ANNUAL REPORT

of the

ATTORNEY GENERAL

STATE OF FLORIDA

January 1 through December 31, 1976

ROBERT L. SHEVIN
Attorney General

Tallahassee, Florida
1977

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 of 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 official acts and opinions.

Serves as a reporter for the Supreme Court.

Assembles the Circuit Judges in biennial session to consider the betterment of the Judicial System, including recommendations for Legislature.

Reports to the Governor, for transmission to the Legislature, on the operation of laws of the last previous Session, including decisions of the courts affecting these laws.

COST DATA

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ROBERT L. SHEVIN
Attorney General

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

December 31, 1976

LETTER OF TRANSMITTAL

Honorable Reubin O'D. A w
Governor of Florida
The Capitol

Dear Governor:

I have the honor of submitting to you herewith the annual report of the Attorney General for the year 1976. This report is submitted to you by virtue of the constitutional mandate directing each officer of the executive department to make a full report of the actions of his office to the Governor.

This report includes opinions rendered by me as Attorney General, an organizational chart setting forth the structure of the Department of Legal Affairs, and the personnel of my office.

Statutes and constitutional sections cited and an alphabetical subject index may be found in the last portion of the report.

Most respectfully,

Robert L. Shevin

ROBERT L. SHEVIN
ATTORNEY GENERAL

RLS/dg

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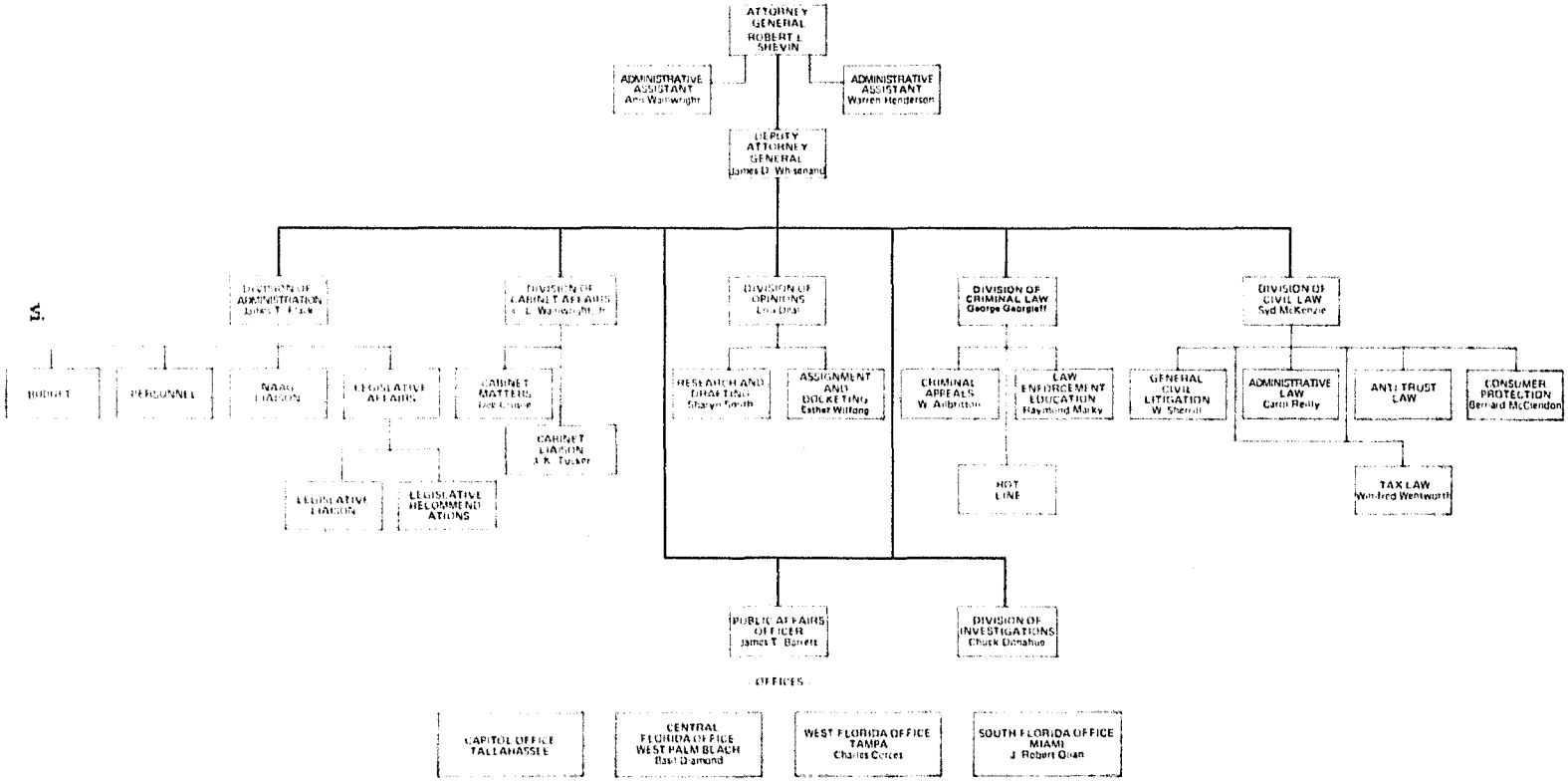

DEPARTMENT OF LEGAL AFFAIRS

The Capitol, Tallahassee 32304 (904) 488-1891

ROBERT L. SHEVIN

Attorney General

JIM WHISENAND

Deputy Attorney General

ASSISTANT ATTORNEYS GENERAL

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Robert L. Shevin
The Capitol
Tallahassee

ANNUAL REPORT

of the

ATTORNEY GENERAL

State of Florida

January 1 through December 31, 1976

076-1—January 6, 1976

LEGISLATIVE EMPLOYEES

OUTSIDE EMPLOYMENT—PRIVATE PRACTICE OF LAW

To: Donald L. Tucker, Speaker, House of Representatives, Tallahassee

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

May full- or part-time legislative employees of the House of Representatives, with the written permission of the Speaker, engage in the practice of law after the regular hours of their employment have terminated?

SUMMARY:

Pending legislative or judicial clarification, under s. 11.26(1), F. S., as amended by Ch. 75-208, Laws of Florida, full- or part-time legislative employees may engage in the practice of law during their off-duty hours in matters unrelated to legislation or their legislative duties that will not interfere with the full and faithful performance of their legislative duties.

Until 1975, employees of the Legislature were specifically prohibited from engaging in the practice of law by s. 11.26(1)(d), F. S. As originally adopted (by Ch. 25369, 1949, Laws of Florida), the statute applied only to the director and other employees of the Legislative Council and Legislative Bureau. It was amended in 1969 to apply to all employees of the Legislature (Ch. 69-52, Laws of Florida). Until amended in 1975, the statute read in pertinent part as follows:

> (1) No employee of the legislature shall:
>
> * * * * *
>
> (c) Give legal advice on any subject to any person, firm or corporation, except members of the legislature;
> (d) During his employment by any division of the legislature, be associated or interested in the private practice of law in any manner, nor be personally engaged in any other business for profit.

As amended by Ch. 75-208, Laws of Florida, it now reads:

> (1) No employee of the legislature shall:
>
> * * * * *
>
> (b) Give legal advice on any subject to any person, firm, or corporation, except members of the legislature;
>
> (c) During his employment by any division of the legislature, engage in any activity which seeks to influence any legislative action outside the scope of his specific employment.

Under well-settled rules of statutory construction, it must be assumed that the Legislature used particular language in a legislative act advisedly and for some purpose. Stein v. Biscayne Kennel Club, 199 So. 364 (Fla. 1941); Lee v. Gulf Oil Corp., 4 So.2d 868, 870 (Fla. 1941); Alexander v. Booth, 56 So.2d 716, 718 (Fla. 1952). And when the Legislature amends a statute, it is presumed that the Legislature intended it to have a meaning different from that accorded to the statute before the amendment. Arnold v. Shumpert, 127 So.2d 116 (Fla. 1968); Kelly v. Retail Liquor Dealers Ass'n of Dade County, 126 So.2d 299 (3 D.C.A. Fla., 1961).

Applying these rules to the statute here in question, it must be assumed that paragraph (c) of subsection (1) of s. 11.26, F. S., as originally enacted, was adopted for some purpose other than to prohibit legislative employees from engaging in the practice of law, as paragraph (d) of the same subsection (1) speaks especially on this subject. *Cf.* Alexander v. Booth, *supra*, concluding that a particular subsection of the statute there in question "was enacted for some purpose." A reasonable interpretation of these provisions is that employees of any division of the Legislature were not only specifically prohibited from practicing law or engaging in any other business *for profit* while so employed but were also prohibited from giving any legal advice on any subject related to or in connection with legislation or their legislative duties, except to members of the Legislature. As so interpreted, there is no inconsistency in the Legislature's authorizing legislative employees to engage in other remunerative employment, including the practice of law, while still retaining the prohibition against giving legal advice on any subject related to or in connection with legislation or legislative duties except to members of the Legislature. The new language of s. 11.26(1)(c)—which, in effect, prohibits any lobbying activities by a legislative employee "outside the scope of his specific employment"—is an additional prohibition but does not, of course, have the effect of prohibiting other business or professional activities, including the practice of law, by legislative employees.

There can be no doubt that, in adopting the provisions of Ch. 75-208 here in question, the Legislature intended to change the restrictions on employment made by s. 11.26(1), *supra*, in view of the title to Ch. 75-208, providing that it is an act "amending s. 11.26(1), F. S., relating to employees of the Legislature, *modifying restrictions on employment*. . . ." (Emphasis supplied.) Nor can there be any doubt that the Legislature contemplates that legislative employees may engage in other employment. *See* s. 112.3141(2), F. S., which reads as follows:

> No full-time legislative employee shall be otherwise employed *during the regular hours of his primary occupation*, except with the written permission of the presiding officer of the house by which he is employed, filed with the Clerk of the House of Representatives or with the Secretary of the Senate, as may be appropriate. Employees of joint committees must have the permission of the presiding officers of both houses. *This section shall not be construed to contravene the restrictions of s. 11.26.* (Emphasis supplied.)

The italicized portions of the statute quoted above were added by the 1975 act (s. 5, Ch. 75-208, *supra*).

It is worthy of note also that the amendment "modifying" the s. 11.26(1), F. S., restrictions on employment was made by the same legislative act, Ch. 75-208, *supra*, that also amended portions of the Code of Ethics and Financial Disclosure Law, Part III, Ch. 112, F. S. (1974 Supp.); and the legislative policy, as expressed in s. 112.316, F. S., is as follows:

> It is not the intent of this part, nor shall it be construed, to prevent any officer or employee . . . from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his duties to the state or the county, city, or other political subdivision of the state involved.

It is a well-settled rule of statutory construction that statutes in derogation of common law or common rights are to be strictly construed. 82 C.J.S. *Statutes* s. 393, p. 938; *In re* Levy's Estate, 141 So.2d 803, 805 (2 D.C.A. Fla., 1962), and cases cited. Statutes which operate to restrain the exercise of any trade or occupation or the conduct of business have been held to be within the purview of this rule. *See* West Virginia Board of Dental Examiners v. Storch, 122 S.E.2d 925 (W. Va. 1961); and Battaglia v. Moore, 261 P.2d 1017 (Colo. 1953). In *Battaglia*, the court rules squarely that legislation purporting to restrain one's right to follow any lawful, useful calling, business, or profession will be strictly construed in favor of the existence of the right and against the limitation. *Accord*: Florida Accountants Association v. Dandelake, 98 S.2d 232, 327 (Fla. 1957), in which the court recognized "the fundamental right of all citizens to enter into contracts of personal employment" in ruling upon the validity of a statute relating to the practice of accounting.

When interpreted in light of its history and other statutes *in pari materia* and the rule of construction referred to above, I have the view, pending legislative or judicial clarification, that legislative employees, whether full-or part-time employees, may engage in the practice of law during their off-duty hours or periods in matters that are not related to legislation or their legislative duties and will not interfere with the full and faithful discharge of such duties. It might be repeated, for emphasis, that a legislative employee should not engage in any activities that might be interpreted as seeking to influence any legislative action "outside the scope of his specific employment" or the giving of legal advice relating to legislation or his legislative duties.

076-2—January 6, 1976

CONSTITUTIONAL LAW

SUBMISSION OF CONSTITUTIONAL AMENDMENT TO REFERENDUM—REQUIREMENT FOR SUBMISSION AT SPECIAL ELECTION

To: Bruce A. Smathers, Secretary of State, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Should the constitutional amendment proposed by House Joint Resolution 1709 (amendment relating to discipline, removal and retirement of justices and judges) be submitted to the electors at a special election to be held March 9, 1976, or at the general election to be held in November 1976?

SUMMARY:

The constitutional amendment proposed by House Joint Resolution 1709 must be submitted to the electors at the general election to be held in November 1976 unless the Legislature, in the manner provided by s. 5(a), Art. XI, State Const., enacts a law providing for the submission of such proposed amendment at an earlier special election.

The constitutional provisions bearing on this question appear at s. 5(a), Art. XI, State Const., which subsection reads in pertinent part:

> (a) A proposed amendment to or revision of this constitutio , or any part of it, *shall be submitted to the electors at the next general election* held more than ninety days after the joint resolution . . . proposing it is filed with the secretary of state, *unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election* held more than ninety days after such filing. (Emphasis supplied.)

It is clear from the foregoing that any such proposed amendment or revision must be submitted at the next general election which is held more than 90 days after the filing of the proposed amendment or revision, unless the Legislature provides—in the manner established by s. 5(a), Art. XI—for such a proposed amendment or revision to be submitted at an earlier special election. *Cf.* AGO 073-103.

However, in order for a proposed amendment or revision to be submitted to the electors at a special election, provision for such special election must be made "pursuant to" a law enacted by the affirmative vote of three-fourths of the members of both houses of the Legislature. Although the Legislature enacted such a law (Ch. 75-245, Laws of Florida) providing for a special election to submit to the electors the constitutional amendment proposed by Senate Joint Resolution 1061, I have found no such law providing for a special election for the submission to the electors of the constitutional amendment proposed by House Joint Resolution 1709. Accordingly, unless and until the Legislature enacts a law, in the manner established by s. 5(a), Art. XI, State Const., providing for an earlier special election for the submission of the constitutional amendments proposed by House Joint Resolution 1709, such proposed amendments must be submitted to the electors at the general election to be held in November 1976, which will be the "next general election held more than ninety days after the joint resolution. . . ."

In reaching the foregoing conclusion, I have not overlooked the fact that the introductory paragraph of House Joint Resolution 1709 stated that the proposed amendment is to be submitted to the electors

> . . . at the general election to be held in November 1976, *or, if authorized by three-fourths of the membership of each house of the legislature, at a special election to be held March 9, 1976.* . . . (Emphasis supplied.)

Further, I am aware of the fact that the journals of the House and the Senate reflect that more than three-fourths of the membership of each body voted in favor of the subject joint resolution. Such vote is, however, ineffective with respect to the establishment of an earlier special election for submission of the proposed amendment. As noted above, provision for such a special election must be "pursuant to law," and it is clear that a joint resolution of the Legislature is not a *law. In re* Advisory Opinion, 31 So. 348 (Fla. 1901). *Accord:* State *ex rel.* Davis v. Green, 116 So. 66 (Fla. 1928); Advisory Opinion to Governor, 22 So.2d 398 (Fla. 1945); *cf.* AGO 067-64 and authorities cited at p. 1028, Black's Law Dictionary (Revised Fourth Ed.), and Futch v. Stone, 281 So.2d 484 (Fla. 1973).

076-3—January 6, 1976

PUBLIC EMPLOYEES' TRAVEL

AGENCY MAY NOT PAY TRAVEL AND PER DIEM EXPENSES DIRECTLY TO RESTAURANTS AND MOTELS

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

Is it permissible for the Department of Agriculture to make direct arrangements with restaurants and motels to provide meals and lodging

for the employees of the department who are called upon on short notice to travel during an emergency situation?

SUMMARY:

Pursuant to s. 112.061, F. S. (1974 Supp.), vouchers for travel expense reimbursement should be filed by the separate individuals incurring the expenses; and the agency is not authorized to pay the vendor directly.

Section 112.061, F. S. (1974 Supp.), which controls per diem and traveling expenses of public officers, employees, and authorized persons, consistently speaks in terms of reimbursement. And, as reimbursement means to pay back, there is contemplated an expenditure by the traveler for which he will be repaid after filing the voucher form pursuant to s. 112.061(12)(b).

Section 112.061(11), F. S. (1974 Supp.), provides that

> . . . any claim authorized or required to be made under any provision of this section shall contain a statement that the expenses were actually incurred by the traveler as necessary traveling expenses in the performance of his official duties and shall be verified by a written declaration that it is true and correct in every material matter . . . .

In a letter dated May 8, 1970, to A. R. Brautigam, then Executive Director of the Department of Business Regulation, my predecessor in office was faced with the question of whether each individual attending a luncheon should file a separate travel expense reimbursement voucher or whether one voucher and one warrant to the vendor is the proper method of payment. Therein it was stated:

> Pertinent to your question is the requirement that reimbursement be to the "traveler," in the words of the statute, and not to the person furnishing the services to the traveler. I find no provision in the above section allowing payment from state funds for travel and per diem to persons other than to the person incurring the authorized expenses.
>
> It is my conclusion therefore that the warrants issued in payment of travel expense reimbursement, if any, should be to the separate individuals incurring the expenses. . . .

Although the statute has been amended several times since that opinion was expressed, such amendments are not relevant to the question now before me. And, as my present research has disclosed no reason for me to change that view, it is reaffirmed and is dispositive of this question.

Your question is answered in the negative.

076-4—January 6, 1976

STATE FIRE MARSHAL

POWERS RELATING TO FIRE PREVENTION

To: Philip F. Ashler, State Treasurer and Fire Marshal, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTION:

Does the State Fire Marshal have statutory authority and responsibility for requiring the installation of fire extinguishing equipment in condominiums and cooperative apartments?

SUMMARY:

The State Fire Marshal is authorized by s. 633.081, F. S., as amended by Ch. 75-151, Laws of Florida, to inspect at any reasonable hour any building or premises (including condominiums and cooperative apartment buildings), except the interiors of individual dwellings, and after inspection if he should find that any such building or structure inspected lacks sufficient fire escapes, alarm apparatus, or fire extinguishing equipment, or is in need of repair or is in a dilapidated condition or from any other cause is especially liable to fire and situated so as to endanger life or property, he may order the same remedied or removed within a reasonable time.

Section 633.01, F. S., designates the head of the Department of Insurance as State Fire Marshal who shall enforce *all laws and provisions* of that chapter relating to:

(1) Prevention of fires;

* * * * *

(3) Installation and maintenance of fire alarm systems and fire-extinguishing equipment.

The Florida Building Codes Act of 1974, s. 553.70 *et. seq.*, F. S. (1974 Supp.), as amended by Ch. 75-111, Laws of Florida, creates and establishes the State Minimum Building Codes. Pursuant to s. 553.80, as amended by Ch. 75-111, jurisdiction for the enforcement of the Interim State Building Codes and the State Minimum Building Codes lies with local enforcement agencies—counties and municipalities, enforcement districts as specified in and established under s. 553.80, and state agencies with statutory authority to regulate building construction. As to the state enforcement agency—the Department of General Services—*see* AGO 075-170, holding that a county is not authorized or required to enforce the Interim State Building Code or the State Minimum Building Codes against the buildings of the state or its agencies; as to the Uniform Building Code for Public Educational Facilities and the enforcement thereof, *see* AGO 075-98; and *cf.* s. 255.25(3), F. S., as to state-owned or leased buildings. By s. 553.73(6), the Interim State Building Code is to be effective in all locations throughout the state no later than January 1, 1975, and the State Minimum Building Codes shall become effective no later than January 1, 1977, pursuant to s. 553.78(7).

Sections 553.77 and 553.78(3), F. S. (1974 Supp.), as amended by Ch. 75-111, Laws of Florida, authorize the Board of Building Codes and Standards to promulgate the above-cited codes, providing for a segment to cover fire prevention therein. From the provisions of s. 553.80, *supra*, it is clear that the various local enforcement agencies and enforcement districts and the aforementioned state enforcement agency are the proper agencies to enforce the fire prevention provisions of the state building codes during the planning and construction or renovation phases of any building or structure (except as provided otherwise by the Uniform Code for Public Educational Facilities) in the state, *cf.* ss. 255.25(3) and 633.085, F. S., as to state-owned or state-leased buildings.

Section 633.05, F. S., as amended by Ch. 75-151, Laws of Florida, empowers the State Fire Marshal to make and promulgate all rules and regulations necessary to effectuate the enforcement of his powers and duties, including, but not limited to, the making and promulgation of rules and regulations for the:

(1) Prevention of fires.

* * * * *

(3) Installation and maintenance of fire alarm systems and fire-extinguishing equipment.

* * * * *

(5) Construction, maintenance, and regulation of fire escapes.

Under the provisions of s. 633.081, F. S., as amended by Ch. 75-151, Laws of Florida, the State Fire Marshal and his agents shall, when they deem it necessary, inspect at any reasonable hour *any and all buildings, equipment,* and vehicular equipment on premises within their jurisdiction. *See* ss. 633.081(3) and 633.085, F. S., as to inspections of state-owned or leased buildings and facilities. Whenever they find that *any* building or structure inspected lacks sufficient fire escapes, alarm apparatus, or fire extinguishing equipment, or is in need of repair or is in a dilapidated condition or from any other cause is especially liable to fire and situated so as to endanger life or property, they may order the same removed or remedied within a reasonable length of time. Pursuant to s. 633.081(2), F. S., every fire safety inspection of the fire marshal shall be conducted by a person certified as having met the inspection training requirements set by the Division of State Fire Marshal of the Department of Insurance. *Cf.* s. 633.081(3)(a) relative to inspections of state department facilities by fire safety coordinators trained by the Division of State Fire Marshal.

Condominiums and cooperative apartments are not excepted from the terms "any and all buildings" and "any building or structure" as employed in s. 633.081, *supra*, and in the absence of any other statutory exception or exemption, such buildings must be deemed to be within the regulatory powers vested in the fire marshal under s. 633.081, as amended. It is an established maxim of statutory construction that a statute is to be taken, construed, and applied in the form enacted. Blount v. State, 138 So. 2 (Fla. 1931). The use by the Legislature of a comprehensive term ordinarily indicates an intent to include everything embraced within the term. Florida State Racing Com. v. McLaughlin, 102 So.2d 574 (Fla. 1958); Florida Industrial Commission v. Growers Equipment Co., 12 So.2d 889 (Fla. 1943); State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951). No exceptions having been made by any statute, none may be implied or written into the law. Dobbs v. Sea Isle Hotel, *et al.*, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974). The Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918); Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. App., 1963).

Section 509.2111(1), F. S., deals with the construction of apartment houses, town houses, and cooperative or condominium apartment buildings. This section in effect incorporates the Southern Standard Building Code, as amended (or the South Florida Building Code when applicable), while allowing local or district building codes which are substantially consistent therewith, or more stringent, to apply in those cases. The Southern Standard Building Code, Chapter III, s. 301.3(c), provides that every building shall be fire protected throughout as specified for the various types of construction in Chapter VI. Chapter VI of the code enumerates the various classifications of buildings by type of construction, along with the various structural requirements, materials, and assemblies which must be used to comply with the fire resistant standards of the code, and insures to the future occupants of the structures that the standards for fire protection have been built in.

Chapter IV, s. 404.1, Southern Standard Building Code, provides that "[b]uildings in which families or households live or in which sleeping accommodations are provided, and all dormitories, shall be classified as Group A–Residential Occupancy. Group A–Residential Occupancy–shall include, among others, the following: Dwelling[,] Multiple Dwellings (more than two families) . . . ."

Section 404.2, *supra*, entitled "Protective Requirements-Group 'A' Occupancy," at subsection (6) provides for sprinklers and standpipes by referring to ss. 901 and 902, *infra*. Section 901.6(2) requires approved automatic sprinkler equipment to be installed in all buildings which do not have suitable access as set forth in s. 703.1. By the provisions of s. 703.1(a), every building except one-and two-family dwellings which are not over two stories in height shall have various approved fire protectives. Section 902.1, *supra*, states that:

> Unless otherwise provided herein, standpipes, standpipe systems, hoses, water supply, pumps, connections, etc., shall be constructed and installed to meet the requirements of the standard for the installation of "Standpipe and Hose Systems, NFPA 14-1971," except that the single source of water supply, if reliable and capable of automatically supplying the required service, may be approved by the Building Official.

Section 902.4, *supra*, provides that:

> In buildings requiring wet standpipes in accordance with s. 902.1 where in the opinion of the Building Official and the Chief of the Fire Department such constant and automatic water supply is not necessary because of the occupancy and type of construction, with their approval dry standpipes may be substituted for one or more of the required wet standpipes.

Chapter 4A-3.04(1), Florida Administrative Code, states that it shall be the duty of the State Fire Marshal or his deputy to inspect, or cause to be inspected, *all buildings and premises*, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, endanger life from fire, or any violations of any other law or regulation affecting the fire hazard.

From the foregoing authorities, it is clear that the fire marshal is empowered under s. 633.081, F. S., as amended by Ch. 75-151, Laws of Florida, to inspect at any reasonable hour any building or premises, except the interiors of individual dwellings, and after inspection if he should find that any building or structure inspected lacks sufficient fire escapes, alarm apparatus, or fire extinguishing equipment, or is in need of repair or is in a dilapidated condition or from any other cause is especially liable to fire and situated so as to endanger life or property, he may order the same removed or remedied within a reasonable time. *Cf.* AGO 068-91.

076-5—January 8, 1976

LAW ENFORCEMENT OFFICERS

CORRECTIONAL SYSTEM EMPLOYEES—DESIGNATION AS LAW ENFORCEMENT OFFICERS

To: Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

> **Are employees of the Department of Offender Rehabilitation who are designated law enforcement officers pursuant to s. 790.001(8)(d), F. S., law enforcement officers within the meaning and intent of s. 90.141, F. S.?**

SUMMARY:

> **Employees of the Department of Offender Rehabilitation who have been designated as "law enforcement officers" by the head of the department *and* are actually serving as armed guards or custodial officers or employees with custody and control of prisoners in any of our correctional institutions are entitled to the per diem, travel expenses, and witness fees authorized for "law enforcement officers" by s. 90.141, F. S., when appearing as an official witness to testify at any hearing or law action in any court as a direct result of their employment as such law enforcement officers, *i.e.*, armed guards or custodial officers or employees.**

The opinion as herein expressed is limited to those employees of the Department of Offender Rehabilitation who are *actually* serving as armed guards or custodial officers and employees. The designation for the purposes of s. 790.001(8)(d), F. S., does not make one a law enforcement officer within the general meaning of the term.

Witness fees and mileage generally are provided by s. 90.14, F. S.—presently $5 per day for each day's actual attendance and also 6 cents per mile for actual distance traveled to and from the courts. Prior to 1963, s. 902.19(4), F. S., specifically prohibited law enforcement officers from receiving witness fees or mileage "when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence." However, by Ch. 63-508, Laws of Florida, as amended by Ch. 67-427, Laws of

Florida (s. 90.141, F. S.), "[a]ny law enforcement officer of any municipality, county or the state" who appears as an official witness to testify at any hearing or law action in any court of this state "as a direct result of his employment as a law enforcement officer" is entitled to per diem and traveling expenses at the same rate provided for state employees under s. 112.061, F. S., as well as the $5 witness fee provided by s. 90.14, F. S., in certain circumstances.

The designation of employees of the Department of Offender Rehabilitation as "law enforcement officers" in Ch. 790 is for the purpose of exempting them from the firearm licensing requirement of that act. The question of whether such employees should be considered "law enforcement officers" within the purview of s. 90.141, F. S., providing for the payment of per diem and travel expenses of such persons when appearing as official witnesses, is an entirely different matter. Chapter 90, F. S., nowhere provides a definition of "law enforcement officer" for the purposes of that chapter; thus, the term, as employed in, and for the purposes of, s. 90.141 must be construed in light of general judicial definitions of the term.

A law enforcement officer is one whose duty it is to preserve the peace. Black's Law Dictionary (Rev'd Fourth Ed. 1968). In Frazier v. Elmore, 173 S.W.2d 563 (Tenn. 1943), the court said: "We commonly refer to and describe those whose duty it is to preserve the peace as 'peace officers' or 'law enforcement officers.' " In this context, at least, a peace officer is synonymous with a law enforcement officer. *Cf.* "Peace Officers," Black's Law Dictionary (Rev'd Fourth Ed. 1968). Restatement of Torts 2d, s. 114, defines a peace officer as one "designated by public authority whose duty it is to keep the peace, and arrest persons guilty or suspected of crime."

The supervision of prisoners and their activities during the terms of their confinement can be classified as a police function in that they keep the public peace. Headley v. Sharpe, 138 So.2d 536 (3 D.C.A. Fla., 1962), *cert. denied*, 146 So.2d 749. The court in Headley v. Sharpe, *supra*, citing State *ex rel.* Priest v. Gunn, 326 S.W.2d 314 (Mo. 1959), stated: "Certainly the actual keeping and custody of prisoners confined in a jail is the performance of an inherent and naked police function." Other jurisdictions have similarly held that prison guards and custodial officers or employees are law enforcement or peace officers. *See* State v. Grant, 245 A.2d 528 (N.J. Ct. App. 1968); Kimball v. County of Santa Clara, 24 Cal. App. 3d 780, 101 Cal. Rptr. 353 (1972); and Bell v. City of Cincinnati, 88 N.E. 128 (Ohio 1909). And *in dicta*, the court in Taylor v. Multnomah County Deputy Sheriffs' Retirement Board, 265 Ore. 445, 510 P.2d 339 (1973), indicated that a corrections officer (*i.e.*, jail matron) may very well "preserve the peace."

For the purposes of the special death benefit payable to law enforcement officers under s. 112.19, F. S., the term "law enforcement officer" is defined to include full-time officers and employees whose duties require them to handle or guard persons arrested for, charged with, or convicted of the violation of criminal laws.

Prior to the repeal of s. 902.19(4), *supra*, it was construed by this office as applying to a Beverage Department Supervisor who, under the Beverage Act, had "all the powers of Deputy Sheriffs in the enforcement of the beverage laws of this state and in the prosecution of offenders against such law," AGO 039-626, Biennial Report of the Attorney General, 1939-1940, p. 87, but not to a fruit inspection employee who had no authority to arrest or any general police power, AGO 039-684, Biennial Report of the Attorney General, 1939-1940, p. 87.

Under s. 843.04(1), F. S., prison officers and guards are specifically directed to "immediately arrest any convict, held under the provisions of law, who may have escaped." And s. 944.39, *id.*, prohibiting persons from interfering with prisoners in various ways, authorizes prison guards and inspectors or any employee of the division to arrest without a warrant any person violating the provisions of that section. Employees of the Division of Corrections, while actually serving as armed guards or custodial officers or employees in our correctional institutions, are charged with the responsibility of keeping and custody of prisoners in state correctional institutions and enforcing the law relating to the custody and recapture of prisoners and are just as much "law enforcement officers" within the area of their jurisdiction as are sheriffs and municipal police officers within their respective jurisdictions. I understand that the employees designated by you as law enforcement officers pursuant to s. 790.001(8)(d), F. S., so that they may carry a weapon without a permit, are only those with actual custody and control over inmates. And I am of the opinion that employees who have been designated by you as "law enforcement officers" *and* who are actually serving as armed guards or custodial officers or employees in our state correctional system have the same right as

other law enforcement officers of the state to the per diem, travel expenses, and witness fees, in certain circumstances, provided by s. 90.141, F. S.

076-6—January 8, 1976

FRESH PURSUIT

NOT AFFECTED BY DECRIMINALIZATION OF TRAFFIC OFFENSES

To: Philip S. Shailer, State Attorney, Fort Lauderdale

Prepared by: Carolyn M. Snurkowski, Assistant Attorney General

QUESTION:

Is the doctrine of hot or fresh pursuit applicable to Ch. 74-377, Laws of Florida, which provides for the decriminalization of certain traffic violations?

SUMMARY:

A traffic infraction as defined in s. 318.13(3), F. S., created by Ch. 74-377, Laws of Florida, is a "violation" for the purpose of permitting a peace officer to cite a traffic violator immediately or on fresh pursuit, as authorized by s. 901.15(5), F. S.

The answer to your question is in the affirmative.

Chapter 74-377, Laws of Florida, created Ch. 318, which provides for the decriminalization of certain traffic violations in Ch. 316, F. S., and excepts five specific violations enumerated in s. 318.17, F. S. The legislative purpose in decriminalizing violations of Ch. 316, F. S., is to facilitate "the implementation of a more uniform and expeditious system for the disposition of traffic infractions."

Section 901.15(5), F. S., authorizes a peace officer to arrest a person without a warrant when:

> (5) A violation of chapter 316 has been committed in the presence of the officer. Such arrest may be made immediately or on fresh pursuit.

The term "violation" as used in s. 901.15(5) includes both traffic violations and traffic infractions as defined in s. 318.13(3), F. S. Throughout Ch. 318, F. S., the Legislature interchangeably used the terms infractions and violations and, as a matter of fact, defined "infraction" in s. 318.13(3) as a "noncriminal violation."

Although certain traffic offenses have been decriminalized and renamed traffic infractions, such legislation does not adulterate a peace officer's power to arrest a traffic offender immediately or on fresh pursuit.

A violator under Ch. 318, F. S., receives a citation for a traffic infraction under s. 318.14, which is the same type of citation as issued for a criminal traffic violation. The issuance of the traffic citation is an "arrest" as contemplated in s. 901.15(5), F. S., which permits warrantless arrests for violations of Ch. 316, F. S., when committed in the presence of a peace officer. The violator, following the issuance of the citation, is permitted to either post bond or sign and accept this citation which indicates a promise to appear. Section 318.14.

The Florida Legislature in enacting Ch. 318, F. S., placed no restrictions on the ability of a peace officer to issue a citation for a noncriminal infraction. The need to apprehend noncriminal infraction violators is not eliminated simply because the violation has been redefined as an infraction and the penalty for such an infraction changed from criminal to civil. Practically speaking, the apprehension of traffic violators has not been affected but rather the criminal stigma of running a red light or making an illegal turn has been removed. Therefore, a peace officer who observes a violation of Ch. 316, F. S., which was decriminalized by Ch. 318 can arrest a violator immediately or, when an officer observes

an infraction committed in his presence and the violator drives away from the site of the infraction, the officer may use fresh pursuit to apprehend the violator.

076-7—January 8, 1976

WATER MANAGEMENT DISTRICTS

CONSTITUTIONAL AMENDMENT—LIMIT ON AUTHORIZED TAXES

To: Herbert M. Webb, District Counsel, St. Johns River Water Management District, Palatka

Prepared by: David M. Hudson, Assistant Attorney General

QUESTION:

Does Senate Joint Resolution 1061 proposing to amend s. 9(b), Art. VII, State Const., give specific taxing authority to the water management districts as constituted under s. 373.069(3), F. S.?

SUMMARY:

If the amendment to s. 9(b), Art. VII, State Const., proposed by Senate Joint Resolution 1061, is approved by a vote of the electors in a special election to be held March 9, 1976, it will not give water management districts as constituted under s. 373.069(3), F. S., as amended by Ch. 75-125, Laws of Florida, specific *authority* to levy ad valorem taxes. If adopted, the proposed amendment would limit the maximum millage which may be levied for water management purposes in the northwest portion of the state lying west of the line between ranges two and three east to 0.05 mill and for water management purposes for the remaining portions of the state to 1.0 mill.

Your question must, in my opinion, be answered in the negative.

Chapter 75-245, Laws of Florida, provides that Senate Joint Resolution 1061, "proposing the amending of Section 9 of Article VII of the State Constitution, to establish a limit on local taxes to be used for water management purposes," shall be submitted to the electors of Florida for approval or rejection in a special election to be held concurrent with the Presidential Preference Primary Election, March 9, 1976. The proposed amendment to s. 9(b), Art. VII, State Const., is indicated in italics:

> (b) Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; *for water management purposes for the northwest portion of the state lying west of the line between ranges two and three east, 0.05 mill; for water management purposes for the remaining portions of the state, 1.0 mill*; and for *all other* special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

Senate Joint Resolution 1061 does not propose any amendment to s. 9*(a)* of Art. VII, State Const., which provides the *authorization* for the Legislature to grant special districts ad valorem taxing power:

> (a) Counties, school districts, and municipalities shall, *and special districts may, be authorized by law to levy ad valorem taxes* . . . . (Emphasis supplied.)

In contrast to the ad valorem taxing authorization provisions of s. 9(a), Art. VII, State Const., s. 9*(b)*, which Senate Joint Resolution 1061 proposes to amend, contains *limitations* on the exercise of ad valorem taxing powers by the various taxing powers. *See* AGO's 069-26, 069-71, and 075-160. Section 9(b), Art. VII, State Const., has been characterized as a "tax relief section," State *ex rel.* Dade County v. Dickinson, 230 So.2d 130, 134 (Fla. 1969), because it contains limits on the maximum millage which can be levied for the various designated purposes. Therefore, it is my opinion that if the proposed amendment to s. 9(b), Art. VII, State Const., is approved, it will not give specific taxing *authority* to the water management districts as constituted under s. 373.069(3), F. S., as amended by Ch. 75-125, Laws of Florida; rather, it will *limit* the ad valorem taxes which may have otherwise been authorized by law to be levied

> for water management purposes for the northwest portion of the state lying west of the line between ranges two and three east, [to] 0.05 mill; [and] for water management purposes for the remaining portions of the state, [to] 1.0 mill . . . .

076-8—January 8, 1976

COUNTY EMPLOYEES

PROPERTY APPRAISER MAY NOT INDEPENDENTLY ESTABLISH GROUP INSURANCE PROGRAM FOR EMPLOYEES

To: John R. Jones, Jr., Escambia County Property Appraiser, Pensacola

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

> **May the property appraiser's office withdraw from the county's group insurance program and establish independently its own office group policy?**

SUMMARY:

> **A property appraiser is not within the purview of ss. 112.08 and 112.12, F. S., authorizing each "county, school board, governmental unit, department, board, or bureau of this state" to provide a group insurance program for its employees and to pay "all or any portion of the premiums for such insurance out of any of its available funds."**

Sections 112.08-112.14, F. S., authorize the public bodies therein designated to provide certain types of group insurance for their officers and employees and to pay all or a portion of the cost of such insurance from available public funds. Section 112.11 specifically provides that participation in such a group insurance program shall be entirely voluntary on the part of each officer and employee entitled to its benefits. Thus, there is nothing to prevent you and your employees from withdrawing from the county's group insurance program. However, the answer to the question of whether your office could withdraw from the county's group insurance program and establish independently its own office group policy depends upon whether the property appraiser is within the purview of s. 112.08 authorizing "each and every county, school board, governmental unit, department, board, or bureau, of the state" to provide for a group insurance program for "the officers and employees thereof." *See also* s. 112.12, authorizing "[e]ach county, school board, governmental unit, department, board, or bureau of this state" to pay all or any portion of the premiums of such group insurance "out of any of *its* available funds." (Emphasis supplied.) Also relevant here are the provisions of s. 112.09, providing that:

> The election to exercise such authority shall be evidenced by resolution, duly recorded in the official minutes, adopted by the board of county commissioners

> in the case of a county, by the school board, in the case of a school district and by the members of the board, or department head if an individual, in the case of any state department, board or bureau, and by the governing body by resolution or ordinance in the case of any other governmental unit of the State of Florida.

The property appraiser is a county official and his employees are county employees even though employed and paid by him from funds budgeted with the approval of the Department of Revenue, s. 195.087, F. S., and derived from taxing authorities other than the county, s. 192.091, *id. Cf. In re* Florida Board of Bar Examiners, 268 So.2d 371 (Fla. 1972), stating that the board was "a state agency under the judicial branch of the government and its employees are state employees just as, for example, legislative employees under the legislative branch are state employees" in ruling that the board's employees were entitled to participate in the state's group insurance program authorized by s. 112.075, F. S. As county employees, public funds may be and have been used to pay a portion of the premiums for the participation of the property appraiser's employees in the county's group insurance program, as authorized by s. 112.12, *supra*. Thus, the only real question here is whether the statute contemplates that the property appraiser or other county officials may exercise, independently of the board of county commissioners, the authority granted by s. 112.08, *supra*, as supplemented by s. 112.12. Pending legislative or judicial clarification, I have the view that the property appraiser should not undertake to proceed independently in this respect.

It was held early on by one of my predecessors in office that s. 112.08 (adopted in 1941 as Ch. 20852, 1941, Laws of Florida) "confers authority to negotiate for and obtain insurance by the respective department heads, boards and commissions of the State and of the counties" and that "[t]here is no provision by which the powers may be exercised jointly *or by any other* State or *county agency*." (Emphasis supplied.) Attorney General Opinion 041-486, Biennial Report of the Attorney General, 1941-1942, p. 90, ruling that the state cabinet had no authority to negotiate for a group insurance policy covering all state employees. Subsequent opinions of this office have been in accord with this strict construction of the statute. *Cf.* AGO 067-20 (mosquito control district), AGO's 073-468 and 074-299 (fire control district), and AGO 073-32 (county expressway authorities and the Inter-American Cultural and Trade Center), in all of which the authority to provide group insurance for their respective employees under ss. 112.08 and 112.12 was denied. *Accord*: Attorney General Opinion 075-256, concluding that a school district had no authority under the statute to self-insure its group health insurance program for school employees. It was noted therein that the powers of the school board "are limited and defined by statute and may not be extended by construction" and that, when the right to exercise authority is doubtful, the board "should not assume that authority." These statements are equally applicable to the county official here in question and require the conclusion that, pending legislative or judicial clarification, such an independent group insurance program should not be undertaken by you. The statutes in question apply, in terms, to "the county" and to the exercise of the authority granted by means of a resolution of the board of county commissioners; and they may not be extended, by construction, to apply to county officials.

I have not overlooked my opinion in AGO 073-363, concluding that the employees of a county hospital organized under Ch. 155, F. S., were "county" employees within the purview of ss. 112.08 and 112.12, *supra*, and that hospital funds derived from an ad valorem tax levied *by the county commissioners*, when properly budgeted and approved *by the county commissioners*, could be used to pay the premiums for group insurance for such employees. It is clear that this opinion does not stand for the proposition that a county officer or agency may proceed independently of the county commissioners to establish his or its own group insurance program; thus, it is not decisive here.

Your question is, therefore, answered in the negative.

076-9—January 8, 1976

FIREARMS

COUNTY COMMISSION MAY NOT IMPOSE ADDITIONAL RESTRICTIONS WHEN ISSUING FIREARM PERMIT

To: Alton M. Towles, Gadsden County Attorney, Quincy

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

May the County Commissioners of Gadsden County, when granting a license to carry a pistol or Winchester or other repeating rifle under s. 790.06, F. S., impose restrictions on such license respecting the times and/or circumstances under which it will be valid?

SUMMARY:

When granting a license to carry a pistol or Winchester or other repeating rifle under s. 790.06, F. S., the Board of County Commissioners of Gadsden County is without authority to impose restrictions on such license respecting the times and/or circumstances under which it will be valid and effective.

Section 1(f), Art. VIII, State Const. states in pertinent part:

> Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law . . . .

The powers of counties respecting the granting of licenses to carry firearms are found at s. 790.06, F. S., which provides:

> The county commissioners of the respective counties of this state may at any regular or special meeting grant a license to carry a pistol, Winchester or other repeating rifle, only to such persons as are over the age of 21 [now 18, AGO 073-378] years and of good moral character, for a period of 2 years, upon such person giving a bond payable to the Governor of the state in the sum of $100, conditioned for the proper and legitimate use of said weapons, with sureties to be approved by the county commissioners. The county commissioners shall keep a record of the names of the persons taking out such a license, the name of the maker of the firearm so licensed to be carried, and the caliber and number of the same.

And s. 790.01, F. S., which, *inter alia*, makes it a felony of the third degree to carry a concealed firearm, provides in its last subsection: "Nothing in this section shall relate to persons licensed as set forth in ss. 790.05 and 790.06."

Further, s. 790.05, F. S., provides, in pertinent part:

> Whoever shall carry around with him, or have in his manual possession, in any county in this state, any pistol, Winchester rifle, or other repeating rifle, without having a license from the county commissioners of the respective counties of this state shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 . . . .

It is clear from the language quoted above from ss. 790.01 and 790.05, F. S., that the legal effect of the granting of a license to carry a firearm under s. 790.06, F. S., is established by statute. *Cf.* AGO 074-45. Any action by the county commissioners to limit or restrict the operation of ss. 790.01 and 790.05 would be in conflict with, and

inconsistent with, those statutory provisions. As noted in AGO 071-223, which discusses, *inter alia*, the meaning of the phrase "not inconsistent with general or special law" as used in s. 1(f), Art. VIII, State Const.:

> According to Webster, the term "inconsistent" means "not compatible with another fact or claim." In the home rule context, it means that when the legislature has, by general or special law, spoken upon a matter in terms that evidence an intent that the provisions of such law should control the matter in question, a county may not, by home rule ordinance, provide to the contrary.

Therefore, in view of the constitutional limitations on the exercise of county power found at s. 1(f), Art. VIII, State Const., I am of the view that the Board of County Commissioners of Gadsden County is without authority to impose restrictions respecting the times and/or circumstances under which a firearms license issued by it under s. 790.06, F. S., would be valid and effective. *Cf.* AGO 071-54, concluding that a noncharter county may not require a bond in an amount other than that prescribed by s. 790.06. Under the statute, the commission's sole power is to grant or deny the license to those persons otherwise eligible or qualified therefor by the terms of s. 790.06.

Accordingly, your question is answered in the negative.

076-10—January 8, 1976

COUNTY COURT CLERKS

FILING FEES—COUNTERCLAIM EXCEEDING LIMIT FOR SUMMARY PROCEDURE RULES; CHANGE OF VENUE—COSTS TO BE PAID

To: Randall P. Kirkland, Clerk, Circuit and County Court, Orlando

Prepared by: Mary Jo Carpenter, Assistant Attorney General

QUESTIONS:

> **1(a). Is the clerk of the county court entitled to an additional filing fee if in the original complaint the claim for damages is under $1,000 but the counterclaim is between $1,500 and $2,500?**
>
> **1(b). Does Rule 7.100(d), Florida Rules of Summary Procedure, apply?**
>
> **2. To whom are accrued costs paid for change of venue, pursuant to s. 47.191, F. S., and what costs may be involved when the plaintiff has paid filing and service of process fees?**

SUMMARY:

> **The county court clerk is not entitled to an additional filing fee or service charge when a counterclaim exceeding $1,500 but less than $2,500 is filed in an action pending in county court. Rule 7.100(d) RSP does not apply where the demand of the counterclaim in such action does not exceed the jurisdictional limits of the county court, since the action remains pending in the court in which it was filed.**
>
> **Pursuant to s. 47.191, F. S., governing those changes of venue prescribed in ss. 47.091-47.181, F. S., the party requesting a change of venue is required to pay all taxable costs accruing in the action to the person (*e.g.*, clerk of court, sheriff, court reporter) furnishing official services to either party to such action or, where appropriate, to reimburse the adverse party to the action for any taxable costs paid by the adverse party, as specified in the order of the transferring court.**

AS TO QUESTION 1(a):

Since the 1972 amendment to s. 1, Art. V, State Const., became effective, the formerly independent small claims courts have been a part of the county court system. The only

difference between a small claim—one in which the claim is less than $1,500—and any other civil action in county court is that the Rules of Summary Procedure, instead of the Rules of Civil Procedure, are used in adjudicating a claim of less than $1,500. *See* Rule 1.010 RCP and Rule 7.010 RSP.

The statute that establishes the filing fees for actions in county court, s. 34.041(1), F. S., provides, in pertinent part:

> (1) Upon the *institution* of any civil action or proceeding in county court, the *plaintiff*, when filing his action or proceeding, shall pay the following filing fees: (Emphasis supplied.)
>
> (a) For all claims less than $100 ..... $ 3.50
> (b) For all claims of $100 and less than $1,000 ..... 10.00
> (c) For all claims of $1,000 or more 15.00

In the factual situation presented in the first question, the plaintiff instituted the civil action in county court and paid the proper $10 filing fee. The defendant has filed a counterclaim, *but* the demand thereof is still within the jurisdiction of the county court. *Cf.* Rule 1.170(j) RCP, providing that when the demand of a counterclaim exceeds the jurisdiction of the court in which the action is pending, the action will be transferred to a court of the same county having jurisdiction of the amount demanded in the counterclaim upon the counterclaimant depositing with the transferring court an amount sufficient to pay the clerk's service charge in the court to which the action is transferred. Failure to make such a service charge deposit when the counterclaim is filed, or within such other time as the court may allow, operates to reduce the demand of the counterclaim to an amount that is within the jurisdictional limits of the court where the action is pending. This is not the situation presented in your question, since the counterclaim is still within the $2,500 jurisdictional limitation of county court and no statute requires an additional filing fee upon the filing of a counterclaim within the jurisdiction of the court where the action is pending. *See also* AGO 064-165, concluding that in the absence of a statute no additional filing fee was required when a cause of action was transferred from the law to the equity side of the court because the transfer did not constitute the filing of a new case. It is well settled that fee statutes are to be strictly construed, and no service charge may be made unless clearly provided by law. Bradford v. Stoutamire, 38 So.2d 684 (Fla. 1949).

In these circumstances, it must be concluded that the clerk of the county court is not entitled to an additional filing fee upon the filing of a counterclaim in an action pending in such court, the demand of which exceeds $1,500 but is less than $2,500.

AS TO QUESTION 1(b):

Rule 7.100(d), RSP, does not apply to the question presented because, as pointed out above, the demand of the counterclaim does not exceed the jurisdictional limit of the county court. The fact that the counterclaim is more than $1,500 and thus exceeds the jurisdictional limit of the small claims division (if there is one) and the Rules of Summary Procedure is immaterial: The action remains pending in county court where it was originally filed. Rule 7.100(d) would, of course, apply if the counterclaim exceeded $2,500, the jurisdictional limitation of the county court. *Cf.* Rule 1.170(j) RCP, discussed above.

AS TO QUESTION 2:

Section 47.191, F. S., provides that no change of venue shall be granted except on the condition that the party requesting the change shall pay all costs that have accrued in the action and, further, that no change will be effective until the costs are paid. The apparent purpose of this statute is to have all accrued costs in the action pending in the transferring court paid before that court transfers the action to the proper court in the new venue; and this statute applies only to those changes of venue and in the circumstances specified and provided for in ss. 47.091-47.181, F. S. *Cf.* Rules 1.060(b) and 1.170(j) RCP; *also cf.* s. 28.242, F. S., relating to service charges when a case has been laid by the plaintiff in the wrong venue and requiring the plaintiff to pay another service charge to the clerk of the court in the new venue "in accordance with the statutes applicable in the county or district to which the action is transferred."

If the plaintiff moves for a change of venue for one of the reasons specified in ss. 47.091-47.181, *supra*, the clerk's service charge or filing fee and the sheriff's fee for serving process will already have been paid; and if any other costs have accrued but have not been paid, or have been paid by the defendant in the action, the plaintiff is required to pay them to the person providing the official services to either party to the action, or to reimburse the defendant for any taxable costs paid by him [which might include the cost of taking depositions found by the court to have served a useful purpose, Miller Yacht Sales, Inc. v. Scott, 311 So.2d 762 (4 D.C.A. Fla., 1975)], before the change of venue becomes effective, under the express terms of the statute. Where the defendant is the moving party, the statute would seem to require the defendant to reimburse the plaintiff for any taxable costs paid by the plaintiff as well as the cost of any official services furnished to either party to the action which remains unpaid, e.g., clerk of court, sheriff, court reporter, or costs of depositions. The taxable costs which must be paid or reimbursed to the adverse party lie within the discretion of the court and should, and normally will be, specified in the order of the transferring court.

076-11—January 8, 1976

COURT CLERKS

COUNTY COMMISSION'S DUTY TO PAY CIRCUIT COURT CLERK OPERATIONAL COSTS—MANNER OF PAYMENT; FEE FOR RECEIVING MONEYS; FEES FOR COUNTY AND CIRCUIT COURT CLERKS

To: Ralph W. White, Clerk of Courts, Key West

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

1. Is the clerk of the circuit court or the board of county commissioners responsible for the operational cost of the clerk's operation within the county court?
2. If the board is responsible, in what manner does the board of county commissioners pay the cost?
3. Do the deputy clerks operating in county court go on the county payroll, or does the clerk certify a payroll to the county each month for reimbursement?
4. Should the fee be collected at the time the money is accepted or at the time of disbursement, when the clerk receives moneys into the registry of court pursuant to s. 28.24(14), F. S.?
5. Does the clerk of the circuit court charge the existing fees collected in circuit court for the same services rendered in the county court?

SUMMARY:

The board of county commissioners is responsible for the operational cost of the circuit court clerk's operation as clerk of the county court. The board of county commissioners may specify the amount, manner, and time of payment for the operational expenses of the county clerk's office, as there are no statutory directions.

Except where otherwise provided by law, the service charge due the clerk pursuant to s. 28.24(14), F. S., for receiving money into the registry of court is earned and thus payable upon receipt of such money into the registry of court.

Except as otherwise provided by s. 34.041, F. S. (1974 Supp.), the clerk of the county court charges the same fee for services rendered in that court as the clerk of the circuit court charges for similar services in the circuit court.

AS TO QUESTION 1:

The 1975 Appropriations Act, Ch. 75-280, Laws of Florida (Items 791 through 794), provides for the funding of the county courts. The Governor's Workpapers at p. j32 disclose that of the 520 positions provided for in the act, 131 are county support positions (judicial clerks, judicial clerk supervisors, administrative assistants, and clerk typists) in the offices of the clerks of the circuit court. A proviso in the act states that as of September 30, 1975, these state-funded county support positions in the circuit court clerk's office are abolished. Thus, personnel necessary to operate the offices of the clerks of the county court formerly funded by the state must be provided by the county from October 1, 1975.

There is no statutory provision stating who is to bear the expense of the county clerk's office. However, in AGO 072-424 I stated that "[t]here can be no doubt that, in performing the duties of county court clerk, a circuit court clerk will be a salaried budget officer." Although the language of one of the statutes relied upon has been repealed, the other statutes relied upon are still applicable and govern the question. *See* s. 34.041, F. S. (1974 Supp.), which requires filing fees collected in county court to be remitted monthly to the county in the manner prescribed by the Auditor General, and s. 34.191, F. S., which requires fines and forfeitures arising from offenses tried in the county court to be collected by the clerk and remitted monthly to the county or a municipality depending upon the territorial jurisdiction in which the offense was committed.

Thus, the board of county commissioners is responsible for budgeting reasonable and necessary moneys to defray the costs of the operational expenses of the office of clerk of the county court.

AS TO QUESTIONS 2 AND 3:

Section 34.032(1), F. S., empowers the clerk, with the concurrence of the chief circuit judge of the circuit, to appoint deputy clerks of the county court. There appears to be no difference between the manner of payment of a deputy clerk, other employees, and other operational costs of that office.

The board of county commissioners has the power to require "every county official" to submit to it a copy of the official's operating budget for the succeeding fiscal year. Section 125.01(1)(v), F. S. (1974 Supp.). *See also* s. 218.35(2), F. S., relating to the budget of the circuit court clerk "in his capacity as clerk of the circuit and county courts."

There is no statutory direction relating to the details of budgeting for the county clerk's office. Thus, the amount, manner, and time of disbursement of budgeted funds to the clerk in his capacity as clerk of the county court is to be determined by the board of county commissioners, whose responsibility it is to provide the reasonable and necessary moneys to defray the cost of operational expenses of that office.

The provisions of ss. 30.49-30.50, F. S., for budgeting and paying of budgeted funds to defray the costs of the operational expenses of the sheriff's office, insofar as they may be applicable to county court clerk's offices, could be utilized by the board of county commissioners, in its discretion, for the county clerk's office. It must be kept in mind that in budgeting the board is also controlled by the provisions of Ch. 129, F. S. *Cf.* AGO 061-151.

AS TO QUESTION 4:

Section 28.24(14) provides:

> For *receiving* money into the registry of court:
>
> (a) First $500, percent 1
> (b) Each subsequent $100, percent ..... ½

It is noteworthy that prior to its amendment by Ch. 70-134, Laws of Florida, the predecessor of this provision stated that the fee was for "[m]oneys, received into registry of court *and* paying out." (Emphasis supplied.) In construing the provision, this office concluded that only one fee was contemplated for the combined process of receiving and paying out and that such fee was earned and should be collected when the money is paid out. Biennial Report of the Attorney General 1931-1932, p. 490, and 1951-1952, p. 42.

As it presently exists, the statute does not contain the phrase "and paying out." In making material changes in the language of a statute, the Legislature is presumed to have intended some objective or alteration of the law. Ryder Truck Rentals, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964). Where there is no ambiguity in a statute, there is no room for construction and its plain meaning will not be disturbed. City of Sarasota v. Burch, 192 So.2d 9 (2 D.C.A. Fla., 1966). The statute clearly provides that the duty for which the clerk earns his fee is *receiving* money into the registry of court. And as that is the service for which he is being compensated, the service charge is payable at that time.

However, the clerk's fees as provided for by the Legislature in s. 28.24(14), F. S., are applicable only where there is no contrary provision in another statute. City of Sarasota v. Burch, *supra*. For example, in AGO 075-298, I concluded that s. 28.24 must be construed together with s. 74.051, F. S., and that the clerk's fee for depositing money in the registry of the court as required by the "quick taking" procedure of Ch. 74, F. S., could not be determined, and thus was not payable, until such funds were disbursed.

AS TO QUESTION 5:

Section 28.231, F. S., provides that the clerk of the county court shall receive as compensation for similar services the same charge as provided for the clerk of the circuit court. However, s. 34.041(1), F. S. (1974 Supp.), which was amended subsequent to the enactment of s. 28.231, specifically prescribes the filing fees for civil actions *in the county court* and provides further that: "Except as provided herein, service charges for performing duties of the clerk relating to the county court shall be as provided in ss. 28.24 and 28.241." Section 34.041(3), F. S. (1974 Supp.), specifically provides that s. 28.241(2) shall not apply to criminal proceedings in county court. However, the county court clerk is entitled to the service charges prescribed by ss. 28.24 and 28.241(3), F. S., in matters connected with criminal proceedings, such as searching the record, and reporting to the Comptroller the payroll of jurors and grand jury witnesses. Attorney General Opinion 074-320. Section 34.041(4), F. S. (1974 Supp.), states that service charges as provided in Ch. 28, F. S., shall also apply to institution of appellate proceedings from the county court to the circuit court.

Thus, the fees set forth in ss. 28.24 and 28.241, F. S., relating to the clerk of the circuit court shall also apply to similar services performed in the county court, except as otherwise provided by s. 34.041, F. S. (1974 Supp.).

Your fifth question is answered in the affirmative.

076-12—January 8, 1976

MUNICIPALITIES

VACATION OF DEDICATED STREET WITHOUT COUNTY APPROVAL

To: R. William Rutter, Jr., Palm Beach County Attorney, West Palm Beach

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

May a municipality unilaterally discontinue or vacate streets dedicated to public use located within its boundaries and thus obviate county approval for the discontinuance or vacation?

SUMMARY:

A municipality may discontinue or vacate a street located within the municipality without subsequent approval of the county, even though shown on a recorded plat covering land within and without the municipality, unless such street had been designated a part of the county road system pursuant to s. 336.01, F. S.

This opinion is restricted to, and has to do only with, municipalities located in noncharter counties.

It is a fundamental rule of statutory construction that a statute must be construed *in pari materia* with all other laws on the same subject. State *ex rel.* Gaines Const. Co. v. Pearson, 154 So.2d 833, 7 A.L.R.3d 602 (Fla. 1963). Thus, s. 177.101(4), F. S., must be construed in light of Chs. 166 and 336, F. S.

In AGO 075-171, I discussed the proper procedure for a municipality to follow in vacating a street pursuant to its home rule powers. A municipality's power to vacate streets is based upon s. 166.042, F. S., and s. 167.09, F. S. 1971, and I stated in that opinion:

> Thus, I am of the opinion that the legislative and governing bodies of municipalities may continue to exercise the authority formerly delegated by s. 167.09, subject only to the otherwise valid terms and conditions which they choose to prescribe. *Cf.* Penn v. Pensacola-Escambia Government Ctr. Auth., 311 So.2d 97, 101 (Fla. 1975); AGO's 074-274 and 075-101.

And in regard to whether a street or alley should be vacated by ordinance or resolution, I concluded in the summary:

> Within the purview of the definitions of the words "ordinance" and "resolution" contained in s. 166.041, F. S., it would appear that, at least with respect to *permanent* vacating of a street or alley by a municipal legislative body, the more appropriate procedure would be the adoption of an ordinance rather than a resolution.

Section 336.01, F. S., authorizes the county and city to agree that a street within the city shall be designated as a part of the county road system. Obviously, a city could not unilaterally vacate any road so designated. However, in absence of such a designation, a county would have no authority over a street within the corporate limits of a municipality, unless it is acquired under Ch. 177, F. S., the Map and Plat Law.

Chapter 177, F. S., regulates the platting of subdivisions. Section 177.071 requires the approval of "the appropriate governing bodies in a county" before a plat may be recorded, and s. 177.081 provides that when "the approval of the governing body has been secured and recorded in compliance with this chapter, all streets, alleys, easements, rights-of-way, and public areas shown on such plat, unless otherwise stated, shall be deemed to have been dedicated to the public for the uses and purposes therein stated." *See* AGO 071-307. However, pursuant to s. 177.081(2) such dedication does not create any obligation upon any governing body to perform any act of construction or maintenance within such dedicated areas except when the obligation is voluntarily assumed by the governing body. An offer of dedication continues, and thus may be accepted, until it is revoked or withdrawn by the grantor. City of Miami v. Florida East Coast Railway Co., 84 So. 726 (Fla. 1920). And acceptance may be by formal or informal act of the governing body or by actual use by the public. Robinson v. Riviera, 25 So.2d 277 (Fla. 1946).

Section 177.101, F. S., provides for the vacation and annulment of a subdivision plat or a part thereof by the governing body of the county. Subsection (4) requires the persons making application for the vacation of a plat or a part thereof to publish notice of this intention to apply therefor and provides further that:

> If such tract or parcel of land is within the corporate limits of any incorporated city or town, the governing body of the county shall be furnished with certified copy of resolution of the town council or city commission, as the case may be, showing that it has already by suitable resolution vacated such plat or subdivision or such part thereof sought to be vacated.

In AGO 071-307, I ruled that county approval of a subdivision plat located entirely within a municipality is not required as a prerequisite to its recordation, but mutual agreement would be required prior to recordation of a subdivision plat encompassing land lying both within and without a municipality. I have the view that, even though a plat of land or portion thereof lying both within and without an incorporated municipality may be vacated only by joint action of the city and county (as it had been approved by joint action of both), the county could vacate a county road located in the unincorporated area of the county, as authorized by s. 336.09, F. S., without the consent

of the city; and, conversely, a municipality could discontinue or vacate a street within its boundaries dedicated to the public for use as a city street without the consent of the county (assuming, of course, that the particular street had not been designated by agreement as a county road).

076-13—January 23, 1976

SHERIFFS

AUTHORITY TO DETAIN PERSON PURSUANT TO WRIT OF *NE EXEAT*

To: John A. Madigan, Jr., Counsel for Florida Sheriffs Association, Tallahassee

Prepared by: Mary Jo Carpenter, Assistant Attorney General

QUESTION:

Does the approved form of a writ of *ne exeat*, Form 1.917, Florida Rules of Civil Procedure, authorize the sheriff (or his deputy) to take the defendant named in the writ into custody and deliver him to the booking desk at the county jail, where the defendant then has the option of posting the bond required by the writ or being jailed?

SUMMARY:

The language of the form of a writ of *ne exeat* (approved by Rule 1.900 RCP), Form 1.917, *Ne Exeat*, does not appear to be legally sufficient, within constitutional limitations, to authorize a sheriff to arrest or take a person against whom such writ has been issued into custody and to deliver such person to the booking desk at the county jail before such person is allowed to post bond, absent explicit refusal by such person to give the bond. However, the issuing court may, in its order for the writ, command the sheriff to take the defendant into custody and detain him until defendant shall have properly executed and filed the bond required of him by the court. The approved form of the writ, Form 1.917, RCP, may be modified by the clerk of the court if necessary to conform the writ to such order of the court.

The form for a writ of *ne exeat*, as approved by the Florida Supreme Court at 211 So.2d 174 (Fla. 1968), is as follows:

> YOU ARE COMMANDED to *request defendant . . . . to give bond* in the sum of $ . . . . payable to the Governor of Florida and his successors in office conditioned that defendant will answer plaintiff's pleading in this action and will not depart from the state without leave of court and will comply with the lawful orders of this court and pay any judgment hereafter entered in this action, with sureties to be approved by the clerk of this court, *and if defendant refuses* to give the bond, you are commanded to arrest him and confine him in the . . . . County jail until he gives the bond or until the further order of this court.
>
> WITNESS my hand and the seal of this Court on . . . . , 19 . . . .
>
> (Name of Clerk)
> As Clerk of the Court
>
> By . . . .
> As Deputy Clerk

NOTE: The court may eliminate the requirement that the bond be to "pay any

> judgment hereafter entered in this action." An order for the writ must be obtained from the court. (Emphasis supplied.)

The writ of *ne exeat*, issued by the clerk pursuant to an order of the court, is primarily a personal writ intended to enable the court to retain jurisdiction over the defendant by preventing him from leaving the jurisdiction until he gives security for his appearance in court. State *ex rel.* Perky v. Browne, 142 So. 247 (Fla. 1932); Pan American Surety Co. v. Walterson, 44 So.2d 94 (Fla. 1950); Aiken v. Aiken, 81 So.2d 757 (Fla. 1955). Since the primary purpose of the writ is to maintain or secure the defendant's presence within the issuing court's jurisdiction, and one of the prerequisite requirements for the issuance of the writ is that the defendant is about to leave the jurisdiction, Hagen v. Viney, 169 So. 391 (Fla. 1936), it would seem obvious that some restraint of the defendant's freedom is necessarily required between the time the writ is served and the required bond is posted and the sureties approved, if such approval is required by the writ. Note that the approved form requires sureties on the defendant's bond to be approved by the clerk of the court, but the three statutes specifically providing for a writ of *ne exeat*, ss. 61.11 (for enforcement of alimony), 742.021 (in paternity actions), and 68.02(1) (in general), F. S., are silent as to the requirements for surety bond or approval of defendant's sureties. Although s. 68.02(1), as well as the other cited statutes, does not expressly provide for the giving of a bond by the party taken into custody by a sheriff under a writ of *ne exeat*, there can be no question as to one under such restraint having such right. Thomas v. Martin, 129 So. 602, 603 (Fla. 1930). Pursuant to s. 45.011, F. S., relative to all statutes about practice and procedure, a "bond with surety" means one with two sufficient sureties, a bond with a licensed surety company as surety, or a cash deposit conditioned as for a bond; and pursuant to s. 45.021, F. S., this definition applies to any bond ordered to be given under the provisions of s. 68.02(1), F. S., unless specifically provided otherwise in Ch. 68 or parts thereof. Thus, any bond ordered pursuant to s. 68.02(1) or (2) could be a bond with a licensed surety company as surety or a cash deposit conditioned as for a bond in lieu of a bond with two sureties. *Also see* s. 61.13(4), F. S., as renumbered by s. 1 of Ch. 75-99, Laws of Florida, authorizing the court at any stage of the proceeding and after final judgment to make such orders about what security is to be given for the care, custody, and support of the minor children of a marriage as from the circumstances of the case is equitable. The authorities are in agreement that the arrest, or taking into custody, and detention of the defendant until he gives bond or furnishes the required security is what is contemplated and normally ordered by the court:

> The writ generally commands the sheriff to arrest the respondent and detain him in jail until he furnishes a bond . . . . 23 Fla. Jur., *Ne Exeat* s. 2. The writ itself is directed to the sheriff commanding him to commit the party to custody until he gives security in the amount set by the court. 57 Am. Jur.2d, *Ne Exeat* s. 17.

See also 5 C.J.S. *Ne Exeat* ss. 10 and 11.

The Florida courts also view the writ as requiring the arrest and detention of defendant:

> On being arrested on a writ of *ne exeat* . . . . [Perky, *supra*, at 250.]

> [t]he principal [defendant] must then be surrendered to the custody of the sheriff until such time as he makes another satisfactory bond. . . . [Aiken, *supra*, at 760.]

And see the form of an "Order in the Nature of a Writ of Ne Exeat" issued by a circuit court, cited in Pan American Surety, *supra*, 44 So.2d at 95:

> This, therefore, is to command you to immediately take into custody [defendant] and to hold him until the said defendant . . . shall have executed and filed a bond in the sum of $7,500.00 to be approved by the Clerk of this Court. . . .

In addition, s. 68.02(4), F. S., granting the surety of the defendant the right at any time before the bond is forfeited to surrender the principal defendant to the court or to its

executive officer (sheriff), provides that the executive officer of the court "shall detain the principal [defendant]." The problem thus arises: The standard form of the writ, Form 1.917, RCP, approved by the Supreme Court of Florida at 211 So.2d 174 (Fla. 1968), does *not* command the sheriff to arrest the defendant nor to take him into custody and detain him until the required bond is posted. Therefore, since the three *ne exeat* statutes cited above are silent in this regard, under those three statutes, and because of the inherent equitable power of the court, the terms and conditions of the order for the writ, or the writ itself, or the defendant's bond, become the obligation and province of the court. If a writ of *ne exeat* using the approved form is what the clerk actually issues pursuant to the order of the court, the sheriff is only commanded to *request* the defendant to give bond. It is too well settled in Florida to require citation of authority that a sheriff may not make an arrest unless he has the lawful authority to do so. In this instance, in serving a writ of *ne exeat*, the sheriff is acting as executive officer of the court (s. 30.15, F. S.), so the court, in its order for a writ, must grant the sheriff the authority to arrest or take the defendant into custody, since no statute does so. However, a sheriff need not look to the actual court order, but will be protected in the execution of process valid on its face. Camp v. Mosley, 2 Fla. 171 (1881). *Cf.* DeWitt v. Thompson, 7 So.2d 529 (Miss. 1942); U. S. *ex rel.* Bailey v. Askew, 486 F.2d 134 (5th Cir. 1973); O'Brien v. Food Fair Stores, North Dade, Inc., 155 So.2d 836 (3 D.C.A. Fla., 1963). And the language of approved Form 1.917 does not expressly authorize the sheriff to arrest the defendant *unless* defendant "refuses" to give bond. Therefore, if Form 1.917 is used for the writ, the authority to make the arrest does not spring into existence until, and is conditioned upon, the defendant's refusal to give the bond.

What, other than an explicit statement from defendant, may constitute a "refusal" to give bond, will depend on the facts of the particular case and is a matter for judicial determination. While there is some authority for the proposition that "refusal" may be merely a passive failure to act, Halprin v. Babbitt, 303 F.2d 138 (1st Cir. 1962), Florida appears to follow the majority rule that a "refusal" implies something more than a mere passive failure to act—it implies an active rejection or denial of what is asked. County Canvassing Board, etc. v. Lester, 118 So. 201 (Fla. 1928); Board of Public Instruction of Palm Beach County, Fla. v. Cohen, 413 F.2d 1201 (5th Cir. 1969).

The court in Perky, *supra*, at 250, pointed out that because the writ of *ne exeat* was "contrary to the right of free locomotion as taught by the common law," it was done away with at one time, and even now it "should be sparingly used. . . ." The court went on to say

> . . . as the writ is a purely civil writ, it should not be allowed to be used oppressively or in unnecessary violation of the defendant's constitutional right to personal freedom to go and come as he may please.

In view of the fact that courts take very seriously any infringement by law enforcement officers of a citizen's constitutional right to liberty and the fact that the approved form of the writ does not specifically authorize the sheriff to take the defendant into custody and to detain him until he gives bond and, as noted above, the authority to arrest the defendant is conditioned upon the defendant's refusal to give bond, the "common practice" you describe of "picking up a defendant and bringing him to the booking desk" at the jail "where [he] has the choice of posting bond or being jailed" is constitutionally suspect, absent explicit refusal of the defendant to give the bond. This is not to say that the defendant may not voluntarily accompany the sheriff or voluntarily consent to detention until the required bond or surety is given, thus waiving any claim against the sheriff for false arrest and/or imprisonment. *See* 35 C.J.S. *False Imprisonment* ss. 12 and 45; *cf.* 79 C.J.S. *Searches and Seizures* ss. 62 and 102.

However, the best resolution of the conflict between what Form 1.917 commands the sheriff to do, absent explicit refusal of the defendant to give bond, and the "common practice" described above is for the sheriff to seek an order from the issuing court as to the procedure the sheriff is to follow in executing or serving the writ, and that the sheriff is to take defendant into custody and detain him until defendant shall have properly executed and filed the bond required of him. This is the usual style of a writ of *ne exeat* as set out in the form books. *See* 18 Am. Jur. *Pleading and Practice Forms* (Rev. ed.), *Ne Exeat*, Forms 7, 8, 9, and 10. The preface to the Florida Forms, Rule 1.900, RCP, states that the forms may be varied to meet the facts of a particular case. It would seem a simple matter for the court order for the *ne exeat* writ or other court order or decree to authorize and order the sheriff to take defendant into custody and detain him until

defendant posts the required bond, thus protecting the sheriff from a suit for false arrest and/or false imprisonment.

As it now reads, the language of Form 1.917, RCP, does not appear to be legally sufficient, within constitutional limitations, to authorize the sheriff to arrest or "pick up a defendant and [take] him to the booking desk" at the county jail before the defendant is allowed to post bond, absent explicit refusal by defendant to give the bond. Therefore, your question as stated must be answered in the negative.

076-14—January 23, 1976

COUNTIES

MAY NOT CHARGE PUBLIC UTILITIES FOR USE OF ROAD RIGHTS-OF-WAY

To: Ralph B. Wilson, St. Lucie County Attorney, Fort Pierce

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

May a board of county commissioners impose an annual charge for the use of county and secondary road rights-of-way by public utilities under the provisions of s. 125.42, F. S.?

SUMMARY:

The board of county commissioners does *not* have the authority pursuant to s. 125.42, F. S., to impose an annual charge in the nature of a rental for the use of the county and secondary road rights-of-way by public utilities.

Section 125.42(1), F. S., provides:

> (1) The board of county commissioners, with respect to property located without the corporate limits of any municipality are authorized to *grant a license* to any person or private corporation to construct, maintain, repair, operate and remove lines for the transmission of water, sewage, gas, power, telephone and other public utilities under, on, over, across and along any county highway or any public road or highway acquired by the county or public by purchase, gift, devise, dedication, or prescription . . . . (Emphasis supplied.)

The Florida Constitution, s. 1(f), Art. VIII, provides that noncharter counties, such as St. Lucie County, may exercise only those powers granted by general or special law.

It is assumed that the annual charge to which you refer is in the nature of a rental of such public properties to public utilities. The statute, s. 125.42(1), F. S., is clear in authorizing the board of county commissioners to grant a "license."

> A license in real property may be defined as a personal, and ordinarily revocable assignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein. In other words, a license in real property is a mere permit to do something on the land of another; it does not imply an interest in his land. [11 Fla. Jur. *Easements and Licenses* s. 2.]

> A license is distinguishable from a lease in that a lease conveys an interest in land and transfers possession, and may be required to be in writing, where the period is sufficient to bring it within the statute of frauds. [25 Am. Jur.2d *Easements and Licenses* s. 123.]

The Florida Supreme Court summed up the authority of the board of county commissioners well in Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944):

> It seems well established by decisions of this court that the county commissioners have only such powers as are granted them by statute [cite omitted], may exercise only the authority conferred by statutory regulations [cite omitted], and by the constitution itself [cite omitted]. Moreover, where "there is doubt as to the existence of authority, it should not be assumed." [Cite omitted].

It is apparent from the discussion above that the power to license is not equivalent to the power to lease and that s. 125.42, F. S., does not authorize the board of county commissioners to exercise the latter power.

Your question is answered in the negative.

076-15—January 23, 1976

MUNICIPALITIES

MEMBERSHIP IN REGIONAL PLANNING COUNCIL

To: Margaret M. Gentle, North Port Charlotte Mayor, Venice

Prepared by: Michael Davidson, Assistant Attorney General

QUESTIONS:

1. Must a municipality adhere to a particular regional planning council area, under Ch. 160, F. S., or may it join a regional planning council for any area it chooses?

2. May a municipality refrain from being included in *any* regional planning council?

SUMMARY:

Only one regional planning council may be created pursuant to Ch. 160, F. S., within a geographical area. Municipalities located within that area desiring to join a regional planning council may join only the council created in their area. A municipality may refrain from joining or participating in any regional planning council but must complete by July 1, 1979, a comprehensive growth plan under Ch. 75-257, Laws of Florida.

AS TO QUESTION 1:

Section 160.01(1), F. S., reads in part:

> (1) Any two or more counties and municipalities are hereby authorized and empowered to create and establish *a* regional planning council . . . . (Emphasis supplied.)

This authorization is to create *a* planning council. Therefore, in my opinion, "a" is used here to mean "one." In reference to "a," 1 *Words and Phrases* 4 reads: "It [a] is placed before nouns of the singular number, denoting an individual object, or quantity individualized."

In s. 160.01(1), F. S., "regional planning council" is singular in number. My interpretation, therefore, is that only one regional planning council is authorized within a given region.

"Region" is defined in 36A *Words and Phrases* 226, as "neighborhood, vicinity, district, quarter, or ward." The words of a statute "should be construed in their plain and ordinary sense." 30 Fla. Jur. *Statutes* s. 87. "Neighborhood" is defined in 28 *Words and Phrases* (74 Cumulative Supp., p. 68) as "nearness" and "connotes congeries of local

interests arising from problems confined to a limited area as distinguished from matters in which every citizen in state has common concern."

In my opinion, a reading of s. 160.01(1), F. S., with these definitions dictates the conclusion that only one council may exist within a reasonably restricted geographical area.

Aside from the technical argument, this also produces a very practical result—and one that was obviously intended by the Legislature. Since the council's function is advisory [s. 160.02(10), F. S.], the confusion and uncertainty that would be generated by fragmenting and overlapping regional planning between several councils is immediately apparent. Such fragmentation or overlapping would effectively defeat the intent of the statute which is to provide coordination of growth planning by governing bodies within the entire area for the future.

AS TO QUESTION 2:

Section 160.01(1), F. S., is permissive in nature as is indicated by its use of the terms "authorized and empowered." It contains no requirement that mandates that a municipality join such an organization.

Question 2 is therefore answered in the affirmative.

It should not be overlooked that all cities and counties must comply with the requirements of the Local Government Comprehensive Planning Act of 1975, Ch. 75-257, Laws of Florida, by designating on or before July 1, 1976, a "local planning agency" to develop a comprehensive growth plan on or before July 1, 1979. As interpreted by the Division of State Planning, a regional planning council created pursuant to Ch. 160, *supra*, may be designated as its "local planning agency" by a local governing body; however, as noted in AGO 075-280, the "growth plan" required to be adopted by 1979 under Ch. 75-257 must be prepared in accordance with the substantive and procedural requirements of that act.

076-16—January 23, 1976

FUNERAL DIRECTORS

WHEN EMBALMING NECESSARY—PRESERVATION OF BODY BY REFRIGERATION

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Donald D. Conn, Assistant Attorney General

QUESTIONS:

1. Under what circumstances must a dead human body be embalmed?

2. If a dead human body is maintained under refrigeration at a temperature of 40° F or below, may a funeral establishment remove the body from refrigeration and hold a brief chapel service with the body present without embalming said body?

SUMMARY:

A dead human body must be embalmed only when death occurred as a result of highly contagious disease and when the body is to be transported out of state.

When refrigeration is used to preserve a dead human body rather than embalming, a brief chapel service with the body present may be held as long as the remains are maintained at or below 40° F.

Embalming is defined by s. 470.01(1), F. S., to mean the disinfection, preservation, or the attempted disinfection or preservation of the dead human body by the application of chemicals, externally or internally, or both, or by any other means.

Pursuant to statutory authority found in subparagraphs 10. and 11. of s. 381.031(1)(g), F. S., the Division of Health of the Department of Health and Rehabilitative Services has adopted Ch. 10D-37, F.A.C., which provides in Rule 10D-37.05 that:

> A dead human body may be held in any place or in transit over twenty-four (24) hours after death or pending final disposition only if the body is maintained under refrigeration at a temperature of 40° F or below, embalmed in a manner approved by the Board of Funeral Directors and Embalmers in accordance with provisions of Chapter 470, F. S., or otherwise preserved.

It is apparent from this rule that there is no requirement for either embalming or refrigeration of a dead human body during the first 24 hours after death. However, I presume that your question refers primarily to disposition of the remains more than 24 hours after death, and in this case the body must either be embalmed in a manner approved by the Board of Funeral Directors and Embalmers, maintained under refrigeration at a temperature of 40° F or below, or otherwise preserved in a manner approved by the board and the Division of Health. Thus, with the exception of deaths resulting from highly contagious diseases, after the initial 24-hour period following death, embalming is simply one method of preserving the remains in a safe condition as determined and recognized by the Division of Health and an equally acceptable procedure would be to maintain the body under refrigeration at a temperature of 40° F or below.

However, it should be noted that with regard to deaths resulting from certain highly contagious diseases, Rule 10D-37.04, F.A.C., does require embalming prior to the transportation of such bodies:

> . . . [T]he bodies of those who died of smallpox, bubonic plague, asiatic cholera, glanders, or anthrax shall not be transported unless prepared as follows: embalmed in a manner approved by the Board of Funeral Directors and Embalmers in accordance with provisions of Chapter 470, F. S., washed with a disinfectant, all orifices stopped with absorbent cotton, and encased in an air-tight metal casket or other air-tight container.

In addition, Rule 10D-3.18, F.A.C., also deals with highly contagious diseases and provides that:

> Bodies of those who died of smallpox, bubonic plague, asiatic cholera, glanders, anthrax or epidemic meningitis shall not be transported unless prepared as follows: embalmed by an approved process, washed with disinfectant, all orifices stopped with absorbent cotton and encased in an air-tight metal casket or air-tight metal lined outside case.

Nevertheless, this rule would appear to require embalming only when the body is to be transported to a point outside of the state and not require embalming when such body is to be disposed of in this state. *See* Rules 10D-37.01 and 10D-37.03, F.A.C.

It is the duty of all funeral directors and embalmers in Florida to comply with all laws and rules of the Division of Health relating to embalming of a dead human body. Section 470.12(1)(i) and (2)(k), F. S. In addition, the board has adopted Rule 21J-7.02, F.A.C., which provides:

> (a) Licensees, in all their licensed activities, shall comply with all applicable Florida laws and rules and regulations related to health.
> (b) The responsible licensee shall give his closest personal supervision to the body of any person who has died of any contagious or infectious disease; and such licensee shall embalm or cause to be embalmed, through arterial injection with an approved embalming fluid, and shall likewise treat and disinfect the body cavities of such body if it is to be transported by a common carrier.

This rule adopted by the board is consistent with the previously cited Division of Health rules.

Thus, embalming would appear to be mandatory only when death resulted from highly contagious diseases referred to above and when the body is to be transported by a common carrier. In other cases, as an alternative method of preserving the remains, a

body may be maintained by refrigeration at 40° F or below and, as long as such temperature is maintained, there is no prohibition on a brief chapel service with the body present.

076-17—January 27, 1976

COUNTIES

PROPRIETY OF REIMBURSEMENT OF TRAVEL EXPENSES OF COUNTY COMMISSIONERS

To: C. Burton Marsh, Clerk, Circuit Court, Bushnell

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

May a noncharter county grant an in-county travel allowance for members of the board of county commissioners by ordinance, or would such payment be in conflict with Ch. 145, F. S., which provides for the compensation of county officials?

SUMMARY:

A payment under Sumter County Ordinance No. 71-8 providing for an in-county travel expense allowance of $50 per month for each member of the board of county commissioners without complying with the requirements of s. 112.061(7)(f), F. S. (1974 Supp.), would not appear to be a proper reimbursement for travel expenses under s. 112.061, F. S. (1974 Supp.). However, such ordinance may be deemed to be effective to implement s. 145.121(2), F. S. (1974 Supp.), insofar as the chairman of the board of county commissioners is concerned and, as applied to the chairman of the board, is not in conflict with Ch. 145, F. S.

The legislative intent of Ch. 145, F. S., is clearly set forth in s. 145.011. The essence of this section is the intent to provide uniform compensation of county officials having substantially equal duties and responsibilities. (The salary for each member of the board of county commissioners is set forth in s. 145.031.) The compensation provided for in Ch. 145 is the sole and exclusive compensation of the officers whose salary is established therein for the execution of their official duties. Section 145.17.

The board of county commissioners, pursuant to s. 145.121(2), F. S. (1974 Supp.), is authorized to grant an additional monthly expense allowance for the chairman of the commission of up to $50 per month for travel and other expenses related to the performance of his duties. Such compensation shall not be considered as part of the chairman's income from office. As the authority granted by s. 145.121(2), *supra*, specifically mentions the chairman of the board of county commissioners, the statute should be construed to exclude such payments to the rest of the board. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952).

It is well settled that public officers may only exercise those powers specifically granted by constitution or statute and those necessarily implied from such grant. First National Bank v. Filer, 145 So. 204, 87 A.L.R. 267 (Fla. 1933). Moreover, where there is doubt as to the existence of authority, it should not be assumed. White v. Crandon, 156 So. 303 (Fla. 1934). The board of county commissioners is not authorized by Ch. 145 to grant *to themselves* an additional monthly expense allowance for travel and other expenses related to the performance of their duties as they may do for the chairman.

Payments made to county officials pursuant to s. 112.061, F. S. (1974 Supp.), should not be considered extra compensation to the official prohibited by ss. 145.121(1), F. S. (1974 Supp.), or 145.17, F. S. *Cf.* s. 145.131(1), (3), F. S., and AGO 073-485. Sumter County Ordinance No. 71-8 provides for an in-county travel allowance of $50 per month for each member of the board of county commissioners regardless of actual mileage traveled.

The board of county commissioners is authorized by s. 112.061(7)(f), F. S. (1974 Supp.), to grant monthly allowances in fixed amounts for the use of privately owned automobiles on official business in lieu of the mileage rate prescribed by s. 112.061(7)(d). Attorney General Opinion 072-83. However, such allowances shall be reasonable, taking into account the customary use of the automobile, the roads customarily traveled, and whether any of the expenses incident to the operation, maintenance, and ownership of the automobile are paid from funds of the agency or other public funds. The allowance may be changed at any time and shall be made on the basis of a signed statement of the traveler, filed before the allowance is granted or changed, and at least annually thereafter. (It should be noted that a depreciation allowance may not be used in computing the amount due by the county to the individual commissioner for the use of a privately owned vehicle on official business. Section 112.061(7)(g), F. S. (1974 Supp.). The statement shall show the places and distances for an average typical month's travel on official business and the amount that would be allowed under the approved rate per mile for the travel shown in the statement if payment had been made pursuant to s. 112.061(7)(d), F. S. (1974 Supp.). Section 112.061(7)(f). The signed statement required by this statute is necessary even though the ordinance granting the in-county travel expense makes a specific finding of an average expense based upon the experience and research of the county for the payment of authorized travel. Attorney General Opinion 072-83. (Moreover, a noncharter county may not enact any ordinance inconsistent with general or special law. Section 1(f), Art. VIII, State Const., and s. 125.01(1), F. S.)

The county ordinance in question does not appear to be sufficient to substitute for or serve in lieu of the action authorized and required by s. 112.061(7)(d), *supra*, or to meet the requirements of a signed statement of the traveler provided for in s. 112.061(7)(f), *supra*; and, payments pursuant to any such ordinance would not appear to be proper reimbursement for travel or transportation expenses under s. 112.061, F. S. (1974 Supp.).

Section 112.061, F. S. (1974 Supp.), is the only authority for the county to reimburse its officers and employees for travel expenses. Section 112.061 controls as to conflicts between its provisions and conflicting provisions in other general laws. Section 112.061(1)(b)1. However, the provisions of special or local laws prevail over conflicting provisions of s. 112.061 to the extent of any conflict. Section 112.061(1)(b)2. An ordinance is not a special or local law within the purview of s. 112.061(1)(b)2. which would prevail over any conflicting provisions of s. 112.061; and the county is not constitutionally empowered and is not authorized by s. 112.061 to adopt any ordinance or resolution inconsistent with s. 112.061.

However, a different situation exists in regard to the chairman of the board of county commissioners. Section 145.121(2), F. S. (1974 Supp.), provides:

> (2) Any board of county commissioners which prior to July 1, 1969 had not authorized an additional monthly expense allowance for the chairman of the commission may authorize such an allowance of up to $50 per month *for travel* and other expenses related to the performance of his duties, and compensation shall not be considered as part of the chairman's income from office. (Emphasis supplied.)

The compensation of the chairman of a board of county commissioners for his duties as chairman is not fixed by Ch. 145. Attorney General Opinions 069-87 and 073-485. Accordingly, it is concluded that Sumter County Ordinance No. 71-8 may be deemed to be effective to implement s. 145.121(2), *supra*, insofar as the chairman of the board of county commissioners is concerned and is not in conflict with Ch. 145 in this regard.

A point which underlies this opinion and should be stated for clarification is that, generally, mileage allowances or travel expenses authorized by s. 112.061, F. S. (1974 Supp.), are reimbursable only for travel away from the officer's or employee's "official headquarters"; there is not authority to reimburse an officer or employee for travel from his home to his "official headquarters." Attorney General Opinion 075-275.

076-18—January 27, 1976

PUBLIC FUNDS

PURCHASE OF EXTORTION INSURANCE BY COUNTY TAX COLLECTOR

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

Is the purchase of extortion insurance a proper expenditure for the office of county tax collector?

SUMMARY:

A county tax collector may, under certain circumstances, and with the approval of the Department of Banking and Finance, purchase extortion insurance and, with the approval or amendment of his budget by the Department of Revenue, charge the cost thereof as an expense of the office.

The primary obligation to provide adequate insurance for the protection of public money in the respective county offices is upon the several boards of county commissioners. Section 219.02(3), F. S. However, recognizing that it is the duty of each officer to keep safely all public money collected by him and to exercise all possible care for the protection of public money in his custody, s. 219.02(2), F. S., if it appears to an officer that the insurance provided by the board of county commissioners is inadequate, he may, with the approval of the Department of Banking and Finance, provide additional insurance found to be necessary and charge the cost thereof to the expense of his office. Section 219.02(3).

In addition, it appears that the Department of Revenue must also approve such an expenditure. Section 195.087(2), F. S. (1974 Supp.), requires the tax collector to submit to the Department of Revenue his budget for the operation of his office for the ensuing fiscal year. After final approval of the budget there shall be no reduction or increase by an officer, board, or commission without the approval of the Department of Revenue.

It should be noted that, pursuant to s. 219.05, F. S., deposits of public money should be made in a qualified depository sufficiently often to keep the amount of money in the office within the insurance coverage.

076-19—January 28, 1976

LAW ENFORCEMENT OFFICERS

AUTHORITY OF LOCAL OFFICERS IN FEDERAL WILDLIFE REFUGE

To: J. H. "Jim" Williams, Lieutenant Governor, Tallahassee

Prepared by: Donald D. Conn, Assistant Attorney General, and Barry Silber, Legal Assistant

QUESTION:

Does a local law enforcement officer have the authority to enforce federal and state laws, as well as county and municipal ordinances, within the boundaries of the J. N. "Ding" Darling National Wildlife Refuge?

SUMMARY:

Municipal police officers are authorized to enforce municipal ordinances and state criminal laws (felonies and misdemeanors) as peace officers, and make arrests therefor without a warrant, pursuant to s. 901.15, F. S., on a federal wildlife refuge located within the municipal limits where exclusive jurisdiction has not been ceded to the federal government. A county sheriff is authorized to enforce state criminal laws (felonies and misdemeanors), county ordinances, and municipal ordinances and make arrests therefor without warrant, pursuant to s. 901.15, on a federal wildlife refuge located within the territorial limits of the county, where exclusive jurisdiction has not been ceded to the federal government. Municipal police officers may execute process of the municipal court within the limits of a federal wildlife refuge located within the municipal limits, while the sheriff may execute the process of state courts throughout the county. Municipal police officers may enforce the provisions of Ch. 316, F. S., wherever the public has the right to travel by motor vehicle within the municipality, and the sheriff may enforce Ch. 316 wherever the public has the right to travel by motor vehicle throughout the county. Neither the sheriff nor municipal police officers are authorized to enforce federal law.

The creation of the J. N. "Ding" Darling Wildlife Refuge was the result of an exchange of lands between the federal government and the State of Florida. (State of Florida Board of Trustees of the Internal Improvement Trust Fund, Deed No. 23253-A, January 30, 1970.) The federal enabling legislation providing for acquisition of such lands by the Secretary of the Interior for use and maintenance as a wildlife refuge indicates an absence of congressional intent to secure exclusive federal jurisdiction over such lands. 16 U.S.C., s. 460K-1. Furthermore, there has been no deed of cession executed by the Governor, pursuant to Ch. 6, F. S., which provides for the cession of exclusive jurisdiction to the federal government when lands within the state are acquired, held for, or used by the federal government ". . . to erect and maintain forts, magazines, arsenals, dockyards, and other needful buildings," s. 6.02, or to acquire state lands for national forests, s. 6.06. The State of Florida in such cases retains concurrent jurisdiction to prosecute crimes committed on these lands.

The Darling Wildlife Refuge on Sanibel Island is situated within the municipal boundaries of the City of Sanibel. Chapter 74-606, Laws of Florida; Trustees of the Internal Improvement Trust Fund, Deed No. 23253-A, *supra*. Municipal police officers may enforce state criminal law (felonies and misdemeanors) and municipal ordinances as peace officers, and make arrests therefor without a warrant, within the municipal boundaries. Section 901.15, F. S. Additionally, municipal police officers are authorized to execute the lawfully authorized process of the municipal court within the limits of the refuge—additionally, process of the municipal court may be served anywhere within the county in which the municipal court is situated. Attorney General Opinion 074-274. However, municipal police officers may not execute the process of the state courts or those of federal courts or officials. The deed of conveyance establishing the wildlife refuge makes the transaction expressly "subject to rights-of-way for existing public roads, ditches, canals and public utilities." Trustees of the Internal Improvement Trust Fund, Deed No. 23253-A, *supra*. Chapter 316, F. S., provides for the enforcement of the traffic laws of the state on all the streets and highways thereof and elsewhere, wherever the public has the right to travel by motor vehicle. Municipal police officers are authorized to enforce the provisions of Ch. 316 wherever the public has the right to travel within the incorporated boundaries of the municipality. Municipal police officers may also effect an arrest without a warrant for misdemeanors or violations of city ordinances occurring in their presence within the city limits, or in fresh pursuit, s. 901.25, F. S., and may effect a warrantless arrest for felonies committed, as set forth in s. 901.15(2), (3), and (4), F. S.; and for violations of Ch. 316 occurring in their presence within the municipal limits or in fresh pursuit, s. 901.15(5), F. S. Attorney General Opinion 076-6.

The county sheriff, as a peace officer, may arrest a person without a warrant when the person has committed a felony or misdemeanor or violated a county ordinance (*see* s. 125.69, F. S.) or violated a municipal ordinance in the presence of the officer. He may also effect an arrest without a warrant when a felony has been committed and he reasonably believes that the person has committed it or when he reasonably believes that

a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it. The sheriff may also place a person in custody when a warrant for the arrest has been issued and is held by another peace officer for execution. Finally, the sheriff as a peace officer may arrest the subject for a violation of Ch. 316, F. S., which has been committed in his presence within the county boundaries. Such arrest may be made immediately or on fresh pursuit. Section 901.15, F. S. The sheriff, as executive officer of the state courts, may execute the process of the state courts throughout the county. Municipal and county law enforcement officers are not authorized to enforce federal law.

076-20—January 28, 1976

FIRE PREVENTION

COUNTY HAS NO AUTHORITY TO REQUIRE CONTROL BURNING

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

Prepared by: Michael Davidson, Assistant Attorney General

QUESTIONS:

1. Can a county, by local ordinance, require a private owner to control burn his land for fire protection purposes in view of the specific provisions of s. 590.08, F. S., as well as other provisions in Ch. 590?
2. If question 1 is answered affirmatively, can the county contract with the state Division of Forestry to perform such control burns if the private owner fails to comply with such an ordinance?
3. Can a county, through local legislation, obtain the authority to require a private landowner to control burn his land as a fire prevention measure?
4. Would an amendment to Ch. 590, F. S., be more appropriate in relation to this matter in lieu of a county ordinance, if such amendment gave the Division of Forestry the authority to prescribe and burn limited areas of private land as a fire prevention measure without the authority of the owner?

SUMMARY:

The authority granted a noncharter county by s. 125.01, F. S., to provide "fire protection" does not include the power to require a landowner to control burn his property for fire prevention purposes or to contract with the state Division of Forestry for such control burning. A legislative act specifically authorizing a county or counties or the Division of Forestry to engage in such control burning must comply with constitutional due process and equal protection requirements.

AS TO QUESTIONS 1 AND 2:

In answering these questions, it is assumed that the county is a noncharter county and that there are no applicable special or local laws governing your question.

Although your first questions refer to s. 590.08, F. S., making it unlawful for any person to willfully or carelessly burn or to set fire to, or cause a backfire to be set to "any forest, grass, woods, wild lands or marshes not owned or controlled by such person," that statute does not control and is not dispositive of the questions as they relate to the county's legislative powers to enact ordinances under the police power and/or to contract for the execution and enforcement of such ordinances.

Section 1(f), Art. VIII, State Const., provides that noncharter counties (with which we are herein concerned and limited to) "shall have such power of self government as is provided by general or special law." This means that legislative authority must be found for the exercise by a noncharter county of its home rule power. Davis v. Gronemeyer,

251 So.2d 1, 5 (Fla. 1971); Weaver v. Heidtman, 245 So.2d 295 (1 D.C.A. Fla., 1971); *cf.* State *ex rel.* Volusia County v. Dickinson, 269 So.2d 9 (Fla. 1972). Under s. 125.01(1)(d), F. S., noncharter counties are authorized to "provide fire protection." This statute confers upon the county government the authority to enact local ordinances to provide fire protection, provided that such ordinances are "not inconsistent with general or special law." Section 1(f), Art. VIII, State Const.

As noted in AGO 072-347, the Division of Forestry is *required* by s. 125.27(1), F. S., to enter into a contract, when requested by a county to do so, for the establishment and maintenance of countywide fire control and protection of all forest and wild lands within the county; and it *may*, under s. 125.27(2), *id.*,

> provide communication services and other services directly related to fire protection within the county, other than forest fire control . . . provided the rendering of such services does not hinder or impede in any way the division's ability to accomplish its primary function with respect to forest fire control.

Attorney General Opinion 072-347 also concluded that the county's authority under s. 125.01(1)(d), F. S., to provide fire protection is "all inclusive or more exhaustive" than the mandate of s. 125.27(1).

Thus, insofar as the power of the county to adopt an ordinance relating to fire protection is concerned, the only limitation referable to Ch. 590, F. S., has to do with forest and wild land fire protection and control, as to which the primary responsibility is vested in the Division of Forestry by s. 590.02(1)(b). Attorney General Opinion 072-347. And it is clear that counties may, under s. 125.01(1)(d), *supra*, adopt ordinances relating to fire protection generally for lands and improvements within the unincorporated areas of the county and may, if they determine to do so, provide "countywide fire protection of *all* forest and wild lands *within* said county" (Emphasis supplied.), pursuant to s. 125.27(1), F. S., by agreement with and in cooperation with the Division of Forestry. The division is authorized by s. 125.27(2), F. S., to provide other services directly related to fire protection within the county, if requested by the county, other than forest fire control. However, the authority to provide for "fire protection" granted to a county by s. 125.01(1)(d) should not be interpreted as constituting broad and unlimited authority for a county to adopt an ordinance under the police power providing for the mandatory control burning of certain lands in the county under which trees, grass, shrubs, and plants may be destroyed to protect other segments of the public from *potential* injury or hazard. This statute must be read *in pari materia* with other laws pertaining to fire protection and control and the constitutional limitations upon the exercise of the police power of the state; and none of the statutes referred to above include any authorization or in any manner provide for compulsory or prescribed control burning of private land for protection purposes or the public health, safety, or welfare. Even during a drought emergency, backfires may lawfully be set only if it can be proved that such a backfire was necessary to save life or property; and the burden of proving such necessity as a defense rests upon the person asserting that defense. Section 590.081, F. S.

Thus, it seems that neither the division nor a county is presently empowered by law to require a private landowner to control burn his land as a measure of preventing or controlling an *anticipated* blaze or a potential injury or hazard to life or property; and neither the division nor the county is authorized by law to perform such control burns. While municipalities are granted the power under former s. 167.05, F. S., to abate nuisances—and now possess such power under the Municipal Home Rule Powers Act, s. 166.042, F. S.—nowhere are counties granted such authority. County commissioners have only such powers as are granted them by statute; and where there is doubt as to the existence of authority, it should not be assumed. Hopkins v. Leon County, 74 So. 309 (Fla. 1917); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944). Since the county is without statutory authority to require control burning of private lands by the owners thereof for fire protection purposes, it likewise is without lawful authority to contract with the Division of Forestry to perform such control burns in the absence of consent thereto by the private owner or the lawful possessor of such land. Moreover, in the absence of statutory authorization, the governmental powers of the county commission cannot be delegated by contract or otherwise. Crandon v. Hazlett, 26 So.2d 638 (Fla. 1946); State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955); Nicholas v. Wainwright, 152 So.2d 458 (Fla. 1963); 67 C.J.S. *Officers* s. 104.

Your first two questions are accordingly answered in the negative.

AS TO QUESTIONS 3 AND 4:

As to whether the Legislature could validly authorize a county to require a private landowner to control burn his land as a fire prevention measure, there is nothing in s. 11, Art. III, State Const., designating the subjects upon which special laws are forbidden that would prohibit such a special law. Such legislation must, however, be consistent with other constitutional limitations. And, whether adopted as a special law relating to a particular county or as a general law relating to all the counties or to the Division of Forestry, due process and equal protection requirements for deprivation of property without compensation would have to be met. Actual necessity would have to be shown, an emergency would probably have to be declared to exist (*e.g.*, as in s. 590.082, *supra*), and entry upon private lands (especially fenced or enclosed land) would have to be authorized; otherwise, the agents or employees of the county or the state might be found liable under the trespass laws for at least nominal damages and any actual damages flowing from such trespass. The statute would have to include detailed definitions, standards, and limitations so that such an exercise of the police power of the state, as delegated by the Legislature to the county or counties or the division, is "so clearly defined, so limited in scope, that nothing is left to the unbridled discretion of the agency charged with the responsibility of enforcing the Act." Mahon v. County of Sarasota, 177 So.2d 665, 666 (Fla. 1965). *Cf.* Flesch v. Metropolitan Dade County, 240 So.2d 504 (3 D.C.A. Fla., 1970). *See also* Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957).

In State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), the court said: "There is a very clear distinction between an appropriation of private property to a public use in the exercise of the power of eminent domain, and the regulation of the use of property—and its destruction if necessary—in the exercise of the police power." The court went on to explain that "in the exercise of eminent domain the sovereign compels the dedication of the property, or some interest therein, to a public use, or, if already dedicated to one public use, then to another." The court then added: "On the other hand the police power is exercised by the sovereign to promote the health, morals, and safety of the community . . . it rests upon the fundamental principle that everyone shall so use his own as not to wrong or injure another."

It is widely held that, in order to justify an exercise of the police power, there must be a sound basis of necessity to protect the health, safety, and welfare of the public and a reasonable relationship between the legislation so enacted and the object sought to be achieved. Larson v. Lesser, 106 So.2d 188 (Fla. 1958); Florida Citrus Commission v. Golden, 91 So.2d 657 (Fla. 1956); Eelbeck Milling Co. v. Mayo, 86 So.2d 438 (Fla. 1956); Gaylon v. Municipal Court of San Bernardino Judicial District, San Bernardino County, 40 Cal. Rptr. 446 (4 D.C.A. Cal., 1964); Killingsworth v. West Way Motors, Inc., 347 P.2d 1098 (Ariz. 1959).

See also Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957), in which the court held that the absolute destruction of private property "is an extreme exercise of police power" of the state and is "justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation." Thus, if control burning as a fire prevention measure results in the destruction of private property, the state must pay compensation for said property unless such destruction takes place in the face of "actual" necessity.

Black's Law Dictionary defines "actual" as:

> Real; substantial; existing presently in act, having a valid objective existence as opposed to that which is merely theoretical or possible. Giacco v. Hartman, 170 La. 949, 129 So. 540. Opposed to potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal. American Ins. Co. of Newark, N.J., v. Seminole County Board of Education, 51 Ga. App. 808, 181 S.E. 783, 786. Something real, in opposition to constructive or speculative; something existing in act.

It thus appears in the instant case that if private property is destroyed through such controlled burning as has been discussed above the state must pay compensation to the owner of such property unless it is destroyed in the face of a presently existing—as opposed to a potential—necessity. In contextual terms, "actual necessity" must be interpreted to mean an *existing, ongoing, threatening* conflagration. The destruction, by the state or its agent, of private property in *anticipation* of some "actual necessity" yet to arise, as is suggested in the instant case (*i.e.*, in order to control or prevent *potential*, future fires), without payment of compensation to the owner thereof, seems to be, under

present case law guidelines, an unconstitutional act. Thus, any such amendment to Ch. 590, *supra*, as has been proposed above, would seem to have to provide for notice and a hearing, as w " as for compensation to the owner of any private property which suffered destruction at ne hands of the state, absent an "actual necessity," which in the instant case translates as an existing, threatening conflagration. Conversely stated, any amendment to Ch. 590 which would not provide for compensation to be paid to the owner of such land as is destroyed in the absence of an actual necessity would appear to be constitutionally infirm.

Additionally, under further guidelines set forth in Smith v. State Plant Board, *supra*, it appears that a reasonable notice requirement must be met in order to comply with due process requirements. Equal protection requirements would also have to be met.

In sum: The Legislature may provide for control burning of private land in appropriate circumstances; but such a statute must comply with both United States and Florida constitutional guarantees, particularly as laid down in the Corneal and Smith cases, *supra*.

076-21—January 28, 1976

CHILD ABUSE

CASE RECORDS—CONFIDENTIALITY

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. What constitutes the "records of any child-abuse case"?
2. Are "the records" kept in either the state office registry or the local Division of Family Services office of the reports from the abuse registry and investigative reports and records of the alleged abuse available under the discovery procedures of the civil and criminal rules of procedure despite statutory provisions of confidentiality?
3. If the "records" themselves are not available, may the caseworker investigating the alleged abuse be deposed as to the worker's personal knowledge of the case without violating confidentiality provisions in:
   (a) A criminal abuse action?
   (b) A civil dependency proceeding under Ch. 39, F. S.?
4. What do the words "except as provided in this section" mean in relation to s. 827.07(6), (7), and (8), F. S., and the release of confidential information in the registry and social work records of the division in the following situations:
   (a) When police protection appears urgent, may the Division of Family Services caseworker call law enforcement officials directly without going through the office of the state attorney?
   (b) Must the caseworker call only the state attorney?
   (c) Would releasing information directly to law enforcement officials, if the worker is not required to relay only to the state attorney, be in violation of the provisions against the release of information which would make the worker personally liable?
   (d) How much of the information of the abuse registry may be transmitted to the state attorney (or law enforcement officials, if permitted)?

SUMMARY:

Any and all documents or "public records" made or received by the Department of Health and Rehabilitative Services which contain any information involving known or suspected instances of child abuse or

maltreatment are confidential within the purview of Chs. 75-101 and 75-185, Laws of Florida, and, accordingly, are not subject to public inspection except as specifically provided therein.

Questions concerning the extent to which statutorily confidential records and reports of known or suspected child-abuse cases or information contained therein are subject to discovery under the Civil or Criminal Rules of Procedure must be resolved by the courts on a case-by-case analysis of need and relevancy and the legal issues and actual circumstances involved in any given case.

The Division of Family Services may call law enforcement officials directly without first contacting the state attorney when an urgent situation exists requiring immediate police action or protection of the safety and welfare of children.

The prohibition regarding release of confidential information was neither intended to, nor does it, apply to release of information to the state attorney and local law enforcement personnel assisting in the investigation of a criminally abused child. The findings of an investigation made pursuant to s. 827.07(6), F. S., or the entire report of the investigation—except for the name of the person reporting the child abuse—rendered to and received by the department may be transmitted to the state attorney. However, the names of persons reporting abuse should not be furnished to the state attorney, the police, or the courts without the written authorization of the person reporting the abuse.

AS TO QUESTION 1:

Section 827.07(11), F. S., Ch. 75-101, Laws of Florida, provides that:

> Any person who willfully or knowingly makes public or discloses any information contained in the child-abuse registry or the records of any child-abuse case, except as provided in this section, may be held personally liable. Any person injured or aggrieved by such disclosure shall be entitled to damages.

This section amended s. 827.07, F. S., formerly s. 828.041, F. S., which relates to child abuse. Subsequently, s. 827.07 was further amended by Ch. 75-185, Laws of Florida.

While the "records" of any child-abuse case are not specifically defined within either Ch. 75-101 or Ch. 75-185, *supra*, various documents are mentioned within the latter act which can be used to delineate the intended coverage of the prohibition found within Ch. 75-101. For example, s. 827.07(6), F. S., refers to "reports of abuse" which must be transmitted to the department. More specifically, s. 827.01(7), F. S., makes *all* reports and records concerning known *or* suspected instances of child abuse confidential.

This provision is an obvious exception to those provisions of Ch. 119, F. S., as amended by Ch. 75-225, Laws of Florida, relating to public inspection of public records. Pursuant to s. 119.011(1), "public records" are defined to include

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

Based on the above, I am of the view that any and all documents or "public records" made or received by the department which contain any information involving known or suspected instances of child abuse or maltreatment are confidential within the purview of Chs. 75-101 and 75-185, *supra*, and, accordingly, are not subject to public inspection except as specifically provided therein. *Also see* s. 119.07(2)(a), F. S., exempting all "public records" which are provided by law to be confidential or which are prohibited from being inspected by the public, from inspection under the provisions of s. 119.07(1), F. S.

AS TO QUESTION 2:

A definitive answer to this question is impossible to formulate without analyzing the facts of a particular case which might arise in which such records could be deemed to be

relevant or necessary to the maintenance or defense of a civil action or criminal prosecution. Additionally, because of the nature of the subject matter and the type of civil actions which could arise in connection therewith, potential constitutional questions involving due process rights could be presented. *See* s. 9, Art. I, State Const.; United States Const., Amend. XIV, s. 1. In a criminal context, issues involving compulsory process of witnesses, the right to present a full defense, and the right to confrontation and cross-examination might also be involved. *See* s. 16, Art. I, State Const.; United States Const., Amend. VI.

Generally, courts which have considered issues involving discovery and confidential documents have ordered *in camera* inspections of such materials in order to determine the relevance and need for the documents in a particular case. *See, e.g.*, Barnett v. Police Dept. of County of Nassau, 364 N.Y.S.2d 186 (Sup. Ct. 1975); *In re* L., 357 N.Y.S.2d 987 (Sup. Ct. 1974); Addie W. v. Chorees U., 354 N.Y.S.2d 721 (Sup. Ct. 1974). *Also see* State *ex rel.* R. R. v. Schmidt, 216 N.W.2d 18 (Wis. 1974), involving the federal constitutional right of a juvenile to inspect a hearing examiner's report made confidential by state law concerning revocation of a juvenile's "aftercare supervision" status.

However, in Fogarty Bros. Transfer Co. v. Perkins, 250 So.2d 655 (2 D.C.A. Fla., 1971), the court found to be clearly erroneous a trial court order which had required production of certain accident reports required by s. 350.45(1), F. S., to be made by common carriers to the Public Service Commission which statute provided that "no such report shall be competent evidence in any court against the common carriers making it in any court." The court construed this proviso as rendering privileged the reports required to be made by such common carriers and filed with the Public Service Commission. The court in *Fogarty* further observed that such reports were no less confidential than accident reports required by s. 317.131, F. S. 1969, nor any more amenable to discovery. *See* Nationwide Insurance Co., Pinellas Co. v. Monroe, 276 So.2d 547 (2 D.C.A. Fla., 1973), *cert. denied*, 283 So.2d 366, holding that the statement of deputy sheriff given in compliance with the statute requiring an accident report, s. 316.066 (former ss. 317.131 and 317.171), is immune from discovery except as to its existence. It is noteworthy that Ch. 75-101, *supra*, while providing civil liability for proscribed disclosure, does *not* provide that the information and records therein mentioned are not admissible in civil or criminal proceedings in the courts and that Ch. 75-185, *supra*, likewise does *not* provide that the s. 827.07(7), F. S., information, reports, and records are inadmissible in court or beyond the process of the court. To the contrary, s. 827.07(8) requires reports received and investigated pursuant to s. 827.07(6) to be immediately transmitted to the circuit court. Thus, *Fogarty* does not necessarily control the answer to this question because neither Ch. 75-101 nor Ch. 75-185 contains provisions similar to s. 350.45(1), making reports mentioned therein inadmissible in any action against the carriers, or ss. 317.131 and 317.171, F. S. 1969, and present s. 316.066, F. S., making the accident reports inadmissible in any civil or criminal trial except as therein specifically provided for certain limited purposes.

Moreover, an additional factor which must be considered is the language of former s. 828.041(7) which was deleted in the subsequent amendatory act. This now deleted provision permitted disclosure of records in the registry "to counsel representing the person in any civil or criminal proceeding."

Accordingly, this office is unable to render a definitive opinion on this question. This issue must instead be resolved by the courts based on a case-by-case analysis of the facts in any given situation.

AS TO QUESTION 3:

In response to your third question, I must again decline to give a definitive answer and, instead, defer resolution of this question to the courts when presented in an appropriate judicial proceeding. I would add, however, that although this question deals with depositions as opposed to discovery or inspection of tangible documents or "records," I do not believe that this distinction would require a different answer from that provided in response to question number 2. Chapter 75-101, *supra, in effect* prohibits disclosure—*i.e.*, any disclosure by any means, oral or written—of *any information contained in* the registry or the records of a child-abuse case. Chapter 75-185, *supra*, makes *all information in the registry* and all reports or records, and necessarily and impliedly the information contained therein, confidential. Once a document is made confidential by the Legislature, the information may not be disclosed regardless of the physical form of such disclosure. *Accord*: Attorney General Opinion 075-203.

AS TO QUESTION 4:

I am of the view that the Division of Family Services may call law enforcement officials directly without first contacting the state attorney when an urgent situation exists requiring immediate police action or protection of the safety and welfare of children. The statute requires the department to "secure the cooperation of law enforcement officials" and, in turn, law enforcement has a corresponding duty to, *inter alia*, "give full cooperation to the department" and "to *protect* and enhance the welfare of abused children" and/or other children potentially subject to abuse.

While the statute requires the department to immediately and orally notify the state attorney who shall assist local law enforcement officers in the investigation of the case when it has reason to believe that a child has been criminally abused, there is nothing in the statute which either requires the state attorney to immediately contact local law enforcement officials or furnish any immediately necessary police action or protection or which expressly or by necessary implication prohibits the department from so proceeding. Therefore, nothing in the statute purports to prohibit the department or its authorized agents from contacting both the state attorney and local law enforcement officials or initially contacting local law enforcement officials and immediately thereafter notifying the state attorney when an urgent situation exists requiring police action and protection of the safety and welfare of the child or children involved.

I do not believe that the prohibition regarding release of confidential information was intended to or does apply to release of information to the state attorney and local law enforcement personnel assisting in the investigation of a case of a criminally abused child. These authorities obviously must be provided with whatever information is necessary for them to conduct a thorough investigation and prosecution, if required, of the case. Section 827.07(11), F. S., specifically exempts a person from personal liability for disclosure of information when provided for within s. 827.07, F. S. Since s. 827.07 requires the state attorney and local law enforcement officials to assist in a case of possible criminal abuse, information forwarded to these agencies as part of an investigation would remain confidential and would not subject the sender of such information to personal liability or criminal penalties pursuant to s. 827.07(11).

In regard to question 4(d), I am of the view that when s. 827.07(8), F. S., relating to transmittal of the report to the state attorney, s. 827.07(6), F. S., relating to investigations upon receipt of a report, and the title to Ch. 75-185, *supra*, stating that a report of such findings will be transmitted to the state attorney, are read *in pari materia*, it is apparent that the findings of the investigation made pursuant to s. 827.07(6) or the *entire report of the investigation*—except for the name of the person reporting the child abuse—rendered to and received by the department may be transmitted to the state attorney.

However, in specific regard to the names of persons reporting child abuse, a different conclusion must be reached. Section 827.07(7), F. S. (s. 1, Ch. 75-185, *supra*), provides that:

> . . . the names of persons reporting abuse shall *in no case be released to any person, other than employees of the department involved in the investigation of reports of abuse, without the written consent of the person reporting.* (Emphasis supplied.)

The *only* individuals who are permitted access to this information without the written consent of the person reporting the abuse are employees of the department who perform department investigations of reports of child abuse. There is no provision which excepts state attorneys, the police, or the courts from this prohibition. By specifically exempting only employees of the department involved in child-abuse investigations from the prohibition found at s. 827.07(7), the Legislature in effect expressed its intention to make the prohibition applicable to all other persons. The rule of statutory construction, "the express mention of one thing is the exclusion of another," *see* Ideal Farms Drainage District v. Certain Lands, 19 So.2d 234 (Fla. 1944), and Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952), compels the conclusion that this prohibition *is* applicable to state attorneys, the police, and the courts, and, accordingly, the names of persons reporting abuse should not be furnished to these agencies or individuals without the written authorization of the person who reported the abuse. This conclusion is bolstered by Ch. 75-101, Laws of Florida, which provides that:

> Any person who willfully or knowingly makes public or discloses any information contained in the child abuse registry or the records of any child abuse case except as provided in this section may be held personally liable. . . .

Because of the very real possibility that certain individuals who have committed crimes involving criminal child abuse or maltreatment will avoid prosecution because Ch. 75-185, *supra*, prohibits state attorneys and police from, in certain instances, obtaining information which could be critical to a successful criminal investigation and prosecution, I intend to strongly urge that the Legislature consider remedial legislation revising both Chs. 75-101 and 75-185 as quickly as possible. While certain of the confidentiality provisions should be continued because of the admittedly sensitive nature of this information, at the same time it should not be permitted to frustrate or impede investigative and prosecutorial functions of criminal justice agencies or to allow individuals who have committed criminal acts against children to escape detection and/or punishment.

076-22—January 28, 1976

FIRE PREVENTION

DEFINITION OF "FIRE ALARM SYSTEMS"

To: Philip F. Ashler, State Treasurer and Fire Marshal, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTION:

Do the definitions contained in s. 2, Ch. 75-240, Laws of Florida [s. 633.021(12), F. S.], include all automatic fire alarm systems, including those not installed in connection with a sprinkler system?

SUMMARY:

Only those fire alarm systems which are an integral part of or connected with or related to fire protection systems as defined in s. 633.021(12), F. S., and the contractors who design, install, repair, inspect, and service them are intended to be regulated by Ch. 633, F. S. The definitions contained in s. 2 of Ch. 75-240, Laws of Florida [s. 633.021(12)], do NOT embrace and include fire alarm systems that are not a part of or connected with or appurtenant to automatic or manual sprinkler systems protecting buildings or structures from fire.

Section 633.021(12), F. S., defines a fire protection system as consisting of

> . . . an automatic or manual sprinkler system designed to protect the interior or exterior of a building or structure from fire. *Such systems* shall include, but not be limited to, water sprinkler systems, water spray systems, foam water sprinkler systems . . . *Halon and other chemical and automatic alarm systems used for fire protection use. Such systems shall also include* . . . air lines and thermal systems *used in connection with sprinkler* and *automatic alarm systems* and tanks and pumps *connected thereto.* (Emphasis supplied.)

The first sentence of s. 633.021(12) actually defines the system to consist of automatic or manual sprinkler systems, and the second sentence goes on to, in effect, define "such systems" to include, *i.e.*, as part of the sprinkler systems, automatic alarm systems and certain chemical alarm systems. Use of the phrase "include but not limited to," is one of enlargement rather than limitation, Argosy Limited v. Hennigan, 404 F.2d 14 (5th Cir. 1968); 10B Fla. Digest *Statutes* s. 199; and other parts, devices, equipment, and appurtenances, though not enumerated in s. 633.021(12), that pertain to, are connected with, are part of, or are appurtenant to an automatic or manual sprinkler system or are

otherwise used or employed in such sprinkler systems would also be included if in effect they are or become a part of the sprinkler systems. Thus, the statute does not embrace or include, but rather it impliedly excludes from its operation, alarm systems or any other devices or system not a part of or connected with a sprinkler system.

While Rule 4A-3.09(3), F.A.C., provides the fire marshal's definition of an automatic fire alarm system, which the fire marshal was authorized to promulgate by rule (s. 633.05, F. S.), in the absence of an express statutory definition, and there previously having been no definition of a fire alarm system in Ch. 633, F. S., the Legislature, by its amending of Ch. 633 by enacting Ch. 75-240, Laws of Florida, and by providing for the definition of such systems in s. 633.021(12), has preempted the fire marshal's definition and replaced it through the passage of s. 633.021(12). A statutory definition of a term takes precedence and controls over all other definitions. First Nat. Bank v. Florida Industrial Com., 16 So.2d 636 (Fla. 1944); Greenleaf & Crosby Co. v. Coleman, 158 So. 421 (Fla. 1934); Ervin v. Capitol Weekly Post, Inc., 97 So.2d 464 (Fla. 1957); Richard Burtram & Co. v. Green, 132 So.2d 24 (Fla. App. 1961).

Whereas no statutory definition appears within the provisions of Ch. 633, *supra*, or Ch. 75-240, *supra*, other than that inherent in or implicit in s. 633.021(12) and (13), the fact that s. 633.01(3) refers to "fire alarm systems" and "fire extinguishing equipment" and the fire marshal is empowered to enforce (only) "all laws . . . relating (thereto)," and if there are no laws relating thereto other than s. 633.021 definitions, the remaining applicable parts of Ch. 633, as amended by Ch. 75-240, must refer to "fire extinguishing equipment," "fire extinguishers," "fire extinguishers and systems," *e.g.*, ss. 633.01, 633.05, 633.061, and "fire protective equipment" in s. 633.065.

Contractors, as defined by s. 633.021(13), F. S., are those

> . . . whose business includes the execution of contracts requiring the art, ability, experience, knowledge, science, and skill intelligently to lay out, fabricate, install, inspect, alter, repair, or service *all types of fire protection systems, piping or tubing, and appurtenances and equipment pertaining thereto, including* . . . air lines and thermal systems *used in connection with sprinkler and alarm systems*, and tanks and pumps *connected thereto*. (Emphasis supplied.)

The "all types of fire protection systems" has reference to the various systems defined and enumerated in s. 633.021(12), *supra*, and appurtenances thereto.

It is clear from the language employed by the Legislature in enacting this chapter that only those fire alarm systems which are an integral part of or connected with or related to fire protection systems [as defined in s. 633.021(12), F. S.] and the contractors who design, install, repair, inspect, and service them, are intended to be regulated by Ch. 633, F. S. It is a general principle of statutory construction that the mention of one thing implies the exclusion of another. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Biddle v. State Beverage Dept., 187 So.2d 65 (Fla. App. 1966). Where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944). A court cannot extend the meaning of language used to include a class of persons that the Legislature did not refer to, even though the title of the act contains a statement that the legislation is for the protection of the general public. Fisher v. American Fire & Casualty Co., 10 Fla. Supp. 81, *cert. den.*, 101 So.2d 150 (Fla. 1956). When the language of a statute is both clear and reasonable, and logical in its operation, a court should not speculate as to what the Legislature intended. *In re* Estate of Levy, 141 So.2d 803 (Fla. App. 1962); Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960); *In re* Estate of Jeffcott, 186 So.2d 80 (Fla. App. 1966). Moreover, an administrative agency or officer of the state possesses no power not granted by statute, and any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof. State *ex rel.* Greenberg v. Florida State Bd. of Dent., 297 So.2d 628 (1 D.C.A. Fla.), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); City of Cape Coral v. G.A.C. Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973).

Your question as stated is therefore answered in the negative.

076-23—January 29, 1976

TRAFFIC INFRACTIONS

SUFFICIENCY OF DETAINER FOR GIVING CHEMICAL TEST FOR INTOXICATION; WHEN MANDATORY HEARING REQUIRED

To: John J. Blair, State Attorney, Sarasota

Prepared by: A. S. Johnston, Assistant Attorney General

QUESTIONS:

1. Does detainer of a motorist for a noncriminal infraction constitute a lawful arrest for the purpose of allowing a subsequent chemical test for intoxication?
2. Is a mandatory hearing required by s. 318.19, F. S., when property damage is between $51 and $250?

SUMMARY:

The detaining for a noncriminal traffic infraction or for allegedly driving under the influence of alcoholic beverages, based on probable cause, is a sufficient "lawful arrest" to satisfy the statutory requirements of s. 322.261(1)(a), F. S., to allow a subsequent chemical test for intoxication.

A mandatory hearing is not required by s. 318.19(2), F. S., as it incorporates the provision of s. 322.27(1)(b), until a violation of the traffic laws has resulted in property damage in excess of $250.

Responding to your first question, Ch. 74-377, Laws of Florida, effective January 1, 1975, decriminalizes a number of formerly criminal traffic offenses by downgrading these offenses to what are to be known as "infractions." A determination of whether a detainer for a noncriminal "infraction" is tantamount to an arrest is necessary in order to answer your initial question.

In Gustafson v. State, 243 So.2d 615 (4 D.C.A. Fla., 1971), a motorist was stopped on the suspicion of a peace officer that he was driving while intoxicated. Upon conviction, Gustafson appealed to the Fourth District where he argued, among other things, that this stop was unreasonable and therefore unlawful under the Fourth Amendment to the United States Constitution. The court held that:

> . . . [T]he act of an officer in stopping an automobile and approaching it while armed and in uniform constitutes a *seizure* of the person, no matter how brief the detention. Albeit for a short time, the liberty of the occupants is restrained just as much as if the officer had made a formal arrest and then subsequently released the "arrested" individuals.

The court then cited Terry v. Ohio, 392 U.S. 1 (1968): "It must be recognized that whenever a police officer arrests an individual and restrains his freedom to walk away, he has 'seized' that person."

Detention for a noncriminal traffic infraction under the new law, Ch. 74-377, *supra*, falls within this definition of a "technical" arrest. In the situation where a motorist has been detained for a traffic infraction, his person has been seized by law enforcement officials and prohibited from continuing on his way, regardless of the brevity of the delay. The liberty of the individual has been restrained the same as if he had been placed under arrest and then released.

It must be recognized, on the other hand, that not all instances in which a vehicle is stopped on the state's roads constitute technical arrests. A license check is such a case. City of Miami v. Aronovitz, 114 So.2d 784 (Fla. 1959). Detention of a motorist for a routine investigation for a stolen car, Nicholson v. United States, 355 F.2d 80 (5th Cir. 1966), or detention of robbery suspects, Lowe v. State, 191 So.2d 303 (3 D.C.A. Fla., 1966), would not be a technical arrest. In these cases there is lack of probable cause. In stops for traffic infractions, however, the officer must have some probable cause to make the

stop. Once the stop is made, the motorist is detained in the sense that he is temporarily deprived of his liberty and is subjected to the authority of the law. This is a technical arrest.

Another factor to be considered in determining whether detention for a traffic infraction constitutes a lawful arrest is the nature of the penalties imposed thereon. The new statute provides for monetary fines for violations of the traffic law. Although these fines are designated as "civil" in nature, their essential character is criminal. The imposition is in the form of a penalty which is enforced by the sovereign, or state, rather than by personal individual enforcement. Their purpose is to deter unlawful conduct, not to compensate a private individual for a civil wrong committed by the offender. *See* AGO 072-60.

Once it has been determined that detention for a traffic infraction under Ch. 74-377 is a technical arrest, the question then becomes whether such an arrest satisfies the requirements of s. 322.261(1)(a), F. S. This statute, commonly known as the "implied consent" law, provides that chemical tests for intoxication may be given to any person who accepts the privilege of operating a motor vehicle while within the State of Florida, if he is lawfully arrested for any offense allegedly committed while driving under the influence of alcoholic beverages. It further provides that the test "shall be incidental to a lawful arrest." A lawful arrest without a warrant is one which is predicated upon probable cause to believe that an offense has been or is in the process of being committed. In the instance where a motorist is detained for a traffic infraction, there is also present probable cause to believe that the law is being or has been disobeyed. Since probable cause must exist in cases of traffic infractions as a predicate to a lawful detention, such detention also meets the standard of a lawful arrest. So long as adequate probable cause exists, detention is lawful whether it is a "technical" arrest or a full stationhouse arrest. Chapter 75-298, Laws of Florida.

This conclusion—that detention of a motorist for a noncriminal infraction constitutes a lawful technical arrest for the purpose of allowing a subsequent chemical test—must not be read so as to allow indiscriminate use of chemical tests upon any motorist detained for a traffic infraction. *The peace officer must have probable cause to believe that the motorist is intoxicated before he may administer the test, in order to comply with the requirements of s. 322.261(1)(a), F. S.* In circumstances where the initial detention of the motorist is for a noncriminal traffic infraction, and the peace officer subsequently discovers evidence of intoxication, he may have probable cause to arrest for driving while intoxicated (which is an offense which remains criminal by its exception from the new law). This probable cause would be sufficient for a lawful arrest, and this arrest also would provide the basis for giving the chemical test.

In response to your second question, s. 318.19(1), F. S., provides for a mandatory hearing for "any infraction which results in an accident that causes the death or personal injury of another or property damage in excess of $250," while s. 318.19(2), F. S., provides for a mandatory hearing for "[a]ny infraction which would, if the person is convicted, result in the suspension or revocation of his driver's license or privilege under ss. 322.26 and 322.27." Reference to s. 322.26 in s. 318.19(2), F. S., is erroneous as none of the offenses listed in that section qualify as an "infraction" and will be deleted from the statutes by reviser's bill.

Section 322.27(1)(b), F. S., authorizes the Department of Highway Safety and Motor Vehicles to suspend an operator's or chauffeur's license upon a showing that he:

> (b) Has been convicted of a violation of any traffic law which resulted in an accident that caused the death or personal injury of another or property damage in excess of $50;

which latter subsection appears to conflict with the provisions of s. 318.19(1), F. S., in that there is a different minimum property damage specified.

It must first be remembered that s. 318.19, F. S., only provides that a person violating the terms of s. 318.19(1), (2), and (3) shall not have available to him the provisions of s. 318.14(2) and (4), F. S. The provisions of s. 318.14(2) and (4) are provisions which permit a person cited for an infraction to either post bond and forfeit the same or pay the civil penalty by mail or in person within 10 days of the date of the infraction. These two sections in substance permit the payment of a civil penalty without the necessity of a hearing before the court. It therefore follows that if the privilege of not attending a hearing is taken away, then a person charged with an infraction, who has lost that privilege by statute, is required to appear before the court.

When an infraction occurs which results in an accident causing death or personal injury to another or property damage, the question evolves as to what amount of property damage is necessary to cause the person committing the infraction to be required to appear before the court for hearing. It is obvious that subsection (1) of s. 318.19, F. S., is in conflict with subsection (2), as the former provides for property damage in excess of $250 while the latter (by incorporating s. 322.27(1)(b), F. S.), provides for property damage in excess of $50.

If paragraphs of a statute are so inconsistent that they cannot be harmonized or reconciled, the statute must be construed in a manner which will give effect to the purpose of the statutes and to legislative intent. Reyes v. Banks, 292 So.2d 39. All parts of a statute must be considered and harmonized so that the whole legislative scheme may be made effectual and the cardinal rule in construing a statute is that the legislative intent must govern in the final analysis. Chiapetta v. Jordan, 16 So.2d 641.

It is also important to note that the construction of a statute by the agency or body charged with its administration is entitled to great weight and will not be overturned until clearly erroneous. State *ex rel.* Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823. The Department of Highway Safety and Motor Vehicles administers the provisions of s. 322.27, F. S., and does not suspend a driver's license for an infraction of any traffic law which resulted in property damage until said property damage is in excess of $250.

It therefore must follow that in following the cardinal rule in the interpretation of conflicting sections of a statute as expressed by the courts of this state and in harmonizing and reconciling the legislative intent, after consideration of the construction of the statute by the agency charged with the statute's administration, a mandatory hearing would not be required under s. 318.19(2), F. S., as it incorporates s. 322.27(1)(b), until the property damage exceeds $250.

076-24—January 29, 1976

LAW ENFORCEMENT OFFICERS

PAROLE AND PROBATION OFFICERS ARE LAW ENFORCEMENT OFFICERS

To: Ray E. Howard, Chairman, Florida Parole and Probation Commission, Tallahassee

Prepared by: A. S. Johnston, Assistant Attorney General

QUESTION:

Are parole and probation officers law enforcement officers as defined in s. 112.19, F. S.?

SUMMARY:

Parole and probation officers are, for the purposes of s. 112.19, F. S., "law enforcement officers" as defined in said section.

A law enforcement officer is one whose duty it is to preserve the peace. Black's Law Dictionary (Rev'd Fourth Ed. 1968). In Frazier v. Elmore, 173 S.W.2d (Tenn. 1943), the court said; "We commonly refer to and describe those whose duty it is to preserve the peace as 'peace officers' or 'law enforcement officers.' " In this context, at least, a peace officer is synonymous with a law enforcement officer. *Cf.* "Peace Officers," Black's Law Dictionary (Rev'd Fourth Ed. 1968). Restatement of Torts 2d, s. 114, defines a peace officer as one "designated by public authority whose duty it is to keep the peace, and arrest persons guilty or suspected of crime."

Chapter 112, F. S., contains general provisions of Florida law which apply to public officers and employees. Section 112.19 provides for death benefits to law enforcement officers. Section 112.19(1) is the definition section of the statute, while s. 112.19(2) provides for the payment of $20,000 in death benefits to the beneficiary of a law enforcement officer, under 70 years of age, while engaged in the performance of any of

the duties mentioned in s. 112.19(1)(c) who is killed or receives bodily injury which results in the loss of his life within 180 days from the date of said injury. As to the application of s. 112.19 to law enforcement officers who die of heart attacks while on duty, your attention is directed to informal opinion dated May 5, 1975, to the Honorable Tom Lewis, Representative, 83rd District of the Florida Legislature.

For the purposes of the special death benefit payable to law enforcement officers under s. 112.19(1)(c), F. S.:

> The term "law enforcement officer" means a full-time officer, deputy, agent or employee of an employer, whether elected at the polls, appointed or employed, whose duties require him to enforce criminal laws, make investigations relating thereto, apprehend and arrest violators thereof or transport, handle or guard persons arrested for, charged with or convicted of violations thereof.

The duties of the Florida Parole and Probation Commission, which are carried out by parole and probation officers, include "[s]upervising all persons placed on parole and determining violations thereof and what action shall be taken with reference thereto" and "[m]aking such investigations as may be necessary." Section 947.13, F. S. Parole and probation officers have the power of arrest when they have reasonable grounds to believe that "a parolee has violated the terms and conditions of his parole in a material respect." Sections 947.22(2) and 948.06(1), F. S. Because parole and probation officers have limited power of arrest they are law enforcement officers within the meaning of s. 790.001(8)(a), F. S., and may carry concealed weapons without a license when acting within the scope of their duties. Attorney General Opinion 071-386. Parole and probation officers are included in those classes of persons whom it is unlawful to resist, with or without violence to their persons, in the execution of any legal duty and whom it is unlawful to falsely personate. Sections 843.01, 843.02, and 843.08, F. S.

Since parole and probation officers' duties are concerned with the enforcement of criminal law and making investigations relating thereto, they do have the power of arrest and right to carry concealed weapons without a license. Furthermore, parole and probation officers are included under the coverage of ss. 843.01, 843.02, and 843.08, F. S., as law enforcement personnel, are considered law enforcement officers for the purposes of Ch. 790, F. S., and have been designated "high hazard" members by the Division of Retirement of the Department of Administration for purposes of s. 122.34(1)(b), F. S., a designation reserved for "only those members who are full-time criminal law enforcement officers or agents, as certified by the employing authority, who perform duties according to rule, order or established custom as full-time criminal law enforcement officers or agents."

Accordingly, I am of the opinion that parole and probation officers are, for the purposes of s. 112.19, F. S., "law enforcement officers" as defined in said section and that the question presented here must be answered in the affirmative.

076-25—January 29, 1976

PUBLIC OFFICERS

WHEN APPOINTMENT TO OFFICE TAKES EFFECT

To: J. H. Guerry, Executive Director, Judicial Administrative Commission, Tallahassee

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

> **For payroll purposes, if a person has signed a loyalty oath and has been sworn in as a circuit judge and assumed his duties on that date, should his official date of commission be the date he was sworn in as a circuit judge or the date he made the required payment of a commission fee under s. 15.08, F. S.?**

SUMMARY:

A circuit judge who received a written appointment to the office from the Governor stating that it was to be effective upon a date certain and who qualified in all respects for and began the performance of the duties of the office on that date is entitled to be compensated for the judicial services performed after that date, even though the formal commission was not issued until 10 days after the effective date of the original appointment.

It appears that the person in question was appointed by the Governor as a circuit judge on May 27, 1975, the appointment stating that it was to become effective on June 13, 1975. On June 11, 1975, the appointee took and subscribed to the oath of office and forwarded it to the Secretary of State, along with his acceptance of the office, as prescribed by s. 113.06, F. S.; and he was sworn in and assumed the duties of the office on June 13, 1975. However, he inadvertently failed to send to the Secretary of State the $10 fee required by law, ss. 113.01 and 113.02, F. S., for the issuance of his commission. *See also* s. 15.08, *id.*, prohibiting the Secretary of State "from affixing his signature and the seal of the state to the commission of any public officer until such officer has paid the amount of the tax required to be paid by said officer for the commission." Consequently, because of the time required for the Secretary of State to advise him through regular mail channels of the fee requirement and to receive the fee, the official commission, signed by the Governor and sealed and countersigned by the Secretary of State, was not issued until June 23, 1975.

It is settled in this state that the issuance of a formal commission to an officer who has been elected by the people or whose appointment by the Governor has been confirmed by the Senate is not necessary in order to complete the right and title of the person so elected or appointed to the office and the perquisites thereof. *See* Slaughter v. Dickinson, 226 So.2d 97 (Fla. 1969), in which the court directed the Comptroller to issue salary and expense warrants to an elected state attorney even though no formal commission was ever issued to him by the Governor, and cases cited. It has also been held that an appointment or "nomination" by the Governor of a person to an appointive office in which confirmation by the Senate is not required is not complete and final until the formal commission, signed, sealed, and countersigned by the Secretary of State, has been issued, in deciding the question of whether an incoming Governor is bound by the appointments or "nominations" made by the outgoing Governor. *See* State *ex rel.* Shevin v. Page, 250 So.2d 257 (Fla. 1971). *Accord*: Attorney General Opinion 071-1.

Here, however, an entirely different question is presented; and, as noted above, the Governor's written appointment of the circuit judge in question was, in fact, completed by the issuance of a formal commission. Prior to assuming the duties of the office, the judge complied with all the requirements prescribed by law as condition precedents to performing the duties of the office, including taking the oath required by the Constitution, s. 5(b), Art. II, State Const.; and he performed those duties with public acquiescence without any question having been raised as to his authority to do so and without the slightest appearance of a usurper. Thus, he was a de facto, if not a de jure, officer pending the issuance of the formal commission. *See* Sawyer v. State, 113 So. 736 (Fla. 1927), and State *ex rel.* Hawthorne v. Wiseheart, 28 So.2d 589, 593 (Fla. 1947).

In the case involving Judge Wiseheart, the court said that "[t]here is no taint attached to the fact of being a de facto officer," and that the only difference between a de jure and a de facto officer is that "one rests on right and the other rests on reputation." 28 So.2d at 593. And I know of no judicial decision or opinion of this office in which the right of a de facto officer to compensation for performing duties which he was fully qualified to perform, except for the issuance of a formal commission, has been questioned—much less denied. It may be that the Governor could direct the Secretary of State to amend the formal commission of the circuit judge here in question to make it effective as of the effective date of the written appointment. However, aside from the doubtful propriety of answering that question in this response, it is unnecessary to do so in the context presented by your question "for payroll purposes."

For the reasons stated above, I have the view that the circuit judge in question, who duly qualified in all respects to carry out the duties of the office, is entitled to be compensated for services performed under a written appointment from the Governor after the effective date of the appointment as stated therein, even though the issuance

of the formal commission was inadvertently delayed for 10 days following the effective date of the appointment.

076-26—January 29, 1976

MINORS

REMOVAL OF DISABILITY OF NONAGE—TREATMENT OF DRUG ABUSE—DISABILITY NOT REMOVED TO ALLOW CONSENT TO OTHER MEDICAL TREATMENT

To: Stuart Simon, Dade County Attorney, Miami

Prepared by: Caroline C. Mueller, Assistant Attorney General

QUESTION:

Do the provisions of s. 397.099, F. S., permit a minor who enters a drug abuse treatment and education center for purposes of rehabilitation to authorize medical treatment which may or may not be directly related to the minor's drug abuse problem?

SUMMARY:

Section 397.099, F. S., removes the disability of nonage of minors solely for the purpose of obtaining medical attention or treatment which is directly related to drug abuse or dependency. Any other medical treatment requires parental consent, except for emergency medical care or treatment prescribed by s. 458.21, F. S., or except as may be otherwise provided by statute, *e.g.*, s. 384.061(1), F. S.

It is my conclusion that the disability of nonage of minors is removed by s. 397.099, F. S., solely for the purpose of obtaining medical attention or treatment which is directly related to drug abuse or dependency. Any other necessary medical treatment for minors is subject to the general rules requiring parental consent, except as may be otherwise provided by statute, *e.g.*, s. 384.061(1), F. S. *Cf.* s. 458.21, F. S., relating to emergency care or treatment of minors in certain circumstances and subject to the conditions therein prescribed.

My research on this subject indicates that there have been no cases construing s. 397.099, F. S. It is thus necessary to look at the statute itself and determine the intent of the Legislature. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). The legislative intent must be determined primarily from the language of the statute. Vocelle v. Knight Brothers Paper Company, 118 So.2d 664 (1 D.C.A. Fla., 1963).

The language of s. 397.099, F. S., provides that the disability of nonage of minors is removed "for the purpose of obtaining rehabilitative or medical treatment for drug abuse or dependency." It is clear from the language that the intent of the Legislature was to remove the disability of nonage of minors solely for the purpose of obtaining drug abuse or dependency-related treatment.

In regard to intent, the title of Ch. 72-302, Laws of Florida, creating s. 397.099, F. S., declares that the legislative intent is "to provide minors with the capacity to consent to rehabilitative or medical treatment for drug abuse or dependency." The body of the act does not authorize or provide for any other kind of medical care or treatment without prior parental consent.

Moreover, the rule *expressio unius est exclusio alterius*—express mention of one thing implies the exclusion of another—appears to apply and rule out the removal of disability of nonage for any other purpose. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); State *ex rel.* Judicial Qualifications Commission v. Rose, 286 So.2d 562 (Fla. 1973); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974).

Thus, s. 397.099, F. S., removes the disability of nonage of minors solely for the purpose of obtaining drug abuse or dependency-related treatment. The question is then presented as to the scope of this treatment. The issue is whether "rehabilitative or

medical treatment for drug abuse or dependency" refers only to medical care or attention which is directly related to drug abuse treatment and rehabilitation or whether it refers also to any medical attention or treatment which may become, or may be deemed to be, necessary during a process of drug abuse treatment and rehabilitation.

Section 397.099, F. S., speaks of drug abuse or dependency-related treatment. The statute does not vest discretion in any person or treatment facility, nor does it fix any standards or conditions under which any discretion may be exercised or any other medical treatment for any other disease or bodily infirmity be administered or prescribed. Thus the treatment to which the minor consents under s. 397.099, F. S., must be directly related to drug abuse or dependency.

Moreover, a statute is to be strictly construed when it is in derogation of the common law. Such a statute is not to be interpreted as displacing the common law any further than is expressly declared. Bryan v. Landis, 142 So. 650 (Fla. 1932). As indicated in Volume 59 of American Jurisprudence Second, in the discussion on *Parent and Child*, s. 15, the common law duty and right of making decisions regarding medical treatment for minors have traditionally been held by parents and guardians. Section 397.099, F. S., changes the common law to provide minors with the capacity to consent to rehabilitative or medical treatment for drug abuse or dependency and, in effect, grants to the minor the right to make his own decision as to whether he will seek such drug abuse treatment. The drug abuse or dependency-related treatment he obtains with his own consent should be strictly interpreted to mean direct medical treatment for drug abuse or dependency and not any and all medical attention or treatment which may become, or may be deemed to be, necessary during a process of drug abuse treatment or rehabilitation.

076-27—January 29, 1976

PUBLIC FUNDS

STATE ATTORNEY MAY SPONSOR EDUCATIONAL TELEVISION PROGRAM RELATING TO CONSUMER PROTECTION

To: J. H. Guerry, Executive Director, Judicial Administrative Commission, Tallahassee

Prepared by: Stephen V. Rosin, Assistant Attorney General

QUESTION:

May a state attorney use state appropriated funds budgeted to underwrite the cost of an educational television program entitled "Consumer Survival Kit"?

SUMMARY:

The state attorney has been delegated considerable consumer protection responsibilities, both expressed and implied, which would authorize the state attorney's office to expend funds from his general operations appropriation to underwrite the cost of an educational television program entitled "Consumer Survival Kit."

Section 1(c), Art. VII, State Const., prohibits all expenditures from state funds except those made in pursuance of appropriations made by law, the legislative power to appropriate state funds for state purposes being exercised only through duly enacted statutes. Attorney General Opinions 057-150, 068-12, and 071-28. Moreover, as expressed in AGO 071-28:

> To perform any function for the state or to expend any moneys belonging to the state, the officer seeking to perform such function or to incur such obligation against the moneys of the state must find and point to a constitutional or statutory provision so authorizing him to do.

The statutory authorization for expenditure of appropriated funds to carry out a statutory purpose may be expressed or implied. In Molwin Investment Co. v. Turner, *et al.*, 167 So. 33 (Fla. 1936), the Florida Supreme Court held a county commission could expend public funds to hire auditors, as this action's authorization could be implied from the commission's statutory duties and responsibilities:

> The general and specific statutory powers of county commissioners as the general administrative and physical officers of the county are sufficient to support implied authority in the county commissioners to employ auditors for reasonable compensation to audit the books, records and accounts of county fee officers; that being a county purpose, and the county commissioners being constitutional officers. [167 So. at 34.]

This general principle is also discussed in *In re* Advisory Opinion to the Governor, 60 So.2d 285 (Fla. 1952), and Peters V. Hanson, 157 So.2d 103 (2 D.C.A. Fla., 1963):

> It is the well settled rule in this state that if a statute imposes the duty upon a public officer to accomplish a stated governmental purpose, it also confers by implication every particular power necessary or proper for complete exercise or performance of the duty, that is not in violation of law or public policy. [157 So.2d at 105.]

Implied powers, however, cannot be too far removed from the actual statutory authority. In Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970), the court held the Florida Development Commission could not expend public funds for a television broadcast on public television. The court found that Ch. 288, F. S., did not grant, either expressly or by implication, the commission authority to inject itself into the public school system of the state through a television program entitled "Education in Florida, A Perspective of Tomorrow." Chapter 288, "Commercial Development and Capital Improvements," was enacted to plan and to develop new businesses and business opportunities in the state. Section 288.03.

For the state attorney to expend public funds to underwrite the cost of a consumer protection educational television program, there must be constitutional or legislative authorization either expressed or implied for the state attorney to underwrite the program and the lawful appropriation therefor. If the funds for such a program are coming from the state attorney's office's general operating funds which were appropriated to his office, then a lawful appropriation would have occurred.

With regard to the constitutional or legislative authorization for the state attorney to conduct the program, a review of Florida's consumer protection statutes involving duties of the state attorneys' offices is necessary. In s. 83.73, F. S., the Legislature has imposed enforcement responsibilities upon the state attorneys' offices to enforce the consumer protection provisions of Florida's mobile home park law. In Part II, Ch. 501, F. S., the state's major consumer protection statute, the Legislature has designated state attorneys' offices as enforcing authorities to rid the marketplace of unfair and deceptive trade practices. Attorney General Opinion 073-459. In s. 559.78, F. S., state attorneys are given authority to enforce certain provisions of the Consumer Collection Practices Act, and in s. 917.561, F. S., the state attorneys are delegated with the responsibility of enforcing the state's deceptive advertising laws. There can be little doubt the Legislature has mandated the state attorney as one of the chief consumer protectors in the State of Florida. In order to carry out his mandated duties, the state attorney can use his expressed statutory powers such as injunctive relief and cease and desist orders and he may use his implied powers such as educating consumers on what they can do to protect themselves in the marketplace. Therefore, since the Legislature has appropriated funds to the state attorneys' offices to carry out their duties and one of their duties is consumer protection, it seems clear that the state attorney can exercise his discretion to use appropriated funds for consumer protection educational programs.

Having thus determined that the state attorney has been delegated certain expressed and implied powers by the Legislature in the area of consumer protection, the state attorney may exercise his discretion to expend funds from the general operations appropriation to underwrite the cost of an educational consumer protection television program.

076-28—January 30, 1976

REGULATION OF PROFESSIONS

LICENSE FEE EARNED WHEN LICENSE ISSUED— PRO RATA REFUND NOT AUTHORIZED

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTIONS:

1. Is the State Board of Cosmetology required to collect the $10 fee for the issuance of a certificate of registration to practice cosmetology as a master cosmetologist as provided for under s. 477.17(1)(f), F. S., from a person who holds a valid unexpired cosmetologist license at the time he becomes qualified to receive a certificate of registration as a master cosmetologist under s. 477.06(1)(c) or (f), F. S.?
2. If such person under the circumstances referred to above is required to pay the $10 issuance fee for "upgrading" his license, is he to be given any credit towards such fee for the unexpired portion of his existing unexpired cosmetologist license which he would presently be holding?

SUMMARY:

Section 477.17(1)(f), F. S., requires the State Board of Cosmetology to collect the $10 fee for issuance of certificates of registration to practice cosmetology as master cosmetologists from those persons holding active unexpired cosmetologist certificates regardless of whether they qualify for certification as master cosmetologists pursuant to s. 477.06(1)(c) or (f), F. S., and the board is without authority to credit to those cosmetologists receiving certification as master cosmetologists any portion of the fee previously submitted for registration as cosmetologists pursuant to s. 477.17(1)(m), F. S.

Section 477.06, F. S., sets out, among other things, the requirements and qualifications that a practicing cosmetologist must meet in order to apply for a certificate of registration as a master cosmetologist. A licensed cosmetologist is offered two options in obtaining the master cosmetologist certification. Section 477.06(1)(c) provides that a cosmetologist:

> [w]ho has practiced as a registered cosmetologist for a period of not less than 24 nor more than 36 months under the immediate supervision of a registered master cosmetologist, and in a salon in which a majority of the practices of cosmetology are engaged in;

and who files an application for certification as a master cosmetologist within the 36-month period may be considered for such certification.

Additionally, s. 477.06(1)(f), F. S., provides:

> . . . that as an alternative to the procedure set forth in this section, any person who has practiced as a cosmetologist for a period of not less than 12 months under the immediate supervision of a registered cosmetologist is qualified to receive a certificate of registration to practice cosmetology as a master cosmetologist upon passing a satisfactory practical examination conducted by the board to determine his or her fitness to practice cosmetology. . . .

Section 477.17(1)(f), F. S., provides that the fee for the issuance of a certificate of registration to practice cosmetology as a master cosmetologist shall be $10.

Both s. 477.06(1)(c) and s. 477.06(1)(f), *supra*, expressly require that an applicant for certification as a registered master cosmetologist must be a practicing cosmetologist for a minimum specified time prior to seeking such certification as a master cosmetologist. Certification by the board as a cosmetologist pursuant to s. 477.07, F. S., is required in order for a person to lawfully be practicing cosmetology as a cosmetologist in this state. The language and intent of the Legislature, as expressed in s. 477.17(1)(f), is clearly to require that all cosmetologists who meet the qualifications set out in s. 477.06(1)(c) and (f) for certification by the board as master cosmetologists shall pay the fee of $10 each to the board for issuance of their certificates of registration to practice cosmetology as master cosmetologists. The primary guide to statutory interpretation is to determine the purpose of the Legislature, to ascertain the legislative will, and to carry that intent into effect to the fullest degree. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); Bill Smith, Inc. v. Cox, 166 So.2d 497 (Fla. App. 1964); Gracie v. Deming, 213 So.2d 294 (Fla. App. 1968); *In re* Estate of Jeffcott, 186 So.2d 80 (Fla. App. 1966). Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, the plain and obvious provisions must control. Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964); State v. Stuler, 122 So.2d 1 (Fla. 1960); Phil's Yellow Taxi Co. v. Carter, 134 So.2d 230 (Fla. 1961). If the language of the statute is clear and admits of only one meaning, the Legislature should be held to have intended what it has plainly expressed. Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951); Ross v. Gore, 48 So.2d 412 (Fla. 1950); Armistead v. State, 41 So.2d 879 (Fla. 1949).

Your first question is therefore answered in the affirmative.

The fee for the renewal of certificates of registration to practice cosmetology as cosmetologists is provided for in s. 477.17(1)(m), F. S. In accord with s. 477.21, F. S., such moneys are deposited and expended pursuant to the provisions of s. 215.37, F. S., as amended by Ch. 75-201, Laws of Florida. No provision of Ch. 477, F. S., authorizes the board to credit a portion of an unexpired certificate of registration fee toward the statutorily established fee required to be submitted for issuance of a certificate of registration for another designation of competence within the chapter.

When a registrant submits his application for renewal, accompanied by the statutory fee, and the board initiates its procedures whereby the renewal certificate is processed and subsequently issued, the statutory fee is thereby earned and due, and, absent any statutory directive to the contrary, the board is without authority to refund or otherwise credit the registrant for any unused portion of the certificate on a pro rata time basis or otherwise. *See* AGO 075-293. It is a well-known principle of law that administrative bodies have no common law powers; they are creatures of the Legislature and what powers they have are limited to the statutes that create them. State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900; City of Cape Coral v. G.A.C. Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973); Florida Industrial Commission v. National Trucking Company, 107 So.2d 397 (1 D.C.A. Fla., 1958); St. Regis Paper Co. v. State of Florida, Florida Air and Water Pollution Control Commission, 237 So.2d 797 (1 D.C.A. Fla., 1970). If there is reasonable doubt as to the lawful existence of a particular power which is being exercised by an administrative agency, the further exercise of the power should be arrested. State *ex rel.* Greenberg, *supra*; State v. Atlantic Coast Line Railroad Company, 47 So. 969 (Fla. 1908). An administrative agency's powers, duties, and authority are those and only those conferred expressly or impliedly by statute of the state. City of Cape Coral, *supra*; State *ex rel.* Burr v. Jacksonville Terminal Co., 71 So. 474 (Fla. 1916); City of West Palm Beach v. Florida Public Service Commission, 223 So.2d 322 (Fla. 1969); Southern Gulf Utilities, Inc. v. Mason, 166 So.2d 138 (Fla. 1964).

Your second question is therefore answered in the negative.

076-29—January 30, 1976

PROPERTY APPRAISERS

DISTRIBUTION OF COMMISSION MADE UNDER LAW IN EFFECT WHEN COMMISSION EARNED RATHER THAN LAW IN EFFECT WHEN MONEY RECEIVED

To: Robert Lee Shapiro, Attorney for Palm Beach County Property Appraiser, Palm Beach

Prepared by: Zollie M. Maynard, Assistant Attorney General and Charles R. Denman, Legal Intern

QUESTION:

Should property appraisers' commissions earned in 1970 and due and payable under court order for the 1970 tax year be distributed pursuant to s. 145.12(4), F. S. 1969, or should they be distributed under s. 218.36(2), F. S. (1974 Supp.), which was in effect when the commissions were actually paid to the property appraiser?

SUMMARY:

Property appraisers' excess commissions earned in 1970 and due and payable under court order for the 1970 tax year but not actually paid over to him until 1974 should be distributed pursuant to s. 145.12(4), F. S. 1969, in effect at the time such commissions accrued and became earned and due and payable.

I assume that the taxes for the 1970 tax year for assessment of which the commissions are due were actually levied, collected, and received by the school board, as the litigation to which you refer was between the school board of Palm Beach County and the property appraiser. School Board of Palm Beach County v. Reid, 304 So.2d 155 (4 D.C.A. Fla., 1974). You have informed me that the entire amount awarded pursuant to judgment in that case represented commissions due for the period January 1 through June 30, 1970. You have further informed me that the appraiser had received the maximum salary amount possible for that period prior to entry of this judgment and that the judgment pertains only to excess commissions or office funds. Therefore, the purpose of your question is only to seek guidance as to the proper distribution of those excess moneys.

The subject excess commissions should in my opinion be distributed under the provisions of s. 145.12(4), F. S. 1969, in effect at the time the commissions accrued and became earned and due. It should be pointed out that since the subject commissions represent commissions for only the first half of the tax year 1970, no issue is raised as to the change in the method of billing of appraisers' commissions (*i.e.* billing the county rather than the school board) which occurred during 1970.

In the case of Saint Lucie County v. Nobles, 5 So.2d 855 (Fla. 1942), *rehearing denied*, the Florida Supreme Court affirmed the lower court order which read in pertinent part:

> . . . [T]he Court is of the opinion that . . . the Tax Collector's commission for taxes collected by him in the year 1936, but which commissions were not actually received by said Tax Collector from the various bodies for which he collected said taxes until sometime during 1937, should be charged against said Tax Collector's income for the year 1936 rather than against said Tax Collector's income for the year 1937.

The tax collector's 1936 income was accordingly charged against the commissions earned that year but received the following year. It would seem reasonable to conclude, in the absence of specific contrary legislative provision, that any moneys received at a later time after being "earned" during previous fiscal period should be treated according to the law and related facts existent *as of the time earned.*

These moneys were earned and due in 1970. Under the law in effect at that time, there would exist an accrued obligation whereby these moneys were committed to the school district and the county general fund in their respective proportionate shares. The fact

that the Legislature passed a law [s. 218.36(2), F. S.] in 1974 which changed the distribution procedure should, under these circumstances, have no effect upon the later disbursement of funds earned during a prior period. *Accord*: Attorney General Opinions 074-188 and 071-353, citing Okaloosa County v. Okaloosa County School Board, 250 So.2d 295 (1 D.C.A. Fla., 1971). This is particularly true in light of the commonly accepted rule of construction that legislation will not be applied retroactively unless such intent is clearly stated in the law. State *ex rel.* Bayless v. Lee, 23 So.2d 575, 576 (Fla. 1945). No such intent as to retrospective effect appears from the terms of s. 218.36(2), F. S. *Cf.* Crooks v. State *ex rel.* Pierce, 194 So. 237, 240 (Fla. 1940); *rehearing denied* (Fla. 1940).

It is therefore my opinion that the money should be distributed in accordance with s. 145.12(4), *supra*, which was in effect in 1970. The distribution should be calculated as if these commissions had been paid when due in 1970. This may possibly require a complete recomputation of all 1970 distributions of excess commissions or office funds.

076-30—January 30, 1976

TAXATION

MUNICIPAL OCCUPATIONAL LICENSE—WHEN TAX MAY BE IMPOSED ON PERSON NOT MAINTAINING PERMANENT OR BRANCH OFFICE

To: Robert A. Andreu, City Attorney, St. Augustine

Prepared by: Stephen E. Mitchell, Assistant Attorney General, and David Slaughter, Legal Intern

QUESTION:

May a municipality require, under s. 166.221, F. S., an occupational license from a person who does not maintain a permanent business location or branch office within the municipality, notwithstanding s. 205.042, F. S.?

SUMMARY:

A regulatory license fee imposed under the municipal police power pursuant to s. 166.221, F. S., does not fall within the purview of Ch. 205, F. S., and the municipality may levy the regulatory fee on a person who does not maintain a permanent business location or branch office within the municipality. Whether a license fee meets the requirements necessary to be considered a *regulatory* fee is an issue of fact to ultimately be determined by the judiciary.

Your question is answered in the affirmative for the reasons hereinafter set forth.

Preliminarily, it should be noted that occupational licenses may be imposed under either the police power or the taxing power of a municipality. Section 166.221, F. S., relates solely to the municipal police power to regulate businesses. That section provides:

> A municipality may levy reasonable business, professional, and occupational *regulatory* fees, commensurate with the cost of the regulatory activity, including consumer protection, on such classes of businesses, professions and occupations, the regulation of which has not been preempted by the state or a county pursuant to a county charter. (Emphasis supplied.)

Chapter 205, F. S., the Local Occupational License Tax Act, specifically recognizes the revenue nature of the occupational licenses authorized therein distinguishing them from regulatory licenses. Section 205.022(1) provides:

> (1) "Local occupational license" means the method by which a local governing authority grants the privilege of engaging in or managing any

> business, profession, or occupation within its jurisdiction. It shall not mean any fees or licenses paid to any board, commission, or officer for permits, registration, examination, or inspection. *Unless otherwise provided by law, these are deemed to be regulatory and in addition to, and not in lieu of, any local occupational license imposed under the provisions of this chapter.* (Emphasis supplied.)

In AGO 074-21, I concluded that a regulatory license fee, enacted pursuant to municipal police powers, is not within the purview of Ch. 205, F. S.

> The main judicial delineation between a "regulatory fee" and a "license tax" appears to be the regulatory fee requirement that some standards for regulation and control of the registrant, subsequent to the payment of the fee, be provided. If the applicant is merely required to pay a fee and by payment acquires the right to carry on an occupation, without any further conditions, the pecuniary extraction is generally considered a license tax. Tamiami Trail Tours, Inc. v. City of Orlando, 120 So.2d 170 (Fla. 1960). The judiciary has also required the regulatory fee to be reasonably commensurate with the actual expense of issuing the regulatory license and the cost of regulation. *See* Atkins v. Phillips, 8 So. 429 (Fla. 1890); 21 Fla. Jur. *License and License Taxes* s. 9; 23 Fla. Jur. *Municipal Corporations* ss. 129 *et seq.*

The activity or vocation subject to regulation must first be affected with a public interest and then regulated in a manner reasonably necessary to preserve the public interest based on:

> [W]hether it [ordinance] has a rational relation to the public health, morals, safety or general welfare and is reasonably designed to correct a condition adversely affecting the public good. City of Miami v. Kayfetz, 92 So.2d 798, 801 (1957).

See also Maxwell v. City of Miami, 100 So. 147 (Fla. 1924); City of Miami v. Shell's Super Store, 50 So.2d 883 (Fla. 1951).

Although this office must leave the factual determination of whether a particular extraction is a regulatory fee or a license tax to the judiciary, I can conclude that where said extraction meets the regulatory fee definition, s. 166.221, F. S., authorizes a municipality to levy the "fee" upon a person who does not maintain a permanent business location or branch office within the municipality as required by s. 205.042, F. S., for a municipality to impose an occupational license tax for revenue purposes.

076-31—February 6, 1976

MARRIAGE LICENSE

NOT REQUIRED TO BE ISSUED TO APPLICANTS OF SAME SEX

To: Fred W. Baggett, General Counsel, Florida Association of Court Clerks, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

> **May two individuals of the same sex validly apply for a marriage license, and is the clerk of the circuit court required to accept such an application and thereafter issue a license?**

SUMMARY:

> **Two individuals of the same sex may not validly apply for a marriage license; therefore, the clerk of the circuit court is not required to accept such an application and thereafter issue a license.**

Subject to constitutional limitations, the state has exclusive dominion over the legal institution of marriage, and the state alone has the prerogative of creating and overseeing the institution. *See* Light v. Meginniss, 22 So.2d 455 (Fla. 1945). Chapter 741, F. S. (1974 Supp.), which governs marriages in Florida, requires the county court judge or clerk of the circuit court to issue a marriage license, upon application, if there appears to be no impediment to the marriage, s. 741.01. Notwithstanding the fact that the law relating to marriages uses neuter terms, I am of the opinion that it does not contemplate "marriage" between persons of the same sex.

Three reported decisions exist in the United States which have confronted this particular question. Singer v. Hara, 11 Wash.App. 247, 522 P.2d 1187 (1974); Jones v. Hallahan, 501 S.W.2d 588, 63 A.L.R.3d 1195 (Ky.Ct.App. 1973); and Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dism'd*, 409 U.S. 810 (1972). Each case is in accord with the opinion expressed herein.

In absence of a statutory definition, words should be construed in their plain and ordinary sense. Pederson v. Green, 105 So.2d 1 (Fla. 1958). Webster's New International Dictionary, Second Edition, defines marriage as follows:

> A state of being married, or being united to a person or persons of the opposite sex as husband or wife; also, the mutual relation of husband and wife; wedlock; abstractly, the institution whereby men and women are joined in a special kind of social and legal dependence, for the purpose of founding and maintaining a family.

Black's Law Dictionary, Fourth Edition, defines marriage as:

> The civil status, condition or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.

In B v. B, 78 Misc.2d 112, 355 N.Y.S.2d 712 (1974), and Anonymous v. Anonymous, 67 Misc.2d 982, 325 N.Y.S.2d 499 (1971), citing 52 Am. Jur.2d *Marriages* s. 1, the courts stated that a marriage is and always has been a contract between a man and a woman. In Jones v. Hallahan, *supra*, the court stated:

> Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage were kept by the church. Some states even now recognize a common-law marriage which has neither the benefit of license nor clergy. In all cases, however, marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.
>
> It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.
>
> A license to enter into a status or a relationship which the parties are incapable of achieving is a nullity. If the appellants had concealed from the clerk the fact that they were of the same sex and he had issued a license to them and a ceremony had been performed, the resulting relationship would not constitute a marriage.

The United States Supreme Court in dismissing the appeal in Baker v. Nelson, *supra*, for want of substantial federal question, in effect ruled that the prohibition against persons of the same sex marrying does not constitute a cognizable claim under either the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.

It is interesting to note that in Singer v. Hara, *supra*, the court considered the effect of the state's equal rights amendment on this question. The amendment is substantially similar to the ERA now before the states for ratification. Prior to its passage, the opponents of the state's ERA argued that such an amendment would legalize homosexual marriages. In ruling that ratification of the ERA does not legalize homosexual marriages, the court noted that the primary purpose of the ERA is to overcome discriminatory legal

treatment as between men and women "on account of sex." The court further stated that laws which differentiate between the sexes are permissible so long as they are based upon the unique physical characteristics of a particular sex rather than a person's membership in a particular sex per se. Laws or policies prohibiting homosexual marriages are clearly based upon the former principle.

Your question is answered in the negative.

076-32—February 6, 1976

MENTAL COMPETENCE

FINDING OF INCOMPETENCE TO STAND TRIAL NOT EQUIVALENT TO ADJUDICATION OF MENTAL INCOMPETENCE

To: William J. Page, Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Wallace E. Allbritton, Assistant Attorney General

QUESTIONS:

1. **Is a court declaration of insanity and mental incompetency at the time of trial pursuant to Rule 3.210(a), Florida Rules of Criminal Procedure, the equivalent of an adjudication of mental incompetency under s. 744.3101, F. S.?**
2. **Does an incompetent under Rule 3.210, CrPR, suffer the legal disabilities referred to in s. 744.3101(8), F. S.?**

SUMMARY:

A court declaration of mental incompetency to stand trial pursuant to Rule 3.210(a), CrPR, is not the equivalent of an adjudication of mental incompetency under s. 744.3101, F. S. A person found incompetent under Rule 3.210 does not as a result of such finding of incompetency suffer the legal disabilities referred to in s. 744.3101(8).

Your questions are answered in the negative. Rule 3.210(a), CrPR, is the procedural vehicle for determining mental competency to stand trial on a criminal charge. The rule was promulgated by the Florida Supreme Court in the exercise of its rulemaking power under the Florida Constitution. Section 2(a), Art. V, State Const. Section 744.3101, F. S., is substantive law enacted by the Legislature. A person adjudicated mentally incompetent under this statute suffers the legal disabilities referred to in s. 744.3101(8).

In my opinion, s. 744.3101, *supra*, establishes the exclusive statutory method for a declaration of incompetency. Admittedly, a circuit judge may declare a person mentally incompetent to stand trial on a criminal charge pursuant to Rule 3.210(a), CrPR. This is a procedural matter. However, a circuit judge may not make a substantive determination of incompetency except pursuant to the existing statutory scheme. This is so because s. 2(a), Art. V, State Const., grants the Supreme Court authority to promulgate rules governing procedural matters. But it is emphasized that the enactment of substantive law remains within the exclusive province of the Legislature. As the Supreme Court said in State v. Garcia, 229 So.2d 236 (Fla. 1969): "The rules adopted by the Supreme Court are limited to matters of procedure, for a rule cannot abrogate or modify substantive law." *See also* Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975); *cf.* Swan v. State, 322 So.2d 485, 489 (Fla. 1975). Thus, to hold that our Supreme Court, through its rulemaking power, could establish an alternate method for the determination of mental competency would constitute an invasion of the legislative function prohibited under the doctrine of separation of powers of the state government. Section 3, Art. II, State Const.; Benyard v. Wainwright, *supra*.

It is my firm opinion that the question of a person's mental competency is a substantive matter except in the context of a criminal trial. Therefore, any substantive determination

of mental competency must be in accord with s. 744.3101, *supra*, for the resultant disabilities of s. 744.3101(8) to be presumed. It follows that a person found mentally incompetent to stand trial under the provisions of Rule 3.210, CrPR, does not as a result of such finding of incompetency suffer the same legal disabilities inherent in an adjudication under s. 744.3101.

076-33—February 11, 1976

HORSERACING

STATE MAY NOT REQUIRE PERMITHOLDER TO CONDUCT RACE MEETING FOR LONGER PERIOD THAN PERMITHOLDER REQUESTS

To: A. L. Baker, Executive Director, Department of Business Regulation, Tallahassee

Prepared by: James D. Whisenand, Deputy Attorney General

QUESTION:

Is the Board of Business Regulation authorized by ss. 20.16 and 550.41-550.46, F. S., to mandate Calder Race Course, Inc., a full season of 120 racing days for the 1976 summer thoroughbred season when Calder has applied for permission to race only 106 days and has contended that the board is without power to award more days?

SUMMARY:

The Board of Business Regulation lacks the authority to mandate a permitholder that has applied for a 106-day summer thoroughbred racing season pursuant to s. 550.43, F. S., to conduct a 120-day summer thoroughbred racing season.

According to the facts submitted, a pari-mutuel permitholder that conducts summer thoroughbred horseracing has applied, due to economic reasons, for a 106-day summer racing meet rather than the full season of 120 days. The State of Florida receives, based upon past revenue collections, approximately $54,000 per day in state revenue from the track's operation. No other track is presently authorized to conduct a summer thoroughbred racing meet.

Section 550.41, F. S., authorizes a summer thoroughbred horseracing period:

> Such new permitholder within the area shall be *permitted*, during the period beginning on May 6 and ending on or before November 12 of each year, to conduct an additional 120 days of . . . racing . . . upon dates allocated to it by the Board of Business Regulation . . . . (Emphasis supplied.)

See Miami Beach Jockey Club, Inc. v. State *ex rel.* Willis, 227 So.2d 96 (1 D.C.A. Fla., 1969). Additional charity and scholarship days are authorized to be approved by the board pursuant to s. 550.41(4)-(8). Sections 20.16(5), 550.011, and 550.41, F. S., grant the board exclusive authority to "hear and approve the dates for racing" and, in this instance, the Division of Pari-Mutuel Wagering shall issue, on or before March 1, a license authorizing the permitholder to conduct a summer thoroughbred racing season. Sections 20.16 and 550.43, F. S.; Hialeah Race Course, Inc. v. Board of Business Regulation, 270 So.2d 366 (Fla. 1972).

A track "*desiring* to conduct summer thoroughbred racing *may* file in writing with the Board of Business Regulation its application for permission to conduct a thoroughbred horse race meeting for a period *not to exceed* 120 days . . . ." (Emphasis supplied.) Section 550.43, F. S. Once this application for dates has been received, the board may exercise its discretion to approve the dates. Section 550.45, F. S., grants the board authority to allocate or assign to another approved track any dates "which have not been applied for" and to reallocate or reassign to another approved track any dates or days

that have been "abandoned, surrendered, or will not be used for any reason whatsoever." Also, the statute expressly states that the failure of a track to apply for dates in one year will not preclude an application in subsequent years.

A very similar issue was presented in State *ex rel.* Biscayne Kennel Club v. Stein, 178 So. 132 (Fla. 1938), under a statute that "permitted" 90 days of greyhound racing at a track. Biscayne, due to financial inability, contended that it could not operate a full 90-day season, and the court approved a shorter season: "It is optional with it (track) to race the 72 days or 90 days if it so desires." 178 So. at 137.

Approval of charity and scholarship dates pursuant to statutes which require the permitholder to apply and to agree to conduct dates presents an analogous situation. In State *ex rel.* Gulfstream Park Racing Association v. Florida State Racing Commission, 70 So.2d 375 (Fla. 1953), the court concluded to place the discretion in the track or permitholder:

> It (the date) is done upon application and agreement by any track and donation of the profits is permissive or voluntary rather than mandatory. The language of the statute is permissive, there is nothing compulsory about the extra day's racing. [70 So.2d at 379.]

Section 550.43, F. S., similarly states that a permitholder "may file" an application to conduct summer thoroughbred racing "for a period not to exceed 120 days." The express discretionary terms of this statute authorize the permitholder to apply for any number of days less than 121 and create no statutory duty to apply for or conduct a full 120-day season.

The suggestion that a pari-mutuel permit carries with it the concurrent obligation to enhance state revenue has been recognized by the judiciary, but not in a date assignment or permit revocation or suspension situation, and the permit is judicially considered to be a mere license, not a franchise. Gulfstream Park Racing Association, Inc. v. Board of Business Regulation, 318 So.2d 458 (1 D.C.A. Fla., 1975) *cert. denied* 323 So.2d 290 (Fla. 1975); West Flagler Association, Ltd. v. Board of Business Regulation, 241 So.2d 369, 376 (Fla. 1970); Wilson v. Sandstrom, 317 So.2d 732 (Fla. 1975); Hialeah Racecourse, Inc. v. Gulfstream Park Racing Association, (Fla. 1971); Hubel v. West Va. Racing Commission, 513 F.2d 243 (4 Cir. 1975). The state's goal of maximizing production of tax revenue was implicitly recognized in Calder Race Course, Inc. v. Board of Business Regulation, 319 So.2d 67 (1 D.C.A. Fla., 1975). In *Calder*, the court found that the absence of state revenue from a pari-mutuel holder for a 9-day period constituted a sufficient state interest to premise emergency board action in reassigning concurrent dates for the West Flagler Greyhound Track and the Calder Race Course.

As persuasive as the state revenue collection interest may be, the Legislature has couched the statute in permissive or discretionary terms. Absent further judicial or legislative clarification, the Board of Business Regulation may not mandate that a permitholder conduct a 120-day summer thoroughbred racing season pursuant to s. 550.43, F. S., if the permitholder has applied for less than that number. State *ex rel.* Associated Outdoor Clubs v. Lechner, 197 So.2d 512 (Fla. 1967). This determination does not, however, reflect upon the request of and assignment of dates for the winter thoroughbred horse racing season pursuant to s. 550.081, F. S.

076-34—February 16, 1976

PUBLIC RECORDS LAW

USE OF COMPUTER TERMINAL TO MAKE RECORDS AVAILABLE WITHOUT CHARGING FEE

To: Bruce Smathers, Secretary of State, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Will providing access to an existing computer video terminal for use by the general public so that they may have free access to corporation records violate either Ch. 15 or Ch. 119, F. S.?

SUMMARY:

Providing access to an existing computer video terminal for use by the general public so that they may have free access to corporation records violates neither Ch. 15 nor Ch. 119, F. S.

According to your letter, the department is contemplating utilizing existing computer video equipment in the Corporations Division so as to allow free access to records stored therein. This terminal would be operated by members of the public based upon instructions furnished by the department. You have expressed your belief that this method of access helps to carry out the spirit and the letter of the Public Records Law.

Section 15.09(1)(a), F. S., provides, in pertinent part, as follows:

> (1) The fees, except as provided by law to be collected by the Department of State, are:
> (a) For searching of papers or records, $2.

Additionally, s. 119.07(1), F. S., provides that the custodian of public documents shall furnish copies or certified copies thereof upon payment of fees as prescribed by law, or, if fees are not prescribed by law, upon payment of the actual cost of duplication of the copies.

Although the fee schedule found at s. 15.09(1)(a), F. S, authorizes the imposition of a $2 fee for the *searching* of public records or papers by employees of the department, I do not believe that this fee may be imposed for the mere inspection and examination of public records by the general public. In AGO 075-50 this office expressed the view that Ch. 119, F. S., does not authorize a public official to impose a fee for the inspection of public documents. The right of citizens to inspect their records may not, in the absence of statute, be conditioned upon payment of search fees, the payment of the salary of the custodian, or the like. While s. 15.09(1)(a) authorizes the imposition of an employee search fee when such task is performed by the employee for the benefit of a member of the public, it does not purport to authorize the imposition of such a fee when a member of the public inspects and examines public documents without requiring an employee of the department to carry out a search of the department's records.

Since, according to your letter, the public will be able to inspect and examine public records through the use of a computer terminal, thereby avoiding the use of employee time in searching for records based upon individual demands, the provisions of s. 15.09(1)(a), F. S., are not applicable to the instant case. Moreover, nothing in s. 15.09(1)(a) purports to authorize the imposition of a fee based upon such circumstances. *See* AGO 075-50 and cases cited therein.

I would also note that the department has the mandatory duty under Ch. 119, F. S., to permit access to public records. The choice of methods by which this is most effectively accomplished in keeping with the legislative mandate of Ch. 119 must be within the sound discretion of the agency head who is responsible for insuring that the commands of Florida's Public Records Law are followed both in letter and spirit.

Your question is answered in the negative.

076-35—February 18, 1976

TAXATION

INSURANCE PREMIUM TAX NOT APPLICABLE TO POLICIES ISSUED BY MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION

To: Philip F. Ashler, State Insurance Commissioner, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General, and David B. Slaughter, Legal Intern

QUESTION:

Is the insurance business written through the Florida Medical Malpractice Joint Underwriting Association subject to the premium tax provided in s. 624.509, F. S.?

SUMMARY:

Insurance business written through the Florida Medical Malpractice Joint Underwriting Association as insurer is not subject to the premium tax imposed under s. 624.509, F. S., because such insurance business would be within the exemption provided for in s. 624.512, F. S.

Your question is answered in the negative.
You have advised in your letter as follows:

> The 1975 Legislature provided for the issuance of medical malpractice insurance through a joint underwriting association to be composed of certain casualty insurers and medical malpractice self-insurers authorized to do business in Florida.
>
> The association created to implement the legislation is a nonprofit entity whose members are domestic insurance corporations, foreign insurance corporations, foreign insurance corporations having regional home offices in Florida and self-insuring groups of varying organizational characteristics.

Section 624.509(1), F. S., imposes a premium tax as provided for therein on each "insurer." Section 624.512, F. S., provides:

> **Domestic insurers exempt.**—*Insurers organized and existing under the laws of this state, and which insurers maintain their home office in this state, shall not be required to pay the tax* on insurance and annuity premiums, assessments or considerations as imposed under ss. 624.509 and 624.510, except as provided in s. 624.513. (Emphasis supplied.)

Thus, the question posed is whether or not the joint underwriting association (JUA) created under s. 14 of Ch. 75-9, Laws of Florida, is required to pay the premium tax imposed under s. 624.509(1), F. S. The pivotal question is whether or not such joint underwriting association is within the exemption provided in s. 624.512, F. S. For the reasons hereinafter stated, I conclude that the association is within the exemption provided for.

The exemption runs to insurers organized and existing under the laws of this state which maintain their home office within this state. Your letter indicates that you are concerned because the members of the joint underwriting association (JUA) include foreign insurance corporations and foreign insurance corporations having regional home offices in Florida.

Section 624.03, F. S., defines "insurer" as "every *person engaged* as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity." (Emphasis supplied.)

Section 624.04, F. S., defines "person" as follows:

> "Person" includes an individual, insurer, company, *association*, organization, Lloyds, society, reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation, agent, general agent, broker, solicitor, service representative, adjuster, and every legal entity. (Emphasis supplied.)

As can be noted, an "association" is included within the definition of "person" which is included within the definition of "insurer."

Section 624.06, F. S., defines "domestic" and "foreign" insurers as follows:

> (1) A "domestic" insurer is one formed under the laws of this state.
> (2) A "foreign" insurer is one formed under the laws of any jurisdiction other than this state.

Thus, a domestic insurer is one formed under the laws of this state while a foreign insurer is one formed under the laws of any other jurisdiction. The joint underwriting association is clearly an "insurer" formed under the laws of the State of Florida and thus will be a "domestic" insurer, and the fact that some of the members of the association were formed under the laws of other states or jurisdictions or maintain offices in other states or jurisdictions is immaterial. The exemption found in s. 624.512, F. S., runs to insurers and is not restricted or qualified by the residence of the members of an association or by the residence of stockholders of corporations. Thus, the first requirement of the exemption provided in s. 624.512 is met. That is, the insurer (joint underwriting association) is organized and existing under the laws of this state.

The Insurance Commissioner or his representative is designated chairman of the board in s. 627.351(8)(c), F. S., as created by s. 14 of Ch. 75-9, *supra*. The board of governors is constituted of representatives of five of the insurers participating under the joint underwriting association, an attorney to be provided by The Florida Bar, a medical representative to be named by the hospital association, and the Insurance Commissioner or his designated representative employed by the Department of Insurance. This board is created under Florida law and has no existence outside the territorial boundaries of the State of Florida. (*See* State *ex rel.* Clyatt v. Hocker, 22 So. 721.) Thus, the home office of the joint underwriting association would be within the State of Florida, and you have not advised this office to the contrary. The sample policy forms provided by your office state the address to be 325 John Knox Road, Tallahassee, Florida, 32303. Thus, the second requirement of the exemption statute is met, and the JUA would be entitled to the exemption *if* it is the *insurer*.

The purpose of the joint underwriting association is to establish a temporary joint underwriting plan which will function for a period not exceeding 3 years from the date of adoption by the Department of Insurance. The statute mandates that the plan *shall* provide professional liability or malpractice coverage in a *standard policy form* for all hospitals licensed under Ch. 395, F. S., physicians licensed under Ch. 458, F. S., osteopaths licensed under Ch. 459, F. S., podiatrists licensed under Ch. 461, F. S., dentists licensed under Ch. 466, F. S., nurses licensed under Ch. 464, F. S., and nursing homes licensed under Ch. 400, F. S., or professional associations of such persons. (Section 627.351(8)(d), F. S.)

