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ANNUAL REPORT

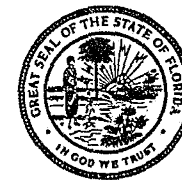
of the

ATTORNEY GENERAL

STATE OF FLORIDA

January 1 through December 31, 1977

ROBERT L. SHEVIN
Attorney General



Tallahassee, Florida
1978

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

This public document was promulgated at a base cost of $5.69 per book for 1200 copies for the purpose of providing a permanent compilation and index of official Attorney General's Opinions.

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL

ROBERT L. SHEVIN
Attorney General

TALLAHASSEE, FLORIDA 32304

December 31, 1977

LETTER OF TRANSMITTAL

Honorable Reubin O'D. Askew
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 1977. 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. This year as a continuing reference source on Government in the Sunshine and Public Records laws we are including a booklet which outlines existing case law and legal opinions on these subjects.

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
ATTORNEY GENERAL

RLS/B/g

TABLE OF CONTENTS

	Page
Constitutional Duties of the Attorney General	ii
Cost Data	ii
Letter of Transmittal	iii
Table of Contents	iv
Attorneys General of Florida since 1845	v
Department of Legal Affairs	vi, vii
Seal of the Attorney General of Florida	viii

OPINIONS

Opinions 1977 1

Florida's Government-in-the-Sunshine and Public Records Law Manual 313

REPORTS AND STATISTICS

Moneys Collected by the Department of Legal Affairs 377

INDEX AND CITATOR

General Index 381

Citator to Florida Statutes, Constitution and Session Laws 396

ATTORNEYS GENERAL OF FLORIDA SINCE 1845

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1846-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESTCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
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CARY D. LANDIS	1931-1938
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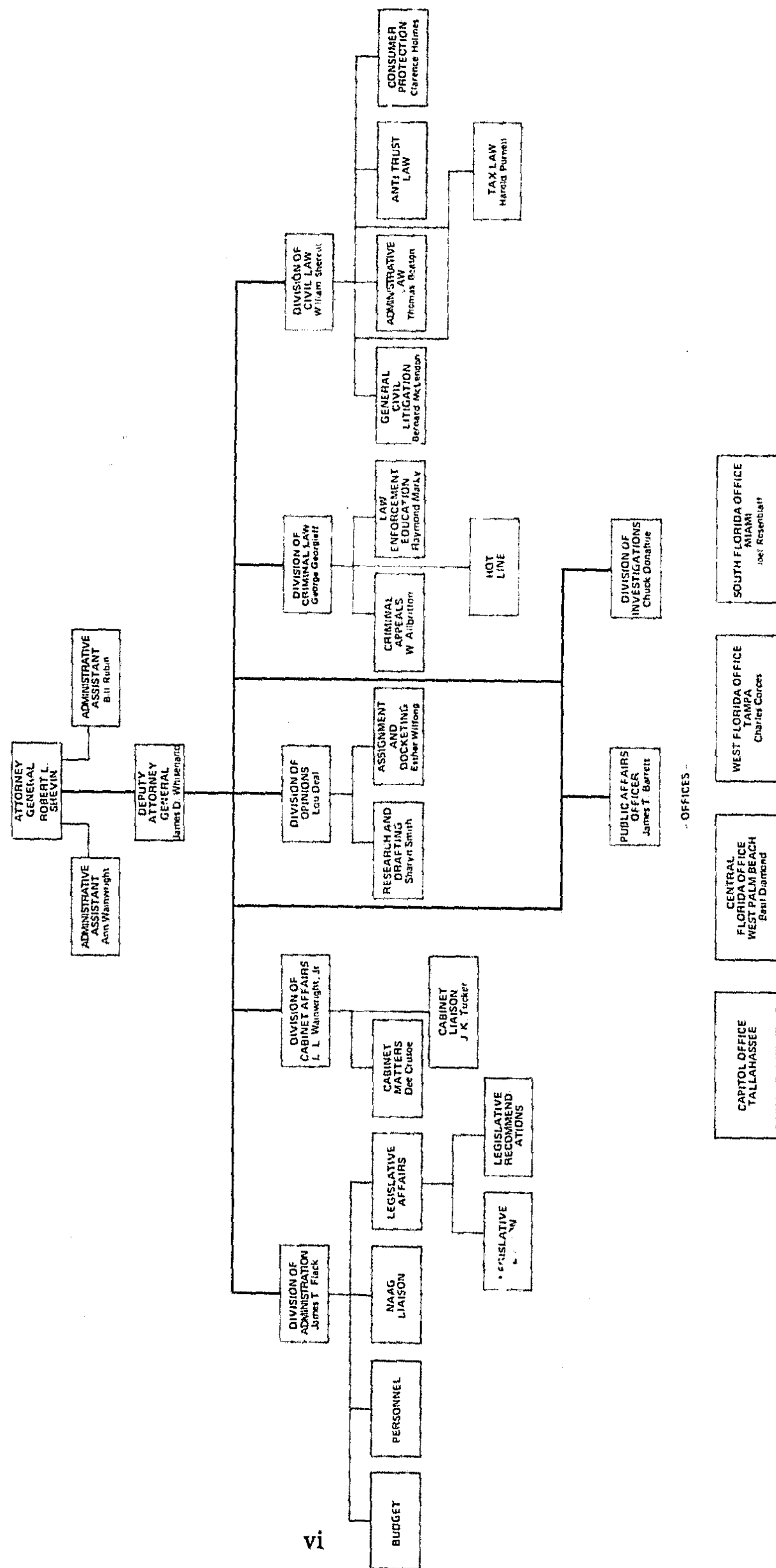
JAMES W. KYNES	1964-1964
EARL FAIRCLOTH	1965-1970
ROBERT L. SHEVIN	1971-



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The Capitol
Tallahassee

ANNUAL REPORT
of the
ATTORNEY GENERAL
State of Florida
January 1 through December 31, 1977

077-1—January 11, 1977

ELECTIONS

PERSONS DECLARED PHYSICALLY INCOMPETENT NOT DISQUALIFIED FROM VOTING

To: Sal Geraci, Clerk, Circuit Court, Fort Myers

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is a person who has been adjudicated physically incompetent, and for whose property a guardian has been appointed, eligible to vote?
2. Is the clerk of the circuit court required to report such a person to the supervisor of elections so that his or her name may be removed from the registration books?

SUMMARY:

A person who has been adjudicated *physically* incompetent continues to be eligible to vote, provided such person is duly registered as an elector. The clerk of the circuit court is under no duty to report such person to the supervisor of elections.

AS TO QUESTIONS 1 AND 2:

As your questions are interrelated, they will be answered together.

Section 2, Art. VI of our State Constitution, as construed by the courts, provides, essentially, for universal suffrage for all residents of this state who have reached the age of majority if they are registered as provided by law. The only disqualifications to the constitutional grant of suffrage are found at s. 4, Art. VI, State Const.:

> No person convicted of a felony, or adjudicated in this or any other state to be *mentally* incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. (Emphasis supplied.)

It is clear from the foregoing language that an adjudication of *physical* incompetency in a proceeding prescribed by s. 744.331, F. S., is not among the constitutional disabilities.

When the state's Constitution prescribes the qualifications for voting in express self-executing terms and such provisions are not in conflict with the federal Constitution, the Legislature is powerless to modify such provisions or to create other disqualifications than those found in the organic law. Neither may it restrict or modify the constitutionally prescribed qualifications or requirements of electors. Riley v. Holner, 131 So. 330 (Fla. 1930); Thomas v. State, 58 So.2d 173 (Fla. 1952); Bowden v. Carter, 65 So.2d 871 (Fla. 1953); State *ex rel.* Landis v. County Board of Public Instruction, 188 So. 88 (Fla. 1939); *see also* AGO 074-15.

In view of the foregoing constitutional provisions and judicial decisions, I am of the opinion that a person who is adjudicated to be *physically* incompetent continues to be eligible to vote, provided he or she is duly registered as an elector. *Cf.* State v. Parsons, 302 So.2d 766 (4 D.C.A. Fla., 1974). To the extent that s. 97.041(3)(b), F. S., would appear to disqualify from voting all persons under any guardianship, it must be narrowly construed so as to avoid conflict with the clear provisions of s. 4, Art. VI, State Const. *Accord:* Attorney General Opinion 074-15, wherein I concluded that, in light of s. 4, Art.

VI, State Const., s. 97.041(3)(b) does not operate to disqualify from voting (if otherwise qualified) a resident of Sunland Training Center, unless and until said resident has been adjudicated mentally incompetent.

It follows, therefore, that the clerk is under no duty to report a person who has been adjudicated physically incompetent, and for whose property a guardian has been appointed, to the supervisor of elections. *Cf.* s. 98.311, F. S., requiring the clerk at least once each month to deliver to the supervisor a list of persons who have been adjudicated *mentally* incompetent during the preceding calendar month. No such statutory requirement exists with respect to persons adjudicated physically incompetent.

077-2—January 11, 1977

TAXATION

TAX DAY UNCHANGED BY LEGISLATION ESTABLISHING RESIDENCY REQUIREMENT FOR ADDITIONAL HOMESTEAD EXEMPTION

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

Prepared by: Patricia S. Turner, Assistant Attorney General

QUESTIONS:

1. Is the language added to s. 196.031(3), F. S., by Ch. 72-372, Laws of Florida, consistent with the conclusions reached in AGO 071-379 establishing the residency requirement for the additional homestead exemption to be January 1?

2. If inconsistent, is the determinative date for establishing the residency requirement for the additional homestead exemption under s. 196.031(3)(a), F. S., the date of application or January 1?

SUMMARY:

The taxable status of real property and entitlement to tax exemption for each tax year is determined as of the tax day, January 1 of each year, and an individual's status as being subject to taxation or exempt therefrom, wholly or partially, is determined as of January 1 of each year despite the language in s. 196.031(3), F. S., concerning the submission of an affidavit that an applicant for the additional homestead exemption has been a permanent resident of the state for the 5 years immediately preceding the date of application. Section 196.031(3), F. S., as amended, did not effect any change in preexistent law or administrative and judicial construction thereof as to the determination of the status of property as exempt or taxable on the tax day, January 1 of each tax year, but only prescribes procedures for making application for the additional homestead exemption.

Your first question is answered in the affirmative; your second question, depending on a negative answer to the first question, is irrelevant.

Section 196.031(3), F. S. 1971, stated:

> For every person who is entitled to the exemption provided in subsection (1), *who has been a permanent resident of this state for the five (5) consecutive years prior to claiming an exemption* under this subsection, and who is sixty-five years of age or older, the exemption is increased to ten thousand dollars ($10,000) for taxes levied by district school boards for current school operating purposes. (Emphasis supplied.)

Also see Rule 12A-1.202(1)(B), F.A.C., providing in pertinent part that an otherwise qualified person be "a permanent resident of this state for five (5) consecutive years prior to claiming an additional exemption and . . . sixty-five (65) years of age or older."

As stated in AGO 071-379, two pertinent tax-day statutes are presently in existence. Section 192.042, F. S., provides that all real property shall be assessed as of January 1, while s. 192.053, F. S., states that a lien for taxes, penalties, and interest shall attach to property on the date of assessment. *Also see* Rule 12B-1.202(4)(A), F.A.C., providing in pertinent part that "the status of real property on the tax day (January first of the tax year in Florida) determines its status as exempt or taxable property for the tax period or year." Attorney General Opinions 069-46, 061-1, 057-377, and 054-59 concluded that these statutes were applicable and that January 1 of the tax year was the date for determining an individual's tax status and right to the homestead exemption. *See* Gautier v. Lapof, 91 So.2d 324 (Fla. 1956); Ammerman v. Markham, 222 So.2d 423 (Fla. 1969).

In response to the question of whether an individual qualified for the additional homestead tax exemption if said individual reached the age of 65 subsequent to January 1, I concluded in AGO 071-379 that ss. 192.042 and 192.053, F. S., apply to s. 196.031(3), F. S., and do not entitle the individual to the exemption, since an individual's status as being subject to taxation or being exempt from taxation is determined as of January 1 of each year and since there was no language to the contrary stating that some date other than January 1 was the date for determining the individual's tax status.

However, Ch. 72-372, Laws of Florida, amended s. 196.031(3), F. S., by adding the following language:

> Application for this additional exemption shall be made by the applicant in person or by mail. Submission of an affidavit that the applicant claiming the additional exemption under this subsection has been a permanent resident of this state for the five years immediately preceding the date of application shall be prima facie proof of such residence.

