

BIENNIAL REPORT

of the

**ATTORNEY GENERAL
STATE OF FLORIDA**

January 1, 2015, through December 31, 2016

PAM BONDI

Attorney General

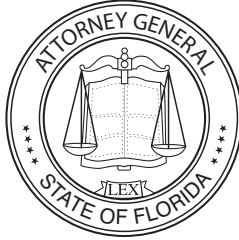


**Tallahassee, Florida
2017**

CONSTITUTIONAL DUTIES OF THE ATTORNEY GENERAL

The revised Constitution of Florida of 1968 sets out the duties of the Attorney General in Subsection (c), Section 4, Article IV, as: “...the chief state legal officer.”

**By statute, the Attorney General is head of the Department of Legal Affairs, and supervises the following functions:
Serves as legal advisor to the Governor and other executive officers of the State and state agencies;
Defends the public interest;
Represents the State in legal proceedings;
Keeps a record of his or her official acts and opinions;
Serves as a reporter for the Supreme Court.**



**STATE OF FLORIDA
OFFICE OF ATTORNEY GENERAL
PAM BONDI**

March 31, 2017

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

Dear Governor Scott:

Pursuant to my constitutional duties and the statutory requirement that this office periodically publish a report on the Attorney General official opinions, I submit herewith the biennial report of the Attorney General for the two preceding years from January 1, 2015, through December 31, 2016.

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

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

Sincerely,

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

**Pam Bondi
Attorney General**

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**ATTORNEYS GENERAL OF FLORIDA
SINCE 1845**

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

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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:

**Pam Bondi
Attorney General
Department of Legal Affairs
PL01 The Capitol
Tallahassee, Florida 32399-1050**

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

The response time for requests for Attorney General Opinions has been substantially reduced. This office attempts to respond to all requests for opinions within 30 days of their receipt in this office. However, in order to facilitate this expedited response to opinion requests, this office requires that the attorneys for public entities requesting an opinion supply this office with a memorandum of law to accompany the request. The memorandum should include the opinion of the requesting party's own legal counsel, a discussion of the legal issues involved, together with references to relevant constitutional provisions, statutes, charter, administrative rules, judicial decisions, etc.

Input from other public officials, organizations or associations representing public officials may be requested. Interested parties may also submit a memorandum of law and other written material

or statements for consideration. Any such material will be attached to and made a part of the permanent file of the opinion request to which it relates.

VI. Miscellaneous

This office provides access to formal Attorney General Opinions through a searchable database on the Attorney General's website at:

myfloridalegal.com

Persons who do not have access to the Internet and wish to obtain a copy of a previously issued formal opinion should contact the Florida Legal Resource Center of the Attorney General's Office. Copies of informal opinions can be obtained from the Opinions Division of the Attorney General's Office.

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



*Pam Bondi
The Capitol
Tallahassee*

BIENNIAL REPORT
of the
ATTORNEY GENERAL
State of Florida

January 1, 2015, through December 31, 2016

AGO 2015-01 – January 28, 2015

**PUBLIC RECORDS – EMERGENCY CALLS –
CONFIDENTIALITY – VOICE RECORDINGS**

**WHETHER SOUND OF CALLER'S VOICE IS CONFIDENTIAL
IDENTIFYING INFORMATION**

*To: The Honorable Deryl Loar, Sheriff of Indian River County
Attention: Major James G. Harpring*

QUESTION:

Is the recording and sound of a voice of the caller in an E911 call requesting emergency service considered "information which may identify any person" which is made confidential by section 365.171, Florida Statutes?

SUMMARY:

While section 365.171(12), Florida Statutes, makes confidential information obtained by a public agency which may identify a person requesting emergency services or reporting an emergency in an E911 call, there is no clear indication that the Legislature intended to include the sound of a person's voice as information protected from disclosure to the public at large.

Florida's Public Records Law, Chapter 119, Florida Statutes, provides a right of access to the records of state and local governments, as well as private entities acting on their behalf.¹ For purposes of the law, the term "public records" is defined to include

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

The only exceptions to the requirements of the Public Records Law are those established by general law or by the Constitution.² There is no question that the sound recording of an E911 call is a public record for purposes of the Public Records Law.³ Section 365.171(12)(a), Florida Statutes, however, provides:

Any record, recording, or information, or portions thereof, obtained by a public agency or a public safety agency for the purpose of providing services in an emergency and which reveals the name, address, telephone number, or personal information about, or information which may identify any person requesting emergency service or reporting an emergency by accessing an emergency communications E911 system is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that such record or information may be disclosed to a public safety agency. The exemption applies only to the name, address, telephone number or personal information about, or information which may identify any person requesting emergency services or reporting an emergency while such information is in the custody of the public agency or public safety agency providing emergency services. . . .

Prior to its amendment in 1990, the statute, then section 365.171(15), Florida Statutes, merely provided confidentiality for information “which reveals the name, address, or telephone number of any person requesting emergency service or reporting an emergency by accessing an emergency telephone number ‘911’ system[.]”⁴ Relying on this language, it was concluded in Attorney General Opinion 90-43 that only that portion of the voice recording of a “911” call relating to the name, address, and telephone number of the person calling the emergency telephone number “911” to report an emergency or to request emergency assistance is exempt from the disclosure requirements of Chapter 119, Florida Statutes. Thus, the opinion concluded that the voice recording of a “911” call is subject to disclosure once the name, address, and telephone number of the caller have been deleted.

Following issuance of Attorney General Opinion 90-43, the first sentence of section 365.171(15), Florida Statutes, was amended to extend confidentiality to certain personal, identifying information. The legislative history for enactment of Chapter 90-305, Laws of Florida, amending the statute, reveals that this change in subsection (15) was intended to “[p]rovide for confidentiality of ‘911’ recordings or portions of such recordings when processing information requests (under the provisions of section 119.07(1), Florida Statutes . . .) for personal information or information which might identify a person requesting or reporting emergency service by use of the ‘911’ number.”⁵

This office subsequently concluded that a tape recording of a “911” call is a public record subject to disclosure and copying when in the custody of an emergency services department, but that portion of a “911” call containing the name, address, telephone number, and personal information or information which might identify a person requesting emergency service or reporting an emergency must be redacted by the records custodian prior to disclosure.⁶

The general purpose of Chapter 119, Florida Statutes, “is to open public records to allow Florida’s citizens to discover the actions of their government.”⁷ The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.⁸ Any doubt as to the applicability of a Public Records exemption should be resolved in favor of disclosure rather than secrecy.⁹

It is reasonable to conclude that the sound of a person’s voice “may” identify the individual requesting emergency services or reporting an emergency to someone who is acquainted with or related to the caller.¹⁰ The Legislature, however, has not chosen to specify that the recording of an oral communication in an E911 call is protected from disclosure. Rather, it appears that the issue was considered during the 2010 Legislative Session. Legislation was introduced in response to a situation in which the family of an overdose victim had to endure repeated playbacks of the 911 call reporting their son’s death.¹¹ Proposed Committee Bill 10-03a by the House Governmental Affairs Policy Committee would have made confidential any recording of a request for emergency services or report of an emergency using the E911 system, allowing the release of a transcript of the recording 60 days after the date of the call or by court order upon a showing of good cause. The bill, however, died in committee. The following year, Senate Bill 1310 sought to amend section 365.171, Florida Statutes, to provide that if an oral recording of a 911 emergency transmission is requested, the recording must be digitally modified in order to protect the personal identity of any person requesting emergency services or reporting an emergency.¹² The bill was temporarily postponed while in committee and was not addressed further.¹³

Thus, while it could be asserted that the sound of a person’s voice may identify an individual, the Legislature has considered legislation requiring the distortion of a person’s voice requesting services or reporting an emergency in a 911 recording and chose to not do so. This office recognizes, however, that advancements in technology to identify a person by his or her voice may have created a need for the Legislature to revisit the matter and would suggest that you seek legislative clarification in how best to protect the identity of an E911 caller.

Absent a clear provision for the confidentiality or exemption of a voice recording of the person making an E911 call, I cannot conclude

that section 365.171(12), Florida makes the sound of a person's voice "information" which would identify the caller for purposes of redacting confidential information from the call.

¹ Article I, s. 24, Fla. Const., also recognizes a right of access to public records of virtually all state and local governmental entities, including the legislative, executive, and judicial branches.

² See s. 24, Art. I, Fla. Const., recognizing an exception from public disclosure for records exempted pursuant to the section or made confidential by the Florida Constitution. Subsection (c) states: "The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

³ See s. 119.011(12), Fla. Stat., defining "public records" to include:

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

See also Ops. Att'y Gen. Fla. 93-60 (1993) and 90-43 (1990).

⁴ See Ops. Att'y Gen. Fla. 95-48 (1995), 93-60 (1993), and 90-43 (1990) (while the portion of a voice recording revealing the name, address, and telephone number of a person reporting an emergency or requesting assistance using a "911" number is exempt from disclosure, the public agency is required to release the remainder of the voice recording once the exempt material has been deleted).

⁵ See Final Staff Analysis & Economic Impact Statement of CS/HB 1437, House of Representatives Committee on Community Affairs, dated June 28, 1990.

⁶ Op. Att'y Gen. Fla. 93-60 (1993).

⁷ *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997).

⁸ *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

⁹ *Tribune Company v. Public Records, supra.*

¹⁰ *Compares.* 817.568(1)(f)2., Fla. Stat., defining “[p]ersonal identification information” for purposes of the statute to include “[u]nique biometric data, such as fingerprint, *voice print*, retina or iris image, or other unique physical representation[.]” (e.s.)

¹¹ *See* <http://www.palmbeachpost.com/news/news/state-regional/house-leader-pushes-bill-to-keep-911-calls-private/nL5LM/>.

¹² *See* Bill Analysis and Fiscal Impact Statement, Florida Senate, SB 1310, dated April 3, 2011.

¹³ Governmental Oversight & Accountability Committee, Florida Senate, April 5, 2011. *See* SB 1310 History at: http://www.flsenate.gov/Session/Bill/2011/1310#1310/?Tab=BillHistory&_suid=1409933439157007642448516300654.

AGO 15-02 – January 28, 2015

**PUBLIC RECORDS – UNDERCOVER PERSONNEL –
EXEMPTIONS – CRIMINAL JUSTICE AGENCY**

**PUBLIC RECORDS EXEMPTION FOR UNDERCOVER
PERSONNEL OF CITY’S CRIMINAL JUSTICE AGENCY**

To: Mr. Jeffrey A. Chudnow, Chief of Police, City of Oviedo

QUESTION:

Do the provisions of section 119.071(4)(c), Florida Statutes, which exempt “[a]ny information revealing undercover personnel of any criminal justice agency” authorize the City of Oviedo to exempt from public disclosure the names of law enforcement officers of the city who are assigned to undercover duty when a request is made for a personnel roster of any type (pay roster, etc.) or a listing of all law enforcement officers of the city when the record does not identify the officers as being assigned to undercover duty?

SUMMARY:

Pursuant to section 119.071(4)(c), Florida Statutes, information regarding law enforcement officers of the city who are assigned to undercover duty and whose names appear on personnel rosters or other lists of all law enforcement officers of the city without regard to whether the record reveals the nature of their duties may constitute “[a]ny information revealing undercover personnel of any criminal justice agency[.]” The

Legislature's determination that such information is exempt from disclosure and copying under the Public Records Law, rather than making such information confidential, conditions the release of exempt information upon a determination by the custodian that there is a statutory or substantial policy need for disclosure.

Additional information contained in your request states that the rosters or listings would not indicate that undercover activities are being assigned by particular law enforcement officers or that particular law enforcement officers perform undercover duty. However, the names of undercover law enforcement officers are included in the general roster or general listing of all city law enforcement officers.

The general purpose of Florida's Public Records Law "is to open public records to allow Florida's citizens to discover the actions of their government."¹ While the Public Records Law is to be liberally construed in favor of open government, exemptions from disclosure are to be narrowly construed and limited to their stated purpose.²

Section 119.071, Florida Statutes, provides general exemptions from the inspection and copying requirements of Florida's Public Records Law. The statute containing the exemption about which you have inquired, section 119.071(4)(c), Florida Statutes, provides:

Any information revealing undercover personnel of any criminal justice agency is *exempt* from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. (e.s.)

The exemption's applicability to "*any* information" suggests a broader application of the exemption rather than a narrow one.³ Clearly, the names of undercover personnel would come within the scope of "any information." However, the information must "reveal" undercover personnel of the criminal justice agency. The word "reveal" is generally defined as "to make known; disclose;"⁴ but the Legislature has provided no additional direction as to what "reveal" may mean.

Thus, the question becomes whether the names of undercover personnel, without any reference to the nature of the duties performed by those officers would reveal the officers as undercover personnel. The governmental agency claiming the benefit of the exemption has the burden of proving its entitlement to that exemption.⁵

Florida courts and this office have recognized that a distinction exists between records which are confidential and records which are only exempt from the mandatory disclosure requirements in section 119.07(1), Florida Statutes.⁶ As the court in *WFTV, Inc. v. School Board of Seminole*,⁷ stated:

There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and 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.

Thus, the exemption provided in section 119.071(4)(c), Florida Statutes, does not absolutely prohibit the production of information revealing undercover personnel under all circumstances.

In Attorney General Opinion 90-50, this office considered those circumstances under which information exempted pursuant to what is now section 119.071(4)(d)2.a, Florida Statutes (providing an exemption for home addresses, etc., of law enforcement personnel), may be released by an agency.⁸ Although the Legislature apparently chose to place the release of this information within the discretion of the agency by making it subject to an exemption rather than confidentiality, in light of the underlying purpose of the enactment, *i.e.*, the safety of law enforcement officers and their families, any such discretion by the agency must be exercised in light of that legislative purpose. Accordingly, the opinion concluded that in determining whether such information should be disclosed, an agency should consider whether there is a statutory or substantial policy need for disclosure. In the absence of a statutory or other legal duty to be accomplished by disclosure, an agency should consider whether the release of such information is consistent with the purpose of the exemption.⁹

Likewise, section 119.071(4)(c), Florida Statutes, *exempts* any information revealing undercover personnel of any criminal justice agency from the disclosure provisions of section 119.07(1), Florida Statutes. By making it the subject of an exemption, the Legislature apparently chose to place the release of this information, once it has been determined to “reveal” undercover personnel, within the discretion of the agency. Whether particular information may “reveal” undercover personnel is a determination which must be made in a case-by-case consideration of the particular situation. Once the information is determined to be exempt, the chief of police or the city is not *required* to produce this information pursuant to a public records request. The statute makes the information revealing undercover personnel exempt rather than confidential and therefore would not appear to preclude the release of such information, however, the purpose of the exemption, *i.e.*, the safety of undercover personnel, must be considered in determining

whether such information should be released. Thus, as this office has previously advised, a custodian of such information should determine whether there is a statutory or substantial policy need for disclosure before releasing any information revealing undercover personnel.

In sum, it is my opinion that pursuant to section 119.071(4)(c), Florida Statutes, information regarding law enforcement officers of the city who are assigned to undercover duty and whose names appear on personnel rosters or other lists of all law enforcement officers of the city without regard to whether the record reveals the nature of their duties may constitute “[a]ny information revealing undercover personnel of any criminal justice agency[.]” The Legislature’s determination that such information is exempt from disclosure and copying under the Public Records Law, rather than making such information confidential, conditions the release of exempt information upon a determination by the custodian that there is a statutory or substantial policy need for such disclosure.

¹ *Christy v. Palm Beach County Sheriff’s Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997).

² *See National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), *review denied*, 37 So. 3d 848 (Fla. 2010); *Krischer v. D’Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

³ The word “any” is defined to mean “one, a, an, or some; one or more without specification or identification; . . . every; all[.]” Webster’s New Universal Unabridged Dictionary (2003), p. 96. *And see* Op. Att’y Gen. Fla. 74-311 (1974).

⁴ *See* Webster’s New Universal Unabridged Dictionary (2003), p. 1646; *and see* The American Heritage Dictionary (office edition 1987), p. 589.

⁵ *See Christy v. Palm Beach County Sheriff’s Office*, 698 So. 2d 1365, 1367 (Fla. 4th DCA 1997); *Barfield v. City of Ft. Lauderdale Police Department*, 639 So. 2d 1012, 1015 (Fla. 4th DCA, 1994), *review denied*, 649 So. 2d 869 (Fla. 1994); *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985).

⁶ *See, e.g.*, Ops. Att’y Gen. Fla. 07-21 (2007) (Legislature recognized a distinction between “exempt” and “confidential;” confidential information could not be revealed under any circumstances, exempt information could be revealed at discretion of agency); 90-50 (1990).

⁷ 874 So. 2d 48, 53 54 (Fla. 5th DCA 2004).

⁸ The exemptions in what are now ss. 119.071(4)(d)2.a. and 119.071(4)(c), Fla. Stat., were amendments added to the statute by Ch. 79-187, Laws of Fla., and would appear to be directed to the same purpose – the protection of law enforcement personnel. *See* Title, Ch. 79-187, Laws of Fla., “providing that certain . . . information . . . relating to . . . law enforcement personnel . . . are exempt from disclosure provisions of the public record law” and Inf. Op. to Amunds, dated June 8, 2012, discussing the purpose of the exemption currently designated in s. 119.071(4)(d)2.a., Fla. Stat.

⁹ For example, in an Inf. Op. to Chief Lee Reese, Lake Worth Police Department, dated April 25, 1989, this office stated that the personnel files of the City of Lake Worth Police Department which revealed the home addresses of former law enforcement personnel could be disclosed to the State Attorney’s Office for the purpose of serving criminal witness subpoenas by mail pursuant to s. 48.031, Fla. Stat.

AGO 15-03 – January 28, 2015

**GOVERNMENT IN THE SUNSHINE LAW - SETTLEMENT -
“CONCLUSION OF LITIGATION” - DISMISSAL
WITH PREJUDICE**

**WHETHER EXEMPTION FOR LITIGATION STRATEGY
MEETINGS WOULD EXTEND TO TRANSCRIPTS OF CLOSED
SESSIONS WHEN CLAIM DISMISSED WITH PREJUDICE, BUT
JURISDICTION TO ENFORCE RETAINED BY COURT**

To: The Honorable Bruce H. Colton, State Attorney, Nineteenth Judicial Circuit

QUESTION:

Does a dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement which have not been fulfilled by the parties operate to conclude litigation for purposes of section 286.011(8), Florida Statutes, to permit the release of a transcript of a settlement or litigation strategy session closed to the public while the litigation was ongoing?

SUMMARY:

A dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement would operate as a conclusion of the litigation for purposes of section 286.011(8), Florida Statutes, making the transcript of a settlement or

litigation strategy session which was closed to the public while the litigation was ongoing, open for inspection and copying.

According to your letter, a municipality within the Nineteenth Judicial Circuit was sued. Pursuant to section 286.011(8), Florida Statutes, the governing body of the municipality held a settlement or litigation strategy session that was closed to the public. The municipality subsequently reached a settlement agreement with the plaintiff. The settlement agreement was approved by the court and the lawsuit was dismissed with prejudice, but the court retained jurisdiction to enforce the terms of the agreement. The terms of the agreement have not yet been satisfied and you note that the parties may seek to invoke the jurisdiction of the court to enforce the terms of the agreement. A copy of the transcript of the closed litigation strategy session has been requested, but the municipality is concerned that releasing the transcript when further litigation to enforce the settlement agreement may occur would allow the plaintiff to gain access to the transcript and use it to its advantage in future litigation. The Nineteenth Judicial Circuit State Attorney's Office became involved in this matter as it is the State Attorney who is statutorily charged with investigation and prosecution of Public Records violations.¹ You have advised this office that you have discussed your request for an Attorney General's Opinion with the city attorney involved in the litigation who has agreed that an Opinion on this question would be helpful.

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

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

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

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

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement

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

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

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

When considering the construction of this provision, Florida courts have held that the Legislature intended a strict construction of the exemption.³ Applying such strict construction, this office concluded that the exemption in section 286.011(8), Florida Statutes, did not apply when no lawsuit had been filed even though the parties involved in the dispute believed that litigation was inevitable.⁴ However, when on-going litigation had been suspended temporarily pursuant to a stipulation for settlement, this office stated that the litigation had not been concluded for purposes of section 286.011(8), Florida Statutes, and therefore, a transcript of meetings held between the city and its attorney to discuss such litigation could be kept confidential until the litigation was concluded.⁵

Your factual situation involves transcripts of strategy sessions relating to a complaint in an action that has been dismissed with prejudice. This office, in Attorney General Opinion 94-33, concluded that to give effect to the purpose of section 286.011(8), Florida Statutes, a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run. That opinion involved the question of whether a voluntary dismissal operated to conclude litigation for purposes of section 286.011(8), Florida Statutes. The plaintiff in the action had previously filed lawsuits against the Gainesville-Alachua County Regional Airport Authority and voluntarily dismissed these actions after a year or two of litigation. The airport authority was concerned that the plaintiff would dismiss his suits, allege that the litigation was concluded, request a copy of the transcript of strategy meetings, and then refile the lawsuits.

In a subsequent opinion, Attorney General Opinion 13-13, the Citrus County School Board was sued in federal court by three plaintiffs who alleged that they had been denied equal access to educational opportunities and that retaliatory action had been taken against them. The matter was resolved between the parties and the complaint was dismissed with prejudice by the court. Subsequently, claims were filed by the parents of the original plaintiffs which derived directly from the same facts and circumstances litigated in the original lawsuit. A request for the transcripts of the meetings between the school board and its attorney pursuant to section 286.011(8), Florida Statutes, was received from the parent of two of the original plaintiffs. Shortly thereafter, a complaint against the school board was filed in federal court by the parents of the original plaintiffs based on the complaints made by their daughters in the original lawsuit. The attorneys for the Citrus County School Board asked whether the language in section 286.011(8)(e), Florida Statutes, requiring the release of transcripts of closed meetings held to discuss settlement negotiations and litigation expenditure strategy upon the “conclusion of the litigation” would apply in light of the filing of the subsequent, derivative claim. As was noted in Attorney General Opinion 13-13, “[i]n light of the language of section 286.011(8)(e), Florida Statutes, making the transcripts of strategy meetings held pursuant to that section public records ‘upon conclusion of the litigation,’ it does not appear that the Legislature intended to recognize a continuation of the exemption for ‘derivative claims.’”⁶

In a recent Second District case, *Chmielewski v. City of St. Pete Beach*,⁷ the court commented favorably on Attorney General Opinion 13-13 and held that a “shade meeting” transcript, prepared pursuant to section 286.011(8), Florida Statutes, became a matter of public record at the entry of a final judgment at the conclusion of a quiet title action. The final judgment contained executory provisions which the city characterized as enforcement proceedings resulting from the settlement of an earlier lawsuit. The court rejected the city’s characterization and stated that nothing in the settlement of the earlier lawsuit could be interpreted to suggest that the quiet title lawsuit was still open, ongoing, or capable of being reopened as to that issue. Thus, the court held that “[t]he transcript does not regain ‘secret’ status just because a new tangentially related lawsuit is filed.”⁸

You have advised this office that a settlement agreement has been reached and the lawsuit has been dismissed with prejudice. “Dismissed with prejudice” is commonly understood to mean “[a] dismissal, usually after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim.”⁹ While it appears that the court has retained jurisdiction to enforce the terms of the settlement agreement, a lawsuit on the same claim is precluded by the dismissal with prejudice. Thus, this litigation appears to be concluded and section 286.011(8), Florida Statutes, requires that “[t]he transcript shall be made part of the public record *upon conclusion of the litigation.*”

(e.s.)

In sum, it is my opinion that a dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement would operate as a conclusion of the litigation for purposes of section 286.011(8), Florida Statutes, making the transcript of a settlement or litigation strategy session which was closed to the public while the litigation was ongoing a public record which would be open for inspection and copying.

¹ See Op. Att’y Gen. Fla. 91-38 (1991) (a state attorney may prosecute suits charging public officials with violations of the Public Records Act, including those violations which may result in a finding of guilt for a noncriminal infraction); and s. 119.10, Fla. Stat. (violations of Ch. 119, Fla. Stat.).

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

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

⁴ See Ops. Att’y Gen. Fla. 13-13 (2013), 04-35 (2004), and 98-21 (1998). And see Ops. Att’y Gen. Fla. 06 03 (2006) (exemption not applicable to pre litigation mediation proceedings) and 09-25 (2009) (town council which received pre suit notice letter under the Bert J. Harris Act, s. 70.001, Fla. Stat., is not a party to pending litigation for purposes of s. 286.011[8], Fla. Stat.).

⁵ See Op. Att’y Gen. Fla. 94 64 (1994). And see Ops. Att’y Gen. Fla. 06-03 (2006) (exemption not applicable to pre litigation mediation proceedings) and 09 25 (2009) (town council which received pre suit notice letter under the Bert J. Harris Act, s. 70.001, Fla. Stat., is not a party to pending litigation for purposes of s. 286.011[8], Fla. Stat.).

⁶ And see Op. Att’y Gen. Fla. 94-33 (1994) (a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run). Cf. Op. Att’y Gen. Fla. 96-75 (1996) (disclosure of medical records to city council during closed

door meeting under s. 286.011(8), Fla. Stat., does not affect requirement that transcript of such meeting be made part of public record at conclusion of litigation).

⁷ 161 So. 3d 521, 2014 WL 4212742 (Fla. 2d DCA 2014).

⁸ *And see Wagner v. Orange County*, 960 So. 2d 785 (Fla. 5th DCA 2007), noting that conclusion of litigation generally occurs when final judgment is entered. The court in *Wagner* concluded that the phrase “conclusion of the litigation or adversarial administrative proceedings” for purposes of the attorney work product exemption in s. 119.071(1)(d), Fla. Stat., encompasses post-judgment collection efforts such as a legislative claims bill.

⁹ Black’s Law Dictionary (8th ed.), p. 502.

AGO 15-04 – January 28, 2015

**MUNICIPALITIES – CONSTRUCTION CONTRACTORS –
BOND**

**MUNICIPALITY REQUIRED TO ACCEPT ALTERNATIVE FORMS
OF SECURITY FOR PAYMENT AND PERFORMANCE BOND**

To: Mr. Patrick G. Gilligan, City Attorney for the City of Ocala

QUESTION:

Does section 255.05(7), Florida Statutes, require that a municipality accept alternate forms of security from a contractor for public construction projects?

SUMMARY:

Section 255.05(7), Florida Statutes, authorizes a contractor to file alternative forms of security with the city for public construction projects and provides no discretion in the municipality to refuse to accept the alternate forms of security authorized in that subsection provided these alternate forms of security are determined to be of sufficient value.

According to the information you have forwarded to this office, the City of Ocala issues numerous invitations to bid for public construction projects that require the successful bidding contractor to purchase and provide a payment and performance bond pursuant to section 255.05, Florida Statutes, prior to beginning construction. Subsection (7) of the statute states that “[i]n lieu of the bond required by this section, a contractor may file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money

order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part II of chapter 625."¹

You advise that the city would prefer not to be involved in evaluating alternate forms of security to ensure that such security satisfies statutory requirements and is of sufficient value to serve the same purpose as a bond. Further, the city would prefer that suppliers and subcontractors in payment disputes with the contractor look to the payment bond for compensation and not to the municipality holding the alternate form of security.

The city has asked for this office's assistance in determining whether it is authorized to only accept a payment and performance bond pursuant to section 255.05(1), Florida Statutes, and to make clear in its bid documents that it will not accept the alternate forms of security set forth in subsection (7) of section 255.05, Florida Statutes.

Florida law has long recognized the rights of laborers, materialmen, and subcontractors to seek payment through statutory bonding requirements for a contractor's failure to furnish compensation.² The current statutory mechanisms for enforcing that policy are payment and performance bonds for public works projects under section 255.05, Florida Statutes, and payment bonds and construction liens for private property under Part I, Chapter 713, Florida Statutes, Florida's "Construction Lien Law."³ The legislative scheme set out in section 255.05, Florida Statutes, is designed to provide protection for those providing work and materials on public projects because a mechanic's lien cannot be perfected against public property.⁴

Section 255.05(1), Florida Statutes, about which you have specifically inquired, provides, in part, that:

A person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority or private entity, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety.

Thus, the statute requires that a contractor for the construction of a public building or public works project generally guarantee the prompt payment of persons who furnish labor, services, or materials through the use of a payment bond.

The statute relating to public contractors' bonds was patterned

after the federal Miller Act⁵ and was intended to establish for Florida a little Miller Act whose general aim is to equate suppliers to public projects against which materialmen's liens are not available with those suppliers to private projects enjoying the security of a lien.⁶ The statute is also designed to afford protection to both the surety on the project and the public. The bond protects the public, as project "owner," from two distinct defaults by a builder: the payment portion of the bond contains the insurer's undertaking to guarantee that all subcontractors and materialmen will be paid and the performance part of the bond guarantees that the contract will be fully performed.⁷ Further, Florida courts have recognized that "section 255.05 places a corresponding duty on the public agency, as well as the contractor, to see that a bond is in fact posted for the protection of the subcontractors before construction commences."⁸

As a statute designed to protect various interests, including those of subcontractors, contractors, sureties, and the public, the straightforward language of the statute sets forth a clear and simple method of bonding payment for, and performance of, public construction projects.⁹ Florida's little Miller Act is remedial in nature and thus, is entitled to a liberal construction, within reason, to effect its intended purpose.¹⁰ The statute has existed as a part of the Florida Statutes since 1915.¹¹

Subsection (7) of section 255.05, Florida Statutes, authorizes contractors constructing public buildings to file alternative forms of security to satisfy the statutory requirements for a payment and performance bond. Subsection (7) states:

In lieu of the bond required by this section, a contractor may file with the state, county, city, or other political authority an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, an irrevocable letter of credit, or a security of a type listed in part II of chapter 625. Any such alternative form of security shall be for the same purpose and be subject to the same conditions as those applicable to the bond required by this section. The determination of the value of an alternative form of security shall be made by the appropriate state, county, city, or other political subdivision.

