no less than 5 years' experience in the area of ad valorem taxation. A "special magistrate appointed to hear issues regarding the valuation of real estate shall be a state certified real estate appraiser with not less than 5 years' experience in real property valuation." Section 193.1555(5)(a), in turn, defines a "qualifying improvement" as "any substantially completed improvement that increases the just value of the property by at least 25 percent."

Therefore, if the assessment valuation based on a challenged determination of substantial completion reflects an increase in the just value of the property of at least 25 percent, the appeal should be heard by an attorney special magistrate. If the assessment valuation based on a challenged determination of substantial completion reflects an increase in the just value of the property of less than 25 percent, the appeal should be heard by a valuation special magistrate.

Based on the foregoing, it is my opinion that the Volusia County Value Adjustment Board has authority to hear taxpayers' petitions appealing whether, under section 192.042(1), an improvement to property was "substantially completed" as of January 1. Challenges to assessments reflecting an increase, based on a disputed improvement, in the just value of the property of at least 25 percent shall be heard by an attorney special magistrate, and challenges to assessments reflecting an increase, based on a disputed improvement, in the just value of the property of less than 25 percent shall be heard by a valuation special magistrate.

[1] *Klein v. Robbins*, 947 So. 2d 623, 624 (Fla. 3d DCA 2007) (citing *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 932 (Fla. 2005), as revised on denial of reh'g (Nov. 3, 2005) ("This statute reflects the Legislature's intent to delay valuation of improvements to property until such time as these improvements are substantially completed.")).

[2] *Id*. (Emphasis supplied.)

AGO 18-03 – June 1, 2018

HOUSING FINANCE AUTHORITY – GRANT OF SURPLUS FUNDS TO NONPROFIT

WHETHER A HOUSING FINANCE AUTHORITY MAY GRANT FUNDS TO HABITAT FOR HUMANITY, A NONPROFIT CORPORATION, FOR RENOVATION OF ONE OF ITS HABITAT RESTORES, WHICH SELLS USED FURNITURE, ETC.

To: Mr. David G. Fisher, Counsel for the Housing Finance Authority of Polk County, Florida

QUESTION:

Can the Housing Finance Authority of Polk County, Florida, pursuant to section 159.608(10)(a), Florida Statutes, make a grant to Habitat for Humanity of East Polk County, Inc., a not-for-profit corporation, for the renovation of its Habitat ReStore, which will act as a revenue generator for Habitat's development of affordable housing?

SUMMARY:

Under section 159.608(10)(a), Florida Statutes, the Polk County Housing Finance Authority is authorized to grant surplus funds to Habitat for Humanity for the renovation of its ReStore, which, once renovated, will generate revenues that will permit Habitat to increase the number of affordable houses it can build within Polk County.

You state that the Housing Finance Authority of Polk County, Florida, was established to alleviate and remedy the shortage of housing and of capital for investment in housing in Polk County pursuant to Polk County Ordinance No. 78.20 and section 159.604, Florida Statutes. Habitat for Humanity ("Habitat"), a nonprofit corporation under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and under the laws of the State of Florida, builds affordable housing throughout East Polk County. Habitat has asked the Housing Finance

Authority of Polk County for a one-time grant to assist Habitat in renovating one of its Habitat ReStore ("ReStore") locations in East Polk County. ReStore sells new and gently used furniture, home accessories, appliances, building materials, etc., to the public at a discounted rate. All of the proceeds from sales go to Habitat, which uses such proceeds for the development of affordable housing. In the 2015-2016 fiscal year, ReStore generated $178,814.00 for Habitat, which was 19.14 percent of Habitat's annual budget, and in 2016-2017, generated $271,133.00, or 21.16 percent of Habitat's budget that fiscal year.

Habitat generally builds six to eight houses annually in East Polk County, and expects to build at least 12 houses annually once the ReStore has been renovated. Without the proposed renovations to ReStore, it is projected that Habitat will not have sufficient staff support to build more than six to eight houses per year.

The Legislature authorized the creation of housing finance authorities for the purpose of carrying out the powers granted in the Florida Housing Finance Authority Law, sections 159.601 through 159.623, Florida Statutes. In section 159.602(3), Florida Statutes, the Legislature found that the "financing, acquisition, construction, reconstruction, and rehabilitation of housing … are exclusively public uses and purposes for which public money may be spent, advanced, loaned, or granted and are governmental functions of public concern."[1]

Section 159.608, Florida Statutes, sets forth the powers of housing finance authorities, and specifically includes the following power:

> (10)(a) To make loans or grant surplus funds to corporations that qualify as not-for-profit corporations under s. 501(c)(3) of the Internal Revenue Code of 1986, as amended, and under the laws of this state, for the development of affordable housing[.]