Apparently the plan contemplates that the *association* provide such insurance to the aforementioned groups. The sample policy forms provided by your office support this conclusion. The forms reflect that the insurance is written by the Florida Medical Malpractice Joint Underwriting Association, as *insurer*, as opposed to being written by the various *members* as insurers. Thus, the JUA is the insurer, and since the requirements of the exemption statute, s. 624.512, F. S., are otherwise met, insurance written by the JUA would be exempt from the premium tax imposed under s. 624.509, F. S.

076-36—February 18, 1976

TAXATION

PROCEEDING TO ENFORCE TAX LIEN

To: Harry F. Knight, Monroe County Tax Collector, Key West

Prepared by: Stephen E. Mitchell, Assistant Attorney General, and David Slaughter, Legal Intern

QUESTIONS:

1. What is the proper judicial proceeding referred to in s. 197.086(2), F. S.?
2. Is such a judicial proceeding a prerequisite generally to the perfecting of a lien against tangible personal property?

SUMMARY:

Section 197.086, F. S., as amended by s. 3, Ch. 75-136, Laws of Florida, mandates a uniform judicial procedure to be followed by tax collectors in enforcing collection of delinquent ad valorem personal property taxes. Subsequent to the judicial proceeding a tax warrant issued for this purpose shall have the same force as a writ of garnishment.

A lien for unpaid personal property taxes is created and perfected for state and local purposes by s. 197.056, F. S., independently of s. 197.086, F. S., which concerns only enforcement of said lien.

Chapter 75-136, Laws of Florida, amended s. 197.086, F. S., to remove any ambiguity as to what constitutes a "proper judicial proceeding" and to establish a uniform statewide procedure for enforcing collection of unpaid personal property taxes. Section 197.086, *supra*, now reads:

> (1) Prior to May 1 of each year, the tax collector shall prepare a list of the unpaid personal property taxes containing the names and addresses of the taxpayers and the property subject to the tax, as the same appear on the tax roll. Thereupon, the tax collector shall issue warrants against the delinquent taxpayers providing the levy upon and seizure of tangible personal property of each delinquent taxpayer for unpaid taxes in the form of a written appointment from the tax collector with a statement from him to the person in whose name the property is assessed stating the amount of taxes due. Within 30 days from the date such list is prepared, the tax collector shall cause the filing of a petition in the Circuit Court for the county in which the tax collector serves, which petition shall briefly describe the levies and nonpayment of taxes, the issuance of warrants, and the publication of notice as provided for in s. 197.062, and shall list the names and addresses of the taxpayers who failed to pay taxes and the personal property taxed, as the same appear on the assessment roll. Said petition shall pray for an order ratifying and confirming the issuance of said warrants and directing the tax collector or his deputy to levy upon and seize the tangible personal property of each delinquent taxpayer to satisfy the unpaid taxes set forth in the petition. At the time such petition is directed to be filed, such tax collector is empowered to employ counsel and agree upon his or their compensation for conducting such suit or suits and to pay such compensation out of the general office expense fund, and he may include such item in the budget. No attorneys' fees shall be fixed as costs or allowed by the court in such suits. Immediately upon the filing of said petition, the tax collector, through his attorney, shall request the earliest possible time for hearing before the Circuit Court on said petition, at which hearing the tax roll shall be presented and the tax collector or one of his deputies shall appear to testify under oath as to the nonpayment of the personal property taxes listed in the petition. If it shall appear to the Circuit Court that the taxes as appear on the tax roll are unpaid, the court shall issue its order directing the tax collector or his deputy to levy

upon and seize so much of the tangible personal property of the taxpayers who are listed in the petition as is necessary to satisfy the unpaid taxes. This proceeding is specifically provided to safeguard the constitutional rights of the taxpayers in relation to their tangible personal property and shall be conducted with this objective in mind. The court shall retain jurisdiction over the matters raised in the petition to hear such objections of taxpayers to the levy and seizure of their tangible personal property as may be warranted under the statutes and laws of the state.

(2) *A tax warrant issued by the tax collector for the collection of tangible personal property taxes shall, after the court has issued its order as set forth in subsection (1), have the same force as a writ of garnishment when levied by the tax collector upon any person, firm, or corporation who has any goods, moneys, chattels, or effects of the delinquent taxpayer in his hands, possession, or control or who is indebted to such delinquent taxpayer.* When any tax warrant is levied upon any debtor or person holding property of the taxpayer, the debtor or person shall pay the debt or deliver the property of the tax delinquent to the tax collector levying the warrant, and the receipt of the tax collector shall be complete discharge to that extent of the debtor or person holding the property. The tax collector shall make note of the levy upon the tax warrant. (Emphasis supplied.)

Your first question is answered accordingly and your second question is answered in the negative.

The requirements of a judicial proceeding as outlined in s. 197.086, F. S., as amended by s. 3, Ch. 73-136, *supra*, apply only in regard to the *enforcement* of collection of the unpaid personal property taxes. Section 197.056(1), F. S., provides:

(1) All taxes imposed pursuant to the constitution and laws of this state *shall be a first lien*, superior to all other liens, *on any property against which the taxes have been assessed* . . . . All personal property tax liens, to the extent that the property to which the lien is applicable cannot be located in the county or to which the sale of the property is insufficient to pay all delinquent taxes, interest, fees, and costs due, shall be liens against all other personal property of the taxpayer within that county. . . . (Emphasis supplied.)

Thus, for state and local purposes, a lien for delinquent ad valorem taxes assessed on tangible personal property is in the nature of a perfected lien from the date of assessment, January 1 of the year assessed. This lien is enforceable pursuant to the mandatory provisions of s. 197.086, but exists independently of such provisions. *Also see* s. 197.092, F. S., as amended by s. 3, Ch. 75-136, Laws of Florida, as to execution on personal property removed from the county in which the tax was assessed. It should be noted that when a lien for ad valorem taxes on personal property competes for priority with an Internal Revenue Service lien, federal law controls and the ad valorem tax lien is not deemed perfected until such time as the amount of taxes is actually known. This point may occur well after the statutory lien date of January 1. Attorney General Opinion 074-337. However, if the competing federal lien on personal property is held by the Small Business Administration, federal law gives the local ad valorem tax lien the same status and priority it would have over private liens or mortgages pursuant to s. 197.056(1), *supra*. Attorney General Opinion 074-345.

076-37—February 18, 1976

SPECIAL DISTRICTS

DISTRICT MAY NOT LEASE PROPERTY OR GRANT LICENSE TO USE PROPERTY TO PRIVATE CORPORATION WITHOUT STATUTORY AUTHORIZATION THEREFOR

To: Robert A. Dickinson and Glenn W. Phipps, Jr., Attorneys for Englewood Water District, Englewood

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

1. Does the board of supervisors of the Englewood Water District have a right under Ch. 59-931, Laws of Florida, as amended, to lease real property belonging to the district?
2. Does the board of supervisors of the Englewood Water District have the right under Ch. 59-931, Laws of Florida, as amended, to grant a license to use property belonging to the district?
3. In the event that the board of supervisors of the Englewood Water District has the right to lease or grant a license for the use of its property belonging to the water district, would the act of leasing said property cause the district to lose its tax-exempt status on real property that is assessed by the taxing authorities?

SUMMARY:

The Englewood Water District is without statutory authority to lease or grant a license for the use of its property to private corporations or individuals for use as recreational areas or facilities.

AS TO QUESTIONS 1 AND 2:

According to your letter, several nonprofit organizations have asked permission of the board to use certain real property belonging to the district as recreational areas. If there are any bonds outstanding, then the board is prohibited from exercising the power "to mortgage, pledge, encumber, sell or otherwise convey all or part of its water system or sewer system, or both, except that the board may dispose of any part of such system or systems as may be no longer necessary for the purposes of the district." Section 26, Ch. 59-931, Laws of Florida. No other exceptions from this statutory prohibition having been explicitly made, no other may be implied, and only such parts of the district's water or sewer systems as are no longer necessary for its purposes may be disposed of. Williams v. American Surety Co. of N.Y., 99 So.2d 877 (2 D.C.A. Fla., 1958), and State *ex rel.* Judicial Qualifications Comm. v. Rose, 286 So.2d 562 (Fla. 1973). It might be noted that in no event is the district empowered to mortgage or encumber the property held by it in absence of the approval by the electorate of the district. Attorney General Opinions 073-164 and 073-261.

Section 4(c), Ch. 59-931, *supra*, authorizes the district to "construct, install, erect, acquire and operate, maintain . . . a water system or a sewer system or both . . . for the furnishing of water service or sewer service or both services to the inhabitants of the district . . . ."

Section 4(g), Ch. 59-931, *supra*, authorizes and empowers the Board of Supervisors of the Englewood Water District

> To acquire . . such lands and rights and interest therein . . . as may be deemed necessary in connection with the construction . . . or operation and maintenance of any water system or sewer system or both and to hold and dispose of all real and personal property under its control.

The board is expressly granted the power to contract in furtherance of its objectives, s. 1, Ch. 59-931, and to enter into contracts with other governmental agencies or private

corporations or individuals providing for or relating to the treatment, collection, and disposal of sewage or the treatment, supply, and distribution of water and other matters relevant thereto or otherwise necessary to effect the purposes of Ch. 59-931. Section 4(t), Ch. 59-931. The board is not authorized to contract with private corporations or individuals for any other purposes. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952), and Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974).

Such grants of authority carry with them the necessary limitation that they will be exercised for district purposes and for the benefit of the district. *See* State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); City of Clearwater v. Caldwell, 75 So.2d 765 (Fla. 1954); 63 C.J.S. *Mun. Corps.* s. 958. Thus, it may be implied that the board may not dispose of property of the district which is being held, used, or needed for the current or future statutorily prescribed functions and purposes of the district, nor may it divert the use of such property to other public or nonpublic purposes not expressly provided for by statute. City of Clearwater v. Caldwell, *supra*; 63 C.J.S. *Mun. Corps.* ss. 962b. and 967; *cf.* Martin v. Board of Public Instruction, 42 So.2d 721 (Fla. 1949).

A determination by the board that property is no longer necessary for the purposes of the district should not be disturbed in absence of showing of fraud, bad faith, or abuse of discretion. *See* Raney v. City of Lakeland, 88 So.2d 148 (Fla. 1956). (Any such disposition of any such unneeded property would be a permanent disposition to the advantage of or for the benefit of the district and for an adequate consideration.)

Black's Law Dictionary defines the term "dispose of" broadly, as follows, and would seem to include a lease and grant of a license:

> To exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away.

A similar definition is found in Montgomery v. Carlton, 126 So. 135 (Fla. 1950). *Also see* 63 C.J.S. *Mun. Corps.* s. 962a.; 27 C.J.S. *Dispose*, p. 594. As the district does not contemplate any permanent disposition of its unneeded or surplus lands, this opinion should not be construed to include any such permanent disposition.

In determining the validity of a proposed lease or grant of a license, it must be ascertained whether the district will, contrary to s. 10, Art. VII, State Const., "give, lend or use its taxing power or credit to aid any corporation, association, partnership or person." When an undertaking is for a statutorily authorized public purpose, s. 10, Art. VII, of the Constitution is not violated even though some private parties may be incidentally benefited. State v. Daytona Beach Racing & Rec. Fac. District, 89 So.2d 34 (Fla. 1956); *cf.* O'Neill v. Burns, 198 So.2d 1 (Fla. 1967). However, no public purpose is served when a lease is designed purely for the private benefit of the individual members of a quasi-public or eleemosynary association or corporation. Raney v. City of Lakeland, *supra*. Whenever a lease of public lands for private uses is not coupled with the issuance of bonds or the expenditure of public funds, or with the acquisition of land by purchase or eminent domain and the public body possesses legislative authority to do so, it can lease public land for private uses, but not otherwise. City of West Palm Beach v. Williams, 291 So.2d 572 (Fla. 1974).

The powers of the district must be interpreted and construed in reference to the purpose of the district, and if reasonable doubt exists as to whether the district possesses a specific power, such doubt must be resolved against the district. City of Clearwater v. Caldwell, *supra*; Martin v. Board of Public Instruction, *supra*; White v. Crandon, 156 So. 303 (Fla. 1934); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); State *ex rel.* Greenberg v. Fla. State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dism'd*, 300 So.2d 900 (Fla. 1974); *cf.* City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972). The rules governing municipalities and public quasi-corporations in such regard apply with equal force and effect to all statutory entities, as do those governing counties and state agencies. *See* AGO's 073-374 and 074-169; City of Cape Coral v. G.A.C. Utilities, Inc., 281 So.2d 493 (Fla. 1973).

The purposes for which the Englewood Water District was created are essentially to acquire, maintain, and operate a water system or a sewer system or both for furnishing such services to the inhabitants of the district (s. 4(c), Ch. 59-931, *supra*) and to acquire, hold, and use such property as may be necessary in connection therewith. Sections 4(g) and (t), Ch. 59-931. No other functions, purposes, or uses of its property are permissible. The district is not expressly or by necessary implication authorized to provide, maintain, or operate recreational areas or facilities, nor does its enabling statute authorize it to

lease or otherwise license its property to private parties for such use or purposes. Thus, a lease or grant of a license to use the district's property for such purposes would not be for a statutorily prescribed purpose authorized by law to be carried on or performed by the district and would be unauthorized. A special district is a statutory agency having no powers except those conferred by its enabling statute or those necessarily implied therefrom. Attorney General Opinions 073-314. 073-374, 074-49, and 074-169.

076-38—February 18, 1976

LAW ENFORCEMENT OFFICERS

COMPLAINT REVIEW BOARDS—NOT QUASI-JUDICIAL BODIES UNLESS SO DESIGNATED BY MUNICIPALITY

To: Daniel C. McCormic, City Attorney, Wildwood

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Are the complaint review boards provided for by s. 112.532(2), F. S., quasi-judicial bodies possessing adjudicatory powers?

SUMMARY:

Complaint review boards provided for by s. 112.532(2), F. S., are not, by the terms of Part VI of Ch. 112, F. S., made bodies possessing adjudicatory functions and powers. However, the governing body of a municipality may, under the authority of the Municipal Home Rule Powers Act (Ch. 166, F. S.), create such a board in conjunction with the complaint processing system mandated by s. 112.533 and grant it adjudicatory or quasi-judicial powers; or, in its discretion, it may limit the board to an advisory or recommendatory status. However no such legislative action by the municipality's governing body may contravene or repeal or modify any preexistent civil service law, charter act, or special law affecting the rights of municipal employees and which govern the municipal police. In either case, a municipality may not provide for any type of judicial review of the action of any such board or confer or require any appellate jurisdiction on or of any court, for such a power is reserved to the state, which has not by statute made a provision therefor.

Your question as stated is answered in the negative.

Section 112.532(2), F. S. (1974 Supp.), provides, *inter alia*, that "[a] complaint review board shall be composed of" and then simply numerates the composition of the board, the qualifications of the members thereof, and the manner of their selection. Nowhere in that section or in any other section of Part VI of Ch. 112, F. S., are there any provisions denoting or establishing any powers, duties, or functions for such complaint review board. Neither does the title to the enabling legislation, Ch. 74-274, Laws of Florida, throw any illumination on the legislative intent and purpose pertinent to this legislation. It is of interest that the courts have expressed their difficulty in ascertaining the powers and functions of the board and have complained of the vagueness of the statute. *See* Longo v. City of Hallandale, 42 Fla. Supp. 53, 59.

Section 112.533, F. S. (1974 Supp.), requires every agency employing law enforcement officers (*see* s. 112.531(2), F. S. (1974 Supp.), for definition of "employing agency") to establish and put into operation "*a system* for the receipt, investigation, and determination" of the various complaints received by such employing agency from any person. (Emphasis supplied.) The statute is silent as to just what type of system is required thereby and fails to specify any procedures that should be established to carry out this statutory responsibility. I have heretofore concluded in AGO 075-41 that a municipality has the authority under s. 166.021(1), F. S., to establish any system implementive of the purposes set forth in s. 112.533 (s. 3 of Ch. 74-274, *supra*) which does

not conflict with the requirements of Part VI of Ch. 112, F. S., deprive the affected police officer of any rights provided employees by the municipality's charter, or violate the provisions of s. 286.011, F. S., the Government in the Sunshine Law.

As I further concluded in AGO 075-41, the board provided for in s. 2(2) of Ch. 74-274, *supra* (s. 112.532(2), F. S.), is not intended to operate as a limitation on s. 3 (s. 112.533, F. S.) of the act requiring the creation of a system to handle complaints submitted. However, if such a board is created in connection with the complaints processing and investigative system requirement of s. 3 of the act, it must conform with the requirements and due process provisions of Ch. 74-274 (Part VI, Ch. 112, F. S.). Attorney General Opinion 075-41. Since no quasi-judicial powers or duties are prescribed by statute for any such complaint review board, any such board that might be established in connection with s. 3 of the act is not, *by the terms of Ch. 74-274*, made an "adjudicatory board" or one vested with quasi-judicial powers, duties, or functions.

However, a municipality, under the authority of the Municipal Home Rule Powers Act (Ch. 166, F. S.), can create such a board in conjunction with the complaint processing and investigative system mandated by s. 3 (s. 112.533, F. S.) of the act and prescribe its powers, duties, and functions so as to grant the board such quasi-judicial powers necessary to give the findings and determinations of any such board the status of final adjudications, or, in its sound discretion, it may limit such board's findings to an advisory or recommendatory status. However, no such legislative action of the municipality's governing body may contravene or operate to repeal or modify any preexistent charter act, civil service law, or special law affecting any rights of municipal employees and which govern the municipal police. *See* AGO's 074-141 and 075-136. Regardless of the status granted the board by the legislative action of the governing body of the municipality under Ch. 166, F. S., the municipality may not prescribe any judicial review of the action of any such board or confer or require any appellate jurisdiction on or of any court, as this power is reserved to the state, which did not make any such provision therefor in Ch. 74-274, *supra* (Part VI, Ch. 112, F. S.).

076-39—February 18, 1976

REGIONAL PLANNING COUNCILS

MEMBERSHIP—ORGANIZATION—FINANCING

To: Seymour Rowland, Jr., City Attorney, Ocala

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTIONS:

1. May a regional planning council composed of two or more counties, established under the provisions of Ch. 160, F. S., reorganize under the provisions of Parts I and II of Ch. 163, F. S.? May said council so organized then refuse to admit to membership municipalities who applied prior to reorganization?
2. In the event a municipality was admitted to membership after the regional planning council has reorganized under Ch. 163, F. S., could the municipal member be prohibited from voting?
3. In the event a municipality is admitted to membership in a regional planning council organized under Ch. 160, F. S., or Ch. 163, F. S., may the member be required to pay membership dues based upon a population per capita rate since the county wherein the municipality is located is already a member and has paid similar dues for membership?

SUMMARY:

A regional planning council established by two or more counties pursuant to s. 160.01, F. S., may be dissolved by the withdrawal of all of its constituent members. The counties that formerly comprised the dissolved regional planning council may form a new intergovernmental

body or group under the provisions of and as prescribed in Part II of Ch. 163, F. S., pursuant to mutual agreement. Such intergovernmental body established pursuant to Part II of Ch. 163 may refuse to admit any municipality to membership in the intergovernmental body.

A nonvoting membership provision for municipalities, mutually agreed upon by all of the contracting parties in accordance with provisions of s. 163.02, F. S., or Part II of Ch. 163, F. S., does not appear to be precluded by law.

"Membership dues" based on a per capita rate may be provided for by mutual agreement of the contracting parties under Part II of Ch. 163, F. S., regardless of any payment of similar "per capita dues" paid by any member county within which any participating municipality may be located.

AS TO QUESTION 1:

Section 160.01, F. S., provides for the establishment of a regional planning council composed of two or more counties and municipalities. There is no provision anywhere in Ch. 160, F. S., for the dissolution or reorganization of a regional planning council; however, reasonable reading of s. 160.01(1) would indicate that when the local governments forming the council withdraw their representation on and participation in the regional council to the extent that less than two members remain, the council would cease to exist. Nothing in Ch. 160 purports to compel the permanent membership or participation of any governmental body represented on the council.

In the case of the District 5 Regional Planning Council, apparently only the several county governments were members at the time of their withdrawal from the council. Therefore, what in fact took place was that all constituent county governments that were members of the council withdrew therefrom and the council was thereupon dissolved for lack of sufficient membership and representation thereon. Then, the counties that formerly comprised the former regional planning council formed a new regional planning council under Part II of Ch. 163, F. S. Such an action seems merely to be the lawful exercise of an option presented by the passage of Ch. 163, F. S., and does not seem in contravention of any statutory or constitutional provisions.

The first part of question 1 is therefore answered in the affirmative.

An intergovernmental program pursuant to Part I or Part II, Ch. 163, F. S., is entered into by the *mutual* agreement of its participants. Sections 163.02, 163.160(1), and 163.175. This differs from the language of Ch. 160, F. S., in that s. 160.01(1) permits all counties or municipalities "desiring representation" to participate. *See* AGO 073-402. Thus, as the intergovernmental program is to be entered into by *mutual* agreement and as there is no statutory provision as is seen in Ch. 160, *supra*, permitting participation of all counties or municipalities desiring to so participate, the constituent members of the program or organization are free to refuse membership to other counties or municipalities.

The second part of question 1 is therefore answered in the affirmative.

AS TO QUESTION 2:

The answer to this question is similar to the second part of question 1. The various members of the intergovernmental group are given a relatively free hand as to what their agreement will provide and generally may contract with one another as their individual or common interest may dictate. However, the courts may well feel inclined to define the perimeters of this relative freedom in terms of caprice or arbitrariness shown in the exclusion of candidates for membership.

A nonvoting membership provision, mutually agreed to by all the parties in accordance with the provisions of s. 163.02, F. S., or Part II of Ch. 163, F. S., does not appear to be precluded by law. If the party to be admitted on a nonvoting basis does not agree to this status, that party is free to decline membership. As noted above, however, the exercise of the power of choice in membership matters may well be subject to court-imposed limitations mandated as a result of a suit challenging the manner in which such power was exercised.

Your second question is therefore answered in the affirmative.

AS TO QUESTION 3:

Sections 163.180(4) and 160.01(1), F. S., authorize the several designated governmental bodies to appropriate moneys to carry out the respective stipulated statutory purposes, but set no guidelines as to the source of this money. Section 163.180(4) further empowers the governing bodies, defined by s. 163.170(4), F. S., to establish a schedule of fees to be charged by the planning commission defined by s. 163.170(2) in carrying out its authorized functions and authorizes such governing body to approve expenditures by such commission and conditions the commission's authority to expend moneys appropriated to it upon such approval. It would therefore appear that "membership dues" based on a per capita rate may be provided for by mutual agreement of the contracting parties, regardless of any payment of similar "per capita dues" by any member county within which any participating municipality may be located.

Your third question is therefore answered in the affirmative.

Your attention is called to Ch. 75-257, Laws of Florida, entitled the Local Government Comprehensive Planning Act. This act requires, *inter alia*, the designation of local planning agencies for the purpose of promulgating comprehensive growth plans for local governments. The act further provides compliance deadlines for both the designation of such an agency and the adoption of a local comprehensive growth plan by the local government. You are urged to become familiar with this act, as it significantly affects the area of local comprehensive planning. Enclosed is a copy of AGO 075-280, which should be of value to you in interpreting this new law.

076-40—February 19, 1976

MUNICIPALITIES

POWER TO REGULATE SITUS OF LIQUOR VENDING ESTABLISHMENTS

To: B. Paul Pettie, Jr., Margate City Attorney, Pompano Beach

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Does the governing body of a municipality have the power under general law to establish, by ordinance, distance limitations between liquor vendors and other liquor vendors and between liquor vendors and churches and schools?

SUMMARY:

A municipal governing body has the power, under s. 168.07, F. S. 1971 (as preserved in effect by s. 166.042(1), F. S.), and s. 562.45(2), F. S., to establish by ordinance distance limitations between liquor vendors and other liquor vendors and between liquor vendors and churches and schools provided such power is not exercised unreasonably and arbitrarily.

Subject to the following discussion, your question is answered in the affirmative.

Section 166.021, F. S., of the Municipal Home Rule Powers Act (Ch. 73-129, Laws of Florida), provides in part that the governing bodies of municipalities may exercise any power for municipal purposes and may enact legislation concerning any subject matter upon which the state Legislature may act except, *inter alia*, "any subject expressly preempted to state or county government by the constitution or by general law." In this regard, s. 5, Art. VIII, State Const., provides in part that:

> Local option on the legality or prohibition of the sale of intoxicating liquors, wines or beers shall be preserved to each county. . . . *Where legal, the sale of*

> *intoxicating liquors, wines and beers shall be regulated by law.* (Emphasis supplied.)

The emphasized portion of the constitutional provision states that the sale of intoxicating liquors shall be regulated *by law*, which refers to an enactment of the Florida Legislature and not the legislation of a municipal governing body. *See* Grapeland Heights Civic Ass'n v. City of Miami, 267 So.2d 321, 324 (Fla. 1972). Thus, within the purview of the Municipal Home Rule Powers Act, I am of the opinion that the subject of the regulation of the sale of intoxicating liquors has been "expressly preempted" to state government by the Constitution and that if a municipality has the power to regulate any aspect of that sale, such power does not emanate from the grant of general home rule powers to municipalities under s. 166.021. *Cf.* AGO 073-54; *see also* City of Miami v. Kichinko, 22 So.2d 627, 629 (Fla. 1945), in which the Florida Supreme Court stated that the State Beverage Law "is a taxing as well as a regulatory statute intended to have uniform operation throughout the state."

As to whether other provisions of law exist which may constitute a grant of power to municipalities to adopt the type of ordinances to which you refer, the power of municipalities in this respect was once expressed and direct. Section 561.44(1), F. S. 1971, formerly provided in part that municipalities

> . . . are hereby given the power hereafter to establish zoning ordinances restricting the location wherein a vendor licensed under s. 561.34 may be permitted to conduct his place of business and no license shall be granted to any such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance. . . .

This provision, which together with s. 562.45(2), F. S., discussed *infra*, was interpreted as allowing municipal establishment of distance limitations between liquor vendors and other liquor vendors, and between liquor vendors and churches and schools, *see* Glackman v. City of Miami Beach, 51 So.2d 294 (Fla. 1951); State *ex rel.* First Presbyterian Church of Miami v. Fuller, 187 So. 145, 150 (Fla. 1939), was deleted in a 1972 revision of the State Beverage Law, Chapter 72-230, Laws of Florida. However, in AGO 074-319, it was concluded that pursuant to s. 168.07, F. S. 1971 (as preserved in effect by s. 166.042(1), F. S.), and s. 562.45(2), F. S., a municipal governing body can continue to regulate the "location of place of business" of any licensee under the State Beverage Law within the corporate limits of that municipality. Section 168.07, repealed by Ch. 73-129, Laws of Florida, provided in part that municipalities "may regulate and restrain tippling, barrooms and all places where beer, wine or spirituous liquor of any kind is sold. . . ." (Section 166.042(1) provides, in effect, that municipalities may continue to exercise all powers conferred on them by the statutory provisions repealed by Ch. 73-129, including s. 168.07. *Cf.* Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97, 101 (Fla. 1975), wherein the court noted that s. 167.28, F. S. 1971, although repealed, is still viable as a grant of municipal power under Ch. 73-129.) And s. 562.45(2) provides as follows:

> (2) Nothing in the Beverage Law contained shall be construed to affect or impair the power or right of any incorporated municipality of the state hereafter 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 corporate limits of such municipality. (Emphasis supplied.)

See Ellis v. City of Winter Haven, 60 So.2d 620, 622 (Fla. 1952), in which the Florida Supreme Court stated that s. 562.45(2) "expressly reserved to the cities their power to regulate . . . *location of places of business* [of] . . . liquor establishments, as theretofore exercised by the cities under the authority of [s. 168.07]."

Having thus previously concluded that municipalities may continue to regulate "the location of places of business" of liquor vendors, the determinative consideration here is whether such regulation may include the adoption and enforcement of the type of ordinances to which you refer. In this regard, in City of Miami Beach v. State *ex rel.* Patrician Hotel Co., 200 So. 213 (Fla. 1941), cited in AGO 074-319, the Florida Supreme Court upheld a municipal ordinance which, generally, prohibited the sale of alcoholic beverages at any place of business located within 500 feet of another liquor vendor.

Later, in City of Miami v. Kichinko, *supra*, the same court made clear that municipalities could regulate the sale of intoxicating liquors only to the extent permitted in the State Beverage Law. Then the court discussed its earlier decision in *Patrician Hotel* as follows:

> Insofar as our holdings here may appear to be in conflict with what was said in City of Miami Beach et al v. State ex rel. Patrician Hotel Co., 145 Fla. 716, 200 So. 213, the latter is overruled. We may say, however, that we apprehend that there is really no conflict. In the City of Miami Beach case we were considering an ordinance which precluded the issuance of a license to an applicant to engage in the business of a liquor dealer within 500 feet of the main entrance to the place of business of another licensed liquor vendor and, therefore, *the ordinance there under consideration came within the purview of Sec. 562.45 Fla. Statutes 1941, same F.S.A., as to "location of places of business."* (Emphasis supplied.)

Thus, the Florida Supreme Court has apparently already opined that the power of municipalities to regulate the "location of places of business," as reserved by s. 562.45(2), F. S., encompasses the power to adopt the type of municipal ordinances to which you refer. Accordingly, I am of the opinion that, notwithstanding the repeal of s. 561.44(1), F. S. 1971, a municipal governing body has the power under s. 168.07, F. S. 1971 (as preserved in effect by s. 166.042(1), F. S.), and s. 562.45(2) to establish by ordinance distance limitations between liquor vendors and other liquor vendors and between liquor vendors and churches and schools provided, of course, that such power is not exercised unreasonably and arbitrarily. *See* Glackman v. City of Miami Beach, *supra*. (For statutory exception, *see* s. 563.02(1)(a), F. S.; *cf.* AGO 074-362.)

076-41—February 23, 1976

MUNICIPALITIES

TORT LIABILITY—EXTENT; EFFECT OF STATE'S WAIVER OF SOVEREIGN IMMUNITY

To: W. W. Caldwell, Jr., City Attorney, Fort Lauderdale

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

What effect, if any, does the state's waiver of sovereign immunity from tort liability contained in s. 768.28, F. S., have on the tort liability of municipalities?

SUMMARY:

With the exception of immunity in the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions, municipalities possessed no aspect of the state's sovereign immunity from tort liability upon which the state's waiver of sovereign immunity contained in s. 768.28, F. S., and the statutory limitations applicable thereto, could operate.

By the enactment of s. 768.28, F. S. (Ch. 73-313, Laws of Florida, as amended by Ch. 74-235, Laws of Florida), the Florida Legislature waived the state's sovereign immunity from tort liability to the extent provided therein. *See* s. 768.28(1), which provides in part that "the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act"; s. 768.28(2), which defines the phrase "state agencies and subdivisions" to include municipalities; s. 768.28(5), which establishes the monetary limitations on the state's waiver; and s. 768.28(9), which precludes the personal liability of officers, employees, or agents of the state or its subdivisions for their negligent acts or omissions in the scope of their

employment unless committed "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property."

In light of the enactment of s. 768.28, F. S., which became effective generally on January 1, 1975, you pose specific questions as to the authority for, or efficacy of, a municipality appealing a "claims bill" enacted by the Florida Legislature; the Florida Legislature directing a municipality to pay a judgment in excess of the monetary limitations established in s. 768.28(5); and a municipality purchasing insurance to cover only that amount granted by a "claims bill" which is in excess of those monetary limitations. The following discussion, which is limited solely to a consideration of the effect, if any, of the state's waiver of sovereign immunity contained in s. 768.28 on the tort liability of municipalities under the doctrine of *respondeat superior*, should be dispositive of your questions.

In Modlin v. City of Miami Beach, 201 So.2d 70, 73 (Fla. 1967), the Florida Supreme Court attempted to clarify its earlier decision in Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), as follows:

> . . . the *Hargrove* decision specifically reserved municipal tort immunity in the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions. Because private persons and corporations do not exercise legislative or judicial functions, this means that the tort liability of municipal corporations may now be equated with that of private corporations.
>
> The *Hargrove* specification of the legislative and judicial functions as constituting the area of continuing immunity obviously implies that the performance of the executive or administrative function will constitute the area of potential liability. . . .

This judicial language states the essential status of municipal tort immunity prior to the enactment of s. 768.28, F. S. That is, except with respect to those activities which could properly be designated legislative, judicial, quasi-legislative, and quasi-judicial, a municipality was liable in tort under the doctrine of *respondeat superior* for any injuries or damages suffered as a result of the acts, events, or omissions of action, whether negligent or intentional, committed by its officers, employees, or agents in the scope of their employment or function the same as any private corporation. *See also* City of Miami v. Simpson, 172 So.2d 435 (Fla. 1965); and Fisher v. City of Miami, 172 So.2d 455 (Fla. 1965). Therefore, I am of the opinion that with the exception of immunity in the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions [which immunity may still exist on other grounds, *see* Rivello v. Cooper City, 322 So.2d 602 (4 D.C.A. Fla., 1975), and McNayr v. Kelly, 184 So.2d 428 (Fla. 1966)], municipalities possessed no aspect of the state's sovereign immunity from tort liability upon which the waiver contained in s. 768.28, and the limitations specified therein, could operate. *Cf.* AGO 075-114. In sum, the state's waiver of sovereign immunity contained in s. 768.28 does not operate to limit in any substantive way the tort liability of municipalities under the doctrine of *respondeat superior*.

076-42—February 23, 1976

TAXATION

PURCHASE OF UTILITIES BY CHURCH FOR CHURCH SCHOOL USE—EXEMPTION FROM MUNICIPAL PUBLIC SERVICE TAX

To: Julian B. Lane, Senator, 23rd District, Tampa

Prepared by: Patricia S. Turner, Assistant Attorney General

QUESTION:

Are purchases of utilities by a church when said utilities are used for Sunday School services, vacation bible school, and church day schools

exempt from municipal public service tax pursuant to s. 166.231(4), F. S. (1974 Supp.)?

SUMMARY:

Purchases of utilities by a church when said utilities are used for Sunday School services and vacation bible school are exempt from municipal public service tax pursuant to s. 166.231(4), F. S. (1974 Supp.), since these activities directly or primarily further the religious purposes of the congregation even though said activities may serve incidental nonreligious purposes. Purchases of utilities by a church when said utilities are used for church day schools are exempt from said municipal public service tax if the church conducts day schools in the area of church-owned property for the purpose of caring for children of working parents and if the church utilizes any excess funds derived from the operation of said schools to further church or religious purposes.

Your question is answered in the affirmative as discussed herein.
Section 166.231(4), F. S. (1974 Supp.), states:

> A municipality *may* exempt from taxation hereunder the purchase of the taxable items by the United States Government, the State of Florida, or any other public body as defined in s. 1.01, and *shall* exempt [purchases by] any recognized church in this state *for use exclusively for church purposes.* (Emphasis supplied.)

This statute was considered by the Supreme Court of Florida in Dickinson v. City of Tallahassee, Case No. 46,580 (Fla. Sup. Ct., filed Dec. 10, 1975), in determining that the State of Florida and its agencies and departments, Leon County, and the Leon County School Board were immune from the 10 percent utility tax levied by the City of Tallahassee, since neither s. 9(a), Art. VII, State Const., the authorizing constitutional provision, nor s. 166.231(1) and (4), F. S. (1974 Supp.), the implementing statute, constituted a waiver of that immunity. The Supreme Court reached this decision even though the language of the statute is permissive. An examination of this case reveals that the court did not consider the questions presented by your inquiry.

Initially, it must be noted that your enclosed letter dated April 30, 1973, from Henry E. Williams, Jr., City Attorney of Tampa, to Melvin B. Smith, City Comptroller of Tampa, defining the word "church" to mean "only the church proper and not the broader nonprofit religious institution carrying on its customary religious activities," was based upon Ch. 72-721, Laws of Florida, which amended Ch. 167, F. S., by creating a new section providing the following:

> **Exemption of churches, utility tax.**—All churches that are entitled to exemption from the state sales and use tax law shall be exempt from the payment of any municipal tax on utility services as defined in section 167.431, Florida Statutes, furnished to church property used exclusively for church purposes.

Chapter 167, *supra*, was subsequently repealed by the Legislature. Chapter 73-129, Laws of Florida, effective October 1, 1973, states:

> AN ACT relating to local government . . . repealing chapters 166, 167 . . . Florida Statutes, and all existing sections thereof not otherwise transferred . . . .

Section 5(1) of Ch. 73-129, *supra*, specifically states:

> Except as otherwise provided in sections 2 and 3, the following enumerated chapters of Florida Statutes, and all sections thereof as presently constituted, relating to powers of local officials, are repealed: chapter 167 (sections 167.005 through 167.78, inclusive) . . . .

Sections 2 and 3 of Ch. 73-129, *supra*, did not transfer s. 167.431, F. S., but said Ch. 73-129 did create the above-quoted s. 166.231(4), *supra*, which deletes that portion of s. 167.431 entitling a church to exemption from municipal tax on utility services furnished to church property used exclusively for church purposes *if a church is entitled to exemption from state sales and use tax pursuant to Ch. 212, F. S.* Therefore, City Attorney Williams' letter is no longer relevant to the question sub judice.

Therefore, the instant issue must be resolved by construing the clause, "for use exclusively for church purposes," as contained in s. 166.231(4), *supra*. Under the statute, it is the *use* to which the utility is put which is determinative of its exempt status and this is consistent with other Florida statutory and case law regarding exemptions. [*See* Maxwell v. Good Samaritan Hospital Association, 161 So.2d 31 (2 D.C.A. Fla., 1964); State v. Doss, 8 So.2d 15 (Fla. 1942); Lummus v. Florida Adirondack School, 168 So. 253 (Fla. 1934); AGO's 046-369 and 063-138; ss. 196.195, 196.196, 196.197, 196.198, and 196.199, F. S.]

This phrase has been construed previously to mean that a nonreligious, incidental use of property does not prevent the granting of an exemption. 15A Words and Phrases *Exclusively for Religious Purpose* p. 199 (1950). The phrase "exclusively used" has reference to a primary use as opposed to a mere secondary and incidental use. 15 Words and Phrases *Exclusively Used* p. 201 (1950). Incidental purposes do not effect a change in the purpose for which property is held and used, as long as the primary use of such property is to further religious purposes. Jasper v. Mease Manor, Inc., 208 So.2d 821 (Fla. 1968).

Applying the above definition, courts have previously held that the fact that a building, occupied by a church for church services at stated times, is rented for lectures, concerts, and readings, and the rent from such entertainments is used to defray the expenses of the church and society, does not prevent the use of the building by the church from being its exclusive occupation pursuant to a statute exempting from taxation all buildings exclusively occupied as churches, First Unitarian Society of Hartford v. Town of Hartford, 34 A. 89 (Conn. 1895); that earning one's livelihood or performing certain incidental services does not convert property otherwise used exclusively for religious purposes into property which is not used for said purposes, Lummus v. Florida Adirondack School, *supra*; that use of church-owned property as a parking lot for parishioners attending church services, although said parking lot was used as a commercial parking area during weekdays, serves a religious purpose, Central Baptist Church of Miami v. Dade County, 216 So.2d 4 (Fla. 1968), *rev'd on other grounds*, 404 U.S. 412 (1972).

In the latter case, the Central Baptist Church of Miami, Florida, Inc., owned a city block in downtown Miami on which its church building was located. A large portion of the lot, 59 percent, was utilized as a parking area. During the weekday business hours, this area, with the exception of a small part reserved at all times for the church staff, was rented for and used as a commercial parking lot, the net income from which was devoted in its entirety to world missions and educational programs of the church. On Sundays and evenings the parking area served as a gratuitous parking facility for the congregation during hours of church services and church-related activities.

The Supreme Court of Florida, in construing s. 192.06, F. S. 1967, which stated in part:

> **192.06 Property exempt from taxation.**—The following property shall be exempt from taxation:
>
> * * * * *
>
> (4) All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial; but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property.

determined that the church property was exempt from ad valorem taxation when said property was used for religious purposes and that the limited part-time rental of a portion of the church lot for commercial parking during weekday business hours was reasonably incidental to the primary use of the church property for religious purposes

and was not a sufficiently divergent commercial use to eliminate the exemption. Central Baptist Church of Miami v. Dade County, *supra.*

At p. 6, the Supreme Court specifically stated:

> . . . [I]t does not appear that the Legislature intended by the language of Section 192.06(4) to remove the church property tax exemption where the *rental* of a *portion* of a church lot is *limited in nature* and does *not* result in the portion rented being *placed beyond its regular and customary church use,* and the rental *funds* derived are used for *purposes* contemplated by Section 16, Article XVI, State Constitution. The legislative wisdom and policy of the statute are that if certain church related property (parsonages and burying grounds) is held by private persons for speculative purposes or if the house of worship itself is rented for a *nonworship or nonschool purpose,* these are diversions from church use sufficient in degree to warrant lifting the tax exemption. However, *lesser* and more *limited* divergent *uses* of church property are apparently not deemed by the Legislature sufficiently inconsistent with church purposes to lift the exemption, *provided the funds derived from such uses are not diverted to purposes not contemplated by Section 16, Article XVI.* (Emphasis supplied.)

Emphasizing that each individual situation must be examined on its own merits to determine factually whether the organization and the activity are exempt from taxation, my predecessor, in response to the question of whether the word "exclusively" in s. 166.231(4), *supra,* permitted the exemption from municipal public service tax to be applied to church purchases for nonprofit church properties and operations such as schools, clinics, recreation areas, playgrounds, convents, and rectories restated the interpretation of the clause "exclusively for church purposes" as follows, which I quoted in AGO 075-209:

> . . . [T]he term "used exclusively for church purposes" has a broader meaning than the use of the church auditorium for Sunday sermons or preaching services, but extends to such services as the Sunday school services, the young people's Sunday services in the church, and other services in the church *directly furthering the religious purposes* of the congregation. [Attorney General Opinion 057-255; emphasis supplied.]

Applying this interpretation to the above-quoted issue, my predecessor determined that the exemption from municipal public service tax does not apply to church purchases for nonprofit church properties and activities such as schools, clinics, recreation areas, etc., unless the activity constitutes a direct adjunct of the church and its congregation, *i.e.,* a parsonage, whether or not physically located on church premises, furnished to the minister without cost of any nature (including cost of utility services). Attorney General Opinion 075-209.

Applying these requirements to your particular question, it is clear that the operation of Sunday School services and vacation bible schools on church property falls within the exemption granted by s. 166.231(4), *supra.* Both further religious purposes, such as teaching stories from the Bible. However, the application of the above-stated requirements to the operation of church day schools presents a more complicated issue. It is common knowledge that many churches operate day schools on church premises for the purpose of caring for children of working parents. Thus, utilities used in operating such schools are used in the area of the church property where said schools are operated during the period of operation. Additionally, it is presumed that any excess funds derived from the operation of day schools are used to further church or religious purposes.

The above-described situation would then be quite similar to that before the Florida Supreme Court in the *Central Baptist* case wherein the parking area was rented during weekday business hours, with proceeds from such rentals used for religious or educational purposes. Therefore, it would appear that utilities purchased for use in day schools located on church premises would come within the exemption granted in s. 166.231(4), *supra,* provided the funds derived therefrom were used for religious purposes and not diverted to other uses. If church property, used and operated as a commercial parking lot during the week, was found to meet the test of "exclusive use" for tax exemption purposes, then the same should be true of a day school operated on the church premises by the church, provided no diversion of funds to nonreligious purposes or uses occurred.

However, it must be emphasized that each individual situation must be examined on its own merits to determine factually whether the organization and the activity meet the above-stated requirements.

076-43—February 23, 1976

UNIFORM CONTRABAND TRANSPORTATION ACT

VEHICLES TRANSPORTING NON-TAX-PAID CIGARETTES SUBJECT TO FORFEITURE

To: A. L. Baker, Executive Director, Department of Business Regulation, Tallahassee

Prepared by: Richard W. Prospect, Assistant Attorney General

QUESTION:

Are non-tax-paid cigarettes "contraband" within the meaning of the Uniform Contraband Transportation Act, Ch. 74-385, Laws of Florida, so as to provide for forfeiture proceedings against vehicles used in transporting those cigarettes?

SUMMARY:

Vehicles used in transporting non-tax-paid cigarettes are subject to forfeiture proceedings under Ch. 74-385, Laws of Florida.

The Uniform Contraband Transportation Act, hereinafter referred to as the act, has as one of its intentions the establishment of uniform procedures for forfeitures of motor vehicles used in transporting contraband articles. This intent is gleaned from the judicial practice of examining the title of a given act. Board of Public Instruction v. Dade County Classroom Teachers' Association, 243 So.2d 210 (3 D.C.A. Fla., 1971). The title of the act, Ch. 74-385, Laws of Florida, in its pertinent parts states:

> AN ACT relating to . . . the seizure and forfeiture of vessels, *vehicles* and aircraft; . . . providing uniform procedures for confiscation of vessels, *motor vehicles* and aircraft containing contraband articles . . . . (Emphasis supplied.)

The obvious legislative intent in creating this uniformity is to provide a plan by which contraband and that which is used in transporting this contraband are to be legally seized and forfeited. Prior to the adoption of the act, several state laws relating to specified contraband articles each provided for seizure of vessels, vehicles, and aircraft which were used to transport the named contraband. *See* s. 206.205, F. S. (non-tax-paid motor fuel), s. 562.27, F. S. (illegal alcoholic beverages), s. 562.35, F. S. (materials used in the manufacture of illicit liquors), s. 849.36, F. S. (lottery paraphernalia), s. 849.231, F. S. (gambling devices), and s. 893.12, F. S. (illegal drugs and narcotics). The act amended each of the above-cited statutes to create uniform forfeiture proceedings according to the provisions of the act.

In addition to providing for forfeiture of vessels, vehicles, or aircraft transporting the contraband embraced in the above statutes, the act created similar forfeiture in situations involving contraband within the meaning of state tobacco law, a provision not theretofore found in Florida law.

The question remaining then is: Why is there no mention of the tobacco statutes within ss. 5 through 10 unless the Legislature intended to exclude them from the coverage of the act? The answer becomes apparent when one views the tobacco statutes, their prior authority regarding forfeitures, and the stated purpose of the act to unify statutory forfeiture procedures. As will be shown, there was no necessity to include Ch. 210, F. S., the tobacco laws, in these sections because prior to the act there was no authority to seek forfeiture of vehicles used in violation of the tobacco laws. However, the act has now plainly and explicitly authorized such proceedings. Hence, since no prior authority

existed, there also was no procedural mechanism which needed to be made uniform and therefore includable within ss. 5 through 10.

Section 210.12(1), F. S., states:

> **210.12 Seizures; forfeiture proceedings.—**
> (1) The state, acting by and through the division of beverage, shall be authorized and empowered to seize, confiscate and forfeit for the use and benefit of the state, any cigarettes upon which taxes payable hereunder may be unpaid, and also any vending machine or receptacle in which such cigarettes are held for sale, or any vending machine that does not have affixed thereto the identification sticker required by the provisions of s. 210.07, or which does not display at all times at least one package of each brand of cigarettes located therein so the same is clearly visible and arranged in such a manner that the cigarette tax stamp or meter impression of the stamp affixed thereto is clearly visible. Such seizure may be made by the division, its duly authorized representative, any sheriff or deputy sheriff, or any police officer.

This section authorized seizure and forfeiture of only the non-tax-paid cigarettes; no provision was made for the forfeiture of vehicles used to transport, conceal, or sell the cigarettes. Since neither procedural mechanism nor authority was statutorily provided for vehicular forfeiture under Ch. 210, F. S., the act created both.

Support of this theory may be found in two principles of statutory construction. The first is that when different statutes relate to the same subject and those statutes exist in possible or actual conflict, it is the latest expression, in time, of the Legislature which will control over the earlier. Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962). The second is that the legislative intent is the polestar by which the courts must be guided. To this principle all rules of statutory construction are subordinate. American Bakeries Co. v. Haines, 180 So. 524 (Fla. 1938). The obvious legislative intent of the act is uniformity.

Applying these principles to the situation under consideration, it is seen that the earlier expression of the Legislature relative to forfeiture of non-tax-paid cigarettes is s. 210.12, F. S. It makes no provision for forfeiture of vehicles. The latest legislative expression is the act. It does provide for such forfeiture. In regard to the latter principle, clearly the act is a statute of specific intent. Chapter 210, F. S., is a general law not speaking directly to specific vehicular forfeitures. Accordingly, the act controls.

Further support of the above is found when once again the title of the act is examined. There it is seen that the act provides "for seizure and forfeiture of *vehicles* illegally transporting or delivering . . . *tobacco*." (Emphasis supplied.)

Turning now to the provisions of the act, s. 2(1)(c) defines as a contraband article "[a]ny equipment, liquid or solid, which is being used or intended to be used in violation of the beverage or tobacco laws of the state." Referring to the tobacco laws of Florida, specifically s. 210.18(1), F. S., it is seen that the possession or transportation of non-tax-paid cigarettes for purposes of sale is a misdemeanor of the first degree.

Therefore, since the possession or transportation of non-tax-paid cigarettes violates the state tobacco laws, non-tax-paid cigarettes are contraband within the meaning of s. 2(1)(c) of the act. Since s. 2(a) of the act makes it unlawful to transport any contraband article by means of a motor vehicle, that motor vehicle is subject to the seizure and forfeiture provisions of ss. 3 through 5 of the act.

076-44—February 24, 1976

ELECTION CODE

SOLICITING SIGNATURES ON PETITION WITHIN 100 YARDS OF POLLING PLACE NOT UNLAWFUL

To: Reubin O'D. Askew, Governor, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Is the activity of requesting passersby to sign initiative petitions proposing an amendment to the State Constitution within 100 yards of a polling place, but more than 15 feet from a polling place, on the day of an election prohibited by s. 104.36, F. S.?

SUMMARY:

The solicitation, on an election day, of signatures on forms petitioning for the submission of a proposed constitutional amendment at a future election at locations within 100 years of a polling place is not prohibited by s. 104.36, F. S.

I have assumed for the purpose of this opinion that the activity about which inquiry is made would be limited to soliciting passersby on election day within 100 yards of a polling place to sign forms petitioning for the submission of a proposed constitutional amendment at a future election. I have assumed further that such petition forms will be made available for signature at the site of the solicitation, that upon such forms being signed same will be retained by the persons soliciting the signatures, and that no distribution of such forms for signature at a later date or other place will be made within 100 yards of a polling place.

Section 104.36, F. S., reads as follows, in pertinent part:

> On the day of any election it shall be unlawful for any person to distribute any political pamphlets, cards or literature of any kind, or solicit votes, or approach any elector in an attempt to solicit votes within 100 yards of any polling place. . . .

The statute prohibits three specific activities within the 100-yard zone: the solicitation of *votes*, the attempted solicitation of *votes*, and the distribution of "any political pamphlets, cards or literature of any kind." And it is clear from the following language of AGO 073-377 that s. 104.36, F. S., does not impliedly prohibit any other activities:

> Section 104.36, F. S., is a penal or criminal law and as such it is to be strictly construed. The only specified prohibited activities within 100 yards of any polling place are the distribution of political pamphlets, cards, or political literature of any kind and the solicitation of votes or attempts to solicit votes. From the language used in s. 104.36, it is impossible for anyone to consider that the legislature intended to imply that any other activity within the 100 yard area should also be prohibited.
>
> Except for the specifically enumerated activities, all other implied activities are excluded under the legal doctrine *expressio unius est exclusio alterius*, and it would be impossible to apply the provisions of s. 104.36, *supra*, against an individual participating in activities not otherwise prohibited within 300 feet of a polling place, but beyond 15 feet therefrom.

While the inquired-about activity obviously involves a solicitation, it is a solicitation of *signatures*, not of votes. The signature of such a petition does not constitute a vote in favor of the proposition advocated by the petition, nor does the act of signing such a petition obligate the signer to vote in favor of the proposition when and if it is ultimately placed on a ballot.

Accordingly, I am of the opinion that the activity about which you inquire is not one which is prohibited by s. 104.36, F. S.

076-45—February 26, 1976

FIREARMS

DEFINITION INCLUDES "TASER" WEAPON

To: Richard E. Gerstein, State Attorney, Miami

Prepared by: Richard W. Prospect, Assistant Attorney General

QUESTION:

Does the "Taser" weapon constitute a "firearm" for the purposes of s. 790.001(6), F. S.?

SUMMARY:

The Taser TF-1, is a firearm within the meaning of s. 790.001(6), F. S. (The use thereof, under certain conditions, would invoke Florida's 3-year mandatory penalty.)

Section 790.001(6), F. S., provides the definition:

> "Firearm" means any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" shall not include an antique firearm.

According to the manufacturer's information booklet, the Taser TF-1 is a device described as a hand-held, flashlight-configured, plastic body which contains an electrical supply unit and into which an expendable plastic cassette is inserted. The cassette contains two barb-like projectiles which are connected to the body by insulated wires. The projectiles are launched by the expelling energy created by 0/0 of a grain of smokeless powder. When triggered, the barbs are deployed up to a distance of 15 feet and are intended to snag on the clothing of a would-be attacker. Once launched and making contact, the device may cause up to 50,000 volts of electrical charge to pass through the body of the assailant, thereby rendering him helpless.

I am informed that the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms was requested to classify the Taser under the provision of the federal Gun Control Act of 1968. Pertinent language from that legislation in terms strikingly similar to those found in s. 790.001(6), F. S., reads as follows:

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm. [Section 921(a)(3), Title I of Public Law 90-618 (1968).]

By letter dated October 12, 1973, that agency, in concluding that the device was not a firearm within the meaning of the above-quoted statute, stated:

> Although the "Taser" wires are expelled by the explosion or expansion of gases generated by the ignition of 0/0 of a grain of smokeless powder, the wires and appropriate wire contacts do not meet the definition of a projectile. This determination is based on the fact that the muzzle velocity is well below the standards established by the Office of the Surgeon General, Department of the Army.

I am also informed that the Taser was the subject of an opinion of the Honorable Evelle J. Younger, Attorney General of California. In said opinion Attorney General Younger

held that the Taser was a firearm under California law, specifically s. 12001, California Penal Code, which reads as follows:

> "Pistol," "revolver," and "firearm capable of being concealed upon the person" as used in this chapter shall apply to and include any device, designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and which has a barrel less than 12 inches in length. "Pistol," "revolver," and "firearm capable of being concealed upon the person" as used in Sections 12021, 12072 and 12073 include the frame or receiver of any such weapon.

Notably absent in both California's and Florida's law is any requirement in the definition of "projectile" which includes a minimum muzzle velocity—the exclusive basis for the decision of the Bureau of Alcohol, Tobacco and Firearms.

Although the Attorney General of California acknowledged the existence of the federal opinion, he nonetheless based his conclusion on the fact that it was not the intent of Congress to exclude the operation of state law on the same subject. As he noted:

> Title 18, section 927 of the United States Code declares that it is not Congress' intent to occupy the entire field of firearms control. Section 927 reads as follows:
>
> No provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.
>
> If the Gun Control Act of 1968 is found not to regulate the Taser TF-1, it is axiomatic that there would be no conflict with California law that controls the possession and use of such a firearm. See *C.D.M. Products, Inc. v. City of New York*, 350 N.Y.S. 2d 500 (1973). [California Attorney General Opinion CR 75/22, October 30, 1975.]

Having the benefit of both of the above opinions, I refer once again to applicable Florida law which contains no specific definition of what constitutes a "projectile" in terms of muzzle velocity. Absent this definition and lacking the state equivalent of standards set forth by the United States Army, I conclude that a projectile is any "body projected by external force and continuing in motion by its own inertia." *Webster's New Collegiate Dictionary*, 920 (1st ed. 1973). Since the projectiles are expelled by the action of an explosive charge, I am of the opinion that the Taser TF-1 is a firearm within the meaning of existing Florida law.

Additionally, I do not consider Florida law in conflict with the Gun Control Act of 1968 under Title 18, s. 927, U.S.C. As Attorney General Younger observed, since the Taser is not a firearm under the Gun Control Act of 1968, then it logically follows that the same subject matter, *i.e.*, firearms, is not the basis of conflicting state and federal laws.

076-46—February 26, 1976

PUBLIC EMPLOYEES

MAY NOT BE REIMBURSED FOR PER DIEM WHEN ON SICK LEAVE WHILE ON TRAVEL STATUS

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

Is it permissible for a department to allow an employee to take sick leave for personal illness while on travel status away from his official headquarters and to continue to receive travel allowance?

SUMMARY:

There is no statutory authority to reimburse a state employee for per diem when on sick leave because of illness occurring while on travel status away from his official headquarters.

Your question is answered in the negative.
Under the express terms of s. 112.061(3)(b), F. S., reimbursable expenses of travelers

> . . . shall be limited to those expenses *necessarily incurred by them in the performance of a public purpose authorized by law* to be performed by the agency and must be within the limitations prescribed by this section. (Emphasis supplied.)

Section 112.061(12)(b), F. S., requires the traveler to sign a travel voucher certifying, among other things, to the truth and correctness of his claim for travel expenses, and that the travel expenses "were actually incurred by the traveler as *necessary in the performance of official duties.*" (Emphasis supplied.)
Although one can certainly sympathize with the position a state employee is placed in when he becomes ill while away from his official headquarters on official business, there is no statutory authority to reimburse the employee for per diem while on sick leave because of illness occurring while on travel status away from his official headquarters.
In the absence of such statutory authority, public funds may not legally be expended for such purposes. *See* AGO 071-28, 073-414, Florida Development Comm. v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970), and *cf.* AGO's 074-305 and 075-120.

076-47—February 26, 1976

REGULATION OF PROFESSIONS

NURSING—NURSE LICENSED BY FOREIGN COUNTRY MAY BE LICENSED IN FLORIDA WITHOUT EXAMINATION

To: Kenneth M. Myers, Senator, 37th District, Miami

Prepared by: Donald D. Conn, Assistant Attorney General

QUESTION:

Does the phrase "under the laws of another jurisdiction," as used in s. 464.071(2), F. S., as amended by Ch. 75-273, Laws of Florida, include a foreign country or the laws of a foreign country or nation?

SUMMARY:

As used in s. 464.071(2), F. S., as amended, the phrase "under the laws of another jurisdiction" does mean and include foreign countries and the laws of foreign countries or nations.

Your question is answered in the affirmative.
Prior to July 1, 1975, s. 464.071(2), F. S., provided that:

> The board [of nursing] *shall issue* a license to practice nursing as a registered nurse *without examination*, to an applicant who has been *duly licensed or*

> *registered* as a registered nurse under the laws of another state, territory or *foreign country*, if in the opinion of the board the applicant meets the qualifications required of registered nurses in this state. (Emphasis supplied.)

With the enactment of Ch. 75-273, Laws of Florida, which took effect on July 1, 1975, s. 464.071(2), F. S., now provides that:

> The board [of nursing] *shall issue* a license to practice professional nursing *without examination*, to an applicant who has been *duly licensed or registered under the laws* of *another jurisdiction if, in the opinion of the board*, the applicant *meets* the *same standards for licensure required* of registered professional nurses in this state. (Emphasis supplied.)

In analyzing your question, the only relevant change made in s. 464.071(2), F. S., by Ch. 75-273, *supra*, was the change of the phrase "under the laws of another state, territory or foreign country" to the phrase "under the laws of another jurisdiction." In this regard it should be noted that the term "jurisdiction" is a term of comprehensive and large import, having different meanings dependent upon the connection in which it is found. 50 C.J.S. *Jurisdiction*, at 1090. Thus, the context in which this term is used is significant in determining its meaning and the intent of the Legislature in making the change from the specific enumeration of "state, territory or foreign country" to "another jurisdiction."

There is no indication in the title of Ch. 75-273, *supra*, of any intent to limit the generally comprehensive meaning of the term jurisdiction. It is a general rule of statutory construction that the use of a comprehensive term indicates an intent to include everything embraced within that term. Thus, the use by the Legislature of the comprehensive term jurisdiction would indicate an intent to include within its meaning all aspects of that term. Florida Industrial Comm. v. Growers Equipment Co., 12 So.2d 889, 893 (Fla. 1943); Fla. State Racing Comm. v. McLaughlin, 102 So.2d 574 (Fla. 1958).

As noted above, the precise meaning of the broad term jurisdiction is frequently determined by the context in which it is used. In this regard, s. 464.071(2), F. S., associates the term "laws of" with the term jurisdiction. Thus, the "jurisdiction" referred to in s. 464.071(2) is one which has the authority to enact laws. The right to make, declare, and execute laws is most commonly associated with and applied to the powers of a sovereign, either state or nation. In this regard the word jurisdiction may take on a geographical connotation signifying the territory within which the power to declare and enforce the law may be exercised. 50 C.J.S. *Jurisdiction*, at 1090, 1091.

Regarding the regulation of the practice of a profession such as nursing, the power of the sovereign is most frequently exercised with the enactment of laws requiring examination and licensure in the proper exercise of the sovereign's police power. The sovereign is authorized in the exercise of its police power to require licensure for those who propose to engage in a profession or occupation within the jurisdiction of the sovereign. Semler v. Oregon State Dental Examiners, 294 U.S. 608 (1935); Fischwenger v. York, 18 So.2d 8 (Fla. 1944).

Thus, as used in s. 464.071(2), F. S., as amended, the term jurisdiction refers to the authority of a sovereign power to govern or legislate as well as to exercise authority and control. State *ex rel.* Dreyer v. Bekke, 28 N.W.2d 598, 599 (N.D. 1947). Absent an expression of legislative intent to the contrary, it would appear that Ch. 75-273, *supra*, has not resulted in a change in the substantive scope of applicability of this provision, but has only simplified the language used in s. 464.071(2).

Due to the broad and comprehensive common meaning of the term jurisdiction, and the fact that nothing in Ch. 75-273, Laws of Florida, evidences an intent to use this term in any way other than its commonly accepted manner, I am of the opinion that licensure without examination pursuant to s. 464.071(2), *supra*, should be available on an equal basis and under the same terms to applicants who have been duly licensed or registered "under the laws of another jurisdiction" whether it be another state, nation, or foreign country.

Nevertheless, the State Board of Nursing is given the duty and responsibility to determine that applicants duly licensed or registered under the laws of another jurisdiction do meet the same standards for licensure required of registered professional nurses in Florida before allowing licensure without examination.

Finally, I find nothing in s. 455.015, F. S., which would in any way repeal or modify s. 464.071(2), *supra*. Rather, the method available under s. 455.015 for licensure is an

alternative which an applicant may choose, but certainly a foreign licensee may still utilize s. 464.071(2) if that applicant can show that he or she meets the standards for licensure of registered professional nurses in this state.

076-48—February 27, 1976

REGULATION OF PROFESSION

REGULATION OF REAL ESTATE "RESALE INDUSTRY"

To: A. L. Baker, Executive Director, Department of Business Regulation, Tallahassee

Prepared by: Richard Goldstein, Assistant Attorney General

QUESTIONS:

1. Is the regulation of the "resale industry" properly within the jurisdiction of the Division of Land Sales under Ch. 478, F. S.?
2. Is the regulation of the "resale industry" properly within the jurisdiction of the Florida Real Estate Commission under Ch. 475, F. S.?
3. Is the regulation of the "resale industry" properly within the jurisdiction of the enforcing authority under Part II, Ch. 501, F. S.?

SUMMARY:

The division has jurisdiction to regulate the resale industry as to sales and offers to dispose of subdivided land. The commission has jurisdiction to regulate those individuals participating in the resale industry for violations of Ch. 475, F. S., and the enforcing authority has jurisdiction to prevent unfair and deceptive trade practices that occur in the resale industry.

These questions will be answered in accord with the factual situation taken from your correspondence. Certain business entities (realtors) are specializing in the "resale of Florida land." The realtor contacts owners of Florida land who wish to sell that land. The realtor requires the person wishing to sell his land to pay an initial fee in return for the realtor's promise to list the land for sale. The landowner is unable to verify what efforts are being performed by the realtor to sell the land, and that very frequently little is actually done by the realtor to attempt to sell the land.

AS TO QUESTION 1:

The Division of Florida Land Sales (division) has jurisdiction over offers to dispose of "subdivided lands" located within the state. Section 478.27(1), F. S. The term "subdivided land" is defined to mean

> . . . any land which is divided or is proposed to be divided for the purpose of disposition into 50 or more lots, parcels, units or interests and also includes any land, whether contiguous or not, if 50 or more lots, parcels, units or interests are offered as part of a common promotional plan of advertising and sale. [Section 478.021(2)(f), F. S.]

Thus, the division has regulatory authority over any offers to dispose of any subdivided land, as defined, within the state. Section 478.27(1). The division also has authority to regulate the disposition of subdivided land if the offer to dispose thereof originates within the state. Section 478.27(3), F. S.

The Florida Legislature expressly declared Ch. 478, F. S., to be both a remedial and a penal statute with the remedial portions thereof being liberally construed to effectuate that purpose. Section 478.021(1). To implement the remedial components of Ch. 478, the Legislature granted the division certain powers and duties contained in ss. 478.041, 478.151, 478.161, and 478.171.

Specifically, the division has the power to issue a cease and desist order upon the determination, in accord with Ch. 120, F. S., that a person has directly, or through an agent or employee, knowingly engaged in any false, deceptive, or misleading advertising, promotional, or sales methods to offer or dispose of an interest in subdivided lands. Section 478.171(1)(b), F. S. The division may also issue a temporary cease and desist order without notice of hearing upon a finding of fact, in writing, that the public interest will be irreparably harmed by the delay in issuing an order pursuant to s. 478.171(1)(b) and (2), F. S. The Florida Legislature has expressly stated that false, deceptive, or misleading advertising, promotional, or sales methods used to offer or dispose of an interest in subdivided lands are within the jurisdiction of the division. Section 478.171(1)(b).

The division may seek judicial relief with or without prior administrative remedies. The division has the power to seek judicial relief in the circuit court to enjoin acts or practices if it appears that a person has engaged or is about to engage in any act or practice which constitutes a violation of any provision of Ch. 478, F. S., or a rule promulgated thereunder. Section 478.041(3). Therefore, the division could proceed, on the grounds set forth in s. 478.171, in circuit court.

Section 478.221, F. S., sets forth specific exemptions from Ch. 478, F. S., which do not include the scheme described in your letter. The basic rule of statutory construction that where the express mention of one thing is the exclusion of another is applicable here. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); State *ex rel.* Shevin v. Indico Corp., 319 So.2d 173 (1 D.C.A. Fla., 1975); Marshall v. Hollywood Inc., 224 So.2d 743, 750 (4 D.C.A. Fla., 1969). The factual situation set forth above and the individuals participating therein do not appear to be within the parameters of s. 478.221 and therefore are not exempt from regulation by the division.

The division has jurisdiction over the person selling and the sale or offer to dispose of subdivided land. Section 478.27(1), F. S. The activity described in your letter constitutes an offer to dispose of subdivided lands. The division also has the judicial and administrative jurisdiction to act against any person who, in the sale of subdivided land, violates any part of Ch. 478, F. S., or rules promulgated thereunder, which would include the facts presented in your letter. Therefore, the division appears to have sufficient authority to determine whether or not the acts of any realtor have violated or will violate Ch. 478.

This opinion is limited to the factual situation set forth in your letter. There are particular factual situations which could remove the sale of subdivided land from the jurisdiction of the division, none of which appear to be applicable here.

AS TO QUESTION 2:

The Florida Real Estate Commission (commission) is created by Ch. 475, F. S., and has the statutory authority to grant, deny, revoke, or suspend any registration held by a registrant of the commission. Section 475.25. The commission, an administrative board created by the Legislature, has no common-law power and is thereby limited to the powers expressed in the statute that creates it. State *ex rel.* Greenberg v. Florida State Board of Dentistry, 277 So.2d 628 (1 D.C.A. Fla., 1974). Under Ch. 475, the commission's authority is premised upon a person's actions pertaining to or affecting the sale, exchange, purchase, lease, or assignment of real property or an interest therein. Section 475.01(11).

The activities the commission is granted authority to regulate are, in pertinent part, contained in s. 475.01(2), F. S.:

> Every person who shall, in this state . . . for a compensation or valuable consideration directly or indirectly paid or promised, . . . negotiate the sale, exchange, purchase or rental of any real property, or any interest in or concerning the same . . . or who shall advertise or hold out to the public by any oral or printed solicitation or representation that such person is engaged in the business of . . . buying, selling, exchanging, leasing or renting real estate, or interests therein, . . . and every person who shall take any part in the procuring of sellers, purchasers, lessors or lessees of the real property, or interests therein . . . and all persons who are members of partnerships of officers or directors of corporations engaged in performing any of the aforesaid acts or services; each and every such person shall be deemed and held to be a "real estate broker" or a "real estate salesman" . . . .

The commission has jurisdiction to regulate the activities expressed in Ch. 475, F. S., and the rules promulgated thereunder unless an express exemption is set forth within the statute. No express exemption appears to apply to the facts contained in your letter.

Applying the foregoing statutory section, the factual situation you have described indicates a realtor who, for compensation actually paid in advance, promises to negotiate a sale of real estate, holds himself out to the public as being in the business of selling real estate, and takes part in the procuring of sellers and buyers of real estate. Therefore, it appears that the realtor, in your factual situation, whether licensed or not, falls within the jurisdiction of the commission.

The basis for an administrative agency to suspend or revoke a license must be found in the specific grounds enumerated in the statute. *In re* Weathers, 31 So.2d 543 (Fla. 1947); State *ex rel.* Volusia Jai Alai, Inc. v. Board of Business Regulation, 304 So.2d 473 (1 D.C.A. Fla., 1974). The grounds for suspension of any registration are set forth in s. 475.25(1)(a)-(i), F. S. The grounds for revocation are set forth in s. 475.25(2) and (3), F. S.

A registration may be suspended for a period not exceeding 2 years upon a finding of facts showing that the registrant has "violated a duty imposed upon him by law or by the terms of a listing contract, written, oral, express or implied, in a real estate transaction." Section 475.25(1)(a), F. S. The registration of a registrant may be revoked if the registrant shall:

> . . . for a second time be found guilty of any misconduct that warrants his suspension under subsection (1) of this section, or if he shall be found guilty of a course of conduct or practices which show that he is so incompetent, negligent, dishonest or untruthful that the money, property, transactions and rights of investors or those with whom he may sustain a confidential relation, may not safely be entrusted to him. [Section 475.25(3), F. S.]

The factual situation that you have set forth involves the solicitation by a realtor attempting to procure a listing so that he may procure a purchaser under a listing contract. In your factual situation you indicate that the realtor, in so procuring the listing, may be dishonest or untruthful with the seller of real property. Apparently the realtor, after accepting the advance fee, does little if anything to actually procure a buyer. That situation appears to be within the jurisdiction of the commission and the acts performed appear to be specifically proscribed by s. 475.25(1) and (3), F. S.

I have assumed that the realtor in your factual situation is properly registered with the commission. Assuming that the realtor is not so registered, a violation of ss. 475.13 and 475.25(1)(d), F. S., is apparent and within the jurisdiction of the commission. If the person is unregistered, the commission may properly seek relief in a circuit court of competent jurisdiction. Section 475.39(1), F. S.

Therefore, based on the above authority and factual situation, your question is answered in the affirmative.

AS TO QUESTION 3:

The Department of Legal Affairs and the individual state attorneys are designated as the enforcing authorities for violations of Part II, Ch. 501, F. S., (the act). Sections 501.203(4) and 501.207. The Legislature, in s. 501.204, declared what shall be an unlawful activity or practice:

> (1) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
> (2) It is the intent of the Legislature that in construing subsection (1) of this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

The Legislature expressly made remedies available under the act to be in addition to those otherwise available for the same conduct under state or local law. Section 501.213.

The intent of the Legislature was expressed in s. 501.204(1), F. S., that due consideration and great weight shall be given to the interpretations of the Federal Trade Commission (F.T.C.) and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1). Therefore, a review of the Federal Trade

Commission complaints and orders which are reported in Federal Trade Commission decisions is appropriate to determine whether or not the F.T.C. has determined that business activities related to real property transactions are within its jurisdiction and therefore within the jurisdiction of the enforcing authorities. A review of those complaints and orders demonstrates the commission's determination that business practices related to the sale of real property fall within the purview of the Federal Trade Commission Act. Arizona Valley Dev. Co. Inc. *et al.*, 56 F.T.C. 708 (1960); Nicholson & Associates, Inc., 56 F.T.C. 155 (1959); Tom Vint, d/b/a/ Nat'l Business Service, 56 F.T.C. 606 (1959); Affiliated Brokers, Inc., *et al.*, 54 F.T.C. 97 (1957).

In addition to the interpretations of the Federal Trade Commission, the Fifth Circuit Court of Appeals stated that a retaliatory eviction of tenants from a mobile home park is declared to be an unfair and deceptive trade practice under the act and Rule 2-11.07. Bowles v. Blue Lake Dev. Corp., 504 F.2d 1094 (5th Cir. 1974). In Kendig v. Kendall Construction Co., 294 So.2d 709 (4 D.C.A. Fla., 1974), *further reviewed at* 317 So.2d 138 (4 D.C.A. Fla., 1975), the Fourth District Court of Appeal held that the act was applicable to a tenant eviction and lease of real property. *See also* Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 819 (Pa. 1974), where the Pennsylvania Supreme Court applied its Unfair and Deceptive Trade Practices Act to the leasing of real property.

Section 501.208, F. S., grants to the enforcing authority the power to seek a cease and desist order whenever the enforcing authority has reason to believe that a person has been or is violating the act. Pursuant to this power the enforcing authority may act against any person who violates any provision of the act.

Following the legislative intent expressed in s. 501.204(2), F. S., we find that the F.T.C. has held that business activities relating to the sale of real property are under their jurisdiction. Both the Fifth Circuit Court of Appeals and the Fourth District Court of Appeal have held that the act and rules promulgated thereunder are applicable to the leasing of real property. Since no expressed exemption is set forth in s. 501.212(1)-(5), F. S., for either real estate transactions in general or the specific transaction you have set forth in your factual situation, and none of the individuals in your factual situation are exempt, it would appear that the act applies to the above factual situation.

Therefore, based on the above authority, your third question is answered in the affirmative. My response reflects the position I have taken in State *ex rel.* Herring v. Murdock, Case No. 75-1270 (4 D.C.A. Fla., 1975). This response is, of course, subject to that judicial determination and to any which the Florida Supreme Court may render.

076-49—March 1, 1976

PUBLIC RECORDS

CONFIDENTIAL RECORDS RELATING TO DEVELOPMENTALLY DISABLED PERSONS—RELEASE ONLY TO AUTHORIZED GROUPS

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May the Department of Health and Rehabilitative Services release confidential information from the Developmentally Disabled Adult Abuse Registry to organizations or groups wishing to independently investigate alleged abuse of developmentally abused persons?

SUMMARY:

The Department of Health and Rehabilitative Services should not release confidential information from the Developmentally Disabled Adult Abuse Registry to organizations or groups wishing to independently investigate alleged abuse of developmentally disabled persons in the absence of a court order.

CONTINUED

1 OF 6

According to your letter, the Division of Family Services has been advised by the Division of Retardation that a private group known as the Human Rights Advocacy Committee and other persons concerned with the welfare of retarded citizens wish to have access to the reports contained in the abuse registry maintained by the department pursuant to s. 827.09(7), F. S. These organizations wish to have access to the records in order to independently investigate alleged abuse of developmentally disabled persons. It is the position of the Department of Health and Rehabilitative Services that neither the Division of Family Services nor the Division of Retardation may release this information to the foregoing parties.

Section 827.09(7), F. S., provides as follows:

> CENTRAL REGISTRY.—Reports of abuse shall be recorded in central registries established and maintained by the department as required by s. 828.041 [carried forward as s. 827.07(7)], dealing with abuse of children. Each registry shall contain information as to the name of the abused developmentally disabled person and the members of the family or other persons responsible for his care, the facts of the investigation, and the result of the investigation. The information contained in the registry shall not be open to inspection by the public. However, appropriate disclosure may be made for use in connection with the treatment of the abused person or the person perpetrating abuse, and to counsel representing either person in any criminal or civil proceeding. Appropriate disclosure may also be made for use in connection with the hiring or employment of persons to serve developmentally disabled persons. *In addition, information contained in the registry may be available for purposes of research relating to the abuse of developmentally disabled persons. The department shall make such information available upon application by a researcher or research agency of professional repute provided the need for the records has been demonstrated to the satisfaction of the department.* Records shall not be opened under this provision unless adequate assurances are given that names and other information identifying developmentally disabled persons will not be disclosed by the applicant. (Emphasis supplied.)

An examination of this statute demonstrates that the records contained in the abuse registry are limited access public records which may be released only to the persons specifically authorized and subject to the conditions prescribed therein. *See* AGO 075-21 and cases cited therein dealing with release of information within the child abuse registry, s. 827.07(7), F. S. The statute clearly states that the information which these organizations have requested may be made available only to specified groups or persons. Whether the organizations requesting the information could be considered "research agencies of professional repute" as contemplated by the statute is questionable. Additionally, assuming for the sake of argument that such organizations could be considered "research agencies of professional repute" the organizations would still be required to demonstrate their need for such records to the satisfaction of the department.

By requiring that the research agencies do not disclose the names and other identifying information of developmentally disabled persons, I am inclined to the view that the Legislature contemplated that this information be released to *bona fide* research agencies for purposes of compiling general statistical data and information and not to serve as a catalyst for independent investigations of the reports. Accordingly, until ordered by a court of competent jurisdiction to release this information to organizations who desire this information for purposes of independently investigating reports of abuse, I must advise against the release of the reports. *Cf.* Patterson v. Tribune Co., 146 So.2d 623 (2 D.C.A. Fla., 1962).

076-50—March 1, 1976

ADMINISTRATIVE PROCEDURE ACT

REFERRAL OF SOME HEARINGS BY AGENCY HEAD TO HEARING EXAMINERS FROM DIVISION OF ADMINISTRATIVE HEARINGS

To: Catherine W. Chapin, Chairman, Career Service Commission, Tampa

Prepared by: Betty Steffens, Assistant Attorney General

QUESTIONS:

1. If the Career Service Commission should elect to refer certain of its appeal cases to hearing officers for the Division of Administrative Hearings, would this decision have any effect on whether the commission would lose any of its rights to hear those cases it does not elect to refer?
2. If the commission should choose to refer only appeals such as for 3-day suspensions, layoffs, and transfers, could this possibly be interpreted as being in violation of any state statutes?

SUMMARY:

The Career Service Commission, as an agency head as defined by s. 120.52(3), F. S., may legally elect to refer certain of its appeals cases to hearing officers of the Division of Administrative Hearings and retain the authority to hear cases it does not elect to refer.

The answers to your questions are in the negative.

A basic premise of your question, in which I concur, is that the Career Service Commission is an agency within the meaning of s. 120.52(1), F. S., and as such it comes within the purview of the Administrative Procedure Act. The Career Service Commission is created by s. 110.041, F. S., to hear appeals arising from the state's personnel rules and regulations, hold public hearings on proposed rules and regulations, and to perform any other duties which are authorized by rules of the Department of Administration. Section 110.041(2). As such, the commission appears to be an agency as specifically defined by s. 120.53(1)(b), F. S. *Cf.* AGO's 075-6 and 075-58.

Section 120.57, F. S., applies "in all proceedings in which the substantial interests of a party are determined by an agency." Assuming that matters coming before the commission are within this phraseology, s. 120.57(1)(a) provides that a hearing officer assigned by the Division of Administrative Hearings shall conduct all formal proceedings which are defined to mean proceedings involving a disputed issue of material fact, *except for*:

1. Hearings before agency heads other than those within the Department of Professional and Occupational Regulation;
2. Hearings before a member of an agency head other than agency heads within the Department of Professional and Occupational Regulation;
3. Hearings before the Industrial Relations Commission, judges of industrial claims, unemployment compensation appeals referees, and the Public Service Commission or its examiners;
4. Hearings regarding drivers' licensing pursuant to chapter 322;
5. Hearings within the Division of Family Services of the Department of Health and Rehabilitative Services; and
6. Hearings in which the division is a party; when the division is a party, an attorney assigned by the Administration Commission shall be the hearing officer.

Section 120.52(3), F. S., defines "agency head" for the purposes of administrative procedures as follows: " 'Agency head' means the person or collegial body in a department or other governmental unit statutorily responsible for final agency action."

Section 110.061(4), F. S., directs that actions of the Career Service Commission are directly reviewable by the judiciary and reads as follows:

The exercise by the Career Service Commission of the powers, duties, and functions prescribed by this section shall be reviewable only by the judiciary on the grounds that:

(a) The commission did not afford a fair and equitable hearing.

(b) The decision of the commission was not in accordance with existing statutes or rules and regulations promulgated thereunder.

(c) The decision of the commission was not based on substantial evidence.

Thus, the Career Service Commission is responsible for final agency action, which includes the whole or part of an order issued by the head of an agency pursuant to s. 120.57(1) or (2), F. S., and is an agency head as defined in s. 120.52(3), F. S. Attorney General Opinion 075-306. This being the case, the use of hearing officers is permissive rather than mandatory. The Career Service Commission may conduct the hearings or request that they be conducted by a hearing officer. I am unaware of any statutes which would prevent the Career Service Commission from electing to refer only certain appeals to hearing officers. The commission or its delegate must, however, make this elective determination within the 10-day time constraint of s. 120.57(1)(b)3., F. S. *See* s. 20.04, F. S., and AGO 075-306.

076-51—March 2, 1976

COUNTY COMMISSIONERS

GOVERNOR'S DISCIPLINARY POWER— CONSTITUTIONAL LIMITATIONS

To: Reubin O'D. Askew, Governor, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Where the Florida Commission on Ethics recommends that an elected county commissioner be suspended for a period of 90 days with a concomitant forfeiture of salary, is that penalty within the statutory authority of the commission to recommend, and if any penalty is recommended by the commission for an officer subject to suspension under the Constitution, which penalty does not appear in the Constitution, may the Governor impose it?

SUMMARY:

Until judicially determined otherwise, the Governor is not empowered to suspend an elected county commissioner for a temporary period such as 90 days. The power to suspend an elected county official is bestowed upon the Governor solely by s. 7(a), Art. IV, State Const., and such power appears to be preliminary to and an integral part of the removal proceedings prescribed by s. 7(b), Art. IV, State Const. Exercise of the power of suspension granted by the Constitution, and determination of need and of constitutionally prescribed grounds therefor, is solely a function of the executive. The Legislature and the Commission on Ethics are without authority to provide for suspension by the Governor in any manner other than that provided by the Constitution. Penalties of restitution and public censure and reprimand, as recommended by the Commission on Ethics, are presumptively valid and should be given effect until judicially determined to be unconstitutional.

You stated that, pursuant to its finding that an elected county commissioner violated the Code of Ethics for Public Officers and Employees (Part III, Ch. 112, F. S.), the Commission on Ethics has recommended that you suspend the commissioner in the

manner set forth above and has also recommended to you the invoking of the penalties of restitution and public censure and reprimand.

The election of county commissioners, the term of their office, and their qualifications for office are prescribed by s. 1(e), Art. VIII, State Const., and s. 7, Art. IV, State Const., provides for their suspension and removal from office and provides conditions or grounds for such suspension and removal. Part V, Ch. 112, F. S., provides the procedures for disposition of executive orders of suspension and the removal or reinstatement of any such suspended county officers in implementation of s. 7(b), Art. IV. No other constitutional provisions control the election of county commissioners, their terms of office, or their suspension and removal from office. It is beyond the legislative power to provide for the suspension and removal, or the reinstatement, of elected county commissioners in any manner other than that provided by the Constitution. *In re* Investigation of Circuit Judge, 93 So.2d 601, 604 (Fla. 1957); *cf.* Wilson v. Newell, 223 So.2d 734 (Fla. 1969), holding that a statute prescribing qualifications for the office of county commissioners in addition to those prescribed by the Constitution was unconstitutional and invalid, and State *ex rel.* Askew v. Thomas, 293 So.2d 40, 42 (Fla. 1974). The Constitution places the power to *suspend* commissioners on specified grounds in the chief executive officer alone, s. 7(a), Art. IV, and the power so conferred is exercised by executive order stating the grounds therefor and filed with the Secretary of State. The power to remove such officials based on the charges made in the executive order of suspension is vested in the Senate alone, s. 7(b), Art. IV.

Under the separation of powers doctrine, s. 3, Art. II, State Const., and the principle that the express mention of one thing is the exclusion of another, *expressio unius est exclusio alterius*, it is not competent for the Legislature or any other authority to exercise such power of suspension or to prescribe any grounds therefor other than those designated in the Constitution, to provide for any form or manner of suspension other than that prescribed in s. 7(a), Art. IV, or to provide for any other action or proceedings preliminary to or leading to the removal from office of an elected county commissioner. *See In re* Advisory Opinion of Governor Civil Rights, 306 So.2d 520 (Fla. 1975); *also see* State *ex rel.* Judicial Qualifications Com'n v. Rose, 286 So.2d 562 (Fla. 1973), and Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974), applying the aforementioned principle to other constitutional provisions. Conversely, under the constitutional scheme, only the Senate is vested with the power to remove from office a suspended county officer. Moreover, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner, and the manner prescribed is exclusive and beyond the reach of the legislative power. *In re* Advisory Opinion of Governor Civil Rights, *supra*, at p. 523, and cases therein cited; State v. Coleman, 155 So. 129 (Fla. 1934); Amos v. Mathews, 126 So. 308 (Fla. 1930).

The extent of the suspension power invested in you by s. 7(a), Art. IV, State Const., and the exercise of the duty imposed and the power granted in any given case may, in the final analysis, be determined only by the judiciary. Such considerations are not within the prerogatives of my office. However, in an effort to construe the provisions of Part III, Ch. 112, F. S., to comport with the Constitution and the aforestated rules of law, I offer the following observations as to the operative effect and efficacy of that law.

Section 112.324, F. S., among other things, makes it the duty of the Commission on Ethics to report its findings of a violation of Part III, Ch. 112, F. S., on the part of an elected county commissioner to the Governor, and to recommend appropriate disciplinary action thereon. Section 112.317(4) provides that any violation of Part III of that statute shall constitute malfeasance, misfeasance, or neglect of duty in office within the meaning of s. 7(a), Art. IV, State Const. Section 112.317, among other things, stipulates that a violation of any provision of Part III of Ch. 112 shall, pursuant to *applicable constitutional and statutory procedures*, constitute grounds for the *removal* from office of an affected county commissioner. (The executive action prescribed by s. 7(a), Art. IV, *supra*, appears to be *preliminary to* and *leads to* and is an *integral part of* the *removal* proceedings prescribed by s. 7(b), Art. IV, as implemented by Part V, Ch. 112.) Section 112.317 also provides for the suspension from office of a "public officer," but I construe s. 7, Art. IV, in its entirety, and *in pari materia* with Part V, Ch. 112, to provide an integral process or procedure for the suspension *and* removal of elected county officials contemplating, indeed requiring, the trial by the Senate of the charges made against the suspended officer by the Chief Executive in and according to "the proceedings prescribed by law [Part V, Ch. 112, F. S.]" and the disposition of such charges by the Senate by the removal or reinstatement of such elected county official.

Under s. 7(a), Art. IV, the suspension of a county commissioner is effected by executive order stating the grounds for suspension *and* filed with the Secretary of State. Upon the filing of the executive order, Part V of Ch. 112, as authorized by and in implementation of s. 7(b), Art. IV, by operation of law takes command and provides for the trial and disposition of the charges made against the affected county commissioner as presented in the executive order. It is true that s. 7(a), Art. IV, authorizes the Governor to reinstate any suspended officer at any time before removal by the Senate. However, I do not construe that provision to mean that the Governor is endowed with any authority to intercede in, or halt, suspend, or interrupt, the proceedings initiated by operation of law upon the filing of the order of suspension with the Department of State (and as mandated by the terms of Part V, Ch. 112) by any means other than the actual, full reinstatement of the suspended county official before the Senate acts finally to remove the official as prescribed by s. 112.45. Once the executive order of suspension is filed, *except for* the aforestated power of the Governor to reinstate, the executive no longer has any discretion in or control over the disposition of the order of suspension. *Cf.* AGO 067-55.

Thus, ss. 112.317(1)(a)2. and 112.324(4), F. S., read together, empower the Governor to invoke the prescribed penalty of removal from office of those officers found by the Commission on Ethics to have violated Part III, Ch. 112, F. S., who have been reported by that body to the Governor and over which officers he possesses the power to initiate constitutionally mandated proceedings of "removal from office" by filing the executive order of suspension prescribed by s. 7(a), Art. IV, State Const., on one or more of the grounds specified therein. Though the Commission on Ethics may *recommend* such action to the Governor, only he may determine whether sufficient facts exist to activate executive action to make and file an order of suspension under s. 7(a), Art. IV. Advisory Opinion to the Governor, 196 So.2d 737 (Fla. 1967). If the Governor, in the exercise of his independent and singular judgment, determines to suspend an elected county official and makes and files the requisite executive order as prescribed in s. 7(a), Art. IV, from the date of the filing thereof (s. 112.40, F. S.) the pay and emoluments of office of the suspended official cease and the suspended official is not entitled to pay and emoluments for the period of suspension unless and until he or she is reinstated by the Senate pursuant to s. 112.45 or by the Governor pursuant to s. 7(a), Art. IV. Attorney General Opinion 072-222. *Also see* s. 111.05, F. S.

As to restitution by conveyance to the county of certain lands, as recommended by the Commission on Ethics, Part III, Ch. 112, F. S., is clothed with a presumption of validity and must be given effect until judicially declared unconstitutional. Evans v. Hillsborough County, 186 So. 193 (Fla. 1938); Pickerill v. Schott, 55 So.2d 716 (Fla. 1951). Also, it must be noted that s. 112.317(2) charges the Attorney General with the responsibility of bringing civil actions to recover restitution penalties recommended by the Commission on Ethics.

As to the penalty of public censure and reprimand, as recommended by the Commission on Ethics, I am unaware of any constitutional provision which would control or prevent the invoking thereof by the Governor. Also, as I pointed out above in regard to the restitution penalty, the penalty of public censure and reprimand would be clothed with a presumption of validity until judicially found to be unconstitutional. Under such circumstances, I cannot state that the prescribing of public censure and reprimand as a penalty for violation of Part III, Ch. 112, F. S., is not within the legislative power. Therefore, you may, by executive order or proclamation, censure and reprimand. However, if you should determine to file an order of suspension, you should not proclaim such reprimand, but may, in your discretion, withhold same and abide by the Senate's action on the suspension order. It must be noted in this regard that s. 112.317 is discretionary and permissive. The Governor is not required or commanded by either s. 112.317(1) or s. 112.324(4) to invoke any penalty. Rather, the words of the statutes, in effect, only authorize the Governor to invoke the penalty.

076-52—March 10, 1976

PUBLIC BUILDINGS

STATE MAY NOT DELEGATE AUTHORITY TO SUPERVISE CONSTRUCTION OF BUILDING PARTLY FUNDED BY STATE FUNDS TO LOCAL GOVERNMENT

To: Jack D. Kane, Executive Director, Department of General Services, F. E. Steinmeyer III, Leon County Attorney, and Bryan W. Henry, City Attorney, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May the Department of General Services, pursuant to Ch. 120, F. S., and Ch. 75-243, Laws of Florida, adopt rules and regulations to delegate to the Tallahassee-Leon County Civic Center Authority the supervisory authority to construct the civic center being jointly funded by the City of Tallahassee, Leon County, and the state?

SUMMARY:

The Department of General Services is not authorized by law to adopt and promulgate rules pursuant to Ch. 120, F. S., or s. 255.30, F. S., to establish a procedure for delegating to the Tallahassee-Leon County Civic Center Authority the general power and duty of the Division of Building Construction and Property Management of the Department of General Services to supervise the construction of state buildings, as that power applies to the construction of a civic center in the City of Tallahassee, jointly funded by the state and local governments.

The general rule, as stated in 67 C.J.S. *Officers* s. 104, is that:

> In the absence of statutory authority a public officer cannot delegate his powers, even with the approval of a court. An officer, to whom a power of discretion is intrusted, cannot delegate the exercise thereof except as prescribed by statute. He may, however, delegate the performance of a ministerial act . . . .

This rule has been followed by the Florida courts. *See* Nicholas v. Wainwright, 152 So.2d 458 (Fla. 1963); State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955). *Accord*: Attorney General Opinions 075-306, 074-116, 074-57, and 073-380.

With respect to heads of departments, the rule is the same regardless of whether a particular power is vested in the officer by title or is vested in the department or a division of the department. *Cf.* AGO's 074-57 and 074-116. This is because under s. 20.05, F. S., each head of a department, except as otherwise provided, shall:

> (1)(a) Plan, direct, coordinate, and execute the powers, duties, and functions vested in that department or vested in a division, bureau, or section of that department . . . .
>
> * * * * *
>
> (5) Subject to requirements of chapter 120 (Administrative Procedure Act), have authority to promulgate rules pursuant and limited to the powers, duties, and functions transferred herein and have authority to promulgate rules pursuant and limited to the powers, duties, and functions enacted hereby.

The effect of this provision is to vest in the head of a department the powers of that department. *Cf.* s. 20.05(1)(b) authorizing the head of each department of state government to delegate certain powers and functions to administrative units within the

department and to such assistants and deputies thereof as may be designated by the head of the department, and AGO 075-306.

Applying the foregoing general rule to the instant situation, the Division of Building Construction and Property Management of the Department of General Services (hereinafter referred to as the "division") is assigned the general power and responsibility to supervise the construction of state buildings. Section 20.22(5)(c), F. S. More specifically, the division is assigned the powers, duties, and functions relating to the supervision of construction of buildings formerly exercised and performed by the Board of Regents and the institutions under the Board of Regents. Section 20.22(5)(e), F. S. *Cf.* AGO 071-7. This power of building construction supervision, involving as it does the exercise of independent official judgment on the part of the division, clearly appears to be discretionary rather than ministerial. *See* s. 553.80, F. S., *re:* Enforcement of the state building code; *see also* ss. 255.25(5) and 553.70(1), F. S.; *cf.* AGO 075-170. Accordingly, unless there is some statutory authority providing otherwise, the Governor and Cabinet, as head of the Department of General Services, s. 20.22(1), F. S., may not delegate the general power and duty of the division to supervise the construction of state buildings.

As to whether there exists statutory authority to so delegate, the only relevant provision of law of which I am aware is s. 255.30, F. S. (Ch. 75-243, Laws of Florida), providing as follows:

> **Fixed capital outlay projects; department rules; delegation of supervisory authority.**—The Department of General Services shall make and promulgate rules pursuant to chapter 120 in order to establish a procedure for delegating to *state agencies* the supervisory authority of the Division of Building Construction and Property Management as it relates to the repair, alteration, and construction of fixed capital outlay projects. (Emphasis supplied.)

Since the authority to delegate supervisory power granted by this section is limited to delegations to "state agencies," the determinative issue here appears to be whether the Tallahassee-Leon County Civic Center Authority is an agency of the state within the purview of this section. In this regard, the authority was created by special act, s. 1, Ch. 72-605, Laws of Florida, as

> . . . a public agency, politic and corporate, for the purpose of planning, developing, operating and maintaining a comprehensive complex of civic, governmental, educational, recreational, convention and entertainment facilities, for the use and enjoyment of the citizens of Leon County and the State. . . .

The law then goes on to designate the governing body of the authority, to prescribe the manner of the members' selection and the powers of the authority, and to provide for the issuance of revenue bonds by the authority. Nowhere in Ch. 72-605 is the authority designated a "state agency" or assigned to any branch of state government or any department in the executive branch. *See* s. 6, Art. IV, State Const., providing that "[a]ll functions of the executive branch of state government shall be allotted among not more than twenty-five departments." *Cf.* ss. 20.03(2), 20.22(2), and 216.011(1)(e), F. S. *See also* s. 255.28(1)(a), F. S., which was enacted by the same law that enacted s. 255.30, F. S., defining "agency" for purposes of s. 255.28 to mean "any *state* board, commission, department, division, or bureau." (Emphasis supplied.) Accordingly, I am of the opinion that the authority is one of numerous public bodies corporate created by the Legislature to perform some special governmental or public function and is not among the "state agencies" contemplated by s. 255.30, F. S., as potential recipients of the delegated power and duty of the division with respect to the supervision of construction of state buildings.

Your question, therefore, is answered in the negative.

076-53—March 10, 1976

LAW REVISION COUNCIL

PART OF LEGISLATIVE BRANCH OF GOVERNMENT

To: J. H. "Jim" Williams, Lt. Governor, Secretary of Administration, Tallahassee

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Is the Florida Law Revision Council a part of the legislative or the executive branch of state government?

SUMMARY:

Pending legislative or judicial clarification, the functions performed by the Florida Law Revision Council are legislative in nature, not executive, and the council is a part of the legislative branch of state government; and the provisions of Ch. 216, F. S., relating to the planning and budgeting of executive and judicial branch agencies of state government, are not applicable to the Law Revision Council, save such sections as ss. 216.081 and 216.192 and others which are properly related to the legislative branch of state government. The executive director and other council personnel are under Ch. 110, F. S., the State Career Service System, in its entirety.

The Florida Law Revision Council, formerly known as the Florida Law Revision Commission, was established substantially in its present form, with substantially the same duties, in 1967 (Ch. 67-472, Laws of Florida; ss. 13.90-13.996, F. S.). Thus, the council had been created and was in existence at the time of the adoption of the 1968 Constitution, including s. 6, Art. IV, thereof. This provision directed the Legislature to allot all functions of the executive branch of state government among not more than 25 departments, exclusive of those specifically provided for or authorized in the Constitution. Additionally, s. 6, Art. IV, also states:

> The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor . . . .

The main thrust of s. 6, Art. IV, is that it commands the Legislature to allot the functions of the executive branch of state government among not more than 25 departments, with each department being specifically placed by law under one or more of the therein mentioned officers. It does not, however, deny or deprive the Legislature of its right to interpret the Constitution, or to determine, within constitutional limitations, what is or is not a function of any particular branch of state government. *Cf.* Owens v. State, 316 So.2d 537, 538 (Fla. 1975), upholding a statute requiring a person convicted of a capital felony to serve 25 years before becoming eligible for parole as against a contention that the statute usurped the executive authority of the Parole and Probation Commission.

The Constitution nowhere specifically provides for or authorizes the establishment of the Law Revision Council; thus, the council cannot be said to have been made a part of the executive (or any other) branch of state government by or under the direct authority of the Constitution. The Legislature, in enacting the 1969 Governmental Reorganization Act (Ch. 20, F. S.), declined to assign the council to any of the executive departments of state government or to place it under any of the executive officers of state government designated in s. 6, Art. IV, *supra.* No other law has assigned or transferred the council to any executive department. The legislation creating the council was amended in 1972 (Ch. 72-107, Laws of Florida) for the purpose of changing the name of the organization from "commission" to "council." But here, again, the Legislature did not assign or transfer the council to any executive department; and the title stated that it was an act

"relating to law revision." The Governor apparently has not proposed, as he is constitutionally empowered to do under s. 1(e), Art. IV, State Const., any reorganization of the executive branch so as to include the council therein. Nor is the council found anywhere within Ch. 23, F. S., entitled "Miscellaneous Executive Functions," but rather is found in Ch. 13, F. S., entitled "Miscellaneous Commissions." The council is expressly authorized by law to choose its own executive director, determine its own personnel needs, and fix the compensation of the executive director and personnel. *See* s. 13.99, *id.* This statutory autonomy in the selection of personnel and fixing of their compensation is not normally accorded to an agency of the executive branch of state government. *Cf.* Chs. 110 and 216, F. S. Further, under s. 13.98, the council is required to report to the Legislature, not to a member of the executive branch of the state government.

Clearly then, the Legislature has determined that the law revision function is a legislative and not an executive function of state government.

The functions of the Law Revision Council as stated in s. 13.96, F. S., confirm the legislative nature of the council. Its duty is to:

> (1) Examine the common law, constitution, and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms;
> (2) Recommend, from time to time, such changes in the law as it deems proper to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state into harmony with modern conditions;
> (3) Conduct such surveys or research of the law of Florida as the Legislature may request.

A comparison between the above-noted functions of the council and the accepted definitions of "executive functions" will highlight the nonexecutive nature of the council. In AGO 074-291, it was said that "[t]he executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature," quoting from s. 20.02(1), F. S. *See also* 81 C.J.S. *States* s. 50, stating:

> An executive department has primarily to do with the political government of the state in the execution and enforcement of the law wherein the governor is the supreme head, but every commission which exercises executive duties in some capacity cannot be narrowed to the definition of being an executive department under the governor.

The Florida Supreme Court has approached the questions of separation of powers of government and delegation of authority with the following statement:

> The essential nature and effect of the governmental function to be performed, rather than the name given to the function or to the officer who performs it, should be considered in determining whether the particular function is a "power of government" within the meaning of the Constitution; and, if it is such a "power," whether it is legislative, executive, or judicial in its nature, so that it may be exercised by appropriate officers of the proper department. [Florida Motor Lines v. Railroad Commissioners, 129 So. 876, 881 (Fla. 1930)].

This exact language was cited with approval by the Florida Supreme Court in *In re* Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969). This advisory opinion dealt directly with the matter of determining to which branch or branches of government the Public Service Commission properly belonged and concluded that, as the commission's powers and duties were essentially legislative and quasi-judicial in nature, the performance of those duties did not constitute a function of the executive branch so as to require reorganization of the Public Service Commission under one of the executive departments as required by s. 6, Art. IV, State Const.

By applying the above criteria, it is apparent that the essential nature and effect of the function of the Law Revision Council is not executive in nature. It does not execute or enforce the law or policy of the Legislature in any shape, manner, or fashion, but serves only to aid the Legislature in the creation, modification, and repeal of law.

Additionally, to hold that the council is in the executive branch would mean that the Legislature has failed to comply with the requirements of s. 6, Art. IV, *supra*. Such a

result is contrary to long-standing court policy to construe the law to comport with the Constitution if it is at all possible. Overstreet v. Blum, 227 So.2d 197 (Fla. 1969).

Black's Law Dictionary defines "legislative power" as

> The lawmaking power; the department of government whose function is the framing and enactment of laws. Evansville v. State, 118 Ind. 426, 21 N.E. 267, 4 L.R.A. 93, Brown v. Galveston, 97 Tex. 1, 75 S.W. 495; O'Neil v. American F. Ins. Co., 166 Pa. 72, 30 A. 943, 26 L.R.A. 715, 45 Am. St.Rep. 650.

The same term is further defined as "the power to make, alter and repeal laws." *In re* Marshall, 69 A.2d 619 (Pa. 1949). *Accord:* Hutchins v. City of Des Moines, 157 N.W. 881 (Ia. 1916); O'Neil v. Am. Fire Ins. Co., 30 A. 943 (Pa. 1895).

In Florida Power Corp. v. Pinellas Utility Board, 40 So.2d 350 (Fla. 1949), the court said that a legislative power could be exercised either directly or through some board or commission or other instrumentality created by the Legislature for that purpose. That principle was reaffirmed in *In re* Advisory Opinion to the Governor, *supra*, 223 So.2d at p. 37, wherein the court noted that the Legislature had inherent authority to establish a Public Utilities Commission. The court further held that in the performance of its duties the commission did not perform an executive function so as to require reorganization under one of the executive departments as stipulated in s. 6, Art. IV, State Const., but rather was a part of the legislative or judicial branch of state government. *Accord:* Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1974), in which the court held that a school board created by the Legislature, even though it exercised quasi-judicial powers, was subject to the Sunshine Law as a legislative body.

Here, a commission has been created by the Legislature for the express purpose of aiding the Legislature in the exercise of its legislative duties. In Gibson v. Florida Investigation Committee, 273 U.S. 539 (1963), the court said: "The power to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws *as well as proposed or possibly needed statutes.*" (Emphasis supplied.) *Accord:* Johnson v. Gallen, 217 So.2d 319 (Fla. 1969), in which the court, although holding that there were limitations on the legislative power to investigate, said that "[t]he power of investigation is a necessary adjunct to the exercise of the power to legislate."

Section 5, Art. III, State Const., recognizes the inherent power of the Legislature to establish committees to assist in the legislative process; and there are various statutory legislative committees whose prime duty it is to aid the Legislature in the performance of its legislative powers and responsibilities. *See* ss. 11.141-11.147, F. S. The duties of the Law Revision Council fall squarely within the area of investigating the need for new legislation as well as the propriety of existing legislation. *See* s. 13.96, *supra.* The fact that the council is an independent body and not a legislative committee composed entirely of legislators makes it no less a part and parcel of the legislative process.

I have the view also that the council is not subject to the planning and budgeting requirements of Ch. 216, F. S., relating to planning and budgeting by state agencies in the executive and judicial branches of government. Section 216.011(1)(e) defines "state agency" for the purpose of the fiscal affairs of the state, appropriations act, legislative budgets, and approved budgets as "any official, officer, commission, board, authority, council, committee, or department of the executive branch, or judicial branch . . . of state government." This definition of state agency is devoid of any reference to the legislative branch of state government. Therefore, it seems apparent that the legislative branch of state government, of which the Law Revision Council is a part, is by nonreference excluded from Ch. 216 under the rule of statutory construction *expressio unius est exclusio alterius.* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); State *ex rel.* Judicial Qualifications Com'n v. Rose, 286 So.2d 562 (Fla. 1974). Thus, the provisions of Ch. 216 do not apply to the Law Revision Council, save ss. 216.081 and 216.192 and other such sections properly related to the legislative branch of state government.

As to the applicability of Ch. 110, F. S., the State Career Service System, to the Law Revision Council: Section 110.051(1) provides that the Career Service System shall apply to all positions not specifically exempted within Ch. 110, "any provisions of the Florida Statutes to the contrary notwithstanding." This statute was enacted later in time than ss. 13.90-13.996, *supra*, and therefore controls over said statutes to the extent of any irreconcilable conflict between the statutes in question. State v. City of Boca Raton, 172 So.2d 230 (Fla. 1965). As such conflict exists between s. 13.99 and Ch. 110 (*e.g.*, ss. 110.022

and 110.061) in regard to the executive director and other personnel, Ch. 110 prevails; and unless a specific exemption therein is applicable, the executive director and all other council personnel are subject to the Career Service System.

Section 110.051(2)(b), F. S., provides an exemption from Ch. 110, *supra*, to the "officers and employees of the Legislature." "Legislature" is defined in 52A C.J.S. *Legislature*, pp. 765-766, as "[a]ny *body* of persons *authorized to make laws* or rules for the community represented by them; a representative *body* which *makes the laws* of the people. . . ." (Emphasis supplied.) This definition clearly indicates that the term "legislature" is limited to the Legislature proper and does not encompass the entire legislative department. Thus, the exemption accorded by s. 110.051(2)(b) is applicable only to the officers and employees of the Legislature proper and does not extend to those respective positions outside the Legislature but within the legislative department of state government. Clearly, the personnel in question are not officers or employees of the Legislature proper, thus rendering the above exemption inapplicable in the instant case. Additionally, council personnel, including the executive director, are not currently subject to the personnel regulations, job classification, and pay plan applicable to employees of the Legislature (*see* ss. 11.147 and 11.148, F. S.), but rather are independent of such regulations. Further, council personnel compensation is provided for within the council budget rather than within the budget of either house of the Legislature, the Joint Legislative Management Committee, or any other legislative committee or division (*see* s. 11.148(2), F. S.); and the council budget is itself separate from and not a part of any budget of the Legislature or any committee or division thereof. Thus, it seems that council personnel, including the executive director, are not considered by the Legislature to be a part of the Legislature, of either house, or of any committee or division thereof.

Although it has been suggested that s. 110.051(2)(c), F. S., exempting "[m]embers of boards and commissions and the head of each state agency, board or commission, however selected" from Ch. 110, F. S., covers the executive director of the council, I do not find that the same is legally susceptible to such an interpretation. The executive director of the council is neither a member of, nor the head of, the council, but, to the contrary, appears to be the employee or servant of the council, much as the executive director of the Public Service Commission (*see* Rules 25-1.20, 25-1.21, F.A.C.), although its chief administrator, is an employee of the commission, but not its head. (The executive director of the Public Service Commission is specifically exempted from Ch. 110 by s. 110.051(2)(m).)

Additionally, s. 110.051(2)(k), F. S., exempting, *inter alia*, the executive directors of "all departments" is also inapplicable in the instant case, as such exemption is made only for the executive directors of departments belonging to the executive branch of state government, while the council, as I have stated, is a part of the legislative branch of state government. This limitation of said exemption to departments of the executive branch is supported by the use of terminology in that section commonly applicable to executive branch positions rather than to legislative branch positions; and an examination of the legislative history of s. 110.051 reveals that in s. 3(2), Ch. 69-106, Laws of Florida [s. 20.03(2), F. S.], providing uniform nomenclature throughout the structure of the executive branch, "department" is expressly defined as "the principal administrative unit within the executive branch of state government." *Also see* s. 4 of Ch. 69-106 [s. 20.04, F. S.], requiring each department to bear a title beginning with the words "State of Florida" and continuing with "department of . . . ." Additionally, s. 110.042(1), F. S., defining "state agency" for the purposes of Ch. 110, F. S., as "any official, officer, commission, board, authority, council, committee or department of the executive branch or judicial branch of state government as defined in Ch. 216," is devoid of any reference to the legislative branch of state government, as is the definition supplied within Ch. 216 for the purposes of that statute. Moreover, the only chief administrative officers of any board or commission exempted from Ch. 110 by s. 110.051(2)(k) are those of the various boards and commissions under the Department of Professional and Occupational Regulation, to which the Law Revision Council is not assigned. The express mention of those boards and commissions operates to exclude all others. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974). Therefore, under the rule of statutory construction *expressio unius est exclusio alterius* —the express mention of one thing is the exclusion of all others—the legislative branch, by such nonreference as is witnessed in Chs. 110 and 216, is excluded from the statutory provision under consideration. It is unlikely that the Legislature intended differently, particularly in the absence of any express provision so indicating.

Therefore, no other specific exemptions enumerated in Ch. 110, *supra*, being applicable, I am of the opinion that, pending legislative or judicial clarification, council personnel, including the executive director, are subject to all provisions of Ch. 110, *supra*, the State Career Service System.

076-54—March 10, 1976

COMMISSION ON ETHICS

PART OF LEGISLATIVE BRANCH OF GOVERNMENT

To: J. H. "Jim" Williams, Lt. Governor, Secretary of Administration, Tallahassee

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Is the Commission on Ethics a part of the legislative or executive branch of state government?

SUMMARY:

Pending legislative or judicial clarification, the functions of the Commission on Ethics are legislative, and not executive, functions of state government; and the commission is a part of the legislative branch of state government. As such, the commission is not subject to, nor regulated by, Ch. 216, F. S., relating to planning and budgeting of executive and judicial branch agencies of state government, save the provisions of ss. 216.081 and 216.192 and other such sections as are properly related to the legislative branch of state government.

The position of executive director of the Commission on Ethics is exempt from the provisions and requirements of Ch. 110, F. S., with respect to setting the salary of such position; and the commission possesses the statutory power to set the compensation of that position. In all other respects, the position of executive director is subject to and regulated by the terms and provisions of Ch. 110 and duly adopted personnel rules and regulations in implementation thereof.

Under the current status of the law, other employees of the Commission on Ethics are subject to the provisions of Ch. 110, F. S., in its entirety.

Section 18, Art. III, State Const., commands the Legislature to prescribe by law a code of ethics for all state employees and nonjudicial officers. Partly pursuant to this constitutional command and in the exercise of its inherent legislative powers, s. 1, Art. III, State Const., the Legislature adopted a Code of Ethics and Financial Disclosure Law, Ch. 74-177, Laws of Florida, and created the Commission on Ethics to administer the Code, Ch. 74-176, *id.* (*See* ss. 112.311-112.324, F. S.) The stated general purpose of the commission is to serve as "guardian of the standards of conduct for the officers and employees of the state, and of a county, city or other political subdivision," as defined by the act. The duties of the Commission on Ethics, according to s. 112.322, (Ch. 74-176, *supra*) as amended by Ch. 75-199, Laws of Florida, are, among others,

> . . . to receive and investigate sworn complaints of violation of the code of ethics as established in this part, including investigation of all facts and parties materially related to the complaint at issue.

To fulfill this duty, the commission was granted the power to investigate complaints, hold hearings, issue subpoenas, compel witness attendance and testimony, administer oaths and affirmations, take evidence, require the production of evidence by subpoena, and conduct audits.

Procedures to be followed by the commission, as prescribed by s. 112.324, *id.*, include requirements that the accused be given notice and an opportunity to attend the hearing.

Further set forth are the procedures to be followed by the commission in recommending various disciplinary actions to the appropriate officials also set forth in the statute; and, insuring due process, a provision is made for direct judicial review of any final commission action. Section 112.3241, *id.* The commission may also request that the Governor initiate judicial proceedings against a public officer or employee and may issue advisory opinions to public officers and employees as to the applicability of the Code of Ethics in a particular factual situation. These opinions are binding on the conduct of the requesting officer until amended or revoked or unless material facts were misstated or omitted in the request. *See* s. 112.322, *supra*. Said opinions are subject to judicial review under s. 112.3241, F. S.

These duties and procedures are clearly quasi-judicial in nature. *See* Black's Law Dictionary, defining quasi-judicial as

> [a] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

Accord: Bloomfield v. Mayo, 119 So.2d 417, 421 (1 D.C.A. Fla., 1960), in which the court said that, to be quasi-judicial in nature, an administrative order must be based on notice and a hearing in accordance with the basic requirements of due process of law. But the fact that the commission has been vested with quasi-judicial powers by the Legislature, as authorized by s. 1, Art. V, State Const., does not mean that it is a part of the judicial branch of government. *See* Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973), in which the court noted that the school board exercised quasi-judicial powers but stated that the characterization of the decision-making process by a school board as "quasi-judicial" does not make the body into a judicial body. It was further stated that:

> The correct understanding of the terminology "quasi-judicial" means only that the School Board is acting under certain constitutional strictures which have been enforced upon all administrative boards and not that the School Board has become a part of the judicial branch. To hold otherwise would be to combine the legislative and judicial functions in one body clearly contrary to the separation of powers doctrine. . . .

Similarly, the Commission on Ethics is not a part of the judicial branch of government. It goes without saying that it is not a part of the system of courts of this state, nor does it perform any functions in connection with the administration of our judicial system that would justify its inclusion by the Legislature as a part of the judicial branch of government, such as the Judicial Administrative Commission, the Judicial Qualifications Commission, and the Judicial Council—each of which is listed under the Judicial Branch of Government in the 1975 General Appropriations Act, Ch. 75-280, Laws of Florida (Items 787-790, 837, and 838-840, respectively).

Nor is the commission designated by the Legislature as a part of the executive branch of government—and, presumptively, rightly so. In AGO 074-291, it was said that "[t]he executive branch has the purpose of executing the programs and policies adopted by the legislature and of making policy recommendations to the legislature," quoting from s. 20.02(1), F. S. *See also* 81 C.J.S. *States* s. 50, stating:

> An executive department has primarily to do with the political government of the state in the execution and enforcement of the law wherein the governor is the supreme head, but every commission which exercises executive duties in some capacity cannot be narrowed to the definition of being an executive department under the governor.

The Commission on Ethics does not itself enforce any portion of the law. Based on its investigations of complaints, discussed above, it may recommend certain action or enforcement by another official; but it is the other official, not the commission, through which enforcement powers are exercised. *See* ss. 112.322(4), and 112.324(3), (4)(a)-(f), (5), and (6), F. S. Thus, it does not appear that the commission exercises any executive-type powers of enforcement in investigating complaints. *Cf. In re* Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969), ruling that the functions of the Florida Public Service

Commission were not executive functions so as to require reorganization under s. 6, Art. IV, State Const.

In any event, the Legislature did not place the commission within one of the executive branches of government heretofore established by it pursuant to the mandate of s. 6, Art. IV, that "[a]ll functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution." Nor did it place the commission under the "direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor," as required by the same provision of the Constitution for all executive agencies of government "unless otherwise provided in this constitution." The constitutional provision requiring the Legislature to prescribe a code of ethics for all state employees and nonjudicial officers, s. 18, Art. III, *supra*, did not "otherwise provide." It is a long-standing rule of construction that, if possible to do so, the law should be construed so as to comport with the Constitution. Overstreet v. Blum, 227 So.2d 197 (Fla. 1969). Therefore, to comport with the Constitution, and in consideration of all of the above, it must be concluded that the Legislature did not intend the Commission on Ethics to be a part of the executive branch of state government.

This leaves, then, only the legislative as the branch of government to which the Commission on Ethics belongs. It is well settled that the Legislature may, within appropriate limitations, authorize a statutory administrative body to perform quasi-legislative functions designed to effectuate valid legislative purposes, if consistent with organic law. Florida Motor Lines v. Railroad Com'rs, 129 So. 876 (Fla. 1930); Miami Bridge Co. v. State R. R. Commission, 20 So.2d 356, 361 (Fla. 1945); *In re* Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969). In the case last cited, the Supreme Court ruled squarely that the performance of the duties of the commission was not a function of the executive branch of government so as to require reorganization under s. 6, Art. IV, State Const., but a part of "the legislative or the judicial branch of government." As was noted above, the Commission on Ethics is not a part of the judicial branch of government and has not been treated by the Legislature as a part of the executive branch of government. It is noteworthy that, during the fiscal year immediately after its creation, 1974-1975, the commission received fiscal and administrative assistance from the Joint Legislative Management Committee (a legislative committee). It was included as a separate item in the 1975-1976 budget; but this fact, standing alone, would not appear to be sufficient to justify a conclusion that it was intended by the Legislature to be a part of the executive branch of government in light of the matters and authorities referred to above.

It must be concluded, therefore, pending legislative or judicial clarification, that the Commission on Ethics is a part of the legislative branch of government.

I have heretofore ruled in AGO 076-53, dealing with the question of the applicability of the provisions of Ch. 216, F. S., relating to the planning and budgeting of "state agencies" as defined in that statute, that said provisions were not applicable to the legislative branch of state government. As I have hereinabove concluded that, pending legislative or judicial clarification, the commission is a part of the legislative branch of government, the conclusions reached in AGO 076-53 regarding the question of the applicability of Ch. 216 to the Florida Law Revision Council will control the instant case; and, therefore, the provisions of Ch. 216 are not applicable to the Commission on Ethics, save ss. 216.081 and 216.192 and other such sections properly related to the legislative branch of state government.

As to the question of the applicability of Ch. 110, F. S., the State Career Service System, to the commission personnel, a complex situation arises. I have heretofore ruled in AGO 076-53 that the exemptions to Ch. 110, *supra*, granted in s. 110.051(2)(b), (c), and (k) are inapplicable to the personnel of the Law Revision Council. In the particular regard of the applicability of those same exemptions to commission personnel, the factual situation here is, for such purpose, identical, and therefore the same conclusion of inapplicability of those exemptions is reached in the instant case. Although s. 110.051(1) states that, unless specifically exempted by that chapter, the Career Service System shall include all such unexempted positions "any provisions of the Florida Statutes to the contrary notwithstanding," s. 112.321(2), F. S., empowering the commission to employ and set the compensation of its executive director, is a later-in-time piece of legislation and will therefore control over Ch. 110 to the extent of any irreconcilable conflict between the statutes. State v. City of Boca Raton, 172 So.2d 230 (Fla. 1965). Therefore, by virtue of s. 112.321(2) being later in time than, and in conflict with, s. 110.051(1) and other

provisions of Ch. 110 controlling and regulating the compensation of state employees. I am of the opinion that, pending legislative or judicial clarification, the position of executive director of the commission is exempt from such statutory provisions and requirements with respect to his compensation and that the Commission on Ethics possesses the statutory power to set the compensation of the executive director under its employ. In all other respects, the executive director is subject to and controlled by the terms and provisions of Ch. 110 and duly adopted personnel rules and regulations implementing that law.

As the applicable statutes are silent with respect to other commission employees, I am of the opinion that, under current status of the law, the remainder of the commission employees are subject to the provisions of the State Career Service System, Ch. 110, *supra*, in its entirety.

076-55—March 10, 1976

ELECTIONS

LIMITATIONS ON EXPENDITURES BY INDEPENDENT, WRITE-IN, AND MINORITY PARTY CANDIDATES

To: Stephen C. O'Connell, Chairman, Florida Elections Commission, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Are persons who run for election to public office as independent, minority party, or write-in candidates permitted under the Florida campaign financing statutes, Ch. 106, F. S., to make expenditures in the same amounts and during the same time periods as persons who run for nomination and election to public office as candidates of major political parties?

SUMMARY:

All candidates for election to public office—those running as independents, write-ins, or under a minority party banner, as well as the candidates of the major political parties—may begin to make campaign expenditures as soon as they have appointed a campaign treasurer and designated a primary depository. However, unless and until otherwise clarified by the courts or the Legislature, the campaign expenditures of an independent, minority party, or write-in candidate are limited to the amounts specified in s. 106.10(1), F. S., for the general election.

At s. 106.011(1)(b), F. S., the term "candidate" is defined to include, for the purposes of Ch. 106, F. S.:

> Any person who has received contributions or made expenditures, appointed a campaign treasurer, designated a campaign depository pursuant to this chapter, or given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination or election to public office . . . .

Section 106.021, F. S., specifies the manner of appointment of a campaign treasurer and subsection (3) of said section states:

> (3) No contribution shall be received or expenditure be made by or on behalf of a candidate . . . until the candidate . . . appoints a campaign treasurer and certifies the name and address of the campaign treasurer pursuant to this section. . . .

It is clear from the above-quoted language that as soon as a candidate has appointed a campaign treasurer, he or she may begin to make expenditures—presuming, of course, that a primary depository has also been properly designated. The concurrence which authorizes the making of expenditures is the appointment of the campaign treasurer, and this is so irrespective of whether the candidate has yet attained the status of a qualified candidate. Accordingly, I am of the view that all candidates—those running as independents, write-ins, or under a minority party banner, as well as the candidates of the major political parties—may begin to make expenditures as soon as they have appointed a campaign treasurer and designated a primary depository.

Turning now to the question of the *amount* of the expenditures which may be made by candidates for election to public office other than those running as candidates of the major political parties, attention must first be directed to s. 106.10, F. S. Subsection (1) of the cited statute specifies in detail the amounts which may be spent for each primary election and for the general election by all candidates regulated by Ch. 106, F. S. The last paragraph of that subsection contains the following rule of construction: "In no event shall this section be construed so as to allow expenditure of funds by a candidate for a given election in excess of the amount specified for that election." And, as stated in State *ex rel.* Triay v. Burr, 84 So. 61 (Fla. 1920), at p. 74: "Where a rule of construction is contained in the statute itself, that rule should be applied if it is necessary to use any rules of construction in determining the meaning or effect of the law."

Independent, minority party, and write-in candidates do not run in the primary elections. The eligibility of such candidates to run in the general election is determined by other methods (*see* ss. 99.023, 99.152, 99.153, 101.261, 101.262, and 101.263, F. S.) and the only election in which they participate is the general election. Such being the case, unless and until otherwise clarified by the courts or the Legislature, I am of the opinion that the above-quoted statutory rule of construction compels a conclusion that independent, minority party, and write-in candidates may not spend more than the limits specified for the general election in subsection (1) of s. 106.10, *supra*.

It is, of course, axiomatic that duly enacted statutes are entitled to a presumption of validity unless and until otherwise decided by the courts, and this presumption must be indulged in with respect to the limitations on the amounts of campaign expenditures found in s. 106.10(1), F. S. However, it should also be noted that the Supreme Court of the United States, in the recent case of Buckley v. Valero, Secretary of the United States Senate, 44 U.S.L.W. 4127 (U. S. Jan. 30, 1976), invalidated, on First Amendment grounds, provisions of the federal campaign financing laws which impose limitations on the total amounts of campaign spending. The court's comments include the following:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. [44 U.S.L.W. 4138]
>
> We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [the] ceiling on independent expenditures. [44 U.S.L.W. 4140]
>
> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing them on election day. [44 U.S.L.W. 4142]
>
> No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by . . . [the] campaign expenditure limitations. [44 U.S.L.W. 4143]

The foregoing, while not dispositive of the validity of the expenditure limitations found in s. 106.10(1), F. S., certainly casts serious doubts on the future enforceability of such provisions.

076-56—March 10, 1976

TRAVEL EXPENSES

ASSIGNMENT OF CIRCUIT JUDGE TO SPECIFIC COUNTY IN CIRCUIT—MAY QUALIFY AS "OFFICIAL HEADQUARTERS"

To: James H. Williams, Secretary, Department of Administration, and Gerald A. Lewis, Comptroller, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Does a local order issued by the Chief Judge of the Ninth Judicial Circuit, which designated the "primary assignment" of a circuit judge as the Osceola County Division of that circuit, establish the official headquarters of that judge and his secretary in Kissimmee for the purposes of s. 112.061, F. S.?

SUMMARY:

Although the local order of the Ninth Judicial Circuit designating the "primary assignment" of a circuit judge as the Osceola County Division of that circuit is unclear as to its effect on the official headquarters of that judge and his secretary, it would appear that if the judge and secretary are, in fact, performing the substantial portion of their official duties in Kissimmee, then that city should be their official headquarters for purposes of s. 112.061, F. S.

Section 26.52, F. S., provides that "[e]ach circuit judge shall be reimbursed for traveling expenses as provided in s. 112.061." Section 112.061 generally limits the entitlement of public officers and employees to per diem and traveling expenses to authorized travel away from their "official headquarters," and according to s. 112.061(4), "[t]he official headquarters of an officer or employee assigned to an office shall be the city or town in which the office is located." *Cf.* AGO 075-275.

Applying the foregoing definition of the term "official headquarters" to the instant situation, neither the Florida Constitution nor the Florida Statutes specifically establish the official headquarters of circuit judges. However, s. 2(d), Art. V, State Const., provides that the chief judge in each circuit shall be responsible for the administrative supervision of the circuit courts and county courts in his circuit. Moreover, Rule 1.020, Florida Rules of Civil Procedure, provides that the chief judge of each circuit shall develop an administrative plan for the efficient and proper administration of all courts within his circuit, such plan to include the "assignment of judges and other court officers." Pursuant to these provisions, I am of the opinion that the chief judge of each judicial circuit has the authority and responsibility of designating the official headquarters of each judge in his circuit for purposes of s. 112.061, *supra. Cf.* AGO 072-248. In making this designation, it would appear that the location of the "official headquarters" of a circuit judge that is most consistent with the definition of that term as it is used in s. 112.061 is the city or town wherein the circuit judge performs the substantial portion of his judicial duties. *Cf.* AGO 064-21.

As to whether the local order in question constitutes a designation by the chief judge of the official headquarters of the circuit judge involved, as contemplated by s. 112.061, F. S., it is unclear that such was the chief judge's intent. The order designates the Osceola County Division as the judge's "primary assignment" for a period of 1 year, but also allows for secondary assignment of the judge, perhaps in another location, or assignment of him at any time to the circuit or county courts in Orange and Osceola Counties. Moreover, nowhere in the order is it expressly indicated that any of the circuit judges' offices are being relocated in another city or town. Thus, it would appear that the appropriate resolution of the question you present lies with the chief judge of the Ninth Judicial Circuit, *i.e.*, he may issue a clarifying order or an order expressly designating the official headquarters of the judges in his circuit. In either event, he should be guided

by the meaning of the term "official headquarters" as defined in s. 112.061 and as discussed hereinabove.

With respect to the secretary who assists the circuit judge involved in carrying out his "primary assignment" in the Osceola County Division, nothing in the local order in question purports to assign her to an office in Kissimmee or "station" her in Kissimmee as contemplated by s. 112.061(4)(b), F. S. (which provision, it might be noted, is apparently limited in application to "employees" as defined in s. 112.061(2)(d), F. S.). Nor am I informed that she has been assigned or stationed in Kissimmee by the circuit judge for whom she works. Accordingly, I cannot conclude where her official headquarters is located for purposes of s. 112.061. However, consistent with the discussion hereinabove, it would appear that her official headquarters should be located wherever she is, in fact, performing the substantial portion of her secretarial duties.

076-57—March 11, 1976

REGULATION OF PROFESSIONS

USE OF UNIFORM LICENSE RENEWAL FORM NOT MANDATORY

To: Dorothy Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Carol L. Reilly, Assistant Attorney General

QUESTION:

Does the head of the Department of Professional and Occupational Regulation, pursuant to s. 20.30(5), F. S., have the discretion to permit some boards and commissions to continue to employ their own license renewal forms?

SUMMARY:

A uniform license renewal form which has been established by the Bureau of Records Administration may be employed by the Board of Nursing and the Real Estate Commission if such a form is consistent with the renewal requirements of Chs. 464 and 475, F. S., respectively, but the secretary may not require that either board issue the uniform license renewal form.

Your predecessor stated that all boards and commissions within the Department of Professional and Occupational Regulation have converted to the use of a uniform renewal license, with the exceptions of the Board of Nursing and the Real Estate Commission. As to these two boards, no appreciable monetary savings would be effected by use of the uniform license because of the large quantity of licenses issued by each board and because only a wallet card is issued; the display portion of the uniform license would be wasted and inconvenient. The Board of Nursing also requires different colored licenses to distinguish registered nurses from practical nurses.

Your question is answered in the affirmative, subject to the following qualifications.

The Department of Professional and Occupational Regulation was created by the Government Reorganization Act of 1969, pursuant to a Type II transfer. Sections 20.30 and 20.06(2), F. S.; AGO 074-133. Type II transfers reserve to the transferred agency the authority to "independently exercise the other powers, duties and functions prescribed by law, including . . . licensing, regulation and enforcement," while directing the head of the department to exercise the functions of "the collection of license fees and other revenues, payroll, procurement, and related administrative functions." The legislative allotment of powers, duties, and functions between the department and the various licensing agencies is mandatory. The statutory use of the word "shall" effectively deprives the head of the department of the authority to engage in the activities which are reserved to the agency, and vice versa.

Where the enumeration of specific things in a statute is followed by a more general word or phrase, then the general phrase is construed to refer to a thing of the same kind or species as included within the preceding limits and more confining terms. State *ex rel.* Wedgworth Farms, Inc. v. Thompson, 101 So.2d 381 (Fla. 1958). Since s. 20.06(2), F. S., mandates that "the collection of license fees . . . and related administrative functions shall be exercised by the head of the department," and also mandates that the agency transferred "shall independently exercise the other powers, duties, and functions prescribed by law, including . . . licensing," the question to be determined is whether the *issuance* of the license renewal form is a "related administrative function" to be included in the preceding limits and more confining terms set out in the statute, such as the collection of license fees and other revenues, or whether the issuance of the license renewal form by a particular board or commission is a power, duty, or function prescribed by the enabling statute of that agency or included within the provisions of the term "licensing."

Section 20.30, F. S., which creates the Department of Professional and Occupational Regulation, also establishes, as a bureau within that department, the Bureau of Records Administration. Section 20.30(4)(a), F. S. At s. 20.30(5), F. S., we find that the head of the department has the discretion to assign to that bureau the function of establishing a "uniform renewal license form for all boards and commissions." The *establishment* of a uniform license renewal form, while not clearly included in those related administrative functions which shall be exercised by the head of the department, is a specific function which may be assigned to the bureau. However, once such a form is established, does the secretary or the bureau have the authority to require that all boards and commissions within the department issue or use the same form?

Both the Board of Nursing and the Real Estate Commission operate pursuant to their own enabling statute, *e.g.*, Ch. 464 and Ch. 475, F. S., respectively. A review of the pertinent sections of these two chapters would seem to indicate that the duty of license renewal by the agency involves much more than a simple administrative function related to the collection of license renewal fees. For instance, s. 464.051(3)(b) provides that one of the duties of the board is to "[e]xamine, license, and renew the license of each *duly qualified* applicant," (Emphasis supplied.) and s. 464.21(2) imparts a quasi-judicial character to the function of license renewal by giving the board the authority to refuse to renew the license of a licensee who is in prison or adjudicated incompetent.

Section 475.20, F. S., provides that renewal licenses shall be issued "upon written request, on a form provided by the commission *or the department*," (Emphasis supplied.) while s. 475.01(10), F. S., states that the certificate initially issued by the commission "and renewed annually thereafter as long as renewals thereof shall be granted" is to be "prepared according to the regulations and bearing the seal of the commission."

In contrast to the above, s. 475.11, F. S., mandates that all moneys (including license and license renewal fees) received by the commission "shall be paid to the chief of the Bureau of Records Administration of the Division of General Services of the Department of Professional and Occupational Regulation." Section 475.20, F. S., was amended by s. 8, Ch. 75-184, Laws of Florida, to make the source of the written form for requesting license renewal discretionary. That is, the license renewal request may be on a form "provided by the commission or the department." This is the most recent expression of the intent of the Legislature and indicates that, while the department has the discretion to direct that the Bureau of Records Administration establish a uniform license form, there is no authority to require the agencies within the department to use that same form, especially since "licensing" is a function specifically reserved to the transferred agency under s. 20.06(2), F. S. The discretionary authority of the secretary to assign to the bureau the function of establishing a uniform license renewal form is *not* tantamount to the authority to order, direct, or require the various boards and commissions to use or issue the uniform license renewal form, as there may be some additional requirement involved with the license renewal function imposed by a particular enabling statute and, therefore, specifically reserved to said board or commission by s. 20.06(2).

With the present status of the statutory law, as outlined above, and in the absence of specific statutory authority vesting the power in the secretary to determine the contents and terms of licenses and renewal of licenses, the effect of s. 20.30(5)(c), F. S., is simply to authorize the secretary to direct that the Bureau of Records Administration establish a uniform license renewal form which may or may not be used by the various boards or commissions within the department.

If there is a reasonable doubt as to the lawful existence of a particular power which could be exercised by an administrative agency, the exercise of that power should be

arrested. State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974). Although the use or issuance of a uniform license renewal form established by the Bureau of Records Administration may be adopted by a particular board or commission, neither the secretary nor the bureau should attempt to require the use of such forms.

076-58—March 11, 1976

PUBLIC OFFICERS

REPORT OF CONTRIBUTIONS

To: Dick J. Batchelor, Representative, 43rd District, Orlando

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTIONS:

1. Is an elected public officer required under s. 111.011, F. S., to report as a contribution the total value of gifts he receives from one donor on a continuing basis during a semiannual reporting period when the value of each such gift does not exceed $25, but the total value of all such gifts does exceed $25?
2. Is an elected public officer required under s. 111.011, F. S., to report as a contribution the costs of meals furnished gratuitously by another to guests who dine with such officer at his or her invitation?

SUMMARY:

The definition of the term "contribution" in s. 111.011(1)(c), F. S., does not appear to include any donation of $25 or less in value within the purview of the statute, irrespective of the number of such donations. However, to avoid any appearance of circumvention of the statute, it is suggested that an elected public officer who has received continuing donations of $25 or less make a report of same, even though such does not appear to be required by the statute.

The value of meals furnished gratuitously by another to an elected public officer's guests should be reported as a contribution under s. 111.011, F. S., if such value exceeds $25.

As to your first question: The contributions which are required to be reported by s. 111.011, F. S., are defined in paragraph (c) of subsection (1) of the statute to include "any gift, donation, or payment of money the value of which is in excess of $25 to any elected public officer or to any other person on his behalf."

This first matter which must be resolved is whether the statute in question is subject to strict or liberal construction. The last quoted subsection of the statute specifically mandates a liberal construction, which is in accord with the general rule that remedial statutes, statutes enacted for the public benefit, and those which have reference to the policy of the state should be construed liberally. Heirs of Bryan v. Dennis, 4 Fla. 445 (1852); Becker v. Amos, 141 So. 136 (Fla. 1932); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944). But, the statute also provides for criminal penalties as well as for removal, impeachment, or expulsion from office for failure to comply with same, and it is well settled that statutes which impose a penalty or a forfeiture are subject to strict construction. Negron v. State, 306 So.2d 104 (Fla. 1974); Nell v. State, 277 So.2d 1 (Fla. 1973); Dotty v. State, 197 So.2d 315 (4 D.C.A. Fla., 1967); Conner v. Alderman, 159 So.2d 890 (2 D.C.A. Fla., 1964). Where—as with the statute under examination—conflicting rules of construction appear to be applicable, the choice between liberal and strict construction turns on the context in which the statute is being applied. As noted by the Florida Supreme Court in Board of Public Instruction of Broward Co. v. Doran, 224 So.2d 693 (Fla. 1969), at p. 699:

> Statutes enacted for the public benefit should be interpreted most favorably to the public. The fact that the statute contains a penal provision does not make the entire statute penal so that it must be strictly construed. For instance, the Workmen's Compensation Act makes it a misdemeanor for an employer not to secure payment of compensation. Fla. Stat., s. 440.43 (F.S.A.). This Court has nevertheless held that the Compensation Act is to be liberally construed. Florida Game & Fresh Water Fish Commission v. Driggers, 65 So.2d 723 (Fla. 1953).

Accord: Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973).

The Doran case, *supra*, is particularly applicable to the construction of the subject statute because of the similarities between the statute construed in that case and the statute about which you inquire. In Doran, *supra*, the court was called upon to construe the "Government in the Sunshine" law, s. 286.011, F. S., which, like s. 111.011, F. S., imposes a duty on certain public officers, contains criminal penalties, and provides for citizen enforcement. The similarity of the statutes compels the application of similar rules of construction. Accordingly, I am of the view that s. 111.011 should be liberally construed for all purposes other than when it is being interpreted in the context of a criminal proceeding under paragraph (a) of subsection (4) or in the context of a forfeiture proceeding under paragraph (b) of subsection (4).

Even when liberally construed, however, I am unable to categorically state that continuing contributions of less than $25 value each must be reported under s. 111.011, F. S. The definition of the term "contribution" does not appear to include any donation of $25 or less in value within the purview of the statute, irrespective of the number of such donations. However, in order to avoid any appearance of circumvention of the statute, I would suggest that an elected public officer who has received any such continuing donations of $25 or less make a report of same, even though such does not appear to be required by the terms of the statute. *Cf.* AGO's 071-39 and 074-383.

As to your second question: The definition of "contribution" in paragraph (c) of subsection (1) of the statute includes goods and services gratuitously provided to an elected public officer as well as "to any other person on his behalf." Accordingly, when an elected public officer takes his or her guests to dine and knows that a donor is going to pay for the meals to be consumed by such officer's guests, the officer should report as a contribution the value of the meals furnished gratuitously to his or her guests if such value exceeds $25.

076-59—March 11, 1976

INDIGENTS

NO REQUIREMENT TO PROVIDE TRANSCRIPT OF PROCEEDINGS ON REVIEW OF ORDER CONTINUING INVOLUNTARY HOSPITALIZATION OF INDIGENT

To: Richard W. Ervin III, Public Defender, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

When a review is sought of an order of a hearing examiner pursuant to s. 394.457(6)(d), F. S., and the patient is indigent, is the county from which the patient was originally committed, the county in which the patient is confined, or the Division of Mental Health of the Department of Health and Rehabilitative Services responsible for paying the expense of the transcript of the proceedings before the hearing examiner pursuant to s. 394.467(4), F. S.?

SUMMARY:

Until legislatively or judicially determined otherwise, when a review is sought in the circuit court of an order of a hearing examiner in a continued involuntary hospitalization hearing pursuant to s. 394.457(6)(d), F. S., and the patient is indigent, neither the county from which the patient was originally committed, the county in which the patient is confined, nor the Division of Mental Health of the Department of Health and Rehabilitative Services is responsible for paying the costs or expense of such review by the circuit court and for paying the expense of the transcript of the proceedings before the hearing examiner pursuant to s. 394.467(4), F. S.

Pursuant to s. 394.457(6)(d), F. S., "[a]n order of a hearing examiner may be reviewable by the circuit court of the county in which the hearing is held or by the court of original jurisdiction." There is no specific statutory direction as to who is responsible for the expenses of filing for judicial review and preparation of the record for judicial review.

In AGO 072-251, I ruled that although s. 394.459(9)(a), F. S. 1971 (now s. 394.459(10)(a), F. S.), provides that a person detained in a treatment facility or some other interested person on behalf of such person may petition for a writ of habeas corpus to question the cause and legality of such detention, that provision does not expressly authorize such detained person who is indigent the right of counsel, nor did I find "any other section of this act or in the Florida statutes or case law which would lead one to believe that such an indigent person must be provided with counsel *for this purpose*." (Emphasis supplied.) Section 394.459(10), F. S. 1971 (now s. 394.459(11), F. S.), does require the governing body "of the patient's county" to arrange for transportation to a treatment facility when the patient is indigent. In AGO 072-251, I noted also that it is within the court's discretion and inherent power to appoint an attorney to represent an indigent in a habeas corpus proceeding; however, there is no requirement "that the county from which the patient originated or the county where such indigent patient is hospitalized pay the attorney fees of such court-appointed counsel."

Costs, expenses, and attorneys' fees cannot be awarded unless such award is authorized by statute. Cullette v. Ochoa, 104 So.2d 799 (1 D.C.A. Fla., 1958); Lang V. Lang, 252 So.2d 809 (4 D.C.A. Fla., 1971). In County of Dade v. Sansom, 226 So.2d 278 (3 D.C.A. Fla., 1969), the court ruled that there was no ordinance, statute, or rule of law authorizing the taxation of costs against the county upon appeal to the circuit court of a conviction in the Metro court of a violation of a Metro county ordinance. "At common law counties were not liable for any costs and their liability for costs depends solely on statutes [or, as here, an ordinance]." *Cf.* Wood v. City of Jacksonville, 248 So.2d 176 (1 D.C.A. Fla., 1971). Nowhere in Ch. 394, F. S., is an indigent entitled to his expenses in seeking the review in the circuit court authorized under s. 394.457(6)(d), nor is there any statutory authority for the assessment of such costs or expenses against counties or agencies of the state. *Cf.* Allen United Enterprises v. Special Disability Fund, 288 So.2d 204, 206 (Fla. 1974).

There is no provision of the Mental Health Act, Ch. 394, F. S., which authorizes the assessment of costs against the Department of Health and Rehabilitative Services, and there is no other Florida statute applicable. One may contend that the question of costs should be controlled by s. 57.041(1), F. S., which provides that a "party recovering judgment shall recover all his legal costs and charges," and Simpson v. Merrill, 234 So.2d 350 (Fla. 1970), which held that this statute authorized the taxation of costs against the state and its agencies in favor of a party recovering judgment. However, a "judgment" as contemplated in the statutes does not contemplate any order or award obtained through any "quasi-judicial" administrative agency. Allen United Enterprises v. Special Disability Fund, 288 So.2d 204 (Fla. 1974). As the law exists, and in absence of any peculiar judicial guidance on the precise question of assessment of, or entitlement to, costs and expenses incurred in seeking judicial review in the circuit court, either by common law certiorari or other appropriate designated statutory procedure, of orders of the hearing examiner for continued involuntary hospitalization entered under Ch. 394, I am unable to say that any authority at law exists for granting of any such costs and expenses.

The only part of Ch. 394, *supra*, dealing with the payment of costs of indigents is s. 394.473(3) concerning the appearance of a physician when one is required in a court hearing. As that subsection sets forth, this expense is to be paid by the county from which

the patient was hospitalized. The statute not having made any other provision for payment of any other costs or expenses in any other proceeding, none other may be implied, and no other costs or expenses are authorized to be assessed against the counties or agencies of the state. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); State *ex rel.* Judicial Qualifications Comm. v. Rose, 286 So.2d 562 (Fla. 1973); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974). *See* especially Bryan v. Dept. of Bus. Reg., Division of Beverage, 316 So.2d 637 (1 D.C.A. Fla., 1975). Nor does Ch. 394 impose liability upon the state or Department of Health and Rehabilitative Services when an indigent patient seeks review by the circuit court of the hearing examiner's order for continued involuntary hospitalization. *Cf.* AGO 072-251 discussed above.

Section 18, Art. V, State Const., provides that the duties of the public defender shall be prescribed by general law. Section 394.467(4)(e), F. S., states that "[i]n the event a patient cannot afford counsel in a hearing before a hearing examiner, the public defender in the county where the hearing is to be held shall act as attorney for the patient." This is the only statutory authority under which the public defender may proceed to represent an indigent patient in a continued involuntary hospitalization hearing. By its terms, this section authorizes the public defender to proceed in a hearing before a hearing examiner on the necessity for continued hospitalization, and he is not thereby authorized to represent such patient before the circuit court. Although he is a constitutional officer, the public defender has no inherent powers but has only those duties imposed and those powers granted by statute and may exercise only the authority conferred by statute. *Cf.* Lang v. Walter, 35 So. 78 (Fla. 1903); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944). Where there is doubt as to the existence of authority, it should not be assumed. White v. Crandon, 156 So. 303 (Fla. 1934); Gessner v. Del-Air Corporation, *supra*, State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, *cert. dism'd*, 300 So.2d 900 (Fla. 1974).

Therefore, until legislatively or judicially determined otherwise, I am of the opinion that an indigent patient is not entitled to the expenses of filing for review and of the record on review in such proceedings in the circuit court; such costs are not authorized to be paid by the county or a state agency, and there is no statutory provision providing for the assessment of such costs or expenses against the counties or state agencies.

076-60—March 11, 1976

MARRIAGE LICENSE

MINIMUM AGE OF APPLICANT; APPLICATION WHEN ONE PARTY IS OUT-OF-STATE

To: Ralph Harris, Clerk, Circuit Court, Vero Beach

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

1. Can a marriage license be issued to a person under the age of 16 who is not pregnant?

2. Can a marriage application be sent to another state to have one of the parties sign and swear to and then be returned to this office for the other party to sign and swear to and, if so, when does the waiting period start?

SUMMARY:

Pursuant to s. 741.06, F. S., a marriage license may not be issued to a person under the age of 16 years who is not the parent or expectant parent of a child, with or without the consent of the parents or guardian. A marriage application not signed and sealed by the county court judge or clerk of the circuit court may be sent to another state to have one of the parties sign and swear to it and then returned to your office for the other party to sign and swear to. When a marriage application (not

signed and sealed) is not given to the issuing authority fully completed, then the statutory waiting period begins when the issuing authority receives the completed and duly executed application by both parties.

AS TO QUESTION 1:

Section 741.04, F. S., among other things, provides that no marriage license shall be issued to persons under the age of 21 years without the written consent of the minor's parents or guardian.

Section 741.06, F. S., states:

> The county court judge of any county in the state may, in the exercise of his discretion, issue a license to marry to any male or female under the age of 21 years, upon sworn application of both applicants under oath that they are the parents or expectant parents of a child. The consent of the parents or guardian of such applicants shall not be required for the issuance of a license to marry under the provisions of this section. *No license to marry shall be granted to any male under the age of 18 years, nor to any female under the age of 16 years, with or without the consent of their parents except as hereinabove provided.* (Emphasis supplied.)

Although s. 741.04, F. S., does not provide for a minimum age at which a person may obtain a marriage license with parental or guardian consent, that provision must be construed in light of s. 741.06, F. S., which does have such a provision. State v. Putnam Co. Develop. Auth., 249 So.2d 6 (Fla. 1971). In spite of the fact that both of these provisions use the age of 21 years as the age of majority, the Legislature, by Ch. 73-21, Laws of Florida, removed the disability of nonage for persons 18 years of age and older. In AGO 074-201, I concluded that s. 741.04, F. S., "should be read as requiring consent of parents or guardian, prior to the issuance of a marriage license, only for persons under the age of 18." *Also see* AGO 073-241.

The last sentence of s. 741.06, *supra*, is clear in forbidding the issuance of a marriage license to a female under the age of 16 years, with or without the consent of the parents, unless she is a parent or expectant parent of a child. The language is plain and unambiguous; thus, there is no necessity for any construction or interpretation of the statute and effect need only be given to the plain meaning of its terms. State v. Egan, 287 So.2d 1 (Fla. 1973).

In summary: A male or female over the age of 18 years may be issued a marriage license without the consent of the parents or guardian of such person or persons. A female 16 years or older, but less than 18, may be issued a marriage license only with the written consent of her parents or guardian unless both applicants for the license swear under oath that they are the parents or expectant parents of a child, in which case the consent of the parents or guardian is not required for the issuance of the license to marry. A female under the age of 16 years may be issued a marriage license only upon sworn application of both applicants for the license under oath that they are the parents or expectant parents of a child.

Your first question is answered in the negative.

AS TO QUESTION 2:

Section 741.04, F. S., in pertinent part, provides that no marriage license shall be issued "unless there shall be first presented and filed with [the county court judge or clerk of the circuit court] an affidavit in writing, signed by both parties to the marriage."

Section 741.03 provides:

> It is unlawful for any county court judge or clerk of the circuit court in the state to send out of his office any marriage *license signed* in blank *to be issued* upon application to persons not in the office of the county court judge or clerk of the circuit court. (Emphasis supplied.)

Section 741.01, F. S., specifies the license shall issue upon application therefor "if there appears to be no impediment to the marriage." *See* AGO 074-338 concluding that the issuing officer is justified in issuing the license when, upon consideration of the application, there appears to be no impediment to the marriage and that all legal

requirements for the issuance have been met. A brief statement of the procedure involved in the application for and issuance of a marriage license would be helpful in understanding the aforementioned statutory provisions.

Initially, one or both of the applicants request an application and complete it as required by law. One or both of the applicants return with the completed application, which includes the sworn affidavit required by s. 741.04, F. S. (The application, of course, can be completed by the parties in the clerk's or county court judge's office.) If there appears no impediment to the marriage (*see* AGO 074-338), then a license is issued after the expiration of 3 days from the application for the license (including the day application is made). Sections 741.01 and 741.04, F. S. (Before issuance of the license, the parties must file the certificate required by ss. 741.051 and 741.052, F. S.; *and cf.* s. 741.055, F. S.) The application form usually contains the license to be issued by the county court judge or clerk of the circuit court under his hand and seal and the certificate of marriage to be executed by the person solemnizing the marriage within 10 days thereafter. The person performing the marriage ceremony then returns the completed document to the clerk of the circuit court or county court judge from whom the license is issued, s. 741.08, F. S., where a record thereof is kept, as prescribed by s. 741.09, F. S.

If a county court judge or clerk of the circuit court were to send out licenses *signed and sealed* in blank, it would be impossible for him to determine if there was any impediment to the marriage, as required by s. 741.01, F. S., or if the parties were minors (under 18 years of age), as required by s. 741.04, F. S.

Section 741.04, F. S., requires that both parties to the marriage present and file with the county court judge or clerk of the circuit court an affidavit in writing, signed by both parties to the marriage, made and subscribed before some person authorized by law to administer an oath, reciting "the true and correct ages of such parties." A license shall not be issued unless both parties are over 18 years of age. (Under certain circumstances not here relevant, a license may be issued to persons under the age of 18 years. *See* s. 741.06, F. S.) This section merely requires the filing of such an affidavit and does not require an independent investigation on the part of the issuing authority as to the applicants' true ages. *Cf.* AGO 071-383.

Sections 90.01 and 90.011, F. S., provide for the administering of oaths, affidavits, and acknowledgments required or authorized under the laws of Florida, such as those required by s. 741.04, F. S., taken or administered in any other state, territory, or district of the United States or by an authorized officer of the United States Armed Forces.

Therefore, a marriage application (not signed and sealed by the county court judge or the clerk of the circuit court) may be mailed to another state by your office or by the other applicant for one of the parties to sign and swear to. By Ch. 74-372, Laws of Florida, the requirement that the license be issued in the county where the woman resides was eliminated. In AGO 075-174, I concluded that residence in the county where the license is to be issued is no longer a requirement for the issuance of a marriage license. (Therein, I also noted that United States citizenship is not a prerequisite to the issuance of a marriage license in Florida.)

Section 741.04, F. S., provides in part that "[n]o marriage license shall be issued by any county court judge or clerk of the circuit court in this state after application therefor until after expiration of 3 days, including the day application is made." As a marriage application cannot be completed until both parties have signed it as required by law, the 3-day waiting period does not begin to run until the application is fully and duly executed by both parties and filed with the county court judge or clerk of the circuit court.

076-61—March 11, 1976

SCHOOL BOARD

NO AUTHORITY TO FURNISH TRANSPORTATION TO PUPILS OF PAROCHIAL SCHOOLS BY CONTRACT

To: Hugh D. Hayes, Attorney for Collier County School Board, Naples

Prepared by: Pat Dunn, Assistant Attorney General

QUESTION:

Does a school board have statutory authority to contract with a parochial school for the bus transportation of children attending said parochial school if *all costs*, including such items as gas, depreciation, driver's salary, etc., of transporting the parochial students are paid by the parochial school?

SUMMARY:

A school board does not have authority to contract with a parochial school for the bus transportation of children attending said parochial school.

School boards, albeit creatures of the Constitution, are part of the machinery of government exercising, pursuant to legislative authority, such part of the governmental powers of the state as the law confides in them and operating at the local level as an agency of the state, and the extent of their powers rests exclusively in legislative discretion. Such powers may be enlarged, diminished, modified, or revoked at the pleasure of the Legislature. Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); Board of Public Instruction v. State *ex rel.* Allen, 219 So.2d 430 (Fla. 1969); AGO 075-148.

A school board has no inherent or common law powers. It has only those powers which have been expressly or by necessary implication conferred by statute. If there are any doubts about the existence of authority, it should not be assumed. Hopkins v. Special Road and Bridge District No. 4, 74 So. 310 (Fla. 1917); Harvey v. Board of Public Instruction for Sarasota County, 133 So. 868 (Fla. 1931); Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); White v. Crandon, 156 So. 303 (Fla. 1934); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); Lang v. Walker, 35 So. 78 (Fla. 1903); State *ex rel.* Hathaway v. Smith, 35 So.2d 650 (Fla. 1948); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900; AGO's 075-148 and 075-94.

The Legislature has restricted school board authority to transport pupils to and from public schools by school buses owned or leased and operated by the school board by Ch. 234, F. S., and other express or implicit provisions of the Florida School Code.

Subsection 230.23(8), F. S., authorizes school boards to provide "transportation of pupils to the public schools or school activities they are required or expected to attend," to exercise all attendant duties thereto including the provision of limited subsidies in lieu of transportation when such provisions are authorized by state board regulations and are more economical, and to adopt the necessary rules and regulations to insure safety, economy, and efficiency in the operation of school buses as prescribed in Ch. 234, F. S. Subsection 230.33(10), F. S., authorizes school superintendents to ascertain and recommend to the school board the needs, routes, facilities, and plans requisite for the administration or execution of the student transportation system and to recommend such rules and regulations as may be necessary and see that all rules and regulations relating to transportation of pupils approved by the school board, as well as regulations of the state board, are properly carried into effect, as prescribed in Ch. 234.

Section 234.01, F. S., mandates school boards to

> . . . provide transportation for each pupil who should attend a *public* school when, and only when, transportation is necessary to provide adequate educational facilities and opportunities which otherwise would not be available and to transport pupils whose homes are more than a reasonable walking distance, as defined by regulations of the state board, from the nearest appropriate school. . . . (Emphasis supplied.)

The boards are also ordered to maintain liability insurance for injury to pupils legally enrolled in the public schools and while being transported to and from a school or school activity and may purchase additional liability insurance for persons other than such pupils who might use school buses in connection with public school activities.

It should be noted that none of the above discussed or cited statutory provisions provide for transportation, by school buses owned or leased or operated by school districts, of anyone except pupils enrolled in the public schools and does not authorize school boards to transport private or parochial students to private or parochial schools.

Under the rule of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of all else. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates v. Snyder, 304 So.2d 433 (Fla. 1973). *Accord:* Attorney General Opinion 075-148.

Therefore, it is my opinion that a school board is without statutory authority to contract with a private or parochial school for the bus transportation of private or parochial school students, even though all costs would be borne by the private or parochial school.

Your question is answered in the negative.

076-62—March 23, 1976

MUNICIPALITIES

ALLOWABLE FEE FOR COLLECTION OF DISHONORED CHECK

To: Paul J. McDonough, City Attorney, Coral Springs

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

What service charge may the governing body of a municipality impose for the collection of a dishonored check, draft, or other order for the payment of money to a municipal official or agency in light of the enactment by the Legislature of Chs. 75-56 and 75-189, Laws of Florida?

SUMMARY:

Notwithstanding the enactment of Ch. 75-189, Laws of Florida (s. 832.07, F. S.), the service fee which a municipality may charge for collecting a dishonored check is limited to not more than $5 by Ch. 75-56, Laws of Florida (s. 166.251, F. S.). While Ch. 75-189 may be utilized by a municipal officer or agency where the conditions prescribed therein have been met, the statutorily prescribed form of notice to the maker of the dishonored check should reflect the limitation prescribed by s. 166.251: *i.e.*, not more than $5.

As made manifest by the title and purview thereof, Ch. 75-56, Laws of Florida, is "an act relating to state and local governments," speaking to and operating specifically on state agencies and officers, counties, and municipalities. Section 2, Ch. 75-56 (now codified as ss. 125.0105 and 166.251, F. S.), with which your question is primarily concerned, provides as follows:

> The governing body of a county or municipality may adopt a service fee up to $5 for the collection of a dishonored check, draft or other order for the payment of money to a county or municipal official or agency. The service fee shall be in addition to all other penalties imposed by law. Proceeds from this fee, if imposed, shall be retained by the collector of the fee.

In contrast, Ch. 75-189, Laws of Florida, is "an act relating to worthless checks . . . [and] prima facie evidence of intent to issue a worthless check . . . ." It operates in a general area and on the public generally, *i.e.*, it concerns evidence of intent to issue a worthless check in any criminal prosecution brought under Ch. 832, F. S. Section 1, Ch. 75-189 (now codified as s. 832.07, F. S.) provides in part as follows:

> (1) INTENT.—
> (a) In any prosecution or action under chapter 832, the making, drawing, uttering, or delivery of a check, draft, or order, payment of which is refused by the drawee because of lack of funds or credit shall be prima facie evidence of intent to defraud or knowledge of insufficient funds in, or credit with, such

> bank, banking institution, trust company, or other depository unless such maker or drawer, or someone for him, shall have paid the holder thereof the amount due thereon, togetner with a service charge not to exceed $5, or 5 percent of the face amount of the check, whichever is greater, within 20 days after receiving written notice . . . .

The form of notice thereinafter prescribed sets forth the same requirements: Payment of the amount of the dishonored check, plus a service charge not to exceed $5 or 5 percent of the amount of the check, whichever is greater.

Construing the above-quoted provisions for purposes of this opinion, it is a well-established rule of statutory construction that a statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation, "the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any." State *ex rel.* Loftin v. McMillan, 45 So. 882 (Fla. 1908); Stewart v. DeLand-Lake Helen, etc., 71 So. 42 (Fla. 1916); American Bakeries Co. v. City of Haines City, 180 So. 524 (Fla. 1938); and Adams v. Culver, 111 So.2d 665 (Fla. 1959); *see also* Scott v. Stone, 176 So. 852, 853 (Fla. 1937), in which the two statutes there involved were construed as follows:

> The two titles indicate that the acts cover different fields, and therefore, the latter does not repeal the former or supersede its provisions, unless the provisions of the latter act are repugnant to the provisions of the earlier act. . . .

and *In re* Wade, 7 So.2d 797 (Fl. 1942), stating the rule that the implied repeal of a prior act, narrow in scope, by a subsequent more general act is not favored in the law and requires a positive repugnancy between the two.

Applying these rules to Chs. 75-56 and 75-189, Laws of Florida, the former act, as stated *supra*, operates *specifically* on state agencies and officers, counties, and municipalities, providing in pertinent part that county and municipal governing bodies may adopt a maximum $5 fee for the collection of worthless checks. In contrast, Ch. 75-189 operates on the public *generally*, providing a method for establishing prima facie evidence of intent to issue a worthless check in any criminal prosecution under Ch. 832, F. S. Thus, construing the two acts as relating to the *same* general subject matter, *i.e.*, worthless checks, Ch. 75-56, being narrower in operation, should control over Ch. 75-189 to the extent of any repugnancy between the two. Moreover, even if the acts are construed as covering wholly *different* fields, the result should be the same since I do not, in fact, perceive any such positive repugnancy. In this regard, Ch. 75-189 is totally silent as to the authority of any public officer (or any private individual, for that matter) to charge a fee for collecting a dishonored check, but provides merely that a dishonored check will constitute prima facie evidence of a defendant's guilty knowledge unless the defendant has paid the fee mentioned in Ch. 75-189 under the circumstances prescribed therein. *See, e.g.*, s. 832.07(2)(d), F. S., requiring the party who accepted the check to have witnessed the signature or endorsement of the party presenting the check and to have initialed the check to authenticate such witnessing. In contrast, that part of Ch. 75-56 which is now s. 166.251, F. S., authorizes municipalities to charge the service fee therein specified for a dishonored check in all events and regardless of guilty intent or knowledge and in addition to any other penalty that may be imposed by law. *See also* s. 215.34(2), F. S. (also derived from Ch. 75-56), which requires state officers and agencies to charge the same service fee in the same circumstances and on the same conditions as those prescribed in s. 166.251.

In sum, therefore, Ch. 75-189, Laws of Florida, does not operate to amend or supersede Ch. 75-56, Laws of Florida, in any way. The method provided in Ch. 75-189 for establishing in court prima facie evidence of a defendant's guilty knowledge in a prosecution for making or delivering a worthless check may be utilized where the holder of the worthless check is a municipality or municipal official or agency and where the conditions prescribed in Ch. 75-189 have been met. However, because Ch. 75-56 limits to $5 the amount of the service fee which a municipality may charge for collecting a worthless check, the service fee mentioned in Ch. 75-189, when that act is applied to a worthless check held by a municipality to establish prima facie evidence of intent to defraud or knowledge of insufficient funds, may not exceed $5. The notice to the maker of the check as set out in Ch. 75-189 should reflect this limitation, *i.e.*, require payment

of the amount of the dishonored check plus a service charge of not more than $5, or in such lesser amount as may have been prescribed by ordinance adopted by the governing body of the municipality.

076-63—March 23, 1976

SCHOOL BOARDS

NOT AUTHORIZED TO SET SCHOOL ZONE SPEED LIMITS

To: Gene M. Pillot, Sarasota County School Superintendent, Sarasota

Prepared by: Betty Steffens, Assistant Attorney General

QUESTION:

Are county school officials empowered to determine the locations of school speed zones?

SUMMARY:

County school officials are not authorized by statute to establish school zones and school zone speed limits for traffic control purposes. Whenever safety hazards exist in the circumstances prescribed in s. 234.082, F. S., which have not been corrected by the Department of Transportation or local authorities (county and municipal) responsible for traffic safety, whichever has original jurisdiction over the involved road or street, the district school board is required to take or cause to be taken such precautions as may be necessary to safeguard the pupils.

Your question is answered in the negative.

The question appears to be designed to elicit an opinion as to the "proper governmental authority" to establish school zones and school zone speed limits, for traffic control purposes, on public roads and streets surrounding an established and functioning public or private school. Section 316.184, F. S.

A school zone is an area designated for the purpose of establishing a reduced school zone speed limit which is in effect at the beginning and end of the regularly scheduled school day. *Cf.* AGO 073-16.

Section 316.184, F. S., provides for the "*[e]stablishment* of school speed zones, enforcement; *designation*" (Emphasis supplied.) and subsection (4) thereof provides:

> No school zone speed limit shall be less than 15 miles per hour except by *local regulation.* Such speed limit shall be in force only during those times 30 minutes before and 30 minutes after the times necessary and corresponding to the periods of time when pupils are arriving at and leaving regularly scheduled school sessions. (Emphasis supplied.)

The language in the heading or subtitle was supplied by the Legislature itself in Ch. 71-135, Laws of Florida, the original act creating s. 316.184, F. S. The entire section therefore is to be read in light of the legislative intent manifested when it used the language "*[e]stablishment* of school speed zones, enforcement; *designation.*" (Emphasis supplied.) *See* AGO 057-314. The intent of the Legislature as gleaned from the statute is the law. State *ex rel.* Davis v. Knight, 124 So. 461 (Fla. 1929); Small v. Sun Oil Co., 222 So.2d 196 (Fla. 1969).

Chapter 71-135, *supra,* declares, in its title, that Ch. 316 provides for "the respective powers of state and local authorities in control of traffic upon the streets and highways." Section 316.003(20), F. S., defines "local authorities" to include all public officials of the several counties and municipalities of the state.

The Legislature amended s. 316.184 by Chs. 73-161 and 73-366, Laws of Florida, and in enacting these amendatory laws it provided the same subtitle.

The heading or subtitle, "*[e]stablishment* of school speed zones, enforcement; *designation*," placed at the beginning of s. 316.184, F. S., by the Legislature itself, when read with the entire statute, says in effect that s. 316.184 is intended to govern the establishment and location of school zones as well as the maintenance thereof and school zone speed limits and that such is within the province of, and is the lawful responsibility of, the Department of Transportation or the governing body of each county and municipality, as the case may be, whichever has lawful jurisdiction over the area in which any such school zones are located and the highways and streets adjacent to or surrounding the affected public or private schools. The subtitle is a part of the statute itself, limiting and defining the effect of the section of which it is a part. Berger v. Jackson, 23 So.2d 265 (Fla. 1945). The legislative intent and purpose deducible from the statute must be given effect even though apparently it may contradict the strict letter of the statute and the canons of construction. State v. Sullivan, 116 So. 255, 261 (Fla. 1928); Singleton v. Larson, 46 So.2d 186, 189 (Fla. 1950); Overman v. State Board of Control, 62 So.2d 696, 701 (Fla. 1952).

The Legislature has by the terms of s. 316.184, F. S., imposed duties upon and empowered the Department of Transportation, municipalities, and counties, as the case may be, in regard to the designation, establishment, maintenance, and regulation of school zones and school zone speed limits. The conclusion must be drawn that the Legislature intended that the Department of Transportation, municipalities, and counties within their respective jurisdiction designate or establish, locate, and regulate school speed zones. The statute nowhere mentioning the county school boards in this regard, they are deemed to be excluded from the operation of the law. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); Ideal Farms Drainage Dist. v. Certain Land, 19 So.2d 234 (Fla. 1944).

Moreover, s. 316.184(4), F. S., must be read in the context of related laws, *e.g.*, s. 234.082, F. S.; Markham v. Blount, 175 So.2d 526 (Fla. 1965); Garner v. Ward, 251 So.2d 252 (Fla. 1971); and other parts and sections of Ch. 316, F. S., such as ss. 316.006, 316.008(1)(j), 316.131, 316.181(2), and 316.182; AGO's 057-269 and 058-283; Chiapetta v. Jordan, 16 So.2d 641 (Fla. 1943); State v. Hayles, 240 So.2d 1 (Fla. 1970).

Section 316.006, F. S., vests jurisdiction to control traffic as follows:

> (1) STATE.—The Department of Transportation shall have all original jurisdiction over all state roads throughout this state . . . .
> (2) MUNICIPALITIES.—Chartered municipalities shall have original jurisdiction over all streets and highways located within their boundaries, except state roads . . . .
> (3) COUNTIES.—Counties shall have original jurisdiction over all streets and highways located within their boundaries, except all state roads and those streets and highways specified in subsection (2) . . . .

Section 316.008(1)(j), F. S., dealing with powers of local authorities, provides that local authorities, within their jurisdiction and reasonable exercise of the police power, will not be prevented from "[a]ltering or establishing speed limits within the provisions of [Ch. 316, F. S.]." *See* s. 316.182, F. S.

Section 316.182, F. S., establishes maximum municipal and county speed limits, allowing a municipality to alter the statutorily prescribed speed limits after an investigation indicating a need for reasonable change and determination that the change is reasonable and in conformity to criteria promulgated by the Department of Transportation, except no changes may be made on state highways or connecting links or extensions thereof. Likewise, the board of county commissioners may, after such an investigation and determination, set speed zones altering the statutorily established county speed limits. Neither the county or a municipality may establish or make any changes in speed limits on state highways, connecting links, or extensions thereof. Sections 316.006 and 316.181(2), F. S. *See also* AGO 075-205.

Traffic control signals and devices are required to be uniform throughout the state, and the Department of Transportation is required to adopt such uniform system and to compile and publish a manual of uniform traffic control devices defining such systems and minimum specifications therefor. Section 316.131, F. S. All official traffic control signals or official control devices purchased and installed by any public body must conform to such manual and specifications; s. 316.131(3). And provisions are made for periodic revisions "to meet state and local needs." Section 316.131(1).

The Legislature does specifically call for school board input into traffic control matters by s. 234.082, F. S., which reads:

> School boards, with the assistance of superintendents, school principals, teachers, bus drivers, parents, pupils, *the Department of Transportation, and local agencies and officials responsible for traffic safety, shall,* on an annual basis, conduct surveys and reports on those hazards on or near public sidewalks, streets, and highways which endanger the life or threaten the health or safety of pupils who walk or are transported regularly between their homes and the school in which they are enrolled. *The reports shall be submitted promptly in writing to the mayor or manager of the city, the board of county commissioners, or the Department of Transportation, according to the location of the hazard reported,* and, until such hazards are corrected, the school board shall take or cause to be taken such precautions as are necessary to safeguard pupils. . . . (Emphasis supplied.)

Upon receipt of such reports the county commission, the municipal official having proper authority, or the Department of Transportation, as the case may be, shall take such steps as are practicable to correct the hazards so reported or shall report to the school board that it is impracticable to make corrections necessary to overcome the reported hazards. Section 234.082, F. S.

School boards, while constitutionally created, are not constitutionally endowed with any part of the police power of the state with respect to the regulation of traffic and cannot take to themselves any such power. School boards are without inherent authority, but derive their powers solely from legislative enactments. Only those powers expressly or by necessary implication granted by statute may be exercised by school boards. White v. Crandon, 156 So.2d 303 (Fla. 1934); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); State *ex rel.* Greenberg v. Fla. State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed,* 300 So.2d 900; Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); Board of Public Instruction v. State *ex rel.* Allen, 219 So.2d 430 (Fla. 1969); AGO 075-148. None of the statutes referred to or cited in foregoing parts of this opinion nor any statute of which I am aware vests any authority in the school board or school superintendent to in any manner regulate traffic or to establish school zones or school zone speed limits; therefore school officials are not possessed with any such power.

In consideration of the foregoing, it seems clear that the Legislature empowers the Department of Transportation, chartered municipalities, and counties—but not county school officials—to establish school zones and school zone speed limits within their respective jurisdictions. *Cf.* AGO's 051-396 and 051-397. However, local authorities (counties and municipalities, s. 316.003(20), F. S.) may alter school zone speed limits within their jurisdiction upon complying with the statutory requirements set forth in s. 316.182, F. S. In the circumstances prescribed in s. 234.082, F. S., the school board is required to take or cause to be taken whatever precautions may be necessary to safeguard the pupils. Clearly, under the statutes which I have outlined and discussed above, taken with fundamental principles of statutory construction, the powers or duties in question reside with the Department of Transportation or the county or city having jurisdiction.

076-64—March 23, 1976

LAW ENFORCEMENT OFFICERS

EXPENDITURE OF ADDITIONAL $1 COURT COST FOR LAW ENFORCEMENT OFFICERS' TRAINING PROGRAM

To: Donald E. Fish, Director, Division of Standards and Training, Police Standards and Training Commission, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTIONS:

1. Is the expenditure of moneys collected by municipalities and counties pursuant to s. 943.25(5), F. S., limited to law enforcement training and educational purposes?
2. What fiscal procedures should be established to account for and distribute the moneys collected pursuant to s. 943.25(5), F. S.?

SUMMARY:

The proceeds of the additional $1 costs assessment imposed by a municipality or county pursuant to s. 943.25(5), F. S., may be expended only for law enforcement education for the respective law enforcement personnel.

The budgeting and appropriation of, and accounting for, the proceeds of such additional $1 costs assessment is not within the statutory authority or duties of the Division of Standards and Training or the Police Standards and Training Commission.

Subject to applicable provisions of law, charters, and ordinances relating to the budgeting, appropriation, and disbursement of, and accounting for, county and municipal funds, it is the prerogative and responsibility of the governing bodies of the respective counties and municipalities assessing such additional $1 costs to establish a method of handling and accounting for the moneys collected thereby.

AS TO QUESTION 1:

Section 943.25, F. S., provides generally for the establishment and supervision by the Division of Standards and Training of the Department of Criminal Law Enforcement of an advanced and highly specialized training program, to be approved by the Police Standards and Training Commission, for the training of law enforcement officers and support personnel in the prevention, investigation, detection, and identification of crime, and, upon request, the instruction of law enforcement agencies in these areas. The expenses of such program are funded by a $1 court cost assessed in state courts against every person convicted for violation of a state penal or criminal statute or municipal or county ordinance not related to the parking of vehicles and $1 from every bond estreature or forfeited bail bond related to such penal statutes or penal ordinances. All such costs collected are remitted to the state for deposit in the State Treasury to be credited and disbursed in the manner prescribed by s. 943.25(3), (7), and (8), F. S.

Section 943.25(5), F. S. (formerly s. 23.105, F. S. 1973), provides that:

> Municipalities and counties may assess an additional $1, as aforesaid, *for law enforcement education* expenditures for their respective law enforcement officers. (Emphasis supplied.)

In statutory construction, it has been held that statutes must be given their plain and obvious meaning. Maryland Casualty Company v. Sutherland, 169 So. 679 (Fla. 1936); Fixel v. Clevenger, 285 So.2d 687 (3 D.C.A. Fla., 1973). Moreover, it is a basic rule of statutory construction that the express mention of one thing is the exclusion of another. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); State *ex rel.* Shevin v. Indico Corp., 319 So.2d 173 (1 D.C.A. Fla., 1975); Marshall v. Hollywood, Inc., 224 So.2d 743, 750 (4 D.C.A. Fla., 1969). Applying these rules here, the plain and obvious meaning of s. 943.25(5), F. S., is that the moneys collected by a municipality or county pursuant thereto may be expended *only* on the one thing expressed therein, *i.e.*, "law enforcement education . . . for their respective law enforcement officers." *Cf.* AGO's 073-284 and 074-134, both of which at least imply that the moneys so collected should be expended only for law enforcement education purposes.

AS TO QUESTION 2:

The approval or disapproval of expenditures for, and the appropriation of moneys collected pursuant to s. 943.25(5), F. S., to, law enforcement education programs and purposes is the lawful duty and responsibility of the governing bodies of the affected

counties or municipalities. The budgeting and appropriation of, and accounting for, the proceeds of such moneys is not within the statutory duties of the Division of Standards and Training or the Police Standards and Training Commission, neither agency having authority to regulate in this area. *Cf.* State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974). However, it was stated in AGO 074-134 that, pursuant to certain provisions of Part IV, Ch. 23, F. S. 1973 (carried forward in substantially similar form as ss. 943.12, 943.14, 943.17, and 943.20, F. S.), local police training and education programs which are not exempted by s. 23.069(8) and (9), F. S. 1973 (now s. 943.14(7) and (8), F. S.), "should be submitted for approval in writing by the Police Standards Board" (now the Police Standards and Training Commission), such approval insuring that the moneys collected pursuant to s. 23.105, F. S. 1973 (now s. 943.25(5), F. S.), would not be expended for any unauthorized law enforcement education programs. *Cf.* AGO 073-284.

As to the appropriate fiscal procedures to be utilized to account for and distribute the moneys collected pursuant to s. 943.25(5), F. S., it is the prerogative and responsibility of the governing bodies of the municipalities and counties which assess the additional $1 to establish a method of handling such moneys. Of course, the method so established is governed by the fiscal and budgetary procedures required by law, applicable charter provisions, and ordinances. *See generally* Ch. 129, F. S.; s. 166.241, F. S., and Part III, Ch. 218, F. S.

076-65—March 23, 1976

BUREAU OF BLIND SERVICES

IDENTIFICATION CARD ISSUED TO BLIND PERSONS—STATUS AS LEGAL DOCUMENT

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTION:

Is a card issued to blind persons by the Bureau of Blind Services pursuant to s. 413.091, F. S., for identification purposes considered a legal document?

SUMMARY:

The identification card issued by the Bureau of Blind Services to applicants upon proof of blindness or partial sight, pursuant to s. 413.091, F. S., is intended to identify the bearer and operates to provide a means of identification of the individual in the same manner accorded by various private entities to individuals holding valid operators' licenses under the provisions of Ch. 322, F. S.

From statements contained in your letter comparing the identification card that the Bureau of Blind Services is authorized to issue with the nondriver identification card authorized to be issued by the Department of Highway Safety and Motor Vehicles pursuant to s. 322.051, F. S., I must assume that your use of the term "legal document" in your request concerning the status of identification cards for blind or visually handicapped individuals is with reference to equating that document's force and effect to that generally accorded a driver's license for purposes other than the operation of a motor vehicle upon the streets and highways of this state, as in instances where a driver's license is recognized by various private entities throughout the state as an "official" means of identification.

A prerequisite to the lawful operation of a motor vehicle upon the streets or highways of this state is that the operator thereof possess a valid driver's or chauffeur's license. Section 322.03, F. S. Nowhere within Ch. 322, F. S., is there expressed the legislative

intent that a driver's license be officially recognized for any purpose other than to evidence the fact that a holder of a valid driver's license may lawfully operate a motor vehicle upon the streets and highways of this state. While s. 322.14 requires that an operator's or chauffeur's license, when issued, bear a distinguishing number assigned the licensee, his full name, date of birth, residence address, a brief description of the licensee, and a space for his signature, these requirements cannot be read to expand the lawful effect of possessing such a license other than to facilitate the enforcement provisions of Ch. 322.

Commercial necessity has in recent times dictated the need for a reliable source of identification to facilitate the rising demand for credit transactions and check cashing, among other functions and services, that private enterprise furnishes as a convenience to the public. It is a generally acknowledged fact that many businesses and other entities in the private sector recognize a valid operator's license as a reliable source of personal identification. The significance and reliance that these various entities accord to a currently valid operator's license as a means of identification are entirely upon their own volition and whatever reliance given thereon is absent any sanction of the state other than the fact that the holder thereof is qualified to operate a motor vehicle upon the streets and highways of Florida.

Conscious of the significance placed upon drivers' licenses as a means of identification, the Legislature has recently adopted provisions whereby those individuals who are unable to acquire operators' licenses for one reason or another may apply to the designated agency for issuance of an identification card. Chapter 73-236, Laws of Florida, created s. 322.051, F. S., providing for the issuance of identification cards for persons not otherwise licensed under Ch. 322, F. S. In so doing, the Legislature recognized that the driver's license was the most commonly used and widespread form of identification and that a large segment of Florida's population which did not possess drivers' licenses might be inconvenienced and possibly discriminated against due to a lack of an easy and reliable source of identification. Chapter 73-236. However, s. 322.051(2), F. S., expressly provides that the card, when issued, shall bear the following caveat:

> "State of Florida"—"Identification Card, Not a Driver's License. Issued for identification purposes only"—"This card is provided solely for the purpose of establishing that the bearer described on the card was not the holder of a Florida driver's license as of the date of issuance of this card."

Similarly, the Legislature, in adopting Chapter 71-265, Laws of Florida, which created s. 413.091, F. S., recognized that Florida drivers' licenses are commonly used for personal identification for convenience in cashing checks, proof of age, etc., and that an individual prevented from obtaining an operator's license because of blindness or partial sight was subject to inconvenience and possible embarrassment. Chapter 71-265. As a solution to this situation, the Department of Health and Rehabilitative Services, through its Bureau of Blind Services, was authorized to issue identification cards at cost upon the application of, and submission of proof of blindness by, persons known to be blind or partially sighted. Section 413.091. (The blind services program functions of the Department of Health and Rehabilitative Services are transferred to the Department of Education effective April 1, 1976. *See* s. 33, Ch. 75-48, Laws of Florida and AGO 075-300.) *Cf.* s. 832.07(2), F. S., as to worthless checks.

It is the intent of the Legislature, as embodied in both Chs. 71-265 and 73-236, Laws of Florida, that the State of Florida provide a means whereby a person who is unable to obtain an operator's license under the provisions of Ch. 322, F. S., has a procedure available whereby an identification card indicating either nonissuance of an operator's license or blindness or partial sight of the bearer would identify the individual in lieu of a valid driver's license for those purposes for which various private entities utilize or recognize an operator's license.

076-66—March 24, 1976

ELECTION CODE

"TRUE" NAME—DETERMINATION FOR INITIAL VOTER REGISTRATION

To: Bruce A. Smathers, Secretary of State, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

May a person whose name has been changed because of "marriage or other legal process," initially register to vote in his or her birth name in view of the statutory provisions which require that an elector take certain action when his or her name changes?

SUMMARY:

A person must initially register to vote in his or her "true" name. The "true" name of a person whose name has been changed by judicial decree is the name decreed by the court and is the name which must be used upon initial registration as an elector. The "true" name of a married woman who chooses to retain her maiden or birth surname and who does not adopt her husband's surname and uses and is known by her maiden name is her given name and her birth surname. The "true" name of a married woman who follows the existing custom and tradition and upon marriage adopts and thereafter uses and is known by her husband's surname is, until otherwise determined by the courts or the enactment of appropriate controlling legislation, her given name and her husband's surname for purposes of original voter registration.

Section 97.103, F. S., makes it the duty of an elector to advise the supervisor of elections of "any changes in his record with reference to name by marriage or other legal process." Section 97.091(2), F. S., requires that an elector whose name changes "because of marriage or other legal process" execute a specified affidavit in order to remain eligible to vote. It should be noted, however, that these provisions relate only to changes in the names of persons who are already registered electors. *Cf.* AGO 074-348.

The question of what name a person may or must use at the time of his or her original registration as a voter requires an examination of the statutory provisions relating to initial registration. Such provisions are discussed at length in AGO 074-348, where I concluded, in summary:

> A person may not register as an elector under an assumed name; in registering as an elector the individual must be identified by his or her "true" name, *i.e.*, one's given name and family surname.

Where one's original given name and/or family surname have been changed by legal process—as in the case of a judicial decree in an adoption, dissolution of marriage, or change of name proceeding—such new name decreed by the court becomes one's "true" name and is the name which must be used for purposes of an initial registration as an elector.

With respect to the effect of marriage on one's "true" name, in Davis v. Roos, ... So.2d ..... (1 D.C.A. Fla., Case No. X-369, decided February 3, 1976), the court recently concluded:

> . . . [A]fter reviewing the extensive authorities on the subject, we conclude that the common law of England on July 4, 1776, did not by operation of law engraft the husband's surname upon the wife. In Florida there is no statute or judicial decision requiring a woman to take her husband's surname upon marriage. Although it is the general custom for a woman to change her name upon marriage to that of her husband, the law does not compel her to do so.

Accordingly, upon the authority of that decision, where a married woman chooses to retain her maiden or birth name, does not adopt her husband's surname, and in fact uses and is known by her maiden name, the law does *not* operate to change her original surname to that of her husband and her "true" name for purposes of voter registration in those circumstances would be unchanged by the change in her marital status.

As recognized by the court in the Davis case, *supra*, "it is the general custom for a woman to change her name upon marriage to that of her husband." Such custom is so well recognized and deeply ingrained in our custom and tradition in Florida that I am of the opinion, until otherwise determined by the courts or the enactment of appropriate controlling legislation, that when a woman follows the existing general custom and tradition and upon marriage adopts and thereafter is known by her husband's surname, his surname becomes and is her "true" surname for purposes of original voter registration.

076-67—March 24, 1976

TORTS

FIREFIGHTER NOT LIABLE FOR DAMAGE TO PERSONAL PROPERTY CAUSED WHILE ATTEMPTING TO EXTINGUISH FIRE

To: Philip F. Ashler, State Treasurer and Fire Marshal, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Is a firefighter, either paid or volunteer, personally liable in tort for damage to, or destruction of, private property (doors, windows, furniture, etc.) intentionally caused by him during the course of his attempts to contain and extinguish a fire?