Among the purposes of section 255.05, Florida Statutes, is the protection of subcontractors and suppliers by providing them with an alternative remedy to mechanics liens on public projects. Legislative history for section 255.05, Florida Statutes, expresses the Legislature's intent that contractors be authorized to file an alternative form of security to address the concern that:

Contractors which currently are unable to enter into construction and repair contracts because of an inability to obtain a performance [sic] bond would be able to do so, provided

they could file an alternative form of security.¹²

Nothing in subsection (7) would authorize a local governmental agency to limit its acceptance of alternative forms of security or foreclose that option entirely. Rather, the statute requires, by use of the word “shall,”¹³ local governments to develop a system for determining the value of alternative forms of security for public projects.

In sum, it is my opinion that section 255.05(7), Florida Statutes, authorizes a contractor to file alternative forms of security with the city for public construction projects in the manner provided therein, and, as such, provides no discretion in the municipality to refuse to accept the alternate forms of security authorized in that subsection.

¹ Chapter 625, Fla. Stat., is entitled “Accounting, Investments, and Deposits by Insurers” and Part II relates to investments by domestic insurers and commercially domiciled insurers.

² See, e.g., Art. XVI, s. 22, Fla. Const. 1885, which provided that “[t]he Legislature shall provide for giving to mechanics and laborers an adequate lien on the subject matter of their labor[.]” and “History,” s. 255.05 and Part I, Ch. 713, Fla. Stat.

³ See s. 713.001, Fla. Stat., for the short title of Part I, Ch. 713, Fla. Stat. Projects involving real property and the improvements thereon owned by the state or any county, municipality, school board, or governmental agency, commission, or political subdivision are excluded from coverage under Part I, Ch. 713, Fla. Stat. And see s. 713.01(26), Fla. Stat., defining “real property” for purposes of this part to exclude governmental property.

⁴ See *American Home Assurance Company v. Plaza Materials Corp.*, 908 So. 2d 360 (Fla. 2005), *Coastal Caisson Drill Co. v. American Casualty Co. of Reading, Pa.*, 523 So. 2d 791, 793 (Fla. 2d DCA 1988), approved, 542 So. 2d 957 (Fla. 1989); *William H. Gulsby, Inc. v. Miller Construction Inc. of Leesburg*, 351 So. 2d 396, 397 (Fla. 2d DCA 1977).

⁵ See 40 U.S.C.A. ss. 3131-3134 (formerly codified as 40 U.S.C.A. ss. 270a-270d).

⁶ *Delduca v. U.S. Fidelity & Guarantee Co.*, 357 F.2d 204, (5th Cir. Fla. 1966), rehearing denied, 362 F.2d 1012 (5th Cir. Fla. 1966). And see *City of Ocala v. Continental Casualty Co.*, 127 So. 326 (Fla. 1930); *Collins for Use and Benefit of Dixie Plywood Co. of Tampa v. National Fire Insurance Co. of Hartford*, 105 So. 2d 190 (Fla. 2d DCA 1958).

⁷ See *American Home Assurance Company*, supra n.4 at 363 and *Coastal Caisson*, supra n.4 at 793.

⁸ See *Palm Beach County v. Trinity Industries, Inc.*, 661 So. 2d 942 (Fla. 4th DCA 1995) (county liable to subcontractor which had supplied

materials for public guardrail project where estimated annual amount of guardrail contract was \$250,000, where county failed to ensure that contractor post a payment and performance bond before construction commenced, and where contractor had become insolvent, making it impossible for subcontractor to collect on default judgment against contractor) and citing *Warren v. Glens Falls Indem. Co.*, 66 So. 2d 54 (Fla. 1953) and *Pavex Corp. v. Broward County Board of County Commissioners*, 498 So. 2d 1317, 1318 (Fla. 4th DCA 1986), *review dismissed*, 509 So. 2d 118 (Fla. 1987).

⁹ *American Home Assurance Company, supra* n.4.

¹⁰ *See, e.g., Aquatic Plant Management, Inc. v. Paramount Engineering, Inc.*, 977 So. 2d 600 (Fla. 4th DCA 2007); *Runyon Enterprises, Inc. v. S.T. Wicole Construction Corporation of Florida, Inc.*, 677 So. 2d 909 (Fla. 4th DCA 1996); *Gergora v. R.L. Lapp Forming, Inc.*, 619 F.2d 387 (1980).

¹¹ *See* s. 1, Ch. 6867, Laws of Fla. (1915).

¹² Senate Staff Analysis and Economic Impact Statement on SB 907 (Ch. 84-288, Laws of Fla.), dated April 24, 1984.

¹³ The word “shall” is normally used in a statute to connote a mandatory requirement. *See, e.g., Drury v. Harding*, 461 So. 2d 104 (Fla. 1984); *Holloway v. State*, 342 So. 2d 966 (Fla. 1977); *Neal v. Bryant*, 149 So. 2d 529 (Fla. 1962).

AGO 15-05 – January 28, 2015

COMMUNITY REDEVELOPMENT AGENCY – MUNICIPALITY

WHETHER CITY AUTHORIZED TO CHANGE COMPOSITION OF APPOINTED COMMUNITY REDEVELOPMENT AGENCY BOARD

To: Mr. James C. Brady, City Attorney for the City of Lauderdale Lakes

QUESTIONS:

1. May the City of Lauderdale Lakes, through an adopted ordinance, change the Commission of the Lauderdale Lakes Redevelopment Agency from the original Commission adopted pursuant to section 163.357(1), Florida Statutes, to one established under section 163.356(2), Florida Statutes?

2. May the City of Lauderdale Lakes, by ordinance, provide for a seven-member Commission for the Lauderdale Lakes Redevelopment Agency, pursuant to section 163.357(1)(c), Florida Statutes, by appointing one or two additional members to the CRA Commission, in circumstances in which the original

seven-member governing body appointed itself as the CFA Commission, but a recent city charter revision reduced the number of the governing body to six (6) members?

SUMMARY:

1. Having exercised its authority to appoint a board of commissioners for the Lauderdale Lakes Redevelopment Agency and having appointed the city commission to serve as the board of that agency, the city has no authority to change the composition of the board of commissioners.

2. Section 163.357(1)(c), Florida Statutes, provides that a governing body which consists of five members may appoint two additional persons to act as members of the community redevelopment agency. The statute does not authorize a governing body of six to appoint any additional persons to the community redevelopment agency.

According to your letter, the City of Lauderdale Lakes established the Lauderdale Lakes Community Redevelopment Agency (the "CRA") in 2000, and appointed the City's seven-member governing body as the CRA's Commission or governing board. In 2013, the Charter of the City of Lauderdale Lakes was revised and beginning with the election of November 2014, the City's governing body was reduced to six members which resulted in a reduction in the CRA's board to six members. The charter's changes will result in a final reduction in the city's governing body, and the CRA board, in November 2016, when the city's governing body will be reduced to five members. The city is concerned that, with a governing board of six members, the CRA "will find itself hamstrung by tie votes on items of vital business." You have contacted this office for assistance in determining whether the city is authorized to alter the composition of the CRA board.

The Community Redevelopment Act, Part III, Chapter 163, Florida Statutes, was enacted to enable counties and municipalities to eliminate and prevent the development or spread of slums and urban blight, encourage needed community redevelopment, and provide for the redevelopment of slums and blighted areas.¹ Upon making the requisite findings, a county or municipality is authorized to create a community redevelopment agency to carry out the purposes set forth in the act.²

The act prescribes with particularity the structural organization and powers of such agencies and the composition, number, and terms of office of the members thereof. Section 163.356(2), Florida Statutes, provides that the governing body of the county or municipality creating the community redevelopment agency shall appoint by ordinance a board of commissioners for the agency "which shall consist of not fewer than five or more than nine commissioners." The governing body of

the county or municipality is authorized to remove a commissioner “for inefficiency, neglect of duty, or misconduct in office only after a hearing and only if he or she has been given a copy of the charges at least 10 days prior to such hearing and has had an opportunity to be heard in person or by counsel.”³

As an alternative to the appointment of a board of commissioners, the governing body may declare itself to be a community redevelopment agency through adoption of a resolution.⁴ In such cases all rights, powers, duties, privileges, and immunities vested by Part III, Chapter 163, Florida Statutes, in the community redevelopment agency are vested in the governing body of the municipality.⁵ Section 163.357(1) (b), Florida Statutes, provides:

The members of the governing body shall be the members of the agency, but such members constitute the *head of a legal entity, separate, distinct, and independent from the governing body of the county or municipality*. If the governing body declares itself to be an agency which already exists, the new agency is subject to all of the responsibilities and liabilities imposed or incurred by the existing agency. (e.s.)

According to your letter, the City Commission of the City of Lauderdale Lakes has exercised this option and designated itself to be the community redevelopment agency.

In Attorney General Opinion 84-74, this office concluded that a city commission was not authorized to alter the composition of a community redevelopment agency or to increase or decrease the number or ratio of its members, given the specific statutorily prescribed organization and powers of these agencies.⁶ That opinion required consideration of whether a city commission, if it declared itself to be the community redevelopment agency pursuant to section 163.357(1), Florida Statutes, was authorized to alter the composition of the board of commissioners of the agency by changing the ratio or number of city commissioners and citizens sitting on the board from that prescribed in the statute. In response to that question, the opinion concluded that the governing body of a municipality in establishing a community redevelopment agency pursuant to Part III, Chapter 163, Florida Statutes, the Community Redevelopment Act of 1969, as amended, does not have the authority to alter the composition of the board of commissioners of the community redevelopment agency from that prescribed by statute.

In a later opinion of this office, Attorney General Opinion 89-60, the question presented was whether a city council member who served as a member of the community redevelopment agency established pursuant to Part III, Chapter 163, Florida Statutes, could resign as a member of the community redevelopment agency. The city council in that request had designated itself as the board of commissioners of the CRA. After

reviewing the provisions of Part III, Chapter 163, Florida Statutes, prescribing with particularity the structural organization and powers of such agencies and the composition and number of its members and their terms of office, it was concluded that no provision of Part III, Chapter 163, Florida Statutes, granted an individual member of the governing body of a municipality, the discretion or option of whether to serve as a member of that board. As the Attorney General Opinion notes:

The authority of public officers to proceed in a particular way or under specific conditions implies a duty not to proceed in any other manner than that which is authorized by law.⁷ Therefore, it appears that an individual would not be authorized to resign from one office and not the other. The two positions work in tandem; to be a member of the city council entails being a member of the board of commissioners of the redevelopment agency. Once the governing body has elected to serve as the board of commissioners for the community redevelopment agency, the individual members of the governing body of the municipality would appear to be bound by such an election.

Similarly, the City of Lauderdale Lakes elected in 2000 to appoint itself as the Commission for the Lauderdale Lakes Redevelopment Agency pursuant to section 163.357(1)(a), Florida Statutes. Nothing in section 163.357, Florida Statutes, authorizes the city to alter this election or to modify the composition of the board outside the scope of the statute. Section 163.357(1)(c), Florida Statutes, does provide a municipal governing body of five members which has appointed itself as the CRA board, the discretion to appoint two additional persons to act as members of the CRA. No authority is extended by the statute to act otherwise.

¹ See s. 163.335, Fla. Stat., setting forth the legislative findings and declarations of necessity.

² See ss. 163.355 and 163.356, Fla. Stat., providing for the finding of necessity by the county or municipality and the creation of the community redevelopment agency.

³ Section 163.356(4), Fla. Stat.

⁴ Section 163.357(1)(a), Fla. Stat.

⁵ See s. 163.357(1)(b), Fla. Stat., providing:

The members of the governing body shall be the members of the agency, but such members constitute the head of a legal entity, separate, distinct, and independent from the governing body of the county or municipality. If the governing body declares itself to be an agency which already exists, the new agency is

subject to all of the responsibilities and liabilities imposed or incurred by the existing agency.

⁶ *Citing First Nat. Bank of Key West v. Filer*, 145 So. 204, 207 (Fla. 1933) (authority of public officers to proceed in a particular way or only upon specific conditions implies a duty not to proceed in any other manner than that which is authorized by law); and *see, e.g.*, Ops. Att'y Gen. Fla. 98-16 (1998) (city commission serving as governing body of CRA cannot remove one of its members only from CRA nor may member resign from CRA while still retaining seat on city commission); 91-49 (1991) (city commission declaring itself to be CRA is a separate, distinct and independent legal entity, chairman and vice chairman of which are designated by city commission); 89-60 (1989) (member of governing body of municipality not authorized to resign from CRA board where governing body of municipality has designated itself as head of agency pursuant to s. 163.357, Fla. Stat.)

⁷ *First National Bank of Key West v. Filer*, 145 So. 204, 207 (Fla. 1933) (where the Legislature has prescribed the mode, that mode must be observed). And *see* Op. Att'y Gen. Fla. 84-74 (1984) (municipal governing body in establishing community redevelopment agency does not have authority to alter composition of board of commissioners of agency from that prescribed by statute). *Cf.* Op. Att'y Gen. Fla. 84-56 (1984) (where Legislature has prescribed term and cycle of membership of governing body of municipal housing authority, municipality has no authority to alter such terms); Op. Att'y Gen. Fla. 78-115 (1978).

AGO 15-06 - April 16, 2015

**SECURITY SYSTEMS - VIDEO SURVEILLANCE TAPES -
PUBLIC RECORDS**

VIDEO TAPES FROM SURVEILLANCE CAMERAS ARE
CONFIDENTIAL AND EXEMPT FROM PUBLIC INSPECTION

To: Mr. Alan S. Zimmet, General Counsel for Pinellas Suncoast Transit Authority

QUESTION:

Are surveillance video recordings from PSTA facilities exempt from public disclosure pursuant to sections 119.071(3)(a) and 281.301, Florida Statutes (as part of a security system plan), and section 119.071(2)(d), Florida Statutes (as information revealing the surveillance techniques or procedures of an agency)?

SUMMARY:

Surveillance tapes from a security system for a public building

constitute information which reveals a security system which is confidential pursuant to sections 119.071(3)(a) and 281.301, Florida Statutes.

Chapter 119, Florida Statutes, Florida's Public Records Law, provides a right of access to the records of state and local governments as well as private entities acting on their behalf.¹ This right of access applies to all materials made or received in connection with the conduct of official business, when such materials are used to perpetuate, communicate, or formalize knowledge.² All such materials are open for inspection and copying, unless the Legislature has exempted them from disclosure.³

Clearly, video surveillance recordings created in the course of official business of the PSTA would be public records.⁴ Your question, however, implicates the exemptions for security systems and surveillance techniques contained in sections 281.301 and 119.071, Florida Statutes.⁵

Section 281.301, Florida Statutes, provides:

Security systems; records and meetings exempt from public access or disclosure.—Information relating to the security systems for any property owned by or leased to the state or any of its political subdivisions, and information relating to the security systems for any privately owned or leased property which is in the possession of any agency as defined in s. 119.011(2), including all records, *information*, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to or *revealing such systems* or information, and all meetings relating directly to or that would reveal such systems or information are confidential and exempt from ss. 119.07(1) and 286.011 and other laws and rules requiring public access or disclosure. (e.s.)

This exemption was clarified and recreated in section 119.071, Florida Statutes, during the 2001 Legislative Session.⁶ Section 119.071(3)(a)2., Florida Statutes, provides:

2. A security system plan or portion thereof for:
 - a. Any property owned by or leased to the state or any of its political subdivisions; or
 - b. Any privately owned or leased property held by any agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

As used in this section, the term a “security system plan” includes “all . . . [r]ecords, *information*, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or *revealing security systems*.”⁷ (e.s.)

These provisions were previously addressed by this office when asked whether the names and addresses of applicants for security system permits from a city’s building department, as well as the names and addresses of persons or businesses cited for false alarms and addresses where false alarms were reported, were public records open to inspection and copying. In Attorney General Opinion 2004-28, this office cited the Legislature’s specific finding of a public necessity for the exemption in section 119.071, Florida Statutes, to ensure public safety, before concluding that the names and addresses of applicants for permits to install security systems would be information which would reveal the existence of a security system and, therefore, would be exempt from public disclosure.

The Second District Court of Appeal, in *Critical Intervention Services, Inc. v. City of Clearwater*,⁸ cited with approval the discussion in Attorney General Opinion 2004-28, when it addressed whether the identity of residential and business alarm permit holders was subject to disclosure. The city relied upon sections 281.301 and 119.071, Florida Statutes, to deny access to the information. The court found that the plain language of the statutes makes confidential all records revealing a security system and stated that disclosure of such information “would imperil the safety of persons and property.”⁹

More recently, the Fifth District Court of Appeal in *Central Florida Regional Transportation Authority d/b/a Lynx v. Post-Newsweek Stations, Orlando, Inc.*,¹⁰ considered whether security tapes from cameras installed on transit authority buses were confidential as revealing the security system. Citing the provisions in section 281.301, Florida Statutes, which state records that directly relate to or reveal information about security systems are confidential, the court concluded that the video footage captured by the bus camera “directly relates to and reveals information about a security system.” The court found that the videos “which are records, reveal the capabilities—and as a corollary, the vulnerabilities—of the current system[,]” and, therefore, are confidential and exempt from public inspection.

Similarly, a surveillance tape from the cameras installed at the transit authority’s facilities is information which would reveal the existence of a security system. As such, it is my opinion that the surveillance tapes which are made by a security system, while public records, are confidential and exempt from the disclosure requirements of the Public Records Law pursuant to sections 281.301 and 119.071, Florida Statutes.

¹ See s. 119.01(1), Fla. Stat., setting forth the general state policy on public records, and s. 119.011(2), Fla. Stat, defining “[a]gency” to include “any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

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

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

⁴ See s. 119.011(12), Fla. Stat, defining “Public records” as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

⁵ While your question includes s. 119.071(2)(d), Fla. Stat., it would appear that the provisions in subsection (2) of the statute relate to undercover law enforcement activities and you have not indicated that the surveillance cameras within the PSTA facility are used for such purposes.

⁶ See s. 1, Ch. 2001-361, Laws of Fla.

⁷ Section 119.071(3)(a)1., Fla. Stat.

⁸ 908 So. 2d 1195 (Fla. 2d DCA 2005).

⁹ 908 So. 2d at 1197.

¹⁰ 157 So. 3d 401 (Fla. 5th DCA 2015).

AGO 15-07 – April 16, 2015

**COUNTIES – TAXATION – ECONOMIC DEVELOPMENT AND
VALOREM TAX EXEMPTION – IMPROVEMENTS**

**TAX EXEMPTION FOR IMPROVEMENTS TO PROPERTY MADE
PRIOR TO ADOPTION OF ORDINANCE**

To: Mr. Donald D. Conn, County Attorney for DeSoto County

QUESTION:

Pursuant to section 196.1995(5), Florida Statutes, is the Board

of County Commissioners of DeSoto County authorized to grant an exemption from ad valorem taxation to a private purchaser of real property and improvements thereon, when those improvements had been exempt from taxation as governmentally owned property prior to the date of purchase, and the purchaser intends to operate a new business on that real property using said improvements?

SUMMARY:

To qualify for the economic development ad valorem tax exemption in section 196.1995(5), Florida Statutes, improvements to real property must be made or tangible personal property must be added or increased after the date the ordinance authorizing the exemption is adopted.¹ Thus, to qualify for this exemption from ad valorem taxation in DeSoto County, the improvements must have been made after January 25, 2011, and section 196.1995(5), Florida Statutes, would appear to preclude application of the exemption to any improvements to real property made prior to that date.

According to information you have provided to this office, there is a sale pending by the State of Florida of real property and improvements located in DeSoto County, to a private party. The property was formerly used as the G. Pierce Wood Memorial Hospital, which closed in 2001, and a facility operated by the Department of Juvenile Justice, which closed in 2012. A private purchaser will operate a business leasing the real property and improvements formerly owned by the State of Florida.

The voters of DeSoto County approved by referendum in 2010 and the commission subsequently adopted an ordinance authorizing an exemption from ad valorem taxation for certain new business and expansion of existing businesses in accordance with section 196.1995, Florida Statutes. It appears that you are concerned that the terms of the ordinance may prove problematic for application of the economic development ad valorem tax exemption to this property. The Florida Attorney General's Office is statutorily limited to providing legal opinions on questions of state law and does not comment on local legislation such as the DeSoto County ordinance.² To the extent that resolution of this question requires consideration of section 196.1995, Florida Statutes, however, the following discussion is provided in an effort to be of assistance.

Article VII, section 3(c) of the Florida Constitution, provides:

Any county or municipality may, for the purpose of its respective tax levy and subject to the provisions of this subsection and general law, grant community and economic development ad valorem tax exemptions to new businesses

and expansions of existing businesses, as defined by general law. Such an exemption may be granted only by ordinance of the county or municipality, and only after the electors of the county or municipality voting on such question in a referendum authorize the county or municipality to adopt such ordinances. *An exemption so granted shall apply to improvements to real property made by or for the use of a new business and improvements to real property related to the expansion of an existing business and shall also apply to tangible personal property of such new business and tangible personal property related to the expansion of an existing business.* The amount or limits of the amount of such exemption shall be specified by general law. The period of time for which such exemption may be granted to a new business or expansion of an existing business shall be determined by general law. The authority to grant such exemption shall expire ten years from the date of approval by the electors of the county or municipality, and may be renewable by referendum as provided by general law. (e.s.)

Section 196.1995, Florida Statutes, implements this constitutional provision.³ Subsection (5) of the statute, addresses the granting of an exemption and states:

Upon a majority vote in favor of such authority, the board of county commissioners or the governing authority of the municipality, at its discretion, by ordinance may exempt from ad valorem taxation up to 100 percent of the assessed value of all improvements to real property made by or for the use of a new business and of all tangible personal property of such new business, or up to 100 percent of the assessed value of all added improvements to real property made to facilitate the expansion of an existing business and of the net increase in all tangible personal property acquired to facilitate such expansion of an existing business. *To qualify for this exemption, the improvements to real property must be made or the tangible personal property must be added or increased after approval by motion or resolution of the local governing body, subject to ordinance adoption or on or after the day the ordinance is adopted.* However, if the authority to grant exemptions is approved in a referendum in which the ballot question contained in subsection (3) appears on the ballot, the authority of the board of county commissioners or the governing authority of the municipality to grant exemptions is limited solely to new businesses and expansions of existing businesses that are located in an enterprise zone or brownfield area. Property acquired to replace existing property shall not be considered to facilitate a business expansion. The exemption applies only to taxes levied by the respective unit of government granting the exemption. The exemption does not apply, however, to taxes

levied for the payment of bonds or to taxes authorized by a vote of the electors pursuant to s. 9(b) or s. 12, Art. VII of the State Constitution. Any such exemption shall remain in effect for up to 10 years with respect to any particular facility, regardless of any change in the authority of the county or municipality to grant such exemptions. The exemption shall not be prolonged or extended by granting exemptions from additional taxes or by virtue of any reorganization or sale of the business receiving the exemption. (e.s.)

Thus, section 196.1995(5), Florida Statutes, implementing the provisions of Article VII, section 3(c), Florida Constitution, limits the tax exemption provided therein to improvements to real property that are made or to tangible personal property that is added or increased on or after the day the ordinance is adopted.⁴ You advise that the DeSoto County ordinance was adopted on January 25, 2011. Thus, the statute would preclude application of the exemption to any improvements to real property made prior to that date.

While doubtful language in taxing statutes should be resolved in favor of the taxpayer, the reverse applies in the construction of exceptions and exemptions from taxation.⁵ Thus, to the extent that there is any question, exceptions and exemptions such as the one discussed above, should be read to favor the taxing authority.

In sum, it is my opinion that to qualify for the economic development ad valorem tax exemption in section 196.1995(5), Florida Statutes, improvements to real property must be made or tangible personal property must be added or increased after the date the ordinance authorizing the exemption is adopted.⁶ Thus, to qualify for this exemption from ad valorem taxation in DeSoto County, the improvements must have been made after January 25, 2011, and section 196.1995(5), Florida Statutes, precludes application of the exemption to any improvements to real property made prior to that date.

¹ Section 196.1995(5), Fla. Stat., also authorizes granting the exemption for improvements “added or increased after approval by motion or resolution of the local governing body, subject to ordinance adoption[.]” You have provided the date of adoption of DeSoto County Ordinance 2011-01, but no information regarding approval by motion or resolution. The date of adoption of the ordinance is, therefore, used herein.

² See section 16.01(3), Fla. Stat., and Department of Legal Affairs Statement Concerning Attorney General Opinions (available at: www.myfloridalegal.com / Legal Resources / AG Opinions / Frequently Asked Questions).

³ See s. 196.1995(1), Fla. Stat., which provides in part that “[t]he board

of county commissioners of any county or the governing authority of any municipality shall call a referendum within its total jurisdiction to determine whether its respective jurisdiction may grant economic development ad valorem tax exemptions under s. 3, Art. VII of the State Constitution” *And see* s. 5, Ch. 80-347, Laws of Fla., creating s. 196.1995 and providing that “[t]his act shall take effect upon approval by the electors of an amendment to s. 3, Art. VII of the State Constitution authorizing the ad valorem tax exemptions provided for in this act, and shall first apply to the 1981 assessment rolls.” Senate Joint Resolution 9 E, amending Art. 7, s. 3, Fla. Const., by adding subsection (c) pertaining to economic development tax exemptions, was approved by the electors at the special election of October 7, 1980.

⁴ *And see* n.1.

⁵ *See Markham v. PPI, Inc.*, 843 So. 2d 922 (Fla. 4th DCA 2003), *rehearing denied*.

⁶ *Supra* n.1.

AGO 15-08 – April 16, 2015

**LAW ENFORCEMENT – PORTS – CONCEALED WEAPONS –
WEAPONS – FIREARMS**

**WHETHER TERM “CONCEALED WEAPONS” IN STATUTORY
PROHIBITION APPLIES TO FIREARMS**

To: The Honorable Wayne Ivey, Brevard County Sheriff's Office
Attn: Charles Ian Nash, General Counsel

QUESTION:

Whether the phrase “concealed weapon” as used in section 311.12(3)(b), Florida Statutes, includes firearms.

SUMMARY:

The phrase “concealed weapon” as used in section 311.12(3)(b), Florida Statutes, includes firearms.

You have advised this office that the Canaveral Port Authority and the Sheriff have entered into an interlocal agreement providing that seaport security services and law enforcement services will be the responsibility of the Sheriff of Brevard County. After conversations with your office, I understand your question to be whether the phrase “concealed weapon” as used in section 311.12(3)(b), Florida Statutes, includes firearms.¹ The question has arisen because the understanding of this phrase by the Sheriff's Office and the State Attorney's Office

differs. The State Attorney's Office has been contacted and joins in your request for an opinion. For the reasons set forth below, it is my opinion that the phrase "concealed weapon" as it is used in section 311.12(3)(b), Florida Statutes, does include firearms.

Section 311.12, Florida Statutes, requires each seaport listed by the Legislature to adopt and maintain a security plan specific to that seaport. The plan is to provide for a secure seaport infrastructure that "promotes the safety and security of state residents and visitors and the flow of legitimate trade and travel."² Each of these seaport security plans must designate all secure and restricted areas "as defined by 33 C.F.R. part 105." These areas must be clearly identified with appropriate signs and markers on the premises.³ All persons and objects in secure and restricted areas are subject to search by sworn, state-certified law enforcement officers such as those of the Brevard County Sheriff's Office.⁴

Section 311.12(3)(b), Florida Statutes, provides:

The seaport must provide clear notice of the prohibition against possession of concealed weapons and other contraband material on the premises of the seaport. Any person in a restricted area who has in his or her possession a concealed weapon, or who operates or has possession or control of a vehicle in or upon which a concealed weapon is placed or stored, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. This paragraph does not apply to active duty certified federal or state law enforcement personnel or persons so designated by the seaport director in writing.

Section 311.12, Florida Statutes, contains no definition of the phrase "concealed weapons," nor does one appear elsewhere within Chapter 311, Florida Statutes.⁵ Further, the statute makes no reference to any other provision in the Florida Statutes intended by the Legislature to be used to construe section 311.12, Florida Statutes. A review of legislative history provides no direction as to the Legislature's intent in using these terms.

It is a basic rule of statutory construction that in the absence of a statutory definition, words of common usage are to be construed in their plain and ordinary sense and, if necessary, the plain and ordinary meaning of a word can be ascertained by referring to a dictionary.⁶ To "conceal" is "to hide, withdraw or remove from observation; cover or keep from sight"⁷ or "[t]o keep from observation, discovery, or understanding."⁸ A weapon is defined as: "any instrument or device for use in attack or defense in combat, fighting, or war, as a sword, rifle, or cannon"⁹ or "[a]n instrument or device used to attack another or to defend oneself from attack."¹⁰ Black's Law Dictionary defines a "weapon" as "[a]n instrument used or designed to be used to injure or

kill someone” and a “concealed weapon” as “[a] weapon that is carried by a person but that is not visible by ordinary observation.”¹¹ A “firearm” is commonly understood to be “a small arms weapon, as a rifle or pistol, from which a projectile is fired by gunpowder”¹² and “[a] weapon capable of firing a missile, esp. a pistol or rifle.”¹³ Thus, it appears that a common sense reading of the terms would clearly include a “firearm” within the scope of the broader term “weapon.”