This office stated in Attorney General Opinion 2000-14 that "housing finance authorities may operate in a variety of capacities in order to accomplish the purposes of the act." For example, in Attorney General Opinion 2000-14, this office concluded that section 159.608(3) authorized the provision of mortgage loans to individuals for the purchase of an apartment complex to be rented to low-income families or individuals. In Attorney General Opinion 2009-17, this office found that section 159.608(10)(b) authorized the loan of surplus funds to a private individual or entity in order to develop affordable housing for profit.

You have represented that a grant of surplus funds to Habitat for Humanity for the purpose of renovating the ReStore, which provides Habitat with all of its proceeds, will allow Habitat to go from building six to eight affordable houses per year, to being able to build at least 12 affordable houses per year. It is my opinion that this satisfies the

criteria in section 159.608(10)(a) and the purposes of the Housing Finance Authority Law, thus authorizing such grant of funds.

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[1] *See also State v. Housing Fin. Auth. of Pinellas County*, 506 So. 2d 397, 399 (Fla. 1987).

AGO 18-04 – June 1, 2018

ELECTRONIC SIGNATURES – ELECTRONIC RECORDS – PUBLIC RECORDS RETENTION – MUNICIPALITIES

MUNICIPALITY MAY ACCEPT ELECTRONIC SIGNATURES FOR ITS BUSINESS TRANSACTIONS, AND IS NOT REQUIRED TO RETAIN AN ORIGINAL OR DUPLICATE HARD COPY WHEN THERE IS A DIGITAL VERSION OF THE RECORD

To: Mr. Gustavo Ceballos, Assistant City Attorney, City of Coral Gables

QUESTIONS:

1. Whether the City of Coral Gables can use electronic signatures for its myriad business processes.

2. Whether the City of Coral Gables is required to preserve a hard copy of a document notwithstanding the fact that there is a digital version of the document in the City's digital storage.

SUMMARY:

1. The City is authorized to use electronic signatures to sign a writing, pursuant to the requirements and exceptions of sections 668.004 and 668.50, Florida Statutes (2017).

2. There is no general requirement in chapters 119 or 257, Florida Statutes (2017), requiring the City to preserve a hard copy of documents being stored digitally. Section 668.50(12) provides that a statute that requires a record to be retained in its original form is satisfied if the record is retained electronically, with limited exceptions. Rule 1B-24.003, Florida Administrative Code, authorizes disposal of the paper original of a record when there is an electronic copy, unless there is a law, rule, or ordinance that specifically requires retention of the paper original.

QUESTION 1.

Chapter 668 of the Florida Statutes deals with electronic commerce.

Part I, the Electronic Signature Act of 1996, provides, in section 668.004, Florida Statutes (2017), in full:

> **Force and effect of electronic signature**. — Unless otherwise provided by law, *an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature.*

(Emphasis added.) Part II, the Uniform Electronic Transaction Act, provides in section 668.50(7)(d) that any statute requiring a signature is satisfied by providing an electronic signature.[1]

Pursuant to section 668.50(5), a party is not required to accept an electronic signature, and may refuse to do so.[2] The parties to a transaction with the City must agree, implicitly or explicitly, to conduct the transaction electronically. Whether there has been an agreement is determined from the circumstances of the transaction.[3]

It is therefore my opinion that under the plain language of these provisions, the City is authorized to use electronic signatures when conducting business in compliance with chapter 668.

QUESTION 2.

You also ask whether the City is required to preserve a hard copy of a document that is otherwise being stored digitally.

In section 119.01, Florida Statutes, entitled "General state policy on public records," the Legislature recognized the prevalence of electronic record keeping, stating that agencies must facilitate access to public records as well as preserve confidentiality when required by law.[4] Subsection 119.01(2)(f) requires an agency to provide a copy of any public record that is being digitally stored "in the medium requested" by the person requesting such document, unless the record is exempt or confidential.

Under section 668.50(18), an agency is not required to use electronic records or signatures. Instead, each governmental agency is given the discretion to decide whether and how it will send and accept electronic records and signatures, consistent with policies developed by the Agency for State Technology. If the agency does choose to use electronic records and signatures, section 668.50(12)(a) expressly provides:

> (a) *If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of* the information in the record which:
>
> 1. Accurately reflects the information set forth in the record after the record was first generated in final form as an electronic

record or otherwise.

2. Remains accessible for later reference.

(Emphasis added.) Under section 668.50(12)(d):

> (d) If a provision of law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, *that law is satisfied by an electronic record* retained in accordance with paragraph (a).