SUMMARY:

Under the privilege of public necessity, a firefighter is not personally liable for damage to, or destruction of, private property intentionally caused by him during his attempts to contain and extinguish a fire, provided that such damage or destruction is, or the affected firefighter reasonably believes it to be, necessary in order to prevent or mitigate the public injury which might otherwise result.

A consideration of the circumstances in which a public entity (state, county, municipality, or special district) would be liable to indemnify the person whose property has been damaged or destroyed by a firefighter employed by that entity is outside the scope of this opinion. *Cf.* State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959); Anno., 14 A.L.R.2d 73 (1950); *also cf.* City of Miami v. Simpson, 172 So.2d 435 (Fla. 1965); City of Miami v. Albro, 120 So.2d 23, 26 (3 D.C.A. Fla., 1960), holding that, when exercising its police power for the protection of the public, a municipality is not liable in damages for every mistake of judgment made by its officers; s. 768.28, F. S., and AGO 076-41.

According to Restatement (Second) of Torts s. 196 (1965),

> One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting public disaster.

This public necessity privilege to enter land in the possession of another—which may be exercised in order to prevent or mitigate the effects of an impending disaster such as a conflagration, flood, earthquake, or pestilence—carries with it the privilege to tear down or destroy buildings and to perform other acts reasonably necessary to effectuate the purpose for which the privilege exists. Restatement, *supra*, comment *f* at 354; *see also* Restatement, *supra*, s. 262, stating a similar public necessity privilege for acts which

would otherwise be a trespass to a chattel or conversion. Moreover, this public necessity privilege is not confined to an official representative of the public but is equally applicable to afford an effective defense to a private citizen so long as he acts for the purpose of the protection of the public against impending disaster. Restatement, *supra*, comment *b* at 494. However, the privilege must be exercised in a reasonable manner, and the actor must use reasonable care to avoid doing unnecessary harm to persons or things. Restatement, *supra*, comment *e* at 354. *See generally* 75 Am. Jur.2d *Trespass* s. 42; and Bowditch v. Boston, 101 U.S. 16, 18 (1879); *cf.* City of Miami v. Simpson, *supra*, at 438, stating that the standard of care imposed upon municipal police officers and other city employees should give due regard to the type of duty which is required to be performed in the public interest.

Applying the foregoing rule to the instant situation, it would appear that a firefighter will not be held personally liable in tort for damage to, or destruction of, private property intentionally caused by him during the course of his attempts to contain and extinguish a fire, provided that such damage or destruction is necessary, or reasonably appears to be necessary, in order to prevent or mitigate the public injury which might otherwise result.

076-68—March 24, 1976

PAROLE AND PROBATION COMMISSION

DUTIES UPON SUPREME COURT RESOLUTION BETWEEN STATUTE AND RULE ON CONSECUTIVE VERSUS CONCURRENT SENTENCING

To: Ray E. Howard, Chairman, Florida Parole and Probation Commission, Tallahassee

Prepared by: Wallace E. Allbritton, Assistant Attorney General

QUESTIONS:

1. Should the Florida Parole and Probation Commission issue amended orders of revocation in all cases where the original order specified the revocation to be effective at some future date?
2. Should the commission, in the setting of a parole expiration date, be concerned with the sentence structure of inmates serving sentences where the trial court was silent as to the cor currency or consecutiveness of the sentences?
3. If question 2 is answered in the affirmative, in what way should the commission treat such sentences if the Department of Offender Rehabilitation has not reflected a sentence structure consistent with s. 921.16, F. S.?
4. Should the *Benyard* resolution of the conflict between s. 921.16, F. S., and Rule 3.722, Florida Rules of Criminal Procedure, be given retroactive application?

SUMMARY:

In the light of Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975), giving retroactive application to Brumit v. Wainwright, 290 So.2d 39 (Fla. 1974), the Florida Parole and Probation Commission should issue amended orders of revocation in all cases where the original order specified the revocation to be effective at some future date. The commission should not be concerned with the sentence structure of inmates serving sentences where the trial court was silent as to the concurrency or consecutiveness of the sentences. The decision in Benyard v. Wainwright, *supra*, invalidating Rule 3.722, CrPR, should not be viewed by the commission as having retroactive application in its determination of parole expiration dates.

STATEMENT OF FACTS:

The questions you present are properly brought into focus by the conflict between s. 921.16, F. S. 1973, and Rule 3.722, Florida Rules of Criminal Procedure, adopted February 1, 1973. This conflict was resolved by the Florida Supreme Court in Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975), as follows:

> We recognize direct conflict exists between Rule of Criminal Procedure 3.722, adopted February 1, 1973, and Section 921.16, Florida Statutes (1973). Our Rule of Criminal Procedure 3.722 directs that sentences are concurrent unless affirmatively designated as consecutive by the sentencing court. In our opinion, the statute must prevail over our rule because the subject is substantive law.

AS TO QUESTION 1:

This question is answered in the affirmative. In the light of Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975), giving retroactive application to Brumit v. Wainwright, 290 So.2d 39 (Fla. 1974), you should issue amended orders of revocation in all cases where the original order specified the revocation to be effective at some future date. This will aid the Department of Offender Rehabilitation in determining that no inmate has been denied proper credit for each day spent in jail subsequent to his initial conviction and sentence.

It is appreciated that the volume of such amended or corrected orders could be enormous. By way of suggestion, it would seem both proper and practical for the commission to amend or correct its revocation orders in a manner similar to the method used in the granting of a parole. In that instance, while the commission enters an order bearing a majority of signatures, the order simply requires the director to issue a certificate of parole in keeping with the terms of the order. I see no reason why the commission should not consider a similar procedure for the issuance of its amended or corrected orders of revocation.

AS TO QUESTION 2:

This question is answered in the negative. This is so because to do otherwise would assume a retroactive application of the *Benyard* resolution of the conflict between s. 921.16, F. S., and Rule 3.722, Florida Rules of Criminal Procedure. In my opinion, to do so at this time would be unwarranted.

AS TO QUESTION 3:

Since question 2 was answered in the negative, this question does not require an answer.

AS TO QUESTION 4:

This question is answered in the negative. Generally speaking, changes in the law, whether substantive or procedural, usually may be accorded prospective application only. This would be particularly true in a criminal case when the retroactive effect of a decision would cause a defendant to lose a vested right previously lawfully acquired. Application of McNeer, 343 P.2d 304 (Cal. App. 3 1959); and State v. Longino, 67 So. 902 (Miss. 1915).

While I am aware of legal precedents holding that the constitutional prohibition against ex post facto laws is directed against legislative action only and does not reach erroneous or inconsistent decisions by courts, Frank v. Mangrum, 237 U.S. 309, 344 (1915), I cannot escape the conclusion that to give *Benyard* a retroactive application would come within the spirit of the constitutional prohibition. This thought is buttressed by the fact that the court said nothing to indicate that its decision should be given retroactive application nor was it constitutionally compelled to do so. Wainwright v. Stone, 414 U.S. 21 (1973). I consider this to be of controlling importance.

The decision in *Benyard* invalidating Rule 3.722, *supra*, had the effect of breathing new life into s. 921.16, *supra*. In the absence of a clear indication to the contrary, I am convinced that the statute should not be given a retroactive application because to do so might render it unconstitutional. *In re* Seven Barrels of Wine, 83 So. 627 (Fla. 1920). *Cf.*

United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973); and United States v. B & H Dist. Corp., 375 F. Supp. 136 (D.C. Wis. 1974). It is believed that the court's silence on this point is a tacit recognition of the constitutional impediment involved.

In my opinion, the decisions of the Florida Supreme Court construing statutes and rules are as much a part of the law of this state as legislative enactments. Statutory or judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct, and such circumstances underpin the modern decisions recognizing a doctrine of nonretroactivity. Lemon v. Kurtzman, 411 U.S. 192 (1973).

The definition of an ex post facto law generally accepted in this country is stated in Higginbotham v. State, 101 So. 233, 235 (Fla. 1924), as follows:

> One which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offense or its consequences alters the situation of a party to his disadvantage.

I think it is reasonable to say that an inmate has an interest in the concurrent sentences he is now serving. Thus, to deprive him of this right or interest by making his concurrent sentences to run consecutively would increase his punishment and unmistakably alter the situation to his disadvantage. In this context, I do not use the term "right or interest" in a narrow or technical sense but rather as implying a vested interest which it is right and equitable that the government should recognize and protect and of which the individual could not be deprived arbitrarily without injustice. Board of Com'rs of Everglades Drainage Dist. v. Forbes Pioneer Boat Line, 86 So. 199 (Fla. 1920), *reversed on other grounds* 258 U.S. 338. I cannot believe the court intended that such an untoward result flow from its decision in *Benyard*.

Therefore, in your determination of parole expiration dates, you should not view *Benyard*'s resolution of the statute-rule conflict as being retroactive. This issue is properly one for the court, and you should await its decision rather than assume that *Benyard* is to be applied retroactively, an assumption for which I can find no support in the opinion of the court.

076-69—March 31, 1976

APPRENTICES

MAXIMUM RATIO OF APPRENTICES TO JOURNEYMEN

To: George Grosse, Representative, 15th District, Jacksonville

Prepared by: Staff

QUESTION:

> **What is the maximum ratio of apprentices to journeymen which may be maintained in an apprenticeship program registered with the Bureau of Apprenticeship under Ch. 446, F. S., and rules and regulations promulgated thereunder?**

SUMMARY:

> **The maximum ratio of apprentices to journeymen is determined by Rule 8C-16.05(2)(g), F.A.C., to be one apprentice for every three journeymen, and such rule should be given effect until declared otherwise by a court of competent jurisdiction.**

The public policy of the State of Florida has been expressed by the Legislature to include providing educational opportunities and training for trades and occupations which have traditionally involved apprenticeship programs. Section 446.011, F. S. To this extent, such apprenticeship programs are to be encouraged and are found to serve a valid

public purpose as expressed through the enactment of Ch. 446, F. S., as amended by Ch. 75-287, Laws of Florida.

Section 446.041, F. S., establishes within the Division of Labor of the Department of Commerce a Bureau of Apprenticeship which has the duty to supervise all apprenticeship programs registered with the bureau by administering laws relating to apprenticeship and labor standards and by registering apprenticeship programs which meet the standards developed by the Department of Commerce. Section 446.041(2). The bureau also conducts studies to determine training standards for apprenticeship programs and, based upon those studies, the Department of Commerce establishes "uniform apprenticeship standards which shall not be limited to traditional training standards or traditional apprenticeable occupations." Section 446.041(3).

Section 446.101, F. S., as amended, deals specifically with ratios of apprentices to journeymen, to which your questions refer, on state, county, or municipal contracts. In adopting and authorizing such ratios, the Legislature expressed its intent to "promote the furtherance of labor standards necessary to safeguard the welfare of apprentices or trainees." Section 446.101(1). An "apprentice" is defined to mean a person registered in an apprenticeship program registered with the Bureau of Apprenticeship and "journeyman" is defined to mean a person working in an apprenticeable occupation who has successfully completed a registered apprenticeship program or has demonstrated proficiency in all phases of that occupation. Section 446.101(2)(d) and (h).

In any state, county, or municipal contract in excess of $25,000, except contracts for the construction, repair, or maintenance of public roads or highways, the contractor must agree, among other things, that "he will hire for the performance of the contract a number of apprentices in each occupation which bears to the average number of the journeymen in that occupation to be employed in the performance of the contract, the ratio of at least 1 apprentice or trainee to every 5 journeymen." Section 446.101(3)(a)1., F. S. In addition, on-the-job training programs authorized for persons other than apprentices under s. 446.091, F. S., shall only be established which meet and conform to this ratio requirement. Section 446.101(3)(a)3., F. S. Thus, a minimum ratio is clearly established calling for at least one apprentice for every five journeymen. Your question, however, deals with maximum ratios which may have been established.

Pursuant to its authority concerning the establishment of training standards for apprenticeship programs, discussed above, the Department of Commerce has adopted Rule 8C-16.05(2)(g), F.A.C. [formerly 8AA-1.05(2)(g), F.A.C.], which reads:

> The ratio of apprentices to journeymen (shall be) consistent with proper supervision, training, and continuity of employment or applicable provisions in collective bargaining agreements, but in a ratio of not more than one apprentice to the employer in each apprenticeable occupation, *and one apprentice for each three journeymen thereafter*; (Emphasis supplied.)

Thus, while s. 446.101, *supra*, requires at least one apprentice for every five journeymen as a minimum ratio, there is no maximum ratio established by statute. Yet as a means of establishing appropriate training standards for apprenticeship programs which will provide for "proper supervision," the Department of Commerce has established a maximum ratio of one apprentice to every three journeymen by rule.

It is a well-accepted rule of law that a valid rule or regulation of an administrative agency has the force and effect of law. McSween v. State Live Stock Sanitary Board, 122 So. 239 (Fla. 1929). If an administrative rule is within the scope and intent of an agency's authority conferred by statute and is a reasonable exercise of that agency's duties and powers, such rule carries the force and effect of a state statute. Florida Livestock Board v. Gladden, 76 So.2d 291 (Fla. 1954).

Nevertheless, in addressing the instant question it should be pointed out that the former Secretary of the Department of Commerce directed a similar question to this office in August, 1974, prior to the revision of Rule 8C-16.05(2)(g), F.A.C. [formerly 8AA-1.05(2)(g), F.A.C.], in September 1974. While our research at that time indicated there was doubtful statutory authority for the adoption of a rule revision establishing a maximum ratio of apprentices to journeymen, the opinion request was withdrawn prior to the issuance of a formal opinion on this matter. *See* opinion request number 8355, dated August 12, 1974.

Further, it has been previously stated in AGO 073-489 that an administrative agency of the state must have *specific* statutory authority in order to promulgate rules and regulations. The Florida Supreme Court has held that:

> Administrative authorities are creatures of statute and have only such powers as the statute confers on them. Their powers must be exercised in accordance with the statute bestowing such powers, and they can act only in the mode prescribed by statute. [Edgerton v. International Company, Inc., 89 So.2d 488 (Fla. 1956).]

Thus, the fact that there is no *specific* statutory authorization for the establishment of maximum ratios would appear to raise serious questions concerning the validity of Rule 8C-16.05(2)(g), F.A.C., since it does not appear that specific statutory authority exists for the adoption of such rule. However, until declared otherwise by a court of competent jurisdiction, on the basis of the points noted above and in answer to the instant question, Rule 8C-16.05(2)(g), F.A.C., does establish a maximum ratio of one apprentice for each three journeymen and this rule should be given effect.

A definitive response to the other question posed in your letter will soon be forthcoming, following additional research and consideration.

076-70—April 5, 1976

PUBLIC RECORDS

EXPUNCTION OF CRIMINAL RECORDS IN THE POSSESSION OF STATE ATTORNEYS UPON COURT ORDER

To: Abbott M. Herring, State Attorney, Titusville

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does s. 901.33, F. S., which requires expunction of all records related to certain arrests for, and charges, trials, and dismissals of charges of, certain violations of law or ordinance upon order of the court apply to records in the custody of state attorneys?

SUMMARY:

Section 901.33, F. S., which requires the expunction of all records related to certain arrests for, and charges, trials, and dismissals of charges of, certain violations of law or ordinance upon order of the court is applicable to records in the custody of state attorneys.

Section 901.33, F. S., provides in pertinent part:

> If a person who has never previously been convicted of a criminal offense or municipal ordinance violation is charged with a violation of a municipal ordinance or a felony or misdemeanor, but is acquitted or released without being adjudicated guilty, he may file a motion with the court wherein the charge was brought to expunge the record of arrest from the official records of the arresting authority . . . The court shall issue an order to expunge all official records relating to such arrest, indictment or information, trial, and dismissal or discharge. . . . The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. . . .

In AGO 075-29, I concluded that the provisions of s. 901.33, F. S., clearly mandate and require the physical destruction or annihilation of all records suggesting that a person who meets the tests of s. 901.33 has been arrested or charged with a criminal offense or municipal ordinance violation. Further, it was stated that the retention of evidence or statements relating to a person whose records are to be expunged would not be sufficient compliance with an order to expunge even though all reference to the person in question is removed and the paper and documents are retained in a safe and secure place. That

opinion also suggests that when an order to expunge directs that all records relating to a particular person in a given designated proceeding are to be expunged, all such records must be physically destroyed, and if there should be any doubt as to whether certain records come within the meaning and intent of the order to expunge, then clarification should be requested from the judge who issued the order. The same conclusions are equally applicable to any records in the custody *or* possession of the state attorney in any way related to or supplied by the arresting authority (and its records) or relating to the indictment of a person coming within the terms of s. 901.33 or information made or issued against such person or the trial of such person and the dismissal or discharge of such persons in the circumstances and on the conditions prescribed in s. 901.33.

The "records" referred to in s. 901.33, *supra*, are governed exclusively by the provisions of that act and the order of the court irrespective of whether such records are "public records" within or exempted from Ch. 119, F. S., and, accordingly, the court order issued pursuant to s. 901.33 must be obeyed. In effect, s. 901.33 constitutes a statutory exception from s. 119.041, F. S., which regulates the destruction of public records. *Accord*: Attorney General Opinion 075-29.

Therefore, neither the provisions of Ch. 119, F. S., and exemptions therefrom, the "work-product" doctrine, nor the so-called "police secrets rule" has anything to do with and does not operate in any way to intercede with, inhibit the operative effect of, or bar, halt, or interrupt s. 901.33, F. S., in its legal effect and efficacy. Section 901.33 is a legislative grant of jurisdiction to the judiciary and confers the rights designated therein on certain persons in the circumstances and subject to the conditions prescribed in s. 901.33, F. S. Except insofar as s. 901.33 may itself limit or restrict, no other limitation or restriction exists and nothing else may restrain the power of the court to order such records expunged—except, of course, a higher tribunal.

Your question is, therefore, answered in the affirmative.

076-71—April 5, 1976

COUNTIES

SERVICES WHICH MUST BE PROVIDED TO STATE ATTORNEYS' AND PUBLIC DEFENDERS' OFFICES

To: Ralph W. White, Clerk, Monroe County Commission, Key West

Prepared by: Staff

QUESTIONS:

1. Is AGO 073-329, which ruled that a county is not required to pay for long distance calls and monthly service charges incurred by the public defender in the operation of his office, equally applicable to the state attorney's office?

2. Are transportation services of the state attorney's and public defender's office to be paid for by the county?

SUMMARY:

Under ss. 27.34 and 27.54, F. S., Ch. 75-280, Laws of Florida, and a recent judicial decision, counties are statutorily responsible for providing all "telephone services" to the state attorneys and public defenders. Any "operating capital outlay items" presently being provided by a county to a state attorney or public defender should continue to be provided by the county. Under ss. 27.34 and 27.54 and Ch. 75-280, state funds should be used to pay all costs of transportation services for the state attorney and public defender of Monroe County except for those "centralized county services" provided in fiscal year 1973-1974 by the county to all units of county government for which the costs of the services were not prorated.

AS TO QUESTION 1:

In AGO 073-329, I was called upon to determine what was contemplated by the use of the phrase "telephone services" as used in s. 27.54, F. S. The statute unequivocally states that the county shall not appropriate or contribute to the "operation" of the public defender's office. Section 27.54(2). Another provision, however, states that the county shall provide the public defender with, among other things, "telephone services." Section 27.54(3). (Substantially identical provisions are contained in s. 27.34, relating to state attorneys.) As the meaning of the phrase was in doubt due to the apparent inconsistency, I examined the legislative comments in the letter of intent appended to appropriations for the several public defenders and state attorneys in the 1973 General Appropriations Act, Ch. 73-335, Laws of Florida. While the statement of intent appended to the 1973 act could not, of course, be given effect in the face of clear and unambiguous language in a statute to the contrary, it was proper to consider it in resolving the ambiguities in the act as finally adopted. Attorney General Opinion 075-257. *Accord*: Attorney General Opinion 073-330A, in which ambiguities in the 1973 county officers' salary act were resolved "in accordance with the legislative intent as shown by the legislative debates and reports." The statement of intent clarified the nonoperational services that may be provided by the county to public defenders and state attorneys under ss. 27.34(2) and 27.54(3); and I ruled in AGO 073-329 that:

> The cost of long distance calls and the monthly service charge for telephone service would appear to be "operation" costs that are not properly chargeable to the county. Thus, pending legislative or judicial clarification, only the installation costs of telephone service—or the cost of connecting with a Central PBX system—should be paid by the county.

The legislative intent in this respect, as interpreted in AGO 073-329, was, in fact, confirmed by the 1974 and 1975 General Appropriations Acts, Chs. 74-300 and 75-280, Laws of Florida. A proviso incorporated in each of these acts following the line item appropriations for state attorneys and public defenders reads as follows:

> Provided, however, office space, and related expenses for custodial services and utilities shall continue to be provided by the counties as prescribed by section 27.34(2), [27.54(3)] F. S. Any operating capital outlay items now provided by county to the state attorneys [and public defenders] shall continue to be provided. Notwithstanding section 27.34(2), [27.54(3)] F. S., *only centralized county services as provided in FY 73-74 to all units of county governments for which cost of services are not prorated may be continued.* (Emphasis supplied.)

It has long been settled that "reasonable and related conditions upon the same subject may be placed upon expenditures in an appropriation bill." Department of Administration v. Horne, 269 So.2d 659, 661 (Fla. 1972). While the proviso in question speaks in terms of the expenditure of county funds, it operates in practical effect as a qualification of, or a limitation upon, the use of state funds which the Legislature in its wisdom and sole discretion (subject, of course, to any constitutional restrictions or mandates) may deem expedient. *See* State *ex rel.* King v. Lee, 153 So. 859 (Fla. 1935). And, as in the case of any other law, it is presumptively valid, Evans v. Hillsborough County, 186 So. 193 (Fla. 1938); *cf.* Village of North Palm Beach v. Mason, 167 So.2d 721 (Fla. 1964).

While the term "service" would include the providing of telephone service, *see* State v. Southern Telephone & Construction Co., 61 So. 506 (Fla. 1913), plainly, long distance calls and monthly telephone service charges incurred by a state attorney or public defender are not "centralized county services" provided to all units of county government for which cost of services are not prorated. A county service is one provided by the county. "Centralize" means "to bring under one control, esp. in government." The *Random House Dictionary of the English Language* (unabridged 1973). In AGO 073-329 I concluded that a "centralized county service" would include telephone service that was under the control of and provided by the county and would not include long distance calls and monthly telephone service charges incurred by the state attorney and public defender in the day-to-day operation of their offices.

Sections 27.34 and 27.54, *supra*, have not been amended since AGO 073-329 was rendered. The interpretation made therein of s. 27.54 (which is equally applicable to the

supplying of telephone services to a state attorney under identical provisions of law) was rejected in Schwarz v. Glucker, No. 73-607-CA, 19th Jud. Cir., rendered January 9, 1974. One of the questions before that court was what was contemplated by the term "telephone services" as used in s. 27.54(3). (This was substantially the same question which I answered in AGO 073-329, discussed above.) The court concluded that the financial obligation was statutorily placed upon the county:

> 1. The Defendant counties must pay all bills for office space, utilities, telephone services, and custodial services for the offices of the Public Defender, which bills have accrued since July 1, 1973, and current bills as they shall continue to become due within the amounts previously budgeted. If no funds have been budgeted, a budget therefore shall be established from other funds available for this purpose, until such time as said items and services are provided by the said Defendant counties to the Public Defender in kind.
> 2. The telephone services mentioned in the above paragraph shall include all costs of telephone service, installation, monthly charges and long distance telephone calls.

Thus, until judicially or legislatively declared otherwise, I am compelled to adhere to this judicial decision requiring counties to pay for all telephone services of the public defenders and state attorneys.

AS TO QUESTION 2:

It should be noted at the outset that s. 27.54(3), F. S., does not authorize or require the providing of transportation services to the public defenders. The maxim *expressio unius est exclusio alterius* is applicable and would limit the services that shall be provided by the county to the public defender to those services specifically mentioned. Thus, this opinion is limited to the providing of such services to state attorneys under s. 27.34(2), *supra*.

In ordinary usage, the term "services" has a rather broad and general meaning. Skrivanick v. Davis, 186 P.2d 364 (1974). In that broad sense, it means any act performed for the benefit of another under some arrangement or agreement whereby such act was to be performed. New Jersey Assoc. of Ind. Ins. Agents v. Hospital Service Plan of New Jersey, 320 A.2d 504 (1974). The more limited definition of "services" applicable here is "the supplying or a supplier of public communication and *transportation*: telephone service, bus service." (Emphasis supplied.) The *Random House Dictionary of the English Language* (unabridged 1973). Thus, the term "service" includes transportation services. As it relates to the state attorney, he should continue to be provided with any "centralized county transportation service" that was provided in fiscal year 1973-1974 to all units of county government for which cost of services was not prorated. Apparently, according to your letter, the state attorney was not provided with any transportation services by the county in the fiscal year 1973-1974; thus, transportation expenses of the state attorney's office should be included in his annual budget of estimated operational expense submitted to the state Department of Administration in accordance with s. 27.33(1), F. S., except for any "operating capital outlay items" now provided by the county to the state attorney or public defender. *Accord*: Attorney General Opinions 074-74 and 073-458.

076-72—April 5, 1976

COUNTIES

STATE ATTORNEYS' AND PUBLIC DEFENDERS' COSTS AND EXPENSES WHICH MUST BE PAID BY A COUNTY

To: D. O. Oxley, Clerk, Circuit Court, Fernandina Beach

Prepared by: Staff

QUESTIONS:

1. Should a county pay for monthly telephone service and long distance charges for the benefit of the state attorney and public defender?
2. Should a county pay court reporter charges for the purpose of sworn statements of various prospective witnesses prior to or after information or indictment has been filed?
3. Should a county pay for various forms such as affidavits used in line with the input of the state attorney and public defender?

SUMMARY:

Pursuant to ss. 27.34(2) and 27.54(3), F. S., the county shall provide the state attorney and public defender with all telephone services, which shall include the costs of installation, monthly charges, and long distance calls.

When a defendant is discharged or adjudged insolvent pursuant to ss. 939.06, 939.07, and 939.15, F. S., the county should pay all costs of prosecution, including preindictment, preinformation, and deposition costs, when it is determined by the court that such served a "useful purpose."

AS TO QUESTION 1:

In AGO 073-329, this office ruled that "pending legislative or judicial clarification only the installation costs of telephone service—or the cost of connecting with a central PBX system—should be paid by the county." As discussed in AGO 076-71 judicial clarification was forthcoming. In Schwarz v. Glucker, No. 73-607-CA, 19th Jud. Cir., rendered January 9, 1974, the circuit court ruled that "telephone services," as contemplated in ss. 27.34(2) and 27.54(3), F. S., "shall include all costs of telephone service, installation, monthly charges and long distance telephone calls." As concluded in AGO 076-71:

> Thus, until judicially or legislatively declared otherwise, I am compelled to adhere to this judicial decision requiring counties to pay for all telephone services of the public defenders and state attorneys.

Your first question is answered in the affirmative.

AS TO QUESTION 2:

This office has previously ruled that pursuant to ss. 939.07 and 939.15, F. S., the county was only responsible for the expenses incurred after the filing of an information or finding of an indictment. *See* AGO's 075-297, 075-271, 074-301, 072-39, 071-26, and 058-313. Similarly, this office ruled in AGO 075-271 that the expense of obtaining a copy of a deposition of a state witness taken by the defendant is not a proper court cost unless actually introduced into evidence. An identical determination was made with regard to the cost of discovery by the state attorney pursuant to Rule 3.220, Fla. CrPR. To the extent of any conflict, the above opinions are modified or overruled as hereinbelow provided.

Pursuant to s. 939.15, F. S., when a defendant is adjudged insolvent or discharged, the *costs allowed by law* shall be paid by the county where the crime was committed. In 1975 the First and Second District Courts of Appeal adopted the "useful purpose" test in determining what costs are properly taxable costs in criminal actions. Powell v. State, 314 So.2d 789 (2 D.C.A. Fla., 1975); Dinauer v. State, 317 So.2d 792 (1 D.C.A. Fla., 1975). The useful purpose test had been in effect for a number of years in regard to civil costs. *See* Lockwood v. Test, 160 So.2d 142 (2 D.C.A. Fla., 1964); Buyer Finance Corp. v. Oliveros, 196 So.2d 451 (3 D.C.A. Fla., 1967); and Miller Yacht Sales, Inc. v. Scott, 311 So.2d 762 (4 D.C.A. Fla., 1975).

The rationale for the adoption of the "useful purpose" test was clearly stated in Miller Yacht Sales, Inc. v. Scott, *supra*:

> No lawyer worth his salt proceeds to trial today without determining in

> advance the strength and weakness of his adversary's case via the discovery process. Because the taking of depositions can be of utmost importance, the test for recovering the cost of such taking should not be whether the depositions are offered into evidence or are used extensively in impeachment of witnesses; rather the test should be . . . whether the taking of the depositions in question served a useful purpose. This test will foster the reasonable and judicious use of the discovery process by denying an allowance of costs for excessive use of that process.

The determination as to what constitutes a "useful purpose" is solely within the discretion of the trial judge. Lockwood v. Test, *supra*; Miller Yacht Sales, Inc. v. Scott, *supra*; *cf.* Powell v. State, *supra*.

Therefore, when a defendant is discharged or adjudged insolvent, the county should pay all costs of prosecution, including preindictment, preinformation, and deposition costs when it is determined by the court that such served a "useful purpose."

This opinion should not be construed to require the county to pay the expenses of an investigation when no indictment or information is subsequently issued.

Your second question is answered accordingly, and the reasoning and conclusion are equally applicable to various forms used by the state attorney and public defender; therefore, your third question is answered accordingly.

076-73—April 6, 1976

LEGISLATURE

CREATION OF SPECIAL FIRE PROTECTION AND AMBULANCE SERVICE DISTRICT NOT PROHIBITED

To: Jon C. Thomas, Senator, 30th District, Fort Lauderdale

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Can the Florida Legislature, by a special act, create a special district to provide fire protection and ancillary emergency services, such as ambulance service, to serve a populated but unincorporated area of a noncharter county in view of s. 163.633, F. S.?

SUMMARY:

Section 163.633, F. S., does not prohibit the enactment of a special act creating a special district to provide fire protection and ancillary emergency services, such as ambulance services, to serve a populated but unincorporated area of a noncharter county.

Section 163.633, F. S., provides:

> Pursuant to s. 11(a)(21), Art. III, of the State Constitution, the Legislature hereby prohibits special laws pertaining to the future creation of independent special districts for any of the purposes set forth in this act.

The cited provision of the State Constitution prohibits the enactment of special laws or general laws of local application pertaining to "any subject when prohibited by general law passed by a three-fifths vote of the membership of each house." Chapter 75-204, Laws of Florida, which created s. 163.633, F. S., passed both houses of the Legislature by such three-fifths margin and, thus, by operation of s. 11(a)(21), Art. III of our State Constitution, there presently exists a prohibition against the enactment of a special law "pertaining to the future creation of independent special districts *for any of the purposes set forth in this act.*" (Emphasis supplied.)

As you will note upon examination of the language italicized above, the prohibition does not encompass the creation of all independent special districts, but only the creation of those which are for "the purposes set forth in this act." Section 2, Ch. 75-204, Laws of Florida. Such purposes are found at s. 163.603(1), F. S. which states, in pertinent part:

> (1) This act shall constitute the sole authorization for the future establishment of independent special districts *having the power to provide the capital improvements for sewer, road, water management and supply, solid waste, and erosion control systems and community facilities for development of lands*, except for independent special districts and municipal service taxing and benefit units established pursuant to chapters 125, 153, 163, and 298 and s. 1, Art. VIII of the State Constitution. . . . (Emphasis supplied.)

Also see the definitions at subsections (11), (12), and (13) of s. 163.604, F. S. It is clear from the foregoing that the purposes for which independent special districts may be established under Part V of Ch. 163, F. S., do not include the providing of fire protection and/or ambulance service. Thus, s. 163.633 does not prohibit the enactment of a special act to create a special district for the purpose of providing fire protection and ancillary emergency services, such as ambulance service, to serve a populated but unincorporated area of a noncharter county. It should be noted, parenthetically, that any special district created by special law must have the tax millage authorized by that law approved by vote of the electors pursuant to s. 9(b), Art. VII of our State Constitution.

076-74—April 6, 1976

ELECTIONS

VOTER NOT PROHIBITED FROM WEARING CAMPAIGN BUTTON WHEN GOING TO POLL TO VOTE

To: John R. Culbreath, Representative, 36th District, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Does s. 104.36, F. S., prohibit an elector from wearing a political campaign button when he goes to the polls to vote?

SUMMARY:

Section 104.36, F. S., does not prohibit an elector from wearing a political campaign button when he goes to the polls to vote.

The pertinent portion of the statute about which you inquire reads:

> On the day of any election it shall be unlawful for any person to distribute any political pamphlets, cards or literature of any kind, or solicit votes, or approach any elector in an attempt to solicit votes within 100 yards of any polling place.

I recently noted in AGO 076-44 that s. 104.36, F. S., prohibits only three specific activities within the 100-yard zone; namely: "[T]he solicitation of *votes*, the attempted solicitation of *votes*, and the distribution of 'any political pamphlets, cards or literature of any kind.' " And in AGO 073-377, I stated:

> Section 104.36, F. S., is a penal or criminal law and as such it is to be strictly construed. The only specified prohibited activities within 100 yards of any polling place are the distribution of political pamphlets, cards, or political literature of any kind and the solicitation of votes or attempts to solicit votes. From the language used in s. 104.36, it is impossible for anyone to consider that

the legislature intended to imply that any other activity within the 100 yard area should also be prohibited.

Except for the specifically enumerated activities, all other implied activities are excluded under the legal doctrine *expressio unius est exclusio alterius*, and it would be impossible to apply the provisions of s. 104.36, *supra*, against an individual participating in activities not otherwise prohibited within 300 feet of a polling place, but beyond 15 feet therefrom.

The act of an elector going to and from a polling place while wearing a campaign button is clearly not a distribution of "any political pamphlets, cards or literature." Accordingly, such conduct is prohibited by s. 104.36, F. S., only if it constitutes a solicitation of votes or an attempt to solicit votes. I am not aware of any reported decisions of the courts construing s. 104.36, nor has the question you pose been previously ruled upon by this office. However, the plain meaning of the word "solicit" involves something more than the mere communication of an idea addressed to the public at large. Black's Law Dictionary (Rev. 4th Ed.) defines the word as follows, at p. 1564:

> To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for, to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication. People v. Phillips, 70 Cal.App.2d 449, 160 P.2d 872, 874. To tempt a person; to lure on, especially into evil. People v. Rice, 383 Ill. 584, 50 N.E.2d 711, 713. To awake or excite to action, or to invite. In Re Winthrop, 135 Wash. 135, 237 P. 3, 4; Briody v. De Kimpe, 91 N.J. Law, 206, 102 A.688, 689. *The term implies personal petition and importunity addressed to a particular individual to do some particular thing.* Golden & Co. v. Justice's Court of Woodland Tp., Yolo County, 23 Cal.App. 778, 140 P. 49, 58. (Emphasis supplied.)

Also see cases collected at 39 Words and Phrases, pp. 614-617. And it is a well-settled rule of statutory construction that "[w]ords of common usage, when used in a statute, should be construed in their plain and ordinary signification." Gasson v. Gay, 49 So.2d 525 (Fla. 1950). Applying that rule to the statutory language in question, I am of the view that s. 104.36 does not prohibit an elector from wearing a political campaign button when he or she goes to a polling place to vote.

Your question is answered in the negative.

076-75—April 6, 1976

FIREFIGHTERS

DEFINITION OF REGULAR OR PERMANENT FIREFIGHTER; EFFECT OF PROBATIONARY STATUS

To: Philip F. Ashler, State Treasurer and Fire Marshal, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTIONS:

1. Who is considered a regular or permanent firefighter as contemplated in s. 633.35, F. S.?

2. Is a firefighter on probation considered to be a regular or permanent firefighter?

SUMMARY:

Section 633.35(2), F. S., delegates to the various employing agencies the authority to define, for their purposes, what shall constitute a "regular or permanent firefighter," but no individual shall be employed as a regular,

permanent, or full-time professional firefighter by an employing agency without first having received a certificate evidencing satisfactory compliance with the training program established by the Division of State Fire Marshal of the Department of Insurance, and nothing within ss. 633.30-633.49, F. S., is intended to require employing agencies to hire a firefighter possessing a certificate of compliance from the division until such time as that individual shall satisfy any duly established standards or qualifications of the employing agency which exceed those established by the division. Those firefighters possessing a certificate of compliance from the division and who are hired by an employing agency, but by reason of civil service, merit, or career service laws, regulations, or rules are placed on probationary status for a fixed period of time are considered "regular or permanent firefighters" within the provisions of s. 633.35(2) and/or "full-time professional firefighters" within the provisions of s. 633.30(1), while "recruits," "recruit trainees," and "firefighter recruits" are not considered "regular or permanent firefighters" or "full-time professional firefighters" within the contemplation of s. 633.35(2).

Section 633.35, F. S., directs the Division of State Fire Marshal of the Department of Insurance (hereinafter division) to establish a firefighter training program to be administered by various approved agencies and institutions. The statute further directs that "[n]o person shall be employed as a regular or permanent firefighter as defined by the employing agency until he has obtained such certificate of compliance" evidencing that he has satisfactorily complied with the training program established by the division. Section 633.35(2), F. S.

For the purposes of the firefighting training program prescribed by s. 633.35(1), F. S., a "firefighter" is defined in s. 633.30(1), F. S., as

> . . . any person initially employed as a full-time professional firefighter by any employing agency, as defined herein, whose primary responsibility is the prevention and extinguishment of fires, the protection of life and property, and the enforcement of municipal, county, and state fire prevention codes, as well as any law pertaining to the prevention and control of fires.

The employing agency, under the provisions of s. 633.30(2), F. S., is defined as "any municipality or county, the state, or any political subdivision of the state, including authorities and special districts, employing firefighters as defined in subsection (1)."

The division is charged with the responsibility of establishing uniform minimum standards for the employment and training of firefighters throughout the state, s. 633.45(1)(a), F. S., and establishing minimum curriculum requirements for schools operated by or for any employing agency for the specific purpose of training firefighter-recruits or firefighters, s. 633.45(1)(b), F. S. In conjunction with these duties, the division is authorized, subject to the availability of funds, to reimburse the various employing agencies in an amount equivalent to 50 percent of the salary, if any, and allowable living expenses of recruit trainees while in attendance at approved training programs. Section 633.36, F. S. Additionally, the employing agencies are authorized to pay all or part of the costs of tuition of trainees in attendance at approved training programs. Section 633.37, F. S.

By the provisions contained in s. 633.35(2), F. S., the various employing agencies are delegated the authority to define, for their purposes, what shall constitute a regular or permanent firefighter. However, the firefighter cannot be employed as a "regular or permanent firefighter," however defined by the employing agency, until he has received the division's certificate of compliance provided for in subsections (1) and (2) of s. 633.35, F. S. The definition of a "firefighter" provided in s. 633.030(1), F. S., is, by operation of the statute, a guideline defining those firefighters, otherwise defined by their employing agencies, who are subject to the training program provisions of s. 633.35, F. S., as a condition to their employment as regular or permanent firefighters by an employing agency.

The authority of the division extends to the establishment of uniform minimum standards for the employment and training of firefighters, the establishment of minimum curriculum requirements for schools operated by or for any employing agency for the specific purpose of training firefighter recruits or firefighters, the approval of institutions and facilities for school operation by or for any employing agency for the specific purpose

of training firefighters and firefighter recruits, and the issuance of certificates of competency to persons who, by reason of experience and completion of basic inservice training, advanced education, or specialized training, are especially qualified for particular aspects or classes of firefighter duties. Section 633.45(1)(a), (b), (c), and (d), F. S. Once the division has issued its certificate of compliance to a firefighter or firefighter recruit, as provided in s. 633.35(1) and (2), F. S., its authority over the individual is relinquished, notwithstanding any further conditions or regulations that the various employing agencies may incorporate into their definition of a "regular or permanent firefighter." The employing agency may or may not have more stringent qualifications and standards for hiring and training than the minimum standards and qualifications established by the division, s. 633.42, F. S., and the employing agency is not compelled to hire an individual solely on the basis of his having completed the division's training program and received its certificate of compliance. But, if the employing agency initially hires an individual "as a full-time professional firefighter," s. 633.30(1), F. S., or "as a regular or permanent firefighter as defined by the employing agency," s. 633.35(2), then such a "hired" individual must possess a certificate of compliance from the division.

If an individual who possesses a certificate of compliance issued by the division is hired by an employing agency, and if, by reason of city or county or state civil service laws or rules or merit or career service laws or rules, such individual is on probationary status for some fixed period of time but is hired as a (probationary) regular or permanent firefighter or as a full-time professional firefighter, he is, nonetheless, a regular and permanent firefighter within the intent embodied in s. 633.35, F. S., and/or a full-time professional firefighter within the intent embodied in s. 633.30(1), F. S. However, those individuals designated and considered to be "recruit trainees," s. 633.36, F. S., "trainees," s. 633.37, F. S., "firefighter recruits," s. 633.45(1)(b), F. S., or those individuals undergoing additional training to comply with an employing agency's qualifications and standards exceeding those established by the division, s. 633.42, F. S., do not come within the scope of the definitions of "regular or permanent firefighter(s)" as contemplated by s. 633.35(2) or "full-time professional firefighter(s)" as contemplated by s. 633.30(1), as these individuals have yet to satisfactorily complete the training program and receive a certificate of compliance from the division, which is clearly a prerequisite to employment as a regular or permanent firefighter or full-time professional firefighter by any employing agency as defined in s. 633.30(2), F. S.

From the foregoing provisions it is clear that the legislative intent embodied within the enactment of Ch. 75-151, Laws of Florida, ss. 633.30-633.49, F. S., is to require that the division establish uniform minimum standards for the employment and training of firefighters as defined in s. 633.30(1) and that no firefighter so defined, or otherwise defined as a regular or permanent firefighter by the employing agency, shall be initially employed as a regular or permanent firefighter or as a full-time professional firefighter by any employing agency without first having received a certificate evidencing satisfactory compliance with the training program established by the division. While s. 633.42 authorizes the several employing agencies to establish qualifications and standards for hiring, training, or promoting firefighters that exceed those set out in ss. 633.30-633.49, the overriding legislative intent found within these sections is that any full-time professional firefighter employed by an employing agency as defined in s. 633.30(2) shall have at least successfully completed the training program established by the division and have been duly issued the division's certificate of compliance provided for in s. 633.35. However, nothing within these sections is intended to require an employing agency to hire a firefighter possessing a certificate of compliance from the division until such time as that individual shall satisfy any duly established standards and qualifications of the employing agency which exceed those established by the division.

076-76—April 6, 1976

PUBLIC PRINTING

DEFINITION OF "PUBLIC" IN DETERMINING WHICH MAILING LISTS MUST BE ANNUALLY PURGED

To: Ralph D. Turlington, Commissioner of Education, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

What is the meaning of the term "public" as used in s. 283.28, F. S., which requires state agencies which distribute printed material to the public without charge on a periodic basis to purge their mailing lists annually?

SUMMARY:

State agencies distributing printed material without charge on a periodic basis to entities and persons other than subordinate or functionally related or connected governmental agencies and officials are required to purge their mailing lists annually in the manner of, and pursuant to, the procedure prescribed in s. 283.28, F. S.

For the purposes of s. 283.28, F. S., the phrase "to the public" means those entities and persons other than subordinate and functionally related or connected governmental agencies and officials whose names appear on one or more mailing lists kept and maintained by a state agency and used by it for the purpose of making periodic distributions of printed material without charge to such entities and persons.

Section 283.28, F. S., provides:

> State agencies which distribute printed material to the public without charge on a periodic basis shall purge their mailing lists annually. At least annually, each agency shall require each subscriber to reply affirmatively that he wishes to continue receiving such printed material. Any subscriber failing to so reply shall have his name purged from the list.

The Legislature has not defined the term "public" as used in s. 283.28, F. S.

The term "public" does not have any fixed or definite meaning, but must depend for its meaning on the context in which it is used or to which it is applied and must be interpreted according to its use and the legislative intent as gleaned from the statute. *See* 73 C.J.S. *Public*, pp. 274-275, and Askew v. Parker, 312 P.2d 342 (Cal. Ct. App. 1957).

The preamble of Ch. 75-84, Laws of Florida, creating s. 283.28, F. S., states that the basis for this law is the Governor's Management and Efficiency Study Commission Recommendation Number 10 relating to the Department of Agriculture and Consumer Services, which recommended that the department should purge mailing lists annually. From my conversation with the Department of Agriculture, it is apparent that the mailing lists to which the commission referred were for publications which were mailed to private individuals who had requested to be placed on such lists. In construing a statute, consideration must be given to its history, the evil to be corrected, the intent of the Legislature, the subject to be regulated, and the objectives to be obtained. In statutory construction, the legislative intent as gleaned from the statute is the polestar by which one is guided. Singleton v. Larson, 46 So.2d 186 (Fla. 1959); Garner v. Ward, 251 So.2d 252 (Fla. 1971); American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938). The preamble is to be considered in construing a statute. 2A *Sutherland Statutory Construction* s. 47.04 (Sands 4th Ed. 1973).

The term "public" and the phrase "to the public" have been construed by the courts in other jurisdictions in varying contexts. In Barkin v. Board of Optometry, 269 C.A.2d 714, 75 Cal. Rptr. 337 (Ct. App. 1969), a statute prohibited advertising to the public for discount professional services. The court held that the mailing of advertisements only to

members of a union and their families nevertheless was advertising to the public. The court said that "public" did not mean all the people, or most of the people, "but so many of them as contradistinguishes them from a few."

In People v. A.A.A. Dental Laboratories, 47 N.E.2d 371 (Ill. 1943), the court held that the provisions of the Illinois Dental Practice Act permitting corporations to make dental plates in accordance with impressions taken by a licensed dentist provided such plates were not offered for sale or delivery to the public used the word "public" as meaning persons other than those examined and fitted by licensed dentists.

The court in Iowa State Commerce Commission v. Northern Natural Gas Co. 161 N.W.2d 111 (Ia. 1968), was called upon to define the phrase "furnishing gas . . . to the public." The Iowa Supreme Court defined "to the public" in this context to mean "sales to sufficient of the public to clothe the operation with a public interest and does not mean willingness to sell to each and every one of the public without discrimination."

Griffith v. New Mexico Public Service Commission, 520 P.2d 269 (N.M. 1974), involved a subdivision developer who provided lot owners with water services and charged them therefor. The court, following the definition of "to the public" set forth in Iowa State Commerce Commission, *supra*, held that although water was supplied only to lot owners of the subdivision, it was furnishing water "to or for the public."

In Gary Pickford Co. v. Bagly Bros., Inc., 86 P.2d 102 (Cal. 1939), the court ruled that offering securities to a small number of persons at random was an offering to the public.

There appears to be no clear-cut point from which to determine that a distribution of printed material is "to the public."

The term "public" and each distribution of printed material must be considered in light of the statutory context in which such term is used and the above definitions and judicial constructions of similar terms. Section 283.28, F. S., does provide at least a modicum of guidance in that it requires "their mailing lists" to be purged and that "each subscriber" be required by the affected agency to "reply affirmatively that he wishes to continue receiving" any printed material that he had in fact been receiving. It would seem to follow that those persons on an agency's mailing list to whom printed material is being or has been distributed on a periodic basis without charge would, at least, come within the purview of the phrase "to the public" as used in s. 283.28. It should be noted that the statute does not purport to regulate the distribution of printed material, nor does it seek to inhibit or restrict such distribution without charge on a periodic basis to the public as distinguished from distributions to governmental entities and officials; but it operates on the state agency's mail list or list of subscribers, *i.e.*, those persons to whom the free periodic distributions are being made, and it is those lists which the statute requires to be purged annually. Thus, it appears that the term "public" as used in s. 283.28 has reference to those entities and persons other than governmental entities and officials whose names appear on any one or more mailing or subscribers' lists kept and maintained by the agency to be used by it in making the periodic distributions of printed material without charge to such entities and persons.

The title to Ch. 75-84, Laws of Florida, and the preamble and language of the act make manifest the legislative intent that all state agencies distributing any printed material without charge on a periodic basis be required to purge their mailing lists governing such distributions annually. The act also prescribes the procedure therefor, *i.e.*, all state agencies shall require each person or subscriber whose name appears on any one or more such mailing lists kept or maintained by the agencies for such purposes to reply affirmatively to the affected agency that such person wishes to continue receiving such printed material, failing in which his name shall be purged from such mailing list or lists. Although s. 283.28, F. S., is not limited to such printed material, it includes or operates upon the public documents defined in s. 257.05(1), F. S., and regulated by s. 283.27, F. S., but does not appear to include any printed materials or distribution of printed materials for which a charge to the recipient is made by the affected state agency or any printed materials which are not regularly distributed on some periodic basis—recurring at fixed intervals or regularly recurring intervals. *See* Black's Law Dictionary (Rev'd 4th Ed.), at p. 1297, and 70 C.J.S. *Periodic*, at p. 453. The act, in its peculiar context, would not appear to apply to subordinate or functionally related or connected governmental agencies and officials.

In AGO 073-147, I ruled that a manual of instructions for tax assessors prepared by the Department of Revenue to instruct and assist taxing officials in the administration of property taxes is not a document "subject to distribution to the public." General public distribution of the manual would be inconsistent with the prescribed statutory purpose for its promulgation.

076-77—April 6, 1976

DRUGS

FACILITIES PARTICIPATING IN INDIGENT DRUG PROGRAM NEED NOT BE LICENSED AS DRUG MANUFACTURERS OR WHOLESALERS

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Are community health centers and clinics participating in the Indigent Drug Program operated by the state through the Mental Health Program Office of the Department of Health and Rehabilitative Services subject to the provisions of s. 500.46, F. S., requiring manufacturers and wholesalers of drugs to obtain a permit from the state to lawfully operate as wholesalers or manufacturers of drugs in this state?

SUMMARY:

Community health centers and clinics participating in the Indigent Drug Program operated by the state through the Mental Health Program Office of the Department of Health and Rehabilitative Services do not have to obtain the permit for operation as drug wholesale or drug manufacturing establishments or businesses as specified in s. 500.46, F. S.

Your question is answered in the negative.

Section 500.46, F. S., specifically addresses drug manufacturers and wholesalers, requiring them to obtain permits from the Department of Health and Rehabilitative Services as a condition precedent to lawful engagement in their respective businesses. The statute operates on those persons engaged in the drug wholesaling or drug manufacturing business in this state. *See* s. 500.46(3) and (4).

I am informed by the department that the community health centers and clinics in question are private, nonprofit organizations, quasi-public in nature, which distribute psychotropic drugs to indigent persons certified to be in need of such medication by, and upon the prescription of, a licensed physician. The recipient, I understand, pays what he or she can afford to pay for the drugs, but if the person cannot afford to pay any amount, the drugs are distributed free of charge. I am further informed by the department that the drugs are purchased under state contract for use in this program by the Department of Health and Rehabilitative Services Mental Health Program Office and administered by and through local governmental agencies and community health centers and clinics and that none of the drugs utilized in the program in question are classified as "controlled substances" by either federal law or the law of this state.

The Indigent Drug Program and the community health centers and clinics participating therein operate under the Mental Health Program Office of the department pursuant to the Community Mental Health Act, Part IV of Ch. 394, F. S., and the program is an integral part of a uniform state-operated mental health system. Such system is administered through local governmental agencies, s. 394.66, and is not in any way engaged in the drug wholesale or manufacturing business.

It is readily apparent from the language of s. 500.46, *supra*, that the health centers and clinics are not drug manufacturers or wholesalers, are not, in terms of the statute, engaged in the (business of) wholesaling or manufacturing of drugs, and thus do not come within the purview of said statute, which speaks only to those particular classifications. This interpretation is particularly warranted in light of the rule of statutory construction, *expressio unius est exclusio alterius*, which means that the express mention of one thing (in this case, drug manufacturing or wholesaling) is the exclusion of another. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944).

Therefore, I am of the opinion that the community health centers and clinics participating in the Indigent Drug Program operated by the state through the Mental Health Program Office of the Department of Health and Rehabilitative Services are not subject to the licensing or permitting requirements of s. 500.46, *supra*, and therefore do not have to obtain the permit for their operation as specified therein.

076-78—April 6, 1976

PAROLE AND PROBATION COMMISSION

SUPERVISEES' $10 CONTRIBUTION TOWARD COST OF SUPERVISION—COMMISSION HAS NO POWER TO ENFORCE COLLECTION AFTER DEATH OF SUPERVISEE OR TERMINATION OR REVOCATION OF PAROLE

To: Ray Howard, Chairman, Florida Parole and Probation Commission, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Does the Parole and Probation Commission have any responsibility, upon the death of a parolee or probationer or upon termination or revocation of his or her parole or probation, for taking action to recover moneys which such parolee or probationer had failed to pay to the state under s. 945.30, F. S., which requires parolees and probationers not exempted by the commission to contribute $10 monthly toward the cost of their supervision?

SUMMARY:

The Parole and Probation Commission is neither required nor authorized to take legal action (or to expend state funds therefor) to recover money due the state by a parolee or probationer who has failed to make the $10 monthly contributions required by s. 945.30, F. S., when such parolee or probationer dies or when his or her parole or probation is revoked or terminated. No penalty or enforcement procedure has been provided with respect to the contributions required by s. 945.30.

Section 945.30, F. S., provides in part: "Anyone on probation or parole shall be required to contribute $10 per month toward the cost of his supervision and rehabilitation beginning 60 days from the date he is free to seek employment." The section also empowers the Parole and Probation Commission to exempt parolees and probationers from the payment based on certain grounds specified in s. 945.30, such as hardship. When it imposed this monthly payment requirement during the 1974 legislative session, the Legislature provided little, if any, elaborative language, thus necessitating repeated interpretation of s. 945.30 by this office. *See* AGO's 075-19 and 075-253.

Nowhere in s. 945.30, *supra*, in the act by which that section was created (Ch. 74-112, Laws of Florida), or in any other statute relating to the Parole and Probation Commission is there any provision requiring or authorizing the commission to take legal action of any form with respect to recovery of moneys due the state by parolees and probationers pursuant to s. 945.30, nor has any penalty or enforcement procedure been provided with respect to the contributions required by s. 945.30. For that matter, other than s. 945.30 itself, no other statute makes any mention of, acknowledges the existence of, or modifies or elaborates upon the $10 monthly contribution requirement of s. 945.30.

In AGO 075-253, I considered the applicability of the contribution requirement of s. 945.30, *supra*, to parolees and probationers from another state under supervision in Florida, and Florida parolees and probationers under supervision in another state, pursuant to interstate compact. In that context I stated:

> *There must exist some basis in the statute* for the exercise of the authority to require payment of such charge or contribution and to collect and use the same with respect to such out-of-state parolees or probationers, and if there is any reasonable doubt as to the statutory existence of such authority, the commission should not undertake to exercise it. State *ex rel.* Greenberg v. Florida State Bd. of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, . . . 300 So.2d 900 (Fla. 1974). (Emphasis supplied.)

In accord with the above is the following statement from AGO 071-28:

> To perform any function for the state or to expend any moneys belonging to the state, the officer seeking to perform such function or to incur such obligation against the moneys of the state must find and point to a constitutional or statutory provision so authorizing him to do. Attorney General Opinion 068-12; Florida Development Commission v. Dickinson, *supra*, [229 So.2d 6 (1 D.C.A. Fla., 1969)].

In this instance, to paraphrase 071-28, the Parole and Probation Commission may not perform the function of bringing any legal action to recover past-due contributions under s. 945.30, *supra*, upon the death of a parolee or probationer or upon the revocation or termination of his or her parole or probation, nor may the commission expend any state funds to perform such a function unless there is some constitutional or statutory provision so authorizing or requiring the commission to do so. I know of no such provision, and thus I am of the opinion that, pending legislative clarification of the commission's duties in regard to s. 945.30, the commission has no authority or responsibility to take legal action to recover moneys owed the state under s. 945.30 by parolees or probationers who die or whose parole or probation is terminated or revoked.

However, irrespective of the above conclusion it should be noted that the commission's responsibilities in regard to s. 945.30, *supra*, may also be affected or controlled by s. 20.315(22), F. S., which provides in part:

> All powers, duties, and functions of the Parole and Probation Commission, except those relating to the exercise of its quasi-judicial duties and functions, as provided by law, are hereby transferred by a type four transfer pursuant to subsection 20.06(4) to the Department of Offender Rehabilitation. This transfer shall include all court-related investigations, all supervision of parolees and probationers, administrative support services, data collection and information services, field offices and other programs, and services and resources of the commission which are not necessary for the immediate support of the commissioners. . . .

Section 20.315(22), *supra*, must be presumed to be valid and must be given effect until judicially declared unconstitutional. Evans v. Hillsborough County, 186 So. 193 (Fla. 1938); Pickerill v. Schott, 55 So.2d 716 (Fla. 1951); AGO 076-51. In this regard it should be noted that, although s. 20.315(22) was held unconstitutional by the Circuit Court of the Second Judicial Circuit, that judgment was reversed by the Florida Supreme Court in an opinion filed February 26, 1976, on the grounds that the plaintiffs lacked standing to challenge the statute's constitutionality. Thus, as of this writing, s. 20.315(22) is presumptively valid and must be given full effect.

It is my understanding that, even though you have had to direct approximately one dozen questions to this office regarding s. 945.30, *supra* (which questions, so far, have required three Attorney General's Opinions), you did not seek legislative clarification from the 1975 Legislature. Therefore, I would hope that this opinion, together with AGO 075-19 and AGO 075-253, might bring to the attention of the 1976 Legislature the desirability and need for further legislation in regard to the implementation and administration of the $10 monthly contribution requirement of s. 945.30.

076-79—April 8, 1976

DEPARTMENT OF TRANSPORTATION

AUTHORITY TO IMPLEMENT AFFIRMATIVE ACTION IN HIGHWAY CONSTRUCTION CONTRACTING PROCESS

To. Tom B. Webb, Jr., Secretary, Department of Transportation, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

1. May the Department of Transportation, as a provision of the bid specifications for construction contractors open to all prequalified bidders, include a provision that the successful contractor must award a specified percentage of any subcontracts which the contractor issues to minority business enterprises?
2. May the department, under s. 337.13, F. S., adopt regulations which would limit prequalification for a certain portion of its contracts to minority business enterprises as defined in Paragraph 3b of Volume 6, Chapter 4, Section 1, Subsection 8, of the Federal-Aid Highway Program Manual?

SUMMARY:

Although the Department of Transportation may not require a successful contractor to absolutely guarantee a specified percentage of any subcontracts to minority business enterprises, it has wide latitude in setting goals and imposing sanction to insure that "each bidder intending to sublet part of the contract work shall make contact with potential minority business enterprise subcontractors to affirmatively solicit their interest, capability and prices." The department is not authorized under s. 337.13, F. S., to adopt regulations which would limit prequalification for a certain portion of its contracts to minority business enterprises. However, the department may consider the fact that one of the bidders is a minority business enterprise in awarding the contract to the "lowest responsible bidder."

The Division of Road Operations is authorized by s. 339.05, F. S., "to make all contracts and do all things necessary to cooperate with the United States Government in the construction of roads under the provisions of said Acts of Congress [Federal Aid Law] and all amendments thereto." Pursuant to s. 337.13, F. S., the Department of Transportation is required to adopt regulations "for the qualification of competent and responsible bidders. Such regulations shall include requirements with respect to equipment, past record, experience of applicant, and personnel of organization."

Volume 6, Chapter 4, Section 1, Subsection 8, of the U.S. Department of Transportation, Federal Highway Administration, Federal-Aid Highway Program Manual in Transmittal 164, dated November 3, 1975, provides, in part, that it is the policy of the Federal Highway Administration, based on Executive Order 11625, dated October 13, 1971, "to promote increased participation of minority business enterprises in Federal-aid highway construction programs."

Paragraph 8c of Subsection 8 provides that "[t]he State highway agencies shall take affirmative action to increase the participation of minority business firms in Federal-aid highway construction." The affirmative action is required to include various provisions to assure adequate identification of minority business enterprises by the contractors and requirements that "each bidder intending to sublet part of the contract work shall make contact with potential minority business enterprise subcontractors to affirmatively solicit their interest, capability and prices, and shall document the results of such contacts." Paragraph d encourages the state highway agencies to establish "innovative programs for assisting minority and small business firms to become prequalified, licensed or otherwise eligible to bid on State highway agency work."

The goals as set forth in the manual are to prequalify or license an additional 500 minority businesses nationwide as potential contractors by July 1978 (the goal for Florida is 20) and to have each state formulate its own dollar goal based upon criteria set forth therein. It is important to note that they are goals and not absolute and rigid requirements.

AS TO QUESTION 1:

As I read this question, you ask if the department may require a successful contractor to *absolutely guarantee* a specified percentage of subcontracts to minority business enterprises, and interpreting your question thusly, it is answered in the negative.

In so ruling, a distinction must be made between an absolute guarantee (regardless of qualification and without consideration for availability) and a goal which is set which requires the contractor to make every good faith effort to meet that goal.

This opinion will not discuss affirmative action programs in general, as it seems well understood that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. Associated Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 312 (1974). Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

My research has disclosed no decisional law regarding the requirement that a contractor subcontract a certain percentage of any subcontracts to minority business enterprises; however, sufficiently analogous are the decisions requiring a successful bidder to take affirmative steps to hire minorities.

In Weiner v. Cuyahoga Community College District, 19 Ohio St.2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970), the court stated that the establishment of a quota system of employment directed at securing either an absolute guarantee of the actual results or a result pertaining only to a particular minority would be discriminatory in violation of the Civil Rights Act of 1964. The court upheld the affirmative action plan which was intended to "have the result of assuring that there is minority group representation in all trades on the job and in all phases of the work," noting that what was being sought was an unequivocal statement by the contractor which would assure equal employment opportunity.

The affirmative action plan which was the basis of the action in Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), was similar to that in Weiner, *supra*. The plan required that a contractor set specific goals for minority group hiring within certain skilled trades and that he make "every good faith effort" to meet those goals. The court upheld the validity of the plan against attacks based upon the Civil Rights Act of 1964 and the due process clause of the U.S. Constitution stating that the plan was a valid action "to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest."

The court in Associated General Contractors of Massachusetts, Inc. v. Altshuler, *supra*, was asked to sanction a plan for hiring a specific percentage of minority workers that requires an employer to take "every possible measure" to reach the goal and places upon him the burden of proving compliance, under threat of serious penalties if that burden is not sustained. The court noted:

> It is but a short step from these requirements to demand that an employer give an absolute percentage preference to members of a racial minority, regardless of their qualifications and without consideration for their availability within the general population.

It stated that an affirmative action plan might be considered to impose unrealistic and unreasonable goals if it included a racial preference that could not be fulfilled, or that could be fulfilled only by taking unqualified workers. Thus, it becomes important that affirmative action plans contain fair procedures for contractors to make a showing that insufficient qualified workers are available.

From the above-cited, and numerous other uncited, cases, it can be seen that a contractor for public works may be required to take affirmative steps to employ racial minorities. The courts seem to have allowed the states wide latitude in establishing and carrying out such plans, subject to the limitation that sanctions cannot be imposed if the

contractor in good faith strives to meet the goals and falls short. *See* Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970).

It is recognized that affirmative action may be expensive. The level of such action required on any given project is a factor which will almost surely affect the amounts of the individual bids and often will determine whether a contractor will be able to bid at all.

As can be gleaned from the above discussion, although the department may not require a successful contractor to absolutely guarantee a specified percentage of any subcontracts to minority business enterprises, it has wide latitude in setting goals and imposing sanctions in order to insure that "each bidder intending to sublet part of the contract work shall make contact with potential minority business enterprise subcontractors to affirmatively solicit their interest, capability and prices."

AS TO QUESTION 2:

Your second question is answered in the negative.

As stated previously, s. 337.13, F. S., requires the Department of Transportation to adopt regulations for the qualification of competent and responsible bidders. If an applicant for qualification is found to possess the qualifications prescribed by law, then a certificate of qualification is issued. Such certificate shall authorize the holder to bid on *all* work on which bids are taken by the department for which the certificate indicates he is qualified. Section 337.14, F. S. I can find no authority for the department to modify the effect of this provision.

The department may exercise only those powers granted by statutes or the Constitution, either expressly or by necessary implication. If reasonable doubt exists as to whether the department possesses a specific power, doubt must be resolved against the department. Florida State University v. Jenkins, 323 So.2d 597 (1 D.C.A. Fla., 1975); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dism'd*, 300 So.2d 900 (Fla. 1974); White v. Crandon, 156 So. 303 (Fla. 1934); First National Bank of Key West v. Filer, 145 So. 204 (Fla. 1933), 87 A.L.R. 267 (1933).

Pursuant to s. 337.11, F. S., the department may use its discretion and either award the proposed work to the "lowest responsible bidder," reject all bids and readvertise, or perform the work with convict or free labor. In determining the "lowest responsible bidder," the department is vested with discretion to determine who are and who are not responsible bidders. In exercising this discretion, the department is vested with the power, authority, and duty to consider more than just the dollar and cents figure of the bid. Willis v. Hathaway, 177 So. 89 (Fla. 1928).

Against attacks of violation of the principles of competitive bidding and the equal protection clause, the court in Dalton v. Kunde, 31 Ohio Misc. 75, 286 N.E.2d 483 (1972), upheld a city ordinance requiring city officials to determine the lowest and best bid for municipal contracts by giving consideration to minority group representation in the bidder's operation as a valid exercise of the police power and being consistent with the city's affirmative obligation of assuring equal protection, including nondiscrimination, to all its citizens. The court stated that "the Constitution *requires* that government shall *affirmatively* seek and find effective programs to combat segregation and discrimination, at least where government funds or influence is involved."

Thus, although the department is not authorized by s. 337.13, F. S., to adopt regulations which would limit prequalification for a certain portion of its contracts to minority business enterprises, the department may consider the fact that one of the bidders is a minority business enterprise in awarding the contract to the "lowest responsible bidder."

076-80—April 8, 1976

GAME AND FRESH WATER FISH COMMISSION

MAY ADOPT RULE HAVING FUTURE EFFECTIVE DATE

To: O. E. Frye, Jr., Director, Game and Fresh Water Fish Commission, Tallahassee

Prepared by: Donald D. Conn, Assistant Attorney General

QUESTIONS:

1. May the Game and Fresh Water Fish Commission adopt a rule to become effective at a future date, more than 30 days in advance, under the Administrative Procedure Act?
2. Would such an advance effective date be nullified by the provisions of s. 372.021, F. S.?

SUMMARY:

The Game and Fresh Water Fish Commission may adopt a rule to become effective at a future date, as long as that date is at least 20 days after filing the rule with the Department of State. The revised Administrative Procedure Act (Ch. 120, F. S.) has replaced the rulemaking procedures and requirements previously found in s. 372.021, F. S.

The Game and Fresh Water Fish Commission is an "agency" as defined in s. 120.52, F. S., and therefore the Administrative Procedure Act (Ch. 120, F. S.) prescribes the procedures which must be followed by the commission in the exercise of its substantive powers and responsibilities. There is no exclusion for the commission or its rulemaking procedures in the Administrative Procedure Act. *See* ss. 120.50 and 120.54(14).

Section 120.54, F. S., sets forth the procedures to be followed by "agencies" to which the Administrative Procedure Act applies in the adoption and promulgation of rules. Subsection (11) of s. 120.54 states that a "proposed rule shall be adopted on filing with the Department of State and become effective 20 days after filing, on a later date specified in the rule, or on a date required by statute."

Section 120.72(1), F. S., mandates that in enacting a complete revision of Ch. 120, F. S., in 1974, the Florida Legislature intended to make uniform the rulemaking and adjudicative procedures used by administrative agencies of this state, and to that extent the provisions of the revised Ch. 120 replaced all other provisions in the Florida Statutes 1973 relating to, among other things, rulemaking. As previously addressed in AGO 075-312, the revised Administrative Procedure Act (Ch. 120) has therefore replaced and superseded all other rulemaking procedural requirements found in the Florida Statutes 1973. *See also* Alford v. Duval County School Board, 324 So.2d 174 (1 D.C.A. Fla., 1975); Office of the Public Defender v. Hunter, 323 So.2d 316 (1 D.C.A. Fla., 1975).

Section 372.021(2), F. S., provides that the Game and Fresh Water Fish Commission may adopt rules and regulations which "shall become effective 30 days after the filing of a certified copy with the Department of State." This provision was initially adopted in 1943 with the enactment of Ch. 21945, 1943, Laws of Florida. Section 5 of Ch. 21945 specifically noted that provisions in that act relating to the promulgation and filing of rules by the commission are directory and not mandatory.

Since s. 372.021, F. S., to which your question refers, was enacted in 1943 and found in the Florida Statutes 1973, and since it prescribed rulemaking procedures, it is my opinion that Ch. 120, F. S., has repealed the rulemaking requirements prescribed in s. 372.021(2) and that therefore the commission, in adopting its rules, will be governed by s. 120.54. As previously noted, s. 120.54(11) does provide for a rule to become effective at a future date which exceeds 20 days after filing. Therefore, the commission may adopt a rule to become effective more than 20 days after filing if the actual effective date is specified in the rule.

076-81—April 8, 1976

DEPARTMENT OF GENERAL SERVICES

SHOULD NOT CHARGE FEE FOR SUPERVISING CONSTRUCTION OF TALLAHASSEE-LEON COUNTY CIVIC CENTER

To: Jack D. Kane, Executive Director, Department of General Services, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May the Department of General Services, in connection with its supervision of construction of the Tallahassee-Leon County Civic Center, which is to be funded by the state and local governments, levy and assess a fee which is a percentage of the total cost of constructing the civic center?

SUMMARY:

Provided the requirements and conditions set out therein are present and satisfied, s. 13 of Ch. 75-280, Laws of Florida, the 1975 General Appropriations Act, grants apparent authority to the Department of General Services to levy and assess a reasonable fee, determined on a reasonable basis, for supervising the construction of the Tallahassee-Leon County Civic Center being funded jointly by the state and local governments. However, in light of that section's susceptibility to constitutional challenge under s. 12, Art. III, State Const., it would be advisable that the department refrain in this instance from assessing a fee which is based in part on the cost of construction funded by the City of Tallahassee and Leon County. In any event, unless reenacted, s. 13 of Ch. 75-280 will apparently expire and be of no further legal efficacy after June 30, 1976.

Section 13, Ch. 75-280, Laws of Florida, the 1975 General Appropriations Act, provides as follows:

> The Department of General Services, Division of Building Construction and Maintenance, is hereby authorized to levy and assess an amount for supervision of the construction of each fixed capital outlay project on which they serve as owner-representative on behalf of the state. The amount is subject to the approval of the Department of Administration and is to be transferred to the architects incidental trust fund of said division from appropriate construction funds upon the award of construction contract.

Applying the plain and obvious meaning of this provision to your inquiry, *see* Maryland Casualty Company v. Sutherland, 169 So. 679 (Fla. 1936), it would appear that the Department of General Services is *authorized* to levy and assess a fee for supervision of the construction of the civic center in question, provided that the civic center is a fixed capital outlay project, the department is serving as owner-representative on behalf of the state, and the fee is approved by the Department of Administration. The word "authorized" in common usage ordinarily denotes permission rather than a mandatory direction. *See Webster's Third New International Dictionary* (1966), pp. 146-147, defining "authorize" in part to mean "endowing formally with a power or right to act, usually with discretionary privileges"; *see also* 4A Words and Phrases, pp. 602-619; Morgan v. Wilson, 450 P.2d 902, 903 (Okla. 1969).

As to the manner in which the amount of such fee, if imposed, should be fixed, it is ultimately the function and responsibility of the Governor and Cabinet, as head of the Department of General Services, s. 20.22(1), F. S., to make such determination. *See* s. 20.05(1)(a) and (b), F. S. Thus, if the Department of Administration approves, and the other requirements and conditions of s. 13 of Ch. 75-280, *supra*, are present and satisfied, the Governor and Cabinet have the apparent power to levy and assess a reasonable fee, determined upon a reasonable basis, for supervision by the Department of General Services of construction of the civic center. *Cf.* AGO 076-52.

Having so concluded, however, I feel compelled in these circumstances to point out that your inquiry raises an obvious and serious constitutional issue. Section 12, Art. III, State Const., provides:

> Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.

This provision has been consistently interpreted by the Florida Supreme Court as prohibiting the Legislature from making laws on other subjects in an appropriations bill,

unless the other subjects are so relevant to, interwoven with, and interdependent upon the appropriations as to jointly constitute a complete legislative expression on the subject. *See* Dickinson v. Stone, 251 So.2d 268 (Fla. 1971); Advisory Opinion to the Governor, 239 So.2d 1 (Fla. 1970); Lee v. Dowda, 19 So.2d 570 (Fla. 1944), construing s. 30, Art. III, State Const. 1885; Opinion of Justices, 14 Fla. 282 (1872); and Opinion of Justices, 14 Fla. 286 (1872).

Most recently, in Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972), the court held that a challenge to certain provisions of the 1971 General Appropriations Act was moot since the protracted litigation in that case had consumed the fiscal year. However, the court set out several of the challenged provisions of the act—including an exact precursor of s. 13 of Ch. 75-280, Laws of Florida, with which this opinion is concerned—and indicated its thinking on the substantive issue as follows:

> Actual modifications of existing statutes or new provisions which are plainly substantive in nature and upon a subject other than appropriations are in violation of Fla. Const. art. III, s. 12. Separate provisions impinging upon the expenditures set forth, which involve existing statutes and which should have been enacted as general legislation, are contrary to this constitutional safeguard prohibiting substantive law or additional subjects being enacted by way of an appropriations bill. This prevents such issues from being fairly debated and voted upon separately and, in some instances, avoids the authorized "line veto" of the Governor, thus accomplishing indirectly what could not be done directly.
>
> There could in the guise of "appropriations" be designations inserted in the Act which could actually establish new agencies or projects incidental to the appropriation, if this principle were not strictly adhered to. Without benefit of the required general legislation first establishing such agency or project, such indulgence would deny the vital independent consideration by legislative committees and the general body, as to the validity or need for such agencies. It could also be a subtle approach to government "empire building". In such instances, the evil does not end with the fiscal year which first creates such an agency. Having been established, subsequent appropriations can be granted to it and the agency thereby perpetuated without ever having legitimate birth. Such indirect enactment of law is contrary to our principles of representative government.

Applying the foregoing case law to the instant inquiry—particularly the last mentioned case, in which the 1971 version of the provision here under consideration was mentioned—it would appear that s. 13 of Ch. 75-280, Laws of Florida, is subject to a significant constitutional challenge, *i.e.*, that such section concerns a subject other than appropriations and is not so relevant to, interwoven with, and interdependent upon any appropriation contained in Ch. 75-280 as to justify its inclusion therein. Accordingly, I am of the opinion that it would be advisable in this particular instance, the civic center being a joint governmental undertaking and local funds being involved, that the Department of General Services refrain from assessing a fee for construction supervision which is based in part on the costs of the civic center's construction funded by the City of Tallahassee and Leon County. In any event, unless reenacted by the 1976 Session of the Florida Legislature, s. 13 of Ch. 75-280, being like most other provisions of general appropriations acts, will apparently expire and will be of no further legal efficacy after the end of the current fiscal year, June 30, 1976. *Cf.* Department of Administration v. Horne, *supra.*

076-82—April 8, 1976

ADMINISTRATIVE PROCEDURE ACT

SETTING OF EXPERT WITNESS FEES

To: George S. Palmer, Executive Director, Board of Medical Examiners, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

May a qualified physician, appearing as an expert witness in quasi-judicial proceedings before the Florida State Board of Medical Examiners in the performance of its regulatory power and duties, be paid an expert witness fee as set by the agency, its duly empowered presiding officer, or a hearing officer?

SUMMARY:

Expert witness fees in amounts set by an agency, its duly empowered presiding officer, or a hearing officer in a quasi-judicial administrative proceeding under Ch. 120, F. S., may legally be paid under s. 120.58(1)(c), s. 90.231, F. S., and Rule 1.390, Florida Rules of Civil Procedure.

Your question is answered in the affirmative.

Chapter 120, F. S., is the newly revised Administrative Procedure Act of the State of Florida, created through Chs. 74-310 and 75-191, Laws of Florida, designed to embrace all administrative proceedings of the various state agencies, departments, and officers and, where specifically made applicable, counties and municipalities. Section 120.52.

Section 120.58(1), F. S., provides in part:

> (c) Any public employee subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as that provided for state employees under s. 112.061 if travel away from such public employee's headquarters is required. All *other witnesses appearing pursuant to a subpoena shall be paid such fees and mileage* for their attendance *as is provided in civil actions in circuit courts of this state.* In the case of a public employee, such expenses shall be processed and paid in the manner provided for agency employee travel expense reimbursement, and in the case of a witness who is not a public employee, payment of such fees and expenses shall accompany the subpoena. (Emphasis supplied.)

Said section applies to all *proceedings* which would include both formal and informal proceedings.

Section 90.231(2), F. S., provides:

> Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in the amount of $10 per hour *or such amount as the trial judge may deem reasonable*, and the same shall be taxed as costs. (Emphasis supplied.)

Apparently it is the language "or such amount as the trial judge may deem reasonable" around which the controversy centers.

The language found in s. 120.58(1)(c), F. S., referring to payment of all other witnesses clearly authorizes payment of a fee which *could be* authorized in civil actions in circuit courts of this state. The language "as is provided" has reference to the *manner* in which the witness fee is set, not to a specific person setting the fee, be he circuit court judge or hearing examiner. The *manner* of setting the fee is the procedure whereby the fee is set.

It would be illogical to presume that the Legislature enacted a comprehensive act, Ch. 120, F. S., designed in large part to totally supplant circuit court jurisdiction in all matters involving state administrative matters and then did not provide the basic necessary means of obtaining witnesses to testify on matters requiring expertise, in the same manner as such witnesses were provided for in circuit court proceedings. To construe the disputed language in s. 120.58(1)(c), F. S., in some other fashion would be to hold that at the time of setting expert witness fees, the hearing examiner would have to petition a circuit court for approval of such fee.

The fundamental rule of statutory construction is to ascertain and give effect to the intention and purpose of the Legislature, and such intention is to be ascertained primarily from the language used in the statute, irrespective of the fact that the phraseology may be awkward, slovenly, or inarticulate, and the intention is to be taken or presumed according to what is consonant with reason and good discretion. 82 C.J.S. *Statutes* s. 322 *et seq.* Furthermore, a construction should not be adopted which would

lead to an unjust, absurd, unreasonable, or mischievous result or one at variance with the policy of the legislation as a whole. 82 C.J.S. *Statutes* s. 322.

The intention of the Legislature in s. 120.58(1)(c), F. S., was to provide for payment of *all* witness fees, expert included, in exactly the same manner as existed in circuit court. Section 120.58(1)(b), F. S., is also pertinent to your inquiry. Said section provides:

> (b) An agency or its duly empowered presiding officer or a hearing officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas upon the written request of any party or upon its own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure.

The Florida Rules of Civil Procedure contain numerous rules relating to discovery, among which is Rule 1.390 which deals with depositions of expert witnesses. The rule provides in part:

> (b) **Procedure.** The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether he is within the distance prescribed by Rule 1.330(a)(3). No special form of notice need be given that the deposition will be used for trial.
>
> (c) **Fee.** An expert or skilled witness whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine and it shall be taxed as costs.

The *power* given the agency, presiding officer, or hearing officer to effect discovery at the written request of any party by *any means* available *in court* and in the *manner* provided by the Florida Rules of Civil Procedure would clearly include the power to set the expert witness fee.

It would be inconsistent with logic and reason to presume that the hearing examiner could set the fee during discovery but could not set it at the hearing or when a subpoena was requested.

076-83—April 8, 1976

TRAVEL EXPENSES

REIMBURSEMENT FOR GRATUITOUSLY FURNISHED MEALS

To: Rudy Underdown, Brevard County Tax Collector, Titusville

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

Must a traveler who is on per diem deduct the cost of gratuitously furnished meals at the rate prescribed in s. 112.061(6)(d), F. S.?

SUMMARY:

Pursuant to s. 112.061(6)(a)1., F. S., a traveler to a convention or conference need not reduce his request for the statutory per diem for a meal given to him gratuitously. However, a convention or conference traveler seeking reimbursement pursuant to s. 112.061(6)(a)2., F. S., must reduce his request for reimbursement in the applicable amount set forth in s. 112.061(6)(d), F. S., for any meal received gratuitously.

It should be noted at the outset that no lodging costs are involved in this question, nor does the question involve any meals or lodging included in a registration fee.

The subsistence allowed travelers when traveling to a convention or conference which serves a direct and lawful public purpose with relation to the public agency served by the person attending such meeting is up to $25 per diem, s. 112.061(6)(a)1., F. S., or up to the amounts permitted in s. 112.061(6)(d), F. S., for meals, plus actual expenses for lodging at a single occupancy rate to be substantiated by bills paid therefor. Section 112.061(6)(a)2., F. S.

If the traveler to a convention or conference elects reimbursement pursuant to s. 112.061(6)(a)1., F. S., he is entitled to the flat per diem, up to $25, as determined by the agency head. The per diem authorized by s. 112.061(6)(a)1. does not contemplate itemizing the amount that the traveler to a convention or conference spent on each meal or lodging. Therefore, if someone gives such traveler a meal, he is not required to reduce his request for the statutory per diem by the amount specified in s. 112.061(6)(d), F. S.

A traveler to a convention or conference who elects reimbursement pursuant to s. 112.061(6)(a)2., F. S., in addition to lodging, is entitled to up to the amount permitted in s. 112.061(6)(d), F. S., for meals. Although there is no requirement that the traveler present paid bills for meals, s. 112.061(6), F. S., does not give the public officer or employee anything; it only *reimburses* him for anything that he has actually paid for within the limits fixed by law. Therefore, the traveler seeking reimbursement pursuant to this provision should not include a claim for any meal or meals which may have been provided to him gratuitously.

Such an interpretation is compelled by s. 112.061(11), F. S., which requires that

> . . . any claim authorized or required to be made under any provision of this section shall contain a statement that the expenses were *actually incurred* by the traveler as necessary traveling expenses in the performance of his official duties and shall be verified by a written declaration that it is true and correct as to every material matter . . . . (Emphasis supplied.)

Provided therein are criminal penalties for willful violations and civil liability for any false claim in the amount of such overpayment.

076-84—April 8, 1976

COUNTIES

HEAD OF COUNTY DISASTER PREPAREDNESS AGENCY MAY NOT BE SUBORDINATED TO INTERMEDIATE COUNTY AGENCY OR OFFICIAL

To: Robert L. Nabors, Brevard County Attorney, Titusville

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May the governing body of a county place the director of the county disaster preparedness agency under the administrative supervision and control of some intermediate county agency or official, or is the director subject only to the supervision and control of such governing body and the Division of Disaster Preparedness of the Department of Community Affairs?

SUMMARY:

Pursuant to s. 252.38(3), F. S., the director of a county's disaster preparedness agency is subject only to the direction and control of the county's governing body and the Division of Disaster Preparedness of the Department of Community Affairs, and the governing body of the county may not place the director under the administrative supervision and control of some intermediate county agency or official.

Section 252.38(3), F. S., of the State Disaster Preparedness Act of 1974 (Ch. 74-285, Laws of Florida), provides in part as follows:

> Each local disaster preparedness agency created and established pursuant to the provisions of this act shall have a director who shall be appointed, and have his annual salary fixed, by the board of county commissioners of the county or the governing body of a city or town, as appropriate. . . . Each local director shall have direct responsibility for the organization, administration, and operation of such local organization, subject only to the direction and control of the governing body of the political subdivision and of the Division of Disaster Preparedness. . . .

It is a fundamental rule of statutory construction that statutes should be given their plain and obvious meaning. *See* Maryland Casualty Company v. Sutherland, 169 So. 679 (Fla. 1936); Fixel v. Clevenger, 285 So.2d 687 (3 D.C.A. Fla., 1973); Adams v. Dickinson, 264 So.2d 17 (1 D.C.A. Fla., 1972), *cert. denied*, 268 So.2d 908 (Fla. 1972). Applying this rule to the instant inquiry, I construe s. 252.38(3), *supra*, as plainly providing that no public official, agency, or body other than the county governing body and the Division of Disaster Preparedness of the Department of Community Affairs shall have direction and control over the director of a county's disaster preparedness agency. Thus, the county governing body may not place the director under the administrative supervision and control of some intermediate county agency or official. This construction appears to be consistent with the declared legislative purpose "to provide effective and orderly governmental control and coordination of emergency operations in disasters and emergencies," s. 252.38(2), F. S. That is, it eliminates the possibility of additional administrative "layers" from being interjected into the coordinated statewide effort necessary to prepare for and act decisively during a disaster or emergency.

In reaching the foregoing conclusion, I am not unaware of Part III of Ch. 125, F. S., the County Administration Law of 1974, Ch. 74-193, Laws of Florida, which provides in part, at s. 125.73(1), that:

> Each county to which this part applies shall appoint a county administrator, who shall be the administrative head of the county and shall be responsible for the administration of all departments of the county government which the board of county commissioners has authority to control pursuant to this act, the general laws of Florida, or other applicable legislation.

See also s. 125.74(1), F. S. However, this section concerns the general subject of county administration, and s. 252.38(3), F. S., deals particularly with administration of a county disaster preparedness agency. In this situation, the statute relating to the particular part of the general subject will operate as an exception to, or qualification of, the general terms of the more comprehensive statute to the extent of any repugnancy between the two. State *ex rel.* Loftin v. McMillan, 45 So. 882 (Fla. 1908); Stewart v. DeLand-Lake Helen, etc., 71 So. 42 (Fla. 1916); American Bakeries Co. v. City of Haines City, 180 So. 524 (Fla. 1938); and Adams v. Culver, 111 So.2d 665 (Fla. 1959). Thus, I am of the opinion that, to the extent there is any repugnancy between s. 252.38(3) and the provisions of Part III of Ch. 125, the former section should control. *See also* Provident Life & Accident Ins. Co. v. Mathers, 26 So.2d 814, 187 (Fla. 1946), stating that when statutes enacted at the same session are repugnant, the one last enacted will control.

076-85—April 8, 1976

COUNTIES

EXPENSES OF COUNTY COURT JUDGE PAYABLE BY COUNTIES

To: Oliver Lawton, Clerk, Circuit Court, St. Augustine

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

Is the office of county court judge completely funded by the state pursuant to revised Art. V, State Const.?

SUMMARY:

Pursuant to s. 34.171, F. S., the counties shall pay all reasonable expenses of the offices of the county court judges unless the state shall pay such expenses. By the 1975 General Appropriations Act, Ch. 75-280, Laws of Florida, the Legislature has appropriated state funds to pay the expenses of travel of the county court judges when on official assignment outside their official headquarters. Additional expenses of the offices of the county court judges such as other travel, telephone, office supplies, books, postage, equipment, and dues of the County Court Judges Association are the responsibility of the counties.

Section 34.171, F. S., provides that the counties are required to pay "all reasonable expenses of the offices of circuit and county court judges" unless the state shall pay such expenses. Thus an examination of the 1975 General Appropriations Act (Ch. 75-280, Laws of Florida), Item 793, is necessary.

According to the enclosure with your letter the contemplated expenditures for the county court judges' offices are:

EXPENSES: Travel; Telephone; Office Supplies; Books; Postage
EQUIPMENT: (including IBM electric typewriter)
DUES: County Court Judges Association

An examination of the 1975 General Appropriations Act, as well as the Governor's Workpapers at p. j-35, and discussions with Mr. Frank Habershaw of the State Court Administrator's office, discloses that of the above-mentioned expenses, the Legislature has appropriated state funds only for the travel of county court judges when on official assignment outside their official headquarters. Travel to conferences, conventions, or similar meetings by county court judges which serves a public purpose and is generally reimbursable under s. 112.061, F. S., is an expense to be borne by the counties. All other expenses are the responsibility of the counties.

Whether the particular expenses of the county court judge's office are "reasonable" type and amount, and thus legally payable from county funds under s. 34.171, F. S., is a factual question that I am not in a position to decide. Attorney General Opinion 073-173.

Your question is therefore answered in the negative.

076-86—April 19, 1976

PUBLIC EMPLOYEES

RESIDENCE OR DOMICILIARY STATUS AS CONDITION FOR EMPLOYMENT

To: Jerry Melvin, Chairman, House Committee on Retirement, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May the state lawfully require residence within a given geographical area as a condition of public employment and/or give preference to Florida residents in the hiring of public employees?

SUMMARY:

The state may lawfully require residence within a given geographical area as a condition of public employment so long as a rational basis exists for imposing such a requirement. Additionally, the state may lawfully give preference to bona fide Florida residents in the hiring of public employees.

A number of courts, both state and federal, have considered the validity of laws which require residence in a certain place as a condition for employment. In Wright v. City of Jackson, Mississippi, 506 F.2d 900 (5th Cir. 1975), a nonresident fireman challenged the constitutionality of a municipal ordinance which required city employees to live within the city. In upholding the validity of the ordinance, the court held that no fundamental right of *interstate* travel was infringed by the ordinance and that the city was not required to justify the ordinance under the compelling-interest standard which must be met upon interference with right to travel *interstate*. This right of interstate travel was recognized in Shapiro v. Thompson, 394 U.S. 618 (1969), in which the court invalidated a requirement for the receipt of welfare payments that an applicant be a resident of the state for 1 year. Although the court held that the durational residency requirement was unconstitutional, it was careful to point out that its holding did not invalidate bona fide continuing residence requirements. Subsequently, in Dunn v. Blumstein, 405 U.S. 330 (1972), the court invalidated a durational residency requirement for voter registration, but noted that "[n]othing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residency requirements." The Fifth Circuit, in Wright, *supra*, at 902, agreed with the California Supreme Court's decision in Eaton v. City of Torrance, 514 P.2d 433 (1973), *cert. denied*, 415 U.S. 935 (1974), that nothing in *Shapiro* or any of its progeny stands for the proposition that there is a fundamental "right to commute" which would cause the compelling governmental purpose test to apply in cases involving local employment To the contrary, a line of federal cases appears to be developing which allows state and local legislative bodies greater flexibility in enacting legislation in this area. *See, e.g.*, Construction Industry of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Wright v. City of Jackson, *supra*; Vlandis v. Kline, 412 U.S. 441 (1973).

Numerous cases since *Shapiro* have upheld municipal employee residence requirements and preferential hiring for bona fide residents when the same can be found to bear a rational relationship to one or more legitimate state purposes. *See, e.g.*, Eaton v. City of Torrance, 514 P.2d 433 (1973), *cert. denied*, 415 U.S. 935 (librarian) (in which Justice Mosk noted at 437, "The question is not whether a man is free to live where he will. Rather, the question is whether he may live where he wishes and, at the same time, insist upon employment by government."); Hattiesburg Firefighters Local 814 v. City of Detroit, 190 N.W.2d 97 (1971), *dism'd for want of a substantial fed. question*, 405 U.S. 950 (1972) (In this circuit, a dismissal for want of a substantial federal question by the United States Supreme Court constitutes a decision on the merits of the case appealed.); Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972) (police officers); Town of Milton v. Civil Service Commission, 312 N.E.2d 188 (Mass. 1974) (preferential hiring for residents); People *ex rel.* Holland v. Bleigh Construction Co., 335 N.E.2d 469 (Ill. 1975) (preferential hiring of residents of Illinois as laborers on public works projects); McCarthy v. Philadelphia Civil Service Commission, 339 A.2d 634 (Pa. 1975) (policeman). Most recently, the Supreme Court of the United States affirmed McCarthy, *supra*, in a *per curiam* opinion filed on March 22, 1976. The appellant in *McCarthy* contended that he had a constitutional right to be employed by the City of Philadelphia while living elsewhere. The court answered this by stating that there is no support in prior Supreme Court decisions for such a claim. The court also noted that none of the "right to travel" cases cited by the appellant involved "a public agency's relationship with its own employees which, of course, may justify greater control than over the citizenry at large." Based upon these considerations, it is probable that a statute which required individuals who work for the state to be residents of Leon and/or surrounding counties would pass constitutional scrutiny so long as a rational basis existed for such a requirement. Among the reasons for the imposition for such a requirement which have been found to bear a rational relationship to the objective sought are enhancement of the quality of performance by greater personal knowledge of local conditions and a personal stake in the locality, diminution of absenteeism and tardiness among personnel, ready availability

of employees in emergency situations, general economic benefits flowing from local expenditures of employees' salaries, etc.

Moreover, a statute which gives residents of the state a preference in hiring for public employment would likewise probably pass constitutional scrutiny. In People *ex rel.* Holland v. Bleigh Construction Co., *supra*, the court held that the state could give preference to residents of Illinois for employment on public works projects without violating the equal protection clause of either the Federal or Illinois Constitution. Presumably, a statute could be enacted by the Florida Legislature which gives to Florida residents preference in hiring for public employment over non-Florida residents without running afoul of either the State or Federal Constitution.

It should be noted, however, that s. 112.021, F. S., presently provides that: "*Except as provided by law*, there shall be no Florida residence requirement for any person as a condition precedent to employment by the state or any county." (Emphasis supplied.)

076-87—April 19, 1976

WATER MANAGEMENT DISTRICTS

LANDS EXEMPT OR IMMUNE FROM TAXATION; LANDS MAY BE CLOSED TO PUBLIC

To: W. E. Fulford, Chairman, House Natural Resources Committee, Tallahassee

Prepared by: David M. Hudson, Assistant Attorney General, and Marva A. Davis, Legal Intern

QUESTIONS:

1. Under what statutory and constitutional authority do Ch. 298, F. S., water management districts, as opposed to Ch. 373, F. S., water management districts, enjoy exemption from ad valorem taxation?

2. If a response to question 1 includes a finding that Ch. 298, F. S., water management districts are political subdivisions of the state and/or their functions fall within a public purpose, may such districts consequently prohibit public access to such "public" lands?

SUMMARY:

Property owned by drainage and water management districts created pursuant to Ch. 298, F. S., would, under Department of Revenue Rule 12B-1.207, F.A.C., be immune from ad valorem taxation. Section 196.199(1), F. S., further provides that such property may be exempted from ad valorem taxation when used for governmental or public purposes. Such districts may prohibit trespass on property owned by them and presently are not lawfully authorized to permit general public use thereof.

I gather from your inquiry that you are concerned about the sufficiency of existing constitutional and statutory law to exempt such drainage and water management districts from ad valorem taxation and to control the use of their property or the desirability or necessity of legislation in these areas. The Florida Constitution has no specific provision with regard to these matters; however, I trust the following discussion of relevant statutory provisions and case law will be helpful to you.

AS TO QUESTION 1:

Chapter 298, F. S., provides for the formation of water management districts and prescribes their duties and functions. Section 298.03(3) provides that such districts are created as "public corporation[s] of this state." It might be noted, parenthetically, that in AGO 075-108 I expressed the opinion that the provisions of ss. 165.022 and 165.041(2), F. S., operate to supersede the provisions of Ch. 298 concerning the methods of creating and abolishing water management districts under Ch. 298.

Initially, it should be noted that property owned by the state and its political subdivisions is immune from ad valorem taxation in Florida. Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975), Park-N-Shop, Inc. v. Sparkman, 99 So.2d 571, 573-574 (Fla. 1957); AGO's 074-315 and 072-277; *see also* State v. Alford, 107 So.2d 27, 29 (Fla. 1958); and Orlando Utilities Commission v. Milligan, 229 So.2d 262, 264 (4 D.C.A. Fla., 1970).

Department of Revenue Rule 12B-1.207, F.A.C., provides, in pertinent part:

> (C) Property owned and used exclusively by the United States, the state or a political subdivision thereof is immune from taxation. . . .
>
> * * * * *
>
> (2) A political subdivision of the state shall include the following: county authorities, and agencies and instrumentalities of the state or county.

In AGO 074-315, I was presented with the issue of whether property owned by the Oklawaha Basin Recreation and Water Conservation Control Authority is immune from ad valorem taxation. At that time, Department of Revenue Rule 12B-1.207, F.A.C., provided in pertinent part:

> (C) Property owned and used exclusively by the United States, the state, or a political subdivision thereof is immune from taxation. . . .
>
> * * * * *
>
> (2) A political subdivision of this state, shall include the following: *special tax districts* . . . . (Emphasis supplied.)

In AGO 074-315, I stated:

> The Department of Revenue is charged with the duty of prescribing "reasonable rules and regulations for the assessing of and collecting of taxes." Section 195.042, F. S. Absent a judicial determination to the contrary, the quoted provisions of Rule 12B-1.207, *supra*, constitute a proper exercise of that authority. *See* 1 Fla. Jur., *Admin. Law*, s. 90, AGO 073-437. Therefore, the property of a special taxing district such as the authority would appear to be generally immune from taxation, absent some specific reason to the contrary.

Drainage and water management districts created under Ch. 298, F. S., have long been held to partake of sovereign immunity from tort liability because they act "in a governmental capacity as . . . public corporation[s]." Rabin v. Lake Worth Drainage District, 82 So.2d 353, 355 (Fla. 1955), *cert. den.* 350 U.S. 958; *see also* Spangler v. Florida State Turnpike Authority, 106 So.2d 421, 423 (Fla. 1958). The functions performed and purposes served by drainage and water management districts could be directly performed and served by the state itself, *see* Lainhart v. Catts, 75 So. 47 (Fla. 1917), and Richardson v. Hardee, 96 So. 290 (Fla. 1923), and such districts have been referred to as agencies of the state, *see* Palm Beach County v. South Florida Conservancy District, 170 So. 630, 633 (Fla. 1936). In addition, the Legislature has provided the Department of Environmental Regulation with the power to, *inter alia*, join in or initiate a petition for the creation of a water management district, s. 298.01 (*but see* AGO 075-108, *supra*); to object to the creation of such a district, s. 298.03(1); to petition for amendment to the decree creating such a district or to amend or change the district's water management plan, s. 298.07(1); to appoint members to the district's board of supervisors in the event the election therefor is not held, or a vacancy arises, ss. 298.11(3) and 298.12; to review a district's water management plan and proposed modifications thereto, s. 298.25; and to file exceptions to the report of the district's board of supervisors assessing benefits and damages to the property and lands within the district, s. 298.34. *See also* "whereas" clauses to Ch. 72-291, Laws of Florida, and 84 C.J.S. *Taxation* s. 259.

An "instrumentality" is defined by *Webster's New Twentieth Century Dictionary* (2nd ed. 1971) as "the condition, quality or fact of being instrumental, or serving as a means; agency; means; as, the *instrumentality* of the law." (Emphasis supplied.) Organizations such as the American National Red Cross, American National Red Cross v. Department

of Employment, 263 F. Supp. 581 (D. Colo. 1965), and national banking institutions, First National Bank of Homestead, Florida v. Dickinson, 291 F. Supp. 855 (N.D. Fla. 1968), have been held to be "instrumentalities" of government. In full consideration of the foregoing, it is my opinion that drainage and water management distri created under Ch. 298, F. S., are "instrumentalities" of the state within the purview Department of Revenue Rule 12B-1.207, F.A.C., and, as such, property owned by such districts is immune from ad valorem taxation. Attorney General Opinion 074-315.

Furthermore, it would appear that property owned and used by a drainage and water management district is entitled to *exemption* from ad valorem taxation pursuant to s. 196.199, F. S.:

> (1) Property owned and used by the following governmental units shall be *exempt* from taxation under the following conditions:
>
> * * * * *
>
> (c) All property of the several political subdivisions and municipalities of this state which is used for governmental, municipal, or public purposes shall be *exempt* from ad valorem taxation, except as otherwise provided by law. (Emphasis supplied.)

Chapter 196, F. S., does not contain a definition of "political subdivision," but s. 1.01, F. S., provides in pertinent part:

> In construing *these statutes* and each and every word, phrase, or part hereof, where the context will permit:
>
> * * * * *
>
> (9) The words "public body," "body politic" or "*political subdivision*" include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts *and all other districts in this state.* (Emphasis supplied.)

Therefore, it is my opinion that property owned by a drainage and water management district created under Ch. 298, F. S., and used for governmental or public purposes would be entitled to exemption from ad valorem taxation pursuant to s. 196.199, F. S.

AS TO QUESTION 2:

Drainage and water management districts may be created under s. 298.01(1), F. S., for "the purpose of preserving and protecting water resources." Such districts "have no power or authority other than that conferred by statute." Halifax Drainage District of Volusia County v. State, 185 So. 123, 129 (Fla. 1938); *see also* AGO's 076-37, 074-314, 073-374, 074-49, and 074-169. The Legislature has delineated the powers granted to the board of supervisors of drainage and water management districts in s. 298.22, F. S., which provides in pertinent part:

> In order to effect the drainage, protection and reclamation of the land in the district subject to tax, the board of supervisors may:
>
> * * * * *
>
> (5) Shall have the right to *hold, control* and acquire by donation or purchase and if need be, condemn any land, easement, . . . *for any of the purposes herein provided,* or for material to be used in constructing and maintaining said works and improvements for drainage, protecting and reclaiming the lands in said district. (Emphasis supplied.)

Generally, a governmental body is considered to have, with respect to its own lands, the rights of an ordinary proprietor. Clayton v. Warlick, 232 F.2d 698 (9th Cir. 1956); 81 C.J.S. *States* s. 104 (1953). As Mr. Justice Black, writing for the U.S. Supreme Court in Adderly v. Florida, 385 U.S. 39, 47-48 (1966), stated:

> . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated . . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

The legislatively delegated power to control land owned by drainage and water management districts, s. 298.22(5), *supra*, and the concomitant duty of such districts as public corporations, s. 298.03(3), *supra*, to preserve and protect water resources, s. 298.01(1), *supra*, would give them the power to prohibit trespass on lands owned by such districts under their general corporate powers and proprietary ownership rights in property. *See* 32 Fla. Jur. *Trespass* s. 5 (1960); 25 Fla. Jur. *Property* s. 14 (1959); and *In re* Quinn, 35 Cal. App.3d 473, 485, 110 Cal. Rptr. 881, 889 (5th Ct. App. 1973). Moreover, where a statute imposes a duty on public officials to perform a stated purpose, it also confers by implication all necessary or proper power for the complete exercise of such authority and duty not otherwise violative of law. *In re* Advisory Opinion to the Governor, 60 So.2d 285, 287 (Fla. 1952).

The Legislature has authorized public use of property owned by certain governmental bodies. *See, e.g.*, ss. 253.665, 372.121, 372.573, 373.139(3), and 589.26, F. S.; *see also* s. 11, Art. X, State Const., and ss. 253.04 and 253.05, F. S., and *cf.* AGO 076-37. However, there is no statutory authority providing for public use of property owned by drainage and water management districts created under Ch. 298, F. S. It would seem to be particularly appropriate that general public use of property owned by a public corporation created for limited and special purposes has not been provided for, but s. 298.76(1), F. S., does indicate that the Legislature may enact special or local laws "granting additional authority, powers, rights and privileges . . . pertaining to or affecting any drainage district heretofore or that may be hereafter created as provided for by said chapter 298."

076-88--April 19, 1976

ELECTIONS

STATEMENTS OPPOSING A PERSON'S CANDIDACY

To: David H. Bludworth, State Attorney, West Palm Beach

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTIONS:

1. Does an expression by mass media which *opposes* the candidacy of a particular candidate without any mention of, or connection with, that candidate's opponent or opponents come within the definition of "political advertisement" in s. 104.371, F. S.?
2. Does a group, club, association, or other organization which sponsors a publication which characterizes a candidate for public office for the purpose of *opposing* the candidacy of such candidate come within the purview of s. 104.37(5), F. S.?
3. Is a contribution made through or in the name of another in *opposition* to a candidate for election or nomination prohibited by s. 106.08(3), F. S.?

SUMMARY:

An expression by mass media which *opposes* the candidacy of a particular candidate without any mention of, or connection with, any opponent of such candidate does *not* come within the definition of "political advertisement" in s. 104.371, F. S. A group, club, association, or other organization which sponsors a publication which characterizes a candidate for public office for the purpose of *opposing* the candidacy of such candidate does not come within the purview of s. 104.37(5), F. S. A contribution made through or in the name of another in *opposition* to a

candidate for election or nomination is *not* prohibited by s. 106.08(3), F. S., *unless* such contribution is made to a political committee.

In view of their interrelationship and similarity, your questions will be answered together. It should first be noted that throughout the statutory scheme regulating elections in this state (Chs. 97-106, F. S.), prohibitions and regulations respecting campaign activities related to candidates fall into three general categories: Those which prohibit or regulate particular activities only when they are in support of, in furtherance of, or for the purposes of advancing or endorsing a particular candidate. *See*: ss. 104.071(1), 104.071(1)(c), 104.37(4), 104.37(5), 104.373, 106.021(4), 106.04(5), 106.08(1), 106.08(3), 106.10(1), 106.15(2), 106.17(1), 106.17(4), 106.17(5), 106.29(3), F. S. Those which prohibit or regulate particular activities when they are in support of, in furtherance of, or for the purpose of advancing or endorsing a particular candidate as well as when they are in opposition to or against a particular candidate. *See*: ss. 100.361(9), 104.071(1)(b), 104.081, 106.011(2), 106.07(3), F. S. Those which prohibit or regulate particular activities only when they are in opposition to or against a particular candidate. *See* s. 104.35, F. S.

In view of the fact that, as itemized above, the Legislature has made specific distinctions with respect to the context in which certain campaign activities are subject to regulation or prohibition, it must be presumed that the Legislature had some purpose in mind in its selection of the various contextual settings within which it deemed there to be a need for regulation or prohibition. The rule to be applied in the construction of such statutory provisions is stated in United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972):

> Moreover, where Congress [or the Legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress [or the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion.

Similarly, as noted in Stein v. Biscayne Kennel Club, 199 So. 364 (Fla. 1940): "It must be assumed that the Legislature had some purpose in using particular language in a legislative act."

Turning now to the particular statutory provisions about which you inquire, s. 104.371, F. S., reads, in pertinent part:

> Political advertisement is an expression by any mass media, attracting public attention . . . which shall transmit any idea *furthering the candidacy for public office of any person.* (Emphasis supplied.)

The definition is limited by its specific terms to an expression "furthering the candidacy for public office of any person." It neither specifically nor impliedly includes an expression *opposing* the candidacy for public office of any person. Accordingly, I am of the view that an expression by mass media which is limited to the transmission of any idea *opposing* the candidacy for public office of any person does *not* come within the meaning of the term "political advertisement" as defined in s. 104.371.

The second statutory provision about which you inquire, s. 104.37(5), F. S., requires—with exceptions not here pertinent—the inclusion of certain information in

> [a]ll political advertisements or endorsements, including any publication which purports to rate, rank, or characterize candidates for public office, sponsored by any group, club, association, or other organization . . . *for [the] purpose of endorsing the candidacy of one or more candidates for public office* or for [the] purpose of endorsing or opposing any referendum . . . . (Emphasis supplied.)

Although the foregoing statutory provision clearly applies to expressions "endorsing *or* opposing" a *referendum*, insofar as it purports to regulate conduct relating to a candidacy for nomination or election to public office the statute is specifically limited to expressions "for [the] purpose of *endorsing* the candidacy of one or more candidates." As noted in AGO 075-122:

> An examination of Webster's *Third New International Dictionary* (unabridged) reveals at p. 749 that the definition of the word *endorse* includes "to express

> definite approval or acceptance of" as well as to "support or aid explicitly" or "vouch for" . . . .

It is clear from the foregoing definition that an expression limited to the transmission of an idea *opposing* the candidacy for public office of any person does not come within the meaning of the word "endorsing." Further, I am of the view that the phrase "for [the] purpose of endorsing the candidacy of one or more candidates" modifies and limits the scope of the preceding portion of the sentence in which it appears, which portion reads "including any publication which purports to rate, rank, or characterize candidates for public office." Accordingly, a publication which characterizes a candidate for public office would come within the purview of s. 104.37(5), F. S., *only* if such characterization also constituted a political advertisement as defined in s. 104.371, F. S., and discussed above or was "for [the] purpose of endorsing the candidacy of one or more candidates for public office." On the basis of the foregoing, it is my opinion that an expression limited to the transmission of an idea *opposing* the candidacy for public office of any person—or limited to the characterization of a candidate as one who should not be elected—does *not* come within the scope of s. 104.37(5).

The last statutory provision about which you inquire is s. 106.08(3), F. S., which provides, in pertinent part:

> No person shall give, furnish, or contribute money, material, or supplies, or make loans, *in support of a candidate for election or nomination* or in support of or in opposition to an issue, *or to any political committee*, through or in the name of another, directly or indirectly, in any primary or general election or in any election at which an issue is presented to the electors for their approval or rejection. (Emphasis supplied.)

Insofar as the foregoing prohibition relates specifically to candidates for election or nomination, the scope of the prohibition is by its terms expressly limited to contributions "in support of" such a candidate. Accordingly, a contribution in *opposition* to a candidate for election or nomination made in the name of another would not appear to run afoul of the prohibition against such contributions made "in support of" a candidate.

However, attention must also be given to that portion of the statute which prohibits contributions in the name of another "to *any* political committee." (Emphasis supplied.) This last-quoted portion of the statute is couched in broad terms and contains no qualification respecting the purposes of the political committee. Therefore, I am of the view that a contribution made to a political committee in the name of another is prohibited by the subject statute, irrespective of the purposes of the political committee or the purposes to which the contribution is to be applied.

076-89—April 19, 1976

TRAVEL EXPENSES

"CONVENTION" AND "CONFERENCE" DEFINED

To: Dorothy W. Glisson, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

What are the definitions of "convention" and "conference" as contemplated by s. 112.061(6)(a), F. S., with respect to meetings of the State Board of Accountancy?

SUMMARY:

Regular meetings of the State Board of Accountancy are not "conventions" or "conferences" within the meaning of s. 112.061, F. S.

Such meetings are not made "conventions" or "conferences" by the fact that an "outside" person or group may appear before the board to discuss, or make presentations to the board of, matters within the statutory functions of the board.

"Each member [of the State Board of Accountancy] shall receive $10 per day, or any part of a day, while attending official board meetings and shall receive per diem and mileage as provided in s. 112.061." Section 473.21, F. S. The board is required by s. 473.07, F. S., to meet at least twice a year to act upon applications to take the examination provided in s. 473.08, F. S. Other meetings may be called in accordance with the rules adopted by the board.

All travelers *when traveling to a convention or conference* which serves a direct and lawful public purpose with relation to the public agency served by the person attending such meeting shall receive for subsistence up to $25 per diem or up to the amounts permitted in s. 112.061(6)(d), F. S., for meals, plus actual expenses for lodging at a single occupancy rate to be substantiated by paid bills. Section 112.061(6)(a), F. S.

Pursuant to s. 112.061(6), (10), and (12), F. S., the Department of Banking and Finance has defined "convention" and "conference" and provided examples to aid in the construction of the terms. Rule 3A-1.06, Florida Administrative Code provides:

> 1. "CONVENTION" DEFINED. A Convention is the assembly [sic] a group of persons representing persons and groups, coming together for the accomplishment of a purpose of interest to a large group or groups.
>
> 2. "CONFERENCE" DEFINED. A conference is coming together of persons with a common interest or interests for the purpose of deliberation, interchange of views, or disputes; and for discussion of their common problems and interests. The term also includes similar meetings such as seminars and workshops which are large formal group meetings that are programmed and supervised to accomplish intensive research, study, discussion and work in some specific field or on a governmental problem or problems.
>
> 3. CONSTRUCTION. *Where the head of a state agency, office, division, bureau or department calls together state officers, employees, and authorized persons of his agency, office, division, bureau or department for the discussion and study of their common problems or interests, such a gathering or meeting will not be deemed to be either a convention or conference*; and the same would be true of a gathering of such persons of a district or area office of such agency, office, division, bureau, or department. Also, where the head of such state agencies or departments calls together his own departmental state officers, employees and authorized persons from various sections of the state for interoffice discussion and consideration, such a gathering will not [sic] deemed to be either a convention or a conference. However, when the head of a state agency, division or department calls together state officers, employees and authorized persons from other departments, offices, divisions, or agencies for the purpose of discussing common governmental problems, for the purpose of discussing the implementation of legislation or rules and regulations, or for the purpose of discussing uniform procedures to be established for the operation of other departments, agencies, offices, or divisions of the state, such a gathering will be considered to be a conference within the meaning of Section 112.061(6), F. S. (Emphasis supplied.)

This rule was adopted from AGO 063-95. Therein this office concluded:

> What we believe the legislature had in mind were those more formal or important meetings of public officers or employees where they come together in their official associations or hold group meetings of an exceptional nature and official programs, panel discussions and group clinics are involved. We think that the legislature did not draw too great a distinction between its use of the words "convention" or "conference" but that its use of these terms was practically synonymous or interchangeable.

As gleaned by the italicized portion of Rule 3A-1.06, F.A.C., above, the general meetings of the State Board of Accountancy, which I understand are held once a month

at different locations around the state, would not be considered conferences or conventions.

Your question, as I understand it, is whether a regular meeting of the State Board of Accountancy becomes a conference or a convention within the purview of s. 112.061, F. S., when "other persons or groups are scheduled for discussion, deliberation and/or appearance." The agendas of the board disclose that almost every meeting has some type of appearance from "outside" persons or groups. However, such appearances would not ordinarily convert a regular meeting into a conference or convention within the purview of Rule 3A-1.06, *supra*. Meetings with appearances by persons or groups which relate to the internal functioning of the board, such as the consideration of examination applications, petitions for declaratory statements, admissions into the profession, suspensions, revocations and reinstatements, and complaints would not be a "convention or conference which serves a direct and lawful public purpose with relation to the [administrative board] served by the person attending such meeting" for which reimbursement for travel expenses may be made under s. 112.061(6)(a). *Cf.* AGO 073-188.

Consideration must now be given to those meetings which include appearances of "outside" persons or groups which do not relate to the internal functioning of the board. Such appearances may include those to discuss educational requirements and proposed legislation. The agendas of the State Board of Accountancy which include such appearances disclose that such were not the primary purpose for the meetings but were merely incidental to the scheduled meetings of the board and were business matters routinely before the board at such meetings for its consideration. In any event, the members of the board would not be entitled to any per diem or travel expenses for the travel to a convention or conference, as the board members traveled to an official board meeting rather than a conference or convention in which the board members were participating in such capacity as members of a larger group of individuals with a common interest assembled for the purpose of attaining or implementing common goals.

It should be noted parenthetically that the compensation provided for the members of the board under s. 473.21, F. S., is only "while attending official board meetings" and not when attending a convention or conference.

076-90—April 20, 1976

CIRCUIT COURT CLERK

CHARGE FOR PREPARING TRANSCRIPT OF RECORD IN APPELLATE PROCEEDING

To: Miller Newton, Clerk, Circuit Court, Dade City

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

In preparing a transcript of record for appeal pursuant to Florida Appellate Rule 6.9, may the clerk of the circuit court charge for one copy as if it were an original record?

SUMMARY:

A clerk of circuit court may not charge costs under s. 28.24(12), F. S., for the making of transcripts of record as provided for in Rule 6.9, Florida Appellate Rules but must confine his charges for that service to those authorized under s. 28.24(13), F. S.

Florida Appellate Rule 6.9(a) requires the preparation of record upon appeal by the defendant, stating that "an original and two copies" shall be completed by the clerk. That Rule 6.9(a) has to do with "transcripts of record" and not the preparation of an "original" document is evidenced by the contrast between it and Rule 6.9(e), which provides that the *original papers and exhibits* may be sent to the appellate court either by order of that court or by order of the lower court. Otherwise, the *original papers and exhibits*

remain in the lower court file. *Also cf.* Rule 6.10(a), Florida Appellate Rules which requires the clerk to deliver the "transcript of record" and two copies to the appropriate persons in cases where the state is the appellant.

The applicable statutes also note the distinction between "transcripts of record" and "original" papers and documents. Section 28.24(12), F. S., prescribes a service charge of $1 per instrument for "preparing, numbering and indexing of original record" of appellate proceedings, while s. 28.24(13), F. S., prescribes a charge of $1 per page for "making transcripts of record" in appellate proceedings.

Therefore, as the clerk of the circuit court does not prepare, number, or index an original record in the performance of his or her duties prescribed by Rule 6.9(a), *supra*, I am of the opinion that he or she may not so charge for that service, as provided for in s. 28.24(12), F. S., but must confine his charges to those prescribed by s. 28.24(13), F. S.

076-91—April 20, 1976

EDUCATION

CHANGE IN CORPORATE STRUCTURE OF INDEPENDENT SCHOOL LICENSEE—NOT TANTAMOUNT TO TRANSFER OF LICENSE

To: Earl R. Edwards, Executive Director, Board of Independent Postsecondary Vocational, Technical, Trade, and Business Schools, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTION:

Does a change in the corporate structure of a licensed nongovernmental postsecondary vocational, technical, trade, or business school or a change of the corporate name of such school constitute a "transfer" of its license, which is prohibited by s. 246.217, F. S.?

SUMMARY:

Pursuant to s. 607.191, F. S., no amendment of the articles of incorporation of a corporation, including changes in the corporate structure or of the corporate name authorized by Ch. 607, F. S., shall affect any existing cause of action or existing rights of any person other than the shareholders. Therefore, as long as a licensed school (as defined in s. 246.203, F. S.) remains essentially the same in objectives, philosophy, curriculum, and administration, an amendment of the articles of incorporation changing the corporate structure in a manner authorized by law or changing the corporate name of such corporate licensee does not constitute a "transfer" within the purview of, and prohibited by, s. 246.217, F. S.

Your question is answered in the negative.

Your inquiry does not delineate the "changes in corporate structure" of the organizations or schools to which you may have specific reference, but I assume that your inquiry is in reference to those changes authorized and prescribed by s. 607.177, F. S., including a change of the corporate name. Corporations may be organized under Ch. 607, F. S., and the provisions of that statute extend to all corporations, whether for profit or not for profit. Section 607.007. *Also see* Ch. 608, F. S. Pursuant to s. 607.191, no amendment of the articles of incorporation, including "changes in corporate structure" or change of the corporate name authorized by s. 607.177 shall affect any existing cause of action in favor of, or against, the corporation or existing rights of any person other than the shareholders thereof.

In general, a change in the corporate name has no effect on the corporation as a legal entity, nor does it affect its identity. The corporation continues, as before, to be responsible in its new name for all debts or other liabilities which it had previously contracted or incurred. Steward v. Priston, 86 So. 348 (Fla. 1920); Sealcell Corporation v.

Berry, 150 So. 634 (Fla. 1933); 18 C.J.S. *Corporations* s. 171 f., p. 571 *et seq.* The mere amendment of the articles of incorporation does not create a new corporation or otherwise affect its identity, or its existing rights or liabilities. 18 C.J.S. *Corporations* s. 84.

Under s. 246.215, F. S., both the school and the agent of a nongovernmental postsecondary vocational, technical, trade, or business school (as defined in s. 246.203, F. S.) must be duly licensed.

> A license is in the nature of a special privilege rather than a right common to all, and is often required as a condition precedent to the right to carry on business . . . . [30 Am. Jur. *Licenses* s. 2, p. 325.]

A license generally is regarded as a special privilege of personal trust and confidence that cannot be assigned or transferred. *See* Hom Moon Jung v. Soo, *et ux.*, 167 P.2d 929; John Barth Co. v. Brandy, *et al.*, 161 N.W. 766; *In re* Buck's Estate, 30 A. 821; *In re* Grimm's Estate, 37 A. 403; State *ex rel.* Gordon Memorial Hosp., Inc. v. West Virginia State Board of Examiners for Registered Nurses, *et al.*, 66 S.E.2d 1; *In re* Blumenthal, 18 A. 395; State v. Lydick, 9 N.W. 560; Shannon v. Esbeco Dist. Corp., 120 S.W.2d 745; State v. Bayne, 75 N.W. 403; *cf.* 53 C.J.S. *Licenses* s. 45; 33 Am. Jur. *Licenses* s. 66; AGO 062-110.

While the authorized officials of a licensed corporate school might sell and transfer its assets and property or dissolve the corporation, the corporation may not sell and transfer its license or privilege to operate the school and carry on its business, as the same is merely a personal privilege or right granted by the State Board of Independent Postsecondary Vocational, Technical, Trade, and Business Schools. In any event, s. 246.217, F. S., expressly prohibits the transfer of the license of either the licensed school or its agent (as defined by s. 246.203(5), F. S.).

It is stated in 1 Am. Jur.2d *Adm. Law* s. 70, p. 866:

> Administrative agencies are creatures of statute and their power is dependent upon statutes, *so that they must find within the statute warrant for the exercise of any authority which they claim.* They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication. (Emphasis supplied.)

See also 73 C.J.S. *Pub. Adm. Bodies* s. 48, p. 367, *et seq.*; Bd. of County Com. of Dade County v. State, 111 So.2d 476, 479.

An examination of the provisions of Ch. 246, F. S., fails to indicate the existence of any procedure or any authority to effectuate a transfer of a school's or agent's license. Indeed, s. 246.217, F. S., specifically provides that the licenses shall not be transferable.

> . . . If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised . . . the further exercise of the power should be arrested. [State v. Atlantic Coast Line R. Co., 47 So. 969 (Fla. 1908). *See also* State of Fla. *ex rel.* Barbara Greenberg v. The Florida State Board of Dentistry, 297 So.2d 628 (Fla. 1974).]

There is authority in support of the proposition that a change in membership of a firm does not constitute a transfer within the statutory prohibition. Hill v. Trexton, 23 S.W. 947; Valentine v. G.S. Donaldson Inv. Co., 260 P. 305.

Accordingly, it is my opinion that, if a school remains essentially the same in objectives, philosophy, curriculum, and administration, a mere amendment of the articles of incorporation changing the corporate structure in a manner authorized by law or changing the corporate name of the licensed school is not a "transfer" as contemplated and prohibited by s. 246.217, F. S.

076-92—April 20, 1976

DUAL OFFICEHOLDING

OFFICES OF MAYOR AND TOWN MARSHAL INCOMPATIBLE

To: Matthew M. Sullivan, Mayor, Frostproof

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May the city council of the City of Frostproof assign the duties of town marshal to the mayor?

SUMMARY:

The dual officeholding prohibition of s. 5(a), Art. II, State Const., and the public policy rule against holding two incompatible public offices preclude the mayor of the City of Frostproof from assuming and performing the duties of town marshal. In addition, the mayor could not act as town marshal or conservator of the peace without obtaining a certificate of compliance in accordance with s. 943.14(2), F. S., of the Department of Criminal Law Enforcement Act of 1974.

Section 5(a), Art. II, State Const., provides, in pertinent part, that "[n]o person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein." *See also* s. 15, Art. XVI, State Const. 1885. Applying this constitutional provision to the instant question, it would appear that both the mayor and town marshal are made officers of the City of Frostproof by that municipality's charter act. *See* s. 1, Art. II, Ch. 8955, 1921, Laws of Florida, enumerating officers of the city to include the mayor and town marshal. Consistent with this charter act, I am compelled to conclude that the positions of mayor and town marshal of the City of Frostproof are offices within the purview of s. 5(a), Art. II, State Const., and that, therefore, one person may not serve in both positions simultaneously. *Cf.* AGO's 071-167 and 072-348 concluding that a deputy sheriff and a police chief are also officers within the purview of the constitutional dual officeholding prohibition; also *cf.* AGO 069-2.

In reaching the foregoing conclusion, I am not unaware of the provision of the charter act of the City of Frostproof which states that the city council may abolish the office of town marshal, among others, and "provide that the duties of same be performed by the officers of said town." Section 1, Art. II, Ch. 8955, *supra.* Neither am I unaware of those cases which hold that the mere imposition on an officeholder of additional or ex officio duties *compatible* with the duties the officeholder is already required to perform is not a violation of the constitutional dual officeholding prohibition. *See* Whitaker v. Parsons, 86 So. 247 (Fla. 1920); State *ex rel.* Landis v. Reardon, 154 So. 868 (Fla. 1934); State v. Florida State Turnpike Authority, 80 So.2d 337 (Fla. 1955).

However, as I understand it, the city council here is not abolishing the office of town marshal, but, according to the ordinance in question, is merely authorizing the mayor "to assume and perform the duties of Town Marshal as conservator of the peace," *i.e.*, to exercise the powers and perform the functions of another office which is still in existence. Moreover, the duties of the offices of mayor and town marshal are *incompatible,* since the mayor is empowered and directed by the charter act to appoint and supervise the town marshal. *See* s. 1, Art. III, and s. 3, Art. VI, Ch. 8955, *supra.* Thus, performing the duties of both offices simultaneously would be in violation of the public policy rule prohibiting the holding of two incompatible public offices, such incompatibility existing

> . . . where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one has the power to appoint or remove or set the salary of the other, or where the duties clash, inviting the incumbent to prefer one obligation over the other. [Attorney General Opinion 070-46.]

Finally, it would appear that even if such dual service were otherwise valid, the mayor could not assume and perform the duties of town marshal as conservator of the peace without obtaining a certificate of compliance in accordance with s. 943.14(2), F. S., of the Department of Criminal Law Enforcement Act of 1974. Compare the definition of "police officer" contained in s. 943.10(1), F. S., with the definitions of "marshal" and "conservator of the peace" contained in Black's Law Dictionary (Rev. 4th Ed.), pp. 378 and 1125. The exception provided in s. 943.21, F. S., for "elected officers," in my opinion, refers to elected *police* officers as defined in s. 943.10(1) such as elected sheriffs, police chiefs, etc., and not to such offices as a city mayor or an appointive town marshal.

Your question is answered in the negative.

076-93—April 21, 1976

STATE OFFICERS AND EMPLOYEES

OPTIONAL MEMBERSHIP IN HEALTH MAINTENANCE ORGANIZATION

To: J. H. "Jim" Williams, Lieutenant Governor, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General

QUESTIONS:

1. Do federal law and regulations require the state to offer its employees the option of health maintenance organization membership as an alternate to the state insurance program provided pursuant to s. 112.075, F. S.?
2. If the above question is answered in the affirmative, can and must the state pay to a federally qualified health organization chosen by an employee the sum equal to the state insurance contribution provided by s. 112.075, F. S.?

SUMMARY:

The State of Florida or any agency thereof is required to offer its employees the option of membership in a qualified health maintenance organization engaged in the provision of basic and supplemental health service in the area in which such employees reside as an alternative to the state insurance program provided pursuant to s. 112.075, F. S., due to the requirements of federal law and regulations embodied in Title 42 U.S.C.A. 300e *et seq.* (Public Law 93-222), and C.F.R., Title 42, Ch. 1, Part 110, Subpart H, Rules 110.801-110.808 as published in the federal register Vol. 40, No. 208, and is required to pay to such a federally qualified health maintenance organization chosen by an employee a sum equal in amount to the state insurance contribution provided by s. 112.075.

In your letter you advise:

It is asserted to us that the provisions of s. 112.075 are required by Federal law to be made equally applicable to an employee who chooses membership in a health maintenance organization as an alternate to the state insurance plan. Among the Federal provisions asserted to be applicable are Title XIII of the Public Health Service Act, (42 U.S.C. 300e et seq.), as added by the Health Maintenance Organization Act of 1973, Public Law 93-222, (especially Section 1310) and CFR Title 42, Chapter 1, Part 110, Subpart H. Rules 110.801-110.808, as published in the *Federal Register*, Vol. 40, No. 208, for Tuesday, October 28, 1975, pages 50212-50216. However, before taking any action in the matter, we feel that the advice of your office is necessary.

Question 1 is answered in the affirmative. Question 2 is answered in the affirmative subject to the discussion which follows.

Section 112.075, F. S., is the State Officers and Employees Group Insurance Program Law. Section 112.075(1)(b) states that the purpose of the law is to authorize a group life, health, and accident insurance benefit program for all state officers and all full-time state employees holding salaried positions. Section 112.075(2) defines "full-time state employees holding salaried positions." Section 112.075(3)(b)4. provides that the group insurance program "shall be uniformly available to all state officers and full-time state employees holding salaried positions." The Secretary of Administration is responsible for the administration of the group insurance program, s. 112.075(4), and the Department of Insurance has the duty of determining that insurance carriers desiring to bid for the insurance to be offered are fully qualified, financially sound, and capable of meeting all servicing requirements. Section 112.075(3)(b)3. Section 112.075(5) mandates that participation in the state group insurance program by any state officer or employee shall at all times be *voluntary* under the rules and procedures prescribed by the Department of Administration.

Section 112.075(7), F. S., provides the authority for the payment by state agencies, from any funds made available for such purposes, of 75 percent of the cost of the individual coverage of each officer or employee participating in the state insurance program. Section 112.075(7)(d) provides:

> No state or agency funds shall be contributed by any state agency toward the premium cost of any group health insurance program unless said program is established pursuant to the provisions of this section.

The mandate of the above-quoted paragraph and the other provisions of s. 112.075 must be examined in light of federal law to determine if federal law requires the state to offer its employees the option of health maintenance organization membership as an alternative to the state insurance program and to determine if state or agency funds are required to be contributed toward the dues or premium costs of such state employees for participating in a health maintenance organization.

Public Law 93-222, enacted December 29, 1973, created what is commonly referred to as the "Health Maintenance Organization Act of 1973." Said law is now embodied in Title 42 U.S.C.A. s. 300e-9, *et seq.* Section 300e-9(a) provides:

> (a) Each *employer* which is required during any calendar quarter to *pay its employees* the minimum wage specified by section 206 *of Title 29* (or would be required to pay his employees such wage but *for section 213(a) of Title 29*), and which during such calendar quarter employed an average number of employees of *not less than twenty-five*, shall, in accordance with regulations which the Secretary shall prescribe, *include in any health benefits plan offered to its employees in the calendar year beginning after such calendar quarter the option of membership in qualified health maintenance organizations* which are engaged in the provision of basic and supplemental health services in the areas in which such employees reside. (Emphasis supplied.)

It is this federal law which requires that the option of membership in qualified health maintenance organizations be offered by any *employer* required by Title 29 U.S.C.A., s. 206, which is s. 6 of the Fair Labor Standards Act of 1938, to pay its employees the minimum wage specified therein.

Title 29 U.S.C.A., s. 206, provides in part:

> (a) Every *employer* shall pay to each of his *employees* who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates . . . . (Emphasis supplied.)

Thus we must determine if the State of Florida is an "employer" as defined by the Fair Labor Standards Act, as amended. Examination of s. 203(d) reveals that, originally, a state was *excluded* from the definition of "employer" as defined therein. However, the section was amended by Public Law 89-601, s. 203(d), to define employer as follows:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and *includes a public agency*, but does

> not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization. (Emphasis supplied.)

"Public agency" is defined in s. 203(x) as follows:

> "Public agency" means the Government of the United States; *the government of a State or political subdivision thereof; any agency of* the United States (including the United States Postal Service and Postal Rate Commission), *a State or a political subdivision of a State*; or any interstate governmental agency. (Emphasis supplied.)

Thus it can be seen that a state or any agency of a state is squarely within the definition of a "public agency" and accordingly would be an "employer" as defined in Title 29 U.S.C.A. s. 203(d). Thus, the state or its agencies would be an "employer" within the purview of Title 42 U.S.C.A. s. 300e-9, previously quoted herein, and would be required to offer the option provided for therein. An examination of the Federal Register, Vol. 40, No. 208, reveals that the rules and regulations adopted thereunder, Title 42, Ch. 1, Part 110, Subpart H in s. 110.801, define "employer" as follows:

> (a) "Employer" shall have the same meaning as that given such term in Section 3(d) of the Fair Labor Standards Act of 1933, as amended, (29 U.S.C.A. s. 203).

As can be seen, the rule defines "employer" in substantially the same manner as the word is defined in Title 42 U.S.C.A. s. 300e-9.

Section 110.802 provides in part:

> (a) The regulations of this subpart apply in each calendar year to each *employer* which:
> (1) Was required during any calendar quarter of the previous calendar year to pay its employees the minimum wage specified by Section 6 of the Fair Labor Standards Act of 1938 (or would have been required to pay its employees such wage but for section 13(a) of such Act) . . . . (Emphasis supplied.)

This rule likewise makes it crystal clear that an employer required to comply with s. 6 of the Fair Labor Standards Act of 1938, as amended, which would include the state, is within the purview of the "Health Maintenance Organization Act of 1973." Section 110.803(a) of the Rules provides:

> An *employer subject to s. 110.802 shall,* at the time a health benefits plan *is offered* to its eligible employees or to such employees and their eligible dependents, *include in such plan the option of membership in qualified health maintenance organizations in accordance with the provisions of this section.* (Emphasis supplied.)

This rule generally tracks the statute it implements. A state would be within the purview of the rule and the statute because the state would be an employer subject to s. 110.802, previously quoted herein.

Thus it is clear that the State of Florida, being an employer as defined in Title 29 U.S.C.A. s. 203(d), the Fair Labor Standards Act, would be an "employer" as that term is used in Title 42 U.S.C.A. s. 300e-9, and accordingly would be required to offer its employees the option of membership in qualified health maintenance organizations which are engaged in the provision of basic and supplemental health service in the areas in which such employees reside.

Inasmuch as s. 112.075, F. S., the State Officers and Employees Group Insurance Program Law, reaches both state officers and employees, it is necessary to consider the term "employee" as defined in Title 29 U.S.C.A. s. 203(e). Where referring to employees of a state or political subdivision of a state, said section provides in s. 203(e)(2) in part:

> (e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means . . .

* * * * *

(c) any *individual* employed by a State, political subdivision of a State or an interstate governmental agency, *other than* such an individual . . .
(i) *who is not subject to the civil service laws of the State, political subdivision, or agency which employs him*; and
(ii) who . . .
(I) *holds a public elective office of that State, political subdivision, or agency,*
(II) *is selected by the holder of such an office to be a member of his personal staff,*
(III) *is appointed by such an officeholder to serve on a policymaking level,* or
(IV) *who is an immediate adviser to such an officeholder* with respect to the constitutional or legal powers of his office. (Emphasis supplied.)

As can be noted, the provision excludes the individuals described above from the definition of "employee." Included in the exclusion are individuals employed by a state, or political subdivision of a state, who are not subject to the civil service laws of the state, political subdivision or agency which employs him; an individual who holds a public elected office of that state, political subdivision or agency; an individual who is selected by the holder of such an office to be a member of his personal staff; an individual who is appointed by such an officeholder to serve on a policymaking level; and an individual who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office. Since the thrust of Public Law 93-222 is for the purpose of reaching employers and employees under the Fair Labor Standards Act, it seems clear that the *excluded described individuals,* not being employees within the purview of the Fair Labor Standards Act of 1938, would *not be required to be offered the option of membership* in health maintenance organizations as an alternate to state insurance. This seems the logical and natural result of the language found in s. 300-9(a). The language of the provision commences by referring to each employer required to pay its employees the minimum wage specified by s. 206, and concludes by requiring that such employer shall include in any health benefits plan offered to *its employees* the option of membership in qualified health maintenance organizations.

Therefore, it seems clear that *only those employees* covered under the Fair Labor Standards Act of 1938 would be required to be offered such option. The thrust of the law seems designed to reach employees protected by the Fair Labor Standards Act of 1938.

An examination of Public Law 93-222, the Health Maintenance Organization Act of 1973, reveals that the term "employee" is not defined therein although it is covered by the regulations in s. 110.801(c) wherein it is defined to mean "any individual employed by an employer whether on a full or part-time basis." As compared to the definition of "employer" found in s. 110.801(a) of the regulations, it is noted that the regulations specifically define "employer" to have the same meaning as that given in s. 3(d) of the Fair Labor Standards Act of 1938, as amended. Although "employee" is not defined in the regulations in relation to the definition of "employee" in the Fair Labor Standards Act of 1938 in the manner in which the term "employer" is so defined, in light of the overall thrust and purpose of Public Law 93-222, it is my opinion that employees excluded from the definition of the term "employee" of the Fair Labor Standards Act would not be required to be offered the option of membership in a health maintenance organization. This answers question number 1.

Next to be considered is question number 2 which is also answered in the affirmative subject to the following discussion.

Title 42 U.S.C.A. s. 300e-9(c) provides:

> No *employer* shall be required to *pay more for health benefits* as a result of the application of this section than would otherwise be required by any prevailing collective bargaining agreement *or other legally enforceable contract for the provision of health benefits between the employer and its employees. Failure of* any employer to comply with the requirements of subsection (a) of this section shall be considered a willful violation of section 215 of Title 29. (Emphasis supplied.)

This section protects an employer from being required to pay more for health benefits as a result of the requirements of s. 300e-9 than such employer would otherwise be required to pay by any prevailing collective agreement or other legally enforceable contract for the provision of health benefits between the employer and its employees and also imposes a penalty on an employer for failing to comply with the requirements of the section. Rules and regulations have also been adopted pursuant to this provision. Section 110.807 provides in part:

> (a) The health maintenance organization alternative shall be included in the health benefits plan on *terms no less favorable* in regard to an employer's monetary contribution or designee's cost for health benefits, than those *on which* the *other alternatives* in the health benefits plan are included: *Provided*, That the employer shall *not be required to pay more* for health benefits as a result of offering the option of membership in qualified health maintenance organizations than such *employer* would otherwise be required to pay for health benefits by a collective bargaining agreement or other *employer-employee contract in effect* at the time that the health maintenance organization is included in the health benefits plans.
> (b) The amount of the employer's or designee's contribution shall be determined in a manner consistent with this section. (Emphasis supplied.)

This rule is consistent with Title 42 U.S.C.A. s. 300e-9(c) and protects the employer from being required to pay for health benefits *in excess* of those the employer would otherwise be required to pay. "Employer-employee" contract is defined in s. 110.801(m) as follows:

> "Employer-employee contract" means a *legally enforceable agreement* (other than a collective bargaining agreement) between an *employer* and its *employees* for the provision of, or payment for, health benefits for its employees, or for such employees and their eligible dependents. (Emphasis supplied.)

In the instant case, s. 112.075, F. S., would be considered as the "employer-employee" contract within the purview of the federal law and regulations. The *amount* of the state's contribution would be determined in the manner set forth in s. 110.807 of the Rules and in the instant situation would be that amount established by s. 112.075(7)(a), F. S. This is recognized in Rule s. 110.807(c) as follows:

> Where the specific amount of the employer's contribution for health benefits is fixed by a collective bargaining agreement, by an *employer-employee contract, or by law*, the amount so determined *shall constitute* the employer's obligation for contribution toward the health maintenance organization *dues or premiums* on behalf of eligible employees or such employees and their eligible dependents. (Emphasis supplied.)

The "Health Maintenance Organization Act of 1973" is clearly and specifically designed to reach all employers as that term is defined in the Fair Labor Standards Act of 1938, as amended. States have been clearly unequivocally brought within the purview of said Act. The mandate of the "Health Maintenance Organization Act of 1973" is to require that all such employers within the purview of the Fair Labor Standards Act of 1938, as amended, offer their employees the option of membership in qualified health maintenance organizations which are engaged in the provision of basic and supplemental health service in the areas in which such employees reside. In the face of such clear and unequivocal mandate, the restrictions found in s. 112.075(7)(d), F. S., must yield. The effect of the federal law and its requirements is to *lift* the restriction of the *use* of state or agency funds allowed to be contributed toward the premium costs of any group health insurance program, *unless* one or the other, but not both programs are established pursuant to the provisions of s. 112.075, F. S., and to authorize and require the use of such funds toward the dues or premium costs of membership opted for by state employees in qualified health maintenance organizations which are engaged in the provision of basic and supplemental health service in the areas in which such employees reside. This is so by virtue of the Supremacy Clause of the Federal Constitution, Art. 6, Clause 2, of the United States Constitution.

The effect of the Supremacy Clause of the United States Constitution is well settled. It has been stated that the Constitution and laws of the United States extend and are

paramount over all the territory of every state and cannot be annulled, nor the force of *either* of them be in any degree impaired by any law of the state no matter in what form or with what solemnity such law may have been enacted, or by what name it may be designated, whether it be a constitution, an ordinance, a statute, or a resolution, and so far as it conflicts with the Constitution or with any valid law of the United States, it is utterly nugatory and can afford no legal protection whatever to those who act under it. (Charge of grand jury, D.C. Mass., 1861, at Sprague, U.S. 602, 30 Fed. Case No. 18,273; *also see* Public Utilities Commission of State of California v. United States, 355 U.S. 534 (1958), *rehearing denied*, 356 U.S. 925.)

This doctrine was recognized by the courts of the State of Florida in the cases of United States v. Carter, 121 So.2d 433 (Fla. 1960), and Montgomery v. State, 45 So. 879 (Fla. 1908).

It has also been stated that statutes within the constitutional authorization of Congress become *part of the law* of the several states because the laws of the United States are the supreme law of the land. Anderson v. Andrews, 156 F.2d 972 (3rd Cir. 1946), *reversed on other grounds*, 331 U.S. 461. A state law cannot stand which either frustrates the purpose of national legislation or impairs the efficiency of those agencies of federal government to discharge the duties for the performance of which they were created. (Nash v. Florida Industrial Commission, 389 U.S. 235 [1969].) No state government can exclude the government of the United States from the exercise of any authority conferred upon it by the Constitution, obstruct its authoritative officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it. Tennessee v. Davis, 100 U.S. 257 (1879).

The states are devoid of power to retard, impede, burden, or in any measure control the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government. Nash v. Florida Industrial Commission, *supra*. *See* same case at 205 So.2d 700.

A state statute is in conflict with a federal statute when one may incur the penalty of the federal statute by obeying the state statute or vice versa, American Federation of Labor v. Watson, 60 F. Supp. 1010 (Fla. 1945), *reversed on other grounds*, 327 U.S. 582.

The Supremacy Doctrine also applies to federal regulations. Free v. Bland, 369 U.S. 663 (1962).

The Supremacy Doctrine has even allowed a federal court to reach the Governor of the State of Florida through an order to show cause why he should not be held in contempt for interfering with a court order. *See* Harvest v. Board of Public Instruction of Manatee County, 312 F. Supp. 269 (Fla. 1970).

Thus it is quite clear that the mandates of the federal law involved herein and the federal regulations implementing said law must be complied with.

076-94—April 21, 1976

COURT COSTS

COUNTY NOT REQUIRED TO PAY COSTS OF NOTICE BY PUBLICATION FOR INDIGENTS

To: Harris G. Daniel, Clerk, Circuit Court, Kissimmee

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Who is to bear the cost of notice by publication when the party plaintiff is legally indigent as set forth in s. 57.081, F. S.?

SUMMARY:

The state and county are not responsible for the payment of the costs of publication of notice of action by insolvent and poverty-stricken persons, except as may otherwise be provided in s. 50.071, F. S.

In actions or proceedings for dissolution or annulment of marriage, adoption, or wherein the state law and state and federal Constitutions do not require personal service of process, the alternative means of obtaining jurisdiction or posting notice of action set forth in ss. 49.10(1)(b) and 49.11, F. S., and the means of publication prescribed by s. 50.071(3), F. S., are available if the party seeking to utilize those means has fully complied with s. 57.081, F. S., and obtained a certificate of insolvency as required therein. If said party is not qualified or duly certified insolvent under s. 57.081, the alternative means of obtaining jurisdiction or posting provided for in ss. 49.10(1)(b) and 49.11, and the means of publication prescribed by s. 50.071(3) are not then available. Any publication of notice made by such noncertified person shall be at the expense of the person publishing such notice, and the state or county is not responsible therefor.

In civil actions or proceedings other than in the above-mentioned categories, the alternative means for notice of action set forth in ss. 49.10(1)(b) and 49.11, F. S., and the means of publication prescribed by s. 50.071(3), F. S., are not available, and no statutory authority exists for the state or county to pay such publication costs from public funds. In the absence of a judgment of a court of competent jurisdiction requiring the state or county to pay such publication costs, the same may not be lawfully paid by the state or county.

The Legislature may extend the provisions of ss. 49.10(1)(b), 49.11, and 50.071(3), F. S., to other areas or to other actions or proceedings than those specified in said statutes, or it could amend s. 57.081, F. S., to provide that the county defray the costs of publication required of those persons qualified under s. 57.081 who have obtained the prescribed certificate of insolvency from the clerk of court.

Because of the direct involvement of an Orange County neighborhood attorney and the Osceola County Attorney, acting as a legal aid attorney, I am assuming, for the purposes of this opinion, that the party plaintiffs are insolvent and poverty-stricken persons within the purview of s. 57.081, F. S., seeking publication of notice of action under Ch. 49, F. S.

In Boddie v. Connecticut, 401 U.S. 371 (1971), the United States Supreme Court was confronted with a similar question regarding filing fees for divorce proceedings by indigent plaintiffs. The court therein held that a state denied due process of law to indigent persons when it refused to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they were unable to pay.

Faced with the question of payment of publication costs in an adoption proceeding initiated by an indigent person, the Florida Supreme Court in Grissom v. Dade County, 293 So.2d 9 (Fla. 1974), applied the *Boddie* decision, stating "it becomes obvious that *Boddie* is limited to a class of actions where the State has exclusively made judicial process the only method of altering a fundamental human relationship; excepting financial and economic relationships." (This limitation of *Boddie* to "fundamental human relationships" and the exclusion of "financial and economic relationships" made by the court in *Grissom* was prompted by the decision in U.S. v. Kras, 409 U.S. 434 [1973].) The court then went on to hold that the having of children, either through procreation or adoption, is a fundamental right "so basic as to be inseparable from the rights to enjoy and defend life and liberty [and] to pursue happiness," as provided in the Florida Constitution, that the application to indigents of statutes requiring the person initiating said adoption proceedings to bear the costs of publication therein denies such persons access to the courts when no other means for securing such a fundamental right is available, and that such application is, therefore, unconstitutional. The court further held that, in such cases, the state should bear such costs of publication as may arise therein where no other means of securing such fundamental rights are available. The court also noted that if the costs in such cases became excessive, the Legislature should provide a less costly alternative method of obtaining jurisdiction.

Section 49.10(1)(b), F. S., provides that, in proceedings for dissolution or annulment of marriages, adoptions, and actions or proceedings wherein personal service of process or notice is not required by the statutes or Constitution of this state or by the Constitution of the United States, the clerk of the court shall post notices of action in the manner prescribed by s. 49.11, F. S., when such notices are required of persons authorized to proceed as insolvent and poverty-stricken persons under s. 57.081, F. S., in lieu of

publication of notice of said actions. Where personal service of process or notice is required by law, the sheriff is, of course, required to make service for these persons qualifying under s. 57.081, regardless of the county of residency, at such time as they have obtained a certificate of insolvency from the clerk as therein specified. *See* State *ex rel.* Shellman v. Norvell, 270 So.2d 417 (4 D.C.A. Fla., 1972); AGO 072-137. The above-cited statutory provisions accord with the guidelines set forth in *Boddie* and *Grissom*, as they provide a means through which an indigent person may have access to the courts in these actions or proceedings. Further, as there are no publication costs to bear in such cases, the state and county are thus freed from this fiscal burden. However, compliance with s. 57.081 is a condition precedent to the operation of s. 49.10(1)(b), and failure to so comply, whether through inability or neglect, renders said person ineligible to come under the operation of s. 49.10(1)(b). *See* Adams v. Powers, 278 So.2d 598 (Fla. 1973). This being so, any publication of notice made by a plaintiff who has failed to qualify and obtain a certificate of insolvency under s. 57.081 shall be at the cost or expense of the person publishing such notice, and the state and county are not responsible therefor.

Section 50.071(1), F. S., has created a docket fund in Broward, Dade, and Duval Counties for the purpose of "paying the cost of publication of the fact of the filing of any civil case in the circuit court" in those counties; and subsection (2) of s. 50.071 authorizes the other counties of the state to create by ordinance such a docket fund "on the same terms and conditions established in subsection (1)." Subsection (3) of s. 50.071 requires the publishers of any designated record newspapers receiving the court docket fund to publish, without charge, legal advertisement for the purpose of service of process under s. 49.011(4), (10), or (11), F. S., when such publication is required of persons properly classified as insolvent and poverty stricken under s. 57.081, F. S. If a county elects to establish a docket fund as provided in subsection (2) of s. 50.071, it follows that subsection (3) of s. 50.071 will also be of full force and effect in that county.

If the action or proceeding is *not* one for dissolution or annulment of marriage, adoption, or one wherein the statutes or Constitution of this state or the Constitution of the United States does not require personal service, neither the alternative means of obtaining jurisdiction provided by s. 49.10(1)(b), *supra*, nor the means of publication provided for by s. 50.071(3), F. S., or the potential means of publication authorized by s. 50.071(2), F. S., are available. There does not appear to be any other statute authorizing the payment of such costs of *publication* by the state or the county in any other action or proceedings. Thus, no statutory authority exists for the expenditure of state or county funds to defray *publication* costs in any action or proceeding other than those designated in s. 49.011(4), (10), and (11), *supra*, and under s. 50.071(1) and (3), F. S. In the absence of a judgment of a court of competent jurisdiction requiring the state or the county to pay the costs of publication in any action or proceeding outside the scope of ss. 49.011(4), (10), and (11), and 50.071(3), such costs may not lawfully be paid by the state or county.

As to what other actions or proceedings may fall under the judicially created "fundamental human relationship" standard as enunciated in Grissom, *supra*, it is for the courts to determine, and the Legislature could, of course, extend ss. 49.10(1)(b) and 50.071(3), F. S., to other areas or to other actions and proceedings than those now specified in said statutes, or it could amend s. 57.081, F. S., to provide that the county defray the costs of publication required by law of those persons qualified under s. 57.081 and who have obtained the prescribed certificate of insolvency from the clerk of court.

076-95—April 21, 1976

SUNLAND CENTERS

AUTHORITY OF DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES TO ADOPT RULES REGULATING PUBLIC ENTERING PREMISES

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTIONS:

1. May the Sunland Centers' security personnel of the Division of Retardation monitor members of the public undertaking to enter the Sunland Centers' grounds so as to require specific information as to identity, purpose, and time on the premises?
2. May members of the public be excluded if they have no bona fide purpose for being on the premises other than curiosity?
3. May the department require that persons who wish to enter the premises for purposes of visiting residents with whom they have no blood relationship obtain prior permission so that the department may ascertain from the guardian, resident, or personal representative of the resident whether the person's visit is appropriate?

SUMMARY:

In order to effectuate the intent and purpose of Ch. 393, F. S., and s. 402.13, F. S., the Department of Health and Rehabilitative Services may adopt regulations and guidelines which are necessary and reasonable for the monitoring of members of the public entering the premises, and the exclusion of persons who have no bona fide purpose or business upon the premises, of Sunland Centers. However, the legislative intent with respect to visitation of patients or clients at Sunland Centers is to allow the widest opportunity for such visitation, within reasonable hours, so long as other patients' rights to privacy are not infringed thereby.

AS TO QUESTIONS 1 AND 2:

Section 402.13, F. S., provides that:

> (1) . . . The Division of Retardation of the Department of Health and Rehabilitative Services shall have supervisory and protective care, custody, and control of persons placed under its jurisdiction according to law and of the buildings, grounds and all other property and matters . . . .

A more recent and concise articulation of legislative intent regarding the responsibility of supervising and protecting persons is contained in Ch. 393, F. S., which abolished the Division of Retardation and assigned its functions to the Retardation Program Office. Section 3(3), Ch. 75-48, Laws of Florida.

All Sunland Training Centers, hospitals, and other state residential facilities for the retarded are under the supervision and control of the Department of Health and Rehabilitative Services. Section 393.01(1), F. S.

Section 393.04, F. S., reads in full:

> The Department of Health and Rehabilitative Services shall be the legal guardian or custodian of all persons admitted to Sunland Centers and residential facilities only if no alternative guardian is available and such persons are adjudicated incompetent as prescribed by statute or are under the statutory age of majority. [*See also* ss. 393.11(2) and 393.12(1).]

In enacting Ch. 393, F. S., it was the intent of the Legislature: "To articulate the existing legal and human rights of the retarded so that they may be exercised and protected. The mentally retarded person shall have all the rights enjoyed by citizens of the state and the United States." Section 393.13(2)(d)1.

Section 393.13(2)(a), F. S., further states that the "system of care which the state provides to mentally retarded individuals is designed to meet the needs of the clients as well as protect the integrity of their legal and human rights," and the Legislature must have intended Sunland Training Centers to take reasonable and necessary steps to implement the provisions of Ch. 393, F. S.

When a statute grants a right or imposes a duty, it also confers by implication the power to exercise reasonable means necessary to carry out any statutorily imposed duty, Mitchell v. Maxwell, 2 Fla. 594 (1849); Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969).

It is widely held that, in order to justify an exercise of the police power, there must be a sound basis of necessity to protect the health, safety, and welfare of the public and a reasonable relationship between the legislation so enacted and the object sought to be achieved. Larson v. Lesser, 106 So.2d 188 (Fla. 1958); Florida Citrus Commission v. Golden, 91 So.2d 657 (Fla. 1956); Eelbeck Milling Co. v. Mayo, 86 So.2d 438 (Fla. 1956); Gaylon v. Municipal Court of San Bernardino Judicial District, San Bernardino County, 40 Cal. Rptr. 446 (4 D.C.A. Cal., 1964); Killingsworth v. West Way Motors, Inc., 347 P.2d 1098 (Ariz. 1959).

Such a sound basis of necessity would appear to exist in the cases referred to by your first two questions. The means used to implement legislation must be reasonably designed to fall within the scope of the police power. Whether the monitoring of members of the public entering the premises and the exclusion of persons who have no bona fide purpose falls within this scope depends on whether these methods of security are necessary and reasonable in order to effectuate the intent and purpose of Ch. 393, F. S. and s. 402.13, F. S. In the instant case, it appears that such actions were contemplated by the Legislature in order to insure the protection and security of persons, buildings, and property within the department's jurisdiction, even though the department has not exercised its authority under s. 393.02(2) to adopt reasonable rules or regulations in accordance with the Administrative Procedure Act, Ch. 120, F. S.

The adoption of such rules and regulations would seem to be proper. And adopted rules, by force of law, would automatically become public, and the public would be charged with knowledge of such rules and regulations. Once the rules and regulations are adopted, certain procedures must be followed in order to insure that the legal rights of the clients have not been abridged.

Section 393.13(4)(l)4., F. S., requires the department to post a copy of the rules and regulations promulgated under s. 393.13 in each living unit of residential facilities. Additionally, s. 393.13(6), provides for a copy of the act to be given to each client, if competent, or to a parent or legal guardian of each client if the client is incompetent.

In reaching the conclusion that the department is authorized to adopt reasonable rules and regulations to insure the protection and security of persons within these jurisdictions, I note that such procedures are generally used by the Department of General Services as well as by some federal departments to insure the safety and security of government property within their jurisdiction.

Therefore, your first and second questions must be answered in the affirmative.

AS TO QUESTION 3:

The action contemplated in question 3 is of a more restrictive nature than the mere monitoring of individuals and the exclusion of curiosity seekers.

It seems clear that the requirement of obtaining prior permission in order for persons to enter the premises for purposes of visiting residents with whom they have no blood relationship was not contemplated within the meaning of s. 402.13, F. S., or Ch. 393, F. S.

The Legislature enacted s. 393.13(4)(c)3., F. S., to deal specifically with the right of a client to communicate freely and privately with persons outside the facility. This section provides that "clients shall have an unrestricted right to visitations. However, nothing in this provision shall be construed to [permit infringement] upon other clients' rights to privacy."

The Florida Mental Health Act (The Baker Act), Ch. 393, F. S., also set forth the rights of patients who seek hospitalization under this chapter.

Section 393.459(5)(a), F. S., is similar to s. 393.13(4)(c)3., F. S., in that it also deals with a patient's right to communicate freely and privately with persons outside the facility. Section 394.459(5)(d), F. S., authorizes the department to establish reasonable regulations governing visitors, visiting hours, and the use of telephones by patients, but in view of the use of the terms "unrestricted," "freely," and "privately" by the Legislature in defining patients' rights to visitation and communication in Chs. 393 and 394, F. S., regulation in such a manner as you are proposing in your third question does not appear to reasonably fall within the parameters expressed in these acts, or the legislative intent embodied within Chs. 393 and 394.

When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, the plain and obvious provisions must control. Southeastern Utilities Service Co. v. Redding, 131 So.2d 1 (Fla. 1961); Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960); Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918). The primary guide to statutory interpretation is to determine the purpose of the Legislature and to carry that

intent into effect to the fullest degree. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); Jackson v. Princeton Farms, Inc., 140 So.2d 570 (Fla. 1962); Van Pelt v. Hilliard, *supra.* Any uncertainty as to the legislative intent should be resolved by an interpretation that best accords with the public benefit. Warnock v. Florida Hotel and Restaurant Com'n, 178 So.2d 917 (3 D.C.A. Fla., 1965); Sunshine State News Co. v. State, 121 So.2d 705 (3 D.C.A. Fla., 1960).

From the foregoing authorities, it appears clear that the legislative intent with respect to visitation of patients at Sunland Centers is to allow the widest opportunity for such visitation, within reasonable hours, so long as the visitations of any patient do not unreasonably infringe upon the other patients' rights to privacy.

076-96—April 23, 1976

MUNICIPALITIES

EXISTING MUNICIPALITY NOT AFFECTED BY ENACTMENT OF CH. 165, F. S. 1975

To: R. K. Kramer, Attorney for Town of Cloud Lake, West Palm Beach

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

What is the current corporate status of the Town of Cloud Lake, which was established pursuant to Ch. 165, F. S. 1973, or predecessor general laws, in light of the enactment of Ch. 165, F. S. 1975, by Ch. 74-192, Laws of Florida?

SUMMARY:

The Town of Cloud Lake, created pursuant to Ch. 165, F. S. 1973, or predecessor statutes, continues as an existing municipality notwithstanding the enactment of Ch. 165, F. S. 1975, by Ch. 74-192, Laws of Florida, establishing general-law standards and procedures for forming and dissolving municipalities from and after the effective date thereof, July 1, 1974.

Section 2(a), Art. VIII, State Const., provides as follows:

> Municipalities may be established or abolished and their charters amended pursuant to general or special law. When any municipality is abolished, provision shall be made for the protection of its creditors.

In Treadwell v. Town of Oak Hill, 175 So.2d 777, 778 (Fla. 1965), the Florida Supreme Court construed the counterpart of this provision in the 1885 Florida Constitution (s. 8, Art. VIII) to provide that the Florida Legislature has the sole authority to both establish and dissolve municipalities. *See also* Cobo v. O'Bryant, 116 So.2d 233 (Fla. 1960).

The Town of Cloud Lake was apparently created as a municipality pursuant to general law. *See* Ch. 165, F. S. 1973, and predecessor statutes, which established a "self-starter" method for the organization of municipalities. Thus, consistent with s. 2(a), Art. VIII, *supra*, the town could not have been, and cannot be, dissolved except pursuant to an enactment of the Florida Legislature. In this regard, I have been informed of no special law which has abolished the Town of Cloud Lake, nor does it appear that the town has ever surrendered its franchise or otherwise been dissolved pursuant to the general-law methods of municipal dissolution. *See* ss. 165.26-165.28, F. S. 1973, and predecessor statutes, and ss. 165.051 and 165.052, F. S. 1975.

As to whether the mere enactment of Ch. 165, F. S. 1975, by Ch. 74-192, Laws of Florida, constitutes an abolition of municipalities created pursuant to Ch. 165, F. S. 1973, or its predecessor statutes, I find no legislative intent that such enactment have that effect. Rather, the Legislature appears to have recognized the continuing existence of

municipalities created pursuant to Ch. 165, F. S. 1973, or its predecessor statutes by defining the word "municipality" in s. 165.031(4), F. S. 1975, to mean "a municipality created pursuant to *general or special law* authorized or recognized pursuant to s. 2 or s. 6, Art. VIII of the State Constitution." (Emphasis supplied.) Moreover, nowhere in Ch. 165, F. S. 1975, is provision made for protection of the creditors of municipalities created pursuant to Ch. 165, F. S. 1973 (*cf.* s. 165.052(3), F. S. 1975), such protection being a constitutional prerequisite to the abolition of any municipality. *See* Humphreys v. State, 145 So. 858 (Fla. 1933). Thus, I am of the opinion that the mere enactment of Ch. 165, F. S. 1975, did not abolish any existing municipality, but merely established a new general-law method for the formation and dissolution of municipalities subsequent to the effective date thereof (July 1, 1974).

076-97—April 28, 1976

DEVELOPMENT OF REGIONAL IMPACT VESTING OF RIGHTS

To: J. H. "Jim" Williams, Lieutenant Governor, Tallahassee

Prepared by: Staff

QUESTIONS:

1. Is approval of W. R. Grace & Company's mining site plan to mine Hooker's Prairie by formal vote of the Polk County Commission tantamount to approval of a "subdivision plat" for purposes of vesting under s. 380.06(12), F. S.?
2. Did W. R. Grace & Company's development rights to mine Hooker's Prairie vest pursuant to s. 380.06(12), F. S., prior to November 4, 1970?
3. Did W. R. Grace & Company's development rights to mine Hooker's Prairie vest pursuant to s. 380.06(12), F. S., as of June 26, 1973?
4. Did W. R. Grace & Company's development rights to mine Hooker's Prairie vest pursuant to s. 380.06(12), F. S., after July 1, 1973?
5. Is compliance with the formal permitting procedure under Ch. 380, F. S., required if a development has substantially complied with the purposes and intents of Ch. 380, F. S., and if so, has W. R. Grace & Company's subdivision substantially complied with the requirements of Ch. 380?

SUMMARY:

Approval by a formal vote of a county board, pursuant to a local subdivision plat law, must occur prior to July 1, 1973, to create a vested right under s. 380.06(12), F. S. The doctrines of nonconforming use and equitable estoppel may be applied to a fact situation created under s. 380.06(12). In this instance, W. R. Grace & Company's rights to mine Hooker's Prairie are vested under s. 380.06(12).

According to the facts contained in the materials submitted with your request, W. R. Grace & Company, hereinafter Grace, intends to mine phosphate on a commercial scale beginning November 1, 1976, at Hooker's Prairie where Grace has substantially completed construction of a phosphate rock processing facility (beneficiation facility). Between 1956 and 1958, Grace explored and determined that economically minable quantities of phosphate existed at Hooker's Prairie. Between 1958 and 1964, Grace acquired fee interests, surface and subsurface mineral mining rights, and an additional 3,890 acres. In December 1970, Grace acquired another 2,388 acres and further acquired an additional 280 acres in January 1975.

From 1956 to December 1970, Grace expended: $6,612,558 for land acquisition; $321,348 for prospecting; $160,000 for engineering and development work; and $20,000 for miscellaneous expenditures. From January 1971 to July 1, 1973, Grace expended $1,731,360 for land acquisition and $32,000 for engineering and development work. Since 1963, Grace has prepared engineering details, mining plans, cost estimates, and other

activities for mining and production commencement in July 1968. Due to market conditions, production was not started. Grace has substantially all required permits and approvals for operation.

The Polk County Board of Commissioners adopted, on October 30, 1970, Protective Development Regulations which were approved by referendum on November 4, 1970. The county board, on June 26, 1973, approved Grace's mining site plan for Hooker's Prairie as an amendment to another existing site plan. On September 26, 1973, Grace was advised by the Division of State Planning (DSP) that the beneficiation facility was not a development of regional impact (DRI).

The Division of State Planning notified Grace of its DRI reconsideration in August 1975. Grace contended that its rights had vested under s. 380.06(12), F. S., and the county board resolved that Grace's rights had vested in June 1973.

Question 1 is answered in the negative. Section 380.06(12), F. S., defines vesting as it pertains to subdivision plats:

> [A]pproval pursuant to local subdivision plat law, ordinances, or regulations of a subdivision plat by formal vote of a county . . . having jurisdiction after August 1, 1967, and prior to July 1, 1973, shall be sufficient to vest all property rights for the purposes of this subsection . . . .

The statute enumerates two criteria required for vesting: Approval must be given pursuant to local subdivision plat law; and such approval must be by a formal vote of the governmental (county) body after August 1, 1967, and prior to July 1, 1973.

Your letter and attachments thereto reveal that Grace has not applied for or been given approval in any form pursuant to the Polk County subdivision plat ordinance. This county ordinance is in fact a resolution of the Polk County Board dated August 10, 1971, pursuant to the authority of Ch. 57-1746, Laws of Florida. The resolution relates to the platting and development of residential subdivisions, which is evidenced by the regulations incorporated therein.

As referenced above, the county board formally approved the mining site on June 26, 1973. On December 9, 1975, the commission attempted, by formal vote, to state that the June 26, 1973, vote had vested Grace pursuant to their subdivision plat law. It is my opinion that this vote is of no effect, as it is after the statutory cutoff.

Question 2 is answered in the affirmative. Section 380.06(12), F. S., in essence provides that if a local government (county) would be prevented from effecting vested or other legal rights, "nothing in this chapter authorizes any government agency to abridge those rights." To ascertain whether or not the local governmental agency could have affected the Grace rights on November 4, 1970, application of the doctrine of nonconforming use is required.

Generally, the right of a landowner to continue the nonconforming use of property applies only to a nonconforming use which existed at the time of the promulgation of the ordinance or regulation prohibiting such use. Fortuano v. The City of Coral Gables, 47 So.2d 321 (Fla. 1950); 101 C.J.S. *Zoning* s. 184. A nonconforming use which is merely contemplated or intended but not realized as of the effective date of the zoning regulation prohibiting such use is generally not protected as a nonconforming use. 101 C.J.S. *Zoning* s. 185. To determine whether the construction or use will be regarded as a nonconforming one depends upon the sufficiency of the activity in progress at the time of the enactment of the ordinance. 101 C.J.S. *Zoning* s. 90. Structures or uses in the course of construction at the time of the enacting of zoning regulations prohibiting such use may be regarded as nonconforming uses. Bemas Corp. v. City of Jacksonville, 298 So.2d 467 (1 D.C.A. Fla., 1974).

I have found no Florida case that specifically expresses criteria to ascertain the amount of activity required to establish a nonconforming use. In Bemas, *supra*, however, the court found a nonconforming use when a city adopted an ordinance prohibiting a contemplated borrow pit operation. The ordinance required actual commencement of activities to avoid the prohibitions of the ordinance. The Bemas Corporation, to comply with the ordinance, rushed the closing of contractual negotiations and removed and sold ten truck loads of dirt prior to the ordinance's effective date. The trial court held that such acts were not sufficient and determined that a nonconforming use did not exist.

The appellate court reversed and stated:

> When all the evidence is considered, there leaves no doubt that the property was bought for the borrow pit purpose, nor any doubt that the buyers were

> doing their best to get in before the change in the Ordinance took effect. The evidence clearly shows the intent of the buyers to start a borrow pit. The Ordinance only provides that the operation be *commenced*. . . .
>
> The evidence of the attempt and intent to commence the borrow pit operation seems to us to be clear and undisputed. Only so much can be done in the last moment rush to come under the wire. [298 So.2d at 468.]

Courts of other states have set forth appropriate tests. The Kentucky Court of Appeals, in Darlington v. Board of Councilmen of City of Frankfort, 140 S.W.2d 392 (Ky. App. 1940), when faced with the issue of whether a nonconforming use had been established, stated:

> Obviously, it is not the amount of money expended which determines the vesting of the right, since one property owner might be required to expend more in the preliminary steps of altering his property for the conduct of a particular business than his neighbor would be compelled to expend in completing the alteration of his property for a different type of business. On the other hand, the mere ownership of property which could be utilized for the conduct of a lawful business does not constitute a right to so utilize it which cannot be terminated by the enactment of a valid zoning ordinance, as such a concept involves an irreconcilable contradiction of terms. "*It would seem, therefore, that the right to utilize one's property for the conduct of a lawful business not* inimicable to the health, safety, or morals of the community," becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality, or, in other words, *becomes "vested" within the full meaning of that term, when, prior to the enactment of such restrictions, the owner has in good faith substantially entered upon the performance of the series of acts necessary to the accomplishment of the end intended.* [140 S.W.2d at 396; emphasis supplied.]

See also Smith v. Juillerat, 119 N.E.2d 611 (Ohio 1954). Two other cases decided outside of this jurisdiction are helpful in the resolution of this issue. The first, Blundell v. City of West Helena, 522 S.W.2d 661 (Ark. 1975), found a nonconforming use at plaintiff's mobile home park where the plaintiff had paved the streets and made water and sewer service available. The court did make a distinction as to the balance of the mobile home park where nothing had been done other than the mere purchase of land, calling it a long-range future plan and, therefore, not sufficient to be a nonconforming use.

In Perkins v. Joint City-County Planning Comm'n, 480 S.W.2d 166 (Ky. 1972), the court concluded that actual conversion of a motel had commenced and rights were protected. Approximately $12,000 of a $128,000 total expenditure necessary to accomplish the finished product has been paid out. The test as set forth above is not the intent of the development plan, but the actual implementation, the entering upon a series of acts necessary to accomplishment of the intended goal.

The facts submitted reveal that as of November 4, 1970, the applicant in good faith substantially entered upon the performance of a series of acts necessary to accomplish the intended goal. It is noted that previously Grace purchased extensive mineral rights to enable it to extract those minerals for which Grace expended over $500,000 in prospecting and related engineering studies. Grace had expended approximately 75 percent of the funds necessary to accomplish the intended goal. Grace had also drained much of the property and constructed roads for the purpose of access to the mineral locations. These activities and expenditures cannot be isolated from the prospecting and engineering studies performed and the expenditure of approximately $7,000,000. Moreover, Grace was prepared to actually mine parts of the minerals as early as 1967. In addition, s. 380.06(12), F. S., does not require actual commencement of operations to establish a nonconforming use.

Therefore, it is my opinion that, under the facts submitted, Grace has substantially entered upon the performance of a series of acts necessary to the accomplishment of the intended goal. Grace is vested, pursuant to s. 380.06(12), F. S., and is not required to comply with the other requirements set forth in Ch. 380, F. S.

Question 3 is answered in the negative. Section 380.06(12), F. S., vests such rights no later than July 1, 1973, the act's effective date. The county board issued the mining site approval on June 26, 1973, and could have rezoned the property until July 1, 1973. The

county board and the Division of State Planning are estopped from affecting Grace's rights since Grace is within the s. 380.06(12) exemption.

In Andover Development Corp. v. City of New Smyrna Beach, 328 So.2d 231 (1 D.C.A. Fla., 1976), the court found that, prior to the closing and for several months thereafter, Andover worked with various city officials on various aspects of developing the subject property and in devising an amended development plan for the land. On February 12, 1973, 1 year after the purchase of the property, Andover presented its preliminary development plan to the city planning board and was given approval. The following month the city commission approved the preliminary plan.

Thereafter the citizens of New Smyrna Beach by initiative and referendum changed the zoning ordinance and forced the city to rezone the property back to its original zoning. Andover filed suit alleging that the initiative and referendum was unconstitutional upon the estoppel doctrine to which the court agreed:

> The overwhelming evidence in this case clearly shows that Andover, in relying upon a valid zoning ordinance, expended a large sum of money in purchasing land, planning the use thereof, and with the cooperation of the "official mind" exerted commendable effort to pacify the public protests. The city officials did not yield to the "clamor of the crowd" and, in their efforts to protect the interests of its citizens and the *vested rights of Andover*, sought to reach a realistic use of the property involved . . . the city is estopped from denying Andover a building permit of Phase I pursuant to the city's valid RR-PUD zoning. [328 So.2d at 238, 239; emphasis supplied.]

A similar result was reached in Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (2 D.C.A. Fla., 1973). Imperial contracted to purchase 25 acres of property for approximately $200,000 which was zoned without restrictions. The sale was contingent upon obtaining zoning which would authorize multi-family development. In December 1968, the town approved rezoning to allow such development. A year later, an additional 16 acres was purchased by Imperial based on notification by the town that multi-family development was permissible. In a meeting held in January 1972, the town and Imperial agreed to limit the development to 39 units per acre. Imperial further agreed to actually limit the construction to only 24 units per acre and further agreed to use the second tract for only recreational purposes. In May 1972, the town commission voted to rezone the property to two and a half units per acre.

The appellate court stated that the existence of a building permit and the making of a physical change is not to be a condition precedent to application of the doctrine of equitable estoppel. The court set forth the elements that "when a property owner:

> (1) relying in good faith
> (2) upon some act or omission of the government
> (3) has made such a substantial change in position or incurred such extensive obligations and expenses

that it would be highly inequitable and unjust to destroy the rights he has acquired." The town was estopped from changing the zoning.

Based upon the facts set forth above and the actions of the county board I am of the opinion that Grace relied upon the inducements and acts of the county board, which it complied with. Board of City Commissioners of Metropolitan Dade v. Lutz, 314 So.2d 185 (3 D.C.A. Fla., 1975); City of North Miami v. Margulies, 289 So.2d 424 (3 D.C.A. Fla., 1974). Therefore, Grace is within the protection of s. 380.06(12), F. S.

Question 4 is answered in the negative. Section 380.06(12), F. S., contains no provision for vesting after July 1, 1973. The doctrine of equitable estoppel is, however, applicable to DSP. Texas Co. v. Town of Miami Springs, 44 So.2d 808 (Fla. 1950). The Division of State Planning on September 6, 1973, notified Grace that the construction of the beneficiation facility was not a development of regional impact. This action was done pursuant to a request by Grace for a binding letter. Grace may, therefore, assert that the mining site is included within the beneficiation facility's binding letter and, since there are substantial expenditures after September 6, 1973, that the doctrine is applicable.

The binding letter for the beneficiation facility was requested pursuant to Ch. 22F-2.05, F.A.C., which relates to industrial plants. The letter was not requested under Ch. 22F-2.06, F.A.C. which relates to mining sites. As to the beneficiation facility, DSP would clearly be estopped to prevent the completion of or use of the facility. However, the

binding letter clearly indicates that even the expansion of the plant's parking lot would void the binding letter and make the facility fall within the statutory definition of a DRI. Since the binding letter was requested and issued pursuant to 22F-2.05, F.A.C. (industrial plants), it is my opinion the doctrine of equitable estoppel would not apply to the division as to the mining site.

Question 5, first part, is answered in the affirmative. Unless an applicant is exempt under s. 380.06(12), F. S., the applicant must comply with the requirements of Ch. 380, F. S. There are no references, direct or implied, for the proposition that substantial compliance with any other regulation would exempt a developer from complying with the formal permitting procedures. Nor have I found any Florida case law to support the doctrine of substantial compliance. Therefore, it is my opinion that the doctrine is inapplicable. Since compliance with the formal permitting procedures is required, there is no necessity for me to express an opinion as to the second part of question 5.

076-98—April 30, 1976

BEVERAGE LAW

GROUNDS FOR DENIAL OF LICENSE APPLICATION

To: A. L. Baker, Executive Director, Department of Business Regulation, Tallahassee

Prepared by: Staff

QUESTIONS:

1. May the Division of Beverage disapprove an application for a liquor license or the transfer of a liquor license on the ground that the location of the place of business to be covered by the license violates municipal or county zoning restrictions?
2. May the division disapprove an application for a liquor license on the ground that the location of the place of business to be covered by the license violates the provisions of a special act of the Legislature establishing the distance limitations between liquor vendors and churches and schools?
3. May the division disapprove an application for a liquor license on the ground that the application is not accompanied by a certificate of compliance with sanitary requirements of the state from the Department of Health and Rehabilitative Services or the appropriate county health department?

SUMMARY:

The Division of Beverage may disapprove an application for the issuance or transfer of a liquor vendor's license if the location of the place of business to be covered by the license violates municipal or county zoning regulations.

The Division of Beverage may disapprove an application for the issuance of a liquor vendor's license if the location of the place of business to be covered by the license violates the provisions of a special law of the Legislature establishing distance limitations between liquor vendors and churches and schools.

The division may disapprove an application for a liquor vendor's license for consumption on the premises, but not one for consumption off the premises, which is not accompanied by a certificate of compliance with sanitary requirements of the state from the Department of Health and Rehabilitative Services or the appropriate county health department.

AS TO QUESTION 1:

Since a liquor vendor is licensed "to sell alcoholic beverages," s. 561.14(3), F. S., and each license application must describe the location of the place of business "where such beverage may be sold," s. 562.06, F. S., the Beverage Law, Chs. 561-568, F. S., appears to contemplate that liquor vendors' licenses should not be issued to persons who are otherwise precluded from selling alcoholic beverages at the location sought to be licensed.

In this regard, this office concluded in AGO's 074-319 and 076-40 that, notwithstanding the deletion of s. 561.44, F. S. 1971, from the Beverage Law by Ch. 72-230, Laws of Florida, municipalities continue to possess general authority pursuant to s. 562.45(2), F. S., and s. 168.07, F. S. 1971, as preserved in effect by s. 166.042(1), F. S., to regulate the location of liquor vendors' places of business within municipal boundaries. *See also* s. 125.01(1)(h) and (o), F. S., with respect to the authority of counties in t[illegible] respect. Thus, it appears that the Division of Beverage should not issue a liquor vendor's license, s. 561.19, F. S., or approve the transfer of a liquor vendor's license, s. 561.32, F. S., if municipal or county zoning restrictions preclude the sale of liquor at the location sought to be licensed. To conclude otherwise would lead to the anomalous situation in which a prospective liquor vendor may be prohibited by municipal or county zoning regulations from operating his place of business at a certain location, but may not be denied a liquor vendor's license on that ground by the Division of Beverage. *See* City of St. Petersburg v. Siebold, 48 So.2d 291, 294 (Fla. 1950), in which it was stated that a statutory interpretation avoiding absurdity is always preferred.

Your first question is answered in the affirmative.

AS TO QUESTION 2:

Consistent with the discussion under question 1, I am of the opinion that the Division of Beverage may disapprove an application for a liquor vendor's license on the ground that the location of the place of business to be covered by the license violates the provisions of a special act of the Legislature establishing distance limitations between liquor vendors and churches and schools. *See* 53 C.J.S. *Licenses* s. 28, in which the general rule is stated that a business prohibited by law cannot properly be licensed.

Your second question is answered in the affirmative.

AS TO QUESTION 3:

Section 561.17(2), F. S., expressly provides that:

> All applications for alcoholic beverage licenses *for consumption on the premises* shall be accompanied by a certificate of the [Department of Health and Rehabilitative Services] or the county health department that the place of business wherein the business is to be conducted meets all of the sanitary requirements of the state. (Emphasis supplied.)

Thus, it is clear that an application for alcoholic beverage licenses *for consumption on the premises* is not complete or proper, and, therefore, may be disapproved if not accompanied by a certificate of compliance with sanitary requirements of the state from the Department of Health and Rehabilitative Services or the appropriate county health department. *See also* s. 561.32, F. S., requiring, *inter alia*, that applications for transfers of license "shall be approved by the division in accord with the same procedure provided for in ss. 561.17, 561.18 and 561.19, in the case of issuance of new licenses." However, I find no authority for the Division of Beverage to extend this certificate requirement to *all* applications for a liquor license, or the transfer thereof, and must, therefore, conclude that the division may not do so. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952), for the rule of statutory construction that the express mention of one thing is the exclusion of another *expressio unius est exclusio alterius*; *cf.* s. 561.29(1)(d), F. S., providing that the Division of Beverage may revoke or suspend the license of *any* liquor vendor for "*maintaining licensed premises* that are unsanitary, or are not approved as sanitary by the county board of health or the [Department of Health and Rehabilitative Services] having jurisdiction thereof." (Emphasis supplied.)

076-99—May 6, 1976

AGRICULTURE INSPECTION OFFICERS

TRAINING STANDARDS FOR ROAD-GUARD INSPECTION SPECIAL OFFICERS

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

Prepared by: Staff

QUESTIONS:

1. Will it meet the statutory requirements of s. 570.151(2), F. S., and Ch. 943, F. S., for the Police Standards and Training Commission to approve a special training program for the road-guard inspection special officers performing duties prescribed in Ch. 570, F. S., rather than requiring such officers to undergo the full training course required for full-time police officers?
2. Do the road-guard inspection special officers of the Road Guard Inspection Bureau who were employed as road-guard inspectors prior to January 1, 1974, have to meet the physical and educational requirements now prescribed by the Police Standards and Training Commission?

SUMMARY:

Agriculture road-guard inspection special officers whose enforcement powers are narrowly limited by s. 570.151(2), F. S., may be trained in their enforcement duties in courses approved by the Police Standards and Training Commission which are shorter than the 320-hour courses required for police officers as defined in s. 943.10, F. S.

Road-guard inspection special officers of the Road Guard Inspection Bureau who were employed as road-guard inspectors prior to January 1, 1974, do not have to meet the physical and educational requirements prescribed by the Police Standards and Training Commission.

Initially, I consider it appropriate to note that Ch. 570, F. S., narrowly defines the duties of the road-guard special officers. Section 570.151(2), F. S., in pertinent part reads as follows:

> 570.151 Appointment and duties of road-guard inspection special officers.—
>
> * * * * *
>
> (2) All such special officers shall have power and authority to make arrests, with or without warrants as provided in s. 570.15, for violations of law committed within the jurisdiction of s. 570.15 to the same extent and under the same limitations and duties as do peace officers under the provisions of chapter 901 and all such special officers shall have the right and authority to carry arms while on duty, provided such officers shall meet the requirements of the Police Standards and Training Commission established under s. 943.11. . . .

It is also important to note the provisions of s. 943.10(1), F. S., reading as follows:

> 943.10 Definitions; ss. 943.09-943.24.—
> (1) "Police officer" means any person employed full time by any municipality or the state or any political subdivision thereof, whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state.

A simple comparison reveals that the road-guard inspection special officers' duties do not fall within the descriptive language quoted immediately above, that is to say they

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are not engaged in the "prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state."

Accordingly, one must consider that the legislative reference to training mandated by the Police Standards and Training Commission found in s. 570.151(2), *supra*, should be measured as against the responsibilities placed upon them by the law first quoted above. In other words, if they do not perform the functions of line police officers or law enforcement personnel as contemplated by Ch. 943, F. S., the compliance with police standards must be something less than is generally required.

This would seem to follow as a logical result, because if law enforcement officers as contemplated by s. 943.10(1), *supra*, are required to complete the current 320-hour course because they do those things contemplated thereby, then the Legislature could not be presumed to have required the same amount of training for people whose duties are very narrowly circumscribed and indeed apply only to the inspection of vehicles carrying agricultural, horticultural and livestock products.

Section 943.25(1), F. S., reads in pertinent part as follows:

> **943.25 Advanced training; program; costs; funding.—**
> (1) The Division of Standards and Training is directed to establish and supervise, as approved by the commission, an advanced and highly specialized training program for the purpose of training police officers and support personnel . . . .

I consider this is an additional predicate based upon which the Police Standards and Training Commission may approve a special training program determined as a result of consultation with the people in your department whose responsibilities were made the object of your inquiry.

It should be understood that whatever training schedules may be determined as appropriate in the circumstances would of necessity require some explanation to the individuals who will serve as your special guards. Individuals performing those duties for your department cannot be included in any salary incentive program such as is contemplated by s. 943.22, F. S., for the reason that they are not local law enforcement officers as defined therein. An added reason that they could not qualify for salary incentive is the simple fact that they would not be receiving the 320-hour course mandated by Ch. 943, F. S., and the rules and regulations of the Police Standards and Training Commission.

Individuals performing those duties for your department would not be circumstanced so as to be permitted to participate in revenue sharing as contemplated by Part II of Ch. 218, F. S.