There is further evidence that the Legislature intended a firearm to constitute a weapon within the scope of section 311.12, Florida Statutes. The statute itself includes several references to firearms and firearms statutes. Section 311.12(1)(b), Florida Statutes, relating to security standards provides that

[t]he provisions of s. 790.251 are not superseded, preempted, or otherwise modified in any way by the provisions of this section.

Section 790.251, Florida Statutes, is the “Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008” and protects the right to keep and bear arms in motor vehicles by delineating the duties of public and private employers. If firearms are not considered “weapons” within the scope of section 311.12, Florida Statutes, there would be no necessity to establish the relationship of section 790.251.¹⁴

Further, section 311.12(3)(b), Florida Statutes, includes language making it clear that “[t]his paragraph does not apply to active-duty certified federal or state law enforcement personnel or persons so designated by the seaport director in writing.” That is, the prohibition against possession of concealed weapons on the premises of the seaport does not apply to active duty law enforcement personnel. Common sense dictates that the reference to weapons carried by law enforcement personnel is intended to address firearms.

In sum, it is my opinion that the phrase “concealed weapon” as used in section 311.12(3)(b), Florida Statutes, includes firearms.

¹ As originally presented, your question is “[w]hether section 311.12(3)(b), Florida Statutes, authorizes the Sheriff and his deputies to arrest individuals for possession of concealed firearms in restricted areas of the seaport and appurtenant facilities owned and operated by the Canaveral Port Authority where the Sheriff and his deputies are lawfully acting in accordance with an agreement between the Sheriff and the Canaveral Port Authority for Seaport Security Services and Law Enforcement Services.” As this office does not comment on local agreements or legislation, your question has been reframed.

² See s. 311.12(2), Fla. Stat.

³ Section 311.12(3), Fla. Stat.

⁴ Section 311.12(3)(a)2., Fla. Stat.

⁵ Compare s. 790.001(3)(a), Fla. Stat., which defines a “[c]oncealed weapon” to mean “any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such manner as to conceal the weapon from the ordinary sight of another person.” This statute also defines “[c]oncealed firearm” separately from a “[c]oncealed weapon,” but does not exclude a firearm from inclusion within the definition. In fact, the definition of a “[f]irearm” contained in s. 790.001(6), Fla. Stat., describes a firearm as a “weapon.” However, for purposes of Ch. 790, Fla. Stat., the definition of a “[w]eapon” excludes a firearm. This distinction appears to relate to the Legislature’s attempt to differentiate between penalties imposed for various firearm and weapons crimes. See e.g., s. 790.01, Fla. Stat. (carrying a concealed weapon is a first degree misdemeanor and carrying a concealed firearm is a third degree felony).

⁶ See *Sieniarecki v. State*, 756 So. 2d 68 (Fla. 2000) (in absence of a statutory definition, words of common usage are construed in their plain and ordinary sense and, if necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary); *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000); *In re McCollam*, 612 So. 2d 572 (Fla. 1993) (when language of statute is clear and unambiguous and conveys a clear meaning, statute must be given its plain and ordinary meaning).

⁷ Webster’s New Universal Unabridged Dictionary (2003), p. 422.

⁸ The American Heritage Dictionary (office ed. 1987), p. 144.

⁹ *Supra* n.7 at p. 2153

¹⁰ *Supra* n.8 at p. 771.

¹¹ Black’s Law Dictionary (8th ed. 2004), p. 1624.

¹² Webster’s New Universal Unabridged Dictionary (2003), p. 722.

¹³ The American Heritage Dictionary (office ed.1987), p. 264

¹⁴ Provisions enacted by the Legislature must be assumed to have some useful purpose as the Legislature is not presumed to have enacted useless or meaningless legislation. *Smith v. Piezo Technology and Professional Administrators*, 427 So. 2d 182 (Fla. 1983); *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968); Ops. Att’y Gen. Fla. 00-46 (2000) (this office will not presume that the Legislature intended to enact purposeless or useless legislation), 98-83 (1998), and 97-78 (1997).

AGO 15-09 – August 5, 2015

**COUNTIES – ALCOHOLIC BEVERAGES – LICENSING –
REGULATION OF ALCOHOLIC BEVERAGES**

COUNTY'S PROHIBITION OF ALCOHOLIC BEVERAGES
LIMITED BY S. 5(A), ART. VIII, FLA. CONST.; REGULATION
LIMITED TO LOCATION, HOURS OF OPERATION, SANITARY
CONDITIONS, AND TYPE OF ENTERTAINMENT OR CONDUCT

To: Ms. Shalene Grover, Attorney for Liberty County

QUESTIONS:

1. May the county prohibit the sale of alcoholic beverages for consumption on premises within the county, including restaurants, bars, and all other facilities?
2. May the county require that alcohol sold at convenience stores or any other store be transported in a brown bag after purchase?
3. May the county limit the number of drinks which may be served to one person?
4. Should the county be unable to prohibit the sale of alcohol for consumption on premises, may the county restrict restaurants that sell alcohol to land use areas designated as commercial?

SUMMARY:

1. The county may authorize or prohibit the sale of alcoholic beverages only through the local option provisions contained in section 5(a), Article VIII, Florida Constitution.
- 2 & 3. A county's authority to regulate the sale of alcohol includes designating the location of liquor establishments, the hours of operation, and the sanitary conditions of such establishments, as well as restricting the type of entertainment or conduct within establishments licensed to sell alcohol. While a county may enact an ordinance to promote and protect the general health, safety, and welfare of the public which would affect an establishment licensed to sell alcohol, such an ordinance must treat a licensee selling alcohol in a nondiscriminatory manner. It would appear, therefore, that a county may not require that alcohol be transported in a brown bag after purchase, nor may a county limit the number of drinks which may be served to one person.

4. A county's authority to designate the location of liquor establishments through appropriate zoning regulations would appear to encompass the authority to restrict alcohol sales to restaurants located on land which is zoned for commercial purposes.

QUESTION 1.

Section 5(a), Article VIII, Florida Constitution, provides the exclusive means for a county to authorize or prohibit the sale of alcoholic beverages:

Local option on the legality or prohibition of the sale of intoxicating liquors, wines or beers shall be preserved to each county. The status of a county with respect thereto shall be changed *only* by vote of the electors in a special election called upon the petition of twenty-five per cent of the electors of the county, and not sooner than two years after an earlier election on the same question. Where legal, the sale of intoxicating liquors, wines and beers shall be regulated by law. (e.s.)

The plain language of the constitutional provision limits a county's authority to authorize or prohibit the sale of alcoholic beverages to the procedure prescribed therein and further provides that the regulation of the sale of alcohol shall be regulated by law.¹

QUESTIONS 2. & 3.

Florida's Beverage Law is contained in Chapters 561 through 568 of the Florida Statutes. As provided in section 562.45(2), Florida Statutes,

(a) Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business and location of place of business, and prescribing sanitary regulations therefor, of any licensee under the Beverage Law within the county or corporate limits of such municipality. . . .

(b) Nothing in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the type of entertainment and conduct permitted in any establishment licensed under the Beverage Law to sell alcoholic beverages for consumption on the premises, or any bottle club licensed under s. 561.14, which is located within such county or municipality.

Section 562.45(2)(c), Florida Statutes, however, states:

A county or municipality *may* not enact any ordinance that regulates or prohibits those activities or business transactions of a licensee regulated by the Division of Alcoholic Beverages and Tobacco under the Beverage Law. Except as otherwise provided in the Beverage Law, a local government, when enacting ordinances designed to promote and protect the general health, safety, and welfare of the public, shall treat a licensee in a nondiscriminatory manner and in a manner that is consistent with the manner of treatment of any other lawful business transacted in this state. Nothing in this section shall be construed to affect or impair the enactment or enforcement by a county or municipality of any zoning, land development or comprehensive plan regulation or other ordinance authorized under ss. 1, 2, and 5, Art. VIII of the State Constitution. (e.s.)

Thus, the Florida Legislature prohibits local ordinances which regulate or prohibit activities or business transactions of an alcoholic beverage licensee, except in the specific areas allowing municipalities and counties to regulate the location of liquor establishments, the hours the establishments may stay open, and the sanitary conditions of these establishments, as well as the type of entertainment and conduct permitted therein. When a local government enacts an ordinance to promote and protect the general health, safety, and welfare of the public, such ordinance may not be isolated to alcoholic beverage establishments and must treat a licensee in the same manner as any other lawful business transacted within the state. When the Legislature has prescribed the manner in which something may be done, it operates as a prohibition against its being done in any other way.²

A county's attempt to require that alcoholic beverages purchased from a licensee be placed in a brown paper bag for transport would most likely have to be supported by a determination by the county commission that it promotes the health, safety and welfare of the general public. However, such an ordinance could not be limited to the sale of alcoholic beverages and would have to affect all licensed businesses within the county in the same manner.

An attempt to limit the number of drinks which may be served to a customer by a licensed vendor of alcoholic beverages would appear to affect the ability of a vendor to sell alcoholic beverages and, as discussed above, would be less likely to be upheld, in that such an ordinance would discriminate against a licensee. I would note, that the "Florida Responsible Vendor Act"³ sets forth the Legislature's intent to "[e]ncourage alcoholic beverage vendors to be prudent in their serving practices" and "to implement responsible policies for serving and promoting alcoholic beverages and, by so doing, prevent the over-service of alcoholic beverages to customers and prevent the over-consumption of alcoholic beverages by customers while on the licensed premises of vendors."⁴

QUESTION 4.

Clearly, the beverage statutes recognize the county's authority to use zoning to designate where a commercial establishment serving alcohol may be located.⁵ Thus it would appear that the county may require that a restaurant serving alcohol be located on land which is zoned for commercial activity.

Accordingly, it would appear that a county may regulate the sale of alcohol by designating the location of liquor establishments, the hours of operation, and the sanitary conditions of such establishments, as well as the type of entertainment and conduct permitted in a licensed establishment, but may not enact an ordinance which regulates the business transactions of a licensee. Moreover, while a county may enact an ordinance to promote and protect the general health, safety, and welfare of the public, such an ordinance must treat an alcoholic beverage licensee in the same manner as any other business and may not discriminate against the licensee.

¹ The phrase "by law" contemplates an enactment of the Legislature, not a county ordinance. *Grapeland Heights Civic Association v. City of Miami*, 267 So. 2d 321, 324 (Fla. 1972); *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145, 1148 (Fla. 4th DCA 1982).

² See *Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (where Legislature prescribes the mode, that mode must be observed).

³ Section 561.701 – 706, Fla. Stat.

⁴ Section 561.702(4) and (5), Fla. Stat.

⁵ See *Hardage v. City of Jacksonville Beach*, 399 So. 2d 1077 (Fla. 1st DCA 1981), *review denied*, 411 So. 2d 382 (Fla. 1981) (under power to regulate location of liquor establishments, municipalities may permit one or more types of sale in designated area without being required to permit all other modes of sale).

AGO 15-10 – August 5, 2015

**PUBLIC RECORDS – SEALED RECORDS – JOB
APPLICATIONS – PERSONNEL RECORDS**

WHETHER SEALED JOB APPLICATIONS WHICH ARE
UNOPENED ARE SUBJECT TO PUBLIC INSPECTION AND
COPYING AS PUBLIC RECORDS

To: Mr. Hal A. Airth, Attorney for the Suwannee Valley Transit

QUESTION:

Are sealed job applications which were received by the Suwannee Valley Transit Authority but rejected before the applications were opened public records subject to inspection and copying under section 119.07, Florida Statutes?

SUMMARY:

Job applications, like other personnel records, are public records made or received by the public agency in the usual course of business¹ and are subject to inspection and copying under section 119.07, Florida Statutes, once they are received. An agency may not “seal” job applications or request that they be submitted as “sealed” records to foreclose public access.

According to your letter, the Suwannee Valley Transit Authority was created in the 1970s by interlocal agreement between Columbia, Hamilton, and Suwannee Counties. The mission of the agency is set forth in the authority’s Vision Statement:

Suwannee Valley Transit Authority (SVTA) will continue to improve the safe, and reliable transportation services provided to those with disabilities; to those who are ‘transportation disadvantaged’; and those who are eligible to consider SVTA as their transportation of last resort. SVTA will also develop, plan and implement service that will allow the general public to use SVTA transportation as a preferred choice of transportation particularly in and around the communities Jasper, Lake City and Live Oak.²

You acknowledge that the SVTA is subject to Florida’s Public Records Law. From my research it appears that the SVTA has recently been involved in a search for an administrator for that agency but, when the position was advertised, only two applications for that position were received. The board rejected both applications and will readvertise in order to attract more applicants. Apparently, the board accepts sealed job applications, but did not open either of the two that were received prior to making the decision to readvertise. A public records request has been received for the two sealed applications and you have requested our assistance in determining whether these records are subject to inspection and copying.

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

‘Public records’ means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the

physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.³

The Florida Supreme Court has determined that the definition of “public records” encompasses *all material received by an agency in connection with official business that is used to perpetuate, communicate, or formalize knowledge.*⁴ (e.s.) All such material, regardless of whether it is in final form, is open for public inspection and copying unless the Legislature has exempted it from disclosure.⁵

The general rule applicable to other public records applies equally to personnel records. That is, unless the Legislature has expressly exempted the particular personnel records from disclosure or authorized the agency to adopt rules limiting access to such records, personnel records are subject to public inspection and copying under the Public Records Law, section 119.07(1), Florida Statutes.⁶

Based on this office’s conclusion that personnel records are public records, this office has determined that an agency is not authorized to “seal” disciplinary notices and thereby remove those notices from disclosure under the Public Records Act.⁷ Further, an agency may not, in the absence of a statutory exemption, agree to remove counseling slips and written reprimands from an employee’s personnel file and maintain such documents in a separate disciplinary file for the purpose of removing such records from public access.⁸ Thus, this office and the courts have advised that applications for employment, references, and resumes are subject to disclosure after redaction of statutorily exempt information such as social security numbers.⁹

Section 119.071, Florida Statutes, contains the general exemptions from inspection or copying of public records. Among the exemptions contained therein is section 119.071(1)(b)2., Florida Statutes, which provides an exemption from public inspection and copying for “sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation.” Such material is exempt until such time as the agency provides notice of an intended decision or until 30 days after opening “the bids, proposals, or final replies,” whichever is earlier. The statute continues:

If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. A bid, proposal, or reply is not exempt

for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.

Thus, the Legislature has made clear provision for sealed bids, proposals, or replies related to competitive solicitation and their ultimate release even if the agency rejects the sealed bids. No such language appears in the statutes with regard to employment applications.¹⁰

The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.¹¹ In the absence of any specific legislative provision for the confidentiality of employment applications, this office will not read such an exception into the statutes.

In sum, job applications, like other personnel records, are public records made or received by the public agency in the usual course of business¹² and are subject to inspection and copying under section 119.07, Florida Statutes, once they are received. Further, an agency may not “seal” job applications or request that they be submitted as “sealed” records to foreclose public access.

¹ See Op. Att’y Gen. Fla. 84-37 (1984), concluding that sealed bids, even if unopened, which are in the custody and control of the county have been “received” by the county in connection with the transaction of its official business and are public records.

² http://www.suwanneesolutions.com/transit/index.php?option=com_content&view=article&id=38&Itemid=179.

³ See s. 119.011(2), Fla. Stat., defining the term “[a]gency” to mean “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁴ See *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980).

⁵ See *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁶ See *Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985).

⁷ Op. Att’y Gen. Fla. 94-75 (1994).

⁸ Op. Att’y Gen. Fla. 94-75 (1994). And see Op. Att’y Gen. Fla. 11-19 (2011) (superintendent’s failure to comply with a statutory requirement

to discuss a performance evaluation with the employee before filing it in the employee's personnel file, does not change the public records status of the evaluation; the evaluation is a public record and may not be removed from public view or destroyed).

⁹ See, e.g., *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980) and Op. Att'y Gen. Fla. 77-48 (1977). And see *Douglas v. Michel*, 410 So. 2d 936 (Fla. 5th DCA 1982), *questions answered and approved*, 464 So. 2d 545 (Fla. 1985) (communications from third parties included in employment file are subject to disclosure); Op. Att'y Gen. Fla. 13-14 (2013) (written employment contract is a public record).

¹⁰ But see s. 435.09, Fla. Stat., that provides confidentiality of personnel background check information.

¹¹ See *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), *review denied*, 37 So. 3d 848 (Fla. 2010); *Lightbourne v. McCollum*, 969 So. 2d 326 (2007), *rehearing denied, certiorari denied*, 128 S.Ct. 2485, 553 U.S. 1059, 171 L.Ed.2d 777; *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987). See also *Southern Bell Telephone and Telegraph Company v. Beard*, 597 So. 2d 873, 876 (Fla. 1st DCA 1992) (Public Service Commission's determination that statutory exemption for proprietary confidential business information should be narrowly construed and did not apply to company's internal self analysis was "consistent with the liberal construction afforded the Public Records Act in favor of open government").

¹² See Op. Att'y Gen. Fla. 84-37 (1984), concluding that sealed bids, even if unopened, which are in the custody and control of the county have been "received" by the county in connection with the transaction of its official business and are public records. I would note that Op. Att'y Gen. Fla. 84-37 (1984) was issued prior to the adoption of the language in s. 119.071(1)(b)2., Fla. Stat., cited above. See Ch. 85-45, Laws of Fla., providing that "[s]ealed bids or proposals received by an agency pursuant to invitations to bid or requests for proposals are exempt from the provisions of subsection (1) until such time as the bids or proposals are opened."

AGO 15-11 – August 11, 2015

**WATER AND SEWER DISTRICTS – COUNTIES – SPECIAL
ASSESSMENTS – LIENS**

AUTHORITY OF WATER DISTRICT CREATED BY INTERLOCAL
AGREEMENT TO USE LIEN PROVISIONS IN CHAPTER 153,
FLORIDA STATUTES

To: Mr. Terry J. Harmon, General Counsel, Big Bend Water Authority

QUESTION:

May the Big Bend Water Authority utilize the lien provisions in section 153.67, Florida Statutes, and, if so, may a lien be imposed for charges to a customer for damages to the authority's water and sewer property?

SUMMARY:

The lien provision in section 153.67, Florida Statutes, may only be used by water and sewer districts created pursuant to Part II, Chapter 153, Florida Statutes, and, therefore, is not available to the Big Bend Water Authority which was created by an interlocal agreement under Part I, Chapter 163, Florida Statutes.

You state that the Big Bend Water Authority (authority) was created by an interlocal agreement between Taylor County and Dixie County pursuant to Part I, Chapter 163, Florida Statutes. The purpose of the district is to provide water and sewer services to customers located in unincorporated areas of both counties. The authority's governing board is contemplating the adoption of policies to address unpaid fees, rates, and charges for water and sewer services, including charges for damages to authority water and sewer property. The board questions whether the authority has the power to attach a lien for unpaid fees or for damages to authority property as provided in section 153.67, Florida Statutes.¹

Part II, Chapter 153, Florida Statutes, is the "County Water and Sewer District Law."² Section 153.53, Florida Statutes, sets forth the procedure for a board of county commissioners to establish one or more water and sewer districts in unincorporated contiguous areas of the county. As an alternative means to create a district, a petition signed by persons owning not less than 10 percent of the property within the boundaries of a proposed district may be filed with the property appraiser, requesting the county commission to call and provide for a referendum election to determine whether such district should be created and call for the election of a governing board.³

Pursuant to section 153.62(4), Florida Statutes, districts created pursuant to the act are, among other things, authorized:

To levy and assess ad valorem taxes without limitation of rate or amount on all taxable property within said district for the purpose of paying principal of and interest on any general obligation bonds which may be issued for the purposes of this law, not in excess of the total amount of such general obligation

bonds provided for in subsection (3).⁴

Moreover, a Chapter 153 district may

fix and collect rates, fees and other charges to persons or property or both for the use of the facilities and services provided by any water system or sewer system or both and to fix and collect charges for making connections with any such water system or sewer system and to provide for reasonable penalties on any users or property for any such rates, fees or charges that are delinquent.⁵

Section 153.67, Florida Statutes, recognizes:

In the event that the fees, rates or charges for the services and facilities of any water or sewer system shall not be paid as and when due, any unpaid balance thereof and all interest accruing thereon shall be a lien on any parcel or property affected thereby. Such liens shall be superior and paramount to the interest on such parcel or property of any owner, lessee, tenant, mortgagee or other person except the lien of county taxes and shall be on a parity with the lien of any such county taxes. In the event that any such service charge shall not be paid as and when due and shall be in default for thirty days or more the unpaid balance thereof and all interest accrued thereon, together with attorneys fees and costs, may be recovered by the district in a civil action, and any such lien and accrued interest may be foreclosed or otherwise enforced by the district by action or suit in equity as for the foreclosure of a mortgage on real property.

The “Water and Sewer District Law” further states that a district “may provide for the construction or reconstruction of assessable improvements as defined in s. 153.52, and for the levying of special assessments upon benefited property for the payment thereof, *under the provisions of this section.*”⁶ (e.s.) Such assessments are collected by the tax collector of the county in which the district is located and “shall constitute a lien upon the property so assessed from the date of confirmation of the resolution ordering the improvement, of the same nature and to the same extent as the lien for general county taxes falling due in the same year or years in which such assessments or installments thereof fall due”⁷

Section 153.62(10), Florida Statutes, provides that a district created under Chapter 153 may “join with any other district or districts, cities, towns, counties or other political subdivisions, public agencies or authorities in the exercise of common powers.”

As noted above, however, the Big Bend Water Authority was created by interlocal agreement under Chapter 163, Florida Statutes. While the

Water and Sewer District Law recognizes that a district created under its provisions may enter into an interlocal agreement with an authority, they may do so only in the exercise of a common power. There is nothing contained in the statutes which indicates that an authority created by interlocal agreement under Chapter 163 which enters into an interlocal agreement with a district created under the Water and Sewer District Law would be imbued with the same powers as a Chapter 153 district as a result of the contractual relationship. Moreover, while water and sewer districts created under Chapter 153, Florida Statutes, are authorized to levy and assess ad valorem taxes, section 163.01(7)(c), Florida Statutes, states:

No separate legal or administrative entity created by an interlocal agreement shall possess the power or authority to levy any type of tax within the boundaries of any governmental unit participating in the interlocal agreement, to issue any type of bond in its own name, or in any way to obligate financially a governmental unit participating in the interlocal agreement.

...

As an administrative agency created under the terms of Chapter 163, Florida Statutes, the Big Bend Water Authority may exercise only those powers which are expressly granted under its empowering legislation or by implication those necessary to carry out its express power.⁸ There is no apparent or implied power contained in Chapter 163, Florida Statutes, for the authority to attach a lien to property which is delinquent in its payments or for damage to authority property. Moreover, administrative agencies are constrained not to expand their authority beyond that provided in the statutory grant.⁹

Accordingly, it is my opinion that the Big Bend Water Authority may not utilize the lien provisions in section 153.67, Florida Statutes.

¹ There is no assertion or indication that the Big Bend Water Authority was created pursuant to the provisions in Part II, Ch. 153, Fla. Stat., governing county water and sewer districts.

² Section 153.50, Fla. Stat.

³ Section 153.53(2)(a) and (c), Fla. Stat.

⁴ Section 153.62(3), Fla. Stat., provides that “the total amount of all general obligation indebtedness of the district issued pursuant to this law shall not exceed 15 percent of the assessed value of the taxable property in the district at the time of the creation of such district, to be ascertained by the assessed valuations for county taxes in effect at the time of the creation of such district.”

⁵ Section 153.62(6), Fla. Stat.

⁶ Section 153.73(1), Fla. Stat.

⁷ Section 153.73(11)(c), Fla. Stat.

⁸ See *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974), *cert. dismissed*, 300 So. 2d 900 (Fla. 1974).

⁹ See *State, Department of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So. 2d 787 (Fla. 1st DCA 1982), *pet. for rev. den.*, 436 So. 2d 98 (Fla. 1983); *Seitz v. Duval County School Board*, 366 So. 2d 119 (Fla. 1st DCA 1979); *Department of Transportation v. James*, 403 So. 2d 1066 (Fla. 4th DCA 1981).

AGO 15-12 – September 10, 2015

COUNTIES – CHARTERS – SUPERVISOR OF ELECTIONS – PETITIONS

DATE TO BE USED TO DETERMINE WHETHER PETITION REQUESTING APPOINTMENT OF COUNTY CHARTER COMMISSION HAS BEEN SIGNED BY REQUISITE NUMBER OF VOTERS

*To: The Honorable Brian E. Corley, Pasco County Supervisor of
Elections*

QUESTION:

What date must a Supervisor of Elections use to calculate whether the required number of qualified voters have signed a petition requesting the establishment of a county charter commission pursuant to section 125.61, Florida Statutes?

SUMMARY:

A Supervisor of Elections should use the date upon which the petition requesting the establishment of a county charter commission is submitted to the county commission to calculate the number of qualified voters required to meet the statutory requirement of “15 percent of the qualified electors of the county” mandated by section 125.61, Florida Statutes.

According to information obtained by this office, a citizens group in Pasco County has announced that it plans to seek petition signatures to require appointment of a county charter commission. The statute requires a determination of whether the petition has been “signed by at least 15 percent of the qualified electors of the county[.]” As the Supervisor of Elections, you are unsure when this calculation should be made as the statute is silent in this regard.

Section 125.61, Florida Statutes, was enacted by Chapter 69-45, Laws of Florida, as a part of the procedure enabling a county to adopt a home rule charter. The proceedings may be initiated by resolution of the board of county commissioners or by petition signed by at least 15 percent of the qualified electors of the county. Within 30 days of the adoption of the resolution or the filing of the petition, the members of the county charter commission “shall be appointed[.]” Specifically, the statute provides:

125.61 Charter commission.—

(1) Following the adoption of a resolution by the board of county commissioners or upon the submission of a petition to the county commission signed by at least 15 percent of the qualified electors of the county requesting that a charter commission be established, a charter commission shall be appointed pursuant to subsection (2) within 30 days of the adoption of said resolution or of the filing of said petition.

(2) The charter commission shall be composed of an odd number of not less than 11 or more than 15 members. The members of the commission shall be appointed by the board of county commissioners of said county or, if so directed in the initiative petition, by the legislative delegation. No member of the Legislature or board of county commissioners shall be a member of the charter commission. Vacancies shall be filled within 30 days in the same manner as the original appointments.

Unlike a number of other statutes requiring a calculation of the requisite number of signatures on a petition, section 125.61, Florida Statutes, does not establish a benchmark date for the Supervisor to make this calculation. In section 100.361, Florida Statutes, dealing with municipal recall elections, a recall petition must be signed by “at least 50 electors or by 10 percent of the total number of registered electors of the municipality or district *as of the preceding municipal election*, whichever is greater.”¹ (e.s.) Similarly, section 166.031(1), Florida Statutes, dealing with municipal charter amendments, provides:

The governing body of a municipality may, by ordinance, or the electors of a municipality may, by petition signed by 10 percent of the registered electors *as of the last preceding municipal general election*, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality. The governing body of the municipality shall place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election held within the municipality or at a special

election called for such purpose.² (e.s.)

It is a general rule of statutory construction that courts, in construing a statute, cannot invoke a limitation or add words to a statute not placed there by the Legislature, nor is this office authorized to do so.³ Thus, this office cannot read into section 125.61, Florida Statutes, a requirement that these calculations be made “as of the last preceding . . . general election” or other such qualifying event. Further, the fact that the qualifying language exists in other statutes, particularly the municipal charter process described in section 166.031, Florida Statutes, *supra*, suggests that it was not intended to apply to the process described in section 125.61, Florida Statutes.

Other language in section 125.61, Florida Statutes, suggests that the date the petition is presented to the county commission is a significant date for this process. The statute provides that the charter commission must be appointed “within 30 days . . . of the filing of said petition.” It would appear reasonable to conclude that the date upon which the petition is presented to the county commission is the benchmark date for calculation of the required number of signatures on the petition.

Therefore, in the absence of any legislative or judicial mandate to the contrary, it is reasonable to conclude that pursuant to section 125.61, Florida Statutes, a Supervisor of Elections should use the date a petition for establishment of a charter commission is submitted to the county commission to determine the number of signatures representing “at least 15 percent of the qualified electors of the county.”

¹ Section 100.361(2)(b)1., Fla. Stat. *And see* s. 100.361(2)(b)2. - 6., Fla. Stat., containing identical language as to the benchmark date.

² However, like s. 125.61, Fla. Stat., several statutes contain no benchmark date for calculation of the requisite number of signatures on a petition. See s. 171.051(2), Fla. Stat., providing the procedure for municipal contraction by a petition of 15% of qualified voters in an area; and s. 367.072(2)(b), Fla. Stat., relating to a utility’s certificate of authorization to provide water service and the requirements for petitions to revoke such certificates which must be signed by 65% of the customers in the service area covered by the certificate of authorization.