(Emphasis added.) Notwithstanding the broad scope of paragraph (12)(d), paragraph (12)(f) provides an exception when a law specifically *prohibits* use of an electronic record for "evidentiary, audit, or similar purposes," and such law was enacted after July 1, 2000.[5] In a further exception, paragraph (12)(g) provides that a government agency may specify "additional requirements for the retention of a record subject to the agency's jurisdiction."[6]

Finally, the Legislature created a records and information management program within the Division of Library and Information Services of the Department of State to address the creation, management, security, retention, and disposal of public records.[7] The Division was directed to adopt rules to facilitate retention and destruction of records,[8] which it did in Florida Administrative Code chapter 1B. Under rule 1B-24.003, regarding records retention scheduling and disposition, paragraph (9)(a) addresses retention of a hard-copy original, providing:

> (9)(a) Public records may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division. Photographic reproductions or reproductions through electronic recordkeeping systems may substitute for the original or paper copy, per Section 92.29, F.S., Photographic or electronic copies. Minimum standards for image reproduction shall be in accordance with Rules 1B-26.0021 and 1B-26.003, F.A.C. An electronic or microfilmed copy serving as the record (master) copy[9] must be retained for the length indicated for the record (master) copy in the applicable retention schedule. An agency that designates an electronic or microfilmed copy as the record (master) copy may then designate the paper original as a duplicate and dispose of it in accordance with the retention requirement for duplicates in the applicable retention schedule unless another law, rule, or ordinance specifically requires its retention.

(Emphasis added.)

It is therefore my opinion that retention of an electronic record alone is in most cases sufficient under the law, and that local government is not required to preserve either an original hard copy or a duplicate hard copy of electronic records. The City is obligated, however, to determine whether there is a statute, rule, or ordinance applicable to a specific electronic record that requires preservation of an original or a duplicate hard copy, or that prohibits use of the record in electronic form for "evidentiary, audit, or similar purposes."

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[1] Section 668.50(7)(d) provides: "If a provision of law requires a signature, an electronic signature satisfies such provision."

[2] *See generally* Op. Att'y Gen. Fla. 2005-34 (reflecting that, although s. 668.50(5) does not require an agency to accept electronic records and signatures, the Manatee County property appraiser was permitted to under the statute).

[3] Section 668.50(5) provides:

> (a) This section does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.
> (b) This section applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

[4] Section 119.01(2) provides, in part:

> (2)(a) 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.
>
> * * *
>
> (e) Providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible. If an agency provides access to public records by remote electronic means, such access should be provided in the most cost-effective and efficient manner available to the agency providing the information.

[5] Section 668.50(12)(f) provides: "A record retained as an electronic record in accordance with paragraph (a) satisfies a provision of law

requiring a person to retain a record for evidentiary, audit, or similar purposes, unless a provision of law enacted after July 1, 2000, specifically prohibits the use of an electronic record for the specified purpose."

[6] Section 668.50(12)(g) provides: "This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction."

[7] See section 257.36, Fla. Stat. (2017).

[8] See sections 257.36(6) and 119.021(2)(a), Fla. Stat. (2017).

[9] A "record (master) copy" is defined in rule 1B-26.003(5)(j) as "public records specifically designated by the custodian as the official record."

AGO 18-05 – August 14, 2018

LAW ENFORCEMENT TRUST FUND – GRANT PROGRAM – MUNICIPALITIES

§ 932.7055 DOES NOT AUTHORIZE A MUNICIPALITY TO DELEGATE PROCEEDS FROM THE LAW ENFORCEMENT TRUST FUND TO A GRANT PROGRAM FROM WHICH THE CHIEF OF POLICE WOULD APPROVE AND AWARD FUNDS FOR PROGRAMS THAT COMPLY WITH THE STATUTE. TWO SPECIFIC PROGRAMS, HOWEVER, THAT ARE INTENDED TO ADDRESS CRIME PREVENTION AND SAFE NEIGHBORHOODS, APPEAR TO COMPLY WITH THE USES AUTHORIZED IN THE STATUTE, SUBJECT TO THE APPROPRIATION PROCEDURE OUTLINED THEREIN

To: Ms. Kimberly L. Rothenburg, City Attorney, West Palm Beach

QUESTIONS:

1. Can the City Commission approve a grant program with the primary purpose of crime prevention, safe neighborhoods, drug abuse education and prevention programs, and other law enforcement purposes, and appropriate a specific amount of money from the forfeiture trust fund to the grant program, from which the Chief of Police could award funds to qualified 501(c)(3) entities pursuant to section 932.7055(1)(c) and 932.7055(5)(c)3., Florida Statutes (2017)?