Additionally, it should be noted that Ch. 74-264, Laws of Florida, further amended s. 196.031(3), F. S., by incorporating the language contained in said s. 196.031(3) into s. 196.031(3)(a), F. S., and by repealing that portion stating that "[a]pplication for this additional exemption shall be made by the applicant in person or by mail."

Chapters 72-372 and 74-264, Laws of Florida, were enacted in implementation of the authority granted by s. 6, Art. VII, State Const. Section 6(c) states: "*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 or is totally and permanently disabled." (Emphasis supplied.)

Chapters 72-372 and 74-264, Laws of Florida, are interrelated with other tax laws, and the provisions contained in said chapters, as written, cannot operate independently thereof. Therefore, the amendatory statutory provisions must be read *in pari materia* with ss. 192.042 and 192.053, F. S. *See* State v. Bowden, 150 So.2d 259 (Fla. 1933); Stewart v. DeLand-Lake Helen Special Road & Bridge Dist., 71 So. 42 (Fla. 1916); Panama City Airport Board v. Laird, 90 So.2d 616 (Fla. 1956); Markham v. Blount, 175 So.2d 526 (Fla. 1965); and Mann v. Goodyear Tire and Rubber Company, 300 So.2d 666 (Fla. 1974).

Additionally, the title of an act may be resorted to in construing the body of the act in order to ascertain legislative intent where some doubt or ambiguity exists and serves to define the scope of the act. *See* Jackson Lumber Co. v. Walton County, 116 So. 771 (Fla. 1928); Curry v. Lehman, 47 So. 18 (Fla. 1908); State v. Yeats, 77 So. 262 (Fla. 1917); Board of Public Instruction v. State *ex rel.* Allen, 219 So.2d 430 (Fla. 1969); County of Hillsborough v. Price, 149 So.2d 912 (2 D.C.A. Fla., 1963); and Finn v. Finn, 312 So.2d 726 (Fla. 1975).

As stated in its title, Ch. 72-372, *supra*, was enacted to provide application procedures for persons over 65 years of age who are entitled to the homestead exemption under s. 196.031(1), F. S. The title does not indicate an intent by the Legislature to effect any change of the tax day, January 1 of each year, which has historically been used as the date for determining an individual's tax status or entitlement to homestead exemption. Said Ch. 72-372 refers only to application procedures for persons over 65 years of age. It does not purport to change any substantive, as distinct from procedural, law and does not create any exception therefrom for persons over 65 years of age. *Cf.* Overstreet v. Ty-Tan, Inc., 48 So.2d 158 (Fla. 1950).

Additionally, Ch. 72-372, *supra*, does not purport to amend or alter s. 192.042, F. S. One statute does not impliedly repeal another unless there is a positive repugnancy between

the two or a clear legislative intent to repeal the prior statute exists. *See* Florida E. C. Ry. Co. v. Hazel, 31 So. 272 (Fla. 1901). Chapter 72-372 is not repugnant to s. 192.042, nor is there any indication of legislative intent to change, modify, or repeal the tax-day statute or overturn the long-standing legal precedents and construction placed on the statute by the courts with respect to the date on which property is to be valued, the date on which the inchoate tax lien arises, and the date on which certain facts must exist to entitle taxpayers to the various exemptions allowed by law. *Cf.* State *ex rel.* Housing Auth. of Plant City v. Kirk, 231 So.2d 522 (Fla. 1970); United Gas Pipe Line Company v. Bevis, 336 So.2d 560 (Fla. 1976).

Therefore, pursuant to s. 192.042, F. S., the taxable status of real and personal property and entitlement to tax exemption for each tax year continues to be determined as of the tax day, January 1 of each year, and, pursuant to s. 196.031(3), F. S., an individual's status as being subject to taxation or being exempt from taxation is determined as of January 1 of each tax year.

In conclusion, Ch. 72-372, *supra*, is reconcilable with and not repugnant to s. 192.042, F. S., and my conclusion in AGO 071-379 is consistent with, and has not been altered by, the more recent legislation. The tax status of an individual's property is fixed on January 1 of each tax year regardless of the procedures used to qualify for, or to make application for, a tax exemption.

077-3—January 11, 1977

BAIL BONDS

BONDSMAN—NO AUTHORITY TO ARREST PRINCIPAL ON BOND WHEN LICENSE CANCELED BY SURETY

To: Russell H. McIntosh, Judge, Circuit Court, West Palm Beach

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. When a bondsman writes a bond for one company and the bond is estreated, and after the estreature the surety company for whom the bondsman wrote the bond cancels the bondsman's license with that company, may the bondsman still legally arrest the principal pursuant to s. 903.29, F. S., if the bondsman had an indemnity agreement with the surety company, at the time of the estreature, to save it harmless from the estreature?

2. If the answer to question 1 is "no," would it make any difference if, at the time of the arrest of the principal, the bondsman was licensed by another company?

SUMMARY:

Section 903.29, F. S., authorizes a *surety* to arrest the principal on a forfeited bond. If the license and power of attorney by which a bondsman acts as limited surety agent for a surety company are revoked, the bondsman ceases to have any authority under s. 903.29 to arrest the principal of a bond given by the surety company by whom the bondsman was formerly licensed. This conclusion would not be affected by an indemnity agreement between the bondsman and the surety company, or by the fact that the bondsman, after such revocation by the surety company in question, might still be licensed by some other surety company.

Section 903.29, F. S., grants the following arrest authority to sureties:

> Within 1 year from the date of forfeiture of a bond that has been paid, the surety may arrest the principal for the purpose of surrendering him to the official in whose custody he was at the time bail was taken or in whose custody he would have been placed had he been committed.

It should be carefully noted that s. 903.29, F. S., is directed to the *surety*, rather than the bondsman. Under certain circumstances, a bondsman may also be a surety. However, this opinion is based on the facts you have presented, under which facts it appears that the type of bondsman contemplated is one who acts as a "limited surety agent" (as defined in s. 648.25(4), F. S.) of a surety company. Under these circumstances, the surety company is the actual "surety" for purposes of the arrest power of s. 903.29. Thus, if the bondsman establishes suretyship (pursuant to s. 903.29[2]) by attaching to the bond a power of attorney to act for and as the agent of a surety company by which he is licensed, then that bondsman, as agent for the surety, would have only those powers granted to the *surety* by s. 903.29 in regard to arrest of the principal. If the bondsman's license and power of attorney to act as agent of the surety are revoked, then the bondsman, upon such revocation, would cease to have any arrest authority under s. 903.29 (which speaks only to the *surety*). Any other contractual agreement between the surety company and the bondsman (such as the indemnity agreement to which you referred) would not of itself provide sufficient authority for the power to arrest and could not be substituted for the statutory arrest authority granted to the surety by s. 903.29.

The fact that the bondsman in question, after revocation, might still be licensed by another surety company (other than the surety company which has given the bond in question) would be of no effect as to the *surety's* statutory authority under s. 903.29 to arrest the principal. There is no statutory authority of which I am aware which would allow one surety to arrest the principal of a bond given by another surety.

077-4—January 19, 1977
(Reconsidered; see AGO 077-112)

CRIMES AND OFFENSES

PENALTIES FOR ATTEMPTED BURGLARY

To: E. J. Salcines, State Attorney, Tampa

Prepared by: Michael H. Davidson and Wallace E. Allbritton, Assistant Attorneys General

QUESTION:

In view of the conflict between ss. 777.04(4)(c) and 810.02(3), F. S., should attempted burglary of an unoccupied structure or conveyance be considered a third degree felony or a first degree misdemeanor?

SUMMARY:

The phrase ". . . or any burglary, . . ." in s. 777.04(4)(c), F. S., must be construed to mean any burglary of the second degree. The burglary classified by s. 810.02(3), F. S., as a third degree felony is reduced by the operation of s. 777.04(d), F. S., to a first degree misdemeanor.

Your question brings into focus a rather unusual statutory conflict. Therefore, in order to facilitate an understanding of the problem, I think it necessary to set forth the provisions of the statutes involved. Accordingly, s. 777.04(4)(c), F. S., provides:

> (c) If the offense attempted, solicited, or conspired to is a felony of the second degree *or any burglary*, the person convicted shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (Emphasis supplied.)

Section 777.04(4)(d), F. S., provides:

(d) If the offense attempted, solicited, or conspired to is a felony of the third degree, the person convicted shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 810.02(3), F. S., provides:

(3) If the offender does not make an assault or is not armed, or does not arm himself, with a dangerous weapon or explosive as aforesaid during the course of committing the offense and the structure entered is a dwelling or there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance, the burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. *Otherwise, burglary is a felony of the third degree*, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (Emphasis supplied.)

The conflict now becomes apparent. Section 777.04(4)(c), F. S., reduces an attempt at a felony of the second degree ". . . or any burglary, . . ." to a third degree felony. However s. 810.02(3), F. S., provides that burglary under certain conditions is a felony of either the second or third degree. As I read this statute, the breaking and entering of an unoccupied structure or conveyance by an unarmed person would constitute a felony of the third degree. The puzzle becomes more challenging as we find that the provisions of s. 777.04(4)(d), F. S., reduce an attempt at a third degree felony to a first degree misdemeanor. Further examination of s. 777.04, F. S., reveals an obvious legislative intent to prescribe lesser penalties for attempts at crimes than for those prescribed for completed crimes. The reduction therein specified is an unbroken pattern of prescribing a punishment for attempts identical to that punishment prescribed for the completion of the next lesser offense.

What then are we to conclude? Is the crime of attempted burglary, regardless of conditions, always punishable as a third degree felony or is it under certain conditions punishable as a first degree misdemeanor as indicated by s. 777.04(4)(d), F. S., or under other conditions punishable as a felony of the second degree as is indicated by the operation of s. 777.04(4)(b), F. S., upon s. 810.02(2), F. S.? I note with interest that all of these statutes became effective October 1, 1975. This removes the relatively simple task of determining which statute represents the latest expression of legislative intent as an approach to the problem under consideration.

In considering problems of statutory construction, an appellate court will adopt that construction which harmonizes and reconciles statutory provisions when it is possible to do so. Courts have endeavored to find a reasonable field of operation for conflicting statutes in order to preserve the force and effect of each. State *ex rel.* Ashley v. Haddock, 140 So.2d 631 (1 D.C.A. Fla., 1962), *reversed on other grounds*, 149 So.2d 552; and Woodley Lane, Inc. v. Nolen, 147 So.2d 569 (2 D.C.A. Fla., 1962). I am convinced that if an appellate court can by any fair and reasonable construction give two statutes a reasonable field of operation without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with legislation in the same area, it will do so. City of St. Petersburg v. Pinellas County Power Co., 100 So. 509 (Fla. 1924).

The ascertainment of the applicable principles of law is in most cases relatively simple. It is in the application of those principles that the difficulty arises. But if the principles of statutory construction above mentioned are to be given more than mere lip service, I am forced to the conclusion that the phrase ". . . or any burglary, . . ." as used in s. 777.04(4)(c), F. S., must be construed to mean *any burglary of the second degree*. This construction preserves the force and effect of s. 777.04(4)(c) and gives it a field of operation in reducing the attempt to commit a burglary which is a second degree felony to a third degree felony. This construction does no violence to s. 810.02(3), F. S., which classifies burglary of an unoccupied structure or conveyance as a third degree felony. Then, as a third degree felony, such offense is subject to the operation of s. 777.04(4)(d), F. S., which reduces an attempted third degree felony to a first degree misdemeanor.

I think this construction of the statutes gives each a reasonable field of operation in harmony with the legislative intent and removes the conflict. Any attempt to construe these provisions so as to vest complete control of the subject matter in one at the expense of the other can be nothing less than a direct repudiation of settled principles of statutory

construction. For example, should the phrase ". . . or any burglary, . . ." in s. 777.04(4)(c) be literally construed, the resultant effect would be to negate the command in ss. 777.04(4)(d) and 810.02(3), F. S., designating burglary of an unoccupied structure or conveyance as a third degree felony and further designating an attempt thereat as a first degree misdemeanor. Such a construction is contrary not only to the judicial directives above mentioned but also to those requiring utilization of the presumption that the Legislature does not enact purposeless or useless legislation, Dickinson v. Davis, 224 So.2d 262 (Fla. 1969), and those requiring effect to be given to the entire statute under consideration. State v. Burr, 84 So. 61 (Fla. 1920); and Chiapetta v. Jordan, 16 So.2d 641 (Fla. 1944).