I would also advise those individuals circumstanced as are those about whom you write that they do not fall within the provisions of ss. 112.531-112.534, F. S., often referred to as the "Policeman's Bill of Rights."

Your second question is answered in the negative.

076-100—May 6, 1976

CIRCUIT COURT CLERKS

AUTHORITY TO RETAIN PRIVATE LEGAL COUNSEL

To: Fred W. Baggett, General Counsel, Florida Association of Court Clerks, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May the clerk of a circuit court use funds of his office, either from the budgeted sources or from excess fees generated by the operation of his office, to pay private legal counsel for legal services rendered which are necessary to the proper operation of the office?

SUMMARY:

If a county attorney is available, qualified, and authorized to render legal services to a clerk of circuit court, then, in the absence of exceptional circumstances, the clerk should not expend the funds of his office to obtain additional private legal counsel, but should rely on the county attorney for legal assistance in the operation of the clerk's office. If a county attorney is not available, qualified, or authorized to act, or if exceptional circumstances do exist (such as a controversy arising under s. 129.09, F. S.), then a circuit court clerk may expend properly budgeted funds of his office for legal assistance *reasonably necessary* for the operation thereof.

Initially, it should be noted that there is no express provision in the statutes empowering clerks of circuit court to employ private counsel. *Cf.* s. 28.06, F. S., authorizing clerks to appoint deputies. Nor is there any provision in the statutes which requires the clerks of circuit court to utilize the services of any publicly employed attorney, such as the county attorney. Accordingly, the long-established rule prevails that if a public officer is charged by law with a specific duty, and the means by which the duty is to be accomplished are not specially provided for, the public officer has the implied power to use such means as are *reasonably necessary* to the successful performance of the required duty, which might include the power to employ private counsel. *See generally, In Re* Advisory Opinion to the Governor, 60 So.2d 285 (Fla. 1952); Peters v. Hansen, 157 So.2d 103 (2 D.C.A. Fla., 1963); *cf.* State v. Clausen, 146 P. 630 (Wash. 1915).

Applying this rule to the instant inquiry, in AGO 074-192 it was concluded that, ordinarily, the services of a publicly employed attorney, available and qualified to act, will be sufficient to protect the public interest; and, in the absence of the exceptional circumstances discussed in that opinion, the expenditure of public funds for additional private counsel would be unwarranted and constitute an abuse of discretion. *Accord:* Attorney General Opinion 071-166. Consistent with this view, I am of the opinion that if a county attorney or other publicly employed attorney is available, qualified, and authorized to render legal services to a clerk of circuit court, then, in the absence of exceptional circumstances (such as a controversy between a clerk and the board of county commissioners over the legality of a claim against county funds, *see* s. 129.09, F. S.), the employment of additional private counsel by the clerk would not be *reasonably necessary* to the successful performance of his duties, and the funds of his office should not be expended therefor.

In those situations in which a county attorney is not available, qualified, or authorized to act or in which exceptional circumstances do exist, it would appear that a clerk of circuit court may expend the properly budgeted funds of his office for *necessary* legal assistance in the same manner that he may expend such funds for other personnel *reasonably necessary* for the operation of the clerk's office. *Cf.* Biennial Report of the Attorney General, 1929-1930, pp. 316-317; and AGO 051-8, January 11, 1951, Biennial Report of the Attorney General, 1951-1952, p. 224, in which it was concluded that, because of the exceptional circumstances described therein, the board of county commissioners could pay from county funds the fees incurred by a county tax assessor whose office had not collected enough excess fees to pay the attorney's fees. In this regard, I concluded in AGO 073-424 that a circuit court clerk is a fee officer unless, by agreement with the board of county commissioners pursuant to s. 145.022, F. S., he is guaranteed an annual salary and all fees collected by him are turned over to the board. As a fee officer, a clerk is required to establish an annual budget showing expected revenues and the functions for which money is to be expended, s. 218.35(1) and (2), F. S.; and, at the end of the fiscal year, he is required to make a report to the board of county commissioners showing his "official expenses" and any "net income or unexpended budget balance," and pay into the county general revenue fund any moneys in excess of the salary to which he is entitled under Ch. 145, F. S. Section 218.36(1) and (2), F. S.

As to whether a county charter may expressly require a circuit court clerk to utilize county legal services, I stated in AGO 073-356 that:

> A provision in a county charter requiring county officials to use county purchasing, personnel, *legal*, and budgeting services, if not inconsistent with general law or special law approved by vote of the electorate, would be valid. (Emphasis supplied.)

076-101—May 6, 1976

LOST PROPERTY

NO STATUTORY GUIDELINES GOVERNING DISPOSITION OF LOST PROPERTY BY POLICE DEPARTMENT

To: Richard R. Kirsch, City Attorney, Plantation

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

What is the statutory procedure to be followed by a police department in regard to disposition of lost bicycles found by department personnel or turned in to the department?

SUMMARY:

Other than the limited provisions of s. 715.01, F. S., there is no general law in Florida providing any procedure to be followed in disposing of *lost* (rather than abandoned or derelict) personal property which is found by, or turned in to, a local police department. In the absence of statutory procedures, the principles of the common law of property govern lost personal property and the property rights in or title thereto.

You stated in your letter that you seek advice "as to the procedure for disposing of bicycles found by the police department or otherwise turned in to the police department *as lost property.*" (Emphasis supplied.) You then referred to two provisions of the Florida Statutes—ss. 705.01 and 715.01—as appearing to be applicable, and also as appearing to be in conflict.

First, it should be established that s. 705.01, F. S., is not applicable in this instance. That section applies by its terms to property which is abandoned or derelict, as opposed to property which is lost. Also, although you did not mention it, I would note that s. 705.16, F. S., is likewise not applicable. Not only is its application limited to abandoned—as opposed to lost—property, but s. 705.16 has the additional requirement that the abandoned property has "no value other than nominal salvage value, if any." Abandonment of property is distinguishable from a loss or neglect of property by virtue of the intent required for abandonment:

> Abandoned property is that of which the owner has relinquished all right, title, claim, and possession, with the *intention* of not reclaiming it or resuming its ownership, possession or enjoyment. [Jackson v. Steinberg, 200 P.2d 376 (Ore. 1948); emphasis supplied.]

Cf. s. 705.16(2)(b), and 1 C.J.S. *Abandonment* ss. 2, 3, and 9.

In regard to what constitutes lost property, it has been stated:

> The rule as laid down by many authorities is: "Goods or chattels are lost in the legal sense of the word only when the possession has been *casually* or *involuntarily* been parted with, so that the mind has no impress of, and can have no recourse to, the event." [Automobile Ins. Co. of Hartford, Conn. v. Kirby, 144 So. 123, 124 (Ala. App. 1932); emphasis supplied.]

Of course, the nature of any such property "is to be determined from all the facts and circumstances of the particular case, and in accordance with the rule governing personal property generally." 36A C.J.S. *Finding Lost Goods* s. 1.

In general, lost property is subject to the principles of the common law of property, except where, and to the extent that, such common law has been abrogated by state statute. In some states, there have been enacted statutes specifying procedures which must be followed by a finder of lost property, such as advertising a description of the property or depositing it with some governmental agency. However, no such general law applicable to local governments has been enacted in Florida. *Cf.* s. 705.18, F. S., providing

a procedure for disposal of lost personal property at the several state universities. There now exists only the aforementioned s. 715.01, F. S., which simply provides that a finder—other than one who is an employee of a public transportation system—is vested with title to personal property found in or upon certain public conveyances and public places, subject to claim by the rightful owner within a period of 6 months after the finding of the property. The statute is devoid of any procedure establishing duties or liabilities to be borne by the finder or any third party (*e.g.*, a police department) to whom the finder might entrust the property. Thus, for your information and assistance, I offer the following general observations in regard to some of the applicable common law principles.

In 36A C.J.S. *Finding Lost Goods* s. 5, the following is provided regarding a finder who delivers the found property to a third party (such as a police department):

> Where the finder of a lost article has delivered it to a third person to be kept for the owner, or for the finder in case the owner does not claim it, the finder, on the refusal of the bailee to return the article, may recover it, if no claim has in the meantime been made by the true owner. However, where a bailee of a finder ascertains that the finder has the intention wrongfully to convert the property to his own use, it becomes the duty of the bailee to retain it until the owner can be found.

Similarly, s. 8 of 36A C.J.S. *Finding Lost Goods* provides that "the finder may protect his rights by an action against anyone who infringes on them. He may defend the property against *all others than the true owner* with every remedy which is available to a bailee." (Emphasis supplied.)

The above refers to the rights of a finder. As to the obligation of a finder, the following statement should first be considered:

> *It is entirely at the option of the finder of lost property whether he will or will not take possession of it*; if he does he should restore it to its owner, and he should, in the absence of knowledge as to who the true owner is, follow any *procedure required by statute* for discovering the owner, such as notifying the town clerk, or otherwise reporting the find, posting notices in public places in town, and depositing the goods with the proper authorities. [36A C.J.S. *Finding Lost Goods* s. 7; emphasis supplied.]

(In regard to the above, I would reemphasize that s. 715.01, F. S., contains no such procedure to be followed by the finder of *lost* property.) It is further stated, in s. 7 of 36A C.J.S. *Finding Lost Goods* that "[o]ne who has found an article and assumed possession of it is bound to exercise only slight diligence, and is responsible only for gross neglect." Thus, absent specific *statutory* procedures, a finder of lost property appears to be charged with few obligations under the common law.

In regard to lost property, it is clear that both the loser/rightful owner and the finder have protectable and enforceable interests. As an example, either party might maintain an action for conversion: "In this state an action for conversion is regarded as a possessory action, and the plaintiff, in order to maintain this action, must have a present or immediate right of possession of the property in question." Allen v. Universal C.I.T. Credit Corporation, 133 So.2d 442, 445-446 (1 D.C.A. Fla., 1961). For that matter, the right to such an action can extend even to a bailee to whom a finder entrusts lost property: "a bailee may maintain an action for conversion if he has a present or immediate right of possession to the property." Treasure Cay, Ltd. v. Investors Inter. Const. Corp., 259 So.2d 169, 171 (4 D.C.A. Fla., 1972). There would also appear to be other remedies available:

> The *true owner* may enforce his rights against the finder by *trover* or *replevin*, or, if it was money that was lost, or if he seeks to recover the proceeds from the finder's sale and conversion of the property, he may bring an action against the finder for *money had and received*. However, the finder may retain possession of the property until the owner furnishes proof of his ownership, and for doing this he is not liable as for conversion. [36A C.J.S., p. 426; emphasis supplied.]

There is no statute of repose other than s. 715.01, *supra*, and there does not appear to be any common law period of repose (for the duration of which a finder would be required

to hold the lost property for the owner). Thus, until the Legislature clarifies the rights and obligations of owners and finders of lost property, I would offer the suggestion that a city might, under the circumstances implicit in your inquiry, establish reasonable criteria whereby lost bicycles in custody and possession of the police department are advertised in a newspaper of general circulation and the owners thereby notified that the bicycles have been found and, if not claimed within a reasonable time, will be sold by the city at public auction. Any such procedure formulated by a municipality would not, of course, change any party's rights or obligations under the common law of property. Rather, it would be simply a temporary, administrative measure designed to facilitate the handling of lost bicycles until such time as the Legislature adopts a general law covering all aspects of lost property.

076-102—May 7, 1976

SUNSHINE LAW

APPLICABLE TO MUNICIPAL HOUSING AUTHORITIES

To: Thomas Wilson III, Executive Director, Housing Authority of the City of Sanford, Sanford

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Henry C. Hunter, Legal Research Assistant

QUESTIONS:

1. Do meetings held by the appointed boards of commissioners of municipal housing authorities created by s. 421.04, F. S., come within the purview of the Sunshine Law, s. 286.011, F. S.?

2. Do executive work sessions of commissioners of housing authorities, at which matters concerning policy, collective bargaining, grievance processes, and model lease provisions are discussed, come within the purview of the Sunshine Law, s. 286.011, F. S.?

SUMMARY:

The Sunshine Law, s. 286.011, F. S., is applicable to meetings held by the appointed board of commissioners of municipal housing authorities created by s. 421.04, F. S., and to "executive work sessions" of appointed commissioners of such housing authorities at which matters concerning policy, collective bargaining, grievance processes, and "model lease" provisions are discussed.

AS TO QUESTION 1:

Your first question is answered in the affirmative.

Based upon the information received in this office, the Housing Authority of the City of Sanford was created by, and is operating under, Ch. 421, F. S.

Section 421.04(1), F. S., creates in each city (as defined in s. 421.03[2], F. S.) "a public body corporate and politic to be known as the 'Housing Authority' *of the city*." (Emphasis supplied.) As defined in s. 421.03(1), F. S., "housing authority" means a public corporation created by s. 421.04, F. S., which is an agency of, and established by, municipal government. *Cf.* AGO 055-326, concluding that the Jacksonville Expressway Authority, which was by statute "created and established a body politic and corporate and *agency of the state* to be known as the Jacksonville Expressway Authority" (Emphasis supplied.), was an agency of the state within the purview of the state and county retirement system law (Ch. 29801, 1955, Laws of Florida).

A housing authority created pursuant to Ch. 421, F. S., to exercise and perform "public and essential governmental functions" set forth therein (*see* s. 421.08) becomes operative when the governing body of the city by resolution duly declares a need for a housing authority in such city. Section 421.04. The mayor, with the approval of the governing

body of the city, appoints the commissioners of the housing authority "created *for said city*." (Emphasis supplied.) Section 421.05. For causes specified in s. 421.07, a commissioner of an authority may be removed by the mayor with the concurrence of the governing body of the city.

A complete and full financial accounting and auditing of a housing authority's operation is required to be made annually by a certified public accountant, a copy of such accounting and auditing being filed with the city's governing body not less than 90 days after the close of each fiscal year. Section 421.091, F. S. At least once a year, housing authorities are required to file with the city clerk a report of their activities for the preceding year and make recommendations for additional legislation or other actions deemed necessary. Section 421.22, F. S. The Florida Supreme Court early held that the property of a municipal housing authority is held and used for municipal purposes and thus exempted from taxation under s. 1, Art. IX and s 16, Art. XVI of the Constitution of 1885. State v. McDavid, 200 So. 100 (Fla. 1941); State v. Campbell, 1 So.2d 483 (Fla. 1941); and *see* s. 423.02, F. S., exempting such authorities from all taxes and special assessments and providing that they may agree with the municipality to make payments to it in lieu of taxes or special assessments for services, improvements, or facilities furnished by the municipality for the benefit of a project owned by the authority.

In AGO 055-245, this office concluded that a county housing authority created under s. 421.27, F. S., providing that "[i]n each county of the state there is hereby created a public body corporate and politic to be known as the 'housing authority' of the county", was an agency or institution of the county within the purview of the state and county officers and employees retirement statute (Ch. 29801, 1955, Laws of Florida).

Section 286.011, F. S., in pertinent part, requires "[a]ll meetings of any board or commission of . . . any agency or authority of any . . . municipal corporation . . . at which official acts are to be taken . . . to public meetings open to the public at all times."

In light of the aforementioned statutory provisions, attorney general opinions, and authorities, I conclude that a municipal housing authority is an agency or authority of the municipality within the purview of s. 286.011, F. S., and governed thereby.

Moreover, s. 286.011, F. S., does not in terms qualify or restrict its operative force to elective boards of any agency or authority of the municipalities; indeed, many of the boards or commissions referred to therein are appointive, and no distinction is made between elective or appointive bodies. The statute applies to any and all boards and commissions of any agency or authority of any municipality. *See* AGO 073-223.

AS TO QUESTION 2:

Your second question is answered in the affirmative.

Your letter inquires as to whether executive work sessions discussing policy are within the scope of the Sunshine Law. This office has stated that gatherings such as "workshop meetings" of planning and zoning commissions, AGO 074-94; "conference sessions" or meetings held by a town council prior to regular meetings, AGO 074-2; "conciliation conferences" of a human relations board, AGO 074-358; "work sessions" of a city council, Inf. Op. to the Honorable Glen Darty, State Attorney, March 4, 1972; and "executive sessions" held to discuss personnel matters, Inf. Op. to Ms. Margaret Bosarge, December 22, 1972, are all subject to the commands of the Sunshine Law. Accordingly, executive work sessions of a municipal housing authority created by s. 421.04, F. S., are within the purview of the Sunshine Law.

When discussing collective bargaining in executive work sessions of a housing authority, it should be noted that the new Collective Bargaining Act, Ch. 447, F. S., exempts from the Sunshine Law all discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining. However, pursuant to s. 447.605(2), F. S., collective bargaining negotiations between a chief executive officer and a bargaining agent are not exempt from s. 286.011, F. S.

In AGO 075-48, this office attempted to delineate the scope and applicability of the above exemption. It was concluded that the exemption does not allow private discussions of a proposed "mini-perc ordinance" or discussions regarding the attitude or stance that a public body intends to adopt in regard to unionization and/or collective bargaining. It was the view of this office that the exemption extends only to actual ongoing collective bargaining and, accordingly, is inapplicable to such policy matters or to personnel policies or the like.

As to whether the Sunshine Law, s. 286.011, F. S., is applicable to executive work sessions at which grievances and personnel matters are discussed, the courts have repeatedly stated that personnel matters are within the scope of s. 286.011. *See* Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969); City of Miami Beach v. Berns 245 So.2d 38 (Fla. 1971); Canney v. Board of Public Instruction of Alachua County, 228 So.2d 260 (Fla. 1973); Times Publishing Co. v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969).

In particular regard to executive work sessions where "model leases" are discussed, the court in Berns, *supra*, and Doran, *supra*, held that discussions of condemnation matters, personnel matters, pending litigation, or any other matter relating to city government are subject to the commands of the Sunshine Law, so long as the discussions involve any matter on which foreseeable action will or may be taken by the covered public agency. In AGO 073-56, this office concluded that a public agency could not confer privately with its attorney to discuss pending litigation or any other matter not exempted from s. 286.011, F. S. Therefore, s. 286.011 is applicable to discussions at executive work sessions involving the terms and conditions of "model leases."

076-103—May 7, 1976

SUNSHINE LAW

APPLICABILITY TO CITY COMMISSIONERS WHO ARE VOLUNTEER FIREMEN WHEN ATTENDING FIREMEN'S ASSOCIATION MEETING

To: W. R. Scott, City Attorney, Stuart

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTION:

Is it proper for three city commissioners who are also volunteer firemen to attend meetings of the volunteer firemen's association when there is a probability of discussions of matters on which foreseeable action may be taken by the city commission, or does such attendance constitute a violation of the Sunshine Law?

SUMMARY:

Members of a city commission who are also volunteer firemen may attend meetings of the volunteer firemen's association, provided that they do not engage in any discussion of matters relating to their public duties or on which foreseeable action may be taken by the city commission.

According to your letter, three members of the city commission are also members of the volunteer fire department and attend meetings of the volunteer firemen's association. From time to time, discussions of matters take place at these meetings which may result in foreseeable formal action by the city commission—such as recommendations to the commission for the purchase of various firefighting equipment and other matters relating to their public duties.

The Sunshine Law has been held to apply to any gathering of two or more members of a public body where those members discuss matters on which foreseeable action may be taken by the city commission. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971); Hough v. Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1973). Under this broad construction of the law, the three city commissioners, who make up a quorum of the governing body of the city, constitute a "meeting" governed by the requirements of s. 286.011, F. S., when they discuss matters relating to their public duties or on which foreseeable formal action may be taken by the city commission.

This office has recognized that many public officials belong to private associations or organizations and that *mere attendance* by public officials at such functions does not

violate the Sunshine Law. Attorney General Opinion 072-158; Inf. Op. to the Honorable Glen Darty, March 24, 1972. However, this office has also emphasized that an added degree of caution is required when public officials attend such meetings, in that the public officials may not discuss *any* matter on which foreseeable formal action may be taken by such officials or the public bodies of which they are members. Attorney General Opinions 071-295 and 072-158.

Since circumstances outlined in your letter indicate that some issues related to public business are discussed at the volunteer firemen's association meetings, the city commissioners should refrain from any discussion of those matters, either amongst themselves, or with other association members, until the properly noticed and scheduled meeting of the city commission.

Therefore, I am of the opinion that the three city commissioners mentioned in your letter may attend meetings of the volunteer firemen's association provided that they refrain from any discussion of matters relating to their public duties or on which foreseeable action may be taken by the city commission.

076-104—May 11, 1976

DENTISTRY

PLACEMENT OF DENTIST'S SIGNS—OFFICE DOOR AND BUILDING DIRECTORY

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Donald D. Conn, Assistant Attorney General

QUESTION:

Is a dentist absolutely limited, under s. 466.27(2), F. S., to two signs, or may he have his name, dental degree, and other information referred to in s. 466.27(2) next to his office door or on the building, if his door opens up directly to the outside, as well as having two signs which are physically separate from the building?

SUMMARY:

A dentist is authorized by s. 466.27(2), F. S., to have not more than two unilluminated signs which are visible from the exterior of the dentist's office, and which conform to all requirements set forth in s. 466.27, and in addition thereto a dentist may list the statutorily prescribed information on the directory of the building in which he practices, whether located on the interior or exterior of such building, as well as on one of the doors opening into or entering the dentist's office, whether said door is on the interior or exterior of such building.

Section 466.27(2), F. S., provides in pertinent part that:

> A dentist may not have more than two unilluminated signs *visible from the exterior of his office. . . . In addition to the foregoing signs,* he may list his name, dental degree, "D.D.S." or "D.M.D.," using the abbreviation only, the word "dentist," "dentistry," or "general dentistry" or any specialty as defined above, his room number and office hours *on the directory* of the building in which he practices. . . . The information listed on the directory may be placed *on one door* entering his office . . . . (Emphasis supplied.)

It therefore appears that there is specific statutory authorization for the appearance of a dentist's name, with the other information specified in s. 466.27, F. S., on the directory of the building in which he practices, in addition to his use of two unilluminated signs visible from the exterior of his office. Your question, however, contemplates a building

with individual offices opening directly to the outside of the building or with the placing of the building's directory outside of the building due to the lack of a common entranceway or lobby in and to the building.

The legislative intent and purpose in enacting a law must be primarily determined from the language of the legislation itself, and not from conjecture *aliunde*. Maryland Casualty Company v. Sutherland, 169 So. 679 (Fla. 1936). Words in common use in a statute are to be construed according to their plain and ordinary signification, unless used in a technical sense. State v. Tunnicliffe, 124 So. 279 (Fla. 1929); Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Gasson v. Gay, 49 So.2d 525 (Fla. 1950). The legislative intent as deducible from the language employed in a statute is the law. Pillans and Smith Co. Inc v. Lowe, 157 So. 649 (Fla. 1934); State v. Knight, 124 So. 461 (Fla. 1929); Overman v. State Board of Control, 62 So.2d 696 (Fla. 1952); and, when ascertained, the statute must be given its plain and obvious meaning. A. R. Douglass, Inc. v. McRainey, 137 So. 157 (Fla. 1931); Van Pelt V. Hilliard, 78 So. 693 (Fla. 1918).

In enacting s. 466.27(2), *supra*, the Legislature has specifically recognized and allowed the use of directories in addition to two unilluminated signs visible from the exterior of a dentist's office. It has also authorized a dentist to list his name and the other information prescribed in s. 466.27(2) *on one door* entering the dentist's office, in lettering not to exceed 2 inches in height. The statute restricts the latter information or listing to the door, or to one of the doors, which opens into and enters the dentist's office. The statutory language does not require the door to be physically located within the interior of the building, nor does it limit the placement of the information listed on the directory to interior doors of the building in which the dentist practices.

Therefore, I conclude from the plain meaning of the statute that a dentist who practices in a building where the individual office units are entered through a door or doors directly from the outside of the building and egress from such individual offices is directly to the outside of the building may place the information authorized to be listed on the building's directory on the door, or on one of the doors, which opens into and enters his office.

Section 466.27(2), *supra*, further specifies that a dentist may list his name and other prescribed information "on the directory of *the building* in which he practices." (Emphasis supplied.) It does not direct that the directory must be physically located within the building, nor even on the outside wall of the building. Therefore, I also conclude that a dentist practicing in the type buildings referred to in your question may allow his name to be placed on the building's directory, whether such directory is located within or without the building, provided the letters of such directory listing do not exceed 2 inches in height.

076-105—May 11, 1976

WEIGHT REVIEW BOARD

NO AUTHORITY TO WRITE OFF BAD DEBTS

To: Roland J. Baggett, Chairman, Weight Review Board, Department of Transportation, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTION:

Does the Florida Weight Review Board have authority to write off bad debts as uncollectible?

SUMMARY:

Section 316.200(6) and (7), F. S., which creates the Weight Review Board and vests it with enumerated powers and functions, does not authorize the board to write off bad debts as uncollectible, and, absent express statutory authority, the board is not lawfully authorized to write or charge off such debts as uncollectible.

Your question is answered in the negative.

The Weight Review Board (hereinafter board) is created and vested with authority pursuant to s. 316.200(6) and (7), F. S., which provides:

> (6) There is hereby created a board consisting of the secretary of the Department of Transportation, the chairman of the Public Service Commission, the director of the Division of Motor Vehicles, and the director of the Division of Highway Patrol, or their authorized representatives, which may review any penalty imposed upon any vehicle or person under the provisions of this chapter relating to weights imposed on the highways by the axles and wheels of motor vehicles.
>
> (7) Any person aggrieved by the imposition of a civil penalty pursuant to this section may apply to the review board for a modification, cancellation, or revocation of the penalty, and the review board is authorized to modify, cancel, revoke, or sustain such penalty.

While s. 316.200(7), F. S., permits the board, upon application of any person aggrieved by the imposition of a civil penalty for weight law violations, to modify, cancel, revoke, or sustain the penalty, I can find no statutory language in the provisions of s. 316.200(6) and (7), F. S., authorizing or empowering the board to charge off or write off, as uncollectible or otherwise, bad debts in any way or respect arising out of or resulting from the imposition of civil penalties for violations of the weight and load provisions of ss. 316.199 and 316.200, F. S. Moreover, those statutory provisions having enumerated the things on which they are to operate must be deemed to have excluded from their operation all other things not expressly mentioned therein. Interlacken Lake Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952).

It is a well-settled principle of law that administrative bodies have no common-law powers. They are creatures of the Legislature and what powers they have are limited to the statutes that create them. State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974); Florida Industrial Commission v. National Trucking Co., 107 So.2d 397 (1 D.C.A. Fla., 1958); St. Regis Paper Co. v. State, 237 So.2d 797 (1 D.C.A. Fla., 1970). It has also been held that if there is a reasonable doubt as to the lawful existence of a particular power which is being exercised, the further exercise of the power should be arrested. State *ex rel.* Greenberg v. Florida Board of Dentistry, *supra*; State v. Atlantic Coast Line Railroad Company, 47 So. 969 (Fla. 1908). Statutory agencies do not possess any inherent powers and such agencies are limited to powers granted either expressly or by necessary implication from the statutes creating them. St. Regis Paper Co. v. State, *supra*; Florida Industrial Commission v. National Trucking Co., *supra*.

Statutory authority does exist whereby some state agencies are empowered to charge off accounts as uncollectible, but such action is pursuant to an express statutory grant of authority to so act (*e.g., see* s. 402.17(1)(i), F. S., and *cf.* ss. 27.12 and 27.13, F. S.). Authority for the Weight Review Board to write off bad debts as uncollectible must necessarily come about by an exercise of the legislative prerogative in granting that authority to the board.

076-106—May 11, 1976

EDUCATION

DEPARTMENT OF OFFENDER REHABILITATION VOCATIONAL EDUCATION PROGRAMS—PART OF STATE PUBLIC EDUCATION SYSTEM—ELIGIBILITY FOR TRUST FUNDS

To: Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, Tallahassee

Prepared by: Staff

QUESTION:

Are vocational education programs of the Department of Offender Rehabilitation a part of the state system of public education, and, if so,

are these programs eligible to receive capital outlay funds from the Public Education Capital Outlay and Debt Service Trust Fund?

SUMMARY:

Legislatively authorized education programs of the Department of Offender Rehabilitation are part of the state public education system, and are eligible for funds allocated by the State Board of Education from the Public Education Capital Outlay and Debt Service Trust Fund.

Your question is answered in the affirmative by the following discussion.

The State Constitution authorizes a state system of public education which may be defined by law. Section 1, Art. IX, State Const., reads as follows:

> **System of public education.**—Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning *and other public education programs that the needs of the people may require.* (Emphasis supplied.)

See also s. 2, Art. IX, State Const., authorizing the State Board of Education to supervise the system "as is provided by law." The language in s. 1, Art. IX, State Const., does not limit the legislative definition of the system to the free public schools and institutions of higher learning, but allows that legislative definition to include a broad range of educational programs.

The legislative definition of the public education system is found in ss. 228.03 and 228.041(1), F. S. Section 228.03 reads in its entirety:

> **Scope of state system.**—The state system of public education includes such school systems, schools, institutions, agencies, services, and types of instruction as may be provided and authorized by law, or by regulations of the state board within limits prescribed by law.

Section 228.041(1) reads in pertinent part:

> STATE SYSTEM OF PUBLIC EDUCATION.—The state system of public education shall consist of such publicly supported and controlled schools, institutions of higher education, other educational institutions, and *other educational services* as may be provided or authorized by the Constitution and laws of Florida. (Emphasis supplied.)
>
> * * * * *
>
> (d) **Other educational institutions.**—Other state-supported institutions primarily of an educational nature shall be considered parts of the state system of public education. *The educational functions of other state-supported institutions not primarily of an educational nature but which have specific educational responsibilities shall be considered responsibilities belonging to the state system of public education.* (Emphasis supplied.)

The language of these statutes is broad and nonexclusive; they would appear to encompass all educational programs carried out in state institutions, such as those of the Department of Offender Rehabilitation, as long as those programs are not expressly excluded.

Examination of the statutes requiring and authorizing vocational education programs in the Department of Offender Rehabilitation reveals no such exclusionary language. On the contrary, these statutes mandate substantial involvement in and control over these programs by the public education system. Section 944.19, F. S., provides:

> **Vocational, adult, and academic education of prisoners under the jurisdiction of the department.—**
>
> (1) The '[Department of Offender Rehabilitation] shall establish educational programs for the prisoners under the jurisdiction of the '[department] utilizing

personnel of the [1][department], or by arranging for instruction to be given by public or private educational agencies of the state.

(2) The [1][department] shall cooperate with the school board and the State Department of Education, which may establish and maintain classes for prisoners under the jurisdiction of the [1][department], to provide instruction of a vocational, adult, or academic nature designed to meet the needs of said prisoners. Such instruction is to be under the supervision and control of the school board in which the institution is located. For the organization and operation of these classes, school boards are authorized to expend funds available to them either from local sources or through the minimum foundation program as provided by law.

(3) This program shall be operated in the various institutions only with the approval of the State Board of Education.

The department is required not only to cooperate with agencies of the public education system, but to accept the supervision of local school boards and obtain approval from the State Board of Education for programs established under this section. The language "[t]his program" in subsection (3) makes it clear that this section envisions a single, unified educational program in which the department is required to participate and in which the public education system has a controlling influence. *See also* ss. 944.551, 944.56, and 944.57, F. S., which further describe the vocational education programs of the department but in no way limit the role of the public education system. I therefore conclude, based upon my reading of these statutes, that the vocational education programs of the department are within the scope of the public education system.

The second part of your question concerns the eligibility of these programs for capital outlay funds of the Public Education Capital Outlay and Debt Service Trust Fund, hereinafter called the Capital Outlay Fund. This fund is established by s. 9(a)(2), Art. XII, State Const. The relevant provisions of that section are as follows:

. . . [R]evenues derived from the gross receipts taxes . . . shall, as collected, be placed in a trust fund to be known as the "public education capital outlay and debt service trust fund" in the state treasury (hereinafter referred to as "capital outlay fund"), and used only as provided herein.

The capital outlay fund shall be administered by the state board of education as created and constituted by Section 2 of Article IX of the Constitution of Florida as revised in 1968 (hereinafter referred to as "state board") . . . .

State bonds pledging the full faith and credit of the state may be issued, without a vote of the electors, by the state board pursuant to law to finance or refinance capital projects theretofore authorized by the legislature, and any purposes appurtenant or incidental thereto, *for the state system of public education provided for in Section 1 of Article IX of this Constitution* (hereinafter referred to as "state system"), *including but not limited to institutions of higher learning, junior colleges, vocational technical schools or public schools, as now defined . . . by law.*

* * * * *

The moneys in the capital outlay fund in each fiscal year shall be used only for the following purposes and in the following order of priority:

a. For the payment of the principal of and interest on any bonds maturing in such fiscal year;

b. For the deposit into any reserve funds provided for in the proceedings authorizing the issuance of bonds of any amounts required to be deposited in such reserve funds in such fiscal year;

c. For direct payment of the cost or any part of the cost of *any capital project for the state system theretofore authorized by the legislature*, or for the purchase or redemption of outstanding bonds in accordance with the provisions of the proceedings which authorized the issuance of such bonds. (Emphasis supplied.)

There is no limit in these provisions to the projects or programs which may receive funds, except that: They must be part of the state public education system; they must be legislatively authorized; and the State Board of Education must, in its discretion, allocate

the funds. I therefore conclude that vocational education programs of the department are eligible for funding as part of the public education system; that is, that they meet the first requirement.

A previous opinion from this office, AGO 075-150, appears to take a more restrictive approach to the eligibility question. Specifically, that opinion concerned the eligibility of the Florida School for the Deaf and Blind and the public broadcasting system for funding under the Capital Outlay Fund. That opinion, however, was based upon the provisions of s. 9(a), Art. XII, State Const., that were in force at the time of its issuance; since that opinion was issued, an amendment to s. 9(a), Art. XII, has taken effect, which I believe was intended to increase the number of programs for which the fund is available. In a letter dated June 30, 1975, a copy of which is attached, I indicated that under the amendments to s. 9(a), Art. XII, AGO 075-150 would no longer be valid. I believe the plain language of the constitutional provision, as it stands today, supports the conclusion that vocational education programs of the department are eligible for capital outlay funds.

076-107—May 11, 1976

LAND ACQUISITION TRUST FUND

WHEN REFUNDS OF MONEYS PAID FOR FILL MATERIALS MAY BE GIVEN

To: Harmon W. Shields, Executive Director, Department of Natural Resources, Tallahassee

Prepared by: J. Kendrick Tucker, Assistant Attorney General

QUESTIONS:

1. In view of the fact that Ch. 75-22(15), Laws of Florida, transferred the Internal Improvement Trust Fund to the Land Acquisition Trust Fund, created by s. 375.041, F. S., may refunds of moneys paid as the sales price of fill materials be made from the Land Acquisition Trust Fund when the permit to dredge and fill was granted by the Trustees of the Internal Improvement Trust Fund?
2. In view of the fact that Ch. 75-22(15), Laws of Florida, transferred the Internal Improvement Trust Fund to the Land Acquisition Trust Fund, created by s. 375.041, F. S., may refunds of moneys paid as the sales price of fill materials be made from the Land Acquisition Trust Fund when the permit to dredge and fill was never granted by the Trustees of the Internal Improvement Trust Fund due to cancellation or withdrawal of the application?

SUMMARY:

Refunds of moneys paid as the sales price of fill materials by applicants for dredge and fill permits who have received the permits may not be refunded because such sales are consummated, fully executed contracts selling the fill material and which are not contingent upon applicants actually dredging the fill. As such, there is no basis for a claim for refund for a transaction fully completed, and likewise no statutory authorization exists for same. If the application for a dredge and fill permit is canceled or withdrawn prior to issuance of the permit, moneys deposited with the application for payment of fill material may be refunded by the Comptroller from the Land Acquisition Trust Fund pursuant to ss. 215.26, 215.32, and 375.041, F. S., because such payments are made on an account not legally due, but only conditionally due, per s. 215.26(1)(b). The right to the refund accrues when the claimant has a right to recover the moneys paid or, in this instance, upon cancellation or withdrawal of the application for the dredge and fill permit.

Your first question is answered in the negative and the second question in the affirmative as hereinafter qualified.

AS TO QUESTION 1:

The Trustees of the Internal Improvement Trust Fund, as owners of state lands, were at all times material herein empowered to manage, control, and dispose of state lands, including sales of fill material. *See* s. 253.03, F. S.; Rules 18-2.071, 18-2.08, and 18-2.09, Florida Administrative Code (repealed); and AGO 071-68. The proceeds from such sales of fill material were deposited in the Internal Improvement Trust Fund to be strictly applied and expended according to the provisions of Ch. 253, F. S. *See* ss. 253.01 and 253.015; *cf.* s. 253.031(4).

Pursuant to s. 15, Ch. 75-22, Laws of Florida, the uncommitted fund of balance of the Internal Improvement Trust Fund as of July 1, 1975, and all revenues subsequently accruing from sources now designated by law for deposit in such fund shall be deposited in the Land Acquisition Trust Fund created by s. 375.041, F. S., to be used in accordance with Ch. 375, F. S. Section 375.041 creates the last-named trust fund to be administered by the Division of Recreation and Parks of the Department of Natural Resources.

Specifically, as to sales of fill material to fill private upland or to fill submerged land in private ownership or under contract to purchase, Rules 18-2.071 and 18-2.08, *supra*, required such fill material to be "purchased under application":

> 18-2.071 MATERIAL FROM SOVEREIGNTY LANDS TO FILL SUBMERGED LAND IN PRIVATE OWNERSHIP, OR UNDER CONTRACT TO PURCHASE, *MUST BE PURCHASED.* Material from sovereignty lands for filling privately and publicly-owned property, or under contract to purchase, *must be purchased under application*, which includes:
>
> * * * * *
>
> 18-2.08 MATERIAL FROM SOVEREIGNTY LAND TO FILL UPLAND *MUST BE PURCHASED.* Material from sovereignty lands for filling private upland *must be purchased under application* which includes . . . . (Emphasis supplied.)

Thus, the above-quoted regulations require the applicant to actually purchase the fill material. *Cf.* s. 253.12(8), F. S., and AGO 071-68. Inasmuch as the relationship between the trustees as owners of state lands and the applicant seeking to purchase fill material from state-owned lands is contractual, it is apparent that the applicant has in fact and in law actually purchased the fill material, the subject of the application to dredge and fill.

Although the above-cited regulations, by their literal terms, appear to indicate that the purchase takes place "under application" or at the time of the application for the dredge and fill permit, nevertheless, the applicant receives the legal, and inferentially the contractual, right to dredge the fill material *only upon the grant of the dredge and fill permit.* I am therefore of the view that the purchase of the fill material has not occurred until such time as the grant of the dredge and fill permit. In the instant case wherein the application with deposit of funds was made and the dredge and fill permit granted, it is evident that the fill material has been sold to the applicant pursuant to a completed transaction or contract. I find no indication that the sale was contingent upon the applicant actually dredging the specified fill material or any other occurrence. There can, accordingly, be no basis for a claim for refund since the contract selling the fill material has been executed in full by both parties with no obligations remaining thereunder. Likewise, I find no statutory direction or authorization allowing refunds by the trustees for fill materials sold by the state in a transaction completed in all particulars. *Cf.* s. 253.29, F. S., as to refunds of moneys paid for lands purchased from the state when title fails. Thus no refunds may be allowed for sales of fill material to fill private upland or to fill submerged land in private ownership or under contract to purchase when the permit to dredge and fill was granted by the Trustees of the Internal Improvement Trust Fund.

AS TO QUESTION 2:

As discussed in question 1, the sale of the fill material does not take place until such time as the permit to dredge and fill is granted. Since you have specified in question 2

that the application for the permit was withdrawn and the permit never granted, it appears that the moneys deposited with the application and now reposing in the Land Acquisition Trust Fund may be the proper subject of a refund claim subject to the legislative prerogative. *Cf.* State v. Gay, 74 So.2d 560 (Fla. 1954). Section 375.041(1), F. S., provides for the disposition of such moneys deposited in the Land Acquisition Trust Fund:

> All moneys so deposited into the Land Acquisition Trust Fund shall be trust funds for the uses and purposes herein set forth, within the meaning of s. 215.32(1)(b) and such moneys shall not become or be commingled with the General Revenue Fund of the state . . . .

As above quoted, the Land Acquisition Trust Fund is denominated as a s. 215.32 trust fund. Section 215.32, F. S., provides that moneys received by the state are to be deposited into the *State Treasury* in the various named funds including the trust funds. Said section further provides:

> (b)1. The trust funds shall consist of moneys received by the state which under law or under trust agreement are segregated for a purpose authorized by law. . . .
>
> * * * * *
>
> 3. All such moneys are hereby appropriated for the purpose for which they were received, to be expended in accordance with the law or trust agreement under which they were received, *subject always to other applicable laws relating to the deposit or expenditure of moneys in the State Treasury.* (Emphasis supplied.)

Accordingly, s. 215.26, F. S., which controls claims for refunds of payments into the State Treasury, is applicable:

> (1) The Comptroller of the state may refund to the person who paid same, or his heirs, personal representatives or assigns, *any* moneys paid into the State Treasury which constitute:
> (a) An overpayment of any tax, license or account due;
> (b) *A payment where no tax, license or account is due;*
>
> * * * * *
>
> and if any such payment has been credited to an appropriation, *such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.* (Emphasis supplied.)

Assuming the permit to dredge and fill was not granted by the trustees and the application for same was canceled or withdrawn by the parties, then the payment for the fill material would appear to be a payment where no account is due within the meaning of s. 215.26, *supra*, and therefore eligible for refund from the Land Acquisition Trust Fund under the conditions stated therein. Until the permit was issued, the payment for the fill was, in my opinion, in legal effect a payment of an account not in law due, but only conditionally due, subject to the grant of the permit. *Cf.* AGO 075-293. Hence, the moneys so deposited were subject to a claim for refund pursuant to s. 215.26, *supra*. I direct your attention to the provisions of said section which require applications for such refunds to be submitted to the Comptroller within 3 years after the right to such refund accrues, else such right shall be barred. The right to the refund accrues when the claimant has a right to recover the moneys paid or, in this instance, upon cancellation or withdrawal of the application for the dredge and fill permit. Of course the Comptroller likewise must authorize the refund. *See* s. 4, Art. IV, State Const.; s. 17.03(1), F. S.; and Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970).

076-108—May 11, 1976

HORSERACING

TRANSFER OF PERMIT FROM ONE COUNTY TO ANOTHER—REFERENDUM REQUIREMENTS

To: William H. Lockward, Representative, 104th District, Tallahassee

Prepared by: James D. Whisenand, Deputy Attorney General

QUESTION:

Pursuant to s. 550.17, F. S., must the party requesting the transfer of a pari-mutuel permit hold a referendum vote in the county to which the permit is being transferred?

SUMMARY:

The statutory scheme provided in ss. 550.05, 550.06, 550.07, and 550.17, F. S., requires a referendum in Broward County if a party acquires a permit approved by the electors of Dade County prior to the conducting of any racing dates under the permit. Thus, any sale of the Hialeah Race Course permit to the Gulfstream Park Race Track must be approved by the electors of Broward County prior to the issuance of a license or the conducting of a racing meet.

According to the facts in your letter, you state that the House of Representatives has passed H.B. 2537 [Ch. 76-179, Laws of Florida] which affects the referendum requirements of s. 550.17, F. S. Your inquiry is particularly premised upon the possible purchase of the Hialeah Race Course by the Gulfstream Park Race Track. If the transaction is completed, it is contemplated that the Hialeah permit and dates would be transferred to and conducted at Gulfstream Park Race Track. The Hialeah Race Course is located in Dade County and has been previously approved by elector referendum. The Gulfstream Park Race Track is located in Broward County and has been previously approved by elector referendum.

By letter of October 29, 1974, I responded to a similar question regarding the transfer of Hialeah's racing dates to Gulfstream subsequent to the Gulfstream purchase of Hialeah Race Course. I concluded therein that the reassignment of Hialeah's dates to be conducted at Gulfstream was precluded by the previous assignment of dates by the Board of Business Regulation, the late date of the request, and the apparent lack of statutory authority for the board to approve the transfer for the reasons given.

A pari-mutuel permit is issued to the racetrack by the Division of Pari-Mutuel Wagering, when applied for between June 1 and July 1 and then ratified or rejected by the electors of the county wherein the track will be operated. Sections 550.05 and 550.06, F. S. Upon electorate approval, the division is required to issue a license and to annually grant racing days which are to be conducted at the location fixed in the permit and ratified in the election. Section 550.07, F. S. The electorate of the county in which the racing has been ratified, licensed, and conducted may petition for an election to revoke the permit under the procedure provided in s. 550.18, F. S. *See* s. 550.19, F. S. An exception to the county referendum is the newly created summer thoroughbred horseracing season. Miami Beach Jockey Club, Inc. v. State *ex rel.* Willis, 227 So.2d 96 (1 D.C.A. Fla., 1969).

The clear legislative intent of the pari-mutuel system is to create a local county option authorizing or rejecting the operation of a racetrack within the county. This intent is clearly expressed in s. 550.17, F. S., which requires proof of the referendum election in the county wherein the racing meet will be conducted prior to issuance of the license.

The conclusion that the transfer of a racing permit from Dade to Broward requires a referendum pursuant to ss. 550.05, 550.06, 550.07, and 550.17, F. S., does not include leasing arrangements under s. 550.47, F. S., upon which you have not inquired.

In addition to Ch. 550, F. S., requiring a referendum upon a cross-county permit change, permits operative in Dade and Broward Counties have an absolute restriction in s. 550.05(2). This statute prohibits any referendum upon a permit issued to conduct

horseracing. Thus, consideration should be given this provision in the passage of H.B. 2537.

076-109—May 17, 1976

HOMESTEAD EXEMPTION

LEGISLATURE DOES NOT HAVE POWER TO DEFINE SECOND HOMESTEAD EXEMPTION TO INCLUDE COST-OF-LIVING ADJUSTMENTS

To: Ray C. Knopke, Representative, 67th District, Tampa

Prepared by: Caroline C. Mueller, Assistant Attorney General and David Slaughter, Legal Intern

QUESTION:

May the Legislature, through the customary procedures for the passage of bills into statutes, pass and cause to be effective a law allowing for a cost-of-living increase in the homestead exemption for the elderly (those who qualify for the second $5,000 exemption for homestead)?

SUMMARY:

The Legislature does not have the power to define the $10,000 limitation on the homestead exemption for the elderly in s. 6, Art. VII, State Const., in such a way that would tie it to cost-of-living increases.

Although this question is ultimately for the judiciary to resolve, my opinion is that your question must be answered in the negative for the reasons discussed below.

Section 6, Art. VII, State Const., provides in pertinent part:

> (a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars . . . .
>
> * * * * *
>
> (c) By general law and subject to conditions specified therein, the exemption may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five . . . .

Section 196.031, F. S., increased the exemption to $10,000 of assessed valuation if the owner has attained age sixty-five, subject to the condition that said owner must be a permanent resident of this state for 5 consecutive years prior to claiming the exemption.

The question presented is whether the Legislature can pass a law defining the $10,000 limitation in the Constitution as $10,000 in terms of the purchasing power of the dollar in the year in which the $10,000 provision was placed in the Constitution. The $10,000 amount would be adjusted each year or every 2 years to conform to Consumer Price Index figures which reflect cost-of-living adjustments. At any time it wished, the Legislature could increase by statute the homestead exemption allowed to the elderly up to the maximum amount stated in the Constitution as adjusted in relation to the Consumer Price Index.

The issue is whether the Legislature has the power to so define the $10,000 amount. After a review of the cases dealing with constitutional principles and legislative powers, it would appear that the Legislature does not have the power to give a definition to the $10,000 amount which would have the effect of increasing the maximum amount allowed by the Constitution.

It is well settled that the Florida Constitution is not a grant of, but a limitation on, legislative power. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950). Where the Constitution prescribes the manner of doing an act or ascertaining a fact, the manner is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the Constitution. State *ex rel.* Church v. Yeats, 77 So. 262 (Fla. 1917). That which is implied in the Constitution is as much a part of it and is as effective as that which is expressed. State *ex rel.* Nuveen v. Greer, 102 So. 739 (Fla. 1924). Express or implied provisions of the Constitution cannot be altered, contracted, or enlarged by legislative enactment. Sparkman v. State *ex rel.* Scott, 58 So.2d 431 (Fla. 1952).

The fundamental object in construing a constitutional provision is to ascertain and give effect to the intentions of the framers or adopters. State *ex rel.* Dade County v. Dickinson, 230 So.2d 130 (Fla. 1969). Constitutional provisions are to be interpreted in accordance with their plain and obvious meaning, unless it is very plain or absolutely certain that the language employed was not intended in its natural signification. Schooley v. Judd, 149 So.2d 587 (Fla. 1963). A legislative construction of a constitutional provision will not be permitted to overturn and render nugatory a clear provision of the Constitution. Amos v. Moseley, 77 So. 619 (Fla. 1917). Constitutional provisions which are clear and explicit in term, or made so by the history of their adoption and by long-continued application and recognition in governmental proceedings, cannot be given a meaning by the Legislature that conflicts with the terms of such provisions. State *ex rel.* West v. Butler, 69 So. 771 (Fla. 1915). *See* 6 Fla. Jur. *Constitutional Law* ss. 23-29, pp. 288-292.

The constitutional principles and cases cited above limit generally the Legislature's power to define constitutional terms. Cases which deal specifically with exemptions in the Constitution similarly discuss the implied prohibition against tampering with the provisions in the Constitution. It is stated in L. Maxcy, Inc. v. Federal Land Bank of Columbia, 150 So. 248, 250 (Fla. 1933) that:

> The principle has been more than once affirmed in this state that the Constitution must be construed as a limitation upon the power of the Legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself.

The court in Steuart v. State *ex rel.* Dolcimascolo, 161 So. 378 (Fla. 1935), while defining the word "citizen" in the homestead exemption provision in the Constitution, stated that neither the judicial, legislative, nor executive departments have the authority to amend, add to, detract from, or alter the constitutional provision exempting homesteads from taxation.

Defining the term $10,000 in the manner suggested by the proposed legislation would have the effect of increasing the limitation amount in the Constitution. The class of the elderly would be entitled to additional exemption. This would appear to be a tampering with the homestead exemption provisions of the Constitution which would be prohibited.

Several Florida cases deal with situations where the Legislature has validly defined constitutional terms in regard to exemptions. The test applied for measuring the legislation against constitutional restraints was whether there was a reasonable relationship between the legislation and the purpose of the constitutional provision relating to exemptions. In Jasper v. Mease Manor, Inc., 208 So.2d 821 (Fla. 1968), the court dealt with the legislative application of the word "charitable" in the constitutional exemption provisions. In Ammerman v. Markham, 222 So.2d 423 (Fla. 1969), the court dealt with the legislative definition of "real property" in relation to constitutional homestead exemption provisions. The words "charitable" and "real property" are words which may require defining by the Legislature in order to establish classes of exemptions. The term "$10,000" is purely a *limitation* on the power of the Legislature. The term has a clear and precise meaning and does not require defining by the Legislature.

The maxim *expressio unius est exclusio alterius* must also be considered in regard to the proposed legislation. This maxim that the express mention of one thing implies the exclusion of another has been applied to constitutional provisions. The court in *In Re Advisory Opinion of the Governor Civil Rights*, 306 So.2d 520, 523 (Fla. 1975), quoted from another case in regard to this maxim:

> The principle is well established that where the Constitution expressly provides the manner of doing a thing, it impliedly forbids it being done in a substantially different manner. Even though the Constitution does not in terms prohibit the

> doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. . . .

When the maxim is applied to the question presented here, it would appear that, since the Constitution provides for a $10,000 limitation, it excludes a $10,000 limitation as adjusted by the Consumer Price Index.

The history of the homestead exemption provision in the Constitution supports the assertion that the Legislature does not have the authority to alter the ordinary meaning of the $10,000 limitation. The homestead tax exemption originally came into the Florida Constitution as the result of a 1933 constitutional amendment. The original limitation was $5,000, which amount has not been changed over the past few decades. Obviously, the value of the dollar has decreased drastically since 1933, yet the $5,000 limitation was readopted in the 1968 Constitution. The increase to $10,000 for the elderly is in effect an additional $5,000 exemption. These amounts must be given their ordinary meaning, since there is nothing to indicate in the constitutional history that the amounts were to mean anything other than the stated figures.

It has been brought to my attention that the Kentucky courts have recently considered the issue presented by the legislation proposed here and have concluded that the Kentucky Legislature has the authority to define the $6,500 exemption provided for in s. 170 of the Kentucky Constitution in terms of the purchasing value of the dollar in a given year. Section 170 is worded substantially the same as s. 6, Art. 7, Fla. Const.:

> There shall be exempt from taxation . . . a homestead, which is a single unit residential property maintained by the owner who is sixty-five years of age or older, as his personal residence, up to the assessed valuation of sixty-five hundred dollars. . . .

The Kentucky Legislature in Ch. 314, Acts of 1974, specifically defined the term $6,500 in the following way:

> ". . . [T]he $6,500 exemption shall be construed to mean $6,500 in terms of the purchasing power of the dollar in 1972. Every two (2) years thereafter, if the cost of living index of the United States Department of Labor has changed as much as one (1) per cent, the maximum exemption shall be adjusted accordingly."

In Lester v. City of Fort Thomas, Ky., *et al.*, 531 S.W.2d 490 (Ky. 1975), the Court of Appeals of Kentucky held that the amendments to KRS 132.810(1) and (2)(c) as enacted by Ch. 314, Acts of 1974, are valid. The court concluded that "the dollar-value principle of *Mathews v. Allen*, 360 S.W.2d 135 (Ky. 1962), *Commonwealth v. Hesch*, 395 S.W.2d 362 (Ky. 1965), and *Sarakatsannis v. Baker*, 488 S.W.2d 683 (Ky. 1972), applies to the $6,500 limit of the homestead exemption allowed to persons 65 years of age or older by Constitution, Section 170."

The three decisions used by the court in Lester, *supra*, to support its conclusion all deal with constitutional salary provisions. In Mathews v. Allen, *supra*, the Kentucky Court of Appeals emphasized that s. 133 of the Constitution provides that judges shall receive "adequate compensation" for their services. The court further stated that:

> . . . [W]hen the nominal dollar salary becomes of such reduced purchasing power in relation to the cost of living that it no longer enables its recipient to maintain the standard of living afforded by the same salary in 1949 [the year that Section 246 was amended to provide a $12,000 cap for judges], it is necessarily inadequate within the meaning of Section 133. The sections can be truthfully harmonized only through equating "dollars" with what they will do in the market place.

The court also discussed the legislative history of the 1949 amendment to s. 246:

> . . . [I]t was done in order to afford the Courts just or adequate compensation when it was thought that the $5,000 limitation of original Section 246 precluded payment of it.

> . . . [T]his background . . . indicates [that] national averages were considered in setting constitutional limits in 1949 and that it was not the intention of the founding fathers or supporters of the 1949 amendment to Section 246 in 1949 to doom public officers to the strapped financial state a waning dollar value so easily can produce.

Commonwealth v. Hesch, *supra*, and Sarakatsannis v. Baker, *supra*, also dealt with salary increases in the face of a constitutional or statutory dollar limit and used rationales similar to Mathews v. Allen, *supra*, to justify defining the constitutional dollar limits in terms of current dollar value. It should be noted that in all these cases there is a legislative history of salary increases to keep pace with the rise in the cost of living. There is additional justification in construing the salary limitations according to the dollar-value principle when the constitutional provision for adequate compensation for constitutional officers is taken into account.

The analogy drawn by the Court of Appeals in Lester, *supra*, between constitutional salary limitation and the constitutional homestead exemption limitation can be questioned. The $6,500 limitation for the elderly was adopted by the voters on November 2, 1971, and added to the Kentucky Constitution. A proposed amendment in 1974 contained the same $6,500 limit with no mention of the decrease in the value of the dollar between 1971-1974. What little legislative history there is concerning the Kentucky homestead exemption indicates that the $6,500 was intended to mean $6,500. Additionally, there is no constitutional provision analogous to s. 133 which would guarantee the elderly "adequate exemptions." The Attorney General of Kentucky adopted a similar view of the proper construction of s. 170 in AGO 073-371 in which he stated that:

> There is no authority in the constitution, either directly or implied, to increase the $6,500 exemption provided for the assessed value of homesteads owned by persons 65 years of age or older and the only method by which such exemption could be increased would be by amending the constitution.

Although the Kentucky judicial decisions are entitled to great respect by the courts of sister states, an analysis of Florida decisions and history would indicate that the Kentucky decision in Lester, *supra*, would not be followed by the Florida courts, should the question arise.

Since I have determined that the proposed legislation would run counter to the constitutional provisions, it is unnecessary to discuss issues which might arise in the drafting of such legislation. Some of these issues would be equal protection of the laws, prospective application of the statutes, and delegation of legislative authority to the body compiling the Consumer Price Index.

It should be pointed out that what is desired by the proposed legislation could be accomplished by a constitutional amendment.

076-110—May 18, 1976

APPRENTICESHIP

NO CONFLICT BETWEEN JACKSONVILLE ORDINANCE AND DEPARTMENT OF COMMERCE RULE

To: George R. Grosse, Representative, 15th District, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Does s. 910.111(b)(2) of the Jacksonville Code conflict with Florida Department of Commerce Rule 8C-16.05(2)(g), F.A.C., and, if so, which of the two controls?

SUMMARY:

Section 910.111(b)(2) of the Jacksonville Code does not regulate apprenticeship standards or apprenticeship agreements and does not conflict with Florida Department of Commerce Rule 8C-16.05(2)(g), F.A.C.

The Florida Department of Commerce rule about which you inquire reads:

> The ratio of apprentices to journeymen [shall be] consistent with proper supervision, training, and continuity of employment or applicable provisions in collective bargaining agreements, but in a ratio of not more than one apprentice to the employer in each apprenticeable occupation, *and one apprentice for each three journeymen thereafter*. . . . (Emphasis supplied.)

The purpose of the above-quoted rule and the rules found in Ch. 8C-16, F.A.C.,

> . . . is to set forth labor standards to safeguard the welfare of apprentices and to extend the application of such standards by prescribing policies and procedures concerning the registration of acceptable apprenticeship programs with the State of Florida, Department of Commerce, Division of Labor, Bureau of Apprenticeship. These labor standards and procedures cover the registration, cancellation and deregistration of apprenticeship agreements; and matters related thereto. [Rule 8C-16.01[2], F.A.C.]

Section 910.111(b)(2) of the Jacksonville Code reads as follows:

> It is the responsibility of a master craftsman obtaining a permit under his name to ensure that:
>
> * * * * *
>
> (2) The work is done by craftsmen holding valid certificates where required. For this purpose, a certified craftsman is deemed to do the work if he is in direct charge of the work, is continuously present on the site where the work is being done, and is assisted by no more than four *helpers*. (Emphasis supplied.)

The above-quoted provisions of s. 910.111 of the Jacksonville Code do not purport to, and do not in fact, have any bearing on apprenticeship standards. The purpose of s. 910.111(b)(2), *supra*, is to establish the maximum number of nonjourneymen "helpers"—irrespective of whether such helpers are apprentices—who may assist a certified craftsman in the performance of work which must be performed by a certified craftsman. Inasmuch as s. 910.111(b)(2) of the Jacksonville Code does not purport to regulate apprenticeship standards or apprenticeship agreements, it does not conflict with Rule 8C-16.05(2)(g), F.A.C.

076-111—May 18, 1976

BEVERAGE LAW

LAW ENFORCEMENT OFFICER PROHIBITED FROM PERFORMING AT LICENSED ESTABLISHMENT AS PART OF MUSICAL GROUP

To: James T. Russell, State Attorney, New Port Richey

Prepared by: Charles W. Musgrove, Assistant Attorney General

QUESTION:

Is it unlawful for a deputy sheriff to perform with a musical group engaged by a business licensed under the beverage laws of the State of Florida?

SUMMARY:

Section 561.25, F. S., prohibits a deputy sheriff from performing with a musical group engaged by a business licensed under the beverage laws of Florida.

Section 561.25, F. S., provides:

> 561.25 **Officers and employees prohibited from being employed by or engaging in beverage business; exceptions; penalties.**—No officer or employee of the division, and no sheriff or other state, county, or municipal officer with state police power granted by the Legislature, shall be permitted to engage in the sale of alcoholic beverages under the Beverage Law; or be employed, *directly or indirectly*, in connection with the operation of any business licensed under the Beverage Law; or be permitted to own any stock or interest in any firm, partnership, or corporation dealing wholly or partly in the sale or distribution of alcoholic beverages. Any person violating this provision of the Beverage Law shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, and shall be automatically removed or suspended from office. However, nothing herein may be construed to prohibit the said police officers, excluding officers or employees of the division, from rendering security services when off duty to any business establishment licensed under the beverage laws to sell beverages, provided that in excess of 50 percent of said business establishment's gross income is from a source other than the sale of alcoholic beverages for consumption on the premises and the written approval of the chief of police, sheriff, or other appropriate department head is obtained for the place and hours of such service. Any officer employed for the purposes of rendering private security services as permitted under this section shall not be paid less than the established prevailing wage. (Emphasis supplied.)

The purpose of this statute is to prohibit law enforcement officers from being connected with the operation of licensed premises in such a way as to interfere with or prevent the officer involved from enforcing the Beverage Law in an unbiased and unprejudiced manner. Inasmuch as the statute prohibits indirect employment as well, no technical distinction can be made because bands are not usually hired upon traditional employment terms. When a business licensed under the Beverage Law hires a musical group, it appears to me that the musical group is engaged or employed, at least indirectly, with the operation of that business.

The only exception provided by the Legislature is for off-duty officers rendering security services and only to a business deriving less than 50 percent of its gross income from a source other than the sale of alcoholic beverages for consumption on the premises. That exception was added by amendment, effective October 1, 1972 (*see* Ch. 72-93, Laws of Florida).

For related opinions, *see* AGO's 073-467, 073-228, 070-68, and 058-16.

076-112—May 18, 1976

CIRCUIT COURT CLERKS

FEES—HABEAS CORPUS PROCEEDINGS, RECORDING CERTIFICATE OF TITLE IN CIVIL FORECLOSURE ACTION

To: Edwin Baur, Clerk, Circuit Court, Quincy

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTIONS:

1. Is the clerk of a circuit court entitled to a filing fee in a civil action on a petition for writ of habeas corpus?

2. Is the clerk of a circuit court entitled to a recording fee for recording a certificate of title in a foreclosure civil action in the official records book?

SUMMARY:

The clerk of the circuit court is authorized and required to charge the statutorily prescribed filing fees or service charges in habeas corpus proceedings, with payment due for such services at the time of filing as usual in a civil action or proceeding, unless the person filing such proceeding is properly qualified under s. 57.081, F. S., as an insolvent and poverty-stricken person, in which case the clerk's services are furnished without cost to such insolvent person, or unless the proceeding falls under s. 57.091, F. S., in which case the county initially bears such costs but is reimbursed therefor by the state.

As s. 45.031, F. S., providing for an alternative method of judicial sale of real or personal property under order of the court and at the court's discretion does not authorize or require the clerk to charge and collect a recording fee for recordation of a certificate of title filed by the clerk in such alternative proceeding pursuant thereto, no filing or recording fees may lawfully be charged under s. 45.031.

Your first question is answered in the affirmative, and the second question in the negative.

AS TO QUESTION 1:

Section 13, Art. I, State Const., provides that the writ of habeas corpus "shall be granted of right, freely and without cost." The writ is recognized as a fundamental guaranty and protection of peoples' right of liberty. Allison v. Baker, 11 So.2d 578 (Fla. 1943). As a general rule, a habeas corpus proceeding is an independent action, legal and civil in nature, designed to secure prompt determination as to the legality of restraint in some form. Crane v. Hayes, 253 So.2d 435 (Fla. 1971). The proceeding is civil rather than criminal in nature, even though in behalf of one charged with or convicted of a crime. Lee v. Buchanan, 191 So.2d 33 (Fla. 1966).

Generally, costs may be allowed in habeas corpus proceedings as authorized by statute, and where the statutes relating specifically to the habeas corpus contain no provision as to taxation of costs, the authority to award costs may be found in the general statutes. 30 C.J.S. *Habeas Corpus* s. 106a; for applicable Florida Statutes governing the assessment of costs in civil actions *see* ss. 57.011, 57.021, 57.041, 57.071, 79.02, and 79.08, F. S.; *and cf.* ss. 57.081 and 57.091, F. S.

In Beasley v. Cahoon, 147 So. 288 (Fla. 1933), the Florida Supreme Court construed substantially the same language in s. 7, Art. I, State Const. 1885, as is now found in s. 13, Art. I, State Const. 1968, to allow the taxation of costs of the ministerial officers of the court in a judgment duly entered by a circuit court in a habeas corpus proceeding. The court stated that such writs were "grantable" only by certain courts and judges, that those courts did not assess costs for *granting* the writ, and that the ministerial officers were entitled to their costs in habeas proceedings. Beasley, *supra*, at p. 295. The court further held that the judgment in that habeas corpus proceeding was a final judgment and that costs in such cases were provided for by s. 5441 (35,) Compiled General Laws (1927), from which present s. 79.08, F. S., is derived. Beasley, *supra*, at p. 295.

In AGO 045-294 (Biennial Report of the Attorney General, 1945-1946, p. 108) the question of liability for clerk's costs incurred in connection with a proceeding in habeas corpus to determine custody of a minor child was presented. The Attorney General therein stated: "The proceeding in question being in the nature of a private suit, the usual procedure followed in other civil suits regarding liability for costs is applicable." The opinion stated in conclusion that clerk's costs in such cases should be paid initially by the party seeking the writ and that the court could award costs in such proceedings as in other civil cases.

Although, generally, the fees or compensation for services rendered by the officers of the court are properly included in the costs of habeas corpus proceedings, 39 C.J.S. *Habeas Corpus* s. 106c, the county is not liable for such costs in the absence of a statute fastening such liability on the county. *Ibid.*, s. 106b. Former s. 31.05, F. S., provided for

a fee of $1 for court commissioners for issuing a writ of habeas corpus, and former s. 31.06, F. S., provided that costs in habeas corpus proceedings were to be paid by the party applying for the writ in case he should not be discharged from the imprisonment complained of; but if the movant proved to the satisfaction of the court commissioner that he was without the resources sufficient to pay such costs, the county in which the proceedings were held would become liable therefor. Denton v. Cockran, 131 So.2d 734 (Fla. 1961); Hyatt v. Mayo, 117 So.2d 476 (Fla. 1960). If the movant was discharged, such costs were required to be paid by the county. Sections 31.01-31.06, F. S. 1971, were repealed by Ch. 72-404, Laws of Florida, an act relating to the judiciary and enacted to implement revised Art. V of the Constitution, adopted at a special election on March 14, 1972, effective January 1, 1973.

Presently, s. 57.091, F. S., provides, *inter alia*, that all lawful costs adjudged against and paid by the county in habeas corpus cases testing the legality of imprisonment of inmates at the Raiford Prison Farm shall be refunded to the county from the General Revenue Fund of the State Treasury. Section 79.08, F. S., further addresses the matter of habeas corpus costs proceedings testing the legality of imprisonment, providing that the judge before whom the prisoner is brought may award costs in his favor, or against him, or none to either party as is just or right. However, s. 79.08 cannot be said to fasten upon a county liability for the payment of such costs as the judge, justice, or court might tax thereunder. At common law, counties were not liable for such costs; their liability for costs depends solely on statutes, County of Dade v. Sanscm, 226 So.2d 278 (3 D.C.A. Fla., 1969), and s. 79.08 does not by its terms fasten such liability on the county. Only in conjunction with, and by the terms of, s. 57.091 can s. 79.08 serve to fasten liability for such payment of costs upon the county, and under s. 57.091, the county is reimbursed by the state. Otherwise the county is not liable for such costs.

It should be noted at this time that s. 79.01, F. S., requires the issuance of the writ regardless of whether the movant is charged with a criminal offense and that, under s. 79.02, F. S., the court may require the posting of a bond with surety conditioned for the payment of charges and costs or, if the petitioner is unable to give such bond, the court may permit him or her to make such deposit in such amount as the court may determine or require.

Section 57.081, F. S., requires, *inter alia*, that the clerk and the sheriff provide their services without charge to an insolvent and poverty-stricken person who has an actionable claim or demand and who has properly applied for and received the required certificate of insolvency thereunder. *Cf.* AGO 076-94 as to costs of publication in certain actions.

Thus, statutory authority must exist in order for such costs to be charged and taxed, and if no such authority is found either in the statutes relating directly to habeas corpus proceedings or in the general statutes, costs may not be charged or taxed. 39 C.J.S. s. 106 *Habeas Corpus*; *and see* ss. 57.011, 57.021, 57.031, 57.041, and 57.071, F. S.; *cf.* ss. 57.081, 57.091, and 79.08, F. S.

Section 28.241, F. S., provides, *inter alia*, that the party instituting "any civil action, suit, or proceeding in the Circuit Court" must pay to the clerk certain specified service charges. This language, "any civil action, suit, or proceeding," is sufficiently inclusive to embrace habeas corpus proceedings, which, as noted earlier in this opinion, are civil actions or proceedings. Thus, s. 28.241 is sufficient authority for, indeed requires, the clerk to charge for his services in such proceedings in the manner usually followed in civil proceedings. *See* AGO 045-294, *supra*. In such proceedings the movant must pay the statutorily prescribed service charge or fee at the time of filing, unless movant is properly qualified as an insolvent and poverty-stricken person under s. 57.081, *supra*. Thus, the clerk is authorized and required to charge the statutorily prescribed filing fees or service charges in a habeas corpus proceeding with payment for such services due at the time of filing as usual in a civil suit or proceeding, unless the movant is properly qualified under s. 57.081 as insolvent and poverty stricken, in which case the clerk's services are without cost to the movant, or the proceeding falls under s. 57.091, F. S., in which case the county initially bears such costs but is reimbursed therefor by the state. Additionally, the clerk may issue execution as provided in s. 79.08, *supra*, for costs and charges awarded thereunder.

AS TO QUESTION 2:

Section 45.031, F. S., provides an alternative method of judicial sale of real or personal property to be utilized at the discretion of the court, under its order. Section 45.031(1)

provides, *inter alia*, that the clerk "shall receive a fee of $15 for his services in making and certifying the sale" with said fee to be assessed as costs. The statute requires the clerk to file a certificate of title and record the same. Section 45.031(3) and (5), F. S. When the certificate of title is so filed, the sale stands confirmed, and title to the property passes to the purchaser at such judicial sale without the necessity of further proceedings or instruments. Section 45.031(4). However, no fee is prescribed by s. 45.031 for the clerk's services in recording such certificate of title as directed and required by the statute, nor does it provide that the fee prescribed in s. 28.24(16), F. S., for recording various instruments be made applicable thereto. *Cf.* s. 28.29, F. S., providing that the *certified copy of a judgment*, required under s. 55.10, F. S., to be recorded in order *to become a lien* on real property, shall be recorded only when presented for recording with the statutorily prescribed service charge.

Thus, the operative effect of s. 45.031(5), *supra*, is to require the clerk to record the certificate of title in the official records in the same manner as final judgments or other orders on the written direction of the court are recorded under s. 28.29, *supra*, but no charge is statutorily prescribed therefor by s. 45.031, *supra*. *Cf.* s. 28.223(5), F. S., which provides that the recording of any instrument required or permitted to be recorded in the official records under that statute in a pending probate or administration proceeding "shall *be included* in the fees prescribed in s. 28.2401." The recorded certificate of title should be indexed in the manner provided by s. 24.222(2), F. S.

Therefore, in consideration of the above, I am of the opinion that as s. 45.031, F. S., which provides for an alternative method of judicial sale of real or personal property under the order of the court and at the court's discretion, does not authorize or require the clerk to charge and collect a recording fee for recordation of the certificate of title filed by the clerk in such proceeding pursuant thereto, no filing or recording fee may lawfully be made thereunder.

076-113—May 18, 1976

CIRCUIT COURT CLERKS

FEES—WRIT OF POSSESSION, TENANT REMOVAL ACTION

To: Miller Newton, Clerk, Circuit Court, Dade City

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. May the clerk of a circuit court impose a $10 fee for issuance of a writ of possession in a residential tenant removal case?
2. In a residential tenant removal action not involving monetary damages, should the clerk charge the filing fee ($3.50) prescribed by s. 34.041(1)(a), F. S., for claims less than $100?

SUMMARY:

There is no service charge or fee prescribed by statute to be paid in a residential action for possession for issuance by the clerk of a writ of possession under s. 83.62, F. S., and the clerk is not authorized or required to charge and collect any fee therefor. Pending legislative or judicial determination to the contrary, the filing fee in actions for possession of rented dwelling or residential units not involving any claim for monetary damages or unpaid rent should be the $3.50 filing fee prescribed by s. 34.041(1)(a), F. S., for claims less than $100, payable upon institution of any such action.

You referred in your letter to the $10 fee which, under s. 34.041(1)(d), F. S., is required of the plaintiff in a distress proceeding in addition to the regular filing fee based upon the amount of the claim (*see* AGO 072-425). You noted that you have found no service charge or fee provided by statute for issuing a writ of possession in an action for

possession (*see* s. 83.62, F. S.). However, you seemed to suggest that, nevertheless, you should be able to charge and collect a $10 fee for issuing a writ of possession in such an action, since an additional $10 filing fee is required in distress proceedings.

Two points should be made clear at the beginning. First, the additional $10 fee prescribed by s. 34.041(1)(d), *supra*, is not designated as a fee for issuing a distress writ; rather, it is an additional *filing fee* for a distress (or garnishment, attachment, or replevin) proceeding brought in county court, payable upon filing the action. Second, a distress for rent proceeding and a residential action for possession (*see* ss. 83.59-83.60, F. S.) are two separate and distinctive proceedings. A *distress* proceeding is one in which property distrainable for rent is levied on by the sheriff pursuant to duly issued process. If not restored to the defendant on giving proper forthcoming bond, the property is sold by the sheriff under a judgment for the landlord and the proceeds of such sale applied on the payment of the execution (*see* ss. 83.08-83.19, F. S.). An action for *possession* of dwelling or residential units is one brought upon the termination of a rental agreement (*see* s. 83.56, F. S.) to recover possession of the rented premises or for the removal of a tenant in which the landlord is entitled to the summary procedure provided in s. 51.011, F. S. After entry of judgment for the landlord, the writ of possession is issued by the clerk of court (*see* ss. 83.59 and 83.62, F. S.) for the purpose of commanding the sheriff to put the landlord in possession of the residential unit. Thus, even if there were a fee prescribed by statute for issuing a distress writ (and there is not; there is only the additional $10 *filing fee*), there would be no basis in law for applying a fee statutorily prescribed for one type of action to another type of action for which no service charge or fee is authorized or required.

As the Florida Supreme Court stated in Bradford v. Stoutamire, 38 So.2d 684, 685 (Fla. 1949), "[i]t is a well known rule that fee statutes are to be strictly construed and none allowed except where clearly provided by law." *Accord*: State v. Fussell, 24 So.2d 804 (Fla. 1946). I have found nothing in Ch. 83, *supra*, either requiring or authorizing a $10 service charge or fee or any other fee for issuance of a writ of possession in a residential action for possession. Neither have I found any such requirement or authorization in s. 34.041, F. S. (relating to county courts), or in s. 28.24, F. S. (relating to service charges of clerks of the circuit courts). Thus, under the above-stated principle from Bradford v. Stoutamire, *supra*, your first question must be answered in the negative.

As to your second question regarding the proper filing fee, there does not appear to have been provided any specific filing fee for a residential action for possession or removal of a tenant in which neither damages nor unpaid rent is sought (*cf.* s. 83.625, F. S.) as has been provided for distress, attachment, replevin, and garnishment in s. 34.041(1)(d), *supra*. However, I do not take this to mean that the Legislature intended there to be no filing fee in an action to recover possession of demised residential premises. The Legislature might well wish to place residential actions for possession or removal of tenants along with distress, attachment, replevin, and garnishment proceedings because of their somewhat similar aspects and to charge the same $10 additional filing fee. However, pending such action by the Legislature, or clarification by the courts, it is my opinion that the filing fee in actions for possession of demised dwelling units not involving any claim for damages or unpaid rent should be $3.50, as prescribed by s. 34.041(1)(a), *supra*, for "all claims less than $100," payable upon the institution of any such action.

076-114—May 27, 1976

MUNICIPALITIES

LAND OWNED BY OTHER GOVERNMENTAL ENTITIES—ZONING JURISDICTION, RESPONSIBILITY TO PROVIDE POLICE PROTECTION

To: Myles J. Tralins, City Attorney, North Miami

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTIONS:

1. Does the City of North Miami have the authority to regulate building and zoning on lands formerly under the jurisdiction of the Inter-American Center Authority and located within that city's territorial limits?
2. What is the obligation or authority of the City of North Miami Police Department to patrol these various areas?

SUMMARY:

Except with respect to the property exempted by s. 253.033(2), F. S., and the exclusive jurisdiction of the state Department of General Services to regulate the construction of state buildings, the use of, and construction on, lands or property formerly owned by the Inter-American Center Authority located within the territorial limits of the City of North Miami are subject to that city's zoning and building regulations.

The City of North Miami has the same authority and responsibility to provide police protection in the area composed of the lands formerly owned by the Inter-American Center Authority as it has to provide police protection to the remaining area within the territorial limits of the City of North Miami.

AS TO QUESTION 1:

According to your letter, approximately 1,500 acres of the former "Interama" tract are located within the territorial limits of the City of North Miami. Various sections of this acreage are presently owned by the City of North Miami, the City of Miami, Dade County, the State of Florida and several private interests. In addition, some of the publicly owned land has been leased to private interests.

With respect to the applicability of zoning regulations of the City of North Miami to the land in question, the recently developed general rule in this state is that, unless the Florida Legislature provides otherwise, one governmental unit, in the use of its property located within the jurisdictional boundaries of another governmental unit, is bound by the zoning regulations of the latter. *See* Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, Case No. 48,504 (Fla. Sup. Ct., filed May 12, 1976, petition for rehearing pending); Orange County v. City of Apopka, 229 So.2d 652 (4 D.C.A. Fla., 1974); Palm Beach County v. Town of Palm Beach, 310 So.2d 384 (4 D.C.A. Fla., 1975). In addition, a local governmental unit, in the use of its own property, is bound by its own zoning regulations. *See* Parkway Towers Con. Ass'n v. Metropolitan Dade County, 295 So.2d 295 (Fla. 1974)

Applying these rules to the instant situation, the use of the land in question by the governmental units to which you refer, including the City of Miami, Dade County, and the State of Florida, is subject to zoning regulations of the City of North Miami unless there is some statutory provision providing otherwise. In this regard, s. 253.033(2), F. S., provides as follows:

> It is hereby recognized that certain governmental entities have expended substantial public funds in acquiring, planning for, or constructing public facilities for the purpose of carrying out or undertaking governmental functions on property formerly under the jurisdiction of the authority. All property owned or controlled by any governmental entity shall be exempt from any local building and zoning regulations which might otherwise be applicable in the absence of this section in carrying out or undertaking any such governmental function and purpose.

Thus, it would appear that if one of the governmental units to which you refer expended substantial public funds in acquiring, planning for, or constructing public facilities in carrying out or undertaking governmental functions on property formerly under the jurisdiction of the Inter-American Center Authority, then the use of such property by that governmental unit for the construction of such public facilities will not be subject to zoning regulations of the City of North Miami which might otherwise be applicable.

With respect to the applicability of *building* regulations of the City of North Miami to building construction on the land in question by the governmental units to which you refer, again s. 253.033(2), F. S., provides that building construction by such governmental units in furtherance of the purposes described in that section is not subject to any local building regulations. Thus, the City of North Miami may not require building permits or enforce the applicable building code in connection with such building construction.

Finally, with respect to the applicability of zoning and building regulations of the City of North Miami to the use of, and construction on, former Interama land by the governmental units to which you refer for purposes other than the purposes described in s. 253.033(2), F. S., or by private interests, I am aware of no statutory provision, with one exception, which would exempt such use or construction from that city's zoning and building regulations. The one exception relates to the jurisdiction and responsibility of the state Department of General Services to enforce the provisions of the interim state building code and the minimum building codes against state buildings wherever located. *See* Part VI, Ch. 553, F. S.; AGO 075-170. Thus, consistent with the recent Florida judicial decisions cited, *supra* (which dealt only with zoning, but the reasoning of which appears equally applicable to building regulations), and with this one exception, zoning and building regulations of the City of North Miami are applicable to the use of, and construction on, former Interama land not exempted therefrom by s. 253.033(2), F. S.

AS TO QUESTION 2:

I am aware of no statutory provision which removes or restricts the authority and obligation of the City of North Miami to provide police protection in the area composed of the land in question. *Cf.* AGO's 076-19, 071-203, 071-203A, and 060-139.

076-115—May 27, 1976

TAXATION

NO AUTHORITY FOR PLAN TO DEFER AD VALOREM TAXATION THROUGH ISSUANCE OF TAX ANTICIPATION NOTES

To: Gwen Margolis, Representative, 102nd District, Tallahassee

Prepared by: Harold F. X. Purnell, Assistant Attorney General

QUESTIONS:

1. Would the bill require a constitutional amendment, given restrictions in s. 10, Art. VII, State Const., relative to lending credit to persons?

2. Would the provisions of the bill be considered a form of exemption, thus possibly requiring an amendment to s. 3, Art. VII, State Const.?

3. Are there any other constitutional questions which may arise as a result of the provisions of the bill, as set forth above?

4. Are there any restrictions on the use of state retirement funds which would prohibit their use for the purposes set forth?

SUMMARY:

Proposed legislation which would defer ad valorem taxes for certain permanent Florida citizens pursuant to a system by which a local governmental body issues interest-bearing tax anticipation notes maturing more than 12 months after issuance and payable no later than 10 years after issuance, in the amount of the deferred taxes, would be in violation of both ss. 10 and 12 of Art. VII of the Florida Constitution. Additionally, serious equal protection considerations under s. 2, Art. I, and uniformity of taxation considerations under ss. 2 and 4, Art. VII, would be inherent in the proposed legislation.

STATEMENT OF FACTS:

You have requested my opinion on the constitutional aspects of proposed legislation which would allow deferred taxation to permanent Florida residents age 65 or over who are entitled to the homestead tax exemption. The concepts incorporated in the bill are: Applicants may defer property taxes on their home up to a dollar amount not to exceed 80 percent of the assessed value of the home; no deferral can be granted on any portion of the assessed value of the homestead in excess of $75,000; interest shall accrue at 10 percent per year; deferred taxes constitute a prior lien which attaches as of the date and in the same manner as other liens for taxes; local governmental bodies issue tax anticipation notes the total of which equals the full amount of taxes due to the governing body and reported as deferred by the tax collector, the notes being payable to the State Board of Administration (SBA); the notes are payable no later than 10 years from date of issuance and bear interest equivalent to the average interest rate earned by the SBA on retirement funds investment; the SBA pays to the tax collectors those amounts of moneys listed by the collectors as deferred, the funds being made available on loan from the retirement trust funds under its jurisdiction; when ownership or use of the tax-deferred property changes so as to disallow homestead exemption for property, deferral for the year in which the change occurs is lost and deferred taxes plus interest become due.

AS TO QUESTION 1:

Question 1 must be answered in the affirmative. Section 10, Art. VII, State Const., provides:

> **Pledging credit.**—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing:
> (a) the investment of public trust funds;
> (b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;
> (c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.
> (d) a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person.

The pledge of credit involved herein is the issuance by the governmental body of tax anticipation notes to the State Board of Administration in the full amount of the taxes due but deferred. The predominant purpose served by the issuance of such tax anticipation notes is to relieve private citizens of their present duty to pay ad valorem taxes. Stated differently, the governmental body is simply loaning public funds to a private individual at 10 percent interest for the purpose of financing the latter's ad valorem tax payments.

In Nohrr v. Brevard County Educational Facility Authority, 247 So.2d 304 (Fla. 1971), the Supreme Court made two observations directly pertinent to the validity of the proposed legislation. First, the court noted at 308 and 309:

> All other proposed public revenue bond projects not falling into the exempted class described in Section 10(c) of Article VII would, of course, have to run the gauntlet of prior case decisions to test whether the lending or use of public credit for any of them was contemplated. . . .

Since the pledge of public credit contemplated by the proposed legislation is not within the exempt categories enumerated in s. 10, Art. VII, *supra*, its validity depends upon its compliance with the established case law standards. Such prior case decisions reflect the general rule that where the proceeds of a bond issue serve a predominantly public purpose though there may be an incidental private benefit, the bond issue is not constitutionally infirm as a pledge of public credit for private purposes. State v. Manatee County Port Authority, 193 So.2d 162 (Fla. 1967), and AGO 073-230. The rule is to the contrary, however, when the pledge of public credit is for a predominantly private purpose, with only incidental benefit to the public body. State v. Clay County Development Authority, 140 So.2d 576 (Fla. 1962), State v. Washington County Development Authority, 178 So.2d 573 (Fla. 1965), O'Neill v. Burns, 198 So.2d 1 (Fla. 1967), and AGO 073-230. Indeed, in the *Washington County Development Authority* case, the court held that a bond issue for the construction of rural housing to be amortized from the income and revenues derived from the housing project was a constitutionally infirm pledge of public credit for a private purpose, i.e., the construction of homes for individuals in Washington County. *See also* s. 15, Art. VII, State Const., where express constitutional authorization is provided for the pledge of public credit in the form of student loans.

While the proposed legislation contemplates the use of tax anticipation notes rather than a bond issue, such as was involved in the above-referenced cases, such fact is a distinction without a difference. *Cf.* O'Neill v. Burns, *supra*, involving an appropriation of state moneys. Section 10, Art. VII, *supra*, forbids a governmental entity from giving, lending, or using *its taxing power* for a private purpose. Further, s. 12, Art. VII, clearly places tax anticipation notes within the same category as bonds; and *cf.* Hollywood, Inc. v. Broward County, 90 So.2d 47 (Fla. 1956), wherein the acquisition of land subject to a mortgage or on a deferred payment plan was in effect held to be a bond within s. 16, Art. IX, State Const. 1885, requiring electorate approval in a referendum election.

The second passage from the Nohrr decision, *supra*, pertinent to the instant matter was the court's definition of the term "credit" as used in s. 10, Art. VII, *supra*. The court noted at 309 that such term:

> . . . implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.

Under the proposed legislation, the local governmental bodies issue up to 10-year tax anticipation notes payable to the State Board of Administration in return for which the local governing bodies acquire present funds equal in amount to the taxes of its citizens being deferred. The execution by the governmental body of such tax anticipation notes is clearly the imposition of a new financial liability upon a governmental entity which results in the creation of a debt solely for the benefit of certain private individuals and is therefore a pledge of credit within the *Nohrr* definition. *See* s. 12, Art. VII, State Const.; State v. County of Dade, 234 So.2d 651 (Fla. 1970).

Consequently, the *Nohrr* decision leads inescapably to the conclusion that the issuance of tax anticipation notes to allow certain of Florida's citizenry to defer their ad valorem tax payments constitutes an impermissible pledge of the public credit under s. 10, Art. VII, State Const.

AS TO QUESTION 2:

Question 2 would appear to require a negative answer. The term "exemption" generally connotes the freedom from all or part of the burden of enforced contributions to the expenses and maintenance of government imposed on the general class to which the exempted party belongs: *See* 15A Words and Phrases, Black's Law Dictionary (4th Ed.), and JAR Corporation v. Culbertson, 246 So.2d 144 (3 D.C.A. Fla., 1971), *cert. den.* 249 So.2d 690 (Fla. 1971). The proposed legislation does not free one from bearing all or a part of the burden of taxation but merely postpones the date upon which one will be called to bear such burden. It is not, therefore, an exemption within the literal definition

of the term so as to require express constitutional authorization for its enactment in s. 3, Art. VII, State Const.

AS TO QUESTION 3:

Question 3 must be answered in the affirmative. First, the proposed legislation is in patent violation of s. 12, Art. VII, of the Florida Constitution. This section provides:

> **Local bonds.**—Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:
> (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or
> (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

The proposed legislation would issue tax anticipation notes maturing more than 12 months after issuance for a purpose unrelated to either the financing or refinancing of a voter-approved capital project or to the refunding of an outstanding bond issue at a lower net interest rate. Consequently, the tax anticipation notes contemplated by the proposed legislation would be barred by s. 12, Art. VII, State Const.

Further, serious constitutional problems appear inherent in the application of the standards of ss. 2 and 4, Art. VII, and s. 2, Art. I, of the Florida Constitution, to the proposed legislation. Section 2, Art. I, contains the basic constitutional guarantee of equal protection of law. Sections 2 and 4, Art. VII, mandate uniformity and equality in the application of Florida's ad valorem tax laws. Such mandates govern both the assessment and collection of ad valorem taxes. State v. O'Quinn, 154 So. 166 (Fla. 1934). While such provisions do not forbid classification for purposes of taxation, such classification must not be arbitrary, unreasonable, or unjustly discriminatory and must rest upon a reasonable distinction or difference having a fair and substantial relation to the object of the legislation. Just Valuation and Taxation League, Inc. v. Simpson, 209 So.2d 229 (Fla. 1968), Tyson v. Lanier, 156 So.2d 833 (Fla. 1963), and 31 Fla. Jur. *Taxation* s. 75, p. 121.

Whether the classification in the collection of taxes contemplated by the proposed legislation passes constitutional muster under s. 2, Art. I, and ss. 2 and 4, Art. VII, however, is, in the final analysis, a question capable of judicial resolution only. *See* Shevin v. Kahn, 273 So.2d 72 (Fla. 1973), *affirmed* 416 U.S. 351, (1974) for the most recent treatment of an ad valorem tax classification.

AS TO QUESTION 4:

Question 4 must be answered in the negative as to the existence of any constitutional restrictions on the investment of state retirement funds. The present restrictions on the investment of such funds are, pursuant to s. 121.151, F. S., embodied in ss. 215.44-215.53, F. S. Such statutory restrictions, however, principally delineated in s. 215.47, F. S., would not appear to authorize the utilization of retirement funds in the manner contemplated by the proposed legislation.

076-116—May 27, 1976

STATE RETIREMENT COMMISSION

CONDUCT OF HEARINGS; ELECTION OF OFFICERS

To: J. H. "Jim" Williams, Secretary, Department of Administration, Tallahassee

Prepared by: Pat Dunn, Assistant Attorney General

QUESTIONS:

1. Does the State Retirement Commission have the authority to appoint a single commissioner to hear a case? In addition, may the commission request that a hearing officer from the Division of Administrative Hearings conduct a hearing for the full commission?
2. In the absence of the permanent chairman of the State Retirement Commission, may the vice-chairman conduct the meetings and hearings of the commission; or, when a quorum of members is present but not the permanent chairman, may a temporary chairman be elected to serve throughout the duration of a particular meeting?

SUMMARY:

The State Retirement Commission is authorized to appoint a member of the commission to hear and to enter a recommended order in an appeals hearing or it may elect to request a hearing officer from the Division of Administrative Hearings to conduct an appeals hearing. The commission is authorized to adopt rules providing for a vice-chairman to act as chairman pro tempore in the absence or the temporary incapacity to act of the elected chairman and providing for the succession to office of the chairman upon death, resignation, removal, or permanent incapacity to act.

The answers to your questions are in the affirmative.

AS TO QUESTION 1:

The State Retirement Commission was created by Ch. 75-248, Laws of Florida, within the Department of Administration for the purpose of hearing appeals respecting applications for disability retirement, decisions on reexamination of retired members receiving disability benefits, and applications for special risk membership in the Florida Retirement System. Sections 121.22 and 121.23, F. S.

The commission is clearly within the definition of "agency," as described by s. 120.52(1)(b), F. S., and by such definition it comes within the purview of the Administrative Procedure Act. *Also see* s. 20.04(7), F. S., and *cf.* AGO 076-50. Moreover, s. 121.23(2), F. S., requires the commission to conduct its appeals hearings pursuant to the formal proceedings and procedures set forth in s. 120.57(1), F. S. For the purposes of its appeals hearings, the commission is expressly made "an agency head as defined by subsection 120.52(3)." Section 121.23(2).

Section 120.52(3), F. S., defines "agency head" for the purposes of administrative procedures as follows: "'Agency head' means the person or collegial body in a department or other governmental unit statutorily responsible for final agency action."

Section 120.57(1), F. S., governs proceedings affecting the substantial interests of a party which involve disputed issues of material facts, and by virtue of s. 121.23(2), F. S., all hearings of the commission are governed by the prescribed procedures and the commission may not waive the proceedings or procedures specified in s. 120.57(1), F. S. Section 120.57(1)(a) provides that a hearing officer assigned by the Division of Administrative Hearings shall conduct all formal proceedings under that subsection, *except for*, among other things:

1. *Hearings before agency heads* other than those within the Department of Professional and Occupational Regulation;
2. *Hearings before a member of an agency head* other than agency heads within the Department of Professional and Occupational Regulation;

* * * * *

6. Hearings in which the division [of Administrative Hearings] is a party; when the division is a party, an attorney assigned by the Administration Commission shall be the hearing officer. (Emphasis supplied.)

Section 120.57(1)(b)3., F. S., permits the commission to request and use a hearing officer of the Division of Administrative Hearings to conduct a hearing, and s. 120.57(1)(b)8., F. S., requires the hearing officer so selected to:

> . . . complete and submit to the [commission] and all parties a recommended order consisting of his findings of fact, conclusions of law, interpretation of administrative rules, recommended penalty, if applicable, and any other information required by law or agency rule to be contained in the final order. The [commission] shall allow each party at least 10 days in which to submit written exceptions to the recommended order.

The commission may adopt the recommended order as its final order or reject or modify the conclusions of law and the findings of fact *if* it determines that the findings are not based on competent substantial evidence. Section 120.57(1)(b)9., F. S.

In addition to the above procedures, s. 120.57(1)(b)11., F. S., permits "a hearing officer who is a member" of the commission to "participate in the formulation of the agency's final order, provided he has completed all his duties as hearing officer." The procedures under s. 120.57, F. S., must be read in conjunction with s. 120.58, F. S., which sets forth guidelines regarding evidence, cross-examination when testimony is taken or documents are made part of the record, subpoenas, and the rendition of a final order when a majority of the commission has neither heard the case nor read the record.

The commission is responsible for final agency action, which includes the whole or part of a final order (*see* s. 120.52(2) and (9), F. S.) issued by the head of an agency pursuant to ss. 120.57(1) and 120.59, F. S.; it is an "agency head" as defined in s. 120.52(3), F. S.; and its actions pursuant to s. 121.23(3), F. S., are reviewable by the First District Court of Appeal.

Therefore, in view of the foregoing authorities, it is clear that the commission may appoint or assign a single commissioner to conduct the hearings for the commission. As a hearing officer, he shall act accordingly and shall submit a recommended order pursuant to law. The commission may elect to have a hearing officer of the Division of Administrative Hearings conduct such hearings and make recommended orders on which the commission shall make a final determination. The commission, however, must make known its election to the Division of Administrative Hearings regarding a hearing officer within 10 days of the receipt of the petition or hearing request, requesting the assignment and setting the time, date, and place for the hearing with the concurrence of the division.

AS TO QUESTION 2:

As discussed above, the State Retirement Commission comes within the purview of the Administrative Procedure Act. Thus, as an agency, it is legislatively directed by s. 120.53, F. S., to adopt certain rules of organization, operation, practice, procedure, and the scheduling of meetings and hearings and agendas therefor. Pursuant to s. 121.24(3), F. S., the Division of Retirement of the Department of Administration is required to furnish to the commission administrative and secretarial assistance necessary to the effectuation and implementation of s. 120.53. It is also statutorily authorized by s. 121.24(1)(b) to organize and operate within the following guidelines:

> The commission shall elect a chairman and such other officers as it deems necessary. The chairman shall conduct the meetings and hearings of the commission and shall take whatever action is necessary to ensure that the business of the commission is conducted in an equitable, orderly, and expeditious manner. All parties shall abide by the chairman's decisions, unless the chairman is overruled by a majority of members present.

The word "shall" in a statute has, according to its normal usage, a mandatory connotation. Neal v. Bryant, 149 So.2d 529 (Fla. 1962). However, the general rule is that where mandatory words or provisions are used in statutes defining the duties of administrative officers, such words or provisions may be construed as directory only, unless the body of the act is indicative of the contrary intent. Apgar v. Wilkinson, 116 So. 78 (Fla. 1928). When a particular provision of a statute relates to some immaterial matter, compliance with which is a matter of convenience, rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly and

prompt conduct of business, the provision may generally be regarded as directory. Reid v. Southern Development Co., 42 So. 206 (Fla. 1906). *Cf.* AGO 075-79. I find no substantive provision in ss. 121.22-121.24, F. S., or express legislative intent therein requiring the language thereof to be mandatorily construed. Rather, it appears such language is directory or advisory in nature, allowing the board to properly, orderly, and promptly conduct its business. Moreover, s. 120.53, F. S., requires the commission to adopt rules governing its organization and operations and rules of practice and procedure controlling the conduct of the appeals hearings by and before it.

Regulations and rules of procedure, when not otherwise prescribed by statute, may be adopted by a public, corporate, politic, or other deliberative body and, in the absence of such procedures, general rules of parliamentary law prevail. 62 C.J.S. *Municipal Corporations* s. 400, 67 C.J.S. *Parliamentary Law* s. 3. *Accord*: Witherspoon v. State, 103 So. 134 (Miss. 1925); Crawford v. Gilchrist, 59 So. 963 (Fla. 1912). Where lawful authority exists, an administrative agency may adopt its own mode or form of organization. 73 C.J.S. *Public Administrative Bodies and Procedure* s. 19; State v. State Board of Administration, 25 So.2d 880 (Fla. 1946). *Also see* 62 C.J.S. *Municipal Corporations* s. 389 and s. 120.53, F. S.

Section 121.24, F. S., does not specify that the chairman shall be elected at any particular time, and the commission may elect a chairman at any meeting at which four or more of its members are present. *See* Brewer v. Kellum, 50 So. 581 (Fla. 1909). Neither does the statute specify the term of office for the presiding officer of the commission, nor provide for his or her succession in office upon the permanent or temporary inability or incapacity to act as such presiding officer. The statute does not prescribe any authority or duties of the "other officers" the commission may deem necessary to the conduct of its business, nor does it prohibit such "other officers" acting as chairman or presiding officer pro tem of the commission during the permanent or temporary absence or incapacity of its elected presiding officer. Therefore, the commission may adopt reasonable rules in conformity with the Administrative Procedure Act with respect to the time and method of selecting its officers, their respective terms of office, and their powers and duties as officers of the commission in the absence of a specific statutory enactment to the contrary. These rules may provide for the vice-chairman to "automatically" act and serve as chairman pro tempore upon the temporary absence or incapacity to act or the recusal of the elected chairman and may also provide for the succession to the office of chairman of the commission upon the permanent incapacity or death or the resignation or removal of the elected chairman or provide for the election of an active or interim chairman to serve until the next reorganization. *See* AGO's 074-6 and 075-79.

The chairman of the commission acts merely as the board's presiding officer and as its agency for the performance of certain duties incidental to and devolving upon the office. This authority to act is in accordance with the duly adopted rules of the commission in the absence of any statutory prescription by the Legislature. Consequently, this office is a means by which the commission exercises its functions and powers in an orderly and convenient way.

Section 121.24(1)(b), F. S., authorizes the chairman to "conduct the meetings and hearings of the commission" and to "take whatever action is necessary" for the proper functioning of the commission. This authority given to the chairman indicates a need for rules regarding the succession of chairmen in the conduct of the board's business. These rules would be in the nature of bylaws for the convenient and orderly conduct of its own proceedings and would assist the board in its mode or manner of carrying out its statutorily assigned duties and functions; also, it would facilitate the expeditious performance of such duties. Any such rules should, of course, conform to ss. 120.52(14), 120.53, 120.54, and 120.55, F. S., or such parts thereof as may be applicable to the organization, procedure, or practice of administrative agencies of state government.

076-117—May 28, 1976

DEPARTMENT OF OFFENDER REHABILITATION

POWER TO INCARCERATE SUSPECTED PAROLE VIOLATORS

To: Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, Tallahassee

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

What authority does the Department of Offender Rehabilitation have to receive and incarcerate persons accused of violations of conditions of parole or mandatory conditional release?

SUMMARY:

The state correctional system may hold in custody, pending a final hearing by the Parole and Probation Commission, suspected parole and mandatory conditional release violators when there has been a finding of probable cause to believe they have violated the terms of their release, or when they have waived their right to a preliminary hearing, even though the commission may order the violator restored to conditional liberty.

The Parole and Probation Commission has adopted procedures designed to afford necessary due process in accordance with the Supreme Court's decision in Morrissey v. Brewer, 408 U.S. 471 (1972), in parole revocation proceedings. Those procedures are incorporated in Rule 25-2.09, Florida Administrative Code and in numerous internal commission memoranda, including a Preliminary Hearing Handbook promulgated by the commission for use by its hearing officers. Since prisoners released on either mandatory conditional release by virtue of gain-time allowances or parole are subject to revocation under similar procedures, the following discussion will refer to prisoners granted either type of conditional release as parolees. *See* s. 944.291, F. S.; AGO 073-473.

Section 947.21, F. S., provides that a parolee who violates the terms of his parole may be subject to arrest and to return to prison. In s. 947.22, F. S., the Parole and Probation Commission is given the authority to arrest and detain in jail pending a revocation hearing before the commission any parolee whom the commission has reasonable grounds to believe has violated the terms of his parole. Under present procedures, an arrested parolee is first incarcerated in a local county jail pending a preliminary hearing before a commission hearing officer. After the preliminary hearing, the hearing officer enters a written finding as to whether there is probable cause to believe the parolee has violated the conditions of his parole. If the preliminary hearing results in a finding of probable cause, the parolee is then subject to immediate return to the state prison system for a final revocation hearing. Alternatively, a parolee may waive his right to a preliminary hearing, in which case he is returned to prison pending a final hearing. After holding a final hearing, the commission may find that the parolee has not violated his parole and should be released or that he has violated his parole and should either be restored to parole on account of mitigating circumstances or be held to serve the remainder of sentence.

In Morrissey v. Brewer, *supra*, the court held that a finding by a preliminary hearing officer that there is probable cause to believe a parolee has violated the conditions of parole "would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision." *Id.*, at 487. Further, returning the parolee to the state system after a finding of probable cause to believe he has violated his parole or after waiver of a preliminary hearing is also a practical procedure since the final revocation hearing may be held up to 2 months after the preliminary hearing. Because a parolee is a state prisoner subject to return to traditional custody upon violation of the terms of his conditional freedom, the duties and responsibilities relating to his incarceration during the interval between the preliminary hearing and the final hearing should be borne by the state rather than by county authorities. *See* AGO 046-79, February 25, 1946, Biennial Report of the Attorney General,

1945-1946, p. 756; Marsh v. Garwood, 65 So.2d 15 (Fla. 1953); Sellers v. Bridges, 15 So.2d 293 (Fla. 1943).

Accordingly, I conclude that the procedures employed by the Parole and Probation Commission comport with the constitutional requirements of Morrissey v. Brewer, *supra*, and that the Department of Offender Rehabilitation has the authority to hold in custody, pending a final revocation hearing, paroled prisoners arrested and returned to the state correctional system in accordance with commission procedures.

076-118—May 28, 1976

REGULATION OF PROFESSIONS

BOARD OF NURSING—REINSTATEMENT OF LAPSED LICENSES, GRACE PERIOD FOR REINSTATEMENT NOT AUTHORIZED

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTIONS:

1. May the Board of Nursing reissue a license to a licensed practical nurse licensed in Florida under a previous Nurse Practice Act, whose license has lapsed and who does not meet certain requirements of the current law?
2. May the board continue to allow a "30-day grace period" for the yearly renewal of the license?

SUMMARY:

The Board of Nursing is not authorized by law to reinstate the license of any licensee who has allowed his or her license to lapse or terminate unless and until such licensee demonstrates to the satisfaction of the board that he or she meets all of the standards prescribed in subsections (1) through (5) of s. 464.111, F. S. However, s. 464.151, F. S., does not require a licensee who had allowed his or her license to lapse or terminate for failure to timely renew the license to take and pass the written and supplemental oral examinations provided for in s. 464.121, F. S., and if any such licensee provides evidence satisfactory to the board that he or she meets the current standards of practice as set forth in s. 464.111, the licensee may not be required to take such examinations.

Neither s. 464.051, F. S., nor s. 464.151, F. S., authorizes the Board of Nursing to allow a 30-day grace period for the annual renewal of such licenses. However, when s. 464.151 is read with Ch. 73-97, Laws of Florida (s. 20.30(5)(d), F. S.), the expiration date for purposes of the annual renewals of licenses and the automatic termination of licenses provided for in s. 464.151 may be ascertained. The final date for the renewal of licenses duly established by the Department of Professional and Occupational Regulation with the concurrence of the Board of Nursing is the "expiration date" referred to in s. 464.151(1)(b) for the annual renewal of licenses and, upon failure to renew by that date, is the date upon which the license automatically terminates by operation of law, except as provided in s. 464.151(1)(c).

AS TO QUESTION 1:

As noted in your letter, s. 464.111(5), F. S. 1973, required an applicant to complete at least 2 years of high school or its equivalent. A more recent articulation of legislative intent regarding the qualifications for applicants for licensing is set forth in Ch. 75-273, Laws of Florida (s. 464.111, F. S.), which establishes a 4-year high school course of study,

or the equivalent thereof as determined by the board, as a prerequisite to licensure, as well as other qualifications. Section 464.111(1)-(5). (Subsection (1) took effect October 1, 1975; subsections (2), (3), (4), and (5) took effect July 1, 1975. *See* s. 24 of Ch. 75-273.)

Section 464.131, F. S., in effect "grandfathers" those persons holding a valid subsisting license or certificate to practice nursing as a licensed practical nurse on July 1, 1975. The holder of any such license is by force of the statute deemed to be duly licensed as a practical nurse under Ch. 464, F. S., as amended, as of that date. In terms, the section does not purport to perpetuate or preserve any person's privilege or right to practice as a licensed practical nurse other than those persons who in fact and in law held a valid and duly issued license on July 1, 1975. It does not serve or operate to restore, reinstate, or renew any license or certificate of registration to practice nursing as a licensed practical nurse, nor does it authorize the Board of Nursing to renew, restore, or reinstate any license or certificate not subsistent on July 1, 1975.

Any former licensee who had failed or neglected to renew his or her license before the expiration date thereof had allowed the license to lapse or terminate, and the right or privilege to practice nursing as a licensed practical nurse in this state terminated or failed through such person's failure or neglect to exercise the right to renew on or before the expiration date of the license. *See* Black's Law Dictionary, Revised 4th Ed., p. 1022; 52A C.J.S. *Lapse*, p. 386. As to those lapsed licenses, the former licensees may be reinstated by the board upon providing evidence satisfactory to the board that such licensee or former licensee meets the current standards for practice as defined in Ch. 464, F. S. 1975, pursuant to s. 464.151(1)(c) and upon payment of the prescribed reinstatement fees.

While s. 464.151(1)(d), F. S. 1973, required such licensees to provide the board a "satisfactory explanation for such failure to renew said license," s. 464.151(1)(c), F. S. 1975, effective July 1, 1975, requires such licensees to provide evidence satisfactory to the board "that the licensee meets the current standards for practice as defined in (Ch. 464, F. S.)." The 1975 amendment of s. 464.151, F. S., took the place of that section as it existed before July 1, 1975, and on that date became a part of existent Ch. 464, F. S., and became for all purposes the governing law of the state with respect to the reinstatment of lapsed or terminated licenses. *See* AGO 057-343. Further, any matter set out in s. 464.151, F. S. 1973, that is omitted in the 1975 amendatory act (Ch. 75-273, Laws of Florida), is considered to be repealed. *See* AGO 071-395.

The "current standards for practice" mentioned in s. 464.151(1)(c), F. S. 1975, are those qualifications set forth in s. 464.111, F. S. 1975, of which those prescribed by subsections (1), (3), and (4) of that section are of particular significance for the purposes of this opinion. Therefore, the board is not authorized by law to reinstate the license of any licensee who has allowed his or her license to lapse or terminate unless and until such licensee demonstrates to the satisfaction of the board that he or she meets all of the standards prescribed in subsections (1) through (5) of s. 464.111. However, s. 464.151 does not require a licensee who had allowed h ɔ or her license to lapse or terminate for failure to timely renew the license to take and pass the written and supplemental oral examinations provided for in s. 464.121, F. S., and if any such licensee provides evidence satisfactory to the board that he or she meets the current standards of practice as set forth in s. 464.111, the licensee may not be required to take such examinations. Generally, *see* 53 C.J.S. *Licenses* s. 34; *cf.* Eslin v. Collins, 108 So.2d 889 (Fla. 1959); Solomon v. Sanitarians Registration Board, 155 So.2d 353 (Fla. 1963); State v. Dade County, 120 So.2d at 625 (3 D.C.A. Fla., 1960); Cowart v. Kalif, 123 So.2d 468 (3 D.C.A. Fla., 1960).

Your first question is answered in the negative.

AS TO QUESTION 2:

Neither s. 464.051, F. S., prescribing the general duties of the board, nor s. 464.151, F. S., providing for the renewal and reinstatement and the expiration and termination of the licenses of practical nurses, authorizes the board to allow a 30-day grace period for the annual renewal of such licenses. The board possesses no common-law or inherent powers (*cf.* s. 120.54(13), F. S.), and what powers it has are limited to those expressly granted by Ch. 464, F. S., or necessarily implied therefrom. There must exist some basis in the enabling legislation for the exercise of jurisdiction and power by the board and it may act only in accordance with the statute bestowing such powers and only in the mode prescribed by the statute. State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *certiorari dismissed*, 300 So.2d 900 (Fla. 1974). Section

464.151(1)(a) requires a licensee to renew his or her license annually, and paragraph (1)(b) provides that failure by the licensee to renew the license before the expiration date shall automatically terminate the license, except as provided in paragraph (1)(c) which provides for the reinstatement of terminated licenses upon certain conditions. Nowhere in these statutory provisions is the board empowered to allow or provide for any grace period from the expiration or termination date therein mentioned within which to renew any license. The statute having enumerated those things on which it is to operate is deemed to have excluded from its operation all things not expressly mentioned therein. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); *In re* Advisory Opinion of the Governor, Civil Rights, 306 So.2d 520 (Fla. 1975); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974). Therefore, your second question, as stated, must be answered in the negative, subject to the following qualifications.

Neither s. 464.151, F. S., nor any other section of Ch. 464, F. S., defines or fixes the "expiration date" therein mentioned, nor is any renewal date, renewal period, grace period, or delinquency period prescribed. However, when s. 464.151 is read with Ch. 73-97, Laws of Florida (s. 20.30(5)(d), F. S.), authorizing the head of the Department of Professional and Occupational Regulation to assign to the Bureau of Records Administration of the Division of General Services of that department responsibility for the establishment of renewal and delinquency periods with the concurrence of the Board of Nursing, the expiration date for purposes of the annual renewals of licenses and the automatic termination of licenses provided for in s. 464.151 may be ascertained. *Cf.* AGO 074-59. The final date for the renewal of licenses duly established by the Department of Professional and Occupational Regulation with the concurrence of the Board of Nursing becomes and is the "expiration date" referred to in s. 464.151(1)(b) for the annual renewal of licenses and, if a licensee fails to renew his or her license before that date, is the date upon which the license automatically terminates by operation of law, except as provided in s. 464.151(1)(c).

076-119—May 28, 1976

MOTOR VEHICLES

PRIORITY OF FEDERAL TAX LIEN OVER SUBSEQUENTLY RECORDED SECURITY INTEREST

To: Ralph Davis, Executive Director, Department of Highway Safety and Motor Vehicles, Tallahassee

Prepared by: Patricia S. Turner, Assistant Attorney General

QUESTION:

Does a federal tax lien on a motor vehicle, filed in the office of the clerk of the circuit court pursuant to s. 28.222, F. S., have priority over a security interest in said motor vehicle subsequently filed by a third party with the Department of Highway Safety and Motor Vehicles?

SUMMARY:

Section 28.222(3)(e), F. S., authorizes and requires the filing or recordation of notices of federal tax liens with the clerk of the circuit court. Said section applies to federal tax liens on motor vehicles and meets the Internal Revenue Code "one office as designated by state law" requirement for perfection by filing or recording such liens. A security interest in a motor vehicle subsequently filed by a third party with the Department of Highway Safety and Motor Vehicles is inferior to a notice of federal tax lien filed pursuant to said s. 28.222(3)(e), and the sale of the motor vehicle subject to the duly recorded superior notice of federal tax lien discharged all liens and encumbrances over which the United States had priority.

You requested that I base my opinion upon the following statement of facts presented in your letter. A corporation became indebted to the United States of America for withholding tax obligations for the years 1972 and 1973. The Internal Revenue Service assessed said corporation and filed notices of a federal tax lien with the clerk of the circuit court at various intervals between March 8, 1973, and July 3, 1974. Said Internal Revenue Service seized and sold the motor vehicle in question in July 1975 pursuant to the provisions of s. 6335, Internal Revenue Code. The purchaser at the sale was unable to obtain a certificate of title to the motor vehicle from the Department of Highway Safety and Motor Vehicles, because a bank had recorded a lien with said department on June 13, 1975, nearly a year after the last notice of a federal tax lien was filed.

Authority for federal tax liens and procedures for enforcing said liens are found in the Internal Revenue Code, Title 26 of the United States Code. Such liens are governed by state law only as specified by Congress. Section 6323(a), Internal Revenue Code, requires that notice of the federal tax lien be filed in order to obtain priority over subsequent purchasers, holders of security interests, mechanics' lienors, and judgment lien creditors. Section 6323(f)(1)(A)(ii), Internal Revenue Code, details the requirements for filing notices of federal tax liens on personal property:

> (f) Place for filing notice; form.—
> (1) Place for filing.—The notice referred to in subsection (a) shall be filed—
> (A) Under State laws.—
>
> * * * * *
>
> (ii) Personal property.—In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated . . . .

If state law fails to specify "one office" in which to perfect the notice of the federal tax lien by filing, said filing is to occur in the office of the Clerk of the United States District Court in the district where the property subject to said lien is situated, pursuant to s. 6323(f)(1)(B), Internal Revenue Code. *See* Gordon White Const. Co., Inc. v. Southland Inv. Co., 521 F.2d 856 (5th Cir. 1975).

The instant question is determined by whether Florida law specifies "one office" in which to record the notice of the federal tax lien on a motor vehicle. Section 28.222(1) and (3)(e), F. S., upon which the Internal Revenue Service relies, provides:

> (1) The Clerk of the Circuit Court shall be the recorder of all instruments that he may be required or authorized by law to record in the county where he is clerk.
>
> * * * * *
>
> (3) The Clerk of the Circuit Court shall record the following kinds of instruments presented to him for recording, upon payment of the service charges prescribed by law:
>
> * * * * *
>
> (e) Notices of liens for taxes payable to the United States, and certificates discharging, partially discharging, or releasing the liens, in accordance with the laws of the United States.

Authority for the Department of Highway Safety and Motor Vehicles' involvement in the lien-recording process is found in s. 319.27(1) and (2), F. S.:

> (1) All liens, mortgages and encumbrances on motor vehicles titled in Florida shall be noted upon the face of the certificate of title as and when issued in Florida or on a duplicate or corrected copy thereof, as is now provided by law; provided, however, that this section shall not apply to any retain title contract, conditional bill of sale, chattel mortgage or other like instrument covering any motor vehicle floor plan stock of any motor vehicle dealer. *Except*

for the recording of liens upon motor vehicles for which no certificate of title has been issued in this state as provided in subsection (3), the Department of Highway Safety and Motor Vehicles *shall not be a recording office for liens on motor vehicles.*

(2) No liens for purchase money or as security for a debt in the form of retain title contract, conditional bill of sale, chattel mortgage, or other similar instrument, upon a motor vehicle, as now or may hereafter be defined by law, upon which a certificate of title has been issued in this state shall be enforceable in any of the courts of this state, against creditors or subsequent purchasers for a valuable consideration and without notice, unless a sworn notice of such lien showing the following information:

(a) Date and amount of lien;
(b) Kind of lien;
(c) Name and address of registered owner;
(d) Description of motor vehicle, showing make, type, and serial number; and
(e) Name and address of lienholder;

has been filed in the department and such lien has been noted upon the certificate of title covering such motor vehicle, and shall be effective as constructive notice when filed. (Emphasis supplied.)

Nothing in the above-quoted sections specifically refers to notices of federal tax liens or abrogates the requirements of any other statutory provision. The Department of Highway Safety and Motor Vehicles is not authorized to act as a recording office for liens generally (s. 319.27[1], F. S., with certain exceptions not here material, specifically states that the department shall not be a recording office for liens on motor vehicles), but is required to record upon the face of the certificates of title certain types of liens. Section 319.24, F. S. These liens include purchase money liens, retain title contracts, conditional bills of sale, chattel mortgages, and "other similar instrument[s]."

A federal tax lien differs from the above-enumerated liens in that it is not a consensual transaction, evidenced by an instrument, involving consideration (generally in the form of financing) to the vehicle owner who grants the security interest. Rather, a federal tax lien is imposed upon the vehicle owner without specific consideration or without consent.

The language and reasoning of the state statutes thus support the conclusion that Florida law provides only one office, the office of the clerk of the circuit court, for the recording of notices of federal tax liens upon motor vehicles. It is therefore my opinion that notices of federal tax liens are required to be filed and recorded in the office of the clerk of the circuit court pursuant to s. 28.222, F. S., and not pursuant to s. 319.27, F. S. The same conclusion was reached in a previous opinion from this office, AGO 052-287, October 6, 1952, Biennial Report of the Attorney General, 1951-1952, p. 464, relying upon statutory language similar to that presently in effect.

Additionally, it should be noted that other jurisdictions have held that a recorded federal tax lien takes priority over a subsequent private lien on an automobile, despite the fact that only the private lien had been recorded on the certificate of title as required by state statute. United States v. Birns, 223 F. Supp. 94 (N.D. Ohio 1963); Merchants Loan Co. v. United States, 169 F. Supp. 227 (D. Ariz. 1957); Union Planters National Bank v. Godwin, 140 F. Supp. 528 (E.D. Ark. 1956); Atlas Finance Co. v. Wilkerson, 382 S.W.2d 529 (Tenn. 1964).

Based upon the instant facts as previously stated, the notice of the federal tax lien was properly recorded pursuant to Florida law, and the sale of the motor vehicle to a third party as provided in the Internal Revenue Code discharged all liens and encumbrances over which the United States had priority. 26 U.S.C. ss. 6338 and 6339. *Cf.* AGO 074-337 applying the "first in time is first in right" rule and concluding that when a federal tax lien is superior to a county's lien for taxes, a sale of the property pursuant to s. 6335 of the Internal Revenue Code extinguished all subordinate liens or junior encumbrances. The purchaser at said sale should receive marketable title as against and discharged from the security interest of the bank.

Your question is answered in the affirmative.

076-120—May 28, 1976

MUNICIPALITIES

MINOR MAY NOT BE APPOINTED TO OFFICE REQUIRING THE EXERCISE OF JUDGMENT AND DISCRETION

To: Joseph Nazzaro, City Attorney, North Miami Beach

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

In light of the requirement contained in s. 167.30, F. S. 1971, that members of a library board created pursuant thereto be chosen from "citizens at large," may a person who is under 18 years of age be appointed to a library board so created?

SUMMARY:

Consistent with the common-law rule which prohibits any person who has not attained the age of majority as prescribed by law from holding an office which entails the exercise of judgment and discretion, a person who is under the age of 18 years should not be appointed as a member of a library board created pursuant to s. 167.30, F. S. 1971, which statute remains in general effect pursuant to s. 166.042(1), F. S.

Section 167.30, F. S. 1971, formerly provided in pertinent part that:

> (1) When any city or town council shall have decided by ordinance to establish and maintain a public library and reading room, they shall elect a library board to consist of five directors, to be chosen from the *citizens at large*, of which board neither the mayor nor any member of the city or town council shall be a member. . . . (Emphasis supplied.)

This section, along with the remainder of Ch. 167, F. S. 1971, was repealed by Ch. 73-129, Laws of Florida, the Municipal Home Rule Powers Act (Ch. 166, F. S.). However, s. 5(2) of Ch. 73-129 (s. 166.042(1), F. S.) provides that it is the legislative intent that:

> . . . municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above [including Ch. 167, F. S. 1971], but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.

Applying this language to the instant situation, it would appear that the power formerly conferred on a municipal governing body by s. 167.30, F. S. 1971, may continue to be exercised by that governing body subject only to the terms and conditions which it chooses to prescribe. *Cf.* Penn v. Pensacola-Escambia Government Center Authority, 311 So.2d 97, 101 (Fla. 1975), in which it was stated that "[s]ection 167.28, although repealed, is still viable as a grant of municipal power under Ch. 73-129, Laws of Florida." More specifically, the city council of the City of North Miami Beach may continue to maintain a library board and appoint the members thereof pursuant to s. 167.30, but apparently, in the absence of any charter provision otherwise controlling the question, the governing body is no longer specifically restricted by the condition contained in that provision that such appointments be from "citizens at large." Thus, it is unnecessary to determine whether the phrase "citizens at large" as used in s. 167.30 includes residents of the City of North Miami Beach who are under 18 years of age. *But cf.* Belmont v. Town of Gulfport, 122 So. 10 (Fla. 1929).

As to whether the city council of the City of North Miami Beach is *otherwise* precluded by law from appointing to that city's library board persons who are under 18 years of age, at common law any person who has not attained the age of majority as prescribed by law may not hold an office, the performance of the duties of which requires the exercise of judgment and discretion. 43 C.J.S. *Infants* s. 24, p. 85; 63 Am. Jur.2d *Public*

Officers and Employees s. 46, p. 657; *cf.* AGO 055-166. In this regard, s. 743.07(1), F. S., prescribes the general age of majority in this state as 18 years; and it appears that a member of a library board established pursuant to s. 167.30, F. S. 1971, is an officer, the performance of whose duties requires the exercise of judgment and discretion. *See* ss. 167.30, 167.31, 167.32, 167.36, and 167.37, F. S. 1971. Thus, I am of the opinion that a person under 18 years of age should not be appointed as a member of a library board created pursuant to s. 167.30, F. S. 1971.

076-121—May 28, 1976

MUNICIPALITIES

MAY NOT FINANCE MUNICIPAL FACILITY WITH NOTE SECURED BY MORTGAGE WITHOUT REFERENDUM APPROVAL

To: Michael E. Zealy, Lauderdale Lakes City Attorney, Fort Lauderdale

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

In the absence of referendum approval by the municipal electorate, may a municipality execute a promissory note and mortgage for the purpose of acquiring funds necessary for the construction of a municipal facility, when the term of such note and mortgage extends the indebtedness of the municipality beyond the end of the fiscal year in which said note and mortgage are executed?

SUMMARY:

In the absence of an approving referendum by the municipal electorate, a municipality may not finance the construction of a municipal facility by borrowing money and giving a promissory note secured by a long-term purchase money mortgage therefor.

Initially, it is clear that a municipality's governing body possesses the power to borrow money and to issue certificates of indebtedness to finance the undertaking of any capital or other project for the purposes permitted by the State Constitution and to pledge the funds, credit, property, and taxing power of the municipality for the payment of such debts. Section 166.111, F. S. However, the exercise of this power is constitutionally limited by ss. 10 and 12, Art. VII, State Const. Section 10 of Art. VII prohibits, generally, the pledging of municipal credit or the using of the municipal taxing power for other than municipal purposes. *Cf.* Bannon v. Port of Palm Beach Dist., 246 So.2d 737 (Fla. 1971). Section 12 of Art. VII, the provision by which the answer to your inquiry is primarily controlled, provides, generally, that a municipality may issue bonds, certificates of indebtedness, or any form of tax anticipation certificates payable from ad valorem taxation and maturing more than 12 months after issuance "only to finance capital projects authorized by law and only when approved by vote of the electors." *See* s. 166.121, F. S., which recognizes this limitation; and State v. County of Dade, 234 So.2d 651 (Fla. 1970).

In AGO 073-164, this office concluded that, absent an approving referendum of the county electors, a county could not purchase improved real property for hospital purposes on a deferred payment plan where the contingent legal liability and obligation of the county was evidenced by a promissory note secured by a purchase money mortgage on the improved real property so acquired. According to the view expressed therein,

> . . . such deferred payment plan would create a conditional indebtedness on the part of the county in the nature of a legal liability for a capital venture predicated upon the general credit of the county. The plan places the county in a position of being coerced to levy a tax to prevent loss of property by

foreclosure. Such a mortgage with the accompanying right of foreclosure is not constitutionally permissible without an approving election.

See also Boykin v. Town of River Junction, 164 So. 558 (Fla. 1935); Hollywood, Inc. v. Broward County, 90 So.2d 47 (Fla. 1956); State v. Putnam County Development Authority, 249 So.2d 6 (Fla. 1971); and Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304, 311 (Fla. 1971), in which the general rule is stated that with respect to the financing of capital projects of public entities in this state, "a mortgage with the accompanying right of foreclosure is not constitutionally permissible without an election." *Cf.* AGO's 073-261 and 060-62.

Likewise, in the instant situation, the financing of the construction of a municipal facility by a municipality's execution of a promissory note secured by a long-term purchase money mortgage would create a conditional indebtedness on the part of the municipality in the nature of a legal liability for a capital venture predicated upon the general credit of the municipality. Such method of financing places the municipality in a position of being coerced to levy a tax to prevent loss of the facility by foreclosure. Accordingly, I am of the opinion that such method of financing may not be utilized unless the municipality receives prior referendum approval by the municipal electorate.

Your question is answered in the negative.

076-122—May 28, 1976

STATE BUILDINGS

NOT SUBJECT TO COUNTY ORDINANCE GOVERNING STRUCTURAL CONDITION OF EXISTING BUILDINGS

To: K. C. Bullard, Adjutant General, St. Augustine

Prepared by: Staff

QUESTION:

Does an ordinance adopted by the Board of County Commissioners of Dade County requiring inspection and recertification of the structural condition of all buildings more than 40 years old apply to an armory owned by the State of Florida and located within the municipal limits of the City of Miami?

SUMMARY:

Consistent with the general rule that, unless otherwise provided by the Constitution or by statute, control and regulation of public buildings and places owned by the state are vested in the Legislature and its authorized agencies, and, until legislatively or judicially determined otherwise, the Dade County ordinance relating to the structural condition of existing buildings is not applicable to the state-owned armory located within the municipal limits of the City of Miami.

Initially, it should be stated that the answer to your inquiry is not controlled by the enforcement provisions of Part VI of Ch. 553, F. S., which provides for a State Interim Building Code and State Minimum Building Code. Part VI of Ch. 553 concerns the regulation of *new* building construction, whereas the ordinance in question (Dade County Ordinance No. 75-34) relates to the minimum structural condition of *existing* buildings. *Cf.* AGO 075-170. Moreover, I do not view the Florida Supreme Court's recent decision in Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, Case No. 48, 504 (Fla. Sup. Ct., opinion filed May 12, 1976, petition for rehearing pending), as necessarily controlling the answer to your inquiry since that case dealt with the initial intrusion of a state agency into a municipality's territorial limits and the applicability of that municipality's zoning ordinances to the use of state property located therein. Here, as stated previously, the ordinance in question purports to regulate the structural

condition of buildings which are more than 40 years old and does not regulate either the use of land or the construction of new buildings in Dade County. Accordingly, I am of the opinion that the general principle of law discussed *infra* should prevail.

In AGO 071-75, it was stated that, unless otherwise provided by the Constitution, control and regulation of public buildings and places owned by the state are vested in the Legislature and its authorized agencies. *See* 81 C.J.S. *States* s. 105, p. 1078; 13 Am. Jur.2d *Buildings* s. 7, p. 271. In the instant situation, I am aware of no constitutional or statutory provision authorizing Dade County, or any municipality located therein, to enforce ordinances establishing minimum structural standards for existing buildings against buildings owned and used by the state. Thus, I am of the opinion that, until legislatively or judicially determined otherwise, the ordinance in question is not applicable to the armory owned by the state and located within the municipal limits of the City of Miami.

Your question is answered in the negative.

076-123—June 1, 1976

TAXATION

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT TO STANDARD ASSESSMENT PROCEDURES, FORMS, AND MEASURES OF VALUE

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General

QUESTIONS:

1. Is a standard assessment procedure a rule?
2. Is a standard measure of value a rule?
3. Is a form and its instructions, promulgated pursuant to s. 195.022, F. S., a rule; would such a form be a rule if its sole use was by a county official in reporting to the Department of Revenue; would the written permission of the executive director allowing a county officer to use his own form constitute an order or a rule?
4. If the answer to any of the foregoing questions is yes, must such rules be published and indexed in the Florida Administrative Code?

SUMMARY:

A standard assessment procedure prescribed pursuant to s. 195.027, F. S., a standard measure of value promulgated pursuant to ss. 195.002 and 195.032, F. S., and a form and its instructions prescribed by s. 195.022, F. S., are rules under the provisions of Ch. 120, F. S. Such forms and instructions, whether or not a particular form was solely for use by a county official reporting to the Department of Revenue, are rules under the provisions of Ch. 120. Written permission by the executive director pursuant to s. 195.022 to a county official to use a form other than the forms described by the department is an order under Ch. 120, F. S., which requires that the standard assessment procedures, the standard measure of value, and the forms and instructions adopted by the department be filed, published, and indexed in the Florida Administrative Code.

Section 195.062, F. S., provides:

> The department shall prepare and maintain a current manual of instructions for property appraisers and other officials connected with the administration of property taxes. This manual shall contain all rules and regulations, all instructions relating to the use of forms and maps, standard assessment

> procedures, and the standard measures of value prescribed by the department or by general law. . . .

Your questions are answered in the affirmative. Preliminarily, it should be noted that Ch. 74-234, Laws of Florida, passed during the same legislative session as Ch. 74-310, Laws of Florida, contained no provisions which would alter the application of the Administrative Procedure Act to the Department of Revenue. There are no provisions in Ch. 120, F. S., exempting the department from the provisions of the act, and it is within s. 120.52, defining agency. Attorney General Opinion 075-312. Therefore, if it is determined that the manual of instructions are rules under the statutory definition, it can be concluded that all pertinent provisions of the Administrative Procedure Act must be complied with by the department.

This legal situation arises out of s. 4, Art. VII, State Const., providing:

> By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation . . . .

Section 195.027(1), F. S., provides that the Department of Revenue shall prescribe reasonable rules and regulations for the assessing and collecting of taxes.

Section 195.002, F. S., provides that the Department of Revenue shall have general supervision of the assessment and valuation of property so that all property will be placed on the tax rolls and valued according to its just valuation.

Section 195.032, F. S., provides that, in furtherance of the requirements set out in s. 195.002, the Department of Revenue shall establish and promulgate standard measures of value not inconsistent with those standards provided by law.

Section 195.022, F. S., provides that the Department of Revenue shall prescribe and furnish all forms to be used in administering and collecting ad valorem taxes.

Section 195.062, F. S., provides that the Department of Revenue shall prepare and maintain a current manual of instructions which shall contain all rules and regulations, all instructions relating to the use of forms and maps, standard assessment procedures, and the standard measures of value prescribed by the department or by general law for property appraisers and other officials connected with the administration of property taxes.

The term "rule" as it is used in Ch. 120, F. S., must be defined to determine whether a standard assessment procedure, a standard measure of value, and a form and its instruction promulgated pursuant to s. 195.022, *supra*, are rules within the purview of that definition. Agency action must be an exercise of its quasi-legislative powers to be within the purview of s. 120.54, F. S. *See* Boone v. Div. of Family Services, 297 So.2d 594 (1 D.C.A. Fla., 1974); AGO 075-12. This quasi-legislative act can be generally defined as being primarily concerned with policy considerations for future, rather than the evaluation of past, conduct; based not on evidentiary facts but on policymaking conclusions to be drawn from facts; action affecting an entire class rather than individuals of the class; and action when particular members of a class are not singled out for special consideration based on their own facts. These descriptive phrases were capsulized in Polar Ice Cream & Creamery Co. v. Andrews, 146 So.2d 609 (1 D.C.A. Fla., 1962) at 612:

> Stripped of its irrelevant verbiage, this section [s. 120.021(2)] of the statute defines the term "rule" as a rule or order of general application adopted by an agency which affects the rights of the public or other interested parties.

Section 120.52(14), F. S., defines the term "rule" as meaning:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public,
>
> (b) Legal memoranda or opinions issued to an agency by the attorney general or agency legal opinions prior to their use in connection with the agency action, or
>
> (c) The preparation or modification of:

1. Agency budgets,
2. Contractual provisions reached as a result of collective bargaining, or
3. Agricultural marketing orders under chapter 573 or chapter 601.

It is a well-settled rule of statutory construction that where the language of a statute is plain and unambiguous and conveys a clear and definitive meaning, there is no occasion for resort to the rules of statutory interpretation. The Legislature should be held to have intended what it has plainly expressed. 30 Fla. Jur. *Statutes* s. 79, pp. 230-231 (1974). The legislative intent and meaning of the term "rule," as it is used in Ch. 120, F. S., is unequivocally expressed in s. 120.52(14). *See* AGO 075-12. Thus, in view of the above, the inescapable conclusion is that a standard assessment procedure prescribed pursuant to s. 195.027, F. S., and a standard measure of value promulgated pursuant to ss. 195.002 and 195.032, F. S., must be considered rules under the provisions of Ch. 120. The conclusion is mandated by the fact that they are unambiguous statements by the Department of Revenue that implement and interpret the Constitution and legislative policy of just valuation for ad valorem tax purposes of all property and provide for a uniform assessment as between property within each county and property in each other county or taxing district and are not mere internal memoranda which do not affect either the private interests of any person or any plan or procedure important to the public. Section 195.0012, F. S.; Burns v. Butscher, 187 So.2d 594 (Fla. 1966); Powell v. Kelly, 223 So.2d 305 (Fla. 1969); Container Corporation of America v. Rutherford, 293 So.2d 379 (1 D.C.A. Fla., 1974).

It seems equally clear that a form and its instructions prescribed pursuant to s. 195.022, F. S., are likewise a rule. The form and instructions are department statements of general applicability to all property appraisers, tax collectors, clerks of the circuit courts, and boards of tax adjustment in administering and collecting ad valorem taxes which describe the procedure and practice requirements of the department in order that all property will be assessed, taxes will be collected, and that the administration will be uniform, just, and otherwise in compliance with the requirements of the general law and the Constitution. Such forms and instructions could not reasonably be considered an exception to the definition of a rule as set forth in s. 120.52(14), F. S.

There remains the question of whether or not written permission of the executive director allowing a county officer to use his own form in lieu of those forms prescribed by the department constitutes an order or a rule. Section 195.022, *supra*, provides that the department is to prescribe and furnish all forms to be used by county officials in administering and collecting ad valorem taxes. A county officer may, however, at his own expense and with the showing of good cause receive written permission from the executive director to use a form other than the form prescribed by the department pursuant to s. 195.022.

Chapter 120, F. S., does not contain any reference to such terms as adjudication, rights, duties, privileges, or immunities. *Cf.* Bay National Bank and Trust Company v. Dickinson, 229 So.2d 302, 306 (1 D.C.A. Fla., 1969); Dickinson v. Judges of District Court of Appeal, First District, 282 So.2d 168 (Fla. 1973); Lewis v. Judges of District Court of Appeal, First District, 322 So.2d 16 (Fla. 1975). It would appear that, by deleting these terms from the statute, the limitations placed on the definition of the term "order" under Ch. 120, F. S. 1973, are not applicable as parameters. The new Ch. 120, F. S. 1975, covers *all* final agency actions. *See* Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. Miami L. Rev. 617 (1975).

Section 120.52(2) and (9), F. S., define the terms "agency action" and "order" as follows:

> (2) "Agency action" means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any request made under [s. 120.54(4)].
>
> (9) "Order" means a final agency decision which does not have the effect of a rule and which is not excepted from the definition of a rule, whether affirmative, negative, injunctive, or declaratory in form. An agency decision shall be final when reduced to writing.

Thus, based upon these definitional changes by the Legislature, it is my opinion that the term "order," within the meaning and context of Ch. 120 includes the agency's quasi-judicial powers, part of the agency's quasi-executive powers, and so much of the exercise of its "quasi-legislative" function not considered part of the rulemaking process. Broward

County v. The Administration Commission, 321 So.2d 605 (1 D.C.A. Fla., 1975); Lewis v. Judges of District Court of Appeal, First District, *supra.*

In view of the above definition, it is my opinion that such written permission by the executive director to a county official, based on good cause shown, to use a form other than the forms prescribed by the department is an order as the term is contemplated under Ch. 120, F. S. Such written permission would affect the private interests of persons whose property is being taxed under such form and is therefore a procedure important to the public. The written permission does not have the effect of a rule since it is not an agency statement of general applicability.

In view of the affirmative answers to your questions concerning whether or not a standard assessment procedure prescribed pursuant to s. 195.027, F. S., a standard measure of value promulgated pursuant to ss. 195.002 and 195.032, F. S., and the forms and instructions prescribed pursuant to s. 195.022, F. S., are rules for the purposes of Ch. 120, *supra*, the rules must be published and indexed in the Florida Administrative Code. Section 120.54(10)(b) provides that:

> Twenty-one days after the notice required by subsection (1), or after the final public hearing, if the hearing extends beyond the 21 days, the adopting agency shall file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule.

Section 120.55, F. S., provides that:

> (1) The Department of State shall:
>
> * * * * *
>
> (b) Publish in a permanent compilation entitled "Florida Administrative Code" *all rules* adopted by each agency . . . and complete indexes to all rules contained in the code. . . .

It is my opinion that Ch. 120, F. S., will require that the standard assessment procedures, the standard measures of value, and the forms and instructions adopted by the department be filed, published, and indexed in the Florida Administrative Code.

076-124—June 1, 1976

MUNICIPALITIES

PROPRIETY OF IMPOSING HIGHER FEES ON NONRESIDENTS USING MUNICIPAL RECREATIONAL FACILITIES

To: W. W. Caldwell, Jr., City Attorney, Fort Lauderdale

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May a municipality charge a higher fee to nonresidents than residents for the use of municipally owned parks and other municipal recreational facilities?

SUMMARY:

Although a municipality may charge a fee for individual use of a municipally owned park or other municipal recreational facility which is reasonably related to the expense incurred in operating and maintaining the park or facility, the municipality may not charge a higher fee to

nonresidents than residents unless all relevant economic factors establish a rational foundation for such differentiation.

As stated in AGO 075-84, a municipality may make all regulations with regard to the control and management of its public parks as are necessary to preserve the public peace and safety, to protect the property from injury, and to secure to the public the common enjoyment thereof. Moreover, as an aspect of this regulatory authority, it is generally recognized that a municipality may charge a fee for individual use which is reasonably related to the expense incurred in operating and maintaining a public park. 64 C.J.S. *Municipal Corporations* s. 1818, pp. 300-303; AGO 062-142 and authorities cited therein.

As to whether a municipality may charge a higher fee to nonresidents than residents for the use of a municipally owned park or other municipal recreational facility, any legislative classification, including a legislative distinction based on residency, to survive a constitutional challenge must be found to comply with the mandates of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *See also* the Privileges and Immunities Clause, 14th Amend., and the Interstate Commerce Clause, s. 8, Art. I, cl. 3, U.S. Const. And, since such determination of compliance depends upon the peculiar facts existent in each particular situation, your question is not susceptible of a specific affirmative or negative response but is ultimately one for judicial resolution within the context of a proper case and controversy. However, the following general comments may be made.

The United States Supreme Court has developed a so-called "two-tiered" approach to equal protection, one known as the "strict scrutiny" or the "compelling state interest" test, and the other known as the "minimal scrutiny" or "rational relationship" test. The strict scrutiny test is applied when rights properly classified as "fundamental," such as the right to travel, the right to vote, and the right to essential facilities for prosecution of a criminal appeal, are involved, or when the classification is predicated upon certain "suspect" classifications, such as race, alienage, and national origin. On the other hand, if neither a fundamental right nor a suspect classification is involved, the statute or regulation is presumptively valid and will not be disturbed unless without a reasonable relation to a valid state purpose. *See Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972), in which the author discusses the court's apparent discontent with the two-tiered system of judicial review and the possible development of a new, hybrid equal protection standard.

As to which of the equal protection tests is applicable to the instant inquiry, I am aware of no case holding that residency per se is a suspect classification. Nor am I aware of any case directly holding that use of public parks for recreational purposes involves a fundamental right. *But see Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach*, 7 Suffolk Univ. L. Rev. 936, 966-969 (1973), in which the author asserts that the right of access to shoreline recreation resources should be considered a fundamental right. Thus, the minimal scrutiny or rational relationship test appears applicable here. This test requires that a rational foundation for a distinction between residents and nonresidents be shown in order to sustain such a classification. *Cf.* Toomer v. Witsell, 334 U.S. 385 (1948), establishing a similar test under the Privileges and Immunities Clause of the Fourteenth Amendment; AGO 074-279.

Undoubtedly, the argument most often asserted by municipalities to justify the imposition of a higher fee upon nonresidents than residents for use of municipally owned parks and other municipal recreational facilities will be that tax moneys derived from residents support the park or recreational facility, and that if the user fee treated residents and nonresidents equally, the result would be a reverse discrimination against residents. *See* Toomer v. Witsell, *supra*, at 399; Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N. J. 1972); Gewirtz v. City of Long Beach, 69 Misc.2d 763, 330 N.Y.S.2d 495 (S.Ct. 1972); and *Non-Residency Restrictions in Municipally Owned Beaches: Approaches to the Problem*, 10 Colum. J. of Law & Soc. Prob. 177, 187-191 (1974). However, in making its determination as to whether such tax allocations justify a distinction between residents and nonresidents, a municipal governing body should also consider the amount of federal and state money that has supported the construction and maintenance of the park or recreational facility in question and the general economic benefit accruing to the municipality by reason of the influx of persons to use the park or recreational facility. In other words, a court, when presented with the issue, is likely to require that a municipality which has made such a resident-nonresident distinction show that the differential in user fees reflects, and is substantially related to, *all* economic factors, not simply related to the quantum of tax dollars spent by residents, and that a

definite financial burden on the municipality in park maintenance costs clearly justifies a higher fee for nonresidents. *See Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. Rev. 369, 383, 390-393 (1973), in which the author argues that the Equal Protection Clause requires that in accomplishing a legitimate governmental purpose, the state and its agencies and subdivisions must employ the means resulting in the least classification.

In light of the obvious difficulties in establishing the proposition that a higher fee for nonresidents than residents for the use of municipally owned park or other municipal recreational facility is justified because of municipal tax allocations, it is suggested that, instead of establishing a fee schedule which differentiates on the basis of residency, a municipality may wish to consider removing the maintenance and operation expense of such park or facility from the municipality's general budget and financing the park or facility entirely from fees charged equally to all park or facility users. In addition to being "less onerous" in an equal protection sense, this approach would be more consistent with the accepted notion that public parks are held not for the sole use of a particular community, but for the use of the general public without reference to the residence of the user. *See* 24 Fla. Jur. *Parks and Recreation Centers* s. 6, p. 175; 10 McQuillin *Municipal Corporations* s. 28.52, p. 169; *cf.* AGO's 075-84, 074-279, and 062-142.

076-125—June 2, 1976

SUPERVISOR OF ELECTIONS

FEES FOR VERIFYING NAMES ON PETITION TO PLACE CONSTITUTIONAL AMENDMENT ON BALLOT

To: Reubin O'D. Askew, Governor, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

What is the authorized fee which may be charged by a county supervisor of elections for the certification of names on petitions collected for the purpose of placing an initiative question on the ballot?

SUMMARY:

Supervisors of elections are authorized to determine the registration or nonregistration of names appearing on initiative petitions referred to in s. 3, Art. XI, of the State Constitution, and in the rendering of such service to charge a fee therefor not to exceed 3 cents per name on which this information is furnished as authorized by s. 98.212(3), F. S. 1971, plus the customary fee of 50 cents for affixing his official seal to the certification on such petition as authorized by ss. 98.211 and 28.24(18), F. S.

I have previously ruled on a substantially identical question in AGO 072-221, where I concluded:

> Therefore, based upon the foregoing authorities, I am of the opinion that a county supervisor of elections has the authority under s. 98.212(3), F. S., to examine and certify names on petitions to be filed with the secretary of state for the purpose of placing an initiative amendment on the ballot *and to charge a fee for that service on a cost basis, which in no case shall exceed the charge of three cents for each name; and in addition thereto, for certifying the total number of electors signing such petitions the added fee of fifty cents* as prescribed in ss. 98.211 and 28.24(18), F. S., for the affixing of the official seal of such supervisor. (Emphasis supplied.)

In the lengthy discussion which preceded the above-quoted conclusion in AGO 072-221, I also noted:

> It is the settled law in this state that public officers have no claim to compensation for services rendered except when and to the extent provided by law, and such law shall be strictly construed. The right to collect any fee is dependent upon statutory authority. Pridgeon v. Folsom, Fla. 1 D.C.A. 1965, 181 So.2d 222; Gavagan v. Marshall, Fla. 1948, 33 So.2d 862. See also AGO 053-188, Oct. 6, 1953, Biennial Report of the Attorney General, 1953-1954, pp. 255-257 and AGO 067-44.

In AGO 072-314 the same question was posed again, and there I reaffirmed the conclusions reached in AGO 072-221. My research indicates that there has been no substantive change in the constitutional and statutory authorities relied upon in AGO 072-221. Accordingly, I again reaffirm the conclusions reached therein.

076-126—June 2, 1976

ADMINISTRATIVE PROCEDURE ACT

APPLICABILITY TO DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES' PERSONNEL POLICIES; EFFECT OF WAIVERS IN CH. 75-48, LAWS OF FLORIDA

To: Elaine Gordon, Chairperson, House Committee on Health and Rehabilitative Services

Prepared by: Staff

QUESTIONS:

1. Does Ch. 120, F. S., apply to the development of "personnel policies" of the Department of Health and Rehabilitative Services?
2. Do the "waivers" provided under s. 11 of Ch. 75-48, Laws of Florida, exempt the department from the procedures required under Chs. 120 and 110, F. S.?
3. Do the personnel policies relating to adversely affected employees developed by the department comply with the provisions of s. 110.061, F. S.?

SUMMARY:

The Department of Health and Rehabilitative Services is not exempt from the rulemaking requirements of Ch. 120, F. S., the Administrative Procedure Act; however, it does not appear that the department has the statutory authority to promulgate general personnel rules. Section 11(3), Ch. 75-48, Laws of Florida, grants a limited exemption from the Department of Administration oversight, but only for personnel rules dealing with the classification of authorized positions, and only for the fiscal year 1975-1976. Therefore, the question of whether or not the department has the authority to adopt personnel rules in this area of classification of positions is practically moot, since the notice requirements of s. 120.54 cannot be met in the time remaining in fiscal year 1975-1976 in order to adopt valid rules. There is no express or implied exemption from Ch. 120 in Ch. 75-48. The department is governed by the personnel rules set out in Ch. 22A, F.A.C., with regard to the provisions of s. 110.061, F. S.

AS TO QUESTION 1:

The Department of Health and Rehabilitative Services is an "agency" within the meaning of the Administrative Procedure Act (Ch. 120, F. S.). Section 120.52(1)(b); AGO's 075-6 and 076-50. For this reason, the provisions of the Administrative Procedure Act do apply to the department, and the rulemaking procedures established in s. 120.54 must be followed by the department in order to adopt valid administrative rules. However, no agency has inherent rulemaking authority (s. 120.54[13]); to the extent that an agency is authorized by law to adopt administrative rules, the substance and the purpose of those administrative rules is limited by the legislative grant of rulemaking authority. *See generally*, AGO 075-94 and cases cited therein, especially: St. Regis Paper Co. v. State of Florida, Florida Air and Water Pollution Control Commission, 237 So.2d 797 (1 D.C.A. Fla., 1970); City of Cape Coral v. G.A.C. Utilities, Inc., 281 So.2d 493 (Fla. 1973); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974).

A "rule" is defined in s. 120.52(14), F. S., to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency." Expressly removed from the definition of "rule" are internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public. Section 120.52(14)(a).

It should be noted that I have previously indicated that L & H Bulletins issued by the Department of Insurance are rules as defined in the Administrative Procedure Act and as such must be adopted pursuant to the prescribed statutory procedures of the act in order to be effective. Attorney General Opinion 075-12. If the personnel policies to which you refer interpret and implement the practices of the department regarding promotion, evaluation of employees, suspension, termination, layoff, and related matters, and if such policies implement personnel laws, they would appear to come within the definition of "rule" in the Administrative Procedure Act, as did the L & H Bulletins promulgated by the Department of Insurance.

However, it does not appear that the department has any general authority to adopt administrative rules with regard to personnel matters, except for the limited grant of rulemaking authority which is contained in s. 11(3) of Ch. 75-48, Laws of Florida. Section 20.05(5), F. S., grants authority to the head of the department to promulgate rules:

> pursuant and limited to the powers, duties, and functions transferred herein and . . . pursuant and limited to the powers, duties, and functions enacted hereby.

Section 2, Ch. 75-48, describes the purposes of the department and delineates the powers of the secretary, the head of the department. Nowhere do I find a grant of legislative authority to adopt rules regarding personnel matters.

The Division of Administrative Hearings has initially determined that this type of material is a rule (Stevens v. Department of Health and Rehabilitative Services and Department of Administration, Case No. 75-2024R, Order dated April 26, 1976). Since the matter is currently being appealed, I will follow my long-standing policy and not comment any further on matters under litigation. However, I will say that the department is clearly subject to the rulemaking requirements of Ch. 120, F. S., to the extent that is authorized by the Legislature to enact rules; without the legislative authority to enact rules dealing with personnel policies, the department cannot do so.

AS TO QUESTION 2:

Section 11, Ch. 75-48, Laws of Florida, requires the Department of Health and Rehabilitative Services to accomplish the departmental reorganization mandated by Ch. 75-48 within existing resources and appropriations and to effectuate the required internal reorganization prior to July 1, 1976. In addition, and notwithstanding the provisions of s. 216.351, F. S., the department may transfer appropriated funds within the department to more effectively administer authorized and approved programs. Section 216.351 specifies that subsequently enacted laws which are inconsistent with Ch. 216, F. S., dealing with planning and budgeting by the Department of Administration shall supersede the provisions of Ch. 216 "only to the extent that they do so by express reference to this section." Therefore, by specifically referring to s. 216.351, Ch. 75-48 has

provided for an exemption from Ch. 216 which would otherwise prescribe the planning and budgeting requirements for the Department of Health and Rehabilitative Services as determined and administered by the Department of Administration.

Further, s. 11(3), Ch. 75-48, Laws of Florida, specifies that the department is authorized for fiscal year 1975-1976 to "add, delete, classify, reclassify, and transfer authorized positions within the department and to establish new classifications of positions." The purpose of this authority is to "administer more effectively its authorized and approved programs." This authority for personnel action is granted to the department notwithstanding the provisions of s. 216.351, F. S., referred to above, and notwithstanding the provisions of s. 110.022, F. S., which relate to the powers and duties of the Department of Administration in personnel matters.

However, the exemption from s. 110.022, F. S., is limited by the statute to that portion of s. 110.022 which deals with the classification of positions, since the section of the statute in question is a grant of authority to "add, delete, classify, reclassify, and transfer authorized positions within the department," in spite of the Department of Administration oversight provided for in ss. 110.022 and 216.351, F. S. Section 11(3), Ch. 75-48, Laws of Florida, has given the Department of Health and Rehabilitative Services authority in one limited area dealing with the classification of positions, which is a personnel matter normally handled by the Division of Personnel of the Department of Administration pursuant to s. 110.022. I note also that this limited waiver of oversight by the Department of Administration ceases at the end of fiscal year 1975-1976. To the extent that the waiver of ss. 110.022 and 216.351 restrictions is a grant of authority to the Department of Health and Rehabilitative Services, and in the absence of a waiver of the rulemaking requirements set out in Ch. 120, F. S., the department may be considered to have received a limited authority to adopt rules regarding classification of position personnel policies for one year. However, the question would seem to be moot, as there is not enough time left in the fiscal year 1975-1976 to comply with the notice and rulemaking requirements contained in s. 120.54, F. S. In any event, the authority granted by s. 11(3), Ch. 75-48, Laws of Florida, is definitely limited by that section to matters regarding the classification of authorized positions.

AS TO QUESTION 3:

Section 110.061, F. S., requires that the Department of Administration establish rules and procedures for the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of employees in the Career Service System. Since the Department of Health and Rehabilitative Services is exempt only from the rules established by the Department of Administration dealing with the classification of authorized positions, the Department of Health and Rehabilitative Services continues to be governed by the other provisions of s. 110.022, F. S., and by the provisions of s. 110.061 with regard to personnel matters. Any "policies" which the department uses must conform to the rules of the Division of Personnel, Department of Administration, Ch. 22A, Florida Administrative Code.

076-127—June 3, 1976

PUBLIC EMPLOYEES

TRAVEL AUTHORIZATION REQUEST FORM USE REQUIRED OF STATE AGENCIES—FORM NOT REQUIRED FOR LOCAL GOVERNMENTS—APPROVAL OF TRAVEL EX POST FACTO

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

1. Must all public agencies utilize the uniform travel authorization request form prescribed by s. 112.061(12)(a), F. S., and promulgated by the Department of Banking and Finance?

2. Are those public agencies, if any, which are not required to utilize the uniform request form required to utilize some form of request document of a suitable and possibly similar format, *or* may the requisite approval be granted orally?

3. In *all* instances of official travel funded by a public agency and governed by the provisions of s. 112.061, F. S., must the traveler obtain approval for said travel from the head of said public agency *prior* to the actual performance of said travel?

4. In the event that prior approval is required, and if travel is performed *without* prior approval, may the public agency involved reimburse the traveler when, *subsequent* to the performance of the travel, the agency reviews and approves the performance of said travel?

SUMMARY:

Only state agencies are required to use the uniform travel authorization request form prescribed by s. 112.061(12)(a), F. S., and promulgated by the Department of Banking and Finance. Local governments are not required to utilize any travel authorization request form. However, when a local government promulgates a travel authorization request form, its use is subject to the terms and conditions of the promulgating agency. Under those circumstances when a travel authorization request form is required prior to travel, the agency head has the authority to ratify or validate travel performed without prior approval.

AS TO QUESTION 1:

Your first question is answered in the negative.

Prior to its amendment in 1974, s. 112.061(12), F. S., provided that the Department of Banking and Finance would furnish travel vouchers to be used by all state officers, employees, and authorized persons when submitting travel expense statements to the Comptroller for approval and payment. By Ch. 74-365, Laws of Florida, the Legislature, among other things, added the requirement that a uniform travel authorization form shall be used by all state officers, employees, and authorized persons when requesting approval for the performance of travel. This subsection by its terms operates on "state officers and employees and authorized persons," and by the express mention of such persons it is deemed to have excluded from its operation all other agencies, as defined by s. 112.061(2)(a), F. S., and officers and employees of such other agencies of local government. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974).

AS TO QUESTION 2:

There is no general statutory provision requiring local governments to utilize any specific form or document with regard to accounting for the travel expenditures of its officers and employees. Section 112.061(10)(a), F. S., does provide, however, that the Department of Banking and Finance shall promulgate such rules and regulations and prescribe such forms as may be necessary to effectuate the purposes of this section (s. 112.061, F. S.). There are not presently in effect any such rules and regulations or any such forms which are applicable to local governmental entities.

In absence of rules and regulations of the Department of Banking and Finance, a county or municipality has the power to prescribe forms to be used for authorization to incur travel expenses. As to counties, *see* s. 1(f) and (g), Art. VIII, State Const.; s. 125.01(1)(s) and (x) and (3) and Part III, Ch. 125, F. S. As to municipalities, *see* s. 2, Art. VIII, State Const.; Ch. 166, F. S.; *cf.* AGO 074-18. Whether other units of local government, such as special districts, have the authority to prescribe rules, regulations, and forms to be used for authorization to incur travel expenses, it is necessary to examine the special legislation creating and controlling such district on an individual basis.

Therefore, the Department of Banking and Finance is authorized to prescribe uniform practices and procedures which might be used as guidelines for units of local government. Absent rules and regulations of both the Department of Banking and Finance and the

local government, there is no requirement that local governments use travel authorization forms. This opinion should not be construed as negating any requirement for vouchers when seeking reimbursement for the performance of travel. As my predecessor stated in AGO 068-12:

> Vouchers for payment of public funds, whether state, district or county, submitted or to be submitted to the paying agency should contain sufficient information for the paying agency, or its preauditors or officials and the postauditor to determine whether the requested payment is authorized by law. . . .

AS TO QUESTION 3:

As discussed above, absent rules and regulations of the Department of Banking and Finance, there is no requirement that local governments utilize travel authorization forms. And when such forms are used they are subject to the terms and conditions of the promulgating agency.

AS TO QUESTION 4:

Section 112.061, F. S., does not specifically provide for ratification of travel when an authorization request form prior to travel is required. However, it is generally recognized that a public body may ratify or validate a previously unauthorized act if such public body could have originally authorized the act. *See generally*, 20 C.J.S. *Counties* ss. 90 and 194; 81 C.J.S. *States* s. 123; 72 Am. Jur. *States* ss. 68 and 74; 16A C.J.S. *Const. Law* ss. 422 and 428; 15 McQuillin *Municipal Corporations* (3d ed.) s. 39.37. Therefore, as the agency head is empowered with the authority to approve an authorization form prior to travel, he has the authority to ratify or validate such travel performed without prior approval.

Your fourth question is answered in the affirmative.

076-128—June 3, 1976

PAROLE AND PROBATION COMMISSION

ALLEGATION OF PAROLE VIOLATION—USE OF INFORMATION AT FINAL PAROLE REVOCATION HEARING WHEN PROBABLE CAUSE NOT FOUND AT PRELIMINARY HEARING

To: Ray E. Howard, Chairman, Florida Parole and Probation Commission, Tallahassee

Prepared by: Staff

QUESTION:

> **Does a finding of no probable cause at the preliminary hearing as to an alleged violation of a condition of parole prohibit subsequent consideration of that violation at the final parole revocation hearing?**

SUMMARY:

> **A finding by the hearing officer that no probable cause exists at a parolee's preliminary revocation hearing does not preclude the commission from consideration of those charges at the final parole revocation hearing, assuming the minimum due process requirements set forth in Morrissey v. Brewer are satisfied.**

The "preliminary hearing" in parole revocation proceedings mandated by Morrissey v. Brewer, 408 U.S. 471 (1972), is to determine the existence of probable cause or reason to believe the arrested parolee has committed acts that would constitute a violation of his parole.

While this preliminary parole revocation hearing also serves the purpose of gathering and preserving live testimony, since final revocation hearings are frequently held at some distance from the place where the violations occurred, and the parolee may appear and present evidence on his own behalf, the hearing officer is not required to make formal findings of fact and conclusions of law but is required only to state the reasons and evidence relied upon in determining whether probable cause exists to hold the parolee for a final decision of the commission on revocation.

As you are aware, Morrissey v. Brewer, *supra*, also mandates that prior to a final decision of revocation the parolee be afforded the opportunity for a "hearing" if desired.

This "revocation hearing" is more than a determination of probable cause, being a final evaluation of contested relevant facts plus consideration of whether the facts warrant parole revocation. Again the parolee has the opportunity to be heard to present evidence that he did not violate the conditions of parole and/or evidence in mitigation suggesting the violation does not warrant revocation.

While the minimum requirements of due process require the parolee be given written notice of the claimed parole violations, the final revocation hearing is not equatable with a criminal prosecution in any sense, and evidence, including material which would not be admissible in an adversary criminal trial, may be considered.

It is clear that the two-step procedure is first to determine whether a parolee should be held for a determination of whether he violated the conditions of his parole. Then at the second or final revocation hearing, if desired by the parolee, contested facts be resolved and a decision be reached whether the violation or violations did occur and whether revocation is warranted.

Thus, while the commission, or commissioner if the final hearing be held before only one member, is required to enter a written statement as to the evidence relied on and reasons for revoking parole, evidence may be taken on all claimed violations set forth in the written notice, and a finding of no probable cause at the preliminary hearing will not limit the evidence to be presented at the final revocation hearing.

076-129—June 4, 1976

TAXATION

HARDSHIP EXEMPTION BASED ON INCOME, WEALTH, AND RELATIVE TAX BURDEN NOT CONSTITUTIONALLY AUTHORIZED

To: Guy Spicola, Senator, 22nd District, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General, and David K. Miller, Legal Intern

QUESTION:

Is there any constitutional prohibition against legislation creating a hardship exemption from ad valorem taxation based on income, wealth, and relative property tax burden?

SUMMARY:

Until judicially determined otherwise, legislation creating a hardship exemption from ad valorem taxation, based on income, wealth, and relative property tax burden, would be invalid in violation of ss. 3 and 4, Art. VII, and ss. 2 and 9, Art. I, State Const.

Until judicially determined otherwise by the courts, it is the opinion of this office that such legislation would be barred by the provisions of the Florida Constitution, more specifically ss. 3 and 4, Art. VII, and quite likely ss. 2 and 9, Art. I.

The question posed requires a balancing of the Legislature's power to define and the limitations, express and implied, found in the Florida Constitution.

It is well settled that the Florida Constitution is a limitation of power and not a grant of power. State *ex rel.* Moodie v. Bryan, 39 So. 929; Savage v. Bd. of Public Instruction of Hillsborough County, 133 So. 341; Gaulden v. Kirk, 47 So.2d 567. Under this concept,

the test of state legislative power is constitutional restriction; the Legislature may do what the state organic law does not forbid, so long as it does not infringe upon a power granted to the federal government. State *ex rel.* Cunningham v. Davis, 166 So. 289, *reh. den.* 166 So. 574; City of Jacksonville v. Bowden, 64 So. 769; Neisel v. Moran, 85 So. 346; State *ex rel.* Moodie v. Bryan, *supra.* Such restrictions need not be expressed but may be implied, and such restrictions are just as much a part of the organic law as the expressed restrictions. State *ex rel.* Nuveen v. Greer, 102 So. 739. It is, of course, the duty of the courts, if the same can be done consistent with the protection of constitutional rights, to resolve all doubts as to the constitutionality, sustaining it, if it can be done as a whole, or if that cannot be done, then sustaining it in part. State *ex rel.* Moodie v. Bryan, *supra.*

The Legislature's power to define or classify has been considered by the courts on numerous occasions. In Ammerman v. Markham, 222 So.2d 423, the Florida Supreme Court upheld a statute which granted homestead exemptions to cooperative and condominium apartments prior to the effective date of the new constitution, which expressly authorized same. The court's reasoning was expressed at p. 426 as follows:

> *The framers* of the Fla.Const. of 1885 *had no concept* of the condominium ownership of property. The *Legislature modified* the frozen common law concept of *real property ownership* and, in 1963, enacted a Condominium Act defining a condominium parcel as "a separate parcel of real property, the ownership of which may be in fee simple, or any other estate in real property recognized by law." See Fla.Stat., s. 711.04(1), F.S.A. Moreover, the Legislature had recognized the owners of condominium parcels and cooperative apartments as freeholders. Fla.Stat., s. 97.021(7), F.S.A.
>
> This legislative approval of individual ownership of units in a multiple-dwelling structure *bears a reasonable relationship to the purposes of Art. X, s. 7, Fla.Const.1885. Ch. 67-339 is a valid legislative definition of "real property"* and "dwelling house," as used in the Constitution, so as to extend homestead tax exemption benefits to owners of condominium and cooperative apartments beginning January 1, 1969. (Emphasis supplied.)

In Jasper v. Mease Manor, Inc., 208 So.2d 821, the Supreme Court considered a statute defining the word "charitable" as used in the Florida Constitution 1885, s. 1, Art. IX. In a 4-3 decision the statute was upheld. The statute, s. 192.06(11), F. S. 1965, provided ad valorem tax exemptions for bona fide homes for the aged meeting the criteria found in the statute. The court stated at p. 825:

> The statute thus construed clearly constitutes *a legislative definition of "charitable"* to include operation of a home under the stated conditions for persons who are chronologically aged without regard to dependence or independence otherwise. *This, we now conclude, is within the legislative prerogative.* (Emphasis supplied.)

It stated the test to be applied as follows at p. 825:

> The test for measuring such legislation against the constitutional restraints must be that of *reasonable relationship between the specifically described exemption and one of the purposes which the Constitution requires to be served.* . . . (Emphasis supplied.)

Thus the statute was upheld, the essence of the holding being that tax exemption for a nonprofit corporation operating a bona fide home for the aged was tax exemption for a charitable purpose within the constitutional purview.

The most recent case dealing with the legislative power to define is the case of Williams v. Jones, 326 So.2d 425. In that case the court upheld a legislative definition of real property to include private leaseholds in publicly owned land, holding that the Legislature clearly had the power to classify property so that all property devoted to private use is treated on a parity and in such a manner that there is an equitable distribution of tax burden and pointing out that the courts for many years had recognized a valid lease as an interest in real property.

The exemption provisions of s. 3, Art. VII, State Const., include no express authority for any hardship exemption of the type proposed. Subsection (a) of this section authorizes exemption of "[s]uch portions of property as are used predominantly for educational,

literary, scientific, religious, or charitable purposes." All statutes providing for tax exemptions, other than those relating to property owned by public bodies and personal or homestead property, must come within the ambit of this constitutional provision. Holbein v. Hall, 189 So.2d 797. If the Legislature has the power either to expand the list of permissible purposes for exemption or to define these purposes by appropriate legislation, the proposed exemption will be valid. These two possibilities will be discussed in turn.

Florida courts have applied the maxim of construction *expressio unius est exclusio alterius* to limit the power of the Legislature to alter the tax provisions in the Constitution. In Palethorpe v. Thomson, 171 So.2d 526, the court held unconstitutional a statute exempting house trailers used for housing, reasoning that the Legislature could not exempt any class of real or personal property which the Constitution itself made no provision for exempting. In Franks v. Davis, 145 So.2d 228, the maxim was applied to strike a statute granting special tax treatment to stock in trade. *Cf.* Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, in which a list of exceptions to the "just valuation" requirement was held to preclude additional exceptions, and Sparkman v. State *ex rel.* Scott, 58 So.2d 431, striking a statute prescribing conditions for the homestead exemption beyond those specified in the Constitution. A majority of American jurisdictions having considered the issue recognize express or implied constitutional limitations on the legislative power to exempt. *See* Annot., 61 A.L.R.2d 1038 (1958). *Cf. In re* Advisory Opinion of the Governor Civil Rights, 306 So.2d 520, 523, in which legislation reinstating the civil rights of convicted felons was held barred by the constitutional power of the Governor to restore civil rights in s. 8(a), Art. IV, State Const. Thus it is unlikely that the Legislature can expand the number of permissible purposes for exemption.

It follows, then, that the proposed hardship exemption must be justified under one of the categories in which exemptions are already permitted under s. 3(a), Art. VII, State Const. Specifically, the measure must qualify as exempting property predominantly used for a "charitable purpose" within the meaning of the Constitution. Here conflicting principles operate. The courts have always construed the constitutional exemption provisions strictly against the taxpayer. *See* Palethorpe v. Thomson, *supra*; State *ex rel.* Miller v. Doss, 2 So.2d 303. Nevertheless, the courts have also presumed legislative acts to be constitutional. Faircloth v. Mr. Boston Distiller Corp., 245 So.2d 240.

In Presbyterian Homes v. Wood, 297 So.2d 556, the Supreme Court struck a statute which granted an exemption to homes for the aged, which exemption was conditioned upon the homes' use of an income test for admissions. That condition, the court stated, is too narrow to conform to the constitutional provision requiring no more than a predominantly charitable use. Thus it appears that the Legislature is bound to an extent by the ordinary definition of "charitable purpose" and cannot require an exempted party to be super-charitable or to meet irrelevant criteria. Words of the Constitution are interpreted in their most usual and obvious meaning, unless the text suggests that they may have been used in a technical sense. City of Jacksonville v. Continental Can Co., 151 So. 488; Gaulden v. Kirk, *supra*, at p. 574.

Reading *Jasper* and *Presbyterian Homes* together, it can be said that the Legislature cannot restrict the ordinary definition of "charitable" nor expand it beyond what is reasonably related to the ordinary definition of the word. My reading of the authorities suggests that there is not a sufficient nexus between the ordinary definition and the proposed exemption measure to support the exemption.

One major difficulty is that the right to any charitable exemption turns on the use of the property as well as its ownership. State *ex rel.* Miller v. Doss, 2 So.2d 303; AGO 071-247. The proposed exemption appears to focus exclusively upon the attributes and financial status of the owner rather than the use to which the property is put.

Most compelling, however, is the fact that "charitable purpose" does not seem to embrace most uses of property owned by private persons. One widely accepted definition of "charity" is as follows:

> . . . a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. [15 Am. Jur.2d *Charities* s. 3, p. 8]

Florida accepted this definition in Porter v. Baynard, 28 So.2d 890, in which the court sought to distinguish charitable from private trusts for purposes of the Rule against Perpetuities. While recognizing that the definition of "charitable" may change over time, the court held the essence of the term was a benefit to the general public or an indefinite number of persons, as opposed to specified individuals. Porter, *supra*, at 894-895. *Also see* Miami Battlecreek v. Lummus, 192 So. 211.

Florida courts have also recognized that ventures undertaken for individual profit generally cannot be classed as charitable. *See* Simpson v. Jones Business College, 118 So.2d 779, Orange County v. Orlando Osteopathic Hospital, 66 So.2d 285, both cited with approval in Presbyterian Homes v. Wood, *supra*, at 558.

Accordingly, it would be my view that a legislative enactment establishing a tax exemption based on income, wealth, and property tax burden would not be permissible under s. 3, Art. VII, *supra*.

By the same rationale and reasoning, s. 4, Art. VII, State Const., would also be violated. Said provision requires that all property be assessed at just value unless immune or exempted by law from taxation. Thus, if not validly immune or exempted, all property must be taxed at its just value, with the exception of those classes of property specifically mentioned in s. 4, Art. VII. The legislation embraced in your request contemplates classifying property on the basis of hardship which is in turn based on wealth, income, and property tax burden. Such property would then be exempted in whole or in part, or perhaps by some stated percentage of just value. Since s. 4, Art. VII, State Const., expressly limits the classes of property which can be classified and taxed by a different standard than just value, such as a percentage of just value, any legislation which classified property and purported to tax it on such a different standard or percentage of just value would violate this provision and the prohibitions found therein.

Even if there is authority to create a hardship exemption under s. 3, Art. VII, State Const., any such exemption may still be challenged as arbitrary or discriminatory. Restrictions on the legislative power to classify are found in the Equal Protection Clause of the 14th Amendment to the United States Constitution, and in the equality before law and due process provisions of the Florida Constitution. *See* ss. 2 and 9, Art. I, State Const. The legislation proposed would classify property according to the financial status of the owner.

The courts have been willing to uphold state tax classifications under the 14th Amendment as long as they are reasonable and not arbitrary. *See, e.g.*, Allied Stores of Ohio v. Bowers, 358 U.S. 522; Kahn v. Shevin, 273 So.2d 72, *aff'd*, 416 U.S. 351. The *Kahn* case involved a Florida tax provision exempting the property of widows up to $500; although the classification there was based on sex, the case contains helpful authority for tax classifications based on financial status. The Florida court pointed out that "the object of the legislation here in question is 'to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to reduce the disparity between the economic . . . capabilities of a man and a woman.' " Kahn, *supra*, at 73. The particular provision was upheld as having a "fair and substantial relation" to this objective. This language was quoted with approval by the United States Supreme Court in its affirmance. Kahn, *supra*.

The legislation considered in *Kahn* had its basis in a provision of the Florida Constitution, specifically authorizing and requiring the exemption. Section 3(b), Art. VII, State Const. The legislation proposed here has no such constitutional backing. In Just Valuation & Taxation League v. Simpson, 209 So.2d 229, the court upheld the constitutionally authorized classification of property as tangible or intangible and the favorable tax treatment of the latter category. The court pointed out that classifications authorized in the Florida Constitution need meet only the reasonableness requirements of the 14th Amendment, not those of s. 12, Art. I, State Const. 1885 (presently s. 9, Art. I, State Const.). Just Valuation & Taxation League v. Simpson, *supra*, at 230. In summary, the requirements of the Florida Constitution limit the power of the Legislature to create exemptions on its own initiative.

Returning to the proposed hardship exemption, it would be inappropriate for me to express a categorical or definite conclusion as to the reasonableness of its classifications, because I do not have before me the specific provisions proposed and because there is no judicial authority in this jurisdiction dealing directly with this issue. Recent cases suggest, however, that the classifications you are considering would be held invalid.

In Presbyterian Homes v. Wood, *supra*, at 559, the court stated that "an 'income test' as the criterion for tax exemption of homes for the aged raises serious questions of equal protection." The statute considered in that case classified institutions according to who

received the benefit of their charitable activities. Unlike the proposed measure, it did not classify taxpayers directly according to financial status to determine entitlement to an exemption. However, an expansive reading of that language, apparently dicta in the case, would support the invalidation of the proposed exemption. In Interlachen Lakes Estates v. Snyder, *supra*, it was pointed out that a statute classifying property for ad valorem tax purposes based on the ownership thereof might well have been found to be invalid under the 1885 Constitution. The court stated that the statute discriminates between subdividers who had sold 60 percent of their lots and those who hadn't, and between sellers and purchasers of the lots.

Here two property owners of identical property could be treated differently taxwise, based on differences in income and wealth. The potential for abuse is readily apparent, and a thoughtful or devious individual could eliminate or reduce his ad valorem property tax burden simply by working less or earning less income, while his identically situated gainfully employed and industrious neighbor would be required to shoulder part of his neighbor's burden for the financial obligations of the taxing unit. This would be exactly opposite the function of the statutes before the Supreme Court in the *Williams* case and, *instead* of achieving an *equitable distribution* of tax burden, would promote an *inequitable* distribution of tax burden resulting in part from one person's willingness to work and another person's unwillingness to work.

I conclude, therefore, that while the matter is not free from doubt, the proposed legislation would likely offend ss. 2 and 9, Art. I, Florida's equal protection and due process constitutional provisions.

076-130—June 10, 1976

JUDGES

JUDICIAL CANDIDATES QUALIFY BEFORE DIVISION OF ELECTIONS; ELIGIBILITY OF SPECIFIC CANDIDATE IS JUDICIAL QUESTION

To: Miller Newton, Clerk, Circuit Court, Dade City

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Is the former municipal judge of the City of Port Richey, sitting as such when the municipal court was abolished subsequent to the effective date of amended Art. V of the State Constitution, eligible to qualify as a candidate for the office of county court judge?

SUMMARY:

Candidates for election to the office of county court judge qualify with the Division of Elections of the Department of State, not with the clerk of the circuit court. There is case law in this state to the effect that the Division of Elections is without authority to reject any qualification papers which are in proper form. Any question as to a candidate's eligibility is a judicial question.

You state in your letter that your need for an answer to this question arises from the fact that candidates for election to county offices file their qualification papers with your office. Such is the usual case, but under Ch. 105, F. S., it is provided otherwise with respect to candidates for judicial office.

It is clear from s. 105.011, F. S., that the term "judicial office" includes the office of county court judge, and s. 105.031, F. S., provides, *inter alia*: "Candidates for *judicial office* shall qualify with *the Division of Elections of the Department of State* . . . . Filing shall be on forms provided for that purpose by *the Division of Elections*." (Emphasis supplied.) Section 105.031 goes on to specify the manner in which candidates for judicial office shall qualify, which includes the taking of an oath of office. Such being the case,

the several clerks of the circuit courts have no role in the qualification of candidates for election to judicial office.

It might be noted, generally, that in the case of State *ex rel.* Shevin v. Stone, 279 So.2d 17 (Fla. 1972), the Supreme Court of Florida made it clear that candidates who qualify with the Secretary of State's office are entitled to have their qualification papers accepted and filed if the papers are in proper order and otherwise in compliance with statutory requirements, and any question as to their eligibility to hold office becomes a judicial question if and when an appropriate challenge is made in the courts. As stated in State *ex rel.* Shevin v. Stone, *supra*, at p. 22:

> His [the Secretary of State's] charge under the constitution and statute does not extend to the substance or correctness or enforcement of a sworn compliance with the law—with "matters in pais," as it were. Once the candidate states his compliance, under oath, the Secretary's ministerial determination of *eligibility* (Emphasis by the court.) for the office is at end. *Any challenge to the correctness of the candidate's statement of compliance is for appropriate judicial determination* upon any challenge properly made, as here. (Emphasis supplied.)

See also, Davis *ex rel.* Taylor v. Crawford, 116 So. 41, 42 (Fla. 1928); State *ex rel.* Hall v. Hildebrand, 168 So. 531, 532 (Fla. 1936); State *ex rel.* Cherry v. Stone, 265 So.2d 56, 58 (1 D.C.A. Fla., 1972).

076-131—June 16, 1976

PARI-MUTUEL WAGERING

SWEEPSTAKES PROGRAM AT PARI-MUTUEL WAGERING ESTABLISHMENT PERMITTED

To: John R. Culbreath, Chairman, House Committee on Regulated Industries and Licensing

Prepared by: James D. Whisenand, Deputy Attorney General

QUESTION:

May a pari-mutuel wagering permittee licensed by the state lawfully sponsor, during its operating season, a sweepstakes program as heretofore defined within the confines of the physical plant wherein pari-mutuel wagering is authorized by the state?

SUMMARY:

A sweepstakes program requiring selection of thoroughbred racehorse winners by a patron at a licensed pari-mutuel establishment is not a lottery prohibited by Ch. 849, F. S. The sweepstakes program is not prohibited by Ch. 550, F. S., and is subject to strict regulation by the Division of Pari-Mutuel Wagering.

According to the facts submitted, the Florida thoroughbred racetracks intend to sponsor a "sweepstakes program." The program would be conducted by giving each patron, without additional charge, an entry card. The patron is instructed to select the winner of each of the nine designated races, and an alternate winner in the event of a late scratch. Only one card will be given each patron who must select the winning horse in eight of the nine races. The completed entry card is placed in an entry box prior to commencing the racing meet.

The prize money is posted by the track. If there is no winner, the money is carried forward to succeeding days until a patron selects the proper number of winners. The prize money, in case of a tie, is divided equally among the winners. The racetracks are initiating the program with expectation of increasing attendance and handle.

The issues raised by your question are twofold: Whether the program is a lottery prohibited by Ch. 849, F. S., and whether the program is otherwise prohibited by Ch. 550, F. S. Lotteries and the printing of lottery tickets are prohibited, with certain nonapplicable exceptions, by Ch. 849. A lottery has been judicially defined to include three elements: A prize awarded by chance for a consideration. The first element of a prize is clearly found by the awarding of prize money to the winner.

The second element of consideration is present through the admission price paid by each patron. In Little River Theatre Corp. v. State *ex rel.* Hodge, 185 So. 855 (Fla. 1939), a theatre held "bank night" at which its paid attendance was two to seven times greater than other nights. To be a winner a person merely had to register, not purchase a ticket; however, the scheme advertised the theatre, increased attendance, and increased receipts so as to constitute "consideration." *See also* Biennial Report of the Attorney General, 1951-1952, pp. 731 and 737; Biennial Report of the Attorney General, 1953-1954, p. 668; AGO's 055-189, 055-251, 055-389, 056-135, 058-128, 064-46, 065-25, and 065-139. Under the above authorities, it is my opinion that consideration is present in the program scheme. Consideration is provided by the admission paid by each patron receiving an entry card and the track's expected increase in attendance and handle.

The third element, chance, is difficult to define and to delineate from skill. The delineation issue is not whether chance is present in determining the results but whether skill or chance is the predominant characteristic in determining the result. Chance is defined as accomplishing a result that is one in which a person's choice, will, or input has no part and will not enable the individual to know or to determine the result until it has been accomplished. Great Atlantic and Pacific Tea Co. v. Cook, 240 N.E.2d 114, 118 (Ohio Misc. 1965); State *ex rel.* McKittrick v. Globe-Democrat Publishing Co., 110 S.W.2d 705, 713 (Mo. 1937).

In AGO 051-469, Biennial Report of the Attorney General, 1950-1951, p. 745, it was concluded that "chance" was not present when a pool hall operator awarded a prize at the end of each week to the person whose game score was higher than any other person. The element of chance in the game of pool was recognized but skill was determined to be the *predominant factor* in selection of the winner. *See* AGO's 056-315 and 058-128. The completion of a jigsaw puzzle was also found to be predominantly a game of skill in AGO 055-189. This conclusion was based on the need for the contestant's "speed, power and dexterity to rapidly reassemble the puzzle against the efforts" of other contestants. *See* AGO's 062-155, 064-18, and 064-46.

The Florida Supreme Court has not considered the issue of whether selection of winners in horseraces is predominantly a skill; however, other jurisdictions have concluded that it is based upon skill rather than chance. *Cf.* Greater Loretta Imp. Ass'n v. State *ex rel.* Boone, 234 So.2d 665 (Fla. 1970); Lamkin v. Faircloth, 204 So.2d 747 (2 D.C.A. Fla., 1968); Pompano Horse Club v. State, 111 So. 804 (Fla. 1927). The Alabama Supreme Court most recently did so in *In re* Opinion of the Justices, 251 So.2d 751 (Ala. 1971) at 753:

> As Justice Lawson pointed out in 1947, the winner of a dog race is *not* determined by chance. A *significant degree of skill* is involved in picking the winning dog, such factors as weight, paternity, trainer, position, past record, wet or dry track, etc., all must be considered by successful bettor. The fact that the pari-mutuel system of betting is used is not determinative of the winner, but the amount of the purse. (Emphasis supplied.)

An exhaustive examination of most jurisdictions is provided in Oneida County Fair Bd. v. Smylie, 386 P.2d 374 (Idaho 1963), wherein the court concluded at p. 377 that the element of skill predominated in the patron's selection of race winners:

> They distinguish the operation of the pari-mutuel system of wagering by asserting that the player, or bettor—being furnished by the operation of the system with information concerning the breeding, training and experience of the horses, and the weight, experience and ability of the jockey—can, by exercise of his own skill and judgment, forecast, with some degree of certainty, the outcome of the race and can place his bet accordingly.

See also Longstreth v. Cook, 220 S.W.2d 433 (Ark. 1949); Rohan v. Detroit Racing Ass'n, 22 N.W.2d 433 (Mich. 1943), reaching a similar conclusion.

A different result was reached in Finster v. Keller, 96 Cal. Rptr. 241 (4 Ct. App. 1971), with a similar scheme that had, however, significant differing characteristics. The California scheme involved distribution of the forms to the general public at off-track locations, completion of as many forms as desired by patrons, validation of the forms as much as two days prior to the races, and completion of the forms by patrons without track attendance and without consideration of the racing factors discussed in the above quotes. Moreover, I have discussed this matter with the California racing authorities who state that a scheme similar to the one described in your request is being conducted at the Hollywood racetrack.

The element of chance is always present in an activity but, based upon past opinions of this office and judicial decisions of other jurisdictions, the element of skill appears to be the predominant factor in the program. Presumably, selection of the winner will be based on an analysis of each horse's breeding, past race time, past performances, weight, jockey, trainer, and position; track conditions; and other similar factors.

Thus, the program does contain elements of a prize and consideration but not the element of chance. Absent the coexistence of all three elements, a lottery prohibited by s. 849.09, F. S., is not created by the referenced program and is not violative of Ch. 849, F. S.