2. Is the West Palm Beach Police Department authorized to use contraband forfeiture trust funds pursuant to sections 932.7055(1)(c) and 932.7055(5)(c)3., Florida Statutes (2017), to fund two annual programs, each to be operated by a nonprofit organization: the "Shop with a Cop" program, put

on by the West Palm Beach Police Foundation, and the "Toy Giveaway Extravaganza" program, put on by the Coleman Park Neighborhood Association, or, in the alternative, may the City buy bicycles using forfeiture funds and donate them to the Coleman Park Neighborhood Association for use at the event?

SUMMARY:

1. There are no provisions in section 932.7055, Florida Statutes, that authorize local government to establish a grant program consisting of funds from the law enforcement trust fund, out of which the Chief of Police would administer expenditures consistent with the authorized uses.

2. The two programs described in which gift cards and bicycles would be provided to children for the purpose of fostering crime reporting and safe neighborhoods appear to meet the criteria of section 932.7055, so long as the Chief of Police certifies that they are in compliance with the uses authorized in the statute and the City Commission appropriates the funds.

Section 932.7055 establishes procedures to be used to dispose of real or personal property that has been seized and forfeited as contraband. Subsection (5) directs a county or municipal seizing agency to deposit the proceeds into a special law enforcement trust fund established by the local government. The statute then provides:

Such 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.

Subsequent provisions state that the Sheriff or Chief of Police may submit requests to local government for use of such funds by the agency, or on behalf of another agency or organization, when the proposed use is certified to be one of the authorized purposes.

QUESTION 1

You ask whether, pursuant to sections 932.7055(1)(c) and 932.7055(5)(a)3., West Palm Beach may establish a grant program consisting of money from the law enforcement trust fund, from which the Chief of Police could then award amounts requested by nonprofit entities when

consistent with the purposes authorized by the statute. You describe the proposed procedure as follows:

- The Chief of Police would certify that the grant program complies with the provisions of section 932.7055;

- The City Commission would approve the grant program and appropriate a certain amount of money from the trust fund to the grant program;

- The Chief of Police would review applications and certify those that are consistent with the purposes authorized in the statute;

- The Chief of Police would appropriate funds from the grant program to certified applicants.

The first provision you suggest as providing authority for this arrangement, section 932.7055(1)(c), states that a seizing agency that obtains a final judgment granting forfeiture of real or personal property, may elect to "[s]alvage, trade, or transfer the property to any public or nonprofit organization." This provision does not support the proposed grant program, however, because the plain language contemplates a direct transfer of forfeited property rather than retention of the property for deposit in a law enforcement trust fund.[1] If any proceeds remain following the salvage, trade, or transfer, the municipality must deposit them in the law enforcement trust fund.

The second provision you rely upon, section 932.7055(5)(c)3, mandates any local law enforcement agency that obtains $15,000 or more from forfeitures during a fiscal year, to provide at least 25 percent "for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program or programs. The local law enforcement agency has the discretion to determine which program or programs will receive the designated proceeds."

The narrow field of discretion authorized by section 932.7055(5)(c)3 gives local law enforcement agencies the choice as to which programs that receive law enforcement trust fund appropriations will comprise the mandatory 25 percent required from agencies that receive $15,000 or more through contraband forfeiture.[2] This provision does not give the City or the Chief of Police the discretion to create a different structure than that provided in the statute for the appropriation of funds.

There is no language in section 932.7055 that authorizes local governments to designate a certain portion of the law enforcement trust fund to a grant program, whereupon the Chief of Police would then have the discretion to appropriate funds to applicants that would use

the funds for one of the purposes enumerated in the statute. A grant program and a trust fund are distinct entities, and the Legislature has in other statutes specifically authorized the creation of grant programs to fund comparable initiatives that address community issues,[3] and has also specifically authorized trust funds to be used to create grant programs.[4] Had the Legislature intended to authorize local government to create a grant program in conjunction with the law enforcement trust fund, it would have done so.

Instead, section 932.7055(5)(a) directs the municipal government to establish a law enforcement trust fund, and section (5)(b) allows the Chief of Police to submit requests for expenditure of funds for uses encompassed by the statute. Section (5)(b) expressly provides that expenditures may be made following such request "only upon appropriation to the…police department by…the governing body of the municipality." The municipality cannot delegate its statutory authority to appropriate funds to the Chief of Police.

When the Legislature has provided a method for the implementation of a statute, alternative methods are implicitly prohibited.[5] It is therefore my opinion that section 932.7055 does not authorize the City of West Palm Beach to approve a grant program through which the Chief of Police may appropriate proceeds from the law enforcement trust fund.