³ See *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990); *Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974); and see *Ops. Att’y Gen.* Fla. 82-80 (1982) (Attorney General, like a court, is not free to add words to a statute to support a conclusion that the plain wording of the statute does not supply; general rule of statutory construction is that any doubts as to legislative intent should be resolved against the power of the court to supply missing words); 98-82 (1998) (Attorney General will not read words of limitation into statute); 94-09 (1994); 87-43 (1987); 86-32

(1986); 82-20 (1982).

AGO 15-13 – September 17, 2015

SUNSHINE LAW – LITIGATION – MAYOR

**APPLICABILITY TO MAYOR OF EXCEPTION FOR MEETINGS
BETWEEN CITY COUNCIL AND ITS ATTORNEY TO DISCUSS
SETTLEMENT AND LITIGATION EXPENDITURES**

To: Ms. Pam E. Booker, City Attorney, City of Port St. Lucie

QUESTION:

1. Pursuant to section 286.011(8), Florida Statutes, is the mayor, who is a named defendant in two lawsuits filed against the City and various City officials, prohibited from attending “shade meetings” with counsel to discuss the litigation?

2. If the mayor is statutorily permitted to attend shade meetings, would provisions within Florida’s Ethics Code, Part III, Chapter 112, Florida Statutes, prohibit him from participating in discussions at such meetings, and from voting on decisions relating to the litigation during Sunshine meetings?

SUMMARY:

1. Section 286.011(8), Florida Statutes, does not prohibit the mayor, who is a voting member of the city council, from attending meetings between the city council and its attorney to discuss settlement negotiations and/or strategy related to litigation expenditures in connection with the pending lawsuits in which the council is a party.

2. This office will not comment on your questions pertaining to prohibitions that may exist in the Ethics Code. Pursuant to section 112.322(3), Florida Statutes, the Ethics Commission is responsible for issuing advisory opinions on questions regarding application of the Ethics Code.¹

As you acknowledge, meetings between members of the city council to conduct city business are public meetings under section 286.011(1), Florida Statutes, which requires governmental entities, including municipalities, to conduct their business at open meetings “in the sunshine.”² Subsection (1) provides:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal

corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Meetings between members of the city council and the council's attorney to discuss pending litigation in which the city council is a party are also public meetings subject to section 286.011(1), Florida Statutes.³ The Legislature has created a narrow exception in subsection (8), however, to allow meetings "in the shade" between the same governmental entities enumerated in subsection (1), along with chief administrative or executive officers, and their attorney for the purpose of discussing certain limited issues related to pending litigation:⁴

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

* * *

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

This exception gives an attorney who is representing the governmental entity in a lawsuit or administrative action the opportunity to obtain information and direction regarding "two narrowly prescribed areas": settlement negotiations and strategy sessions regarding litigation expenditures.⁵ Final action to approve a settlement or litigation expenditure must still be voted upon in a public meeting.⁶

You report that two lawsuits have been filed in St. Lucie County Circuit Court, each naming as defendants, among others, the City of Port St. Lucie and the then-City Manager, who is now the mayor, in both his official and individual capacities. Your concern is whether the mayor may attend shade meetings under section 286.011(8), Florida Statutes, which applies to "any board or commission of any state agency or authority or *any agency or authority of any county, municipal corporation, or political subdivision[.]*" (e.s.) The Florida Supreme

Court has characterized city councils as municipal agencies under section 286.011, Florida Statutes.⁷ The Charter of the City of Port St. Lucie, Florida,⁸ provides in Article III, section 3.01: “There shall be a city council with all legislative powers of the city vested therein consisting of one member residing in each of the council districts, and a mayor[.]” Section 3.05 provides, in part: “The mayor shall be a voting member of the city council[.]”⁹ This office has observed that when the mayor is a member of the city council, the Sunshine Law applies to discussions between the mayor and other members of the council.¹⁰ Because the mayor of the City of Port St. Lucie is a voting member of the city council, which is a party in the ongoing litigation, he is not precluded from attending shade meetings with the council regarding the suits under subsection (8).¹¹

The fact that the plaintiffs in these lawsuits have also sued the mayor in his individual capacity, alleging “willful and wanton” conduct toward the plaintiffs, does not take him outside the scope of section 286.011(8), Florida Statutes. Personal liability of a public official is not determined until a case has been finally terminated on the merits.¹² By its terms, section 286.011(8) allows a government official who is “presently a party” to “pending litigation” to discuss settlement and expenditures during the pendency of the action. This office has previously construed “pending” in subsection (8) as referring to a lawsuit that has been filed and is ongoing and not yet completed.¹³ Hence, the possibility that the mayor will be found individually liable after the merits of the case are decided does not preclude him from attending shade meetings while the case is active pursuant to section 286.011(8), Florida Statutes.

In conclusion, it is my opinion that section 286.011(8), Florida Statutes, does not prohibit the mayor from attending meetings between the city council and its attorney to discuss settlement negotiations and/or strategy regarding litigation expenditures in connection with the pending lawsuits in which the council is a party. I am unable to comment on your questions regarding possible prohibitions within the Ethics Code as to the mayor’s participation in meetings about the litigation. These questions may instead be directed to the Florida Commission on Ethics.

¹ See Op. Att’y Gen. Fla. 89-18 (1989); Op. Att’y Gen. Fla. 87-17 (1987).

² See *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971).

³ See *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985).

⁴ See *Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521, 523 (Fla. 2d DCA 2014).

⁵ See Op. Att’y Gen. Fla. 04-35 (2004).

⁶ See *Zorc v. City of Vero Beach*, 722 So. 2d 891, 901 (Fla. 4th DCA 1998); Op. Att’y Gen. Fla. 08-17 (2008).

⁷ *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971).

⁸ https://www.municode.com/library/fl/port_st._lucie/codes/code_of_ordinances?nodeId=CHPOSTLUFL.

⁹ *Id.*

¹⁰ See Op. Att’y Gen. Fla. 90-26 (1990) (concluding that a mayor who was not a member of the city council and had no voting power on the council was not subject to the Government-in-the-Sunshine Law). *Accord Ops.* Att’y Gen. Fla. 85-36 (1985), 75-210 (1975).

¹¹ In contrast, a governmental entity in Op. Att’y Gen. Fla. 09-52 (2009) – the school superintendent – was not a party to the pending administrative action and thus could not attend a shade meeting with the school board, which was a party.

¹² See *Nuzum v. Valdes*, 407 So. 2d 277, 279 (Fla. 3d DCA 1981).

¹³ See Op. Att’y Gen. Fla. 06-03 (2006).

AGO 15-14 – September 29, 2015

TOURIST DEVELOPMENT TAX – COUNTIES – NATURE CENTERS

USE OF TOURIST DEVELOPMENT TAX FOR BOAT RAMP AND OBSERVATION PLATFORM IN A NATURE CENTER

To: Ms. Michelle Blankenship Jordan, County Attorney for Jackson County

QUESTION:

May tourist development tax revenues be used to construct a boat ramp and an elevated platform on the Chipola River, with the elevated platform used as an observation area for viewing birds and the natural landscape?

SUMMARY:

Section 125.0104(5)(b), Florida Statutes, authorizes a county with a population of less than 750,000 to expend tourist development tax revenues for the construction of a nature center which may contain a boat ramp and an elevated platform for observation of birds and the landscape, when the county makes the appropriate legislative determination that such project

relates to tourism and primarily promotes such a purpose.

You state that Jackson County has proposed the use of tourist development tax revenues to fund the construction of a ramp for launching boats and an elevated platform for nature observation on the Chipola River as part of a larger “Blueway,” *i.e.*, a scenic waterway providing a water path or trail with launching points, camping and picnic locations, and points of interest for paddlers. You indicate that “Blueways” are typically developed to encourage recreation, education, and community development. The county contends that such a facility would constitute the construction, extension, enlargement, remodeling, improvement, or promotion of a “nature center” within the scope of section 125.0104(5)(b), Florida Statutes.

Section 125.0104, Florida Statutes, known as the “Local Option Tourist Development Act,”¹ authorizes a county to impose a tax on short-term rentals of living quarters or accommodations within the county unless such activities are exempt pursuant to Chapter 212, Florida Statutes.² The purpose and intent of section 125.0104, Florida Statutes, is to “provide for the advancement, generation, growth and promotion of tourism, the enhancement of the tourist industry, and the attraction of conventioners and tourists from within and without the state to a particular area or county of the state.”³

The Local Option Tourist Development Act requires that construction of publicly owned facilities financed by proceeds from the tourist development tax be primarily related to the advancement and promotion of tourism. It is the governing body of the county that must make the factual determination of whether a particular facility or project is related to tourism and primarily promotes such a purpose. This determination must follow appropriate legislative findings and due consideration of the specific needs and conditions of the particular locality.⁴ Any such determination must show a distinct and direct relationship between expenditure of tourist development tax revenues and the promotion of tourism.

Section 125.0104(5), Florida Statutes, provides the authorized uses of tourist development tax revenues:

(5) AUTHORIZED USES OF REVENUE.—

(a) All tax revenues received pursuant to this section by a county imposing the tourist development tax shall be used by that county for the following purposes only:

1. To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more:

a. Publicly owned and operated convention centers, sports

stadiums, sports arenas, coliseums, or auditoriums within the boundaries of the county or subcounty special taxing district in which the tax is levied; or

b. Aquariums or museums that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public, within the boundaries of the county or subcounty special taxing district in which the tax is levied;

2. To promote zoological parks that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public;

3. To promote and advertise tourism in this state and nationally and internationally; however, if tax revenues are expended for an activity, service, venue, or event, the activity, service, venue, or event must have as one of its main purposes the attraction of tourists as evidenced by the promotion of the activity, service, venue, or event to tourists;

4. To fund convention bureaus, tourist bureaus, tourist information centers, and news bureaus as county agencies or by contract with the chambers of commerce or similar associations in the county, which may include any indirect administrative costs for services performed by the county on behalf of the promotion agency; or

5. To finance beach park facilities or beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, cleanup, or restoration of inland lakes and rivers to which there is public access as those uses relate to the physical preservation of the beach, shoreline, or inland lake or river. . . .

Subparagraphs 1. and 2. may be implemented through service contracts and leases with lessees that have sufficient expertise or financial capability to operate such facilities.

(b) Tax revenues received pursuant to this section by a county of less than 750,000 population imposing a tourist development tax *may only be used by that county for the following purposes in addition to those purposes allowed pursuant to paragraph (a):* to acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more zoological parks, fishing piers or nature centers which are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public. All population figures relating to this subsection shall be based on the most recent population estimates prepared pursuant to the provisions of s.

186.901. These population estimates shall be those in effect on July 1 of each year.

* * *

(d) Any use of the local option tourist development tax revenues collected pursuant to this section for a purpose not expressly authorized by paragraph (3)(l) or paragraph (3)(n) or paragraph (a), paragraph (b), or paragraph (c) of this subsection is expressly prohibited. (e.s.)

You advise that Jackson County has a population of less than 750,000 and, thus, subsection (5)(b) above would authorize the county to use tourist development taxes for the additional purposes described therein. The county wishes to expend its tourist development tax revenues for the construction of the boat ramp and the observation platform as part of a “nature center.”

Initially, I would note that this office has consistently found that tourist development tax revenues may not be used for the construction of boat ramps.⁵ Attorney General Opinion 91-62 considered whether tourist development tax revenues could be used pursuant to what is now section 125.0104(5)(a)5., Florida Statutes, for the repair, construction, and improvement of boat ramps and parking facilities to serve inland lakes and rivers in Citrus County. After a consideration of the language of the statute, the opinion concludes:

[T]he terms of s. 125.0104(5)(a)4., F.S. (1990 Supp.),⁶ relate to the ‘actual, physical nature of the beach and [do] not contemplate the construction of artificial structures upon the beach or otherwise authorize activities which do not protect or enhance the physical nature of the beach.’⁷ Similarly, the provisions relating to inland lakes and rivers should be read to authorize the direct physical enhancement or protection of these water bodies rather than authorizing the construction of artificial structures upon them or other activities which do not protect or enhance such lakes or rivers.

Thus, the construction of boat ramps and attendant parking facilities in proximity to inland lakes and rivers would appear to be outside the scope of expenditures authorized in s. 125.0104(5)(a)4., F.S. (1990 Supp.).

Attorney General Opinion 91-62 is distinguishable from the instant situation, as it was based upon the use of tourist development tax revenues under section 125.0104(5)(a), Florida Statutes, and does not address the additional uses for tourist development tax revenues under subsection (5)(b). It should be noted, however, that this office is of the position that the provisions in subsection (5)(b) do not enlarge the uses

described in subsection (5)(a). Rather, subsection (5)(b) authorizes a county with a population of less than 750,000 to expend tourist development tax revenues for “zoological parks, fishing piers or nature centers” in addition to those purposes described in subsection (5)(a).

As you have indicated that Jackson County has a population of less than 750,000 and that tourist development tax revenues may be used in such circumstance for the construction of a nature center, the question is now whether a boat ramp and elevated platform on the Chipola River may be constructed as part of a “nature center” for purposes of section 125.0104(5)(b), Florida Statutes.

This office has previously recognized that the term “nature center” is not defined for purposes of the statute. By deconstructing the term and individually defining the words, however, it was concluded that the plain meaning of the term may be derived: “nature” being defined as “the aspect of the out-of-doors (as a landscape): natural scenery”; and “center” connoting “a point around which things revolve: a focal point for attraction, concentration, or activity.” In Attorney General Opinion 94-12, it was determined that given this common meaning along with its placement with zoological parks and fishing piers in the statute, the Legislature apparently contemplated that tourist development tax revenues could be used to acquire property for a nature trail or preserve open to the public. The opinion reiterated that it is the governing body of the county which must ultimately make the determination that the expenditure is for a purpose that falls within the enumerated authorized uses in section 125.0104(5), Florida Statutes.

In Attorney General Opinion 97-48, this office was asked to consider whether a county could use tourist development tax dollars to construct an artificial reef to provide diving and snorkeling opportunities in waters bordering the county. Information provided with the opinion request suggested that the proposed artificial reef was to be part of a larger scheme to develop an aquatic nature center. After determining that an aquatic nature center could be characterized as a nature center within the scope of section 125.0104(5)(b), Florida Statutes, it was concluded that tourist development taxes could be used for its development.⁸

Finally, in Attorney General Opinion 2012-38, this office considered whether tourist development tax revenues could be used to repair, improve and expand a multi-use pathway as part of a recreational network, including the construction of pedestrian bridges to connect the pathway over inland lakes and other bodies of water. Characterizing the pathway as part of a nature center, the opinion concluded that the expenditure was permissible should the county satisfy the statutory requirement that the pedestrian bridges constitute an extension, remodeling or improvement of a nature center. Of particular note, the opinion found that the pedestrian bridges over the inland lakes would serve as extensions and improvements of the multi-use pathway.

making it safer and more useful.

Much like a nature trail, an artificial reef, or a multi-use pathway, it would appear that an area on a river could be designated as a “nature center” as a natural part of the landscape and a focal point for activity. Moreover, the specific mention of a fishing pier, makes clear that the construction of an artificial structure is contemplated under the provisions of subsection (5)(b). While this office would maintain that the construction of a boat ramp does not relate to the physical preservation of an inland lake or river, prescribed under section 125.0104(5)(a), Florida Statutes, and would not fall within the authorized uses for tourist development tax revenues pursuant to that subsection, I cannot definitively conclude that the construction of a boat ramp and an elevated platform as part of a nature center would fall outside the authorized uses under subsection (5)(b). Much like the pedestrian bridges considered in Attorney General Opinion 2012-38, a boat ramp and observation platform may serve as improvements to the nature center, making it safer and more useful. Ultimately, the county must make the appropriate legislative determination that the construction of a boat ramp and observation platform serve as a part of a nature center and that such construction relates to and primarily promotes tourism. While the construction of such structures does not protect or enhance the natural state of the river as required by subsection (5)(a), there may be instances where they act as an integral part of a nature center.

Accordingly, in a county with a population of less than 750,000, section 125.0104(5)(b), Florida Statutes, authorizes the expenditure of tourist development tax revenues for the construction of a nature center which may contain a boat ramp and an elevated platform for observation of birds and the landscape, when the county makes the appropriate legislative determination that such project relates to and primarily promotes tourism.

¹ Section 125.0104(1), Fla. Stat.

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

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

⁴ See e.g., Ops. Att’y Gen. Fla. 94-12 (1994) (governing body of the county must make determination that expenditure of tourist development tax

revenues for the acquisition of a railway right-of-way and construction of a public recreational trail falls within the scope of expenditures authorized by s. 125.0104, Fla. Stat.), 10-09 (2010), and 98-74 (1998).

⁵ See Op. Att’y Gen. Fla. 91-62 (1991) and Inf. Op. to the Hon. W.N. Chapman, Walton Co. Bd. of Comms., November 5, 2014.

⁶ Section 125.0104(5)(a)4., Fla. Stat. (1990 Supp.), provided authorized uses of tourist development tax revenues:

To finance beach improvement, maintenance, renourishment, restoration, and erosion control, including shoreline protection, enhancement, cleanup, or restoration of inland lakes and rivers to which there is public access.

⁷ *Citing* Op. Att’y Gen. Fla. 90-55 (1990).

⁸ See *also* Op. Att’y Gen. Fla. 13-29 (2013) (tourist development tax revenues may be used for a coral outplanting project to repair or improve a naturally occurring reef as the repair of a zoological or nature center).

AGO 2016-01 – March 10, 2016

GOVERNMENT IN THE SUNSHINE LAW – MEETINGS – PRIVATE ORGANIZATION

APPLICATION OF SUNSHINE LAW TO BOARD OF TRUSTEES OF PRIVATE INSURANCE TRUST FUND

*To: Mr. Dustin L. Watkins, Attorney, Board of Trustees of the Fort
Lauderdale Fire Fighters Insurance Trust Fund*

QUESTION:

Is the Board of Trustees of the Fort Lauderdale Fire Fighters Insurance Trust Fund subject to open meetings requirements of the Government in the Sunshine Law, section 286.011, Florida Statutes?

SUMMARY:

The Board of Trustees of the Fort Lauderdale Fire Fighters Insurance Trust Fund is subject to the open meetings requirements of the Government in the Sunshine Law, section 286.011, Florida Statutes.

Your letter acknowledges that in 1997 your office asked the same question on behalf of the same client. Attorney General Opinion 98-01 concluded that “[t]he Board of Trustees of the Fort Lauderdale

Fire Fighters Insurance Trust Fund is subject to the Government in the Sunshine Law, section 286.011, Florida Statutes.”¹ As reported in this earlier opinion, the Fort Lauderdale Fire Fighters Insurance Trust Fund was created in August of 1981 pursuant to an Agreement and Declaration of Trust between the City of Fort Lauderdale and the Fire Fighters Union. The transfer of this responsibility to the union was the result of a collective bargaining agreement. The purpose of the trust fund was to receive contributions on behalf of the city and each employee, and to administer these funds and provide insurance benefits to the participants and their beneficiaries.

Prior to entering into this agreement, the city provided insurance benefits directly to its fire department employees. As was noted in the 1998 opinion, and you have not suggested it is currently otherwise, the city continues to administer insurance benefit plans for all other city government employees.

This office has recognized that private organizations generally are not subject to the Government in the Sunshine Law unless the private organization has been created by a public agency, has been delegated the authority to perform some governmental function, or plays an integral part in the decision-making process of a public entity.² Thus, the Sunshine Law does apply to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties.³

The Agreement and Declaration of Trust of the Fort Lauderdale Fire Fighters Insurance Trust Fund (the agreement) provides that the term “[p]lan” as used in the trust agreement shall mean “these rules and regulations as adopted and thereafter amended from time to time by the Trustees regarding death, accident, health and hospitalization, and surgery, medical benefits and other related benefits and the basis on which such benefits are made available to Participants and Beneficiaries, as determined by the Trustees.”⁴ The term “[e]mployer” as used therein includes the City of Fort Lauderdale, Florida and any other employer who “is bound to make payment of contributions on behalf of certain of its Employees to the Trust Fund.”⁵ An “[e]mployee” for purposes of the trust agreement is “[a]ny Employee represented by the Union and working for an Employer as defined herein”; officers or employees of the union; former fire department employees along with the spouses, widows, children and dependents; and other employees of the Fort Lauderdale Fire Department for whom the trustees have agreed to accept contributions.⁶

My review of the earlier opinion suggests that these terms have remained substantially the same. While collective bargaining may result in limiting the scope of the insurance being provided during a particular year, that is, as you state, that the trust fund currently is limited to reimbursing retired Fort Lauderdale fire fighters for certain

medical expenses and health insurance premiums that they may incur, the trust agreement reflects the broader authority of the trust to provide insurance benefits to Fort Lauderdale's fire fighter participants and beneficiaries.

In Attorney General Opinion 98-01, this office considered the applicability of the Government in the Sunshine Law to the Fort Lauderdale Fire Fighters Insurance Trust Fund and determined that the board of directors of the trust fund was acting on behalf of the city in collecting and administering employee contributions and was accomplishing a public purpose. Information and data provided by the city were used to compile records of the funds and the moneys being administered were public funds contributed on behalf of public employees.⁷ The opinion notes that a responsibility of a governmental agency may not be transferred to a private entity with the effect of creating an exemption from the open meetings requirement of section 286.011, Florida Statutes.

Again, while the situation presented by your most recent letter is not identical to that discussed in Attorney General Opinion 98-01, the similarities are significant and it would appear that the reasoning of the 1998 opinion and the Informal Opinion provided to the Board of Trustees of the Fort Lauderdale Fire Fighters Insurance Trust Fund dated December 28, 1998, on the Government in the Sunshine Law would be applicable.

Thus, it is my opinion that the Board of Trustees of the Fort Lauderdale Fire Fighters Insurance Trust Fund is subject to the open meetings requirements of the Government in the Sunshine Law, section 286.011, Florida Statutes.

¹ I note that an Informal Attorney General Opinion dated 12/28/98 on the same topic was issued to Mr. Richard M. Weiner, attorney for the board of trustees of the Florida Fire Fighters Insurance Trust Fund and affirming the conclusion in Op. Att'y Gen. Fla. 98-01 (1998) under the slightly different facts of the restated trust agreement entered into following issuance of Op. Att'y Gen. Fla. 98-01 (1998).

² See Op. Att'y Gen. Fla. 07-27 (2007).

³ See, e.g., Ops. Att'y Gen. Fla. 00-03 (2000) (board of directors of corporation performing services for Department of Children and Families which services would normally be performed by department); 98-49 (1998) (nonprofit organization designated by county to fulfill role of county's dissolved cultural affairs council); 83-95 (1983) (private nonprofit corporation when county accepts corporation's offer to review, recodify, and prepare draft amendments to county zoning code).

⁴ See Art., I, s. 1.11, Agreement and Declaration of Trust of the Fort Lauderdale Fire Fighters Insurance Trust Fund.

⁵ *Id.* s. 1.9.

⁶ *Supra* n.5 at s.1.8.

⁷ I note that it appears that the city continues to contribute toward insurance for its firefighter employees under the bargaining agreement. See, e.g., Article 34, Agreement Between City of Fort Lauderdale and Local 765 effective April 6, 2010 - September 30, 2012.

AGO 16-02 – March 10, 2016

**INFRASTRUCTURE SURTAX – EMERGENCY GENERATORS –
MUNICIPALITY**

USING INFRASTRUCTURE SURTAX TO FUND PURCHASE OF
EMERGENCY GENERATORS, POWER SOURCE UNITS, AND
ASSOCIATED SITE IMPROVEMENTS AND UPGRADES, AS
FIXED CAPITAL EXPENDITURE OR OUTLAY

To: Mr. Alan S. Zimmet, B.C.S., City Attorney, City of Largo

QUESTION:

May the City of Largo use proceeds from the local government infrastructure surtax collected pursuant to section 212.055(2), Florida Statutes, to fund the purchase of emergency generators and Uninterruptible Power Source units for the city's Municipal Complex, and to fund site improvements and upgrades necessary to activate and utilize this equipment?

SUMMARY:

Emergency generators and Uninterruptible Power Source units, and the site improvements and electrical system upgrades necessary to ensure proper functioning of such equipment within the Municipal Complex, constitute infrastructure under section 212.055(2), Florida Statutes, which may be acquired using funds from the Largo infrastructure surtax.

Section 212.055(2), Florida Statutes, authorizes local governments to enact an ordinance for approval by electors that would levy a discretionary sales surtax of .5 percent or 1 percent, to be used “to finance, plan, and construct infrastructure[.]” among other uses, as stated in subsection (2)(d)1. The statute defines “infrastructure” in subsection (2)(d)1. as:

a. Any fixed capital expenditure or fixed capital outlay associated with the construction, reconstruction, or improvement of public facilities that have a life expectancy of 5 or more years and any related land acquisition, land improvement, design, and engineering costs.

Although “fixed capital expenditure” and “fixed capital outlay” are not defined in Chapter 212, Florida Statutes, they are defined in Chapter 216, Florida Statutes, which relates to state planning and budgeting. When the Legislature uses the identical words or phrases in different chapters of the Florida Statutes, we may assume that it intended the terms to mean the same thing.¹

Under section 216.011, Florida Statutes:

(m) “Expenditure” means the creation or incurring of a legal obligation to disburse money.

* * *

(p) “Fixed capital outlay” means the appropriation category used to fund real property (land, buildings, including appurtenances, fixtures and fixed equipment, structures, etc.), including additions, replacements, major repairs, and renovations to real property which materially extend its useful life or materially improve or change its functional use and including furniture and equipment necessary to furnish and operate a new or improved facility, when appropriated by the Legislature in the fixed capital outlay appropriation category.

It may also be useful to consider the common understanding and definitions of the component parts of the phrases, “fixed capital expenditure” and “fixed capital outlay.”² The term “fixed capital” refers to “money invested in fixed assets, such as land and machinery,” and “fixed asset” refers more specifically to a “long-term” item that is owned and has value, such as “equipment, land, or an industrial plant.”³ In order to satisfy the requirements of section 212.055(2), Florida Statutes, the asset must have a life expectancy of five years or longer.

Based upon the provisions and definitions quoted above, section 212.055(2), Florida Statutes, permits a local government to seek voter approval of a sales surtax that will be used to replace, perform major repair of, or renovate long-term fixed assets in a public facility, such as machinery and equipment, in order to materially extend the property’s useful life or improve its functional use. This includes the acquisition of equipment necessary to implement the improvements.

You state in your memorandum of law that the city’s main offices are housed in its Municipal Complex, including the city hall, the

Largo Police Department, the 911 Communications Center, and the Emergency Operations Center. There are currently five generators used for backup emergency power within the Municipal Complex, three of which have far exceeded their useful life expectancy. The remaining two are smaller and capable of providing only limited resources and are within the typical 20-year generator replacement cycle. In addition, there are three Uninterruptible Power Source units, all of which have reached the end of their useful lives and are no longer supported by the manufacturer. Finally, the electrical system itself has never been comprehensively updated, and its components that manage the emergency power supply are not compatible with power generated by new technology. You assert that substantial upgrades to the electrical system are necessary before new emergency power equipment can be utilized.

The condition of these power sources led the city to engage an engineering firm to evaluate the emergency backup power system and make any necessary recommendations for improvements to meet current and future needs of the Municipal Complex. You were informed that the city should purchase two 750 KW power generators that use internal combustion engines and include an advanced distribution system. There would also be new Uninterrupted Power Supply units to provide battery backup power for the electrical system in the Municipal Complex, with a separate unit dedicated to the 911 Communications Center. The equipment would be incorporated as fixtures in the Municipal Complex property and buildings. This new equipment would allow the complex to operate in an emergency situation with little or no interruption in its power supply and would have the ability to specifically divert energy to critical operations during an emergency or disaster while still conserving power.

Based on the condition of the power sources that you describe, replacement of the outdated fixed machinery and equipment for generating and managing emergency backup power will materially improve the functional use of the Municipal Complex. The machinery and equipment purchased will have a life expectancy of five or more years. Associated site improvements and electrical system upgrades are equally necessary to implement the emergency machinery and equipment replacements. Accordingly, the items described properly constitute infrastructure under section 212.055(2), Florida Statutes, and it is my opinion that proceeds from the local government infrastructure surtax would properly be used to purchase the machinery, equipment, and associated improvements for the Municipal Complex.

¹ *Goldstein v. Acme Concrete Corp.*, 103 So. 2d 202, 204 (Fla. 1958). *And see* Op. Att'y Gen. Fla. 83-32 (1983).

² When a statute does not specifically define words of common usage, such

words must be given their plain and ordinary meaning. *See Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So. 2d 1351 (Fla. 1984).

³ Black's Law Dictionary, "fixed capital" & "fixed asset" (within definition of "capital asset"), <http://web2.westlaw.com> (10th ed. 2014). These dictionary definitions taken from the same source relied upon in prior Attorney General Opinions addressing this subject have changed slightly.