The other issue to resolve is whether Ch. 550, F. S., prohibits operation of the program. Section 550.16 authorizes the operation of pari-mutuel pools within certain enclosures of any licensed racetrack and under the Division of Pari-Mutuel Wagering's regulatory authority. This pari-mutuel wagering is exempted by s. 849.24, F. S., from "bookmaking" prohibitions. A similar pari-mutuel exemption from betting is provided in s. 849.24. The mere payment of track admission price would not be within the purview of "betting" which is defined as the tender of something of value which will belong to one of the parties according to the outcome of a trial of chance or skill. Attorney General Opinions 065-139 and 070-19. Accordingly, I can find no statutory prohibition in Ch. 550 and conclude that the program's operation is subject to the strict regulation of the Division of Pari-Mutuel Wagering.

076-132—June 16, 1976

UNIFORM TRAFFIC CONTROL LAW

AMBULANCE DRIVERS FOR VOLUNTEER FIRE DEPARTMENTS MAY NOT DISPLAY RED LIGHTS ON PRIVATE VEHICLES

To: John J. Blair, State Attorney, Sarasota

Prepared by: Barry Silber, Assistant Attorney General

QUESTION:

Are ambulance drivers of a volunteer fire department authorized to use or display red lights on privately owned vehicles while responding to the scene of a call?

SUMMARY:

Section 316.292, F. S., does not authorize ambulance drivers of a volunteer fire department to use or display red lights on their privately owned vehicles while responding to the scene of a call.

Your question is answered in the negative.

Section 316.223, F. S., provides:

> (1) No person shall drive or move or cause to be moved any vehicle or equipment upon any highway within this state with any lamp or device thereon

showing or displaying a red or blue light visible from directly in front thereof except for certain vehicles hereinafter provided.

* * * * *

(3) Vehicles of the fire department, fire patrol, including vehicles of volunteer firemen as permitted under s. 316.292, and ambulances as authorized under this chapter are permitted to show or display red lights. . . .

Section 316.292, F. S., provides:

(1) Privately owned vehicles belonging to the active *firemen* members of regularly organized volunteer firefighting companies or associations, while en route to scenes of fires or other emergencies *in the line of duty as active firemen* members of regularly organized firefighting companies or associations may display or use red lights visible from the front and from the rear of such vehicles . . . .

* * * * *

(2) It is unlawful for any person who is not an active *fireman* member of a regularly organized volunteer firefighting company or association to display on any motor vehicle owned by him, at any time, red lights as described above. (Emphasis supplied.)

From the foregoing statutory provisions it is clear that only active *firemen* members of regularly organized volunteer firefighting companies or associations are authorized to use or display red lights on privately owned vehicles while en route to the scene of a fire or other emergencies *in the line of duty* as active *firemen* members of such volunteer companies.

The prohibition against anyone but active firemen members of regularly organized volunteer firefighting companies or associations using or displaying red lights on their motor vehicles is so plain and unambiguous that no room is left for a construction or interpretation that departs from the plain language employed by the Legislature. State *ex rel.* Florida Jai Alai, Inc. v. State Racing Commission, 112 So.2d 825 (Fla. 1959). Moreover, it is a well-settled rule of statutory construction that when a statute enumerates the things on which it is to operate or forbids certain things, it must be deemed to exclude from its operation all things not expressly mentioned therein. Ideal Farms Drainage District v. Certain Lands, 19 So.2d 234 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lake Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973). A corollary principle of construction is that the mention of one thing within a statute implies the exclusion of another. Mitchell v. Cotten, 3 Fla. 134 (1850); Peeples v. State, 35 So. 223 (Fla. 1903); Bergh v. Stephens, 175 So.2d 787 (1 D.C.A., Fla., 1965).

076-133—June 16, 1976

SHERIFFS

PROCEDURES FOR DISPOSING OF LOST OR ABANDONED PERSONAL PROPERTY OR PROPERTY SEIZED OR USED AS EVIDENCE IN A TRIAL

To: Don R. Moreland, Marion County Sheriff, Ocala

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Under which Florida Statutes may property be disposed of when said property has come into the hands of the sheriff in the following manner: Lost and found; abandoned; personal property picked up for

safekeeping and ownership is unknown or the owner cannot be located; evidence in a criminal trial when the case has been disposed of and the evidence was not introduced at trial?

2. What procedure should be followed to convert said property to departmental use?

SUMMARY:

A sheriff should dispose of *lost* personal property according to the principles of the common law of property, and, when applicable, s. 715.01, F. S. *Abandoned* personal property should be disposed of by a sheriff pursuant to s. 705.01(1) or s. 705.16, F. S., depending on the value and condition of the property. Unclaimed personal property or evidence in or from a criminal trial should be disposed of by a sheriff pursuant to s. 925.06, F. S. Personal property taken into a sheriff's possession may be retained for use by the sheriff's department only pursuant to specific statutory authority and procedure, such as is provided in ss. 790.08 and 943.41-943.44, F. S.

As to *lost* personal property in the possession of the sheriff's department, I would note that in AGO 076-101 I considered the question of what statutory procedure should be followed by a municipal police department in disposing of lost bicycles found by, or turned in to, the department. In essence, the answer given was that there is no statutory procedure to be followed under such circumstances and that the principles of the common law of property must therefore be applied. In that opinion I stated:

> In general, lost property is subject to the principles of the common law of property, except where, and to the extent that, such common law has been abrogated by state statute. In some states, there have been enacted statutes specifying procedures which must be followed by a finder of lost property, such as advertising a description of the property or depositing it with some governmental agency. However, no such general law applicable to local governments has been enacted in Florida. *Cf.* s. 705.18, F. S., providing a procedure for disposal of lost personal property at the several state universities. There now exists only the aforementioned s. 715.01, F. S., which simply provides that a finder—other than one who is an employee of a public transportation system—is vested with title to personal property found in or upon certain public conveyances and public places, subject to claim by the rightful owner within a period of 6 months after the finding of the property. The statute is devoid of any procedure establishing duties or liabilities to be borne by the finder or any third party (*e.g.*, a police department) to whom the finder might entrust the property.

The above holding would apply to personal property in general, not just bicycles, and would apply to a sheriff's department to the same extent as to a municipal police department. In AGO 076-101 I suggested that, pending clarification by the Legislature of rights and obligations regarding lost property in general, a city might "establish reasonable criteria whereby lost bicycles in custody and possession of the police department are advertised in a newspaper of general circulation and the owners thereby notified that the bicycles have been found and, if not claimed within a reasonable time, will be sold by the city at public auction." However, I went on to emphasize that "[a]ny such procedure formulated by a municipality would not, of course, change any party's rights or obligations under the common law of property." It would appear that a similar, temporary administrative measure could be adopted by a county with respect to the handling of lost personal property held by the sheriff's department, subject to the same caveat that common law rights and obligations of any party would not thereby be modified or superseded. And, should such a procedure be adopted, proceeds from any sale thereunder should be deposited into the general fund of the county.

As to *abandoned* personal property—which differs from lost property in that abandonment occurs only when the owner voluntarily parts with the property with the intention not to reclaim it—statutory procedures have been provided in Ch. 705, F. S. In general, disposition of abandoned property should be effected according to s. 705.01(1) unless the property has "no value other than nominal salvage value, if any," in which

case s. 705.16 would be applicable. *See* AGO 075-161 for a discussion of the application and coordination of these two sections.

As to personal property "picked up for safekeeping," if the owner is unknown, then the property should logically be considered as either *lost* or *abandoned*, depending on the nature of the property and the circumstances of its finding, and it should thus be handled in the manner herein described for lost or abandoned property. If the owner of the property is known by the sheriff's department but that person simply cannot be located, the property should still be either lost or abandoned (assuming the property was not taken into the sheriff's possession at the request of its owner). It is to the owner of the property—not its finder—and the facts and circumstances surrounding its loss or abandonment that one must look to determine whether property has been lost or abandoned. The main distinguishing point is the owner's intent. If you determine from all circumstances otherwise known to you that the owner *abandoned* the property, then the procedures of either s. 705.01(1) or s. 705.16, *supra*, should be followed (depending on the value and condition of the property). However, if you determine from the circumstances known to you that the property was probably *lost*, rather than abandoned, and you choose to take the property into your possession or custody, then the common law principles regarding lost personal property as applied to the facts of case should govern your actions with respect to what effort is made to locate the owner and how long the property is held for claim by the owner. As noted above, should such lost personal property be advertised and sold at public auction, as suggested in AGO 076-101, proceeds therefrom should be deposited into the county treasury. *See* AGO 076-101 for a summary of some of the applicable common law principles.

Section 925.06, F. S., appears to provide a sufficient procedure to be followed by a sheriff in regard to unclaimed personal property or *evidence in or from a criminal trial.* That section provides:

> (1) Unclaimed personal property in custody of the court from a criminal proceeding, if of appreciable value, shall be sold at public sale by the sheriff. The notice, procedure, and sheriff's fees for the sale shall be the same as provided for sales under execution. The proceeds shall be paid to any person making proper claim or, if unclaimed for 60 days, shall be paid to the county general fund. If the property is not of appreciable value, the court may order the sheriff to destroy it.
>
> (2) Nothing in this section shall be construed to repeal or supersede the provisions of s. 790.08 relating to the disposition of weapons and firearms.

As referred to above in subsection (2) of s. 925.06, special provision has been made by statute—s. 790.08, F. S.—for the disposition of weapons and firearms taken into the possession of law enforcement officers. The detailed procedures provided in s. 790.08 should thus be followed with respect to *weapons and firearms* either taken from a person upon arrest or found abandoned. However, s. 790.08 does not appear to contemplate the application of its procedures to weapons or firearms which have been lost, as opposed to having been abandoned or taken from a person upon arrest. As to *lost* weapons or firearms, the comments hereinabove presented regarding lost personal property will still apply.

In general, there is no procedure through which a sheriff may convert personal property—whether lost or abandoned—to his own or the department's use. In AGO 075-161, I emphasized that a sheriff acts as an administrative or ministerial officer in regard to abandoned property, and as such must be able to point to statutory authority before he may retain such property for use of the department. However, there are limited instances in which a sheriff is authorized by statute to retain personal property for the use of the department. One is in regard to weapons and firearms. The procedures of s. 790.08, *supra*, include provisions for forfeiture of weapons or firearms to the state for use by the sheriff as custodian for the state. *See* s. 790.01(4), (5), and (6), F. S. In addition, ss. 943.41-943.44, F. S., the Florida Uniform Contraband Transportation Act, provide a procedure whereby vessels, motor vehicles or aircraft used to transport contraband, as "contraband" is defined in s. 943.41(2), may be seized and forfeited to the law enforcement agency which effected the seizure of the contraband for the use of that agency. The procedures set forth in these statutes must be strictly followed, and if the circumstances under which a sheriff comes into possession of personal property do not fall within the purview of such statutory provisions, the property may not be retained for use of the sheriff's department.

076-134—June 16, 1976

REGULATION OF PROFESSIONS

DOCUMENTATION BY FOREIGN PROFESSIONAL ASSOCIATION OF PREVIOUS LICENSURE IN FOREIGN COUNTRY

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTION:

Does the term "foreign professional association" refer only to that association within the country of origin or can the aforementioned term be considered to include a separate association of foreign professionals formed within the United States?

SUMMARY:

The term "foreign professional association" as used in s. 455.015, F. S., refers only to that association within or arising out of the country of origin. If some form of foreign professional association does in fact exist in exile and is recognized as being the true professional association or arm thereof (in exile) of that foreign country, then such foreign professional association may provide the required documentation as provided for in s. 455.015(1)(b).

In the context of ss. 455.014 and 455.015, F. S., the term "proper documentation" may include any sworn declaration in writing or written testimony to, or attestation of, the fact of licensure in a foreign country before July 1, 1974, which satisfies the Board of Nursing, in its judgment or sound discretion, that an applicant lawfully practiced in, and was licensed in and by, a foreign country before July 1, 1974.

Section 455.015(1)(a), F. S., provides for continued education programs for the training of certain applicants "who have lawfully practiced prior to July 1, 1974, in a country other than the United States," and s. 455.015(1)(b) requires the applicant to "provide the board . . . to which he applies, proper documentation that he was licensed prior to July 1, 1974, in some country other than the United States."

The term "documentation" refers to the use of documentary evidence (*The Random House Dictionary, Unabridged Edition*) and similarly, the word "documentary" pertains to what is written, consisting of one or more documents. 27B C.J.S. at p. 972. The word "document" is of comprehensive signification and includes any writing or written or printed paper furnishing information or evidence or any written item of a factual nature. *The Random House Dictionary, supra*; 27B. C.J.S. at pp. 970-971. "Documentary evidence" means evidence supplied by writings and documents of every kind in the widest sense of the term; evidence derived from conventional symbols (such as letters) by which ideas are represented on material substances; such evidence as is furnished by written instruments, inscriptions, documents of all kinds. Black's Law Dictionary, Revised 4th Edition, at p. 568.

Section 455.015(1)(b), F. S., further provides that such documentation (or documentary evidence) shall include a certificate of licensure or the *certification by affidavit* from the *respective foreign professional association*. A certification or certificate by affidavit is a declaration in writing of some fact, or a written testimony to, or attestation of, the truth of any fact by a person having some official status concerning some matter within his knowledge. 14 C.J.S. *Certificate*, at p. 111; Black's Law Dictionary, *supra*, at p. 285. The word "foreign" is used as an adjective and in its more usual sense relates to nationality or origin or to something that is of, pertains to, or is derived from or is operating in another country. *The Random House Dictionary, supra*, at p. 555. The term "foreign," as defined by 36 C.J.S. *Foreign*, at 1092 means:

> Belonging to another nation or country; belonging to or relating to another

> sovereignty or dominion; belonging to or subject to another jurisdiction; that which belongs to another country; that which is out of a certain state, country, jurisdiction, etc. [*Also see* Black's Law Dictionary, Revised 4th Edition, at p. 775.]

In the absence of a statutory definition, "foreign" should be construed in its plain and ordinary sense. Pederson v. Green, 105 So.2d 1 (Fla. 1958). Furthermore, words of common usage, when used in a statute, should be construed in a plain and ordinary signification and not in a technical sense. *See* cases collected under Key Number 188, 10B Fla. Digest, STATUTES.

The word "include" as used in s. 455.015(1)(b), F. S., and read in the context of ss. 455.014 and 455.015, F. S., in their entirety, appears to be a term of enlargement, not of limitation, and conveys the conclusion that there are other items includable, though not specifically enumerated by statute. Argosy Limited v. Hennigan, 404 F.2d 14. *Also see* Black's Law Dictionary, *supra*, at p. 905. In its present context, and in light of the legislatively declared purpose of the statute, the phrase "shall include" indicates that documentation, as defined above, which supplies proof that the applicant was licensed in, and by, the foreign country before July 1, 1974, may include any sworn declaration in writing or written testimony to, or attestation of, the fact of licensure in a foreign country which satisfies the Board of Nursing, in its judgment or sound discretion, that the applicant lawfully practiced in a foreign country prior to July 1, 1974, and was licensed in and by that country prior to July 1, 1974.

Even though s. 455.015, F. S., applies to those licensed in countries other than the United States and requires evidence of a license certificate *from* such other country, the Legislature, in enacting Ch. 74-105, Laws of Florida (s. 455.014, F. S.), recognized that "as of 1972 there were over 500,000 Cubans in exile residing in Florida," and that the problem of approximately 3,000 Cubans who are taxpaying residents of Florida having the opportunity of pursuing their chosen profession or occupation required immediate action by the Legislature. Section 455.014(1)(a) and (g). Section 455.014(2) further provides that:

> It is the declared purpose of this section . . . to encourage the use of foreign-speaking Florida residents duly qualified to become actively qualified in their professions or occupations so that all Florida citizens may receive better services.

If some form of professional association does in fact exist in exile in Florida and if there is some proper or quasi official recognition of such a foreign professional organization in exile, e.g., recognition by its counterpart American professional association as being the true professional association or arm thereof (in exile) of that foreign country, then such association in exile might make the certification by affidavit as provided for in s. 455.015(1)(b), F. S.

Therefore, the term "foreign professional association" refers only to that professional association within or arising out of that association within the country of origin.

076-135—June 17, 1976

STATE PURCHASING

APPLICABILITY OF REQUIREMENTS MET IN ACQUISITION OF COMMODITIES TO FIXED CAPITAL OUTLAY EXPENDITURES

To: Jack D. Kane, Executive Director, Department of General Services, Tallahassee

Prepared by: Larry Levy and David K. Miller, Assistant Attorneys General

QUESTION:

Are fixed capital outlay operations of the Division of Building Construction and Property Management subject to the restrictions on commodity acquisition in s. 287.052, F. S.?

SUMMARY:

Fixed capital outlay operations by the Division of Building Construction and Property Management, to the extent that they involve the acquisition of commodities as defined in s. 287.012(2), F. S., are subject to the commodity purchasing requirements of Ch. 287, F. S., including those of s. 287.052, unless exempt under the provisions of Ch. 287.

Your question is phrased in very abstract terms, and fails to relate the specific facts and circumstances which gave rise to the inquiry. Questions posed in this manner are not susceptible of an absolute response, since differing factual situations can give rise to differing legal results. Therefore, in order to clarify my discussion, I have taken the liberty to make use of examples.

Full treatment of this question necessarily requires some explanation of the background of state commodity purchasing. Supervision over many aspects of state purchasing is vested in the Division of Purchasing of the Department of General Services. The significant aspects of that supervision include price and quality monitoring and, perhaps most important, regulation of competitive bidding. This authority is vested in the division under s. 287.042, F. S., which reads in pertinent part:

> **287.042 Powers, duties, and functions.**—The division shall have the following powers, duties, and functions pertaining to commodities:
> (1) To canvass all sources of supply and contract for the purchase, lease, or acquisition in any manner of all commodities required by the *state government or any of its agencies* under competitive bidding or by contractual negotiation, in the manner hereinafter provided;
> (2) To plan and coordinate purchases in volume and to negotiate and execute purchasing agreements and contracts under which the division shall require *state agencies* to purchase . . . .
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> * * * * *
>
> (4) To prescribe the methods of securing bids or negotiating and awarding contracts;
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> * * * * *
>
> (7) To govern the purchase *by any agency* of any commodity; to establish standards and specifications for any commodity; and to set the maximum fair prices that shall be paid for any commodity; (Emphasis supplied.)

Purchase of materials which are "commodities" is therefore subject to the division's supervision. "Commodity" is a term ordinarily encompassing all tangible and movable personal property. *See* 15A C.J.S. *Commodity*, pp. 14-16; 7A Words and Phrases *Commodity*, pp. 588-91. Florida has broadly defined "commodity" in the context of state purchasing to include:

> . . . any of the various supplies, materials, goods, merchandise, class B printing, equipment, and other personal property purchased, leased, or otherwise contracted for by the state and its agencies. However, commodities purchased for resale except class B printing are excluded from this definition. [Section 287.012(2), F. S.]

Section 287.052, F. S., deals with commodity purchases made pursuant to or incident to a contract for services (*e.g.*, a contract to paint a building in which the painter supplies his own materials):

> **Contracts for acquisition or purchase of commodities.**—Commodities shall not be acquired by any agency pursuant to any contract for services or incidental to the services performed thereunder. *Any contract providing for the acquisition of both services and commodities shall be deemed to be a contract for the acquisition or purchase of commodities*, except that service contracts

> may provide for purchase of reports on the findings of consultants engaged thereunder. (Emphasis supplied.)

The purpose of this section appears not to be the outright prohibition of the purchase of commodities and services in the same transaction, but subjection of such transactions to the governing standards and specifications of the Division of Purchasing. To require that services and commodities always be purchased separately would be an absurd result, incompatible with the customs of trade and with the legislative intent in passing the provision to improve management and coordination of state services. *See* s. 2(6), Ch. 69-106, Laws of Florida. Under s. 287.052, transactions which might otherwise be deemed contracts for services are subject to commodity purchasing supervision, particularly competitive bidding requirements.

The Division of Building Construction and Property Management of the Department of General Services is charged with managing and maintaining state buildings and grounds in the Capitol Center. Sections 272.03-272.09, F. S. Presumably, in carrying out these services the division purchases commodities and services together, which may be reflected in its own records as "fixed capital outlay." Again, paint purchased incident to a painting contract will serve as an example. Your question is whether these purchases are subject to the supervision and competitive bidding requirements of the Division of Purchasing.

"Fixed capital outlay" is a term used in state budgeting, defined in s. 216.011(1)(r), F. S., to mean:

> . . . 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 operating capital outlay* necessary to furnish and operate a new or improved facility. (Emphasis supplied.)

This definition incorporates the term "operating capital outlay," defined in s. 216.011(1)(q) as "equipment, including bound books, fixtures, and other tangible personal property of a nonexpendable nature, the normal expected life of which is 1 year or more."

Examination of these definitions reveals that "fixed capital outlay" and "commodities" are not mutually exclusive categories. There is some overlapping between the terms, because items of personal property, which are "commodities," may also be incorporated into "fixed capital outlay" as "operating capital outlay." To the extent that personal property is included, fixed capital outlay must be subject to the Division of Purchasing bidding regulations under Ch. 287, F. S.

An example may help to clarify this conclusion. When the fixed capital outlay is limited to realty, including existing fixtures, the commodity purchasing requirements of Ch. 287, F. S., do not apply. When, however, fixed capital outlay includes materials to be incorporated as fixtures subsequent to purchase (*e.g.*, bricks and lumber), or materials used for routine upkeep which are operating capital outlay (*e.g.*, paint and washers for faucets), then Ch. 287 commodity purchasing requirements apply to these materials. Under s. 287.052, the purchase of such materials pursuant to a service contract would also be subject to the Ch. 287 requirements.

Note that a previous opinion from this office, AGO 057-309, concluded that materials furnished pursuant to a contract for interior decorating need not meet competitive bidding requirements. That opinion was based on s. 287.081, F. S. 1957. The Governmental Reorganization Act of 1969, Ch. 69-106, Laws of Florida, repealed the 1957 provision and substituted present s. 287.052 which commands the result reached in this opinion.

The cited provisions of s. 287.042, F. S., apply to all state agencies without exception. There remains the question of whether the Division of Building Construction and Property Management is exempt from the Ch. 287 commodity purchasing restrictions. The Division of Building Construction and Property Management has broad authority to enter "any contract or agreement, with any person or agency, public or private, to lease, buy, acquire, construct, hold or dispose of real and personal property necessary to carry out the objects and purposes of this act . . . ." Section 272.124, F. S. It is unlikely, however, that the Legislature intended this authority to abrogate the Ch. 287 requirements. If so, then similar provisions would exempt the Department of Environmental Regulation and the Department of Citrus. *See* ss. 403.704(9) and 601.10(4),

F. S. Purchases of personal property by the Division of Building Construction and Property Management are not qualitatively different from those of other state agencies. To exempt a single agency from a very specific government-wide mandate, when such exemption could lead to a result inconsistent with public policy, requires more explicit language than that of s. 272.124.

The permissible exceptions to the competitive bidding requirements in commodity purchasing are set forth in s. 287.062, F. S. That section reads, in pertinent part:

> **Competitive bids, when required, exception.**—No purchase of commodities may be made when the purchase price thereof is in excess of $1,000 unless made upon competitive bids received, except:

This language demonstrates a clear legislative intent that the list of exceptions shall be exclusive. The purchase of commodities in fixed capital outlay operations of the Division of Building Construction and Property Management is not among the exceptions listed.

These conclusions are based upon legislative intent as evidenced by the language of the relevant statutes, without the benefit of judicial construction. These conclusions are reinforced, however, by the courts' construction of statutory competitive bidding requirements so as to give them broad application. The Florida First District Court of Appeal has said, citing authority from the Florida Supreme Court:

> Laws requiring contracts to be let to the lowest responsible bidder are of great importance to the taxpayers, and ought not to be frittered away by exceptions. As stated in the landmark case of Wester v. Belote on page 724:
>
> "In so far as they thus serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition *upon equal terms to all the bidders*, they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated." [Robinson's, Inc. v. Short, 146 So.2d 108, 113 (1 D.C.A. Fla., 1962); *cert. denied*, 152 So.2d 170, 155 So.2d 548 (Fla. 1963).]

I therefore conclude that materials purchased in fixed capital outlay operations of the Division of Building Construction and Property Management, to the extent they are commodities as defined in Ch. 287, F. S., are subject to the commodity purchasing requirements of that chapter unless specifically exempted therein. Your question is answered in the affirmative.

076-137—June 17, 1976

TAXATION

UTILITY "IMPACT FEES" ARE NOT TAX—SCHOOL DISTRICT LIABLE FOR PAYMENT THEREOF

To: Earl H. Parmer, Jr., City Manager, and Stephen E. Sharpe, Osceola County School Superintendent, Kissimmee

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General

QUESTIONS:

1. Is the Osceola County School District liable for the payment of "impact fees" for the construction of municipal water and sewer facilities?

2. If the answer to the above question is in the affirmative, from what funds may this liability be paid and by what specific legal authority; is the school district legally authorized to borrow funds for the purpose of making this payment?

SUMMARY:

An "impact fee" or user charge established by city ordinance imposed on a school board for the privilege of connecting to a city's water and sewer system is not a tax or special assessment but a user charge imposed by the city for the privilege of connecting to the city's water and sewer system for which the school board is liable the same as it is for other utility fees and charges of publicly or privately owned utilities.

The purpose of s. 235.34, F. S., is to regulate the levying of assessments for special benefits on school districts and for the directing of payment of said assessments, and thus it has no application to the imposition of "impact fees" or user charges against the school board and, as such, affords the school board no protection from the liability for payment of the "impact fee" or user charge imposed by city ordinance for the privilege of connecting to the city's water and sewer system.

The payment of such liability by the school board would be from operating expenses as are other utility charges and not from capital outlay. Section 237.151, F. S., authorizes the school board to borrow money for the purpose of paying any and all lawful operating expenses in the manner and on the terms and conditions therein prescribed.

These questions were predicated upon the facts set forth in your request as well as Ordinance No. 692, which the city adopted on August 2, 1973, imposing a water and sewer "impact fee."

Your first question in answered in the affirmative for the reason stated herein.

The issue that must be first resolved is: What is this so-called "impact fee" imposed for the privilege of connecting to the city's water and sewer system by Ordinance No. 692?

If this "impact fee" is a special assessment, then the provisions of s. 235.34, F. S., would be applicable and would govern the liability of the school district. (*See* Board of Public Instruction of Duval County v. City of Jacksonville, 86 So.2d 887 (Fla. 1956); City of Titusville v. Board of Public Instruction of Brevard County, 258 So.2d 836 (4 D.C.A. Fla., 1970); City of Coral Gables v. Board of Public Instruction of Dade County, 313 So.2d 92 (3 D.C.A. Fla., 1975); Ch. 75-258, Laws of Florida.)

Likewise, if this "impact fee" is deemed to be a tax, the liability of the school district would depend on the tax's initial validity and would then be governed by whether the city could tax the school district for the particular purpose. *See* Broward County v. Janis Development, 311 So.2d 371 (4 D.C.A. Fla., 1975); Fred O. Dickinson, Jr., *et al.* v. City of Tallahassee, etc., 325 So.2d 1 (Fla. 1975).

However, if this "impact fee" was deemed to be a user charge (*see, e.g.*, s. 166.201, F. S.) or payment for services furnished, s. 235.34, F. S., would not be applicable to the question of liability of the school district for the "impact fee," and the school district would be liable for the same as it is for any other sewer and water utility charges by publicly or privately owned and operated utilities. *Cf.* AGO 070-56, concluding that a franchise fee imposed by a city on a telephone company by ordinance and separately stated on statements to consumers as an increase in telephone service charges was required to be paid to agencies of the state.

These questions concerning the so-called "impact fee" have been decided in a case of first impression in Florida involving an "impact fee" imposed in connection with sewer and water services pursuant to an ordinance substantially the same as the ordinance adopted by the City of Kissimmee.

In the case of City of Dunedin v. Contractors and Builders Association of Pinellas County, 312 So.2d 763 (2 D.C.A. Fla., 1975), the court held that the so-called "impact fee" did not constitute "taxes" but was a charge for using the utility services under Ch. 180, F. S.

In the *Dunedin* case, the City of Dunedin passed certain ordinances, quite similar to the ones passed by the City of Kissimmee, which imposed a fee of $325 for each water connection and $375 for each sewer connection to defray the cost of production, distribution, transmission, and treatment facilities for water and sewer provided at the expense of the city. These fees were in addition to charges imposed for the cost of physically connecting into the system.

The court answered the question of whether or not the so-called "impact fee" imposed by the ordinance was either tax or special assessment, stating:

> The imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment. State v. City of Miami, 1946, 157 Fla. 726, 27 So.2d 118. In our view, connection fees such as those involved in this case do not constitute a tax but a charge which may be made for the use of the utility service pursuant to the authority of its charter and Fla.Stat. s. 180.13 (1971), providing they meet the criteria hereafter set forth. [312 So.2d 763, 766, *supra.*]

The criteria set forth by the court were that:

> . . . where the growth patterns are such that an existing water or sewer system will have to be expanded in the near future, *a municipality may properly charge for the privilege of connecting to the system a fee which is in excess of the physical cost of connection, if this fee does not exceed a proportionate part of the amount reasonably necessary to finance the expansion* and is earmarked for that purpose. [312 So.2d 763, 766, *supra*; emphasis supplied.]

and the court found that the criteria had been met.

However, the case was appealed to the Florida Supreme Court and a decision rendered in the case of Contractors and Builders Association of Pinellas County v. City of Dunedin, *reh. den.*, 329 So.2d 314 (Fla. 1976), in which the Second District Court's decision was reversed on other grounds.

The Supreme Court rejected the contention that the so-called "impact fees" constituted taxes and held that they were user charges analogous to fees collected by privately owned utilities for services rendered. However, the court did reverse the decision of the Second District Court on the grounds that the ordinance omitted provisions the court felt were crucial to its validity stating, at pp. 321 and 322, that:

> The failure to include necessary restrictions on the use of the fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys, although certain uses, even within the water and sewer systems, would undercut the legal basis for the fund's existence. *There is no justification for such casual handling of public moneys, and we therefore hold that the ordinance is defective for failure to spell out necessary restrictions on the use of fees it authorizes to be collected.* Nothing we *decide, however prevents Dunedin from adopting* another *sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces.* Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected. We pretermit any discussion of refunds for that reason.
>
> *If the ordinance in the present case had so restricted use of the fees which it required to be collected, there would be little question as to its validity.* We conclude that the ordinance in the present case cannot stand as it is written. (Emphasis supplied.)

Thus, in view of the above decisions, there is little doubt that the fee imposed by Ordinance 692 is not a tax or a special assessment but is a valid imposition of an "impact fee" or user charge for the privilege of connecting to the city's water and sewer system pursuant to Ch. 180, F. S. (or pursuant to the city charter or the Municipal Home Rule Powers Act, Ch. 166, F. S.).

It is important at this point to state that whether or not the instant ordinance suffers from the same infirmities that were present in the City of Dunedin ordinance is a question for a court of competent jurisdiction to decide and will not be dealt with in this opinion. A regularly enacted municipal ordinance is presumed to be valid until the contrary is shown by a party challenging it. State v. Ehinger, 46 So.2d 601 (Fla. 1950); Seaboard Air Line Railroad Company v. Hawes, 269 So.2d 392 (4 D.C.A. Fla., 1972).

There remains the issue of whether s. 235.34, F. S., shields the School Board from the payment of the so-called "impact fee" or user charge for the privilege of connecting to the city's water and sewer system.

Section 235.34, F. S. *1973*, provided that:

> School boards, boards of county commissioners, municipal boards, and other agencies and boards of the state are authorized to expend funds, separately or collectively, by contract or agreement, for the placement, paving, or maintaining of any road, byway, or sidewalk adjacent to or running through the property of any public school. Expenditures may also be made for sanitary improvements and for the installation, operation and maintenance of traffic control and safety devices upon or in the vicinty [sic] of any existing or proposed public school site. The boards of county commissioners, municipal boards, and other agencies and boards of the state may plant or maintain trees, flowers, shrubbery, and beautifying plants upon the school grounds of any public school upon approval of the superintendent or his designee. Payment by a school board for any improvement set forth in this section shall be authorized in any amounts agreed to by the school board. Any payments so authorized to be made by a school board shall not be mandatory unless the specific improvement and its costs have been agreed to by the school board prior to the improvement's being made.

The purpose of this section was set forth in the case of City of Titusville v. Board of Public Instruction, *supra*, wherein the court stated:

> In 1953 the legislature of this state, by Chapter 28266, Laws of Florida, 1953, expressly authorized county boards of public instruction to expend public funds for the purpose of discharging lawfully imposed encumbrances upon school properties for special assessments for sanitary improvement, this being carried in the statutes as F.S. Section 235.34, F.S.A. The purpose of this legislation was discussed by the Supreme Court of Florida in Miami v. Board of Public Instruction of Dade County, Fla. 1954, 72 So.2d 901, at 903 in the following language:
>
> "As we read [Chapter 28266], it was undoubtedly enacted by the legislature to meet the views expressed by this Court in Blake v. City of Tampa, 115 Fla. 348, 156 So. 97, 100, wherein it was held, in respect to the payment of assessment liens against school property: '. . . it is not within the constitutional power of the Legislature to provide for the enforcement of any such special or local assessment lien *by execution, levy, or decretal sale on foreclosure* to satisfy said lien, even though duly imposed, because to do so would tend to destroy the constitutional trust upon which all school property is owned and held, and is required by the Constitution to be employed. . . . [however] the authority given under the Constitution to a school district to purchase, own, hold, and use real property for school purposes, and to expend special tax school district funds thereon, is subject to *legislative direction and control* within the scope of the special constitutional school purposes, and that the Legislature by *a specific enactment* so providing, may *authorize and direct* the expenditure of a part of the public school funds for the purpose of paying off and discharging lawfully imposed encumbrances upon school properties, imposed thereon by reason of special or local assessments . . . when not in excess of the benefits . . . thereon as determined pursuant to law . . . .' (Emphasis supplied.)" [258 So.2d 836, 837, 838, *supra*.]

See Board of Public Inst. v. Little River Val. Drain. Dist., 119 So.2d 323 (3 D.C.A. Fla., 1960); City of Coral Gables v. Board of Public Inst., *supra*; AGO 074-24; *also see* s. 1, Ch. 75-258, Laws of Florida, amending s. 235.34, F. S., and adding subsection (2) thereto providing that s. 235.34, as amended, shall regulate the levying of assessments for special benefits on school districts and the directing of the payment thereof.

In view of the above, it is my opinion that the purpose of s. 235.34, F. S., is to regulate the levying of assessments for special benefits on school districts and for the directing of the payment of said assessments and has no application to the imposition of the "impact fee" or user charge against the school board and would not shield the school board from the payment of the "impact fee" or user charge for the privilege of connecting to the city's water and sewer system.

The resolution of your first question in the affirmative necessitates answering the second question contained in your request. In that question you raised the issue, if the school board is liable for the "impact fee" or user charge, from what source of funds may the payment of that liability be paid, by what specific legal authority may the payment

be made, and is the school board authorized to borrow funds for payment of such fees or charges.

The answer to this question is somewhat limited since no copy of the budget or restrictions on the use of the funds was provided with the initial request. However, in view of the nature of the "impact fee" or user charge, being no more than a user charge for the privilege of connecting to the city's water and sewer system, it is presumed that the user charge would be paid as a normal operating expense, such as other utility charges, and not out of capital outlay. As to the authority to borrow moneys with which to pay such operating expenses, s. 237.151, F. S., appears to authorize the school board to borrow money for the purpose of paying any and all lawful expenses incurred in operating the district schools, in the manner and on the terms and conditions therein prescribed.

076-138—June 17, 1976

WATER-MANAGEMENT DISTRICTS

PROXY VOTING IN ELECTION OF BOARD OF SUPERVISORS PERMITTED

To: Harry N. Lembeck, Attorney for Dixie Drainage District, Hollywood

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Does s. 298.12, F. S., allow the owners of land located within a water-management district created pursuant to Ch. 298, F. S., to vote by proxy in the annual election of a district supervisor?

SUMMARY:

District landowners may vote by proxy in the annual elections of water-management district supervisors under s. 298.12, F. S.

The statutory sections with which your inquiry is concerned are ss. 298.11 and 298.12, F. S. Section 298.11 provides, among other things, that within 20 days of any water-management district's being organized pursuant to Ch. 298, *id.*, the appropriate circuit court clerk shall give notice and call a meeting of landowners in the district for the purpose of electing the district's first board of supervisors. At the meeting, each district landowner (including the Department of Environmental Regulation on behalf of the State of Florida if the state owns land in the district) is entitled "to one vote in person or by proxy in writing duly signed, for every acre of land owned by him in such district." Section 298.11(2). The owners of a majority of the acreage included in such district shall be necessary to constitute a quorum for the purpose of holding such election, "or any election thereafter," and in the event that the owners of a majority of the acreage included in such district are not present "in person or duly represented" at the meeting, then no election shall be held, and the Department of Environmental Regulation shall appoint the district's board of supervisors. Section 298.11(3).

Section 298.12, F. S., provides that every year after the election of a district's first board of supervisors,

> . . . it shall call a meeting of the landowners in the district in the same manner as is provided for in s. 298.11, and the owners of land in such district shall meet at the stated time and place and elect one supervisor therefor, or in the case of their failure to elect, the Department of [Environmental Regulation] shall appoint such supervisor, in like manner as prescribed in s. 298.11 . . . .

The general rule applicable to your inquiry has been stated as follows:

> At the common law the right of franchise conferred on a member of a municipal

> corporation was considered as one in the nature of a personal trust committed to the judgment and discretion of the member as an individual, and was not delegable . . . [However,] the Legislature has the power to delegate the right and to extend to voters the privilege of voting by proxy.

State *ex rel,* Green v. Holzmueller, 40 Del. 16, 5 A.2d 251, 253 (Super. Ct. 1939); *see also* Bontempo v. Carey, 64 N.J. Super. 51, 165 A.2d 222 (1960); Friesen v. People *ex rel.* Fletcher, 118 Colo. 1, 192 P.2d 430 (1948); O'Brien v. Fuller, 93 N.H. 221, 39 A.2d 220 (1944); *see generally* 29 C.J.S. *Elections* s. 201(1), p. 558; *cf.* State v. Inter-American Center Authority, 84 So.2d 9, 14 (Fla. 1955), in which a similar rule is stated that "in the absence of statutory authority a public officer can not [sic] delegate his [discretionary] powers, even with the approval of the court."

Applying this general rule to ss. 298.11 and 298.12, F. S., which must be construed together in order to ascertain legislative intent, *see In re* Opinion to the Governor, 60 So.2d 321, 324 (Fla. 1952), it is clear that district landowners have been expressly granted the privilege of voting by proxy in the election of their district's first board of supervisors under s. 298.11. As to whether district landowners may also vote by proxy in the annual election of a district supervisor under s. 298.12, the legislative intent is indicated by the language of s. 298.11(3) providing that a quorum of district landowners is absent both at the initial election of the board of supervisors and at "any election thereafter," if "the owners of a majority of the acreage included in such district are not present in person or *duly represented.*" (Emphasis supplied.) In addition, s. 298.12 itself provides that the annual election meeting of a district's landowners shall be called "in the same manner as is provided for in s. 298.11," and that in the event of a failure to elect a supervisor at an annual district election the Department of Environmental Regulation shall appoint a supervisor "in like manner as prescribed in s. 298.11." The only circumstance in which the Department of Environmental Regulation appoints district supervisors under s. 298.11 is when a quorum of district landowners, *i.e.*, district landowners "in person or *duly represented,*" is not present and, therefore, an election by district landowners in person or by proxy cannot be held. (Emphasis supplied.) Thus, although the matter is not entirely free from doubt, I am of the opinion that district landowners may vote by proxy in the annual election of a district supervisor under s. 298.12.

The conclusion reached herein is consistent with the proposition most recently enunciated in Spector v. Glisson, 305 So.2d 777, 781-782 (Fla. 1975), that, absent clear expression otherwise, the applicable constitutional or statutory language should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice. In this instance, therefore, where the applicable statutory language is subject to construction, any question as to whether district landowners may vote by proxy in annual elections of district supervisors under s. 298.12, F. S., should be answered in the affirmative, since the alternative may be that the Department of Environmental Regulation will appoint such supervisors. Moreover, the conclusion reached herein is consistent with the well-accepted rule of statutory construction that statutes should be interpreted so as to avoid unreasonable or anomalous results. *See* Radio Tel. Communications, Inc. v. Southeastern Tel. Co., 170 So.2d 577, 580 (Fla. 1964); Leach v. State, 293 So.2d 77 (1 D.C.A. Fla., 1974). In this regard, it seems unreasonable to conclude that s. 298.11, *id.*, allows district landowners to vote by proxy at the initial election of a district's board of supervisors, but that s. 298.12 precludes their voting by proxy at subsequent elections of district supervisors. I perceive no reasonable basis for such a distinction in the statutes.

Your question is answered in the affirmative.

076-139—June 18, 1976

MUNICIPALITIES

RESPONSIBILITIES TO PROVIDE MEDICAL TREATMENT FOR MUNICIPAL PRISONERS

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

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Is the City of Daytona Beach legally obligated for costs incurred by the hospital or a physician in furnishing medical care to persons incarcerated in the city detention facility in the absence of an agreement with the Halifax Hospital District, and, further, does the city's obligation depend upon whether the persons receiving treatment are indigent or nonindigent, or whether the treatment is for a serious illness or injury and is necessary during the period of confinement?

SUMMARY:

A municipality is responsible for providing all necessary medical care to its municipal prisoners so long as they remain in custody and regardless of whether they are indigent or nonindigent. Although local detention facility rules (Ch. 10B-17, Florida Administrative Code) require treatment for "serious" or "substantial" injury or illness, caution should be exercised in allowing nonmedical detention facility personnel to decide whether a prisoner's request for medical attention is frivolous or is based on serious or substantial illness or injury.

The opinions of this office have consistently held that the officer in charge of a county or *municipal* detention facility, and ultimately the county or municipality for which the officer in charge is acting, is charged with the responsibility to provide medical care to prisoners incarcerated in the local detention facility. This duty derives from s. 951.23, F. S., and the implementing Florida Administrative Code (F.A.C.) or rules of the Department of Offender Rehabilitation (formerly the Division of Corrections of the Department of Health and Rehabilitative Services). *See* Ch. 10B-17, F.A.C., formerly Ch. 10B-8, F.A.C.

As to whether an individual is a municipal prisoner or a county prisoner for purposes of determining the entity responsible for providing medical care, the following definitions are provided in s. 951.23, F. S. Section 951.23(1)(b) defines *county* prisoner as "a person who is detained in a county detention facility by reason of being charged with or convicted of either *felony or misdemeanor*." (Emphasis supplied.) A *municipal* prisoner is defined by s. 951.23(1)(d) as "a person who is detained in a municipal detention facility by reason of being charged with or convicted of violation of *municipal law or ordinance*." (Emphasis supplied.) In AGO's 072-346 and 075-47 I held that a municipal police officer who arrests a person for violation of a *state* law (felony or misdemeanor) is acting on behalf of the state and that a person so arrested by a municipal officer for violation of state law is constructively a county prisoner for whose medical care the sheriff is responsible.

In AGO 075-35 I stated unequivocally that the duty to provide medical care applies with equal force to indigent and nonindigent prisoners. Also emphasized in AGO 075-35 were the points that the duty to provide medical care ends upon release of the prisoner from custody and that the duty is not affected by the fact that the illness or injury might have arisen before the prisoner was taken into custody.

I have considered the special act creating the Halifax Hospital District, Ch. 11272, 1925, Laws of Florida, as amended by Ch. 13490, 1927, Laws of Florida, but I am of the opinion that the act's requirement that the hospital district provide free care to indigents does not affect or relieve the duty of a municipality or county to be responsible for providing medical care required by its prisoners. While it does appear that the hospital district would become responsible for an indigent prisoner upon release from custody, under the rationale of the previous opinions of this office the entity in charge of the local detention facility in which the prisoner is incarcerated is responsible for furnishing medical care so long as the prisoner remains in custody. I would also note that it has been established, in AGO's 059-148 and 075-47, that the transfer of a prisoner from the detention facility to a hospital for treatment does not remove the prisoner from custody of the sheriff or municipal police department. Similarly, AGO 075-47 established that a sheriff's or police department's duty to provide medical care is not precluded or delayed if a prisoner must be taken to a hospital directly upon arrest and before being taken to the detention facility for formal booking procedures.

Finally, as to whether the city's duty to provide medical care depends upon "whether the treatment is for a serious illness or injury," I would refer you to the following sections

of the local detention facility rules concerning medical care. In Ch. 10B-17.04(16), F.A.C., it is provided in pertinent part: "Prisoners that show or complain of *substantial* injuries or illness should be afforded the opportunity to be seen by a physician or another appropriate medical person unless the Officer-In-Charge determines it is not necessary." (Emphasis supplied.) Chapter 10B-17.07(1), F.A.C., provides in pertinent part that "[t]he Officer-In-Charge will make arrangements for appropriate physician and hospital care for prisoners." Chapter 10B-17.07(2), F.A.C., provides in pertinent part: "The Officer-In-Charge shall assure that each prisoner is observed on a regular basis and a physician called or treatment provided if there are indications of *serious* injury, wound or illness. The instructions of the physician shall be strictly carried out." (Emphasis supplied.) And in Ch. 10B-17.07(8), F.A.C., it is provided that "[t]he Officer-In-Charge will take action concerning mentally ill persons consistent with applicable Florida Statutes and/or court orders."

It should be obvious that no clear or readily usable standard emerges from the above-quoted rules. Both "substantial" and "serious" are used to describe the degree of illness or injury which purportedly must exist before treatment or the summoning of a physician is required. Either of these modifiers could reasonably be subject to vastly differing interpretations on the part of either the prisoner or the officer in charge of the detention facility. In light of the recent proliferation of civil rights suits brought by prisoners demanding better medical care, food, recreation, etc., I must advise against your taking an overly strict approach to what constitutes serious or substantial illness or injury. Considerable caution should be exercised in allowing nonmedical personnel of the detention facility to decide that a prisoner's request for medical attention is frivolous.

076-140—June 18, 1976

MUNICIPALITIES

NOT AUTHORIZED UNDER COMMUNITY REDEVELOPMENT ACT TO SELL HOUSING UNITS AS CONDOMINIUMS

To: Carl R. Linn, City Attorney, St. Petersburg

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

Does the Community Redevelopment Act of 1969 expressly or impliedly grant to a city the authority to sell, in condominium form, units developed under the general redevelopment plan?

SUMMARY:

The Community Redevelopment Act of 1969 (ss. 163.330-163.450, F. S.) does not expressly or impliedly grant to a city the authority to sell in condominium form units developed under the general redevelopment plan.

Municipalities are granted extensive powers under the Community Redevelopment Act (Part III, Ch. 163, F. S.) to carry out the purposes of the act. *See* ss. 163.370, 163.375, 163.380, 163.385, and 163.420.

A thorough perusal of the act discloses no express or necessarily implied authority for a municipality to sell, in condominium form, newly constructed units developed under the Community Redevelopment Act. *Cf.* ss. 163.335(2), 163.340(12)(b), 163.345, 163.370(1), (4)(a) and (b), (7)(a), and (8), and 163.380(1), (2), and (3), F. S. The municipality does have the authority, pursuant to s. 163.380(3), to *temporarily* operate and maintain real property acquired by it in a community development area pending disposition of the property as authorized in the act.

In spite of broad "home rule" powers granted to municipalities by s. 2(b), Art. VIII, of the Florida Constitution and implemented by Ch. 166, F. S., the Community

Redevelopment Act appears to be a preemption of the field, intending to inhibit the powers of a municipality except those expressly granted or necessarily implied therein. *Cf.* AGO 073-54 relating to the powers of a municipality under the Florida Beverage Law, Chs. 561-568, F. S. Moreover, the city redevelopment plan and the redevelopment project which is the subject of this opinion were not carried out under the authority of Ch. 166, but, presumably, the city adopted the resolution provided for in s. 163.355, F. S., and proceeded to exercise the authority conferred by Part III of Ch. 163, F. S. And in areas such as this, if reasonable doubt should arise as to whether the municipality possesses a specific power, such doubt should be resolved against the municipality. *Cf.* City of Clearwater v. Caldwell, 75 So.2d 265 (Fla. 1954); City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974).

The intent of the act, as expressed in s. 163.345, F. S., is to afford maximum opportunity to the rehabilitation or redevelopment of the community redevelopment area by private enterprise. Notwithstanding temporary retention and operation provided for under s. 163.380(3), F. S., a municipality may retain property or an interest in such property in a community redevelopment only for public use.

The contemplated project in St. Petersburg does not involve rehabilitation of a deteriorated building, nor is it a "guidance" or demonstration project. Section 163.370(1)(f), F. S. Therefore, the city is without authority to purchase or condemn property for the purpose of clearing it and building condominiums thereon and selling such condominium units to individuals.

Your question is answered in the negative.

076-141—June 18, 1976

SUNSHINE LAW

BUS TOURS OF CITY PROJECTS AND PUBLIC WORKS BY CITY COUNCIL

To: Lawrence C. Casey, City Manager, North Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTION:

May a city council conduct regularly scheduled bus tours of the city accompanied by the city staff, if the tours are open to the public and advance notice is given, without violating the Sunshine Law and, if so, must minutes be recorded?

SUMMARY:

A regularly scheduled bus tour by a city council with the city staff of various city projects and works where informal discussions of city matters take place does not violate the Sunshine Law (s. 286.011, F. S.) when the tours are open to the public, adequate advance notice is given, reasonable opportunity to attend is afforded the public, and adequate minutes are promptly recorded and available for inspection.

According to your letter, the North Miami City Council has decided that it would be beneficial for its members to tour the city regularly with city staff members in order to keep abreast of various city projects. The council has adopted Resolution No. 1757 which provides that the council will take a bus tour of the city on the Saturday prior to the first city council meeting of each month. Legal notices announcing the bus tour are posted on the city hall bulletin board and in both post offices several days before the date of the tour. In addition, members of the news media are notified of each tour and an agenda is prepared which sets forth the locations to be visited. The tours are open to both the press and public. The overall purpose of the tours is to keep the city council abreast of various

city projects and public works and to provide an opportunity for the city staff to discuss city matters informally with members of the city council. Although the council does not officially convene as a group during the tour, two or more council members could find themselves engaged in discussions on some matters on which foreseeable action may be taken by the city council. The general nature of the tours, therefore, is akin to that of an informal "workshop meeting" which has been held to be within the purview of s. 286.011, F. S. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969). *Accord*: Attorney General Opinions 074-62 and 074-94.

When the requisite advance notice has been given and a reasonable opportunity for the public to attend exists, there is no violation of the Government in the Sunshine Law. *See* Hough v. Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1974). The Supreme Court has stated in City of Miami Beach v. Berns, *supra*, at 41, that "a secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public." The bus tours as outlined in your letter are not "secret meetings" within this definition since they are open to both public and press and reasonable notice of each trip is posted several days in advance of the date of the tour.

The second part of your question relates to the recording of minutes of meetings of public bodies covered by the Sunshine Law. Section 286.011(2), F. S., states: "The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection."

In AGO 074-62, this office held that minutes were required for workshop meetings and that such minutes should be promptly recorded and available for inspection. Even though the city council does not convene formally as a body during the bus tours, minutes are still required under the Sunshine Law. These minutes should indicate each place visited, the general purpose for the stop, general nature of discussions with the staff, and any tentative proposals or recommendations made. Upon transcription they should be recorded and available for public inspection.

I am of the opinion, therefore, that the city council may continue the bus tours as provided for in the aforecited ordinance provided that there is adequate advance notice thereof to the public and reasonable opportunity for the public to attend and minutes are taken and promptly recorded pursuant to s. 286.011, F. S.

076-142—June 18, 1976

CONSULTANTS' COMPETITIVE NEGOTIATION ACT

APPLICABILITY TO MUNICIPALITIES AND OTHER NONSTATE AGENCIES; APPLICABILITY TO CONTINUOUS INSPECTION PROGRAM OF WATER AND SEWER SYSTEM

To: William K. Howell, City Attorney, Boca Raton

Prepared by: Staff

QUESTIONS:

1. Are municipalities and other nonstate agencies subject to the requirements of s. 287.055(3)(a) or (4), F. S.?

2. If so, is a program of continuous inspections, investigations, examinations, and analyses of a municipal water and sewer service system under a continuing contract a "project" as defined by s. 287.055(2)(f), F. S., and thus subject to the requirements of s. 287.055(3)(a) and (4), F. S.?

SUMMARY:

Municipalities and other nonstate agencies are still subject to the notice requirements and the competitive selection and negotiation requirements of the CCNA (s. 287.055, F. S.). 1975 amendments did not operate to

impliedly repeal these requirements as to the local governmental units designated in the act.

A program of continuous inspections, investigations, examinations, and analyses of a municipal water and sewer service system under a continuing contract could be construed as a study activity within s. 287.055(3)(a), F. S., and subject to the act if it involves professional fees of more than $5,000 and provides for other than general advice and assistance, but that is a factual question to be determined by the governing body of the municipality or other governmental agency.

Section 287.055, F. S., the Consultants' Competitive Negotiation Act (CCNA), has been the subject of several Attorney General Opinions during the preceding years. As I noted in AGO 074-308, the CCNA:

> . . . was designed to provide procedures *for state and local government agencies* to follow in the employment of professional service consultants so as to make more competitive the contracting for professional services and to require the employing of the most qualified and competent individuals and firms at fair, competitive, and reasonable compensation. [Attorney General Opinions 073-216 and 075-56; emphasis supplied.]

The purpose of the CCNA has also been stated as "to require competitive negotiation with a view of obtaining the most qualified firm for a particular project at the most reasonable compensation." Attorney General Opinions 074-191 and 075-86.

Since 1973, the CCNA has defined "agency" to include the state or a state agency; a municipality or political subdivision; and a school district or school board. Section 287.055(2)(b), F. S. Section 2, Ch. 75-281, Laws of Florida, added a definition of the word "project" which reads, in part:

> "Project" means that fixed capital outlay study or planning activity described in the public notice of the state or a state agency pursuant to paragraph (3)(a). *An agency shall prescribe* by administrative rule *procedures for the determination* of a project under its jurisdiction. . . . [Section 287.055(2)(f), F. S.; emphasis supplied.]

Section 287.055(3)(a), F. S., requires that each agency publicly announce:

> . . . each occasion when professional services are required to be purchased *for a project whose basic construction cost is estimated by the agency to be more than $100,000 or for a planning or study activity when the fee for professional services exceeds $5,000 . . . . Public notice* shall include a general description of the project . . . . (Emphasis supplied.)

The material which I have italicized is added to the subsection as a result of the 1975 amendments (s. 2, Ch. 75-281).

Since the definition of the word "project" refers to the activity described in the public notice required by s. 287.055(3)(a), F. S., it is not permissible to rely solely upon the disembodied language of the first sentence of s. 287.055(2)(f), F. S., for an inclusive definition of the word "project." All parts of a statute must be read together. Amos v. Conkling, 126 So. 283 (Fla. 1930); State *ex rel.* Harris v. Bowden, 150 So. 259 (Fla. 1933). Each part of a statute is to be construed in connection with every other part, Tampa & J. Ry Co. v. Catts, 85 So. 364 (Fla. 1920); *In re* Opinion to the Governor, 60 So.2d 321 (Fla. 1952), and force and effect given to each part thereof, State *ex rel.* Finlayson v. Amos, 79 So. 433 (Fla. 1918); AGO 057-269. Statutory definitions usually control the meaning of statutory words, but statutory definitions do not control where obvious incongruities in language would be created and where the major purpose of the statute would be destroyed. Lawson v. Suwannee Fruit & Steamship Company, 336 U.S. 198 (1949).

I further note that the title of Ch. 75-281, Laws of Florida, describes the amendment to s. 287.055(3)(a), F. S., as

> . . . eliminating the public notice and selection process requirements for professional service contracts for projects the estimated basic construction cost

of which is $100,000 or less or a planning or study activity of which the fee is $5,000 or less . . . .

The title of an act may be considered in determining legislative intent and may serve to aid in the construction of the body of the act and as evidence of that legislative intent. Curry v. Lehman, 47 So. 18 (Fla. 1908); State *ex rel.* Church v. Yeats, 77 So. 262 (Fla. 1917). The function of the title is to define the scope of the act. County of Hillsborough v. Price, 149 So.2d 912 (2 D.C.A. Fla., 1963). Section 287.055(3)(a), as amended by Ch. 75-281, still requires that each *agency* (as defined by s. 287.055(2)(b), F. S.) publicly announce each occasion when *professional services* (as defined by s. 287.055(2)(a), F. S.) are required for a *project* (as determined by each agency having jurisdiction, s. 287.055(2)(f), F. S.) when the cost of that project exceeds the prescribed amounts. Therefore, any implied limitation of the notice requirement, restricting it to only those projects contemplated by the state or state agencies, which appears in the first sentence of s. 287.055(2)(f) contradicts the existing law (s. 287.055[3][a]), as well as the second sentence of s. 287.055(2)(f), both of which were added to or amended by Ch. 75-281 limiting the notice requirement for projects of a certain cost.

The question of whether an amendment to a statute effects an implied amendment or repeal of an existing statute is one of legislative intent. State v. Gadsden County, 58 So. 22 (Fla. 1912), State *ex rel.* Worley v. Lee, 168 So. 809 (Fla. 1936), State *ex rel.* Myers v. Cone, 190 So. 698 (Fla. 1939), *In re* Wade, 7 So.2d 797 (Fla. 1942).

In this case, not only is the clear legislative intent to repeal a portion of the notice requirement absent, but, further, it seems clear that the legislative intent was to limit notice requirements for projects below a certain dollar cost, not for projects contemplated by municipalities and other nonstate agencies. In the absence of a clear indication of legislative intent to limit the application of the CCNA to state and state agency projects only, *cf.* State *ex rel.* Housing Authority of Plant City v. Kirk, 231 So.2d 522 (Fla. 1970), I can see no fashion in which the statute can be read as a cohesive whole, given the intent previously described (AGO's 073-216, 074-191, 075-56, and 075-86), and yet construe s. 287.055(2)(f), F. S., as effecting an implied repeal of the application of a major portion of the act. The legislative intent as gathered from the language of a statute is the law, State *ex rel.* Davis v. Knight, 124 So. 461 (Fla. 1929); Pillans & Smith Co., Inc. v. Lowe, 157 So. 649 (Fla. 1934), even though that intent may apparently contradict the strict letter of the statute, or a part thereof. State v. Sullivan, 116 So. 255 (Fla. 1928); Singleton v. Larson, 46 So.2d 186 (Fla. 1950).

When the CCNA is examined and read in its entirety, the manifest legislative intent and purpose to regulate the competitive negotiation of contracts by consultants for certain professional services by designated local governments is clearly the overriding purpose of the act and therefore controls. This purpose is in no way affected by the first sentence of s. 287.055(2)(f), which cannot be construed to defeat the overriding purpose of the act. Municipalities and nonstate agencies are subject to the Consultants' Competitive Negotiation Act (s. 287.055, F. S.), and 1975 amendments to that act did not operate to impliedly repeal the application of the act to municipalities and other nonstate agencies.

Your first question is answered in the affirmative.

As to your second question, a program of continuous inspection, investigations, examinations, and analyses of a municipal water and sewer system, under a continuing contract, might be construed as a study activity within s. 287.055(3)(a), F. S., and therefore would be subject to the act if the fee for professional services involved were greater than $5,000. Attorney General Opinion 075-131 states that a city may employ a city engineer under a yearly contract to provide general advice and assistance without complying with the CCNA each time the city called upon the city engineer for advice or assistance pursuant to the contract. Such a contract would not be a project pursuant to the CCNA. That same opinion also states that "such an employment contract should be limited to general advice and assistance; and an engineering contract for a particular 'project' should be negotiated in compliance with the CCNA requirements." Anything further than general advice probably falls within the intent of the CCNA, as has been previously expressed.

I note further that s. 287.055(2)(f)1. and 2., F. S., provides for procedures for determination of projects which are couched in terms of construction, rehabilitation, or renovation activities. Whether or not a particular project falls within the parameters indicated above is a question of fact to be determined in each instance by the responsible

agency and challenged by parties who disagree. The Attorney General is not a fact-finding official or body. Attorney General Opinion 075-78.

076-143—June 21, 1976

MUNICIPALITIES

AUTHORITY TO IMPOSE AD VALOREM AND OCCUPATIONAL LICENSE TAXES ON PRIVATE INTERESTS LEASING PUBLIC LAND OR PRIVATE LAND FORMERLY BELONGING TO INTERAMA

To: Myles J. Tralins, City Attorney, North Miami

Prepared by: David K. Miller, Assistant Attorney General

QUESTIONS:

1. Does the City of North Miami have the *authority* to impose and collect ad valorem taxes on private interests leasing real property owned by: The State of Florida (and Florida International University); Dade County; the City of Miami; or private owners, when such property was formerly a part of Interama?

2. Does the City of North Miami have the *authority* to require occupational license taxes of private interests situated on lands owned by the parties listed above?

SUMMARY:

The City of North Miami does have the authority to impose ad valorem taxes upon private leaseholds of publicly owned lands unless expressly exempted by law, and upon the fees of private owners whose land was formerly owned by Interama. The city may also impose occupational license taxes upon such lessees as provided in Ch. 205, F. S., unless exempted by law.

Both questions are answered in the affirmative with the caveat that the questions and answers are both limited to the "authority" to tax and do not consider whether the lessee may be entitled to a tax exemption based upon its use of the property.

AS TO QUESTION 1:

The Florida Supreme Court has held that land owned and used by the state or by a county is immune from ad valorem taxation. Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975); Hillsborough County Aviation Auth. v. Walden, 210 So.2d 193 (Fla. 1968); State *ex rel.* Charlotte County v. Alford, 107 So.2d 27 (Fla. 1958); Park-N-Shop v. Sparkman, 99 So.2d 571 (Fla. 1957). This immunity extends to state-owned lands within the state university system, including Florida International University. *See* ss. 20.15 and 240.031(2), F. S. The immunity also extends to lands previously owned by the Inter-American Center Authority (Interama) under Ch. 554, F. S. 1973, which are presently owned by the Department of Natural Resources under ss. 253.033 and 20.25(5), F. S. Land owned and used by municipalities for public purposes is exempt from ad valorem taxation under s. 3(a), Art. VII, State Const., and s. 196.199(1)(c), F. S.

When a private party purchases the fee interest in public land, however, the land's immunity or exemption by virtue of public ownership is lost, and the land becomes taxable unless exempt under some other provision of law. *See* s. 4, Art. VII, State Const., requiring a just valuation of all property for ad valorem taxation, and s. 196.001(1), F. S. The privately owned property described in your question 1 is neither immune nor exempt by virtue of having previously been owned by Interama. This property is taxable unless exempt under some other provision of law.

Section 196.001(2), F. S., expressly authorizes taxation of leasehold interests in public property, unless such leaseholds are expressly exempted by law. That section reads:

> **Property subject to taxation.**—Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:
>
> * * * * *
>
> (2) All leasehold interests in property of the United States, of the state, or any political subdivision, municipality, agency, authority, or other public body corporate of the state.

Notwithstanding that the leaseholder may qualify for an exemption by virtue of an appropriate use of the leasehold and upon meeting all conditions precedent, the power to tax is still present under the section cited. The *right* to an exemption necessarily presupposes the *power* to tax. *See* Dickinson v. City of Tallahassee, *supra*, at 3 (citing Orlando Utilities Comm'n v. Milligan, 229 So.2d 262, 264 [4 D.C.A. Fla., 1969], *cert. denied* 237 So.2d 539 [Fla. 1970]).

In order to treat this issue thoroughly and avoid confusion, I will discuss briefly leasehold exemptions. The uses for which a leasehold exemption may be obtained are set forth in s. 196.199(2), F. S. They include, in paragraph (a), the use by the lessee so as to serve a governmental, municipal, or public purpose or function, as defined in s. 196.012(5), F. S. These sections should be read in light of Williams v. Jones, 326 So.2d 425 (Fla. 1975) (discussed *infra*). Paragraph (b) allows an exemption for leaseholds to organizations which use the property exclusively for literary, scientific, religious, or charitable purposes. There is now a substantial body of case law upholding and interpreting these statutes. Under the authority of these cases, the taxability of the leasehold must rest upon the use to which it is put. *See, e.g.*, Williams v. Jones, 326 So.2d 425 (Fla. 1975), in which private leaseholders on land owned by Escambia County were held to be outside the scope of these exemption provisions and, therefore, not entitled to an exemption. The uses in question, for private residential and commercial purposes, were held to be proprietary rather than governmental in nature; such proprietary uses, under *Williams*, cannot be said to be exempt from ad valorem taxing power. Decisions on this point prior to the *Williams* decision include Straughn v. Camp, 293 So.2d 689 (Fla. 1974); Dade County v. Pan American World Airways, 275 So.2d 505 (Fla. 1973); and Hertz Corp. v. Walden, 299 So.2d 121 (2 D.C.A. Fla., 1974), *aff'd.* 320 So.2d 385 (Fla. 1975).

Because your request does not specify the uses to which the leaseholds in question 1 are put, I cannot opine on whether they would be entitled to apply for exemption. The cases cited and others decided under s. 196.199(2), F. S., should be helpful as guidelines. Nevertheless, my conclusion as regards the taxing *authority* is unaffected by the cited exemption provisions.

AS TO QUESTION 2:

Municipal occupational license taxation is authorized by the Local Occupational License Tax Act, Ch. 205, F. S. Although that act recognizes certain exemptions from the license tax, none is allowed for occupations pursued by private lessees of public lands. The absence of such an exemption suggests that the taxing power can reach these interests. In fact, such a result may be compelled under the uniformity requirement of s. 205.043(1)(a) and the constitutional guarantee of equal protection in Amendment XIV, U. S. Const. These requirements operate to prohibit discrimination within a taxed class, so that vulnerability to occupational license taxation should not depend upon the situs of the taxpayer within a jurisdiction.

This conclusion does not diminish the immunities or exemptions from ad valorem taxation which are enjoyed by public bodies and certain of their lessees. The licensee, rather than the public owner, pays the tax. The license tax does not interfere with the public owner's ability to attract tenants or collect rent. There is no disharmony of function or purpose. The distinction between a license tax and a property tax is recognized in Gauden v. Kirk, 47 So.2d 567, 572 (Fla. 1950), and 51 Am. Jur.2d *Licenses and Permits* s. 1. That distinction resides in the fact that a property tax imposes no condition or restriction, but is levied directly upon property, whereas a license tax is imposed upon the exercise of a privilege and its payment is a condition precedent to that exercise.

It follows that the leaseholders in question 2 are not exempt from occupational license taxation by virtue of operating on publicly owned lands. The leaseholder in question 2 operating on privately owned land is likewise nonexempt.

076-144—June 21, 1976

TAXATION

DISABLED EX-SERVICEMAN ENTITLED TO EXEMPTION ON PROPERTY RENTED TO OTHER PERSONS

To: David L. Reid, Palm Beach County Property Appraiser, West Palm Beach

Prepared by: Zollie M. Maynard, Jr., Assistant Attorney General, and Barry F. Rose, Legal Intern

QUESTION:

May a qualified, partially disabled ex-serviceman be granted the limited tax exemption provided for in s. 196.24, F. S., on property rented to others and on which he is not claiming the basic $5,000 homestead exemption?

SUMMARY:

A qualified, partially disabled ex-serviceman may be granted the limited tax exemption provided for in s. 196.24, F. S., on property owned by such ex-serviceman but rented to other persons.

Your question is answered in the affirmative.

Section 196.24, F. S., sets forth two requirements for ex-servicemen to qualify for the particular property tax exemption:

> 196.24 **Evidence of disability of ex-servicemen; exemption.**—Any ex-serviceman, [1] *a bona fide resident of the state*, who has been [2] *disabled to a degree of 10 percent or more in war service between [specified] dates* . . . shall be entitled to the exemption from taxation provided for in s. 3(b), Art. VII of the Constitution . . . . (Emphasis supplied.)

I direct your attention to AGO 072-151 wherein I stated that s. 196.202, F. S., implements s. 3(b), Art. VII, State Const., and that s. 196.24, F. S.:

> . . . assuming its constitutional validity, permits an ex-serviceman who is disabled to a degree of 10 percent or more to qualify for the $500 tax exemption provided by the constitution and by s. 196.202 . . . .

In AGO 074-325, I stated:

> Section 196.24 is entitled "*Evidence* of disability" and purports to implement the same constitutional provisions as does s. 196.202, which restates the minimum five hundred dollar constitutional exemption for certain classes of persons. Article VII, s. 3(b), State Const. Section 196.24 therefore defines an exemption for veterans disabled 10 percent or more during war service, *in place of* the requirement of total and permanent disability under s. 196.202. (Cf. constitutional issues considered in AGO 069-132.) Thus, by claiming exemption under s. 196.24, a taxpayer would simply qualify, by means of separate *standards or tests*, for the disability exemption stated in s. 196.202.

Both ss. 196.24 and 196.202 are derivatives of s. 3(b), Art. VII, *supra*, and neither are restricted to homesteads or residences of the individual. Based upon the above rationale, this office held in AGO 073-325 that the exemption in s. 196.202 was not limited to homestead property. In that opinion, I concluded:

> The exemption provided by s. 196.202, F. S. . . . is not limited to homestead property. . . . Persons who qualify for the exemption provided by s. 196.202 . . . may apply this exemption to homestead property or to *other taxable property owned by them, including real property* which is not contiguous to the homestead. (Emphasis supplied.)

Therefore, a qualified, partially disabled ex-serviceman may be granted the limited tax exemption provided for in s. 196.24, F. S., on property owned by him but rented to other persons.

076-145—June 28, 1976

ELECTIONS

STATUS OF CAMPAIGN FINANCE LAWS IN LIGHT OF U. S. SUPREME COURT DECISION INVALIDATING FEDERAL STATUTES

To: Reubin O'D. Askew, Governor, Tallahassee

Prepared by: Staff

QUESTIONS:

> **1. Which provisions of the Florida election laws have been affected by the United States Supreme Court decision in Buckley v. Valeo, 96 S.Ct. 612 (1976)?**
> **2. Does the Department of State have the authority to require, by the adoption of administrative rules, disclosure of campaign spending activities by third-party independent spenders?**

SUMMARY:

> **The United States Supreme Court decision in Buckley v. Valeo, 96 S.Ct. 612 (1976), has the effect of invalidating, on constitutional grounds, state campaign financing statutes which have the same purpose and effect as the federal statutes invalidated in *Buckley*. The Department of State has the authority to require, by the adoption of administrative rules, disclosure of campaign spending activities by third-party independent spenders.**

AS TO QUESTION 1:

In the case of Buckley v. Valeo, 96 S.Ct. 612 (1976), the United States Supreme Court ruled on constitutional challenges to numerous provisions of the federal campaign financing laws. The essence of the decision is perhaps best summarized in the court's own words:

> In summary, we sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. *We conclude, however, that the limitations on campaign expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm.* Finally, we hold that most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by "Officers of the United States," appointed in conformity with Art. II, s. 2, cl. 2 of the Constitution, and therefore cannot be exercised by the Commission as presently constituted. (Emphasis supplied.)

As discussed in further detail below, a number of the provisions of the Florida Statutes regulating campaign financing (many of which were modeled on the federal regulatory scheme) have the same effect as, and prohibit the same activities as, the federal statutes

invalidated in the *Buckley* case, *supra*. It cannot be gainsaid that the interest of the state in regulating such matters with respect to candidates for state and local offices is indistinguishable in nature or degree from the interest of the federal government in the regulation of the campaign financing activities of candidates for federal office. Similarly, those who would participate in state or local political activity are no less entitled to the exercise of their First Amendment freedoms than are those who choose to become active in federal political campaigns. Such being the case, I am of the view that the *Buckley* decision must be regarded as having the effect of invalidating all state statutory provisions which have the same purpose and effect as the federal statutes invalidated in *Buckley*. To adopt any other construction of the *Buckley* decision would be to disregard, with no substantial foundation for so doing, the First Amendment rights of those who participate in state and local political campaigns. In the following paragraphs, I have listed the provisions of our state campaign financing laws which are clearly affected by the *Buckley* decision. It should be noted that it is also possible the *Buckley* decision may in the future be found to affect other statutory provisions within the context of a particular factual situation.

The provisions of s. 106.10, F. S., would appear to be invalidated *in toto* by the *Buckley* decision. Section 106.10 has the effect of prohibiting all candidates for state and local office from expending funds on behalf of their nomination or election in excess of the dollar-amount limits specified in the statute. With respect to such prohibitions in the federal legislation, the court in *Buckley* said:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. * * * It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates.
>
> We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [the] ceiling on independent expenditures.
>
> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing them on election day.
>
> No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by . . . [the] campaign expenditure limitations.

For the same reasons, the provisions of s. 106.19(1)(d), F. S., are invalidated to the extent that they impose a penalty for making expenditures in excess of the amounts provided in s. 106.10, F. S.

The provisions of s. 106.021(3) and (4), F. S., would appear to be invalidated by the *Buckley* decision to the extent that they operate to prohibit expenditures by a group or individual which are not coordinated with a candidate. *Buckley* invalidated, on First Amendment grounds, a federal statute which had the effect of limiting the amount a group or individual could spend advocating the election or defeat of a candidate. In so doing, the court stated:

> We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [the statute's] ceiling on independent expenditures.
>
> While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression.
>
> For the reasons stated, we conclude that . . . [the statute's] independent expenditure limitation is unconstitutional under the First Amendment.

It cannot be doubted that if a limitation on such spending offends the First Amendment guarantees, no less violence is done to the Constitution by a statute which prohibits such spending. It should also be noted that to the extent that s. 106.14, F. S., might appear to prohibit uncoordinated expenditures by a group or individual, it should be regarded as invalidated for the reasons discussed immediately above.

The question of whether s. 106.15, F. S., is also rendered invalid by *Buckley* is presently pending in a case before the Florida courts. I am of the opinion that there are distinguishing features between the statutes ruled on in the *Buckley* case and the provisions of s. 106.15 and have taken the position in the pending litigation that s. 106.15 is unaffected by the *Buckley* case. Until the litigation regarding s. 106.15 is resolved, I am of the view that it should be regarded as unaffected by *Buckley*.

AS TO QUESTION 2:

Being an "agency" within the definition of that term found at s. 120.52(1), F. S., the Department of State is subject to the Administrative Procedure Act. *Cf.* AGO's 075-6, 076-50, 076-116, and 076-126. In addition, the Division of Elections of the Department of State is expressly made subject to the Administrative Procedure Act by s. 106.22(16), F. S., which involves the adoption of rules by the division regarding campaign financing. As such, the department is prohibited from the exercise of "inherent" rulemaking authority by s. 120.54(13), F. S. Nevertheless, there is a clear distinction between the exercise of "inherent" rulemaking authority, prohibited by the Administrative Procedure Act, and the exercise of "implied" authority which (it is well settled by judicial decision) does exist.

"Inherent power" of an agency is that authority alleged to exist without its being derived from any source; a right or ability to do things without having received that right or ability from another source. Black's Law Dictionary 921 (Rev. 4th Ed.). "Implied powers" of an agency are those which are necessary to effectuate powers expressly granted or conferred and which must therefore be presumed to have been within the intention of the legislative grant of authority to the agency. Black's Law Dictionary, *supra*, at p. 1334.

This distinction has been recognized in St. Regis Paper Co. v. State, 237 So.2d 797 (1 D.C.A. Fla., 1970), *affirmed in part, expunged in part*, 257 So.2d 253 (Fla. 1971), wherein the court held that while statutory agencies do not possess any "inherent" powers, they do have, and are limited to, powers granted either expressly or impliedly in the agency's enabling legislation. The court stated at 799:

> [2] The [Florida Air and Water Pollution Control] Commission strenuously argues that its grant of powers is derived from Chapter 403 and it further has the inherent powers of both the State Board of Health, under Chapter 381, Florida Statutes, F.S.A. and that of the former Air Pollution Control Commission, under Chapter 403, Florida Statutes, F.S.A. *It is well settled that a statutory agency does not possess any inherent powers; such agency is limited to the powers granted, either expressly or by necessary implication,* by the statutes creating them. Florida Industrial Commission ex rel. Special Disability Fund v. National Trucking Company, 107 So.2d 397 (Fla.App.1st, 1958). (Emphasis supplied.)

It is therefore evident that while the Administrative Procedure Act codified the prohibition against an agency's exercise of inherent powers (s. 120.54[13], F. S.), it has not affected the existence or exercise of implied authority by agencies which the courts have traditionally recognized to exist. Peoples Gas System, Inc. v. City Gas Co., 167 So.2d 577 (3 D.C.A. Fla., 1964), *aff'd*, 182 So.2d 429 (Fla. 1965).

The implied authority of an agency is that power which exists by fair implication and intendment incident to, and included in, authority expressly conferred on the agency, the exercise of which is consistent with, and necessary for, the effectuation of the agency's statutory duties and responsibilities. State v. Atlantic Coast Line R. Co., 47 So. 969 (Fla. 1908). As stated in Williams v. Florida Real Estate Commission, 232 So.2d 239 (4 D.C.A. Fla., 1970) at 240:

> [1] Administrative agencies are creatures of statutes. Their powers are special and limited, *being only those which are legally conferred upon them by the statutes of the state, expressly or impliedly for the purpose of carrying out the aims for which they were established.* State ex rel. Burr v. Jacksonville

> Terminal Co., 1916, 71 Fla. 295, 71 So. 474. The statute which creates the administrative agency and invests it with its powers restricts it to the powers granted. The agency has no powers except those mentioned in the statute or *reasonably implied.* It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy, which the agency is at liberty to disregard or put into effect according to the agency's ideas of what is best for the public welfare. (Emphasis supplied.)

Implied powers must, of course, be reasonably implied from the express terms of the statute and must, by fair implication, be incident to, and included in, the authority expressly conferred. Keating v. State, 167 So.2d 46 (1 D.C.A. Fla., 1964), *quashed on other grounds,* 173 So.2d 673 (Fla. 1965).

Beyond the mere existence of implied powers, the courts have also ruled that such implied powers are equal in legal force and effect to an agency's express powers. In City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965), the Florida Supreme Court indicated at 436 and 437:

> . . . *we reject the notion of any such distinction between express and implied statutory authority as posited by the chancellor.* The powers of this and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute. State ex rel. Wells v. Western Union Tel. Co., 1928, 96 Fla. 392, 118 So. 478. *Neither category is possessed of greater dignity or effect.* (Emphasis supplied.)

It therefore appears that the Department of State may exercise that implied rulemaking authority which is, by fair implication, incident and necessary to the effectuation of its express statutory authority and responsibilities regarding campaign financing found in Ch. 106, F. S.

Turning now to the express statutory powers and duties of the Department of State regarding campaign financing, attention is first directed to s. 15.13, F. S., which provides, *inter alia*: "The Department of State shall have general supervision and administration of the election laws." The Secretary of State has also been statutorily designated the chief election officer of the state and has been granted broad authority to maintain uniformity in the election process by s. 97.012, F. S.:

> The Secretary of State is the chief election officer of the state, and it is his responsibility to:
> (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.

To implement this broad statutory charge, the Legislature has empowered the Secretary of State, through the Division of Elections, to promulgate rules to implement the Florida Campaign Financing Act:

> It shall be the *duty* of the Division of Elections to:
>
> * * * * *
>
> (16) Prescribe suitable rules and regulations to carry out the provisions of this chapter. Such rules shall be prescribed pursuant to chapter 120. [Section 106.22, F. S.; emphasis supplied.]

I am of the view that the statutory responsibility of the Secretary of State to insure "uniformity in the application, operation, and interpretation of the election laws," coupled with the *duty* to "[p]rescribe suitable rules and regulations to carry out the provisions" of the campaign financing laws, provides ample authority under the legal principles discussed above for the Department of State to adopt rules and regulations to require uniform disclosure of *all* campaign spending activities. Specifically, such rules and regulations could include the imposition of disclosure requirements on groups or individuals who make independent expenditures which are not coordinated with any candidate.

Unquestionably, it would be desirable for the Legislature to enact modernizing legislation to conform the letter of the campaign financing laws to the guidelines of the

Buckley case. However, their failure to do so has not left us with an unworkable system. As noted in answering your first question, very few of our campaign financing statutes have been affected by *Buckley*. And, as concluded above, the Department of State has at least implied authority to enact rules and regulations to establish uniform disclosure of all campaign spending.

Your second question is answered in the affirmative.

076-146—June 28, 1976

ELECTIONS

CALCULATION OF QUALIFYING FEES FOR CANDIDATES FOR COUNTY OFFICE

To: Bruce A. Smathers, Secretary of State, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTIONS:

1. Are the guidelines in AGO 074-177 for calculating the amount of qualifying fees of candidates for county offices in 1974 still applicable for calculation of such fees in 1976?
2. What cost-of-living adjustment, if any, should be used for the purpose of calculating the qualifying fees of candidates for such offices?
3. Should the 20 percent limitation provided by s. 145.18, F. S., be taken into consideration for the purpose of calculating the qualifying fees of candidates for such offices?

SUMMARY:

The "annual salary" for the purpose of computing the filing fee and committee assessment of candidates for offices the salaries of which are established by Ch. 145, F. S., consists of the base salary plus compensation for the population increments over the minimum for each population group, multiplied by a cost-of-living factor of 1.211. The population estimates as of July 1, 1975, should be used for this purpose. This method of computation should be applied to all county offices whose compensation is fixed by Ch. 145, even though a particular officer may not have yet attained the full amount of the maximum salary authorized under Ch. 145 by reason of the 20 percent limitation of s. 145.18(2). The computation should also take into consideration the special qualification salary provided by s. 145.10(2), where applicable.

Due to their interrelationship, your questions will be answered together. It should be noted at the inception that the general principles enunciated in AGO 074-177 continue to be applicable to the calculation of the amount of the qualifying fees of candidates for nomination and election to offices the salaries of which are established by Ch. 145, F. S., as amended by Ch. 76-80, Laws of Florida. However, factual and statutory changes since 1974 require a different procedure for the implementation of such general principles.

The first factual change which affects this matter is that the cost-of-living factor must now be taken into account in computing the amount of the qualifying fees. Pursuant to s. 145.18(1), F. S. 1975 (repealed effective July 1, 1976, by Ch. 76-80, Laws of Florida), the salaries provided by the several sections of Ch. 145, F. S., have, since October 1, 1974, been adjusted annually by a cost-of-living factor certified by the Department of Administration. Accordingly, the maximum authorized salary for any officer whose compensation is set by Ch. 145 is determined by three elements: The base salary, the compensation for population increments, and the cost-of-living factor. The last factor certified—which is the factor used to adjust salaries during the current fiscal year—is 1.211. Inasmuch as application of this factor has the effect of an upwards adjustment of 21.1 percent of the sum of the base salary and the compensation for population

increments, it must be taken into account in arriving at "the best measure of the financial possibilities of the office." *See* AGO's 072-217 and 074-177.

The second factual change which affects this matter is the change in the estimated population of the several counties of the state. Pursuant to s. 23.019, F. S., the Department of Administration annually prepares estimates of the population of each of the counties in this state. The most recent such population estimate—and the one which will be used for the calculation of salaries under Ch. 145, F. S., for the fiscal year beginning October 1, 1976—is the estimate of population as of July 1, 1975, a copy of which is attached hereto as Appendix A. The population figures shown in Appendix A are the ones which should be used for the purposes of calculating the amount of the subject qualifying fees, because they are the population figures which will be used to compute the salaries of officials under Ch. 145 during the greater part of the first year in office of those who are elected in November of 1976.

The statutory change which bears on this matter is Ch. 76-80, Laws of Florida, section 1 of which has the effect of repealing subsection (1) of s. 145.18, F. S., as of July 1, 1976. Section 2 of Ch. 76-80 provides: "This act shall not affect cost-of-living adjustments certified prior to the effective date of this act." Accordingly, while Ch. 76-80 has the effect of disallowing any future fluctuation in the rate of cost-of-living adjustments to salaries established by Ch. 145, F. S., it specifically preserves the adjustments which have been previously certified.

Subsection (2) of s. 145.18, F. S., limits the amount by which salaries established by Ch. 145, F. S., may increase from one year to the next to 20 percent of the previous year's compensation. The effect of this limitation is that the salary payable to an officer whose compensation is set by Ch. 145 may not in any given fiscal year be more than a total of 120 percent of his salary for the preceding fiscal year. *See* AGO 075-38. However, although the provisions of s. 145.18 may impose limitations on the amount of the salary increases of an officer who has not yet attained the maximum salary authorized by Ch. 145, such provisions do not enter into the calculation of qualifying fees of candidates for election to public office. Accordingly, I am of the view that the amount of the qualifying fees should be calculated on the basis of the maximum salary authorized for that office by Ch. 145, irrespective of whether the incumbent of the office has yet attained such maximum salary level.

It must also be noted that s. 145.10(2), F. S. 1975, provides, with respect to the salaries of property appraisers:

> (2) Special qualification salary shall be an additional $2,000 per year to each [property appraiser] who has met the requirements of the Department of Revenue and has been designated a certified Florida [property appraiser]. . . .

Therefore, in calculating the amount of the filing fee and committee assessment of a candidate for the office of property appraiser, this special qualification salary should be included as part of the estimate of annual salary with respect to all candidates who would be eligible to receive it if successful in their bid for election.

In an effort to simplify the implementation of the foregoing, I am attaching hereto as Appendix B a suggested procedure for calculation of the subject qualifying fees. Also attached as Appendix C is a sample calculation following the procedure set out in Appendix B, which uses as an example the office of member of the board of county commissioners of Alachua County.

Appendix A
Estimates of Population, by County in Florida: July 1, 1975

County	April 1, 1970 Census	Estimate July 1, 1975	Percent Change
Florida	6,791,418	8,485,230	24.9%
Alachua	104,764	130,838	24.9
Baker	9,242	12,256	32.6
Bay	75,283	91,606	21.7
Bradford	14,625	16,265	11.2
Brevard	230,006	251,986	9.6
Broward	620,100	876,296	41.3
Calhoun	7,624	8,328	9.2
Charlotte	27,559	42,190	53.1
Citrus	19,196	35,252	83.6
Clay	32,059	47,706	48.8
Collier	38,040	62,734	64.9
Columbia	25,250	28,793	14.0
Dade	1,267,792	1,437,993	13.4
DeSoto	13,060	18,190	39.3
Dixie	5,480	6,638	21.1
Duval	528,865	578,347	9.4
Escambia	205,334	224,893	9.5
Flagler	4,454	6,634	48.9
Franklin	7,065	7,855	11.2
Gadsden	39,184	39,068	.3
Gilchrist	3,551	5,052	42.3
Glades	3,669	5,148	40.3
Gulf	10,096	10,920	8.2
Hamilton	7,787	8,641	11.0
Hardee	14,889	18,511	24.3
Hendry	11,859	15,875	33.9
Hernando	17,004	28,546	67.9
Highlands	29,507	42,787	45.0
Hillsborough	490,265	605,597	23.5
Holmes	10,720	12,518	16.8
Indian River	35,992	46,254	28.5
Jackson	34,434	41,224	19.7
Jefferson	8,778	9,442	7.6
Lafayette	2,892	3,116	7.7
Lake	69,305	86,718	25.1
Lee	105,216	156,499	48.7
Leon	103,047	133,204	29.3
Levy	12,756	15,630	22.5
Liberty	3,379	3,925	16.2
Madison	13,481	14,423	7.0
Manatee	97,115	123,506	27.2
Marion	69,030	93,469	35.4

Appendix A

Estimates of Population, by County in Florida: July 1, 1975

	April 1, 1970 Census	Estimate July 1, 1975	Percent Change
Martin	28,035	47,726	70.2%
Monroe	52,586	55,706	5.9
Nassau	20,626	29,149	41.3
Okaloosa	88,187	102,017	15.7
Okeechobee	11,233	16,950	50.9
Orange	344,311	424,556	23.3
Osceola	25,267	36,668	45.1
Palm Beach	348,993	477.751	36.9
Pasco	75,955	130,190	71.4
Pinellas	522,329	666,595	27.6
Polk	228,515	275,973	20.8
Putnam	36,424	43,494	19.4
St. Johns	31,035	40,220	29.6
St. Lucie	50,836	69,079	35.9
Santa Rosa	37,741	46,892	24.2
Sarasota	120,413	163,172	35.5
Seminole	83,692	136,447	63.0
Sumter	14,839	20,589	38.7
Suwannee	15,559	18,866	21.3
Taylor	13,641	14,553	6.7
Union	8,112	10,395	28.1
Volusia	169,487	212,417	25.3
Wakulla	6,308	8,837	40.1
Walton	16,087	18,043	12.2
Washington	11,453	14,072	22.9

Appendix B

SUGGESTED PROCEDURE FOR CALCULATION OF QUALIFYING FEES OF CANDIDATES FOR OFFICES THE SALARIES OF WHICH ARE ESTABLISHED BY CHAPTER 145, FLORIDA STATUTES

Step 1: Identify the Base Salary of the office in question for the Population Group of your county.

Step 2: Subtract the *minimum* population for your county's Population Group from the population of your county as shown on the attached estimate of population as of July 1, 1975.

Step 3: Multiply the figure obtained in Step 2 by the Group Rate for your county's Population Group.

Step 4: Add the Base Salary (Step 1) and the product of the computation in Step 3.

Step 5: Multiply the sum obtained in Step 4 by a cost-of-living adjustment factor of 1.211. (Note: In the case of candidates for the office of property appraiser who, if elected, would be eligible for the special qualification salary authorized by §145.10(2), F. S., add $2,000 to the result obtained in Step 5 before proceeding to Step 6.)

Step 6: Multiply the result obtained in Step 5 by three percent (3%) to obtain the amount of the filing fee.

Step 7: Multiply the result obtained in Step 5 by two percent (2%) to obtain the amount of the committee assessment.

Step 8: Add the results obtained in Step 6 and Step 7. The result of this computation is the full amount of the qualifying fees of a candidate for nomination to a particular office in your county.

Appendix C

SAMPLE COMPUTATION OF THE QUALIFYING FEES OF A CANDIDATE FOR THE OFFICE OF MEMBER OF THE BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY

Step 1: The July 1, 1975, estimate of population shows Alachua County to have an estimated population of 130,838. This places it in Population Group IV (minimum 100,000 to a maximum of 199,999), which provides for a base salary of $12,000.

Step 2: Subtraction of the minimum population from the actual population is as follows:

130,838 (actual population)
- 100,000 (minimum for Population Group IV)
= 30,838

Step 3: The applicable Group Rate for Population Group IV is $0.045, which multiplies the figure obtained in Step 2 as follows:

30,838 (figure obtained in Step 2)
x $ 0.045
= $1,387.71

Step 4: Addition of the Base Salary (Step 1) and the product of Step 3 is as follows:

$12,000.00
+ 1,387.71
= $13,387.71

Step 5: Multiplication of the sum obtained in Step 4 by the cost-of-living factor is as follows:

$13,387.71
x 1.211
= $16,212.52

Step 6: Multiplication of the result obtained in Step 5 by 3% is as follows:

$$\begin{array}{r} \$16,212.52 \\ \times \quad .03 \\ \hline = \$ \quad 486.38 \end{array}$$

Step 7: Multiplication of the result obtained in Step 5 by 2% is as follows:

$$\begin{array}{r} \$16,212.52 \\ \times \quad .02 \\ \hline = \$ \quad 324.25 \end{array}$$

Step 8: The addition of the results obtained in Step 6 and Step 7 is as follows:

$$\begin{array}{r} \$486.38 \\ + \$324.25 \\ \hline = \$810.63 \end{array}$$

Note: All computations in the foregoing example have been rounded upward to the next full cent.

076-147—June 29, 1976

SOVEREIGN IMMUNITY

LIMITATION ON CLAIMS AGAINST DADE COUNTY OR THE DADE COUNTY SCHOOL BOARD

To: Dick Clark, Representative, 118th District, Miami

Prepared by: Staff

QUESTION:

Is the statutory limit on claims provided in the Florida Tort Claims Act a rigid limit, or may a claimant from Dade County petition the Legislature for judgment rendered in excess of that limit or sue the employer beyond the statutory limit?

SUMMARY:

Pursuant to s. 768.28, F. S., which provides generally for the waiver of the state's sovereign immunity from suits in tort, a claimant from Dade County may bring suit against Dade County or the Dade County School District to recover compensatory money damages in tort in excess of the monetary limitations prescribed in s. 768.28(5). However, except to the extent that insurance coverage is available, that part of any tort judgment obtained by a Dade County claimant against Dade County or the Dade County School District which is in excess of these statutory monetary limitations may not be paid and, to that extent, is unenforceable except upon "further act" of the Florida Legislature; and, until judicially determined otherwise, the power of the Florida Legislature to so "further act" appears limited to the extent that s. 11, Art. VIII, State Const. 1885, as carried forward by s. 6, Art. VIII, State Const. 1968, precludes the enactment of a claims bill directing such an excess to be paid from the funds of Dade County or the Dade County School District or from funds in the State Treasury due that county or school district.

The following discussion is limited solely to a consideration of tort claims originating in Dade County, to claims and suits in tort for money damages against Dade County or the Dade County School District, and to the effect or impact thereon of the Dade County Home Rule Amendment to the Florida Constitution, s. 11, Art. VIII, State Const. 1885, carried forward by s. 6, Art. VIII, State Const. 1968, the Dade County Home Rule Charter, and s. 768.28, F. S., which provides generally for the waiver of the state's sovereign immunity from suit.

By the enactment of s. 768.28, F. S., which became effective generally on January 1, 1975, the Florida Legislature waived the sovereign immunity of the state and its agencies and subdivisions from tort liability, but only to the extent provided therein. More specifically, s. 768.28(5) establishes monetary limitations on the tort liability of the state and its agencies and subdivisions of $50,000 per claimant and $100,000 per incident or occurrence. *See also* s. 768.28(5) providing that the state's liability shall not include punitive damages or interest for the period prior to judgment; and s. 768.28(10) providing that the monetary limitations do not apply to the extent an insurance policy provides coverage. However, as discussed in AGO 075-69, it is also expressly provided in s. 768.28(5) that:

> . . . a judgment or judgments may be claimed and rendered in excess of these amounts . . . and that portion of the judgment that exceeds these amounts may be reported to the legislature but may be paid in part or in whole only by further act of the legislature.

It is clear, therefore, that s. 768.28, F. S., does not fix any rigid limit on the amount of compensatory money damages a claimant may seek to recover in a tort claim or suit against the state or its agencies or subdivisions. Thus, a claimant from Dade County may bring suit against Dade County or the Dade County School District to recover compensatory money damages in tort in excess of the monetary limitations prescribed in s. 768.28(5). However, any part of any judgment obtained by such a claimant that exceeds these statutory monetary limitations may not be paid and, to that extent, is unenforceable except upon some further valid act of the Florida Legislature. *Cf.* AGO 076-41 in which this office concluded that, with certain limited exceptions mentioned in that opinion, *municipalities* possessed no aspect of the state's immunity from tort liability upon which the state's waiver of sovereign immunity contained in s. 768.28 and the statutory limitations applicable thereto could operate.

As to what would constitute a further valid act of the Florida Legislature with regard to a tort judgment obtained by a claimant from Dade County against Dade County or the Dade County School District that exceeds the monetary limitations established by s. 768.28(5), F. S., there are two Florida Supreme Court decisions which affect this issue. In Dickinson v. Board of Public Instruction of Dade County, 217 So.2d 553 (Fla. 1968), the Florida Supreme Court held constitutionally invalid Ch. 67-677, Laws of Florida, a claims bill which directed payment, out of funds appropriated to the Board of Public Instruction of Dade County (and not specifically committed to a particular use) to the father of a student fatally injured while playing on the grounds of a Dade County elementary school, of the sum of $5,000 as compensation for medical expenses and other damages suffered by the father as a result of the student's fatal injury. In those portions of the Supreme Court's decision pertinent to the instant inquiry, it was first concluded that Ch. 67-677 was a local law "because it affected only Dade County and made an appropriation out of specific funds due to the schools of that county only." Then, the Supreme Court considered the Dade County Home Rule Amendment, s. 11(5), (6), and (9), Art. VIII, State Const. 1885 (carried forward by s. 6, Art. VIII, State Const. 1968), and stated as follows:

> As we have done on other occasions, we concur in the view that in matters which affect only Dade County, and which are not the subject of specific constitutional provisions or valid general acts pertaining to Dade County and at least one other county, the electors of Dade County may "govern themselves autonomously and differently than the people of other counties of the state." S & J Transportation, Inc. v. Gordon, 176 So.2d 69 (Fla. 1965). In the cited opinion we announced the view that a reasonable construction of the constitutional scheme formulated for the government of Dade County alone suggests that the Legislature "no longer has authority to enact laws which relate only" to the affairs of Dade County. Indeed, the view which we announced in the last cited case expresses the very essence of so-called "home rule government." Consistent with this view it appears to us that in regard to matters of the nature under consideration, the people of Dade County have adequate authority through the referendum process to make provision in their Home Rule Charter for meeting moral obligations of this type. Actually, in so doing they would be following a course little different than if they were required to pursue a constitutional referendum on a local law. . . . [217 So.2d at p. 555.]

Cf. AGO 074-99 in which this office opined that a special law (or local law, *see* s. 12(g), Art. X, State Const. 1968) relating to a single county operating under a charter adopted pursuant to s. 1(c), Art. VIII, State Const. 1968, and requiring the payment of a sum certain from county funds or from funds due the county from the State Treasury for the relief of a claimant will not become effective unless and until it is approved by the affected county's electorate.

Subsequently, in Dickinson v. Bradley, 298 So.2d 352 (Fla. 1974), the Florida Supreme Court upheld the constitutional validity of another claims bill, Ch. 71-468, Laws of Florida, which provided that the State of Florida reimburse the claimant there involved for compensation lost during the period in which he was suspended from the office of Constable of the Second District of Dade County. In its decision on direct appeal, the Supreme Court quoted at length from the trial court's opinion, finding it to be "an able and accurate explanation of the law governing this case," and, accordingly, affirmed the trial court's judgment that Ch. 71-468 was constitutionally valid. In that portion of the trial court's opinion pertinent to the instant inquiry, it was stated as follows:

> ". . . This case is to be distinguished from the Dickinson case [Dickinson v. Board of Public Instruction of Dade County] . . . in that here there is a recognition of liability of the state for the action of state officers and bodies in the wrongful removal of plaintiff from office and thus depriving him of the emoluments of such office. In Dickinson, [supra] the act involved sought to direct the disbursal of Dade County funds for death resulting from negligence of the Dade County school system. Chap. 71-168 is not a special act in the sense of operating in a particular locality or single county even though the plaintiff was and is a county officer of Dade County. It may be reasoned that it is special in its restriction to a single person. However, any claim bill is restricted to less than the general public and its purpose is to discharge the state's moral obligation to any individual or other entity whom or which the legislature recognizes as being entitled to such. . . . [T]his act does not appropriate the funds of any locality. The act is a valid claim bill, enacted as a general law and in full harmony with other statutory provisions relating to bills of this nature. The Dade County Charter is not involved in the slightest, nor are the other constitutional provisions which have been cited by the defendant. . . ." [298 So.2d at pp. 353-354.]

The trial court then construed the language of Ch. 71-468 relating to the source of the funds to compensate the claimant and concluded that "[i]t is clear that it is the state and not a particular county which is to pay the sum." 298 So.2d at p. 354.

Applying these two Florida Supreme Court decisions to the instant inquiry, and until judicially determined otherwise, it would appear that when a tort judgment obtained by a claimant from Dade County against Dade County or the Dade County School District exceeds the statutory monetary limitations prescribed by s. 768.28(5), F. S., or any insurance coverage available, the Florida Legislature is constitutionally precluded from enacting a claims bill directing such excess to be paid from funds of Dade County or the Dade County School District or from funds in the State Treasury due that county or school district. *See* Dickinson v. Board of Public Instruction of Dade County, *supra.* However, if the Florida Legislature acknowledges or recognizes that there is a liability on the part of the State of Florida (as distinguished from its political subdivisions) to discharge the state's moral obligation to any individual or entity whom or which the Legislature determines is entitled to such, it may constitutionally enact a general law granting relief to a claimant from Dade County *provided* that the source of funds for payment of any such claims bill is limited to state funds, *i.e.*, the state's General Revenue Fund, and not the funds of Dade County or the Dade County School District or any funds in the State Treasury due that county or school district. *See* Dickinson v. Bradley, *supra.*

To the extent that the general statement made in AGO 075-69 with respect to the Florida Legislature directing a political subdivision to pay a tort judgment in excess of the monetary limitations prescribed by s. 768.28(5), F. S., differs from the conclusion reached herein (or the provisions of s. 11, Art. VIII, State Const. 1885, as carried forward by s. 6, Art. VIII, State Const. 1968), such statement is hereby modified so as to except Dade County and the Dade County School District therefrom and, to that extent, is hereby superseded.

CONTINUED

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076-148--June 29, 1976

PAROLE AND PROBATION COMMISSION

SELECTION OF COMMISSION MEMBER TO SERVE AS VICE-CHAIRMAN OF COMMISSION

To: Ray E. Howard, Chairman, Florida Parole and Probation Commission, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

May the members of the Parole and Probation Commission elect a member to serve as vice-chairman of the commission?

SUMMARY:

Pursuant to the authority granted it by ss. 947.06 and 947.07, F. S., and governing rules of parliamentary law, the Parole and Probation Commission may provide, by properly adopted rule of internal organization and procedure for the conduct of its affairs of business, for the designation of a member of the commission as vice-chairman of the commission to act as chairman in the absence or incapacity of the chairman, including the exercise of the duty of calling meetings of the commission. The commission may likewise by rule provide for the method of selection, term of office, and duties of the vice-chairman.

The existence, powers, duties, and general organization of the Parole and Probation Commission are provided by Ch. 947, F. S. As to the internal organization of the commission, s. 947.04(1) provides:

> As soon as practicable after their appointment, the members of the commission shall meet and select from their number a *chairman* who shall serve for a period of 2 years and until his successor is elected and qualified, and they shall likewise select from their number a *secretary* who shall serve for a period of 2 years and until his successor is elected and qualified. (Emphasis supplied.)

Other than the above section requiring a chairman and secretary of the commission, there is no statutory provision requiring or specifically authorizing the creation of any other office—such as vice-chairman—of the commission.

However, s. 947.06, F. S., empowers the commission to meet "from time to time as may otherwise [than at the call of the chairman] be determined by the commission." And s. 947.07, F. S., grants to the commission the following authority:

> The commission shall have power to make such rules and regulations *as it deems best for its governance* including among other things rules of practice and procedure and rules prescribing qualifications to be possessed by its employees. (Emphasis supplied.)

This broad grant of rule-making power to the commission is not limited with respect to the commission's power to meet at such times as it may determine or to organize itself for the performance of its statutory functions, other than by s. 947.06, which requires the commission to meet at the call of the chairman, and s. 947.04, which provides that there shall be a chairman and secretary.

In AGO 074-6, I considered the power of a municipal housing authority to establish its own procedural and organizational rules, including the selection of its officers. It was stated in that opinion:

> When not otherwise prescribed by statute, a public body corporate and politic or other deliberative body may adopt its own regulations and rules of procedure and, in the absence thereof, the general parliamentary rules of law prevail. *See*

62 C.J.S., *Municipal Corporations*, s. 400; 67 C.J.S., *Parliamentary Law*, Section 3. *Accord*: Witherspoon v. State, 103 So. 134 (Miss. 1925); Crawford v. Gilchrist, 59 So. 963 (Fla. 1912). When lawful authority therefor exists, an administrative agency may adopt its own mode or form of organization. *See* 73 C.J.S., *Public Administrative Bodies and Procedure*, s. 19; State v. State Board of Administration, 25 So.2d 880 (Fla. 1946). *See also* 62 C.J.S., *Municipal Corporations*, s. 389.

The only statutory limitations imposed upon the Parole and Probation Commission with respect to officers of the commission and its meetings are that there shall be a chairman and secretary and that the commission shall meet at the call of the chairman.

Therefore, I am of the opinion that the commission may provide, by a properly adopted rule of internal organization and procedure for the conduct of its business, for the designation of one of the commission members as vice-chairman of the commission to act as chairman in the absence of the chairman or during periods of incapacity of the chairman to act as such, including exercise of the duty of calling of meetings of the commission. And the commission may provide by rule for the method of selection, term of office, and duties of the vice-chairman. The vice-chairman may be given ministerial functions relating to the commission's own governance and the conduct of its affairs or business and could be assigned any statutory duty of the commission other than those duties which may be required by statute to be performed only by the commission as a whole or only by some other officer of the commission.

076-149—June 30, 1976

NURSING ACT

EMPLOYEES OF DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ACTING AS NURSING ASSISTANTS IN ADMINISTERING MEDICATION, DEFINITION OF "MEDICATION"

To: William J. Page, Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTIONS:

1. May psychiatric aides, resident life assistants (aides), cottage parents, foster parents, or other persons with similar job descriptions orally administer prescribed, prepackaged, premeasured doses of medication; must this administration occur under the supervision of a physician, registered nurse, or dentist if the medication has already been properly prescribed; would these psychiatric aides, etc., be considered nursing assistants?
2. What is the definition of "medication" as used in the Nursing Act; is medication limited to those items which are normally dispensed only by prescription, so as to exclude aspirin, cold tablets, etc.?

SUMMARY:

Psychiatric aides, resident life assistants (aides), cottage parents, foster parents, or other persons with similar job descriptions may orally administer prescribed, premeasured, prepackaged doses of medication to patients as a purely ministerial function of ensuring that such medication is taken by the patient or in assisting patients in taking the medication when the patients cannot take the medication by themselves, provided that such activity by a nursing assistant in the administration of medication of any description is performed under the adequate supervision of a physician, dentist, or registered nurse.

In your letter requesting my opinion on the foregoing questions you have expressed a familiarity with AGO 075-218, wherein I treated substantially the same inquiry by your predecessor. It is my understanding that the above questions relate only to the amendments made in Ch. 464, F. S., by Ch. 75-273, Laws of Florida, and the manner in which that enactment would modify or alter, if at all, those conclusions reached in AGO 075-218. Furthermore, I must assume that the medication which would be administered by those persons enumerated in your inquiry is prescribed by a physician and the particular medication to be administered to a particular patient is placed in a labeled container by a physician or a registered nurse.

The material amendment to Ch. 464, *supra*, implemented by Ch. 75-273, Laws of Florida, with respect to the instant question is found within s. 464.22, which states:

> **Exceptions.**—No provision of this law shall be construed as prohibiting:
>
> * * * * *
>
> (5) The rendering of services by nursing assistants acting under the adequate supervision of a registered professional nurse.

In AGO 075-218, the relevant statutory language with respect to the foregoing exception read in part "nor shall it be construed to prohibit the rendition of services by auxiliary workers acting under the adequate supervision of a registered nurse." Section 464.22, F. S. 1973. In this context the term "auxiliary" was said to be defined as, "helping or aiding; giving support; subsidiary or additional supplementary power." "A Helper or Aide." Texas & Pacific Motor Transport Co. v. United States, 87 F. Supp. 107, 112 (N.D. Texas, Dallas Div., 1949).

The term "assistant," when used as a noun, has been defined as, "a means of help; an auxiliary; one who assists; a helper." State *ex rel.* City of Cincinnati v. Urner, 70 N.E.2d 881, 884 (Ohio 1947). It has been held that the term implies a presumed absence of authority to use discretionary power. Lower v. State, 184 N.W. 174, 176, 106 Neb. 666; *in accord*, State *ex rel.* Dunn v. Ayers, 113 P.2d 785, 788, 112 Mont. 120; State *ex rel.* Neffner v. Hummel, 51 N.E.2d 900, 904, 142 Ohio St. 324.

Based upon the homogeneous definitions of the terms "auxiliary" and "assistants" as used in the former and present s. 464.22, F. S., it is apparent that the Legislature, in amending Ch. 464, F. S., did not intend to change the law with regard to those individuals that are authorized to administer prescribed, premeasured, prepackaged doses of medication under adequate supervision of a registered nurse. It has been held that a mere change of language in a statute does not necessarily indicate an intent to change the law, for the intent may be to clarify what was doubtful and to safeguard against a misapprehension as to the existing law. State *ex rel.* Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973).

The foregoing authorities support my conclusion that nursing assistants, *i.e.*, psychiatric aides, resident life assistants (aides), foster parents, and individuals with similar job descriptions may orally administer medication or perform other purely ministerial acts such as assisting patients to take oral medications, when the medication cannot be taken by the patients themselves, or other similar services, so long as such assistance is not contrary to good medical practice based on the nature of the medication or treatment and is under the adequate supervision of a registered nurse.

In AGO 075-218, I made the following comments:

> In rendering this opinion, I am mindful of s. 464.021(2) and (3), F. S., regarding the practice of professional nursing and the practice of practical nursing, respectively. Since there is no indication the medication to be administered by auxiliary personnel requires "substantial specialized judgment and skill" and is not "based on knowledge and the application of the principles of biological, physical or social science" as required by s. 464.021(2), it does not appear the ministerial acts to be performed by such personnel are included in the definition of "professional nursing." To construe otherwise would require that even the most routine medication or treatment (*e.g.*, aspirin) would be required to be given by a registered nurse. Such a construction would not only place a substantial burden on the professional nurse but would also fail to utilize his or her professional training inasmuch as the nurse would be performing ministerial acts that could be performed by other staff personnel. It

is a rule of statutory construction that courts will not ascribe to the legislature an intent to create an absurd or harsh consequence, so an interpretation avoiding absurdity is always preferred, City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950).

Nor does the assistance in taking oral medication fall within the "practice of practical nursing" definition (requiring nursing acts in the care of the ill, injured, or infirm under the direction of a licensed physician or a licensed dentist or a registered professional nurse) which does not require the specialized skill, judgment and knowledge required in professional nursing but requires some basic knowledge of nursing care. Section 464.021(3), F. S. Unlike the provisions of s. 464.111(6)(a) and (b), F. S., which requires a practical nurse to have completed a course of nursing in an accredited school or to have completed at least 1½ years in an accredited professional school of nursing, the assistance provided by these auxiliary personnel appears to be merely ministerial in nature requiring no nursing skill and only at the direction and supervision of a licensed physician, a licensed dentist, or a registered nurse.

Therefore, I am of the opinion that a psychiatric aide may orally administer prepackaged doses of medication where such medication has been premeasured and/or mixed and the aide's function is to merely insure that the medication is taken by the patient or to assist the patient in taking medication when such medication cannot be taken by the patient unassisted, provided such auxiliary worker is acting under the adequate supervision of a licensed physician, a licensed dentist, or a registered nurse.

Inasmuch as the Legislature has not shown the intent to change the law with respect to "auxiliaries" or "assistants" performing purely ministerial functions under the adequate supervision of a registered nurse, it is my opinion that psychiatric aides, resident life assistants (aides), cottage parents, foster parents, or other individuals with similar job descriptions may orally administer prescribed, premeasured, prepackaged doses of medication to patients while acting under the adequate supervision of a physician, dentist, or registered nurse.

The term "medicine" has been used as signifying a drug, or a remedial agent that has the property of curing or mitigating diseases or is used for that purpose. State v. Miller, 229 N.W. 569, 572, 59 N.E. 286; Commonwealth v. Seibert, 105 A. 507, 508, 262 Pa. 345. In its ordinary sense, as applied to human ailments, it means something which is administered, either internally or externally, in the treatment of disease or the relief of sickness, Kansas City v. Baird, 92 Mo. App. 204, 208. Any substance or preparation used in treating diseases and articles intended for use in the diagnosis, cure, medication, treatment, or prevention of disease in man or other animals have been held generally as being within the definition of the term "medicine." People v. Garcia, 32 P.2d 445, 447, 1 Cal. App.2d 761; Justice v. State, 42 S.E. 1013, 1014, 116 Ga. 605; Board of Pharmacy v. Quackenbush & Co., 39 A.2d 28, 29, 22 N.J. Misc. 334.

Section 465.031, F. S., defines "medicinal drugs" and "patents or proprietary preparations" for use in the Florida Pharmacy Act, Ch. 465, F. S.

Section 465.031(5), F. S., provides that:

> The term "medicinal drugs" or "drugs" shall mean those substances or preparations commonly known as prescription legend drugs which are required by federal or state law to be dispensed only on a prescription, but shall not include patent or proprietary preparations as hereafter defined.

Section 465.031(6), F. S., provides that:

> The term "patents or proprietary preparations" shall mean a medicine in its unbroken original package which is sold to the public by, or under the authority of, the manufacturer or primary distributor thereof, and which is not misbranded under the provisions of the Florida Food, Drug, and Cosmetic Law.

Notwithstanding the distinctions made in the definitions of various types of medicines and medications by the Florida Pharmacy Act, it is apparent that the legislative intent underlying s. 464.22(5), F. S., is to require that nursing assistants in administering medication of any description or in the performance of any ministerial function or service

in their capacity as aides or assistants act only under the adequate supervision of a registered nurse, a physician, or a dentist.

076-150—June 30, 1976

MUNICIPALITIES

MAY NOT MAKE EFFECTIVENESS OF COUNTY ORDINANCE IN CITY CONTINGENT UPON CITY COUNCIL APPROVAL

To: Betty Lynn Lee, General Counsel, Broward County Commission, Fort Lauderdale

Prepared by: Gerald L. Knight, Assistant Attorney General, and Margaret L. Toms, Legal Research Assistant

QUESTION:

May the governing body of a municipality in Broward County validly adopt an ordinance providing that no Broward County ordinance shall be effective within that municipality unless and until approved by that governing body?

SUMMARY:

An ordinance of a Broward County municipality which purports to make the effectiveness of all Broward County countywide ordinances within that municipality contingent upon the approval of that municipality's governing body appears violative of s. 1(i), Art. VIII, State Const., providing that county ordinances shall be filed with the Secretary of State and shall become effective at such time thereafter "as is provided by general law."

According to your letter, the City Council of the City of Margate has adopted an ordinance (No. 76-6) providing that no ordinance of Broward County shall become effective within that city until approved by the city council. You contend that such municipal ordinance is unconstitutional.

It is clear that a county, whether operating under a charter or noncharter government, may adopt an ordinance applicable throughout the county—in the incorporated, as well as the unincorporated, areas thereof—when such ordinance deals with a subject matter that is susceptible of countywide regulation. *Accord:* Attorney General Opinion 071-223. Moreover, the Florida Constitution provides that each county ordinance "shall be filed with the secretary of state and shall become effective at such time thereafter as is provided by general law," s. 1(i), Art. VIII, State Const.; and, according to general law, a county ordinance shall become effective upon receipt of official acknowledgment from the Department of State that said ordinance has been filed therewith, or at a later date prescribed in the ordinance, s. 125.66(1), F. S.

Accordingly, the Board of County Commissioners of Broward County may adopt an ordinance applicable throughout that county, which ordinance shall become effective upon the county's receipt of an acknowledgment of filing from the Department of State or at a later date prescribed in the ordinance. Moreover, since neither s. 125.66(1), F. S., nor any other provision of general law authorizes a municipality to alter or modify in any way the effective date of county ordinances in general, it would appear that the governing body of the City of Margate may not adopt a municipal ordinance which has as its purpose and effect the avoidance or delay of the effectiveness of all Broward County ordinances within that city. Thus, I am of the opinion that, to the extent the municipal ordinance in question purports to make the effectiveness of all Broward County countywide ordinances within that city contingent upon the approval of that city's governing body, such municipal ordinance is constitutionally infirm.

In reaching the foregoing conclusion, I have not overlooked that provision of s. 1(g), Art. VIII, State Const., which states that, in a county operating under a charter government, "[t]he charter shall provide which shall prevail in the event of conflict

between county and municipal ordinances"; or s. 8.04 of the Broward County Charter, which provides, generally, that "any county ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict." However, in my opinion, both of these provisions, when read within the context in which they appear, *see* Burnsed v. Seaboard Coastline R. Co., 290 So.2d 13,16 (Fla. 1974), are concerned with substantive conflict between particular county and municipal ordinances regulating the same subject matter and do not authorize a Broward County municipality to adopt an ordinance delaying or otherwise making contingent the effectiveness therein of a Broward County ordinance which is not in conflict with any ordinance of that municipality on the same subject matter. *Cf.* s. 1(f), Art. VIII, State Const., which provides in part that a noncharter county ordinance "in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict"; and *Commentary*, 26A F.S.A., p. 271.

076-151—June 30, 1976

PUBLIC EMPLOYEES

RIGHTS TO REEMPLOYMENT UPON SEPARATION FROM MILITARY SERVICE

To: J. H. "Jim" Williams, Lt. Governor, Tallahassee

Prepared by: Staff

QUESTIONS:

1. What is the status of s. 115.01, F. S., in light of federal legislation relating reemployment of veterans, and what is the legislative intent of this section?
2. What rights has a veteran who was on probationary status upon entering military service?
3. What must the state do for a returning veteran who has had short-term military duty?
4. What are the state's responsibilities to an employee who undergoes inactive duty training?

SUMMARY:

Public employees are protected by Title 38 U.S.C. s. 2021, which preempts Florida statutes and regulations pertaining to veterans' reemployment rights.

The United States Congress enacted the Universal Military Training & Service Act of 1967, Title 50 U.S.C. App. with s. 459 relating to reemployment rights of veterans. Public Law 93-598 repealed this section, and similar provisions for reemployment rights of veterans as reenacted are contained in Title 38 U.S.C. s. 2021 (effective December 3, 1974), which extends such rights to employees of states or political subdivisions thereof.

Florida law regarding leave of absence to public employees for military service includes Ch. 115, F. S., and State Personnel Rule 22A-8.14, F.A.C.

The threshold question to determine the applicable law involves the doctrine of preemption emanating from the U. S. Constitution, s. 2, Art. 6, Supremacy Clause. Federal law preempts state law if Congress clearly manifests intent to supersede the exercise of state power. Hines v. Davidowitz, 312 U.S. 52 (1940); Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); N.Y.S. Dept. of Social Services v. Dublino, 413 U.S. 405 688 (1973).

A reading of the federal law and the legislative history and purpose of Public Law 93-508 indicates that Congress has expressed its intent to supersede state power as specifically delineated in Title 38 U.S.C. 43, and such provisions would be the controlling law in Florida. *Cf.* U.S. Code Cong. and Adm. News, 1974, p. 6313. Title 38 U.S.C. s. 2021(a)(B)(ii) does state:

> Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a state or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

Thus, those specific areas which have been addressed by Congress are controlled by federal law, but any state law granting benefits in addition to federal provisions controls. In areas not specifically spoken to by federal legislation state law applies. (State statutes of limitations applied in absence of federal provision.) Bell v. Aerodex, Inc., 473 F.2d 869 (5th Cir. 1973); Gruca v. U.S. Steel Corp., 495 F.2d 1252 (3rd Cir. 1974).

Section 115.15, F. S., which adopted federal law for public employees, specifically naming Title 50 App. s. 308, U.S.C.A., as it relates to reemployment of public employees granting a leave of absence for military duty, would be preempted by the superseding Title 38 U.S.C. s. 2021, as of the December 3, 1974, effective date.

This office has issued several opinions concerning leave of absence for military training in accord with the pertinent federal law at the time of request, which allowed for discretion at state and local levels. *Cf.* AGO 050-478, October 6, 1950, Biennial Report of the Attorney General 1949-1950, p. 158; AGO's 059-84, 074-26, and 074-204. However, under the new federal law, Title 38 U.S.C. s. 2021, reemployment rights as set forth are *mandatory*, effective December 3, 1974.

The detailed, factual questions set forth in your letters are matters of federal law and case law interpretation. I would respectfully direct such inquiries to those administrative federal agencies created by Congress with expertise in the area, specifically the U.S. Department of Labor, Labor Management Services Administration, for thorough examination and proper response and will at this point briefly comment on the major areas in question.

Your first question involving the intent of s. 115.01, F. S., with respect to all types of military leave without pay is a matter within the doctrine of preemption as discussed above.

Your second question sets forth various factual situations concerning employee status. Again, reference must be made to federal law, 38 U.S.C. s. 2021, rather than s. 115.09, F. S., and Personnel Rule 22A-8.14, F.A.C. Specific responses could best be handled by the U.S. Department of Labor, Labor Management Services Administration, Office of Veterans' Reemployment Rights, for a case-by-case determination. For purposes of veterans' reemployment rights, an employee in an "other than temporary position" has full reemployment rights. While there are some conflicting cases in this area, it would appear, if the nature of the position is permanent and there is a reasonable expectation that employment would be continuous, that an employee who enters into military service while in probationary status has a right to return to that status upon completion of military duties. Moe v. Eastern Airlines, Inc., 246 F.2d 215 (5th Cir. 1957), *cert. den.* 357 U.S. 936 (1958), *reh. den.* 358 U.S. 858 (1958), Brickner v. Johnson Motors, 425 F.2d 75 (7th Cir. 1970); *cf.* Lesher v. P. R. Mallory & Co., 166 F.2d 983 (7th Cir. 1948).

Question 3, concerning short-term military and employee status, is answered substantially the same as question 2 in that reference must be made to federal law rather than state law or regulations.

Question 4 with respect to inactive duty training is also referenced to controlling federal provisions. Inasmuch as there has been a change of law since the issuance of AGO 074-26, its applicability is superseded by the new federal legislation.

076-152—July 1, 1976

GOVERNOR

POWER TO FILL VACANCY ON COMMISSION ON ETHICS

To: Reubin O'D. Askew, Governor, Tallahassee

Prepared by: Staff

QUESTION:

Does the Governor have constitutional authority to appoint the ninth member of the Florida Commission on Ethics in the event of a vacancy?

SUMMARY:

Pursuant to s. 1(f), Art. IV, State Const., and ss. 112.321(1) and 114.04, F. S., the Governor has the constitutional authority to appoint the ninth member of the Florida Commission on Ethics.

Section 112.320, F. S., provides for the creation of a Commission on Ethics "to serve as guardian of the standards of conduct" for state employees and officers at all levels of government. In its original version, the commission was to be composed of nine members: Four members appointed by representatives of the legislative branch, and the remaining five appointed by the Governor, subject to confirmation by the Senate. Chapter 74-176, Laws of Florida. As amended by Ch. 75-199, Laws of Florida, s. 112.321(1), F. S., maintains the nine-member commission, but reduces the number to be appointed by the Governor from five to four. It is the ambiguity created by this inconsistency which has prompted your question regarding the appointment of a ninth commission member.

There is no doubt that there must exist a legal vacancy before the executive power to appoint is activated, s. 1(f), Art. IV, State Const.; *cf.* Gray v. Bryant, 125 So.2d 846 (Fla. 1960); and the existence of such a vacancy in the present situation has been determined by the Legislature:

> Every office shall be deemed vacant in the following cases:
>
> * * * * *
>
> (6) When any office created or continued by the constitution or laws shall not have been filled by election or appointment under the constitution or law creating or continuing such office. [Section 114.01(6), F. S.]

Because s. 112.321(1), F. S., as amended by Ch. 75-199, Laws of Florida, "created or continued" the office of the ninth member of the Commission on Ethics originally created by Ch. 74-176, Laws of Florida but failed to provide for an appointment while so doing, the office must be deemed vacant.

The vacancy existing on the Florida Commission on Ethics, because a vacancy in a state office, shall be filled by appointment by the Governor pursuant to s. 1(f), Art. IV, State Const., and s. 114.04, F. S.

Any issues respecting confirmation by the Senate have not been explored at this time, and no opinion regarding the same is intended to be expressed herein.

076-153—July 2, 1976

COMMUNITY MENTAL HEALTH CENTERS

CONFIDENTIALITY OF PATIENTS' PERSONAL RECORDS; COUNTIES' FINANCIAL SUPPORT OF CENTERS FOR TREATMENT OF COUNTY RESIDENTS

To: Randall N. Thornton, Attorney for Sumter County Court Clerk, Wildwood

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTION:

May the clerk of the circuit court acting in his capacity as county auditor require a community mental health facility established and operated under the Community Mental Health Act to disclose the names

and addresses of patients who are residents of the county, in the absence of consent of patients or court order, so as to justify payments by the board of county commissioners to such facility?

SUMMARY:

A community mental health facility established and operating under the Community Mental Health Act (part IV, Ch. 394, F. S.) is prohibited by the terms of s. 394.459 from releasing to the clerk of the circuit court, acting as county auditor, any part of a patient's clinical record, including the patient's name and address or other identifying information, except when consent has been properly given by the patient and/or the guardian, attorney, or designated representative for the patient or upon court order. Section 394.459 does not prohibit the release of other information from records maintained by the center (such as the total number of patients who are residents of the particular county, number of patients from that county admitted or discharged within a given period, the number of patients who are residents of another county or counties, the total number of all patients, etc.) and other records relating to budgeting and finances and operating costs of the mental health center, and such public records (other than the clinical records) are subject to public inspection pursuant to the Public Records Law (Ch. 119, F. S.).

Your question is answered in the negative.

According to your letter, the Lake/Sumter Mental Health Center has refused to release the names and addresses of Sumter County patients who are served by the center, asserting that such disclosure is prohibited by the Florida Mental Health Act (part I, Ch. 394, F. S.). Due to the center's refusal to divulge the requested information, the Clerk of the Circuit Court in Sumter County, acting in his capacity as county auditor, has maintained he cannot make payments to the center as authorized under the Community Mental Health Act (part IV, Ch. 394, F. S.), as without such information he cannot determine whether each bill presented is a valid county obligation.

The Lake/Sumter Mental Health Center is a community mental health facility operating under the Community Mental Health Act. This act establishes a system of locally administered and controlled community mental health services under the supervision of the state by the Department of Health and Rehabilitative Services. Section 394.66(1) and (7), F. S. The community mental health programs so established are to be integrated with state-operated programs into a unified mental health system. Section 394.66(3).

The community mental health programs are to be conducted within service districts designated by the Department of Health and Rehabilitative Services. Section 394.68, F. S. In addition, the department has established board districts administered by a mental health board, which may include one or more service districts. Section 394.67(11), F. S. The Lake/Sumter Mental Health Center provides service to a service district composed of Lake and Sumter Counties. The board district also consists of both counties and is under the jurisdiction of a district mental health board. *See* Rule 10E-1.04, F.A.C.

The district mental health boards are appointed by the governing body or bodies of the county or counties having jurisdiction in the board district. Sections 364.67(2) and 394.70, F. S. The Department of Health and Rehabilitative Services is authorized to contract with the district boards to provide for, and be provided with, mental health services and facilities. Section 394.457(3), F. S. In addition, the county or counties within a board district possess the same power as the department to contract with the mental health board for mental health services. Section 394.73(1), F. S. Section 394.73(3) states that "two or more counties within a board district may enter into agreements with each other for the establishment of joint mental health programs."

The financing of the community mental health services is based upon a uniform ratio of state government responsibility and local participation. Section 394.66(5), F. S. The state share of financial participation is 75 percent of the total operating costs less the following: Nonreimbursable expenses as specified in s. 394.75(3), F. S.; federal grants, excluding funds earned under Titles IV-A and VI of the Social Security Act; inpatient and third-party payments for which reimbursement has been requested from the state; and

three-quarters of all other noninpatient fees excluding funds earned under Titles IV-A and VI of the Social Security Act. Section 394.76(8), F. S.

Operating and capital outlay costs of community mental health programs which are not funded by the state or federal government may be financed by local matching funds. Section 394.76(8), F. S. "Local matching funds," as used in the Community Mental Health Act (part IV, Ch. 394, F. S.), means:

> . . . funds received from governing bodies of local government, including city commissions, county commissions, district school boards, special tax districts, private hospital funds, private gifts, both individual and corporate, and bequests and funds received from community drives or any other sources. [Section 394.67(8), F. S.]

The Department of Health and Rehabilitative Services has further defined "local matching funds" to mean:

> Funds from any local source excluding State and Federal Funds, all inpatient fees for which reimbursement has been requested from the State, and three-fourths (3/4) of all other patient fees. [Rule 10E-1.07(2), F.A.C.]

Counties are specifically authorized to appropriate funds to support all or any portion of the costs of services and construction not met through support of the state or federal governments. Section 394.80, F. S. *See also* ss. 394.453; 394.455(8), (9), (10), and (11); 394.67(7) and (8); 394.71(2); 394.73(2) and (3); 394.74(1) and (2); and 394.75, F. S.

However, neither the Community Mental Health Act nor the rules promulgated by the Department of Health and Rehabilitative Services establish clear guidelines as to the manner in which local funds are to be received and disbursed or as to what information a mental health center is required to divulge to the governing body of the county or counties within a board district as a condition to receipt of local funds.

The district mental health board is required to prepare a budget and to "receive and disburse such funds as are entrusted to it by law or otherwise, including funds from both private and public sources." Section 394.71(2), F. S. In addition, the board is required to report to the governing body of the county as to a program of community mental health services and to submit an annual report to the county governing body. Section 394.71(4), F. S. Likewise, where a board district comprises two or more counties, the board is required to submit, prior to the budget submission date of each governing body of the affected counties, an estimate of the proportionate share of costs of mental health services to be borne by each governing body. A rule promulgated by the Department of Health and Rehabilitative Services states that the manner in which local funds, both public and private, are received shall be determined jointly by the district board and the various funding sources within the board district. Rule 10E-1.07(2), F.A.C.

It is clear, therefore, that the Legislature intended that county payments of local matching funds should be received in accordance with procedures set forth in agreements between the district mental health board and the county commission. *See* s. 394.73(2), F. S. In an informal advisory opinion to Harry A. Johnston, II, Attorney for the Clerk of the Circuit Court of Palm Beach County, November 22, 1971, supplemented by letter to John B. Dunkle, Clerk of Circuit Court of Palm Beach County, December 16, 1971, I concluded that monthly payments to a community mental health center based upon an agreement limiting the county's share to an agreed-upon percentage of the operating and capital expenses of the center and requiring monthly requisitions to be accompanied by a certified copy of the previous month's list of payroll warrants and warrants for operating expenses were not unauthorized "lump sum" payments and could be made by the county after a review by the clerk, as county auditor, of such certified list of payroll warrants and warrants for operating expenses submitted to him with the monthly requisitions. The information to be supplied the governing body of a county seeking to make payments pursuant to the Community Mental Health Act for mental health services or construction could, and should, also be worked out by agreement. In specific regard as to whether a clerk may require a community mental health center to release the names and addresses of the county patients served there, reference must be made to the Florida Mental Health Act (part I, Ch. 394, F. S.).

The Florida Mental Health Act establishes a "Bill of Rights" for patients suffering from, and being treated for, mental illness. Section 394.459, F. S. One of the rights guaranteed to any patient receiving treatment in a community mental health facility is

the right to the confidentiality of his or her clinical record. Section 394.459(9). This section states:

> A clinical record for each patient shall be maintained. The record shall include data pertaining to admission and such other information as may be required under regulations of the department. Unless waived by the patient or his guardian or attorney, the privileged and confidential status of the clinical record shall not be lost by either authorized or unauthorized disclosure to any person, organization, or agency. The clinical record shall not be a public record and no part of it shall be released, except:
> (a) The record may be released to physicians, attorneys, and government agencies as designated by the patient, his guardian or his attorney.
> (b) The record shall be produced in response to a subpoena or released to persons authorized by order of court, excluding matters privileged by other provisions of law.
> (c) The record or any part thereof may be disclosed to a qualified researcher, a staff member of the facility, or an employee of the department when the administrator of the facility or secretary of the department deems it necessary for treatment of the patient, maintenance of adequate records, compilation of treatment data, or evaluation of programs.
> (d) Information from the clinical records may be used for statistical and research purposes if the information is abstracted in such a way as to protect the identity of individuals.

A county clerk is not among those authorized to receive information under any of the exceptions listed above. Hence, a community mental health facility as defined in s. 394.455(10), F. S., is prohibited from releasing a patient's clinical record or any part thereof to a county clerk absent the patient's consent or court order.

Part I of Ch. 394, F. S., does not expressly state whether or not a patient's name and address are part of his or her clinical record, but s. 394.459(9)(d) implicitly does by prohibiting the release of any information from the clinical record which identifies individuals or patients. "Clinical record" is defined by s. 394.455(23):

> "Clinical record" means all parts of the record required to be maintained and includes all medical records, progress notes, charts, admission and discharge data, and all other information recorded by a facility which pertains to the patient's hospitalization and treatment.

In addition, s. 354.459(9) requires a clinical record to be maintained for each patient and provides that the clinical record shall include "data pertaining to admission and such other information as may be required under regulations of the department [of health and rehabilitative services]." Pursuant to this delegation of authority, the Department of Health and Rehabilitative Services promulgated the following rule defining "clinical record":

> "Clinical record" means all parts of the patients' records required to be maintained by a receiving and treatment facility including all medical records, progress reports, charts, admission data, discharge data, court orders, hospitalization certificates, law enforcement officers' written reports, and physician certificates, as well as all other information recorded by a receiving or treatment facility which pertains to the patients' admission, designation of representatives, diagnosis, hospitalization, treatment, and release. [State Mental Health Regs., Ch. 10E-2.01(11)]

I am of the opinion that data pertaining to admission and release or designation of representatives which is part of the clinical record (as defined above) which the statute requires to be maintained for each patient includes the names and addresses and all other identifying information of the individual patients. This conclusion is buttressed by the clear intent of the Legislature to insure the patient's right to confidentiality. Obviously, if community mental health facilities were authorized to release information as to a patient's identity, a large part of this confidentiality would be lost.

In determining that a patient's clinical record includes his or her name and address and other identifying information and that, therefore, such information may not be

disclosed to the clerk in the absence of the patient's consent or court order, I am not unmindful of the constitutional and statutory preauditing duties of the clerk of the circuit court. Section 1(d), Art. VIII, of the State Constitution in pertinent part reads:

> When not otherwise provided by county charter or special law approved by the vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds. [*Also see* ss. 28.101 and 125.17, F. S.]

In addition, s. 129.08, F. S., prohibits the board of county commissioners from incurring any unlawful expenses. Section 129.09, F. S., imposes personal liability upon the clerk of the circuit court, acting as auditor, when the clerk signs any warrant for the payment of any unlawful claim. Mayes Printing Co. v. Flowers, 154 So.2d 859 (Fla. 1963).

It is clear, however, that counties are expressly authorized by law to appropriate funds to support all or any portion of the costs of services furnished by community mental health facilities established and operating under part IV of Ch. 394, F. S. Sections 394.66 and 394.80. *See also* ss. 394.453; 394.455(8), (9), (10), and (11); 394.67(7) and (8); 394.73(2) and (3); 394.74(1) and (2); and 394.75(2)(b)1. and (c)1.

It is important to note that only the patient's clinical record is privileged under s. 394.59(9), F. S.; Rule 10E-2.01, F.A.C.; the statute does not prohibit the disclosure of other records of the community mental health facility. In fact, when such mental health facility is created by law or acting on behalf of a public agency, its records, unless exempted by law, are open to the public pursuant to the Public Records Law; *see* ss. 119.011(1) and (2) and 119.07, F. S.

Therefore, I am of the opinion that information may be released regarding, for example, the total number of patients who are residents of the particular county, number of patients from that county admitted or discharged within a given period, the total number of patients who are residents of another county or counties, the total number of all patients, etc., as well as other records related to the finances and operating costs of the center (which may be incorporated in any of the s. 394.73(3), F. S., agreements; the s. 394.74 annual district plan; the s. 394.71(1) and (4), budget data; or the ss. 394.73-394.77 records).

076-154—July 6, 1976

DISTRICT SCHOOL BOARDS

MAY NOT INCLUDE STATE WAGE RATES IN CONTRACTS FOR CONSTRUCTION PROJECTS

To: Ralph Turlington, Commissioner of Education, Tallahassee

Prepared by: Pat Dunn, Assistant Attorney General

QUESTION:

Are district school boards prohibited from obtaining state wage rates from the Florida Department of Commerce for inclusion in contract documents for construction projects?

SUMMARY:

School boards are not statutorily authorized to include state wage rates in contract documents for construction projects of educational facilities.

Your question is answered in the affirmative on the basis of the following discussion.

Prior to July 1, 1974, all *contractors* for public school construction projects were required by s. 235.32, F. S., to comply with Florida's Prevailing Wage Law, s. 215.19, F. S., which states in part that:

(1)(a) Every contract in excess of $5,000 in amount to which the state, any county or municipality in the state, or any political subdivision of the state or other public agency or authority is a party which requires or involves the employment of free laborers, mechanics, or apprentices in the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall contain a provision that the rate of wages for all laborers, mechanics and apprentices, if such apprentices are available in the area in which the said public work is located, employed by any contractor or subcontractor on the work covered by the contract *shall be not less than the prevailing rate of wages for similar skills* or classification of work in the city, town, village or other civil division of the state in which the said public work is located, which provision shall refer to and incorporate this section in the contract by reference.

(b) The provisions of this section shall be called to the attention of all prospective bidders on public contracts of this nature by a notice in the specifications, and by *the insertion in the specifications of a schedule of prevailing wage rates in the* locality or area where the work is contemplated, *furnished by the Division of Labor of the Department of Commerce*, and such schedule of prevailing wage rates shall for the purpose of the contract and for the duration of the contract be deemed the prevailing wage rates as contemplated by this section regardless of any previous or subsequent determination by said division. (Emphasis supplied.)

The requirement to comply with s. 215.19, F. S., was repealed and amended by Ch. 74-374, Laws of Florida (*see* s. 235.32, F. S.), which expressly exempted the *contractor and the contract* "from the requirements of s. 215.19, relating to the rate of payment for wages of laborers, mechanics and apprentices." However, Chapter 74-374 (s. 235.32) further provides that:

> Notwithstanding any other provision of this section, if 25 percent or more of the costs of any construction project is paid out of a trust fund established pursuant to 31 U.S.C. s. 1243(a)(1), laborers and mechanics employed by contractors or subcontractors on such construction projects will be paid wages not less than those prevailing on similar construction projects in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. . . .

Since the 1974 amendment to s. 235.32, F. S., expressly and specifically exempts the *contractor and the contract* from the requirements of s. 215.19, F. S., a school board could not unilaterally include or insert such a wage provision, as envisioned by s. 215.19, in the contract documents. A school board cannot do anything not expressly or by necessary implication authorized by a statute.

School boards, albeit creatures of the Constitution, are part of the machinery of government exercising, pursuant to legislative authority, such governmental powers of the state as the law confides in them and operating at the local level as an agency of the state. The extent of their powers rests exclusively in legislative discretion. Such powers may be enlarged, diminished, modified, or revoked at the pleasure of the Legislature. Buck v. McLean, 115 So.2d 764 (Fla. App., 1959); Board of Public Instruction v. State *ex rel.* Allen, 219 So.2d 430 (Fla. 1969). The Legislature has described and enumerated in s. 235.32, F. S., what shall be the substance of a contract in which the school board enters. A statute which enumerates certain things on which it is to operate or forbids certain things must be construed as excluding from its operation all things not expressly mentioned therein. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). When a statute authorizes public officials to proceed in a particular way or upon specific conditions, it implies a duty not to proceed in any manner other than that which is authorized by law. White v. Crandon, 156 So. 303 (Fla. 1934). To state it another way, a legislative directive as to how a thing shall be done is, in effect, a prohibition against its being done in any other way. *See* Alsop v. Pierce, 19 So.2d 799 (Fla. 1944).

Section 235.32, F. S., also provides for the inclusion of the federal prevailing wage rates as determined by the U.S. Secretary of Labor in accordance with the Davis-Bacon Act, as amended, 40 U.S.C. s. 276a, in those projects 25 percent or more of the costs of which are funded by federal assistance to state and local governments under Public Law 92-512.

Aside from the clear expression of an exemption in the law and the implied lack of authority above discussed, prevailing wage rates as determined by the Division of Labor of the Department of Commerce for a given area within the state may be different from the wage rates as determined by the Secretary of Labor for the same area and generally are not interchangeable due to computation variables.

Therefore, a school board is not authorized by law to include the state wage rates in a contract entered into under s. 235.32, F. S., and, thus being without statutory authority, is in law and effect prohibited from doing so. What the law does not authorize is forbidden, and since statutory agencies, such as school boards, do not possess any inherent powers, these agencies are limited to the powers granted either expressly or by necessary implication from the statutes governing them. State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974).

It is well established in Florida that school boards have "only such powers to contract as the legislature, either expressly or by necessary implication, confers. . . . " 29 Fla. Jur. s. 27, citing Babcock Inc. v. Board of Public Instruction for Dade County, 140 So. 644 (Fla. 1932). It has also been held that a board of public instruction should not assume authority when the right to exercise authority is doubtful. Harvey v. Board of Public Instruction for Sarasota County, 133 So. 868 (Fla. 1931).

076-155—July 9, 1976

GOVERNOR

POWER TO SUSPEND MAYOR OF JACKSONVILLE FROM OFFICE

To: Reubin O'D. Askew, Governor, Tallahassee

Prepared by: James D. Whisenand, Deputy Attorney General

QUESTIONS:

1. Does the Governor have the power to suspend the Mayor of the City of Jacksonville from office?
2. If the answer to question 1 is in the affirmative, what procedure should be utilized to fill the vacancy which would be created by such a suspension?

SUMMARY:

Although the matter is not entirely free from doubt and would be an appropriate subject for a request for an opinion of the Florida Supreme Court, it would appear that if, in the exercise of his constitutional discretion, the Governor deems it advisable to suspend the Mayor of the City of Jacksonville and make an appointment to such office for the period of the suspension, such suspension and appointment are authorized under s. 7(c), Art. IV, State Const.

Because of their interrelationship, your questions will be answered together. It should also be noted that you advise in your letter that the Mayor of the City of Jacksonville has been indicted by a grand jury for several criminal violations, which include two misdemeanors and a felony. The scope of the discussion which follows is limited to the specific situation which prompts your letter.

The questions you have posed first require an examination into the nature of the City of Jacksonville, which is, in some regards, rather unique. Section 9 of Art. VIII of the State Constitution of 1885, the full force and effect of which is preserved by s. 6(e) of Art. VIII of the present Constitution provides, *inter alia*:

> The Legislature shall have power to establish, alter or abolish, a *Municipal corporation* to be known as the City of Jacksonville, extending territorially throughout the present limits of Duval County, in the place of any or all county, district, municipal and local governments, boards, bodies and officers,

> constitutional or statutory, legislative, executive, judicial, or administrative, and shall prescribe the jurisdiction, powers, duties and functions of *such municipal corporation*, its legislative, executive, judicial and administrative departments and its boards, bodies and officers . . . . *Such municipality* may exercise all the powers of *a municipal corporation and shall also be recognized as one of the legal political divisions of the State with the duties and obligations of a county* and shall be entitled to all the powers, rights and privileges, including representation in the State Legislature, which would accrue to it if it were a county. . . . (Emphasis supplied.)

It seems clear from the foregoing that, although the City of Jacksonville may exercise county powers, it is a municipal corporation. Thus, construing the foregoing together with the constitutional provisions relating to the Governor's power to suspend officers, it would appear most reasonable to conclude that, for purposes of the exercise of such powers, the Mayor of the City of Jacksonville is a municipal officer. Accordingly, if in the exercise of your constitutional discretion you deem it advisable to exercise your power to suspend to the Mayor of the City of Jacksonville, such power should be exercised pursuant to s. 7(c), Art. IV, State Const., which provides as follows:

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

On the basis of the foregoing I am of the view that, although the Mayor of the City of Jacksonville may exercise some functions of a county officer, he is clearly a municipal officer and may be regarded as such for the purposes of the Governor's suspension powers under s. 7(c), Art. IV, *supra*. In reaching this conclusion, I am not unmindful of the provisions of s. 112.49, F. S., to the effect that where municipal and county government have been merged

> . . . any officer, official or employee of such merged government who exercises the powers and duties of a county officer, whether he shall be elected or appointed, shall be deemed to be a county officer and therefore subject to the power of the Governor under the State Constitution to suspend officers. . . .

It should first be noted that the quoted provision applies only to an officer who exercises the powers and duties of *a county officer*, which does not appear to be the case here. And, in any event, s. 112.49, F. S., does not purport to deprive a municipal officer of such a merged government of his status as municipal officer, but merely has the effect, at best, of making him also a county officer for the purposes of the Governor's suspension powers.

Further, when a statute is susceptible to more than one construction, it must be given that construction which will avoid conflict with a constitutional provision, in this case the provisions of s. 7(c), Art. IV, which authorize the suspension of municipal officers. It is equally well established that in cases of conflict between statutory and constitutional provisions the former must yield to the latter. *See In re* Advisory Opinion of Governor, 313 So.2d 697 (Fla. 1975), in which the court concluded that as between the Constitution and the Dade County Charter, the Constitution must prevail.

As to the Governor's power to make an appointment under s. 7(c), Art. IV, State Const., I find no provision of law or the charter of the City of Jacksonville which vests such power elsewhere. In so concluding, I am aware of s. 112.51, F. S., which provides that a temporary appointment to fill a temporary vacancy in municipal office occurring under the circumstances described therein "shall be made in the same manner and by the same authority by which permanent vacancies for such office are filled as provided by law." However, I find no provision of law, including the charter acts of the City of Jacksonville, which provides a manner for making *appointment* to fill the office of mayor if he is suspended from office by the Governor pursuant to s. 7(c), Art. IV, in the present circumstances. Thus, the Governor's power to appoint under s. 7(c), Art. IV, does not appear to be vested elsewhere by the law or municipal charter. Moreover, I am aware of s. 6.07 of the Charter of the City of Jacksonville, as amended by Ch. 70-748, Laws of Florida, which provides that the president of the council shall automatically become acting mayor if the mayor is absent or becomes incapable of acting as mayor and

incapable of delegating his duties. However, there is nothing in s. 6.07 which specifically relates to suspension of the mayor. Further, I am of the view that such charter provision contemplates only such circumstances as when the mayor is physically absent from the county or is by reason of physical or mental infirmity or impairment unable to carry out the duties of his office. *See* 20A Words and Phrases *Incapable*, pp. 62-65.

The above discussion has resolved any inconsistencies that may exist between the provisions of Ch. 112, F. S., and Articles IV and VIII, State Const., in a manner that preserves the constitutional integrity of both. Since there are constitutional infirmities that only the Florida Supreme Court can resolve, it would be appropriate for you to exercise your constitutional power under s. 1(c), Art. IV, State Const., to request an advisory opinion of the Florida Supreme Court.

076-156—August 10, 1976

PUBLIC RECORDS LAW

MATERIALS GATHERED BY STATE ATTORNEY'S INVESTIGATION—WHEN EXEMPT

To: Gordon Oldham, State Attorney, Ocala

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTIONS:

1. Are the investigatory records and files compiled by the state attorney's office prior to the trial of a criminal case (said records and files including copies of law enforcement investigative reports) public records within the purview of Ch. 119, F. S.?
2. Are such investigatory records and files public records once prosecution is completed by the state attorney's office?
3. Are such records and files compiled by the office of the state attorney, including autopsy reports, that never result in prosecution of an individual public records within the purview of Ch. 119?

SUMMARY:

The investigatory records and materials compiled by the state attorney's office prior to the trial of a criminal case pursuant to its statutory investigatory or prosecutorial duties, ss. 27.02, 27.03, 27.04, and 27.255, F. S., are confidential pursuant to the "police secrets" rule and therefore are exempted from public inspection under the Public Records Law (Ch. 119, F. S.), prior to and following prosecution and final judgment unless such information or materials become a part of the public record of a trial, when such records and materials contain information which, if released publicly, would burden effective law enforcement. The "police secrets" rule does not exempt records such as arrest records, autopsy reports, business records, copies of informations and indictments, and the like. These records are public records subject to public inspection under Ch. 119 unless a specific exemption exists by statute.

AS TO QUESTION 1:

Florida's Public Records Law provides in relevant part that:

> It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person. [Section 119.01, F. S.]

"Public records" means:

> . . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. [Section 119.011(1), F. S.]

"Agency" is defined to include:

> . . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . . . [Section 119.011(2), F. S.]

The state attorney is a constitutional officer, s. 17, Art. V, State Const., with duties provided by law, ss. 27.02, 27.03, 27.04, and 27.06, F. S. Clearly, the state attorney's office is an "agency" within the meaning of s. 119.011(2), F. S., and hence subject to the requirements of ss. 119.01 and 119.07(1), F. S., unless exempted therefrom by law. The answer to your question depends, therefore, on whether the investigative materials to which you refer are exempted by law from the Public Records Law pursuant to s. 119.07(2)(a), F. S. That subsection in part states that all public records which presently are provided by law to be confidential shall be exempt from public disclosure under the provisions of s. 119.07(1).

The Florida Supreme Court has held that investigatory activity is necessary to the efficient execution of, and incidental to, the state attorney's statutory duty, s. 27.02, F. S., to prosecute criminal actions on behalf of the state. Eagan v. DeManio, 294 So.2d 639 (Fla. 1974). The state attorney has been characterized as a "one man grand jury," and deemed the "investigatory and accusatory arm of our judicial system of government." Imparato v. Spicola, 238 So.2d 503, 506 (2 D.C.A. Fla., 1970), *also see* Widener v. Croft, 184 So.2d 444 (4 D.C.A. Fla., 1966), *cert. denied*, Croft v. Widener, 192 So.2d 486 (Fla. 1966).

The investigative duties of the state attorney's office are outlined in Ch. 27, F. S. Section 27.03 requires the state attorney, at the request of the grand jury, to examine witnesses in their presence, give legal advice, and prepare bills of indictment. In addition, he is required to summon and examine witnesses to testify before him as to any violations of the criminal law, s. 27.04. The state attorney is also authorized to employ investigators, s. 27.25(1), whose powers and functions are spelled out in s. 27.255. The investigators so employed are deemed and legislatively declared to be law enforcement officers and conservators of the peace with full powers of arrest. In addition, such investigators are authorized to serve properly issued arrest warrants, search warrants, witness subpoenas, capias, and court orders in connection with a criminal investigation or in a criminal case. Section 27.255(1). While in the performance of their duties, such investigators possess the same rights, protections, and immunities afforded other peace or law enforcement officers. Section 27.255(3).

It is clear that, as noted by the Florida Supreme Court in Eagen v. DeManio, *supra*, at 640, the activities of the investigators working on behalf of the state attorney are activities customarily performed by the police who primarily investigate crimes. Hence, the same policy considerations which exempt certain police records from public inspection where such disclosure would unduly burden effective law enforcement are applicable to criminal investigations conducted by the state attorney's office. *Cf.* Widener v. Croft, *supra*, at p. 446, as to the privilege of communications made to prosecuting attorneys by persons with knowledge of facts tending to show the commission of a crime or in connection with possible prosecutions of crime on grounds of public policy.

This exemption from disclosure is known as the "police secrets" rule, which was first recognized by the Florida Supreme Court in Lee v. Beach Publishing Co., 173 So. 440, 442 (Fla. 1937). In that case, the court held that certain "letters and dispatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals," are exempt from public inspection on grounds of public policy. *Cf.* Widener, *supra*. This office has interpreted the exemption to apply where the effect would be to significantly impair or impede enforcement of the criminal law and to enable violators to escape detection. Attorney General Opinions 072-168, 073-166, and 075-9.

More specifically, investigative information regarding suspects, leads, tips, confidential information, or sensitive information interrelated with criminal activities falls within the

"police secrets" rule. Attorney General Opinion 075-9. The exception has *not* been applied to records of arrest, names of persons who have been arrested, copies of informations and indictments, or the like. *Id.*

The same guidelines outlined above with respect to police activities should be applied to the criminal investigations of the state attorney's office. Hence, sensitive material including, *inter alia*, the identity or statements of witnesses or informants, possible suspects, and tangible or intangible items of evidence can be withheld from public scrutiny. In specific regard to investigative reports obtained from the police, when the report is a narrative by the police containing confidential or sensitive information of an investigatory nature relating to criminal activities, it is within the rule (*see* AGO 057-157). However, information as to arrest records, identity of the accused or the victim, the crime committed, etc., is not within the rule; and such records are public records and subject to inspection under Ch. 119, F. S., unless elsewhere exempted by law.

The Legislature has enacted several statutes which prohibit disclosure of certain records which would otherwise be subject to the provisions of the Public Records Law. The identity of a victim of sexual battery may not be disclosed, s. 794.03, F. S. (*see also* AGO 075-203), nor may "the identity of any unmarried person under the age of 16 who commits, is the victim of, who is a witness to, or concerning any sex offense" be published or released. Section 801.221, F. S. In addition, all juvenile records and information obtained pursuant to Ch. 39, F. S., are exempted from the provisions of Ch. 119, F. S. Section 39.12(3). This proscription includes the arrest records and arrest reports of juveniles. *See* AGO's 070-113 and 073-112. In AGO 075-100, I stated that, even though there is no express statutory provision barring such dissemination, it is improper to release the name, age, and address of a juvenile to the press unless said juvenile is thereafter handled as an adult or a public hearing is held.

AS TO QUESTION 2:

Investigative records and files compiled by the state attorney's office prior to trial of a criminal case which are exempted from public inspection pursuant to the police secrets rule are not public records subject to public inspection under Ch. 119, F. S. Therefore, where such materials do not become part of the public record of the trial, they retain the exemption provided by the rule following prosecution, the appellate process, and final judgment.

AS TO QUESTION 3:

It has been held that the state attorney has a duty to investigate prior to actual prosecution. In State, Office of State Attorney for 20th Judicial Circuit v. Sievert, 312 So.2d 788, 791 (2 D.C.A. Fla., 1975), the court stated:

> As constitutional officers, State Attorneys must necessarily conduct complete and thorough investigations to determine whether or not they should execute the statutory (s. 923.03(2), F. S.) oath required of them in filing informations.

Therefore, I am of the opinion that the "police secrets" rule applies to confidential and sensitive information and materials gathered as a result of investigations of criminal activities conducted by the state attorney's office even though prosecution is not instituted.

With specific regard to autopsy reports, however, this office has held that they are not within the "police secrets" rule and, hence, are public records and must be made available for inspection. Informal Opinion to Dr. Courtlandt Berry, August 21, 1974.

076-157—August 10, 1976

SHERIFFS

FINANCIAL REPORT—WHEN MADE

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

When should the books of the sheriff be closed, and when should he make his annual report, remit the unexpended budget balance, and remit collections as to the last month of the fiscal year?

SUMMARY:

Although it is unclear that there exists at law a conflict between s. 30.50(5), F. S.—permitting the sheriff to hold his books open for 30 days after the end of the fiscal year for the purpose described therein—and s. 218.36, F. S.—establishing financial reporting requirements for the class of county officers defined therein—to the extent that such a conflict does exist, s. 30.50, being narrower in scope, should control. However, for the sake of full financial accountability and facilitation of the performance of the county's financial responsibilities, the sheriff should close his books, file an annual report with the county, and remit in the prescribed manner all unexpended budget balances and all fees and commissions collected by him in the last month of the fiscal year as soon after the end of the fiscal year as possible.

You refer to several provisions of the Florida Statutes, including ss. 30.50(5) and 218.36, which you suggest are in conflict.

Section 30.50(5), F. S., originally enacted by Ch. 57-368, Laws of Florida, relates to the budget accounts and records of the sheriff and provides as follows:

> All expenses incurred in the fiscal year for which the budget is made shall be vouchered and charged to the budget for that year, and to carry out this purpose *the books may be held open for 30 days after the end of the year.* (Emphasis supplied.)

See also s. 30.50(6), F. S., requiring all unexpended balances at the end of each fiscal year to be refunded to the board of county commissioners and deposited to the county fund or funds from which payment was originally made.

Section 218.36, F. S., of the Uniform Local Government Financial Management and Reporting Act (Ch. 73-349, Laws of Florida) provides in part as follows:

> (1) Each county officer *who receives any expenses or compensation in fees, commissions, or other remuneration,* shall keep a complete record of all fees, commissions, or other remuneration collected by him and shall make an annual report to the board of county commissioners within 15 days of the close of his fiscal year. Such report shall specify in detail the purposes, character, and amount of all official expenses and the amount of net income or unexpended budget balance as of the close of the fiscal year. All officers shall prepare such reports and subscribe under oath as to their accuracy and propriety.
>
> (2) On or before the date for filing the annual report, each county officer shall pay into the county general fund all money in excess of the sum to which he is entitled under the provisions of chapter 145. . . .
>
> * * * * *

(4) Compliance by a county officer with the provisions of this section shall exempt said officer from making any report required pursuant to s. 116.03. (Emphasis supplied.)

See also s. 116.03, F. S., requiring state and county officers who receive all or any part of their compensation in fees or other remuneration to keep a record of such receipts and make an annual report to the Department of Banking and Finance.

Initially, it is not at all clear to me that s. 30.50(5), F. S., and s. 218.36, F. S., are in conflict. Section 218.36 expressly applies only to those county officers who receive "any expenses or compensation in fees, commissions, or other remuneration." In contrast, the sheriff is a county "budget officer" whose budget is included in, and made a part of, the county's annual budget. *See* s. 30.49, F. S. As such, the sheriff receives from the county monthly one-twelfth of his total annual budget amount, s. 30.50(1), F. S., derived in substantial part from the county fine and forfeiture fund, s. 129.02(3), F. S., and pays monthly to the county fine and forfeiture fund all fees collected by him for docketing and service of process in civil cases, s. 30.231, F. S. (as amended by Ch. 72-92, Laws of Florida). *See also* s. 30.51(5), F. S., requiring that all fees, commissions or other funds collected by the sheriff be remitted monthly to the county. Thus, the sheriff apparently does *not* receive "any expenses or compensation in fees, commissions, or other remuneration," and, for that reason, does *not* clearly fall within the class of county officers defined in s. 218.36. (Likewise, with respect to ss. 116.01 and 219.07, F. S., amended by Ch. 76-224, Laws of Florida, to which you also refer, the sheriff, strictly speaking, does not collect funds due the state or county or county public money, *cf.* s. 219.01(2), F. S., but merely receives fees and commissions due him for services performed by his office. Compare s. 116.01, as amended, with s. 116.03, F. S., and s. 219.07, as amended, with s. 219.06, F. S.) Accordingly, I cannot conclude that there is such a positive repugnance between s. 218.36, F. S. (or ss. 116.01 or 219.07, F. S., as amended), and s. 30.50(5), F. S., that the former has impliedly repealed or amended the latter in any way. *Cf.* Scott v. Stone, 176 So. 852 (Fla. 1937); and *In re* Wade, 7 So.2d 797 (Fla. 1942).

In addition, it is an established rule of statutory construction that a statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. The statute relating to the particular part of the general subject will operate as an exception to, or qualification of, the general terms of the more comprehensive statute to the extent of any repugnancy between the two. *See* State *ex rel.* Loftin v. McMillan, 45 So. 882 (Fla. 1908); Stewart v. Deland-Lake Helen, etc., 71 So. 42 (Fla. 1916); American Bakeries Co. v. City of Haines City, 180 So. 524 (Fla. 1938); and Adams v. Culver, 111 So.2d 665 (Fla. 1959). Applying this rule here, s. 30.50, F. S., and the other provisions of Ch. 30, F. S., dealing with the financial matters of sheriffs' offices, operate *specifically* on sheriffs. In contrast, s. 218.36, F. S., operates *generally* on the class of county officers described therein. Thus, even if the two statutes are construed as both relating to the same subject matter, s. 30.50, being narrower in operation, should control over s. 218.36 to the extent of any conflict between the two.

Having thus concluded that the sheriff is not expressly required to file an annual report within 15 days of the end of the fiscal year pursuant to s. 218.36, F. S., and may leave his books open for 30 days after the end of the fiscal year for the purpose described in s. 30.50(5), F. S., it would, nevertheless, be advisable in my opinion for the sheriff, and other county officers similarly situated, to continue to file such annual reports in the interest of full financial accountability. *Cf.* AGO 057-358, in which it was concluded that, consistent with the purpose of s. 116.03, F. S., to provide an accurate report of all fees collected by county officers, a sheriff who was affected by Ch. 57-368, Laws of Florida, must continue to file the report required thereby. Moreover, the sheriff should close his books, file his annual report, and remit in the legally prescribed manner all unexpended budget balances and all fees and commissions collected by him in the last month of the fiscal year as soon after the end of the fiscal year as possible. (As to the remittance of fees and commissions collected by the sheriff, the Auditor General apparently has the authority to prescribe the date for remittance, *see* s. 30.51(5), F. S.) Such cooperation with the county will undoubtedly result in a more accurate picture of county financial accounts, *see* s. 129.06(1)(a), F. S., and facilitate the filing of the county's financial report (which must include a report of the sheriff's financial accounts) pursuant to s. 218.32(1), F. S.

076-158—August 10, 1976

STATE BOARD OF ADMINISTRATION

PAYMENT OF EXPENSES INCURRED IN ADMINISTERING RETIREMENT SYSTEM FUNDS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General, and Marva A. Davis, Legal Intern

QUESTIONS:

1. Under ss. 121.031 and 121.151, F. S., and such other provisions as may be applicable, should the expenses incurred by the State Board of Administration in providing investment services to the Florida Retirement System Trust Fund be paid from the earnings of said investment?
2. If the answer to question 1 is in the negative, may the costs of said investment services be charged to those bond issues listed below or to the counties from their pro rata share of the "Second Gas Tax" or to both?
3. If the answers to questions 1 and 2 are in the negative, then from what source may said board finance its expenses for the investment of the Florida Retirement System trust funds?

SUMMARY:

Expenses incurred by the State Board of Administration in investing and reinvesting available funds from the Retirement System Trust Fund and the Social Security Trust Fund, as required by s. 121.151, F. S., should be paid from interest earned on such investments by the Department of Administration, Division of Retirement. Such expenses so incurred are expenses for the administration of the Florida Retirement System by the Division of Retirement, Department of Administration, as referred to in s. 121.031, F. S.

STATEMENT OF FACTS:

You advise in your letter as follows:

> During the course of recent postaudits of the State Board of Administration I have been concerned with the manner in which the Board has charged the costs of its operations to the various agencies it serves.
>
> As an example, during the fiscal year 1973-1974, the operating costs of the Board were charged to the proceeds of the following bond issues: school bonds (issued pursuant to Section 9(d), Article XII, Fla. Const., 1968), higher education bonds (Section 9(a), Article XII); state building bonds (Article VII); outdoor recreation bonds (Section 9(a), Article XII); student loan bonds (Section 15, Article VII); pollution control bonds (Section 14, Article VII); environmental conservation bonds (Section 9(a), Article IX). Also, the Board charged the pro rata shares of the "Second Gas Tax" entitlements of the various counties a proportionate share of total operating cost.

You advise therein that the State Board of Administration has billed the Department of Administration for the costs incurred by the board for investment services required by s. 121.151, F. S., to be performed for the Florida Retirement System Trust Fund. You also advise that the department has declined to pay the bill and has disagreed with the board's position to the effect that s. 121.031, F. S., provides the authority for the billing and payment.

Question 1 is answered in the affirmative as explained herein, and accordingly questions 2 and 3 require no answer.

Section 121.031, F. S., provides:

> The Department of Administration, through the Division of Retirement, shall make such rules as are necessary for the effective and efficient *administration of this system. The funds to pay the expenses for such administration* are *hereby appropriated* from *interest earned on investments made* by the Board of Administration for the Retirement and Social Security Trust Funds and the assessments allowed under chapter 650. The administrator shall cause an actuarial study of the system to be made at least once every 5 years and report the results of such study to the next session of the Legislature following completion of the study. (Emphasis supplied.)

This section of the statutes provides both the appropriation for and the authority for payment of expenses of the administration of the Florida Retirement System (*see* ss. 121.021(3) and 121.025, F. S.) by the Division of Retirement. Part and parcel of that administration is the necessary investment and reinvestment of available system funds by the Board of Administration, created by the authority of the State Constitution, in accordance with the provisions of ss. 215.44-215.53, F. S. (*See* s. 121.151, F. S.) If the Department of Administration through the Division of Retirement, instead of the Board of Administration, had the authority and duty to invest and reinvest the system funds, it is patently obvious that the expenses required for such investment and reinvestment would be expenses incurred in administration of the retirement system and, accordingly, would be borne by the Department of Administration, Division of Retirement, and paid from interest earned on such investments. Therefore, if the expenses for such administration are incurred instead by the Board of Administration acting as fiscal agent for the Department of Administration, Division of Retirement, such expenses are still expenses for the administration of the retirement system and would be paid from funds designated in and appropriated by s. 121.031, F. S.

Section 9(c), Art. XII, State Const. 1968, adopted s. 16, Art. IX of the State Const. 1885. Section 16(b), Art. IX, State Const. 1885, created a body corporate consisting of the Governor as chairman, the State Treasurer and the State Comptroller, to be known as the State Board of Administration. The board was given certain specific powers in the Constitution and also given "such powers as may be conferred upon it by law." Section 16(d), Art. IX, State Const. 1885, provided that the board shall have the power "to make and enforce all rules and regulations necessary to the full exercise of the powers hereby granted and no legislation shall be required to render its amendment of full force and operating effect from and after January 1, 1943." Part of said provision follows:

> The board shall *pay* refunding expenses and other expenses for services rendered specifically for, or which are properly chargeable to, the *account of any county from funds distributed to such county*; but *general expenses of the board* for services rendered *all* the *counties* alike shall be *prorated among them* and paid out of said funds on the same basis said tax proceeds are distributed among the several counties; provided, report of said expenses shall be made to each Regular Session of the Legislature and the Legislature may limit the expenses of the board. (Emphasis supplied.)

This provision of the Constitution speaks only to the constitutional duties imposed upon the State Board of Administration involving counties and does not speak to the statutory duties imposed by general law upon the State Board of Administration. Accordingly, it does *not* provide the authority for the Board of Administration to charge general expenses of the board incurred in rendering services to the Department of Administration, Division of Retirement, or to the various counties throughout the state.

Accordingly, expenses incurred by the State Board of Administration in performing its duties under s. 121.151, F. S., should be paid pursuant to the provisions of s. 121.031, F. S., from interest earned on investments made by the Board of Administration for the Retirement and Social Security Trust Funds.

076-159—August 10, 1976

STATE UNIVERSITY SYSTEM

HANDLING PROCEDURE FOR FEES RESULTING FROM PROFESSIONAL MEDICAL AND DENTAL PRACTICES; STATUS OF EMPLOYEES HANDLING SUCH FEES

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTIONS:

1. Does the University of Florida have any responsibility for the billing, collection, records systems, and internal cash and accounting controls relating to professional practice fees?
2. Are persons engaged in the billing, collection, and administration of the records system related to professional practice fees generated from the practice of dentistry and medicine at the University of Florida performing a private or a public function?
3. May the University of Florida lawfully accept grants of money from university physicians and dentists to pay salaries and expenses for the billing, collection, and administration of the records system related to professional practice fees?
4. If the answer to question 3 is yes, are persons compensated from the grants subject to the same laws, rules, and regulations as state employees?

SUMMARY:

The University of Florida by law and implementing rules is delegated broad authorization to bill, collect, and keep records of and account for the professional practice fees resulting from clinical practice by members of the academic staff of the J. Hillis Miller Health Center of the university and, having exercised such delegated authority, it is therefore statutorily responsible for the performance of these activities and functions.

The University of Florida is empowered to accept grants of money, materials, or property of any kind and direct the use of such funds to pay and finance university employees and other university operations relating to the collection and administration of professional practice fees resulting from the clinical practice by the academic staff or the dental and medical colleges. However, the professional fees and private practice plans authorized to be set, regulated, and maintained under Rule 6C-9.17, F.A.C., and Board of Regents policy for the handling of professional fees are established, administered, and regulated by the university and its administrative officers, and all collections, disbursements, grants, and donations from the fund established by such rule and policy are made by such university administrative officers.

Since the predominant purpose of such private practice settings is a public or educational one, those persons engaged in the billing, collection, administration, and accounting relating to such professional practice fees are performing a public function.

Employees of the university engaged in the billing, collection, records systems, and internal cash and accounting controls relating to professional practice fees are subject to the same law, rules, and regulations as other state employees.

Your questions are interrelated and will be answered together.

Sections 240.001 and 240.042, F. S., establish the general powers of the Board of Regents. Section 240.001(1), F. S., grants the Board of Regents the necessary power to govern, regulate, coordinate and oversee the agencies in the State University System in order to effectively accomplish the lawful aims of education, including but not limited to

those enumerated in s. 240.001. The stated legislative intent is that the Board of Regents shall be primarily a policymaking board with the power to establish rules and regulations to carry out such lawful aims of education. Section 240.001(2)(a). The Board of Regents is fully responsible for the management of the institutions and agencies of the State University System. *See* AGO 071-199. The board is empowered to delegate to its staff and to heads of the several institutions and agencies under its jurisdiction such of its powers as it deems expedient and proper, and is authorized to establish policies, rules, and regulations under which the State University System is to be managed and operated. Section 240.042(1) and (2); *cf.* s. 240.031(1) and (3), F. S. *See also* AGO 075-306 and ss. 240.042(2)(b) and (e), 240.082, 240.095, and 241.471(1) and (2), F. S. The organization, powers, duties, and functions of the Board of Regents are delineated in Chapter 6C, F.A.C. Rule 6C-9.17, F.A.C., deals specifically with the handling of professional fees.

By the statutes and implementing rules, the University of Florida Health Care Center is authorized to carry on the activities and functions which are the subject of your inquiry, and pursuant to s. 6C-9.17(1), F.A.C., is "authorized to set and regulate professional fees, and develop and maintain private practice plans for the orderly collection and distribution of such fees" as further authorized and provided for in the Policy for Handling of Professional Fees, Revised May 16, 1975. When enabling legislation provides that an administrative agency may make rules and regulations (ss. 240.001(2) and 240.042(2), F. S.) as may be necessary to carry out the provisions of the enabling act (or the lawful aims of education, s. 240.001(1), F. S.), the validity of regulations promulgated thereunder will be sustained by the courts so long as they are reasonably related to the purposes of such enabling legislation. Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Florida Beverage Corporation, Inc. v. Wynne, 306 So.2d 200 (1 D.C.A. Fla., 1975). It is well settled that such statutory provisions and implementing rules and policies are presumably valid and are to be given full force and effect until they are passed upon by the courts and declared or determined otherwise. White v. Crandon, 156 So. 303 (Fla. 1934); Pickerill v. Schott, 55 So.2d 716 (Fla. 1951); State v. Mayo, 91 So.2d 657 (Fla. 1956).

Thus, the university is delegated broad authorization to bill, collect, and keep records of and account for the professional practice fees; and having exercised such delegated authority, it is therefore statutorily responsible for the foregoing activities and functions. (*Also see* Policy for Handling of Professional Fees, 2 and 4, *supra.*)

Section 6C-9.17(1), F.A.C., declares such private practice settings to be educationally oriented and an integral part of the academic activities, designed to generate clinical practice experience essential in training and educating medical students. Such quasi-legislative findings prima facie make such private practice settings a public (educational) function and purpose and such legislative findings and rules are deemed to govern until and unless the facts as shown require a conclusion to the contrary. Florida Citrus Commission v. Golden Gift, Inc., 91 So.2d 657 (Fla. 1956); *also see* State v. Cotney, 104 So.2d 346 (Fla. 1958); Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971).

The State Board of Regents is empowered to receive donations (s. 240.042(1), F. S.) and, subject to the limitations and restrictions in Ch. 243, F. S., has the power and authority to accept grants of money, materials, or property of any kind from a federal agency, private agency, corporation, or individual upon such terms as the grantor may impose. Section 243.02(6) and (8). The State Board of Education, as the head of the Department of Education, of which the Division of Universities is a part (s. 20.15(1), (3)(d), and (4), F. S.), may accept gifts, grants, and endowments on behalf of the department consistent with the powers and functions of the department (s. 20.05(6), F. S.) and may delegate its authority and functions to the Board of Regents unless the State Board of Education is explicitly required by statute to perform the same without delegation. Sections 20.05(1)(b) and 229.053(1), F. S. It should be noted, however, that under Rule 6C-9.17 and the Board of Regents policy for handling professional fees, the university physicians-academic staff and dentists-academic staff do not make any grants of money to the university to pay the salaries and expenses in question and do not administer the private practice plans or the several funds established pursuant to the rule and the Board of Regents policy. The University Health Care Center and Medical Center at the respective designated universities are authorized by Rule 6C-9.17 to set and regulate these professional fees and to maintain the private practice plans for the orderly collection and distribution of such fees, subject to approval by the president of the university and the chancellor, pursuant to the general guidelines established by the Board of Regents. The physician and dentist members of the academic staff are required to deposit all such fees into the

fund established by the university and administered by the university administrative officials, and all disbursements, grants, and donations from the funds established by the rule and the board policy are made by the administrative officers of the university. In sum, the entire system is established, regulated, and administered by the university and its designated administrative officers.

Section 240.095, F. S., requires all funds received by any institution or agency in the State University System, from whatever source received and for whatever purpose, to be deposited in the State Treasury subject to disbursement in such manner and for such purposes as the Legislature may by law provide, but funds received from private sources as gifts, grants, or donations, and such other funds as may be approved by the Board of Regents and the Department of Administration, are specifically exempted from the provisions of that section and, with the approval of the Board of Regents, may be deposited outside the State Treasury. Section 240.095(7) and (8); *cf.* AGO 073-82; s. 215.32(2)(b), F. S. Pursuant to s. 240.82, F. S., all moneys received by institutions under the management of the Board of Regents, other than from state and federal sources, are appropriated to the use of the Board of Regents for the respective institutions collecting the same to be expended as the Board of Regents may direct in pursuance of itemized budgets approved by the Department of Administration. *Also see* ss. 240.001(3) and 240.042(2)(e), F. S., relative to the review and approval of budgets in the State University System and requests for appropriations by the Board of Regents. With respect to the receipt and use of contributions from private sources by state officials in furtherance of public purposes under s. 215.32, F. S., *see* Advisory Opinion to the Governor, 200 So.2d 534 (Fla. 1967); *id.*, 201 So.2d 226 (Fla. 1967).

None of the funds here in question are from a state or federal source. The professional practice fees are nonstate funds which the Legislature, pursuant to s. 240.082, F. S., has appropriated to the use of the Board of Regents and which are to be expended as that board may direct, and they are expressly exempted from the requirement that university system funds must be deposited in the State Treasury and disbursed in such manner and for such purposes as the Legislature may by law provide. Sections 240.082 and 240.095(7) and (8), F. S. *See* AGO's 072-193 and 073-82. Even though these funds are not subject to the control of the State of Florida (*see* Policy 7, Revised May 16, 1975, *supra*, and s. 240.095[7] and [8]), they are still subject to audit by the State Auditor. Policy 8, Revised May 16, 1975, *supra*. It might be noted that Rule 6C-9.17(3), F.A.C., provides that the private practice plans therein provided for are to be audited by "an independent certified public accountant/state auditors" and copies of such audit reports are to be filed with the Board of Regents. *Cf.* s. 240.182(3), F. S.

Since the predominant purpose of the activity referred to in your questions appears to be a public or educational one, under the statutes and implementing rules and the authorities discussed above, and until judicially determined otherwise, those persons engaged in the billing, collection, administration, and accounting relating to such professional practice fees are performing a public function.

The persons engaged in the billing, collection, records systems, and internal cash and accounting controls are all hired and fired by the University of Florida pursuant to the vested authority in the Board of Regents "to provide for the appointment, employment and removal of personnel of the several institutions and agencies." Section 240.042(2)(b), F. S. *Also see* ss. 240.042(2)(e) and 240.082, F. S. These employees are paid by state warrant. Retirement and social security are withheld. Furthermore, these positions are "authorized" within the meaning of s. 216.011(1), F. S., which states that an "authorized position means a position included in an approved budget." Therefore, these employees are subject to the state laws and rules and regulations governing state employees.

076-160—August 11, 1976
(See also 076-160A)

LOCAL GOVERNMENT COMPREHENSIVE PLANNING ACT

INTERIM PLANS PROHIBITED; LAND USE MAP MAY BE INCLUDED BUT IS NOT MANDATORY

To: William H. Ravenell, Secretary, Department of Community Affairs, Tallahassee

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTIONS:

1. May a local government, prior to July 1, 1979, adopt an interim plan for the purpose of providing guidance in the enactment or amendment of local land development regulations, pending the adoption of such an element of a comprehensive plan as required by the Local Government Comprehensive Planning Act?
2. Does s. 163.3177(5) and (6)(a), F. S., require that the land use plan element of a comprehensive plan adopted pursuant to the Local Government Comprehensive Planning Act include a land use map of proposed use, said map being similar in form to a zoning map?

SUMMARY:

Comprehensive plans as prescribed by s. 163.3177, F. S., may be prepared and adopted only in conformance with, and under the terms and provisions of, the Local Government Comprehensive Planning Act of 1975. No "interim" comprehensive plans are authorized by, nor may they be otherwise adopted under, the provisions of that act.

Section 163.3177(5) and (6)(a), F. S., does not require that the future land use plan element of the local comprehensive plan include a land use map in the form and nature of a zoning map, although such element may include a land use map of such nature if deemed to be appropriate to the guidelines and standards prescribed in the several elements of the local comprehensive plan.

At the outset, it seems appropriate to note that the Interdepartmental Coordinating Council on Community Services, an advisory body (*see* s. 20.03(9), F. S.) within the Department of Community Affairs (*see* s. 20.18(5), F. S.), any ad hoc working groups of said coordinating council (*see* s. 20.18[5][c]), and all regional agencies (*see* s. 163.3164(17), F. S.) involved in the administration and implementation of the Local Government Comprehensive Planning Act of 1975 are directed by s. 163.3204, F. S., to "cooperate and work with units of local government and technical advisory committees [*see* s. 163.3207, F. S.] in the preparation and adoption of comprehensive plans, or elements or portions thereof." *See* ss. 163.3164(2) and 163.3177, F. S. The Local Government Comprehensive Planning Act became effective July 1, 1975.

However, neither s. 20.18(5), F. S., nor s. 163.3204, F. S., empowers or authorizes the Department of Community Affairs, as such, to itself assist local governments or to provide technical assistance to local governments in the preparation and adoption of any such "interim plans" addressed in your inquiry. These aforecited sections, read together, provide only that the Interdepartmental Coordinating Council cooperate and work with units of local government in the preparation and adoption of comprehensive plans, or elements or portions thereof. In such interaction, the department itself should not assume or undertake any such authority or function. *See* State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, *cert. denied*, 300 So.2d 900. Further in this regard, it should be noted that the express mention of the Interdepartmental Coordinating Council in the aforementioned context impliedly excludes all other bodies or agencies. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952).

AS TO QUESTION 1:

Section 163.3161(6), F. S., of the Local Government Comprehensive Planning Act, hereinafter referred to as the "act," states:

> It is the intent of this act that the activities of units of local government in the preparation and adoption of comprehensive plans, or elements or portions therefor [sic], shall be conducted in conformity with the provisions of this act.

Such language acts as an express prohibition against comprehensive plans, or elements or portions thereof, being prepared and adopted in any manner or under any terms or provisions other than described therein. Alsop v. Pierce, 19 So.2d 799 (Fla. 1944); *In re* Advisory Opinion of Governor, Civil Rights, 306 So.2d 520 (Fla. 1975).

Nowhere within the act is any provision made for the adoption of such "interim" comprehensive plans, or elements or portions thereof, as are cited in your request. Although s. 163.3197, F. S., authorizes and continues in force and effect comprehensive plans or portions thereof adopted prior to July 1, 1975, until appropriate action is taken to adopt a new comprehensive plan as required by the act, it is silent as to the adoption and promulgation of any such interim plans as you have suggested. The absence of any provision for, or mention of, such interim plans as are here under consideration operates in this context to preclude their promulgation or adoption under the authority of this section. State v. Jacksonville Terminal Co., 71 So. 474 (Fla. 1916); Edgerton v. International Company, 89 So.2d 488 (Fla. 1956); Dobbs v. Sea Isle Hotel, *supra*.

Section 163.3161(5), F. S., of the act states it is the intent of the act that "adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act." Such an express limitation operates as an effective prohibition against "development" proceeding under, or according to, any comprehensive plan, or element or portion thereof, not promulgated and adopted according to the terms and provisions of the act.

In setting out the legal status of plans adopted in conformity with the act, s. 163.3194, F. S., *inter alia*, provides that:

> (1) After a comprehensive plan or element or portion thereof has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted. . . .

Thus, reading the aforementioned statutory provisions *in pari materia*, it is seen that no authorization exists within the act for the adoption of such interim comprehensive plans, that local units of government are restricted in the process of promulgation and adoption of comprehensive plans, or elements or portions thereof, to those terms and provisions provided within the act and, further, that after such promulgation and adoption, no public or private development as defined in s. 380.04, F. S. (*see* s. 163.3164(4), F. S.), is to be permitted except in conformity with said plans and only those plans.

Further, I am informed by the Division of State Planning of the Department of Administration, which agency is charged with varied and significant duties in regard to the administration and implementation of the act, that it has administratively interpreted the act as prohibitive of such interim comprehensive plans. Administrative interpretations of statutes by agencies charged with their administration and implementation are generally given considerable deference by the courts and are accorded great weight when there is special agency expertise and a lack of court expertise. Brennan v. General Telephone Company of Florida, 488 F.2d 157 (5th Cir. 1973); State *ex rel.* Biscayne Ken. Cl. v. Board of Bus. Reg., 276 So.2d 823 (Fla. 1973). Contemporaneous administrative construction of a statute by those charged with its enforcement or interpretation is entitled to great weight; and, although not controlling, the courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788 (Fla. 1952); Daniel v. Florida State Turnpike Authority, 213 So.2d 585 (Fla. 1968); Miller v. Brewer Co. of Fla., 122 So.2d 565 (Fla. 1960). I do not find any clear error or lack of authorization present in regard to the administrative construction proffered by the division and therefore concur in the same.

The above is not intended to express the view that local governments may not properly exercise those planning, zoning, and other general land use and management powers granted to them by Chs. 125 and 166, F. S., except to the extent that said local governments indulge in comprehensive planning under ss. 163.3161-163.3211, F. S. That is to say that development may continue under existing plans and statutes until such time as the required comprehensive plans are adopted, and planning, zoning, and building ordinances and other land use and management devices or regulations may be amended or instituted. However, no comprehensive plans as delineated in s. 163.3177, including "interim plans," may be adopted except in conformity with, and under the terms and provisions of, the act. To the extent that the Local Government Comprehensive Planning Act conflicts with any other provisions of law relating to local governments' authority to regulate the development of land, the provisions of the act govern unless its provisions are met or exceeded by other provisions of law. Section 163.3211; *cf.* Ch. 75-390, Laws of Florida.

Therefore, in consideration of the foregoing, I am of the opinion that such interim plans as have been discussed hereinabove are not permissible under the terms and provisions of the Local Government Comprehensive Planning Act of 1975.

AS TO QUESTION 2:

The statutory provisions cited in your request in this regard seem to give little direction on their face as to the proper disposition of this particular question. However, closer examination of these and other applicable provisions will serve to clarify this matter.

Section 163.3177(5), F. S., requires that the comprehensive plan contain policy recommendations for the implementation of the plan. As the precise form of those policy recommendations is not prescribed therein, it is difficult to see how this provision can be construed to require a detailed zoning map of any land area.