QUESTION 2

You also ask whether the West Palm Beach Police Department is authorized under the statute to use trust fund proceeds to fund two annual programs, each operated by a nonprofit organization. The first is called "Shop with a Cop," in which the West Palm Beach Police Foundation provides funds for children of indigent families to shop during the holidays with police officers, having been provided with gift cards. You state that the main purpose of the event is to foster trusting relationships between law enforcement and community members, which would, in turn, encourage crime reporting, gang resistance education, and safe neighborhoods.

The second program is the "Toy Giveaway Extravaganza," in which the Coleman Park Neighborhood Association purchases bicycles to distribute, along with crime prevention and gang-resistance materials, to children and families within the Coleman Park Neighborhood. The purpose of the program is to encourage engagement between law enforcement and children and families within the community, and expose the latter to some of the special teams within the police department in order to enhance police-community relations, which should, in turn, foster crime prevention and safe neighborhoods.

From your description of these programs, it appears that each would serve the authorized statutory purposes of using funds for crime prevention and safe neighborhoods. Accordingly, it is my opinion that contraband forfeiture funds may be used for the two programs described above, if the Chief of Police certifies that such uses comply with section 932.7055(5) and the governing body of the City authorizes the appropriation.

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[1] Section 932.7055(1) permits a law enforcement agency to sell, salvage, or transfer forfeited property rather than retain it for the law enforcement agency. See Ops. Att'y Gen. Fla. 2001-48; 1997-46.

[2] *See* Op. Att'y Gen. Fla. 2005-62 (concluding that trust funds could be used to fund an educational program that addressed law enforcement and legal studies, and because the program's primary purpose was crime and drug prevention, it qualified as one of the programs that would satisfy the agency's required donation of contraband forfeiture funds under § 932.7055(5)(c)3.).

[3] *See*, e.g., § 394.656(1) (authorizing creation of the Criminal Justice, Mental Health, and Substance Abuse Reinvestment Grant Program within the Department of Children and Families, to fund county initiatives that increase public safety and provide treatment services for persons with mental health and substance abuse disorders), § 397.99(1) (establishing the school substance abuse prevention partnership grant program to be administered by the Departments of Education and of Juvenile Justice), § 943.031 (creating the Florida Violent Crime and Drug Control Council within the Department of Law Enforcement, having as one of its duties the establishment of a program that provides grants to criminal justice agencies that develop and implement programs to reduce drug-related crime, criminal gangs, and money laundering operations, § 985.676(1) (creating a community juvenile justice partnership grant program to be administered by the Department of Juvenile Justice), Fla. Stat. (2017).

[4] *See* § 320.08058(9)(b)2. (providing that a portion of the sports-team specialty license plate annual fees be deposited into a trust fund within the Department of Economic Opportunity, to be used in part "to institute a grant program for communities bidding on minor sports events that create an economic impact for the state"), § 403.413(6) (providing a civil penalty for unlawful dumping of litter, half of which shall be deposited into the Solid Waste Management Trust Fund for use in the solid waste management grant program pursuant to § 403.7095), § 938.01(1)(a) (directing that certain court costs collected by the courts be distributed to the Department of Law Enforcement Operating Trust Fund to be used in its Criminal Justice Grant Program), Fla. Stat. (2017).

[5] *See Headley v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017) ("[L]egislative direction as to how a thing shall be done is, in effect, a prohibition against its being done any other way."); *Alsop v. Pierce*, 19 So. 2d 799, 805-06 (Fla.

1944) ("When the Legislature has prescribed the mode, that mode must be observed."); Op. Att'y Gen. Fla. 96-62 (1996) (applying this maxim to the procedure set forth in § 932.7055).

AGO 2018-06 – December 21, 2018

DWELLING UNIT – VACATION RENTALS -- MUNICIPALITIES

§ 509.032(7) does not prohibit a municipality from allowing an accessory building to be used only as a sleeping facility, because such building does not constitute a "dwelling unit," which is a building where people can live and can thus be used as a vacation rental. Accordingly, an ordinance allowing an accessory structure located on the premises of a house or dwelling unit to be used for sleeping, but prohibiting it from being independently rented out, would not be barred by § 509.032(7), Fla. Stat. (2018), because that provision bars local laws that prohibit "vacation rentals."

To: Mr. Nicholas Beninate, City Attorney, City of Mexico Beach

QUESTIONS:

1. Does a structure where people are permitted to sleep that is not a "dwelling unit" or "house" pursuant to local law, meet the definition of a "vacation rental" under state law, entitling it to a vacation-rental license?

2. If the answer is "no," and if a vacation-rental license has been granted for a house or dwelling unit, is it permissible under that license to conduct transient rentals of an accessory structure independent from the house or dwelling unit?