AGO 16-03 – March 10, 2016

**TAXATION – COUNTIES – AD VALOREM TAX – INDUSTRIAL
DEVELOPMENT AUTHORITY**

THERE IS NO SPECIFIC LEGISLATIVE AUTHORITY
ALLOWING THE COUNTY TO APPORTION A PERCENTAGE
OF AD VALOREM TAX PROCEEDS TO THE INDUSTRIAL
DEVELOPMENT AUTHORITY BASED UPON THE NUMBER OF
BUSINESSES THAT LOCATE IN THE COUNTY DUE TO THE
EFFORTS OF THE AUTHORITY

*To: The Honorable Patricia Patterson, Chairperson, Taylor County
Board of County Commissioners*

QUESTION:

Is the Taylor County Board of County Commissioners authorized to increase the regular budget of the Taylor County Development Authority by apportioning to the Authority a percentage of ad valorem tax revenues generated from new businesses that have located in Taylor County as a result of the efforts and assistance of the Authority?

SUMMARY:

Sections 125.016 and 159.48, which grant counties the power to levy and collect ad valorem taxes, do not grant a board of county commissioners the power to award a percentage of the proceeds to the industrial development authority based upon the number of new businesses that have located in the county as a result of the authority's efforts, nor do counties have an independent power to tax.

In 1959, the Legislature enacted Chapter 59-1927, Laws of Florida, creating the Taylor County Development Authority, a public corporation tasked with assisting in the planning and development of Taylor County. In 1970, the Legislature passed sections 159.44 through 159.53,

Florida Statutes, which articulate the functions and powers of county industrial development authorities, and provide that these powers are supplemental to powers already created by law.

You have advised this office that the Taylor County Development Authority proposed to the Taylor County Board of County Commissioners that a percentage of new ad valorem tax revenues be apportioned to the Authority based upon the number of new businesses that moved to or started up in Taylor County as a result of the Authority's efforts and assistance. The Authority believes this would "incentivize" it by "increasing its operating budget when it secures new investment" and that it would relieve the Authority of the obligation "to prepare and present justifications for the existing budget and for budget increases[.]" You suggest that the proposed apportionment would be "a natural extension of the county's inherent tax and spend power" found in two statutes that specifically grant counties the power to levy ad valorem taxes, namely, sections 125.016 and 159.48, Florida Statutes.

Section 125.016, Florida Statutes, is a general grant to counties of the authority to impose an ad valorem tax, and provides, in full:

Annually an ad valorem tax of not exceeding 1½ mills may be levied upon all property in the county, which shall be levied and collected as other county taxes are levied and collected. The taxes shall be charged to the general fund, but such revenue may be appropriated by the county for the cost of constructing, operating, maintaining, expanding, enlarging, improving, or developing any project or projects herein specified, or for the payment of the costs of removing and relocating any structures, installations, or facilities which in the opinion of the board of county commissioners may be required for the safe and efficient operation of any such projects. Said tax may be levied, collected, and expended for any of the purposes herein specified notwithstanding the cost and expense thereof which may have been incurred in a previous year, and when so collected and used the tax shall be considered to be levied, collected and used for a county purpose.

Section 159.48, Florida Statutes, specifically authorizes a board of county commissioners to levy ad valorem taxes for the benefit of the county's industrial development authority, and provides, in full:

The exercise of the powers granted industrial development authorities is declared to be a public and county purpose. The board of county commissioners is authorized to, and may, levy ad valorem taxes in an amount not to exceed 1 mill annually for the purposes of ss. 159.44-159.53. The proceeds of such ad valorem tax shall be used to aid each industrial development authority in fostering, developing, and locating industry in the

county and to pay the reasonable operating expenses of the authority to the extent that the board of county commissioners finds necessary. No ad valorem taxes shall ever be used for the purpose of paying the interest or principal on any bonds issued to finance or refinance an industrial or manufacturing project as prohibited by the State Constitution.

A county's power to levy taxes is governed by the Florida Constitution.¹ The Constitution provides that "[n]o tax shall be levied except in pursuance of law"² and directs the state to authorize counties to levy ad valorem taxes.³ "Counties do not possess inherent power to tax; the legal authority of a county to tax must derive from the state."⁴ Being purely statutory in nature, taxes on property "can be lawfully levied, assessed, and collected *only in the express method pointed out by statute.*"⁵ (e.s.) Section 125.01(1)(r), Florida Statutes, provides that counties have the power to: "Levy and collect taxes,...for county purposes...which power shall be exercised in such manner, and subject to such limitations, as may be provided by general law." Thus, a county must be authorized by general law to exercise its taxing authority and has no home rule power or independent power to tax.⁶

Neither section 125.016, Florida Statutes, nor section 159.48, Florida Statutes, contains language that would allow the board of county commissioners to carve out a percentage of the ad valorem revenues collected from a subset of new businesses and pledge it to the Authority. Section 125.016 permits ad valorem tax revenues to be used (1) for "the cost of constructing, operating, maintaining, expanding, enlarging, improving, or developing" county projects, and (2) for "the costs of removing and relocating any structures, installations, or facilities" to ensure "the safe and efficient operation of any such projects." Section 159.48 permits the proceeds to be used (1) to aid the Authority in "fostering, developing, and locating industry in the county[.]" and (2) "to pay the reasonable operating expenses of the authority[.]" The latter directs the county commissioners to dedicate ad valorem proceeds to the Authority "to the extent that the board of county commissioners finds necessary."

Both provisions, therefore, permit the use of tax proceeds to fund ongoing and future projects, activities, and expenses that are consistent with the Authority's purpose. They do not authorize the county to release a portion of the tax proceeds to reward past efforts as a means of "incentivizing" the Authority. The merit of incentivizing the Authority is not at issue in this opinion, only whether the method you propose is permitted under the law. When a statute authorizes a unit of local government to impose a tax, the statute must be strictly construed, may not be extended by implication, and may not be enlarged to include any matter not specifically included, even if consistent with the purpose of the statute.⁷ Pledging the tax revenues in the manner you propose would exceed the parameters of sections 125.016 and 159.48, Florida

Statutes.⁸

Even section 125.045(2), Florida Statutes, which authorizes a county to use public funds to encourage the development of private enterprise within its borders, speaks in terms of granting funds for ongoing and future projects rather than as a reward for having previously attracted new businesses to the county: “The governing body of a county may expend public funds *to attract and retain business enterprises*, and the use of public funds toward the achievement of such economic development goals constitutes a public purpose.”⁹ (e.s.) Indeed, paragraph (3) suggests the kinds of economic development activities the county may fund:

developing or improving local infrastructure, issuing bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community.

In sum, the Board of County Commissioners has no authority under either section 125.016 or 159.48 to pledge a percentage of ad valorem tax proceeds to the Taylor County Development Authority based upon the amount of revenue collected from new businesses that have located in Taylor County as a result of the Authority’s efforts, because these statutes do not grant that power to the counties, and counties possess no home rule or independent power regarding taxation.

¹ *County v. State*, 733 So. 2d 1012, 1014 (Fla. 1999); *Whitney v. Hillsborough County*, 127 So. 486, 490-91 (Fla. 1930).

² Art. VII, s. 1(a), Fla. Const.

³ “Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes[.]” Art. VII, s. 9(a), Fla. Const.

⁴ *Gilreath v. Westgate Daytona, Ltd.*, 871 So. 2d 961, 966 (Fla. 5th DCA 2004). *See also* Op. Att’y Gen. Fla. 00-06 (2000).

⁵ *State ex rel. Seaboard Air Line R. Co. v. Gay*, 35 So. 2d 403, 409 (Fla. 1948). *See also* *Wilson v. School Bd. of Marion County*, 424 So. 2d 16, 19-20 (Fla. 5th DCA 1982); Op. Att’y Gen. Fla. 08-26 (2008) (the statutory enumeration of things upon which tax revenues may be spent “is ordinarily to be construed as excluding from its operation all things not expressly mentioned.”).

⁶ *Alachua County v. Adams*, 677 So. 2d 396 (Fla. 1st DCA 1996); *and see* Ops. Att’y Gen. Fla. 09-28 (2009); 00-06 (2000); 99-72 (1999).

⁷ *Alachua County v. Adams*, 677 So. 2d at 398.

⁸ *Cf. Op. Att'y Gen. Fla. 90-23* (1990) (a municipality could not enact an ordinance allowing a rebate to property owners of a portion of ad valorem taxes collected on their newly annexed property, as an incentive to encourage further annexation of property into the municipality, when there was no specific statutory or constitutional basis for it).

⁹ Section 125.045(2), Fla. Stat., also directs that a liberal construction be applied to provisions in Ch. 125, Fla. Stat., that set forth the powers and duties of the county. By its terms, however, this provision applies only to the powers that may lawfully be exercised by the county, and thus would not allow an exercise of taxing power in a manner that is inconsistent with general law.

AGO 16-04 – March 30, 2016

**MUNICIPALITIES – MUNICIPAL CODE ENFORCEMENT –
DRONES – PRIVACY RIGHTS**

**AUTHORITY OF MUNICIPALITY TO ENACT ORDINANCE
PROHIBITING PRIVATE USE OF DRONES TO INVADE PRIVACY
RIGHTS OF CITIZENS**

To: Mr. David M. Wolpin, Attorney for the City of Aventura

QUESTION:

Does section 934.50, Florida Statutes, preempt the adoption of a municipal ordinance prohibiting the use of drones equipped with imaging devices within the city's limits by private individuals and entities, when such use invades the privacy rights of the city's residents?

SUMMARY:

Section 934.50, Florida Statutes, does not preempt the adoption of a municipal ordinance prohibiting the use of drones by private individuals for surveillance which invades the privacy rights of the city's residents.

You state that the City of Aventura is contemplating the enactment of an ordinance to prohibit the unauthorized use of surveillance drones by private persons, when such use invades the privacy rights of citizens. The proposed ordinance would track the statutory exclusions from the prohibition in section 934.50(4), Florida Statutes, and would impose civil penalties for its violation pursuant to the authority in Chapter 162, Florida Statutes.¹ The city, however, questions whether such an ordinance would be preempted by or be in conflict with section 934.50,

Florida Statutes, the “Freedom from Unwarranted Surveillance Act.”²

Initially, I would note that the discussion below generally addresses the provisions in section 934.50, Florida Statutes, and does not speak to the specific language the city may use in its ordinance.

Section 934.50(3), Florida Statutes, in prohibiting the use of drones,³ provides:

(a) A law enforcement agency may not use a drone to gather evidence or other information.

(b) A person, a state agency, or a political subdivision as defined in s. 11.45 may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person’s reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

Specific exceptions to the prohibition against the use of drones are enumerated.⁴ The statute further provides remedies for violation of its terms:

(5)(a) An aggrieved party may initiate a civil action against a law enforcement agency to obtain all appropriate relief in order to prevent or remedy a violation of this section.

(b) The owner, tenant, occupant, invitee, or licensee of privately owned real property may initiate a civil action for compensatory damages for violations of this section and may seek injunctive relief to prevent future violations of this section against a person, state agency, or political subdivision that violates paragraph (3)(b). In such action, the prevailing party is entitled to recover reasonable attorney fees from the nonprevailing party based on the actual and reasonable time expended by his or her attorney billed at an appropriate hourly rate and, in cases in which the payment of such a fee is contingent on the outcome, without a multiplier, unless the action is tried to verdict, in which case a multiplier of up to twice the actual value of the time expended may be awarded in the discretion of the trial court.

(c) Punitive damages for a violation of paragraph (3)(b) may be sought against a person subject to other requirements and limitations of law, including, but not limited to, part II of chapter 768 and case law.

(d) The remedies provided for a violation of paragraph (3)(b) are cumulative to other existing remedies.⁵

Section 166.021(1), Florida Statutes, a provision of the “Municipal Home Rule Powers Act,” states that municipalities may exercise any power for municipal purposes except when expressly prohibited by law. Section 166.021(3), Florida Statutes, provides that pursuant to the authority set forth in section 2(b), Article VIII, Florida Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject upon which the state Legislature may act except, among other things, any subject that is expressly prohibited by the constitution or any subject that is expressly preempted to state or county government by the Constitution or by general law.⁶ The term “express” as used in section 166.021, Florida Statutes, has been construed to mean a reference that is distinctly stated and not left to inference.⁷

A review of section 934.50, Florida Statutes, does not reveal an express preemption of the regulation of drones, nor do the provisions of the statute appear to be so pervasive so as to preclude any other regulation by a local government.⁸ At this time, there does not appear to be a uniform state law which would preempt local regulation of the use of drones by private persons in the manner proposed by the city.

As was established in *City of Miami Beach v. Rocio Corporation*:⁹

The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails. An ordinance which supplements a statute’s restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute must fail.

Accordingly, it is my opinion that section 934.50, Florida Statutes, does not preempt the adoption of a municipal ordinance prohibiting the use of drones equipped with imaging devices within the city limits by private individuals and entities, when such use invades the privacy rights of the city’s residents.

¹ Chapter 162, Fla. Stat., establishes administrative enforcement procedures and a means of imposing administrative fines by local governing bodies for violations of local codes and ordinances for which no criminal penalty has been specified.

² While you have limited your inquiry to the impact of s. 934.50, Fla. Stat., the Federal Aviation Authority and federal law may be implicated in the regulation of drones. Regrettably, this office does not interpret federal law, so it may be advisable to contact the Federal Aviation Authority for further direction.

³ Section 934.50(2)(a), Fla. Stat., provides:

“Drone” means a powered, aerial vehicle that:

1. Does not carry a human operator;
2. Uses aerodynamic forces to provide vehicle lift;
3. Can fly autonomously or be piloted remotely;
4. Can be expendable or recoverable; and
5. Can carry a lethal or nonlethal payload.

⁴ Section 934.50(4), Fla. Stat.:

EXCEPTIONS.—This section does not prohibit the use of a drone:

(a) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk.

(b) If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone.

(c) If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to,

facilitating the search for a missing person.

(d) By a person or an entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license. However, this exception does not apply to a profession in which the licensee's authorized scope of practice includes obtaining information about the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.

(e) By an employee or a contractor of a property appraiser who uses a drone solely for the purpose of assessing property

for ad valorem taxation.

(f) To capture images by or for an electric, water, or natural gas utility:

1. For operations and maintenance of utility facilities, including facilities used in the generation, transmission, or distribution of electricity, gas, or water, for the purpose of maintaining utility system reliability and integrity;
2. For inspecting utility facilities, including pipelines, to determine construction, repair, maintenance, or replacement needs before, during, and after construction of such facilities;
3. For assessing vegetation growth for the purpose of maintaining clearances on utility rights-of-way;
4. For utility routing, siting, and permitting for the purpose of constructing utility facilities or providing utility service; or
5. For conducting environmental monitoring, as provided by federal, state, or local law, rule, or permit.

(g) For aerial mapping, if the person or entity using a drone for this purpose is operating in compliance with Federal Aviation Administration regulations.

(h) To deliver cargo, if the person or entity using a drone for this purpose is operating in compliance with Federal Aviation Administration regulations.

(i) To capture images necessary for the safe operation or navigation of a drone that is being used for a purpose allowed under federal or Florida law.

⁵ Section 934.50(5), Fla. Stat.

⁶ Section 166.021(3)(b) and (c), Fla. Stat.

⁷ See *Edwards v. State*, 422 So. 2d 84, 85 (Fla. 2d DCA 1982); Op. Att'y Gen. Fla. 84-83 (1984). Cf. *Pierce v. Division of Retirement*, 410 So. 2d 669, 672 (Fla. 2d DCA 1982).

⁸ Compare Inf. Op. to Mr. James D. Palermo, dated September 25, 2002, Florida's Beverage Law does not expressly preempt local regulation prohibiting individuals under the age of 21 from entering a bar.

⁹ 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981), *petition for review denied*, 408 So. 2d 1092 (Fla. 1981).

AGO 16-05 – June 8, 2016

FIREWORKS – MUNICIPALITIES – ORDINANCES

MUNICIPALITY PROHIBITED BY S. 10(5), CH. 2007-67, LAWS OF FLA., FROM ISSUING NEW PERMITS FOR PERMANENT OR TEMPORARY FACILITIES TO SELL FIREWORKS PURSUANT TO S. 791.07, FLA. STAT.

To: Mr. James A. ("Skip") Fowler, City Attorney, City of Altamonte Springs

QUESTION:

Does section 791.07, Florida Statutes, including the note from Chapter 2007-67, Laws of Florida, prohibit the City of Altamonte Springs from issuing a permit for the sale of fireworks in the next calendar year?

SUMMARY:

Section 791.07, Florida Statutes, prevents the City of Altamonte Springs from permitting a new permanent or temporary retail sales facility to engage in sales of fireworks authorized by section 791.07, Florida Statutes, because the city had not issued any such permits before March 8, 2007.

Section 791.02, Florida Statutes, generally prohibits individuals from selling fireworks.¹ Section 791.07, Florida Statutes, however, authorizes individuals to sell fireworks for "frightening birds from agricultural works and fish hatcheries." According to your request, the City of Altamonte Springs has been asked to issue a permit for the sale of fireworks pursuant to this provision. The city has never previously issued a permit for the sale of fireworks for any purpose.

Section 791.07, Florida Statutes, provides:

Agricultural and fish hatchery use.—Nothing in this chapter shall prohibit the importation, purchase, sale, or use of fireworks used or to be used solely and exclusively in frightening birds from agricultural works and fish hatcheries; and such use shall be governed entirely by the rules prescribed by the Department of Agriculture and Consumer Services.²

Appended to this provision is a note quoting section 10(5), Chapter 2007-67, Laws of Florida, which was part of an enactment creating the Consumer Fireworks Task Force within the Department of Agriculture and Consumer Services. The Legislature created the task force in 2007 to study and take public input and testimony on multiple factors related to the sale, regulation, and use of consumer fireworks. The Task Force was directed to present its report to the Legislature by January 15, 2008, whereupon the task force would be dissolved. The enactment closed with paragraph (5), which is now appended to section 791.07 and provides:

Pending completion of the Legislature's review of the task force's report and to ensure that fire prevention and safety standards are uniform, *a new permanent retail sales facility*

engaged in sales otherwise permitted under s. 791.07, Florida Statutes, may not be opened in this state after March 8, 2007, unless the permanent retail sales facility has received site-plan approval and construction has begun on or before March 8, 2007; the number of permits for temporary retail sales facilities, such as tents, engaged in sales otherwise permitted by s. 791.07, Florida Statutes, which are issued after March 8, 2007, by a county, municipality, or other unit of local government may not exceed the number of permits that such governmental entity issued for such facilities during the previous calendar year; and a municipality, county, or other unit of local government may not adopt an ordinance, rule, regulation, or other law after March 8, 2007, which directly prohibits or directly interferes with the safety standards established by state law or the right to purchase, sell, use, or possess consumer fireworks in this state. However, if the Legislature enacts legislation to provide for the comprehensive regulation of fire prevention and safety standards for the use of consumer fireworks to replace this subsection on or before July 1, 2008, this subsection does not prohibit opening any such facility, permitting any such temporary facility, or adopting any such ordinance or other law after such legislation is enacted. (e.s.)

The task force presented its report to the Legislature on January 15, 2008.³ The Legislature, however, did not enact legislation providing comprehensive regulation regarding the use of consumer fireworks by the deadline of July 1, 2008, nor has it repealed the moratorium.⁴

By the plain language of section 10(5), Chapter 2007-67, Laws of Florida, which is quoted in full in the note accompanying section 791.07, Florida Statutes,^[5] local governments are precluded from allowing a new facility to be opened for sale of fireworks, and each local government may now only issue as many permits allowing temporary facilities to engage in such sales as it had issued in calendar year 2006. Having never issued a permit for fireworks sale in the City of Altamonte Springs, the city is now barred from issuing any such permit.

In Attorney General Opinion 2009-18, this office concluded that the City of Coral Springs was precluded from enacting an ordinance imposing any limits on state fireworks laws, because the city had no ordinances regulating fireworks sale or use prior to the moratorium of section 10(5), Chapter 2007-67, Laws of Florida. The opinion concluded by stating that section 10(5) “prohibition remains in effect until the Legislature takes action to remove the prohibition.”

Accordingly, it is my opinion, in light of the language in section 10(5), Chapter 2007-67, Laws of Florida, that the City of Altamonte Springs, which has issued no prior permits for the sale of fireworks, is precluded from issuing any permits for the sale of fireworks in the next calendar

year.

¹ “Fireworks” are defined in section 791.01(4), Fla. Stat., as, in part, “any combustible or explosive composition or substance or combination of substances[.]” The term does not include “sparklers,” defined in paragraph (8) as, in part, “a device which emits showers of sparks upon burning[.]”

² The Department of Agriculture and Consumer Services has enacted two rules implementing s. 791.07, Fla. Stat. Rules 5A-3.001 and 5A-3.002, Fla. Admin. Code, set forth the procedure for obtaining permission from the county sheriff for use of fireworks under s. 791.07, Fla. Stat.

³ See Op. Att’y Gen. Fla. 09-18 (2009), fn. 4, which sets forth some of the recommendations the task force made in its report.

⁴ A bill was proposed in 2008 but died in committee, and is described in fn. 6 of Op. Att’y Gen. Fla. 09-18 (2009). *And see* Inf. Op. to City Attorney Maryanne Downs, City of Orlando, dated June 18, 2000.

⁵ Section 11.242(4)(d), Fla. Stat., provides that “[t]he published edition of the Florida Statutes shall contain ... matters, notes, data, and other material as may be deemed necessary or admissible by the Office of Legislative Services for reference, convenience, or interpretation.”

AGO 16-06 – June 24, 2016

COUNTIES – FIREARMS – PREEMPTION – ZONING

APPLICATION OF COUNTY ZONING ORDINANCE PURSUANT TO PREEMPTION EXCEPTION IN S. 790.33(4)(A), FLA. STAT., TO PROHIBIT MANUFACTURE OF FIREARMS IN THE HOME

To: Mr. Michael S. Craig, County Attorney for Polk County

QUESTION:

Does the preemption exception for zoning ordinances in section 790.33(4)(a), Florida Statutes, allow Polk County to enforce a zoning regulation that prohibits firearms manufacturing within a person’s home?

SUMMARY:

The express exemption for zoning ordinances in section 790.33(4)(a), Florida Statutes, allows Polk County to enforce its regulation restricting citizens from conducting a broad range of businesses, including manufacturing, within the home

in residential areas, to the extent that the ordinance does not prohibit firearms manufacture as a means of regulating firearms or ammunition.

According to your request, an individual in Polk County applied to the federal Bureau of Alcohol, Tobacco, Firearms and Explosives for a license to manufacture and sell firearms in his home. He applied for a Type 1 license, required for a dealer in firearms, and a Type 7 license, required for a manufacturer of firearms.¹ The Bureau directed the applicant to the Polk County Land Development Division for a determination as to whether firearms manufacturing would comply with the county's regulations regarding home occupations. The applicant seeks to conduct the manufacturing in an accessory structure on his property.

This office has repeatedly recognized that in section 790.33(1), Florida Statutes, the Legislature has preempted the entire field of firearms regulation and thus local governments have no authority to enact ordinances regulating firearms and ammunition.² The question you present is whether the county regulation you cite in your letter is allowed by the Legislature's exception in section 790.33(4)(a), Florida Statutes, for certain zoning ordinances. You report that Polk County has previously permitted retail and internet sales of firearms and ammunition, as well as assembly of small amounts of ammunition, but the home occupation at issue here is firearms manufacture.

The Polk County Land Development Code, Article III, was enacted pursuant to the authority of section 163.3202, Florida Statutes, which directs each county and municipality to adopt land development regulations to implement the county's comprehensive plan. Within the code are guidelines for the various standard land use districts, such as residential, commercial, and agricultural. Section 206 addresses accessory property uses, defined as "incidental and subordinate to the primary use of the property" within the districts, such as garage apartments, guest houses, security residences, clubhouses, recreation facilities, child- and adult-care facilities, outdoor storage, etc. Section 206-E regulates home occupations as an accessory property use within a residential land use district, addressing such factors as the percentage of habitable space that may be used, amount of traffic that may be generated, and signage, as well as prohibitions against display of merchandise, noise, glare, fumes, etc. Five types of acceptable home occupations are provided as "examples of home occupations":

- a. Activities conducted principally by telephone, computer, facsimile, or mail.
- b. Studios where handicrafts or objects-of-art are produced.
- c. Teaching and tutoring instruction of no more than four pupils at a time.

- d. Dressmaking or apparel alterations.
- e. Barber and beauty shop (one chair).

In the provision at issue herein, paragraph E.12 lists nine types of at-home occupations that are prohibited:

- a. Adult entertainment.
- b. Automotive service and repair.
- c. Bed and breakfasts.
- d. Eating and drinking establishments.
- e. Kennels.
- f. Manufacturing.**
- g. Tanning salons, tattoo parlors, massage parlors.
- h. Commercial sales or leasing of vehicles.
- i. Any use that requires a Building Code upgrade (i.e., from residential standards to commercial standards) to accommodate the home occupation. (e.s.)

You question whether the county has the power to prohibit firearms manufacture in the applicant's home in light of section 790.33, Florida Statutes, which preempts the field of firearm regulation to the state, as follows:

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

Paragraph (4) of the statute, however, goes on to list five exceptions that are not preempted, including:

- (4) EXCEPTIONS. – This section does not prohibit:
 - (a) Zoning ordinances that encompass firearms businesses

along with other businesses, except that zoning ordinances that are designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition are in conflict with this subsection and are prohibited[.]

Polk County has previously asked a question about the zoning exception, which this office answered in Attorney General Opinion 2008-34. The county asked whether under section 790.33, Florida Statutes, it would be permitted to restrict shooting ranges to commercial rather than residential land use districts, because shooting ranges were considered commercial businesses or high-intensity recreation under the land development code, which would be excluded from residential districts. This office considered the question in light of the zoning exception, stating:

Clearly, a municipality's attempt to regulate firearms is null and void. However, the general provisions in section 790.33, Florida Statutes, recognize that **local zoning ordinances which affect other businesses in the same way are allowed**. The statute is equally clear in prohibiting zoning ordinances designed to restrict or prohibit the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition. Thus, a zoning ordinance prohibiting any commercial business activities within an area zoned for residential use would not appear to be inconsistent with the intent of section 790.33, Florida Statutes. (e.s.)

This office concluded that the county was permitted to restrict the siting of a sports shooting range to a commercial land use area based upon existing zoning regulations.

Section 206-E in the Polk County Land Development Code prohibits nine broad categories of business from being conducted in the home in residential areas, including all types of manufacturing. To the extent that the ordinance treats all of the nine diverse business categories the same way, as well as all forms of manufacturing, it appears that the ordinance was not designed to restrict or prohibit firearms manufacture with the underlying goal of regulating firearms.

Based upon the plain language of the exception for zoning ordinances and the scope of section 206-E of the Polk County Land Development Code, it is my opinion that to the extent that the regulation prohibits all manufacturing as a home occupation, it is not preempted by section 790.33(1), Florida Statutes.

¹ See <https://www.atf.gov/firearms/listing-federal-firearms-licensees->

ffls-2016.

² See Ops. Att’y Gen. Fla. 11-20 (2011), 11-17 (2011), and 05-40 (2005).

AGO 16-07 – June 24, 2016

**GOLF CARTS – CHILD SAFETY RESTRAINTS –
MUNICIPALITIES – SEAT BELTS**

**REGULATION OF GOLF CARTS OPERATING ON PUBLIC
STREETS WITHIN MUNICIPALITY**

To: Mr. A. Kurt Ardaman, City Attorney, City of Winter Garden

QUESTIONS:

1. Is the operation of a golf cart on the public streets of a municipality subject to the child restraint requirements of section 316.613, Florida Statutes?

2. Please clarify the limitation in section 316.212(8), Florida Statutes, that “[a]n ordinance referred to in this section must apply only to an unlicensed driver.”

3. May a municipality adopt an ordinance prohibiting the operation of a golf cart on public streets by a person who does not have a valid driver’s license?

4. Is a person who has a suspended or revoked license considered an “unlicensed driver” within the meaning of section 316.212(8)(a), Florida Statutes?

SUMMARY:

1. The operation of a golf cart on the public streets of a municipality is not subject to the child restraint requirements of section 316.613, Florida Statutes.

2. The plain language of the statute limits a municipality’s ordinance imposing more restrictive operation and safety requirements on golf carts to unlicensed drivers.

3. A municipality may not prohibit the operation of a golf cart by an unlicensed driver.

4. A person with a suspended or revoked driver license appears to be treated as an unlicensed driver under Florida’s motor vehicle licensure laws.

Chapter 316, Florida Statutes, is the “Florida Uniform Traffic Control Law.”¹ By enactment of the law, the Legislature has stated its intent to make uniform traffic laws applicable throughout the state and make it unlawful for any local authority to pass or attempt to enforce an ordinance in conflict with the provisions of Chapter 316. The law recognizes, however, that certain conditions, enumerated in section 316.008, Florida Statutes, require municipalities to pass other traffic ordinances in regulation of municipal traffic that are not required to regulate traffic outside the jurisdiction.²

Section 316.008, Florida Statutes, sets forth specific areas in which municipalities may regulate traffic within their jurisdictions, including the enactment of an ordinance to “permit, control, or regulate the operation of vehicles, *golf carts*, mopeds, motorized scooters, and electric personal assistive mobility devices *on sidewalks or sidewalk areas* when such use is permissible under federal law.”³ (e.s.) Moreover, section 316.212, Florida Statutes, designates roadways upon which golf carts may be operated. While generally the operation of a golf cart upon a public street or roadway is prohibited, the Legislature has recognized, pertinent to your inquiry, that a golf cart may be operated upon “a municipal street that has been designated by a municipality, or a two-lane county road located within the jurisdiction of a municipality designated by that municipality, for use by golf carts.”⁴ Section 316.212, Florida Statutes, further prescribes that golf carts may only be operated during the hours between sunrise and sunset, unless “the responsible governmental entity has determined that a golf cart may be operated during the hours between sunset and sunrise and the golf cart is equipped with headlights, brake lights, turn signals, and a windshield.”⁵

While section 316.212 provides that a local government may enact an ordinance relating to golf cart operation and equipment which is more restrictive than those enumerated in the section, such ordinance may apply only to an unlicensed driver.⁶

Question 1.