Section 163.3177(6)(a), F. S., provides that a comprehensive plan, in addition to the required elements of s. 163.3177(1)-(5), F. S., must include a future land use plan element "designating proposed future *general* distribution, location and extent of the uses of the land for housing, business, industry, agriculture, recreation" (Emphasis supplied.), and further requires a "statement of the standards to be followed in the control and distribution of population densities and building and structure intensity as recommended for the various portions of the area," and permits the designation of areas for future planned development use involving combinations of types of uses for which special regulations may be necessary to assure development in accord with the principles and standards of the comprehensive plan.

As noted by emphasis, the plan must include a land use element *generally* describing the distribution, location, and extent of the uses to be made of the land in the future. This language does not seem to operate to require a zoning map to be drawn to fulfill this requirement; indeed, it does not seem to require the construction of a map, per se, of any type, nor does it forbid it.

Further in this regard, s. 163.3177(1), F. S., plainly states that the comprehensive plan "shall consist of materials in such descriptive form, *written or graphic, as may be appropriate* to the prescription of *principles, guidelines, and standards* for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area." (Emphasis supplied.) Thus, the act specifically grants to local governments the option to fulfill the requirements of s. 163.3177 by either written or graphic means, or a combination thereof, and does not require that a zoning-type map be the sole mode of satisfaction thereof.

Therefore, reading s. 163.3177(1)-(5) and (6)(a), F. S., *in pari materia*, I am of the opinion that the act does not require that the future land use plan element required by s. 163.3177(6)(a) include a land use map in the form and nature of a zoning map. However, the future land use plan element may include a land use map of such nature if deemed to be appropriate to the guidelines and standards prescribed in the several elements of the local comprehensive plan.

076-160A—August 26, 1976
(Supplement to 076-160)

To: William H. Ravenell, Secretary, Department of Community Affairs, Tallahassee

Prepared by: Staff

(See 076-160 for questions and summary.)

In AGO 076-160 I noted that the Interdepartmental Coordinating Council created by s. 20.18(5), F. S., has been expressly assigned by s. 163.3204, F. S., the duty of cooperating and assisting local governments in the preparation and adoption of their comprehensive plans or elements or portions thereof, as provided by the Local Government Comprehensive Planning Act. In so noting I stated that, absent legislative authorization for the department also to provide this particular service to local governments, the express assignment of this particular service to the council and the other bodies enumerated in s. 163.3204, F. S., acted in effect as a prohibition against the department or any other body or agency exclusively providing those services.

However, it has come to my attention that this portion of the opinion has been and may be misconstrued to represent that the Department of Community Affairs may not, in any manner, assist local governments in their efforts to comply with the Local Government Comprehensive Planning Act of 1975 and that it has the force of negating the powers and duties assigned to the department in s. 163.03, F. S., particularly subsection (1)(j) and (m) thereof.

This assertion is incorrect, and the language utilized in AGO 076-160 is not, in my view, susceptible to that interpretation. The opinion does not operate to preclude the department from fully exercising its powers under s. 163.03, F. S., in assisting local governments in general planning and zoning.

Thus, the restriction questioned is quite narrow with respect and in comparison to the remaining statutorily granted powers of the department and should not be read so as to prevent the department from exercising those remaining powers, which include aiding and technically assisting local governments in their efforts to generally comply with the Local Government Comprehensive Planning Act except and only in regard to the actual preparation and adoption of the local plan.

076-161—August 11, 1976

FINANCIAL MATTERS

DISHONORED CHECKS OR DRAFTS GIVEN TO STATE—IMPOSITION OF SERVICE CHARGE BY LOCAL OFFICIAL OR AGENCY ACTING AS STATE'S AGENT—PROCEEDINGS TO COLLECT UNDER s. 832.07, F. S.

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Patricia S. Turner, Assistant Attorney General

QUESTIONS:

1. Must a county or municipal official or agency add a $5 service fee to the amount due when acting on behalf of the Department of Revenue in collecting a dishonored check or draft pursuant to s. 215.34(3), F. S.?

2. Must the Department of Revenue, or a county or municipal official or agency when acting on behalf of the Department of Revenue, first attempt to collect a dishonored check, draft, or other order for payment under s. 215.34, F. S., prior to proceeding under s. 832.07, F. S., as created by Ch. 75-189, Laws of Florida?

SUMMARY:

When a county or municipal official or agency is acting on behalf of the Department of Revenue pursuant to s. 215.34(3), F. S., it is mandatory that a $5 service fee be added to the amount due.

The Department of Revenue, or a county or municipal official or agency when acting on behalf of the Department of Revenue, may attempt to collect a dishonored check, draft, or other order for payment by proceeding under s. 832.07, F. S., if all requirements thereof have been met, without first proceeding under s. 215.34, F. S.

Your first question is answered in the affirmative, and the second question in the negative.

AS TO QUESTION 1:

Chapter 75-56, Laws of Florida, as evidenced by the title of said chapter, is "AN ACT relating to state and local governments," amending s. 215.34, F. S., by adding subsection (2) to *require* state officials and state agencies *to collect* a $5 service fee whenever a check, draft, or other order for payment of money is dishonored and to provide for the distribution of collected service fees and by adding subsection (3) providing that local officials acting for state officials or agencies in the collection of charges due the state shall retain the $5 service fee collected under s. 215.34.

Section 215.34(2) and (3), F. S., provides:

> (2) Whenever a check, draft or other order for the payment of money is returned by the State Treasurer to a state officer or state agency for collection, the officer or agency shall add a $5 service fee to the amount due. The $5 service fee shall be in addition to all other penalties imposed by law. Proceeds from this fee shall be deposited in the same fund as the collected item.
>
> (3) When a county or municipal official or agency is acting for a state official or agency in the collection of fees or other charges, the service fee collected under this section shall be retained by the collector of the fee.

Checks, drafts, or other orders for the payment of money made payable to the State of Florida and initially collected by a county or municipal official or agency acting on behalf of the Department of Revenue are transmitted by the local official or agency to said department which then deposits the instruments in the State Treasury.

If the check, draft, or other order for the payment of any licenses, fees, taxes, commissions, or charges authorized to be made pursuant to state law is returned for any reason by the bank or other payor upon which it was drawn, said check, draft, or other order will be returned by the State Treasurer to the Department of Revenue. *See* s. 215.34(1), F. S. Such charges are not actually paid and may be considered delinquent. The Department of Revenue is then required to collect payment for the dishonored check, draft, or other order.

When the Department of Revenue collects payment on the dishonored instrument, s. 215.34(2), F. S., provides that "the officer or agency *shall* add a $5 service fee." (Emphasis supplied.) Section 215.34(3), F. S., which states that "the service fee collected under this section shall be retained by the collector of the fee," must be construed with s. 215.34(2) to require county or municipal officials or agencies, when acting for the Department of Revenue, to charge and collect said service fee also but to allow said county or municipal officials or agencies to retain the fee for their services in the collection procedure.

This interpretation is consistent with general principles of law which state that a statute should be construed to accord significance and effect to each of its parts, 30 Fla. Jur. *Statutes* s. 116 (1960), and that a statute should be interpreted in a manner which leads to a logical conclusion, Gracie V. Deming, 213 So.2d 294 (2 D.C.A. Fla., 1968).

The interpretation of s. 215.34(3), F. S., requiring county or municipal officials or agencies when acting on behalf of the Department of Revenue to collect the $5 service fee is consistent with general principles of agency law. Since the local official or agency is an agent of the state official or agency for the purpose of collecting money due on a dishonored check, draft, or other order and remitting said money to the Department of Revenue, said local official or agency, as an agent, is acting ex officio as a state official or

agency and should logically and legally be held to the same requirement as said state official or agency, to wit, adding a $5 service fee to the amount due.

AS TO QUESTION 2:

Section 832.07(1)(a), F. S., as created by Ch. 75-189, Laws of Florida, states in pertinent part:

> In any prosecution or action under this chapter, the making, drawing, uttering, or delivery of a check, draft, or order, payment of which is refused by the drawee because of lack of funds or credit, shall be prima facie evidence of intent to defraud or knowledge of insufficient funds in, or credit with, such bank, banking institution, trust company, or other depository, unless such maker or drawer, or someone for him, shall have paid the holder thereof the amount due thereon, together with a service charge not to exceed $5, or 5 percent of the face amount of the check, whichever is greater, within 20 days after receiving written notice that such check, draft, or order has not been paid to the holder thereof. . . .

It must be noted that the above-quoted statute and s. 215.34, F. S., serve two distinct purposes. As stated in AGO 076-62, Chs. 75-56 and 75-189, Laws of Florida, are acts relating to the same subject matter, *i.e.*, dishonored checks, but Ch. 75-56 is "AN ACT relating to state and local governments," while Ch. 75-189 is "AN ACT relating to worthless checks . . . [and] prima facie evidence of intent to issue a worthless check" and is silent concerning the authority of a public official to charge a fee for collecting a dishonored check.

Statutes must be construed to effectuate the intent of the Legislature and to maintain a reasonable and harmonious body of law. *See* 82 C.J.S. *Statutes* s. 368 (1953). With this principle in mind, it is important that legislation serving distinct purposes not be construed to cause inconsistencies in the law.

Your question suggests a need for a procedural priority in the utilization of these statutes when the Department of Revenue or a county or a municipality is the holder of a dishonored instrument. However, there is no necessity for such, since ss. 832.07 and 215.34(2) and (3), F. S., were enacted as original and independent legislation and each is complete in itself, allowing an officer to proceed under Ch. 75-189, Laws of Florida, independently of Ch. 75-56, Laws of Florida.

However, it is important to note that, prior to proceeding under Ch. 75-189, Laws of Florida, to collect upon a dishonored instrument, certain requirements must be met [s. 832.07(2)(a), (b), (c), (d), F. S.]. Assuming that the enumerated requirements are complied with, the Department of Revenue or a county or municipal official or agency acting on behalf of said department will be limited to a service fee of $5 as prescribed by Ch. 75-56, Laws of Florida. Attorney General Opinion 076-62. Assuming that said requirements are not complied with, thereby precluding utilization of Ch. 75-189, the Department of Revenue or a county or municipal official or agency acting on behalf of said department would be obligated to attempt collection pursuant to s. 215.34, F. S. Otherwise, there is no repugnancy between Chs. 75-56 and 75-189.

Therefore, since Ch. 75-189, Laws of Florida, serves the purpose, in certain situations, of allowing a dishonored check to establish prima facie evidence of criminal intent in a subsequent prosecution or action, it is not necessary that the Department of Revenue or a county or municipal official or agency, when acting on behalf of said department, attempt to collect a dishonored check, draft, or other order under s. 215.34, F. S., prior to proceeding under s. 832.07, F. S., if all requirements of the latter statute have been met and satisfied.

076-162—August 11, 1976

TAXATION

LAND ZONED FOR COMMERCIAL USE MAY NOT BE ASSESSED AS AGRICULTURAL DESPITE ACTUAL AGRICULTURAL USE

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

May agricultural classification be granted to the appropriate balance of a tract of land if the entire tract is rezoned commercial when only a portion of the tract is used for commercial purposes and the balance of the tract of land remains in agricultural use?

SUMMARY:

Until judicially determined otherwise, an owner of a tract of land presently classified and zoned agricultural who petitions the local zoning board to have a *portion* of the tract of land rezoned "commercial," who is informed by such board that the petition will be granted only if he will agree to have the *entire tract* rezoned "commercial," and who agrees or acquiesces in or accepts the same would be subject to the commands of s. 193.461(4)(a)3., F. S., and the property appraiser would be required to reclassify the *entire* tract of land as nonagricultural.

The question is answered in the negative.
Section 193.461(4)(a), F. S., provides in its entirety:

> (4)(a) The [property appraiser] *shall reclassify* the following lands as nonagricultural:
> 1. Land diverted from an agricultural to a nonagricultural use;
> 2. Land no longer being utilized for agricultural purposes;
> 3. Land that has been zoned to a nonagricultural use *at the request of the owner subsequent to the enactment of this law; or*
> 4. Land for which the owner has recorded a subdivision plat subsequent to the enactment of this law. (Emphasis supplied.)

Your letter indicates that you attach significance to the alleged fact that the landowner has been informed (presumably by members of the local zoning board) that the board would grant his request for rezoning of a portion of the land only if the owner would be agreeable to having the entire tract rezoned to a nonagricultural use.

The statute makes no provision for such a contingency but instead *commands* that land which has been zoned to a nonagricultural use at the request of the owner, subsequent to the enactment of the law, *shall* be reclassified by the property appraiser as nonagricultural. The rezoning is being done *subsequent* to the enactment of the law, since Ch. 72-181, Laws of Florida, through which s. 193.461(4)(a)3., F. S., was created, took effect July 1, 1972, and was made to apply to ad valorem assessments and taxes levied after December 31, 1972. The landowner is not being compelled to petition the zoning board for the desired rezoning or to acquiesce in or accept the proposed rezoning of the land to a nonagricultural use, and it is apparent from your letter that if the owner does not wish *to have the entire tract of land rezoned, he need* only withdraw the petition for rezoning or decline to file it. He does not *have* to accept rezoning of the entire tract. It would accordingly be my view that the provision of the statute would apply and the property appraiser would be required to reclassify the entire tract as nonagricultural if the owner agrees to the rezoning of the entire tract of land to a nonagricultural use in the circumstances set forth in the factual situation stated in your inquiry. The command to reclassify the land as nonagricultural stated in the statute is quite clear and concise, containing no such exception as that mentioned in the factual situation stated in your letter.

As you are no doubt aware, this provision of the statute is presently involved in litigation in various courts throughout the state, although I am not aware of any court case involving the specific question you have posed. However, until determined to the contrary by the judiciary, my opinion is as stated above.

076-163—August 11, 1976

TAXATION

WHEN SPECIAL ASSESSMENT LIEN ATTACHES

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Patricia S. Turner, Assistant Attorney General

QUESTION:

When does a special assessment lien attach to real property subject to said lien pursuant to Ch. 170, F. S.?

SUMMARY:

A special assessment lien attaches to real property subject to said lien at the time the governing body of the municipality equalizes and approves the special assessment by resolution or ordinance, pursuant to s. 170.08, F. S., even if the improvements have not been completed.

Your question is answered by the following discussion.
Section 170.08, F. S., provides in pertinent part:

> **Equalizing board to hear complaints and adjust assessments; rebate of difference in cost and assessment.**—At the time and place named in the notice provided for in s. 170.07, the governing authority of the municipality shall meet as an equalizing board to hear and consider any and all complaints as to such special assessments, and shall adjust and equalize the said assessments on a basis of justice and right, and when so equalized and approved by resolution or ordinance of the governing authority, such assessments shall stand confirmed, and remain legal, valid and binding first liens, upon the property against which such assessments are made, until paid . . . .

Pursuant to the above-quoted statute, the governing body of the municipality must convene, after proper notice is given to property owners whose real property is subject to special assessments in accord with s. 170.07, F. S., to consider complaints of said property owners and to adjust and equalize said assessments. Upon so equalizing and upon approval by resolution or ordinance of the governing body of the municipality, the assessments provided for in Ch. 170, F. S., stand confirmed as legal liens upon the property against which made.

At the time the governing body approves and confirms the special assessments in the manner specified in s. 170.08, F. S., said assessments become "legal, valid and binding first liens" attaching to real property subject to said assessments. The assessment liens so attach and take priority from that date as first liens upon the property against which the assessments are made and are superior to existent mortgages and other private liens, regardless of priority of time, 29A Fla. Jur. *Special Assessments* s. 50, even if the improvements have not been completed. *Also see* Gailey v. Robertson, 123 So. 692 (Fla. 1929).

Although s. 170.08, F. S., requires the city clerk to record the assessments in a special "lien improvement book," recordation is directed toward preserving prima facie *evidence* of the validity of said liens rather than to the validity of the liens themselves. Therefore, special assessment liens attach to real property subject to said liens upon the equalization of the assessments and the approval thereof by resolution or ordinance of the governing body of the municipality.

076-164—August 12, 1976

TAXATION

SUPPLIES OF TIRES AND SPARE PARTS HELD FOR USE IN LEASED VEHICLES TAXABLE AS INVENTORY; FUEL FOR LEASED VEHICLES TAXABLE AS TANGIBLE PERSONAL PROPERTY

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Harold F. X. Purnell, Assistant Attorney General

QUESTION:

Are supplies of motor fuel, tires, and repair parts held for the sole purpose of operation and maintenance of rental cars and trucks to be considered inventory for purpose of assessing the personal property tax?

SUMMARY:

Supplies of tires and repair parts held for the sole purpose of physical incorporation in vehicles held for sale or lease to customers in the ordinary course of business constitute inventory within the purview of s. 192.001(11)(c), F. S., prior to their physical incorporation in the vehicles. Supplies of motor fuel held for the sole purpose of use in vehicles leased to customers in the ordinary course of business, being consumed with use, constitute tangible personal property within the purview of s. 192.001(11)(d), F. S.

The file accompanying the opinion request reflects that a truck rental firm engages in the business of leasing vehicles on both long- and short-term rentals to various customers. Pursuant to the lease contracts, the truck rental firm is obligated to furnish gasoline, repair parts, and tires on the vehicles during the course of the lease. The truck rental firm therefore maintains a stockpile of fuel, parts, and tires based upon anticipated lease needs. It is the proper method of ad valorem taxation of such supplies that is the subject of this opinion.

Two mutually exclusive definitions found in s. 192.001(11)(c) and (d), F. S., play the determinative role in this matter. The former paragraph provides the definition of inventory as follows:

> "Inventory" means only those chattels consisting of items commonly referred to as goods, wares, and merchandise (as well as inventory) which are held for sale or lease to customers in the ordinary course of business. *Supplies and raw materials shall be considered to be inventory only to the extent that they are acquired for sale or lease to customers in the ordinary course of business or will physically become a part of merchandise intended for sale or lease to customers in the ordinary course of business.* Partially finished products which when completed shall be held for sale or lease to customers in the ordinary course of business shall be deemed items of inventory. All livestock shall be considered inventory. Items of inventory held for lease to customers in the ordinary course of business, rather than for sale, shall be deemed inventory only prior to the initial lease of such items. Items of inventory refers to the total of such items in a class or category assessable to a particular taxpayer. (Emphasis supplied.)

The latter paragraph provides the definition of tangible personal property, as follows:

> "Tangible personal property" means all goods, chattels, and other articles of value (but not including the vehicular items enumerated in s. 1(b), Art. VII of the State Constitution and elsewhere defined) capable of manual possession and whose chief value is intrinsic to the article itself. "Inventory" and "household goods" are expressly excluded from this definition.

The definitional context within which the supplies are categorized is of great moment to the taxpayer, for if the same are within the ambit of the statutory definition of inventory, s. 193.511, F. S., provides for their assessment at only 25 percent of just value. If, however, such supplies fall within the context of tangible personal property, they are assessed at 100 percent of just value.

In s. 192.001(11)(c), F. S., the term "supplies" is categorized as inventory in two situations where supplies are acquired for sale or lease to customers in the ordinary course of business or will physically become a part of merchandise intended for sale or lease to customers in the ordinary course of business. Such two alternatives would clearly appear to categorize as inventory supplies either being *directly* sold or leased to customers or being *indirectly* sold or leased to customers through their physical incorporation in another product being so sold or leased.

In the instant situation, there is not a direct sale or lease of the supplies of gasoline, tires, or repair parts to customers, but rather the use of such supplies in or on vehicles leased to customers. Consequently, we are concerned with that portion of s. 192.001(11)(c), F. S., which categorizes as inventory those supplies which "will physically become a part of merchandise intended for sale or lease to customers in the ordinary course of business."

Generally, the term "supplies," when used as a noun, can refer to articles of tangible personalty consumed with their use, to tangible personalty which becomes physically a part of a finished product or, in the term's broadest sense, to tangible personalty either consumed by use or physically incorporated in a finished product. Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212 (9th Cir. 1967), Santa Rosa County v. Raymond Blanton Construction Co., 138 So.2d 518 (1 D.C.A. Fla., 1962), and Waterman Steamship Corp. v. State, 124 So.2d 65 (Ala. 1960).

Applying this rationale to that portion of s. 192.001(11)(c), F. S., which relates to supplies which "will physically become a part of merchandise held for sale or lease," the meaning of the term "supplies" becomes clear. Such term would encompass only those items which physically become a part of another product. Items consumed with their use would not be within the purview of the term "supplies" as so categorized. Hence, supply items which are consumed with their use and do not become a physical part of a product held for sale or lease to customers in the ordinary course of business do not fall within the purview of s. 192.001(11)(c), F. S.

Applying this rationale to the three supply items forming the subject matter of this opinion, motor fuel, tires, and repair parts, it is apparent that the former item, motor fuel, being consumed with its use, is not within the statutory definition of the term "inventory." Motor fuel, being an item of property both intrinsically valuable and capable of manual possession, would fall within the definitional purview of tangible personal property, s. 192.001(11)(d), F. S., and would be subject to ad valorem taxation as such.

The latter two supply items, tires and repair parts, "will physically become a part of merchandise intended for sale or lease to customers in the ordinary course of business" and, therefore, are properly categorized as inventory pursuant to s. 192.001(11)(c).

Consequently, the question posed at the outset of this opinion is answered in the affirmative as to supplies of tires and repair parts. Such supplies, prior to their physical incorporation in the vehicle, fall within the statutory definition of inventory and would be subject to ad valorem taxation as such. The question posed at the outset is answered in the negative as to motor fuel. The same, being consumed with its use, does not fall within the purview of inventory but rather falls within the definition of tangible personal property and is accordingly subject to ad valorem taxation as such.

076-165—August 12, 1976

SUPERVISORS OF ELECTIONS

PROCESSING LISTS OF NAMES FOR REGISTRATION OR PARTY AFFILIATION—WHO MAY SUBMIT LISTS

To: H. Jerome Davis, Manatee County Supervisor of Elections, Bradenton

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Must a supervisor of elections process lists of names pursuant to s. 98.212(3), F. S., when such lists are submitted by persons or organizations other than those listed in s. 98.212(1), F. S.?

SUMMARY:

Under s. 98.212(3), F. S., it is the duty of a supervisor of elections to process lists of names submitted by any person or organization "for indication of registration or nonregistration or for party affiliation."

Your question is answered in the affirmative.

The first two subsections of s. 98.212, F. S., impose upon the several supervisors of elections the duty of providing certain statistical information under specified circumstances to "recognized public or private universities and senior colleges within the state, to state or county governmental agencies and to recognized political party committees." Subsection (3) of s. 98.212 states:

> Lists of names submitted to supervisors *for indication of registration or nonregistration or for party affiliation* shall be processed at all times at cost; provided, that in no case shall the charge exceed 3 cents for each name on which the information is furnished. (Emphasis supplied.)

There is nothing in the text of s. 98.212(3), F. S., which limits the duty imposed thereby to lists of names submitted by the entities described in s. 98.212(1). Accordingly, I am of the opinion that it is the duty of the respective supervisors of elections under s. 98.212(3) to process lists of names submitted by any person or organization. It should be noted, however, that s. 98.212(3) requires that lists of names be processed only "for indication of registration or nonregistration or for party affiliation" and does not require a supervisor of elections to provide any additional information.

076-166—August 12, 1976

TAXATION

PROFESSIONALLY UNRELATED PHYSICIANS WHO CERTIFY TO DISABILITY OF TAX EXEMPTION CLAIMANTS— "PROFESSIONALLY UNRELATED" DEFINED

To: Oliver Lowe, Charlotte County Property Appraiser, Punta Gorda

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General

QUESTION:

Are two or more licensed physicians associated in a medical group, in which each independently practices medicine, "professionally unrelated" as the term is used within the context of s. 196.012(10), F. S., when the only division of income from the association is that each physician pays a proportionate share of the rent for his respective facilities and likewise shares the expense of a common or group-employed clerical staff whose sole responsibility is for appointments and billing, said staff not being otherwise connected, in a professional manner, with the physicians in the medical group?

SUMMARY:

The term "professionally unrelated" as it is used in the context of s. 196.012(10), F. S., means that the two certifying licensed physicians may not be associates, partners, or members of the same firm, employees of the

same professional association or corporation, hospital, clinic, or other health care unit or facility, practicing medicine together.

The term "professionally unrelated" should not be construed to mean that when two or more physicians are associated in a medical group, in which each independently practices medicine, that they are professionally related within the context of s. 196.012(10), F. S., when the only division of income from the association is that each physician pays a proportionate share of the rent for his respective facilities and likewise shares the expense of a common or group-employed clerical staff whose sole responsibility is for appointments and billing, said staff not being otherwise connected in a professional manner with the physicians in the medical group.

As outlined in your letter, your question is predicated on the following factual situation:

> It is reported that there is a medical group, which is composed of two or more licensed physicians. Each of these physicians has his own practice and practices medicine independently of the other. However, each pays rent for his respective facilities and likewise shares the expense of a common or group-employed clerical staff, who are not connected in a professional manner with the physicians and whose sole responsibility is for appointments and billing. There is no other division of income from the operation.

Your question is answered in the affirmative as set forth herein.

Section 196.012(10), F. S., defines "total and permanently disabled persons" to mean "those persons who are currently certified by two licensed physicians of this state *who are professionally unrelated* or the Veterans' Administration to be totally and permanently disabled." (Emphasis supplied.)

I have reviewed the provisions of Ch. 196, F. S., and Ch. 12B-I, Part III, F.A.C., and find no legislative definition or administrative interpretation of the term "professionally unrelated" as it is used in s. 196.012(10).

While Ch. 196, F. S., does not define the term "professionally unrelated," *Webster's New Twentieth Century Dictionary* (1971, unabr. ed.) defines the words "professionally" and "unrelated" as: *Professionally*: "In a professional manner" (adverb); *related*: "Connected; associated" (adjective); *un*: "A prefix meaning 'not.' "

It is a generally recognized rule of statutory construction that words of common usage are to be construed in their plain and ordinary significance and not in their technical sense, unless the context indicates that they are used in some technical sense or in the sense of some trade or professional vernacular or vocabulary. Southern Bell Telephone and Telegraph Company v. D'Alemberte, 21 So. 570 (Fla. 1897); State *ex rel.* Hanbury v. Tunnicliffe, 124 So. 279 (Fla. 1929); Gasson v. Gay, 49 So.2d 525 (Fla. 1950).

Bearing in mind these elementary rules of statutory construction, I have no hesitancy in stating that, from the context in which the term "professionally unrelated" is found in s. 196.012(10), F. S., the Legislature used the term in its popular or ordinary sense and not in some technical sense or in the sense of some trade or professional vernacular or vocabulary.

In view of the above, and taking into consideration the meaning naturally attached to the term "professionally unrelated" from the context of the statute, it is my opinion that for the purpose of s. 196.012(10), F. S., the word "unrelated," used as an adjective, merely limits the phrase "two licensed physicians" to mean that the two certifying licensed physicians may not be connected or associated in a working or practicing relationship, while the word "professionally," being used in an adverb form, in effect simply modifies "unrelated."

Thus, the term "professionally unrelated" should not be construed to mean that when two or more physicians are associated in a medical group, in which each independently practices medicine, that they are professionally related within the context of s. 196.012(10), F. S., when the only division of income from the association is that each physician pays a proportionate share of the rent for his respective facilities and likewise shares the expense of a common or group-employed clerical staff whose sole responsibility is for appointments and billing, said staff not being otherwise connected in a professional manner with the physicians, in the medical group.

However, I am of the opinion that if two licensed physicians enjoy a professional medical business relationship, *i.e.*, if they are associates, partners, or members of the same firm, employees of the same professional association or corporation, hospital, clinic, or other health care unit or facility, they are professionally related within the context and meaning of s. 196.012(10), F. S. The effect of such a relationship is that only one of the licensed physicians in the same association, partnership, professional association, or corporation, hospital, unit, or facility, may certify as to the individual's total and permanent disability which results in requiring the individual to seek the second certification from another licensed physician who is "professionally unrelated" to the first certifying physician.

076-167—August 12, 1976

DADE COUNTY

MUNICIPAL RECALL PROVISIONS IN CHARTERS OF DADE COUNTY MUNICIPALITIES UNAFFECTED BY STATE STATUTE PROVIDING RECALL PROCEDURES

To: Albert Weintraub, City Attorney, Opa-Locka

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTION:

Does s. 100.361, F. S., amend the provisions of the city charter of the City of Opa-Locka relating to the recall of the members of the municipal governing body and establish both the substantive and procedural steps required to effect the recall of a member of the governing body?

SUMMARY:

Since there is a constitutional provision prohibiting the Legislature from amending or repealing the charter of any municipality in Dade County, s. 100.361, F. S., does not have the effect of amending or repealing any charter provision of the City of Opa-Locka or any other Dade County municipality.

Chapter 74-130, Laws of Florida—now codified as s. 100.361, F. S.—authorizes and provides procedures for the recall of members of the governing body of a municipality, and s. 100.361(10) states:

> It is the intent of the legislature that the recall procedures provided in this act shall be uniform statewide. *Therefore, all municipal charter and special law provisions which are contrary to the provisions of this act are hereby repealed to the extent of this conflict.* (Emphasis supplied.)

However, s. 11(1)(g), Art. VIII, State Const. 1885, the full force and effect of which is preserved by s. 6(e), Art. VIII of our present State Constitution, provides, *inter alia*:

> (1) The electors of Dade County, Florida, are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida, under which the Board of County Commissioners of Dade County shall be the governing body. This charter:
>
> * * * * *
>
> (g) Shall provide a method by which each municipal corporation in Dade County shall have the power to make, amend or repeal its own charter. *Upon adoption of this home rule charter by the electors this method shall be exclusive*

and the Legislature shall have no power to amend or repeal the charter of any municipal corporation in Dade County. (Emphasis supplied.)

In AGO 073-440, which dealt with whether a provision of the Municipal Home Rule Powers Act had the effect of amending the charter provisions of a municipality in Dade County, the effect of the above-quoted constitutional provision was stated as follows:

> This is a constitutional provision and, of course, takes precedence over a general law. In an addendum to AGO 071-42, dated March 24, 1971, I held that the charters of the several municipalities situated in Dade County could only be modified in the manner set forth in the Dade County Home Rule Charter. . . . Under the State Constitution, the legislature cannot make laws effecting charter amendments in Dade County's municipalities . . . .

The conclusion in AGO 073-440 is equally applicable here. Accordingly, I am of the opinion that s. 100.361, F. S., does *not* have the effect of amending or repealing any charter provision of the City of Opa-Locka or any other municipality in Dade County. *Cf.* Andrews v. Linden, 284 So.2d 398 (3 D.C.A. Fla., 1973). The statute may, however, confer additional powers on a Dade County municipality, *see* City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla. 1974), so long as it does not conflict with the charter.

076-168—August 12, 1976

TAX SALE

EXCESS PROCEEDS FROM TAX SALE MAY BE USED TO SATISFY RECORDED COUNTY WELFARE LIEN

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: David K. Miller, Assistant Attorney General

QUESTION:

> **Does s. 197.291, F. S., authorize the clerk of circuit court to distribute excess funds from a tax sale of land to the county in satisfaction of a recorded county welfare lien?**

SUMMARY:

> **The county welfare liens of Pinellas County, authorized by Ch. 63-1787, Laws of Florida, may be satisfied from excess funds resulting from a tax sale of land under s. 197.291(2), F. S.**

Your question is answered in the affirmative as qualified by the following discussion.

Section 197.291, F. S., governs the disbursement of the proceeds of a tax sale. Subsection (2) of that section requires that, if the sale produces an amount in excess of the statutory bid, "[t]he clerk shall distribute the excess to the governmental units for the payment of *any lien of record held by a governmental unit* against the property." (Emphasis supplied.) The language "any lien of record" is nowhere qualified or limited. Standing alone, this broad language would seem to include recorded county welfare liens within its scope. This language must, however, be read in the context of general lien law.

County welfare liens are authorized in Pinellas County by special act. *See* Ch. 63-1787, Laws of Florida. Under that act, the county may require the recipient of county welfare funds to execute a lien on all owned or after-acquired property to secure repayment of those funds. Thus, the consideration for a county welfare lien flows to the owner personally and not the res; it is a lien in the nature of a lien securing a private debt. To allow such a lien to be enforced in the manner provided by s. 197.291(2), *supra*, constitutes a substantial departure from previously well-established lien enforcement principles.

Before the enactment of present s. 197.291(2) in s. 22 of Ch. 73-332, Laws of Florida, only general tax and special assessment liens could be automatically satisfied from the excess proceeds of a tax sale. *See* s. 197.291(2), F. S. (1972 Supp.), which read in pertinent part:

> If the property is purchased for an amount in excess of the statutory bid of the certificate holder, *the excess shall be paid over and disbursed by the clerk to the governmental units and agencies holding liens for general taxes* upon the property for the payment of the liens in full, if the excess is sufficient for the purpose. . . . *If any excess remains* after the payment of all liens for general taxes upon the property and there are unpaid liens for special assessments held by any taxing district, the *clerk shall pay the excess to the taxing district for the payment of the special assessment liens.* . . . If, after all liens for general taxes and special assessments of the taxing districts upon the property are paid in full, there remains a balance of undistributed funds, the *balance of the purchase price shall be retained by the clerk for the benefit of the legal titleholder of record.* . . . (Emphasis supplied.)

An earlier statute contained a similar distribution scheme. *See* s. 197.535(2), F. S. 1971.

The Department of Revenue has promulgated an administrative rule governing the distribution of excess proceeds which adopts this distribution scheme. *See* F.A.C. s. 12B-1.348. This rule was promulgated after the passage of Ch. 73-332, *supra*, and presumably reflects the department's construction of that act. The department's rule and the earlier statutes are in harmony with the general principle that tax and special assessment liens are superior in dignity to all other liens and must therefore be satisfied first. *See* City of Tampa v. Lee, 151 So. 316 (Fla. 1933); Gailey v. Robertson, 123 So. 692 (Fla. 1929); ss. 170.09 and 197.056(2), F. S.

An administrative rule is entitled to great weight in construing a statute, but it cannot stand if clearly contrary to the language of the statute. *Cf.* Greyhound Lines, Inc. v. Yarborough, 275 So.2d 1 (Fla. 1973); Southeastern Util. Service Co. v. Redding, 131 So.2d 1 (Fla. 1961). The present statutory language, "any lien of record held by a governmental unit," cannot be limited to tax and special assessment liens, if the words are given their ordinary meaning. It would have been relatively simple to leave the statute unchanged or to specify that only certain types of liens might be satisfied in this manner; the Legislature nevertheless chose language that is plainly nonexclusive. Changes in statutory language create a presumption that the substance of the statute is changed. Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968); State *ex rel.* Triay v. Burr, 84 So. 61 (Fla. 1920).

Given their common meaning, these provisions broaden the scope of automatic disbursement of the excess proceeds of a tax sale. Presumably the Legislature intended to provide the county lienholder a remedy that is not only more convenient but more effective. The purchaser of land at a tax sale receives title free of prior encumbrances, with certain exceptions not relevant here. *See* s. 197.271, F. S. Enforcement of a county welfare lien might therefore not be possible after a tax sale of the lienee's realty. The county would retain its right of action against the debtor, but recovery in this manner may be impractical. Automatic disbursement may be necessary to prevent the disappearance of the only effective remedy after a tax sale.

The question remains whether the provisions of Ch. 63-1787, Laws of Florida, establishing county welfare liens permit their enforcement in this manner. If not, then an express or implied repeal or modification must be found. My reading of this law suggests that no enforcement remedy is excluded. Section 5 of the law permits the county commissioners to "enforce, reduce to judgment, satisfy, compromise, settle, subordinate, release, *or otherwise dispose* of any debt or lien hereby imposed." (Emphasis supplied.) Section 4 provides that the liens "shall be enforceable in the same manner as mortgages." I conclude, in light of the language in s. 5, that the s. 4 remedy is permissive and not exclusive. If this be the case, no express or implied repeal or modification is necessary.

More to the point, however, when a special act and a subsequent general law operate in different areas, the courts will attempt to give effect to both. *See* American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938); State *ex rel.* Triay v. Burr, *supra*; and Stewart v. Deland-Lake Helen Special Road and Bridge Dist., 71 So. 42 (Fla. 1916). In *Stewart* the court looked to the titles of the two acts to determine their fields of operation. Applying that principle here, it is clear that Ch. 63-1787, relating to Pinellas County public welfare, does not operate in the same field as Ch. 73-332, relating to collection of ad valorem taxes.

Giving effect to both laws within their respective fields, I conclude that s. 197.291(2), F. S., authorizes the satisfaction of a county welfare lien from the excess proceeds of a tax sale. Certain caveats must, however, accompany this conclusion. The satisfaction of the welfare lien from excess proceeds of a tax sale may be improper in the following situations: When the amount of the debt secured by the lien is unspecified or uncertain (*i.e.*, where the lien is inchoate), and other specific lien interests exist; when outstanding *private* liens exist that would, in the absence of a tax sale, have priority over the county welfare lien; and when outstanding *public* liens exist that would, in the absence of a tax sale, have priority over the county welfare lien. Note that s. 197.291(2) provides for all public liens to be paid the excess pro rata in full satisfaction of the lien. Such a distribution might not be permitted when an outstanding special assessment lien exists, because special assessment liens ordinarily have priority over county welfare liens.

One can reasonably question whether the Legislature, in passing an act relating to ad valorem tax collection, intended to alter these principles of lien law, and, if so, whether the act so applied would be valid. As these issues are outside the scope of your question, I decline to consider them here.

076-169—August 12, 1976

POLLUTION RECOVERY FUND

MONEYS TO BE DEPOSITED IN

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Are the moneys which are required to be deposited into the Pollution Recovery Fund under s. 403.165, F. S., limited to those moneys which are recovered by the state in a judicial action, as distinguished from an administrative proceeding or similar action by the Department of Pollution Control?

SUMMARY:

In light of the apparent legislative intent that all moneys recovered for violations of part I of Ch. 403, F. S., be used to restore polluted areas, all such moneys should be placed in the Pollution Recovery Fund established by s. 403.165 without regard to the statutory procedure (administrative or judicial) employed to obtain recovery.

Your question is answered in the negative.
Section 403.165, F. S., provides as follows:

> (1) Any moneys recovered by the state *in an action* against any person who has polluted the air, soil, or water of the state in violation of this chapter shall be used to restore the polluted area which was *the subject of suit* to its former condition.
>
> (2) There is hereby created a Pollution Recovery Fund which is to be supervised and used by the department to restore polluted areas of the state, as defined by the department, to the condition they were in before pollution occurred. The fund shall consist of all moneys specified in subsection (1). The moneys shall be disbursed first to pay all amounts necessary to restore the respective polluted areas which were *the subjects of state actions*. Any moneys remaining in the fund shall then be used by the department, as it sees fit, to pay for any work needed to restore areas which required more money than the state was able to obtain *by court action or otherwise* or to restore areas *in which the state brought suit* but was unable to recover any moneys from the alleged violators. (Emphasis supplied.)

This section was enacted as part of Ch. 72-286, Laws of Florida, the primary effect of which was to revise and strengthen the enforcement provisions of part I of Ch. 403, F. S., the Florida Air and Water Pollution Control Act. *See, e.g.*, s. 403.121 establishing judicial and administrative remedies "to recover damages for any injury to the air, waters, or property, including animal, plant, and aquatic life, of the state caused by any violation" of part I of Ch. 403; and s. 403.131 providing that:

> (2) All the judicial and administrative remedies in this section and s. 403.121 are independent and cumulative except that the judicial and administrative remedies to recover damages are alternative and mutually exclusive.

You point out that SB 1058, Regular Session 1976, which "died in committee," would have, among other things, amended s. 403.165, F. S., to expressly refer to "[a]ny moneys recovered by the state in an *administrative or judicial* action." (Emphasis supplied.)

It is true that, in legal matters, the words "action" and "suit" are most often associated with judicial proceedings. *See* 2 Words and Phrases *Action; Action at Law*, pp. 87-90. However, depending on the context in which these words appear, they may encompass a broader meaning. For instance, s. 403.121(2)(d), F. S., provides that "[n]othing herein shall be construed as preventing any other *legal or administrative action* in accordance with law." (Emphasis supplied.) Also, the word "suit" has been construed on occasion to include quasi-judicial administrative proceedings, especially where such proceedings may be continued in court. *See* 40A Words and Phrases *Suit*, p. 174; *see also* s. 403.121(2)(a), F. S., providing in part that "the board may order that the violator pay a specified sum in damages to the state [and] [j]udgment for the amount of damages determined by the board may be entered in any court having jurisdiction thereof and may be enforced as any other judgment"; and s. 403.121(3), F. S. Thus, if it appears to be the legislative intent that the words "action" and "suit," as utilized in s. 403.165, F. S., include administrative proceedings maintained pursuant to part I of Ch. 403, F. S., then those terms, in my opinion, are broad enough in meaning to allow the implementation of that intent. *See* Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522, 524 (Fla. 1973), in which it is stated that "a statute should be construed and applied so as to give effect to the evident legislative intent, even if it varies from the literal meaning of the statute," and that "[l]egislative intent should be gathered from consideration of the statute as a whole rather than from any one part thereof." *See also* Garner v. Ward, 251 So.2d 252 (Fla. 1971); and Adams v. Gordon, 260 So.2d 246 (4 D.C.A. Fla., 1972).

In this latter regard, s. 403.165, F. S., was added to Committee Substitute for HB 2996, Regular Session 1972 (which became Ch. 72-286, Laws of Florida), as a floor amendment proposed by Representative Jim Tillman. As gleaned from the tapes of Representative Tillman's comments during the floor debate, the purpose of this proposed amendment was to insure that moneys recovered pursuant to part I of Ch. 403, F. S., would not be placed in the state General Revenue Fund, from which they could be appropriated for any purpose, but would be used exclusively for restoration of polluted areas. *Cf.* AGO 073-330A in which tape recordings of legislative debates were relied upon in construing Ch. 73-173, Laws of Florida, relating to the salaries of county officers. Further, upon final passage of Committee Substitute for HB 2996 by the Legislature, Representative Guy Spicola, then Chairman of the House Committee on Environmental Pollution Control, sent a letter to the Governor dated April 11, 1972, urging the Governor to sign the bill into law and stating in part that "[t]he bill also contains provisions for a 'pollution recovery fund' into which *all sums received from violators* would be placed and then used to restore polluted areas." (Emphasis supplied.) Thus, it would appear that the overriding intent of the proponents of that part of Committee Substitute for HB 2996, which became s. 403.165, was that *all* moneys collected for violations of part I of Ch. 403 be used for restoration of polluted areas, regardless of the statutory procedure employed to obtain such collection. *See* s. 403.165(2) providing in part that any excess moneys in the fund shall be used to restore areas which required more money than the state was able to obtain "by court action or otherwise."

Accordingly, I am of the view that, until legislatively or judicially determined to the contrary, the moneys which are required to be deposited into the Pollution Recovery Fund under s. 403.165, F. S., should include all moneys received for violations of part I of Ch. 403, F. S., in administrative as well as judicial proceedings.

076-170—August 19, 1976

CRIMINAL LAW

SALE OR TRANSPORT OF LAWFULLY OBTAINED NATIVE PLANTS BY OTHER THAN ORIGINAL COLLECTOR NOT UNLAWFUL

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTION:

Is the sale or transport of legally obtained native plants by anyone other than the original collector legal?

SUMMARY:

The sale or resale of legally obtained wild or native plants listed in s. 865.06(1)(b), F. S., by any person other than the original lawful collector thereof is not prohibited by the state native plant law (s. 865.06, F. S.).

Section 865.06(1)(a), F. S., makes it unlawful for any person to pick, pull up, or dig up the wild plants or trees therein designated growing upon the land of another without having previously obtained permission from the owner or lawful occupant of such land or his representative. Section 865.06(1)(b) provides that it is unlawful for any person to "[t]ransport, carry, or convey on any public highway, or sell or offer for sale in any place, the [wild and native plants listed herein] which have been gathered, picked, pulled up, torn up, dug up, cut or broken *in violation of this law*." (Emphasis supplied.)

Persons who legally obtain, cultivate, or import such wild and native plants cannot be successfully prosecuted for the transportation, conveyance, or sale of such wild or native plants. *See* s. 865.06(2)(a), F. S.; *cf.* s. 865.06(4), F. S. Furthermore, paragraph (b) of subsection (2) specifically permits the sale of commercially grown native plants by licensed, certified nurserymen, as "it is the intent of the law to preserve and encourage the growth of these native plants."

An examination of s. 865.06, F. S., fails to indicate any restriction against the original lawful collector which would prohibit the sale of legally obtained wild and native plants to nurserymen or any other individual for resale. Section 865.06(1)(b) proscribes only the sale and conveyance of the named plants gathered in violation of s. 865.06. Wild and native plants gathered in compliance with the law—with the permission of the owner of the land from which taken or the lawful occupant thereof or his representative, s. 865.06(1), or taken from a person's own land or land leased by him, or legally imported, s. 865.06(2)(a)—are *not* gathered or taken in violation of the native plant law. It is an elemental rule of statutory construction that when a statute enumerates the things on which it is to operate or forbids certain things, it must be construed as excluding from its operation all things not expressly mentioned therein. Ideal Farms Drainage District v. Certain Lands, 19 So.2d 234 (Fla. 1944).

In view of the above, I agree with the Division of Plant Industry's interpretation of this law that when the original collector obtains the wild or native plants in compliance with the law, such plants in effect become legal nursery stock and may be sold by either the original collector, a stock dealer receiving such lawfully gathered wild or native plants, or by any person other than the original lawful collector or who has purchased or received such plants from the collector.

Your question is answered in the affirmative.

076-171—August 19, 1976

SHERIFFS

SERVICE OF PROCESS ISSUED BY FOREIGN COURT—AUTHORITY, BOND

To: R. W. Weitzenfeld, Manatee County Sheriff, Bradenton

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Are the sheriffs of the State of Florida under any duty, obligation, or requirement to serve civil process issued by a state other than Florida?
2. Would a sheriff be in violation of s. 30.19, F. S., or s. 839.19 F. S., if he refused to serve out-of-state civil process?
3. If the sheriff did execute and serve out-of-state civil process, would he come under the protection of ss. 843.01 and 843.02, F. S.?
4. Does the bond, as required of the sheriff under s. 30.01, F. S., conditioned upon the faithful discharge of the duties of his office, cover the service of out-of-state civil process?

SUMMARY:

The duties and authority of a sheriff as to execution or service of civil process are wholly statutory. A Florida sheriff has no legal or statutory *duty* to serve civil process issued by a court of a state other than Florida. Service of such foreign civil process, since not a statutory duty of the sheriff, would not be covered under the sheriff's bond required by s. 30.01, F. S. The requirements, prohibitions, protections, and penalties of ss. 30.19, 839.19, 843.01, and 843.02, F. S., apply to and operate only on execution or service by a Florida sheriff of civil process lawfully issued by a court of the State of Florida. Under certain conditions a Florida sheriff may be authorized by another state's statutes to serve that state's civil process in Florida upon persons subject to the jurisdiction of the courts of the other state. Service so authorized would be only for purposes prescribed by laws of the foreign state, and a sheriff serving civil process under authority of a foreign state's statutes would do so as an agent of that other state, not as an agent of the State of Florida.

It has been generally stated that, "[w]ith respect to the execution of process, *the power possessed by the sheriff or constable is wholly statutory*, and no power exists in him except such as is expressly so conferred or may be fairly implied from the provisions thereof." (Emphasis supplied.) 80 C.J.S. *Sheriffs and Constables* s. 44, p. 214. Service of process is also considered a ministerial duty of a sheriff. Thus he is required to serve all process "which appears on its face to have issued from competent authority, and with legal regularity, and *the service or execution of which is within the lawful powers of his office.*" (Emphasis supplied.) *Id.* These general rules are applicable to a Florida sheriff, particularly as to the proposition that the sheriff's powers and duties in regard to service of process are "wholly statutory." Such an analysis is fully in keeping with a sheriff's overall dependency—as an administrative officer—on legislative enactment. *See* AGO 075-161.

A determination as to whether a Florida sheriff has any *duty* to serve out-of-state civil process requires an examination of applicable laws of Florida (no other state may impose a *duty* upon a sheriff of this state). The primary provision in this regard is s. 30.15, F. S., providing in pertinent part:

> Sheriffs, in their respective counties, in person or by deputy, shall:
> (1) Execute all process of the supreme court, circuit courts, county courts, and boards of county commissioners *of this state*, to be executed in their counties;

(2) Execute such other writs, processes, warrants, and other papers directed to them, as may come to their hands to be executed in their counties;

* * * * *

(10) Perform such other duties as may be *imposed upon them by law.* (Emphasis supplied.)

Section 30.30(1), F. S., provides that "[w]henever any writ, issuing out of any *court of this state,* shall be delivered to a sheriff, commanding him to levy upon property specifically described therein, it shall be his *duty* to levy upon such property." (Emphasis supplied.) And subsection (6) of s. 30.30 provides that "[n]o sheriff shall be liable for making any levy pursuant to the specific order of a *court of competent jurisdiction.*" (Emphasis supplied.)

The sections about which you expressed concern are ss. 30.19, 839.19, 843.01, and 843.02, F. S. Section 30.19 provides:

> Every sheriff or deputy failing to execute any writ or other process, civil or criminal, *to him legally issued and directed* within his county and make due return thereof . . . shall forfeit $100 for each neglect . . . unless such sheriff or deputy can show sufficient cause for such failure or neglect to the court. (Emphasis supplied.)

Section 839.19 provides:

> Any sheriff or other officer authorized to execute process, who willfully or corruptly refuses or neglects to execute and return, *according to law,* any process delivered to him, shall be guilty of a misdemeanor of the first degree . . . . (Emphasis supplied.)

As to obstruction of a sheriff who is serving process, s. 843.01 provides:

> Whoever knowingly and willfully resists, obstructs, or opposes any sheriff, deputy sheriff . . . or other person *legally authorized to execute process,* in the execution of legal process or in the lawful execution of any *legal duty,* by offering or doing violence to the person . . . shall be guilty of a felony of the third degree . . . . (Emphasis supplied.)

And s. 843.02 provides:

> Whoever shall obstruct or oppose any such officer . . . or legally authorized person, in the execution of *legal process* or in the *lawful execution* of any *legal duty,* without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree . . . . (Emphasis supplied.)

Absent any clear and unequivocal evidence to the contrary, I must assume that when the Florida Legislature, as in the above-cited statutes, refers to courts or to process and the issuance and execution thereof, it is referring to *Florida* courts and process issued therefrom. It is axiomatic that the Legislature of Florida possesses no power over the judicial system of other states or the process thereof. It is fundamental that one state cannot make its law effective in another state, American Fire Ins. Co. v. King Lumber & Mfg. Co., 77 So. 168, 172 (Fla. 1917), *aff'd* 250 U.S. 2 (1919), and that a state cannot make its process effective in another state. Beckwith v. Bailey, 161 So. 576, 581 (Fla. 1935). Thus, the various references in the Florida Statutes to *legal* process, process *legally* issued, etc., must have been intended to refer to process lawfully and properly issued *by the courts of Florida.* I am of the opinion, therefore, that a Florida sheriff has no legal or statutory duty to serve civil process issued by the courts of a state other than Florida and that the requirements, prohibitions, protections, and penalties contained in ss. 30.19, 839.19, 843.01, and 843.02, *supra,* do not apply to or operate on civil process issued by a state other than Florida and executed by a Florida sheriff. And, since the sheriff's bond required by s. 30.01, F. S., is "conditioned upon the faithful discharge of the *duties* of his office" (Emphasis supplied.), I am of the opinion that such bond would not cover service by the sheriff of civil process issued by a state other than Florida.

Notwithstanding the above determination that a Florida sheriff has no statutory duty to serve out-of-state civil process, it would appear that a Florida sheriff could be authorized, but not required, under certain conditions by the statutes of a state other than Florida to serve that state's civil process in Florida upon persons subject to the jurisdiction of the courts of such other state. *See* 72 C.J.S. *Process* s. 73; and *cf.* ss. 48.161(1), 48.193(2), and 48.194, F. S., providing that in certain circumstances certain civil process issued by Florida courts may be personally served upon persons subject to the jurisdiction of the Florida courts in another state by an officer authorized to serve like process in that other state. However, it must be emphasized that such authorization by the statutes of another state would impose no legal duty upon a Florida sheriff and that service in Florida by a sheriff pursuant to foreign statutory authority would be only for the purposes authorized and prescribed by laws of the foreign state and could only make the process effective in the issuing state. Should a Florida sheriff serve such out-of-state civil process, he would do so as an agent of that other state—not as an agent of the State of Florida.

076-172—August 19, 1976

AIRPORT SECURITY GUARDS

MEETING STANDARDS OF FEDERAL AVIATION REGULATIONS; COMPLIANCE WITH MINIMUM POLICE STANDARDS

To: Renold L. DeBarge, Airport Manager, Okaloosa County Air Terminal, Eglin Air Force Base

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTIONS:

1. Do security guards appointed by the board of county commissioners under s. 332.08, F. S., meet the requirements of Federal Aviation Regulation Part 107?

2. Are airport security guards appointed under s. 332.08, F. S., required to meet and comply with the minimum police standards as set forth in s. 943.13, F. S.?

SUMMARY:

Airport guards or police duly appointed by a board of county commissioners under s. 332.08(2), F. S., are peace officers statutorily vested with the common-law powers of such officers within the geographic limits of the county airport and therefore are subject to the Police Standards and Training Commission and to all applicable terms and provisions of ss. 943.09-943.24, F. S. Such officers, upon being duly certificated by the Police Standards and Training Commission pursuant to s. 943.14(2), would appear to be law enforcement officers within the meaning of part 107.1(e) of the Federal Aviation Regulations if other requirements are met and satisfied.

As your questions are interrelated, they will be answered together.

Federal aviation regulations require the presence of a law enforcement officer at final passenger screening prior to boarding. Part 107.1(e) of said regulations defines "law enforcement officer" as an armed person authorized to carry and use firearms; vested with a police power of arrest under federal, state, or other political subdivision authority; identifiable by uniform, badge, or other indicia of authority; and assigned the duty of providing law enforcement support for preboard screening aspects of the security programs filed by part 121 certificate holders, foreign air carriers requesting such support and for airport security programs.

Section 332.08(2)(a), F. S., provides that a municipality, as defined in s. 322.01(1), F. S., including any county, is authorized to adopt and amend all needful rules, regulations, and

ordinances for the management, government, and use of the airports, air terminal facilities, and other properties under its control; to fix by ordinance or resolution penalties for the violation of such rules, regulations, and ordinances; to enforce such penalties in the same manner in which penalties prescribed by other regulations and ordinances of the municipality or county are enforced, *i.e.*, through and by the appropriate police agencies and courts; and to appoint airport guards or police with "full police powers." Section 332.08(2)(b), F. S., provides, *inter alia*, that where a county operates one or more airports, its regulations for the government thereof shall be by resolution of the board of county commissioners and shall be enforced "as are the criminal laws. Violations thereof shall be a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083." (It is worthy of note that under s. 1(f), Art. VIII, State Const., a noncharter county should enact such regulations by ordinance in the manner prescribed by s. 125.66, F. S.) *Cf.* s. 125.69 with ss. 775.082(4)(b) and 775.083(1)(e), F. S.

The question immediately pending herein is in regard to the legal status, duties, and functions of the airport guards and police so appointed by a county or municipality under s. 332.08(2)(a), F. S.

As the statute here under consideration authorizes the adoption and enforcement of needful regulations and ordinances in the same manner in which other regulations, ordinances, and penalties are adopted and enforced by a municipality or county and, with respect to a county, directs that its regulations shall be enforced as are the criminal laws and makes any violation thereof a misdemeanor, it is apparent that the airport police duly appointed by a board of county commissioners are, and serve as, the enforcing or "police" agency of the county within the territorial limits of the airport owned and operated by the county and that the statute bestows complete "police" or enforcement powers on such airport guards or police for the purpose of enforcing such regulations in the same manner as criminal laws, *i.e.*, arrest for violation thereof. Otherwise, the provisions of the statutes providing criminal penalties (misdemeanors), vesting enforcement powers, and generally providing for enforcement of the regulations for the government of the county airport would be for naught. It is an elemental rule of statutory construction to give effect to every part of a statute if reasonably possible; and each part should be construed in connection with every other part so as to produce a harmonious result, Snively Groves v. Mayo, 184 So. 839 (Fla. 1939), and to effectuate the intent and purpose of the statute. Atlantic Coast Line R. Co. v. State, 74 So. 595 (Fla. 1917); American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938); Smith v. Ryan, 39 So.2d 281 (Fla. 1949). Therefore, I am of the opinion that such duly appointed county airport guards or police are statutorily empowered to act as the aforementioned enforcement or "police" agency of the county within the territorial limits of the county airport and with complete police or law enforcement powers within the geographic limits thereof.

The word "full" as used in s. 332.08(2)(a), F. S., describes the phrase "police powers," has reference to the airport guards or police, and is defined in Black's Law Dictionary, Revised Fourth Edition, at p. 800, to mean: "Abundantly provided, sufficient in quantity or degree, complete, entire, and detailed," and further as "ample; perfect; mature; not wanting in any essential quality." Thus, it is evident that the Legislature granted the whole of such police or enforcement powers to such airport guards or police, including the power to preserve the peace and maintain the public order and the power of arrest, which are common-law powers now vested in peace officers. *See* s. 901.15, F. S.; Tezeno v. Maryland Casualty Co., 166 So.2d 351, 355 (La. 1964); *cf.* AGO 072-139; State v. Grant, 216 A.2d 790 (N.H. 1966); State v. Cohen, 158 A.2d 497 (N.J. 1960); People v. Salerno, 235 N.Y.S.2d 879 (Sup. 1962); People *ex rel.* Lawrence v. Noble, 256 N.Y.S.2d 730 (Sup. 1965).

In Wyndham v. U.S., 197 F. Supp. 856 (E.D.S.C. 1961), the court stated that the term "police," as commonly understood, "is so plain and unambiguous that there is no occasion for resorting to rules of statutory interpretation," and that "the Court has no right to look for or impose another meaning." The court then defined the term as "an organized civil force for maintaining order, preventing and detecting crime, and enforcing the laws." *Also see* Tezeno v. Maryland Casualty Co., 166 So.2d 351, 355-356 (La. 1964), and decisions cited therein.

Jeremy Bentham is quoted in 72 C.J.S., at p. 207, as writing that the police of a state is in general a system of precaution, either for the prevention of crime or of calamities, and that its business may be divided into eight distinct branches, the first of which is "police for the prevention of offenses." *Also see* Black's Law Dictionary, *supra*, at p. 1316. It has also been defined as the "enforcement of the law [and] public order," and in a more

restricted sense as being "the department of government which is concerned with maintenance of order and enforcement of law;" and the term is particularly applied to "those officers who are appointed for the purpose of the maintenance of public tranquility among the citizens." 72 C.J.S., at p. 207.

"Police," as a noun, is defined in *Ballantine's Law Dictionary* as:

> The law enforcing department of a state or local government having the duty of maintaining order, detecting crimes, and making arrests. Peace officers. In the broadest sense, inclusive of both administrators and magistrates.

(*Also see* Black's Law Dictionary, Fourth Edition, Police Officer, at p. 1317.)

"Peace Officer" is defined in 70 C.J.S., p. 380, as "an officer of the law, a law enforcement officer" and "a conservator of the peace."

In 15A C.J.S., pp. 579-580, "peace officer" and "conservator of the peace" are held to be synonymous and are further defined as:

> A term applied to those who have especial charges, by virtue of their office, to see that the King's peace is kept; a common-law officer whose duties, as such, were to prevent and arrest for breaches of the peace in his presence, but not to arraign and try for them; an officer authorized to preserve or maintain the public peace; an officer who has charge of preserving the peace, as a justice or sheriff.

Application of the aforementioned terms and judicial definitions thereof to the instant questions compels the conclusion that the Legislature, in and by enactment of s. 332.08(2), F. S., must have intended, and in fact did intend, to provide for the appointment of airport guards or police statutorily vested with the common-law powers of peace officers and with complete authority or power to enforce, not only the duly adopted regulations for the government of the county airport, but also the criminal laws of the state on and within the geographic limits of the county airport. *See* s. 901.15, F. S., for the arrest powers of a peace officer without a warrant, s. 901.17, F. S., for the method of arrest by a peace officer without a warrant, and s. 901.21, F. S., as to searches of persons so arrested. It is axiomatic that the intent of the Legislature as gleaned from a statute is the law and must be given effect. State v. Knight, 124 So. 461 (Fla. 1929); Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958); Small v. Sun Oil Co., 222 So.2d 196 (Fla. 1969). Moreover, the Legislature—in employing the language "with full police powers"—is conclusively presumed to have a working knowledge of the English language and to have drafted the statute in such manner as to clearly convey its meaning, and the only proper function of the court is to effectuate such legislative intent. Florida State Racing Commission v. McLaughlin, *supra.*

Section 943.10(1), F. S., applicable to the Police Standards and Training Commission and related statutes in ss. 943.09-943.24, F. S., defines "police officer" as "any *person employed full time by* any municipality or the state or *any political subdivision* thereof, whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state." (Emphasis supplied.) Section 943.10(2) defines "employing agency" as "any political subdivision . . . employing police officers as defined in subsection (1)."

"Penal laws" are those which deal with offenses against the state and are, in this respect, synonymous with "criminal laws." *See* Black's Law Dictionary, p. 1290.

In view of the foregoing discussion, it is apparent that the duties of the airport guards or police here under consideration fall well within the definition of "police officer" in s. 943.10(1), F. S., and that the county is the employing agency as defined in s. 943.10(2), F. S., thus subjecting said person and the county to the terms and provisions of the Police Standards and Training Laws (ss. 943.09-943.24, F. S.).

Section 790.051, F. S., exempts "law enforcement officers," which term is defined in s. 790.001(8)(a), F. S., to include all officers or employees of the political subdivisions of the state possessed with the authority to make arrests (as I have hereinabove concluded these airport police are) and in s. 790.001(8)(e) to include all peace officers (in which status stand the airport police under s. 332.08(2), F. S.) from the licensing and penal provisions of Ch. 790, F. S., in regard to the possession and carrying of firearms by such officers when acting at any time within the scope or course of their official duties or when acting at any time in the line of, or performance of, duty. *Also see* s. 790.25(3)(d), F. S., excepting from the provisions of ss. 790.05 and 790.06, F. S., "policemen . . . and other peace and

law enforcement officers" and making it lawful for such persons to own, possess, and lawfully use firearms and other weapons for lawful purposes.

Section 776.05, F. S., *inter alia*, authorizes a "law enforcement officer," which term is defined in *Ballantine's Law Dictionary*, p. 712, so as to include peace officers (and thus the airport guards and police here under consideration), to use "any force" which he reasonably believes to be necessary to defend himself or another from bodily injury while making an arrest or when necessarily committed in arresting felons fleeing from justice.

Thus, the county airport guards or police about whom you inquire are authorized to use any force, including deadly force, reasonably necessary to effectuate a lawful arrest and are exempted from the licensing and penal provisions of Ch. 790, *supra*, in regard to the possession and lawful use of firearms and other weapons for lawful purposes when acting within the scope or course of their official duties.

Further, should such airport guards or police be identifiable by uniform, badge, or other indicia of authority, and should they be assigned the duties set forth in paragraph 4, part 107.1(e) of the Federal Aviation Regulations, it would appear that the terms and provisions of said regulation are satisfied by the appointment of said guards or police under s. 332.08, F. S., and the issuance of a certificate of compliance by the Police Standards and Training Commission. *See* ss. 943.12(1), 943.13, 943.14, and 943.19, F. S.

Therefore, in consideration of all of the foregoing, I am of the opinion that airport guards or police appointed under s. 332.08(2), F. S., are subject to the Police Standards and Training Commission and to all applicable terms and provisions of ss. 943.09-943.24, F. S.

076-173—August 19, 1976

TAX COLLECTORS

OFFICE EXPENSES; USE OF COUNTY OFFICE SPACE WITHOUT RENT; BRANCH OFFICES; LEGAL SERVICES

To: Rudy Underdown, Brevard County Tax Collector, Titusville

Prepared by: Staff

QUESTIONS:

1. Should the board of county commissioners equip and maintain the offices of the county tax collector fee officer?
2. May the board of county commissioners charge rent to the tax collector fee officer for the use of county office facilities?
3. May a tax collector fee officer, under a budget item, rent office facilities or establish branch offices?
4. May the board of county commissioners furnish legal services to the tax collector fee officer without charge, or can the board charge for such services?

SUMMARY:

As to tax collector fee officers in noncharter counties, the board of county commissioners is without statutory authority to expend any part of the excess fees of the office of county tax collector or any county funds under its control for the purpose of equipping and maintaining the offices of a tax collector fee officer, and it possesses no statutory authority, and is not charged with any statutory responsibility or duty, to equip and maintain the office of a tax collector fee officer. Rather, the annual budget established by tax collector fee officers should provide for all items of expense including operating capital outlays or equipment.

The board of county commissioners is without statutory authority to charge rent to a county tax collector fee officer for the use of county buildings or office facilities for his principal office in the county seat in the absence of special law otherwise providing.

Branch offices in Brevard County for the conduct of county business, including that of the tax collector, may be established only by the Board of County Commissioners of Brevard County pursuant to Ch. 30596, 1955, Laws of Florida, and Ch. 59-1118, Laws of Florida, and the Tax Collector of Brevard County is without authority to establish same, including leasing or renting office facilities for branch offices outside the county seat. The Board of County Commissioners of Brevard County is under a duty to provide office space within the county seat to the county tax collector without charge, but the board's determination of the allocation of county office space to county officers controls in the absence of fraud or a clear abuse of discretion.

The board of county commissioners may provide legal services to the tax collector fee officer without charge if the board determines that such action serves a county purpose and is beneficial to the county. The tax collector fee officer may employ counsel if it becomes necessary to engage an attorney to bring or defend actions or proceedings in carrying out his statutory duties or functions and to compensate such attorney as a necessary expense of operating his office. The board of county commissioners is without statutory authority to charge a tax collector fee officer for any legal services furnished such fee officer by the board.

AS TO QUESTION 1:

My response is confined to tax collector fee officers in noncharter counties. It is my understanding that these questions arise due to the repeal of s. 145.12(3), F. S. 1971, by Ch. 73-349, Laws of Florida. Section 145.12(3) provided that:

> On or before the date for filing the annual report, each county officer shall pay into the county general fund all money in excess of the sum to which he is entitled as annual salary under the provisions of this chapter. *The board of county commissioners shall expend such of the excess fees as necessary for the purpose of equipping and maintaining the offices of the county fee officers.* (Emphasis supplied.)

For the services of collecting their taxes and licenses, each taxing authority or agency pays a statutorily prescribed commission or fee to the tax collector which is used to fund the operation of the office. *See* s. 192.091, F. S. At the end of the calendar year (for fee officers) pursuant to former s. 145.12(3), *supra*, any money in excess of the tax collector's annual salary (and official operating expenses) was paid into the county general fund, but the board of county commissioners was required to expend so much of such excess fees as necessary for the purpose of equipping and maintaining the office of the tax collector.

Subsequently, s. 145.12, *supra*, was repealed by Ch. 73-349, Laws of Florida, and the italicized portion of former s. 145.12(3) delineated above was not reenacted by Ch. 73-349 (Part III, Ch. 218, F. S.), nor by Ch. 145, F. S. 1973.

Section 218.36(2), F. S., provides, in pertinent part:

> Whenever a tax collector has money in excess, he shall distribute the excess to each governmental unit in the same proportion as the fees paid by the governmental unit bear to the total fee income of his office. . . .

See AGO 074-71. Moreover, pursuant to s. 218.35, F. S., the tax collector fee officer is responsible for establishing the budget of his office and for establishing a fiscal year beginning October 1 and ending September 30 of the following year and reporting his finances annually upon the close of the fiscal year. That section provides, *inter alia*:

> (1) Each county fee officer shall establish an annual budget for *his office* which shall clearly reflect the revenues available to said office and the functions for which money is to be expended. . . .
>
> * * * * *
>
> (3) Each county fee officer shall make provision for establishing a fiscal year beginning October 1 and ending September 30 of the following year, and shall

> report his finances annually upon the close of each fiscal year to the county fiscal officer for inclusion in the annual financial report by the county. (Emphasis supplied.)

Furthermore, the tax collector fee officer's budget for the operation of his office for the ensuing fiscal year is required to be submitted to the Department of Revenue by August 1 of each year for review and approval pursuant to s. 195.087(2), F. S., and, after final approval thereof, no reduction or increase thereof is permitted by any board or commission without the approval of the Department of Revenue.

Specifically, I find no statutory duty or other authority imposing on the county commissioners the duty to equip and maintain the office of a tax collector fee officer. Rather, such tax collector is responsible for his own budget to be funded by the fees and commissions paid to his office by the several governmental agencies for whom he collects taxes and licenses. It is fundamental that the powers and duties of county commissioners are purely statutory, and county commissioners have only such authority and duties as are conferred or prescribed by the Constitution or statutes; and, when there are any doubts as to the existence of authority, it should not be assumed. Hopkins v. Special Road & Bridge Dist. No. 4, 74 So. 310 (Fla. 1917); State v. Ausley, 156 So. 909 (Fla. 1934); State v. Culbreath, 174 So.2d 422 (Fla. 1937); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944). Section 145.12(3), F. S., having been repealed and the above-italicized portion of that statute not having been reenacted, the county commission is without authority to use or expend any portion of the excess fees of the office of tax collector or any county funds under the control and jurisdiction of the county commission for the purpose of equipping and maintaining the office of the county tax collector fee officer. It necessarily follows that the county commission possesses no statutory authority to expend county funds for such purposes, nor is it charged by law with any responsibility to do so. Gessner, *supra*, at p. 523; *cf.* AGO 071-28.

Therefore, in the premises aforestated, I am of the opinion that the annual budget established and submitted by the tax collector fee officer should contain all items of expenditure, including operating capital outlay and equipment, and that the board of county commissioners is without statutory authority to expend funds for the purpose of equipping and maintaining the office of the county tax collector fee officer and that it possesses no statutory authority, and is not charged with any statutory responsibility or duty, to equip and maintain the office of a county tax collector fee officer. It should be noted, however, that any equipment so purchased is the property of the county. Attorney General Opinion 060-18 and Ch. 274, F. S.

Accordingly, your first question as stated is answered in the negative.

AS TO QUESTION 2:

You inquire in your second question whether the board of county commissioners may charge rent to a tax collector fee officer for the use of county buildings or office facilities.

Section 1, Art. VIII, State Const., provides:

> (k) COUNTY SEAT. In every county there shall be a county seat at which shall be located the principal offices and permanent records of all county officers. . . .

County officers are those named in s. 1(d), Art. VIII, State Const., which include the tax collector. Section 125.01, F. S., provides that counties are authorized and empowered to:

> (1)(c) Provide and maintain county buildings.
>
> * * * * *
>
> (3)(a) . . . [P]urchase or lease and sell or exchange real or personal property.

Inasmuch as there is a constitutionally mandated requirement that there be a county seat where the principal offices of county officers, including those of tax collectors, are to be located and maintained and s. 125.01(1)(c) and (3)(a), F. S., authorizes the county to lease property *for* the county and for county purposes and *not* to lease or rent county

property *to* the county officers or to others—except as provided in ss. 125.35 and 125.38, F. S.—I have the view that the county is under a duty to provide office space within the county seat at no charge to the county officers designated in s. 1(d), Art. VIII, *supra. Cf.* AGO's 071-275 and 073-99 and 20 C.J.S. *Counties* ss. 82, 170.

Additionally, since there is no general law empowering the county commission to rent county buildings or office facilities *to* the county constitutional officers, and since counties have only such powers as are expressly conferred or necessarily implied from a grant of power—Hopkins, *supra*, at p. 311, and Gessner, *supra*, at pp. 522, 523—I therefore conclude that no authority exists to charge rent to the county tax collector fee officer for the use of county-owned buildings or office facilities for his principal office in the county seat in the absence of a special law otherwise providing. *See also*, AGO 055-101, wherein one of my predecessors in office noted that "[o]rdinarily, it is the *duty* of the board of county commissioners to furnish quarters for county officers." (Emphasis supplied.)

This conclusion is limited to only the issue of rental of county buildings or office facilities to the tax collector as his county office in the county seat and is not concerned with the particular allocation of such county office facilities to county officers, including tax collectors. *See* Mathis v. Lovett, 215 So.2d 490 (1 D.C.A. Fla., 1968); State v. T.O.L., Inc., 206 So.2d 69 (4 D.C.A. Fla., 1968); Broward County Rubbish Con. Ass'n v. Broward County, 112 So.2d 898 (2 D.C.A. Fla., 1959), and AGO's 071-275 and 064-63. In Mathis v. Lovett, *supra*, at p. 491, the court held that in determining the proper allocation of county facilities to county officers, to wit, the assignment to a particular room or area by the board of county commissioners, it "cannot and should not, in the absence of a clear showing of fraud or abuse of discretion, interfere with the discretionary actions of an administrative agency."

Your second question is therefore answered in the negative.

AS TO QUESTION 3:

Your third question asks whether the tax collector may, under a budget item, establish branch offices or rent office facilities.

Section 1(k), Art. VIII, State Const., provides that branch offices for the conduct of county business may be established outside the county seat by resolution of the governing body of the county in the manner prescribed by law.

As to the establishment of county branch offices in Brevard County, Ch. 30596, 1955, Laws of Florida, provides that:

> 1. The *board of county commissioners* of Brevard County is authorized . . . to acquire, equip and maintain *auxiliary* offices outside the county seat and particularly within the cities of Cocoa and Melbourne, for use and occupancy by any of the officers or their authorized agents of Brevard county *as the board of county commissioners determines to be necessary in the performance of their respective duties and functions.* These offices may be acquired by leasing all or any part of any suitable buildings, provided that *no such lease or leases shall be for a term of more than five (5) years.*
>
> * * * * *
>
> 3. . . . *[n]o county records or activities required by the constitution of Florida to be retained or carried on at the county seat shall be maintained or carried on in the buildings leased under the provisions of this act.* . . . (Emphasis supplied.)

Chapter 59-1118, Laws of Florida, provides that:

> The *board of county commissioners of Brevard county is hereby authorized and empowered to acquire sites for, construct and maintain, or to lease, purchase or otherwise acquire or obtain the use of office buildings outside of the county seat of Brevard county,* said buildings to be designated as county office buildings and used for the housing of such of the county agencies, offices and officials of said county *as the board of county commissioners shall determine necessary to enable said agencies, offices and officials to properly perform their respective duties and functions.* . . . (Emphasis supplied.)

Thus, it is the board of county commissioners that is constitutionally and statutorily empowered to establish branch offices for the conduct of county business by the county officers outside of the county seat, and the county officers possess no such authority. Possessing no statutory authority in this particular, the tax collector necessarily is without statutory authority to lease or rent office facilities for branch offices outside of the county seat. *See* Hopkins v. Special Road & Bridge Dist. No. 4, *supra*; White v. Crandon, 156 So. 303 (Fla. 1934). *Also see*, as to administrative agencies and officials in general, City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973); State *ex rel.* Greenberg v. Florida State Bd. of Dent., 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900; and s. 5(c), Art. II, State Const. *Cf.* AGO 075-161.

As to the rental of office space within the county seat by the Tax Collector of Brevard County from parties other than the county, as noted above in question 2, the county is under a duty to provide space within the county seat to the tax collector without charge, and the particular allocation of space to the officer by the board of county commissioners controls in the absence of fraud or a clear abuse of discretion, Mathis v. Lovett, *supra*. However, should the board of county commissioners be unable to provide adequate space to the tax collector due, for example, to the unavailability of space in county-owned buildings in the county seat or want of available funds to lease such office space for the county officers, then such expenditure for rental by the tax collector from the income of his office would be a proper allocation of public funds as a necessary expense of operating his office and carrying out his statutory functions and duties which, of course, would be for a county purpose. *Cf.* s. 195.087(2), F. S. *See* AGO 053-5, Biennial Report of the Attorney General, 1953-1954, p. 325, and AGO's 055-101 and 070-166. It should be noted, however, that s. 1(k), Art. VIII, State Const., requires that all permanent records of county officers be located at the principal office in the county seat. *Cf.* s. 125.222, F. S., with respect to civil and criminal proceedings at auxiliary county offices and maintenance of the records thereof.

As qualified above, your third question is answered in the negative.

AS TO QUESTION 4:

Your fourth question asks whether the board of county commissioners may furnish legal services to the tax collector and, if so, whether the board may charge the tax collector for such services. No special or local law governing this question has been drawn to my attention; and for the purposes of this opinion, I assume that no such law is existent.

Section 125.01, F. S., states that:

> (1) The legislative and governing body of a county shall have the power to carry on county government. . . . [T]his power shall include . . . the power to:
>
> * * * * *
>
> (b) Provide for the prosecution and defense of legal causes in behalf of the county or state and *retain counsel and set their compensation.* (Emphasis supplied.)

Section 125.01(1)(b), *supra*, does not expressly authorize the county commission to furnish legal services to the tax collector and does not empower the commission to charge the tax collector for any such legal services. The statute provides that the county commission may prosecute or defend legal causes in behalf of the county; and it is only when the county has an interest in the excess fees or income of the office, some statutory duty or liability devolves upon the county commission, the revenue of the county is directly affected, some benefit will result to the county, or some county purpose is served that implied authority may be found to exist to provide such legal services on behalf of the county or to defray the costs and expenses thereof. *See* Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936); White v. Crandon, *supra*; AGO 051-8, Biennial Report of the Attorney General, 1951-1952, p. 224; AGO 058-178. *Also see* AGO 068-70, wherein it was stated that: "[T]he board of county commissioners is vested with the power to reimburse counsel for defending county officials acting within the scope of their duties."

However, the aforesaid express or implied authority does *not* extend to employing a general counsel or similar house counsel services under s. 125.01(1)(b), *supra*. As a general rule, the power to employ counsel does not exist unless such power is expressly

conferred or results by necessary implication from the powers granted. *See* Watson v. Caldwell, 27 So.2d 524 (Fla. 1946); White v. Crandon, *supra*; and *also see* State v. Culbreath, *supra*, as to implied power to employ both trial and general counsel.

Also, if the statutes impose some duty on the tax collector and in carrying out such statutory duty or function it becomes *necessary* to engage an attorney to bring or defend some administrative or judicial action or proceeding, then the tax collector may employ and pay such attorney *as a necessary expense* of conducting and operating his office and performing his statutory duties. *See* 67 C.J.S. *Officers* s. 91; AGO's 074-192, 071-166, and 068-70; State v. Culbreath, *supra*; and *cf.* s. 197.086(1), F. S., empowering the tax collector to employ counsel and agree upon his or her compensation for conduct of the proceedings therein specified and to pay such compensation out of the general office expense fund of the tax collector and to budget for such services.

Moreover, in AGO 071-166, it was noted that "if a state-employed attorney is available and qualified to act, the official in question should avail himself of the services of such attorney rather than employ a personal attorney." One of my predecessors in office concluded that a board of county commissioners has the authority to pay for attorneys' services in defending a tax assessor in a suit wherein the revenue of the county is directly affected and the county attorney is disqualified if in the judgment and discretion of the board such employment serves a county purpose and is beneficial to the county. The opinion noted that under ordinary circumstances—*e.g.*, no conflicting interest between the tax assessor and county attorney—it was assumed that the regular attorney for the board of county commissioners would have defended the tax assessor. Attorney General Opinion 051-8, Biennial Report of the Attorney General, 1951-1952, p. 224. *Cf.* AGO's 073-381, 073-389, and 073-412, as to the fiscal administration and budgeting for the office of county tax assessor, including items for independent legal counsel and legal expenses necessary to the operation of the office, under the provisions of Ch. 73-172, Laws of Florida (s. 195.087(1), F. S. 1973). *Also see* s. 195.087(1) and (2), F. S., pertaining to the submission to, and approval by, the Department of Revenue of the tax collector's budget.

As to whether the board of county commissioners may charge for legal services it provides to the tax collector fee officer, I find no express or necessarily implied statutory authority for the board of county commissioners to charge the tax collector fee officer for any such services. In the absence of such statutory grant, I conclude no such authorization exists, since county commissioners have only such authority and duties as are conferred or prescribed by statute or by the Constitution or are necessarily implied from the express terms thereof. Hopkins, *supra*; Ausley, *supra*; and Gessner, *supra*.

Thus, the board of county commissioners may provide legal services to the tax collector fee officer if the board determines that such action serves a county purpose and is beneficial to the county, and the tax collector is empowered to employ counsel if it becomes *necessary* to engage an attorney to bring or defend actions or proceedings in carrying out his statutory duties or functions and to compensate such attorney as a *necessary* expense of operating his office. The board of county commissioners may not, however, charge the tax collector for furnishing such legal services.

076-174—August 20, 1976

PUBLIC EMPLOYEES' COLLECTIVE BARGAINING

WELFARE TRUST FUND MAY BE ESTABLISHED BY COLLECTIVE BARGAINING

To: John A. Hill, Representative, 108th District, Hialeah

Prepared by: Staff

QUESTION:

May a welfare trust fund be established as part of the compensation of employees of a school board through collective bargaining negotiations between a school board and a certified teacher bargaining agent representing the members of the bargaining unit?

SUMMARY:

A welfare trust fund established pursuant to a collectively bargained agreement which has been approved and ratified would appear to represent a proper subject of negotiations pursuant to part II, Ch. 447, F. S., and also a proper activity in which a school board can engage pursuant to ss. 112.08-112.12, F. S. If such an agreement conflicts with any specific statute or ordinance, the agreement does not become operative until the specific statute or ordinance is amended to encompass the agreement.

The information which you have supplied with your inquiry defines and delineates the welfare trust fund contemplated in your question. The fund will be established pursuant to a collective bargaining agreement between a school board and a certified teacher bargaining agent for the purpose of providing benefits and services to participants or beneficiaries of the fund. Such benefits, as described in the proposed fund agreement which you have provided, may include death benefits, hospitalization and surgical benefits, drug benefits, accident and sickness benefits, optical services, preventive medicine benefits, and legal services, as well as other benefits to be determined by the fund's trustees.

Before turning specifically to the requirements and authorizations of the Collective Bargaining Act (part II, Ch. 447, F. S.), I might note that there are several provisions found in Ch. 112, F. S., which authorize school boards to provide for life, health, accident, hospitalization, and annuity insurance for their employees and which further authorize salary deductions for the premiums to provide such coverage. Sections 112.08, 112.09, 112.10, and 112.11. It is further provided that:

> Each . . . school board . . . may pay out of any of its available funds all or part of the premiums or charges for life, accident, hospitalization, or health insurance, as defined by s. 624.603, provided for its officers and employees pursuant to the provisions of s. 112.08. [Section 112.12, F. S.]

It therefore appears that a school board can contribute funds pursuant to ss. 112.08-112.12 to provide the kinds of benefits contemplated in your question. *See also* AGO 075-43.

I am of course aware of my previous opinion, as expressed in AGO 075-256, that under s. 112.08, *supra*, a district school board may not self-insure its health insurance program for its employees and their dependents. However your question does not contemplate a self-insurance program, but rather a welfare trust fund whereby the trustees of the fund would be authorized to negotiate with insurance companies for coverage or would be authorized to provide such benefits directly to those employees participating in the fund.

However, the specific question which you have raised requires a discussion of the scope of negotiations permissible under the Collective Bargaining Act (part II, Ch. 447, F. S.). If the matters contemplated in your question fall within the permissible scope of negotiations, then they may form a part of a collectively bargained agreement subject to all requirements and provisions of the Collective Bargaining Act.

Unfortunately, the Collective Bargaining Act does not provide a definitive answer to this question, and in fact simply indicates that the proper subject matter for a collectively bargained agreement would include all items dealing with the "terms and conditions of employment, as well as a determination concerning wages and hours." Sections 447.203(14) and 447.309(1), F. S. Thus, it would appear that matters which make up a collectively bargained agreement can be all-encompassing and in fact may touch on almost every element and facet of the relationship between public employee and public employer.

Recently the Public Employees' Relations Commission (PERC) addressed the issue of the scope of negotiations for the first time in the case of Escambia Education Assoc. v. School Board of Escambia County, Cases No.: 8H-CA-754-1110, 1117, 1132, decided May 13, 1976. Because of the broad terms used in part II, Ch. 447, *supra*, and precedent from other states with similar laws, PERC found that the association's proposals regarding school calendars, class size, leave and retirement provisions, lunch duty, filling vacancies, promotion and transfer procedures, dismissal and layoff procedures, and extra time duty were all items properly within the scope of negotiations. Further, PERC found that the school board's position that promotion, layoff, transfer, and wage rates were

nonnegotiable, and therefore outside the scope of negotiations, was an untenable and unjustified position.

The position of PERC is based upon and is consistent with decisions in other states with a history of collective bargaining in the public sector.

The New York Public Employees' Relations Board (PERB) has found the following subjects to be mandatory subjects of negotiations:

> Dismissal procedures; exclusive representation status; unit noncompetitive class promotions; certain aspects of competitive class promotions; lay-off procedures; time off for union activities; personal leave; retirement benefits; off duty work; safety rules; work schedules; seniority lists; establishment of a labor management committee. [City of Albany v. Albany Police Officers Union Local 2841, AFSCME, AFL-CIO, Case No. U-1369, issued December 19, 1974; City of Albany v. Albany Permanent Professional Firefighters Association, Local 2007, AFL-CIO, Case No. U-1371, issued December 19, 1974.]

The New York PERB has ruled that with regard to school board negotiations the following items are mandatory subjects of negotiations, and failure to engage in good faith bargaining concerning these matters would be an unfair practice:

> Evaluation and dismissal procedures for probationary teachers; mandatory retirement of members of the Teachers' Retirement System who are aged 70 or over. [Harrison Assoc. of Teachers v. Bd. of Education, Central School Dist. No. 1, Harrison, N.Y., Case No. U-0768, issued March 19, 1973; Monroe-Woodbury Teachers Assoc. v. Monroe-Woodbury Bd. of Educ., Case Nos. U-0061, U-0070, issued July 24, 1970.]

The Wisconsin Employees' Relations Commission (WERC) has held that school boards must bargain with teachers' associations on items directly affecting teachers' job security, including access to their personnel files, as well as the order of teacher layoffs and recalls, but are not required to bargain educational policies such as class size and student pilot programs; however, when such educational policies have an impact on teaching loads and salaries, boards must bargain that impact. Insofar as the impact of class size, which itself is an educational policy, affects hours, salaries, and other conditions of employment, it must be bargained. *See* Beloit City School Bd. and Beloit Education Assoc.; WERC Case V, No. 16732DR (M)-43, Decision No. 11831-C, September 11, 1974. Oak Creek-Franklin Joint City School District No. 1 and Oak Creek Education Association; WERC Case III, No. 16717 DR (M)-42, Decision No. 11827-D, September 11, 1974.

The Pennsylvania Supreme Court has ruled that where an item of dispute is a matter of "*fundamental concern* to the employees' interest in wages, hours and other terms and conditions of employment," it is *not* removed as a matter subject to collective bargaining simply because it may touch upon basic, inherent managerial policy, such as standards of services, overall budget, utilization of technology, organizational structure, and selection and direction of personnel. Pennsylvania Labor Relations Bd. v. State College Area School District, The Bd. of School Directors, Case Nos. 49, 50, 51, January Term, 1974, opinion filed April 17, 1975. Similar broad definitions and interpretations of the scope of negotiations are found in Oregon and Michigan. Springfield Education Assoc. v. Springfield School District No. 19, Oregon PERB Case No. C-278, July 14, 1975; Westwood Community Schools v. Westwood Educ. Assoc., Case No. C70-I-152, March 24, 1972.

Based upon the interpretation given to the Florida collective bargaining law by PERC and also the consistent decisions from other jurisdictions, it is my opinion that a welfare trust fund as you have described would be a proper subject of negotiations for a collective bargaining agreement since it appears to fall within the broad scope of negotiations provided in part II, Ch. 447, *supra.*

Nevertheless, although included within the scope of negotiations and therefore a permissible part of a bargained agreement, if the welfare trust fund proposal as finally adopted and ratified conflicts with any specific statute or ordinance, it shall be the duty of the chief executive officer of the school to submit to the appropriate governmental body having amendatory power a proposed amendment to the conflicting law, ordinance, rule, or regulation in order to effectuate the terms of the collectively bargained agreement. However, until such amendment is enacted, the conflicting provision of the agreement does not become effective. Section 447.309(3), F. S.

The fact that negotiations may result in agreements which conflict with statutes or ordinances does not in my opinion limit the scope of such negotiations, but rather may result in recommendations by the chief executive officer for legislative changes. Thus, a broad scope to negotiations serves the useful purpose of fostering recommendations for statutory changes which will allow agreements to be effectuated.

In addition, if a conflict exists between the requested appropriation to fund an agreement and the amount actually appropriated, the agreement shall be administered on the basis of the amounts appropriated by the legislative body. The failure to appropriate funds sufficient to fully fund an agreement shall not constitute an unfair labor practice. Section 447.309(2), F. S.

076-175—August 20, 1976

DEPARTMENT OF CITRUS

INTERNAL ORGANIZATION

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTION:

Is the internal organizational structure of the Department of Citrus in accordance with the requirements of Ch. 20, F. S.?

SUMMARY:

Section 20.29, F. S., authorizes the Florida Citrus Commission to continue its powers, duties, and functions without change in the board established by s. 601.04, F. S. (Florida Citrus Commission), as head of the Department of Citrus. The department is not in violation of the provisions of the Governmental Reorganization Act, Ch. 20, F. S., by continuing its existing internal organizational structure. The creation of any new divisions, bureaus, sections, or subsections after July 1, 1970, must be in compliance with s. 20.04(4), as amended by the 1970 Legislature, *i.e.*, approved by the Department of Administration or by law.

The structure of the executive branch of state government is set forth generally in s. 20.04, F. S. More particularly, s. 20.04(3) requires that the internal structure of all departments, with the exception of the departments excluded therein, shall adhere to the standard terms as provided for in subsection (3), those terms being divisions, bureaus, sections, and subsections, to be headed, respectively, by directors, chiefs, administrators, and supervisors.

The State Citrus Commission, created and established by s. 601.04, F. S., was *continued* and renamed the Department of Citrus under the provisions of s. 20.29, F. S. I note that, in renaming the Citrus Commission, the Legislature did not transfer the power, duties, and functions under Ch. 601, F. S., to the Department of Citrus, as in nearly every other instance under Ch. 20, F. S. Contrary to the other transfers, s. 20.29(4), instead of transferring the powers and functions to the department, *continues* the powers, duties, and functions of the Florida Citrus Commission in the board, as the head of the department.

Webster's Seventh New Collegiate Dictionary defines "continue" as: "To maintain without interruption a condition, course, or action; to remain in existence."

The cardinal rule in the construction of every statute is to ascertain legislative intent in enactment of the law. *See* Ervin v. Peninsular Telephone Co., 53 So.2d 647 (Fla. 1951); Dade Federal Savings and Loan Association v. Miami Title and Abstract Division, 217 So.2d 873 (3 D.C.A. Fla., 1969).

> The legislative intent must be determined primarily from the language of the statute. A statute is to be taken, construed, and applied in the form enacted. This is so because the legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. [30 Fla.Jur. 232, 233.]

Applying these rules to the statute here in question, it would follow that the Legislature had some specific purpose for using the term "continue" rather than "transfer," as was the case of nearly every other instance under Ch. 20, F. S.

Paraphrasing s. 20.04(6), F. S., the head of the department can not reallocate duties and functions assigned by Ch. 20, F. S., to a specific unit of a department and, as of July 1, 1970, no department of state government shall establish additional divisions or new bureaus, sections, or subsections until approved by the Department of Administration or by law.

Section 20.29, F. S., in providing for the continuance of all personnel and functions of the Florida Citrus Commission in the Department of Citrus, establishes no divisions, bureaus, or sections as is provided for in most of the other departments. Furthermore, under s. 20.04(6), the department has no authority to establish divisions which are not authorized by Ch. 20, F. S.

Therefore, under the provisions of the Governmental Reorganization Act, Ch. 20, F. S., the State Citrus Commission was not merged with any other state agency and the commission's former responsibilities and functions were *continued* without change.

In view of the above, I conclude that the Legislature, in continuing the existence of the State Citrus Commission as the Department of Citrus, did not contemplate, and eliminated the need for, any major retrogressive internal restructuring of the department. But, as a result of the 1970 amendment of s. 20.04(4), F. S., which generally provides that no department can establish additional divisions after July 1, 1970, or new bureaus, sections, or subsections until approved by the Department of Administration or by law, any changes in the organizational structure of the department after July 1, 1970, must be in compliance with s. 20.04(4).

In summary, it is my opinion that the Department of Citrus is not in violation of the provisions of Ch. 20, F. S., by continuing its existing internal organizational structure.

In reaching this conclusion, I note that the creation of any new divisions, bureaus, sections, or subsections after July 1, 1970, must be in compliance with s. 20.04(4), F. S., as amended by the 1970 Legislature.

In rendering this opinion, I further note that my conclusion is based solely upon my interpretation of the Governmental Reorganization Act as it affects the Department of Citrus and should not be construed as an interpretation of the law affecting or applicable to any other governmental entity.

Your question is answered in the affirmative.

076-176—August 23, 1976

UNIFORM TRAFFIC CONTROL LAW

MOTOR VEHICLES MAY NOT DRIVE ON OR ACROSS BICYCLE PATHS EXCEPT AT LAWFUL DRIVEWAYS

To: William K. Howell, Jr., City Attorney, Boca Raton

Prepared by: Barry Silber, Assistant Attorney General

QUESTION:

Does s. 316.1105, F. S., prohibit the operator of a motor vehicle from driving across a bicycle trail or footpath which is located along a state road for the purpose of parking in an otherwise lawful parking space?

SUMMARY:

The term "*upon* a bicycle trail or footpath," (Emphasis supplied.) as used in s. 316.1105, F. S., means on, up and on, over, across, or along the course of a bicycle trail or footpath established under s. 335.065, F. S. Section 316.1105 prohibits the operation of motor vehicles on, over, across, or along the course of such bicycle trails or footpaths, or any part or portion thereof, except upon a duly established permanent or duly authorized temporary driveway.

Section 335.065(1)(a), F. S., directs that bicycle trails and footpaths shall be established in conjunction with the construction, reconstruction, or other change of any state road or any portion of the state highway system at such locations as shall be determined by the Department of Transportation (hereinafter department) in cooperation with the Division of Recreation and Parks of the Department of Natural Resources. Such trails and paths are not required to be established in the circumstances delineated in s. 335.065(1)(b), F. S.

In conjunction with this responsibility, the department is, among other things, directed to adopt reasonable rules and regulations necessary for the maintenance and use of such bicycle trails and footpaths. Section 335.065(2), F. S. At this time there have not been any rules or regulations promulgated by the department with respect to the use of bicycle trails or footpaths. Such trails and paths are declared to be public ways open to travel by the public generally and dedicated to the public use as defined in ss. 334.021 and 334.03(9) and (15), Section 335.065(3), F. S.

Section 316.1[illegible] F. S., provides that "[n]o person shall operate any motor vehicle *upon* a bicycle t[illegible] or footpath established under s. 335.065, except upon a permanent or duly authorized temporary driveway." (Emphasis supplied.) Concurrently, s. 316.110, F. S., operates to prohibit the driving of any vehicle "*upon* a sidewalk or sidewalk area except upon a permanent or duly authorized temporary driveway." (Emphasis supplied.)

While the word "upon" is a relative term, the use by the Legislature of the term "upon" in ss. 316.110 and 316.1105, F. S., and in numerous other sections of Ch. 316, F. S., in the context of traffic regulation, evinces the legislative intent that the term be taken in the sense of "up and on," or "on," "over," "across," or "along (the course of)" any part of the bicycle trail or footpath in question (or any sidewalk or sidewalk area). *See* 67 C.J.S. *On; Upon* pp. 493-494; 3A C.J.S. *Along* p. 258; 29A Words and Phrases, p. 227; 43A Words and Phrases, pp. 198, 203, 205; *The Random House Dictionary, The Unabridged Ed.*, p. 1570. From the provisions of ss. 316.110 and 316.1105, which provide that no motor vehicle shall be operated upon a bicycle trail, footpath, sidewalk, or sidewalk area except upon a permanent or duly authorized temporary driveway, it seems clear that the only reasonable and logical purpose of the driveway provisions therein in relation to a bicycle trail or sidewalk is to permit vehicles to proceed over and across such bicycle trails or footpaths or sidewalks at the indicated driveway locations thereon only and to otherwise prohibit the operation of a motor vehicle on or over or across or along the course of such footpaths, bicycle trails, or sidewalk or any part thereof.

Statutory regulations for the operation of bicycles upon the roadways (that part of a highway designed or used for vehicular—not bicycle—traffic, exclusive of the berm or shoulder, s. 316.003(2), (43), and (64), F. S.) of this state are provided in s. 316.111, F. S. All persons riding bicycles upon the roadways shall be granted all of the rights and be subject to all of the duties applicable to the driver of a vehicle (*see* s. 316.003[64]) insofar as is applicable, and wherever a usable path for bicycles has been provided adjacent to a roadway (*see* s. 316.003[43]), bicycle riders shall use such path and shall not use the roadway. Section 316.111(1) and (7), F. S. Section 316.111, F. S., applies whenever a bicycle, as defined in s. 316.003(2), F. S., is operated upon any public path set aside for the exclusive use of bicycles, subject to the exceptions set forth therein.

From the information provided in your letter of inquiry I must assume that the lawful parking areas duly established on the state right-of-way in that portion thereof lying beyond 10 feet from the edge of the pavement of Highway A-1-A (parking being prohibited within 10 feet of the edge of the pavement) are not accessible by means of duly established permanent or duly authorized temporary driveways on, over, or across the bicycle trail which has been constructed along the edge of the state highway and within that portion of the state right-of-way lying within 10 feet of the edge of the highway. If such permanent or duly authorized temporary driveways allowing access to such authorized parking areas from the highway do exist, then such driveways are the exclusive means of access or egress over or across such bicycle paths to and from said

parking areas by the motoring public. Section 316.1105, F. S., in effect makes such driveways the exclusive means of access or egress by vehicular traffic to and from property or areas lying beyond a bicycle path, footpath, or sidewalk from a public highway. *Cf.* s. 316.110, F. S., to the same effect for sidewalk or sidewalk areas. It is well settled that when a statute expressly mentions one thing or makes one exception from the operative force of the statute, it impliedly excludes all other things or exceptions and the manner prescribed by the statute in which a thing shall be done is exclusive. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); *In re* Advisory Opinion of Governor Civil Rights, 306 So.2d 520 (Fla. 1975).

In the absence of permanent or duly authorized temporary driveways on, over, and across these bicycle trails duly established or authorized by the Department of Transportation, s. 316.1105, F. S., acts to explicitly prohibit the operation of any motor vehicle on, over, or across the bicycle trails or pathways in question. The only exception made by the statute is that of such permanent or duly authorized temporary driveways, and any other exceptions thereto are impliedly excluded. Dobbs v. Sea Isle Hotel, *supra*; William v. American Surety Company of New York, 99 So.2d 877 (2 D.C.A. Fla., 1958).

While s. 335.065, F. S., declares that duly established bicycle trails and footpaths are and shall be public ways open to travel by the public generally and dedicated to the public use as defined in ss. 334.021, F. S. (*see* s. 334.021(4)(b), F. S.) and 334.03(9) and (15), F. S., this provision does not operate in such a way as to negate or nullify the regulation of the use of such public ways by vehicular traffic or the regulation of vehicular, pedestrian, or bicycle traffic by the Uniform Traffic Control Law, Ch. 316, F. S., on such bicycle trails or pathways or on the roads of which such bicycle pathways are a part. *See* ss. 334.021(4)(b) and 334.04(9) and (15). Section 335.065(3) in no way conflicts with the Uniform Traffic Control Law or impliedly amends or repeals any of the traffic control regulations contained therein. It is within the legislative prerogative to regulate traffic on bicycle trails and footpaths and to prohibit the operation of motor vehicles on or upon such trails and paths or any part thereof, except at such times and places and in such a manner as the Legislature may determine and direct.

Clearly, s. 316.1105, F. S., acts to prohibit the operation of any motor vehicle on, upon, over, along, or across any bicycle trail or footpath established pursuant to s. 335.065, F. S., except upon a permanent or duly authorized temporary driveway thereon.

Your attention is directed to Ch. 76-31, Laws of Florida, which renumbers ss. 316.1105 and 316.111, F. S., and numerous other sections of the Uniform Traffic Control Law effective October 1, 1977.

Your question, as stated, is answered in the affirmative.

076-177—August 23, 1976

TAXATION

DETERMINATION OF WHEN HOMESTEAD HAS BEEN ABANDONED

To: Lawrence L. Murray, Clay County Property Appraiser, Green Cove Springs

Prepared by: Patricia S. Turner, Assistant Attorney General

QUESTION:

Is a taxpayer entitled to homestead exemption pursuant to s. 196.031(1), F. S., when said taxpayer works in and rents an apartment in an adjoining county but returns on weekends to the alleged homestead, which is not rented and which is the sole property owned by the taxpayer?

SUMMARY:

Rental of an apartment in an adjoining county to pursue work, in and of itself, does not constitute abandonment of the homestead when the taxpayer returns on weekends to the alleged homestead which is not

rented and which is the sole property owned by said taxpayer. Whether or not abandonment has occurred must be determined from all facts and circumstances applicable to each particular situation.

Section 6(a), Art. VII, State Const., states in pertinent part:

> Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. . . .

Section 196.031(1), F. S., states in pertinent part:

> Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of $5,000 on the said home and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. . . .

Additionally, s. 196.051, F. S., provides:

> The words "resident," "residence," "permanent residence," "permanent home" and those of like import, shall not be construed so as to require continuous physical residence on the property, but mean only that place which the person claiming the exemption may rightfully and in good faith call his home to the exclusion of all other places where he may, from time to time, temporarily reside. [*Also see* Rule 12B-1.202(5)(A), F.A.C.]

Actual residence upon the property claimed as a homestead is essential to establish entitlement to the homestead exemption. *See* Matthews v. Jeacle, 55 So. 865 (Fla. 1911); Hillsborough Inv. Co. v. Wilcox, 13 So.2d 448 (Fla. 1943); Lanier v. Lanier, 116 So. 867 (Fla. 1928); Murphy v. Farquhar, 22 So. 681 (Fla. 1897); Rule 12B-1.202(5)(A)1., F.A.C.

However, temporary absence from the alleged homestead, regardless of the reason for such absence, will not deprive it of that character, providing an abiding intention to return is always present and providing there was no design of permanent abandonment. *See* Matthews v. Jeacle, *supra*; City of Jacksonville v. Bailey, 30 So.2d 529 (Fla. 1947); Collins v. Collins, 7 So.2d 443 (Fla. 1942); Lanier v. Lanier, *supra*; Poppell v. Padrick, 117 So.2d 435 (2 D.C.A. Fla., 1959); Rule 12B-1.202(6)(A), (B), and (C), F.A.C. One of my predecessors discussed what constitutes abandonment of homestead property under s. 192.14, F. S. (now s. 192.051, F. S.), in AGO 058-329.

Whether an abiding intention to return to the premises is present or whether abandonment of the premises as a homestead has actually occurred are questions of fact to be determined from all applicable circumstances and from a preponderance of all the evidence. It must appear that the claimant relinquished possession of the premises and removed therefrom, and that his removal was accompanied by an intention to discontinue his use of the premises as a home. *See* City of Jacksonville v. Bailey, *supra*; Hillsborough Inv. Co. v. Wilcox, *supra*; Lanier v. Lanier, *supra*; Nelson v. Hainlin, 104 So. 589 (Fla. 1925); Gulf Refining Co. v. Ankeny, 135 So. 521 (Fla. 1931).

The continued expressed intention of a landowner to return to his property and further maintain it as a homestead, although prima facie evidence of that fact, is not controlling and will be overcome by evidence to the contrary. *See* Rule 12B-1.202(6)(C), F.A.C. Although absence from one's homestead for an extended period is not of itself an abandonment of the homestead, such an absence may raise a presumption sufficient to cast the burden on the claimant to satisfy the property appraiser that there has, in fact, been no abandonment. Attorney General Opinion 058-329.

Among the factors indicating whether an abiding intention to return to the premises is present or whether abandonment of the premises as a homestead has actually occurred are: Removal only of necessary personal belongings or effects; leaving the house fully furnished and equipped; residing only temporarily in another location, City of

Jacksonville v. Bailey, *supra*; and the precinct in which the applicant is registered to vote, Poppell v. Padrick, *supra*.

The factors disclosed by your letter, to wit, rental of an apartment in an adjoining county in pursuit of work and returning to the alleged homestead (the only property owned by the applicant) on weekends, are insufficient standing alone to categorically answer your question in the affirmative or in the negative.

As previously stated, temporary absence from the homestead does not constitute abandonment but may be considered, in conjunction with all other available evidence, in determining whether or not abandonment of the homestead has occurred.

I agree with my predecessor and conclude that the above-stated question is one which must be answered from the facts, circumstances, and evidence applicable in each particular case, considered in the light of the above and foregoing legal observations, cases, and authorities.

076-178—August 24, 1976

ARREST

"FELON" DEFINED; WHEN DEADLY FORCE MAY BE USED IN APPREHENDING FLEEING FELON; NO DISTINCTION BETWEEN ARMED AND UNARMED FELONS OR BETWEEN CRIMES AGAINST PERSONS AND AGAINST PROPERTY

To: E. Wilson Purdy, Dade County Public Safety Director, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. Does the term "felon" as used in s. 776.05, F. S., refer only to a person who has actually been convicted of a felony?
2. If the answer to question 1 is in the negative, may the term be applied to anyone whom the arresting officer has reason to believe has committed a felony when the use of force is necessary to effect an arrest?
3. Is the phrase "fleeing from justice" applicable to a setting where a police officer, after having identified himself as such and ordered an individual reasonably believed to have committed a felony to halt, uses necessary force, including deadly force, in arresting such person?
4. Does s. 776.05, F. S., make any distinction as to whether an individual whom the officer reasonably believes is a felon is armed or unarmed?
5. Does s. 776.05, F. S., make any distinction between a felony crime against property rather than against a person or persons?

SUMMARY:

The term "felon" as used in s. 776.05, F. S., as amended, is a descriptive reference used by the Legislature in order to differentiate between categories of crimes, *i.e.*, felonies as opposed to misdemeanors, and was not intended to be limited to persons actually convicted of a felony.

If an officer has reasonable grounds to believe that a felony has been or is being committed, that the person to be arrested has committed or is committing it, and that the person to be arrested is fleeing from or escaping arrest, the officer is justified in using any force necessarily committed in retaking or arresting such person, provided that no more force is used than is reasonably necessary to apprehend the person to be arrested or to effectuate such arrest.

Section 776.05, F. S., makes no distinction between armed and unarmed felons.

Section 776.05, F. S., makes no distinction between felony crimes against property rather than against a person or persons.

Before answering your specific questions, a review of the law which has been formulated regarding the use of deadly force by police officers when arresting felons or retaking fleeing felons is necessitated.

The history of this legal issue over the past 50 years has been said to be characterized by "shifting sands and obscured pathways." Jones v. Marshall, 528 F.2d 132, 141 (2nd Cir. 1975). It is an issue on which the courts and commentators throughout the country have long disagreed. *See* Prosser, *Torts* (4th ed.), s. 26, p. 134. Generally, two rules have been either adopted or urged for adoption regarding the scope of an officer's privilege to use a firearm. The first can be characterized as the "traditional rule" and finds its basis initially in the early common law. The second, for purposes of this discussion, will be referred to as the "modern rule" and finds its initial support in treatises such as the American Law Institute Restatement of Torts s. 131 (1934).

At early common law, the rule was that a felon was an outlaw whose life could be taken in the process of effecting an arrest without regard to whether he could otherwise be detained. The rationale of this rule was that all felonies were punishable by death. *See* McDonald, *Use of Force by Police to Effect Lawful Arrest*, 9 Crim. L.Q. 435, 437; Moreland, *Some Trends in the Law of Arrest*, 39 Minn. L. Rev. 479. At common law, felonies included murder, rape, manslaughter, sodomy, mayhem, burglary, arson, and robbery. 1 Wharton *Criminal Law* s. 26. This privilege to use firearms was extended to all persons, whether law officer or private citizen. The common law rule was later refined to reflect a "last resort" factor, so that an officer was not entitled to take the life of a fleeing felon unless the arrest could not otherwise be effected. *See* Blackstone's *Commentaries*, bk. 4, Ch. XIV, at 827 (Gavit ed. 1941). Additionally, the concept of probable cause became a factor in American jurisprudence. Even under the common law rule, the officer must actually and reasonably believe that the individual has committed or is committing a felony.

During the 20th century the common law principles set forth above became the subject of extensive comment and debate. A few American courts adopted the rule initially formulated in the First Restatement of Torts s. 131 (1934) that authorized the use of deadly force only for arrests for treason and felonies which normally cause or threaten death or serious bodily harm or which involve the breaking and entry of a dwelling place. This rule, however, was overturned by the institute in 1948. *See* Restatement of the Law, 1948 Supp., *Torts* s. 131 at 628 *et seq.* (1949). Presently the restatement permits the privilege only when the arrest is for treason or any felony which has been committed; when the officer reasonably believes the (felony) offense was committed by the person; and that the arrest cannot otherwise be effected. The 1934 Restatement was criticized by the author of the 1948 Supplement on the grounds that while the 1934 rule might be a "desirable rule," practically every case which has considered the question agrees that the original English Common Law is still the law. However, on this issue the restatement and the Model Penal Code, adopted by the institute in 1962, have parted company.

The authors of the code have concluded that deadly force can be used to *prevent* the commission of a felony only when the felony involves substantial risk to life and limb. ALI Model Penal Code, s. 3.07(2)(b)(iv) (Proposed Official Draft, 1962). *Accord*: Recommendations of the Presidential Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 189 (1967). By contrast, the latest restatement simply carries forward the common law rule readopted by the 1948 Supplement. *See* Second Restatement of Torts s. 131 (1965). While the proposed Federal Criminal Code recommends adoption of the modern rule, a majority of the states have statutes which seek to codify the common law. United States National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, s. 607(2)(d)(1970). Although a number of federal courts have stated that the preferable rule would limit the privilege to the situation when the crime involved causes or threatens serious bodily harm, they have thus far uniformly declined to impose this rule as a federal standard in civil rights cases. Jones v. Marshall, 528 F.2d 132, 140 (2nd Cir. 1975). This refusal is based on history and current status of the law of privilege, the ready availability of handguns to the populace at large (including nonviolent felons), and the needs of law enforcement in a society where violence is widespread.

Until 1974, Florida was among those states in which the common law rule regarding lawful use of the privilege was in full force and effect. *Cf.* AGO 071-41. In AGO 071-41 this office, citing Dixon v. State, 132 So. 684 (Fla. 1931), City of Miami v. Nelson, 186 So.2d 535 (3 D.C.A. Fla., 1966), and Gordon v. Alexander, 198 So.2d 325 (Fla. 1967), concluded that, in making an arrest for a felony, an officer having reasonable grounds to believe the individual had committed a felony was entitled to use that degree of force

reasonably necessary to effect his capture, even to the extent of killing or wounding. This is true even though the life of the person making the arrest has not been endangered. *See* 6A C.J.S. *Arrest* s. 49, pp. 112-114. These Florida decisions clearly follow the "traditional rule" discussed, *supra*, regarding use of the privilege. However, in 1974, the Florida Legislature abandoned the traditional common law rule in favor of the "modern rule" advocated by the Model Penal Code. Chapter 74-383, Laws of Florida.

In the 1974 Criminal Code Revision, the Florida Legislature authorized the use of deadly force only in certain limited situations. Generally, the use of deadly force was authorized by an officer only when necessary to prevent death or great bodily harm to himself or another or when he reasonably believes *both* that: Such force is necessary to prevent the arrest from being defeated by resistance or escape; and the person to be arrested has committed or attempted a felony or is attempting to escape by use of a weapon or otherwise indicates that he will endanger human life, or inflict great bodily harm unless arrested without delay.

In 1975, the Legislature significantly amended Ch. 74-383, s. 776.05, F. S., to eliminate the restrictions imposed by the 1974 revisions regarding endangering human life or infliction of great bodily harm. In legal effect, the 1975 amendments to s. 776.05, F. S., have codified the traditional common law rule and returned Florida to the law as it existed at the time AGO 071-41 was issued. *See* City of St. Petersburg v. Reed, 330 So.2d 256, 257 (2 D.C.A. Fla., 1976). Thus, the answers to your specific questions involve an analysis of s. 776.05, read in light of the common law principles it codified, regarding use of deadly force by a police officer.

AS TO QUESTIONS 1 AND 2:

Section 776.05, F. S., provides:

> **776.05 Law enforcement officers; use of force in making an arrest.**—A law enforcement officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing from justice.

Section 776.06, F. S., defines "deadly force" as force which is likely to cause death or great bodily harm, including, but not limited to, the firing of a firearm in the direction of a person to be arrested even if there is no intent to kill or to inflict great bodily harm and the firing of a firearm at a vehicle in which the person to be arrested is riding.

In examining these statutes, I am of the view that the term "felon" as used in s. 776.05, F. S., is a descriptive reference used by the Legislature in order to differentiate between categories of crimes, *i.e.*, felonies as opposed to misdemeanors, and was not intended to be limited to persons actually *convicted* of a felony. *See* Taylor v. Commonwealth, 156 S.E.2d 135, 207 Va. 326; Mack v. State of Delaware, 312 A.2d 319; Black's Law Dictionary, pp. 743, 744; s. 10, Art. X, State Const.

The felony/misdemeanor distinction has been recognized because it is generally agreed that an arrest for a misdemeanor does not justify the use of a firearm even though the criminal is in flight and there is no other possible way to apprehend him. Prosser, *Torts* (4th Ed.) s. 26, p. 135, and cases cited at n. 5; Comment, 31 La.L.Rev. 131, 134. Moreover, "felon" has been defined as a person who commits, or one who has committed, a felony. *See* 36A C.J.S. *Felon*, at p. 253; Black's Law Dictionary, at p. 743.

The title of Ch. 75-64, Laws of Florida, which amends s. 776.05, F. S., makes it clear that the statute is concerned with and authorizes law enforcement officers to use "deadly force when retaking or arresting a fleeing felon." If an officer has reasonable grounds to believe that a felony has been or is being committed, that the person to be arrested has committed or is committing it, and that the person to be arrested is fleeing from or escaping arrest, the officer, pursuant to s. 776.05, is justified in using any force necessarily committed in retaking or arresting such person, provided that no more force is used than is reasonably necessary to apprehend the person to be arrested or to effectuate such arrest. This view is in accord with AGO 071-41, *supra*, in which a police officer was said to possess the authority to use deadly force to apprehend a fleeing armed *or* unarmed felon as a last resort when the officer reasonably believes that the person to be

apprehended has committed or is committing a felony. In City of Miami v. Nelson, *supra*, the court, in response to a claim for money damages for a shooting arising out of the arrest of Nelson for attempted breaking and entering, stated at 538:

> Having reasonable grounds to believe J. C. Nelson had committed a felony, *the officers were entitled to use force which was reasonably necessary to capture him, even to the extent of killing or wounding him.* See: 6 C.J.S. Arrest s. 13, p. 613 (now 6A C.J.S., Arrest s. 49); Commonwealth v. Bollinger, 198 Ky. 646, 249 S.W. 786. (Emphasis supplied.)

This statement in *Nelson* was cited with approval by the Supreme Court in Gordon v. Alexander, 198 So.2d 325, 326, 327 (Fla. 1967), in which the court denied Alexander's claim for damages against a police officer and city for the officer's shooting of Alexander whom the officer was attempting to arrest for breaking and entering, a felony.

Recently, the District Court of Appeal, Fourth District, considered the question of the use of deadly force in effectuating an arrest and concurred in that portion of AGO 071-41 which dealt with the questions posed by your inquiry. *See* Chastain v. Civil Service Board of Orlando, 327 So.2d 230, 232 (4 D.C.A. Fla., 1975). *Also see* City of St. Petersburg v. Reed, *supra*, in which the court stated that the decisional rule of *Nelson* and *Alexander* had been codified in s. 776.05, F. S., by Ch. 75-64. Laws of Florida.

AS TO QUESTION 3:

Section 901.17, F. S., provides:

> A peace officer making an arrest without a warrant shall inform the person to be arrested of his authority and the cause of arrest except when the person flees or forcibly resists before the officer has an opportunity to inform him or when giving the information will imperil the arrest.

Additionally, in the event an arrest warrant has been issued, the officer must advise the person to be arrested of that fact unless the person is fleeing or the recital of this information would imperil the arrest. Section 901.16, F. S.

Thus, when ss. 901.17 and 776.05, F. S., are construed together, an officer must inform a person to be arrested of the cause of the arrest and his authority, AGO 071-41, except when a person flees or forcibly resists before an officer has the opportunity to inform him or when giving the information would imperil the arrest. The officer is authorized to use deadly force if he reasonably believes that a felony has been or is being committed, if he reasonably believes that the person to be arrested has committed or is committing it, and if he reasonably believes that the use of deadly force is necessary to retake a felon who has escaped or to arrest a felon fleeing from justice, provided that no more force is used than is reasonably necessary to apprehend such felon or to effectuate an arrest.

The term "fleeing from justice" has been defined as removing oneself from, or secreting oneself within, the jurisdiction where the offense was committed, or leaving one's home, residence, or known place of abode or concealing oneself therein with intent, in either case, to avoid detection and prosecution for some public offense. 36A C.J.S. *Flee*, p. 753; 17 Words and Phrases, pp. 252-256; Black's Law Dictionary, Rev'd. 4th Ed., at p. 767. One "flees from justice" when one absconds or flees from the arresting or prosecuting officers of the state with a purpose to avoid detection. State v. Berryhill, 177 So. 663, 665 (La. 1937).

AS TO QUESTION 4:

The statute makes no distinction between armed and unarmed felons. The only differentiation recognized by the Legislature in enacting s. 776.05, F. S., is between felons and misdemeanants. Accordingly, I do not believe the Legislature intended to limit the power of police officers to effectuate arrests of felons fleeing from justice to those instances where the person to be arrested is armed. Attorney General Opinion 071-41 is to the same effect and is hereby confirmed and ratified. It might be noted that the facts recited in Reed, and in Nelson and Alexander, *supra*, indicate that the involved felons were unarmed.

AS TO QUESTION 5:

I must again reiterate what was stated in response to question 4—since the Legislature made no such distinction when enacting s. 776.05, F. S., none was intended and cannot be implied. *Accord*: City of St. Petersburg v. Reed, *supra*, at pp. 257-258, stating that the "right [to use deadly force] does not depend on the type of felony which has been committed"; AGO 071-41.

It should be noted, however, that the constitutional due process issue posed by this question is presently the subject of litigation in several federal courts under the federal civil rights acts. Recently, many state legislatures have enacted statutes similar to s. 776.05, F. S., which in essence authorize the use of deadly force by police officers when necessary in order to apprehend felons fleeing from arrest. As of 1975, thirty-four states authorized the use of deadly force by police officers under such circumstances. Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975). Recently, the Second Circuit Court of Appeals upheld the constitutionality of such a Connecticut statute, stating:

> Here we are dealing with competing interests of society of the very highest rank—interests in protecting human life against unwarranted invasion, and in promoting peaceable surrender to the exertion of law enforcement authority. The balance that has been struck to date is very likely not the best one that can be. In an area where any balance is imperfect, however, there must be some room under s. 1983 for different views to prevail. The Connecticut rule carries with it the defects explicated above; it makes no distinction between felonies and therefore could be argued to involve an element of irrationality. It also creates an anomalous asymmetry to the privilege relating to the use of force for preventing the commission of felonies. Furthermore, it is contrary to the recommendations of the new proposed federal criminal code, see U. S. National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code s. 607(2)(d) (1970), and the statute law of one of the other two states in this circuit, New York, N.Y. Penal Law s. 35.30(1)(a) (McKinney 1975), although apparently not of the other, 13 Vt.Stat. Ann. s. 2305 (1974). This would seem peculiarly to be one of those areas where some room must be left to the individual states to place a higher value on the interest in this case of peace, order, and vigorous law enforcement, than on the rights of individuals reasonably suspected to have engaged in the commission of a serious crime. . . . While the Fourteenth Amendment may require us to make an independent assessment of the fairness of the state rule, however, we are today interpreting s. 1983, and within that statute the states must be given some leeway in the administration of their systems of justice, at least insofar as determining the scope of such an unsettled rule as an arresting officer's privilege for the use of deadly force. Further, in the light of the shifting history of the privilege, we cannot conclude that the Connecticut rule is fundamentally unfair.

Also see Jones v. Marshall, 383 F. Supp. 358 (D. Conn. 1974), and *compare*, Clark v. Ziedonis, 368 F. Supp. 544 (E.D. Wis. 1973), *aff'd*, 513 F.2d 79 (7th Cir. 1975); Smith v. Wickline, 396 F. Supp. 555 (D. Okla. 1975); Schumann v. McGinn, 240 N.W.2d 525 (Minn. 1976).

A similar constitutional challenge to a Missouri "deadly force" statute is presently pending before the Eighth Circuit Court of Appeals. I have been informed that this case, Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974), on remand, 404 F. Supp. 643 (E.D. Mo. 1975), was scheduled for oral argument before the Eighth Circuit en banc on August 17, 1976.

076-179—August 25, 1976

TAXATION

PERSONAL PROPERTY TAX EXEMPTION FOR TWO-WAY RADIOS INSTALLED IN MOTOR VEHICLES

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Patricia S. Turner, and David K. Miller, Assistant Attorneys General

QUESTIONS:

1. Are two-way mobile radios installed in concrete mixer trucks, which are properly tagged vehicles, exempt from tangible personal property taxation?

2. Are all two-way mobile radios installed in properly tagged vehicles exempt from tangible personal property taxation?

SUMMARY:

Two-way mobile radios installed in properly tagged vehicles, including concrete mixer trucks, are exempt from tangible personal property taxation as "household goods" and "personal effects" under s. 3(b), Art. VII, State Const., when such radios are used for personal purposes and not for commercial purposes by the owners.

The answers to questions 1 and 2 are dependent upon the uses to which two-way mobile radios are put, as governed by the following discussion.

In answering your questions I must first consider whether two-way mobile radios "become" part of the motor vehicles in which they are installed. If so, they may be deemed constitutionally exempt from taxation under the exemption granted to motor vehicles in s. 1(b), Art. VII, State Const. I am aware of no statute or reported case dealing specifically with this issue, but at least two approaches may be used to evaluate the status of installed equipment: A "fixture" approach and a "use" approach.

The "fixture" approach relies upon the analogy of the common law of fixtures to realty, which requires a case-by-case analysis of the following factors to determine whether a particular item of equipment installed on a motor vehicle becomes part of the motor vehicle itself: Actual annexation to realty or actual annexation to an appurtenance of said realty; appropriateness to the use or to the purpose of that portion of the realty to which the particular item is annexed; intent of the party effecting the annexation that the particular item shall be a permanent annexation to the realty. *Cf.* Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814 (Fla. 1929); Wetjen v. Williamson, 196 So.2d 461 (1 D.C.A. Fla., 1967).

The "use" approach relies on the legislative definition of "motor vehicle" in s. 320.01(1)(a), F. S., which defines "motor vehicle" as "[a]utomobiles, motorcycles, motor trucks, trailers, semitrailers, tractor-trailer combinations, and all other vehicles operated over the public streets and highways of this state and *used as a means of transporting persons or property* over the public streets and highways." (Emphasis supplied.) The commentary to s. 1(b), Art. VII, State Const., suggests that the Legislature has the power to define "motor vehicle" for purposes of the tax exemption. Thus, in order to qualify as tax-exempt property, the equipment must, at a minimum, serve the primary purpose of "transporting persons or property." This conclusion is consistent with that of AGO 050-144, March 23, 1950, Biennial Report of the Attorney General, 1949-1950, p. 363; AGO 056-314; and with case law interpreting the statute. *See* Forbes v. Bushnell Steel Const. Co., 76 So.2d 268 (Fla. 1954).

Applying the three factors under the "fixture" approach, the Supreme Court of Florida determined that a refrigerating plant installed by the seller upon a concrete base and connected by necessary pipes did not lose its quality of personal property because the refrigerator was personal property at the time of contract execution; the refrigerator was referred to as a chattel in the contract; and a contract provision dealt with the possibility of the refrigerator's removal from the building in the event of default in payment. Commercial Finance Co. v. Brooksville Hotel Co., *supra* at 815.

Applying the three-pronged test enumerated in the *Commercial Finance Company* case and until otherwise legislatively or judicially clarified, it is my opinion that two-way mobile radios installed in properly tagged vehicles do not become part of the motor vehicles and are therefore not exempt from tangible personal property taxation under s. 1(b), Art. VII, *supra.*

Although the two-way radio may actually be affixed to the motor vehicle, it is not necessarily appropriate to the purpose for which the motor vehicle is used, *i.e.*, transporting persons and property over the public highways; and it is not necessarily the intent of a buyer purchasing said radio to permanently affix the radio to a particular motor vehicle but to remove the radio and to place it in another vehicle when so desired. It should also be emphasized that a seller of a two-way mobile radio on a credit or installment basis would have little difficulty removing the equipment from the motor vehicle and repossessing said equipment should the purchaser default in payment. *See* Maas Bros., Inc. v. Guaranty Fed. Sav. & Loan Ass'n, 157 So.2d 528 (2 D.C.A. Fla., 1963); Fell v. Messeroff, 145 So.2d 238 (3 D.C.A. Fla., 1962).

Likewise, applying the use approach, until legislatively or judicially determined otherwise, it is my opinion that regardless of how two-way mobile radios are installed, said radios are not used primarily to transport persons or property over the public streets and highways and are therefore not exempt from tangible personal property taxation under s. 1(b), Art. VII, *supra.*

A two-way mobile radio is a communications device. Notwithstanding the fact that the radio and the vehicle may be combined to accomplish a myriad of purposes, the radio itself cannot be considered to serve as a means of transportation or as an essential part of such a means. A two-way mobile radio is designed for purposes of communication and is not designed for purposes of transporting persons or property over the public highways. Such a conclusion is consistent with that reached by the Supreme Court of Florida in determining that motor vehicles which were designed exclusively for special nonhighway use and which were used in construction work were subject to ad valorem tangible personal property taxation.

The court specifically stated:

> It seems to us that if we affirm the decree brought here for review the rule will have been established that any equipment mounted on wheels equipped with pneumatic tires that is capable of being self-propelled on the highways by means of a gasoline engine is a motor vehicle, and therefore immune from ad valorem taxation under our laws, even though the equipment is designed exclusively for construction work and is used for this purpose. [Forbes v. Bushnell Steel Const. Co., *supra*, at 269.]

Therefore, in the absence of contrary authority, and until legislatively or judicially determined otherwise, it is my opinion that under both the "fixture" approach and the "use" approach, two-way mobile radios installed in properly tagged motor vehicles are not considered to be parts of the motor vehicles and are therefore subject to tangible personal property taxation, unless said radios are exempt from taxation under some other constitutional and/or statutory provision.

Although your letter did not specifically ask whether two-way mobile radios installed in properly tagged motor vehicles could be exempt under other provisions of law, in the interest of treating the matter thoroughly I must consider whether said radios qualify for exemption from tangible personal property taxation as either "household goods" or "personal effects." The exemption for these forms of personalty is authorized by s. 3(b), Art. VII, State Const., and by s. 196.181, F. S. Said s. 196.181 reads:

> There shall be exempt from taxation to every person residing and making his or her permanent home in this state household goods and personal effects. Title to such household goods and personal effects may be held individually, by the entireties, jointly or in common with others.

"Household goods" are defined in s. 192.001(11)(a), F. S., as:

> . . . wearing apparel, furniture, appliances, and other items ordinarily found in the home and used for the comfort of the owner and his family. Household goods are not held for commercial purposes or resale.

In AGO 074-12 this office considered the tax status of items of personalty located in condominium garages, sheds, courtyards, patios, and other common areas of condominiums. Construing the two sections quoted above, I concluded that the "household goods" exemption extended to furniture, equipment providing comfort and accommodation to residents (including tools and hobby equipment), appliances, and furnishings located in those areas and not affixed to realty. In that opinion I specified that such items may be exempt even if physically separated from the home, so long as they are "ordinarily found in the home." This principle can be applied to support an exemption for two-way mobile radios in motor vehicles as "household goods," so long as they are of a type "ordinarily found in the home." *See also* AGO 065-19.

Section 196.181, F. S., also exempts "personal effects" from taxation. In AGO 065-19 this office construed the term as follows:

> The term personal effects is defined in Black's law dictionary as "articles associated with person, as property having a more or less intimate relation to person of possessor; 'effects' meaning movable or chattel property of any kind." Personal effects is a term generally including such tangible property as is worn or carried about the person; effects movable or chattel property of any kind; goods and items of property having a more or less intimate relation to the person. Personal effects have been held to be personal property having a more or less intimate relation with person of the owner, such as wearing apparel, jewelry, baggage, silverware, etc. [Citations omitted.]

In AGO 068-59 my predecessor construed "household goods" and "personal effects" together and stated:

> It appears to have been the intention of the legislature to exclude from the tangible personal property taxing laws of the state " . . . motor vehicles and household furnishings, wearing apparel, effects of the person [taxpayer] actually employed in the use of serving the *creature comforts* of the owner and not held for commercial purposes . . . " and thereby exempt such properties from ad valorem taxation. The term "creature comforts" used above is defined in the dictionaries as "things that give bodily comfort; food, clothing and shelter are creature comforts." (The World Book Encyclopedia Dictionary.) Webster's Dictionary defines the same term as "things, such as food and warmth, that promote physical comfort and satisfaction."

A review of these definitions reveals a substantial overlap between the terms "household goods" and "personal effects." Both terms appear to encompass two-way mobile radios installed in, but not permanently affixed to, motor vehicles—*provided that such radios are for personal and not for commercial use.* When used in a noncommercial manner, such radios provide recreation and entertainment, and on occasion promote safety, in a manner no different from similar apparatus located inside the home. In fact, said radios are generally not permanently affixed to vehicles and may be removed for use in the home, where the exemption would clearly vest.

The advent of popularly priced, portable two-way mobile radios suitable for installation in vehicles is a relatively recent phenomenon. The use of such radios for personal purposes may not have been within the contemplation of the Legislature at the time s. 196.181, F. S., was enacted. However, it would create an absurd and unfair result to limit the application of that section, thereby taxing these otherwise exempt items, simply because they are kept in the taxpayer's car rather than in his home. Further, it has been suggested that the intent of the framers in granting the "household goods" and "personal effects" exemption was to keep the costs of administering ad valorem taxation to a minimum. *See* AGO 068-59. To require taxation of the radios described above, when used for personal purposes, would raise difficult and costly tax enforcement problems. For these reasons I conclude that such radios are exempt from tangible personal property taxation when owned for personal use.

When the two-way mobile radios you have described are used to further the commercial or pecuniary interests of the owner, however, this exemption cannot apply. The exemption for "household goods" and "personal effects" cannot be extended to include property of a commercial nature. *Cf.* City of Tarpon Springs v. Chrysostomides, 146 So. 845 (Fla. 1933). Since tangible personalty owned by commercial enterprises is

normally taxed, the taxation of radios used by such enterprises presents no substantial administrative problems.

I conclude that the use of two-way mobile radios as personal or commercial governs the tax status of said radios. For this reason I am unable to opine as to the taxability of a radio installed in a particular type of vehicle, although the use of the vehicle as personal or commercial would certainly raise a presumption as to the use of the radio. Therefore, a radio installed in a concrete mixer truck would presumably have a commercial use, although this presumption would be rebuttable by the taxpayer.

076-181—August 30, 1976

OCCUPATIONAL LICENSING

ISSUANCE OF LICENSE TO OPERATOR OF SCHOOL FOR CASINO DEALERS

To: Joseph H. Weil, North Bay Village City Attorney, Miami

Prepared by: Staff

QUESTION:

May a city legally issue an occupational license under the applicable general "coverall" provisions of the city ordinance to an applicant who wishes to operate a "school for casino dealers," in which school students are taught to deal such games as roulette, blackjack, craps, and hazard?

SUMMARY:

While no law specifically prohibits a municipality from issuing an occupational license under applicable general "coverall" provisions of a city ordinance to an applicant who wishes to operate a school for casino dealers, the receipt of such license by the school would not necessarily immunize those in possession of gambling implements prohibited by s. 849.231, F. S., from criminal prosecution for possession or use of the same.

I note from your letter that you cite s. 849.231, F. S., which narrowly proscribes the possession of any "roulette wheel or table, faro layout, crap table or layout, chemin de fer table or layout, chuck-a-luck wheel, bird cage such as used for gambling, bolita balls, chips with house markings, or any other device, implement, apparatus, or paraphernalia ordinarily or commonly used or designed to be used in the operation of gambling houses or establishments, excepting ordinary dice and playing cards."

Your letter advises that the tentative applicant has been informed by the United States Department of Justice that he will be permitted to register pursuant to 15 U.S.C. s. 1171 *et seq.* The provisions of s. 849.231, F. S., make an exception for any person who has such federal authorization provided that the prohibited instruments are not displayed to the general public, sold for use in Florida, or held or manufactured in contravention of the requirements of 15 U.S.C. s. 1171 *et seq.*

The extent to which s. 849.231, F. S., is applicable to a casino dealer-school operator depends on an interpretation of the word "use" as employed in the statutory phrase "sold for use." If the described implements are exempt from the provisions of s. 849.231, then their use in a school where no actual gambling takes place (*see* s. 849.08, F. S., which defines gambling as a game of cards, keno, roulette, faro, or other game of chance for money or value) would not violate the terms of s. 849.231. However, if "use" is defined in its ordinary sense as any employment of the described instruments, *see* Black's Law Dictionary, 4th Ed., then use of the instruments in Florida in any capacity is unlawful.

There is widespread confusion regarding statutes which render unlawful the possession of gambling devices. The problem is whether or not possession of the gambling devices alone is an offense or whether a showing must also be made that the devices were used or intended to be used for gambling or gaming purposes. *See* Annotation 162 A.L.R. 1188 and cases cited therein. Generally, although not always, judicial resolution of the issue

has been based on the language of the particular statute involved. Such has been the general trend in Florida.

In the early case of Kirk v. Morrison, 146 So. 215 (Fla. 1933), the Florida Supreme Court held that a statute which prohibited the possession of gaming implements or apparatus for the purpose of gaming or gambling could not be applied to the owner of a slot machine which was used only to sell mints and for "amusement purposes." The court held that a conviction under the statute was proper only if the instrument itself was constructed or designed for gambling, or, though not so constructed or designed, the instrument was permitted to be used or kept for use for gaming or gambling. Kirk, *supra*, at 216, 217. *See also* Ashcroft v. Healey, 23 F.2d 189 (5th Cir. 1927), wherein the court stated that merely because a slot machine (used as a vending machine) was susceptible to use for gambling, this fact alone did not render its possession unlawful under a statute prohibiting use of slot machines as gambling devices.

In Cooper v. City of Miami, 36 So.2d 195 (Fla. 1948), the court considered a violation of a city ordinance which made it an offense to unlawfully set up and keep a gambling device. The court stated that the term gambling device "includes only such instruments as are intended for the purpose of gaming, or such as are used to determine the result of the contest on which the wager is laid." Cooper, *supra*, at 196.

The aforecited cases dealt with statutes or ordinances which did not describe or name the prohibited instruments but only proscribed possession of "gambling devices" or instruments used for the purpose of gambling. In interpreting such statutes, the court used a two-step analysis: If the particular *instrument* was constructed, designed, or intended to be used for gambling, possession of such instrument could properly be made unlawful; if the instrument was not so constructed, then, before a conviction could be had, a showing of actual or intended *use* for gambling was required.

When the proscribed instruments are actually named and described in a statute, the Florida courts have sustained pertinent statutory provisions which prohibited, *inter alia*, their use or possession. Weathers v. Williams, 183 So. 764 (Fla. 1938); Eccles v. Stone, 183 So. 628 (Fla. 1938); Pasternak v. Bennett, 190 So. 56 (Fla. 1939).

In Pasternak, *supra*, the court upheld a statute which prohibited possession of slot machines or similar devices operated by coin. The court quoted with approval from the case of Bobel v. People, 173 Ill. 19, 50 N.E. 322, 64 Am. St. Rep. 64:

> And we are of the opinion that it was the purpose of the legislature in enacting this statute, not only to suppress the use of these gambling devices, or the keeping of them for gambling purposes, but also to prohibit the ownership, or the keeping of them, whether for gambling purposes or not; otherwise why make it a criminal offense to own or keep them, without qualification as to the purpose of such ownership or keeping and why provide for their seizure and destruction? . . .
>
> We think it is clear that for the purpose of preventing the use of a device for gambling, the legislature may prohibit its possession or ownership, when it is designed for that purpose. The statute does not make its intended use for gambling a prerequisite.

In sum, therefore, the Legislature, in prohibiting possession of the implements described in s. 849.231, F. S., as well as "any other device, implement, apparatus or paraphernalia ordinarily or commonly used or designated to be used in the operation of gambling . . . excepting ordinary dice and playing cards," did not intend to make actual or intended use of such instruments for gambling a necessary part of the offense. It is clear that the possession of devices themselves, which are by definition designed for gambling, is unlawful. Therefore, I am of the opinion that the word "use" in the context of the phrase "sold for use" should be given its ordinary meaning. Hence, the use of the proscribed instruments in a school for casino dealers is unlawful even though no actual gambling takes place and the applicant has registered pursuant to the Federal Gambling Devices Act, 15 U.S.C. s. 1171 *et seq.*

In light of the foregoing, it is my opinion that, while no law prohibits the issuance of an occupational license tax to a school for casino dealers, the receipt of such license by the school would not necessarily immunize those in possession of gambling devices proscribed by s. 849.231, *supra*, from prosecution for possession or use of same. United States v. Calamaro, 354 U.S. 351 (1957); State v. Wassick, 191 S.E.2d 283 (West Va. 1972); State v. Wood, 187 So.2d 820 (Miss. 1966); State v. Pinball Machines, 404 P.2d 923 (Alaska

1965); Owensboro v. Smith, 383 S.W.2d 902 (Ky. 1964); Undercofler v. V.F.W. Post #4625, 139 S.E.2d 776 (Ct. App. Ga. 1964); Annot.—Taxing Unlawful Activities, 118 A.L.R. 827.

076-182—August 30, 1976

FIREWORKS

"BOTTLEROCKETS" WITHIN DEFINITION OF FIREWORKS

To: Frank Wanicka, Lee County Sheriff, Fort Myers

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Is the retail sale or the use of the type of firework called "bottlerocket" prohibited by Ch. 791, F. S.?

SUMMARY:

The forms or types of combustible firework devices called "bottlerockets," if made of any combustible composition or substance or prepared for the purpose of producing a visible or audible effect by combustion or explosion, are "fireworks" within the meaning of and for the purposes of Ch. 791, F. S., and may not lawfully be sold or offered for sale at retail, or used or exploded by any person, firm, or corporation, except as otherwise specifically authorized by Ch. 791.

Your question is qualifiedly answered in the affirmative.

I am advised, and for the purposes of this opinion assume, that the "bottlerocket" article or device about which you inquire is a form or type of firework which consists of a small *skyrocket-type* device attached to a slender stick of wood approximately 1 foot in length which, when ignited, rises into the air under force of its own combustion, emitting a trail of sparks. The practice of placing the stick into an empty soda bottle, thereby using the bottle as a launching platform, apparently accounts for the name, "bottlerocket."

Section 791.01(1), F. S., defining "fireworks" for the purposes of Ch. 791, *supra*, provides:

> The term "fireworks" shall mean and include *any combustible* or explosive *composition*, or *any substance or* combination of *substances, or*, except as hereinafter provided, *any article prepared for the purpose of producing a visible or an audible effect by combustion*, explosion, deflagration or detonation, and *shall include* blank cartridges and toy cannons in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, *skyrockets*, roman candles, daygo bombs, and *any fireworks containing any explosives or flammable compound* or any tablets or other device containing any explosive substance. (Emphasis supplied.)

"Fireworks" has also been held to be a generic term, Caldwell v. Village of Island Park, 107 N.E.2d 441, 444 (C.A. N.Y. 1952), and therefore embraces a wide range of such articles and devices. It is also defined in *Webster's Third New International Dictionary*, p. 856, as "a device for producing a striking display (as of light, noise, or smoke) by the combustion of explosive or flammable compositions" and is further defined in 36A C.J.S. *Fireworks*, p. 487, as "contrivances of inflammable and explosive materials combined in various proportions for the purpose of producing in combustion beautiful or amusing scenic effects." The express mention of skyrockets in s. 791.01(1), F. S., "shall include . . . skyrockets," does not serve to exclude other combustible or explosive articles or devices from the statutory definition, for "include," as used therein is a term of enlargement, not of limitation, and conveys the idea that there are other items includable, though not enumerated therein, especially in light of the use of general, all-inclusive, terms and descriptions preceding the specific names and descriptions and the

fact that the term "fireworks" appears to be a generic term. *See* Argosy Limited v. Hennigan, 404 F.2d 14 (5th Cir. 1968). Further, the language of the statute "shall mean and include any combustible or explosive composition, or any substance or combination of substances, or . . . any article prepared for the purpose of producing a visible or an audible effect" appears to exhaust the genus or enumeration of the series or kinds of "fireworks" and the following specific descriptions or terms do not in any way limit the preceding general or exhaustive terms; thus the doctrine of "ejusdem generis" has no application. *See* Ballard v. Cowart, 238 So.2d 484 (2 D.C.A. Fla., 1970); and Straughn v. Amoco Production, Inc., 309 So.2d 39, 42 (2 D.C.A. Fla., 1975), stating that when a subject is treated generally in a statute (*e.g.*, fireworks, as combustible or explosive composition or article), it necessarily includes the specifics save those expressly excluded; *also see*, generally, 82 C.J.S. *Statutes* s. 332. Moreover, when a statute employs words or terms of general import or application (*e.g.*, any combustible or explosive composition or substance, any article prepared for the purpose of producing visible or audible effect by combustion, or any fireworks containing any explosive or flammable compound), it must be considered that such general terms are used in the sense of and intended to have a meaning broad enough to embrace all kinds and forms of such activities or subjects to which the generality of such terms reasonably extends. *See* Florida Industrial Commission v. Growers Equipment Co., 12 So.2d 889 (Fla. 1943). The use by the Legislature of comprehensive terms, such as in s. 791.01(1), F. S., indicates an intent to include everything embraced within such terms. Florida State Racing Commission v. McLaughlin, 102 So.2d 574, 576 (Fla. 1958). It must be presumed that the Legislature has a working knowledge of the English language, and when a statute is drafted in such a manner as to clearly convey its meaning and intent, the only proper function of a court is to effectuate that intent. *See* State v. Tunnicliffe, 124 So. 279 (Fla. 1929).

As the exceptions enumerated in s. 791.01(2), *supra*, are specific rather than general in nature; as "bottlerockets," as hereinabove described and discussed, are not therein provided for, or excepted from the statutory definition in s. 791.01(1), F. S.; and as subsection (1) generally includes all fireworks, "except as hereinafter provided" (in subsection [2]), the rule *expressio unius est exclusio alterius*—the express mention of one thing is the exclusion of another—is applicable in this instance and works to exclude bottlerockets from that enumeration of exceptions from the operative force of Ch. 791, F. S. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates v. Snyder, 304 So.2d 433 (Fla. 1974). Where a statute sets forth exceptions, no others may be implied to be intended. Williams v. American Surety Co. of New York, 99 So.2d 877 (2 D.C.A. Fla., 1958).

In view of the definition of "fireworks" in s. 791.01(1), F. S., and as "bottlerockets," as hereinabove described, have not been expressly exempted from the operative force of Ch. 791, *supra*, by s. 791.01(2), I am of the opinion that such bottlerockets, if made of any combustible composition or substance or prepared for the purpose of producing a visible or audible effect by combustion or explosion, are fireworks within the meaning of and for the purposes of Ch. 791 and that such articles or devices may not lawfully be sold or offered for sale at retail or used or exploded by any person, firm, or corporation except as otherwise specifically authorized by Ch. 791. *See* ss. 791.02, 791.05, and 791.06. As to sales at wholesale, *see* s. 791.04; *cf.* AGO 071-124. As to agricultural and fish hatchery use, *see* s. 791.07; *cf.* AGO 071-124.

076-183—August 31, 1976

COUNTIES

USE OF MONEYS IN COUNTY FINE AND FORFEITURE FUND

To: Betty Lynn Lee, General Counsel, Broward County Commission, Fort Lauderdale

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTIONS:

1. What statutory restrictions are applicable to the use of moneys in a county's fine and forfeiture fund?

2. How do such restrictions affect the use of moneys in a county's fine and forfeiture fund to support the operation of the county sheriff's office?

SUMMARY:

If the fine and forfeiture fund is maintained as a separate fund by a county, moneys in such fund which are derived from fines and forfeitures collected under the penal laws of the state should be used *only* for the payment of legal costs and expenses, including the fees of officers, in criminal cases prosecuted in the name of the state. Moneys in the fine and forfeiture fund *not* derived from such fines and forfeitures may be used to pay the costs of criminal prosecution as provided in s. 142.01, F. S., *and* all other law enforcement functions and activities of a county authorized by law, including the ordinary operations of a county sheriff's office. The consolidation of the fine and forfeiture fund with other county budgetary funds into a single general fund pursuant to s. 129.011, F. S., does not remove these restrictions on the use of moneys in the county fine and forfeiture fund.

Section 9, Art. XVI, State Const. 1885, provided that:

> In all criminal cases prosecuted in the name of the State when the defendant is insolvent or discharged, *the legal costs and expenses, including the fees of officers*, shall be paid by the counties where the crime is committed, under such regulations as shall be prescribed by law, and all fines and forfeitures *collected under the penal laws of the State shall be paid into the County Treasuries of the respective Counties as a general County* fund to be *applied to such legal costs and expenses*. (Emphasis supplied.)

This provision was judicially construed as requiring fines and forfeitures collected under the penal laws of the state to be paid into the respective county treasuries as a general county fund to be applied to the legal costs and expenses of criminal prosecutions and as prohibiting the utilization of such fines and forfeitures for other purposes. *See* State *ex rel.* Martin v. Board of County Comm'rs, 87 So. 917 (Fla. 1921), and Crandon v. Nelson-Bullock Co., 147 So. 582 (Fla. 1933). However, it was clear that this constitutional prohibition applied only to the use of fines and forfeitures imposed for violation of state penal laws and did not apply to the use of other moneys which were paid into a county's fine and forfeiture fund pursuant to s. 2826, Comp. Gen. Laws 1927, s. 1774, Rev. Gen. St. 1920, now appearing as s. 142.01, F. S. *See* State *ex rel.* Crim v. Juvenal, 163 So. 569, 572 (Fla. 1935), in which it was stated on petition for rehearing that the special tax levy of which the fine and forfeiture fund may be constituted in part, *see* s. 142.02, F. S., "may be disbursed for any county purpose that the Legislature may authorize."

Section 9, Art. XVI, *supra*, was not carried forward in the 1968 Florida Constitution. However, s. 10, Art. XII, State Const. 1968, provides as follows:

> All provisions of Articles I through IV, VII and IX through XX of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

In this regard, I am aware of no inconsistency between that provision of s. 9, Art. XVI, restricting use of fines and forfeitures collected under the penal laws of the state and the 1968 Florida Constitution. Thus, it would appear that upon the effective date of s. 10, Art. XII, *supra*, January 7, 1969, s. 9, Art. XVI, became a statute, subject to modification and repeal as other statutes. And, since I am likewise unaware of any enactment of the Florida Legislature which has subsequently modified or repealed s. 9, Art. XVI, as a statute, it would appear that the restriction established thereby on the use of fines and forfeitures collected under the penal laws of the state is still applicable. *Cf.* Advisory Opinion to the Governor, 225 So.2d 512 (Fla. 1969); *In re* Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969); AGO's 069-17 and 069-90. Accordingly, until legislatively or judicially determined otherwise, all fines and forfeitures collected under the penal laws of the state should continue to be paid into the county treasuries of the respective counties as a general county fund to be applied only to the payment of legal

costs and expenses, including the fees of officers, in criminal cases prosecuted in the name of the state.

As to the existence of other statutory restrictions on the use of a county's fine and forfeiture fund, s. 142.01, F. S., which was first enacted in 1895, provides as follows:

> There shall be in every county of this state a separate fund to be known as the fine and forfeiture fund. Said fund shall consist of all fines and forfeitures collected in the county under the penal laws of the state, all costs refunded to the county, all funds arising from the hire or other disposition of convicts *and* the proceeds of any special tax that may be levied by the county commissioners for expenses of criminal prosecutions. *Said funds shall be paid out only for criminal expenses, fees and costs where* the crime was committed in the county, and the fees and costs are a legal claim against the county, in accordance with the provisions of this chapter. (Emphasis supplied.)

See also s. 142.02, F. S., authorizing boards of county commissioners to levy a special tax, not to exceed two mills, upon the real and personal property of the respective counties for such costs of criminal prosecution; and s. 142.03, F. S.

In 1951, the Florida Legislature established a budget system for the control of the finances of the boards of county commissioners of the several counties of the state. *See* Ch. 26874, 1951, Laws of Florida, now Ch. 129, F. S., as amended. As part of that system, six county budgetary funds were authorized, including the fine and forfeiture fund. Section 129.01. Section 129.02(3) provides that:

> The fine and forfeiture fund budget shall contain an estimate of receipts by source and balances as provided herein, and an itemized estimate of expenditures that need to be incurred *to carry on all criminal prosecution as provided in s. 142.01, and all other law enforcement functions and activities of the county now or hereafter authorized by law,* and of indebtedness of the fine and forfeiture fund; also of the reserve for contingencies and the balance, as hereinbefore provided, which should be carried forward at the end of the year. (Emphasis supplied.)

Finally, in 1970 (Ch. 70-282, Laws of Florida), the Legislature enacted s. 129.011, which provides as follows:

> (1) *In order to simplify and otherwise improve the accounting system provided by law and to facilitate a better understanding of the fiscal operation of the county by the general public,* the board of county commissioners may, by resolution duly adopted, consolidate any of its separate budgetary funds into a single general fund, except that the road and bridge tax shall be levied under s. 336.59, and shown as a separate budgetary fund.
>
> (2) Subsequent to the consolidation of any budgetary funds as provided in subsection (1), *the maximum permitted tax millage of the combined fund shall be the total amount authorized by law for the separate funds so consolidated.*
>
> (3) This section is deemed to be in the general public interests and it is the intent of the legislature that the provisions hereof shall be liberally construed to accomplish the purposes contained herein. (Emphasis supplied.)

All laws and parts of laws in conflict with this section were repealed. *See* s. 3, Ch. 70-282.

Construing the foregoing provisions *in pari materia, see* Singleton v. Carson, 46 So.2d 186, 190 (Fla. 1950), and consistent with the discussion *supra* concerning the effect of s. 9, Art. 16, State Const. 1885, it would appear that s. 129.02(3), F. S., effected an implied modification of s. 142.01, F. S., to the extent that it expanded the purposes for which those moneys in a county's fine and forfeiture fund *not* derived from fines and forfeitures collected under the penal laws of the state may be used, *i.e.*, such moneys may be used to defray or fund the expenses of criminal prosecutions as provided in s. 142.01 and for "all other law enforcement functions and activities of the county now or hereafter authorized by law." *See* Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194 (Fla. 1946), relating to implied modifications of statutes. However, in the absence of a clear expression of legislative intent to the contrary, I cannot conclude that s. 129.011, F. S., has likewise effected an implied statutory modification so as to remove otherwise applicable statutory restrictions on the use of such moneys. This is because s. 129.011

concerns the consolidation of county budgetary funds for the express purpose of simplifying and improving the accounting system provided by law and does not purport to abrogate existent restrictions on the *use* of the funds so consolidated. *Cf.* State v. Gadsden County, 58 So. 232, 235 (Fla. 1912), in which it is stated:

> . . . [T]he mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute. If the two may operate upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given the effect designed for them unless a contrary intent clearly appears.

In sum, therefore, I am of the opinion that if the fine and forfeiture fund is maintained as a separate fund by a county, moneys in such fund which are derived from fines and forfeitures collected under the penal laws of the state should continue to be used *only* for the payment of legal costs and expenses, including the fees of officers, in criminal cases prosecuted in the name of the state. As to moneys in the fine and forfeiture fund derived from other sources, *see, e.g.*, ss. 30.231(3) and 142.02, F. S., such moneys may be utilized to pay the costs of criminal prosecution under s. 142.01, F. S., *and* for all other law enforcement functions and activities of the county authorized by law. *See* s. 129.02(3), F. S. The consolidation of a county fine and forfeiture fund with other county budgetary funds into a single general fund pursuant to s. 129.011, F. S., does not remove these restrictions on the use of moneys in the county fine and forfeiture fund.

It might be noted, parenthetically, that I am also of the view that, until legislatively or judicially determined otherwise, "civil penalties and forfeitures" imposed for noncriminal traffic infractions under the Florida Uniform Disposition of Traffic Infractions Act, Ch. 318, F. S. (Ch. 74-377, Laws of Florida), which are not required by s. 318.21, read *in pari materia* with s. 316.021, F. S., to be paid into the fine and forfeiture fund, nor in anywise earmarked for the payment of the costs of criminal prosecution within the purview of s. 9, Art. 16, or s. 142.01, F. S., are *not* subject to the use restriction contained in s. 9, Art. 16, as a statute.

AS TO QUESTION 2:

The ordinary operation of a county sheriff's office would appear to be a law enforcement activity or function of a county. Thus, consistent with the answer to your first question, I am of the opinion that any moneys in a county's fine and forfeiture fund *not* derived from fines and forfeitures collected pursuant to the penal laws of the state may be utilized to defray or fund the costs of the ordinary operation of the sheriff's office. *See* s. 30.49(9), F. S., originally enacted in 1957, which provides that the budget of the sheriff's office shall be included "in the budget of either the general fund or the fine and forfeiture fund, or in part of each"; *see also* s. 30.231(3), F. S., requiring that all fees collected by a sheriff pursuant thereto "shall be paid monthly into the fine and forfeiture fund of the county"; and s. 30.50(6), F. S. As noted above, the civil penalties and forfeitures imposed for noncriminal traffic infractions under Ch. 318, F. S., are not earmarked for the fine and forfeiture fund or for the payment of the costs of criminal prosecution and, thus, may be used to, *inter alia*, support the operation of the county sheriff's office.

076-184—August 31, 1976

PAROLE AND PROBATION COMMISSION

POWER TO EXEMPT PAROLEES AND PROBATIONERS FROM PAYMENT OF $10 MONTHLY SUPERVISION FEE

To: Charles J. Scriven, Chairman, Florida Parole and Probation Commission, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

What powers or duties of the Parole and Probation Commission relating to s. 945.30, F. S., and the $10 monthly payment for cost of supervision required thereunder of parolees and probationers have been transferred by Ch. 75-49, Laws of Florida, to the Department of Offender Rehabilitation?

SUMMARY:

The power granted by s. 945.30, F. S., to the Parole and Probation Commission, to grant individual exemptions to parolees and probationers from all or any part of the $10 monthly contribution toward cost of supervision and rehabilitation required by s. 945.30, based upon the finding of the existence of one or more of the factors prescribed by the statute, is a quasi-judicial function of the commission. As such, it is within the quasi-judicial exception to the general transfer of the powers and functions of the commission made by s. 20.315(22), F. S., and was not transferred to the Department of Offender Rehabilitation; rather, it remains with the commission. Collection and accounting functions relating to the $10 monthly contributions have been transferred to the Department of Offender Rehabilitation.

Section 945.30, F. S., which has been the subject of AGO's 075-19, 075-253, and 076-78, provides that "[a]nyone on probation or parole shall be required to contribute $10 monthly toward the cost of his supervision and rehabilitation beginning 60 days from the date he is free to seek employment." In addition, the section empowers the Parole and Probation Commission to grant individual exemptions from all or any part of the $10 contributions toward cost of supervision if it finds any of the factors prescribed by the statute to exist. *See* AGO 075-19 in regard to the granting of exemptions.

Chapter 75-49, Laws of Florida (the Correctional Organization Act of 1975), transferred the powers, duties, and functions of the Parole and Probation Commission—except those of a quasi-judicial nature—to the Department of Offender Rehabilitation. Section 2 of Ch. 75-49 has been codified as s. 20.315, F. S., and subsection (22) thereof provides:

> All powers, duties, and functions of the Parole and Probation Commission, *except those relating to the exercise of its quasi-judicial duties and functions*, as provided by law, are hereby transferred by a type four transfer pursuant to subsection 20.06(4) to the Department of Offender Rehabilitation. This transfer shall include all court-related investigations, all supervision of parolees and probationers, administrative support services, data collection and information systems, field offices and other programs, and services and resources of the commission which are not necessary for the immediate support of the commissioners. The commission shall retain 155 positions and may add, delete, classify, and reclassify such positions without Department of Administration approval during fiscal year 1975-76. The Department of Offender Rehabilitation shall perform statistical analysis, research, and program evaluation for the Parole and Probation Commission. There shall be only one offender-based information and records system maintained by the Department of Offender Rehabilitation for the joint use of the Department of Offender Rehabilitation and the Parole and Probation Commission. The Department of Offender Rehabilitation shall develop, in consultation with the Parole and Probation Commission, such offender-based information system designed to serve the needs of both agencies. The Department shall notify the Commission of all violations of parole and the circumstances thereof. (Emphasis supplied.)

In your letter to me, you stated that there "would appear to be no question that the supervision, collection and accounting of funds functions of the cost of supervision program would be transferred to the Department of Offender Rehabilitation." I agree. You then went on to state that the question you wish answered is whether the above-mentioned power to grant individual exemptions from all or any part of the $10 monthly contribution toward cost of supervision required by s. 945.30, *supra*, remains with the Parole and Probation Commission.

In Black's Law Dictionary, Rev. 4th ed., at p. 1411, the following definition of "quasi-judicial" is provided:

> A term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official actions, and to exercise discretion of a judicial nature.

The above-quoted definition was adopted by the Florida Supreme Court in Canney v. Board of Pub. Instruction of Alachua County, 278 So.2d 260, 263 (Fla. 1973). Florida courts have also characterized a quasi-judicial function as one involving the adjudication of a person's legal rights, *duties*, privileges, or immunities. Bay National Bank & Trust Co. v. Dickinson, 229 So.2d 302, 305 (1 D.C.A. Fla., 1969); Deel Motors, Inc. v. Department of Commerce, 252 So.2d 389, 394 (1 D.C.A. Fla., 1971). In this instance, it is clear that the function in question does involve the adjudication of a person's *legal duty*, that duty being the $10 monthly contribution requirement imposed upon parolees and probationers by s. 945.30, F. S.

Therefore, I am of the opinion that, under the above standards, the granting of individual exemptions to parolees and probationers from payment of all or any part of the $10 monthly contributions toward cost of supervision required by s. 945.30, F. S., upon the ascertainment of the facts and the finding of the existence of one or more of the factors delineated in that statute, is a quasi-judicial function. As such, it is within the quasi-judicial exception to the general transfer mandated by s. 20.315(22), *supra*, and thus remains as a function of the Parole and Probation Commission. Further reinforcing this conclusion is the 1976 Legislature's passage of Committee Substitute for Senate Bill 925 (Ch. 76-238, Laws of Florida), amending s. 945.30. This most recent legislative enactment regarding the $10 monthly contribution requirement continues to provide that it is the *commission* that is empowered to grant the exemptions if the *commission* finds any of the specified factors to exist or if the *commission* finds other extenuating circumstances to exist. I must conclude that, had such granting of exemptions been transferred by Ch. 75-49, *supra*, then the 1976 Legislature, in amending s. 945.30, would have amended the repeated references to the commission in s. 945.30 to read "Department of Offender Rehabilitation." It is a fundamental, long-standing rule of statutory construction that it is to be presumed "that the Legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject." Tamiami Trail Tours v. Lee, 194 So. 305, 306 (Fla. 1940). *In accord*: Ervin v. Capital Weekly Post, 97 So.2d 464, 467, 469 (Fla. 1957); Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806, 809 (Fla. 1964); Dickinson v. Davis, 224 So.2d 262, 264 (Fla. 1969); and City of Punta Gorda v. McSmith, Inc., 294 So.2d 27, 29 (2 D.C.A. Fla., 1974).

You also asked me to comment on whether this holding would "apply equally to parolees, probationers, and individuals on Mandatory Conditional Release." The only comment I find necessary to make here is that s. 945.30, F. S.—the statutory source of authority for the $10 payments—is addressed specifically and equally to both *parolees* and *probationers*. I find no mention anywhere in s. 945.30 of "individuals on Mandatory Conditional Release." Therefore, the last-named individuals are excluded from the operation of s. 945.30. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974). *Also see* AGO 075-253, noting that there must exist some basis in the statute for the exercise of authority on the part of an administrative agency (to collect the contributions toward cost of supervision or to exempt individuals from payment of such contributions), and if there is any reasonable doubt as to the statutory authority, the commission should not undertake to exercise it, citing State *ex rel.* Greenberg v. Florida State Bd. of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, Florida State Board of Dentistry v. State *ex rel.* Greenberg, 300 So.2d 900 (Fla. 1974).

076-185—August 31, 1976

STATE FAIR AUTHORITY

NOT GOVERNED BY STATE PURCHASING LAW—INELIGIBLE TO PARTICIPATE IN INSURANCE RISK MANAGEMENT TRUST FUND

To: Jack D. Kane, Executive Director, Department of General Services, Tallahassee

Prepared by: Carol L. Reilly, Assistant Attorney General

QUESTIONS:

1. Is the Florida State Fair Authority a state agency as defined by s. 287.012, F. S., and therefore governed by the state purchasing law?
2. Is the Florida State Fair Authority a state department, as described in s. 284.31, F. S., for which insurance coverage is authorized from the Florida Casualty Insurance Risk Management Trust Fund?

SUMMARY:

The Florida State Fair Authority has not been assigned by the Legislature to the executive branch of government; therefore the authority does not appear subject to the state's purchasing law, part I, Ch. 287, F. S. The Department of Insurance which is charged with the interpretation and enforcement of part II, Ch. 284, F. S., has administratively determined that s. 284.31 excludes the authority from participation in the Risk Management Trust Fund since the word "department" refers only to departments within the executive branch of government. Further, Rule 4-30.02, F.A.C., provides for an exclusion from coverage in certain situations where self-insurance is unfeasible. The rule and the administrative construction of the statute are presumptively correct; and the rule validly promulgated under statutory authority has the force and effect of law until judicially determined otherwise.

Before turning to your specific questions, it might be noted that the Florida State Fair Authority was created by Ch. 74-322, Laws of Florida, and now appears at ss. 616.251-616.263, F. S. Section 1 provides, in part:

> There is hereby created and constituted the Florida State Fair Authority, *a public body corporate and politic and special instrumentality of the state*, under the supervision of the Commissioner of Agriculture, for the purposes and with the powers herein set forth. Said instrumentality, hereinafter referred to as the authority, shall have perpetual succession. *For the purposes of implementing the intent of this act the authority shall be considered an instrumentality of the state.* The State Fair Authority is hereby charged with the responsibility of staging an annual fair. The fair shall serve the entire state . . . . (Emphasis supplied.)

Part I, Ch. 287, F. S., deals with purchasing activities by the state on behalf of state agencies and was brought into the statutes by s. 22, Ch. 69-106, Laws of Florida. Section 287.012 is the definitional section of the state purchasing law, which defines a state agency as "any of the various state officers, departments, boards, commissions, divisions, bureaus, councils, and any other unit of organization however designated."

As indicated by its title, Ch. 69-106, *supra*, is an act relating to the executive branch of government. Its purpose was to restructure the executive branch of government and to consolidate and reorganize existing agencies pursuant to the mandate of s. 6, Art. IV, State Const. The definition contained in s. 287.012(1), F. S., is essentially the same as the general definition of agency found in the Governmental Reorganization Act at s. 20.03(11), F. S. Consequently, it appears that the agencies covered by the state purchasing law are those agencies within the *executive* branch of state government. To be subject to the purchasing requirements of Ch. 287, F. S., an entity would have to be

assigned within the executive branch of government by Ch. 20, F. S. (Ch. 69-106, Laws of Florida), or a later enactment.

Chapter 74-322, Laws of Florida, was enacted after the Governmental Reorganization Act, and the fair authority which it created was not assigned to the executive branch of government. Therefore, the authority does not appear to be a part of the executive branch of government and is not subject to Ch. 287, F. S.

Section 6, Art. IV, State Const., did not deprive the Legislature of its power to determine which functions were executive and which functions were not. Further, the Legislature can properly provide for the performance of legislative functions through some board or commission. Florida Power Corporation v. Pinellas Utility Board, 40 So.2d 350 (Fla. 1949); *In re* Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969). The failure of the Legislature to assign the authority to the executive branch of government indicates that the Legislature did not regard the operation of the state fair as an executive function. *Cf.* AGO's 076-53 and 076-54. Therefore, by reason of its apparent omission from any part of the executive branch, the Florida State Fair Authority is not an agency within the meaning of s. 287.012, F. S., the purchasing law of Florida.

Part II, Ch. 284, F. S., created the Florida Casualty Insurance Risk Management Trust Fund. Section 284.31 provides, *inter alia*,

> The insurance risk management trust fund shall, unless specifically excluded by the Department of Insurance, cover all departments of the State of Florida and their employees and agents and other authorized persons . . . . All departments of the state shall be covered by the fund unless specifically excluded by the Department of Insurance.

In order to be eligible for participation in the Florida Casualty Insurance Risk Management Trust Fund or for the purchase of insurance by the Division of Purchasing, the authority must fit within the definition or classification of a department of the State of Florida, as outlined above.

As was reflected in the materials furnished with your inquiry, I have been advised that the Department of Insurance has interpreted s. 284.31, F. S., as applicable only to departments or subdivisions of departments within the executive branch of state government. The authority does not appear to have been assigned to any executive department; therefore, the fair authority cannot be considered as part of the executive branch of government. *Cf.* s. 20.29, F. S., and AGO 076-175, relating to the Department of Citrus, which is headed by a public corporation, *i.e.*, the Florida Citrus Commission.

The administrative construction of the agency charged with the enforcement and interpretation of a statute carries great weight and is controlling in the absence of clear and cogent reasons to the contrary. Miller v. Brewer Company of Florida, Inc., 122 So.2d 565 (Fla. 1960); Daniel v. Florida State Turnpike Authority, 213 So.2d 585 (Fla. 1968); Heftler Construction Co. and Subsidiaries v. Department of Revenue, 334 So.2d 129 (3 D.C.A. Fla., 1976).

In light of the discretionary language contained in s. 284.31, F. S., the language of Ch. 20, F. S., and the constitutional provision, we are unable to say that the administrative construction of the Department of Insurance is clearly erroneous as a matter of law.

Moreover, with reference to the Risk Management Trust Fund, the Department of Insurance has promulgated Rules 4-30.02 and 4-30.06, F.A.C., which provide, respectively, for coverage exclusion "should there occur a statutory or jurisdictional conflict making self-insurance [*i.e.*, participation in the Risk Management Trust Fund] unfeasible" and for workmen's compensation coverage for the judicial and legislative branches upon request. The exclusionary language of s. 284.31, F. S., which gives the department discretion in the administration of the fund, supports the promulgation of Rule 4-30.02. The language of the rule provides a reasonable basis for exclusions from coverage and is "deemed prima facie reasonable and justified by the facts unless the facts as shown require a conclusion to the contrary." Florida Citrus Commission v. Golden Gift, 91 So.2d 657 (Fla. 1956). Rules and regulations of an administrative agency made under power conferred by statute (ss. 284.17 and 284.39, F. S.) have the force and effect of law until judicially determined otherwise. *In re* Briley's Estate, 21 So.2d 595 (Fla. 1945); Florida Livestock Board v. Gladden, 76 So.2d 291 (Fla. 1954).

Therefore, the Department of Insurance has determined that the authority is not eligible to participate in the fund. I find nothing clearly wrong with their construction of the statute which is their responsibility. The department has determined that the authority is not a department within the meaning of s. 284.31, F. S. Even if the authority

were a department covered by s. 284.31, the Department of Insurance would still have the discretion to exclude the authority from coverage, pursuant to Rule 4-30.02, F.A.C.

Pursuant to Ch. 74-322, Laws of Florida, the authority is a special instrumentality of the State of Florida with the powers to sue and be sued and with perpetual existence and is a body politic and corporate. In short, the authority is a public corporation which is neither assigned to, nor made a part of, the executive branch of state government by Ch. 20, F. S. This does not mean that the authority cannot avail itself of any necessary insurance coverage available commercially or through s. 455.06, F. S.

076-186—August 31, 1976

TAXATION

MUNICIPAL EXCISE TAX ON RENTAL OF LAND NOT AUTHORIZED

To: Denver F. Baxter, City Manager, Winter Garden

Prepared by: Caroline C. Mueller, Assistant Attorney General

QUESTION:

Is the City of Winter Garden authorized by law to levy a tax on the rental of land for the purposes of parking, standing, or other use for a house trailer?

SUMMARY:

Municipalities are not authorized by general law to levy sales and use taxes in the form of a tax on the rental of land for the purposes of parking, standing, or other use for a house trailer, and no such excise tax may be validly levied by municipalities.

Your question is answered in the negative.

Prior to revision of the Florida Constitution in 1968, the authority for a municipality to impose taxes could be derived from either general law or special act. Under the Florida Constitution as revised in 1968, the authority for a municipality to tax must be contained in general law, except in the case of ad valorem taxes.

Section 1(a), Art. VII, State Const., provides:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. *All other forms of taxation shall be preempted to the state except as provided by general law.* (Emphasis supplied.)

Section 9(a), Art. VII, State Const., similarly limits the taxing powers of municipalities:

> Counties, school districts, and *municipalities* shall, and special districts may, be authorized by law to levy ad valorem taxes and *may be authorized by general law to levy other taxes*, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution. (Emphasis supplied.)

It is clear from the foregoing constitutional provisions that, except for ad valorem taxes, municipalities may be granted the power to levy *any* tax *only* by *general law*, and *any* municipal excise tax not so authorized must necessarily fall by virtue of the aforecited constitutional preemption clause. City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972); AGO 074-270.

The issue then becomes whether any tax on the rental of real property for house trailer uses and purposes by the City of Winter Garden is authorized by general law.

Section 166.201, F. S., provides:

> **Taxes and charges.**—A municipality may raise, by taxation and licenses authorized by the Constitution or *general law*, or by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law. (Emphasis supplied.)

This section is no authority for the imposition of the excise tax in question since this section does not *grant* any taxing power.

There are several provisions in the Florida Statutes which grant to municipalities the right to levy certain excise or license taxes. (*See* s. 166.231 and Ch. 205, F. S.) Chapter 205 authorizes municipalities to impose occupational license taxes (for the privilege of engaging in any business or occupation within their jurisdiction), but there is no statute which authorizes municipalities to impose sales and use taxes. Any tax on the rental of real property for house trailer uses or purposes by the City of Winter Garden would be based on the amount of rental and would not be an occupational license tax for the privilege of engaging in a business or occupation. Since the tax would be based on the amount of rental, it would be in the nature of a sales and use tax. (*See* ss. 212.03 and 212.031, F. S.) Thus, the tax would not be authorized by general law to be levied by a municipality.

Since the Legislature has failed to grant to municipalities the power to impose a sales and use tax, the power is preempted to the state. The Legislature has provided that the state may impose a sales and use tax on rentals of real property pursuant to Ch. 212, F. S. This chapter expresses the legislative intent that there shall not be duplication of these taxes. Section 212.081(3)(b) provides in pertinent part:

> It is also the legislative intent that there shall be no pyramiding or duplication of excise taxes levied by the state under this chapter and no municipality shall levy any excise tax upon any privilege, admission, lease, rental, sale, use or storage for use or consumption which is subject to a tax under this chapter unless permitted by general law . . . .

It should be noted that there are certain exceptions to the general rule expressed herein. Section 212.081(3)(b), F. S., provides a "grandfather" clause for certain municipal ordinances which were in effect prior to July 1, 1957. Chapter 67-930, Laws of Florida, provides authority for certain large municipalities to enact a resort tax.

I would, therefore, conclude that the levy of a tax by the City of Winter Garden on the rental of land for the purposes of parking, standing, or other use for a house trailer is not authorized by general law and that no such excise tax may be validly levied.

076-187—September 1, 1976

INTEREST AND USURY

EFFECT OF FEDERAL LAW ON INTEREST RATES WHICH MAY BE CHARGED BY INSURED BANKS AND SAVINGS AND LOAN INSTITUTIONS

To: Gerald A. Lewis, Comptroller, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General

QUESTIONS:

1. Are the provisions of Ch. 687, F. S. (interest and usury), preempted by the provisions of Pub. L. 93-501 (12 U.S.C. ss. 85 and 1831A) which pertain to interest rates that may be charged by state or national banks on certain types of loans in the amount of $25,000 or more?

2. What is the effect, if any, of Pub. L. 93-501 (12 U.S.C. s. 1730?) on the interest rates that may be charged by state or federal savings and loan associations on business or agricultural loans of $25,000 or more?

SUMMARY:

Public Law 93-501 (12 U.S.C. ss. 85 and 1831A) authorizes federally insured state banks and insured institutions to charge on agricultural and business loans of more than $25,000 an interest rate in excess of that prescribed by Ch. 687, F. S., in the absence of state legislative action prohibiting the increased interest rate. Public Law 93-501 does not operate to reduce a state's lawful interest rates that are higher than those authorized by such law.

Question 1 is answered in the affirmative and question 2 is answered by the following discussion.

Public Law 93-501 amended various provisions of federal law, and your inquiry relates thereto. Section 202 of Pub. L. 93-501 provides in part:

> The Federal Deposit Insurance Act (12 U.S.C. 1811-31) is amended by adding at the end thereof the following:
> "Sec. 24. (a) In order to prevent discrimination against State-chartered *insured banks* with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank would be permitted to charge in the absence of this subsection, a *State bank may in the case of business or agricultural loans in the amount of $25,000 or more, notwithstanding any State constitution or statute, which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill or exchange, or other evidence of debt, interest at a rate of not more than 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located,* and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run." (Emphasis supplied.)

Section 203 of said law provides in part:

> Title IV of the National Housing Act (12 U.S.C. 1724-1730(d)) is amended by adding at the end thereof the following:
> "Sec. 412. (a) If the applicable rate prescribed in this section exceeds the rate an *insured institution* would be permitted to charge in the absence of this section, *such institution may in the case of business or agricultural loans in the amount of $25,000 or more, notwithstanding any State constitution or statute, which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the institution is located,* and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.
> (b) If the rate prescribed in subsection (a) exceeds the rate such institution would be permitted to charge in the absence of this section, and such *State fixed rate is thereby preempted* by the rate described in subsection (a). . . . " (Emphasis supplied.)

Both sections contain forfeiture provisions applying to charges in excess of those permitted therein *if* the rate allowed therein exceeds the allowable state rate. Both sections apply *only* to business or agricultural loans. The *first* section applies to *state-chartered insured banks* and the latter section applies to *insured* institutions.

Title 12 U.S.C.A. s. 1811-31 relates to Federal Deposit Insurance and Title 12 U.S.C.A. s. 1724-1730(d) relates to insurance of savings and loan accounts. More specifically, the former creates the Federal Deposit Insurance Corporation (FDIC) and the latter creates the Federal Savings and Loan Insurance Corporation (FSLIC). The former provides insurance for member *banks* and the latter provides insurance for savings and loan institutions, building and loan institutions, homestead associations, and cooperative banks. (*See* ss. 1811 and 1726.) Section 1814 *mandates* that certain banks, state and national, which are, or which become *members* of the Federal Reserve System, be insured

banks. Section 1815 provides for application of *nonmember* banks, both state and national, so that upon approval of the application, such *nonmember* banks may become *insured* banks. Under s. 1726 it is the *duty* of FSLIC to insure the accounts of *all* federal savings and loan associations, and it is *permitted* to insure the accounts "of building and loan, savings, and homestead associations and cooperative banks organized and operated according to the laws of the state, district, territory, or possession in which they are chartered or organized." Application is required to be made and upon approval the applicant institution becomes an "insured institution" as defined in s. 1724(a).

The amendment to 12 U.S.C.A. 1811-31 relates *only* to state-chartered *insured banks* and the amendment to 12 U.S.C.A. 1724-1730(d) relates only to *insured institutions*. Thus, it is only those particular banks and institutions whose accounts are insured by FDIC and FSLIC which are affected by the amendments and these banks and institutions are regulated in part by the respective federal agencies.

Under the "supremacy" clause, Art. VI, Clause 2, U.S. Const., in those areas where the federal Constitution has specifically or by essential implication deposited the power to act in the federal government, the assertion of such power by the federal government is the supreme law of the land; and in those areas "the authority of the state is necessarily subordinate." U.S. v. Carter, 121 So.2d 433 (Fla. 1960). *Accord*: Sperry v. State of Fla. *ex rel.* Florida Bar, 373 U.S. 379 (1963). The intent to preempt in the area of interest rates chargeable by the designated state and federal banks on business and agricultural loans of $25,000 or more is stated in the federal act in plain and unambiguous terms. *Cf.* Washington Fed. S. & L. Ass'n v. Balaban, 281 So.2d 15 (Fla. 1973), noting that, by virtue of Title 12, ss. 1464 *et seq.*, U.S.C., the federal government has preempted the regulation and supervision as well as the organization of federal savings and loan associations.

Your first question must, therefore, be answered in the affirmative.

The purpose of the previously quoted amendments was to *increase* for a limited period the interest rate that may be charged on business and agricultural loans of an amount of $25,000 or more made by state-chartered insured banks and insured institutions as defined elsewhere. There was no intention under the federal law, to *reduce* the interest rates chargeable under the laws of any state. This purpose is clearly apparent from the language of the amendments, wherein it is pointed out that the provisions therein are operative only if the applicable rate prescribed in the subsection *exceeds* the rate permitted to be charged in the absence of this subsection.

Thus, in answer to your second question, savings and loan institutions exempted from the provisions of Ch. 687, F. S., would not be affected by the amendments. Any building and loan or savings and loan associations which were within the purview of the restrictions in Ch. 687 on any transactions would be affected by the amendments and would be allowed to charge the higher interest rate on such transactions. Accordingly, AGO 074-278, which you mentioned in your letter, is not affected by the amendments.

076-188—September 10, 1976

SOVEREIGN IMMUNITY

PRIVATE, VOLUNTEER INSTITUTIONS PARTICIPATING IN SWINE FLU IMMUNIZATION PROGRAM

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: William C. Sherrill, Jr., Assistant Attorney General

QUESTION:

Does the doctrine of sovereign immunity operate to confer sovereign immunity on independently insured private institutions which volunteer their services to the Florida Department of Health and Rehabilitative Services?

SUMMARY:

Pursuant to Pub. L. 94-380, the Department of Health and Rehabilitative Services and volunteer private institutions acting on its behalf and under its guidance in the administration of swine flu vaccine are "program participants." The United States will be primarily liable for all claims for damages but will have a claim against any "program participant" for negligence in carrying out any obligation or responsibility in connection with the swine flu program. Since the State of Florida has enacted a limited waiver of sovereign immunity, the state will, to the extent of that waiver, be liable to the United States pursuant to the provisions of Pub. L. 94-380. Volunteer private institutions not acting in bad faith, maliciously, or in a manner exhibiting wanton and willful disregard of human rights, safety, and property would be entitled to have the State of Florida pay any civil judgment not to exceed $50,000 per claimant or $100,000 per occurrence for damages as a result of any act or omission of action within the scope of its agency or function in the swine flu program. No opinion is expressed as to the liability to the United States of either the State of Florida or the volunteer private institutions for amounts in excess of the limits of s. 768.28, F. S.

Your question is answered to a large extent by Pub. L. 94-380, which was enacted by Congress on August 12, 1976. The purpose of the act, as indicated by its title, is:

> To amend the Public Health Service Act to authorize the establishment and implementation of an emergency national swine flu immunization program and to *provide an exclusive remedy* for personal injury or death arising out of the manufacture, distribution, or *administration* of the swine flu vaccine under such program. (Emphasis supplied.)

Congressional intent is set forth in the act in the newly created 42 U.S.C. s. 274b(k)(1)(A)(i) and (ii):

> (k)(1)(A) The Congress finds that—
> (i) *in order to achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute, and administer the swine flu vaccine* purchased and used in the swine flu program and to assure the availability of such vaccine in interstate commerce, *it is necessary to protect such agencies, organizations, and individuals against liability for other than their own negligence* to persons alleging personal injury or death arising out of the administration of such vaccine;
> (ii) to provide such protection and *to establish an orderly procedure for the prompt and equitable handling of claims* by persons alleging such injury or death, it is necessary that an *exclusive remedy* for such claimants be provided against the United States because of its unique role in the initiation, planning, and administration of the swine flu program; and (Emphasis supplied.)

42 U.S.C. s. 247b(k)(2)(A) then provides that:

> (2)(A) The United States shall be liable with respect to claims submitted *after September 30, 1976* for personal injury or death arising out of the administration of swine flu vaccine under the swine flu program and *based upon the act or omission of a program participant* in the same manner and to the same extent as the United States would be liable in any other action brought against it under such section 1346(b) and chapter 171. . . . [Exceptions, not relevant here, have been omitted; emphasis supplied.]

A "program participant" is then defined by 42 U.S.C. s. 247b(k)(2)(B) to include:

> the *public* or *private* agency or organization that provided an inoculation under the swine flu program *without charge* for such vaccine or its administration and *in compliance with the informed consent form and procedures requirements* prescribed pursuant to subparagraph (b) or paragraph (1) of this subsection,

> *and the medical and other health personnel* who provided or assisted in providing an inoculation under the swine flu program without charge for such vaccine or its administration and in compliance with such informed consent form and procedures requirements. (Emphasis supplied.)

Thus, both the Department of Health and Rehabilitative Services and any volunteer private health agency participating in the swine flu immunization program are "program participants" if either agency provides inoculation without charge and in compliance with certain consent form procedures. I might note at this point that the words "without charge" would seem to refer to the administration of vaccine to citizens "without charge" to the citizen. I understand that, after you wrote your letter to me, you have been asked whether a private health agency may be reimbursed for its expenses and still qualify as a "program participant." Since the program is to be administered by the United States Department of Health, Education and Welfare, and liability claims are to be handled by the United States Attorney General, it would be more appropriate for you to direct that question to the officials directly responsible for administering the federal program.

Public Law 94-380 establishes an exclusive method for handling claims against "program participants." 42 U.S.C. s. 247b(k)(3) provides:

> (3) The remedy against the United States prescribed by paragraph (2) of this subsection for personal injury or death arising out of the administration of the swine flu vaccine under the swine flu program *shall be exclusive of any other civil action or proceeding for such personal injury or death against any employee of the Government* (as defined in section 2671 of title 28, United States Code) *or program participant whose act or omission gave rise to the claim.* (Emphasis supplied.)

The United States Attorney General shall defend all civil actions brought against a "program participant." 42 U.S.C. s. 247b(k)(4).