If the reduction in s. 777.04(4)(c), *supra*, were to be applied literally to s. 810.02(2) and (3), F. S., its operative effect would be to prescribe the same penalty for an attempt at first, second, and third degree felony burglaries, as well as the prescription of the same penalty for an attempt at third degree felony burglary as for a completion of the same offense. Such a result seems totally unreasonable in view of the distinctions drawn by the Legislature in s. 810.02, F. S., regarding the various degrees of burglary and the obvious reduction intent seen in s. 777.04, F. S., regarding punishments prescribed for attempts at the various degrees of offenses set forth therein. Thus, it is clear that a literal interpretation of the term "any burglary" would operate to frustrate the legislative intent and scheme behind ss. 810.02 and 777.04, *supra*.

Therefore, I cannot agree to such a literal construction of the statutory provision here under discussion because to do so would quite obviously lead to an unreasonable result not designated or contemplated by the lawmakers. Maryland Casualty Company v. Marshall, 106 So.2d 212 (1 D.C.A. Fla., 1958); Rudd v. State *ex rel.* Christian, 310 So.2d 295 (Fla. 1975). The Legislature in drafting s. 810.02(2) and (3), F. S., carefully distinguished between first, second, and third degree felony burglaries. I think it completely unreasonable to assume that the Legislature simultaneously and purposely designed to eradicate those distinctions by the contemporary passage of s. 777.04(4)(c), F. S.

It is my firm opinion that the phrase ". . . or any burglary, . . ." as used in s. 777.04(4)(c), F. S., can have reference only to *any burglary of the second degree* and that the attempted burglary of an unoccupied structure or conveyance is a first degree misdemeanor if the offense is otherwise compatible with the requirements set forth in s. 810.02(3), F. S.

077-5—January 19, 1977

RESIGN-TO-RUN LAW

EFFECTIVE DATE OF RESIGNATION

To: John F. Vasquez, City Clerk, Riviera Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

What is the effective date of resignation of a city councilman whose term ends in April 1977, and whose successor will be elected in April 1977, the date of the city's general election, who, on June 23, 1976, resigned to run for the office of county commissioner?

SUMMARY:

The resignation of an elective municipal officer who resigned pursuant to s. 99.012, F. S., to run for the office of county commissioner became effective and hence operated to create a vacancy in the municipal office on the Tuesday 2 weeks following the day of the general election held in 1976 (November 16, 1976), on which date the resigned municipal officer would have assumed the office of county commissioner had he been elected. The resigned municipal officer may continue to serve until the

vacancy for the unexpired term of his office is filled in accordance with procedures provided in the municipal charter.

Section 99.012(2), F. S., provides in pertinent part that:

> No individual may qualify as a candidate for public office who holds another elective or appointive office, whether state, county or municipal, the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office not less than 10 days prior to the first day of qualifying for the office he intends to seek. *Said resignation shall be effective not later than the date upon which he would assume office, if elected to the office to which he seeks to qualify, the expiration date of the term of the office which he presently holds, or the general election day at which his successor is elected, whichever occurs earliest.* . . . (Emphasis supplied.)

Applying the foregoing statutory provision to your inquiry, the councilman's present term of office ends in April 1977, and his successor will be elected in April 1977, on the date of the city's general election. Furthermore, s. 100.041(2), F. S., provides that the term of office of a county commissioner shall begin on the Tuesday 2 weeks following the day of the general election. In 1976, the general election was held on November 2; thus, had the councilman won election to the office of county commissioner, he would have assumed office on November 16, 1976. Clearly, November 16, 1976, is the earliest occurrence of those events specified in s. 99.012(2), F. S.; hence, the councilman's resignation became effective on that date. The vacancy in the elective municipal office may be filled for the unexpired term of the resigned councilman in the manner provided by the municipal charter, but such officer may continue to serve until the vacancy for such unexpired term is filled. *See* s. 99.012(2) and (3), F. S.

077-6—January 25, 1977

ADULT RIGHTS LAW

AGE OF PERSONS FREQUENTING BILLIARD PARLORS

To: Thomas L. Hazouri, Representative, 21st District, Jacksonville

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does s. 743.07, F. S., the Adult Rights Act, impliedly amend s. 849.06, F. S., so as to permit persons 18 years of age and older to frequent, visit, or play in billiard parlors within the state?

SUMMARY:

Section 743.07, F. S., the Adult Rights Act, amends s. 849.06, F. S., so as to permit persons 18 years of age and older to frequent, visit, or play in billiard parlors within the state.

Section 849.06, F. S., provides in pertinent part as follows:

> (1) It is unlawful for any person, his servant or employee to permit anyone under the age of 21 years to visit or frequent or play in any billiard parlor in the state; provided, however, this shall not apply to any person on active duty in the Armed Services of the United States, or who has a written permit or card signed and notarized by his parent or guardian and filed in the establishment to which the permit or card is given by the parent or guardian of the minor involved, or a married minor, or when accompanied by parent or guardian. The said permit card shall be valid only in the establishment to which it is issued,

> and such permit card may be revoked at any time by the parent or guardian, or by the operator of said billiard parlor by returning the card to the parent or guardian, or by any law enforcement officer upon conviction of the party or parties of a crime. No written permit shall be valid in any establishment which sells or permits consumption on its premises of intoxicating or alcoholic beverages.
> (2) Persons playing billiards in bona fide bowling establishments and persons frequenting such establishments are exempt from the provisions contained in subsection (1). For the purposes of this section a "bona fide bowling establishment" shall be one consisting of 12 lanes or more.

The Adult Rights Act, s. 743.07, F. S. (Ch. 73-21, Laws of Florida), states:

> (1) The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older, and they shall enjoy and suffer the rights, privileges, and obligations of all persons 21 years of age or older except as otherwise excluded by the State Constitution immediately preceding the effective date of this section.
> (2) This section shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years; and any crippled child as defined in chapter 391 shall receive benefits under the provisions of said chapter until age 21, the provisions of this section to the contrary notwithstanding.
> (3) This section shall operate prospectively and not retrospectively, and shall not affect the rights and obligations existing prior to July 1, 1973.

Section 1.01(14), F. S., provides:

> . . . In construing these statutes and each and every word, phrase or part thereof, where the context will permit:
> (14) The word "minor" includes any person who has not attained the age of 18 years.

Section 743.07, F. S., set forth above, clearly states that all persons 18 years of age or older shall enjoy and suffer the same rights, *privileges*, and obligations of all persons 21 years of age or older.

At s. 4, Ch. 73-21, *supra*, the Legislature further provided that:

> Any law inconsistent herewith is *hereby repealed to the extent of such inconsistency*. In editing the manuscript for the next revision of the Florida Statutes, the statutory revision and indexing service is hereby directed to conform existing statutes to the provisions of this act.

While revisers' bills which would have amended s. 849.06, F. S., have yet to be enacted into law by the Legislature, the courts of this state have stated that the Legislature intended by enactment of Ch. 73-21, *supra*, to change the rights, privileges, and obligations of persons 18 years of age or older. *See* Hanley v. Liberty Mutual Insurance Company, 323 So.2d 301 (3 D.C.A. Fla., 1975), *aff'd* 334 So.2d 11 (Fla. 1976).

Laws such as s. 849.06, F. S., which contain a definition of a minor inconsistent with the newly created definition of "minor" as one who has not attained the age of 18 years are repealed to the extent of such inconsistency. *Hanley, supra*, at 13. *Also see* AGO's 073-453, 073-206, and 073-207.

Accordingly, I am of the view that Ch. 73-21, *supra*, has amended s. 849.06, F. S., so as to prohibit persons who have not yet attained the age of *eighteen* from visiting, frequenting, or playing in billiard parlors in the state unless certain conditions specified therein are met.

077-7—January 25, 1977

ENVIRONMENTAL PROTECTION

DEVELOPMENTS OF REGIONAL IMPACT—ADOPTION OF COMPREHENSIVE PLAN MAY NOT AFFECT VESTED RIGHTS UNDER DEVELOPMENT ORDER

To: Thomas G. Wright, Jr., Attorney for Broward County Planning Council, Fort Lauderdale

Prepared by: James D. Whisenand, Deputy Attorney General

QUESTION:

May a unit of local government in Broward County that has issued a development order pursuant to s. 380.06, F. S., of the Florida Land and Water Management Act of 1972, ss. 380.012-380.10, F. S., adopt a comprehensive plan for future development and growth pursuant to either the Local Government Comprehensive Planning Act of 1975, ss. 163.3161-163.3211, F. S., or the Broward County Charter that, in effect, amends such development order?

SUMMARY:

A unit of local government in Broward County that has issued a development order pursuant to s. 380.06, F. S., of the Florida Land and Water Management Act of 1972, ss. 380.012-380.10, F. S., is prohibited from adopting a comprehensive plan for future development and growth pursuant to either the Local Government Comprehensive Planning Act of 1975, ss. 163.3161-163.3211, F. S., or the Broward County Charter that in effect amends such development order.

Chapter 380, F. S., the Florida Environmental Land and Water Management Act of 1972 [hereafter "Chapter 380"], was enacted in order to protect Florida's natural resources.

> It is the legislative intent that, in order to protect the natural resources and environment of this state as provided in s. 7, Art. II of the State Constitution, insure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, *facilitate orderly and well-planned development*, and protect the health, welfare, safety, and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within this state. In order to accomplish these purposes, it is necessary that the state establish land and water management policies to guide and coordinate local decisions relating to growth and development; that such state land and water management policies should, to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development; *and that all the existing rights of private property be preserved in accord with the constitutions of this state and of the United States*. [Section 380.021, F. S.; emphasis supplied.]

Sections 163.3161-163.3211, F. S., the Local Government Comprehensive Planning Act [hereafter act], was enacted in "conformity with and in furtherance of the Florida Environmental Land and Water Act of 1972, Chapter 380"; and the act's purpose is to:

> . . . utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development. [Section 163.3161(2), F. S.]

Thus, s. 163.3161, *et seq.*, and Ch. 380 must be read together in their objectives of guiding development and growth and the protection of private property interests as well as protecting environmental quality.

Section 163.3167(10), F. S., provides that:

> Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to Chapter 380.

According to your letter, many developers in Broward County have contended that in enacting s. 163.3167(10), F. S., the Legislature intended to create a new "vested right" with its sole element being the existence of either a development order or permit granted by a unit of local government pursuant to Ch. 380, or a binding letter of interpretation as to vested rights issued by the Division of State Planning pursuant to Ch. 380.

For the reasons that follow, I believe that the Legislature intended s. 163.3167(10), F. S., to operate on local government units so as to prohibit any action under either s. 163.3161, *et seq.*, or a county charter which would effectively amend or alter a development authorized pursuant to Ch. 380.

When Ch. 380 was enacted in 1973, the Legislature at s. 380.06(12) "grandfathered in" projects which met certain criteria as of July 1, 1973. This function of the "grandfather clause" has been said to be consistent with the express legislative intent of Ch. 380 which is to preserve existing rights of private property owners in accordance with the Constitutions of this state and of the United States, and with a presumed intent to protect Ch. 380 from unconstitutionality through retroactive application that unlawfully impairs vested property rights. *See* Rhodes, *The Florida Environmental Land and Water Management Act: The First Operational Year*, The Florida Bar Journal, April, 1975, at 217; *also see* 6 Fla. Jur. *Const. Law* s. 253.

Pursuant to s. 380.06(4)(a), F. S., the Division of State Planning has been empowered to issue "binding letters of interpretation" as to whether rights have been vested pursuant to s. 380.06(12), F. S. The statutory criteria for vesting for the purposes of s. 380.06(4)(a) and (12), F. S., which have to do with the vesting of such property and other legal rights of the developer and property owner, include the following acts which must occur prior to July 1, 1973: Complete any development authorized by registration of a subdivision pursuant to Ch. 478; or recordation pursuant to local subdivision plat law; or issuance of a building permit or other authorization to commence development on which there has been reliance and a change of position and on which recordation or registration was accomplished or which permit or authorization was issued prior to the effective date of rules issued by the Administrative Commission on which there has been reliance and a change of position.

Further, Ch. 380 was amended in 1974, to provide a means for determining the vesting of rights under s. 380.06(12), F. S.: Approval pursuant to local subdivision plat law, ordinances or regulations of a subdivision plat by formal vote of a county or municipal government having jurisdiction after August 1, 1967, and prior to July 1, 1973, shall be sufficient to vest all property rights and no reliance or change of position concerning such local government approval shall be required for vesting to take place.

Chapter 74-326, Laws of Florida, also provides in pertinent part for binding letters of interpretation on developments of regional impact and for determining vested property rights: Conveyance or agreement to convey property to the county, state, or local government as a prerequisite to zoning change approval shall be construed as an act of reliance to vest rights [as determined under subsection (12)] provided such zoning change is actually granted by such government.

Moreover, if a developer has, by his actions in reliance on prior regulations, obtained vested or other legal rights that in law would have prevented a local government from changing those regulations in a way adverse to his interests, nothing in Ch. 380 authorizes any governmental agency to abridge those rights. Section 380.06(12), F. S.