SUMMARY:

A "sleeping facility" is not a "house or dwelling unit," and thus is not a "vacation rental" under section 509.242(1)(c), Florida Statutes (2018). Accordingly, an ordinance allowing an accessory structure located on the premises of a house or dwelling unit to be used for sleeping, but prohibiting it from being independently rented out, would not be barred by section 509.032(7), Florida Statutes (2018), because that provision bars local laws that prohibit "vacation rentals."

Factual Background:

In the Land Development Regulations for Mexico Beach, section 2.04.00 regulates "the installation, configuration, and use of accessory

structures" on property, "to ensure that they are not harmful either aesthetically or physically to residents and surrounding areas." The principal structure on a lot is "the dwelling unit, house, or commercial use located on the lot," and an "accessory structure" on the same lot is "of a nature customarily incidental and subordinate to the principal structure."[1] In residential areas, allowable accessory structures include buildings used as toolsheds, garages, storage sheds, gazebos, doghouses, bathhouses, etc.

You report that the City is considering changing the ordinances to allow accessory structures that include plumbing but prohibit kitchen facilities to be used as bedrooms or sleeping quarters. The City is not certain whether such sleeping quarters would be classified as "vacation rentals," which are regulated under chapter 509, Florida Statutes. More specifically, the City questions whether it could enact an ordinance "that would allow [an] accessory structure to be used for sleeping quarters but prohibit that accessory structure from being a stand-alone rental unit." An answer will enable the City to make an informed policy decision as to whether to change the local law.

Applicable Statutes:

Under section 509.241(1), Florida Statutes (2018), each public lodging establishment must be licensed by the Division of Hotels and Restaurants of the Department of Business and Professional Regulation. The regulation of public lodging establishments has been preempted to the state since 1993 under section 509.032(7), Florida Statutes.[2] A public lodging establishment is classified and defined within section 509.242, as a hotel, motel, vacation rental, nontransient apartment, transient apartment, bed and breakfast inn, and timeshare project. Your concern is whether an accessory structure used as sleeping quarters could be classified as a "vacation rental."

Until 2011, residential properties rented typically to tourists on vacation were classified as "resort condominiums" and "resort dwellings," defined in section 509.242(1)(c) and (g), Florida Statutes (1993) as follows:

> *Resort condominium.* – A resort condominium is any unit or group of units in a condominium, cooperative, or time-share plan which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.

* * *

> *Resort dwelling*.—A resort dwelling is any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.

Before June 1, 2011, local governments were enacting local laws and ordinances that restricted or prohibited the rental of residential properties as resort dwellings.[3] In Chapter 2011-119, the Legislature did two things that are pertinent to this discussion. First, they combined the terms and definitions of "resort condominium" and "resort dwelling" under the new term "vacation rental."[4] Section 509.242(1)(c) now provides:

> A vacation rental is any unit or group of units in a condominium or cooperative or any individually or collectively owned single-family, two-family, three-family, or four-family house or dwelling unit that is also a transient public lodging establishment but that is not a timeshare project.

"Transient public lodging establishment" is defi ned in section 509.013(4)(a)1 as "any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests."

Second, the Legislature expanded the preemption provision of section 509.032(7) by adding subsection (7)(b), which provided:

> 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.

The Legislature subsequently determined that this provision was inhibiting local governments from amending existing regulations on vacation rentals for fear of invalidating them altogether. The Legislature therefore amended section 509.032(7)(b), in Chapter 2014-71, so that it now provides:

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

The Staff Analysis indicates that under this provision as amended, local regulations or ordinances enacted prior to June 1, 2011, that prohibited or restricted vacation rentals would continue to be enforced, but that after that date, new ordinances may only address regulatory matters, such as "noise, parking, registration, and signage requirements for vacation rentals," but cannot prohibit vacation rentals or restrict the duration or frequency of such rentals.[5]

QUESTION 1:

Because an accessory structure used only for sleeping is neither a "unit or group of units in a condominium or cooperative," nor a "single-family, two-family, three-family, or four-family house," the question is whether sleeping quarters could be considered a "dwelling unit" under section 509.242(1)(c). If so, an accessory structure used only for sleeping would constitute a "vacation rental," and the City would be barred from prohibiting a property owner from renting the structure out to guests as a house or dwelling unit independent from the principal structure on the property.[6]

There is no separate definition of "dwelling unit" as used in the definition of "vacation rental." When the meaning of a statutory term is uncertain, it should be given its plain and ordinary meaning, based upon construction of the term found in other statutory provisions, case law, and dictionary definitions.[7] As has been observed, "[t]he meaning of the word 'dwelling' may vary with the context of its usage."[8]

Dictionary

The term "dwelling house" or "dwelling" in the civil context is defined in *Black's Law Dictionary* as: "1. The house or other structure in which one or more people live; a residence or abode. 2. Real estate. The house and all buildings attached to or connected with the house."[9]

Mexico Beach Code

The Land Development Regulations of the City of Mexico Beach, section 2.00.01, define "dwelling unit" as: "A single housing unit providing complete, independent living facilities for one housekeeping unit, including permanent provisions for living, sleeping, eating, cooking, and sanitation."