Section 316.613, Florida Statutes, in part, states:

(1)(a) Every operator of a motor vehicle as defined in this section, while transporting a child in a motor vehicle operated on the roadways, streets, or highways of this state, shall, if the child is 5 years of age or younger, provide for protection of the child by properly using a crash-tested, federally approved child restraint device.

1. For children aged through 3 years, such restraint device must be a separate carrier or a vehicle manufacturer’s integrated child seat.

2. For children aged 4 through 5 years, a separate carrier, an integrated child seat, or a child booster seat may be used. However, the requirement to use a child restraint device under this subparagraph does not apply when a safety belt is used as required in s. 316.614(4)(a) and the child:

- a. Is being transported gratuitously by an operator who is not a member of the child's immediate family;
- b. Is being transported in a medical emergency situation involving the child; or
- c. Has a medical condition that necessitates an exception as evidenced by appropriate documentation from a health care professional.

(b) The department shall provide notice of the requirement for child restraint devices, which notice shall accompany the delivery of each motor vehicle license tag.

(2) As used in this section, the term "motor vehicle" means a motor vehicle as defined in s. 316.003 that is operated on the roadways, streets, and highways of the state. The term does not include:

- (a) A school bus as defined in s. 316.003(45).
- (b) A bus used for the transportation of persons for compensation, other than a bus regularly used to transport children to or from school, as defined in s. 316.615(1)(b), or in conjunction with school activities.
- (c) A farm tractor or implement of husbandry.
- (d) A truck having a gross vehicle weight rating of more than 26,000 pounds.
- (e) A motorcycle, moped, or bicycle.

The plain language of the statute applies to "every operator of a motor vehicle" and adopts the definition of "motor vehicle" in section 316.003, Florida Statutes. Section 316.003(21), Florida Statutes, defines "motor vehicle" as "a self-propelled vehicle not operated upon rails or guideway, but not including any bicycle, motorized scooter, electric personal assistive mobility device, swamp buggy, or moped. For purposes of s. 316.1001, 'motor vehicle' has the same meaning as in s. 320.01(1)(a)."⁷⁷ Thus, in general, it would appear that a golf cart falls within the definition of a motor vehicle which would be subject to the child safety restraint requirements in section 316.613, Florida Statutes.

However, as noted above, there are statutes which specifically address safety equipment required on golf carts.⁸

Moreover, it is worth noting that section 316.614, Florida Statutes, the “Florida Safety Belt Law,” makes it unlawful for any person to operate a motor vehicle “unless each passenger and the operator of the vehicle under the age of 18 years are restrained by a safety belt or by a child restraint device pursuant to s. 316.613, if applicable[,]” but exempts from its application “motor vehicles that are not required to be equipped with safety belts under federal law.”⁹ You indicate that there is no federal requirement for golf carts to be equipped with safety belts.¹⁰ An informational pamphlet distributed by the Florida Department of Highway Safety and Motor Vehicles indicates that conventional golf carts are not classified as low speed vehicles because they have a top speed of less than 20 miles per hour; consequently, they are subject only to state and local requirements regarding safety equipment.¹¹

In Attorney General Opinion 2004-60, this office was asked whether the operation of a golf cart on the public streets of a golf course community is subject to the child restraint requirements in section 316.613, Florida Statutes, and the seat belt requirement in section 316.614, Florida Statutes. The opinion discussed the general prohibition against the operation of golf carts on the public streets and highways of this state, as well as the specific exemption allowing such operation when a municipality has enacted an ordinance in compliance with the statutory requirements. Relying upon the fact that the Legislature has prescribed the safety equipment which must be included on a golf cart which is operated on a public street, which does not include child restraints or safety belts, the opinion concluded that a municipality could not require the installation of such equipment on golf carts.

The conclusion in Attorney General Opinion 2004-60 that a golf cart operating on public streets pursuant to section 316.212, Florida Statutes, is not required to be outfitted with safety belts or child safety restraints remains supported by the plain language of the statute prescribing the safety equipment required on a golf cart and the position of the Florida Department of Highway Safety and Motor Vehicles. While the general traffic laws require safety belts and child safety restraints on motor vehicles, the more specific statutory requirements for golf carts control.¹²

Question 2.

As noted above, section 316.212, Florida Statutes, generally prohibits the operation of golf carts on the public roads and streets of this state, but specifically authorizes municipalities to designate certain roads for use by golf carts. A municipality may enact an ordinance relating to golf cart operation and equipment which is more restrictive than those enumerated in section 316.212, but it may “apply only to an unlicensed driver.”¹³

You request clarification of the term “must apply only to an unlicensed driver.” This language was added when section 316.212, Florida Statutes, was amended during the 2005 Legislative Session. As initially proposed, House Bill 1697 (2005 Legislative Session), contained language which authorized local governments to enact more restrictive golf cart equipment and operation regulations than state law provides. The language limiting such an ordinance to an unlicensed driver was by amendment on the Senate floor without discussion.¹⁴ There is no readily discernible legislative history indicating any intent behind adding such a restriction, other than the plain language of the statute.

The plain language of the statute indicates an intent that any regulations imposed by municipal ordinance on the operation or equipping of a golf cart on municipal streets is limited to unlicensed drivers operating golf carts. Where the Legislature has prescribed the manner in which something may be accomplished, it by implication prohibits its being done in any other way.¹⁵

Question 3.

By its terms, section 316.212, Florida Statutes, would appear to authorize a municipality to adopt an ordinance prohibiting the operation of a golf cart on public streets by a person who does not have a valid driver’s license, as such a prohibition would apply only to an unlicensed driver (the qualifying limitation on the power of a municipality to enact stricter regulations by ordinance). Section 322.04(1)(e), Florida Statutes, however, exempts from licensure “[a]ny person operating a golf cart, as defined in s. 320.01, which is operated in accordance with the provisions of s. 316.212.” The Legislature has clearly authorized unlicensed drivers to operate golf carts on the highways of this state when operating pursuant to section 316.212, thereby precluding a municipality from enacting an ordinance prohibiting the operation of golf carts by an unlicensed driver.¹⁶

Question 4.

In light of the conclusion in Question Three, no comment is necessary as to whether an individual with a suspended or revoked license is considered an “unlicensed driver” for purposes of prohibiting an unlicensed individual from operating a golf cart on a public highway. There may be instances, however, in which a municipality may enact ordinances applicable to an unlicensed driver which would not otherwise be applicable to licensed drivers operating a golf cart on public streets within a municipality.¹⁷

Section 322.01(17), Florida Statutes, defines a “[d]river license” as “a certificate that, subject to all other requirements of law, authorizes an individual to drive a motor vehicle and denotes an operator’s license as defined in 49 U.S.C. s. 30301.”¹⁸ No definition of “unlicensed

driver” as that term is used in section 316.212, Florida Statutes, has been found. For purposes of the Florida motor vehicle licensure laws, [r]evocation” means “the termination of a licensee’s privilege to drive”¹⁹ and “[s]uspension” is “the temporary withdrawal of a licensee’s privilege to drive a motor vehicle.”²⁰

By comparing the privilege which is bestowed upon an individual who possesses a valid driver license, i.e., the authority to drive a motor vehicle upon the public highways of this state, and the condition imposed upon an individual whose driver license has been suspended or revoked, i.e., the temporary or permanent removal of such authority, it is logical to deduce that a person whose driver license has been suspended or revoked is treated as an unlicensed driver for purposes of enforcement of the traffic laws of this state.²¹

¹ Section 316.001, Fla. Stat.

² Section 316.002, Fla. Stat.

³ Section 316.008(7), Fla. Stat.

⁴ Section 316.212(1), Fla. Stat.

⁵ Section 316.212(5), Fla. Stat.

⁶ Section 316.212(8)(a), Fla. Stat.

⁷ Section 320.01, Fla. Stat., provides a definition, as used in the Florida Statutes, except as otherwise provided, the term:

(1) “Motor vehicle” means:

(a) An automobile, motorcycle, truck, trailer, semitrailer, truck tractor and semitrailer combination, or any other vehicle operated on the roads of this state, used to transport persons or property, and propelled by power other than muscular power, but the term does not include traction engines, road rollers, special mobile equipment as defined in s. 316.003(48), vehicles that run only upon a track, bicycles, swamp buggies, or mopeds.

⁸ See n. 12, *infra*.

⁹ Section 316.614(4)(a), Fla. Stat.

¹⁰ This office has further reviewed 63 FR 33913 (49 CFR Part 571), dated June 17, 1998, imposing stricter safety regulations (including safety belts) on low-speed vehicles (capable of speeds of 20 to 25 miles per hour), but recognizing and discussing that golf carts incapable of exceeding 20 miles per hour would not be subject to the new regulations.

¹¹ See <https://www.flhsmv.gov/pdf/mv/lowspeedvehicles.pdf>. See also

Florida Driver's Handbook (2015), p. 46, listing the safety equipment required on golf carts at: <http://www.fhsmv.gov/handbooks/englishdriverhandbook.pdf>.

¹² See, e.g., *State v. McMillan*, 45 So. 882 (Fla. 1908); *American Bakeries Company v. Haines City*, 180 So. 524 (Fla. 1938); *Adams v. Culver*, 111 So. 2d 665 (Fla. 1959) (rule of statutory construction that a statute covering a particular subject matter controls over a general statutory provision covering the same in general terms).

¹³ Section 316.212(8)(a), Fla. Stat.

¹⁴ Florida Senate, Chamber Action on HB 1697, May 5, 2005 (amendment to amendment by Senators Webster and King).

¹⁵ See *Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) (where Legislature prescribes the mode, that mode must be observed; express statutory direction as to how a thing is to be done is implied prohibition of its being done in any contrary manner).

¹⁶ See *City of Miami Beach v. Rocio Corporation*, 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981), *petition for review denied*, 408 So. 2d 1092 (Fla. 1981) (municipal ordinance is inferior to state law; if conflict arises, state law prevails. Ordinance which supplements statute's restriction of rights may coexist with that statute; ordinance which countermands rights provided by statute must fail).

¹⁷ This office has neither been provided nor does it surmise the particular factual circumstances which would be the basis for an ordinance applicable to an unlicensed driver operating a golf cart.

¹⁸ 49 U.S.C. s. 30301(5), defines "motor vehicle operator's license" as "a license issued by a State authorizing an individual to operate a motor vehicle on public streets, roads, or highways."

¹⁹ Section 322.01(36), Fla. Stat.

²⁰ Section 322.01(40), Fla. Stat.

²¹ See s. 322.34, Fla. Stat., making it a moving violation for a person to drive a vehicle upon the highways of this state while his or her license is suspended, revoked, canceled, or disqualified.

AGO 16-08 – August 2, 2016

**PUBLIC FUNDS – ADMINISTRATIVE AGENCIES –
TRANSPORTATION**

EXPENDITURE OF PUBLIC FUNDS FOR REFRESHMENTS

To: Mr. Paul R. Gougelman, General Counsel, Florida Metropolitan Planning Organization Advisory Council

QUESTION:

Does the MPOAC have the authority to purchase refreshments for meetings, workshops, and seminars with funds received as a federal grant?

SUMMARY:

The MPOAC is not authorized by state law to purchase refreshments for meetings, workshops, and seminars with funds it has received from a federal grant.

While you have posed three separate questions using the terms “necessary and implied power,” as well as “express power” and whether supremacy of federal law controls, this office will address only whether the council has the authority under state law to pay for such expenses.¹

Section 339.175(11), Florida Statutes, creates the Metropolitan Planning Organization Advisory Council to “augment, and not supplant, the role of the individual M.P.O.’s in the cooperative transportation planning process...”² Section 339.175(11)(c), Florida Statutes, enumerates the powers and duties of the MPOAC to:

1. Enter into contracts with individuals, private corporations, and public agencies.
2. Acquire, own, operate, maintain, sell, or lease personal property essential for the conduct of business.
3. Accept funds, grants, assistance, gifts, or bequests from private, local, state, or federal sources.
4. Establish bylaws by action of its governing board providing procedural rules to guide its proceedings and consideration of matters before the council, or, alternatively, adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring powers or duties upon it.
5. Assist M.P.O.’s in carrying out the urbanized area transportation planning process by serving as the principal forum for collective policy discussion pursuant to law.
6. Serve as a clearinghouse for review and comment by M.P.O.’s on the Florida Transportation Plan and on other issues required to comply with federal or state law in carrying out the urbanized area transportation and systematic planning

processes instituted pursuant to s. 339.155.

7. Employ an executive director and such other staff as necessary to perform adequately the functions of the council, within budgetary limitations. The executive director and staff are exempt from part II of chapter 110 and serve at the direction and control of the council. The council is assigned to the Office of the Secretary of the Department of Transportation for fiscal and accountability purposes, but it shall otherwise function independently of the control and direction of the department.

8. Adopt an agency strategic plan that prioritizes steps the agency will take to carry out its mission within the context of the state comprehensive plan and any other statutory mandates and directives.

As a statutorily created entity, the council may only exercise such powers as have been expressly granted by statute or must necessarily be exercised in order to carry out an express power.³ Moreover, it is well settled that any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof.⁴

You state that the council has been advised by the Florida Department of Transportation that reimbursement for the cost of refreshments would likely not be acceptable. This advice supposedly originated from the Department of Financial Services (DFS) and was grounded in the "Reference Guide for State Expenditures" (guide), a publication prepared by the DFS Bureau of Auditing.⁵ The guide "provide[s] state agencies guidance regarding the requirements applicable to the disbursement of funds from the State Treasury, regardless of the payment methods[.]"⁶ Based upon a now repealed rule of administrative procedure, the guide provides a list of prohibited expenditures, unless such are expressly provided by law, which includes "[r]efreshments such as coffee and doughnuts."⁷

While the administrative rule which automatically prohibited the purchase of refreshments with state funds has been repealed, you state that the council has been informed that the prohibition against purchasing refreshments with state funds remains intact based upon Attorney General Opinion 78-101. In that opinion, this office was asked whether a county property appraiser could expend public funds for the development and distribution of informational material explaining the operations of the appraiser's office. Setting forth the basic requirement that a public officer must have the express or necessarily implied statutory authority to expend public funds for a particular purpose, the opinion found that a property appraiser's statutory duties and powers did not include the development and distribution of informational materials about the appraiser's office. In contrast, the opinion cited

several statutes expressly authorizing agencies to prepare materials for informing the public.

In a more recent opinion, this office considered whether a supervisor of elections could use county funds to purchase a membership in local chambers of commerce and to purchase tickets to luncheons and banquets hosted by community organizations such as a chamber. After discussing the supervisor's express statutory authority to work with the business and local community to develop public-private programs to ensure the recruitment of skilled inspectors and clerks, the opinion concluded that the supervisor of elections was authorized based upon that express statutory authority to expend county funds to purchase memberships in local chambers of commerce and to pay related expenses for attendance to meetings of the chambers.⁸

A review of the powers and duties of the MPOAC enumerated in section 339.175(11)(c), Florida Statutes, does not reveal an express authority to purchase refreshments for the meetings or seminars of the council, nor does the purchase of refreshments appear necessary to carry out the council's express powers.⁹ It is my opinion, therefore, that state law does not authorize the expenditure of funds by the MPOAC for refreshments at its meetings, seminars, or conferences.

¹ This office does not interpret federal law and, therefore, offers no comment on the application of such in this instance. Questions involving the application of federal law or regulations would be more appropriately addressed to the federal agency administering the funds. Moreover, whether 2 CFR s. 200.432, recognizing that refreshments may be provided by a non-Federal entity, sponsoring or hosting a conference whose primary purpose is the dissemination of technical information beyond the non-Federal entity, serves as sufficient authority for the purchase of refreshments by the MPOAC at its meetings is a determination which must be made by the Florida Department of Financial Services.

² Section 339.175(11)(a), Fla. Stat.

³ See *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 82 So. 346 (Fla. 1919); *Halifax Drainage District of Volusia County v. State*, 185 So. 123, 129 (Fla. 1938); *State ex rel. Davis v. Jumper Creek Drainage District*, 153 Fla. 451, 14 So. 2d 900, 901 (Fla. 1943) (because the districts are creatures of statute, each board of supervisors must look entirely to the statute for its authority); *Roach v. Loxahatchee Groves Water Control District*, 417 So. 2d 814 (Fla. 4th DCA 1982). And see Ops. Att'y Gen. Fla. 89-34 (1989), 96-66 (1996), 98-20 (1998), and 04-26 (2004).

⁴ *Halifax Drainage District of Volusia County v. State*, *supra*; *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974), *cert. dismissed*, 300 So. 2d 900 (Fla. 1974); *City of Cape Coral*

v. GAC Utilities, Inc., of Florida, 281 So. 2d 493 (Fla. 1973). *And see, e.g.*, Ops. Att’y Gen. Fla. 02-30 (2002) and 04-48 (2004).

⁵ Reference Guide for State Expenditures, Division of Accounting and Auditing, Bureau of Auditing, Department of Financial Services (updated 2011).

⁶ *Id* at p. 7.

⁷ Reference Guide, p. 45, citing Rule 69I-40.103, F.A.C. (repealed 10/14/2013). *See State of Florida, Department of Financial Services v. Peter R. Brown Construction, Inc.*, 108 So. 3d 723 (Fla. 1st DCA 2013) (Rule 69I-40.103, F.A.C., restricting expenditures for decorative items was an invalid exercise of delegated legislative authority).

⁸ *See* Op. Att’y Gen. Fla. 02-16 (2002).

⁹ It should be noted that s. 339.175(11)(b), Fla. Stat., provides: “Members of the council do not receive any compensation for their services, but may be reimbursed from funds made available to council members for travel and per diem expenses incurred in the performance of their council duties as provided in s. 112.061.”

AGO 16-09 – August 2, 2016

**CHARTER SCHOOLS – MUNICIPALITIES – SPECIAL
ASSESSMENT – EXEMPTION**

**WHETHER THE CITY MAY LEVY A SPECIAL ASSESSMENT
AGAINST THE PROPERTY OF A CHARTER SCHOOL**

To: Ms. Victoria Méndez, City Attorney, City of Miami

QUESTION:

May a municipality levy a special assessment against the property of a charter school under Chapter 170 of the Florida Statutes?

SUMMARY:

Section 1002.33(18)(d), Florida Statutes, specifically exempts charter schools from assessments for special benefits; hence, the city may not levy a special assessment against the school.

You state that the City of Miami proposes to levy a special assessment against the property of a charter school. Section 1002.33(18)(d), Florida Statutes, provides:

(d) *Charter school facilities are exempt from assessments of fees for building permits, except as provided in s. 553.80; fees for building and occupational licenses; impact fees or exactions; service availability fees; and assessments for special benefits. (e.s.)*

You contend that section 170.201(2), Florida Statutes, contains an exception to the general rule stated in section 1002.33(18)(d), Florida Statutes. Section 170.201(2), Florida Statutes, provides, in pertinent part:

Property owned or occupied by a religious institution and used as a place of worship or education; by a public or private elementary, middle, or high school; or by a governmentally financed, insured, or subsidized housing facility that is used primarily for persons who are elderly or disabled shall be exempt from any special assessment levied by a municipality to fund any service if the municipality so desires. (e.s.)

You suggest that the final phrase in section 170.201(2) – “if a municipality so desires” – gives municipalities the discretion to choose whether to recognize an exemption from a special assessment for a charter school.¹

In 2006, the Fifth District Court of Appeal considered whether a charter school was subject to a special assessment levied by a community development district located in Osceola County, in *Remington Community Development District v. Education Foundation of Osceola*.² The charter school claimed it was exempt from special assessments based upon a statute in the Education Code,³ but the court pointed out that such provision, as well as most of the statutes in the Code, did not apply to charter schools.⁴ The court considered the provision that you rely upon – section 170.201(2), Florida Statutes – in a footnote, observing that it was “not a model of legislative clarity,” and that it appeared to give the levying authority the discretion whether to impose an assessment against school property.⁵ This is consistent with your interpretation.

The court concluded that a charter school was not exempt from special assessments, because “the legislature has failed to create a statutory exemption for charter schools.”⁶ The court noted that the Legislature had expressly exempted charter schools from being subject to ad valorem taxation in section 1002.33(18)(c), Florida Statutes, and from impact fees and service availability fees in section 1002.33(18)(d), Florida Statutes. Based upon this, the court observed: “[H]ad the legislature intended to create a similar exemption from special assessments, it would have done so expressly.”⁷

The Legislature thereafter did create an express exemption for charter

schools when it amended section 1002.33(18)(d), Florida Statutes, in 2007, to add that charter school facilities are exempt from “assessments for special benefits.”⁸

Any ambiguity or possible conflict between sections 1002.33(18)(d) and 170.201(2), Florida Statutes, is resolved by general rules of statutory interpretation. The Legislature is presumed to intend that laws will operate harmoniously, such that a specific statute addressing a particular subject will control over a more general statute addressing the same subject.⁹ “[T]he specific statute is seen as an exception to the general statute.”¹⁰ In addition, in the event of inconsistency between statutes, “the last expression of legislative will prevails.”¹¹ Section 170.201(2), Florida Statutes, is a general provision addressing exemptions from assessments for a variety of public facilities “if the municipality so desires,” and was enacted in 1996. In contrast, section 1002.33(18)(d), Florida Statutes, addresses only charter schools, provides an express and definite exemption, and was added in 2007.

Therefore, it is my opinion that section 1002.33(18)(d), Florida Statutes, controls and prohibits the City of Miami from levying a special assessment against a charter school.

¹ Section 1002.33(1), Fla. Stat., provides that “[a]ll charter schools in Florida are public schools.”

² 941 So. 2d 15 (Fla. 5th DCA 2006).

³ Section 1013.51(1)(a), Fla. Stat.

⁴ Section 1002.33(16)(a), Fla. Stat., exempts charter schools from all the provisions in Chs. 1000 through 1013, Fla. Stat., except for those enumerated in the statute.

⁵ 941 So. 2d at 17 n.1.

⁶ *Id.* at 16.

⁷ *Id.* at 17 n.3. On motion for rehearing, the Fifth District granted the charter school’s motion to certify two questions of great public importance, one of which asked: “Are charter schools, which are deemed by statute to be public schools, exempt from special assessments?” *Id.* at 18. The Florida Supreme Court *denied review*. *Educ. Found. of Osceola v. Remington Comty. Dev. District*, 946 So. 2d 1069 (Fla. 2006).

⁸ In the session law that contained the assessment amendment, the Legislature singled out the provision amending paragraph (18)(d) to apply retroactively to July 1, 1996, ten years earlier. Ch. 2007-234, s. 10, Laws of Fla.

⁹ See *Palm Beach Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1287 (Fla.

2000); *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994).

¹⁰ *Stevens v. State*, 127 So. 3d 668, 669-70 (Fla. 1st DCA 2013).

¹¹ *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976). *See also In re Sepe*, 421 So. 2d 27, 28 (Fla. 3d DCA 1982).

AGO 16-10 – August 2, 2016

SPECIAL DISTRICTS – ASSESSMENTS – REFERENDUM

**WHETHER SPECIAL DISTRICT MUST HOLD REFERENDUM
BEFORE LEVYING NON-AD VALOREM ASSESSMENT**

To: Ms. Mary M. Viator, Counsel for Indian Trail Improvement District

QUESTION:

Does Chapter 189 or 298, Florida Statutes, require a referendum in order for the Indian Trail Improvement District to levy non-ad valorem assessments to maintain park improvements constructed by the district using no non-ad valorem assessments and located on county-owned land leased to the district at no cost?

SUMMARY:

Chapters 189 and 298, Florida Statutes, do not require a referendum in order for the Indian Trail Improvement District to levy non-ad valorem assessments to maintain park improvements constructed by the district using no non-ad valorem assessments and located on county-owned land leased to the district at no cost.

The Indian Trail Water Control District (the district) is an independent special district operating in Palm Beach County, Florida. The district operates in accordance with its enabling legislation, Chapter 2002-330, Laws of Florida, and applicable provisions of Chapters 189 and 298, Florida Statutes.

According to information you have supplied to this office, in 2001, Palm Beach County leased certain land to the district under a long term lease for use as a district park. The property is leased to the district at no annual cost. The district proposes to construct park improvements on the leased site using no non-ad valorem assessments. The park is currently maintained for the benefit of district residents. After construction is complete, special benefit non-ad valorem assessments will be levied against taxable real property within the district for park

maintenance costs.

Chapter 2002-330, Laws of Florida, codifies the previously enacted special acts relating to the Indian Trail Improvement District.¹ The codification re-creates the district and re-creates and reenacts the district charter. The district's charter, section 3 et seq., Chapter 2002-330, Laws of Florida, provides that the powers of the district include "to construct and maintain recreation areas and facilities, including the authority to provide for the construction, operation, and maintenance of such recreation areas and facilities; provide recreation and playground equipment; . . . and provide any other programs and elements of recreation areas and facilities[.]"²

Chapter 2002-330, Laws of Florida, also "preserve[s] all district authority, including the authority to annually assess and levy taxes or non-ad valorem assessments against all assessable property in the district[.]"³ The powers, functions, and duties of the district regarding non-ad valorem assessments and other revenue-raising capabilities "shall be as set forth in chapters 189, 197, and 298, Florida Statutes, this act, or any other applicable general or special law, as they may be amended from time to time."⁴ The charter requires that non-ad valorem assessments be collected as provided in chapter 197 and 298, Florida Statutes.⁵

As a statutorily created entity, the district may only exercise such powers as have been expressly granted by statute or ordinance or must necessarily be exercised in order to carry out an express power. Unlike counties and municipalities, which have been granted home rule powers, water control districts possess no inherent or home rule powers. Created by statute for specific limited purposes, such districts may exercise only those powers and authority as have been granted by law.⁶ Thus, you ask whether Chapters 189 and 298, Florida Statutes, require the district to conduct a referendum to approve the levy of any special assessments.

Chapter 298, Florida Statutes, requires that special districts subject to the terms of the chapter implement district infrastructure and works projects pursuant to a water control plan.⁷ The notice, hearing, and final adoption of any amendment to a water control plan must comply with the provisions of Chapter 298, Florida Statutes.⁸ You advise that the district's existing Water Control Plan will be amended as required by section 298.301, Florida Statutes, to incorporate the county lease land and improvements.

Before adopting a water district plan amendment, the statutes require that the board of supervisors of the district adopt a resolution to consider the proposed plan amendment and hold a public hearing on the plan amendment. Section 298.301(2), Florida Statutes, provides the form for the public notice to be given and prescribes the length of time

such notice must be published.⁹ At the conclusion of the public hearing, the board of supervisors may determine to proceed with the process, for a plan amendment and direct the district engineer to prepare an engineer's report outlining the property involved, determining benefits and damages, and estimating the cost of implementing the improvements associated with the plan amendment. A final hearing on approval of the proposed plan amendment shall be held at a regularly-scheduled board of supervisors meeting 25 - 60 days after the last scheduled publication of the notice of filing the engineer's report with the district secretary.¹⁰

After approval of the engineer's report by the board of supervisors, and the proposed plan amendment has been finally adopted, the board of supervisors is authorized to levy a non-ad valorem assessment on all lands in the district to which benefits have been assessed "to pay the costs of the completion of the proposed works and improvements, as shown in the adopted plan or plan amendment and in carrying out the objectives of the district[.]"¹¹ The district is also authorized to levy a maintenance assessment:

Under s. 298.54, the board of supervisors may also levy a maintenance assessment on all lands in the district to which benefits have been assessed as may be necessary to operate and maintain the district works and activities and to defray the current expenses of the district.¹²

Section 298.54, Florida Statutes, provides for a "maintenance tax" to maintain and preserve the improvements made pursuant to this chapter and to repair and restore the same.

Nothing in the statutes discussed above imposes a referendum requirement on the district for the levy of non-ad valorem assessments to maintain the park improvements outlined in your request.

You also ask whether provisions of Chapter 189, Florida Statutes (the "Uniform Special District Accountability Act"),¹³ impose a referendum requirement on the district for the levy of non-ad valorem assessments to maintain park improvements. As an independent special district, the Indian Trail Improvement District is subject to the provisions of Part III, Chapter 189, Florida Statutes, and to the general provisions in Part I of that chapter. Section 189.03(3), Florida Statutes, makes it clear that the Legislature intended, with the adoption of Part III of Chapter 189, to "provide by general law for the uniform operation, exercise of power, and procedure for termination of any such independent special district." As provided in the act, the charter of an independent special district must address:

The powers, functions, and duties of the district regarding ad valorem taxation, bond issuance, other revenue-raising capabilities, budget preparation and approval, liens and

foreclosure of liens, use of tax deeds and tax certificates as appropriate for non-ad valorem assessments, and contractual agreements.¹⁴

As discussed herein, the charter for the Indian Trail Improvement District includes no requirement that the levy of non-ad valorem assessments be subject to a referendum and nothing in either Part I or Part III, Chapter 189, Florida Statutes, establishes such a requirement.