When a property owner acquires a vested right as defined in Ch. 380, he does so insofar as the application of that act to his particular development is concerned. It does not relieve him of the requirement to obtain additional development permits, as defined by s. 163.3167(16), F. S., or s. 380.031(3), F. S., if required under those statutes or other statutes or charters or local ordinances. Sarasota County v. General Development Corp., 325 So.2d 45 (2 D.C.A. Fla., 1976). However, the application of s. 163.3161, *et seq.*, has been limited statutorily by the Legislature at s. 163.3167(10), which states that:

> Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to Ch. 380.

Thus, all that is required insofar as s. 163.3167(10) is concerned is an authorization to commence development pursuant to Ch. 380. This, of course, can occur two ways—through issuance by the Division of State Planning of a binding letter or interpretation, or through successful completion of the DRI process. The statutory vesting created at s. 380.06(12) has been applied by the Legislature to s. 163.3161, *et seq.*, to prohibit the application of the Local Government Comprehensive Planning Act when either "traditional" or statutory vesting exists under Ch. 380.

The Division of State Planning has promulgated rules at 22 F-1.22, F.A.C., which empower the division to revisit DRI orders as follows:

> (4) *If a development order is issued* approving *with conditions* the application for development approval, subsequent requests for local development permits need not require further development of regional impact review *unless otherwise stipulated in the development order. Factors requiring further development of regional impact review may include, but shall not be limited to:*
>
> (a) A substantial *deviation from the terms or conditions in the development order or other changes to the approved development plans* which create a reasonable likelihood of adverse regional impacts or other regional impacts *which have not been evaluated in the review by the regional planning agency*; or
>
> (b) Expiration of the period of the effectiveness of the development order; or
>
> (c) A finding of an existing emergency condition.
>
> (5) Copies of all development orders pertaining to a development of regional impact *including any amendments or modifications thereto* shall be transmitted by the local government to the Division of State Planning, to the appropriate regional planning agency, and to the owner or developer of the property subject to such owner. (Emphasis supplied.)

While s. 163.3161, *et seq.*, permits charter counties such as Broward to "exercise such additional authority over municipalities or districts within its boundaries as is provided for in its charter," s. 163.3171(2), F. S., and permits the charter to control as to planning responsibility between the county and the several municipalities, s. 163.3174(1)(b), F. S., the remainder of s. 163.3161, *et seq.*, F. S., is applicable to and must be given effect in charter as well as noncharter counties unless the provisions of s. 163.3161, *et seq.*, are met or exceeded by other provisions of law relating to local government. Section 163.3211, F. S.

Section 6.06 of the Broward County Charter provides that:

> A. If a person, firm or corporation has, by actions in reliance on *prior regulations*, obtained vested or other legal rights that in law would have prevented a local government from changing those *regulations* in a way adverse to its interests, then nothing in this Charter authorizes any governmental agency to abridge those rights. (Emphasis supplied.)
>
> B. Nothing in this Charter authorizes any governmental agency to adopt a rule or *regulation* or issue any order that is unduly restrictive or constitutes a taking of property without the payment of full compensation, in violation of the Constitution of the State of Florida or of the United States. (Emphasis supplied.)

While s. 6.06 could be characterized as a recognition within the charter that land-use planning in Broward County must be done in conformity with established legal and equitable rights of property owners, this provision of the charter has in effect been modified by the Legislature by the enactment of s. 163.3167(10), F. S. Section 1, Art. VIII, State Const., provides that counties operating under county charters shall have all powers of local self-government *not inconsistent with general law.*

To the extent that s. 6.06 is inconsistent with s. 163.3167(10), F. S., the latter provisions must prevail.

Accordingly, I am of the view that the Broward County Charter, insofar as recognition of vested or other legal rights is concerned, has been modified by the Legislature to recognize new statutory rights created by the Legislature through operation of s. 163.3167(10) and Ch. 380. Therefore, a unit of local government in Broward County is prohibited from adopting a comprehensive plan for future development pursuant to either the Broward County Charter or s. 163.3161, *et seq.*, which in effect amends a development order or permit issued pursuant to Ch. 380 or affects a binding letter of interpretation as to vested rights also issued pursuant to Ch. 380, F. S.

077-8—February 1, 1977

PUBLIC FUNDS

EXPENDITURE FOR LEGISLATIVE LOBBYIST TO PROMOTE "RESORT TAX" UNAUTHORIZED

To: Stephen Bechtel, Orange County Attorney, Orlando

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. Does Ch. 71-803, Laws of Florida, as amended by Ch. 72-625, Laws of Florida, authorize the Orange County Civic Facilities Authority to expend funds for a lobbyist for aiding in the passage of a "resort tax" even if said funds were directly or indirectly obtained from the Board of County Commissioners of Orange County for that purpose?

2. Despite the provisions of Ch. 71-803, Laws of Florida, as amended by Ch. 72-625, Laws of Florida, does s. 11.062, F. S. 1975, prohibit the appropriation of public money by the Board of County Commissioners of Orange County to another public agency that uses the funds for the purpose of utilizing the services of a lobbyist?

3. May the Orange County Civic Facilities Authority and the Board of County Commissioners of Orange County use public money to pay for the services of a lobbyist which were rendered prior to formal authorization and official action concerning the rendering of those services?

SUMMARY:

Chapter 71-803, Laws of Florida, as amended by Ch. 72-625, Laws of Florida, does not authorize the Board of County Commissioners of Orange County to appropriate public funds for use by the Orange County Civic Facilities Authority for purposes of retaining a lobbyist in order to promote the passage of "resort tax" legislation during the 1977 Legislative Session.

AS TO QUESTION 1:

According to your letter, the Orange County Civic Facilities Authority has requested that the Board of County Commissioners of Orange County provide a sum of up to $10,000 to the authority which the authority would then use to employ a lobbyist in order to aid in gaining the passage of a "resort tax" at the 1977 Session of the Legislature.

The Civic Facilities Authority was created by Ch. 71-803, Laws of Florida, and amended at Ch. 72-625, Laws of Florida, for the purposes of

> . . . planning, developing, constructing, acquiring, owning, reconstructing, extending, enlarging, repairing, improving, relocating, equipping, maintaining and operating facilities for the holding of conventions and expositions and civic, cultural, recreational, athletic and similar events and activities. . . . Said purpose is hereby deemed to be a public purpose the fulfillment of which is an urgent public necessity. [Section 1, Ch. 71-803, *supra.*]

However, s. 9, Ch. 71-803, *supra*, states that Orange County may appropriate funds for use by the authority ". . . for maintenance of the facilities and for the payment of employees' salaries, operating, and planning expenses and *other necessary expenditures*. . . ." Thus, moneys received by the authority from a county appropriation are limited in their use to those enumerated at s. 9. While the phrase "other necessary expenditures" has not been defined within Ch. 71-803, the rule of statutory construction known as *ejusdem generis* can be applied to s. 9 in order to ascertain what the Legislature intended for such phrase to include. When general words such as "other necessary expenditures" follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. Van Pelt v. Hilliard, 78 So. 693, 697 (Fla. 1918). In this context, the general words are to be construed as permitting only expenditures which could unquestionably be characterized as being essential to the operation of the agency. It does not appear that an expenditure of county funds for purposes of hiring a lobbyist to promote a "resort tax" would be such an essential expense.

Moreover, the only purposes for which the county may lawfully appropriate county funds for the benefit of the authority are found within Ch. 71-803, *supra*. When s. 9 is read in conjunction with the remainder of the act, the express purposes for which expenditures may lawfully be made include those found at s. 1 relating to the general purposes of the authority; s. 3(6), as amended by s. 3, Ch. 72-625, defining facilities for purposes of the act; s. 4(4) relating to the purchasing, leasing, and acquiring of land facilities as well as contracts for operating, improving, extending, enlarging, repairing, and equipping authority facilities; s. 4(13), authorizing advertisements and promotion of facilities and activities of the authority; s. 4(16) empowering the authority to do all acts necessary, desirable, or convenient to carry out the purposes expressly granted in Ch. 71-803; and s. 5(6) authorizing revenues not pledged to revenue bonds or otherwise committed to be used to finance or pay for facilities and the authority or the operation thereof and otherwise in carrying out the purpose and provisions of Ch. 71-803. By applying the rule of *expressio unius est exclusio alterius*, which states that where a statute enumerates things on which it is to operate, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned, to Ch. 71-803, it is clear that by operation of this rule the expenditure is not proper since "lobbying" is not one of the authority purposes specifically enumerated at Ch. 71-803. *See* Thayer v. State, 335 So.2d 815 (Fla. 1976); Interlachen Lakes Estates Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952).

In AGO 075-120 this office concluded that neither the Division of Tourism nor the Division of Economic Development was authorized to make expenditures from "paid advertising and promotion" appropriations to purchase transportation, meals, accommodations, and other similar items for potential investors, tourism officials, and the like or to sponsor special meetings and events by financially contributing to the expenses of such events. While AGO 075-120 noted that judicial precedent raises doubts as to whether or not the Legislature could legally authorize such expenditures, specific express legislation would be necessary before the Legislature could be said to have authorized such expenditure. In reaching this conclusion, this office cited a long line of Florida cases including State v. Jacksonville Terminal Co., 71 So. 474 (Fla. 1916), wherein it was stated:

> A presumption in favor of action taken under an asserted delegated statutory power can arise only when some substantial basis of authority for the exercise of the power appears in a statute. Doubts cannot be resolved in favor of a statutory power when there is no enactment which can be a basis for such asserted delegated power.

Accord: Attorney General Opinion 068-12, stating that expenditures of district funds by the Central and Southern Florida Flood Control District and the Southwest Florida Water Management District for entertainment purposes are not permitted in the absence of specific legislative provisions authorizing such expenditures; AGO 071-28, discussing the need for specific legislative authorization in order to expend funds from the Governor's contingent-discretionary appropriation; and AGO's 072-320 and 065-106, holding that a school board may not expend public funds in order to obtain favorable support from the electorate or to "propagandize" the actions of the board.

The rules discussed in the aforecited Attorney General Opinions and cases cited therein involving the expenditure of public funds by state and district agencies and school boards are equally applicable to expenditures by the various counties. *See* White v. Crandon, 156 So. 303 (Fla. 1934); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); Crandon v. Hazlett, 26 So.2d 638 (Fla. 1946).

This conclusion, that pursuant to Florida law public funds may not be expended by a county or district or other statutory entity for lobbying purposes unless expressly and specifically authorized by statute, is also consistent with the weight of authority throughout the country. *Compare*, Stanson v. Mott, 551 P.2d 1 (Calif. 1976) (en banc); Porter v. Tiffany, 502 P.2d 1385 (Ore. 1972); Stein v. Kramarsky, 375 N.Y.S.2d 235 (Sup. Ct. 1975); City of Phoenix v. Michael, 148 P.2d 353 (Ariz. 1974); City of Cleveland v. Artl, 23 N.E.2d 525 (Ct. App. Ohio 1939); Stuart v. City of Atlanta, 163 S.E. 493 (Ga. 1932); Durgin v. Brown, 180 A.2d 136 (N.J. 1962); Citizens to Protect Public Funds v. Board of Education, 98 A.2d 673 (N.J. 1953); and Shannon v. City of Huron, 69 N.W. 598 (S.D. 1896), *with* Hays v. City of Kalamazoo, 25 N.W.2d 787 (Mich. 1947), and cases cited therein; Fitts v. Com'n of the City of Birmingham, 141 So. 345 (Ala. 1932).

In the leading case of Citizens to Protect Public Funds, *supra*, Justice (now United States Supreme Court Justice) Brennan, writing for the New Jersey Supreme Court, considered the legality of a school board's expenditure of public funds for the publication of an 18-page booklet concerning a school building program which was the subject of an upcoming bond election. Most of the booklet contained factual information as to the need for the proposed school facilities and the cost of the proposed project, but three of the booklet's pages contained the simple exhortation "Vote Yes" "Vote Yes" and an additional page warned of the dire consequences that would result "if You Don't Vote Yes."

Focusing on these latter portions of the booklet, the New Jersey court declared that in publishing such material

> the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and this imperiled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure then is not within the implied power and is not lawful in the absence of express authority from the Legislature. [98 A.2d at p. 677.]

See Stanson v. Mott, *supra*, at 8.

Also compare s. 11.062, F. S., which sets forth a general state policy of prohibiting the use of state funds for lobbying purposes.