Case Law

Florida courts have addressed the meaning of "dwelling" or "dwelling unit" in a limited number of cases. In *State ex rel. Lacedonia v. Harvey*,[10] the Florida Supreme Court was asked to decide an appeal in which a property owner argued that an addition to her apartment house was not a dwelling required to have a five-foot setback pursuant to a

zoning ordinance, because the addition would be used for a business. Observing that the ordinary dictionary definition of "dwelling" was "a building used for human habitation," the Court concluded that it was plain that the municipal authorities intended that the term "should apply to all buildings 'used for human habitation' or living quarters, without regard to the number or nature of units in a particular structure, including apartment houses[.]"[11] The Court concluded that the setback requirement applied to the apartment building addition.

In *Bay County v. Harrison*,[12] Bay County approved a resort condominium development that would consist of 279 living/rental units on two acres. A nearby resident challenged the approval as violative of the Comprehensive Plan, which limited density in the area to only 15 "dwelling units" per acre. The circuit court found for the plaintiff, but the First District reversed, concluding that the density restriction for dwelling units in the Comprehensive Plan did not apply to a resort condominium. The court observed that "resort condominium" was defined in the 2007 version of section 509.242(1)(c) as a unit or group of units in a condominium rented to members of the public more than three times per year for a month or less. Based upon this definition, as well as evidence in the case, the court stated that the resort condominium was "the substantial equivalent" of a hotel, which, unlike a residence or dwelling, which one lives in, is a "permanent structure that accommodates temporary visitors."[13]

The court concluded that the density limitation of 15 dwelling units per acre was a "housing" restriction, that resort condominium units were not "dwelling units," and thus the density restriction did not apply.

> The term "housing" carries a dimension of permanence: "housing" is "shelter; lodging; dwellings provided for people." *Webster's New Collegiate Dictionary* 550 (5th ed. 1973). "Dwelling" is "a building or other shelter in which people live[ ]; house." *Id.* at 352.… Both the terms "dwelling" and "housing" in the Plan evoke a sense of permanency – they are places where "people live" – that could not reasonably be ascribed to a class of temporary or transient accommodations…secured by tourists on their Gulf beach vacations.[14]

In *Miami County Day School v. Bakst*,[15] the circuit court concluded, and the Third District agreed, that the houseboat of a couple who owed tuition to a school, constituted a "dwelling house," and thus was a homestead, and therefore exempt from forced sale to pay the debt. The court characterized houseboats as "self-contained living environments, designed for use as residences rather than transportation."[16] This particular houseboat was the owner's exclusive residence, had four bedrooms and three bathrooms, and was "fully equipped for occupancy and supplied with utilities via dock connections," including water and electric hookups.[17]

In these cases,[18] a dwelling is a place where people could live semi-permanently, rather than a room that people stay in temporarily. A "house or dwelling unit" is complete unto itself as a habitation and thus is suited to be rented out to guests as a vacation rental, unlike sleeping quarters.[19] Separate sleeping quarters, standing alone, may enhance the value of the principal dwelling to either a homeowner or a renter by increasing the occupancy capacity of the principal dwelling, but without more, such as a permanent area for food preparation, sleeping quarters are not a "dwelling unit" suffi cient to constitute an independent "vacation rental" under section 509.242(1)(c).

It is therefore my opinion that the City of Mexico Beach may enact an ordinance allowing an accessory structure to be used as sleeping quarters but not rented out independently, without violating the preemption provision of section 509.032(7).

QUESTION 2:

You also inquire whether the license that permits a primary dwelling to be rented out as a vacation rental could be applied instead to permit rental of an accessory sleeping structure. The language of the licensing provision, section 509.241(1), Florida Statutes (2018), and implementing rule 61C-1.002, authorize licensing of a dwelling, which as shown above, cannot be a stand-alone sleeping facility.

Section 509.241(1), provides, in pertinent part: "Each public lodging establishment … shall obtain a license from the division. Such license may not be transferred from one place or individual to another."