In sum, it is my opinion that Chapters 189 and 298, Florida Statutes, do not require a referendum in order for the Indian Trail Improvement District to levy non-ad valorem assessments to maintain park improvements constructed by the district using no non-ad valorem assessments and located on county-owned land leased to the district at no cost.

¹ Pursuant to s. 189.019, Fla. Stat., each special district must codify its special acts into a single act for reenactment by the Legislature by Dec. 1, 2004.

² Section 3, s. 5(1), Ch. 2002-330, Laws of Fla.

³ Section 1, *supra* n.2.

⁴ Section 3, s. 1(2), *id.*

⁵ Section 3, s. 1(13), *supra* n.2; Ch. 197, Fla. Stat., deals with tax collections, sales, and liens, and provides, in s. 197.3632, Fla. Stat., the method for imposing and collecting non-ad valorem taxes. Nothing in ss. 197.3631, 197.3632, or 197.3635, Fla. Stat., dealing with non-ad valorem taxes requires a referendum.

⁶ *See, e.g.*, Op. Att'y Gen. Fla. 90 63 (1990) (in the absence of a statute authorizing the recall of a supervisor of a water control district, the landowners of such a district are not authorized to establish procedures for the recall of a supervisor); Op. Att'y Gen. Fla. 81 17 (1981). *And see Forbes Pioneer Boat Line v. Bd. of Comm'rs of Everglades Drainage Dist.*, 82 So. 346 (Fla. 1919).

⁷ Section 298.301(1), Fla. Stat.

⁸ *Id.*

⁹ Section 298.301(2), Fla. Stat.

¹⁰ *Id.*

¹¹ Section 298.305(1), Fla. Stat.

¹² *Id.*

¹³ See s. 189.01, Fla. Stat., providing the title for the act.

¹⁴ Section 189.031(3)(b), Fla. Stat.

AGO 16-11 – August 2, 2016

JUVENILE CURFEWS – MUNICIPALITIES – ORDINANCES

**WHETHER MUNICIPALITY IS AUTHORIZED TO ALTER TERMS
OF STATUTORY JUVENILE CURFEW AS ADOPTED IN AN
ORDINANCE**

To: Mr. Jeb T. Branham, Town Attorney, Town of Baldwin

QUESTION:

Is a municipality authorized to adopt by ordinance the terms of the state juvenile curfew law described in sections 877.20 - 877.25, Florida Statutes, and to subsequently make changes, by ordinance, in the terms of the statutes for local application?

SUMMARY:

If a municipality adopts an ordinance that incorporates by reference the provisions of sections 877.20 - 877.24, Florida Statutes, it may not alter by ordinance the statutory terms expressed in the statutes. However, section 877.25, Florida Statutes, does not preclude a municipality from adopting an independently crafted juvenile curfew ordinance. Any such locally crafted language must comport with federal and state constitutional law relating to juvenile curfews.

According to information supplied to this office, the Town of Baldwin has adopted the state curfew imposed by section 877.20, Florida Statutes, et seq., without any changes to the statutory language.¹ A number of local governments nearby have adopted curfew ordinances which include individually-crafted provisions relating to the age of minors subject to the curfew. You ask whether the language of section 877.25, Florida Statutes, which states that local governments may “provide restrictions more stringent or less stringent than the curfew imposed under section 877.22” would allow the Town of Baldwin to modify by ordinance the statutory language contained in section 877.22, Florida Statutes, to redefine the term “minor” which the Town has adopted in its curfew ordinance. As discussed below, it is my opinion that the Town may adopt the provisions of section 877.20 - 877.25, Florida Statutes, but has no authority to alter the language of the statute by ordinance to redefine the term “minor.” If the Town of Baldwin decides to draft its own juvenile curfew ordinance it may develop the terms of its ordinance

but should be cognizant of federal and state constitutional law relating to juvenile curfews.

Sections 877.20 - 877.25, Florida Statutes, describe a template for local juvenile curfew ordinances. It was the intent of the Legislature, in adopting these provisions:

to protect minors in this state from harm and victimization, to promote the safety and well-being of minors in this state, to reduce the crime and violence committed by minors in this state, and to provide counties and municipalities with the option of adopting a local juvenile curfew ordinance by incorporating by reference the provisions of ss. 877.20-877.25.²

As used in the act, the term “[m]inor” is defined as “any person under 16 years of age.”³

The act prohibits minors from being in public places and establishments during certain hours⁴ and prescribes penalties⁵ and procedures⁶ for violations of the curfew provisions. The act does not apply in a county or a municipality unless the governing body of the local government adopts a local ordinance:

Sections 877.20-877.24 do not apply in a county or municipality unless the governing body of the county or municipality adopts an ordinance that incorporates by reference the provisions of ss. 877.20-877.24. Sections 877.20-877.24 do not preclude county or municipal ordinances regulating the presence of minors in public places and establishments which provide restrictions more stringent or less stringent than the curfew imposed under s. 877.22.⁷

Thus, it appears that the juvenile curfew ordinance provided in sections 877.20 - 877.24, Florida Statutes, is not preemptive; rather, the act recognizes that a county or municipality may regulate the presence of minors more strictly, or less strictly, than those provisions of sections 877.20 - 877.24, Florida Statutes. However, if, as the Town of Baldwin has done, a county or municipality adopts the statutory scheme as set out in the statutes, it is my opinion that the Town is bound by the language of those statutory provisions. The statute provides no flexibility to alter the framework set forth in sections 877.20 - 877.24, Florida Statutes, if the Town has adopted that framework.⁸ Rather, the statute appears to authorize local governments to craft juvenile curfew ordinances with terms either more or less stringent which may be adopted independently of sections 877.20 - 877.24, Florida Statutes.

In sum, it is my opinion that if a municipality adopts an ordinance that incorporates by reference the provisions of sections 877.20 - 877.24, Florida Statutes, it may not alter by ordinance the statutory terms

expressed in the statutes. Section 877.25, Florida Statutes, does not, however, preclude a municipality from adopting an independently crafted juvenile curfew ordinance, but any such locally-crafted language must comport with federal and state constitutional law relating to juvenile curfews.⁹

¹ The Baldwin, Florida, Code of Ordinances has adopted the state statutes establishing a curfew for minors in the following terms: “Pursuant to Florida Statutes s. 877.25, the provisions of Florida Statutes ss. 877.20 - 877.24 are hereby adopted by reference as part of the Code of the Town of Baldwin.” The provisions of the state statutes are not set out at length in the code.

² Section 877.20, Fla. Stat.

³ Section 877.21(3), Fla. Stat.

⁴ Section 877.22(1)(a), Fla. Stat., prohibits minors from being or remaining in a public place or establishment between 11:00 p.m. and 5:00 a.m. of the following day, Sunday through Thursday, except for legal holidays; (b) prohibits minors from being or remaining in a public place or establishment between 12:01 a.m. and 6:00 a.m. on Saturdays, Sundays, or legal holidays.

⁵ Penalties include written warnings for a first violation and a fine of \$50.00 and being charged with a civil infraction for those already having received a prior written warning. Section 877.22(3), Fla. Stat. I note that this act came into the statutes in Ch. 94-209, Laws of Fla., which was a major juvenile crime bill.

⁶ Section 877.22(4), Fla. Stat., states that a minor violating a curfew and taken into custody must be transported to a police station or other facility conducting a curfew program and requires that the parents of the minor be contacted to take custody of the minor.

⁷ Section 877.25, Fla. Stat.

⁸ While municipalities in Florida do have home rule powers, Article I, section 18 of the Florida Constitution specifically provides that the imposition of penalties may only be accomplished “as provided by law.” This office has concluded that the term “by law” means an act of the Legislature and does not include municipal ordinances. *See* Ops. Att’y Gen. Fla. 2009-53 and 84-39; *Advisory Opinion to Governor*, 22 So. 2d 398 (Fla. 1945); *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145 (Fla. 4th DCA 1982).

⁹ *See, for example, State v. J.P. v. T.M.*, 907 So. 2d 1101 (Fla. 2005) (“Because the juveniles’ fundamental rights to privacy and freedom of movement are burdened by the curfew ordinances, the cities must have a compelling governmental interest in regulating the activities of minors

during the hours of the curfew and the ordinances must be narrowly tailored to accomplish their goals by the least intrusive means available.”).

AGO 16-12 – October 5, 2016

MUNICIPALITIES – VACATION RENTALS – PREEMPTION – ZONING

WHETHER THE CITY COULD LIMIT VACATION RENTALS THROUGH A PROPOSED ORDINANCE (1) IMPOSING DISTANCE SEPARATION REQUIREMENTS OR (2) LIMITING THE PERCENTAGE OR NUMBER OF VACATION RENTALS, IN LIGHT OF THE PREEMPTION LANGUAGE REGARDING VACATION RENTALS IN S. 509.032(7), FLA. STAT.

To: Mr. Kerry L. Ezrol, City Attorney, Ms. Farah L. Nerette, Assistant City Attorney, City of Wilton Manors

QUESTION:

Does section 509.032(7), Florida Statutes, prohibit the city from: (A) Implementing distance separation requirements between vacation rentals; or (B) Limiting the percentage or number of vacation rentals on city streets or in city neighborhoods?

SUMMARY:

Section 509.032(7)(b), Florida Statutes, allows some regulation of vacation rentals, but prevents local government from enacting a law, ordinance, or regulation that prohibits vacation rentals. Therefore, the city may not impose spacing or proportional regulations that would have the effect of preventing eligible housing as defined in section 509.242, Florida Statutes, from being used as a vacation rental.

You state that Wilton Manors is considering enacting a zoning ordinance that would set distance separation requirements between vacation rentals or would limit the percentage or number of vacation rentals on city streets or in city neighborhoods. You represent that the ordinance would implement various health, safety, and welfare goals, such as reducing vehicle traffic; reducing the need for additional parking; reducing noise detrimental to surrounding residential uses; reducing the need for additional police, fire, emergency services, utilities, and neighborhood watch programs; and maintaining the residential character of neighborhoods. Although municipalities are permitted to enact zoning ordinances to accomplish such legitimate goals, an ordinance may not conflict with a controlling provision of state law.¹ You believe that the proposed ordinance would not forbid

vacation rentals and thus would not run afoul of section 509.032(7)(b), Florida Statutes, which states that a local government may not enact an ordinance that “prohibit[s] vacation rentals.” You have not provided this office with the language of your proposed ordinance (nor would this office interpret such an ordinance if you had), thus, my comments must be general in nature.

To answer your question, it is necessary to review the Legislature’s treatment of preemption in relation to vacation rentals in section 509.032, Florida Statutes.² Part I of Chapter 509, Florida Statutes, contains laws affecting public lodging and public food service establishments. In 1993, the Legislature amended section 509.032, Florida Statutes, adding paragraph (7) to preempt all regulation of public lodging³ and public food service establishments to the state. The provision stated, in pertinent part: “The regulation and inspection of public lodging establishments and public food service establishments ... are preempted to the state.”⁴

In 2011, the Legislature combined two types of public lodgings – “resort condominiums” and “resort dwellings” – under the new term “vacation rentals,” and added a provision to specifically address an issue regarding vacation-rental regulation. According to the final staff analysis:

The regulation of public lodging establishments is preempted to the state. Local governments can conduct inspections of public lodging establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code.⁵ However, some local governments have been prohibiting or restricting transient resort condominiums and dwellings by ordinance.⁶

To address this issue, the Legislature added a new provision, (7)(b), which stated:

(b) A local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.⁷

In 2014, the Legislature amended paragraph (7)(b), “revising the permitted scope of local laws, ordinances, and regulations regarding vacation rentals.”⁸ The provision now allows limited new regulation subject to the following limitations:

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

The final staff analysis for the legislation stated: “The bill removes the total preemption to the state for the regulation of vacation rentals, and permits local governments to regulate vacation rentals, provided those regulations do not prohibit vacation rentals or restrict the duration or frequency of vacation rentals.”⁹

That same year, the City of Wilton Manors asked this office whether the 2014 amendment permitted the city to use zoning ordinances to regulate the location of vacation rentals. In Attorney General Opinion 2014-09, this office concluded:

[W]hile a local government may regulate vacation rentals, it may not enact a local law, ordinance, or regulation which would operate to prohibit vacation rentals. *To the extent a zoning ordinance addresses vacation rentals in an attempt to prohibit them in a particular area where residences are otherwise allowed, it would appear that a local government would have exceeded the regulatory authority granted in section 509.032(7) (b), Florida Statutes. (e.s.)*

Section 509.242(1)(c), Florida Statutes, defines “vacation rental” as “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.” Section 509.013(4)(a)1., Florida Statutes, defines “transient public lodging establishment” 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.”

It appears from these definitions that any unit, group of units, or house as enumerated in section 509.242(1)(c), Florida Statutes, is eligible to be used as a transient public lodging establishment and, hence, a vacation rental. There are no statutory provisions that impose restrictions against owners from offering eligible housing as vacation rentals. Nor have you identified any municipal law, ordinance, or regulation enacted prior to the grandfathering date in the statute, June 1, 2011, that restricted any such housing from being offered as a vacation rental in Wilton Manors.¹⁰ An ordinance requiring certain distances between vacation rentals or limiting their numbers in areas within the city could result in a prohibition against using eligible units as vacation rentals when other existing units have already satisfied the spacing or percentage formulae. Although the proposed ordinance would not absolutely forbid vacation rentals in the City of Wilton Manors, a distance separation requirement and a numerical or percentage limitation have the express purpose of prohibiting units

above a certain threshold from being used as vacation rentals, which is contrary to section 509.032(7)(b), Florida Statutes.¹¹ When there is any doubt as to whether a municipal ordinance may impair the operation of a statute, the doubt must be resolved in favor of the statute and against the ordinance.¹²

In *Moore v. Thompson*,¹³ the Florida Supreme Court discussed the propriety of legislation that prohibited a class of businesses from operating, in the guise of regulating it. A blue law made it unlawful for businesses to sell motor vehicles on Sunday and legal holidays. Although the Court acknowledged that the Legislature had clear statutory authority to regulate automobile dealerships, this law exceeded such authority.

While the act is one purporting to regulate this particular business, it is much more than a regulation. Chapter 318, 319 and 320, Florida Statutes, F.S.A., are illustrations of regulations of a particular industry while the object of this act is—not to regulate—but to prohibit such business on designated days.

*The power to regulate does not encompass the power to prohibit.*¹⁴
(e.s.)

The Court concluded that the state had failed to provide a valid and substantial reason to single out automobile dealerships, and ruled that the law was unconstitutional. The Court cited an earlier case involving legislation in 1938 requiring all persons conducting auctions to post a bond of \$2,000.00 and pay a license tax of \$1,000.00 every fifteen days, regardless of the character or amount of the sale.¹⁵ The Court had concluded in that case that the law was improper because the unreasonably high fees made it prohibitive rather than regulative. “Such an imposition amounts to a prohibition of large numbers from engaging in a legitimate business and is beyond all the necessities for the legislation.”¹⁶ Similarly, the proposed Wilton Manors ordinance might prohibit certain vacation rentals, when section 509.032(7) only permits local governments to regulate them.

The two circuit court orders you provided to this office do not support the proposed Wilton Manors ordinance. In one case, the Flagler County Circuit Court was asked to consider an ordinance prescribing the documentation that must be provided to the county for short-term vacation rentals, and a maximum occupancy limit for all vacation rentals.¹⁷ In the other, the Manatee County Circuit Court considered an ordinance setting a maximum occupancy limit for each vacation rental unit in the City of Ana Maria.¹⁸ The court in each case determined that the ordinance at issue did not prohibit vacation rentals or regulate their duration or frequency in violation of section 509.032(7)(b), Florida Statutes. Those ordinances are distinguishable from what Wilton Manors proposes, because they merely added regulatory requirements

for existing and new vacation rentals and did not limit the number of vacation rentals that would be allowed in a geographic area.

Indeed, in the final staff analysis of the 2014 legislation, the section entitled “Effect of the Bill” stated:

The bill permits local governments to create regulation that distinguishes vacation rentals from other residential property. In the past [prior to June 1, 2011], local government regulations have included noise, parking, registration, and signage requirements for vacation rentals.¹⁹

These matters and those addressed in the circuit court cases you cited are the kinds of regulations that are now permitted under the 2014 amendment to paragraph (7)(b) as exceptions to state preemption.

Accordingly, to the extent that the ordinance you are considering could have the effect of prohibiting a statutorily-eligible housing unit from being used as a vacation rental, it is my opinion that the City of Wilton Manors would be exceeding the regulatory authority granted in section 509.032(7)(b), Florida Statutes.

¹ See *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1246-47 (Fla. 2006); *City of Casselberry v. Orange County Police Benevolent Ass'n*, 482 So. 2d 336, 340 (Fla. 1986).

² See *Massey v. David*, 979 So. 2d 931, 942 (Fla. 2008) (legislative history can be an “invaluable tool” in determining the meaning of statutory language); *Kasischke v. State*, 991, So. 2d 803, 810 (Fla. 2008) (although staff analyses do not determine legislative intent, they provide “one touchstone of the collective legislative will”).

³ Public lodging establishments included hotels, motels, resort condominiums, nontransient and transient apartments, rooming houses, resort dwellings, and bed and breakfast inns. Section 509.242, Fla. Stat. (2010).

⁴ Section 2, Ch. 93-53, Laws of Fla.

⁵ The Legislature had amended s. 509.032, Fla. Stat., in 2000, and added to paragraph (7): “This subsection does not preempt the authority of a local government or local enforcement district to conduct inspections of public lodging and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code, pursuant to ss. 553.80 and 633.022.” Section 47, Ch. 2000-141, Laws of Fla.

⁶ House of Representatives Final Bill Analysis, CS/CS/CS/HB 883, dated June 28, 2011.

- ⁷ See s. 2, Ch. 2011-119, Laws of Fla.
- ⁸ See Preamble, Ch. 2014-71, Laws of Fla.
- ⁹ House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, dated June 19, 2014.
- ¹⁰ See Inf. Op. to County Attorney Albert J. Hadeed, Flagler County, dated October 22, 2013 (concluding under the plain language of s. 509.242(1)(c) that a single-family house could be used as a vacation rental, subject to regulation by the state, when there were no zoning ordinances in effect prior to June 1, 2011, that would have prevented such use).
- ¹¹ The definitions of “prohibit” in Black’s Law Dictionary (10th ed. 2014), are: “1. To forbid by law[,]” and, “2. To prevent, preclude, or severely hinder.”
- ¹² See *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).
- ¹³ 126 So. 2d 543 (Fla. 1960).
- ¹⁴ *Id.* at 550.
- ¹⁵ *Id.* at 551 (citing *State ex rel. James v. Gerell*, 188 So. 812 (Fla. 1938)).
- ¹⁶ *Gerell*, 188 So. at 814.
- ¹⁷ *30 Cinnamon Beach Way, LLC v. Flagler County*, 2015-CA-167 (Fla. 7th Cir. Ct. June 1, 2015), *aff’d*, 183 So. 3d 373 (Fla. 5th DCA 2016) (per curiam).
- ¹⁸ *Fla. Gulf Coast Vacation Homes, LLC v. City of Anna Maria*, 2016-CA-629 (Fla. 12th Cir. Ct. April 11, 2016).
- ¹⁹ See *supra* n. 9.

AGO 16-13 – October 5, 2016

**COUNTIES – MUNICIPAL SERVICE TAXING OR BENEFIT
UNIT – ESSENTIAL MUNICIPAL SERVICES**

WHETHER THE COUNTY MAY EXPAND AN EXISTING MSTU/
MSBU TO PROVIDE LANDSCAPING, SIGNAGE, CANAL
MAINTENANCE, AND CANAL RESTORATION UNDER S.
125.01(1)(Q), FLA. STAT.

To: Mr. Robert B. Shillinger, County Attorney, Monroe County

QUESTION:

Whether Monroe County is authorized pursuant to section 125.01(1)(q), Florida Statutes, to establish a municipal service taxing or benefit unit for landscaping, signage, and canal maintenance and restoration?

SUMMARY:

Section 125.01(1)(q), Florida Statutes, allows a county to create municipal service taxing or benefit units for the provision of enumerated services and “other essential facilities and municipal service[s].” Whether the intended landscaping, signage, canal maintenance, and canal restoration are essential municipal services is a mixed question of law and fact that the County, rather than this office, must determine.

You state that Monroe County has a municipal service benefit unit that was established in 1992 to provide security services for residential areas of Duck Key by means of annual non-ad valorem assessments.¹ You would like to expand the Duck Key Security District to provide landscaping, signage, and canal maintenance and restoration, within which you include property beautification, lawn trimming, planting and landscaping, installation and repair of signage in the residential areas and rights-of-way, mangrove trimming along canals and waterways, and other canal maintenance and restoration projects to improve navigability and water quality. You indicate that the County understands that if these new services are authorized, the County must amend the ordinance used to create the Duck Key Security District, which is limited to the provision of security services.

Section 125.01(1)(q), Florida Statutes, authorizes the county’s legislative and governing body – the board of county commissioners – to establish a municipal service taxing unit (“MSTU”) and/or a municipal service benefit unit (“MSBU”) to provide the kinds of municipal services enumerated in the statute. Specifically, the statute provides that county government may:

(q) Establish, and subsequently merge or abolish those created hereunder, municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire protection; law enforcement; beach erosion control; recreation service and facilities; water; alternative water supplies, including, but not limited to, reclaimed water and water from aquifer storage and recovery and desalination systems; streets; sidewalks; street lighting; garbage and trash collection and disposal; waste and sewage collection and disposal; drainage; transportation; indigent health care services; mental health care services; and other essential facilities and municipal services from funds derived from service charges, special assessments, or taxes within such

unit only.

Because the services specifically enumerated in paragraph (q) do not include those that you propose, namely landscaping, signage, canal maintenance, and canal restoration, these would only be allowed if the county commission determines that they qualify as “other essential facilities and municipal services.”

As you acknowledge, section 125.01, Florida Statutes, does not define “other essential facilities and municipal services.” Use of the term “other” makes clear that the services a county seeks to provide through an MSTU or MSBU must be comparable to the services previously enumerated therein. “The powers enumerated in section 125.01 are not all inclusive, and a county’s authority includes that which is ‘reasonably implied or incidental to carrying out [its] enumerated powers,’ limited only by general or special law.”² In section 125.01(3)(b), Florida Statutes, the Legislature stated that the provisions of the statute must be “liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.”

The term “essential” applies both to “facilities and municipal services.”³ Absent any statutory definition, it is useful to consider how the term has been employed elsewhere in the municipal-services context.⁴ The Florida Supreme Court has specifically addressed the meaning of the term “essential” as it is used when defining “municipal or public purpose” under Article VII, section 3(a) of the Florida Constitution. In order to qualify for an exemption from ad valorem taxation under that provision,⁵ an activity must be shown to be “essential to the health, morals, safety, and general welfare of the people within the municipality.”⁶ (e.s.) The court quoted three dictionary definitions of “essential” – basic, necessary, or indispensable – and concluded that “inherent in the word essential is the concept of great need or necessity.”⁷

Accordingly, it is reasonable to conclude that the term “essential” in section 125.01(1)(q), Florida Statutes, indicates that there must be a great need or necessity for the non-enumerated municipal services that are sought to be provided to district taxpayers within an MSTU or MSBU.

This office has looked to section 170.01, Florida Statutes, which constitutes a lengthy listing of municipal services that may be appropriately funded by special assessment, to determine whether a county might provide a particular service to certain property by special assessment.⁸ Landscaping and signage are specifically included as municipal services under section 170.01(1), Florida Statutes, as are “reconstruction, repair, renovation” of canals, and “improvements to permit the passage and navigation of watercraft.”⁹

The determination of whether the provision of landscaping, signage, and canal maintenance and restoration constitute services essential to the people of Monroe County's proposed MSTU or MSBU presents a mixed question of law and fact which is thus beyond the purview of this office.¹⁰

Accordingly, it is my opinion that under section 125.01(1)(q), Florida Statutes, which allows a county to provide essential municipal services to municipal service taxing or benefit units, the County must decide the mixed question of law and fact as to whether the intended landscaping, signage, canal maintenance, and canal restoration are essential municipal services.

¹ Monroe County collects the assessment on each property within the Security District pursuant to the uniform method for collection of non-ad valorem assessments set forth in s. 197.3632, Fla. Stat.

² *Donnelly v. Marion County*, 851 So. 2d 256, 261 (Fla. 5th DCA 2003) (quoting *Sockol v. Kimmins Recycling Corp.*, 729 So. 2d 998, 1001 [Fla. 4th DCA 1999]).

³ *See, e.g., State v. Huggins*, 802 So. 2d 276, 277-78 (Fla. 2001) (in the phrase, "occupied structure or dwelling," in a sentencing statute, the adjective "occupied" modified both "structure" and "dwelling"). "Phrases constructed like the phrase at issue ... are commonly construed to mean that the adjective modifies subsequent nouns, for example, 'qualified man or woman' and 'governmental fine or penalty' mean 'qualified man or qualified woman' and 'governmental fine or governmental penalty,' respectively." *Id.* at 278.

⁴ *See, e.g., Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470, 472 (Fla. 1995) ("[T]he context in which a term is used may be referred to in ascertaining the meaning of that term."); *Sneed v. State*, 736 So. 2d 1274, 1276 (Fla. 4th DCA 1999) (the meaning of a statutory term should be consistent with "context and ordinary usage," and "the surrounding body of law into which the provision must be integrated").

⁵ Art. VII, s. 3(a), Fla. Const., provides, in part: "All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation."

⁶ *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 264 (Fla. 2005) (concluding that a statute requiring local governments to pay ad valorem taxes on their telecommunications services did not facially conflict with art. VII, s. 3(a), because such services were not necessarily essential to the health, morals, safety, and general welfare of the people within such local government). *Accord City of Ft. Pierce v. Treasure Coast Marina*, 2016 WL 1660600 (Fla. 4th DCA 2016). *See also State v. City of Jacksonville*, 50 So. 2d 532, 535 (Fla. 1951) ("Though there was

a time when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality.”).

⁷ *Fla. Dep’t of Revenue*, 918 So. 2d at 264.

⁸ *See Op. Att’y Gen. Fla. 01-82* (2001) (concluding that the county is authorized to levy a special assessment for replacing above-ground with underground electric transmission lines, so long as supported by appropriate findings).

⁹ *See City of Winter Springs v. State*, 776 So. 2d 255, 257 n.2 (Fla. 2001) (landscaping and signage within a special district were “well-recognized” as municipal services, *see, e.g.*, s. 170.01(1), Fla. Stat., and were the proper subjects of a special assessment bond when supported by legislative findings of the city).

¹⁰ *See Op. Att’y Gen. Fla. 99-70* (1999) (observing that the municipality must make the final determination as to whether maintenance of its canal system is a valid transportation expenditure under s. 336.025).

AGO 16-14 – October 5, 2016

MUNICIPALITIES – PUBLIC EMPLOYEES – SEVERANCE PAY – EARLY RETIREMENT PLAN

WHETHER THE CITY MAY AWARD SEVERANCE PAY TO
EMPLOYEES HIRED BEFORE JULY 1, 2011; WHETHER THE
CITY MAY ADOPT A NEW SEVERANCE PAY PROGRAM
CONSISTENT WITH S. 215.425, FLA. STAT.; AND WHETHER THE
CITY MAY ADOPT AN EARLY RETIREMENT PLAN

To: Mr. Scott E. Simpson, City Attorney, City of South Daytona

QUESTIONS:

1. Does section 215.425, Florida Statutes, prohibit a local government from adopting a personnel policy providing payment in lieu of notice to employees who are terminated without cause or who submit a resignation?

2. If no, does section 215.425, Florida Statutes, limit the payment in lieu of notice to 20 weeks?

3. If yes, are employees who were employed by the City prior to the effective date of the amendment to section 215.425, Florida Statutes, grandfathered under the existing City’s policy

and therefore still entitled to receive the full payment in lieu of notice even if in excess of 20 weeks?

4. Can the City provide an early retirement program that provides benefits that exceed 20 weeks of compensation?

SUMMARY:

1. Section 215.425(4)(a), Florida Statutes, permits a local government to adopt a personnel policy providing severance pay to employees terminated without cause or who submit a resignation.

2. Section 215.425(4)(a)1., Florida Statutes, limits such severance pay to 20 weeks.

3. The amendment to section 215.425, Florida Statutes, operated prospectively, and therefore, under the South Daytona ordinance that existed prior to the effective date of July 1, 2011, the City Manager retains the discretion to decide whether to provide severance pay to City employees who were hired before that date.

4. Section 215.425(4)(d)2., Florida Statutes, provides that an early retirement program that complies with part VII of Chapter 112, Florida Statutes, is not subject to the limitations on severance pay found in section 215.425, Florida Statutes.