Since the authority possesses no specific legislative authority to expend public funds for purposes of lobbying for "resort tax" legislation, your first question is answered in the negative. Because the answer to the first question is in the negative, it appears the remaining questions posed by your inquiry are moot.

077-9—February 3, 1977

JUDGES

EFFECT OF JUDGE'S RESIGNATION WHILE REMOVAL ACTION PENDING

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

Prepared by: Betty Steffens, Assistant Attorney General

QUESTIONS:

1. Will acceptance of the resignation of Circuit Judge Stewart F. LaMotte affect his legal status?
2. Will such acceptance make any difference as to his pension and retirement rights?

SUMMARY:

Resignation from a judicial office is not effective until acceptance by the Governor. In view of the pending constitutionally created removal proceedings, it would be the preferable course to decline acceptance and avoid any intrusion into the judicial process. Under present Florida law, retirement benefits are not extinguished by single acts of resignation or removal from judicial office.

The answer to your first question is dependent upon the status of other proceedings potentially affecting Judge LaMotte's status. The Judicial Qualifications Commission (hereinafter commission) is a constitutionally created body, vested with the jurisdiction to investigate and recommend to the Supreme Court of Florida the removal of a judge from office. When such a recommendation is made by two-thirds of the members of the commission, the Supreme Court is empowered to order that the judge be disciplined by appropriate reprimand, removal from office, or involuntary retirement. Section 12(a) and (f), Art. V, State Constitution.

The commission has investigated and has by vote of two-thirds of its members recommended the removal from office of Stewart F. LaMotte. This recommendation was contained in a report to the Supreme Court by the commission as to its proceedings with respect to the matter. In an opinion issued January 4, 1977, the Supreme Court ordered the removal of Judge LaMotte from office with termination of compensation. The removal would become effective upon the opinion becoming final. On January 19, 1977, Judge LaMotte filed a petition for rehearing with the Supreme Court. As a result, the January 4 opinion cannot become final until the petition has been determined by the court. Since the court could modify or set aside its opinion upon rehearing, the present status of Stewart F. LaMotte, aside from consideration of his letter of resignation, is that he holds the office of circuit judge.

The effect of Judge LaMotte's letter should be viewed against constitutional provisions and relevant case law. Section 3, Art. X, State Const. provides:

> Vacancy in office.—Vacancy in office shall occur upon the creation of an office, upon the death of the incumbent or his removal from office, resignation, succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

Vacancy in judicial office also occurs through removal or involuntary retirement by the Supreme Court and impeachment by the Legislature. Section 12, Art. V; s. 17, Art. III. Since these provisions fail to specifically mention voluntary retirement, it can be inferred that it is the intent of the Constitution to regard voluntary retirement from judicial office as a resignation.

Florida case law recognizes the rule that a mere letter of resignation is insufficient to create a vacancy in office. To be effective the resignation must be accepted by a competent authority whose acceptance may be oral, written, or performance of an official act which would ordinarily not be done unless a vacancy had occurred by resignation. State *ex rel.* Jackson v. Crawford, 79 So. 875 (Fla. 1918); State *ex rel.* Gibbs v. Lunsford, 192 So. 485 (Fla. 1939); *cf.* State *ex rel.* Landis v. Heaton, 132 Fla. 443, 180 So. 766 (1938); *see also* Fla. Jur. *Public Officers* s. 79.

Thus, submission of the resignation letter is ineffective absent oral or written acceptance or other manifestation such as action by you as Governor pursuant to s. 11, Art. V, State Const., to fill a vacancy in judicial office.

A similar case arose in Texas wherein impeachment proceedings by the State Senate were brought against a public officer, the Governor, who was pronounced guilty of the charges. In disallowing the Governor's attempt to resign the day before the official

judgment was rendered, the Texas Supreme Court held that where the Senate had acquired jurisdiction, under the circumstances it could not be deprived of its power to enter its judgment and disqualify him from holding further office. Ferguson v. Maddox, 263 S.W. 888 (Tex. 1925). Since the Supreme Court is presently conducting a removal proceeding in accordance with specific constitutional provisions, and to avoid any question of executive intrusion into judicial matters, it would appear to be the better course of judgment to decline acceptance of the resignation. *See In re* Advisory Opinion to the Governor, 276 So.2d 25 (Fla. 1973).

Your second question can be answered somewhat more easily. Section 121.091(5)(f), (g), and (h), F. S., provides:

> (f) Any member who has been found guilty by a verdict of a jury, or by the court trying the case without a jury, of committing, aiding, or abetting any embezzlement or theft from his employer, bribery in connection with the employment, or other felony specified in chapter 838, committed prior to retirement, or who has entered a plea of guilty or of nolo contendere to such crime, or any member whose employment is terminated by reason of his admitted commitment, aiding, or abetting of an embezzlement or theft from his employer, bribery, or other felony specified in chapter 838, shall forfeit all rights and benefits under this chapter, except the return of his accumulated contributions as of his date of termination.
>
> (g) Any elected official who is convicted by the Senate of an impeachable offense shall forfeit all rights and benefits under this chapter, except the return of his accumulated contributions as of the date of his conviction.
>
> (h) Any member who, prior to retirement, is adjudged by a court of competent jurisdiction to have violated any state law against strikes by public employees, or who has been found guilty by such court of violating any state law prohibiting strikes by public employees, shall forfeit all rights and benefits under this chapter, except the return of his accumulated contributions as of the date of his conviction.

Resignation is not one of the grounds for forfeiture of retirement rights and benefits as set forth in the above statute. Irrespective of whether the vacancy is created by resignation or removal, under existing statutes Judge LaMotte's right to retirement benefits would be determined by the normal procedures employed by the Division of Retirement and would be based upon the criteria specified in the statute and rules administered by that agency. Judge LaMotte would be entitled to any benefits he has acquired the right to as a result of length of service, time of participation in the retirement system, and similar factors. However, if Judge LaMotte is subsequently prosecuted and found guilty of any charge enumerated in s. 121.091, F. S., his retirement benefits may be forfeited.

The Legislature, during the 1977 Session, should address this issue and enact corrective legislation to prevent a judge who has been removed by the Florida Supreme Court from receiving publicly funded retirement benefits. I do not believe that a judge who has created cause for removal by defrauding the public taxpayers should be in a posture to receive retirement benefits that are paid from public funds. I intend to recommend legislative amendments that will accomplish this purpose.

077-10—February 7, 1977

SUNSHINE AND PUBLIC RECORDS LAWS

APPLICABILITY TO LEGISLATIVE INVESTIGATION

To: Eric Smith, Representative, 19th District, Jacksonville

Prepared by: Staff

QUESTIONS:

1. Can the House of Representatives, exercising its rulemaking power pursuant to s. 4(a), Art. III, State Const., authorize the Select Committee on Organized Crime to hold executive sessions for the purpose of considering information provided by law enforcement of a sensitive or confidential nature, the provisions of s. 286.011, F. S., notwithstanding?

2. Can the House of Representatives, exercising its rulemaking power pursuant to s. 4(a), Art. III, State Const., authorize the Select Committee on Organized Crime to withhold certain documents or records provided by law enforcement, which may be of a sensitive or confidential nature, from inspection, examination, or disclosure, the provisions of Ch. 119, F. S., notwithstanding?

SUMMARY:

Pending judicial clarification, since Florida's Government-in-the-Sunshine Law, s. 286.011, F. S., involves matters of substance as well as procedure, the House of Representatives should not by duly adopted house rule attempt to exempt meetings of the Select Committee on Organized Crime from said law.

Assuming that documents and records of a confidential nature provided by law enforcement agencies to the select committee fall within the "police secrets" rule, such documents and records when in the possession of the committee are exempt from the mandatory inspection provision of s. 119.07(1), F. S., by virtue of such rule.

While your questions presume that Florida's Government-in-the-Sunshine Law, s. 286.011, F. S., and Public Records Law, Ch. 119, F. S., are fully applicable to the Legislature, a question has apparently arisen among some members of the Legislature regarding the applicability of these laws to the Legislature. Because of this, it is appropriate to again reiterate what has been the consistent position of this office since I assumed the office of Attorney General.

In AGO 072-16, this office expressed the view that the Sunshine Law was applicable to legislators. Subsequently, in City of Safety Harbor v. City of Clearwater, No. 40,269, order filed May 14, 1974, a circuit judge ruled that, since the Sunshine Law imposed criminal sanctions, it was entitled to a strict construction and, therefore, the Legislature did not fall within the plain meaning of the statute. This statement, however, is in obvious conflict with Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla. 1969), in which the Supreme Court stated that:

> 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.

Indeed, had the 1967 Legislature which enacted s. 286.011, F. S., not intended to include itself within the act, it is difficult to explain why the words "*except as otherwise provided by the Constitution*" came to be inserted into s. 286.011, since the only exception in the 1885 Constitution authorizing executive sessions was that found at s. 13, Art. III, State Const. 1885, relating to executive sessions of the Senate. Had the 1967 Legislature *not* intended to include itself within the Sunshine Law, there would have been no reason to partially exempt itself from the act. Moreover, the history of the Sunshine Law reveals that in 1967, when the law was again reintroduced, the Senate was engaged in debate over "executive sessions" and their abuses. The media had become aroused when one of their members refused to leave one of these sessions and was forcibly ejected. Greenberg, *An Annotated History of Florida Sunshine Law*, Senate Cong. Record, August 4, 1972, at 26907. Additionally, the author of the Sunshine Law, former Senator Emory Cross, has stated that in his view the Senate is covered by the act. Greenberg, *id.*, at 26912.

While it is true that the Sunshine Law does not expressly mention the Legislature within its terms, it should also be recognized that the judiciary, in construing the Sunshine Law, has favorably construed the same in favor of government openness and accountability. For example, while the Sunshine Law does not specifically mention "public notice," the courts have implied into the law such a requirement. Hough v.

Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1973). Similarly, the court has applied the law to ad hoc advisory boards which are likewise not specifically enumerated in the law. Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974).

In concluding that the Legislature is subject to the Sunshine Law, this office was guided primarily by the apparent intent of the 1967 Legislature which enacted the law, the illogic of requiring local boards to comply with s. 286.011, F. S., while at the same time excluding from the law the body which has the greatest impact on the lives and affairs of the people of the state, as well as previous opinions of the Supreme Court of Florida which have consistently stated that all doubts regarding the applicability of the law should be resolved in favor of the public. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971).

Regarding the applicability of Ch. 119, F. S., to the Legislature, the act itself clearly extends to all "state officers" which includes, but is not limited to, members of the Legislature. Section 119.011(2), F. S.; AGO 075-282.

AS TO QUESTION 1:

Section 4(a), Art. III, State Const., provides in pertinent part that "[e]ach house shall determine its rules of procedure." This provision is substantially the same as s. 6, Art. III of the 1885 Constitution, which stated that "[e]ach house shall . . . determine the rules of its proceedings."

It is well recognized that a legislative body possesses the authority to control its own proceedings. Bednar v. King, 272 A.2d 616 (N.H. 1970). Such control is the established prerogative of the legislative body. State *ex rel.* Powott Corp. v. Woodworth, 15 N.Y.S.2d 985, *rev'd on other grounds* 21 N.Y.S.2d 785. In many jurisdictions, including Florida, this power is conferred directly by the State Constitution. *See* 59 Am. Jur.2d *Parliamentary Law* s. 2; 81 C.J.S. *States* s. 30. When rules of procedure are adopted by a legislative body pursuant to constitutional authority, such power has been said to be unlimited and absolute so long as a duly adopted rule does not ignore constitutional restraints. Opinion of the Justices, 179 So.2d 155 (Ala. 1965); Opinion of the Justices, 190 A.2d 519 (Del. 1963); Application of Lamb, 169 A.2d 822, *aff'd* 170 A.2d 34 (N.J. 1961); Opinion of the Justices, 79 N.E.2d 881 (Mass. 1948); Taylor v. Davis, 102 So.433 (Ala. 1924); State v. Cason, 507 S.W.2d 405 (Mo. 1973). In State *ex rel.* X-CEL Stores, Inc. v. Lee, 166 So. 568 (Fla. 1936), the court followed this general rule, stating at 571:

> This is true because section 6 of article 3 of the Constitution gives the Legislature full power to adopt and enforce its own rules of procedure. So long as the legislative rules are in harmony with the constitutional plan for making laws, proceedings had in conformity thereto are not invalid. . . .

Similarly, it was observed in State *ex rel.* Coleman v. Lewis, 186 S.E. 625 (S.C. 1936), that the power of the House of Representatives to determine its rules of procedure is a continuous power always subject to exercise by the house and is absolute in the absence of constitutional restraints. *Accord:* Gewertz v. Joint Legislative Committee on Ethical Standards, 334 A.2d 64 (N.J. App. Div. 1975), stating "rules of procedure of the General Assembly are not reviewable by the judiciary except on constitutional grounds."