Florida Administrative Code rule 61C-1.002, Licensing and Inspection Requirements, provides, in pertinent part:

> (4) Public lodging establishments as defined in section 509.013(4), F.S., are licensed in accordance with the classifications in section 509.242, F.S., and:
> (a) Transient establishments – are licensed as hotels, motels, transient apartments, bed and breakfast inns, vacation rentals and timeshare projects. Vacation rentals are further classified as condominiums or dwellings. A vacation rental condominium license will be issued for a unit or group of units in a condominium or cooperative. A *vacation rental dwelling license will be issued for a single-family house*, a townhouse, or a unit or group of units in a duplex, triplex, quadruplex, or other dwelling unit that has four or less units collectively. (Emphasis added.)

Accordingly, when the Division of Hotels and Restaurants licenses a house or dwelling unit as a vacation rental, an accessory structure that only provides sleeping quarters may be included with the principal

dwelling, but the dwelling license cannot be used to independently rent the accessory structure.

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[1] City of Mexico Beach, Land Development Regulations, amended Aug. 12, 2014, section 2.04.00, at 34-36. An attached structure is considered part of the principal structure rather than an accessory structure.

[2] Ch. 93-53, §1, Laws of Fla. (1993). Until 2011, the provision stated, with regard to preemption of lodging regulation: "The regulation and inspection of public lodging establishments and public food service establishments … are preempted to the state."

[3] *See* House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, p. 2, dated June 19, 2014.

[4] *See* House of Representatives Final Bill Analysis, CS/CS/CS/HB 883, pp. 3 and 5, dated June 28, 2011 ("Vacation rentals are properties generally designed for residential purposes, such as single- and -multi-family homes which are rented out to tourists on vacation. In Florida, they are divided into two main categories: resort condominiums and resort dwellings and are regulated as transient public lodging establishments. … The bill reclassifies resort condominiums and resort dwellings as 'vacation rentals,' a new classification combining the two previous classes.").

[5] *See* House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, p. 3, dated June 19, 2014.

[6] *See* Op. Att'y Gen. Fla. 16-12 (2016) (an ordinance that "could have the effect of prohibiting a statutorily eligible housing unit from being used as a vacation rental" would exceed the municipality's regulatory authority).

[7] *See, e.g., Reform Party of Fla. v. Black*, 885 So. 2d 303, 312 (Fla. 2004); *JPG Enters., Inc. v. McLellan*, 31 So. 3d 821, 824 (Fla. 4th DCA 2010).

[8] *State ex rel. Lacedonia v. Harvey*, 68 So. 2d 817, 818 (Fla. 1953) (citing *Michaels v. Township Comm. of Pemberton Tp*., 67 A.2d 324, 327 (N.J. Sup. Ct.) ("The term 'dwelling' is one of multiple meanings. It does not always have the same sense in all cases, for it may mean one thing under an indictment for burglary or arson, another under the homestead law, another under the pauper law and another in a contract or devise.")).

[9] *Black's Law Dictionary* (10th ed. 2014). "Habitation," in turn, is defined as "[a] dwelling place; a domicile."

[10] *State ex rel. Lacedonia v. Harvey,* 68 So. 2d 817 (Fla. 1953).

[11] *Id*. at 818.

[12] 13 So. 3d 115 (Fla. 1st DCA 2009).

[13] *Id*. at 119.

[14] *Id*. at 119-20.

[15] 641 So. 2d 467 (Fla. 3d DCA 1994).

[16] *Id*. at 469.

[17] *Id*.

[18] *See also Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214-15 (11th Cir. 2008) (concluding that a drug- and alcohol-treatment halfway house was a "dwelling" and thus covered by the Fair Housing Act, wherein the pertinent statute defined "dwelling" as "a residence," observing that "the more occupants treat a building like their home – e.g., cook their own meals, clean their own rooms and maintain the premises, do their own laundry, and spend free time together in common areas – the more likely it is a 'dwelling.'"); *Cochran v. Bentley*, 251 S.W.3d 253, 260-61 (Ark. 2007) (concluding that a two-story building, which was heated and cooled and contained an office with a telephone line, two restrooms, and a hot-water heater, was not a "dwelling," which is "a place to live in." The structure did not contain "a kitchen, shower, or living area of some sort," and thus could not "serve as a place in which to live." Instead, the owner lived in a home on the adjacent lot. The structure was therefore barred by the subdivision's restrictive covenant that allowed one dwelling per lot plus a garage and outbuildings that are "incidental to residential use of the lot.").

[19] An Internet search for short-term vacation rentals shows that there is a market for "sleeping-room only" rentals, such as a studio with a full bathroom and no kitchen. As discussed in this opinion, however, such units are not encompassed by Florida's existing definition of "vacation rental."

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