Public Law 94-380 does not, however, completely shield a "program participant" from all potential liability. Subsection (7) of 42 U.S.C s. 247b(k) provides that, if the United States makes payment to a claimant injured in the administration of the vaccine, the United States may recover from the "program participant"

> . . . that portion of the damages so awarded or paid, as well as any costs of litigation, *resulting from the failure of any program participant to carry out any obligation or responsibility assumed by it under a contract* with the United States in connection with the program or from *any negligent conduct on the part of any program participant in carrying out any obligation or responsibility in connection with the swine flu program.* The United States may maintain such action against such program participant in the district court of the United States in which such program participant resides or has its principal place of business. (Emphasis supplied.)

This section is consistent with subsection (k)(1)(A)(i) previously quoted which expresses congressional intent that participant agencies, organizations, or individuals be protected against liability "for *other than* their *own negligence.*" Thus, a "program participant" may be liable to the United States for its own negligence in carrying out "any obligation or responsibility in connection with the swine flu program."

The only liability, therefore, that remains for a "program participant" is a potential liability for negligence in the administration of the "obligations" or "responsibilities" of the program. Presumably these obligations will be defined by HEW. Whether private volunteer institutions may be ultimately liable to the United States for such negligence is a very difficult question that involves principles of agency, state sovereign immunity, waiver of sovereign immunity, and the effect of Pub. L. 94-380.

Before discussing the potential liability of volunteer health institutions it will be necessary to examine the potential liability of the State of Florida to the United States and determine the nature of the relationship between the Department of Health and Rehabilitative Services and the volunteer agencies.

The Department of Health and Rehabilitative Services is a state agency and therefore partakes of the state's sovereign immunity from liability for torts committed by its officers and employees in the scope of their employment and in the course of providing health services on a statewide basis to Florida citizens. Loucks v. Adair, 312 So.2d 531 (1

D.C.A. Fla., 1975), *cert. den.*, 327 So.2d 33 (Fla. 1976). Immunity of the Department of Health and Rehabilitative Services as a state agency would appear to exist regardless of any distinction between "proprietary" and "governmental" functions premised upon whether the patient or citizen pays for the services rendered. *See* Loucks v. Adair, *supra*, 312 So.2d at 533; Department of Natural Resources v. The Circuit Court of the Twelfth Judicial Circuit, 317 So.2d 772, 774 (2 D.C.A. Fla., 1975).

Pursuant to s. 768.28, F. S., however, the state has waived its immunity with respect to tort liability for state agencies including executive departments such as the Department of Health and Rehabilitative Services. The waiver of immunity is limited to $50,000 on any claim or judgment by one person or $100,000 for all claims arising out of the same incident or occurrence. Section 768.28(5).

Thus it is clear that, at least to the limits specified in s. 768.28, F. S., the State of Florida is potentially liable to the United States pursuant to the provisions of Pub. L. 94-380 for the negligence of its officers, employees, and agents in the administration of swine flu vaccine. Since the State of Florida (and the Department of Health and Rehabilitative Services) can only act through its agents, and a principal is, generally speaking, liable for the torts of its agents (*see* Van Engers v. Hickory House, 104 So.2d 843, 844 [3 D.C.A. Fla., 1958]; Adelhem v. Dougherty, 176 So. 775 [Fla. 1937]), it becomes important to determine whether the volunteer private health institutions are agents of the state for administering flu vaccine.

An "agency" is "a contract either express or implied upon a consideration, or a gratuitous undertaking, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which that other assumes to do the business and render an account of it." King v. Young, 107 So.2d 751, 753 (2 D.C.A. Fla., 1958). A critical feature of an agency relationship is the right of the principal to control the actions of the agent with regard to the details of the task to be accomplished. King v. Young, *supra*, 107 So.2d at 753; McCarty v. King County Medical Service Corp., 175 P.2d 653, 664 (Wash. 1946). An agency relationship is created by the consent of the parties and does not require consideration or compensation to the agent. Adelhem v. Dougherty, 176 So. 775, 777 (Fla. 1937); 3 Am. Jur.2d *Agency* s. 18, n.7 and cases cited therein.

From your letter and from conversations with your legal staff by telephone, it appears that the Department of Health and Rehabilitative Services (HRS) is unable to implement the vaccine program in larger population areas of the state without the assistance of volunteer private health institutions. The swine flu program has been initiated by the federal government, and the Department of Health, Education and Welfare (HEW) has promulgated guidelines for "program participants" to follow. HEW, however, has contact only with HRS and has no contact with the volunteer private agencies. You state that HRS alone has selected the private agencies, and HRS has the authority to terminate the relationship with private agencies. HRS has also promulgated guidelines to be followed by the volunteer agencies. Finally, you state that HRS intends to monitor and control the performance of the private agencies to insure that these institutions comply with HEW and HRS guidelines. Under these circumstances, it is my opinion that the volunteer private health institutions are agents of HRS for purposes of administering swine flu vaccine. (HRS may also be an agent of HEW in the administration of the swine flu program, but that agency relationship is not relevant to the question you pose.)

The status as "agents" of the state is important because, when sovereign immunity exists, the public officers and employees of the sovereign are also immune from liability for acts or omissions committed in the course of their official authority and in line with their official duty. Loucks v. Adair, *supra*, 312 So.2d at 535; Martin v. Broward General Medical Center, 332 So.2d 84, 85 (4 D.C.A. Fla., 1976). Public officers and employees are particular kinds of state agents, but it would appear that *all* agents of the state share the immunity of the sovereign for acts committed within the scope of their agency. Section 768.28(9), F. S., provides:

> (9) No officer, employee, *or agent* of the state or its subdivisions shall be held personally liable in tort for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, *or agent* acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *Subject to the monetary limitations set forth in subsection (5)*, the state shall pay any monetary judgment which is rendered in a civil action personally against an officer, employee, *or agent* of the state which

arises as a result of any act, event, or omission of action within the scope of his employment or function.

Thus, at least to the limits provided in s. 768.28(5), F. S. ($50,000 per claim, $100,000 per incident), it would appear that volunteer private health institutions, acting as agents of the State of Florida in the administration of swine flu vaccine, would be protected from claims by the United States by the provisions of s. 768.28(9), F. S. The state would pay any such claim arising out of an act or omission to act within the scope of the agency relationship *unless* the volunteer institution "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for human rights, safety, or property." Section 768.28(9).

Whether the State of Florida, or any volunteer agency acting on its behalf, may be liable to the United States for damages in excess of the limited waiver of sovereign immunity contained in s. 768.28, F. S., is a question of much greater complexity and beyond the proper scope of this opinion. The fundamental issue at stake is whether Congress may, consistent with the Tenth and Eleventh Amendment to the United States Constitution, effectively waive a state's sovereign immunity for tort claims for damages to citizens of this state or other states. If the claim of the United States against a state under the swine flu program may be characterized as an attempt to obtain contribution from a joint tortfeasor, Hill v. United States, 453 F.2d 839 (6th Cir. 1972), barring such a suit because of state sovereign immunity may be relevant. Moreover, liability for tortious acts strikes directly at the sovereign treasury of a state and raises serious questions of the power of Congress to modify basic principles of state sovereignty. *Compare* National League of Cities v. Usery, 49 L.Ed.2d 245 (1976), *with* Employees v. Missouri Public Health Department, 36 L.Ed.2d 251 (1973).

I trust that you will appreciate and understand my inability to express an opinion as to this last issue and hope that my response has been helpful to you.

076-189—September 14, 1976

CONSTITUTIONAL AMENDMENT

DUTY OF SECRETARY OF STATE IN PREPARATION OF SYNOPSIS OF CONSTITUTIONAL AMENDMENT TO APPEAR ON BALLOT

To: Bruce A. Smathers, Secretary of State, Tallahassee

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTIONS:

1. Must the exact wording of the proposed constitutional amendment creating s. 8, Art. II appear on the ballot?
2. If the exact wording is not required, does the Secretary of State have the authority as Chief Elections Officer to prescribe the wording of the substance of the amendment as it is to appear on the ballot?
3. If the exact wording is not required, would the following wording reasonably and sufficiently give notice of the substance of the amendment?

CONSTITUTIONAL AMENDMENT

ARTICLE II, SECTION 8

Proposing an amendment to the State Constitution relating to ethics in government; providing that a public office is a public trust; requiring certain public officials and candidates to file full and public disclosure of financial interests and campaign finances; providing that public officers and employees who breach the public trust for private gain shall be liable to the state for benefits obtained; providing that public officers and

employees convicted of a felony involving breach of trust shall be subject to forfeiture of pension; prohibiting certain past and present public officers from representing clients for compensation before certain public agencies; providing for an independent commission to investigate and report on complaints; providing for a schedule of filing dates and information.

SUMMARY:

Only the substance of a proposed constitutional amendment, and not the entire text of the amendment, should be printed on the ballot. Unless and until otherwise judicially or legislatively clarified to the contrary, the Secretary of State has the authority and the duty to prescribe or approve the wording of the substance of a proposed constitutional amendment which is to be placed on the ballot when the amendment is proposed by initiative.

AS TO QUESTION 1:

Section 5(a), Art. XI, State Const., provides, with an exception not relevant here, that a proposed amendment of such constitution

> . . . shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, *initiative petition* or report of revision commission or constitutional convention proposing it is filed with the secretary of state . . . . (Emphasis supplied.)

Although the Constitution does not address itself to the manner or form in which the proposed amendment is to be placed on the ballot, s. 101.161, F. S., states:

> *Whenever a constitutional amendment or other public measure shall be submitted statewide to the vote of the people, the substance of such amendment or other public measure shall be printed on the ballot one time,* after the list of candidates, followed by the word "for," and also by the word "against," with a sufficient blank space thereafter for the placing of the symbol "X" to indicate the voter's choice. When voting machines are used the amendment or measure shall be in the form relating to the use of voting machines. The exact wording of the substance of the amendment or other public measure to appear on the ballot shall be embodied in the enabling legislation, and shall be furnished to the several counties by the Department of State, and it shall be authorized to give each of the proposed constitutional amendments or other public measures a designating number for convenient reference. This number designation may also appear on the ballot. (Emphasis supplied.)

It is clear from the language italicized above that only the *substance*, and not the entire text, of a proposed constitutional amendment should be placed on the general election ballot. Accordingly, your first question is answered in the negative.

AS TO QUESTION 2:

Neither our State Constitution nor the Florida Statutes contain any specific provision with respect to the preparation of the statement of the substance of a proposed constitutional amendment other than in those instances in which the amendment is proposed by legislation. However, in view of the duty of the Department of State under s. 101.161, F. S., to furnish the wording of the substance of the proposed amendment to the several counties as well as the duty of the Department of State under s. 101.151(7), F. S., to approve the form of ballots, I am of the view, unless and until otherwise judicially or legislatively clarified to the contrary, that the Secretary of State has the authority and the duty to prescribe or approve the wording of the substance of a proposed amendment which is to be placed on the ballot when the amendment is proposed by initiative. Accordingly, your second question is answered in the affirmative.

AS TO QUESTION 3:

I have carefully compared the wording of your statement of the substance of the proposed amendment with the full text of the proposed amendment, and I am of the opinion that your statement of the substance of such amendment is an accurate and complete description of the contents of the proposed amendment.

076-190—September 14, 1976

PRISONERS

WHEN GAIN-TIME FOR GOOD CONDUCT EARNED

To: Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, Tallahassee

Prepared by: William C. Sherrill, Jr., Assistant Attorney General

QUESTION:

Do the provisions of s. 1, Ch. 76-273, Laws of Florida, amending s. 944.27, F. S., apply to all inmates of the Department of Offender Rehabilitation or to only those inmates who have been committed to the custody of the department for offenses occurring after the effective date of the law?

SUMMARY:

Section 1, Ch. 76-273, Laws of Florida, applies to all inmates of the Department of Offender Rehabilitation and not solely to those inmates committed to the custody of the department for offenses occurring after the effective date of the law.

As amended by Ch. 76-273, Laws of Florida, subsection (1) of s. 944.27, F. S., now reads:

> **944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—**
> (1) The Department of Offender Rehabilitation shall grant the following deductions for gain-time *on a monthly basis, as earned,* from the sentences of *every* prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:
> (a) Five days per month off the first and second years of the sentence;
> (b) Ten days per month off the third and fourth years of the sentence; and
> (c) Fifteen days per month off the fifth and all succeeding years of the sentence;
>
> *and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time* as, when added to the deduction allowable, would equal a month. (Emphasis supplied.)

You state that the department has followed the practice of calculating gain-time at the time the inmate begins serving his sentence rather than on a monthly basis. Your practice, however, appears to have been only one of administrative convenience. Prior to the 1976 amendments, s. 944.27, F. S., provided that a prisoner earned gain-time only after exhibiting good conduct in the service of his sentence. Subsection (1) of s. 944.27, F. S. 1975, provided:

> **944.27 Gain-time *for good conduct*; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—**

> (1) The [Department of Offender Rehabilitation] *shall grant* the following deductions for gain-time from the sentences of every prisoner *who has committed no infraction* of the rules or regulations of the [department], or of the laws of the state, *and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him*, to wit:
> (a) Five days per month off the first and second years of his sentence;
> (b) Ten days per month off the third and fourth years of his sentence; and
> (c) Fifteen days per month off the fifth and all succeeding years of his sentence; *and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month.* (Emphasis supplied.)

Thus, prior to the 1976 amendments, it is apparent that an inmate was entitled to credit only upon completion of his sentence for each month in which his credit was to be calculated. The regulations of the department were consistent with the statute. Rule 10B-20.02 of the Florida Administrative Code provided:

> Gain Time. The Director shall keep a record of the conduct of each inmate. Deduction *shall* be made from the term of an inmate's sentence *when no charge of misconduct has been sustained against the inmate* and when his institutional record has been satisfactory. Such deductions shall be deemed *earned* and the inmate shall be *entitled to credit as soon as the inmate has served such time as when added to the deductible allowance provided by statute will equal a month.* An inmate serving two or more cumulative sentences shall be allowed deductions as though the sentence were all one sentence, and such deductions shall be subject to forfeiture as though the sentences were all one sentence. Deductions from the term of an inmate's sentence shall be made pursuant to the following time schedule . . . . (Emphasis supplied.)

The amendments of Ch. 76-273, Laws of Florida, merely made explicit that which was already the requirement of the law. Though under the prior law your department may have calculated gain-time at the beginning of an inmate's sentence as an administrative convenience, gain-time was not *earned* by an inmate except upon a monthly basis after satisfactory service of his or her sentence. Since s. 1 of Ch. 76-273 does not change prior law except to make explicit that which already was the requirement of the law, it is my opinion that the changes of s. 1, Ch. 76-273 apply to all inmates of the Department of Offender Rehabilitation.

I might note as a matter of information that s. 944.27(1), F. S., is also *repealed* by s. 19 of Ch. 76-273, Laws of Florida, but the repeal does not take effect until January 1, 1979. *See* s. 20, Ch. 76-273.

076-191—September 22, 1976

PUBLIC FUNDS

PLACING OFFICER'S NAME ON OFFICIAL VEHICLE—AUTHORITY REQUIRED FOR SUCH EXPENDITURE

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

> **May an officer expend public funds for the purpose of having his or her name placed on official motor vehicles used in the conduct of official business?**

SUMMARY:

A public officer may not expend public funds for the purpose of defraying the cost of placing his or her name on an official motor vehicle used in the conduct of official business *unless* authorized by express or necessarily implied statutory authority.

In answering this or any other question involving the expenditure of public funds, it is necessary to determine whether the officer in question has been expressly authorized by statute to expend funds for the purpose in question or must be considered to have been given such authority by necessary implication in order to carry out some duty or function expressly imposed or authorized by statute.

As to express statutory authority, I have not found any provision in the Florida Statutes expressly authorizing or requiring any public officer to expend public funds to defray the cost of having his or her name placed on any official motor vehicle used in the conduct of official business. As to necessarily implied authority, it would appear that a case-by-case approach would have to be taken. That is, the statutes relating to a particular officer would have to be analyzed in order to determine whether there exists some express or specific authority or duty of that officer which cannot be properly or efficiently carried out without such implied authority to expend public funds to defray the cost of placing the officer's name on an official motor vehicle used in the conduct of official business. *Cf.* AGO 073-374, wherein it was stated that the power to borrow money was not necessary or indispensable to carry out the expressly granted power or function to purchase land since land might be purchased from current revenues of the affected governmental agency. While an express power duly conferred may include implied authority to use means necessary to make the express power effective, such implied authority may not warrant the exercise of a substantive power not conferred. Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). Moreover, no state or county funds may be disbursed or expended for any purpose unless properly budgeted or appropriated as prescribed by law and in strict accordance with the procedures prescribed by specific legislative authorities.

I would assume that the officers to whom you refer would all be in the category of administrative officers, both appointed and elected. It is clear that administrative officers are creatures of, and must always rely on, statutory authority. In Florida State University v. Jenkins, 323 So.2d 597, 598 (1 D.C.A. Fla., 1975), the court stated:

> The powers and authority of administrative boards, commissions and officers are limited to those granted, either expressly or by necessary implication, by the statutes of their creation.

Accord: Florida Industrial Com'n v. National Trucking Company, 107 So.2d 397, 401 (1 D.C.A. Fla., 1958). The court in State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla., 1974), made it clear that "[i]f there is a reasonable doubt as to the lawful existence of a particular power which is being exercised, the further exercise of the power should be arrested." The general subject of the dependence of administrative officers and boards on statutory authority is also discussed in the following cases: Williams v. Florida Real Estate Commission, 232 So.2d 239, 240 (4 D.C.A. Fla., 1970); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493, 495 (Fla. 1973); and Division of Family Services v. State, 319 So.2d 72, 75 (1 D.C.A. Fla., 1975). *Also see* AGO's 075-161, wherein the particular administrative officer to whom the above rules were applied was a sheriff, 071-28, and 075-299.

It is my opinion, therefore, that public funds may not be expended for the purpose of defraying the cost of placing the name of a public officer on an official motor vehicle which is used in the conduct of official business unless there is express statutory authority therefor (and I know of no such authority) or there exists authority necessarily implied from an express grant of authority in order to carry out some duty or function expressly imposed or provided by statute. An implied power cannot exist in the absence of some express grant of authority or the express imposition of a duty. As stated in AGO 071-28, to perform any function for the state (or a county) or to expend any money belonging to the state (or a county), the officer seeking to perform such function or to incur such obligation against public funds must find and point to a constitutional or statutory provision so authorizing him to do. And as was stated in AGO 075-299 (quoting in part from AGO 068-12),

[i]f the authorization must be necessarily implied, the person issuing the voucher for payment "is obligated to cast such vouchers in such language as will indicate to the postauditor or the public the legality of such payments." . . . Thus, if the authority is implied rather than express, the official must not only point to the statute expressly authorizing or requiring the performance of a particular duty or function but also point out why the expenditure in question is necessary in order to carry out the express duty or function.

076-192—September 22, 1976

MUNICIPALITIES

STATUTE OF LIMITATIONS INAPPLICABLE TO PROSECUTION FOR VIOLATION OF MUNICIPAL ORDINANCE

To: Robert B. Reed, City Attorney, Boynton Beach

Prepared by: Gerald L. Knight, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTION:

Is s. 775.15(2)(d), F. S., applicable to violations of municipal ordinances and, if not, what is the statute of limitations for prosecutions of violations of municipal ordinances when no limitation period is provided by law, municipal charter, or ordinance?

SUMMARY:

Section 775.15(2)(d), F. S., which establishes a time limitation on prosecutions of misdemeanors of the second degree and noncriminal violations, is not applicable to prosecutions for violations of municipal penal ordinances, since convictions for violations of such ordinances are expressly excluded from the statutory definitions of the terms "misdemeanor" and "noncriminal violation" contained in s. 775.08(2) and (3), F. S. In the absence of any statutory, charter, or ordinance time limitation on the prosecutions of violators of municipal penal ordinances, no lapse of time after the commission of an act declared by a municipal ordinance to be unlawful will bar a prosecution for the violation of that ordinance.

Your letter concerns the prosecution by the City of Boynton Beach of a violator of that city's building code, the alleged violations having occurred on or about February 11, 1975. You inquire as to whether s. 775.15(2)(d), F. S., operates to bar such prosecution.

Section 775.15(2)(d), F. S., provides as follows:

A prosecution for a misdemeanor of the second degree or a [noncriminal] violation must be commenced within 1 year after it is committed.

However, s. 775.08(2) and (3), F. S., provides in pertinent part, respectively, that when used in the laws of the state, the terms "misdemeanor" and "noncriminal violation" shall not mean a conviction for violation of any municipal ordinance. Accordingly, it would appear that the statute of limitations provided by s. 775.15(2)(d), F. S., for prosecutions of misdemeanors of the second degree and noncriminal violations is not applicable to the prosecution of a violator of a building code ordinance of the City of Boynton Beach. *See, generally,* Marysville v. Cities Service Oil Co., 3 P.2d 1060 (Kan. 1931), stating that a statutory limitation on actions for violations of *statutes* is not applicable to violations of ordinances. Moreover, my research does not disclose any other statutory provision which creates a time of limitation on prosecutions of violators of municipal penal ordinances, and no pertinent provision in either the Boynton Beach charter or code of ordinances has

been brought to my attention. In this latter regard, it is generally held that, if no applicable statutory limitation exists, a municipality may adopt a municipal ordinance fixing a time limitation on prosecutions for violations of its ordinances. *See* 62 C.J.S. *Municipal Corporations* ss. 324, 375; Starling v. Dublin, 86 S.E. 742 (Ga. App. 1915); and Birmingham v. Brown, 70 So. 718 (Ala. 1915).

In the absence of any time limitation provided by statute, municipal charter, or ordinance on the prosecutions of violators of municipal penal ordinances, the common-law rule is that no lapse of time after the commission of the unlawful act will serve to bar prosecution by the municipality for such violation. *See* 62 C.J.S. *Municipal Corporations* s. 324; Battle v. Marietta, 44 S.E. 994 (Ga. Sup. 1903); *cf.* State v. McCloud, 67 So.2d 242 (Fla. 1953), and State v. Hickman, 189 So.2d 254 (2 D.C.A. Fla., 1966), stating that there is no limitation of time at common law within which a criminal prosecution is permitted. It is my opinion, therefore, that, until an applicable time of limitation is established by statute, charter provision, or ordinance, no lapse of time after the commission of an act declared by an ordinance of the City of Boynton Beach to be unlawful will bar a prosecution for the violation of that ordinance.

076-193—September 22, 1976

SUNSHINE LAW

APPLICABILITY TO CENTRAL FLORIDA COMMISSION ON THE STATUS OF WOMEN

To: Gerald S. Livingston, Attorney for Central Florida Commission on the Status of Women, Winter Park

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTIONS:

1. Is the Central Florida Commission on the Status of Women subject to the Government in the Sunshine Law, s. 286.011, F. S.?
2. If the commission must comply with the Government in the Sunshine Law, is that law also applicable to committee and subcommittee meetings of said body?

SUMMARY:

The Sunshine Law is applicable to all meetings, including committee and subcommittee meetings, of the Central Florida Commission on the Status of Women, an organization created by an interlocal agreement executed by Orange, Seminole, Brevard, and Osceola Counties with its members appointed by the several boards of county commissioners signatory to the interlocal agreement.

AS TO QUESTION 1:

Your question is answered in the affirmative.

According to your letter, Orange, Seminole, Brevard, and Osceola Counties have executed an interlocal agreement—*see* s. 163.01, F. S.—which creates a regional organization called the Central Florida Commission on the Status of Women. Members of the commission are appointed by the boards of county commissioners of the respective counties. The commission is empowered to serve in an advisory and liaison capacity to the several boards of county commissioners and the county administration of the several counties, as well as other public or private agencies, groups, and persons, with respect to all matters pertaining to the status or needs of women in the central Florida area. The express purpose of the commission is to serve as a medium for responsible persons to understand and deal with problems affecting the status of women and to make findings and recommendations to the several boards of county commissioners regarding such

matters. For the purposes of this opinion, I am assuming the validity of the interlocal agreement which creates the Central Florida Commission on the Status of Women.

Florida's Government in the Sunshine Law (s. 286.011(1), F. S.) states in pertinent part:

> All meetings of any board or commission of . . . any agency or authority of any county . . . 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, regulation, or formal action shall be considered binding except as taken or made at such meeting.

In Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), the Florida Supreme Court held that the Sunshine Law was applicable to an ad hoc advisory committee whose powers were limited to making recommendations to the governing body of the municipality which established it and which possessed no authority to bind the governing authority in any way whatsoever. The court concluded that s. 286.011, F. S., should be "construed to frustrate all evasive devices." This can be accomplished, according to the court, only

> . . . by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable formal action will be taken. [Town of Palm Beach v. Gradison, *supra*, at 477.]

The Commission on the Status of Women serves in an advisory and liaison capacity and makes recommendations to the several county commissions that created it and appointed the members thereof and to other public agencies. It seems clear that under the authority of Town of Palm Beach, *supra*, the Regional Commission on the Status of Women is subject to the provisions of the Sunshine Law which require that its meetings be open to the public, that reasonable advance notice thereof be given, and that its minutes be recorded and made available for public inspection.

AS TO QUESTION 2:

Your second question is also answered in the affirmative.

Since the adoption of the present Sunshine Law, the courts have stated, almost without exception, that all phases of the decision-making process must be conducted in the sunshine. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971); Board of Public Instruction of Broward County v. Doran, 224 So.2d 694 (Fla. 1969); Times Publishing Co. v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969). In addition, as quoted hereinabove from Town of Palm Beach, *supra*, the collective inquiry and discussion stages have been brought within the terms of the statute. Accordingly, the law is applicable to any gathering of a public body, or any two or more members thereof, where the members deal with, or which relates to, some matter, inquiry, or discussion on which foreseeable action will be taken by said body. Board of Public Instruction of Broward County v. Doran, *supra*, at 968; City of Miami Beach v. Berns, *supra*, at 40. *See* AGO's 074-62 and 074-94.

Since advisory bodies appointed and established by governmental agencies are within the Sunshine Law—*see* Town of Palm Beach, *supra*—it is clear that s. 286.011, F. S., embraces all of the deliberative processes of the Central Florida Commission on the Status of Women. This would include committee meetings, subcommittee meetings, or any meeting of two or more members of the commission held for the purpose of discussion, research, fact finding, or inquiry on any matter which could foreseeably result in recommendations to the several boards of county commissioners or other public agencies.

076-194—September 22, 1976

SUNSHINE AND PUBLIC RECORDS LAWS

NOT APPLICABLE TO ORLANDO-ORANGE COUNTY INDUSTRIAL BOARD, INC.

To: Steven R. Bechtel, Orange County Attorney, Orlando

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTIONS:

1. Is the board of directors of the Orlando-Orange County Industrial Board, Inc., subject to the Government in the Sunshine Law?
2. Is the Orlando-Orange County Industrial Board, Inc., required to make its records available for public inspection?

SUMMARY:

The Orlando-Orange County Industrial Board, Inc., a nonprofit, nongovernmental organization, is not subject to the Government in the Sunshine Law even if it receives contributions from governmental agencies because it is not a board or commission of any agency or authority of any local government, nor is it an agency of any local government or connected therewith, nor does it serve in an advisory capacity to any such governmental body or agency. The ex officio membership of a single county commissioner and a city councilman on the Board of Directors of the Orlando-Orange County Industrial Board and their participation in the nongovernmental functions of the board do not require that the board of directors' meetings of such corporation be open to the public or conducted in accordance with the requirements of s. 286.011, F. S.

The Orlando-Orange County Industrial Board, Inc., a nongovernmental agency operating independently of, and not connected with, any local governmental body or agency and not acting on behalf of any local governmental agency is not an agency within the meaning of s. 119.011(2), F. S., and, therefore, its records are not public records required to be open for public inspection under s. 119.07, F. S. Contributions to the board toward its operating expenses by governmental agencies do not constitute the expenditure of public funds in payment of dues or membership contributions so as to subject its business and financial records to the provisions of the Public Records Law.

AS TO QUESTION 1:

Your first question is answered in the negative.

According to your letter, the Orlando-Orange County Industrial Board, Inc., is a nonprofit corporation chartered by the State of Florida in accordance with the provisions of Ch. 617, F. S. The purpose of the corporation is to further and promote the general business and industrial interest of Orange County.

The business of the corporation is conducted by a board of directors composed of seven citizens of Orange County. The members of the board are appointed in the following manner: The Orlando City Council appoints one member; the Orange County Board of County Commissioners appoints three members; and the Central Florida Development Committee, another nonprofit corporation, appoints three members. None of the members are elected public officials. However, the Orlando City Council and the Orange County Board of County Commissioners each appoints one of their members to be ex officio members of the board of directors, and these members are active participants in board functions. The operating budget of the Orlando-Orange County Industrial Board, Inc., is funded by contributions from the Orlando City Council and Orange County Board of County Commissioners. Additional background information supplied to this office

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indicates that the board does not serve in an advisory capacity to either the city council or the county commission, nor does it make recommendations to either body. In essence, therefore, the board functions independently of any governmental agency, although it receives contributions from governmental agencies and its ex officio members are appointed by the city council and county commission from their respective memberships. For the purposes of this opinion, I assume the validity of the contributions made to the corporation out of public moneys.

Florida's Government in the Sunshine Law (s. 286.011, F. S.) provides, in pertinent part, that:

> (1) All meetings of any board or commission . . . of any agency or authority of any county, municipal corporation or any political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times . . . .

The test as to whether or not a particular board or commission falls within the parameters of s. 286.011, F. S., has been judicially determined to be whether or not said board or commission is subject to the dominion and control of the Legislature. Times Publishing Company v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). The Orlando-Orange County Industrial Board, Inc., is not a "board or commission . . . of any agency or authority of" the city and county involved, nor is it a state or local governmental agency, nor is it connected with city or county government, nor does it serve in an advisory capacity to either the city council or county commission. *Cf.* Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), wherein the Florida Supreme Court held that a citizens' planning committee appointed and established by a municipal governing body to act in an advisory capacity to the town council was required to meet in the sunshine; and AGO 076-193 concluding that the meetings, including committee and subcommittee meetings, of a Regional Commission on the Status of Women established as an advisory body by several boards of county commissioners was subject to the Sunshine Law. Moreover, in AGO 074-22 it was stated that the fact that a private nonprofit organization which was not a state or local governmental agency or subject to the control of the Legislature received public funds did not subject such organization to the Sunshine Law.

A county commissioner's and a city councilman's ex officio membership on, and participation in the nongovernmental activities of, the board do not in and of themselves require that board meetings of the nonprofit corporation be conducted in accordance with s. 286.011, F. S. The Sunshine Law applies to meetings of two or more members of a *public* board or commission or ad hoc boards or committees established by governmental agencies where those members deal with some matter on which foreseeable official action will be taken. City of Miami Beach v. Berns, *supra*; Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969); *also see* AGO 074-22.

AS TO QUESTION 2:

Your second question is answered in the negative.

Florida's Public Records Law, Ch. 119, F. S., requires all public records made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency to be open for public inspection by any person. Sections 119.011(1) and 119.07(1), F. S.

The applicability of Ch. 119, F. S., to a particular organization depends, therefore, on whether or not said organization is an agency as defined in s. 119.011(2). State *ex rel.* Tindell v. Sharp, 300 So.2d 750 (1 D.C.A. Fla., 1974). "Agency" is defined 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 and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. [Section 119.011(2), F. S.]

Since, according to the information received by this office, the Orlando-Orange County Industrial Board, Inc., is a nongovernmental agency and operates independently of, and is unconnected with, the county commission and the city council and is not acting on behalf of either public body in any capacity, it does not appear to be an "agency" as the

term is defined in s. 119.011(2), F. S. Hence, its records are not public records and cannot be required to be made available for public inspection. *See* State *ex rel.* Tindell v. Sharp, *supra*.

In determining that the Orlando-Orange County Industrial Board, Inc., is not subject to the provisions of the Public Records Law, I am not unaware of s. 119.012, F. S., which provides that dues or membership contributions may not be paid to nonpublic associations or organizations from public funds unless all of the financial, business, and membership records of such association or organization pertaining to the public agency paying such dues on contributions are open to public inspection under s. 119.07, F. S. *Cf.* AGO 074-351. Section 119.012, however, is not applicable to the instant situation because, although the board receives contributions toward its operating expenses from governmental agencies, no public funds are expended by such agencies in payment of dues or membership contributions.

076-195—September 23, 1976

SECURITY OF COMMUNICATIONS

POLICE DEPARTMENT REGULATION ALLOWING MONITORING OF TELEPHONE CALLS—WHEN PERMISSIBLE—ADMISSIBILITY OF EVIDENCE

To: James W. York, Chief of Police, Orlando

Prepared by: Staff

QUESTIONS:

1. Is the regulation stated in the statement of facts sufficient to remove a person's expectation that his telephone conversation is not subject to interception?
2. Are the department-owned telephones used pursuant to the regulation subject to Ch. 934, F. S.?
3. Would a regulation which specifically states that a member or employee using a department telephone consents to the monitoring and/or taping of his conversation suffice as consent under s. 934.01(4), F. S.?
4. Would conversations obtained by monitoring department telephones be admissible in court for the prosecution of crimes not set out in s. 934.07, F. S.?
5. Would the aforementioned conversations be admissible in departmental internal discipline proceedings?

SUMMARY:

While the regulation promulgated by the department removes reasonable expectations of privacy regarding monitoring of calls on department telephone lines as to employees or other persons with knowledge of the regulation, it does not remove the privacy expectations of persons calling into the department on telephone lines not used as "hot lines," publicized numbers to contact police regarding crimes, etc., since those persons have no knowledge of the regulation. Conversations obtained by lawfully monitoring department telephones would be admissible as evidence in court for the prosecution of crimes not set forth in s. 934.07, F. S. If a conversation or communication is lawfully obtained, it should be admissible in departmental internal discipline proceedings.

STATEMENT OF FACTS:

As stated in your letter, the regulation is as follows:

Department Telephones

Members and employees are hereby placed on notice that all department telephones are subject to being equipped with recording and/or listening devices upon the authorization of the chief. Department telephones are primarily intended for use in conducting department business and any member or employee using such telephones does so with the knowledge and understanding of the existence of this department policy.

Your letter advises that all members and employees are issued a copy of this regulation and required to sign a statement that they have read and understand it.

AS TO QUESTIONS 1, 2, AND 3:

Question 1 is answered in the negative. Questions 2 and 3 are answered in the affirmative subject to the qualifications expressed herein.

Section 934.02(2), F. S., provides:

> "Oral communication" means any oral communication uttered by a person *exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting.* (Emphasis supplied.)

The exceptions found in Ch. 934, F. S., which authorize the interception of wire or oral communications of persons are statutory exceptions to the constitutional right to privacy found in the federal *and state* constitutions. As such, they must be strictly construed and narrowly limited in application to the uses delineated by the Florida Legislature. *In re* Grand Jury Investigation, 287 So.2d 43 (Fla. 1973).

The threshold question which must be decided is whether, in the context of your inquiry, an individual who utilizes telephones within a public building has a reasonable expectation of privacy as to the use of such telephones to transmit oral communications. If the circumstances justify such expectations, then the communication may be intercepted only as provided by Ch. 934, F. S.

Since the regulation of the police department of the City of Orlando has been promulgated and is presently in effect, no opinion is expressed as to the power or authority of the department to adopt reasonable regulations as to the use of telephones by employees and procedures whereby such regulations are enforced. This inquiry acknowledges that the regulation is presently in force and effect and, accordingly, analyzes this regulation solely in light of the proscriptions found in Ch. 934, F. S.

It cannot be seriously disputed that any employee or other person who has knowledge of the rule could have a reasonable expectation of privacy as to his or her conversations, since notice has been given that all calls are subject to monitoring pursuant to the regulation. The regulation could be placed in a conspicuous place on or near each telephone so that any person who utilized the telephones of the department would have knowledge of the potential for monitoring which exists as to those telephones. However, a different problem exists as to those individuals without knowledge of, or access to, the regulation who telephone *into* the department. The question then is: If an individual has no knowledge of the regulation permitting blanket monitoring, does he possess a reasonable expectation of privacy as to his conversations into the department? While no Florida case has decided this question, a number of general principles have been formulated which can provide some guidance.

Whether a person possesses a reasonable expectation of privacy will of necessity vary according to the particular situation. Since the Fourth Amendment protects people and not places, the fact that the conversation takes place over a publicly maintained telephone is not solely determinative of the issue. What may constitute a reasonable expectation in one context will not necessarily apply in another. For example, any expectation of privacy which existed as to conversations transmitted on a "hot line" in a police department would be substantially less than conversations occurring over another department telephone without a widely published number and found in an individual's office. As to a widely distributed police telephone number, most individuals of ordinary intelligence would presume that a recording was being made of each call coming into the department because of the type of calls being made to such number. Indeed, s. 934.03, F. S., permits "one-sided" consent when the purpose of the interception is to obtain evidence of a criminal act. On the other hand, it can be strongly argued that the majority

of individuals in our society would not expect that their telephone communications with a police officer or other public official received on that official's own department telephone would be monitored. In the final analysis, however, what is or is not reasonable as to calls placed to the department or any public agency from private citizens which are not placed to a direct, publicized number circulated for purposes of reporting crimes, requesting assistance, or the like is dependent upon the conditions present in each particular case. Accordingly, any *blanket* monitoring of telephones other than on a number normally utilized for reporting or receiving information concerning actual or potential criminal activity should not be attempted.

As an alternative, it is suggested that if the department wishes to monitor *all* calls coming in or going out from the department regardless of the subject matter involved, a system be utilized whereby, prior to the conversation, the party on the line who does not have knowledge of the monitoring be informed of this fact so that if the conversation begins, consent to monitoring, either express or implied, has been given by each party, thus complying with s. 934.03, F. S.

AS TO QUESTION 4:

This question is answered in the affirmative. The legislative intent to limit court-authorized wiretaps to specified major crimes is set forth quite clearly in s. 934.07, F. S. However, interceptions made with the prior consent of one of the parties to the conversation is permitted if the intercept is done by or under the control of a law enforcement officer and for the purpose of obtaining evidence of a criminal act. *See* s. 934.03(2)(c), F. S. Although the Legislature saw fit to put limits on court-authorized intercepts, I find nothing in Ch. 934, F. S., that would evidence an intent to limit the acquisition of evidence by intercept with the consent of one of the parties to the specified crimes set forth in s. 934.07. *See* Griffith v. State, 111 So.2d 282 (1 D.C.A. Fla., 1959); Barber v. State, 172 So.2d 857 (1 D.C.A. Fla., 1965); Rathbun v. United States, 355 U.S. 107 (1957); and United States v. White, 401 U.S. 745 (1971). In the case of Tollett v. State, 272 So.2d 490 (Fla. 1973), the court, in speaking to this issue, remarked as follows:

> We take note of Chapter 934, F. S., enacted as Chapter 69-17 at the 1969 legislative session and particularly Section 934.01(4) thereof, which reads in part:
> "(4) To *safeguard the privacy* of innocent persons, the interception of wire or oral communications *when none of the parties to the communication has consented to the interception* should be allowed only when authorized by a court of competent jurisdiction. . . ." (Emphasis by the court.)
>
> It is our view that this language should not be interpreted to obviate the necessity of a police officer securing a warrant unless one of the parties has given consent which must be shown through proper testimony—not hearsay. "Consents" from police informers with no substantial or requisite interest in the residence or papers or personal effects of a suspect are not legally sufficient to relieve police officers of the necessity of securing search warrants to search the dwelling, person or papers and effects of the suspect; neither should their "consents" except under the safeguards of authentication as hereinafter noted be sufficient to obviate the necessity of securing a warrant for intercepting wire or oral communication. [*Id.* at 494.]

To reiterate, I know of no rule of law or procedure that would exclude from evidence conversations obtained by monitoring department-owned telephones. Court-ordered interceptions of wire or oral communications are restricted to those crimes set forth in s. 934.07, F. S. But there is nothing in the provisions of Ch. 934, F. S., which even purports to exclude from evidence conversations or communications relating to any crime acquired by lawful interception other than pursuant to the provisions of Ch. 934.

AS TO QUESTION 5:

It is difficult to give a definitive answer to this question because I am not familiar with the regulations, if any, governing departmental internal discipline proceedings. However, it seems to me that if the conversation is lawfully acquired and admissible as evidence

in a court of law, then it should be admissible in any departmental internal discipline proceeding.

076-196—September 23, 1976

SPECIAL DISTRICTS

WHEN UNIFORM FISCAL YEAR MUST BE ADOPTED

To: Norman D. Tripp, Attorney for Broward County Fire Control Commission, Fort Lauderdale

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Is the Broward County Fire Control Commission, as the governing body of the Broward County Fire Control District created by Ch. 69-911, Laws of Florida, as subsequently amended, required to adopt the fiscal year prescribed by s. 218.33(1), F. S., of the Uniform Local Government Financial Management and Reporting Act?

SUMMARY:

The Broward County Fire Control Commission, as the governing body of the Broward County Fire Control District created by Ch. 69-911, Laws of Florida, as subsequently amended, is required to adopt for that district the fiscal year beginning October 1 of each year and ending September 30 pursuant to s. 218.33(1), F. S., of the Uniform Local Government Financial Management and Reporting Act, part III, Ch. 218, F. S.

Your question is answered in the affirmative.

Section 218.33(1), F. S., of the Uniform Local Government Financial Management and Reporting Act, part III, Ch. 218, F. S., provides as follows: "Every unit of local government shall begin its fiscal year on October 1 of each year and end it on September 30." *See also* s. 218.33(3). "Unit of local government" is defined in s. 218.31(1) as "a county, municipality, or special district." "Special district" is defined as "a local unit of special government . . . created pursuant to general or special law for the purpose of performing prescribed specialized functions, including urban service functions, within limited boundaries." Section 218.31(5). "Special district" is subdivided into "dependent special district," which is "a special district whose governing head is the local governing authority, ex officio, or otherwise, or whose budget is established by the local government authority," s. 218.31(6); and "independent special district," which is "a special district whose governing head is an independent body, either appointed or elected, and whose budget is established independently of the local governing authority, even though there may be appropriation of funds generally available to a local governing authority involved." Section 218.31(7). "Local governing authority" is defined as "the governing body of a unit of local general purpose government" (here, the Board of County Commissioners of Broward County), s. 218.31(3).

Applying the foregoing statutory definitions to the instant inquiry, the Broward County Fire Control Commission (hereinafter referred to as the "commission") was created as the governing body of the Broward County Fire Control District by special law, Ch. 69-911, Laws of Florida, as amended by Chs. 71-560 and 73-423, Laws of Florida, for the purpose of performing a prescribed, specialized function, *i.e.*, providing and coordinating fire protection in certain unincorporated areas and subdistricts of Broward County and supervising the allotment and disbursement of the public funds provided for in the statute to carry out the purposes thereof within the designated subdistricts and to defray its expenses of operation. Thus, I am of the opinion that the Broward County Fire Control District is a special district within the purview and for the purposes of the Uniform Local Government Financial Management and Reporting Act, part III, Ch. 218, F. S.

Moreover, the commission is an independent body which operates its financial affairs independently of the "local governing authority," as defined in s. 218.31(3), F. S., the Board of County Commissioners of Broward County. *See* s. 9, Ch. 69-911, Laws of Florida, providing that the commission shall have supervision over the allotment and disbursement of public funds provided under the act and is empowered to determine special assessments on property in the district to provide funds to carry out the purpose of the act; s. 14, *id.*, providing that the special assessment, upon approval of the electorate, shall be levied by the Broward County Tax Assessor by resolution of the commission and that the proceeds of the special assessments shall be paid monthly by the Broward County Tax Collector to the commission; and s. 17, *id.*, providing that the commission shall operate within an annual budget not to exceed 15 percent of the gross annual tax receipts of all subdistricts and that the commission shall deposit the proceeds of the special assessments into the accounts of the subdistricts; *see also* ss. 18 and 22, *id.* Thus, I am of the further opinion that the Broward County Fire Control District is an independent special district within the purview and for the purposes of the Uniform Local Government Financial Management and Reporting Act, part III, Ch. 218, F. S. *Cf.* AGO's 074-367, 074-234, 074-169, and 074-17; *also cf.* AGO 073-343.

As the governing body of an independent special district within the purview and for the purposes of part III, Ch. 218, F. S., the Uniform Local Government Financial Management and Reporting Act, the commission must comply with the requirements of part III, Ch. 218, which are applicable to that type of "unit of local government," as defined in that act. Thus, the commission is required to adopt for the Broward County Fire Control District the fiscal year prescribed in s. 218.33(1). *See also* ss. 218.32, 218.33(2) and (4), and 218.34(1), (3), (4), and (5).

076-197—September 23, 1976

MUNICIPALITIES

CHARTER MAY PRESCRIBE LONGER NOTICE OF PROPOSED ORDINANCE THAN PROVIDED BY STATE LAW

To: Gerald R. Colen, St. Petersburg Beach City Attorney, St. Petersburg

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Does that part of Ch. 76-155, Laws of Florida, amending s. 166.041(3)(a), F. S., to require that a proposed ordinance "at least 7 days prior to adoption, be noticed once in a newspaper of general circulation in the municipality," affect in any way that part of the recently revised charter of the City of St. Petersburg Beach (effective July 30, 1976), which provides that a proposed ordinance "shall, at least 14 days prior to adoption, be noticed once in a newspaper of general circulation in that city"?

SUMMARY:

That part of Ch. 76-155, Laws of Florida, which amends s. 166.041(3)(a), F. S., to reduce the notice requirement for a proposed ordinance from "at least 14 days" to "at least 7 days prior to adoption," does not affect in any way the requirement contained in the recently revised charter of the City of St. Petersburg Beach (effective July 30, 1976) that a proposed ordinance be given the prescribed notice "at least 14 days prior to adoption."

Section 166.041(3)(a), F. S., formerly provided in part that a proposed municipal ordinance "shall, *at least 14* days prior to adoption, be noticed once in a newspaper of general circulation in the municipality." (Emphasis supplied.) However, Ch. 76-155, Laws of Florida, which took effect upon becoming a law June 16, 1976, amended s. 166.041(3)(a) so as to, *inter alia*, reduce the notice requirement for a proposed ordinance from "at least

14" to "at least 7 days prior to adoption." (Emphasis supplied.) You inquire as to how this amendment affects the requirement in the recently revised charter of the City of St. Petersburg Beach, which became effective July 30, 1976, that notice of a proposed ordinance be given "*at least 14* days prior to adoption." (Emphasis supplied.)

As stated in AGO 074-371, s. 166.041, F. S., enacted by Ch. 73-129, Laws of Florida, the Municipal Home Rule Powers Act, establishes a uniform procedure for the adoption of municipal ordinances and resolutions which is applicable to, and cannot be lessened or reduced by, any municipality in the state. However, it was also stated that s. 166.041(6) authorizes a municipality, by future ordinance or charter amendment, to specify additional requirements for the adoption or enactment of ordinances or resolutions or prescribe procedures in greater detail than contained in s. 166.041. Thus, it was concluded in AGO 074-371 that the city council of the City of Miramar was authorized by s. 166.041(6) to adopt by ordinance or charter amendment "additional, more stringent requirements than those established by s. 166.041." *Cf.* AGO 075-173.

Likewise, in the instant situation, I am of the opinion that when the revised charter of the City of St. Petersburg Beach became effective on July 30, 1976, that city was authorized by s. 166.041(6), F. S., to adopt a charter amendment establishing additional, more stringent requirements for the adoption of ordinances than those contained in s. 166.041(3)(a), F. S., as amended by Ch. 76-155, Laws of Florida. And, since the minimum notice requirement for proposed ordinances in the revised charter of the City of St. Petersburg Beach—14 days—is more stringent than the minimum notice requirement contained in s. 166.041(3)(a), as amended by Ch. 76-155—7 days—I am of the opinion that the charter requirement is valid and of continuing effect.

076-198—September 23, 1976

TAX COLLECTORS

BOND REQUIREMENTS—TERM OF BOND

To: R. William Rutter, Jr., Palm Beach County Attorney, West Palm Beach

Prepared by: Caroline C. Mueller, Assistant Attorney General

QUESTIONS:

1. Can the tax collector give one bond which will satisfy both ss. 137.02 and 193.116(2), F. S. (1976 Supp.), by increasing the amount of the Governor's bond to reflect the increased money on hand as a result of municipal collection and by adding the names of the municipalities which will also be protected by the bond?
2. If one bond will suffice, what procedure should the county tax collector follow to obtain approval of the various municipalities and to determine the exact amount of the bond?
3. If one bond will not suffice, then may the tax collector give one bond under s. 137.02, F. S. (1976 Supp.), and one bond to cover *all* the municipalities in the county under s. 193.116(2), F. S. (1976 Supp.)?
4. In any event, for what period of time should the bond be purchased?

SUMMARY:

Under s. 137.02, F. S., as amended, and s. 193.116(2), F. S., as amended, the county tax collector is now required to give one bond conditioned to account for *all* taxes collected. The tax collector must post bond under s. 137.02 specifically conditioned to account duly and faithfully for all taxes collected by the tax collector. The amount of such bond is to be fixed by the county commission, subject to the approval by the Department of Banking and Finance as to amount and surety. A separate bond for municipal taxes, subject to approval by an affected municipality, is no longer required. The bond that is given should be purchased for, and the

term of the bond should coincide with, the term or the unexpired term of office of the individual incumbent tax collector. In cases of ad interim appointments until the office is filled at the next general election, the term of the bond should coincide with such ad interim term of office.

Your questions are answered by the discussion below.

AS TO QUESTIONS 1, 2, AND 3:

Chapter 76-140, Laws of Florida, effective June 15, 1976, addresses the issues which you have presented.

Section 1 of Ch. 76-140, *supra*, adds a new provision to s. 137.02, F. S., requiring the tax collector to give bond in a sum to be fixed by the county commission, subject to the approval of the Department of Banking and Finance as to amount and surety. This new provision states: "The bond shall be specifically conditioned to account duly and faithfully for *all taxes* collected by the tax collector." (Emphasis supplied.) In fixing the bond, the county commission is required to take into consideration the amount of money likely to be in the custody of the tax collector at any one time. Section 137.02.

Section 2 of Ch. 76-140, *supra*, deletes the former provision in s. 193.116(2), F. S., dealing with the requirement that the county tax collector post a sufficient surety bond approved by the municipality, conditioned to account duly and faithfully for the municipal taxes. The title of Ch. 76-140, in pertinent part, reads: "removing the requirement for a separate bond for municipal taxes." When an amendatory act purports to set out the original section of a statute as amended, any matter which was in the original section, but is not in the amendatory section, is repealed by omission. *See* AGO 071-395; 82 C.J.S. *Statutes* s. 294, p. 504.

The tax collector need only give one bond conditioned to account for all taxes collected, and there is no requirement that approval be given by the municipalities. Your third question does not need to be addressed since it was contingent upon a negative answer to the first question.

AS TO QUESTION 4:

Your fourth question concerns the period of time for which the tax collector's bond should be purchased. Section 137.01, F. S., provides that:

> Each of the county officers of whom a bond is or shall be required by law, shall . . . give bond . . . conditioned for the faithful performance of the duties of his office.

The term of office of the county tax collector and the cycle thereof are established by the Florida Constitution and various statutes; vacancies in office are filled for unexpired terms by appointment or election as therein prescribed. *See* s. 1(f), Art. IV, and s. 5, Art. VI, State Const.; ss. 100.031, 100.041, and 114.04, F. S. I conclude, therefore, that the bond should be purchased for, and the term of the bond should coincide with, the term or unexpired term of office of the individual incumbent tax collector, *i.e.*, for the length of the term or unexpired term to which he has been duly elected or appointed. In cases of ad interim appointments until the office is filled at the next general election, the term of such bond should coincide with such ad interim term.

076-199—September 24, 1976

MUNICIPALITIES

VALIDITY OF ORDINANCE REQUIRING DEDICATION OF LAND FOR PUBLIC PARK PURPOSES PRIOR TO APPROVAL OF SUBDIVISION PLAT

To: Joseph Nazzaro, City Attorney, North Miami Beach

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May the City of North Miami Beach adopt an ordinance requiring land developers undertaking projects within that city to dedicate to the public for park purposes a portion of the land being developed?

SUMMARY:

As a Dade County municipality, the City of North Miami Beach is authorized by s. 166.021, F. S., of the Municipal Home Rule Powers Act to adopt an otherwise valid ordinance requiring land developers to dedicate to the public for park purposes a portion of the land they are developing within that city as a condition precedent to obtaining subdivision plat approval from the city, provided that such ordinance is not inconsistent with the charters of the City of North Miami Beach or Dade County and the subject upon which such ordinance operates has not been preempted to Dade County by the Dade County Charter. Any question as to the constitutional validity of such an ordinance, if adopted, may only be answered by the courts.

Section 177.081, F. S., requires a plat of a subdivision filed for record to contain a dedication by the developer and provides that, unless otherwise stated, "all streets, alleys, easements, rights-of-way, and public areas" shown on a plat of a subdivision which has been approved and recorded "shall be deemed to have been dedicated to the public for the uses and purposes thereon stated." *See also* s. 177.071, F. S., as amended by Ch. 76-110, Laws of Florida. However, neither this section nor any other provision of the Florida Statutes specifically requires the dedication of land for park purposes as a condition precedent to plat approval. Such statutes have been enacted in other jurisdictions. *See* Associated Home Builders, Inc. v. Walnut Creek, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971); Frank Ansuini, Inc. v. Cranston, 264 A.2d 910 (R.I. 1970); Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Coronado Development Co. v. McPherson, 189 Kan. 174, 368 P.2d 51 (1962); Pioneer Trust & Savings Bank v. Mt. Prospect, 22 Ill.2d 375, 176 N.E.2d 799 (1961), construing statutes of other states which require dedication of land for certain purposes; *see, generally*, 11 McQuillin *Municipal Corporations* s. 33.23a, p. 671; Annot., 43 A.L.R.2d 863 (1972); and Note, *Mandatory Dedication of Land by Land Developers*, 26 U.Fla.L.Rev. 41 (1973). Thus, the determination of your question involves an examination of general municipal powers.

In Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (4 D.C.A. Fla., 1972), it was held that the adoption of a city ordinance requiring that at least 5 percent of the gross area of lands to be subdivided within the city be dedicated for park and recreation purposes, or that, if the land to be subdivided was too small for a park or recreation area, a sum equal to 5 percent of the value of the gross area be paid, was beyond the scope of the city's authority under its charter. In so holding, the court quoted 23 Fla. Jur. *Municipal Corporations* s. 63, pp. 87-88, for the traditional rule that a municipal corporation possesses and can exercise only such powers as are granted in express words or necessarily implied in powers expressly conferred. The court also relied on the Florida Supreme Court's statement in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972), which dealt with the validity of a municipal rent control ordinance, that the paramount law of a municipality is its charter and that a municipality "in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment" of the purposes of local government. Applying these rules to the factual situation confronting it, the court in *Admiral Development Corp.* opined as follows:

> Unquestionably, the City has the authority to enact ordinances to enforce the provisions of its charter; but nowhere in the cited sections of the charter do we find any provision expressly or impliedly authorizing the establishment of prerequisites to or condition precedents for the subdividing of lands within the city. That is *not* to say that such authorization or power cannot be conferred upon the City by appropriate legislative action; *but merely that the present provisions contain no such authorization.* [267 So.2d at 862, 863.]

The court also found the particular ordinance under review to be overbroad.

Subsequent to the decision in *Admiral Development Corp.*, the Florida Legislature, in reaction to the Florida Supreme Court's decision in City of Miami Beach v. Fleetwood Hotel, Inc., *supra*, enacted Ch. 73-129, Laws of Florida, the Municipal Home Rule Powers Act (Ch. 166, F. S.), for the express purpose of securing to municipalities the broad exercise of home rule powers granted by s. 2(b), Art. VIII, State Const. According to s. 166.021(1) of that act,

> . . . municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

See also s. 166.021(2) defining "municipal purpose" to mean "any activity or power which may be exercised by the state or its political subdivisions"; and s. 166.021(3). In City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla. 1974), which again involved the validity of a municipal rent control ordinance, the Florida Supreme Court upheld the constitutionality of s. 166.021. In a special concurring opinion (which apparently expressed the view of the court with respect to the validity of s. 166.021), Justice Dekle, citing cases from other jurisdictions and treatise authority, first concluded that the adoption of a rent control ordinance in appropriate circumstances is a proper municipal purpose and then stated that the broad grant of municipal home rule powers contained in s. 166.021 includes "the power to enact rent control ordinances in appropriate circumstances, thereby providing the missing authority required by *Fleetwood Hotel*." 305 So.2d at 766-767. Justice Dekle went on to discuss specifically the effect of s. 166.021 on a municipality in Dade County, stating that a Dade County municipality may exercise the additional powers conferred on municipalities by that section unless such exercise is inconsistent with the municipality's charter or the Dade County Charter or the subject upon which such exercise is to operate has been preempted to Dade County pursuant to the Dade County Charter, *see* s. 166.021(3)(d). 305 So.2d at 767-768.

Likewise, with respect to the instant question, it would appear that the adoption of an otherwise valid municipal ordinance requiring land developers to dedicate a portion of their land for park purposes as a precondition to obtaining subdivision plat approval may be a proper municipal purpose. *See* Associated Home Builders, Inc. v. Walnut Creek, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971); Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4; People *ex rel.* Exchange National Bank of Chicago v. City of Lake Forest, 40 Ill.2d 281, 239 N.E.2d 819 (1968); and 11 McQuillin *Municipal Corporations* s. 33.23a, p. 671. Moreover, it would appear that s. 166.021, F. S., as upheld by the Florida Supreme Court in City of Miami Beach v. Forte Towers, Inc., *supra*, has provided municipalities the general authority to adopt otherwise valid mandatory dedication ordinances which was found lacking in *Admiral Development Corp. Cf.* AGO 073-267. Thus, I am of the opinion that, as a Dade County municipality, the City of North Miami Beach may adopt an otherwise valid mandatory dedication ordinance, provided that such ordinance is not inconsistent with the charter of the City of North Miami Beach or the Dade County Charter, and that the subject to which the ordinance pertains has not been preempted to Dade County by the Dade County Charter.

As to whether the particular mandatory dedication ordinance which the City of North Miami Beach may adopt *would be* otherwise valid, such question may be answered only within the context of appropriate judicial proceedings when necessary to determine a justiciable controversy. *See* Wiggins v. City of Jacksonville, 311 So.2d 406 (1 D.C.A. Fla., 1975); *cf.* Contractors and Builders Ass'n v. City of Dunedin, 329 So.2d 314 (Fla. 1976), concerning the validity of a municipal ordinance authorizing impact fees for the privilege of connecting to the municipal water and sewer system. Issues which may arise in such a controversy include whether the ordinance in question constitutes a taking of property without due process of law as prohibited by s. 9, Art. I, and s. 6, Art. X, State Constitution, and Amendments 5 and 14, United States Constitution; *see* Jordan v. Menomonee Falls, *supra*; and Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); whether such ordinance is overbroad or arbitrary; *see* Admiral Development Corp. v. City of Maitland, *supra*; and Frank Ansuini, Inc. v. Cranston, 264 A.2d 910 (R.I. 1970); and whether such ordinance is reasonably related to the purposes for which it was adopted; *see* Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla.Supp. 94 (1st Jud. Cir., 1966); and Aunt Hack Ridge Estates, Inc. v. Planning Com. of Danbury, 27 Conn.Sup. 74, 230 A.2d 45 (1967). As the court stated in *Admiral Development Corp.*, 267

So.2d at n. 3, a review of the decision in Associated Home Builders v. City of Walnut Creek, *supra*, may be useful in the consideration of any proposed mandatory dedication ordinance. I also draw your attention to the proposed enabling statute set out in the Note, *Mandatory Dedication of Land by Land Developers*, 26 U.Fla.L.Rev. 41, 57 (1973).

076-200—September 24, 1976

SPECIAL DISTRICTS

FIRE CONTROL DISTRICT MAY NOT BORROW MONEY TO BUILD FIREHOUSE WITHOUT SPECIFIC AUTHORITY

To: Richard John Brodeur, Attorney for Captiva Fire Control District, Fort Myers

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Does the Captiva Fire Control District have the authority to borrow money to construct a firehouse building?

SUMMARY:

There being no statutory provision which, either expressly or by necessary implication, authorizes the Captiva Fire Control District to borrow money to construct a firehouse building, the district is not authorized by law to do so.

Your question is answered in the negative.

It is a well-established principle that specially created districts possess only such powers as are expressly given or necessarily implied because essential to carry into effect those powers expressly granted. *See* Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 82 So. 346 (Fla. 1919); State v. Smith, 35 So.2d 650 (Fla. 1948); Edgerton v. International Company, 89 So.2d 488 (Fla. 1956). More specifically, special districts, as statutory entities, have no inherent power to borrow money but may exercise such power only when authorized to do so by law, and then only in the manner, within the limits, and for the purposes prescribed. *Accord:* Attorney General Opinions 073-374 and 073-261; *see* 15 McQuillin *Municipal Corporations* s. 39.07, p. 11, stating that "[t]he power to borrow money and create indebtedness is not an incident to local government, and such power cannot be exercised unless it is conferred either expressly or by necessary implication;" 64 C.J.S. *Municipal Corporations* s. 1869a, pp. 422-424; 20 C.J.S. *Counties* s. 222b, pp. 1078-1079; and Lang v. Sanitary District of Norfolk, 160 Neb. 754, 71 N.W.2d 608 (1955); *cf.* State v. Broward County, 126 So. 491, 492 (Fla. 1930), stating that:

> Counties and districts possess no inherent authority to issue bonds. Such authority, if it exists, must be wholly derived from the sovereign state. That authority may be granted upon such conditions as the state may impose, so long as constitutional inhibitions are observed.

Also cf. State *ex rel.* Harrington v. City of Pompano, 188 So. 610, 620 (Fla. 1938), stating that municipal bonds are void unless there is express or implied authority to issue them. The foregoing rules of law apply with equal force and effect to all statutory entities, such as the Captiva Fire Control District, with respect to their authority to borrow money.

Applying these rules to your inquiry, I find no provision of Ch. 30929, 1955, Laws of Florida, as amended by Ch. 75-417, Laws of Florida, the enabling legislation of the Captiva Fire Control District, which grants to that district's governing board, either expressly or by necessary implication, the authority to borrow money to construct a firehouse building. *Cf.* s. 166.111, F. S., granting general purpose municipal governments the power to borrow money for the purposes therein described; State v. City of Tampa, 183 So. 491 (Fla. 1938); and State v. City of Treasure Island, 48 So.2d 749 (Fla. 1950). In

this regard, I am aware of s 3 of Ch. 30929 which provides in part that the district's governing board may

> . . . purchase, own and dispose of fire fighting equipment and property, real or personal, which the board may, from time to time, deem necessary or desirable to prevent and extinguish fires within said district.

See also s. 14 of Ch. 30929, providing that "[t]his act shall be construed as remedial act and shall be liberally construed to promote the purpose for which it is intended." However, as stated in AGO 073-374, the power to borrow money is not "necessary" to carry out the function of purchasing property, since property may be purchased from current revenues. Moreover, it is a general rule that an express power duly conferred may include implied authority to use means necessary to make the express power effective, *but such implied authority may not warrant the exercise of a substantive power not conferred. See* Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936); *see also* 15 McQuillin, *supra*, at p. 12, stating that "the prevailing rule is that the power to borrow money and to issue notes therefor cannot be implied from the mere authority to purchase property and erect public buildings."

Accordingly, in the absence of any statutory provision authorizing it to do so, I must conclude that the Captiva Fire Control District is not authorized by law to borrow money to construct a firehouse building. *Cf.* AGO's 074-169, 073-374, 071-305, and 069-130.

076-201—October 1, 1976

RETARDED PERSONS

RETARDED PERSONS' TRUST FUNDS—INTEREST EARNED BELONGS TO SUCH RETARDED PERSONS

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTION:

> **Is interest earned on the client trust funds of retarded clients the property of those clients?**

SUMMARY:

> **In accordance with the provisions of s. 393.13(4)(d)2., F. S., interest earned on trust funds of an individual retarded client of an institution under the jurisdiction of the Department of Health and Rehabilitative Services is the property of the individual client to be used or conserved for the personal use or benefit of the individual client as provided in s. 402.17(2), F. S., and the department is not authorized to use or devote such funds or the interest accruing thereon to the use and benefit or general welfare of the department or any of the institutions under its jurisdiction or the patients or inmates or employees thereof.**

Your question is answered in the affirmative.

The Bill of Rights of Retarded Persons, ss. 393.13-393.14, F. S., provides for the comprehensive care, treatment, and habilitation of mentally retarded individuals by the Department of Health and Rehabilitative Services (hereinafter department) pursuant to the express findings and intent of the Legislature, Section 393.13(2).

Among those rights of clients specifically enumerated within s. 393.13(4), F. S., it is provided that:

> 1. All money belonging to a client held by the [department] shall be held in compliance with subsections 402.17(2) and (7).

2. All interest on money received and held for the personal use and benefit of a client shall be the property of that client and shall not accrue to the general welfare of all clients or be used to defray the cost of residential care. Interest so accrued shall be used or conserved for the personal use or benefit of the individual client as provided in subsection 402.17(2). [Section 393.13(4)(d)1. and 2., F. S.]

Cf. s. 402.18, F. S., relative to the *use* of moneys derived from various sources on deposit in the welfare trust funds referred to in s. 402.17(7).

The express legislative intent embodied within the Bill of Rights of Retarded Persons specifically provides:

(d) It is the intent of the Legislature:

1. To articulate the existing legal and human rights of the retarded so that they may be exercised and protected. The mentally retarded person shall have all the rights enjoyed by citizens of the state and the United States.

* * * * *

(e) It is the clear, unequivocal intent of this act to guarantee individual dignity, liberty, pursuit of happiness, and protection of the civil and legal rights of mentally retarded persons. [Section 393.13(2)(d)1. and (e), F. S.]

Additionally, s. 393.13(6), F. S., provides:

(6) NOTICE OF RIGHTS.—Each client, if competent, or parent or legal guardian of each client if the client is incompetent, shall promptly receive from the Department of Health and Rehabilitative Services a written copy of this act. Each client able to comprehend shall be promptly informed in clear language of the above legal rights of mentally retarded persons.

The primary guide to statutory interpretation is to determine the purpose of the Legislature, to ascertain the legislative will, and to carry that intent into effect to the fullest degree. State v. Atlantic C. L. R. Co., 47 So. 969 (Fla. 1908); Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918); Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); Dickinson v. Bradley, 298 So.2d 352 (Fla. 1974). To this principle, all rules of statutory construction are subordinate. American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938). Where the language of a statute is plain and unambiguous, the plain and obvious provisions must control. Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964); Southeastern Utilities Service Co. v. Redding, 131 So.2d 1 (Fla. 1961). This intent must be given effect even if it appears to be contrary to the strict wording of the statute. Fort Lauderdale v. Des Camps, 111 So.2d 693 (2 D.C.A. Fla., 1959). In general, the manifest intent of the Legislature will prevail over the literal import of the words used by it. Barrington v. State, 199 So. 320 (Fla. 1940); Worden v. Hunt, 147 So.2d 548 (2 D.C.A. Fla., 1962). This rule particularly applies when a construction based on the strict letter of the enactment would lead to a result that defeats the evident legislative intent. Payne v. Payne, 89 So. 538 (Fla. 1921); Bauer v. Reese, 161 So.2d 678 (1 D.C.A. Fla., 1964).

Section 402.17(2), F. S., provides, with respect to the authority of the department to hold such patients' moneys in trust, that the department is empowered to:

(a) Accept and administer as a trust any money or other property received for personal use or benefit of any patient or inmate;

(b) Deposit money so received in banks qualified as state depositories;

(c) Withdraw any such money and use the same to meet the current needs of the patient or inmate as they may exist from time to time;

(d) As such trustee to establish savings accounts, demand deposits, or time deposits, or invest in the manner authorized by law for fiduciaries such moneys not required to be used for current needs of the patient or inmate;

(e) To commingle such moneys for the purpose of deposit or investment.

Alternatively, s. 402.17(7), F. S., provides that:

> (a) Subject to the approval of the Department of Health and Rehabilitative Services, the Divisions of Youth Services, Retardation, or Mental Health may *deposit* any funds of children, patients, or residents in their possession *in any bank* in the state or may *invest* or *reinvest such funds* in *bonds* or *obligations* of the United States for the payment of which the full faith and credit of the United States is pledged. For purposes of *deposit only*, the funds of any child, patient, or resident may be mingled with the funds of any other children, patients, or residents.
>
> (b) The interest or increment accruing on such funds shall be *deposited* in the appropriate welfare trust fund of the Divisions of Youth Services, Retardation, or Mental Health. (Emphasis supplied.)

Cf. s. 402.18, F. S., providing for the use of such trust funds. It might be noted that s. 402.17(7) has to do only with the *deposit* of client or patient funds in banks or the *investment* or *reinvestment* thereof in the specified general obligations of the United States and the *deposit* of interest accruing on patients' funds in the appropriate welfare trust fund; and that s. 393.13(4)(d)1., F. S., makes no reference to s. 402.18, which appropriates the moneys in the several welfare trust funds, which are derived from a variety of sources other than the individual clients or patients, and regulates the *use of all* such moneys for the general benefit and welfare of the patients, inmates, and employees of the several affected institutions and authorizes the *investment* of such proceeds on deposit in such welfare trust funds and the *deposit* of any interest earned on such investments in the several welfare trust funds. Thus, s. 393.13(4)(d)1. simply requires the department to hold and administer the individual client's funds in the manner and by and through the means or vehicles provided for in s. 402.17(2) and (7), F. S., but it does *not* authorize the department to *use* such funds for the benefit and welfare of any agency or person other than the individual client for whom it holds such personal funds.

Section 393.13(4)(d)1. and 2., F. S., authorizes and requires the department to hold (not use or devote to the benefit and welfare of other patients, inmates, or employees of the institution) all moneys belonging to clients in accordance with the aforementioned provisions of s. 402.17(2) and (7), F. S. The term "held" has no primary or legal technical meaning, being determined largely by the connection in which it is used. Chicago Home for Girls v. Carr, 133 N.E. 344, 346, 300 Ill. 478; State v. Thomson, 449 P.2d 656, 659, 79 N.M. 748. As applied to property, the word "held" embraces two ideas: That of actual possession of some subject of dominion or property and that of being invested with legal title or the right to hold or claim such possession. *In re* Coe's Estate, 202 P.2d 1022, 1024, 33 Cal.2d 502; Witsell v. City of Charleston, 7 S.C. 88, 99. The term "held," when used to authorize a trust company to invest trust funds, should be construed in the sense of, and relates to, property other than that of the trust company itself in its possession and under its control for (the use and benefit of) others (for whom it holds such funds or property). *In re* Security Bank & Trust Co., 224 N.W. 235, 236, 178 Minn. 209. *See also*: 19 Words and Phrases *Held*, p. 584, *et seq.*

I am of the opinion, based on the foregoing statutory citations and authorities, that the legislative intent in employing or using the word "held" within the provisions of s. 393.13(4)(d)1. and 2., F. S., requiring the department to *hold* the client's trust funds *in compliance with* subsections 402.17(2) and (7), and to *use* or conserve the interest accruing thereon for the personal use and benefit of the individual client as provided in s. 402.17(2), F. S., is to empower and require the department to administer, invest, deposit, or apply and use such funds, on behalf of the individual client as a trust and in the capacity of a fiduciary or trustee, in the manner and by and through the means and vehicles provided for in s. 402.17(2) and (7), F. S., and there was no intent to empower the department to use or devote such funds to the benefit or general welfare of the affected institutions or the patients or inmates and employees of such institutions.

In providing within s. 393.13(4)(d)2., F. S., that:

> [a]ll interest on money received and held for the personal use and benefit of a client shall be the property of that client and shall not accrue to the general welfare of all clients or be used to defray the cost of residential care. Interest so accrued shall be used or conserved for the personal use or benefit of the individual client as provided in subsection 402.17(2)[,]

it was clearly the specific intention of the Legislature that any and all interest earned on the client trust funds of individual retarded clients shall accrue to and become the property of the client for the personal use and benefit of the retarded client, when needed, or be conserved, reinvested, redeposited, or reapplied by the department in the manner set out in s. 402.17(2), F. S., on behalf of, and for the personal use and benefit of, the individual retarded client, notwithstanding any provision that may be deemed to be to the contrary with respect to the several proceeds and moneys in the several welfare trust funds and the use thereof as provided in s. 402.17(7), F. S. *Cf.* s. 402.18(2), F. S., providing that there shall be deposited in the Welfare Trust Fund (referred to in s. 402.17[7]) "any moneys which may be assigned to the division Welfare Trust Fund by patients . . . for deposit in said fund," and that all moneys in such fund be held for the general benefit and welfare of the patients and employees of the institution.

Moreover, s. 402.17(7), F. S., was promulgated and implemented as part of the Governmental Reorganization Act of 1969, Ch. 69-106, Laws of Florida, and provided a general procedure for the deposit and investment or reinvestment of personal client funds and the trust funds into which the interest accruing on such funds was to be deposited by the then existing Divisions of Youth Services, Retardation, and Mental Health within the department. Subsection (7) does not provide for or regulate the disposition or use of such deposits or the earnings on such investments. Thereafter, the Bill of Rights of Retarded Persons was promulgated and adopted pursuant to Ch. 75-259, Laws of Florida. It is well settled that, to the extent of any inconsistent or conflicting provisions in earlier statutes, the last expression of the legislative will is the law and that, therefore, the last in point of time or order of arrangement prevails, especially where the inconsistent or conflicting provisions appear in different statutes. Johnson v. State, 27 So.2d 276 (Fla. 1946), *cert. den.* 329 U.S. 799; Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962).

The Legislature, in adopting and implementing the Bill of Rights of Retarded Persons, provided specific findings and an express articulation of its intent with respect to the rights and privileges of retarded clients within the purview of the act. The clear, unequivocal legislative intent embodied within the Bill of Rights for Retarded Persons is that the department administer as a trust and use, deposit, invest, apply, or hold the moneys of the individual retarded client in the manner and through or by the means of the vehicles provided in s. 402.17(2) and (7), F. S., but all interest received or earned on the trust funds of any such individual retarded client becomes, and is, the property of the individual client to be used or conserved for the personal use or benefit of the individual client as provided in s. 402.17(2), and not otherwise.

076-202—October 8, 1976

DISTRICT MENTAL HEALTH BOARDS

FUNDING PARTICIPATION; STAFFS NOT STATE EMPLOYEES; BOARDS NOT STATE AGENCIES; BOARDS SUBJECT TO SUNSHINE LAW

To: William J. Page, Jr., Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Barry Silber, Assistant Attorney General

QUESTIONS:

1. When does the requirement in the Community Mental Health Act, as amended, for the 25 percent mandatory participation by the governing body or bodies in the funding of mental health services take effect?

2. Does this 25 percent mandatory participation requirement apply to the operating budget of the district mental health boards, or is the intent of the law that the state fund the boards' operating budgets at 100 percent?

3. Are the staffs of the district mental health boards state employees?

4. Are the district mental health boards state boards so as to be subject to the statutory requirements of competitive bidding, Department of General Services life-cycle cost analysis and approval for leasing, and the Sunshine Law?

SUMMARY:

Pursuant to the provisions of Ch. 76-221, Laws of Florida, the 25 percent mandatory participation requirement, in the sense of the effective or operative date of that statute, on the part of the governing body or bodies of the several counties within a Department of Health and Rehabilitative Services district or subdistrict for the funding of mental health services took effect July 1, 1976. The 25 percent mandatory participation requirement applies to the operating budget of the district mental health boards, and there is *no* intent or requirement that the state fund the boards' operating budgets at 100 percent of their operating expenses.

The district mental health boards' staffs are not state employees.

District mental health boards are not state boards or agencies within the contemplation of Chs. 287 and 255, F. S., so as to be subject to the competitive bidding or life-cycle cost analysis requirements thereof; district mental health boards are public agencies or boards within the contemplation of s. 286.011, F. S., the Government in the Sunshine Law, so as to be subject to the open-meeting requirements thereof.

Part IV of Ch. 394, F. S., known as the Community Mental Health Act (hereinafter act), provides for, among other things, the organization and financing of community mental health services throughout the state and the establishment of a uniform ratio of state government responsibility and local participation in financing mental health services. Section 394.66(1) and (5).

Chapter 76-221, Laws of Florida, amending various sections of, and adding various sections to, Part IV of Ch. 394, F. S., was adopted into law with the additional legislative intent, among others, that community mental health care be included as a component of the integrated delivery system of the Department of Health and Rehabilitative Services (hereinafter department). Section 394.66(8), F. S. (1976 Supp.).

AS TO QUESTIONS 1 AND 2:

Section 11 of Ch. 76-221, Laws of Florida, amends s. 394.76, F. S., in part, by creating s. 394.76(9), F. S. (1976 Supp.), which provides:

> (9) Governing bodies within a district or subdistrict shall be required to participate in the funding of mental health services under the jurisdiction of said governing body, *and the amount of the participation shall be no less than 25 percent of the net balance of the total budget, as approved, as set forth in s. 394.76.* (Emphasis supplied.)

Section 394.69(4), F. S. (1976 Supp.), provides that the total operating budget of any mental health board or boards within any department district shall not exceed 6 percent of the approved district mental health budget or $150,000, whichever is less. Pursuant to the legislative intent embodied within Ch. 76-221, Laws of Florida, each district administrator is charged with the responsibility of initiating and coordinating the reorganization of the mental health board(s) within his district. Section 394.69(1), F. S. (1976 Supp.). Additionally, each mental health board, subject to the provisions of the act and the department's regulations, shall review and evaluate the mental health needs, services, and facilities within its jurisdiction and prepare a district plan and budget based thereon; shall receive and disburse funds entrusted to it by law or received from other public and private sources; and shall contract for state funds with the district administrator for the coordination and disbursement of such funds. Section 394.71(1), (2), and (3), F. S. (1976 Supp.). Each mental health board is authorized, subject to the department's approval and regulations, when sufficient funds are available, to contract for state funds on a matching basis in the establishment and operation of local mental health programs with any hospital, clinic, laboratory, institution, or other appropriate service agency. Section 394.74(1), F. S.

In drafting and preparing the district mental health plan, each board shall reflect the program priorities established by the department and the needs of the district, including a list of the mental health services and the service providers which will receive *state and county funds*. Section 394.75(1)(a), F. S. (1976 Supp.).

In providing within Ch. 76-221, Laws of Florida, for the reorganization of the several mental health boards; the review and evaluation of the various mental health needs and facilities within each board's jurisdiction; the preparation of the district plan and budget based on this evaluation and subject to the department's regulations and approval; the receipt and disbursal of funds; the contracting for state funds; and the contracting for various services with local agencies and facilities when funds are available, subject to the department's regulations and approval, based upon the board's operating budget reflecting the program priorities established by the department, including the service providers who are to receive state and county funds, it is clearly the intent of the Legislature that s. 394.76(9), F. S. (1976 Supp.), which sets out the minimum local government financial participation criteria in the funding of mental health services within their respective jurisdictions, applies to the operating budgets of the district mental health boards.

I might also note that those services included within the district plan of which the district administrator informs the board will be state funded, pursuant to s. 394.76(1), F. S. (1976 Supp.); those services and service providers within the district mental health plan, including those which will receive state and county funds pursuant to s. 394.75(1)(a), F. S. (1976 Supp.); those funds which each board is entrusted with by law and those funds which each board may receive from other public and private sources pursuant to s. 394.71(2), F. S.; as well as the review and evaluation of the mental health needs, services, and facilities within its jurisdiction made by each mental health board in preparing a district plan and budget pursuant to s. 394.71(1), F. S.; and those enumerated services provided for within s. 394.75(3), F. S., which a board may include within its plan, in addition to the overall district board's district plan and budget, its contract and disbursements; comprise and are integral components of the total operating costs of the services provided for and enumerated in s. 394.75(3), *supra*, and referred to in s. 394.76(1)(a), F. S. (1976 Supp.), including the board's director and those staff personnel appointed by the board or its director.

Section 394.76(4), F. S. (1976 Supp.), provides that the state's share of financial participation shall be determined by the following formula:

> (a) The state's share shall be a percentage of the *net balance* determined by deducting from the total operating cost of services and programs as specified in subsection 394.75(3):
>
> 1. Those expenditures which are not reimbursable as provided in subsection (7).
>
> 2. Federal grants, excluding funds earned under title XX of the Social Security Act.
>
> 3. Inpatient fees and third party payments . . . for which reimbursement has been requested from the state. (Emphasis supplied.)

The legislative intent embodied within the act is to establish a uniform funding percentage of 75 percent state financial participation for all community-based, state-aided mental health and alcoholism prevention, treatment, and control programs. The state's annual share of financial participation is 75 percent of the *net balance* determined in accordance with s. 394.76(4)(a), F. S. (1976 Supp.). Section 394.76(4)(b), F. S. Clearly, there is no intent embodied within the act or any provision therein requiring the state to fund such operating budgets of the boards at 100 percent. In any event, only those moneys duly appropriated by the Legislature for the purposes of grants to or reimbursements of or disbursements to the local mental health boards may be lawfully distributed to such boards by the officers of the state. *Also see* s. 394.76(3), F. S., and s. 394.76(3), F. S. (1976 Supp.).

Section 16 of Ch. 76-221, Laws of Florida, provides that the effective date of this act shall be July 1, 1976, except that ss. 3, 4, and 5 and the amendments to s. 394.67(1), F. S., contained in s. 2 shall take effect January 1, 1977, and the amendment to s. 394.76(6), F. S., contained in s. 11, dealing with claims for state reimbursement under a purchase of service approach, shall take effect July 1, 1977. Therefore, the 25 percent mandatory participation requirement, in the sense of the effective or operative date of the statute, set forth in s. 394.76(9), F. S. (s. 11, Ch 76-221), took effect on July 1, 1976, the effective

date of the act, since subsection (9) of s. 394.76 is not excepted from the general operative or effective date of the statute.

Undoubtedly, s. 394.76(9), F. S. (1976 Supp.), operates to require the governing bodies within a district or subdistrict to participate in the funding of mental health services within their jurisdiction in an amount *not less than* 25 percent of the *net balance* of the total budget, as determined in s. 394.76(4), *i.e.*, by deducting from the total operating cost of the services and programs authorized and delineated in s. 394.75(3), F. S., those expenditures, grants, fees, and payments enumerated in s. 394.76(4)(a), F. S. (1976 Supp.).

AS TO QUESTION 3:

With respect to the funding and staffing of district mental health board personnel, s. 394.76(6), F. S. (1976 Supp.), provides that expenditures (of the boards)

> . . . subject to state reimbursement shall include expenditures for approved salaries of personnel . . . . They shall not include expenditures for compensation to members of a community mental health board, except actual and necessary expenses incurred in the performance of official duties, or expenditures for a purpose for which state reimbursement is claimed under any other provision of law.

Pursuant to s. 394.67(10), F. S. (1976 Supp.), the terms "mental health board" and "board" are defined for the purposes of the act as "*the board within* a Department of Health and Rehabilitative Services *district* or subdistrict *established in accordance with provisions of this part for the purposes of coordinating* community mental health programs." (Emphasis supplied.) *Cf.* s. 394.67(10), F. S. 1975, which defined the terms "mental health board" or "board" as the board within a board district established in accordance with the provisions of this part for the purposes of *administering* a community mental health program. The board is established within the service districts created by s. 20.19(4)(a), F. S. (through which the department administers its programs), to *coordinate* mental health services. Section 394.69, F. S. (1976 Supp.). The board is appointed, pursuant to s. 394.70(1), F. S. (1976 Supp.), by the governing body or bodies (county commissions) having jurisdiction in the board district; s. 394.70(1), F. S. 1975, and s. 394.70(1), F. S. (1976 Supp.), containing identical provisions in this regard, and *cf.* s. 394.70(1)(e), F. S. (1976 Supp.) with s. 394.70(g), F. S. 1975. The board is authorized to appoint a director for the board district pursuant to s. 394.72(5), F. S. 1975, *and see* s. 394.72(1), F. S. (1976 Supp.), referring to the "board director appointed by the board." *Cf.* s. 394.72, F. S. 1975. The staff of the district administrator is prohibited from duplicating the activities of "the staff of the district mental health board." Section 394.72, F. S. (1976 Supp.).

Subject to the rules and regulations of the department, any county within a board district shall have the same authority to contract for mental health services as does the department under existing statutes. Section 394.72(1), F. S. (1976 Supp.). *Cf.* s. 394.73(1), F. S. 1975, for substantially identical provisions. Additionally, the counties within a board district may enter into joint agreements with each other for the establishment of joint mental health programs, the joint operation of facilities and services, or the operation of services and facilities by one participating county under contract with other participating counties, s. 394.73(2), F. S. 1975, and, in certain circumstances and upon certain conditions, any county may withdraw from such joint programs. Section 394.73(4), F. S. (1976 Supp.).

The district plan of the board, when approved, and the board's budget, *see* s. 394.76(4)(c), F. S. (1976 Supp.), includes expenditures for approved salaries of personnel pursuant to s. 394.76(7), F. S. (1976 Supp.), and expenditures for capital improvements pursuant to s. 394.76(8), F. S. (1976 Supp.), among others, and these expenditures of the board are reimbursed to it by the state, or the board is otherwise granted funds therefor, for the board's operating expenses. Based on the aforementioned statutory authorities, it is clear that the board's operations, the development and implementation of the district plan and budget, the *coordination* of mental health service within the district, and the disbursement of state and local funds to facilitate the availability and delivery of these services constitute essentially a locally based, state-aided program which is funded by state, local, and federal moneys and patient fees or service charges. The overall community mental health program which is implemented by the act is *administered* by the department with each local board *coordinating* the services, budgets, and

disbursements of the several moneys and funds therefor, within their respective districts. *See* s. 394.75(1) and (5), F. S. (1976 Supp.) and s. 394.75(2), (3), and (4), F. S. 1975.

Nowhere within the statutes can I find authority for a district mental health board to submit a legislative budget to the Department of Administration and the Governor for their approval and submission to the Legislature. However, s. 20.19(8), F. S., specifically provides for the annual development and submission by the secretary of the department, to the Legislature, of a comprehensive departmental budget *which shall array district budget requests along program lines.* In view of the foregoing authorities and by virtue of the fact that the personnel comprising the board staff do not meet the criteria enumerated within s. 216.011(1)(y) and (z), F. S., or Ch. 110, F. S., I am of the opinion that the staffs of the district mental health boards are not state employees. *Cf.* AGO's 073-32, 076-53, 076-54, and 076-185.

AS TO QUESTION 4:

With respect to the first part of your fourth question, as to whether the district mental health boards are state boards or agencies so as to be subject to the statutory requirements of competitive bidding provided for within the state purchasing law, I recently had the occasion to opine the following:

> Part I, Ch. 287, F. S., deals with purchasing activities by the state on behalf of state agencies and was brought into the statutes by s. 22, Ch. 69-106, Laws of Florida. Section 287.012 is the definitional section of the state purchasing law, which defines a state agency as "any of the various state officers, departments, boards, commissions, divisions, bureaus, councils, and any other unit of organization however designated."
>
> As indicated by its title, Ch. 69-106, *supra*, is an act relating to the executive branch of government. Its purpose was to restructure the executive branch of government and to consolidate and reorganize existing agencies pursuant to the mandate of s. 6, Art. IV, State Const. The definition contained in s. 287.012(1), F. S., is essentially the same as the general definition of agency found in the Governmental Reorganization Act at s. 20.03(11), F. S. Consequently, it appears that the agencies covered by the state purchasing law are those agencies within the *executive* branch of state government. To be subject to the purchasing requirements of Ch. 287, F. S., an entity would have to be assigned within the executive branch of government by Ch. 20, F. S. (Ch. 69-106, Laws of Florida), or a later enactment. [Attorney General Opinion 076-185.]

Chapter 70-109, Laws of Florida, was enacted into law after the Governmental Reorganization Act, Ch. 69-106, Laws of Florida, and the district mental health boards which it created were not assigned to the executive branch of state government. Therefore, the district mental health boards do not appear to be a part of the executive branch of state government and are not subject to Ch. 287, F. S. *Cf.* AGO 076-185.

The Florida Energy Conservation in Buildings Act of 1974, ss. 255.251-255.256, F. S., provides for, among other things, life-cycle cost analysis and evaluation of facilities constructed or leased by *state* agencies. Section 255.254, F. S., provides in part that "[n]o *state* agency shall lease, construct, or have constructed . . . a facility without having secured from the division a proper evaluation of life-cycle costs."

However, s. 394.76(7) and (8), F. S. (1976 Supp.), provides for authorized expenditures of the several district mental health boards and for the reimbursement thereof to the boards by the state upon the approval of such expenditures by the district administrator. *Cf.* s. 394.76(7) and (8), F. S. 1975. Section 394.76(8), F. S. (1976 Supp.), provides that:

> (8) Expenditures for capital improvements relating to construction of, additions to, purchase of, or renovation of a community mental health facility may be made by the state, provided said expenditures or capital improvements are part and parcel of a community mental health plan adopted by a board district and approved by the district administrator. *Nothing shall prohibit the use of said expenditures for construction of, additions to, renovation of, or purchase of facilities owned by a county, city, or other governmental agency of the state or a nonprofit entity. Such expenditures shall be subject to the provisions of subsections (4) and (6) above.* (Emphasis supplied.)

From the operative provisions of s. 394.76(8), *supra*, it is apparent that the Legislature did not intend for district mental health boards to be subject to the life-cycle cost analysis provisions of ss. 255.251-255.256, F. S., in the leasing or constructing of facilities and that these sections have reference to state buildings or buildings leased by the state. It is a general principle of statutory construction that when a statute enumerates the things on which it is to operate or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. Ideal Farms Drainage District v. Certain Lands, 19 So.2d 234 (Fla. 1944); Wanda Marine Corp. v. State, 305 So.2d 65 (1 D.C.A. Fla., 1974).

Section 394.71(6), F. S. (1976 Supp.), establishes as a duty that each mental health board:

> [s]hall schedule meetings with local governments, community and citizen groups, and service providers, no less than once a year, to enhance information exchange *and access to decision making.* Such meetings shall be advertised in a newspaper of general circulation in the board district, at least one time, no more than 10 days and no less than 7 days prior to such meeting. *It is intended that such meetings shall be widely publicized.* (Emphasis supplied.)

Section 286.011, F. S., commonly known as the "Sunshine Law," provides:

> (1) 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 any political subdivision, except as otherwise provided in the Constitution, 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, regulation, or formal action shall be considered binding except as taken or made at such meeting.

Subsection (2) of s. 286.011, *supra*, further provides that the minutes of any such meeting shall be promptly recorded and the same shall be open to public inspection.

As I have had the opportunity to opine on many occasions since the adoption of the present Sunshine Law, the courts have stated, almost without exception, that all phases of the decision-making process, including collective inquiry and discussion, must be conducted in the sunshine and that the Sunshine Law, s. 286.011, F. S., requires that *all* meetings of a public board or commission, or any two or more members thereof, be open to the public. Attorney General Opinions 075-37 and 075-41. *Cf.* AGO's 074-169, 073-223, 073-159, and 071-389; Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), *on remand* 298 So.2d 443; City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).

Based upon the foregoing authorities and the express provisions of s. 394.71(6), F. S. (1976 Supp.), I am of the opinion that the district mental health boards are public agencies within the contemplation of s. 286.011, F. S., and subject to the requirements thereof.

With respect to the financial disclosure aspect of your fourth question, part III of Ch. 112, F. S., vests authority for this, among other matters, with the State of Florida Commission on Ethics, which has the authority to issue opinions and declaratory statements in this regard. Generally, however, I might note that, pursuant to s. 112.3145, any local board member of any board of any county or counties, excluding advisory boards, appears to be subject to the provisions thereof, but your question in this regard should be addressed to and answered by the Commission on Ethics.

076-203—October 8, 1976

REGULATION OF PROFESSIONS

WATCHMAKING MAY NOT BE SUBDIVIDED INTO "WATCHMAKING" AND "CLOCKMAKING" FOR SEPARATE LICENSURE

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTIONS:

1. Does s. 489.05, F. S., require applicants for watchmakers' licenses to be examined, theoretically and practically, on both watches and clocks, or, may each applicant be examined in the area of individual preference or specialty?
2. Does s. 489.01(1), F. S., combine watch and clock repairing into one trade, or can they be considered as two separate trades permitting the Florida Watchmakers' Commission to issue separate licenses and to restrict each applicant to the trade in which the applicant is examined?

SUMMARY:

It is the intent of Ch. 489, F. S., that applicants be examined by the Florida Watchmakers' Commission on the proper repair, rebuilding, and regulating of *both* watches and clocks. The commission is without statutory authority to examine applicants for, or to grant separate licenses to examinees for, the repair of watches and clocks or to restrict a licensee to practice of the trade of either watchmaking or clockmaking.

Your questions are interrelated and will be answered together.

"Watchmaking" is defined by s. 489.01, F. S., and by Rule 21Y-1.01, F.A.C., to include the repair of watches *or* clocks.

The language of s. 489.01, *supra*, is in the disjunctive, and in the elementary sense the word "or" indicates an alternative, generally corresponding to "either" as "either this or that," and often connects a series of words or propositions which present a choice. Pompano Horse Club v. State, 111 So. 801 (Fla. 1927), 52 A.L.R. 51; *also see* AGO's 058-199 and 073-265.

The word "or" is usually construed judicially as a disjunctive unless it becomes necessary in order to conform to the clear intention of the Legislature to construe it conjunctively as meaning "and," the intent of the Legislature being the determinative factor. Pinellas County v. Wooley, 189 So.2d 217 (2 D.C.A. Fla., 1966); Infante v. State, 197 So.2d 542 (Fla. 1967).

The statutory definition of "watchmaking" is that a watchmaker is one who repairs, replaces, rebuilds, etc., *either* watches or clocks or *both*. The conjunctive "or" is often used to join two aspects of the same entity rather than two separate entities. Infante v. State, *supra*; *also see* Edwards v. State, 56 So. 401 (Fla. 1911); The Telophase Society of Fla. Inc. v. St. Bd. of Funeral Directors, 308 So.2d 606 (2 D.C.A. Fla., 1975), *cert. denied*, 327 So.2d 229 (Fla. 1976), holding that a statutory definition of "funeral directing" in which various categories were separated by the word "or" made any of the enumerated activities subject to the regulatory provisions of Ch. 470, F. S.; and Dotty v. State, 197 So.2d 315 (4 D.C.A. Fla., 1967), holding that the word "or" separating the words "[t]he prosecuting attorney" and "assistant prosecuting attorney" granted authority to the assistant prosecuting attorney to appear before the grand jury with the prosecuting attorney within the meaning of ss. 905.17 and 905.19, F. S.; and *cf.* Pinellas Co. v. Wooley, *supra*, holding that a statutory provision regulating use of property within 150 feet of the nearest point of any intersection *or lying* more than 600 feet from any inhabited dwelling should read as if "*or lying*" were written "and lying," in order to effectuate the legislative intent and to accomplish the purpose of the statute.

The statute does not grant an individual applicant a choice or allow any preference as to the area of practice he wishes to be examined on and does not limit the practice of "watchmaking" to one or the other or require a choice between the two. Neither does the statute purport to define "clockmaking" as a separate trade or practice from watchmaking.

Section 489.05, F. S., provides for the examination of applicants on the knowledge, practical ability, and skill essential to the proper repair of watches *and* clocks. Only those applicants who successfully pass such examination may be issued a certificate of registration or license certificate. Section 489.06, F. S.

The word "and" in s. 489.05, *supra*, is used in the ordinary conjunctive sense connecting two requirements for examination. "Where two or more requirements are provided in a section and it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive 'and' should be used." *Sutherland Statutory Construction*, Fourth Edition, Vol. 1A p. 90.

For examination and licensing purposes, the operative and regulatory force of the statute rests in ss. 489.05 and 489.06, F. S., which, respectively, direct and require that an applicant be examined in the designated areas of watch *and* clock repair and construction and that, if the applicant successfully passes such examination, the commission register such fact in its records and issue to such applicant a certificate of registration or license certificate.

It seems clear that, although the definition of "watchmaking" applies to either watches or clocks or to both and to no other device or activity, the Legislature intended the examination procedures and requirements of s. 489.05, *supra*, to include the knowledge and practical skill of rebuilding, repairing, or regulating both watches and clocks. No examination requirements or procedures are specified anywhere in Ch. 489, F. S., for the rebuilding, repairing, or regulating of clocks as a trade or practice separate and apart from watches or the trade of watchmaking.

Therefore, it is my opinion that, when reading the definition of watchmaking *in pari materia* with the examination and licensing requirements of ss. 489.05 and 489.06, *supra*, the Legislature intended applicants to be examined on and licensed for the repair, rebuilding, and regulating of *both* watches and clocks. Furthermore, the commission lacks the legislative grant of authority to license watchmakers by any procedures that differ from the provisions of ss. 489.05 and 489.06. A legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way. Alsop v. Pierce, 19 So.2d 799 (Fla. 1944), *In re* Advisory Opinion of the Governor Civil Rights, 306 So.2d 520 (Fla. 1975). For the commission to issue a license restricting an individual to "clockmaking" is to exceed the limits of authority granted by the Legislature and is per se illegal. Greenberg v. Florida State Board of Dentistry, 297 So.2d 629 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); Atlantic Coast Line R. Co. v. State, 143 So. 255 (Fla. 1932).

076-204—October 8, 1976

TAXATION

NO RIGHT TO HOMESTEAD EXEMPTION WHEN HOUSE PLACED IN INTER VIVOS TRUST OF WHICH CLAIMANT IS SETTLOR, COTRUSTEE, AND BENEFICIARY

To: DeVane Mason, Gadsden County Property Appraiser, Quincy

Prepared by: E. Wilson Crump II, Assistant Attorney General

QUESTION:

May Florida's homestead exemption be claimed for ad valorem tax purposes on a home placed in an inter vivos trust by one who is simultaneously the settlor of that trust, a cotrustee of the trust, and a beneficiary of the trust who resides on the property?

SUMMARY:

Under present Florida law, the interest of one who is the settlor of a trust, as well as being cotrustee and beneficiary, does not qualify for a claim of homestead exemption from ad valorem taxation on the trust property even though such person might maintain permanent residence thereon. None of these three incidents separately qualifies for a claim of homestead exemption, and their concurrence likewise cannot be said to qualify.

It is my opinion that, under the facts and the trust instrument which you have forwarded, homestead exemption would not be available.

The Constitution of the State of Florida grants homestead exemption for ad valorem tax purposes to "every person who has legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another, legally or naturally

dependent upon the owner." Section 6, Art. VII, State Const.; *see also* s. 196.031, F. S. Your question clearly turns on whether any of the various interests, or a combination of the same, would constitute sufficient legal or equitable title to real estate to afford this exemption. It is assumed for purposes of this opinion that the claimant in question does in fact make her permanent residence on the property.

It is my opinion that, under present Florida law, the interest of a settlor would qualify for a claim of homestead exemption only if the trust could be considered void. Under present Florida law, a recorded deed of trust could seldom, if ever, be considered void. Section 689.071, F. S.; Ferraro v. Parker, 229 So.2d 621 (2 D.C.A. Fla., 1969). The earlier opinions of this office have all indicated that the interest of a trust beneficiary, even though he or she may reside on the trust property making the same his or her home, is seldom sufficient to support a claim for homestead exemption. Attorney General Opinions 074-313, 072-12, and 055-78. *See also* Aetna Insurance Company v. LaGasse, 223 So.2d 727 (Fla. 1969). I find nothing in the interests of these trust beneficiaries to constitute an exception to this rule.

Furthermore, in AGO 055-78, one of my predecessors held that the legal title of a trustee is not sufficient to support a claim for homestead exemption. While there are no Florida cases to support this conclusion, it seems to be well in accord with the weight of authority from other jurisdictions. Oree v. Gage, 38 Cal. App. 212, 175 P. 799 (1918); Treece v. Carr, 58 S.W. 78 (Tenn. 1900); Wood v. Wit (Tex. Civ. App.), 223 S.W. 277, *error dism'd.*(1920); 40 Am. Jur.2d *Homestead* s. 55; 40 C.J.S. *Homestead* s. 78b; 74 A.L.R.2d 1355, 1384, s. 27, 89 A.L.R. 561.

There seems to be relatively little authority considering the effect of the concurrence of the interests of a trustee and beneficiary. However, in AGO 055-78, it appears that the potential claimant was both a beneficiary and a trustee. That opinion came to the conclusion that, since the potential claimant's interests in neither capacity qualified, homestead exemption was not available. Although the California case of Furman v. Brewer, 38 Cal. App. 678, 177 P. 495 (1918), did seem to find that homestead exemption would be available to one who was simultaneously a trustee and a beneficiary, it appears that the claimant also had joint legal title in her own right, separate and apart from the legal title she held as trustee, distinguishing the case from the situation under inquiry here.

076-205—October 11, 1976

CONSTITUTIONAL LAW

DISCRIMINATION BETWEEN MALE AND FEMALE POLICE OFFICERS IN DUTY ASSIGNMENTS IMPERMISSIBLE

To: Gwendolyn S. Cherry, Representative, 106th District, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does a policy or regulation which excludes all female police officers from patrol duty or limits the functions performed by female officers to such areas as juvenile and rape investigations violate Title VII of the Civil Rights Act of 1964?

SUMMARY:

A policy or regulation which excludes all female officers from patrol duty or limits the functions performed by female officers to such areas as juvenile and rape investigations violates Title VII of the Civil Rights Act of 1964.

The statutory language and legislative history of Title VII of the Civil Rights Act of 1964, 42 U.S.C. s. 2000(e), *et seq.* (hereafter Title VII), indicates that one of the objectives of Congress in enacting Title VII was to provide an opportunity for anyone to enter the

job market without being subjected to disparate treatment because of race, color, religion, sex, or national origin. Through Title VII, Congress has established a national policy that each person must be treated as an individual and not on the basis of characteristics generally, and often falsely, attributed to any racial, religious or sex group. In specific regard to claims of sex discrimination, Congress intended to strike the entire spectrum of disparate treatment of individual men and women resulting from sex stereotypes. Under Title VII, all stereotypic treatment of persons based on race, religion, or sex, whether rational or irrational, is illegal. Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971). Manhart v. City of Los Angeles, Dept. of Water and Power, 387 F. Supp. 980 (D.C. Cal. 1975).

If a police department limits, segregates, or classifies female employees and applicants for employment as police officers in a way which would deprive them of employment opportunities and otherwise adversely affect their status as employees because of their sex, a prima facie violation of Title VII exists. The statistical absence of women on a police force has been said to be an acceptable method of determining the existence of sex discrimination in employment cases. *See* Schaefer v. Tannian, 394 F. Supp. 1128 (E.D. Mich. 1974). Once a prima facie case has been established, a heavy burden shifts to the defendant to show the validity of the selection device or to articulate some legitimate, nondiscriminatory reason underlying these practices. Officers for Justice v. Civil Service Comm. of San Francisco, 395 F. Supp. 378 (N.D. Cal. 1975); Wetzel v. Liberty Mutual Insurance Co., 372 F. Supp. 1146 (W.D. Pa. 1974); McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973).

All federal courts which have considered the issue of exclusion of women from all positions within a law enforcement agency or the selected exclusion of women from patrol or other positions within the law enforcement agency have thus far uniformly held that such exclusionary practices are not justified by any business necessity or bona fide occupational qualification and hence are violative of Title VII.

In Schaefer v. Tannian, 394 F. Supp. 1128 (E.D. Mich. 1974), the court found that the Detroit Police Department (hereafter referred to as the D.P.D.) had until 1970 utilized female police officers *only* in the Women's and Children's Section of the department. The policy of the D.P.D. in past years had been to exclude female officers from the entry position of patrolman. In January 1974, approximately 39 women graduated from the Criminal Justice Institute of the D.P.D., the greatest majority of whom (if not all) were assigned to the Youth Services Bureau. New policewomen hired by the D.P.D. have in the past been assigned to and continued to be predominantly assigned to the Women's Division, or, as now reorganized, the Women's and Children's Service Section and the Youth Services Bureau. In support of the limitations upon women officers, the department urged that such practices were "necessary for the safety of the women and the efficient operation of the police department," and was further justified through business necessity. However, the court found that the department had provided no facts to support a conclusion that its practices are or have been in the past necessary to the safe and efficient operation of the department and that it likewise failed to meet the burden of showing a business necessity. Accordingly, the court held, *inter alia*, that restricting new policewomen employees to positions in the Women's Division violated Title VII. The court, *inter alia*, ordered the imposition of a "quota system" upon the department which required the D.P.D. to hire at least one qualified female officer for every male officer until further ordered; ordered the D.P.D. to assign all persons who completed police training to divisions of the department without regard to sex per se; required the D.P.D. to begin immediately the use of recruiting material which stressed the equal role of men and women in the department; required the D.P.D. to inform the public that the D.P.D. would henceforth hire police officers without regard to their sex; and also extensively revised the procedures previously utilized by the D.P.D. with respect to entrance exams.

In Reynolds v. Wise, 375 F. Supp. 145 (N.D. Texas 1973), the plaintiff, a female employed by the Bureau of Prisons in an all male institution, asserted that the bureau violated Title VII by "freezing" female employees at lower civil service ratings by denying them the right to rotate jobs. It had been the policy of the Civil Service Commission that in institutions for men the correctional officers would be men and in institutions for women the officers would be women. In concluding that this policy of the Bureau of Prisons violated Title VII, the court found that "no business necessity or bona fide occupational qualification has been shown by the government." Reynolds, *supra*, at 151, and accordingly, the defendants were, *inter alia*, ordered to make available to the plaintiff the opportunity to apply for the position of correctional officer and, if application

is made "to entertain that application upon the first opening thereafter." *Id.* Additionally, the court awarded plaintiff an attorney's fee in the amount of $5,000. Reynolds, *supra*, at 152.

Significantly, the court in *Reynolds* did not prohibit "selective work responsibilities among correctional officers excluding from the duties of women officers assignments to dormitories or shakedowns in order to insure the privacy of inmates." Reynolds, *supra*, at 151. Similarly, I am of the view that female police officers may be assigned to special units dealing with cases involving sexual battery upon females, or males assigned to units dealing with cases involving sexual battery upon males, without violating Title VII. Such a practice would guarantee the right of privacy of victims of crimes in an intimate, personal area which has been recognized as such under the Federal Constitution and would not constitute sex discrimination under Title VII.

In Officers for Justice v. Civil Service Comm. of San Francisco, 395 F. Supp. 378 (N.D. Cal. 1975), the court, in enjoining the use of a height requirement and physical agility test for applicants for patrol positions on the city police force, noted that "women have historically been totally excluded from positions as patrol officers in the San Francisco Police Department" despite the presentation of evidence which indicated that

> . . . women have been used in police patrol work in substantial numbers nationwide, most notably in Washington, D.C. and New York City, and locally, in the California city police departments and county sheriff's offices.

The court ordered the city to provide that 15 of the 40 persons in each of the first four police academy classes be women, thereby insuring that 60 female officers would be on patrol duty within 32 weeks. *Also see* Berni v. Leonard, 331 N.Y.S.2d 193 (Sup. Ct. 1972), *aff'd*, 336 N.Y.S.2d 620 (Sup. Ct. 1972); City of Schenectady v. State Division of Human Rights, 373 N.Y.S.2d 59 (Ct. App. 1975).

In sum, I am of the opinion that the exclusion of women from patrol duties within a police department constitutes a violation of Title VII which cannot be justified on the grounds of business necessity or bona fide occupational qualification. Fears for the "physical safety of women" have been found to be insufficient as a matter of law to justify the exclusion. As stated by the Fifth Circuit in response to a similar contention:

> . . . Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. . . . [Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228, 236 (5th Cir. 1969).]

076-206—October 11, 1976

TAXATION

STATUS OF CIRCUIT COURT CLERK WHEN COLLECTING DOCUMENTARY STAMP TAX—BONDING—COMMISSION

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Caroline C. Mueller, Assistant Attorney General

QUESTIONS:

1. Is the status of the clerk of the circuit court, when collecting the excise tax on documents as required by s. 201.11, F. S., that of an *agent* of the Department of Revenue?

2. If the statute classifies him as an "agent," is he required to post bond?

3. If the statute classifies him as an "agent," is he entitled to receive a commission?

SUMMARY:

The clerk of the circuit court, when collecting the excise tax on documents as required by s. 201.11(2), F. S., is acting or serving as the ex officio agent of the state and the Department of Revenue for the collection of such tax. Section 201.11(2) requires that the clerk as such ex officio agent be bonded as required by, and provided for in, the duly promulgated rules of the Department of Revenue. The existing rules provide that the Department of Revenue will purchase a blanket bond covering all agents collecting documentary stamp taxes with all costs associated therewith to be allocated to those agents so bonded and the cost of the coverage for each agent being deducted from any commissions due that agent.

When the clerk of the circuit court collects the documentary stamp taxes for, and as the ex officio agent of, the state and the Department of Revenue, s. 201.11(2), F. S., requires that he be compensated at the prescribed rate as is any other authorized agent performing the same service for the Department of Revenue. Such compensation to the clerk is income of the office of the clerk of the circuit court and not personal income of the clerk.

Questions 1 and 3 are answered in the affirmative and question 2 is answered by the following discussion.

Your first question asks whether a clerk of the circuit court, when collecting the excise tax on documents as required by s. 201.11(2), F. S., as amended by Ch. 74-325, Laws of Florida, and further amended by Ch. 76-199, Laws of Florida, is an agent of the Department of Revenue for the collection of the tax. The answer is clearly in the affirmative.

Section 201.11(2), F. S., as amended by Ch. 76-199, Laws of Florida, provides in pertinent part:

> (2) The county comptroller or, if there be none, then the *clerk of the circuit court, shall serve ex officio, and the Department of Revenue may appoint others, as agents for the collection of the tax* imposed by this chapter [the documentary stamp tax.] . . . All agents shall be subject to audit and shall post a bond as may be required by the Department of Revenue. The Department of Revenue may purchase a blanket bond; however, all costs associated with such a bond shall be allocated by department regulation to those agents so bonded. An agent shall be compensated one-half of 1 percent of the value of the stamps sold as collection costs in the form of a deduction from the amount of the tax due and remitted by him . . . . (Emphasis supplied.)

The material portions of s. 201.11(2), F. S., as amended by Ch. 74-325, are identical with the above-quoted provision from the 1976 amendatory act. The punctuation of the statutory language makes it clear that the phrase "as agents" relates to the verb phrase "shall serve." In relation to the clerk of the circuit court (or the county comptroller), the statute should be read, and in fact does read, as though it stated that the clerk shall serve ex officio as the agent (of the state) for the collection of the documentary stamp tax.

Prior to revision in 1974, s. 201.11(2), F. S., provided only that the Department of Revenue "*may* appoint agents" (Emphasis supplied.) for the collection of the documentary stamp tax, *i.e.*, it *authorized* the department to appoint such agents. Even though clerks of the circuit courts were appointed to be agents of the Department of Revenue for the collection of the tax under s. 201.11(2), F. S. *1973*, there was no *statutory requirement* that the clerks accept the appointment or collect the tax. *Cf.* s. 201.12, F. S., and Rules 12A-4.01(2) and 12A-4.07, F.A.C., relating to the clerk's duty to *report* to the department the names and addresses of anyone failing to have affixed the required amount of stamps on any instruments recorded in the clerk's office, and s. 201.01, F. S. But if a clerk did accept such appointment, he was clearly acting as the *agent* of the Department of Revenue for the collection of the stamp tax. This is evidenced by the statutory language, "[t]he department of revenue may appoint *agents*" (Emphasis supplied.), and by the rules of the Department of Revenue interpreting the statutes.

Rule 12A-4.01(3)(a), F.A.C., revised August 18, 1973, and adopted before the statutory revision of s. 201.11(2), F. S., in 1974, defines "Stamp Tax *Agent*" to mean "[t]he several

Clerks of Circuit Court and other *persons* or firms *authorized by* the Department to collect documentary stamp tax," (Emphasis supplied.) and Rule 12A-4.01(6)(a), F.A.C., states that "[t]he law authorizes the appointment of agents for the collection of the tax." *Also see* Rule 12A-4.01(7), F.A.C., providing that the "clerk's" consignment account shall not exceed his bond and stipulating the procedures to be followed in closing out stamp accounts of clerks.

Upon the revision of s. 201.11(2), F. S., in 1974, pursuant to Ch. 74-325, Laws of Florida, and the amendatory provisions enacted by Ch. 76-199, Laws of Florida, the *statute* itself in terms now *requires* that the several county comptrollers or clerks of the circuit courts, as the case may be, serve as ex officio agents of the state and the Department of Revenue for the collection of the documentary stamp tax. The change in the statute did not affect the status of the clerks as *agents* but only affected their previous *permissive* status as agents. The statute, as amended, not only confers authority to act as such agents but it *imposes* a *duty* on the clerks to act and serve as the ex officio agents of the state for the collection of state taxes.

That the Legislature intended in the 1974 revision for the county comptrollers or clerks of the circuit courts to continue to serve as, and have the status of, ex officio agents of the state and the Department of Revenue for the collection of the documentary stamp tax is further evinced by the title to Ch. 74-325, *supra*, which is an act relating to county officials. The title, among other things, specifies that the act provides for "the clerk of the circuit court to serve ex officio *as agents* for the collection of the excise tax on documents." (Emphasis supplied.)

In addition, the above-cited definition in Rule 12A-4.01(3)(a), F.A.C., is still in effect defining "stamp tax agent" to include clerk of the circuit court. The passage of Ch. 74-325, *supra*, did not change the operative effect of this rule or of other Department of Revenue rules. The Department of Revenue is authorized pursuant to s. 201.11(1), F. S., to issue rules and regulations to carry out the provisions of the documentary stamp tax law. Such rules were and are prima facie valid with the force and effect of law until held otherwise by the courts. *See* Florida Livestock Board v. W. G. Gladden, 76 So.2d 291 (1954); McSween v. State Live Stock Sanitary Board of Florida, 122 So. 239 (1929).

Thus, in regard to your first question, I conclude that the circuit court clerk is acting or serving as the statutory ex officio agent of the state and the Department of Revenue for the collection of the documentary stamp tax; indeed, the statute mandates that he so serve.

Your second question asks whether a clerk of the circuit court acting as an ex officio agent of the state and the Department of Revenue must post a bond. Section 201.11(2), F. S., as amended, provides that "*[a]ll* agents . . . *shall* post a bond *as may be required by the Department* of Revenue." (Emphasis supplied.) This section also provides that the Department of Revenue *may* purchase a blanket bond with all costs associated therewith to be allocated to the agents so bonded.

The rules of the Department of Revenue carry out the provisions of the statute. Rule 12A-4.01(3)(a), F.A.C., states that clerks of the circuit courts are stamp tax agents. Rule 12A-4.01(6)(a), F.A.C., states that all agents shall be bonded *unless* on a cash basis. Rule 12A-4.08(1), F.A.C., reiterates this requirement in a provision dealing with agents' use of meter machines. Rule 12A-4.01(6)(c), F.A.C., provides that a blanket bond *will* be purchased by the Department of Revenue covering *all* agents but that the costs of such bond will be allocated to those agents so bonded, with the cost of the coverage for each agent being deducted from any commissions due that agent. Rule 12A-4.01(7), F.A.C., specifies that the clerk's consignment account shall not exceed his bond and that the bond shall be apportioned to the several accounts therein designated.

Thus, I would conclude in regard to your second question that the clerk of the circuit court acting as a statutory ex officio agent of the state and the Department of Revenue is required by the duly promulgated rules of the department to be bonded as therein provided for.

Your third question concerns the entitlement of the clerks of the circuit courts to the commission paid by the Department of Revenue to agents as compensation for collecting the documentary stamp taxes. Section 201.11(2), F. S., as amended, directs and requires that an agent be compensated at the prescribed rate *as collection costs* and that the department shall allow such compensation to such agents. *See also* Rule 12A-4.01(6)(b), F.A.C. Pursuant to s. 145.121(1), F. S., such commissions or compensation are deemed to be a portion of the income of the office of the clerk and not personal income of the clerk, and pursuant to s. 218.36(2), F. S., must be paid into the county general fund as part of the excess income of the office. *Also see* ss. 116.03, 218.36(4), and 219.06, F. S. Since the

clerk of the circuit court is the ex officio agent of the state and the Department of Revenue for the collection of the state documentary stamp taxes as required by s. 201.11(2), the clerk is not only entitled to the statutorily prescribed commission or compensation, but the statute requires that he be compensated at the prescribed rate as is any other authorized agent performing the same service for the Department of Revenue. The 1976 amendment of s. 201.11(2) made by Ch. 76-199, Laws of Florida, provides that the prescribed commission or costs of collection be paid "in the form of a deduction from the amount of the tax due and remitted" by an agent and that the department allow such deduction to the agent paying and remitting the tax "in the manner as provided for by the department."

076-207—October 11, 1976

COUNTIES

EMPLOYMENT OF COUNTY ATTORNEY NOT ALLOCATING PAYMENT BETWEEN SALARY AND EXPENSES IS LAWFUL; RETIREMENT CREDIT

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

May the Board of County Commissioners of Citrus County properly enter into a contract of employment which does not specifically set forth the amount of compensation to be paid the employee for his services as distinguished from expenses, and which contract therefore is ambiguous as to the amount of compensation for which he should be given retirement credit?

SUMMARY:

A board of county commissioners was authorized under s. 125.01(1) and (3), F. S., to enter into the 5-year employment contract with a county employee at a fixed annual compensation for all required legal services to the county and for such office expenses that such county employee may encounter. The decision to enter into such contracts, and the amount and form or manner of compensation to be paid and the terms and conditions thereof, is a decision which rests within the sound discretion of the board of county commissioners. For purposes of retirement contributions, the board has determined that the annual and monthly rate of compensation is that specified in the contract which governs for all purposes until otherwise determined by the judiciary.

You have attached a copy of the employment agreement entered into between the Board of County Commissioners of Citrus County and Mr. William F. Edwards, who is being employed by the county. This agreement indicates that the attorney is employed as an "employee" of the county subject to the terms and conditions set forth in the employment agreement. Paragraph 6 of the agreement obligates the county to pay the employee the sum of $70,000 annually for his legal services and for such office expenses as the employee may encounter. The employee's obligation is to furnish all legal services required by the county and such other Citrus County governmental agencies as the county may direct as provided therein. (*See* paragraph 2 of the agreement.) Paragraph 6 of the agreement provides that the employee "shall not be entitled to any additional remuneration for his legal services and shall not invoice the County for any additional sums except for the amounts allowed to any other governmental employee in accordance with the Florida Statutes."

The sum and substance of the agreement is that the county has employed the employee at an annual compensation of $70,000 and for such office expense as the employee may

encounter as therein set forth. The general rule pertaining to decisions of boards of county commissioners in entering into such contracts or agreements is that such decisions are within the sound discretion of the boards of county commissioners. This is recognized in the case of State *ex rel.* Himes v. Culbreath, 174 So. 422, wherein it is stated at p. 423:

> Section 2153 of the Compiled General Laws 1927, provides, among other things, that the board of county commissioners shall have power to represent the county in the prosecution and defense of all legal causes. Among the sixteen powers which are by that section of the statute conferred upon the board of county commissioners the one empowering it to represent the county in the prosecution and defense of all legal causes is made the subject of a separate paragraph. The language contained in the grant of that power by the Legislature necessarily vests the boards of county commissioners, which are the fiscal agents of the counties and intrusted with the care and management and direction and control of their properties and their public works and in whom is vested also by that section the power of taxation for specific and general purposes, *broad discretionary powers to the end that the interests of the counties in all legal causes* and controversies in which *they may be involved shall be adequately served.* (Emphasis supplied.)

The powers discussed in the quoted statute may now be found in large part in s. 125.01(1), F. S., as follows:

> The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to:
>
> * * * * *
>
> (b) Provide for the prosecution and defense of legal causes in behalf of the county or state and retain counsel and *set their compensation.* (Emphasis supplied.)

Also see s. 125.01(3)(a), F. S., which provides:

> No enumeration of powers herein shall be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such enumerated powers, including, specifically, authority to employ personnel, expend funds, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property.

Accordingly, the decision of whether or not to enter into such contract as well as the decision as to the amount and form or manner of compensation rests with the board of county commissioners and is subject to its sound discretion. Presumably, the board of county commissioners has made appropriate provisions in the budget adopted pursuant to Ch. 129, F. S., for the inclusion therein of an amount sufficient to fulfill the employment agreement which it had entered into with the present county attorney.

The authority granted pursuant to Ch. 125, F. S., is consistent with the general rule that, in the absence of constitutional restrictions, the Legislature may authorize a board of county commissioners to fix salaries of employees (20 C.J.S. *Counties* s. 122b., p. 932 and 81 C.J.S. *Statutes* s. 92., p. 1055) and that it may fix the compensation of state and county officers by fees, flat salary, or any other way, there being no prescribed formula for fixing a salary or making an appropriation for it. (State v. Lee, 197 So. 681 [Fla. 1940].)

There being no prescribed formula for fixing the compensation of county employees, this, too, rests within the discretion of the board of county commissioners. State v. Lee, *supra.* *Also see* Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936), holding that the general and specific statutory powers of county commissioners as the general administrative and fiscal officers of the county are sufficient to support implied authority in the board to employ auditors for reasonable compensation to audit the books and accounts of county fee officers.

Although you indicate that you feel that the terms of the contract are ambiguous, the contract itself reflects that the amount of compensation is definite and determinable. For purposes of retirement contributions and matching contributions, the county commission has determined that the annual rate as well as the monthly rate of compensation is that specified in the contract, and has annually so reported to the administrator of the Florida Retirement System. Such duly executed contract is prima facie valid and governs for all purposes unless otherwise determined by the courts.

In your letter you refer to the Attorney General Opinion found in the 1931 Biennial Report of the Attorney General at p. 686. That opinion dealt with Ch. 14502, 1929, Laws of Florida, which was a specific statute requiring county officials in all counties in the State of Florida who receive their compensation, in whole or in part, by fees or commissions or fees and commissions to file itemized sworn statements showing receipts and disbursements of their respective offices. That opinion is not pertinent to your request.

Your letter does not state or indicate that you feel that the board of county commissioners has been guilty of fraudulent conduct or other impropriety, and you do not state that the county attorney is not fulfilling his contractual obligations. No abuse of the discretion vested in the county commission has been demonstrated and, in any event, such matters are determinable by the judiciary and beyond the scope of my authority. Accordingly, based on the facts set forth in your letter, no abuse of discretion or improper use of county funds is indicated. This is not such a situation as was considered by this office in AGO 074-192 or AGO 073-113. Accordingly, the decisions involved in the creation of the employment contract and the terms and conditions thereof are decisions which rest within the sound discretion of the board of county commissioners. (*Also see* AGO's 058-178, 068-70, and that found in the 1951 Biennial Report of the Attorney General at p. 236.)

Section 121.021(22), F. S., defines "compensation" and provides therein in part as follows: "Under no circumstances shall compensation include fees paid professional persons for special or particular services." The manner in which the contract is drawn indicates that the county attorney is employed on a full-time basis to perform whatever legal services are required by the county and such other Citrus County governmental agencies that the county may direct and may not accept any private cases after January 1, 1973, without the express written consent of the county. The employee is given until December 31, 1972, to finalize his private practice of law. Accordingly, the contract is not one wherein the attorney is employed for special or particular services but is instead a contract of general employment.

076-208—October 14, 1976

BOARD OF BUSINESS REGULATION

NO POWER TO ADOPT RULE MANDATING PERIOD DURING WHICH PARI-MUTUEL PERMITTEE MUST OPEN FACILITIES

To: John R. Culbreath, Representative, 36th District, Brooksville

Prepared by: Staff

QUESTION:

May the Board of Business Regulation and the Division of Pari-mutuel Wagering of the Department of Business Regulation promulgate a rule which requires a pari-mutuel permittee, specifically a thoroughbred horse track, to open its stables and racing strips prior to the start of its racing season and remain open subsequent to the termination of its racing season?

SUMMARY:

Absent subsequent judicial or legislative clarification, a rule proposed by the Division of Pari-mutuel Wagering to require all horse tracks

within a 50-mile radius to open their stables and racing strips by November 1, and to remain open until 10 days beyond the closing of the winter racing season would appear to violate the necessary statutory authority requirement judicially expressed by the Florida courts.

The Division of Pari-mutuel Wagering has proposed a rule that will require all thoroughbred horse tracks within a 50-mile radius of another to open their stables and racing strips by November 1 of each year and remain open until 10 days beyond the closing date of the track operating the last period of the winter racing season. *See* proposed Rule 7E-1.02(43), F.A.C. A similar rule had been previously in effect but it was repealed in 1972.

The purpose of the rule is to assure horsemen shipping horses to the South Florida track of ample stall space. The division believes this stall availability will enhance efforts to increase the quantity and quality of horses at Florida tracks. The division has also indicated some concern about the competitive impact of year-round racing programs authorized by the states of Illinois and New York. These valid state interests have been recognized as in: Gulfstream Park Racing Association, Inc. v. Board of Business Regulation, 318 So.2d 458 (1 D.C.A. Fla., 1975) *cert. denied* 323 So.2d 290 (Fla. 1975); West Flagler Association, Ltd. v. Board of Business Regulation, 241 So.2d 369, 376 (Fla. 1970); Wilson v. Sandstrom, 317 So.2d 732 (Fla. 1975); Hialeah Racecourse, Inc. v. Gulfstream Park Racing Association, (Fla. 1971); Hubel v. West Va. Racing Commission, 513 F.2d 243 (4th Cir. 1975). The rule is expected to have a substantial economic impact upon all three operating racetracks.

Pursuant to s. 120.54(13), F. S., no agency has inherent rulemaking authority. It is clear that administrative agencies have no common-law powers and that the powers they do possess are limited to the statutes that create them. State *ex rel.* Greenberg v. Fla. St. Bd. of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla., 1974). Any rule must be reasonably related to the purposes of the enabling legislation and cannot be arbitrary or capricious to be sustained. *See also* Mourning Family Publication Service, 411 U.S. 356 (1972); Florida Citrus Commission v. Golden Gift, 91 So.2d 657; State *ex rel.* Paoli v. Baldwin, 31 So.2d 627; State *ex rel.* Burr v. Jacksonville Terminal Company, 106 So. 576. In effect, an administrative rule promulgated in the furtherance of a statute must be consistent with the provisions thereof. DeThorne v. Beck, 280 So.2d 448 (1973). Therefore, when a regulatory body is created by statute and endowed with the authority to promulgate rules and regulations to carry into effect statutory provisions, the rules and regulations must be consistent with those provisions and must not amend them. Florida Growers Co-op Transport v. Department of Revenue, 273 So.2d 142 (Fla. 1973). An administrative agency may not legislate, and its rules and regulations cannot add to or vary the nature of the extent of the authority conferred upon it by statute or change or amend the statutory law. Atlantic Coast Line Railroad Company v. Mack, 57 So.2d 447 (1952).

The division has been granted authority to "carry out the provisions" of Chs. 550 and 551, F. S., and to make rules necessary for the "holding, conducting, and operating of all race tracks, race meets, races held in this state, provided, such rules and regulations *shall be uniform in their application and effect.*" (Emphasis supplied.) State *ex rel.* Hollywood Jockey Club, Inc. v. Stein, 182 So. 863, 871 (1938); State *ex rel.* Biscayne Kennel Club v. Stein, 178 So. 133 (1938); Simmons v. Hanton, 65 So.2d 42 (Fla. 1953); State *ex rel.* Mason v. Rose, 165 So. 347 (1936). In Dept. of Business Regulation v. Vandervort, 273 So.2d 66 (Fla. 1973), the Supreme Court struck down a rule promulgated by the Division of Pari-mutuel Wagering which established a minimum jockey fee schedule for payment of jockeys in the absence of contract. In a brief per curiam opinion, the court stated that the rule was unconstitutional, reasoning as follows:

> We agree . . . that the Legislature has not specifically authorized the setting of fees, and this is too broad a power to be derived from the general statutes cited. [s. 550.01(1) and s. 550.02(4), F. S.] The Due Process Clauses of Article I, Section 9 of the Florida Constitution, F.S.A. and the 14th Amendment of the United States Constitution preclude the prescribing of minimum wages without specific legislative authorization. [273 So.2d at 67.]

The same essential conclusion, lack of statutory authority, was found in Jones v. Kind, 61 So.2d 188 (Fla. 1952) when the court concluded that the then racing commission was without authority to require a person to sever his financial interest in racing.

Of particular interest is St. Petersburg Kennel Club v. Baldwin, 38 So.2d 436 (Fla. 1949) in which a rule prohibited dog racing matinee programs during an authorized horse racing season if the tracks were within a 50-mile radius of each other. A Pinellas County dog track owner successfully challenged the rule since the rule would not be essentially uniform in application:

> We construe the words in paragraph 4, "such rules and regulations shall be uniform in their application and effect," to be of statewide application and effect, there being no attempt in the law at classification on any basis. If the rule complained of violates limitation (1) or (2) preceding paragraph in its practical application, it transcends the power of the State Racing Commission. [38 So.2d at 438.]

In this instance, the effect of the proposed rule is the same as in *Baldwin* and contrary to the statutory requirements.

The horse racing season will commence with Tropical at Calder opening around November 13 to be succeeded by Gulfstream and Hialeah. Calder will commence its summer horse racing season on or about May 13 and close on or about November 10. The effect of the rule will have all three tracks open November 1 and remain open to on or about May 21. Calder would, of course, be the only track required to remain open the entire year. That track is effectively prevented from ever closing its facilities to even be able to rebuild or take other necessary steps to ensure the safety of the attending public. Absent subsequent judicial or legislative clarification, this rule impact would appear to violate the necessary statutory authority requirement judicially expressed in *Vandervort* and *Baldwin*. *See also* Ch. 75-43, Laws of Florida.

076-209—October 14, 1976

CITY OF HIALEAH

MAY PURCHASE HIALEAH RACETRACK

To: Dale Bennett, Mayor, Hialeah

Prepared by: Staff

QUESTION:

May the City of Hialeah acquire Hialeah Racetrack under the terms outlined below?

SUMMARY:

Premised upon described procedural and contractual limitations and safeguards, the City of Hialeah may purchase the Hialeah Race Track and lease the facility to a private person pursuant to a lease-purchase agreement.

The essential aspects of the proposed purchase, as I understand them, are that the present owner of Hialeah Park, Inc., will convey fee title of the park to Mr. John Brunetti. Mr. Brunetti will in turn convey fee title to the city. Hialeah Park, Inc., will receive approximately $12.3 million as consideration for this conveyance. The city will provide $9,000,000. The city will finance its share of the purchase price through loans from various local lending institutions. These city loans will be evidenced by promissory notes secured by a purchase money mortgage on the track and will be repaid *solely* from revenue generated by the city's leasing of the park. The city will then lease the track back to Mr. Brunetti pursuant to a 30-year lease-purchase agreement. The terms of the agreement provide, among other things, that during the life of the agreement, the track will be used as a thoroughbred racing facility and for other municipal-public "recreational and educational purposes." Recognizing the time limitations imposed and

subject to the following discussion, I am of the opinion that the City of Hialeah may exercise its discretion to purchase the track in the manner described above.

Section 7 of the city charter provides that:

> The city is authorized to acquire by purchase or condemnations . . . parks, park lands . . . *or other public places* . . . and to enter into and to execute contracts, leases or mortgages thereon, at the purchase price thereof; provided, however, that the time of payment shall in no case be for a longer period than thirty years, nor shall the rate of interest on such payments exceed six percent per annum. The council is authorized to issue such evidences of indebtedness for the purchase price, *as it may deem proper*. All net revenues derived from any of the properties so purchased shall be applied on the payment of interest and creating a sinking fund for the redemption of such obligations. Any obligation issued under this section shall be exclusive of the limitation of the power of the city to issue bonds as provided in this charter. (Emphasis supplied.)

Section 166.111, F. S., of the Municipal Home Rule Powers Act, provides that:

> The governing body of every municipality may borrow money, contract loans, and issue bonds as defined in s. 166.101 from time to time to finance the undertaking of any capital or other project *for the purposes permitted by the State Constitution* and may pledge the funds, credit, property, and taxing power of the municipality for the payment of such debts and bonds. (Emphasis supplied.)

Section 166.101(8), F. S., provides that "[t]he term 'project' . . . embraces any capital expenditure which the governing body of the municipality shall deem to be made for *a public purpose*." (Emphasis supplied.) *See also* s. 166.021, F. S., providing that municipalities "may exercise any power for *municipal purposes*, except when expressly prohibited by law." (Emphasis supplied.)

Based upon the above statutory provision, the city council has the authority to borrow money to finance the track purchase, to secure such indebtedness with a mortgage (maximum 30 years at 6 percent) on the track, and to lease the track (once purchased) if done so in a manner consistent with the applicable statutory and constitutional limitations. The city does not contend that it is within an exemption enumerated in s. 10(c) and (d), Art. VII, State Const. Section 10 generally prohibits the pledging of municipal credit or taxing power to aid private entities for other than municipal purposes. Thus, the city council must conclude that the transaction and track purchase will serve a "public purchase." Bannon v. Port of Palm Beach Dist., 246 So.2d 737 (Fla. 1971).

The Florida Supreme Court in City of West Palm Beach v. Williams, 291 So.2d 572, 578 (Fla. 1974), stated that a legislative finding that a proposed undertaking would serve a valid public purpose should not be disturbed absent a showing that it is arbitrary and unfounded. *See* State v. Reedy Creek Improvement District, 216 So.2d 202 (Fla. 1968); State v. Daytona Beach Racing and Rec. Fac. Dist., 53 So.2d 34 (Fla. 1956); and State v. City of Jacksonville, 53 So.2d 306 (Fla. 1951). The proposed track purchase will be held constitutionally valid under s. 10, Art. VII, State Const., upon a sufficiently demonstrated determination that the public will be primarily benefited and any private persons only incidentally benefited.

In State v. Daytona Beach Racing & Rec. Fac. Dist., *supra*, the public purpose aspect of the Daytona Beach Motor Speedway was unsuccessfully challenged as being predominantly for private purpose. The court refused, unless blatantly erroneous, to disregard the legislative conclusion that the speedway furthered "public purposes in promoting the economic, commercial and residential development of the District." The court concluded that governmental ownership and operation of the speedway "would serve a valid public purpose."

The Florida judiciary, on many occasions, has recognized the significant governmental revenue interest and public purpose in the Florida pari-mutuel industry. Gulfstream Park Racing Association, Inc. v. Board of Business Regulation, 318 So.2d 458 (1 D.C.A. Fla., 1975) *cert. denied* 322 So.2d 979 (Fla. 1975); West Flagler Association, Ltd. v. Board of Business Regulation, 241 So.2d 369, 376 (Fla. 1970); Wilson v. Sandstrom, 317 So.2d 732 (Fla. 1975); Hialeah Racecourse, Inc. v. Gulfstream Park Racing Association, (Fla.

1971); Hubel v. West Va. Racing Commission, 513 F.2d 243 (4th Cir. 1975). The state's goal of maximizing production of tax revenue was implicitly recognized in Calder Race Course, Inc. v. Board of Business Regulation, 319 So.2d 67 (1 D.C.A. Fla., 1975). The Hialeah track's economic situation was given significant judicial recognition in *Gulfstream Park Racing Assoc. v. Bd. of Business Regulation*:

> The Board finds that it would not be in the best interest of the State if Hialeah Race Track closed its operation because that closing would adversely affect the entire thoroughbred industry within the State of Florida, and could have a deleterious effect on other revenue producing industries, not the least of which is Florida's tourist industry. Owners of horses are annually attracted to Florida's winter racing season because of the continuing operation of the three race tracks (Tropical racing at Calder, Hialeah and Gulfstream), and the Board finds in addition, that Hialeah stabled and raced an impressive list of the nation's leading thoroughbreds.
>
> * * * * *
>
> The evidence further justifies the Board's apprehension that Hialeah's closing would adversely affect the breeding industry and tourism generally. [318 So.2d at 465-466.]

These judicial determinations of the paramount public interest in the survival of the Hialeah track are buttressed by the 1975 legislative findings regarding the Florida thoroughbred pari-mutuel industry. *See* Chs. 75-42, 75-43, and 75-44, Laws of Florida. Based upon these judicial and legislative determinations of a predominant public purpose together with the submitted economic studies of the track's impact upon the city, the city council could properly find a "public purpose" in the track's purchase and is consistent with s. 10, Art. VII, State Const. It should also be noted that in addition to the sales and ad valorem taxes generated by the track's operation, the track recently produced approximately $1,800,000 in pari-mutuel taxes.

The referendum restrictions imposed by s. 12, Art. VII, State Const., are applicable only when a municipality issues bonds, certificates of indebtedness, or any form of tax anticipation certificates payable from ad valorem taxation and maturing more than 12 months after issuance. State v. County of Dade, 234 So.2d 651 (Fla. 1970); Nohrr v. Brevard County Educ. Fac. Author., 247 So.2d 304 (Fla. 1971). In *Nohrr* the court concluded that the possibility of the district's moral obligation to levy taxes or appropriate funds brought that bond issuance within the purview of s. 12. The distinguishable facts presented here are: The lease-purchase arrangements between the city and Mr. Brunetti; the city's contractual arrangement not to have any legal or moral obligation to expend any municipal funds; and the financial arrangements whereby the lending institutions have agreed never to look to the city for any financial relief and to limit their recourse to Mr. Brunetti and the property.

Based upon the submitted agreements and data, contractual assurances referenced above, and the city council's determination that a public purpose is served by purchase of the track, it is my opinion that the city may purchase the Hialeah Race Track. State *ex rel.* Dade Co. Kennel Club, Inc. v. State Racing Commission, 156 So. 343 (Fla. 1934).

076-210—October 14, 1976

PUBLIC RECORDS

EXAMINEE MAY INSPECT CIVIL SERVICE EXAM, INCLUDING THE QUESTION SHEET AND ANSWERS, AFTER COMPLETING THE EXAM

To: Ralph W. Miles, City Attorney, Hialeah

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does an examinee have the right to inspect the results of a completed civil service promotional examination, including questions and answer sheets, after the examination has been completed?

SUMMARY:

An examinee has the right to inspect the results of a completed civil service promotional examination, including questions and answer sheets, after the examination has been completed.

Section 119.01, F. S., as amended, states that "[i]t is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person." Section 119.07(1) and (2)(a), F. S., provides:

> (1) Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee. The custodian shall furnish copies or certified copies of the records upon payment of fees as prescribed by law or, if fees are not prescribed by law, upon payment of the actual cost of duplication of the copies. Unless otherwise provided by law, the fees to be charged for duplication of public records shall be collected, deposited, and accounted for in the manner prescribed for other operating funds of the agency.
> (2)(a) All public records which presently are provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt from the provisions of subsection (1).

The examination questions and answer sheets are public records which must be made available for public inspection and examination unless made confidential *by law. Accord:* Attorney General Opinion 074-259.

Section 119.07(2)(c), F. S., exempts from the mandatory inspection provisions of s. 119.07(1) the following:

> (c) Examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure, certification, or employment. . . . *However, an examinee shall have the right to review his own completed examination.* (Emphasis supplied.)

Thus, while the examination questions and answer sheets of examinations administered for purposes of licensing, certification, or employment are in terms exempt from public inspection under s. 119.07(1), F. S., the law reserves unto the examinee the right to review his own completed *examination* duly administered for such purposes.

It is difficult to conceive how a right of review of administered or completed examinations or examination results by an examinee could be meaningful without a corresponding right to review the examination questions in conjunction with the answer sheets. Moreover, the term "examination" has been defined to include the test itself as well as the list of questions asked and the answers, statements, etc., supplied by the person examined. *See Random House Dictionary,* Unabridged Edition (N.Y. 1967). Section 119.07(2)(c), F. S., contains a proviso which, in legal effect, reserves unto the examinee the legal right to inspect and examine the examination questions administered and his answer sheets, *i.e.*, the completed examination itself as it pertains to him which, by virtue of the proviso, falls within the purview of s. 119.07(1), F. S. In this regard the proviso is a limitation or restraint upon, and an exception from, the confidentiality features of s. 119.07(2)(c). *See* Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); State v. State Racing Commission, 112 So.2d 825 (Fla. 1959). In construing a statute, a court must ascertain and give effect to legislative intent regarding provisos as well as other parts of the statute. Therrell v. Smith, 168 So. 389 (Fla. 1936). Thus, I am of the opinion that, regardless of whether the confidentiality provisions of s. 119.07(2)(c) apply to a civil service promotional examination, an examinee pursuant to s. 119.07(2)(c) nevertheless

retains the right to review his own completed examination including the questions administered and their answer sheets.

While the Civil Service Board of the City of Hialeah has the authority to promulgate rules and regulations governing procedures for administering examinations, it has no authority to adopt a rule which adds to or subtracts from or in any way alters the provisions of Ch. 119, F. S. The Public Records Law specifically provides that exceptions to s. 119.07(1) may be provided for by law. In the absence of a statute authorizing public agencies to adopt rules regarding confidentiality of records, such a rule may not validly be adopted if the effect of the rule is to alter s. 119.07(1) in any way. *See* Industrial Foundation of the South v. Texas Industrial Accident Board, 19 Texas Supreme Court Journal 417, July 21, 1976.

The Texas Supreme Court observed the following in *Industrial Foundation of the South, supra*, at 422, regarding a confidentiality rule which went beyond the scope of Texas' Open Records Law:

> Many statutes make various records kept by state agencies confidential. See, e.g., TEX. REV. CIV. STAT. ANN. art. 695j-1, s. 10 (Supp. 1975-1976); art. 5547-12a (Supp. 1975-1976); and art. 4445c. s. 4 (Supp. 1974). It is clear that the records covered by these statutes fall within Section 3(a)(1)'s exception for records made confidential by statute. While a rule may have the force and effect of a statute in other contexts, we do not believe that a governmental agency may bring its information within exception 3(a)(1) by the promulgation of a rule. *To imply such authority merely from general rule-making powers would be to allow the agency to circumvent the very purpose of the Open Records Act. Absent a more specific grant of authority from the Legislature to make such a rule, the rule must yield to the statute.* (Emphasis supplied.)

Since no charter act or special law grants to the civil service board authority to promulgate rules regarding confidentiality of examinations and answer sheets, the provisions of s. 119.07(1) and (2), F. S., apply and require the board to permit examinees to review their own completed examinations, including questions as well as answer sheets.

076-211—October 18, 1976

MUNICIPALITIES

NO POWER TO REGULATE LOCATION OF VENDORS OF BEER FOR OFF-PREMISES CONSUMPTION; MAY REGULATE HOURS OF BUSINESS OF SUCH VENDORS

To: Harvey R. Klein, Reddick Town Attorney, Ocala

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTIONS:

> **1. Does a municipality have the power to adopt an ordinance which establishes distance limitations between vendors of beer to be consumed off the premises and churches and schools?**
>
> **2. Does a municipality have the power to adopt an ordinance regulating the hours of business of vendors of beer to be consumed off the premises?**

SUMMARY:

> **In light of s. 563.02(1)(a), F. S., a municipality does not have the authority under general law to establish by ordinance distance limitations between vendors of beer to be consumed off the premises and churches and schools. A municipality does have the power to establish**

such distance limitations by ordinance as to other alcoholic beverage vendors.

Pursuant to s. 168.07, F. S. 1971, as preserved in effect by s. 166.042(1), F. S., and s. 562.45(2), F. S., a municipality has the power to adopt an ordinance regulating the hours of business of vendors of beer to be consumed off the premises.

AS TO QUESTION 1:

In AGO 076-40, it was concluded that, pursuant to s. 168.07, F. S. 1971, as preserved in effect by s. 166.042(1), F. S., of the Municipal Home Rule Powers Act and s. 562.45(2), F. S., of the State Beverage Law, municipalities have the power to establish by ordinance distance limitations between alcoholic beverage vendors and other alcoholic beverage vendors and between alcoholic beverage vendors and churches and schools, provided, of course, that such power is not exercised unreasonably or arbitrarily. *Cf.* AGO 074-319. Section 168.07, F. S. 1971, repealed by Ch. 73-129, Laws of Florida, the Municipal Home Rule Powers Act, provided in part that municipalities "may regulate and restrain tippling, barrooms and all places where beer, wine or spirituous liquor of any kind is sold." Section 166.042(1), F. S., provides in effect that municipalities may continue to exercise all powers conferred on them by the statutory provisions repealed by Ch. 73-129, including s. 168.07, and s. 562.45(2), F. S., provides as follows:

> Nothing in the Beverage Law contained shall be construed to affect or impair the power or right of any incorporated municipality of the state hereafter 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 corporate limits of such municipality. (Emphasis supplied.)

However, it was also noted in AGO 076-40 that s. 563.02(1)(a), F. S., creates an exception to this continuing municipal authority to regulate the "location of place of business" of alcoholic beverage vendors. Section 563.02(1)(a) provides as follows:

> (1) Each vendor of malt beverages containing alcohol of more than 1 percent by weight shall pay an annual state license tax as follows:
> (a) Vendors operating places of business where beverages are sold only for consumption off the premises, an amount equal to 50 percent of the amount of the license tax herein provided for vendors in the same county operating places of business where consumption on the premises is permitted. *Vendors holding such off-premise sales licenses shall not be subject to zoning by municipal and county authorities.* (Emphasis supplied.)

Accordingly, consistent with AGO 076-40, I am of the opinion that a municipality does not have the power under general law to adopt an ordinance which establishes distance limitations between vendors of beer to be consumed off the premises and churches and schools. *See, generally*, 8 McQuillin *Municipal Corporations* s. 25.132, pp. 425-426; *cf.* AGO's 074-362, 062-123, and 076-98.

Your first question is answered in the negative.

AS TO QUESTION 2:

In AGO 074-362, it was concluded that, pursuant to s. 168.07, F. S. 1971, as preserved in effect by s. 166.042(1), F. S., and s. 562.45(2), F. S., municipalities have the power to regulate the hours of business of vendors of alcoholic beverages located within municipal boundaries. *See also* ss. 561.29(1)(a) and 562.14, F. S., the latter statute prescribing the hours of sale of alcoholic beverages in the absence of an applicable county or municipal ordinance. Thus, consistent with AGO 074-362, and since s. 563.02(1)(a), F. S., exempts vendors of beer to be consumed off the premises from municipal and county *zoning*, but not from municipal regulations pertaining to the *hours of business* of vendors of alcoholic beverages, I am of the opinion that a municipality has the authority to regulate the hours of business of a vendor of beer to be consumed off the premises. *See, generally*, 8 McQuillin *Municipal Corporations* s. 25.53, pp. 132-134.

Your second question is answered in the affirmative.

076-212—November 10, 1976

MUNICIPALITIES

MAY REQUIRE CONTRACTORS ON PUBLIC WORKS CONTRACTS TO PAY PREVAILING WAGE RATE, INCLUDING FRINGE BENEFITS

To: Frank H. Weston, Acting City Attorney, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May a municipality lawfully enact an ordinance requiring contractors to pay a prevailing wage rate, including fringe benefits, on public works contracts let by the municipality?

SUMMARY:

Pending legislative or judicial clarification, a municipality has the authority to enact an ordinance requiring contractors to pay a prevailing wage rate, including fringe benefits, on public works contracts let by the municipality.

Section 215.19, F. S., provides in part that:

> (1)(a) Every contract in excess of $5,000 in amount to which the state, any county or municipality in the state, or any political subdivision of the state or other public agency or authority is a party which requires or involves the employment of free laborers, mechanics, or apprentices in the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall contain a provision that the rate of wages for all laborers, mechanics and apprentices, if such apprentices are available in the area in which the said public work is located, employed by any contractor or subcontractor on the work covered by the contract shall be not less than the prevailing rate of wages for similar skills or classification or work in the city, town, village or other civil division of the state in which the said public work is located, which provision shall refer to and incorporate this section in the contract by reference.

A schedule of prevailing wages furnished by the Division of Labor, Department of Commerce, is required to be inserted into the specifications, and such schedule shall, for the purpose and duration of the contract, be deemed the prevailing wage rate as contemplated by this section regardless of any previous or subsequent determination. Section 215.19(1)(b), F. S. Every request for payment made by the contract on such project must contain an affidavit that all provisions of this section (*i.e.*, s. 215.19, F. S.) have been complied with by the contractor and, to the best of his knowledge, by all of his subcontractors. Section 215.19(1)(c). Employers of apprentices on public works projects are required to file with the division at Tallahassee within 15 days from the date of employment the name, classification, and wage rate applicable to each apprentice employed on the job. Section 215.19(1)(d). The Division of Labor is required to make a continuing study to determine the prevailing wage rates of laborers, mechanics, and apprentices employed in work similar to that contemplated by s. 215.19 in the various parts of the state and shall furnish such schedule upon request. Section 215.19(2)(a). Prior to publication of invitations to bid, every public contracting authority in the state must notify the division of the nature and magnitude of the work and its location. Section 215.19(2)(b). The wage schedule must be posted on the job, and the contractor shall mail to the division in Tallahassee an affidavit stating that the notice has been posted and is being maintained. Section 215.19(2)(c). Section 215.19(3)(a)-(e) sets forth a detailed procedure for handling grievances of laborers who allegedly have not been paid the prevailing wage and for investigations into allegations regarding noncompliance with the act and disposition of disputes by the division. Section 215.19(8) makes the knowing violation, by a contractor or subcontractor, of the provisions of s. 215.19 or of a lawful

order or rule of the contracting authority or of the Division of Labor authorized by said act a misdemeanor of the second degree. Additionally, the Division of Labor is required to include in its legislative budget request the estimated amounts needed for administering the provisions of this section, and the Legislature shall appropriate such amounts as it deems necessary for this purpose. Section 215.19(7).

It cannot be disputed that the City of Miami, as a municipal corporation, has the authority under its police powers to regulate in the area of minimum wages. West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937). The question then becomes: To what extent was that authority proscribed, restricted, or abrogated by the enactment of s. 215.19, F. S., Florida's Prevailing Wage Law? While in some jurisdictions the answer to this question would involve simply an analysis of s. 215.19, in order to determine whether this statute constitutes a legislative preemption of the field in Florida, other factors must be considered: Among these, the constitutional and statutory relationship existing between Florida's municipalities and the state, the legislative intent surrounding the enactment of s. 215.19, and the purpose to be served by such legislation.

When considering issues of preemption and state power vis-a-vis municipal regulation, the courts have generally followed two lines of reasoning. On one hand, a number of states have adopted a traditional preemption view which entirely prohibits municipal regulation of a subject area which has been found to be preempted to the state. *See* Wholesale Laundry Board of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862 (1962). A general statute dealing with state functions applicable statewide cannot be changed by the enactment of a local law. *See* City of Utica v. Mercon, 336 N.Y.S.2d 880, 882 (N.Y. Sup. Ct. 1972); City of Minnetonka v. Mark Z. Jones Assoc., 236 N.W.2d 163 (Minn. 1975). Underlying these cases is the presumption that the state is sovereign and the municipalities possess only such powers as are clearly conferred upon them by law. *See* Greene v. City of Winston-Salem, 213 S.E.2d 231 (N. C. 1975). The validity of municipal enactments is dependent upon their not being *inconsistent* with any general law of the state. City of Utica, *supra*. Until recently, it could be persuasively argued that Florida, notwithstanding s. 2(b), Art. VIII, State Const., was among those states which adopted a restrictive view toward the existence of municipal powers. For example, early Florida cases repeatedly stress that municipalities, as creatures of the Legislature, may exercise only such powers as are conferred by express or implied provisions of law, and all doubts as to the existence of a power in a municipality are resolved against the city. *See* State *ex rel.* Friaz v. Burr, 84 So. 61 (Fla. 1920); Town of Bithlo v. Bank of Commerce, 110 So. 837 (Fla. 1926). *See also* City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972); Rinzler v. Carson, 262 So.2d 661 (Fla. 1972).

On the other hand, a more flexible view of municipal powers has been formulated which generally forbids municipal regulation *only* when an ordinance seeks to prohibit that which a statute expressly permits. No conflict would be found where an ordinance merely seeks to supplement the burdens imposed by the statute, provided the additional burdens are logically consistent with the statutory purpose. *See* City of Indianapolis v. Sablica, 342 N.E.2d 853 (Ind. 1976); City of Baltimore v. Sitnick, 255 A.2d 376 (Md. 1969); County Council v. Montgomery Assoc. Inc. 333 A.2d 506 (Md. 1975).

It has been stated in reference to the subject of municipal ordinances that, as a general proposition, additional regulation to that of the state law does not constitute a conflict. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith. *See* American Nat'l Bldg. and Loan Assoc. v. Mayor and City Council, 224 A.2d 883 (Md. 1961), citing 37 Am. Jur. *Munic. Corp.* s. 156.

This view of municipal powers has been referred to as the doctrine of "concurrent powers" and is utilized as an alternative to the doctrine of preemption by occupation when warranted. As stated in American Nat'l, *supra*, at 887,

> It would appear that the tests of general law were devised not to draw an impermeable line between the authority of the City and the State, but rather to merely define the inclusive limits of the state's powers. "General" under this test merely means that the subject is of sufficient statewide effect to give the State authority to legislate. It does not mean that it is not of significant local effect to give the city at least concurrent power to legislate. . . .

This doctrine was initially formulated in Maryland, which, like Florida, possesses constitutional and statutory "home-rule" provisions which seek to assure to municipalities and/or counties "the power of self-government and freedom from

interference by the legislature in the exercise of that power." City of Baltimore v. Sitnick, *supra*, at 379. Maryland, like Florida, found it necessary to delegate to political subdivisions the power to enact local laws in order to reduce the "log-jam" of local bills which occurred during the legislative session and to permit local legislation to be enacted by those directly affected by it without interference by representatives from other sections of the state.

Florida's Municipal Home Rule Powers Act, s. 166.021, F. S., has been said to constitute a legislative recognition that the *powers* of municipalities are derived directly from the Constitution. City of Temple Terrace v. Hillsborough Ass'n of Retarded Citizens, 322 So.2d 571, 576 (2 D.C.A. Fla., 1975), *aff'd*, 332 So.2d 610 (Fla. 1976). Chapter 166, F. S., is an attempt to return as broad a control as possible over municipal governmental matters directly to the municipalities. The provisions of s. 166.021 are to be construed so as to secure for municipalities the broad exercise of home-rule powers granted by the Constitution. Thus, in light of s. 2(b), Art. VIII, State Const., and s. 166.021, the continued validity of the Florida cases cited, *infra*, which adopted a restrictive view of municipal powers is highly questionable. Instead, Florida would appear to be among those states, such as Maryland, which do not resolve conflicts between the state and its political subdivisions on the sole basis of preemption but instead look also to the purpose of the local regulation in light of the home-rule powers possessed by municipalities. *Cf.* City of Temple Terrace, *supra*, at 577.

The payment of prevailing wages would appear to be an area in which uniformity would be neither desired nor required and which, of necessity, would vary greatly among the various parts of the state. An ordinance which requires the payment of fringe benefits on public works projects let by a municipality would foster the same purpose as does s. 215.19, F. S., namely, to prohibit the payment of substandard wages, thereby depressing the labor market. The higher cost of living in an urban area and the more severe substandard housing and construction problems could justify additional municipal regulation on the basis that the state and municipality might act concurrently on the subject matter. *See* City of Baltimore v. Sitnick, *supra*, at 384. Certainly, local elected officials are aware of the unique conditions within their municipalities and should be given broad leeway to act on behalf of the people they represent when the subject is one which is suited to decentralized control and when the Legislature has not forcibly expressed a strong intent to occupy the entire field. Additionally, prevailing wage provisions are to be liberally construed to effectuate their purpose, namely, to protect government employees from substandard earnings by fixing a *floor* under wages on government projects. Walker v. County of Los Angeles, 361 P.2d 247 (Cal. 1961); O. G. Sansone Co. v. Department of Transportation, 127 Cal. Rptr. (Ct. App. 2d 1976).

In certain areas, any local regulation would obviously run counter to the clear legislative purpose of the enactment. *See, e.g.*, County Council v. Montgomery Assoc. Inc., 333 A.2d 596 (Md. 1975). This does not, however, appear to be the case regarding ordinances defining the prevailing rate of wages to be paid on public works projects within a municipality.

Section 215.19, F. S., does not expressly prohibit the payment of fringe benefits on public works projects. The Prevailing Wage Law prohibits the payment of *not less than* the prevailing rate of wages on such projects. Thus, while the Legislature has required that a certain prescribed minimum wage be paid on such projects, it has not expressly prohibited municipalities, pursuant to their home-rule powers, from adding to this minimum requirement if local conditions and the purpose of the law are best served by such action. While the Legislature has not required municipalities without local ordinances regulating this subject to pay fringe benefits, *see* AGO 074-200, neither has it expressly prohibited municipalities which desire to enact such legislation from so proceeding.

While it is obviously impossible to state definitely which position the Florida courts would adopt regarding this question, I am inclined to the view that, pending legislative or judicial clarification, the municipalities may enact local ordinances which require the payment of fringe benefits on municipal public works projects in keeping with the intent of the Municipal Home Rule Powers Act, the purposes to be served by enactment of prevailing wage laws, as well as recent Florida decisions which indicate a significant shift in favor of local control over subjects of legitimate local concern and away from a restrictive sovereign preemption view.

076-213—November 10, 1976

BIRTH CERTIFICATES

AMENDMENT TO REFLECT SEX CHANGE IMPERMISSIBLE

To: Elaine Gordon, Representative, 98th District, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Is amendatory legislation required in order to permit the State Registrar to amend birth certificates issued to individuals who have undergone sex reassignment surgery?

SUMMARY:

Amendatory legislation is required in order to permit the State Registrar to amend birth certificates issued to individuals who have undergone sex reassignment surgery.

Pursuant to s. 382.49, F. S., the State Registrar is empowered and directed to correct any error of a general nature pertaining to date of birth, sex of child, or other information necessary to the issuance of a birth certificate and to correct any error of a clerical nature. The registrar is specifically prohibited by statute, *see* s. 382.49(3), from making any rule superseding s. 382.49.

Moreover, you have enclosed in your letter information indicating that this issue was litigated in Patte v. Prather, Case No. 74-7359 CA (4th Cir. 1974), and in that case the Honorable John S. Cox, Circuit Judge, ruled that the court did not have the authority to order a birth certificate amended.

It has been repeatedly held that administrative agencies are "creatures of statute" and their authority is strictly limited to the statutes that create them. State *ex rel.* Greenberg v. State Board of Dentistry, 297 So.2d 628, 635 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); Atlantic Coast Line R. Co. v. State, 154 So. 255 (Fla. 1932). Their power to enact rules and regulations is limited to "the yardstick laid down by the legislature." Lee v. Delmar, 66 So.2d 252 (Fla. 1953).

No authority exists in s. 382.49, F. S., for the registrar to adopt a policy via rule which would permit the action contemplated by your question. Rule 10D-50.03(2), F.A.C., empowers the bureau to make major corrections (which include change of sex) to birth certificates only when accompanied by an affidavit of the attendant at birth. Therefore, it is apparent that the fact that an individual changes sex after birth is irrelevant for purposes of s. 382.49. What the birth certificate records is information at birth.

Accordingly, in light of s. 382.49, F. S., and the administrative rules promulgated thereunder and the order of the circuit court in Patte v. Prather, *supra*, the bureau is not authorized or empowered to amend birth certificates issued to individuals who have undergone sex reassignment surgery. Amendatory legislation specifically permitting such alteration would be required before the bureau could lawfully comply with such a request.

076-214—November 12, 1976

JUVENILES

JUVENILES TAKEN INTO CUSTODY FOR COMMISSION OF MISDEMEANORS MAY BE FINGERPRINTED AND PHOTOGRAPHED

To: Guy C. Bliss, Lake County Sheriff, Tavares

Prepared by: Charles W. Musgrove, Assistant Attorney General

QUESTION:

May juveniles taken into custody on charges which would be misdemeanors if committed by adults be fingerprinted and photographed?

SUMMARY:

Any juvenile taken into custody upon probable cause that he has committed an offense which would be a misdemeanor if he were an adult may be fingerprinted and photographed. Any fingerprints and photographs so taken should be handled in accordance with s. 39.03(6)(a) and (b), F. S.

Section 39.03(6), F. S., provides as follows:

(6)(a) Any child taken into custody upon probable cause that he has committed an act which would be a felony if he were an adult shall be fingerprinted and photographed by the law enforcement agency taking said child into custody. Said fingerprints and photographs so taken shall be kept by the agency making such fingerprints and photographs in a separate file maintained by said agency for that specific purpose only. Such record shall not be a public record and shall not be subject to use by anyone other than officials of law enforcement agencies, the court, the child, the parents or legal custodians of the child, or their attorneys. However, the records of any child may, in the discretion of the court, be opened to inspection by anyone upon a showing of good cause. Said fingerprints and photographs so taken shall be retained in said separate file as a nonpublic record and produced in the court whenever directed by the court. If said child is not cited or referred to the court, if the child is found to be not delinquent, or if the child is adjudicated a delinquent for an offense that would be less than a felony under the criminal laws of this state if such child were an adult, then the court in its discretion may order all originals and copies of said fingerprints and photographs promptly destroyed. If said child is adjudicated a delinquent for an offense which would be a felony under the criminal laws of this state if such child were an adult, or in the absence of an order from the court ordering the fingerprints and photographs destroyed as hereinabove provided, then the law enforcement agency taking the said fingerprints and photographs shall retain the originals thereof. The law enforcement agency taking fingerprints and photographs pursuant to this subsection shall immediately thereafter forward adequate duplicate copies as required under this subsection to the court along with the written offense report relating to the matter for which the child was taken into custody. Except as otherwise provided by this subsection, the court, after adjudication of the case, shall forward duplicate copies of said fingerprints and photographs, together with the child's name, address, date of birth, age, and sex, to the following agencies:

1. The Department of [Criminal] Law Enforcement;
2. The sheriff's department of the county in which the said law enforcement agency is located, in order to maintain a central juvenile identification file in each county; and
3. The law enforcement agencies of municipalities within their respective county having a population in excess of 50,000 persons.

(b) All fingerprints and photographs taken pursuant to this subsection, including all duplicate copies thereof furnished pursuant to this subsection, shall be marked "Juvenile Confidential" and kept in a separate file by each law enforcement agency having possession thereof, and shall not be considered public records. Each such agency shall be subject to the same restrictions concerning the use of these fingerprints and photographs as enumerated herein for the Department of [Criminal] Law Enforcement. The Department of [Criminal] Law Enforcement shall use these fingerprints and photographs only for the purpose of making an identification. If an identification is made, the Department of [Criminal] Law Enforcement shall advise the forwarding law enforcement agency of this fact and of the name and last known address of the

child whose photographs have been identified or whose fingerprints match the latent prints forwarded to the department. The technician of the Department of [Criminal] Law Enforcement who makes the identification shall be available for the purpose of giving testimony as to such identification. Fingerprints and photographs received pursuant to this subsection by the Department of [Criminal] Law Enforcement shall be kept until the child reaches his 21st birthday. At the end of such period they shall be destroyed. These fingerprints and photographs shall not be public records, and no copies shall be made available to any person or agency at any time, except as otherwise provided pursuant to this subsection or for good cause shown upon order of the juvenile court.

(c) Nothing contained in this subsection shall prohibit the fingerprinting or photographing of child traffic violators. All records of child traffic violations shall be kept in the full name of the violator and shall be open to inspection and publication in the same manner as adult traffic violations.

(d) Nothing contained in this subsection shall apply to photographing of children by the Department of Health and Rehabilitative Services.

Thus, there is statutory authority for fingerprinting and photographing juveniles who commit felonies or traffic offenses, but no mention of juveniles who commit misdemeanors. By the same token, there is no statutory prohibition against fingerprinting or photographing juvenile misdemeanants.

I am of the view that the authority to fingerprint and photograph offenders taken into custody upon probable cause inheres in the duties and powers of a peace officer. As stated in 80 C.J.S. *Sheriffs and Constables* s. 42, these duties include the obligation to investigate crimes and to use all means provided by law to accomplish these goals. The useful public purposes to be accomplished by fingerprinting and photographing offenders is well recognized in both Florida and federal case law, such as Gentille v. State, 190 So.2d 200 (3 D.C.A. Fla., 1966), and Schmerber v. California, 388 U.S. 263 (1967). In AGO 073-74, I concluded that municipal police officers had the power to fingerprint persons they arrest, despite the absence of express statutory authority, and I adhere to the reasoning of that opinion.

Until substantially rewritten (by Ch. 69-113, Laws of Florida), s. 39.03(6), F. S., prohibited the fingerprinting or photographing of juvenile offenders except upon special order of the court or after adjudication of an act which would be a felony if committed by an adult, *see* Ch. 67-116, Laws of Florida. If there were no authority to fingerprint or photograph juveniles, the prohibition would have been unnecessary. When the Legislature removed the prohibition, the authority to fingerprint and photograph juvenile offenders necessarily returned, unless the current statute could somehow be said to demonstrate a contrary intent. It is difficult to ascribe any intent to the Legislature to protect juvenile misdemeanants when the statute authorizes juvenile traffic offenders to be fingerprinted and photographed.

As a note of caution, I suggest that the procedure of s. 39.03(6)(a) and (b), F. S., as to storage, usage, dissemination, and destruction of such fingerprints and photographs should be strictly adhered to, even though it does not directly apply to juvenile misdemeanants.

076-215—November 12, 1976

TAXATION

DOCUMENTARY STAMP TAX PENALTY IS MANDATORY AND DEPARTMENT OF REVENUE MAY NOT IMPOSE LESSER PENALTY

To: Henry B. Sayler, Senator, 20th District, St. Petersburg

Prepared by: Harold F. X. Purnell, Assistant Attorney General

QUESTION:

Does the Department of Revenue have the discretionary authority to assess the documentary stamp tax penalty, or any portion thereof, found in s. 201.17(2), F. S. 1975?

SUMMARY:

Section 201.17(2), F. S. 1975, the documentary stamp tax penalty statute, has been judicially construed as providing a mandatory rather than a discretionary penalty. Consequently, the Department of Revenue is without authority to assess less than the full penalty provided therein.

Section 201.17(2), F. S. 1975, provides:

> Any document, instrument, or paper upon which the tax under this chapter is imposed and which, upon audit or at time of recordation, does not bear the proper value of stamps *shall subject* the person or persons liable for the tax upon the document, instrument or paper to:
> (a) Purchase of the stamps not affixed; and
> (b) Payment of penalty to the Department of Revenue equal to the purchase price of the stamps not affixed. This penalty is to be in addition to and not in lieu of any other penalty imposed by law.

Your opinion request centers on the issue of whether the use of the term "shall subject" in this penalty statute is indicative of a legislative intent to impose a discretionary rather than mandatory penalty. For the reasons stated below, this question must be answered in the negative.

Section 201.17(2), F. S., has been judicially construed on two occasions. Dominion Land and Title Corporation v. Department of Revenue, 320 So.2d 815 (Fla. 1974), was the first such case, and it presented to the Supreme Court a full scale challenge to the constitutionality of s. 201.17(2). Among the contentions advanced in support of the alleged unconstitutionality of this statute was the assertion that by using the term "shall subject" the Legislature indicated an intent to impose a discretionary penalty. Under this theory it was contended that, since the Department of Revenue imposed the penalty and the Legislature had not provided any guidelines relative to the situations in which the penalty could be waived, the department's power to impose a discretionary penalty constituted an unconstitutional delegation of legislative authority.

The Supreme Court rejected this argument, however, ruling:

> It is our view, and we so hold, that Section 201.17(2), Florida Statutes, is constitutional. The Legislature's power in the field of taxation is plenary; such legislative power to tax necessarily carries with it the power to fix reasonable penalties to insure the collection of such taxes. *As observed by the trial court, the common method for insuring and protecting the collection of excise taxes enacted pursuant to such taxing power is through the imposition of a mandatory penalty upon the performance of the act being taxed without payment of the excise.*
>
> * * * * *
>
> Unfairness alone does not render a law unconstitutional. In each instance the circumstances will be different, and courts have no magic yardstick by which to reduce the penalty based upon intentions and attitudes of taxpayers. Although we recognize the severity of the penalty herein, we do not find the law unconstitutional. If the law is too harsh, it should be changed by the Legislature and not by this Court. [320 So.2d at 818-819; emphasis supplied.]

In the second case to reach the judiciary, Associated Dry Goods Corporation v. Department of Revenue, 335 So.2d 832 (1 D.C.A. Fla., 1976), the court had before it the question of whether the penalty imposed by s. 201.17(2), F. S., applied to a delinquent tax assessment involving revolving charge accounts. Such documents by law, s. 201.08(2), F. S., do not have to have the stamps physically affixed thereto, while the penalty,

pursuant to s. 201.17(2), is assessed in an amount equal to the purchase price of the stamps "not affixed."

In upholding the application of the penalty, the First District held:

> . . . the legislature required the purchase by the seller of the stamps "not affixed," and *then mandated a penalty upon the failure to purchase the stamps not affixed.*
>
> * * * * *
>
> The cardinal rule in the construction of statutes is to ascertain the legislative intent in the enactment of law. [case omitted]. *In our view it is crystal clear that the legislature intended that those who failed to timely purchase required documentary stamps,* whether the same were to be "affixed" to a deed or "not affixed" to a charge slip, would be subject to a penalty in the amount not timely purchased. By way of caveat, we recognize that the *inflexible penalty equal to the purchase price of the stamps not affixed mandated by the legislature* may well be an unduly harsh penalty in many instances; however, relief of same is a matter of legislative conscience—not of the judiciary. [335 So.2d at 833-834; emphasis supplied.]

Consequently, based upon the decisions in Associated Dry Goods Corporation v. Department of Revenue, *supra*, and Dominion Land and Title Corporation v. Department of Revenue, *supra*, including the express rejection in the latter case of the contention that the use of the term "shall subject" evidenced a legislative intent to impose a discretionary penalty, your question posed at the outset of this opinion must be answered in the negative.

076-216—November 12, 1976

STATUTES

EFFECT OF INCORPORATION BY REFERENCE

CRIMINAL LAW

ALTERNATIVE PROSECUTION UNDER DIFFERENT STATUTES

To: Eugene T. Whitworth, State Attorney, Gainesville

Prepared by: Staff

QUESTION:

May a person be prosecuted for the offense defined by s. 228.091, F. S., which occurred subsequent to the repeal of s. 821.19, F. S. 1973, by Ch. 74-383, Laws of Florida, or must such prosecution now be brought under s. 810.08, F. S., as amended by Ch. 76-46, Laws of Florida?

SUMMARY:

The repeal of s. 821.19, F. S. 1973, by Ch. 74-383, Laws of Florida, did not operate upon or affect s. 228.091, F. S., so that a person who has committed an act which constitutes an offense under s. 228.091 may still be prosecuted for a trespass upon public lands as formerly prohibited by s. 821.19 and, if found guilty, may be punished for the commission of a misdemeanor of the second degree.

A person may be prosecuted under s. 810.08, F. S. (1976 Supp.), for an act which constitutes the offense defined thereby even though the same act may also constitute an offense under s. 228.091, F. S.

Section 228.091, F. S., enacted by Ch. 68-3, Laws of Florida, provides as follows:

> In any case in which a person who is not a student, officer, or employee of a community college, state university, or public school and who is not required by his employment by the institution involved to be on the campus or any other facility owned, operated, or controlled by the governing board of any such community college, state university, or public school enters the campus of such community college, state university, or public school and is committing any act tending to interfere with the normal, orderly, peaceful, or efficient conduct of the activities of such campus or facility, the chief administrative officer or employee designated by him to maintain order on such campus or facility may direct such person to leave such campus or facility. If such person fails to do so, *such person shall be guilty of trespass upon public lands as prohibited by s. 821.19 and shall be punished accordingly.* (Emphasis supplied.)

Section 821.19, F. S. 1967, provided at the time of the original enactment of s. 228.091, F. S., as follows:

> Trespass upon state lands is prohibited, and any person found guilty of such trespass shall be deemed guilty of, and punished as for, a misdemeanor; provided, this section shall not apply to any lands, title to which is now vested or which may hereafter vest in the state by reason of any tax sale certificate.

This section was enacted by Ch. 16185, 1933, Laws of Florida, subsequently amended by Ch. 71-136, Laws of Florida, relating to the reclassification of criminal penalties, and repealed by Ch. 74-383, Laws of Florida, the Florida Criminal Code.

It is a general rule that in the construction of a reference statute, *i.e.*, a statute which incorporates the terms of another statute by reference, the statute referred to is treated and considered as if it were incorporated into and formed part of the reference statute. The two statutes exist as separate, distinct legislative enactments, each having its appointed sphere of action, and the alteration, change, or repeal of one does not operate upon or affect the other. *See* Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918); 1A *Sutherland Statutory Construction* s. 23.32, pp. 278-279. Applying this general rule here, the terms of s. 821.19, F. S. 1967, as quoted *supra*, were incorporated into and formed part of s. 228.091, F. S., upon the latter's enactment into law. The two statutes existed as separate, distinct legislative enactments, and the subsequent amendment to and repeal of s. 821.19 did not operate upon or affect s. 228.091. Thus, a person who has committed an act which constitutes an offense under s. 228.091 may still be prosecuted for a trespass upon public lands as formerly prohibited by s. 821.19 and, if found guilty, may be punished for the commission of a misdemeanor of the second degree, notwithstanding the repeal of s. 821.19, F. S. 1973, by Ch. 74-383, Laws of Florida. *See* s. 775.081(2)(b), F. S., which provides in part that "[a]ny crime declared by statute to be a misdemeanor without specification of degree is of the second degree."

As to whether a person who has committed an act which constitutes an offense under s. 228.091, F. S., may be prosecuted under s. 810.08, F. S., as amended by Ch. 76-46, Laws of Florida, relating to trespass in structure or conveyance, the Florida Legislature properly provides punishment for a wide variety of offenses, and the state is at liberty to prosecute an individual under several different characterizations of essentially the same criminal episode. *See* Benson v. State, 301 So.2d 503 (2 D.C.A. Fla., 1974); Edmond v. State, 280 So.2d 449 (2 D.C.A. Fla., 1973). Thus, a person may be prosecuted under s. 810.08 for an act which constitutes the offense defined thereby even though the same act may also constitute an offense under s. 228.091. For the proposition that a person may be successfully prosecuted under a general trespassing statute for trespass on property under state control, *see* Adderley v. Florida, 385 U.S. 39 (1966).

076-217—November 12, 1976

COUNTY OFFICERS AND EMPLOYEES

CONSTITUTIONAL OFFICER MAY PARTICIPATE IN DEFERRED COMPENSATION PLAN; MAY NOT UNILATERALLY ESTABLISH DEFERRED COMPENSATION PLAN FOR HIS EMPLOYEES

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTIONS:

1. May a constitutional county officer be covered by a plan of deferred compensation established pursuant to s. 112.215, F. S. (1976 Supp.)?
2. May a constitutional county officer, such as a property appraiser, lawfully establish a deferred compensation plan for the employees of his office pursuant to s. 112.215, F. S. (1976 Supp.)?

SUMMARY:

A constitutional county officer may be covered by a plan of deferred compensation established by the board of county commissioners pursuant to s. 112.215, F. S. (1976 Supp.).

A constitutional county officer, such as a property appraiser, may not establish a plan of deferred compensation for the employees of his office pursuant to s. 112.215, F. S. (1976 Supp.), but such employees may be covered by a deferred compensation plan adopted by the board of county commissioners in accordance with the provisions of that act.

AS TO QUESTION 1:

Section 112.215, F. S., as amended by Ch. 76-279, Laws of Florida, the Government Employees Deferred Compensation Plan Act, provides, among other things, that in accordance with an approved plan of deferred compensation

> (3) . . . the state or any state agency, county, municipality or other political subdivision may, by contract or a collective bargaining agreement, agree with any employee to defer all or any portion of that employee's otherwise payable compensation . . . .

The term "employee" is defined for the purposes of the act to mean:

> (2) . . . any person, *whether appointed, elected, or under contract, providing services for the state*; any state agency or *county* or other political subdivision of the state; or any municipality *for which compensation or statutory fees are paid.* (Emphasis supplied.)

Applying this statutory definition of the term "employee" to the instant inquiry, a constitutional county officer is clearly a person, generally elected, who provides services for a county for which compensation or statutory fees are paid. *See, generally,* Ch. 145, F. S. Thus, although officers are ordinarily distinguished from employees in law, *see* Johnson v. Wilson, 336 So.2d 651 (1 D.C.A. Fla., 1976); Robbin v. Brewer, 236 So.2d 448 (4 D.C.A. Fla., 1970); 14 Words and Phrases *Employee*, pp. 734, 758-775, I am of the opinion that for the purposes of s. 112.215, F. S. (1976 Supp.), the definition of the term "employee" contained therein is broad enough to include constitutional county officers within its purview. *See* Ervin v. Capital Weekly Post, Inc., 97 So.2d 464, 469 (Fla. 1957), stating that "[a] statutory definition of a word is controlling and will be followed by the Courts"; and 30 Fla. Jur. *Statutes* s. 81, pp. 233-234, for the general rule that the use by the Legislature of comprehensive terms without qualification (such as "any person, whether appointed, elected or under contract") ordinarily indicates an intent to include everything embraced within such terms; *cf.* State *ex rel.* Sheets v. Fay, 54 Wis.2d 642,

196 N.W.2d 651 (1972); Riddlestorffer v. City of Rahway, 82 N.J. Super. 36, 196 A.2d 550 (1963); and State *ex rel.* Randel v. Scott, 95 Ohio App. 197, 118 N.E.2d 426 (1952), construing statutory definitions of the word "employee" in other jurisdictions to include officers.

Your first question is answered in the affirmative.

AS TO QUESTION 2:

In AGO 076-8, it was concluded that a property appraiser is not within the purview of ss. 112.08 and 112.12, F. S., authorizing each "county, school board, governmental unit, department, board, bureau of this state" to provide a group insurance program for its employees and to pay "all or any portion of the premiums for such insurance out of any of its available funds." *See also* s. 112.09, F. S. As stated in that opinion,

> The statutes in question apply, in terms, to "the county" and to the exercise of the authority granted by means of a resolution of the board of county commissioners; and they may not be extended, by construction, to apply to county officials.

Likewise, with respect to the instant inquiry, s. 112.215, F. S. (1976 Supp.), as stated above, grants authority to "the state or any state agency, county, municipality or other political subdivision," and not to constitutional county officers. Section 112.215(3), *id.*; *cf.* Johnson v. Wilson, *supra*, in which the plain and unambiguous language of the statutory definition of the term "employing agency" contained s. 112.531(2), F. S., of the "Police Officers Bill of Rights," as "any municipality or the state or any political subdivision thereof which employs law enforcement officers," was held to exclude the constitutional county office of sheriff from the purview thereof. Moreover, as to county employees, including employees of the county appraiser's office, s. 112.215(5), *id.*, provides that:

> Any *county*, municipality, or other political subdivision of the state may *by ordinance* adopt and establish for itself and its employees a deferred compensation program. (Emphasis supplied.)

See also s. 112.215(6)(b), (7), and (10), F. S. (1976 Supp.). In this regard, it is elementary that a constitutional county officer, such as a property appraiser, may not adopt a county ordinance. Accordingly, I am of the opinion that a constitutional county officer, such as a property appraiser, may not establish a deferred compensation plan for the employees of his office pursuant to s. 112.215, F. S. (1976 Supp.), and that any deferred compensation plan applicable to such employees must be adopted by the appropriate board of county commissioners in accordance with the provisions of that act. *Cf.* AGO 076-8.

Your second question is answered in the negative.

076-218—November 15, 1976

STATE FUNDS

CHARGING OFF, COLLECTING, AND SETTLING ACCOUNTS DUE THE STATE—PROCEDURES

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General

QUESTIONS:

1. Does the "charge off" by a state agency of an account receivable from a private party constitute a "settlement" of the account, as that term is used in s. 17.04, F. S.?

2. If question 1 is answered in the affirmative, are those agencies which are authorized by statute to "charge off" accounts required under

the provisions of s. 17.04, F. S., to submit any proposed "charge off" to the Department of Banking and Finance for its subsequent and final approval?

SUMMARY:

A charge off of an account or debt of a person indebted to the state is embraced within the provisions of s. 17.04, F. S., making it the duty of the Department of Banking and Finance to "examine, audit, adjust and settle the accounts of . . . any . . . person in anywise intrusted with, or who may have received any property, funds or moneys of this state, or who may be in anywise indebted or accountable to this state for any property, funds or moneys." Under s. 239.80, F. S. (1976 Supp.), and the rules of the State Board of Education, the Department of Education has the duty and authority *to collect* all delinquent unpaid and uncanceled scholarship loan notes and student loan agreements, *to settle* any such account, and to charge off such accounts which are delinquent at least 3 years, if for more than $25 or which are 6 months past due if for $25 or less and which prove uncollectible after good-faith collection efforts, and any such settlement or charge off of these *specific* types of accounts or debts need *not* be submitted to the Department of Banking and Finance pursuant to s. 17.04 for its subsequent approval. Under s. 240.103, F. S., and the rules of the Board of Regents, the Board of Regents is directed to *collect* all delinquent accounts, such delinquent accounts consisting of the various fees and charges provided for in Ch. 240, F. S., and *is* authorized to *charge off* such accounts as may prove uncollectible, but is *not* authorized to *settle* any such account or debt in the sense of *compromising* such account or debt. "Charge offs" by the Board of Regents need *not* be submitted to the Department of Banking and Finance pursuant to s. 17.04. Under s. 402.17, F. S., the Department of Health and Rehabilitative Services is charged with the duty of protecting the state's financial interest with respect to claims which the state may have for the care and maintenance of patients or inmates of state institutions, and under s. 402.17(1), has the duty and authority to *collect* such claims, *to settle* such claims, and to *charge off* such claims which it determines to be uncollectible, and no such settlement or charge off need be submitted to the Department of Banking and Finance pursuant to the provisions of s. 17.04. In charging off any such claim, concurrence by the Department of Legal Affairs is required. The Department of Education, the Board of Regents, and the Department of Health and Rehabilitative Services should submit a list of all such accounts or debts which have been settled or charged off to the Comptroller pursuant to s. 17.18, F. S., together with sufficient information or data as the Comptroller may require explaining the basis for such settlement or charge off to be included in the Comptroller's annual report to the Governor.

AS TO QUESTION 1:

It is common knowledge that for many years state agencies certified to the office of the Comptroller, Department of Banking and Finance, a list of accounts of persons indebted to the state through that state agency for collection or, in the event that collection was deemed to be impractical or useless because of the insolvency of the debtor or for whatever reason, for "charge off" by the office of the Comptroller, Department of Banking and Finance, pursuant to the provisions of s. 17.04, F. S. This administrative practice is long-standing. The procedure in the past has been that the certification of existing indebtedness may be instituted by either the involved state agency or the Auditor General, who may have discovered the indebtedness upon audit. Frequently, the state agency involved has made attempts to collect the indebtedness from the person involved and has been unsuccessful and is utilizing the provisions of s. 17.04 to "clear" or "write off" the account. Traditionally, s. 17.04 has been interpreted by the office of the Comptroller, Department of Banking and Finance, and all state agencies as embracing "charge off" in situations where total charge off or write off is justified. The language "shall examine, audit, adjust and settle" has been interpreted to embrace the term

"charge off," such administrative interpretation being the long-standing policy and procedure of the state and its various agencies which normally would not be disturbed if reasonable and logical. *See* Kirk v. Western Contracting Corporation, 216 So.2d 503, *cert. den.* 225 So.2d 535, *appeal dismissed* 226 So.2d 815.