In Crawford v. Gilchrist, 59 So. 963 (Fla. 1912), the court, in construing the scope of s. 6, Art. III of the 1885 Constitution relating to rules of procedure, stated:

> The provision that each House "shall determine the rules of its proceedings" does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; but in the absence of constitutional restraints, and when exercised by a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power in the transaction of any duty conferred upon it by the Constitution. This, of course, includes authority, subject to the Constitution, to determine the rules of procedure to be observed in agreeing to proposed amendments to the Constitution, and embracing the right to determine the reconsideration of action taken, when no provision of the Constitution is thereby violated. [Crawford, *supra*, at 968. *Also see* State *ex rel.* Landis v. Thompson, 163 So. 270, 281 (Fla. 1935).]

Thus, so long as no constitutional provision is violated, the Legislature has, pursuant to s. 4(a), Art. III, the unlimited right to regulate the conduct of its business. This presumably includes the authority to adopt by rule a procedure different from that required by statute. In Coggin v. Day, 211 S.E.2d 708 (Ga. 1975), the court, in deciding that the Georgia Assembly was not subject to that state's "sunshine law," noted that the House or Senate could pass an internal operating rule for its own procedures that is in conflict with a statute formerly enacted. This is consistent with the rule adopted in this state by the judicial branch regarding the Supreme Court's rulemaking powers under s. 2(a), Art. V, State Const., which has been construed to permit the court to adopt a rule of procedure at variance with its own precedents. State v. Lyons, 293 So.2d 391 (4 D.C.A. Fla., 1974).

However, in specific regard to the Sunshine Law, a serious question exists as to whether the act should be considered procedural as opposed to substantive. Generally, a matter is substantive if it creates, defines, adopts, and regulates rights. *See, In re* Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972) (Adkins, J., concurring). In Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla. 1969), the court noted that "the *right* of the public to be present and heard during all phases of enactments is a source of strength in our country" and went on to admonish boards subject to the act not to attempt to avoid the law and thereby deprive the public of this "inalienable *right* to be present and to be heard at all deliberations wherein decisions affecting the public are being made." As a matter of policy, the judiciary has stated that a mere showing that the Sunshine Law has been violated constitutes an irreparable *public injury.* Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974); Times Publishing Co. v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969). Thus, while the law is procedural in one sense, *i.e.*, regulation of the conduct of meetings, it is also substantive in another, *i.e.*, creation of public rights, which enables individuals to have knowledge of and participation in their government. Accordingly, unless judicially clarified to the contrary, I am inclined to the view that s. 286.011, F. S., is substantive as well as procedural and, therefore, may only be amended by ordinary legislative processes.

AS TO QUESTION 2:

Florida Public Records Law, Ch. 119, F. S., states, generally, that all documents made or received by public officials in the course of conducting public business constitute public records which must be made available for public inspection and examination by any person. Section 119.07(2)(a) recognizes that certain records have been "deemed by law" to be confidential and are thereby exempted from the mandatory inspection provisions of s. 119.07(1).

This office has repeatedly recognized that an exception exists to Ch. 119, F. S., for certain records of law enforcement agencies. *See* Lee v. Beach Publishing Co., 173 So. 440, 442 (Fla. 1937). This exception, commonly referred to as the "police secrets" rule, has been said to encompass sensitive information such as the identity and/or statements of witnesses and informants, possible suspects, tangible and intangible evidence, and the like. Additionally, investigative reports obtained from the police, where the report is a narrative by the police containing confidential or sensitive information of an investigatory nature relating to criminal activities, are also within the scope of the rule. *See* AGO 057-157. Generally, this office has interpreted the police secrets rule to apply where the effect would be to significantly impair or impede enforcement of the criminal law or to enable violators to escape detection. Attorney General Opinions 072-168, 073-166, and 075-9.

Assuming the documents referred to in question 2 of your inquiry fall within the "police secrets rule," then such documents would be exempted from s. 119.07(1), F. S., by virtue of the application of said rule. As to the power of the Legislature to exempt by House or Senate rule legislative records not subject to the "police secrets rule" from s. 119.07(1), *see and compare* Johnson v. State, 336 So.2d 93 (Fla. 1976), and AGO 075-282.

077-11—February 8, 1977

PUBLIC FUNDS

GOVERNOR'S CONTINGENT-DISCRETIONARY FUND—USE FOR PAYMENT OF EXTRA COST OF FIRST-CLASS AIR TRAVEL

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

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

May funds within the Governor's contingent-discretionary appropriation be used to pay the difference in cost between coach and first-class tickets when the Governor uses commercial air transportation on official business?

SUMMARY:

Pursuant to s. 216.231(2), F. S., it is within the discretion of the Governor to expend funds from the Governor's contingent-discretionary appropriation to pay the difference in cost between coach and first-class tickets when the Governor uses commercial air transportation on official business, if the Governor determines such expenditure to be necessary to promote general government and intergovernmental cooperation or to enhance the image of the state.

Because of the unique nature of the contingent-discretionary appropriations to the Governor (currently Item 509 of s. 1 of Ch. 76-285, Laws of Florida), and of the statute (s. 216.231(2), F. S.), providing how such appropriations are to be implemented, it appears that your question may be answered in the affirmative. Section 216.231(2) provides:

> Notwithstanding any other provisions of law, moneys appropriated in any appropriations act for discretionary contingencies to the Governor may be expended *at his discretion* to promote general government and intergovernmental cooperation and to enhance the image of the state. All funds expended for such purposes shall be accounted for, and a report showing the amount expended, the names of the persons receiving same, and the purpose of each expenditure shall be annually reported to the Auditor General and the legislative appropriation committee. (Emphasis supplied.)

The extraordinary language of s. 216.231(2)—with its broad grant of discretion to the Governor, and reference to broadly definable purposes, such as "to promote general government" and "to enhance the image of the state"—is peculiar to the Governor and to the contingent-discretionary fund and appears to have been intended to relieve the Governor from compliance with otherwise applicable state fiscal laws and standards governing expenditure of public funds. Of course, it is fundamental that not even statutory language such as that in s. 216.231(2) could authorize expenditure of public funds for other than a public purpose. Section 216.231(2), instead, broadens the scope of public purpose with respect to the Governor and commits to the discretion of the Governor (subject to audit by the Auditor General) the authority to determine those public purposes requiring expenditure of funds from the contingent-discretionary appropriation.

For a comparison of other expenditures by the Governor from the contingent-discretionary fund which have been approved by this office, *see* AGO's 071-28, 071-160, and 075-116. In AGO 075-116, for example, approval was given to use of contingent-discretionary funds "to pay the Governor's *total travel expenses in carrying out his official duties*, including lodging and meals, when his expenses exceed the $25.00 per diem allowed by law. . . ." (Emphasis supplied.) It likewise appears that contingent-discretionary funds could be used at the Governor's discretion to cover the difference in cost between coach and first-class airline tickets for the Governor when he is traveling

on official business, upon a determination by the Governor that such an expenditure is necessary to "promote general government and intergovernmental cooperation" or to "enhance the image of the state." And, as was stated in AGO's 071-160 and 075-116, the responsibility for making these determinations appears to have been placed by the Legislature solely within the discretion of the Governor, subject to audit by the Auditor General. Such use by the Governor of funds from the contingent-discretionary appropriation would thus appear to satisfy the requirement set forth in the following pertinent portion of s. 112.061(7)(c), F. S. (1976 Supp.):

> In the event transportation other than the most economical class as approved by the agency head is provided by a common carrier on a flight check or credit card, the charges in excess of the most economical class shall be refunded by the traveler to the agency charged with the transportation provided in this manner.

I would emphasize again that the conclusion herein reached regarding the Governor is the result of the peculiar and extraordinary nature of both the contingent-discretionary appropriation to the Governor and s. 216.231(2), F. S. Therefore, this opinion should not be taken as authorizing any public official or agency other than the Governor to expend public funds for first-class commercial air transportation costs unless otherwise authorized by statute.

077-12—February 8, 1977

DEPARTMENT OF OFFENDER REHABILITATION

NO AUTHORITY TO COMPENSATE INJURIES OR DAMAGES CAUSED BY ESCAPEES

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

Prepared by: Joe Belitzky, Assistant Attorney General

QUESTIONS:

1. Was s. 402.181, F. S., made applicable to the Department of Offender Rehabilitation by Ch. 75-49, Laws of Florida?
2. May current claims against the Department of Offender Rehabilitation now be processed?

SUMMARY:

Section 402.181, F. S., created a Claims Fund for restitution for property damages and injuries caused by escapees or inmates of institutions under the Department of Health and Rehabilitative Services. That statute is not applicable to the Department of Offender Rehabilitation, inasmuch as Ch. 75-49, Laws of Florida, which created the Department of Offender Rehabilitation, makes no reference to s. 402.181. Neither has s. 402.181 been amended to include institutions of the Department of Offender Rehabilitation within its purview. Section 402.181 and Ch. 75-49 give no authority to the Department of Legal Affairs to process claims against the Department of Offender Rehabilitation. Lacking specific statutory authority to process such claims, the Department of Legal Affairs is without power to do so.

Your first question is answered in the negative. Section 402.181(1), F. S., provides:

> There is created a State Institutions Claims Fund, available for the purpose of making restitution for property damages and direct medical expenses for injuries caused by escapees or inmates of state institutions under the *Department of Health and Rehabilitative Services*. There shall be a separate fund in the State Treasury which shall be the depository of all funds used for this purpose by all institutions under the supervision and control of the Department of Health and Rehabilitative Services. (Emphasis supplied.)

While Ch. 75-49, Laws of Florida, created the Department of Offender Rehabilitation and transferred the powers, duties, and functions of the former Division of Corrections of the Department of Health and Rehabilitative Services to the Department of Offender Rehabilitation, that chapter makes no reference to s. 402.181, F. S. Furthermore, while s. 6 of Ch. 75-49 provides that the Division of Statutory Revision and Indexing of the Joint Legislative Management Committee shall prepare reviser's bills to clarify the Florida Statutes so as to reflect the changes made by Ch. 75-49, the Legislature has not yet amended s. 402.181 to include institutions under the Department of Offender Rehabilitation, and in its discretion may or may not do so in the future. Accordingly, there is no basis on which to conclude that s. 402.181 was made applicable to the Department of Offender Rehabilitation by Ch. 75-49.

Your second question must also be answered in the negative. Section 402.181(2), F. S., provides as follows:

> Claims for restitution may be filed with the Department of Legal Affairs at its office in accordance with regulations prescribed by the department. The department shall have full power and authority to hear, investigate, and determine all questions in respect to such claims and is authorized to pay individual claims up to $1,000. Claims in excess of this amount shall continue to require legislative approval.

In its payment of claims under subsection (2), the Department of Legal Affairs is limited by the language of subsection (1) which refers to "state institutions under the Department of Health and Rehabilitative Services." Thus, the Department of Legal Affairs lacks statutory authority to process claims against the Department of Offender Rehabilitation.

Questions on the use and expenditure of public moneys and authority therefor have been strictly construed, and no state money may be used or expended except as some statute clearly and specifically authorizes. On this question, *see* AGO 071-28, which states in part as follows:

> Art. VII, s. 1, Fla. Const., further prohibits all expenditures 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.
>
> Such appropriations of state monies can be used *only* to pay claims against the State duly authorized by the Legislature, and audited and approved according to law. (citation omitted)
>
> The power to appropriate state funds for lawful state purposes being exclusively legislative may not be delegated to the executive branch of government.

See also, Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970); AGO 075-120.

Not only would s. 402.181, F. S., have to be amended to specifically include institutions under the Department of Offender Rehabilitation before the Department of Legal Affairs would be authorized to process claims against the Department of Offender Rehabilitation, but the rules of the Department of Legal Affairs, Chapter 2-6, Florida Administrative Code, would also have to be amended to make appropriate references to the Department of Offender Rehabilitation. Lacking specific statutory authorization, the Department of Legal Affairs is without power to process claims for property damage or injuries caused by escapees or inmates of institutions under the Department of Offender Rehabilitation.

077-13—February 8, 1977

CONDOMINIUMS

STATUS OF MORTGAGEE ACQUIRING ONE OR MORE PARCELS BY FORECLOSURE

To: William G. Zinkil, Sr., Senator, 32nd District, Hollywood

Prepared by: Staff

QUESTION:

Does a lending institution which has foreclosed a mortgage on a condominium project have to comply with s. 711.802, F. S. 1975?