You state that in South Daytona, city employees who are not in a bargaining unit serve at the pleasure of the City Manager and can be terminated from employment without cause. In 2009, the City adopted an ordinance authorizing severance pay in lieu of notice to employees who resign or who are terminated from employment without cause.¹ The municipal ordinance provides, in part: “The city manager shall, in the manager’s sole direction, be entitled to provide upon resignation and/or termination of a nonbargaining unit personnel, pay in lieu of notice, up to but not exceeding the limits set forth in subsection 2-402(c) [.]”²

Section 215.425, Florida Statutes, has long prohibited state and local governments from using public funds to pay additional compensation for work that has already been performed for an agreed-upon wage.³

No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made; nor shall any money be appropriated or paid on any claim the subject matter of which has not been provided for by preexisting laws, unless such compensation or claim is

allowed by a law enacted by two-thirds of the members elected to each house of the Legislature.⁴

In 1992, the Legislature amended the statute to add the following exemption from this general prohibition for local governments:

The provisions of this section also do not apply to extra compensation given to county or municipal employees pursuant to policies adopted by county or municipal ordinances.⁵

In the same bill, the Legislature amended sections 125.01, Florida Statutes, and 166.021, Florida Statutes, setting forth the powers and duties of county and municipal government, respectively, to permit programs providing extra compensation to employees after the work had been performed.⁶ The South Daytona ordinance quoted above was consistent with the 1992 amendments.

In 2011, the Legislature amended section 215.425, Florida Statutes, removing the exception specifically addressed to local governments and adding provisions dealing with bonuses and severance pay. Your first three questions pertain to application of the following severance pay provisions of the statute:

(4)(a) On or after July 1, 2011, a unit of government that enters into a contract or employment agreement, or renewal or renegotiation of an existing contract or employment agreement, that contains a provision for severance pay with an officer, agent, employee, or contractor must include the following provisions in the contract:

1. A requirement that severance pay provided may not exceed an amount greater than 20 weeks of compensation.
2. A prohibition of provision of severance pay when the officer, agent, employee, or contractor has been fired for misconduct, as defined in s. 443.036(29), by the unit of government.

(b) On or after July 1, 2011, an officer, agent, employee, or contractor may receive severance pay that is not provided for in a contract or employment agreement if the severance pay represents the settlement of an employment dispute. Such severance pay may not exceed an amount greater than 6 weeks of compensation. The settlement may not include provisions that limit the ability of any party to the settlement to discuss the dispute or settlement.

(c) This subsection does not create an entitlement to severance pay in the absence of its authorization.

(d) As used in this subsection, the term “severance pay” means the actual or constructive compensation, including salary, benefits, or perquisites, for employment services yet to be rendered which is provided to an employee who has recently been or is about to be terminated.⁷

Questions 1. and 2.

Paragraph (4)(a) clearly states that a unit of government is permitted to provide an employee with severance pay upon termination of employment, when an employment agreement has been negotiated or renegotiated after July 1, 2011, so long as the amount does not exceed 20 weeks of compensation and the employee was not terminated for misconduct.

Question 3.

In 2009, when South Daytona enacted its ordinance giving the city manager the discretion to award severance pay in lieu of notice, the 1992 amendment to section 215.425, Florida Statutes (quoted *supra* on page 2), authorized municipalities to provide such extra compensation programs by ordinance as an exception to the general prohibition against compensation for work already performed. The language of the 2011 amendment, by stating that it specifically applied to employment contracts or agreements entered after July 1, 2011, and to employment disputes settled after July 1, 2011, and to employment contracts it to operate prospectively.⁸

Accordingly, the 2011 amendment to section 215.425, Florida Statutes, limiting severance pay to 20 weeks, applies only to employment agreements negotiated after July 1, 2011. There is no language in the amendment disturbing any employment arrangements that were entered into pursuant to lawful ordinance prior to that date that have not been renegotiated.

Question 4.

Included in the 2011 amendment, section 215.425(4)(d), Florida Statutes, states that the term “severance pay” does not encompass “[e]arly retirement under provisions established in an actuarially funded pension plan subject to part VII of chapter 112[.]” This unambiguous language establishes that an early retirement program consistent with this provision would not be subject to the limitations for severance pay found in paragraph (4)(a).

Therefore, it is my opinion that section 215.425, Florida Statutes, permits the City Manager of South Daytona to award severance pay to employees who were hired prior to July 1, 2011, as authorized by then-existing statutes and municipal ordinance, and permits South

Daytona to adopt a personnel policy providing severance pay in lieu of notice in an amount no greater than 20 weeks for employees hired or who renegotiate a contract after July 1, 2011, who are not discharged based upon misconduct. The statute further permits the City to adopt an early retirement program providing benefits in excess of 20 weeks of compensation so long as it is an actuarially funded pension plan subject to Part VII of Chapter 112, Florida Statutes.

¹ “Wages in lieu of notice” are payments for a specified period of time made to employees who are discharged immediately without cause. Such employees remain on the payroll for a period of time in which they would ordinarily have been working after giving notice. *See* Op. Att’y Gen. Fla. 91-51 (1991).

² Art. VIII, s. 2-402(d), South Daytona Code of Ordinances.

³ This office has previously stated that s. 215.425, Fla. Stat., is intended to “carry out a basic and fundamental principle that public funds may be used only for a public purpose and it is contrary to this policy to use public funds to give extra compensation for work which has already been performed for an agreed upon wage.” (emphasis in original) Op. Att’y Gen. Fla. 97-21 (1997).

⁴ This prohibition was originally enacted in Art. XVI, s. 11 of the 1885 Fla. Const., and was converted to statute by Art. XII, s. 10 of the 1968 Constitution.

⁵ Section 3, Ch. 92-90, Laws of Fla.

⁶ Sections 1 and 2, Ch. 92-90, Laws of Fla.

⁷ Section 1, Ch. 2011-143, Laws of Fla.

⁸ *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). Moreover, a substantive law will not be applied retroactively when this would impair an existing right or duty. *See id.*; *Fla. Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.*, 67 So. 3d 187, 194-95 (Fla. 2011); *Morris v. Swanson*, 940 So. 2d 1256, 1257-58 (Fla. 1st DCA 2006); Op. Att’y Gen. Fla. 13-27 (2013). South Daytona’s 2009 ordinance stated that the city manager was “entitled” to provide severance pay to employees who resigned or were terminated.

AGO 16-15 – October 5, 2016

**DUAL OFFICE-HOLDING – COUNTIES – MUNICIPALITIES –
PLANNING AND ZONING BOARDS – HISTORIC
PRESERVATION BOARDS**

INDIVIDUAL MAY NOT SIMULTANEOUSLY SERVE ON THE

CITY'S PLANNING AND ZONING BOARD AND THE COUNTY'S
HISTORIC PRESERVATION BOARD AS BOTH INVOLVE
EXERCISE OF THE SOVEREIGN POWER

To: Mr. William J. Gallo, City of Lighthouse Point Planning and Zoning Board

QUESTION:

Does simultaneous service on the City of Lighthouse Point Planning and Zoning Board and the Broward County Historic Preservation Board violate the constitutional prohibition against dual office-holding?

SUMMARY:

Simultaneous service on the City of Lighthouse Point Planning and Zoning Board and the Broward County Historic Preservation Board would violate the prohibition against dual office-holding in section 5(a), Article II, Florida Constitution.

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

No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

In addressing the question you have raised, it must be determined whether each of the positions you hold is an office for purposes of the dual office-holding prohibition. No definition is provided for the terms "office" and "officer" in the Constitution. Opinions of the Florida Supreme Court and the Attorney General's Office, however, have focused upon the nature of the powers and duties of a particular position to determine whether it is an "office" or an "employment" which falls outside the scope of the prohibition. The Florida Supreme Court has stated:

The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an "employment" does not comprehend

a delegation of any part of the sovereign authority. The term "office" embraces the idea of tenure, duration and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office. . . .¹

In Attorney General Opinions 89-25 and 90-33, this office found that local planning and zoning commissions possessing the power to grant variances that are approved without review or that are final unless appealed to the county commission did not fall within the exception for advisory bodies. While statutory bodies possessing only advisory powers are excepted from the dual office-holding prohibition, section 5(a), Article II, Florida Constitution, does not recognize an exception for bodies whose powers are substantially advisory.²

Certain town committees that are given the authority to make factual determinations, review permit applications, issue permits, grant variances, or impose fines have been determined to be exercising sovereign powers and, therefore, were offices for purposes of the dual office-holding prohibition. However, where a committee or board merely makes non-binding recommendations and has not been delegated any power to make factual determinations or exercise any portion of sovereign power, there is no office subject to the constitutional prohibition.³

You have provided information regarding the powers and duties of both boards. Relative to the Lighthouse Point Planning and Zoning Board, the city's code of ordinances provides that the board, among other things, grants temporary permits for nonconforming uses of lands and buildings with the city, hears and decides appeals of administrative decisions involving zoning regulations, hears and determines grants of variances, and reviews conditional use approval applications.⁴ Given the discussion above regarding what constitutes an office, the power of the planning and zoning board to grant variances and to decide appeals would be characteristics of an office which would subject the position to the dual office-holding prohibition.

In relation to the county's historic preservation board, the county code reflects the board's duty to: make recommendations on historic resource designations; approve, approve with conditions, or deny certificates of appropriateness and certificates to dig; and carry out duties assigned by the county commission.⁵ Of note, the code provides that "no building permits shall be issued for new construction, demolition, alteration, rehabilitation, signage, or any other physical modification of a historic resource, . . ., without the prior issuance of a certificate of appropriateness by the Broward County Historic Preservation Board[.]"⁶

While the weight of the duties of the historic preservation board appear to be advisory in nature, its duties include the approval or denial of certificates of appropriateness which is an essential determination before issuance of a building permit for a historic resource.

As discussed above, there is no exception for bodies with substantially or predominately advisory duties. In light of the historic board's authority to approve or deny certificates of appropriateness, there is the exercise of a sovereign power which would make a position on the board an office subject to the dual office-holding prohibition in section 5, Article II, Florida Constitution.

In sum, it is my opinion that simultaneous membership on the City of Lighthouse Point Planning and Zoning Board and the Broward County Historic Preservation Board would violate section 5(a), Article II, Florida Constitution, prohibiting dual office-holding.⁷

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

² *And see* Op. Att'y Gen. Fla. 73-47 (1973) (if a parks, planning and zoning commission was granted more than mere advisory powers, that fact would exclude commission members from the exemption in s. 5(a), Art. II, Fla. Const.). *Accord* Op. Att'y Gen. Fla. 69-62 (1969).

³ *See* Ops Att'y Gen. Fla. 2013-22 and 2005-59.

⁴ Section 42-281(c), Lighthouse Point Code of Ordinances.

⁵ Section 5-530(b), Art. XVII, Declaration of legislative intent and purpose, Broward County Code of Ordinances.

⁶ Section 5-531(a), Scope and exemptions, Broward County Code of Ordinances.

⁷ *See In re Advisory Opinion to the Governor*, 79 So. 874 (Fla. 1918), in which the Court stated that when a person holding one office is appointed to and accepts another office, such acceptance vacates the person's right and status to the first office; and Ops. Att'y Gen. Fla. 94-40 (1994) and 77-63 (1977). *Cf. Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970) ("The acceptance of an incompatible office by one already holding office operates as a resignation of the first.").

AGO 16-16 – October 5, 2016

**SOUTH BROWARD HOSPITAL DISTRICT – PUBLIC
RECORDS – ATTORNEY'S FEES – PUBLIC FUNDS**

AUTHORITY OF DISTRICT TO REIMBURSE ATTORNEY'S
FEES TO INDIVIDUAL COMMISSIONER RETAINING PRIVATE
COUNSEL TO RESPOND TO PUBLIC RECORD REQUEST

*To: Ms. Kimarie Stratos, General Counsel, Memorial Healthcare
System, South Broward Hospital District*

QUESTION:

May the district reimburse a board member's attorney's fees incurred by her in responding to a public records request pertaining to her board service when no suit, claim, charge, or action has been instituted against the commissioner during the time the attorney's fees were incurred?

SUMMARY:

The South Broward Hospital District is not authorized to reimburse a board member for attorney's fees incurred by her in responding to a public records request when no suit, claim, charge or action has been instituted against the commissioner during the time the attorney's fees were incurred.

You have provided the following background. The South Broward Hospital District (hospital district) was conducting a search for a new chief operating officer. A public records request was made of all commissioners in relation to the search. Allegations of violation of section 286.011, Florida Statutes (Government in the Sunshine Law) were made, but no legal action was filed, and the subject commissioner retained private counsel to assist in her response to the public records request. The district did not provide a district email address or phone for individual commissioners to conduct district business such that the commissioner's private computer and telephone records had to be reviewed to recover the requested public records. Due to her concerns about the independence of the district's counsel, the commissioner was unwilling to turn over all of her records to the district's counsel for review or to make use of the district's information technology staff who were made available to all commissioners to extract and copy responsive material from their individual devices. At no point were any legal charges filed against the commissioner.

Section 286.011(7), Florida Statutes, provides:

Whenever any member of any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision is charged with a violation of this section and is subsequently acquitted, the board or commission is authorized to reimburse said member for any portion of his or her reasonable attorney's fees.

While the language in section 286.011(7), Florida Statutes, is clear in the parameters which must be met before a member of a board may be reimbursed for his or her attorney's fees in successfully defending a charge of violation of the Government in the Sunshine Law, the facts in this situation are that no legal action has been filed against the commissioner and she retained private counsel in order to respond to a public records request.¹ The authority extended by section 286.011(7), Florida Statutes, to reimburse attorney's fees, therefore, is not applicable.

Chapter 2004-397, Laws of Florida, is the enabling legislation for the South Broward Hospital District. The act sets forth the broad powers of the district's governing board to carry out the district's purpose of providing health care services.² The commissioners are required to

cause true and accurate minutes and records to be kept of all business transacted by them, and shall keep full, true, and complete books of account and minutes, which minutes, records, and books of account shall at all reasonable times be open and subject to the inspection of inhabitants of the district; and any person desiring to do so may make or procure a copy of the minutes, records, or books of account, or such portions thereof as he may desire.³

There is no question that all records of the district are public records, subject to inspection and copying by anyone requesting same, unless exempted or made confidential by law.⁴ While there is provision for the recovery of attorney's fees when a plaintiff files a civil action against an agency to enforce the provisions of this chapter and the court determines that such agency unlawfully refused to permit a public record to be inspected or copied,⁵ there is no provision similar to that found in section 286.011(7), Florida Statutes, nor is there authority for the reimbursement of attorney's fees to a public official who has hired a private attorney to assist in the production of public records.

As an administrative agency created by statute, the South Broward Hospital District is constrained to exercise those powers expressly granted or by implication necessary to carry out the express authority granted them by statute.⁶ Any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof.⁷

Therefore, it is my opinion that the South Broward Hospital District is not authorized to reimburse a board member for attorney's fees incurred by her in responding to a public records request when no suit, claim, charge, or action has been instituted against the commissioner during the time the attorney's fees were incurred.

¹ See also s. 111.07, Fla. Stat., authorizing any agency of the state, or any county, municipality, or political subdivision of the state to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

² See s. 4, Ch. 2004-397, Laws of Fla.

³ Section 5, Ch. 2004-397, Laws of Fla.

⁴ See s. 119.07(1), Fla. Stat.

⁵ See s. 119.12, Fla. Stat.

⁶ See *State ex rel. Greenberg v. Fla. State Bd. of Dentistry*, 297 So. 2d 628, 634 (Fla. 1st DCA 1974) (administrative agencies are creatures of statute and have only such powers as statutes confer); *Fiat Motors of North America, Inc. v. Calvin*, 356 So. 2d 908, 909 (Fla. 1st DCA 1978).

⁷ See, e.g., *Gardinier, Inc. v. Fla. Dep't of Pollution Control*, 300 So. 2d 75, 76 (Fla. 1st DCA 1974); *Williams v. Fla. Real Estate Comm'n*, 232 So. 2d 239, 240 (Fla. 4th DCA 1970).

AGO 16-17 – October 5, 2016

JUDGES – SPECIAL MASTERS – FIREARMS

WHETHER A SPECIAL MASTER IS A “JUDGE” FOR PURPOSES
OF CARRYING A FIREARM INTO HIS OR HER COURTROOM
PURSUANT TO S. 790.06(12)(A)5., FLA. STAT.

To: Mr. Charles D. Johnson, Special Master for Lake County

QUESTION:

Is a special master considered a “judge” as that term is used in section 790.06(12)(a)5., Florida Statutes, for purposes of carrying a concealed firearm into his or her courtroom?

SUMMARY:

A special master is not a “judge” for purposes of carrying a concealed firearm into his or her courtroom pursuant to section 790.06(12)(a)5., Florida Statutes.

You have advised this office that you are the appointed Special Master

for Lake County, Florida, and preside over quasi-judicial hearings involving matters related to violations of the Lake County Code and Land Use Development. You are requesting my opinion on whether you, as a special master, fall within the exception to the prohibition against carrying a concealed weapon in a courtroom which is extended to judges under section 790.06(12)(a)5., Florida Statutes.

The Department of Agriculture and Consumer Services is authorized by section 790.06, Florida Statutes, to issue licenses to carry concealed weapons or concealed firearms.¹ Any person in compliance with the licensure requirements may carry a concealed weapon, but must carry the license, and valid identification, at all times while in possession of the concealed weapon.²

However, section 790.06(12)(a), Florida Statutes, contains the following general prohibition and exception:

(12)(a) A license issued under this section does not authorize any person to openly carry a handgun or carry a concealed weapon or firearm into:

* * *

4. Any courthouse;

5. *Any courtroom, except that nothing in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom.*] (e.s.)

Thus, the statute contains a specific, limited exception from the prohibition for a judge to carry a concealed weapon into his or her own courtroom.

Section 790.001, Florida Statutes, providing definitions to be used in construing Chapter 790, Florida Statutes, contains no definition of the term “judge.” However, other provisions of the chapter also refer to judges and may be helpful in addressing your question.

Section 790.061, Florida Statutes, states that:

Judges and justices; exceptions from licensure provisions.—A county court judge, circuit court judge, district court of appeal judge, justice of the supreme court, federal district court judge, or federal court of appeals judge serving in this state is not required to comply with the provisions of s. 790.06 in order to receive a license to carry a concealed weapon or firearm, except that any such justice or judge must comply with the provisions of s. 790.06(2)(h). The Department

of Agriculture and Consumer Services shall issue a license to carry a concealed weapon or firearm to any such justice or judge upon demonstration of competence of the justice or judge pursuant to s. 790.06(2)(h).

This office, in Attorney General Opinion 93-29, concluded that the language of section 790.061, Florida Statutes (1992 Supp.), which contains a limited exception from the licensure requirements of section 790.06, Florida Statutes, for certain judges, applied to state court judges only. The requestor of that opinion, a federal district court judge serving in this state, had asked whether he was exempt from the licensure provisions of the statute. While the statute was amended in 1995 to include both federal district court judges and federal court of appeals judges, Attorney General Opinion 93-29 relies on the legislative history for the original statute to determine that the exception was intended to apply strictly to state court judges and justices and did not encompass federal judges or otherwise reach outside the clear terms of the statute.

Likewise, it is my opinion that the term “judges” as it is used in section 790.06(12)(a)5., Florida Statutes, is intended to apply to those officers vested by the Florida Constitution with the judicial power of the state.³ I read the term “judges” as used in section 790.06, Florida Statutes, providing for a license to carry concealed weapons or firearms, in pari materia with section 790.061, Florida Statutes, which excepts such judges from the requirement to comply with a number of those licensure requirements.⁴ That is, a judge or justice as described in section 790.061, Florida Statutes, is not required to comply with the provisions of section 790.06 in order to receive a license to carry a concealed weapon or firearm [except to demonstrate competence with a firearm pursuant to the provisions of section 790.06(2)(h)] and is authorized to carry that concealed firearm into his or her courtroom while others may not.

The intent of section 790.06(12)(a)5., Florida Statutes, is clear. Where the language of a statute is unambiguous, the clearly expressed intent must be given effect and there is no room for construction.⁵ Where the statute’s language is plain, definite in meaning without ambiguity, it fixes the legislative intention so that interpretation and construction are not needed.⁶

Finally, I note that statutory exceptions to general prohibitions must be construed strictly against the one who attempts to take advantage of the exception⁷ and that exceptions to statutes are to be strictly construed and limited to their intended purpose.⁸ Thus, the statutory exception to the general prohibition against carrying concealed firearms into a courtroom which would allow a judge to do so, must be construed strictly and will not be read to extend to others such as special magistrates.

In sum, it is my opinion that a special master may not be considered

a “judge” within the scope of section 790.06(12)(a)5., Florida Statutes, for purposes of carrying a concealed firearm into his or her courtroom.

¹ Section 790.06(1), Fla. Stat.

² *Id.*

³ See s. 1, Art. V, Fla. Const. *And see* ss. 3, 4, 5, and 6, Art. V, Fla. Const., providing for the organization and jurisdiction of such courts.

⁴ Related statutes should be read together so that they illuminate one another and are harmonized. *See Ideal Farms Drainage Dist. v. Certain Lands*, 19 So. 2d 234 (Fla. 1944); *State v. Haddock*, 140 So. 2d 631 (Fla. 1st DCA 1962).

⁵ *Fine v. Moran*, 77 So. 533, 536 (Fla. 1917); *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000).

⁶ *Osborne v. Simpson*, 114 So. 543, 544 (Fla. 1927); *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984).

⁷ *State v. Nourse*, 340 So. 2d 966, 969 (Fla. 3d DCA 1976); Op. Att’y Gen. Fla. 99-11 (1999).

⁸ *See Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097 (Fla. 1990); *Farrey v. Bettendorf*, 96 So. 2d 889 (Fla. 1957); *Coe v. Broward County*, 327 So. 2d 69 (Fla. 4th DCA 1976), *aff’d*, 341 So. 2d 762 (Fla. 1976).

AGO 16-18 – December 5, 2016

TAXATION – COUNTIES – TOURIST DEVELOPMENT TAX

WHETHER THE COUNTY CAN FUND LAW ENFORCEMENT SERVICES AT A NATURE CENTER USING TOURIST DEVELOPMENT TAX REVENUES UNDER S. 125.0104(5)(B), FLA. STAT.

To: Ms. Michelle Blankenship Jordan, County Attorney for Jackson County

QUESTION:

Does section 125.0104(5)(b), Florida Statutes, authorize the use of tourist development tax revenues to provide law enforcement at a nature center?

SUMMARY:

Section 125.0104(5)(b), Florida Statutes, allows county

government to use tourist development tax revenues to “acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote” a nature center, and does not authorize law enforcement services.

Section 125.0104, Florida Statutes, the Local Option Tourist Development Act, authorizes any county of this state to levy a “tourist development tax.” Section 125.0104(5)(a), Florida Statutes, enumerates the permissible uses of revenues generated from the tax, including, for example, the building and operating of convention centers, sports stadiums, aquariums, museums, tourist bureaus, beach park facilities, etc., and the promotion of tourism. Section 125.0104(5)(b), Florida Statutes, authorizes additional uses, permitting counties with fewer than 750,000 people:

to acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more zoological parks, fishing piers or nature centers which are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public.

You previously submitted a request for an opinion as to whether section 125.0104(5)(b), Florida Statutes, authorized Jackson County to expend tourist development tax revenues to construct a nature center with a boat ramp and an elevated platform for bird and landscape observation. In response, this office issued Attorney General Opinion 2015-14, concluding that such uses were consistent with the statute, if the county were to make the legislative determination that the project related to and primarily promoted tourism.

In your current inquiry, you suggest that expenses associated with law enforcement services (sheriff and police) might be authorized by subsection (5)(b) as part of the “maintenance” or “operation” of the nature center. Under a plain reading of the provision, however, the terms “maintain” and “operate” apply to the running of the nature center itself, whereas law enforcement would be providing the additional services of preventing and detecting unlawful activity occurring at the nature center.¹ Section 125.0104(5)(e), Florida Statutes, explicitly states: “Any use of the local option tourist development tax revenues collected pursuant to this section for a purpose not *expressly authorized* by ... paragraphs (a) – (d) of this subsection is expressly prohibited.”² (e.s.) When there is doubt as to whether the Legislature has expressly authorized a particular exercise of taxation power, such doubt must be resolved against the local government imposing the tax.³

A general rule of statutory construction is that, when the Legislature wishes to authorize certain conduct, it well knows how to express itself, which is best illustrated by the Legislature’s inclusion of such conduct in another part of the same statute in question.⁴ In 2016, the Legislature

amended section 125.0104(5), Florida Statutes, to add a new subsection (c), expressly authorizing use of tourist development tax dollars for law enforcement in certain counties, as follows:

(c) A county located adjacent to the Gulf of Mexico or the Atlantic Ocean, except a county that receives revenue from taxes levied pursuant to s. 125.0108, which meets the following criteria may use up to 10 percent of the tax revenue received pursuant to this section to reimburse expenses incurred in providing public safety services, including emergency medical services as defined in s. 401.107(3), and *law enforcement services, which are needed to address impacts related to increased tourism and visitors to an area*. However, if taxes collected pursuant to this section are used to reimburse emergency medical services or public safety services for tourism or special events, the governing board of a county or municipality may not use such taxes to supplant the normal operating expenses of an emergency medical services department, a fire department, a sheriff's office, or a police department. To receive reimbursement, the county must:

1. Generate a minimum of \$10 million in annual proceeds from any tax, or any combination of taxes, authorized to be levied pursuant to this section;
2. Have at least three municipalities; and
3. Have an estimated population of less than 225,000, according to the most recent population estimate prepared pursuant to s. 186.901, excluding the inmate population.

The board of county commissioners must by majority vote approve reimbursement made pursuant to this paragraph upon receipt of a recommendation from the tourist development council. (e.s.)

You acknowledge in your letter that Jackson County is not eligible to use revenues under this provision. Had the Legislature intended other counties to use revenues generated by the tourist development tax to provide law enforcement services, it would have expressly authorized such use in a manner comparable to this provision.

In Attorney General Opinion 1990-14, this office concluded that subsection (5)(a)2. [now (5)(a)3.], which permits use of tourist development tax revenues “[t]o promote and advertise tourism[.]” did not authorize the use of such funds either for regular law enforcement or for extra police protection during special events or holidays.

The provision of law enforcement within the county is an integral and constituent part of county government, with no

special benefit or service being extended to a particular area or property or to a portion or segment of the county. It is the performance of a governmental duty owed to the general public at large.

The funding of general law enforcement within the county or the provision of additional law enforcement at special events or during particular holidays may, in fact, affect and benefit tourism within the county. However, the provision of such law enforcement functions owed to the public at large, whether generally or at special events or during certain holidays, does not have the promotion and advertisement of tourism as its primary purpose.

Similarly, although the provision of law enforcement at a nature center could be said to beneficially affect its maintenance and operation, law enforcement's primary function would not be to maintain or operate the facility, but instead, to enforce the laws of Florida.

In Attorney General Opinion 1990-55, Nassau County asked whether the county could use tourist development funds to, among other uses, fund "additional law enforcement patrols or lifeguards" at the beach. This office reiterated that law enforcement functions are owed to the public at large and were not subsumed within the authorization for "beach improvement, maintenance, renourishment, restoration, and erosion control" under section 125.0104(5)(a)4., Florida Statutes [now (5)(a)5.]. Construing these terms by reference to other language in the statute, this office concluded that the enumerated terms related "to the actual, physical nature of the beach" and did not contemplate "activities which do not protect or enhance the physical nature of the beach."

Finally, Flagler County previously asked this office whether tourist development tax funds could be used to purchase all-terrain vehicles for the police and fire department to use on Flagler Beach. The county represented that law enforcement would use the vehicles to "watch for persons causing damage to the dunes and enforce state laws and county and city ordinances protecting the beach and dunes," and would "protect citizens and tourists and ... survey the beach for erosion damage and the need for maintenance and renourishment." The county suggested that these uses were allowed by subsection (5)(a)4. [now (5)(a)5.], which permits use of tourist development tax revenues "[t]o finance ... beach improvement, maintenance, renourishment, restoration, and erosion control[.]" While this office stated in Attorney General Opinion 1992-66 that it was the role of the county government to determine whether the use of all-terrain vehicles would primarily serve to control beach erosion, the Attorney General suggested that "[t]he proposed beach patrols appear to be designed primarily to provide a monitoring system for activities on the beach, i.e., protecting beachgoers[.]" which would not be an appropriate use of tourist development tax dollars under the

statute.

Consistent with the reasoning of these prior opinions, the terms applicable to your request, authorizing use of tourist development tax revenues to “acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote” a nature center, appear to allow the county to direct funds only to support the actual nature center facility and environs, including personnel to run the center. In contrast, as part of their regular duties, law enforcement officers are required to provide preventive and protective services to the general public, including those who are making use of the nature center, and there is no provision in the statute allowing the county to fund general law enforcement activity at a nature center with tourist development tax revenues.

Therefore, I am of the opinion that revenues derived from the local tourist development tax may not be used to fund regular police protection at a nature center under section 125.0104(5)(b), Florida Statutes.

¹ Section 943.10(1), Fla. Stat., defines the primary responsibility of a law enforcement officers as “the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state.” See also s. 112.531(1), Fla. Stat.

² Black’s Law Dictionary defines the term “express” to mean: “Clearly and unmistakably communicated; stated with directness and clarity.” *Black’s Law Dictionary* (10th ed. 2014). See, e.g., *Phantom of Clearwater, Inc. v Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005).

³ See *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994).

⁴ See *Cason v. Dep’t of Mgmt. Services*, 944 So. 2d 306, 315 (Fla. 2006); *Rollins v. Pizzarelli*, 761 So. 2d 294, 298-99 (Fla. 2000); *Paragon Health Services, Inc. v. Central Palm Beach Cmty. Mental Health Center, Inc.*, 859 So. 2d 1233, 1235 (Fla. 4th DCA 2003).

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