The purpose of s. 17.04, F. S., was to insure that every reasonable, diligent effort was made to effect collection of debts due the state and to insure that all persons accountable to the state for property, funds, or moneys be required to make proper payment or to yield up such property or funds. The administrative interpretation placed upon the statutes and the language therein, previously mentioned above, is entirely consistent with the purpose of the statute.

The case of L. K. Ireland, etc., *et al.* v. J. B. Thomas, 324 So.2d 146, is an example of a situation where a shortage in the accounts of an officer was discovered by the Auditor General and referred to the Department of Banking and Finance for collection. However, there have been numerous occasions when an overpayment under the retirement system has resulted in matters being referred to the Department of Banking and Finance by the Department of Administration, Division of Retirement, for collection, settlement, or charge-off purposes in which the Auditor General was not involved.

The term "charge off" is discussed in 6 Words and Phrases, beginning at p. 282. Cases cited therein indicate that a worthless debt has been "charged off" and therefore is deductible from income, when a taxpayer acting in good faith forms a mental determination, during the taxable year under circumstances showing the loss, to charge off the debt and that any act by a taxpayer manifesting an intent to eliminate an item from his assets is sufficient to constitute a "charge off" within the provisions of the Revenue Act of 1936 relating to bad debts. *Also see* "charge off," Black's Law Dictionary 295 (Rev'd. 4th Ed.), and *The Random House Dictionary of the English Language*, the unabridged ed., p. 248, defining the term to mean to write off as an expense or loss; and at p. 1648, defining "write off" as a cancellation from the accounts as a loss, an uncollectible account. Thus it would appear that, since the term is not defined in any of the statutes mentioned in your letter, it should be interpreted in light of the foregoing judicial and English dictionary definitions. For state accounting purposes, it would contemplate an act done on the part of the responsible fiscal officer whereby an existing debt was acknowledged as being uncollectible and an appropriate accounting entry made whereby the debt was eliminated or written off as an asset of the state.

The terms "settle," "settlement," "settlement of account," and other related terms are discussed in 39 Words and Phrases, beginning at p. 37. At p. 38 therein, it is stated:

> "Settle" is said to be a word of *equivocal meaning*, and to mean different things in different connections, and that the particular sense in which it is used may be explained by the context or the surrounding circumstances. Accordingly, *the term may be employed as meaning to agree, to arrange, to ascertain, to come to or reach an agreement, to determine, to establish, to fix, to free from uncertainty, to place, or to regulate.* Edwards v. Edwards, Tex.Civ.App., 52 S.W. 2d 657, 661. (Emphasis supplied.)

Black's Law Dictionary, 4th edition, contains the same definition for the word "settle" at p. 1538. Additionally, it is stated therein at p. 1538 as follows:

> Parties are said to settle an account when they go over the items and ascertain and agree upon the balance due from one to the other. And, when the party indebted pays such balance, he is also said to settle it. M. Zimmerman Co. v. Goldberg, 69 Pa.Super.Ct. 254, 255; State Bank of Stratford v. Young, 159 Iowa, 375, 140 N.W. 376, 389.

The terms "adjust," "settle," and "to settle" are discussed at p. 40 of Vol. 39 Words and Phrases. It is stated therein that the "settlement" is an act or process of adjusting or determining; that the words "adjust" and "settle" are synonyms; that the word "settle" when applied to an unliquidated claim or demand means a mutual adjustment between the parties and an agreement upon a balance; and that Webster defines "settle" as meaning, in law, to adjust; to liquidate; to balance as an account; to pay, as a debt. The word "settlement" is discussed at p. 42 thereof. It is stated therein that the word "settlement" in connection with public transactions and accounts is used to describe an administrative determination of the account due.

Thus the language "adjust and settle" as used in s. 17.04, F. S., is broader than the term "charge off." A "charge off" would be embraced within the terms "adjust" and "settle," since a charge off would amount to a determination that an amount due was uncollectible so that such debt could be eliminated as an asset. The terms "to adjust" or "to settle" would also embrace situations wherein, by mutual agreement, the debtor and the Department of Banking and Finance agreed on the *amount* of the debt.

The administrative interpretation heretofore mentioned is consistent with the various judicial and dictionary definitions of the aforementioned terms. Accordingly, a "charge off" of an account receivable from a private party would constitute adjusting or settling the account within the purview of s. 17.04, F. S. This answers question 1.

AS TO QUESTION 2:

Your inquiry refers to ss. 17.04, 239.80(4), 240.103(2), and 402.17(1), F. S., and points out that all of said statutes deal with "settlement" or "charge offs" of delinquent and uncollectible accounts. You are concerned over the effect, if any, of the three last-mentioned statutes on the duties and functions of the office of the Comptroller and the Department of Banking and Finance under the first-mentioned statute, s. 17.04, F. S. Although not referred to in your letter, the organic duties and functions of the Comptroller under s. 4(d), Art. IV, State Const., must be considered.

Section 4(d), Art. IV, *supra*, provides:

> (d) The comptroller shall serve as the *chief fiscal officer of the state, and shall settle and approve accounts against the state.* (Emphasis supplied.)

The constitutional duty of the Comptroller to "settle and approve accounts against the state" is embodied in substance in s. 17.03(1), F. S. It should be noted that both the organic provision and s. 17.03(1) deal with settling and approving accounts *against* the state, as opposed to settling and approving accounts of those *indebted to* the state. The latter subject is covered in s. 17.04, F. S., which provides:

> The Department of Banking and Finance of this state shall *examine, audit, adjust and settle the accounts* of all the officers of this state, *and any other person in anywise intrusted with, or who may have received any property, funds or moneys of this state, or who may be in anywise indebted or accountable to this state for any property, funds or moneys, and require such officer, or persons to render full accounts thereof, and to yield up such property or funds according to law, or pay such moneys into the treasury of this state,* or to such officer or agent of the state as may be appointed to receive the same, and on failure so to do, *to cause to be instituted and prosecuted* proceedings, criminal or civil, at law or in equity, *against such persons, according to law.* (Emphasis supplied.)

Compare s. 17.041, F. S., with respect to county and district accounts and claims and similarly providing; *and* s. 17.20, F. S., charging the several state attorneys with all claims placed in their hands for collection by the Department of Banking and Finance.

Other pertinent provisions relating to the duty of the Comptroller to "examine, audit, adjust and settle the accounts" of persons indebted to the state include s. 17.05, F. S., which permits the Comptroller to "demand and require full answers on oath from any and every person, party or privy to any account, claim or demand . . . by the state" and s. 17.22, F. S., which deals with the procedure to be utilized by the Department of Banking and Finance in initiating or causing to be instituted legal action to effect collection of claims of the state. *Also see* s. 27.20, F. S., charging state attorneys with claims of the state placed in their hands by the Department of Banking and Finance.

These various statutes and the procedures contained therein are of *ancient vintage* and are firmly embodied in the Florida fiscal system. These statutes must be reconciled with the statutes mentioned in your letter.

Section 239.80(4), F. S. (1976 Supp.), referred to in your letter, became law through the enactment of Ch. 75-302, Laws of Florida, which provided in part that there be *no* new Florida student loans after June 30, 1975, and for the establishment of a short-term loan program. It also provided for the "collection, settlement, and charging off of delinquent . . . scholarship loan notes and student loan agreements." (*See* the title to Ch. 75-302, *supra*, and s. 14 thereof.) Section 14 is now embodied in s. 239.80, F. S. (1976 Supp.), and provides, in part:

(1) The Department of Education is *directed* to exert *every lawful and reasonable effort* to collect all *delinquent unpaid* and *uncanceled scholarship loan notes and student loan agreements.*

(2) The department is authorized to *establish* a *recovery account* into which unpaid and uncanceled scholarship loan note and student loan agreement accounts may be transferred.

(3) The department is authorized to *settle* any delinquent unpaid and uncanceled scholarship loan notes and student loan agreements and to employ the service of a collection agency when deemed advisable in collecting delinquent accounts. However, no collection agency shall be paid a commission in excess of 35 percent of the amount collected.

(4) The department is authorized to *charge off unpaid and uncanceled scholarship loan notes and* student loan agreements which are at least 3 years delinquent and which prove uncollectible *after good-faith collection efforts.* However, delinquent accounts with past due balances of $25 or less may be charged off as uncollectible when an account becomes 6 months past due and the cost of further collection effort or assignment to a collection agency would not be warranted.

* * * * *

(6) The State Board of Education shall adopt such rules as are necessary to *regulate the collection, settlement, and charging off of delinquent unpaid and uncanceled scholarship loan notes and student loan agreements.* (Emphasis supplied.)

The provisions of the section must be reconciled with, read in conjunction with, or read in light of s. 17.04, F. S.

Both sections deal with *persons indebted* to the state, and the collection, settling, or charging off of such indebtedness, but s. 239.80, *supra*, is a *limited grant* of authority to the Department of Education involving *only delinquent* and *uncanceled scholarship loan notes* and *student loan agreements.* Section 239.80(1) can be reconciled with s. 17.04, F. S., and other pertinent provisions of Ch. 17, F. S., since the Department of Education is directed therein to exert every "lawful and reasonable effort" to collect such accounts and since the procedure established in s. 17.04 is certainly a *lawful* means of effecting collection. Thus, the Department of Education could refer such delinquent and unpaid accounts to the Department of Banking and Finance for collection. The Department of Banking and Finance would then proceed as provided in s. 17.04 and could cause to be instituted and prosecuted appropriate legal proceedings. This is not inconsistent with the rules of the State Board of Education of Florida which have been promulgated implementing s. 239.80(1). (*See* Rule 6A-7.395.) Accordingly, s. 239.80(1) is not irreconcilable with, or repugnant to, s. 17.04.

Assuming the account is determined to be uncollectible, in whole or in part, then the question arises as to whether the Department of Education or the Department of Banking and Finance would have the *duty* and *authority* to *settle* such account or to *charge off* such account, consisting of any delinquent unpaid and uncanceled scholarship note or student loan agreement. Subsections 239.80(3) and (4), F. S. (1976 Supp.), both place the duty and authority in the Department of Education for the *specific type* of delinquent and unpaid accounts mentioned therein. Thus, as to these *specific* types of accounts, s. 239.80(3), (4), and (5) is inconsistent with s. 17.04, F. S., dealing with the subject of settling accounts of persons indebted to the state generally and, being the later expression of the Legislature, would prevail to the extent of such inconsistency. (*See* 82 C.J.S., s. 290 *et seq.*, and 82 C.J.S., ss. 363 and 369.) A special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms, and such statute relating to the particular part of a general subject will operate as an exception to or qualification of the general terms of a more comprehensive statute to the extent only of the repugnancy. (Adams v. Culver, Fla., 111 So.2d 665.) Both statutes deal with the duty and authority to settle accounts of persons indebted to the state, but s. 239.80(3), (4), and (5) deals with the *specific types* of accounts mentioned therein. Thus, the *Department of Education* has the duty and authority to settle any delinquent unpaid and uncanceled scholarship loan notes and student loan agreements, and to *charge off* any such accounts of more than $25 "which are at least 3 years delinquent and which prove uncollectible after good-faith collection

efforts" and accounts of $25 or less after 6 months, in accordance with rules adopted by the State Board of Education regulating such matters. Thus, the duty and authority of the Department of Banking and Finance has been supplanted as to these specific types of accounts.

The Department of Education has promulgated Rule 6A-7.395 implementing s. 239.80 F. S., establishing the procedure to be followed in settling or charging-off such accounts, including the procedure to be followed when commercial collection services are being utilized, and such rule and procedure are consistent with the conclusions reached herein.

Thus, as to this specific type of account, the procedures and options available would appear to be as follows:

Once the Department of Education had determined in accordance with the rules that a specific account covered by the statute was delinquent, unpaid, or uncanceled, it would be required to exert every lawful and reasonable effort to collect such account.

Such account *could be* referred to the Department of Banking and Finance under s. 17.04, F. S., so that the department could initiate or cause to be instituted legal action under the provisions thereof to effect collection of the account.

The Department of Education having made such a determination, as mentioned above, could employ the service of a collection agency when it deemed such action to be advisable for the purpose of collecting such delinquent accounts subject to the restriction contained in s. 236.80(3), F. S. (1976 Supp.), as to the amount of commission which could be paid such collection agency in accordance with Rule 6A-7.395.

Assuming that the Department of Education has employed such a collection agency, has referred the matter to the Department of Banking and Finance for collection efforts, or has otherwise failed to collect such account, it would be authorized to settle such account upon such terms and conditions and in such an amount as it deemed satisfactory, subject, of course, to the conditions that no fraud or collusion were involved and that the Department of Education had in good faith exhausted all collection efforts.

If the situation were such that the Department of Education determined in accordance with the statute and in conformity with its rule that it would be useless, impractical, or frivolous to make further attempts to collect such delinquent account, it is authorized to "charge of" or "write off" such account when such account is for more than $25 and is delinquent at least 3 years, or is for $25 or less and is 6 months past due, and has proven uncollectible after good-faith collection efforts, as authorized in s. 239.90(4), F. S. (1976 Supp.), and as prescribed and regulated by the rules of the Department of Education.

In the event the Department of Education entered into a *settlement* of any such delinquent account or *charged off* such delinquent account as authorized in s. 239.80(3) and (4), F. S. (1976 Supp.), and the rules, such settlement or charge off is final and would not require subsequent approval of the Department of Banking and Finance under s. 17.04, F. S. The duty and authority to charge off or settle these specific types of accounts are reposed in the Department of Education to be exercised under rules adopted by the State Board of Education regulating the collection, settlement, and charging off of such accounts and not in the Department of Banking and Finance. The decision to settle, the decision to charge off, and the settlement would all be reviewable on postaudit by the Auditor General's office. However, a listing of all such accounts involving settlement or charge off should be forwarded to the Comptroller for inclusion in the annual report of the Comptroller to the Governor required by s. 17.18, F. S. Sufficient information should be given as to each specific account to allow the Comptroller to prepare the annual report so as to completely show the disposition thereof and so as to clearly demonstrate the collection efforts which had been made prior to either settling or charging off such account. This duty of the Comptroller under s. 17.18 has not been in any manner affected or altered by the provisions of s. 239.80 and is part and parcel of the Comptroller's duty as chief fiscal officer of the state.

Reconciliation of the statutes in the manner described above results in the collection procedure set forth in s. 17.04, F. S., and elsewhere in Ch. 17, F. S., whereby criminal or civil proceedings may be instituted and prosecuted against such persons being available to the Department of Education and squarely recognizes the *legislative intent* to *grant* to the Department of Education the *authority to settle* and charge off, pursuant to rules adopted by the State Board of Education and pursuant to s. 239.80(4), F. S. (1976 Supp.), delinquent, unpaid, and uncanceled scholarship loan notes and student loan agreements. The authority given to the Department of Education and the State Board of Education is clear and unequivocal, and the Legislature did not specify that the *settlement* or *charging off* of any such delinquent account was conditioned upon the subsequent approval of the Department of Banking and Finance under s. 17.04. The Legislature has

elected to place the authority and duty as to *specific accounts* in the Department of Education and the rulemaking power and duty to regulate the collection thereof in the State Board of Education.

Although similar to s. 239.80, F. S. (1976 Supp.), s. 240.103, F. S., referred to in your letter, is not as broad. Section 240.103(1) contains the legislative mandate, "[t]he Board of Regents is directed to exert every effort to collect all delinquent accounts." Under s. 240.103(2), the Board of Regents "is authorized to *charge off* such accounts as may be uncollectible," (Emphasis supplied.) and, under s. 240.103(3), the Board of Regents "is authorized to employ the service of a collection agency when deemed advisable in collecting delinquent accounts." Significantly absent from s. 240.103 is any reference to the *settling* of such accounts. This language is present in ss. 17.04 and 239.80.

What has already been stated in regard to s. 239.80, F. S. (1976 Supp.), would be equally applicable to s. 240.103, F. S., with the exception that the absence of any specific authority to *settle* such delinquent accounts would require further consideration.

As stated previously herein in answer to question 1, the term "settle" is broader than the term "charge off." Inasmuch as the Legislature has specifically recognized a distinction in these two terms in s. 239.80 and 240.103, *supra*, it must be presumed that the Legislature did not intend for the Board of Regents to have the authority to "settle" its delinquent accounts in the sense of compromising such claims. *Also see* AGO 060-90. Thus, adjustments or settlements, in that sense, of such accounts would still be required to be performed by the Department of Banking and Finance pursuant to s. 17.04, F. S., but the charge off of such accounts as may prove to be uncollectible is authorized in s. 240.103(2) to be performed by the Board of Regents, and such charge offs need *not* be submitted to the Department of Banking and Finance for subsequent and final approval. It should be noted, however, that the authority to "charge off" is accompanied by the duty to exert every effort to collect all delinquent accounts. Accordingly, no "charge off" could be accomplished until such time as the statutory duty had been fulfilled. However, in the sense that the term "settle" means to fix or determine the amount due and to require payment therefor, this duty to collect would embrace such action and would amount to settling the account. The Board of Regents adopted Rule 6C-10.07 implementing s. 240.103(2) pursuant to its rulemaking power found in s. 240.042(2)(a), F. S.

Finally to be considered is s. 402.17(1), F. S., referred to in your letter. This statute quite clearly places in the Department of Health and Rehabilitative Services the duty to "protect the financial interests of the state with respect to claims which the state may have for the care and maintenance of patients or inmates of state institutions under its supervision and control." Section 402.17(1) specifically empowers said department to receive and supervise the collection of sums due the state; to bring any appropriate court action necessary to protect the interests of the state in order to collect any claim the state may have against any patient or inmate, former patient or inmate, or the guardian or administrator of any such patient or inmate or any person against whom any such patient or inmate may have a claim; to represent the state in the settlement of the estate of deceased patients or inmates or in the settlement of estates in which a patient or an inmate or a former patient or inmate against whom the state may have a claim has a financial interest; and to *charge off* such accounts as may prove uncollectible which have accrued with respect to claims which the state may have for the care and maintenance of patients or inmates of state institutions under their supervision and control. The procedure for charging off accounts provided for in s. 402.17(1)(i) is that the head of the division concerned must certify such accounts as being uncollectible after diligent efforts have been made to collect them without success, and, upon concurrence by the Department of Legal Affairs, the accounts may be charged off. It is clear that the powers enumerated therein are as broad as or broader than the similar powers set forth in s. 239.80, F. S. (1976 Supp.). Thus, the conclusion reached pertaining to that statute would be equally applicable to s. 402.17(1). Research reveals no rule adopted by the Department of Health and Rehabilitative Services implementing s. 402.17(1). This answers question 2.

076-219—November 15, 1976

MUNICIPALITIES

NO POWER TO LEVY REGULATORY FEES ON INSURANCE AGENTS

To: Robert M. Moore, Wewahitchka City Attorney, Port St. Joe

Prepared by: David K. Miller, Assistant Attorney General

QUESTION:

Can a municipality levy regulatory fees on insurance agents and representatives under s. 166.221, F. S., where such agents or representatives reside in and conduct business activities within that municipality but do not maintain a permanent business location or branch office therein?

SUMMARY:

Regulatory licensing of insurance agents is preempted to the state under s. 624.401(3), F. S., and municipalities therefore have no power to levy regulatory fees on such persons under s. 166.221, F. S.

Your question is answered in the negative.

Section 166.221, F. S., authorizes municipalities to levy regulatory fees, commensurate with the cost of the regulatory activity, on businesses, but s. 624.401(3), F. S., preempts the field of regulating insurers and their agents and representatives and operates to prohibit their regulation by municipalities and other local governments. *Cf.* AGO 074-209.

Section 166.221, F. S., provides:

> A municipality *may levy* reasonable business, professional, and occupational *regulatory fees*, commensurate with the cost of the regulatory activity, including consumer protection, *on such classes of* businesses, professions, and *occupations, the regulation of which has not been preempted by the state* or a county pursuant to a county charter. (Emphasis supplied.)

This provision empowers a municipality to levy regulatory fees on persons who do not maintain a permanent business location or branch office within the municipality. *See* AGO 076-30, which dealt generally with the authority of a municipality to levy regulatory fees but did not consider the question of state preemption of any particular regulatory activity or field and did not purport to resolve the issue of whether a particular exaction of a regulatory fee was valid or met the legal requirements prerequisite to the levying of such fees. That opinion does not apply to or control the levying of regulatory fees on insurance agents and representatives. Likewise, s. 624.507, F. S., which authorizes municipalities to levy an occupational license *tax* on insurance agents and solicitors maintaining business offices (or residences, if no business office is required by law) within their boundaries does not govern the levying of regulatory fees under s. 166.221. Concerning municipal license *taxation* of insurance agents and solicitors, *see* AGO 074-209.

Section 624.401(3), F. S., expressly preempts to the state the regulatory licensing of insurers and their agents and representatives within the meaning of ss. 166.021(3)(c) and 166.221, F. S. Section 624.401(3) reads:

> This state hereby preempts the field of regulating insurers and their agents and representatives, and no county, city, municipality, district, school district, or political subdivision shall require of any insurer, agent, or representative regulated under this code any authorization, permit, or registration of any kind for conducting transactions lawful under the authority granted by the state under this code.

Therefore, a municipality is without lawful authority to levy regulatory fees on insurance agents and representatives under s. 166.221, F. S., and, pursuant to s. 624.401,

F. S., is prohibited from requiring any regulatory occupational license or permit of any insurer, agent, or representative regulated under the Florida Insurance Code, Chs. 624 through 632, F. S., for conducting transactions authorized by and lawful under that code.

076-220—November 15, 1976

WEAPONS AND FIREARMS

POSSESSION OF FIREARM AT PLACE OF BUSINESS WHEN COWORKER WHO IS CONVICTED FELON WHOSE CIVIL RIGHTS HAVE NOT BEEN RESTORED WOULD BE IN CLOSE PROXIMITY TO SUCH FIREARM

To: H. Paul Baker, Judge, Circuit Court, Miami

Prepared by: A. S. Johnston, Assistance Attorney General

QUESTIONS:

1. Does s. 790.25(1), (3), and (4), F. S., allow persons to possess firearms at their place of business for the demonstrable purpose of protecting life and property at said business when a fellow worker, a convicted felon whose rights have not been restored, would be in close proximity to the firearms, not withstanding s. 790.23, F. S. (1976 Supp.)?

2. If question 1 is answered in the affirmative, would the factual situation enumerated above subject the convicted felon to arrest for being a convicted felon in possession of firearms?

SUMMARY:

A person may possess a firearm at his place of business and would not be in violation of s. 790.23, F. S., when a convicted felon whose rights have not been restored might come within "close proximity" to the firearm. A convicted felon whose civil rights have not been restored could be convicted of a violation of s. 790.23 if the facts reveal that said felon exercised a conscious or substantial care, custody, possession, or control over said firearm.

You have asked that these questions be considered in the light of present case law and with AGO's 073-229 and 073-391. Inasmuch as we have judicial decisions which control this response to your questions, it will not be necessary to discuss the opinions rendered by this office in AGO's 073-229 and 073-391, as they are general in nature as to the application of Ch. 790, F. S. These opinions pertain to factual situations other than contained in your questions.

To answer the above-posed questions, Ch. 790, F. S., which governs weapons and firearms, must be analyzed. First, s. 790.001, F. S., statutorily defines a firearm to mean "any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun." *See* AGO 076-45. It shall not include an antique firearm as defined in the section.

Section 790.05, F. S., provides a penalty for the carrying of a pistol or repeating rifle by a person who has failed to obtain a license from the county commissioners. Section 790.06, *id.*, sets forth certain requirements which must be satisfied before the county commissioners may issue a license to carry a firearm.

Having set the basic statutory framework, it is necessary to examine s. 790.25, F. S., which provides for the lawful ownership, possession, and use of firearms and other weapons. Subsection 790.25(1) provides as a matter of public policy for the lawful use of firearms in defense of life, home, and property. Subsection 790.25(3) specifies that the licensing requirements and prohibitions of ss. 790.05 and 790.06, F. S., shall not apply to

s. 795.25(3)(n)—a person possessing arms at his home or place of business. Subsection 790.25(4) provides that this act shall be liberally construed.

Having set forth all applicable statutory provisions, it now becomes necessary to apply them to the facts as contained in question 1 above. Under s. 790.25(3), *supra*, a person is not required to obtain a license in accordance with ss. 790.05 and 790.06, *supra*, if that person comes within one of the fourteen enumerated exceptions. Your question asking if a person is allowed to possess firearms at his place of business for the purpose of protecting life and property at the business comes within the statutory exception provided by s. 790.25(3)(n). Thus, under your question, a person not excluded by reason of s. 790.25(2)(a), (b), or (c), F. S., may possess arms at his home or place of business. It would certainly be anomalous to determine that a person who is expressly excepted from the provisions of Ch. 790 and who possesses a firearm at his home or place of business could be prosecuted and convicted for the possession of a firearm under such circumstance.

To give s. 790.25, F. S., the liberal construction expressly provided for in subsection (4), s. 790.25 must be read *in pari materia* with ss. 790.01, 790.02, 790.05, and 790.06, F. S. Under this construction, the possession of a firearm in one's own home or place of business is not prohibited by Ch. 790, F. S., and, as recognized by subsection 790.25(4), nothing contained in Ch. 790 shall impair or diminish any existing rights to bear arms guaranteed by the Constitution and laws of Florida and recognized by decisions of the courts of Florida.

The Supreme Court of Florida in Peoples v. State, 287 So.2d 63 (Fla. 1973), has specifically found that s. 790.25(3)(n), F. S., specifically exempts a person possessing arms at his home or place of business from the prohibitions of s. 790.01, F. S., and the registration requirements of ss. 790.05 and 790.06, F. S. The court further found that said exception was reinforced by the "Declarations of Policy" and "Construction" set forth in s. 790.25(1) and (4). *See also* French v. State, 279 So.2d 317 (4 D.C.A. Fla., 1973).

A close examination of Ch. 790, F. S., does not reveal that any person, not excluded by the statute, is prohibited from keeping a firearm in his home and place of business even though a follow worker is a convicted felon whose civil rights have not been restored. Section 790.23 expressly prohibits any person who has been convicted of a felony and whose civil rights have not been restored from having in his (the convicted felon's) care, custody, possession, or control any firearm and prohibits him (the convicted felon) from carrying a concealed weapon, including all tear gas guns and chemical weapons or devices.

Your second question assumes the factual situation enumerated in question 1, that the convicted felon would be "in close proximity to the firearms." You ask if such "close proximity" would subject the convicted felon to arrest for being a convicted felon in possession of firearms. Your question specifies only "possession" of a firearm, while s. 790.23, F. S., prohibits a convicted felon whose civil rights have not been restored from having in his care, custody, possession, or control any firearm. It is assumed that the response to this question includes not only "possession" but also includes the "care, custody, or control" of any firearm as prohibited by the statute. It is necessary that this distinction be made, as the courts of this state have rendered judicial decisions reaching different conclusions when one or more of the prohibited acts became involved.

The Florida Supreme Court in Reynolds v. State, 111 So. 285 (Fla. 1927), found "possession" is usually defined as having personal charge of or exercising the right of ownership, management, or control over the item in question. The court in that case (possession of intoxicating liquor) found that, to constitute possession, there need not necessarily be an actual manucaption of the item, nor is it necessary that it be otherwise actually upon the person of the accused. There must, however, be a conscious and substantial possession by the accused, as distinguished from a mere involuntary or superficial possession.

More recently the district courts of appeal of Florida have examined factual situations which constitute violations of s. 790.23, F. S. In Maloney v. State, 146 So.2d 581 (2 D.C.A. Fla., 1962), the district court upheld a conviction for a violation of s. 790.23 when weapons were found under the front seat of a motor vehicle which deputy sheriffs observed burning alongside a highway. Three persons were seen to emerge from the vehicle and Maloney was the driver. After the fire was extinguished, the vehicle was towed to a garage where a loaded shotgun was found under the front seat and a pistol found in the glove compartment. Maloney argued on appeal that under the principles of possession as enumerated in Reynolds v. State, *supra*, the evidence was insufficient to establish conscious and substantial possession of the firearms. The district court, in

rejecting this argument, emphasized that the statutory prohibition of "possession" was supplemented by the additional words "care, custody, and control." In Wood v. State, 237 So.2d 485 (1 D.C.A. Fla., 1970), the district court upheld a conviction for possession of a firearm by a convicted felon when the defendant was found with a gun covered by a pillowcase between the defendant's legs. The defendant contended that he was not in possession as contemplated by the statute. The court found that, to come within the purview of the statute, the firearm need not be held in the hands of the accused. It was sufficient to show that the firearm was in the "care, custody, possession or control" of the person charged. In keeping with this decision, Ross v. State, 285 So.2d 429 (3 D.C.A. Fla., 1973), upheld the conviction where the facts showed that the firearm was found under a pillow upon which the defendant's hand rested.

In the recent case of Jones v. State, 325 So.2d 436 (1 D.C.A. Fla., 1975), the district court held that, where the information charged only possession and not care, custody, possession, or control, the state was limited to proof of possession and assumed the burden of showing that the possession by the accused was conscious and substantial as distinguished from a mere involuntary or superficial possession and reversed this conviction when the facts showed that the firearm was in defendant's automobile but no evidence proved that the defendant himself was in the vehicle nor was any evidence introduced that placed the defendant in the automobile with the firearm or near the firearm at any time.

Basically, then, a charge and conviction for possession of a firearm by a convicted felon whose civil rights have not been restored must be determined on a case-by-case basis under the particular facts of the case as charged in the charging document.

076-221—November 15, 1976

MUNICIPALITIES

BOUNDARIES MAY NOT BE CONTRACTED IF TERRITORY SOUGHT TO BE EXCLUDED MEETS CRITERIA USED FOR ANNEXATION; PROCEDURE TO BE FOLLOWED ON CONTRACTION

To: Tom Ingles, Mexico Beach Town Attorney, Panama City

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Does a municipality have the power or authority to enact a contraction ordinance where the area in question fully complies with the requirements for annexation as contained in s. 171.043, F. S. (1976 Supp.)?

2. If, after the 6-month feasibility study on a petition of 15 percent of the voters in an area designated to be excluded, the council determines that it is not feasible, may a specific finding that the area in question fully complies with s. 171.043, *supra*, fulfill the requirements of s. 171.051(2), F. S.?

3. May an area meeting the criteria for annexation in s. 171.043, *supra*, be proposed for exclusion by municipal governing bodies?

4. When the council, after the 6-month feasibility study, specifically determines that the area to be excluded meets all the criteria of s. 171.043, *supra*, can the council set the time and place of a meeting at which the ordinance will be considered, pursuant to s. 171.051(3), F. S.?

5. May the governing body vote not to contract the municipal boundaries under s. 171.051(4), F. S., despite the fact that 15 percent of the qualified voters resident in that area proposed for contraction request a referendum on the question of contraction?

SUMMARY:

The contraction procedures provided by s. 171.051, F. S., may be used to exclude *only* areas found *not* to meet the characteristics required by s.

171.043, F. S. (1976 Supp.), of areas to be annexed. A municipality is without authority to enact a contraction ordinance, either on the initiative of its governing body or in response to a petition therefor, regarding an area which complies with the annexation characteristics set forth in s. 171.043. If, at a meeting called to consider an introduced contraction ordinance, a petition for referendum is submitted pursuant to s. 171.051(4), the governing body must either submit the ordinance to a vote of the qualified voters in the area to be excluded or vote not to contract the municipality's boundaries.

Before answering your questions, I would offer the following summary of the contraction procedure provided by s. 171.051, F. S., for exclusion of an area not meeting the requirements for annexation. There are two methods by which initiation of the contraction procedures may be accomplished, and there are two separate petition procedures.

Under s. 171.051(1), F. S., a municipal governing body may, on its own initiative, "by ordinance propose the contraction of municipal boundaries, as described in the ordinance, and provide an effective date for the contraction." In the alternative, under s. 171.051(2), F. S., such a contraction ordinance may be proposed by a "petition of 15 percent of the qualified voters in an area desiring to be excluded from the municipal boundaries." If the latter course is taken—proposal of the contraction ordinance by petition—the governing body is *required* to undertake a feasibility study of the contraction proposed by the petition. Within 6 months from the time the required study is begun by the governing body, that body *must* do one of two things: It must either initiate contraction proceedings *by ordinance* pursuant to subsection (1), *supra*, or reject the petition (in which case the specific facts on which the rejection is based must be stated). Section 171.052(1) (criteria for contraction) clearly provides that "[o]nly those areas which do *not* meet the criteria for annexation in s. 171.043 may be proposed for exclusion by municipal governing bodies." (Emphasis supplied.) Thus, it would certainly seem that a finding of compliance with s. 171.043 would constitute sufficient grounds for rejecting a petition for initiation of contraction procedures. However, a municipal governing body would appear to have broad discretion under the statute to reject any such petition, so long as it specifically states its reasons therefor.

The second petition procedure is provided for in s. 171.051(4), F. S. It must be understood that this petition procedure would be available only after the governing body has introduced a contraction ordinance pursuant to subsection (1) of s. 171.051 [either on its own initiative or after conducting a feasibility study pursuant to a petition submitted under subsection (2)]. After introduction of the contraction ordinance and advertisement or public notice thereof pursuant to subsection (3) which, among other things, must include a statement of findings showing the area to be excluded fails to meet the criteria of s. 171.043, *supra*, the next step is consideration of the contraction ordinance at a meeting of the governing body held for that purpose. It is at this point—the holding of the meeting at which the ordinance is to be considered—that the second petition procedure comes into play. This second procedure, under subsection (4) of s. 171.051, concerns whether or not the contraction ordinance is to be the subject of a referendum submitted to the vote of the "qualified voters of the area proposed for contraction." Section 171.051(4). Such a referendum may be sought by submission at such meeting of a petition requesting a referendum on the question of contraction as prescribed in subsection (4), or, in the absence thereof, such a referendum may be proposed by the governing body on its own initiative under subsection (5).

Your first question and your third question (which appear to be the same) are answered in the negative by the language quoted above from s. 171.052(1): "*Only* those areas which do *not* meet the criteria for annexation in s. 171.043 may be proposed for exclusion by municipal governing bodies." (Emphasis supplied.) This language is quite clear and must be given its plain and obvious meaning. Maryland Casualty Company v. Sutherland, 169 So. 679 (Fla. 1936); Johnson v. Wilson, 336 So.2d 651 (1 D.C.A. Fla., 1976). Therefore, the statute precludes a municipal governing body from enacting a contraction ordinance—either on its own initiative or in response to a petition therefor—if the area proposed to be excluded is found to meet the criteria for annexation as set forth in s. 171.043, F. S. (1976 Supp.). This statutory provision also answers, in the affirmative, your second question. That is, a specific finding that the area proposed to be excluded complies with or meets the criteria for annexation in s. 171.043 would certainly be a sufficient

specification of the facts or the basis upon which the petition proposing the contraction ordinance is rejected under s. 171.051(2), F. S.

Your fourth question is answered in the negative, again by the explicit language of s. 171.052(1), *supra*. It should be obvious that a specific finding that the area proposed for exclusion meets all the annexation criteria of s. 171.043, *supra*, would, under s. 171.052(1), preclude further action in regard to that area. If the governing body determines that the area does meet the requirements for annexation, it should then reject the petition proposing the contraction, specifying compliance with s. 171.043 as the basis or reason for the rejection. Once the petition is so rejected, there is no statutory requirement that any meeting be noticed or held, and no legal reason exists to call a meeting. Indeed, at this stage of the proceedings, no contraction ordinance has been introduced or noticed and there is no ordinance before the governing body to be considered.

Your fifth question is answered in the affirmative. Section 171.051(4), *supra*, provides clear alternatives, either of which may be followed by the governing body once the proceedings have reached this point [*i.e.*, the study made pursuant to subsection 171.051(2), the ordinance introduced, due and proper notice given, and the meeting held]. If, at this point, a petition for referendum is filed or presented by 15 percent of the qualified voters in the area to be excluded, the statutory alternatives provided by subsection (4) are:

> . . . the governing body shall, upon verification, paid for by the municipality, of the sufficiency of the petition, and *before passing such ordinance, submit the question of contraction to a vote* of the qualified voters of the area proposed for contraction, *or* the governing body may *vote not to contract* the municipal boundaries. (Emphasis supplied.)

The above-quoted language is, in my opinion, sufficiently clear and free from doubt so as to preclude the application of any rules of statutory construction, State v. Egan, 287 So.2d 1, 4 (Fla. 1973), and must be given its plain meaning. Maryland Casualty Company v. Sutherland, *supra*.

076-222—November 16, 1976

COUNTY HOSPITALS

MAY CHARGE HIGHER FEES TO NONRESIDENTS THAN TO RESIDENTS

To: Gordon V. Frederick, Attorney for Seminole Memorial Hospital, Sanford

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

May the Board of Hospital Trustees of the Seminole Memorial Hospital prescribe higher hospital service fees for paying patients who are nonresidents of Seminole County than for residents?

SUMMARY:

There is no *statutory* limitation, other than that all hospital service fees be reasonable or just and proper, which would restrict the authority of the Board of Hospital Trustees of the Seminole Memorial Hospital, under ss. 155.16 and 155.20, F. S., to fix and prescribe higher hospital service fees for nonresidents of Seminole County than for residents. Any question as to the *constitutional* validity of and rational basis for such a classification distinguishing residents from nonresidents may be answered only by a court within the context of a particular case and controversy.

The Board of Hospital Trustees of the Seminole Memorial Hospital (hereinafter referred to as the "board"), established pursuant to Ch. 155, F. S., which relates to the

organization and operation of county hospitals, is clearly authorized by s. 155.16 to extend the services of the hospital to nonresidents of Seminole County upon the terms and conditions which the board chooses to prescribe and to fix and prescribe reasonable hospital service fees for patients, resident and nonresident, who are able to pay. Section 155.16 provides as follows:

> Every hospital established under this law shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits, but the board of hospital trustees may extend the privileges and use of such hospital to persons residing outside of such county upon terms and conditions as such board of trustees may from time to time, by its rules and regulations, prescribe. Every such inhabitant or person who is not a pauper shall pay to such board or such officer as it shall designate, a reasonable compensation for occupancy, nursing, care, medicine, and attendance, according to the rules and regulations prescribed by the said board.

See also s. 155.20 requiring the board to fix charges for the use and services of the hospital by those persons able to pay for same as the board may deem just and proper. I find no *statutory* limitation upon the exercise of this authority, other than the requirement that all hospital service fees be reasonable or just and proper, that would restrict the board in prescribing higher hospital service fees for nonresidents of Seminole County than for residents. *Cf.* s. 180.191, F. S., relating to municipal utility rates for noncity resident users; Mohme v. City of Cocoa, 328 So.2d 422 (Fla. 1976), holding, among other things, that a municipal utility may charge customers outside the city a different rate for service from that charged customers inside the city if such rate differential is justified because of difference in the cost of furnishing service to those outside the city limits; and AGO 074-212.

As to whether the board may *constitutionally* fix and prescribe higher hospital service fees for nonresidents of Seminole County than for residents, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as judicially construed, requires that all legislative or regulatory classifications which do not involve a "fundamental right" or "suspect criteria" bear a rational relation to a permissible state objective. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961); and Massachusetts Board of Retirement v. Murgia, 49 L.Ed.2d 520 (1976); *cf.* s. 2, Art. I, State Const.; AGO 074-279.

Applying the Equal Protection Clause here, I am aware of no case holding that access to and use of public hospital facilities is a fundamental right or that residency per se is a suspect criterion. Thus, the classification in question, in order to be upheld, must bear a rational relation to a permissible state objective. *Cf.* AGO 076-124. In this regard, it may be possible to rationally justify higher hospital service fees for nonresidents of Seminole County than for residents on the basis that residents already contribute a portion of the funds needed to operate the hospital through the county's taxation of them and their property, *see* ss. 155.04, 155.24, and 155.25, F. S., and that the imposition of higher hospital service fees on nonresidents, who generally make no similar tax contribution, will more nearly equalize the cost per patient of the operation of the hospital. *Cf.* Johns v. Redecker, 406 F.2d 878 (8th Cir. 1969), *cert. denied*, Twist v. Redecker, 396 U.S. 853. However, the determination of the rationality of this basis for classification may be made only after a consideration of all relevant economic factors entering into the costs of providing the hospital services, including the amount of any federal and state tax dollars which may have been contributed to support the construction and maintenance of the hospital. In any event, since such determination is a factual one, the constitutional aspect of your question is not susceptible of an affirmative or negative response here but is ultimately a matter for judicial resolution within the context of a particular case and controversy.

076-223—November 16, 1976

MUNICIPALITIES

PERMISSIBLE USES FOR MONEYS IN REVENUE-SHARING TRUST FUND FOR MUNICIPALITIES

To: K. J. Burroughs, Finance Director, Pompano Beach

Prepared by: Caroline C. Mueller, Assistant Attorney General

QUESTION:

Does s. 206.605, F. S., authorize municipalities to use funds available in the revenue-sharing trust fund for municipalities for: Road, street, and sidewalk maintenance and construction, storm drainage systems, and rights-of-way acquisition; a traffic engineering department for the traffic engineer's staff and administrative expenses; traffic signals which include signalized street intersections and other signalized traffic control devices, and traffic signs which include traffic control signs (stop signs, yield signs, etc.), and street painting and/or marking (stop bars, turn lanes, etc.); or street lighting which includes maintenance of city-owned white-way lighting and electricity cost for all street lighting?

SUMMARY:

Pursuant to s. 206.605(3), F. S., that portion of state revenue-sharing moneys attributable to the eighth-cent motor fuel tax may be used for the construction and maintenance of municipal roads, streets, and sidewalks; for storm drainage systems which are integral parts of the roads or streets and necessary for the maintenance of travel thereon; for road and street rights-of-way acquisition; for traffic control signals or devices and traffic signs and markings which are affixed to and an integral part of the road or street; and for the installation and maintenance of street lights on rights-of-way of municipal roads and streets. The moneys derived from the motor fuel tax may not be used for the funding of a municipal traffic engineering department's administrative or operating expenses, the traffic engineer's staff, or the operating expenses of "electricity costs for all street lighting."

The revenue sharing trust fund for municipalities is created and established by s. 218.215(2), F. S., into which fund the revenues derived from the tax on motor fuel levied by s. 206.605, F. S., are deposited by the Department of Revenue. *See* ss. 206.605(2) and 218.21(6)(b), F. S. Section 218.25, F. S., prescribes certain limitations on the use of revenue-sharing funds in excess of the guaranteed entitlement defined by s. 218.21(6) and designated in s. 218.21(6)(b), but such limitations are not applicable to the expenditures enumerated in your question. Therefore, s. 206.605(3) governs the use of revenues derived from the tax on motor fuel made available to municipalities under s. 206.605.

Section 206.605(3), F. S., provides:

> Funds available under this section *shall be used only for* purchase of transportation facilities and road and street rights-of-way, construction, reconstruction, maintenance of roads and streets; for the adjustment of city-owned utilities as required by road and street construction, and the construction, reconstruction, transportation-related public safety activities, maintenance, and operation of transportation facilities. . . . (Emphasis supplied.)

It is a well-recognized rule of statutory construction that when a statute enumerates the things upon which it is to operate or forbids certain things, it is to be considered as excluding from its operation all those not expressly mentioned. Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234, 239 (Fla. 1944); *also see In re* Advisory Opinion of Governor Civil Rights, 306 So.2d 520 (Fla. 1975). Moreover, the statute specifically states

that the funds available under s. 206.605, F. S., shall be used "only" for the uses and purposes expressly enumerated therein. The word "only" is a word of restriction or exclusion, although it does not exclude that which is not within the contemplation of the provision of the statute in which it occurs, and, when used as an adverb, the word is defined to mean exclusively or solely. 67 C.J.S. *Only*, pp. 498-499; *also see* Moore v. Stevens, 106 So. 901, 904 (Fla. 1925); Thompson v. Squibb, 183 So.2d 30, 32 (2 D.C.A. Fla., 1966). Thus, revenue-sharing moneys derived from the tax on motor fuel levied by s. 206.605 may be used or expended for those activities and purposes expressly enumerated or within the contemplation or purview of the things so enumerated in s. 206.605(3) and nothing else.

Section 206.605(3), F. S., explicitly authorizes the use of revenue-sharing moneys derived from the tax on motor fuel for the construction and maintenance of roads and streets and road and street right-of-way acquisitions or purchases.

Section 206.605(3), F. S., does not expressly or specifically provide that the revenue-sharing moneys derived from the tax on motor fuel may be used for the maintenance and construction of sidewalks. However, a sidewalk is generally considered and deemed to be part of a street or road since a sidewalk may be necessary to fulfill the purposes of a street or road. *See* Black's Law Dictionary p. 1552 (Rev'd 4th Ed.,) and ss. 316.003(48), and 334.021(4)(b), and 334.03(9) and (15), F. S. Thus, revenue-sharing funds derived from the tax on motor fuel may be used or expended for maintenance and construction of sidewalks as portions of streets and roads, the construction and maintenance of which are clearly authorized by s. 206.605(3). After a review of various statutory and judicial definitions of sidewalks, the same conclusion was reached in a previous Attorney General Opinion dealing with this statute, AGO 071-397.

Section 206.605(3), F. S., does not expressly or specifically provide that funds derived from the tax on motor fuel may be used for storm drainage systems. However, I concluded that, although sidewalks are not *specifically* provided for by s. 206.605(3), they may qualify for such funds pursuant to this statute since sidewalks are generally considered and deemed to be part of a street or road, the construction and maintenance of which is clearly authorized or provided for by s. 206.605(3). The same rationale applies to storm drainage systems as portions of a road or street. *See* ss. 334.021(4)(b) and 334.03(9), F. S., defining roads, in part, to include culverts, drains, sluices, ditches, slopes, streets, and the rights-of-way. However, for a storm drainage system to be considered part of a street or road, it must be a necessary and integral part thereof and be reasonably connected with the street or road in proximity and purpose for the maintenance of travel thereon. A storm drainage system which is an integral part of the street or road and necessary for the maintenance of travel thereon would qualify for revenue-sharing funds derived from the motor fuel tax.

Section 206.605(3), F. S., does not expressly or implicitly provide that any funds may be used for the traffic engineer's staff and administrative expenses or for operating expenses of any nature whatever. Generally, the statute contemplates the purchase of property or property rights; *see* s. 334.021(4)(c), F. S., in connection with the establishment of public transportation systems and the construction and maintenance of capital projects in connection therewith. Therefore, under the rules of statutory construction and judicial definitions hereinbefore discussed, there exists no statutory authority for the funding of the traffic engineering department's administrative or operating expenses or the personnel or staff of the city traffic engineer out of the funds derived from the tax on motor fuel levied by s. 206.605. *Cf.* AGO 074-221.

Section 206.605(3), F. S., does not expressly or specifically provide that revenue-sharing funds derived from the tax on motor fuel may be used for traffic control signals or devices and traffic signs. However, such items may also be considered to be part of a street or road. *Also see* ss. 316.006(2), 316.131(1), 316.182(1) and (3), and 316.184, F. S. In AGO 074-221, it was stated:

> I likewise note that existing traffic lights and appurtenant structures are affixed to and an integral part of the road or street right-of-way and used thereon to assist and direct traffic movement. I therefore conclude that they too are part of the road or street . . . .

As part of a street or road, the traffic control signals or devices and traffic signs and street paintings and markings which are affixed to and an integral part of the road or street and necessary for the maintenance of travel thereon would qualify for revenue-sharing funds derived from the tax on motor fuel levied by s. 206.605, F. S.

Section 206.605(3), F. S., does not expressly or specifically state that revenue-sharing moneys derived from the tax on motor fuel may be used for the installation and maintenance of street lights. The installation and maintenance of street lights may also be considered to be connected with, and necessary for, the maintenance of travel on public streets or roads, and such lights installed on the right-of-way of such streets or roads are part of such streets and roads because of their annexation to the right-of-way and their use as a part of the road or street. However, the statute does not authorize the expenditure of the motor fuel tax moneys to defray the "electricity costs" for any such street lights.

In a previous Attorney General Opinion, AGO 065-92, it was determined that electric lighting or street lights installed on and annexed to the right-of-way of a street or road are a part of such roads or streets and used as an integral part thereof. I affirmed or concurred in that conclusion in AGO 074-221. Attorney General Opinion 065-92 (dealing with an exception in the prevailing wage law for persons employed under contracts for "the construction, repair or maintenance of public roads or highways") stated:

> You will note from the foregoing statutory definition [s. 334.03(13), F. S., containing basically the same language found in s. 334.021(4), F. S., cited above] that rights-of-way and sidewalks are included as an integral part of the road. Accordingly, since the electric lighting would necessarily be installed on the right-of-way or sidewalks of a road or highway, it becomes a fixture by virtue of annexation and contemplated use. Therefore, it is a part of the road or highway. . . .

Thus, revenue-sharing funds derived from the tax on motor fuel may be expended for the installation and maintenance of street lights on the rights-of-way of municipal roads or streets under the terms of s. 206.605, F. S.

A similar conclusion was reached in AGO 071-397, mentioned previously. In that opinion dealing with the same statute, it was determined that expenditures for parking facilities were within the terms enumerated in s. 206.605(3), F. S., and that parking facilities are necessary for the control or regulation of traffic congestion and for the safety of the general public.

Section 206.605(3), F. S., does not expressly or implicitly provide that revenue-sharing moneys derived from the tax on motor fuel may be used for the operating expense of "electricity cost for all street lighting." The statute provides that the motor fuel tax moneys may be used for the "*operation* of transportation facilities." (Emphasis supplied.) "Transportation facilities" is defined by s. 334.021(4)(c), F. S., to mean the property or property rights of a type used for the establishment of public transportation systems established for the transportation of people and property, including all forms of transportation located on land, water, or air for the mass transportation of people [*see* s. 334.021(4)(a), F. S.]. Since the statute does not provide for any other operating costs, the rule *expressio unius est exclusio alterius*—express mention of one thing is the exclusion of another—is controlling; *see* Dobbs v. Sea Isle Hotel *et al.*, 56 So.2d 341 (Fla. 1952), Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974), so that, by clear implication, no revenue-sharing moneys derived from the tax on motor fuel may be expended for the operating expenses of "electricity cost for all street lighting." However, such moneys may be expended for initial capital outlay and for the maintenance of street lights installed on and annexed to the rights-of-way of municipal roads and streets as an integral part thereof and for the maintenance of public travel thereon.

076-224—November 16, 1976

MUNICIPALITIES

ZONING—PROCEDURE FOR REZONING PROPERTY WHEN REZONING IS AT OWNER'S REQUEST SAME AS FOR OTHER REZONING

To: J. H. Roberts, Jr., City Attorney, Lakeland

Prepared by: Gerald L. Knight, Assistant Attorney General

QUESTION:

Must the procedure established by s. 166.041, F. S. (1976 Supp.), for the adoption of municipal ordinances which rezone private real property be followed when property is being rezoned solely upon the application of the property owner?

SUMMARY:

The procedure established by s. 166.041, F. S. (1976 Supp.), for the adoption of municipal ordinances which rezone private real property must be followed when property is being rezoned solely upon the application of the property owner.

Section 166.041, F. S., was amended by Ch. 76-155, Laws of Florida (which also amended ss. 125.66 and 163.3181, F. S.), to establish a procedure for the adoption of municipal ordinances which rezone private real property. Section 166.041(3)(d) provides in part as follows:

> (d) *Enactment of ordinances which rezone private real property shall be enacted pursuant to the following procedure:*
> 1. In cases in which the proposed rezoning involves less than 5 percent of the total land area of the municipality, the governing body shall direct the clerk of the governing body to notify by mail *each real property owner whose land the municipality will rezone by enactment of the ordinance* and whose address is known by reference to the latest ad valorem tax records. The notice shall state the substance of the proposed ordinance as it affects that property owner and shall set a time and place for one or more public hearings on such ordinance. Such notice shall be given at least 30 days prior to the date set for the public hearing, and *a copy of such notice shall be kept in a separate book which shall be open to public inspection during the regular business hours of the office of the clerk of the governing body.* The governing body shall hold a public hearing on the proposed ordinance not more than 60 days or less than 30 days prior to the date set for adoption of the ordinance. (Emphasis supplied.)

There is no exception provided in the foregoing provision or in any other provision of s. 166.041, F. S. (1976 Supp.), that would make the procedure established thereby inapplicable when a municipal ordinance rezoning private real property is adopted solely upon the application of the person whose property is being rezoned. (Such an exception was included in some of the original house bills on the subject, *see* HB's 35 and 37, but was deleted in the final, substituted version.)

Thus, in accordance with the fundamental rule of statutory construction that a statute must be given its plain and unambiguous meaning without interpretation, *see* State v. Egan, 287 So.2d 1, 4 (Fla. 1973), I am of the opinion that the procedure established by s. 166.041, F. S. (1976 Supp.), for the adoption of municipal ordinances which rezone private real property must be followed even when property is being rezoned solely upon the application of the private property owner. *See also* Alsop v. Pierce, 19 So.2d 805, 806 (Fla. 1944), for the proposition that when the controlling law directs how a thing shall be done, that is, in effect, a prohibition against its being done in any other way. This conclusion seems consistent with the apparent legislative intent in enacting Ch. 76-155, Laws of Florida, *i.e.*, increasing the opportunity of the general public to consider and make its views known regarding proposed rezonings of private real property.

Your question is answered in the affirmative.

076-225—November 29, 1976

SUNSHINE LAW—PUBLIC RECORDS LAW

APPLICABILITY TO INVESTIGATIVE AND OTHER PROCEEDINGS RELATIVE TO POSSIBLE DISCIPLINARY ACTION BY REGULATORY BOARD

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTIONS:

1. Is initiation of an investigation by the State Board of Accountancy of possible violations of Ch. 473, F. S., or the rules of the board to determine whether there is probable cause to take disciplinary action against the holder of a certificate issued by the board or the designation of an investigating officer by the board to conduct such investigation and make a report thereon to the board subject to the Government in the Sunshine Law, s. 286.011, F. S.?
2. Is a meeting of, or a hearing before, the board to consider or review a report filed by an investigating officer to determine whether probable or no probable cause exists to initiate an administrative complaint against a certificate holder subject to the requirements of s. 286.011, F. S.?
3. Which records obtained in the course of investigations by the State Board of Accountancy are subject to the provisions of Ch. 119, F. S., and to what extent is the board authorized to restrict disclosure of such records?

SUMMARY:

The initiation of an investigation by the State Board of Accountancy of possible violations of Ch. 473, F. S., or the rules of the board to determine whether or not probable cause exists to take disciplinary action against the holder of a certificate issued by the board, the designation of an investigating officer by the board to conduct such investigation and make a report thereon to the board, and the hearing before the board to consider or review the investigating officer's report and determine whether probable cause or no probable cause exists to initiate an administrative complaint against a certificate holder are all proceedings required by law to be conducted by the board as an entity and at a proper meeting of said board. Therefore, as the Sunshine Law is applicable to *all* meetings of governmental agencies, the aforementioned investigative proceedings of the board must be conducted in accordance with the requirements of s. 286.011, F. S.

All investigative records and reports made or received by the board prior to a finding of probable cause to commence formal action are exempted from the provisions of s. 119.07, F. S., pursuant to s. 455.08, F. S., and, therefore, are not available for, or subject to, public examination and inspection prior to a finding of probable cause. If the board makes a determination that no probable cause exists, then all such investigative records and reports continue to be exempted from the public inspection requirements of s. 119.07. If, however, the board finds probable cause, then all investigative records and reports, including those otherwise privileged in the courts pursuant to s. 473.141(3), F. S., become subject to the provisions of Ch. 119, F. S., and open for public inspection.

AS TO QUESTIONS 1 AND 2:

The State Board of Accountancy has promulgated Rule 21A-14.02, F.A.C., in pertinent part providing:

(1) Initiation of Investigation
(a) All investigations of possible violations of Chapter 473, F. S. or Chapter 21A, Florida Administrative Code, shall be initiated only with the approval and at the direction of the Board.
(b) An investigation shall be considered a non-adversary executive function to discover or procure evidence as part of the fact finding function of the Board. The Board need not have an administrative complaint, pursuant to F. S. 120.57, submitted or pending to conduct an investigation. The Board may on its own motion or upon written petition of a substantially affected party conduct an investigation. The Board may design forms for the filing of the petition by substantially affected parties requesting the Board to conduct an investigation.

* * * * *

(c) An investigation shall not be commenced by the Board until completion of the following form in the substantial format as indicated:

State Board of Accountancy
Post Office Box 13476
Gainesville, Florida 32604

In re the investigation
of _____
Upon the authority of section(s) ___ F. S., upon action taken at a regularly scheduled meeting held on (date) , (place) the State Board of Accountancy hereby declares that an investigation relating to ___ is initiated generally based on the following brought to the Board's attention:
This investigation is intended to gather facts in the subject matter for the purpose of enabling the Board to determine whether probable or no probable cause exists to initiate an administrative complaint and in no manner implies or alleges that the party of the investigation has been or is guilty of any wrong doing. The Board does, however, reserve the right to extend its investigations to matters other than mentioned above.

Date

Executive Director

(2) Confidentiality—All proceedings and records relating to an investigation shall be confidential until either the subject of the investigation requests in writing that such investigation and records be made public or until the Board makes a finding of probable cause. Upon a finding of probable cause, all proceedings and records relating to an investigation shall become public information unless it is confidential under Florida law such as:
a. Personal financial statements and other personal information, the release of which would constitute an unwarranted invasion of privacy;
b. Communications between a certified public accountant and his/her client unless authorized in writing for public release by the client.

* * * * *

(4) Appointment of Investigation Officer—Pursuant to F. S. 473.261(3), the Board may designate investigating officers to conduct investigations who shall be competent by reason of training or experience.
(5) Conduct of the Investigation

* * * * *

(c) Duty of Investigating Officer—The duty of the investigating officer is to obtain sufficient, competent evidential matter through the conduct of an investigation and to file a written report which the Board will consider in finding whether probable or no probable cause exists to initiate an administrative complaint against the party of the investigation for violation of any portion(s) of Chapter 473, Florida Statutes, and/or Chapter 21A, Florida Administrative Code. The investigating officer shall not make a recommendation as to probable or no probable cause unless requested by the Board.

* * * * *

(6) Filing of Investigating Officer's Report—The investigating officer shall submit a report in writing to the Board containing his findings and other supplemental information and evidential matter as may be appropriate. A copy of the report along with a notice of hearing to consider investigating officer's report shall be forwarded to the party of the investigation and the party who submitted the initial petition for the investigation and such parties shall be given the opportunity to submit statements either personally, by a representative and/or by counsel, verbally or in writing, sworn or unsworn, explaining, refuting or admitting the alleged misconduct and shall also be given an opportunity to be present and address the Board when the report is considered. The notice of hearing to consider investigating officer's report shall be in substantially the following format:

NOTICE OF HEARING TO CONSIDER
INVESTIGATING OFFICER'S REPORT
STATE OF FLORIDA
STATE BOARD OF ACCOUNTANCY

IN RE: Investigation _____

The State Board of Accountancy announces a hearing to which all interested persons are invited.

DATE AND TIME: _____, 19____
at

PLACE: _____

PURPOSE: Pursuant to F. S. 473.261(3) and Rule 21A-__, Florida Administrative Code, the Board of Accountancy will consider a report received from an investigating officer duly appointed under F. S. 473.261(3) and will receive additional information relative to the merits of the matter for the purpose of determining whether probable cause exists to initiate disciplinary action.

Sworn or unsworn written statements will be received from the party of the above investigation, from such person's representative and/or counsel, explaining, refuting or supporting the findings and/or recommendation of the Investigating Officer.

Substantially affected parties who desire to participate at the hearing shall file written notice of intent to participate, showing such substantial interest, no later than __, 19__.

A copy of the public file is available for copying and inspection by any person in the Board's offices at 3131 N.W. 13th Street, Suite 54, Gainesville, Florida, during regular business hours. A charge will be made to cover copying cost.

Copies of the hearing guidelines and the following item(s) are attached hereto: _____

Witness my hand and the Seal of the Board of Accountancy, State of Florida, at Gainesville, Florida, this __ day of __, 19__

_____
Executive Director

Copies with attachments to the following (certified mail—return receipt requested):

(7) Hearing Guidelines to Consider Investigating Officer's Reports—The following guidelines are provided for the efficient and orderly conduct of a hearing to consider reports of investigating officers. The hearing is designed to provide for an orderly procedure to be used by the Board in the assimilation of facts. The hearing is not intended to be adversary but rather investigatory and of a fact-gathering nature. Substantially affected parties will be provided an opportunity to present facts relevant to the matter under consideration; further, participants are given guidelines to assist in establishing the surrounding facts and circumstances before the Board. Those desiring to present facts relevant to the investigation or participate in the hearing will be allowed to do so at the Board's discretion.

(a) Hearing to Consider Investigating Officer's Report

1. Purpose.—Prior to entering an order either finding or not finding probable cause, for the filing of an administrative complaint, the Board will hold a hearing respecting each investigation. The purpose of the hearing will be to receive and secure information relative to the merits of the pending investigation and to determine whether probable or no probable cause exists for the initiation of disciplinary action.

2. Notice—Notice of the hearing shall be mailed to parties being investigated by certified mail, return receipt, no later than 10 days prior to the hearing.

(b) Participation at Hearing—The following parties may participate at a hearing to consider an investigating officer's report:

1. Parties under investigation.

2. Other substantially affected parties providing they file written notice of intent to participate setting forth such substantial interest at least seven (7) days prior to the date of the hearing.

* * * * *

(e) Review of Investigating Officer's Report; Consideration of Testimony and Exhibits Presented at Hearing and Finding of Probable or No Probable Cause

1. At the conclusion of the hearing or within sixty (60) days following said hearing, the Board shall review the investigating officer's report and consider testimony and exhibits presented at the hearing and find by a majority vote:

a. Probable cause;

b. No probable cause; or

c. Return the report to the investigating officer or appoint a new investigating officer with appropriate instruction for further investigation.

* * * * *

3. If the Board finds probable cause it may direct:

(a) That disciplinary action be initiated under Chapter 473, Florida Statutes, pursuant to Chapter 120, Florida Statutes, by the filing of an administrative complaint setting forth the particular act or acts of conduct for which the person is sought to be disciplined;

(b) That an action be instituted pursuant to Section 473.05, Florida Statutes.

The State Board of Accountancy is responsible for the administration of Ch. 473, F. S., and is empowered to formulate rules for its guidance not inconsistent therewith and to prescribe standards of professional conduct and formulate reasonable rules defining unethical practices for persons holding certificates issued by the board to practice as certified public accountants or public accountants in this state. Section 473.04. All penalties provided by Ch. 473 are required to be invoked only after a hearing before the board and by the affirmative vote of four members thereof. Section 473.261(1). The board is required to adopt rules of procedure not inconsistent with the provisions of Ch. 120 for the conduct of hearings. *Id.* Section 473.261(2) empowers the board to conduct investigations of possible violations of Ch. 473 or its own rules to determine whether or not there is probable cause for discipline against the holder of a certificate issued by the board or an out-of-state practitioner as provided in s. 473.241(2) and (4). In aid of such

investigations, the board is empowered to issue subpoenas to compel witnesses to testify and to produce evidence. Section 473.261(2). The board may designate investigating officers to conduct investigations who, upon completion of their investigation, must file a report with the board. Section 473.261(3). The board is then required to review the report and determine whether or not probable cause exists for disciplinary action, or it may return the report to the investigating officer for further investigation. *Id.* Upon a finding of probable cause, the board must direct that an administrative complaint be filed setting forth the particular act or acts for which the person or practitioner is sought to be disciplined. Section 473.261(4).

The aforementioned statutes clearly contemplate that the State Board of Accountancy may act only as a *board* and that transaction of business may be accomplished *only* by a quorum of said board at a proper and legal meeting. *See* State *ex rel.* Greenberg, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974). Thus, while the board may, pursuant to s. 473.261(3), F. S., designate an investigating officer to conduct an investigation, said investigating officer is not authorized to issue subpoenas, take testimony, or receive proofs; only the board may compel the attendance of witnesses, take testimony, and receive proofs. Sections 473.04 and 473.261(3), F. S. Therefore, such actions on the part of the board must be taken by a quorum of the board at a proper meeting of said board. This conclusion necessitates a discussion of Florida's Government in the Sunshine Law (s. 286.011, F. S.), which provides in pertinent part:

> (1) All meetings of any board or commission of any state agency or authority . . . except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times. . . .

The State Board of Accountancy, as a board of a state agency, the Division of Professions of the Department of Professional and Occupational Regulation, is within the purview of this law. The Florida Supreme Court has held that the Sunshine Law applies to *any gathering* of the members of a board at which the members discuss matters on which foreseeable action may be taken. Board of Education of Broward County v. Doran, 224 So.2d 693 (Fla. 1969), City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).

The only exceptions to the Sunshine Law are those set forth in s. 447.605(1), F. S., in connection with certain discussions relative to collective bargaining and certain constitutional exceptions. *Cf.* Bassett v. Braddock, 262 So.2d 425 (Fla. 1972), concerning s. 6, Art. I, State Const., which guarantees collective bargaining and the right of a school board to consult in private with its negotiators. The Supreme Court has specifically held that no exception to the Sunshine Law exists where a board is exercising "quasi-judicial" functions. Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973); *but see* State of Florida, Department of Pollution v. Career Service Commission, 320 So.2d 846 (1 D.C.A. Fla., 1975). A meeting involving alleged violations of laws and regulations is, therefore, subject to the provisions of s. 286.011, F. S. Canney, *supra. Accord*: Attorney General Opinion 074-84 holding that the investigative or quasi-judicial hearings or proceedings of the Board of Dentistry are within the Sunshine Law.

It is clear, therefore, that that portion of Ch. 21A-12.02(2), F.A.C., which provides that all investigative "proceedings" of the board shall be confidential prior to a determination of probable cause unless the subject of the investigation requests otherwise directly contravenes s. 286.011, F. S., which requires *all* meetings of any board of any state agency at which official acts are to be taken to be open to the public and that minutes of all such meetings be promptly recorded and made available for, and open to, public inspection. It is axiomatic that the rulemaking power of an administrative agency does not permit the enactment of regulations which are unauthorized by, and inconsistent with, the expression of the lawmakers' intent in statutes other than those under which the regulations are issued. 1 Am. Jur.2d *Administrative Law* s. 133. I find no provision in Ch. 473, F. S., authorizing the board to conduct or hold confidential meetings or hearings or exempting the proceedings of the board relating to investigations of, or the discipline of, certificate or permitholders. *Cf.* s. 447.605(1), F. S., exempting from the provisions of s. 286.011 all discussions between the chief executive officer of a public employer and the legislative body of such public employer relative to collective bargaining. Sections 473.06 and 455.08, F. S., discussed *infra* in connection with your next question, have no bearing on the authority of the board to render its *proceedings* confidential. These sections create *only* a qualified exemption from the provisions of the

Public Records Law for certain *records* kept and maintained by the board and investigative reports and records made or received by the board.

Therefore, the initiation of an investigation of possible violations of Ch. 473, F. S., or the rules of the board to determine whether or not there is probable cause to take disciplinary action against the holder of a certificate issued by the board, the designation by the board of an investigating officer to conduct such investigation and make a report thereon to the board, and a hearing before the board to consider or review the investigative officer's report and determine whether probable cause or no probable cause exists to initiate an administrative complaint against a certificateholder are all proceedings required by statute to be conducted by the board as an entity at a meeting of said board, which meeting as a meeting of a state agency is subject to the requirements of s. 286.011, F. S.

Your first and second questions are answered in the affirmative.

AS TO QUESTION 3:

The extent to which the investigative reports and records of the board may be rendered confidential by the board depends upon the terms of the Public Records Law, Ch. 119, F. S., and upon the rulemaking authority of the board as described in ss. 473.04 and 473.06(2), F. S.

Florida's Public Records Law, s. 119.01, F. S., requires state, county, and municipal records to be open for public inspection by any person. "Public records" is defined to include

> . . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. [Section 119.011(1), F. S.]

"Agency" means:

> . . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. [Section 119.011(2), F. S.]

The Board of Accountancy is clearly an agency within the meaning of this definition. Records obtained through investigations by agencies are subject to the provisions of Ch. 119, F. S., unless an exemption exists by law pursuant to s. 119.07(2). *See* Caswell v. Manhattan Fire & Marine Ins. Co., 399 F.2d 417 (5th Cir. 1968), holding the investigative reports of the State Fire Marshal subject to the Public Records Law. *See also* AGO 074-84 concluding that a transcript of testimony or evidence taken in an investigation by the State Board of Dentistry no matter what the form—stenographic notes, tape recordings, or handwritten or typed statements—was a public record and open to public inspection pursuant to Ch. 119.

One such exception to Ch. 119, F. S., which has been provided by statute is that contained in s. 455.08, F. S. (brought into the statutes by s. 1, Ch. 75-225, Laws of Florida), which provides, in pertinent part, that:

> Investigative reports and records made or received by a board . . . in . . . the Department of Professional and Occupational Regulation shall be exempt from the provisions of s. 119.07, unless the board . . . has found probable cause to commence formal action.

Clearly, therefore, this section authorizes *that portion* of Rule 21A-14.02(2), F.A.C., or so much thereof as makes confidential all *investigative reports* and *records* until the board makes a finding of probable cause, *i.e.*, such investigative records are not subject to public examination and inspection under s. 119.07 prior to a determination of probable cause.

However, I must emphasize at this point that the exemption from the provisions of s. 119.07, F. S., provided by s. 455.08, F. S., is limited solely to *investigative* reports and records made or received by a board in the Department of Professional and Occupational

Regulation. Thus, it is applicable only to those reports and records made or received subsequent to the initiation of an investigation pursuant to s. 473.261(3), F. S., and Rule 21A-14.02(1) which form the investigative file. The exemption provided by s. 455.08 does not, therefore, restrict public inspection of the written petitions of substantially affected parties requesting an investigation, *see* Rule 21A-14.02(1)(b); the forms prepared by the board indicating the initiation of an investigation, *see* Rule 21A-14.02(1)(e); or the forms prepared by the board which provide notice of a hearing to consider the investigating officer's report, *see* Rule 21A-14.02(6). Additionally, s. 455.08 does not operate to restrict disclosure of the uniform complaint report forms which the board is required to create and maintain pursuant to s. 455.013, F. S.

Rule 21A-14.02(2)a., F.A.C., makes confidential certain information and records otherwise confidential under Florida law such as personal financial statements and other personal information the release of which would constitute an unwarranted invasion of privacy. This part of the rule apparently has reference to, and is implementive of, s. 473.06(2), F. S., for no other section of Ch. 473, *supra*, purports to make confidential any such information contained in *records* of the board. Section 473.06 provides, in pertinent part, that the board is to keep all documents filed under oath with the board and a record of all proceedings before the board. Section 473.06(2) states in relevant part that:

> (2) The *records of the board* shall be kept and held as confidential *to the extent* that the privacy of *certificate* or *permit holders* and of *applicants* for certificates or permits shall not be *unreasonably* invaded or impinged. . . . The board shall adopt and enforce rules and regulations to assure such confidentiality. (Emphasis supplied.)

It is clear that the board's authority to make and enforce rules and regulations pursuant to s. 473.06(2), F. S., is limited to the authority conferred upon it by the statute. *See* State *ex rel.* Greenberg v. State Bd. of Dentistry, 297 So.2d 628, 635 (1 D.C.A. Fla., 1974), *cert. dismissed* 300 So.2d 900 (1974); Atlantic Coast Line R. Co. v. State, 143 So. 255 (Fla. 1932). Section 473.06(2) authorizes the board to protect *only* the privacy of *certificate* or *permitholders* and *applicants* for certificates or permits to the extent therein provided for. The board is *not* authorized to protect the privacy of other persons, such as clients or stockholders, to any extent whatever. It is a cardinal principle of statutory construction that the mention of one thing in a statute implies the exclusion of the other; *expressio unius est exclusio alierius.* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Biddle v. State Beverage Dept., 187 So.2d 65 (4 D.C.A. Fla., 1966).

In addition, s. 473.06(2), F. S., does not contemplate an absolute exemption from disclosure where the privacy of a certificate or permitholder or applicant is at stake. *Only* such records as may *unreasonably* impinge on, or invade the *privacy* of, certificate or permitholders may be rendered confidential and to that extent only. Thus, the operation of this statute is dependent upon the existence of a recognized right of privacy; and I find no such right attendant to disciplinary proceedings conducted by the board. As the United States Supreme Court recently stated, the constitutional right of privacy is limited to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." Paul v. Davis, 47 L.Ed.2d 405, at 421 (1976). Furthermore, it has been held in this state that the right of privacy does not prohibit disclosure of information of public benefit or matters of legitimate or public interest and that the right of privacy does not exist as to persons and events in which the public has a rightful interest. Harms v. Miami Daily News, Inc., 127 So.2d 715, 717 (3 D.C.A. Fla., 1961).

I find no provision in Ch. 473, F. S., or elsewhere in the statutes which creates a right of privacy in disciplinary proceedings upon which s. 473.06(2) can operate to authorize the board to shield from disclosure the investigative reports and records related to such proceedings once probable cause is found to institute disciplinary action. To the contrary, s. 473.141(2) indicates that the Legislature did not intend to create such a right, as this section expressly provides that otherwise privileged communications between clients and accountants shall not be exempt from disclosure in any disciplinary investigations conducted before the board.

As to Rule 21A-14.02(2)b., F.A.C., reference must be made to s. 473.141, F. S., which creates an accountant-client privilege. The 1976 Florida Legislature has repealed s. 473.141 effective July 1, 1977. Sections 2 and 8, Ch. 76-237, Laws of Florida. Thus, the privilege remains in effect until July 1, 1977.

Section 473.141(1), F. S., provides that all communications between a certified public accountant or public accountant and a person for whom the accountant has made an audit or other investigation in a professional capacity and all other information obtained by a public accountant in his professional capacity concerning the business affairs of a client are privileged *in all courts* in Florida unless the client waives this privilege in writing. Section 473.141(2) states, however, that such communications are not privileged from disclosure in any disciplinary investigation or proceeding before the board, or judicial review of the same, and that a public accountant may, without the consent of his client, testify with respect to such matters or be compelled, by subpoena of the board pursuant to s. 473.261, F. S., to testify or produce records with respect to such matters or communications. Communications so disclosed or testified to the board pursuant to s. 473.141(2), F. S., and the records of the board regarding same, for all *other* purposes and proceedings remain privileged communications *in all of the courts of this state.* Section 473.141(3), F. S.

The terms of this statute clearly indicate that the accountant-client privilege is applicable *only* to *court* proceedings and *not* to disciplinary investigations or proceedings under Ch. 473, F. S., conducted by or before the board. The statute does not make confidential such communications or the records of the board regarding same in disciplinary proceedings before the board, nor is the board authorized by law to do so. Hence, it is clearly beyond the scope of the authority of the board to adopt and enforce any rules and regulations which qualify, extend, or enlarge upon the accountant-client privilege. *See* Greenberg, *supra.*

076-226—November 29, 1976

CONSUMER PROTECTION

"LITTLE FTC ACT" APPLICABLE TO PREPAID LEGAL SERVICE PLANS

To: Marshall R. Cassedy, Executive Director, The Florida Bar, Tallahassee

Prepared by: Bernard S. McLendon, Assistant Attorney General

QUESTION:

Does Ch. 501, F. S., better known as the "Little FTC Act," cover prepaid legal service plans in Florida?

SUMMARY:

Prepaid legal service plans in Florida are covered under Ch. 501, F. S., better known as the "Little FTC Act." Assuming that The Florida Bar is a "person" as defined in s. 1.01(3), F. S., The Florida Bar may file suits pursuant to Ch. 501 without additional legislation.

Your question is answered in the affirmative for the reasons set forth below.

Section 501.204, F. S., provides that all "deceptive" trade practices in any "trade or commerce" are unlawful as defined by the precedents of the Federal Trade Commission. The Department of Legal Affairs is the principal enforcer and administrator of this act, but state attorneys and consumers, through private actions, also have enforcement powers. Sections 501.203(4) and 501.211, F. S. Section 501.204, the unlawful acts and practices provision, does not limit its provisions to "consumer transactions." Section 501.204(1) declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." A person who markets prepaid legal service plans is engaging in commerce, as is a person who exchanges legal services for money. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

Under s. 501.212, F. S., activities regulated under laws administered by the Department of Insurance are exempt from the provisions of Ch. 501, F. S. The Insurance Code, part II, Ch. 624, F. S., sets forth the authority and duties of the Department of Insurance. This authority includes that expressly granted by or reasonably implied from

the code provisions, in addition to that provided for in other statutory provisions. Section 624.307. Upon reviewing these statutes, the reasonable conclusion to be made is that these provisions do not apply to prepaid legal service plans, nor do they vest in the Department of Insurance the authority to regulate these plans.

No useful purpose would be served by stating the various definitions of "insurance" which have been given. However, the authorities generally agree that insurance is an agreement whereby one person, for a consideration, promises to pay money or its equivalent or to perform some act of value to another on the destruction, death, loss, or injury of someone or something by specified perils. 18 Fla. Jur. *Insurance* s. 4. However, the dominant feature of insurance is a contract of indemnity against contingent loss. Brock v. Hardie, 154 So. 690 (Fla. 1934); 18 Fla. Jur. *Insurance* s. 4. This definition is not descriptive of prepaid legal service contracts.

Considering that Ch. 501, F. S., is not limited to "consumer transactions" and that the dominant features of insurance are not present in prepaid legal service plans, these plans would not be exempt under s. 501.212 as being activities regulated under laws administered by the Department of Insurance. Therefore, prepaid legal service plans are covered by Ch. 501, the "Little FTC Act." Assuming that The Florida Bar comes within the meaning of a "person" as defined in s. 1.01(3), F. S., and an "interested person" as defined in s. 501.203(8), legislation would not be necessary for The Florida Bar to bring suits under the "Little FTC Act."

076-227—November 29, 1976

SPECIAL DISTRICTS

HOSPITAL DISTRICT MAY NOT OPERATE AMBULANCE SERVICE IN THE ABSENCE OF AUTHORITY THEREFOR IN ITS ENABLING ACT

To: Gurney, Gurney, and Handley, Attorneys for West Orange Memorial Hospital Tax District, Orlando

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTION:

Is the West Orange Memorial Hospital Tax District statutorily authorized to own and operate an ambulance service in connection with its ownership and operation of a public hospital?

SUMMARY:

The West Orange Memorial Hospital Tax District or its governing board of trustees is not authorized by its enabling statute (Ch. 26066, 1949, Laws of Florida) to establish, operate, and maintain an ambulance service in connection with its ownership and operation of a public hospital. Such authority may be granted only by, and must be procured from, the Legislature.

Your question is answered in the negative.

The West Orange Memorial Hospital Tax District was created by Ch. 26066, 1949, Laws of Florida, and is governed by a board of trustees appointed by the Governor. The enabling legislation, in pertinent part, empowers the board of trustees "to establish, construct, operate and maintain such hospital, or hospitals as in their (sic) opinion shall be necessary for the use of the people of said district," and declares the "construction and maintenance of such hospital, or hospitals, within said district . . . to be a public purpose." Section 5, Ch. 26066. It is the duty of the board to levy against the taxable property within the district a tax not to exceed two mills, to be "used by said Board . . . for the operation, maintenance and repair of the hospital, or hospitals, established as authorized by this Act." Section 14, Ch. 26066. Section 19 of Ch. 26066 vests the board with plenary authority to promulgate rules concerning the regulation of

the hospital, or hospitals, and admissions of patients and fees or charges to be paid by patients who enter the hospital for treatment. It is the express legislative intent that Ch. 26066 be liberally construed for "accomplishing the work authorized and provided for by this Act." Section 20, Ch. 26066.

The aforecited statutory provisions make it evident that the hospital district is empowered to own, operate, and maintain hospitals and is under a duty to use its tax revenues only for the operation, maintenance, and repair of the hospital or hospitals established and operated by the district board of trustees. Such activities are the only "work authorized and provided for by [the statute]" within the contemplation and scope of this opinion. Conversely, the statute makes it evident that the board of trustees of the hospital district does not have the authority or duty to acquire, own, and operate an ambulance service.

It is a well-settled rule that statutory entities, such as this hospital district, possess only such authority as is delegated to them by law, *i.e.*, such powers as are expressly given or necessarily implied because essential to carry into effect those powers expressly granted. They have no common-law powers, and what powers they have are limited to the statutes that create them. Forbes Pioneer Boat Line v. Board of Com'rs of Everglades Drainage District, 82 So. 346 (Fla. 1919); City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493 (Fla. 1973). State v. Florida State Bd. of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); *also see* AGO's 073-374, 074-272, 076-37, and 076-200. The establishment and operation of an ambulance service is not essential or necessary to carry out the duty and function of operating and maintaining a hospital, and I am unaware of any judicial authority holding that it is; nor is the establishment and operation of an ambulance service "work authorized and provided for by [Ch. 26066, *supra*]."

Moreover, when a statute enumerates the things on which it is to operate, *i.e.*, establishment and operation and maintenance of hospitals, or forbids certain things, it is ordinarily to be construed as excluding from its operation all things, such as the establishment and operation and maintenance of an ambulance service, not expressly mentioned therein. Thayer v. State, 335 So.2d 815 (Fla. 1976); AGO 076-132. These same principles of law apply to the rulemaking power of the board with respect to the regulation of the hospital and the admission of patients and the fixing of charges to be paid by patients entering the hospital for treatment. The statute does not confer any authority on the board to charge and collect any fees for ambulance services to be rendered or to pay the costs of establishing, operating, and maintaining an ambulance service. *Cf.* s. 125.01(1)(e) and (q) and (3)(a), F. S., and AGO 076-73, holding that s. 163.633, F. S., does not prohibit the Legislature from enacting a special act creating a special district to provide fire protection and ancillary emergency services, such as ambulance services, to serve a populated but unincorporated area of a noncharter county. The authority to establish, operate, and maintain an ambulance service and to charge and collect fees for ambulance services rendered in connection with and as an integral part of the operation and maintenance of public hospitals by the hospital tax district may be granted only by, and must be procured from, the Legislature. *Cf.* Ch. 165, F. S., and AGO's 075-27 and 075-108.

Applying the foregoing principles of law to the instant question, I conclude that this hospital tax district or its governing board of trustees is not authorized by its enabling statute to establish, operate, and maintain an ambulance service in connection with and as an integral part of its ownership, operation, and maintenance of a district hospital or hospitals.

076-228—November 30, 1976

TAXATION

LIMITATION ON HOMESTEAD TAX EXEMPTION FOR PERMANENTLY AND TOTALLY DISABLED VETERANS

To: A. H. "Gus" Craig, Representative, 28th District, Tallahassee

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

Is the homestead tax exemption provided for in s. 196.081, F. S., as amended by Ch. 76-163, Laws of Florida, for certain permanently and totally disabled veterans limited to an amount not exceeding $10,000 of assessed valuation?

SUMMARY:

The homestead tax exemption provided for in s. 196.081, F. S., as amended by Ch. 76-163, Laws of Florida, for certain permanently and totally disabled veterans is not limited to an amount not exceeding $10,000 of assessed valuation. A disabled veteran meeting all the conditions and requirements found in s. 196.081 would be entitled to receive total exemption on any real estate used and owned as a homestead by such ex-serviceman. No other disabled persons may qualify for the homestead tax exemption under s. 196.081.

Your question is answered in the negative.
Section 196.081(1), F. S., as amended by Ch. 76-163, *supra*, provides:

> *Any real estate used and owned* as a homestead by a veteran, honorably discharged with service-connected total and permanent disability and having a letter from the United States Government or United States Veterans' Administration or its successors *certifying* that the ex-serviceman *is totally and permanently disabled*, shall be exempt from taxation, *provided the veteran was a permanent resident* of the state on January 1, 1976, *or* a permanent resident of the state for a period of not less than 5 years as of January 1 of the tax year for which exemption is being claimed. (Emphasis supplied.)

Prior to amendment in 1976, said statute provided:

> (1) Any real estate used and owned as a homestead by an ex-serviceman, honorably discharged with service connected total and permanent disability and having a letter from the United States Government or United States Veterans' Administration or its successors certifying that the ex-serviceman is totally and permanently disabled due to total blindness, or from the amputation of both arms or both legs, or both hands or both feet, or the combination of a hand and a foot, or from paraplegia, osteochondtritis resulting in permanent loss of the use of both legs, or permanent paralysis of both legs and lower parts of the body, or from hemiplegia, or has permanent paralysis of one leg and one arm on either side of the body, resulting from injury to the spinal cord, skeletal structure, or brain, or from disease of the spinal cord not resulting from any form of syphilis, shall be exempt from taxation.

As is readily apparent, there is no limitation on the *amount* of exemption in the law either as it *previously* existed or as it *presently* exists. Accordingly, there is no statutory limitation on the *amount* of the tax exemption provided for in s. 196.081.

In your letter you have referred to several constitutional provisions which will be considered. Section 3(b), Art. VII, State Const., provides in part:

> There shall be exempt from taxation . . . to every widow or *person* who is blind or *totally and permanently disabled*, property to the value fixed by general law *not less* than five hundred dollars. (Emphasis supplied.)

This provision, where pertinent to your inquiry, contains the organic authorization for the Legislature to enact general laws exempting from taxation *property* of *totally* and *permanently disabled persons* in an amount not less than $500. Thus, this provision is authorization for legislative action exempting property of the persons described therein but restricts such action by requiring that it be done by *general law* and by requiring that the *amount* of exemption be *not less* than $500. The provision contemplates legislative implementation and expressly leaves the *determination* of the amount of the

exemption to the *wisdom* and *discretion* of the *Legislature except* that the amount fixed by the Legislature may not be less than $500.

Section 196.081, F. S. (1976 Supp.), is a *general law* implementing said provision as is s. 196.202, F. S., referred to in your letter. However, s. 196.202 extends to "property" and is not restricted to the specific type or classification of real property referred to in s. 196.081; that is, any real estate used and owned as a homestead. The exemption provided for in s. 196.081 is *expressly limited* to real estate used and owned as a *homestead* by a *veteran*, honorably discharged with *service-connected total and permanent disability* and having a letter from the appropriate federal governmental body certifying same, and does *not* extend to similarly classified property owned and used as a homestead by a *nonveteran* who is totally and permanently disabled or by a veteran who does not qualify under the terms of s. 196.081.

The limitations found in s. 6(c), Art. VII, State Const., or s. 196.031(3)(b) and (c), F. S., would not be applicable to s. 196.081, F. S. (1976 Supp.).

The same conclusion was reached in AGO 074-235, wherein it is stated:

> It should be noted that the term totally and permanently disabled is legislatively defined in a more restrictive fashion as used in ss. 196.081, 196.091, and 196.101, F. S., *which sections grant total exemption of homestead properties to certain veterans* and others with specific kinds of disabilities, such as paraplegia and wheelchair confinement. Those sections expressly provide the criteria for determination of eligibility thereunder, and limit the use of such criteria to eligibility for exemption under the specific section in which they are contained. (*See* AGO's 072-42 and 072-194.) (Emphasis supplied.)

In AGO 074-182, ss. 196.081, 196.091, 196.101, and 196.031, F. S., were discussed at some length as follows:

> Several provisions of the Florida Statutes may be applied under certain circumstances to exempt a swimming pool from property taxes when it is a part of homestead real property improvements. Sections 196.081, 196.091, 196.101, and 196.031, F. S.
>
> Section 196.081(1), F. S., provides: Any real estate used and owned as a homestead by an *ex-serviceman*, honorably discharged *with service connected total and permanent disability* [due to total blindness, amputation, paraplegia or hemiplegia] . . . shall be exempt from taxation.
>
> Section 196.091(1), F. S., provides: Any real estate used and owned as a homestead by an *ex-serviceman*, honorably discharged *with service connected total disability* and who has . . . received special pecuniary assistance due to disability requiring specially adapted housing and required to use a wheelchair for his transportation, shall be exempt from taxation. (Emphasis in original.)
>
> * * * * *
>
> *These provisions grant total exemption of property owned and used as a homestead* by any quadriplegic or by those persons within the specified classes of service-connected disabilities. A swimming pool owned and used as a part of such property would accordingly be exempt *regardless of the total value.* Attorney General Opinions 058-132, 069-132, and 071-115. (Emphasis supplied.)

Continuing therein, it is stated:

> Attorney General Opinion 069-132 construed these statutes, which were enacted prior to the adoption of the 1968 Constitution, as presumptively valid under Art. VII, s. 3(b), permitting exemption of property of totally and permanently disabled persons in *whatever amount is fixed by general law, in contrast to the specific authority* under Art. VII, s. 6(c), for homestead exemption for the entire class of totally and permanently disabled "not exceeding" ten thousand dollars. (Emphasis supplied.)

As can be seen, the conclusion reached herein is the same, where pertinent, as that reached by my predecessors in office in AGO's 058-132 and 069-132. It is also consistent with Rule 12B-1.201(4)(a) of the Department of Revenue, which is the old rule and which

was replaced by Rule 12D-7.04, and which is now effective having been promulgated recognizing the change in the statute. The latter rule, in subsection (4) thereof, expressly states that there is no limitation of assessed valuation for such exemption. Such rules when duly promulgated have the force and effect of a statute if within the terms thereof. Florida Citrus Commission v. Golden Gift, 91 So.2d 657, Florida Livestock Board v. Gladden, 76 So.2d 291.

Accordingly, a *veteran* qualifying under s. 196.081, F. S. (1976 Supp.), by meeting all the conditions and requirements specified therein would be entitled to receive *total* exemption on real estate owned and used by such veteran as a homestead, while a *nonveteran* or a nonqualifying veteran who was totally and permanently disabled would *not* be entitled to such total exemption provided for in s. 196.081 on real estate owned and used as a homestead by such nonveteran or nonqualifying veteran.

Also see AGO's 075-73, 074-325, 074-353, 074-375, 074-82, and 073-325 which deal with related questions.

076-229—November 30, 1976

TAXATION

PERMANENTLY AND TOTALLY DISABLED VETERAN QUALIFIES FOR EXEMPTION EVEN THOUGH DISABILITY CERTIFIED AFTER DISCHARGE FROM SERVICE

To: Robert L. Shapiro, Attorney for Palm Beach County Property Appraiser, Palm Beach

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

Does the exemption provided for in s. 196.081, F. S., as amended by Ch. 76-163, Laws of Florida, apply in those situations where an ex-serviceman is certified to be totally and permanently disabled at some time *subsequent* to the date of discharge from the service?

SUMMARY:

A veteran with service-connected total and permanent disability who otherwise qualifies for the tax exemption provided for in s. 196.081(1), F. S., as amended by Ch. 76-163, Laws of Florida, by meeting all the conditions and requirements found therein would be entitled to such exemption whether or not the requisite letter from the United States Government or the United States Veterans' Administration or its successors, certifying that the ex-serviceman was totally and permanently disabled, was written prior to, at the time of, or subsequent to the date such veteran was honorably discharged from the service.

Your question is answered in the affirmative.

Section 196.081(1), F. S., as amended by Ch. 76-163, Laws of Florida, provides:

> Any real estate used and owned as a homestead by a veteran, honorably discharged with service-connected total and permanent disability and having a letter from the United States Government or United States Veterans' Administration or its successors *certifying* that the ex-serviceman *is totally and permanently disabled*, shall be exempt from taxation, *provided the veteran was a permanent resident* of the state on January 1, 1976, *or* a permanent resident of the state for a period of not less than 5 years as of January 1 of the tax year for which exemption is being claimed. (Emphasis supplied.)

It is common knowledge that there are numerous occasions when service-connected disabilities are determined after the serviceman is discharged. Service-connected disabilities may not be discovered or known at the time of discharge, and in some

situations it is common that, even though service injuries are known, recovery is thought to be complete, so that at the time of discharge no disability is recorded. In other situations the disability is known and acknowledged for the amount or percentage of disability recorded at the time of discharge and is later changed if the disability becomes more pronounced. The statute was designed to embrace all such situations and to grant the exemption found therein to such honorably discharged veterans regardless of whether the certification of total and permanent service-connected disability is made at the time of discharge or later. The statute does not require that the certification occur at any given point in time. The only provisos found in the statute are as follows:

> . . . provided the veteran was a permanent resident of the state on January 1, 1976, or a permanent resident of the state for a period of not less than 5 years as of January 1 of the tax year for which exemption is being claimed. [Section 196.081(1).]

There is no proviso or condition requiring that the certification of total and permanent service-connected disability occur prior to or at the time of discharge. Had the Legislature intended to require such a condition, it could have easily done so, but it did not. It is well settled that the legislative intent is to be gleaned primarily from the language employed in the statutes and that the courts can neither add to nor detract from the language employed by the Legislature in statutes. *See* 82 C.J.S. *Statutes* s. 322, at p. 582, wherein it is stated:

> The court cannot indulge in speculation as to the *probable* or *possible qualifications* which might have been in the mind of the legislature, or assume a legislative intent in *plain contradiction to words used by the legislature*, and need not search for the reasons which prompted the legislature to enact the statute. (Emphasis supplied.)

Continuing therein at p. 583:

> An *unambiguous statute must be given effect* according to its *plain and obvious meaning*, and such unambiguous statute cannot be *extended* beyond its plain and obvious meaning, *or restricted* to, or confined in operation within, narrower limits or bounds than manifestly intended by the legislature, because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, otherwise the court would be assuming legislative authority. In construing a statute expressed in reasonably clear language, the court should *neither read in nor read out*; and where a law is plain, unambiguous, and explicit in its terms, the exceptions are *few indeed* that authorize a court *to read something into it that the law writers did not themselves put therein.* (Emphasis supplied.)

The conditions which must be met are clearly spelled out by the Legislature and may be stated as follows: The involved real estate which can be the subject of such exemption must be *used* and *owned* as a *homestead* by a veteran. Such veteran must be *honorably discharged*. Such veteran must have service-connected total and permanent disability. Such veteran must have a letter from the United States Government or the United States Veterans' Administration or its successors *certifying* that the ex-serviceman is totally and permanently disabled.

If these conditions are met, such veteran is entitled to the exemption, provided he was a permanent resident of the state on January 1, 1976, *or* a permanent resident of the state for a period of not less than 5 years as of January 1 of the tax year for which exemption is being claimed.

Rule 12D-7.04(2) is in accordance with the conclusions advanced herein, and such departmental rules are to be given great weight until invalidated by a court of competent jurisdiction.

Accordingly, inasmuch as the statute does not require that a veteran be totally and permanently disabled and have a letter certifying same from the appropriate federal agency prior to or at the time of discharge, a veteran meeting the other conditions and requirements set forth in the statute and having a letter from the United States Government or the United States Veterans' Administration or its successors certifying

that the ex-serviceman is totally and permanently disabled (service connected) would be entitled to the homestead tax exemption provided for in the statute.

076-230—November 30, 1976

SUNSHINE LAW

APPLICABLE TO APPOINTED HIGHWAY BEAUTIFICATION COMMITTEE

To: Anne K. Gurke, Chairman, Broward County Highway Beautification Committee, Hollywood

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Patricia R. Gleason, Legal Research Assistant

QUESTION:

Is the Broward County Beautification Committee, an organization created and appointed by the Broward County Board of County Commissioners pursuant to Ch. 28937, 1953, Laws of Florida, subject to the Government in the Sunshine Law?

SUMMARY:

The Broward County Beautification Committee, created and appointed by the board of county commissioners pursuant to Ch. 28937, 1953, Laws of Florida, for the purpose of conserving natural roadside growths and scenery and beautifying the highways, roads, and streets in Broward County as provided in Ch. 28937, is an agency or authority of the county for the purposes of and subject to the provisions of the Government in the Sunshine Law, s. 286.011, F. S.

You state in your inquiry that the Broward County Beautification Committee was set up without formal meetings since the statute did not specify meetings and that "the chairman acted as the administrator of the program." You further state that "[o]ur contributors and the committee do not feel the open meetings apply to the program since all contributions are freely and voluntarily given with no tax monies involved or any financial assistance given by any tax authority," and that "our contributors feel they should have the say if any" as to "where funds should be expended . . ."

The Broward County Beautification Committee was created by the Broward County Board of County Commissioners pursuant to authority granted by an act of the Legislature, Ch. 28937, 1953, Laws of Florida. The purpose of the Broward County Beautification Committee is to conserve the natural roadside growths and scenery and beautify the highways, streets, and roads in Broward County by restoring, planting, and seeding grasses, plants, and trees and maintaining the same along the roadsides of such highways, roads, and streets. Section 1, Ch. 28937. Section 3 of the act empowers the county tax collector to issue and deliver state motor vehicle license plates of selected numbers and other designations, if available, upon application and payment to the tax collector of a special fee in the amount of $5 upon such forms and in accordance with such rules as the tax collector may deem necessary to effectuate and carry out the provisions of the statute. Section 4 of the act requires the tax collector to deliver all such special fees collected and received by him to the committee and authorizes the committee to use such special fees for the purpose of beautifying the highways, roads, and streets in Broward County as set forth in s. 1 of the act. Section 4 of the act also requires the committee to keep adequate books of account, showing all receipts and expenditures of money. Such books are required to be open at all times for inspection by the board of county commissioners.

The members of the committee are appointed by the board of county commissioners "to serve for such times as may be designated by said board." Section 2, Ch. 28937, *supra*. The committee is required at least once *each year* to file with the board of county

commissioners a final statement showing all moneys received and expended by it and the purpose for which such expenditures were made. Section 4, Ch. 28937.

Florida's Government in the Sunshine Law provides in pertinent part that:

> 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 any political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times. . . . [Section 286.011(1), F. S.; emphasis supplied.]

The Broward County Beautification Committee was created, and its members appointed, by the Board of County Commissioners of Broward County pursuant to legislative act. Its purposes, duties, and functions have been prescribed by law. Its books of account are open to inspection by the board of county commissioners at all times, and it must report all its receipts and expenditures and the purpose thereof to the county commissioners. It is clear, therefore, that said committee is an agency or authority of the county for the purposes of and subject to the provisions of the Sunshine Law, s. 286.011, F. S., which requires that all meetings at which official action is to be taken be open to the public, that reasonable notice of such meetings be given, and that minutes of all such meetings be promptly recorded and made available for public inspection.

The only nonconstitutional exceptions to the Sunshine Law are those created by the Legislature. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971); Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973). The broad provisions of the Sunshine Law make no distinction between elected and appointed boards or commissions and boards or commissions whose members serve with or without compensation. So long as the particular board or commission is an agency or authority of the state, county, municipal corporation, or political subdivision, it must comply with the Sunshine Law. Moreover, the members appointed to the committee by the county commission are not actually "volunteers," as suggested in your inquiry, in the sense of one who volunteers his services to a civic or charitable association or organization. While the Legislature would have no right to require meetings of volunteer civic organizations unconnected with a governmental agency to conform to the Sunshine Law, the same is not true regarding a subordinate group or committee selected by governmental authority. Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974). Regardless of the views of the "contributors" on "who should have the say" as to how these public moneys are spent, the law clearly makes such a determination the responsibility of the committee. The Sunshine Law requires that the public have knowledge of and accordingly be given the opportunity to participate meaningfully in this decision-making process. Additionally, I find no pertinent legislative provision which exempts from s. 286.011, F. S., an agency of a county created pursuant to law such as the Broward County Beautification Committee. Of particular relevance in this context is Justice Adkins' opinion for the Florida Supreme Court in Canney v. Board of Public Instruction of Alachua County, *supra*, in which he states:

> Various boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist. Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the plain provisions of the statute. The benefit to the public far outweighs the inconvenience of the board or agency. If the board or agency feels aggrieved, then the remedy lies in the halls of the Legislature and not in efforts to circumvent the plain provisions of the statute by devious ways in the hope that the judiciary will read some exception into the law.

Regardless of the claimed contributory nature of the highway beautification funds derived from these special fees for vehicle license plates of selected numbers and designations, such moneys are in fact public funds. *Cf.* State v. Town of North Miami, 59 So.2d 779, 785 (Fla. 1952). Since these are public funds or moneys, it is of no import that no *tax* "moneys are involved or any financial assistance given by any tax authority." Such "private contributions" are in fact statutory fees, authorized and prescribed by the Legislature. These official special fees are for the specified services of the state and county, which include the special license plates of the state and the statutorily mandated gratuitous services of the tax collector in issuing such plates and collecting and distributing the special fees. The committee is a statutory creature or entity performing

statutorily prescribed duties and functions and utilizes the public moneys (special fees) distributed to it under authority of law for beautifying the roads and streets in the county as prescribed by Ch. 28937, *supra*. Any public officer, board, or entity receiving public moneys and using or disbursing the same for statutorily prescribed purposes is performing a governmental duty and function and exercising governmental discretion in the use or allotment and disbursement and the expenditure of such public moneys. *Cf.* White v. Crandon, 156 So. 303 (Fla. 1934); Palbicke v. Lee, 172 So. 481 (Fla. 1937); Orrell v. Johnson, 147 So. 254 (Fla. 1933); 67 C.J.S. *Officers* s. 118. The committee cannot delegate its statutorily prescribed governmental authority and duties to any other governmental agency or officer or to any private individual or entity. *See* State *ex rel.* Wolyn v. Apalachicola Northern R. Co. *et al.*, 88 So. 310, 311 (Fla. 1921); State v. Inter-American Center Authority, 84 So.2d 9, 13-14; Nicholas v. Wainwright, 152 So.2d 458 (Fla. 1963); Florida Dry Cleaning and Laundry Board v. Economy Cash & Carry Cleaners, Inc., 197 So. 550 (Fla. 1940); 67 C.J.S. *Officers* s. 104. *Cf.* Pinellas County v. Jasmine Plaza, Inc., 334 So.2d 639 (2 D.C.A. Fla., 1976).

Finally, you noted in your request that Ch. 28937, 1953, Laws of Florida, does not require that the committee hold meetings and the chairman of the committee act as the administrator of the program. However, the only way the committee can officially act is through meetings of that body and through properly adopted motions and/or resolutions. It cannot act by and through the chairman, and the chairman alone cannot administer the statutorily prescribed functions and programs of the committee. Absent statutory authority, a public board or officer cannot delegate its or his statutory powers and duties involving discretion and judgment, although such official may delegate the performance of ministerial acts or duties. *See* 67 C.J.S. *Officers* s. 114, at p. 404; AGO's 073-380, 074-57, 074-116, and 075-306. While the committee may by duly adopted resolution delegate purely ministerial authority and functions to its chairman, it cannot, in the absence of express statutory authority, abdicate its statutorily prescribed authority and duty to use the revenues derived from the prescribed special fees "for the purpose of beautifying the highways, roads, and streets in Broward County as set forth in s. 1 of (Ch. 28937, Spec. Acts 1953)." The use, allotment, distribution, and expenditure of public moneys under the terms of s. 4 of Ch. 28937 involve the exercise of governmental discretion and judgment, not the performance of a ministerial act or function which may be delegable.

Since Ch. 28937, *supra*, does not specify the method of organization of the committee or the procedures and mode of exercising its powers to allocate and use these public moneys for the purposes set forth in s. 1, the general parliamentary law should govern. *See* 67 C.J.S. *Parliamentary Law*, at 869, *et seq.*, and *Robert's Rules of Order.*

076-231—November 30, 1976

UNIFORM TRAFFIC CONTROL LAW

VOLUNTEER FIREMEN'S VEHICLES—USE OF RED LIGHTS, NOT "EMERGENCY VEHICLES"

To: Edward Kapushy, Fire Chief, Indian Harbor Beach

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTIONS:

1. Are the private vehicles of volunteer firemen authorized to display or use flashing red lights while en route to the fire station?

2. Are the drivers of such privately owned vehicles excepted from, or authorized to exercise the privileges conferred by, s. 316.051, F. S., relating to the obedience to and effect of traffic laws set forth in Ch. 316, F. S.?

SUMMARY:

The use or display of flashing red lights on privately owned vehicles belonging to active firemen of regularly authorized volunteer fire

> **departments is strictly limited to emergency use while *en route to scenes of fires* or other emergencies, and such red lights may not lawfully be used or displayed en route to the fire station. The drivers of such privately owned vehicles are not excepted from, or authorized to exercise the privileges conferred by, s. 316.072, F. S. (1976 Supp.), relating to the obedience to and effect of the traffic laws and are subject to all traffic regulations prescribed by the Uniform Traffic Control Law, except as provided in ss. 316.2397(3) and (6) and 316.2398(1), F. S. (1976 Supp.), with respect to the display and use of flashing red lights while en route to scenes of fires or other emergencies in the line of duty as active firemen members of regularly organized firefighting companies or associations. The private vehicles of volunteer firemen are not, and may not be, lawfully designated as authorized emergency vehicles.**

Both questions are answered in the negative.

I note that the 1976 Legislature enacted revisions to Ch. 316, F. S., the Florida Uniform Traffic Control Law, including substantial renumbering of the sections of this statute. However, no substantive amendments to Ch. 316 affect the sections of that law or other Attorney General Opinions cited herein.

The new renumbering system will be used herein.

AS TO QUESTION 1:

The provisions of Ch. 316, F. S., the Florida Uniform Traffic Control Law, generally are applicable to all vehicles operated on the public highways and streets and all vehicles owned or operated by cities, districts, or other political subdivisions of the state *unless* specifically excepted by Ch. 316. Section 316.072(1), (2), and (4), F. S. (1976 Supp.).

Section 316.072(5)(a), F. S. (1976 Supp.), provides an exception from, and authorizes the driver of an authorized emergency vehicle to exercise the privileges set forth in, s. 316.072, F. S. (1976 Supp.), when responding to an emergency call or when responding to a fire alarm, subject to the conditions stated in s. 316.072(5)(b) and (c), F. S. (1976 Supp.).

Section 316.003(1), F. S. (1976 Supp.), defines "authorized emergency vehicles" to mean "[v]ehicles of the fire department (fire patrol), police vehicles and such ambulances and emergency vehicles of municipal departments . . . as are designated or authorized by the department [of Transportation] or the chief of police . . . or any sheriff . . . ." Private vehicles of volunteer firemen are not included in this statutory definition and are not otherwise exempted from the Traffic Control Law.

In 1957, the Department of Public Safety requested an opinion as to whether "privately owned vehicles belonging to the active fireman [sic] members of regularly authorized volunteer fire-fighting companies or associations, while en route to scenes of fires or other emergencies, become emergency vehicles as defined in s. 317.01(1), F. S., 1953." Attorney General Opinion 057-288. My predecessor in office found that, although Ch. 57-781, Laws of Florida, authorized the use of flashing red lights on privately owned vehicles belonging to volunteer firemen when responding to an emergency (while en route to the scene of a fire),

> . . . [n]owhere in the act are such vehicles defined or referred to as authorized emergency vehicles, nor does such act infer that such vehicles shall be exempt from the operation of the traffic laws as is contemplated by s. 317.04(4), F. S., for authorized emergency vehicles. The act is a mere grant of authority to use flashing red lights under certain circumstances. It does not exempt volunteer firemen from the operation of the law regulating traffic on public highways. [Attorney General Opinion 057-288.]

It should be noted that the statutory provisions discussed in AGO 057-288 are substantially the same as the provisions of Ch. 316, F. S. (1976 Supp.), discussed herein, therefore effecting no change in the applicability or continuing validity of AGO 057-288.

In AGO 072-366, I considered the question: "May members of the volunteer fire department install a siren on their private vehicles for use while going to a fire," and concluded that s. 316.003(1), F. S. (1976 Supp.), does not authorize the privately owned vehicles of members of a volunteer fire department to be designated "authorized emergency vehicles" and such privately owned vehicles are not authorized or required

to be equipped with a siren, whistle, or bell under the provisions of s. 316.271(4), F. S. (1976 Supp.).

Section 316.003(1), F. S. (1976 Supp.), does not define privately owned vehicles of volunteer firemen as authorized emergency vehicles, and thus such vehicles are *not* within the purview of s. 316.072(5), F. S. (1976 Supp.). Section 316.2397(3) and (6), F. S. (1976 Supp.), *only* authorizes the use of flashing red lights on such private vehicles and does not except them from the traffic regulations or laws in Ch. 316, F. S.

Therefore, it is clear from the provisions of ss. 316.2397(3) and (6) and 316.2398(1) and (3), F. S. (1976 Supp.), that authorization to use or display flashing red lights *while en route* to scenes of fires or other emergencies is strictly limited and that the use or display of flashing red lights at other times is specifically declared unlawful. Thus, privately owned vehicles of volunteer firemen en route to the fire station are not lawfully authorized to display or use flashing red lights.

AS TO QUESTION 2:

As noted in response to the first question, only "authorized emergency vehicles" as defined in s. 316.003(1), F. S. (1976 Supp.), are authorized to exercise the privileges set forth in s. 316.072, F. S. (1976 Supp.), subject to the conditions stated in s. 316.072(5)(b) and (c), F. S. (1976 Supp.). The privately owned vehicles of volunteer firemen are not embraced within the definition of "authorized emergency vehicles" set forth in s. 316.003(1) and therefore are not covered by or included within the provisions of s. 316.072(5). Thus, the drivers of privately owned vehicles of volunteer firemen are not excepted from, or authorized to exercise the privileges conferred by, s. 316.072 and are subject to all the traffic regulations prescribed by the State Uniform Traffic Control Law, except as provided in ss. 316.2397(3) and (6) and 316.2398(1), F. S. (1976 Supp.), with respect to the display and use of flashing red lights while en route to scenes of fires or other emergencies in the line of duty as active firemen members of regularly organized firefighting companies or associations. The private vehicles of volunteer firemen are not, and may not be, lawfully designated as "authorized emergency vehicles." Attorney General Opinions 057-288 and 072-366.

076-232—December 8, 1976

MUNICIPALITIES

PROVISIONS GOVERNING RECALL ELECTIONS

To: Carl Ogden, Representative, 20th District, Jacksonville

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Are recalls of elected municipal officials governed by state statute or by city charter?

SUMMARY:

Provisions of municipal charters and special laws relating to recall in existence when Ch. 74-130, Laws of Florida (s. 100.361, F. S.), took effect, and which conflicted with Ch. 74-130, were repealed to the extent of such conflict by s. 100.361(10). The repealer clause of s. 100.361(10) would not apply to special laws enacted subsequent to the effective date of Ch. 74-130. Section 100.361 appears to be limited in scope to recall only of members of the *governing body* of a municipality (or charter county).

In 1974, the Legislature enacted Ch. 74-130, Laws of Florida, now codified as s. 100.361, F. S., in order to provide uniform, statewide procedure for municipal recall. The expression of the intent of uniformity, and a repealer clause designed to effect such uniformity, are set forth in s. 100.361(10):

> It is the intent of the legislature that the recall procedures provided in this act shall be uniform statewide. Therefore, all municipal charter and special law provisions which are *contrary* to the provisions of this act are hereby *repealed to the extent of this conflict.* (Emphasis supplied.)

Thus, under the above-quoted provisions, it would appear that any Jacksonville charter provision relating to recall which was in effect at the time Ch. 74-130 took effect, and which was in actual conflict with Ch. 74-130, was repealed as of the effective date of Ch. 74-130 (but only to the extent of such conflict).

However, while the expression in s. 100.361(10), *supra*, of legislative intent that recall provisions be uniform statewide is certainly clear, it is equally clear that such an expression does not bind subsequent legislatures. Kirklands v. Town of Bradley, 139 So. 144 (Fla. 1932); Trustees of Internal Imp. Funds v. St. Johns R. Co., 16 Fla. 531 (Fla. 1878). Any special acts (such as those amending the Jacksonville charter) which may have been enacted subsequent to the effective date of Ch. 74-130, *supra*, would not be affected by the repealer clause in s. 100.361(10) and would, of course, be entitled to the presumption of validity and constitutionality afforded any enactment of the Legislature. In addition, I would refer you to AGO 075-119, wherein I stated on p. 3 that the uniformity and preemption intent expressed in s. 100.361(10) would be of effect only "*insofar as the subject matter of recall proceedings is regulated by the statute.*" (Thus, municipal regulation by ordinance of recall-related matters not regulated by s. 100.361—such as the providing of additional grounds for recall, as was the issue in AGO 075-119—would not appear to be prohibited.)

Finally, and perhaps most importantly, I would point out that s. 100.361, *supra*, does not appear to have been intended to encompass every category of elected municipal official. Rather, the scope of the act would seem to be limited to the recall only of a member of the *governing body* of a municipality (or charter county). Section 100.361(1) provides:

> Any member of the governing body of a municipality which has at least 500 registered electors or charter county, hereinafter referred to as municipality, may be removed from office by the electors of the municipality by the following procedure:

Similar language is also present in the title to Ch. 74-130, *supra*, which sets forth the act's purpose as "authorizing and providing procedures for the recall of any member of the governing body of a municipality or charter county by the municipal or charter county electors."

In addition to the aforementioned AGO 075-119, I am also attaching copies of AGO's 075-242 and 075-83, which interpret other related aspects of s. 100.361 and which should be useful. I trust the above comments, when read in conjunction with the attached opinions, will provide you with sufficient information in this matter.

076-233—December 17, 1976

STATE FUNDS

UNIVERSITY FUNDS MAY BE USED TO IMPROVE ELECTRICAL DISTRIBUTION SYSTEM SERVING "SORORITY ROW"

To: Dr. E. T. York, Jr., Chancellor, State University System, Tallahassee

Prepared by: Staff

QUESTION:

> **May state funds appropriated to the University of Florida be expended to improve an electrical distribution system originally installed by the university to serve its "sorority row" area?**

SUMMARY:

A university may properly expend public funds to improve a university electrical distribution system that services sorority housing when the improvements primarily benefit the public and incidentally benefit the sororities.

In my June 28, 1976, letter to you, I concluded that the factual circumstances you described were not free from doubt and that the contemplated expenditure to improve certain university-related electrical distribution systems was probably improper. However, numerous facts have subsequently been brought to my attention that make it appropriate for me to reconsider this conclusion.

Enclosed with your letter was a copy of a lease-purchase agreement between the State Board of Education and one of the sororities in question. This agreement, which you indicate is similar to the agreements entered into in the 1950's by all of the sororities whose houses are located in the sorority row area, provides for the lease by the sorority of certain State Board of Education property consisting of a parcel of land and a small dormitory-type building located thereon. The agreement also grants to the sorority an option to purchase the property, with legal title remaining in the State Board of Education until the full purchase price, including the costs incurred in financing construction of the building by the issuance of revenue certificates, is paid by the sorority. According to your letter, all of the sororities have exercised their options to purchase and are still paying their purchase prices. The legal title to the property remains in the State Board of Education. The sample lease-purchase agreement supplied by you provides that, even after the sorority completes purchase, the property will continue to be used as a university-approved housing facility and be subject to university regulations (Items XXIV 1. and 4.). The State Board of Education also retains a right of first refusal if, after completion of purchase, a sorority desires to sell the property (Item XXIV 6.).

I have been informed that, since 1971, the university has certified that this sorority housing should be granted a tax-exempt status since it serves an essential university function. Also, the electrical distribution line in question is part of a main distribution system from a power substation to the respective sorority house electrical system that is individually connected to the house meter. The electrical line repair is only from the university power substation to the house meter as an integral part of the entire university electrical distribution system and not maintenance to a house. These facts were either not available to me in June or unclear from your letter.

Article VII of the sample agreement specifically sets forth the three elements that shall, in the aggregate, be the *total* purchase price. The second paragraph of Article VII(3) contains references to "the cost of the property" which implicitly rejects any conclusion that the article relates to anything other than the purchase price of the house. As such, the contract contains no reference to the university's responsibilities regarding the electrical distribution system. My June 28, 1976, conclusion was premised upon the assumption that the sororities, as beneficial owners of the subject property under the doctrine of equitable conversion, would be the primary beneficiaries of such expenditure. The additional facts that have been brought to my attention subsequent to June 28 illustrate that the improvements contemplated would be of primary benefit to the university distribution system through the upgrading of the same and the sororities would only be incidentally benefited thereby. Under such circumstances, the expenditure would probably be lawful. *See* Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971); State v. Daytona Beach Racing and Rec. Facility Dist., 89 So.2d 34 (Fla. 1956); State v. Dade County, 142 So.2d 79; State v. Jacksonville Port Authority, 204 So.2d 881. Moreover, since the primary beneficiary of this expenditure is the university, this expense would not be considered to be a "non-reimbursable cost of the property" as contemplated by Section VII(3) of the lease-purchase agreement.

076-234—December 21, 1976

TAXATION

MUNICIPALITY MAY NOT LEVY OCCUPATIONAL LICENSE TAX ON CONTRACTOR WHO DOES NOT MAINTAIN PERMANENT BUSINESS LOCATION OR BRANCH OFFICE THEREIN

To: Dorothy W. Glisson, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General

QUESTION:

Can a municipality charge an occupational license tax to a certified contractor who does not have a permanent business location or branch office within the municipality but is merely performing a contractual job within the municipality while maintaining a permanent business location or branch office in another municipality and who has paid an occupational license tax to the municipality where the permanent business location and/or branch office is located?

SUMMARY:

A municipality cannot levy an occupational license tax on a certified contractor who does not maintain a permanent business location or branch office within the municipality but is merely performing a contractual job within the municipality while maintaining a permanent business location or branch office in another municipality and who has paid an occupational license tax to the municipality where the permanent business location and/or branch office is located.

Your question is answered in the negative for the reasons set forth hereinafter.

As stated in your letter, the individual involved does not maintain a permanent business location or branch office in the municipality in question.

Section 166.201, F. S., provides that:

> A municipality may raise, by taxation and licenses authorized by the Constitution or general law, or by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law.

Chapter 205, F. S., is the authority for the imposition of municipal occupational license taxes for revenue purposes. Section 205.022(1) provides that:

> "Local occupational license" means the method by which a local governing authority grants the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction. It shall not mean any fees or licenses paid to any board, commission, or officer for permits, registration, examination, or inspection. Unless otherwise provided by law, these are deemed to be regulatory and in addition to, and not in lieu of, any local occupational license imposed under the provisions of this chapter.

In s. 205.042, F. S., the Legislature specifically enumerated those persons upon whom a municipality may levy an occupational license tax, to wit:

> (1) Any person who maintains a permanent business location or branch office within said municipality, for the privilege of engaging in or managing any business within its jurisdiction.

(2) Any person who maintains a permanent business location or branch office within said municipality, for the privilege of engaging in or managing any profession or occupation within its jurisdiction.

This section has made it clear that a potential licensee must fall within one of the above two categories before a municipality may impose an occupational license tax. Under the two categories, a person may conduct any business, profession, or occupation within a municipality without being subject to a municipal occupational license tax unless he maintains a permanent business location or branch office therein. Isern v. City of West Miami, 244 So.2d 420 (Fla. 1971); Duffin v. Tucker, 153 So. 298 (Fla. 1954); Berry v. City of Dania, 24 Fla. Supp. 152, *aff'd*, 168 So.2d 135 (Fla. 1964). *Accord*: Attorney General Opinions 072-117, 072-236, 073-172, 073-399, 075-208, and 075-251. However, the fact that a person may be permanently located and licensed in one municipality does not necessarily preclude licensing elsewhere by another municipality. City of Lakeland v. Lawson Music Co., 301 So.2d 506 (2 D.C.A. Fla., 1974), approved in Alco Services, Inc. v. City of Hollywood, 315 So.2d 110 (4 D.C.A. Fla., 1975); AGO 075-251.

Under s. 205.042(1), *supra*, the certified or noncertified status of the contractor is immaterial because that status relates exclusively to licensing for regulatory purposes. *See, generally* AGO's 074-112 and 073-399; *see also* part II of Ch. 468, F. S.

The two issues presented by your inquiry which must be resolved are whether the contractor can be said to be operating a "permanent business location or branch office" within the purview of s. 205.042, *supra*, and whether an activity may be put under mandate of revenue license, as in the instant case, if it is inseparable from a scheme of activity outside the licensing municipality's jurisdictional limits.

In Isern v. City of West Miami, *supra*, the Florida Supreme Court was faced with the following factual situation and dealt with the first of the two issues involved in this opinion in the following manner.

In that case, the individuals were engaged in termite and pest control activities; included in their services were the fumigation of dwellings and buildings and the treatment of infested lawns. Their places of business, along with all supplies and equipment used in plying their trade, were located outside the jurisdiction of the taxing municipalities.

The municipalities in that case contended that, although not located within their corporate limits, the individuals were nonetheless liable for payment of an exterminator's license fee because they allegedly performed their services virtually entirely upon the premises of the consumer. Thus, their contention went, service to a customer inhabiting a municipality in effect established a business location within the taxing municipality which made the visiting exterminating company liable for the local occupational license tax.

The court held that a temporary presence of a fumigation tent or a spray truck within a municipality, *necessitated merely by a job contract* and under control and operation of properly licensed authorities, does not lay a predicate for the municipality to demand that an occupational license be purchased. Thus, the court concluded, in absence of a relatively permanent presence located within the taxing municipality, the municipality was without power to require an occupational license of the exterminating company. The court did note in passing that a permanent presence would be established by a warehouse or storage facility or any other related facility which would be involved in the operation of the exterminating company's business.

I recognize that the question of what constitutes a "permanent business location" requires legislative or judicial findings of fact which are beyond the scope of my powers as Attorney General. *See* AGO's 075-208 and 072-236. I, therefore, am not prepared to say that the performance of any one or a number of construction contracts could never fall within the scope of the statute. It seems doubtful, however, that a typical project or projects, standing alone, would provide a sufficient basis for licensing.

Section 205.042(1) and (2), F. S., appears to focus on enterprises established as a continuing presence in the community, from which the individual performs administrative and executive functions of the business as a whole, and not on the temporary presence of the typical construction crew on a construction project, whose presence is necessitated merely by the job contract.

The court dealt with the second issue of whether an activity may be put under the mandate of a revenue license if it is inseparable from a scheme of activity outside the licensing municipality's jurisdictional limits, stating that:

> In Florida, we have generally held that an activity may not be put under mandate of revenue license if it is inseparable from a *scheme of activity* (Emphasis supplied.) outside the licensing municipality's jurisdictional limits. Thus, in Duffin v. Tucker, supra, we held that solicitation of sales and subsequent delivery of items sold were not subject to local occupational licensing other than by the municipality containing the home office, because of the inter-municipal character of the sales operation. Similarly, in affirming Berry v. City of Dania, supra, through our decision in City of Pompano Beach, supra, we held that a municipality could not require an occupational license of surveyors bringing themselves and their equipment into the municipality solely for the temporary purpose of conducting physical land surveys. Consider also, Sandstrom v. City of Fort Lauderdale, 133 So.2d 755 (2nd DCA Fla.1961), in which several attorneys brought suit to enjoin the enforcement of a city ordinance levying an occupational tax upon attorneys having offices within the city limits. In *Sandstrom* the District Court made the point that the ordinance did not deny equal protection of law to the attorneys having their offices within the city limits merely because it was not applicable to attorneys using the city's facilities, but *having offices outside of the city limits.* [244 So.2d at 423]

Thus, it has been well established in Florida that any attempt by a municipality to extend its taxing power beyond its territorial limits is unconstitutional and void. Duffin v. Tucker, *supra*; Isern v. City of West Miami, *supra*; Boseman v. City of Brooksville, 82 So.2d 729 (Fla. 1955); Berry *et al.* v. City of Dania, *et al., supra.* Likewise, a municipality cannot divide a business transaction into its component parts and levy a revenue tax on the part carried on within the municipality when the effect would be to subject a business carried on elsewhere to the municipality's tax laws where the transactions sought to be licensed by the municipality are essentially composed of inseparable operations, each contributing to the completion of the whole project under contract.

In the instant case, I am unable to perceive any sound conceptual difference between the temporary presence of surveyors, the temporary presence of attorneys, the temporary presence of exterminating companies, the temporary presence of mobile canteen wagons, or the temporary presence of salesmen and the subsequent delivery of goods and the temporary presence of the contractor and his equipment pursuant to a contract executed in or administered from another municipality in which his permanent business location or branch office is located.

Incursion of the contractor's equipment into the taxing municipality where the contract is to be performed is only part of the chain of services rendered by the contractor. By attempting to require licenses for the presence of the equipment and services rendered, the taxing municipality is necessarily levying as well a license tax upon the inter-municipal delivery and removal of the equipment, manpower, and supplies involved; in addition, the taxing municipality necessarily is levying a license tax upon the executive and administrative functions of the contractor which are conducted at his permanent business location or branch office located outside the jurisdiction of the taxing municipality.

076-235—December 21, 1976

BIRTH CERTIFICATES

BUREAU OF VITAL STATISTICS—NO POWER TO PROHIBIT ISSUANCE OF CERTIFICATES WITH HYPHENATED COMBINATION OF MOTHER'S MAIDEN NAME AND FATHER'S SURNAME

To: Lori Wilson, Senator, 16th District, Cocoa Beach

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Is the Bureau of Vital Statistics empowered to require that birth certificates be issued only in the surname of the father as opposed to a

hyphenated combination of the mother's maiden name and the father's surname?

SUMMARY:

Pending legislative or judicial clarification, the Bureau of Vital Statistics is not empowered to require that birth certificates be issued only in the surname of the father as opposed to a hyphenated combination of the mother's maiden name and the father's surname.

Section 382.18, F. S., provides as follows:

> **Certificate of birth to show given name of child.—**
> (1) When any certificate of birth of a living child is presented without the statement of the given name, then the local registrar shall make out and deliver to either parent of the child a special blank for supplemental report of the given name of the child which will be filled out as directed and returned to the local registrar as soon as the child shall have been named.
> (2) The mother of a child born out of wedlock should enter on the birth certificate the surname by which she desires the child to be known. The registrar, upon presentation of proof that said child has acquired another name through usage, court order, or otherwise, shall correct the original birth certificate as hereinafter provided for to show the name by which said child is known.

Section 382.20, F. S., empowers the state registrar to make and enforce appropriate rules and regulations to carry out Ch. 382, F. S., and to prevent *fraud* and *deception* from being committed under the same.

An examination of Ch. 382, F. S., fails to disclose any statute that requires a registrar to issue a birth certificate in the surname of the father. Similarly, I have been unable to find any rule promulgated pursuant to s. 382.20 which administratively purports to impose such a requirement.

It is well settled that an administrative agency possesses only so much authority as is delegated to it by statute. Greenberg v. State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed* 300 So.2d 900 (Fla. 1974). If there is reasonable doubt as to the lawful existence of a particular power being exercised by an administrative agency, the further exercise of that power should be arrested. Edgerton v. Int'l Co., 89 So.2d 488 (Fla. 1956). *Also see* AGO 075-94.

While the Legislature has specifically addressed the issues of requiring the "given name" of all living children to be recorded and permitting the mother of a child born out of wedlock to select the name under which she desires the child to be known, it has not addressed the issue of whether to permit married parents to select the surname of their children. Significantly, however, the only specific administrative limitation which has been imposed by the Legislature has been to permit the state registrar to administer Ch. 382, F. S., to prevent fraud and deception.

A similar situation arose in Davis v. Roos, 326 So.2d 226 (1 D.C.A. Fla., 1976), in which the court held a woman by custom and usage generally adopts her husband's name upon marriage, but no Florida law compelled her to do so. The same appears to be true regarding registration of birth. While customarily a child assumes the surname of its father, there is no statute or existing rule which requires the same.

Accordingly, until legislatively or judicially clarified to the contrary, I do not believe that a registrar may require that parents use only the surname of the husband in registering the birth of their children.

Nothing herein should be construed to prohibit in an appropriate case the registrar from refusing to accept a particular name in order to permit fraud or deceit.

076-236—December 21, 1976

DEPARTMENT OF COMMUNITY AFFAIRS

STATUS OF INTERIM STATE BUILDING CODE; EFFECT OF LEGISLATURE'S FAILURE TO FUND A PROGRAM OR OFFICE

To: William H. Ravenell, Secretary, Department of Community Affairs, Tallahassee

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTIONS:

1. In view of the failure of the Legislature to appropriate funds to or for the use of the State Board of Building Codes and Standards for the 1976-1977 fiscal year, does the board continue to exist after January 1, 1977?
2. If the answer to question 1 is in the affirmative, does the board possess the authority or responsibility to enforce and carry out the duties and requirements of the Florida Building Codes Act of 1974 in view of the lack of financial and staff resources created by said lack of funds?
3. In view of the failure of the Legislature to adopt the State Minimum Building Codes on or before January 1, 1977, as required by s. 553.78(7), F. S., is the Interim State Building Code of lawful effect after January 1, 1977?

SUMMARY:

Legislative failure to appropriate funds for travel expenses and staff support personnel of the State Board of Building Codes and Standards does not operate to abolish the board. The board continues in existence until the statutory authority for its existence is either expressly or impliedly repealed by the Legislature. To the extent that the board may operate under this legislatively imposed fiscal handicap, it does so with undiminished power and authority.

Legislative failure to adopt the State Minimum Building Codes prior to January 1, 1977, as specified by s. 553.78(7), F. S., does not operate to repeal or otherwise terminate the existence of the Interim State Building Code as created and established by s. 553.73(2), F. S. Until determined otherwise by definitive legislative action, the Interim State Building Code remains in legal existence, is of full force and effect, and must be enforced as required by ss. 553.73(5) and 553.80, F. S.

The State Board of Building Codes and Standards, hereinafter referred to as the "board," was created and established within the Department of Community Affairs, hereinafter referred to as the "department," by Ch. 74-167, Laws of Florida. The general and specific powers and duties of the board and the department material to this opinion are set forth in ss. 553.75, 553.76, and 553.77, F. S., as well as in ss. 553.73(4) and (6), 553.74(3), 553.81, and 553.83, F. S.

According to your budget office, appropriations for the salaries and expenses of the board's support staff and staff-supported services and administrative operating expenses for the 1975-1976 fiscal year were included in the department budget under Ch. 75-280, Items 241-246, entitled Division of Technical Assistance. For the 1976-1977 fiscal year, the Legislature abolished 12 of the board's 16 staff positions included in the department's legislative budget as submitted to the Legislature and deleted the funding therefor as well as the expenses allocated to the board's administrative and operating costs, such as board and staff travel expenses. This legislative action leaves the remaining four positions assigned to Factory Built Housing to be funded from the Factory Built Housing Trust Fund. It is my understanding, as represented to me by your department officials, that the deletion of these staff positions and travel expenses makes board operation impossible.

AS TO QUESTIONS 1 AND 2:

Section 1(c), Art. VII, State Const., provides: "No money shall be drawn from the treasury except in pursuance of an appropriation made by law." Section 215.35, F. S., provides *inter alia*, that "[n]o warrant shall issue until same has been authorized by an appropriation made by law." Further, s. 216.192(1), F. S., states, in pertinent part,

> [t]he Comptroller shall authorize all expenditures to be made from the appropriations on the basis of such releases and *in accordance with the approved budget* [*see* s. 216.181, F. S.] *and not otherwise.* Expenditures shall be authorized only in accordance with legislative authorizations. (Emphasis supplied.)

Cf. AGO's 075-96, holding that in view of s. 1(c), Art. VII, State Const., and ss. 215.35, 216.181, and 216.192(1), F. S., when there had been no legislative appropriation of funds to the Department of Natural Resources for the purpose of carrying out the powers, duties, and functions of the Commission on Marine Sciences and Technology and when funds for such purposes were not included in the budget and release plan required by ss. 216.181 and 216.192(1), the department was neither authorized nor required to assume or execute such powers, duties, and functions, and 067-64.

In view of the foregoing, it becomes evident that, in the absence of a legislative appropriation of funds to the board or to the department for expenditure in fulfillment of board statutory duties and functions, and in the absence of any funds therefor within the approved operating budget and plan for the release of appropriations as required by s. 216.192, F. S., no moneys may be thus expended by the board or department; *see* AGO 071-28; *cf. In re* Advisory Opinion to the Governor, 55 So.2d 99 (Fla. 1951); Petition of The Florida Bar, 61 So.2d 646 (Fla. 1952); and the Comptroller may not issue warrants or otherwise authorize the expenditure of funds by the board or by the department in behalf of the board for such purposes. Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970).

As the board was created and established by legislative act, the sole method of termination of its legal status is likewise by legislative act, *i.e.*, express abolishment, or express or implied repeal of s. 553.74, F. S. *Cf.* Treadwell v. Town of Oak Hill, 175 So.2d 777 (Fla. 1965), wherein the Supreme Court held accordingly with regard to the abolishment or dissolution of municipalities; *also see* AGO 076-96. A legislative enactment may be repealed only by further legislation and not by time or changed conditions or by nonuse and may not be considered repealed or inoperative on the basis that there is no longer any necessity for the statute. *See* State v. Egan, 287 So.2d 1 (Fla. 1973); *cf.* Volusia County v. State, 125 So. 375, 380 (12) (Fla. 1929). I find no such repealing statute to exist, and a general appropriations act cannot constitutionally operate to effect any such modification or repeal of existing statutes or to effect any substantive changes in subsisting laws. *See* Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972); Graves v. Wiggins, 257 So.2d 268 (3 D.C.A. Fla., 1972). Therefore, I am of the opinion that, although it may be without funds to pay its operational expenses and as a consequence thereof may be unable to actually discharge its lawful duties and exercise its powers, the board continues to have a legal status and existence under current law. *Cf.* Treadwell v. Town of Oak Hill, *supra*, in which the court held that nonuse of municipal powers did not result in the dissolution of a municipality. When a valid statute confers a power or imposes a duty upon designated officials, a failure to exercise that power or to perform that duty does not affect the existence of the power or duty or curtail the right to require performance in a proper case. State v. Burr, 84 So. 61, 74 (Fla. 1920). Analogously, the inability or failure of the board to execute its duties and functions or exercise its powers due to a lack of funds appropriated to defray its operational costs does not result in the dissolution or termination of the board or otherwise detract from the authority or the duties and functions cast upon it or conferred upon it by the statute or relieve it of any statutorily imposed duties or responsibilities. I am further of the opinion that, to whatever extent it is possible in the absence of such funding as discussed above, for the board or the department to discharge their respective statutory duties and functions and exercise their powers conferred by law (*see* ss. 553.73(4) and (6); 553.75(2) and (3); 553.76; 553.77(1), (2), and (3); 553.81(1) and (2); and 553.83, F. S.), should either or both do so, either or both act with undiminished powers in regard to the performance of their lawfully prescribed duties and functions. *Also see* s. 20.05(1), F. S., with respect to the powers and duties of the head of the department, and AGO 075-96. When

administrative officials having statutory powers and duties decline to exercise said authority or perform said duties conferred or imposed upon them by law, they may, by mandamus in the absence of other adequate remedy afforded by law, be required, in proper cases duly presented, to proceed with the performance of their duties. State v. Burr, 84 So. 61, 69 (Fla. 1920).

In Broward County Board of Rules and Appeals v. Rush Hampton Industries, 332 So.2d 666 (4 D.C.A. Fla., 1974), the court declared that the exclusive method for reviewing decisions of such county boards is by appeal to the state board. Section 553.81(1), F. S., provides that the board shall have discretionary authority to hear appeals relating to substantial questions concerning the interpretation, enforcement, administration, or modification by local governments of the Interim State Building Code, and subsection (2) thereof imposes a duty upon the board in hearing appeals to render interpretations of such provisions of the code as shall be pertinent to the matter at issue. The secretary of the department is authorized to give advisory interpretations thereof in accordance with regulations established by the board. Subsection 553.81(3) grants an appellant the right to request judicial review by the district court of appeal of a decision of the board, as well as appeal from cases wherein the board has declined to hear an appeal from the action or order of the local government or enforcing agency, in accordance with the provisions of part III of Ch. 120, F. S., or its successor. *See* Rush Hampton, *supra*, at pp. 667 (1), 668 (1), and 669. However, should the board be financially unable to meet and convene hearings in conformity with Ch. 120 as provided by s. 553.81, *supra*, and thus either fail to hear or decline to hear appeals from such local governments or enforcing agencies, it is unclear which court might accept or assume jurisdiction to review the administrative action of the local county boards. *Cf.* s. 120.73; ss. 4(b)(1) and (2) and 5(b), Art. V, State Const. The court in Rush Hampton, *supra*, stated that Ch. 74-167, *supra*, requires appeals from decisions of local governments or enforcing agencies be taken to the state board "or district court of appeal rather than to the circuit court" and that "[s]hould the State Board decline to review the decision [of the local enforcing agency] . . . or should either party be aggrieved by the decision of that board, judicial review is available to the district court of appeal. s. 553.81(3), F. S., 1974." The court further stated at p. 669: "Judicial review commences with the district courts of appeal." However, this review is predicated upon board action, of which there would be none in this case. The resolution of this jurisdictional issue is properly a judicial question which cannot be resolved by this office, and thus it would be inappropriate for me to comment further thereupon.

As indicated above, in proper cases duly presented by those possessing the requisite legal standing, the judicial tribunal or administrative officials declining either to exercise jurisdiction that they may possess and by law ought to exercise or to perform duties conferred on them by law may by mandamus be required to exercise such jurisdiction or to perform such duties. Burr v. State, *supra*; State *ex rel.* Biscayne Kennel Club v. Board of Business Regulation of State, 276 So.2d 823 (Fla. 1973); State *ex rel.* Corbett v. Churchwell, 215 So.2d 302 (Fla. 1968); State *ex rel.* Utilities Operating Co. v. Mason, 172 So.2d 225 (Fla. 1964).

AS TO QUESTION 3:

Section 553.73(2), F. S., created the Interim State Building Code, consisting of the construction requirements set forth in any of the nationally recognized model codes designated therein, and, pursuant to s. 553.73(5), F. S., local governments and affected state agencies are charged with the responsibility of enforcing said Interim Building Code. Section 553.79(3), F. S., provides that the State Minimum Building Codes, *after the effective date of their adoption* pursuant to part VI of Ch. 553, F. S., shall supersede all other building construction codes or ordinances in the state, whether at the local or state level and whether adopted by legislative enactment or administrative regulation, unless such building construction codes or ordinances are determined by the Board of Building Codes and Standards to be more stringent than the State Minimum Building Codes. Section 553.78(7) provides that the State Minimum Building Codes adopted pursuant to that section shall become effective on the date set by the Legislature at the time of adoption, which shall in no case be later than January 1, 1977.

The above-noted legislative contingency with respect to the supersedure of building construction codes or ordinances by the State Minimum Building Codes and condition precedent concerning the effective or operative date of the State Minimum Building Codes has not occurred, and therefore s. 553.79(3), F. S., has no operative force on the

Interim State Building Code created by s. 553.73(2), F. S. *See, generally* 82 C.J.S. *Statutes* s. 410; and *cf.* Brown v. City of Tampa, 6 So.2d 287 (Fla. 1942); *In re* Opinion to the Governor, 239 So.2d 1, 10 (Fla. 1970). No statute has any force until such time as by its terms it takes effect or becomes an operative law, Neisel v. Moran, 85 So. 346 (Fla. 1920), and this rule would seem to be equally applicable to the instant situation.

Since the State Minimum Building Codes contemplated by s. 553.78, F. S., have not yet been adopted, they can not supersede existing building construction codes or ordinances (state or local) as contemplated by s. 553.79(3), *supra*, which so provides only "after the effective date of their adoption." Thus, as the statutory requirement for the operation of s. 553.79(3), the adoption of the State Minimum Building Codes, has not been met or satisfied, s. 553.79(3) is, in this regard, inoperative and the Interim State Building Code continues in full force and effect. As earlier stated, a general appropriations act cannot constitutionally operate to effect any modification or repeal of existing statutes or to effect any substantive changes in subsistent laws. Department of Administration v. Horne, *supra*. No repugnancy such as is required to impliedly repeal the Interim State Building Code or s. 553.73, F. S., is found in any provision of part VI of Ch. 553, F. S., and I am unaware of any other such statutory provision elsewhere. Lacking such repugnancy, implied repeal, which is not favored by law, State v. Collier County, 171 So.2d 890 (Fla. 1965); Sweet v. Josephson, 173 So.2d 444 (Fla. 1965); and Markham v. Blount, 175 So.2d 526 (Fla. 1965), will not obtain. Sanders v. Howell, 74 So. 802 (Fla. 1917); Atkinson v. State, 23 So.2d 524 (Fla. 1945); State v. Digman, 294 So.2d 325 (Fla. 1974).

Therefore, as no statute is found which either expressly or impliedly repeals or supersedes the Interim State Building Code and s. 553.78(7), F. S., does not provide a termination or expiration date for the Interim Code, the Interim State Building Code continues in existence, is of full force and effect, and must be enforced as prescribed by ss. 553.73(5) and 553.80, F. S.

076-237—December 21, 1976

GAMBLING

"BINGO" DEFINED—MAXIMUM PRIZE

To: Melvin G. Colman, Orange County Sheriff, Orlando

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. What constitutes a bingo game as contemplated by s. 849.093, F. S.?
2. May two or more prizes be awarded during a call on the same bingo card when the total of the prizes exceeds $25?

SUMMARY:

A bingo game, for the purposes of s. 849.093(5), F. S., begins when the players receive bingo cards and ends with a player being the first to cover all numbers in a vertical, horizontal, or diagonal row on his card. Therefore, additional prizes may not be awarded during a call on the same bingo card when the total of the prizes exceeds $25.

AS TO QUESTIONS 1 AND 2:

As your questions are interrelated, they will be answered together.

Bingo has been recognized as gambling and hence within the purview of Ch. 849, F. S., which generally makes gambling in its various forms illegal. Creash v. State, 179 So. 149 (Fla. 1938). Section 849.093, enacted in 1967, removes bingo from the entire chapter (Ch. 849) provided the bingo is conducted by certain nonprofit or veterans' organizations within certain statutorily defined limits. Perlman v. State, 269 So.2d 385 (4 D.C.A. Fla., 1972), Greater Loretta Imp. Assoc. v. State *ex rel.* Boone, 234 So.2d 665, 668 (Fla. 1970).

The provisions of s. 849.093 stipulate among other things that no jackpot awarded shall exceed the value of $100 in actual money or its equivalent; that there shall be no more than one jackpot in any one night, s. 849.093(4); and that "there shall be only one prize or jackpot on any one day of play of $100. All other *game* prizes shall not exceed $25." (Emphasis supplied.) Section 849.093(5).

Section 849.093, F. S., contains no definition as to what constitutes a bingo "game" for purposes of that section. *Webster's Third International Dictionary* defines bingo as "a game resembling lotto or keno, the card used being a grid on which five numbers that are covered in a row in any direction constitute a win, the center square being counted as an already drawn number." Additionally, in Greater Loretta Imp. Assoc. v. State *ex rel.* Boone, *supra*, the Florida Supreme Court stated that bingo resembled keno, and defined keno as

> . . . *a game which stops and a player wins* when he has five numbers in a row on a card purchased by him corresponding with numbers on balls, drawn from a globe, or other receptacle. . . . 38 C.J.S., *Gaming* s. 1, pp. 40, 41. (Emphasis supplied.)

Moreover, it has also been recognized that bingo is one of a class of games in which "the *winner* is the one who *first* covers the required number of figures in a row on his card, the figures to be so covered being determined in a variety of ways." (Emphasis supplied.) 38 C.J.S. *Gaming* s. 1, p. 43. *See also* Annot. 135 A.L.R. 175.

In light of the aforementioned authorities, it is my opinion that a bingo "game" begins with all the players receiving cards and ends when a player covers all numbers in a vertical, horizontal, or diagonal row on his card. This player is the winner and may receive a game prize of up to $25 in accordance with s. 849.093(5), F. S. Thus, there can be only one winner with each card in each game. In order to begin a new game, the players must receive new cards. I therefore conclude that two or more prizes may not be awarded during a call on the same card when the total of the prizes exceeds $25.

076-238—December 22, 1976

MUNICIPALITIES

MAY NOT EXCLUDE ALIENS FROM CITY'S CIVIL SERVICE SYSTEM

To: Thomas A. Bustin, City Attorney, Clearwater

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

In light of the decision by the United States Supreme Court in the case of Sugarman v. Dougall, 413 U.S. 634, may a municipality through its civil service system impose a ban on the municipality's employment of aliens?

SUMMARY:

In light of decisions of the United States Supreme Court and lower federal courts, a municipality may not exclude lawfully admitted resident aliens from all public employment opportunities. The Supreme Court has indicated, however, that the states may impose citizenship requirements as to an appropriately designated class of public officeholders, including elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy or perform functions that go to the heart of representative government.

Since Graham v. Richardson, 403 U.S. 365 (1971), was decided by the United States Supreme Court, an expanding volume of cases has been handed down dealing with

constitutional challenges to state statutes and regulations designed to limit all or certain types of employment to citizens, thereby excluding, among others, permanent resident aliens.

In Graham, *supra*, at 376, the court first established that state classifications based on alienage are subject to "strict judicial scrutiny." Subsequently, in Sugarman v. Dougall, 413 U.S. 634 (1973), the court considered an equal protection challenge to a section of the New York Civil Service Law which denied aliens the right to hold positions in New York's competitive civil service system. In striking down the challenged section, the court indicated that it was both "overinclusive and underinclusive." Decided the same day as *Sugarman* was *In re* Griffiths, 413 U.S. 717 (1973), in which the Supreme Court declared invalid a Connecticut statute that excluded aliens from the practice of law. Most recently, in Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 49 L.Ed.2d 65 (1976), the court applied the standards enunciated in *Graham*, *Sugarman* and *In re Griffiths* to a Puerto Rico statute that prohibited aliens from engaging in the private practice of engineering and found the statute constitutionally infirm.

In Otero, *supra*, the court noted the following:

> Official discrimination against lawfully admitted aliens traditionally has taken several forms. Aliens have been prohibited from enjoying public resources or receiving public benefits on the same basis as citizens. See Graham v. Richardson, supra; Takahashi v. Fish & Game Commission, supra. Aliens have been excluded from public employment. Sugarman v. Dougall, supra. See M. Konvitz, The Alien and the Asiatic in American Law, c. 6 (1946). And aliens have been restricted from engaging in private enterprises and occupations that are otherwise lawful. See In Re Griffiths, supra; Truax v. Raich, supra; Yick Wo v. Hopkins, supra.

In discussing recent decisions which have extended full constitutional protection to alien residents, the court in *Otero* noted the following reason for such extension:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. If this should be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. Truax v. Raich, 239 U.S. 33, 41 (1915).

Lower federal courts have applied the standards used by the Supreme Court in *Graham*, *Sugarman*, and *Griffiths* to declare invalid a wide range of prohibitions directed by the states toward resident aliens. In Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973), a three-judge panel found unconstitutional Arizona's constitutional and statutory provisions which, with certain limited exceptions, prohibited resident aliens from holding a broad range of public jobs. The court specifically noted that prior decisions of the Supreme Court dating from the turn of the century which permitted states to discriminate between citizens and resident aliens because of the states' "special public interest" have been "eroded to splinters by more recent decisions." Miranda, *supra*, at 739. Similarly, in Chapman v. Gerard, 456 F.2d 577 (3rd Cir. 1972), the circuit court affirmed a lower court decision which invalidated a section of the Virgin Islands code which barred aliens from participating in a territorial scholarship fund. *Also see* Chapman v. Gerard, 341 F. Supp. 1170 (D. St. Croix 1970).

Taggart v. Mandel, 391 F. Supp. 732 (D. Md. 1975), involved a challenge by a resident alien to a Maryland statute which required applicants for appointment to the state constitutional office of notary public to be citizens. In granting the relief requested, the court held that the citizenship requirement was "wholly unrelated to the achievement of any valid state objective and thus . . . in violation of the equal protection clause of the fourteenth amendment." Taggart, *supra*, at 740. *Also see* Perkins v. Board, CA 72-1174 (D. Md. 1973), striking down a Maryland statute barring aliens from being examined for or issued a license as a doctor of veterinary medicine.

In Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D. N.Y. 1976), the court declared unconstitutional a New York education law which required that an applicant for financial aid be a United States citizen or intend to become a United States citizen. C.D.R. Enterprises, Ltd. v. Bd. of Education of City of New York, 412 F. Supp. 1164 (E.D. N.Y.

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1976), involved another challenge by a resident alien to a provision of the New York labor law which required that, on public projects, preference must be given to New York citizens. In holding the statute unconstitutional, the court observed the following regarding the Supreme Court decisions relied upon by the state in order to defend the statute:

> The Constitution means what the Supreme Court says it means at a given time. The inferior federal courts must follow, in good conscience, the doctrines expounded by the Court. Constitutional law depends not on precise verbiage but on the evolution of doctrine to fit the times. It is not the function of the inferior federal courts to declare new doctrines or to find new meaning in the Constitution unless the controversy compels it. At the same time it is not the function of the federal courts to rely on older precedents based on articulated premises which have since been rejected by later decisions. *Crane* [right/privilege distinction] and *Heim* ["special public interest" doctrine] are not simply moribund; we believe they are dead. Otherwise the results in *Graham* and *Dougall* could not have been reached. *C.D.R. Enterprises*, supra at 1170.

In Surmeli v. State of New York, 412 F. Supp. 394 (S.D. N.Y. 1976), an action was brought by a resident alien physician seeking to have declared unconstitutional a New York statute and the rules and regulations promulgated thereunder which required that a physician, in order to be licensed to practice medicine in New York, must either be a citizen or file a declaration of intent to become a citizen. The statute also provided for termination of a medical license upon the alien physician's failure to become a citizen within 10 years of licensure. The court invalidated the statute on the basis of *In re* Griffiths, *supra*. Norwick v. Nyquist, 417 F. Supp. 913 (S.D. N.Y. 1976), involved yet another challenge to a New York statute by a resident alien, this one barring aliens from teaching in the public schools of New York State. Again, the state attempted to defend the statute on the basis of Heim v. McCall, 239 U.S. 175 (1915), and Crane v. New York, 239 U.S. 195 (1915), and again the court rejected these decisions, stating at 918, n. 9, the following:

> To the extent that defendants would invoke the authority of Heim v. McCall . . . and Crane v. New York . . . this Court need only note that whatever the constitutional status of public employment in 1915, more recent decisions make it clear that the States owe all of their lawful residents, whether aliens or citizens, equal access to public as well as private employment absent the necessity for restrictions designed to promote compelling state interests. (Citations omitted.)

The scope of the state's compelling interests in imposing citizenship requirements was discussed in *Sugarman*. The court deferred to the state the right to exclude aliens from participation in its "democratic political institutions" and also recognized the state's constitutional responsibility for the "establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public officeholders." Sugarman, *supra*, at 863.

The state's power applies not only to imposing qualifications for voting, but also to qualifications of

> . . . persons holding state elective or important nonelective executive, legislative and judicial positions, for officers who participate directly in the formulation, execution or review of broad public policy [or] perform functions that go to the heart of representative government. *Id.* Also see Perkins v. Smith, 370 F.Supp. 134 (D. Md. 1974), aff'd, ...U.S....., 96 S.Ct. 2616 (1976) upholding the exclusion of aliens from service on grand and petit jury panels in state and federal courts and De Canas v. Bica, ...U.S....., n. 6, 47 L.Ed.2d 43, 50 (1976) inferring that disparate treatment of aliens by the states which is congressionally sanctioned would present different questions. [Compare: s. 455.012, F. S., and Ch. 76-277 which relate to state restrictions on employment of resident aliens.]

To the extent that AGO's 073-6, 073-104 and 073-105 are in conflict with this opinion, they are hereby receded from.

076-239—December 22, 1976

REGULATION OF OCCUPATIONS

GENERAL CONTRACTORS, BUILDING CONTRACTORS, AND RESIDENTIAL BUILDING CONTRACTORS—CONSTRUCTION OF TENNIS COURTS

To: Stuart Simon, Dade County Attorney, Miami

Prepared by: Bruce M. Singer, Assistant Attorney General

QUESTION:

Are state certified general contractors, building contractors, or residential building contractors under s. 468.102, F. S., qualified to construct or repair tennis courts, of one or more of the following types: Clay courts, fastdry tennis courts, hot leveling courts, cold cushion courts, combination hot plant and emulsified asphalt mix, emulsified asphalt mix, hot plant mix courts, Atlashield concrete stain?

SUMMARY:

Under ss. 468.101 and 468.102, F. S., the activity of constructing and repairing tennis courts of all kinds or types falls within the scope of, and is regulated by, part II of Ch. 468, F. S., since tennis courts are reasonably included within the broad and comprehensive terms "structure" and "related improvements to real estate" and "accessory use structure" in connection therewith as those terms are used in the construction industry licensing statute.

Certified general contractors may construct and repair all types of tennis courts without limitation.

Certified building contractors and residential building contractors may construct and repair any kind of tennis courts when those courts are accessory use structures to the particular types of buildings and structures and family residences prescribed in s. 468.102(1)(b) and (c), F. S.

The answer to each of the above is in the affirmative.

Section 468.101, F. S., declares it to be the public policy of the state that the business of *construction and home improvements* is a matter affecting the public interest, and any person desiring to obtain a certificate to engage in the business, as defined in s. 468.102, F. S., *on a statewide basis*, shall be required to establish his competency and qualifications to be certified as provided in part II of Ch. 468, F. S. When a certified contractor desires to engage in contracting, as defined in the statutes, in any area of the state, the only prerequisite therefor is the exhibition to the local building officials of evidence of his state certification and payment of any required building permit fees. *See* s. 468.106(6).

The areas and activities of the several categories of state certified contractors defined in s. 468.102, F. S., within the purview of ss. 468.101 and 468.102, F. S., have been preempted to the state, subject to the limitations prescribed therein, and therefore local governments are not authorized by law to regulate in those areas and may only charge a building permit fee and require evidence of certification. Sections 468.101 and 468.106(6), F. S.

The threshold issue, therefore, is whether or not tennis courts are structures or related improvements to real estate or accessory use structures as contemplated by ss. 468.101 and 468.102, F. S., and as those terms are used in the statute.

"It has been said that the word 'structure' is very comprehensive . . . and that it may be used in a broad sense or in a more restricted sense." 83 C.J.S. at 547. "Structure" has

been defined to mean "[a] thing built, erected, or fabricated" or in a more restricted sense, "a building of any kind." The term "construct" also has been defined to mean "to build, erect, fabricate, form or make [something]." 16A C.J.S. at p. 1232. The term "construction" is also a word of variable meaning, and is similarly defined. 16A C.J.S. at p. 1234.

Likewise, the words "improve" or "improvements" are comprehensive terms whose meanings must be ascertained from the context and the subject matter of the instrument in which they are used. "The term [improvement] implies the prior existence of something to improve; it may be employed to designate any beneficial or valuable change or addition." 42 C.J.S. at 416. The above defined terms, as employed in ss. 468.101 and 468.102, F. S., appear to be used in a comprehensive and general sense as related to the business of construction and home improvements as defined by the statute rather than in a technical or restricted sense. The use by the Legislature of comprehensive terms or terms of general import ordinarily indicates an intent to include everything embraced within such terms, and statutes using such comprehensive terms without qualification should be given an equally comprehensive meaning. Florida Industrial Commission *et al.* v. Growers Equipment Co., 12 So.2d 889, 893-894 (Fla. 1943); Florida State Racing Commission v. McLaughlin, 102 So.2d 574, 576 (Fla. 1958).

In consideration of the foregoing statutory provisions, definitions, and rules of construction, I am of the opinion that the activity of constructing and repairing tennis courts of any kind falls within the scope of, and is regulated by, ss. 468.101 and 468.102, F. S., since tennis courts can reasonably be included within the broad parameters of the terms "structure," "related improvement to real estate," and "accessory use structures" in connection therewith, as those comprehensive terms are used in the statute.

Part II of Ch. 468, F. S., defines "general contractors" as "those whose services are unlimited about the type of work which they may do as set forth in [s. 468.102(1), F. S.]." It would follow then that the construction and repair of all types of tennis courts, being structures or related improvements to real estate within the context of s. 468.102, are proper activities for certified general contractors.

Building contractors and residential building contractors are limited by law as to the type of services they can engage in.

" 'Building contractors' are those whose services are limited to construction of commercial buildings and single or multiple dwelling residential buildings . . . and accessory use structures in connection therewith." Section 468.102(1)(b), F. S.

The services of residential building contractors "are limited to construction . . . of family unit residences not exceeding two stories in height and accessory use structures in connection therewith." Section 468.102(1)(c), F. S.

"Accessory" is defined by Black's Law Dictionary, Revised Fourth Edition, as follows:

> Anything which is joined to another thing as an ornament, or to render it more perfect, or which accompanies it, or is connected with it, as an incident, or as subordinate to it, or which belongs to or with it.

"Accessory" has also been defined to mean:

> As a noun: a thing that contributes subordinately to the effecting purpose or to an artistic effect; an adjunct or accompaniment; any article or device that adds to convenience or effectiveness of something else but is not essential . . ., connecting as an incident or subordinate to a principal, additional. [1 Words and Phrases at 440.]

An "accessory use" is one which is subordinate to, clearly incidental to, customarily in connection with, and ordinarily located in the same lot with principal use. Board of County Com'rs of Boulder County v. Thompson, Colo., 493 P.2d 1358, 1360.

Recreation facilities, including lighted recreation fields, swimming pools, and tennis courts have all been permitted as "accessory use" in a residential zone. *Cf.* Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ashton, 448 P.2d 185, 188; Town of Bloomfield v. Parizot, 211 A.2d 230, 232; Hardy v. Calhoun, Tex. Civ. App., 383 S.W.2d 652, 653.

It would seem that these definitions and examples of the terms "accessory" and "accessory use" fully justify the conclusion that tennis courts are accessory use structures in connection with commercial and residential buildings or structures as well as a "structure" and a "related improvement to real estate."

Therefore, both certified "building contractors" and "residential building contractors" are qualified to construct or repair all types of tennis courts, but only when such courts are accessory use structures as prescribed by s. 468.102(1)(b) and (c), F. S., and as hereabove discussed.

076-240—December 22, 1976

SUNSHINE LAW

USE OF CODED SYMBOLS TO PRESERVE ANONYMITY OF APPLICANTS FOR PUBLIC OFFICE PROHIBITED

To: Irene Beckham, Acting City Manager, New Smyrna Beach

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does the Sunshine Law prohibit the use of coded symbols at a public meeting in order to avoid revealing the names of applicants for the position of city manager?

SUMMARY:

The Sunshine Law prohibits the use of coded symbols at a public meeting in order to avoid revealing the names of applicants for the position of city manager.

Pursuant to s. 8, Ch. 22408, 1943, Laws of Florida, the City Commission of the City of New Smyrna Beach is empowered to appoint a chief administrative officer to be known as the "city manager." The city manager holds office at the pleasure of the city commission. Section 28, Ch. 22408.

Your specific question involves the powers and duties of the city commission as the same relate to the hiring of a new city manager.

Florida's Government in the Sunshine Law, s. 286.011, F. S., requires that all discussions between two or more members of a covered board or agency on which foreseeable action may be taken by the entire board or agency occur at a properly noticed and recorded public meeting. In Marko v. Broward County School Board, 26 Fla. Supp. 175, 179 (Cir. Ct. Broward County, 1971), the court stated the following regarding the use of codes by a public body at a "sunshine meeting":

> Clearly, the Sunshine Law was violated within its terms and the decisions interpreting the act when on February 18, 1970, the board deliberated by the use of secret coded symbols representing the names of persons then under consideration for the position of county superintendent of public instruction, the names, identities and full qualifications of such person being withheld from the public. The notice of the meeting by the chairman to the board members stated that applicants would be referred to by number and that names would not be released, and attached to the notice was a list of coded symbols. The notes of the meeting itself disclose a full and spirited discussion, pro and con, by the board members of this method of selection.
>
> By the use of such coded symbols the meeting was not "open to the public at all times," and public scrutiny and participation were denied. Such deliberations were violative of the statute, and when on March 19, 1970, as a result of the above meeting and of the prior meeting with Dr. Willis on January 23, 1970, which was out of the presence of the public, the board appointed him to the position of superintendent, its action became not binding and voidable.

Similarly, in State *ex rel.* Crago v. Hunter, Case No. 75-515 (Cir. Ct. Indian River County, 1975), the court enjoined a school board from utilizing codes during collective bargaining

negotiations and required the board to conduct such sessions in such a manner that "a person of reasonable intelligence and reading ability, listening to the negotiations, can comprehend what is transpiring."

This office in AGO 073-264 advised the members of a local personnel board that they could not vote by secret ballot during a hearing concerning a public employee. Specifically noted in that opinion was s. 286.012, F. S., which requires that at any meeting "at which an official decision, ruling, or other official act is to be taken or adopted . . . *a vote shall be recorded* or counted for each such member present." (Emphasis supplied.) Attorney General Opinion 071-32 expressed the view that if at any time during a public meeting the proceedings become covert, secret, or not wholly exposed to the view and hearing of the public and news media, then that portion of the meeting becomes violative of the statutory requirement that the meeting be *at all times* public.

While the Supreme Court in Bassett v. Braddock, 262 So.2d 425 (Fla. 1972), permitted a secret vote on the election of chairman of a school board, it also noted that any initial violation was cured by a corrective, open vote which followed. *But see* Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974). Here, however, the use of coded symbols would appear to frustrate entirely the purpose of having the public meeting. The views of the members of the commission regarding the appointment of an important city official would be known only to the commissioners themselves. The Sunshine Law requires that the public be given the opportunity to attend an open, public meeting so that the views of its elected officials can be known. If codes at a public meeting were to be approved, the result would be a frustration of the public's right to have knowledge of, and thereby participate in, the decision-making process.

076-241—December 22, 1976

DUAL OFFICEHOLDING

SERVING AS STATE LEGISLATOR AND MEMBER OF HUMAN RELATIONS COMMISSION PROHIBITED

To: Ralph L. Poston, Chairman, Senate Committee on Executive Business, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does s. 5(a), Art. II, State Const., prohibit a legislator from serving simultaneously in the Legislature and as a member of the Florida Commission on Human Relations?

SUMMARY:

Section 5(a), Art. II, State Const., prohibits a legislator from serving simultaneously in the Legislature and on the Florida Commission on Human Relations.

Section 5(a), Art. II, State Const., provides, in pertinent part, as follows:

> 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, constitutional *convention, or statutory body having only advisory powers.* (Emphasis supplied.)

This prohibition on "dual officeholding" appeared in the 1885 Constitution in substantially similar form, the only major change being the inclusion in the 1968 Constitution of municipal officials.

Since the position of state legislator is clearly an "office," the question presented is whether membership on the Florida Human Relations Commission would constitute an

additional "office"—the simultaneous holding of which is prohibited by s. 5(a), Art. II, *supra*.

In State *ex rel.* Clyatt v. Hocker, 22 So. 721 (Fla. 1897), the Supreme Court held the following regarding the definition of "officer":

> A person in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining though the incumbent dies or is changed, is a public officer; every "office," in the constitutional meaning of the term, implying an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws. A state officer is one who falls within this definition, and whose field for the exercise of his jurisdiction, duties, and powers is coextensive with the limits of the state, and extends to every part of it.

The powers of the Commission on Human Relations include, *inter alia*, the right to accept moneys, both public and private, to help finance its activities; to recommend measures to eliminate discrimination; to receive, initiate, investigate, hold hearings on, and pass upon complaints alleging discrimination on the basis of race, color, religion, sex, or national origin; to render, at least annually, a comprehensive written report to the Governor and the Legislature; and to adopt, promulgate, amend, and rescind rules and regulations to effectuate the purposes and policies of this part and govern the proceedings of the commission in accordance with part II, Ch. 13, F. S., with Ch. 120, F. S. *See* s. 13.251. Additionally, the con ission may exercise its powers throughout the state, and its members are appointed the Governor, President of the Senate, and Speaker of the House in accordance with the requirements of s. 13.221. Section 13.221 and all appointments made thereunder are, of course, entitled to a presumption of validity. *See and compare* s. 3, Art. II, State Const., and Olustee Monument Commission v. Amos, 91 So. 125 (Fla. 1922); Westlake v. Merritt, 95 So.2d 662 (Fla. 1923); and *In re* Advisory Opinion to the Governor, 217 So.2d 289 (Fla. 1968).

Thus, I am of the view that the powers and duties of the commission are such that membership thereon constitutes the holding of an "office." As such, a legislator would be prohibited by s. 5(a), Art. II, State Const., from serving in the Legislature and on the commission simultaneously. *See In re* Advisory Opinion to the Governor, 1 So.2d 636 (Fla. 1941).

076-242—December 22, 1976

SUNSHINE AMENDMENT

PUBLIC SERVICE COMMISSION NOT "JUDICIAL TRIBUNAL"—
LEGISLATOR MAY NOT REPRESENT CLIENT
BEFORE COMMISSION

To: Kenneth M. Myers, Senator, 37th District, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Is the Public Service Commission a "judicial tribunal" as contemplated by s. 8(e), Art. II, State Const., thereby permitting members of the Legislature to represent another person or entity for compensation during term of office before the commission?

SUMMARY:

Unless judicially clarified to the contrary, the Sunshine Amendment, s. 8(e), Art. II, State Const., prohibits a legislator from personally

representing another person or entity for compensation during term of office before the Public Service Commission.

Section 8(e), Art. II, State Const. (approved at the 1976 general election), the so-called "Sunshine Amendment," provides in pertinent part:

> No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law.

Since the Public Service Commission is a "state agency," the above restriction is applicable to practice before that body. *See* s. 350.011, F. S., renaming the state regulatory agency known as the Florida Railroad and Public Utilities Commission or Florida Public Utilities Commission the Public Service Commission, and s. 120.52(1)(b), F. S., defining "agency."

The only question which remains is whether the Public Service Commission can be classified as a judicial tribunal, thereby exempting that body from the prohibition found at s. 8(e), Art. II, State Const.

Section 1, Art. V, State Const., states that "judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." This delineation of "courts" is sole and exclusive and "[n]o other courts may be established." Commissions established by law or administrative officers or bodies may, however, be granted *quasi-judicial* powers in matters connected with the functions of their offices. While the Legislature has the constitutional authority to delegate quasi-judicial powers to commissions established by law and administrative officers or bodies, a board which exercises such delegated quasi-judicial functions is clearly not a part of the judicial branch of government, Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260, 263 (Fla. 1973), and hence outside the restriction regarding establishment of courts found at s. 1, Art. V.

It has been repeatedly recognized that the Public Service Commission is an administrative agency established by law which exercises *quasi-legislative* as well as *quasi-judicial* powers. *See, e.g., In re* Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969); General Telephone Company v. Carter, 115 So.2d 554 (Fla. 1959); Florida Motor Lines v. Railroad Commissioners, 129 So. 876 (Fla. 1930); State *ex rel.* Swearingen v. Railroad Com'rs, 84 So. 444 (Fla. 1920); State v. Atlantic Coast Line R. Co., 47 So. 969 (Fla. 1908).

In Florida Motor Lines, *supra*, the Supreme Court discussed the powers of the Railroad Commission (now the Public Service Commission) at length and summarized these powers as follows:

> The Railroad Commissioners are *statutory administrative* officers who exercise only statutory authority. Their *administrative authority*, functions, and duties are not among "the powers of government" which are by the Constitution separated into legislative, executive, and judicial "powers," and which must be exercised only by appropriate officers "properly belonging to" one of the three "departments of the government of the state of Florida." The authority conferred by statute under section 30, article 16, Constitution, to prescribe just and reasonable rates, rules, and regulations for the service rendered by common carriers and others "performing other services of a public nature" is *quasi legislative* in nature; but such authority **as conferred and limited* by the statute is not one of "the powers of the government of the state of Florida" that **must* be exercised *only by the Legislature*. . . . Section 30, article 16, of the Constitution, contemplates that such quasi legislative authority may by statute be conferred with required limitations upon appropriate *administrative officers or commissioners* in order to effectuate the regulatory purpose of the Legislature. *Likewise as to quasi judicial functions, conferred by statute upon the Railroad Commissioners. They are not judicial "powers" that must be exercised only by the courts.* This is particularly so as to quasi judicial functions in view of the authority of the Legislature under the provision of amended section 35, article 5, Constitution, authorizing the Legislature to clothe any Railroad Commission with judicial powers **in all*

matters connected with the functions of their office. See, also, section 1, article 5, Constitution, as amended in 1914.

Statutes confer upon the state board of law examiners quasi judicial powers that had theretofore been exercised by the courts. . . . Likewise as to the state board of medical examiners . . . and Florida real estate commission . . . .

It was held in State v. Brown, 19 Fla. 563, that the statutory authority to hear and determine complaints against the holders of licenses and to revoke licenses, is a judicial function. . . . It is a quasi judicial function. . . . If revoking a license on complaint and hearing is a judicial function, the granting of a license upon adversary hearing and in the exercise of a determining judgment affecting claims of adversary privileges is a quasi judicial function. . . . *If revoking a certificate issued under chapter 13700 is expressly attempted to be made subject to appellate review as a judicial function, then certainly the issue of such certificates after the prescribed adversary hearing and determination of conflicting claims in the exercise of judgment and discretion is a quasi judicial function, though not a "judicial power" that can lawfully be exercised only by the courts* . . . . [*Emphasis by the court; other emphasis supplied.]

While the commission exercises quasi-legislative authority in the area of rate regulation, the mere exercise of this delegated authority does not transform the commission into a legislative body. Similarly, the exercise of quasi-judicial power by the commission does not make the commission a judicial tribunal. The commission is simply an administrative agency which has been delegated legislative and judicial powers by the Florida Legislature. *See In re* Advisory Opinion to the Governor, *supra*, at 38. These powers are of an administrative nature and are not the type of judicial or legislative governmental powers which can be exercised by only one of those departments.

The powers of all the departments are exercised by their proper officials through or by the aid of administrative officers. The Constitution provides for and authorizes the Legislature to provide for administrative officers who lawfully perform functions and duties and exercise more or less authority under the direction of officers who have real governmental powers, and who may properly belong to different departments of the government. This clearly indicates that all official duties, authority, and functions prescribed or contemplated by law are not necessarily governmental powers within the meaning of the constitutional provisions separating the powers of government into departments. . . .

The exercise of powers that appertain exclusively to the Legislature, the Governor, and the courts is not subject to limitations or to review except as provided by the organic law. As the authority given the Commissioners is subject to the limitations imposed by the Legislature, and as the exercise of the authority is reviewable by the courts, the authority cannot be really a governmental power that appertains exclusively to the legislative department. Such authority may therefore be regarded as merely administrative.

State and county officers carry out the legislative will, assist the executive in executing the laws, and aid the courts in making their proceedings and judgments effective. The functions performed by such officers are administrative, and are not the governmental powers separated into departments by the Constitution. The exercise of some authority, discretion, or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion, or judgment is subject to judicial review, and is not among the powers of government that the Constitution separates into departments. [State v. Atlantic Coast Line, *supra*, at 974-975.]

An adjudicatory proceeding before an administrative officer or body is not an action at law. 73 C.J.S. *Public Administrative Bodies and Procedure* s. 115. An administrative board is not a part of the judiciary, and the Supreme Court cannot promulgate rules of practice and procedure for administrative bodies as it may in the instance of state courts. Canney v. Board of Public Instruction, *supra*, at 262. *See and compare* ss. 120.57, 120.58, 120.68, and 120.72(3), F. S. (1976 Supp.).

Moreover, the Sunshine Amendment must be given effect according to its plain meaning and what the people of Florida must have understood it to mean at the time

they adopted it. *In re* Advisory Opinion to the Governor, *supra*, at 39. This is especially true when a constitutional amendment is initiated directly by the people as opposed to being proposed by a joint resolution of the Legislature. The ordinary common meaning of the term "judicial tribunal" indicates that both of these words relate to the courts. "Judicial" has been defined as

> . . . of or relating to a judgment, the function of judging, or the judiciary; belonging to the branch of government that is charged with trying all cases that involve the government and with the administration of justice within its jurisdiction—compare EXECUTIVE, LEGISLATIVE; ordered or enforced by a court. [*Webster's New Collegiate Dictionary*, 1975 Ed.]

"Tribunal" means "the seat of a judge; a court or forum of justice; something that decides or determines, *i.e.*, the 'tribunal of public opinion.' " Webster's, *id.* When the ordinary definitions of these two words are read together, it seems apparent that the people who initiated the Sunshine Amendment and adopted the same at the 1976 general election believed that the words "judicial tribunal" limited the restriction of s. 8(e), Art. II, State Const., to those entities normally considered to be "courts" and a part of the judicial system of Florida and not administrative agencies, such as the Public Service Commission, which merely exercise quasi-judicial functions.

Accordingly, unless judicially clarified to the contrary, I am of the view that the Public Service Commission is not a "judicial tribunal" as contemplated by the Sunshine Amendment, s. 8(e), Art. II, State Const.

076-243—December 29, 1976

LEGISLATURE

GUBERNATORIAL VETO MESSAGES NEED NOT BE TAKEN UP DURING SPECIAL SESSION

To: George H. Sheldon, Representative, 69th District, Tampa

Prepared by: Staff

QUESTION:

Must the Legislature take action to either sustain or override gubernatorial vetoes during a special or extra session or can consideration of such vetoes be delayed until the next regular session?

SUMMARY:

In the absence of clear and unequivocal evidence of an intent to require that the Legislature act on veto messages during special sessions, s. 8(b), Art. III, State Const., should not be construed to require that the Legislature take action to either sustain or override gubernatorial vetoes during a special session.

Section 8, Art. III, State Const., provides in pertinent part:

> (b) When a bill or any specific appropriation of a general appropriation bill has been vetoed by the governor, he shall transmit his signed objections thereto to the house in which the bill originated if in session. If that house is not in session, he shall file them with the secretary of state, who shall lay them before that house at its next regular or special session, and they shall be entered on its journal.

This provision is similar to that contained in the 1885 Florida Constitution which provided that:

> If the Legislature, by its final adjournment prevent [sic] such action, [return of vetoed bill within five days] such bill shall be a law unless the Governor within twenty (20) days after adjournment shall file such bill, with *his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session* . . . . [Section 28, Art. III, State Const. 1885; emphasis supplied.]

These two constitutional provisions, as they relate to the return of vetoed bills, are substantially similar. While the 1885 Constitution required the Secretary of State to lay the vetoed bill and objections thereto before the Legislature at its next session, the 1968 Constitution specifically requires the Secretary of State to lay such bill before the house in which the bill originated at its next regular or special session.

In AGO 061-97, Attorney General Richard W. Ervin opined that once the Legislature is convened in special session, it is *empowered* to consider all things as if convened in regular session. This, of course, is qualified by the specific limitation found at s. 3(c)(1), Art. III, State Const. Attorney General Ervin noted that while normally veto messages would not be presented to the Legislature convened in special session prior to the regular session, doubt exists as to whether the Legislature, convened in special session, would be precluded from considering vetoed bills. *Also see* AGO 044-158, June 6, 1944, Biennial Report of the Attorney General, 1943-1944, p. 96.

In AGO 067-55, Attorney General Earl Faircloth, citing an informal opinion to Senator John A. Mathews, dated August 15, 1967, stated that while it is not mandatory for the Legislature to consider the Governor's current veto messages until the next regular session of the Legislature, the Legislature could, by two-thirds vote of each house, consider such veto messages at a special session.

While it could be argued that the 1968 Constitution has altered this construction and has made the consideration of veto messages mandatory at special sessions, I am unable to reach such a conclusion in the absence of specific evidence of such an intent. Significantly, the comments accompanying s. 8(b), Art. III, State Const., do not make mention of such an intent to alter the previous construction given the 1885 Constitution by three former Attorneys General. To the contrary, a persuasive argument can be made that the insertion of the word "special" in the 1968 Constitution was done in order to give the Legislature the power to consider vetoed bills during special session if it desired to do so. To flatly state, however, that such action is *required* or mandated is a different matter, and I am unable to construe s. 8(b), Art. III in such a manner in the absence of unequivocal evidence of an intent to impose such a constitutional requirement upon the Legislature.

076-244—December 30, 1976

PUBLIC SERVICE COMMISSION

DESIGNATION OF CHAIRMAN

To: William T. Mayo, Chairman, Florida Public Service Commission, Tallahassee

Prepared by: Staff

QUESTIONS:

1. Did Rule 25-1.03, F.A.C., which became effective October 20, 1975, establish a starting point for the cycle of succession to the chairmanship of the Public Service Commission which would begin on the expiration of the term of the chairman incumbent on October 20, 1975?

2. If your answer to the preceding question is in the affirmative, is the chairman incumbent on October 20, 1975, to be considered in determining who would first serve as chairman when the cycle of succession begins?

3. If your answer to question 1 is in the negative, which commissioner would next serve as chairman given the facts recited herein?

4. Irrespective of your answers to the preceding questions, what is the result if the commissioner who would become chairman under the normal operation of the succession cycle declines to serve?

SUMMARY:

To accomplish the intent of Rule 25-1.03, F.A.C., it should be interpreted so as not to affect the present cycle and the member who has not yet been chairman should assume that office on January 4, 1977. When that term ends, the cycle should then begin with members who possess the most years of service on the Commission.

Since the answers to your questions are interrelated, and all involve an interpretation of the same administrative rule, I will proceed to answer them all in one response.

Rule 310.03 of the Public Service Commission provided as follows:

> The chairman is the chief administrative officer of the commission and presides at all hearings and conferences when present. In the absence of the chairman, the immediate past-chairman presides and acts as chief administrative officer of the commission. The chairman serves for a term of two years beginning with the first Tuesday in January of the odd years. The chairmanship rotates biennially among the commissioners beginning with the oldest in point of service on the commission and progressing through the cycle with the other commissioners serving as chairman in the order of their election. The designation of chairman is not regulated by statute and may be changed from time to time in the discretion of the commissioners.

In 1975, this rule was repromulgated and amended as Rule 25-103, and presently states:

> The chairman is the chief administrative officer of the commission and presides at all hearings and conference [sic] when present. In the absence of the chairman, the immediate past-chairman presides and acts as chief administrative officer of the commission. The chairman serves for a term of two years beginning with the first Tuesday in January of the odd years. The chairmanship rotates biennially among the commissioners beginning with the oldest in point of service on the commission and progressing through the cycle with the other commissioners serving as chairman in the order of their election.

An examination of these two rules reveals that they are identical except for one provision. In amending Rule 310.03, the last sentence of that rule was deleted. This sentence had vested in the commissioners the authority to, in effect, supersede the rule's built-in seniority feature based upon time of service and instead select as chairman whomever two of the commissioners desire regardless of seniority. By eliminating this discretion in Rule 25-1.03, an obvious intent exists to establish a set procedure to insure that every member of the commission could eventually become chairman if he or she wished to serve in that capacity.

All rule provisions are to be harmonized to effectuate the overall purpose of the instrument. Barrow v. Holland, 125 So.2d 749 (Fla. 1960); Florida v. Division of Bond Finance, 278 So.2d 614 (Fla. 1973). A construction of the rules that will render any provision superfluous, meaningless, or inoperative should not be adopted. Burnsed v. Seaboard Coastline Ry. Co., 290 So.2d 13 (Fla. 1974). When a provision will bear one construction which is consistent and another which is inconsistent with another section, the former construction must be adopted. Advisory Opinion to the Governor, 96 So.2d 541 (Fla. 1957).

Rule provisions should not be given a construction that defeats the evident intent and purpose of the drafters. Amos v. Mathews, 126 So. 208 (Fla. 1930). If it is necessary to a clear understanding of the provisions that are construed, the provisions should be interpreted in light of historical events and circumstances leading to their adoption and objects manifestly sought to be accomplished. Sullivan v. City of Tampa, 134 So. 211 (Fla. 1931); City of Jacksonville v. Continental Can Co., 151 So. 488 (Fla. 1933); Wilson v. Crews, 34 So.2d 114 (Fla. 1948).

Rules, like statutes, must be interpreted in light of their obvious intent. *See* 30 Fla. Jur. *Statutes*. Moreover, in resolving ambiguities in the law, a construction which renders it unfair or unjust in operation is to be avoided. *Id.*, at s. 123. When viewed in its overall perspective, Rule 25-1.03 should not be interpreted as creating a new starting point in the chairmanship cycle. Instead, it should be interpreted as merely continuing the policy of former Rule 310.03. Two of the commissioners have become chairman at least once since their election while the third commissioner has yet to be given the opportunity to serve in that capacity. To interpret the rule in order to start the cycle over again at the beginning would be unjust and would divest an elected commissioner of her right to serve as chairman during the present cycle. Accordingly, I believe that the rule should be interpreted so as not to affect the present cycle and the member who has not yet been chairman should assume that office on January 4, 1977. When that term ends, the cycle should then begin with members who possess the most years of service on the commission.

While I have been unable to locate any statute or rule which provides a procedure whereby a new chairman can be selected if the person who by operation of the rule should become chairman declines to serve, I believe that the best practice to follow would be to select the person next in line for the chairmanship at that time.

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MONEYS COLLECTED BY THE DEPARTMENT OF LEGAL AFFAIRS

	January through December 1976
Escheat cases	$ 297,483.96
Care and Maintenance	98,655.58
Anti-trust cases:	
American Cast Iron Pipe Co.	109,300.62
In Re Gypsum cases	67,502.98
Consumer cases:	
Refunds obtained under Chapter 501, F.S.	131,215.26
General Civil Section:	
George & Eileen Dreske v. R.J. Carrol, et al.	153.56
Tax cases:	
Commonwealth Corp. v. D.O.R.	70,123.00
Sportscraft, Inc. v. D.O.R.	1,343.40
De Maria v. D.O.R.	359.40
2nd IPA Realty Partners v. D.O.R.	11,099.40
Florida-Carolina Development, Inc. v. Wade H. Lanier	25,958.24
L. Pharr Abner v. The Osceola County Tax Assessor	10,867.07
Jerry W. Thomas v. D.O.R.	1,940.20
Southeast First National Bank of Satellite Beach v. D.O.R.	1,079.70
Sun First National Bank of Orlando v. D.O.R.	26,474.70
F.R.E. Inc. v. Reid	4,797.65
West Cocoa Utilities, Inc. v. Brevard County	10,000.00
Schearbrook Land & Livestock v. Reid	339,050.00
Arviv Corporation v. D.O.R.	930.90
General Motors Acceptance v. Empire Pontiac Center, Inc.	4,499.40
D.O.R. v. General Truck Sales of Chattanooga, Inc.	10,981.00
Leeco Gas & Oil Company v. D.O.R.	10,936.14
D.O.R. v. Tire'n Tube, Inc.	108.48
Top Verdict v. D.O.R.	423.50
D.O.R. v. Wilco Truck Rentals	1,932.60
KBC Development Corporation v. Lewis	55,212.40
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Use Life Credit Corp. v. Freeburn	3,993.67
Cavalier Group Insurance	2,346.00
The Pillsbury Company v. D.O.R.	79.64
Fred McGilvray, Inc. v. Askew	6,848.95

South Florida Air Academy	7,921.04
Ft. Lauderdale Lions Club	1,164.75
Ft. Lauderdale Lodge	6,697.72
Gemuetlichkeit & Harmonie Inc. v. Markham	2,100.00
Edward K. Halsey v. D.O.R.	784.20
John S. & Eleanor Williams v. D.O.R.	558.09
Zero Food Storage v. D.O.R.	51,537.66
Keller Industries v. D.O.R.	10,500.00
Sky Lake Development v. D.O.R.	6,864.00
Commercial Union Insurance Company v. D.O.R.	2,000.00
Washington Federal S&L Association v. D.O.R.	1,501.00
Herman R. Applebaum v. D.O.R.	746.00
Henry and Buchanan v. D.O.R.	427.50
Bernard and Shirley R. Hutner v. D.O.R.	400.00
Charles H. Fleming v. Spading	180.00
D.O.R. v. Gertrud Fischer	135.00
Edythe Freeman v. D.O.R.	135.00
McArthur Jersey Farm Dairy v. Markham	32,831.00
Santa Rosa Island Litigation	2,123,000.00
Florida Boatsmen Association v. J. Ed Straughn and D.O.R.	10,035.00
Total	$3,566,480.09

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CITATOR

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