SUMMARY:

When a lending institution, as mortgagee, forecloses against a developer, as mortgagor, where the mortgaged property is that property submitted to the condominium form of ownership by the developer through a declaration of condominium, the lending institution becomes a developer within the meaning of s. 711.03(12), F. S. 1975, and must comply with the filing provisions of s. 711.802, F. S. 1975.

However, where the mortgaged property foreclosed upon is a single parcel or small number of privately held condominium parcels within the same development, the proper construction of the relevant statutes is unclear and must be resolved by clarifying legislation or by the process of case-to-case judicial construction.

Section 711.802, F. S. 1975, provides:

> One copy of each document and item required to be furnished to a buyer or lessee by a developer pursuant to ss. 711.69 and 711.70 shall be filed with the Division of Florida Land Sales and Condominiums at least 30 days before units are available for contract for purchase. Said documents shall also be filed for six or more units remaining unsold as of October 1, 1975.

The documents and items required by ss. 711.69 and 711.70 represent the information which the Legislature has deemed necessary for each condominium unit purchaser to have prior to his or her purchase. In essence these documents and items disclose to a purchaser all of the terms, conditions, and encumbrances to which his ownership will be subject. The obvious intent of this statute is to facilitate the Division of Florida Land Sales and Condominiums in exercising its power to enforce the provisions of the Condominium Act. Section 711.801, F. S. 1975.

The duty of filing the documents and items is imposed upon anyone who is a "developer." Consequently, the answer to your question depends upon whether or not the foreclosing mortgagee is a developer. By statute a developer is a person who either creates a condominium or who offers condominium parcels owned by him for sale in the ordinary course of business. Section 711.03(12), F. S. 1975. In order to create a condominium, a declaration is recorded "in the public records of the county wherein the land to be included is located." Section 711.08(1), F. S. 1975. The declaration must be executed:

> . . . by all persons having title of record to the interest in such land being submitted to condominium ownership and *all persons having any interest under mortgages of record that encumber any portion of the common elements that are not satisfied prior to the closing of any sales of units.* (*Id.*; emphasis supplied.)

Additionally, "A person who joins in the execution of a declaration subjects his interest in the condominium property to the provisions of the declaration and the provisions of this chapter [Ch. 711, F. S.]." [Brackets added.] Section 711.08(3), F. S. 1975. Therefore, when any lending institution loans funds for the development of a condominium, which loan is secured by a mortgage on the property to be submitted to condominium ownership, the lending institution upon foreclosure succeeds to the interest of the defaulting developer, which interest is still subordinate to the declaration of condominium and the Condominium Act.

Consequently, the lending institution, after having acquired the condominium property, cannot change its character except as provided by s. 711.16, F. S. 1975, and in order to dispose of the property must sell it as condominium parcels. Since the sale of property pledged as security for a loan and acquired upon default by the borrower is the type of transaction normally contemplated as part of the ordinary course of business of a lending institution. the lending institution would be a developer within the meaning of s. 711.03(12), F. S. 1975.

Furthermore, any alternative construction of this provision would appear to be contrary to the legislative mandate within the definition of "developer" which requires that: "This definition shall be construed liberally to accord substantial justice to a unit owner or lessee." Section 711.03(12), F. S. 1975.

In light of the above, your question is answered in the affirmative at least in the situation where the original developer is the mortgagor and the lending institution has foreclosed on his interest in the condominium property. Upon foreclosure, the lending institution acquires the duty to see that the proper documents and items are filed with the division. It would appear, however, that the legislative intent and purpose of s. 711.802, F. S., would not require refiling of required documents already submitted to the division, except to the extent that such documents must be amended to properly reflect the change in the holders of interests in the condominium property or additional documents and items filed to correct the original developer's deficiencies.

The situation where an individual unit owner defaults on his mortgage and the mortgagee forecloses on his parcel is somewhat more complex. Strictly following the foregoing reasoning it would appear that the lending institution would not be within the following exception to the definition of developer:

> . . . except that the term "developer" shall not include the owners or lessees of units in condominiums who offer the units for sale or lease or their leasehold interests for assignment when they have acquired or leased the units for their own occupancy. (Section 711.03(12), F. S.)

Also, under s. 711.03(12), F. S., sale or lease of the acquired condominium parcel by the lender would still be within the ordinary course of business of the lending institution.

However, subjecting a lender which has acquired a single unit within a complex or development to the duties and responsibilities of a developer seems to conflict with the overall intent and purpose of the Condominium Act. It is possible to resolve this conflict by employing the liberal construction mandate cited above on the grounds that including the lending institution as a developer in these circumstances would deny unit owners substantial justice by making it more difficult for unit owners to obtain mortgage financing.

On the other hand, if the same lending institution acquires several individual units within the same development, it would appear that the overall intent of the act is better implemented by including that lender within the definition of a developer. Therefore, in my opinion, the issue would be best resolved by a clarifying enactment of the Legislature. In lieu thereof, the issue would have to be resolved by the courts on a case-by-case basis in consideration of the facts and circumstances of each case and the intent of the Legislature.

077-14—February 9, 1977

COUNTIES

POWER TO FINANCE PURCHASES OF REAL PROPERTY WITH REPAYMENT FROM UNCOMMITTED RACETRACK OR STATE REVENUE SHARING FUNDS

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

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

> **May a county borrow money from banks for the purpose of purchasing real property for authorized county purposes said money to be repaid in approximately five equal annual installments from uncommitted racetrack or state revenue sharing funds with the first installment or principal and interest being paid out of the 1977-1978 fiscal year budget?**

SUMMARY:

> **The board of county commissioners, as the governing body of a noncharter county, has statutory authority to borrow money to purchase real property for authorized county purposes, such as for use as an adjunct of the county courthouse, said purchase money to be repaid in five annual installments *solely* from uncommitted racetrack funds or state revenue sharing funds, subject to restrictions found in ss. 218.25, 130.012, and 215.685, F. S., with the first installment of principal and interest being paid out of the 1977-1978 fiscal year budget.**

STATEMENT OF FACTS:

The County Commissioners of Gadsden County are studying the possibility of purchasing an existing building and lot on which it is located for use as an adjunct or extension to the existing courthouse.

In order to make this purchase, this commission, if it can legally do so, contemplates borrowing the amount of the purchase price from local banks. The principal to be repaid in five approximately equal annual installments (with accrued interest) *from uncommitted racetrack* or *state revenue sharing funds* with the first installment of principal and interest being paid out of the 1977-1978 fiscal year budget. (Emphasis supplied.)

Subject to the qualifications and restrictions set forth herein your question is answered in the affirmative.

Section 125.01(1), F. S., provides in part:

> 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:
>
> * * * * *
>
> (c) Provide and maintain county buildings.
>
> * * * * *
>
> (r) . . . borrow and expend money, and issue bonds, revenue certificates, and other obligations of indebtedness, which power shall be exercised in such manner, and subject to such limitations, as may be provided by general law. . . .

Section 125.01(1)(t), F. S., provides that the powers may be exercised through the adoption of ordinances and resolutions necessary for the exercise of the powers. Section 125.01(3)(a), F. S., 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.* (Emphasis supplied.)

It is quite clear that the legislative and governing body of a county has the power to acquire or provide county buildings, such as buildings for use as an adjunct of the county courthouse, and to *purchase* real property and enter into the necessary *contractual* obligations to accomplish such purchase. It is also clear that such governing body has the power to *borrow* money. Thus, statutorily, both the power to borrow money and the power to purchase real property for authorized county purposes exist. No *specific statutory* restriction is placed on either power. Thus the decision to *purchase* real property for county purposes and the decision to *borrow* money from banks to make such purchase would rest with the governing body of the county subject to its sound discretion, with the understanding that such must be exercised for a lawful county purpose. Section 125.031, F. S., provides for counties to enter into leases or lease-purchase agreements, relating to properties needed for public purposes, and is mentioned for information only since your fact situation contemplates a purchase and not a lease or lease-purchase.

You have stated that the money borrowed to make the purchase will be repaid from uncommitted racetrack or state revenue sharing funds. It is presumed that you mean that the money borrowed will be repaid *solely* from such funds and that ad valorem taxes will *not* be *pledged* or *committed* either *directly* or *indirectly* for such repayment. In this regard *see* Nohrr v. Brevard County Educational Fac. Auth., 247 So.2d 304, which involved the issuance of $880,000 in revenue bonds, the proceeds of which would be used to construct the dormitory-cafeteria at the Florida Institute of Technology and to pay for all expenses and costs in connection therewith. The rents and other revenues received from the project, as well as the project, were to be assigned, pledged, and mortgaged as security for the payment of the principal and interest on the revenue bonds. With regard to the mortgage, the court stated at p. 310:

> Pursuant to authority contained in Chapter 69-345, the trust indenture under which the revenue bonds are to be issued grants a *mortgage with right of foreclosure on the lands and building constituting the project to be financed.*
>
> Commencing with the case of Boykin v. Town of River Junction, 121 Fla. 902, 164 So. 558 (1935), the Court *without exception has held* that revenue bonds secured by a mortgage on the physical properties to be financed *could not be issued* by public bodies *unless approved at an election.* (Emphasis supplied.)

Continuing at p. 311, the court stated:

> While perhaps the county would experience no coercion to levy a tax to prevent the foreclosure of the project leased to this nonprofit corporation in the event of a default; yet, such would not be the case if these bonds were issued to finance a project for Brevard Junior College or for the University of Florida. *Most certainly the county* or the *legislature* would feel morally *compelled* to levy taxes or to *appropriate funds* to prevent the loss of those properties through the process of foreclosure. (Emphasis supplied.)
>
> With certain exceptions not pertinent to the case *sub judice*, a mortgage with the accompanying right of foreclosure is not constitutionally permissible without an election. . . . absent specific constitutional authority a mortgage securing revenue bonds of a public body should not be approved without an election.
>
> . . . the provisions in the trust indenture relating to the mortgage of the project and the accompanying right of foreclosure are deleted.

Although you have not advised that a mortgage is contemplated on the real property to be purchased as further or additional security for the loan, the *Nohrr* case and admonitions found therein should certainly be considered should the use of a mortgage be desired by the bank.

The case of State v. Orange County, 281 So.2d 310, upheld the issuance of capital improvement bonds to finance the acquisition and construction of authorized county buildings by a noncharter county payable *solely* from the county's share of racetrack and jai alai funds, bottoming its holding on s. 1(f) and (i), Art. VIII, s. 6(b), Art. VIII, (schedule), and s. 125.01(1)(c), (r), and (t), F. S. The court pointed out therein that ad valorem tax revenues were not required to be levied to service the contemplated bonds and that the county's taxing credit was not otherwise pledged. The court stated at p. 312:

> However, as indicated by the foregoing cases, if *revenue bonds serviced* by *race track funds* are involved no election is necessary. The Orange County ordinance, similarly as a special act might have done, pursuant to enabling law authorized the issuance of the revenue bonds without the necessity of an election. There is *nothing inconsistent* with any *general or special law* in the Orange County ordinance pledging the County's portion of the race track funds for the service of such bonds or *in not requiring an approving election for the issue.* (Emphasis supplied.)

It pointed out that ss. 130.01 and 130.012, F. S., prescribed the general law authority for the issuance of county bonds and that the requirements of s. 130.03, F. S., and s. 12, Art. VII, State Const., relating to the holding of an election prior to such issuance did not apply if ad valorem tax was not required to be levied or the county taxing credit was not otherwise pledged.

Similarly, the Supreme Court in the case of Orange County Civil Facilities Authority v. State, 286 So.2d 193, upheld the issuance of revenue bonds by said authority to be repaid pursuant to an agreement between the county and the authority from operating revenues and *non-ad valorem* tax revenues accruing to the county and provided by it to the authority.

Accordingly, the borrowed moneys could be repaid from moneys accruing to the county and provided to the authority other than ad valorem tax revenues provided there exists no other statutory or constitutional restrictions placed on the use of such funds.

You advise that uncommitted racetrack or state revenue sharing funds are to be used for repayment of the loan. The use of racetrack funds was upheld in State v. Orange County, *supra*, wherein it stated:

> There is nothing in the 1968 Constitution that *precludes* a noncharter county from issuing revenue bonds *without an approving referendum* to finance the *acquisition* or construction of *authorized county buildings*, payable solely from a portion of its annual share of race track and jai alai fronton funds distributed to it pursuant to F. S. Sections 550.13 and 550.14, F. S. (Emphasis supplied.)

Accordingly, racetrack and jai alai fronton funds could be used for the contemplated purchase. Sections 550.13, 550.14, and 551.01, *et seq.*, F. S., which were mentioned in the above case, would allow for such use of the funds.

