Building Code Inspector -- Dual Office-Holding

Number: AGO 2013-25

Date: November 05, 2013

Subject:
Building Code Inspector -- Dual Office-Holding

Ms. Marilyn W. Miller
Fowler White Boggs P.A.
Post Office Box 1567
Fort Myers, Florida 33902

RE: BUILDING CODE INSPECTOR – INTERLOCAL AGREEMENT – COUNTIES – MUNICIPALITIES – DUAL OFFICE-HOLDING – whether simultaneous service as county and municipal building official pursuant to interlocal agreement violates dual office-holding prohibition. Art. II, s. 5(a), Fla. Const.; ss. 163.01 and 468.617, Fla. Stat.

Dear Ms. Miller:

As Town Attorney for the Town of Fort Myers Beach, you have asked for my opinion on substantially the following question:

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

In sum:

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

According to your letter, the Town of Fort Myers Beach has limited staff and resources and would like to enter into an interlocal agreement with Lee County, pursuant to the provisions of section 163.01, Florida Statutes (the Florida Interlocal Cooperation Act of 1969).[1] The interlocal agreement would provide for the delegation by the town to the county the authority to conduct building code plans review, building code inspections, and building official oversight services for property within the jurisdictional limits of the Town. You recognize that this office has concluded that a building official, charged with issuing permits and certificates of occupancy and

administering a local government's building code, is an "officer" for purposes of Florida's constitutional dual office-holding prohibition[2] and ask whether the simultaneous service of the county's building official as the town's building official under the provisions of an interlocal agreement would violate Article II, section 5(a), Florida Constitution.[3]

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

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

The statute authorizes any public agency[5] of this state to exercise jointly with any other public agency of this state, of another state, or the federal government, any power, privilege, or authority that those agencies "share in common and which each might exercise separately."[6] The statute requires that any joint exercise of power pursuant to the act must be made by contract in the form of an interlocal agreement and may provide for such things as the purpose of the interlocal agreement and the method by which that purpose will be accomplished; the duration of the agreement and the method by which it may be rescinded or terminated; the manner of financial support for the purpose set forth in the agreement; the manner of employing, engaging, compensating, transferring or discharging necessary personnel; and the manner of responding for liabilities that may be incurred through performance of the interlocal agreement and insuring against any such liability.[7] The interlocal agreement may provide that one or more parties to the agreement will administer or execute the agreement and that one or more parties to the agreement may agree to provide all or a part of the services set forth in the agreement. Further, the act authorizes the creation of a separate legal or administrative entity to administer or execute the agreement in the form of a commission, board, or council constituted under the terms of the agreement.[8] The act also provides:

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

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

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

this part to perform building code inspections or plan reviews. An individual or entity may not inspect or examine plans on projects in which the individual or entity designed or permitted the projects.
(3) Nothing in this part shall prohibit any county or municipal government, school board, community college board, state university, or state agency from entering into any contract with any person or entity for the provision of building code inspection services regulated under this part, and notwithstanding any other statutory provision, such county or municipal governments may enter into contracts.
(4) Nothing in this part prohibits any building code inspector, plans examiner, or building code administrator holding a limited certificate who is employed by a jurisdiction within a small county as defined in s. 339.2818[10] from providing building code inspection, plans review, or building code administration services to another jurisdiction within a small county."

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

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

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

Sincerely,

Pam Bondi
Attorney General

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

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

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

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

[4] Section 163.01(2), Fla. Stat.

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

[6] Section 163.01(4), Fla. Stat.

[7] *See* s. 163.01(5), Fla. Stat.

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

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

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

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

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

[13] *See Bath Club, Inc. v. Dade County*, 394 So. 2d 110, 112 (Fla. 1981); *State v. Florida State Turnpike Authority*, 80 So. 2d 337 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla.

1939); *Amos v. Mathews*, 126 So. 308 (Fla. 1930); Op. Att'y Gen. Fla. 13-18 (2013). *Compare* s. 166.0495, Fla. Stat., authorizing interlocal agreements to provide law enforcement services between municipalities.