Part II of Ch. 218, F. S., is the Revenue Sharing Act. Section 218.21(6), defines "guaranteed entitlement," and s. 218.25 provides in part:

> Local government shall *not use* any portion of the moneys received *in excess* of the *guaranteed entitlement* from the revenue sharing trust funds created by this part to *assign, pledge, or set aside as a trust for the payment of principal or interest on bonds,* tax anticipation certificates, or *any other form of indebtedness,* and there shall *be no other use restriction on revenues shared pursuant to this part.* (Emphasis supplied.)

The restriction would restrict the use of the moneys received in excess of the "guaranteed entitlement" as set forth therein and would have to be complied with. Accordingly, funds received pursuant to the revenue sharing act could be used for the purpose contemplated subject to the restriction found in s. 218.25.

077-15—February 9, 1977

INTERGOVERNMENTAL PROGRAMS

AUTHORITY FOR COUNTIES TO CREATE METROPOLITAN PLANNING ORGANIZATION TO PLAN AND COORDINATE TRANSPORTATION NEEDS

To: Gerald S. Livingston, General Counsel, East Central Florida Regional Planning Council, Orlando

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

In view of the provision of s. 163.01(4), F. S., may counties which individually do not possess the authority to undertake multicounty or regional transportation planning create a separate legal or administrative entity by interlocal agreement pursuant to s. 163.01, F. S., which will undertake multicounty transportation planning within the boundaries of the participating counties, said entity to be constituted a metropolitan planning organization under federal law and regulations subsequent to its formation?

SUMMARY:

Duly constituted metropolitan planning organizations which engage in planning and coordinating the transportation needs and plans of their constituent or member public agencies within their respective boundaries may be lawfully created and established by local governmental units through an interlocal agreement and may administer or execute the terms and provisions of the interlocal agreement as specified therein, as provided under and by s. 163.01, F. S.

Section 163.01, F. S., contemplates that a public agency of this state (as defined by s. 163.01[3][b]) may exercise jointly with any other public agency of this state, or of any state of the United States or agency of the United States Government, any power, privilege, or authority which the public agencies involved share in common and which each might exercise separately. This being so, any legal or administrative entity formed by interlocal agreement under s. 163.01 may exercise no greater or additional power, privilege, or authority than is possessed by each of the contracting agencies and, further, may exercise only those powers shared in common and which each of the contracting agencies might exercise separately, except for those additional powers specified in s. 163.01(7)(b) and subject to the limitations prescribed by s. 163.01(15).

Applicable federal law provides that eligibility for federal assistance in transportation projects is predicated upon a continuing, cooperative, and comprehensive *planning process* which meets the criteria established by the Secretary of Transportation for a unified or *officially and properly coordinated* transportation system which is a part of a comprehensive plan for urban development. (Emphasis supplied.) 23 U.S.C. s. 134; 49 U.S.C. ss. 1602(a)(2), 1603(a), and 1604(g)(1) and (l). Properly designated Metropolitan Planning Organizations (hereinafter referred to as MPO) are deemed by federal regulation to meet this requirement. Rules of the Federal Highway Administration and Urban Mass Transportation Administration, Vol. 40 Federal Register No. 181, pp. 42982, 42983, and 42984 (Sept. 1975).

Statutory authority for noncharter counties to prepare and enforce comprehensive plans for the development of the county, provide and operate public transportation systems and terminals, provide and regulate highways and related facilities, and enter into agreements with other governmental agencies within or without the county boundaries for joint performance, or performance by one unit in behalf of the other, of any of either agency's authorized functions appears in s. 125.01(1)(g), (l), (m), (p), and (w) and (3), F. S. Additionally, it seems that the functions to be performed by these intergovernmental organizations, of which the Department of Transportation is a member, are compatible with the objectives and purposes and duties and functions set

forth in s. 334.211, F. S., paragraph (4)(a) of which authorizes the Department of Transportation to adopt local or regional transportation plans as part of, or in lieu of, the department's plans. *Also see* ss. 334.02(7) and (9) and 334.021(1) and (4)(a) and (c), F. S., and *cf.* ss. 163.567 and 163.568(2)(i), F. S. The powers conferred by s. 163.01, F. S., are additional and supplemental to those granted by any other general, local, or special law. Section 163.01(14).

In view of the aforecited federal and state statutes and federal regulations, it seems that the sole objective of an MPO is to provide for a coordinated transportation plan and planning process for a particular urbanized area as designated—in this instance—by interlocal agreement pursuant to s. 163.01, F. S. Said transportation plan is to be a part of a comprehensive plan for urban development. 49 U.S.C. s. 1604(1). *Cf.* s. 163.3177(7)(a), F. S. At no time does it appear that said planning organization will implement or execute any of its plans, for its functions are restricted solely to planning activities and local governments are free to adopt or reject any plan submitted to them by the MPO, as they deem proper. *Cf.* s. 163.01(15), F. S., which prohibits the delegation of the constitutional or statutory duties of state or county or city officers. This restriction to transportation planning functions is also apparent from applicable federal statutory and regulatory provisions and is consistent with the purpose of these organizations as related to me by the Florida Department of Transportation. Thus, it appears that the major function of the MPO will be the coordination, integration, and promulgation of transportation plans for each participating county, within each county's individual territory, thereby facilitating the coordination and integration of transportation plans required in this regard by the federal government in order to receive federal funding. This being so, it does not appear that these interlocal bodies will engage in the promulgation or the implementation of a single regional transportation plan applicable to or in behalf of or binding upon an entire multicounty area as a whole. The separate legal or administrative entity here under discussion may administer and execute only those powers common to and independently exercisable by all members of the agreement and those additional powers enumerated in s. 163.01(7)(a) and (b), F. S., authorized and as specified in the interlocal agreement. It is through this entity that the contracting counties jointly exercise their respective, commonly shared powers, privileges, and authority as provided for in the interlocal agreement.

In consideration of the foregoing, it seems that each party to the agreement thereby seeks to coordinate its plans with those of the other parties, but will not seek to formulate a single "master plan" to be implemented or executed in or applicable to areas outside its legal jurisdiction. I am of the opinion that such an activity does not run afoul of the provisions of s. 163.01(4), F. S., restricting the powers jointly exercised by an interlocal organization to those shared in common by each party to the agreement, which each party could exercise independently. Certainly, each public agency possessed of the power to plan for its own future transportation needs can attempt to coordinate its plans with those of other governmental agencies within the region covered by an interlocal agreement; such an endeavor seems inherent to the underlying concepts of the Interlocal Cooperation Act. *See* s. 163.01(2), F. S., stating the legislative purpose of the statute to be to enable local governments to cooperate with other localities on a basis of mutual advantage and thereby provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.

Therefore, I am of the opinion that a duly constituted metropolitan planning organization which engages in the process of planning and coordinating the transportation needs and plans of its member agencies within their respective boundaries may be lawfully created and established by several counties through interlocal agreement and may administer and execute the agreement as provided therein under the authority of and as provided by s. 163.01, F. S. Metropolitan planning organizations so created and established may exercise only those powers and privileges and the authority granted by the terms of the agreement which are commonly possessed by each member of the agreement, and which each member could exercise separately, and those which are otherwise provided for in s. 163.01(7)(a) and (b).

077-16—February 9, 1977

INTERGOVERNMENTAL PROGRAMS

POWERS EXERCISABLE BY METROPOLITAN TRANSPORTATION PLANNING ORGANIZATION

To: Allan Milledge, Attorney for South Florida Regional Planning Council, Miami

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTIONS:

1. May public agencies of disparate types and degrees of power create a separate administrative entity under s. 163.01, F. S.?

2. May charter counties delegate their charter authority over transportation planning to an organization created and established under s. 163.01, F. S.?

3. May an organization created, established and extant under s. 163.01, F. S., join with a public agency in an interlocal agreement?

SUMMARY:

Under s. 163.01, F. S., public agencies possessing disparate types and degrees of power may through interlocal agreement create a separate legal or administrative entity to exercise a power, privilege, or authority common to all constituent public agencies, which power, privilege, or authority is possessed and separately exercisable by each and any individual member agency.

Absent statutory authority, discretionary governmental powers and judgment of public officials may not be delegated. Only those governmental powers expressly provided for in s. 163.01, F. S., may be the subject of an interlocal agreement or be exercised by any separate administrative entity created by such agreement.

Separate legal or administrative entities created and operated under and by s. 163.01, F. S., may not enter into interlocal agreements with other public agencies or interlocal administrative agencies.

At the outset, I note that your request is in reference to metropolitan planning organizations, and I therefore direct your attention to AGO 077-15, wherein I concluded that a duly constituted metropolitan planning organization which engages in planning and coordinating the transportation needs and plans of its constituent public agencies within their respective boundaries may be created by local governmental units through an interlocal agreement and may administer or execute the terms and provisions of the interlocal agreement as specified therein, as provided by s. 163.01, F. S.

AS TO QUESTION 1:

Section 163.01, F. S., contemplates the joint exercise of any power, privilege, or authority which the public agencies involved share in common and which each might exercise separately. The purpose of the act, as set forth in s. 163.01(2), F. S., is to

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

The public agencies which for such purposes are eligible to enter into interlocal agreements are set forth in s. 163.01(3)(b), F. S., which section includes agencies within and without the state with widely varying types and degrees of powers, privileges, and authority. It is thus apparent that it is not necessary that the public agencies made

parties to an interlocal agreement be of identical conformation as to power, privilege, or authority; it is only necessary that the particular power, privilege, or authority sought to be jointly exercised thereby be common to all members to the agreement, each of which might exercise that power, privilege, or authority separately. Thus, if each agency is possessed of the particular power, privilege, or authority to be jointly exercised by and through the separate legal or administrative entity created pursuant to s. 163.01, F. S., the separate administrative entity may exercise that common power, privilege, or authority to the full extent that it is possessed by the granting agency, notwithstanding other powers, privileges, or authority not possessed by each or common to all parties to the agreement.

Your first question is answered in the affirmative.

AS TO QUESTION 2:

Section 163.01(15), F. S., in effect prohibits the delegation of constitutional or statutory duties of state, county, or city officers. Even apart from or in the absence of that provision and prohibition, the applicable decisional law is that in the absence of statutory authority a public officer cannot delegate his powers even with the approval of the court. State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955); 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); AGO's 073-380, 074-57, 074-116, and 075-306. Therefore, only those discretionary or governmental powers expressly provided for in s. 163.01, F. S., may be the subject of an interlocal agreement or possessed by or exercised by any separate legal or administrative entity created by the interlocal agreement.

However, in the instant matter the participating governmental agencies do not delegate their respective governmental duties and powers pursuant to an interlocal agreement; rather they seek to jointly exercise their common powers through the interlocal agreement and by any separate legal or administrative entity created and operative under said agreement. This separate administrative entity may administer the agreement and exercise the common power granted it thereunder only as specified in the agreement. Moreover, the metropolitan planning organizations here under discussion do not engage in the execution, adoption, or implementation of any transportation plans they might promulgate; their power and authority is restricted to transportation planning functions, and all discretionary governmental powers and decisions are reserved to the constituent governmental units participating in the interlocal agreement. *See* AGO 077-15.

AS TO QUESTION 3:

Question 3 is answered in the negative.

The Florida Interlocal Cooperation Act of 1969 provides that public agencies, as defined in s. 163.01(3)(b), F. S., may participate in the execution of interlocal agreements. Said section defines "public agency" as a

> . . . political subdivision, agency, or officer of this state or of any state of the United States, including, but not limited to, state government, county, city, school district, single and multipurpose special district, single and multipurpose public authority, metropolitan or consolidated government, an independently elected county officer, any agency of the United States Government, and any similar entity of any other state of the United States.

These enumerated bodies all derive their existence and authority from statutory or constitutional provision, while administrative entities created by interlocal agreements derive their existence and authority therefrom, as provided for and governed by s. 163.01, F. S. An examination of s. 163.01 reveals no authority for administrative entities created by interlocal agreement to enter into subsequent interlocal agreements with other governmental agencies, nor does there appear authority for constituent or parent governmental units to authorize interlocal entities to enter into subsequent interlocal agreements with other public agencies. Administrative agencies possess only those powers prescribed by statute or those necessarily implied from expressly granted powers in order to carry out their expressly granted statutory powers and duties, and if there is any reasonable doubt as to the lawful existence of a particular power, it should not be exercised or further exercised. State *ex rel.* Greenberg v. Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974); Florida State University v. Jenkins, 323 So.2d 597 (1 D.C.A. Fla., 1975). In view of the foregoing, I am of the opinion that separate legal or administrative entities created by interlocal agreements may not enter into subsequent interlocal agreements with other public agencies or interlocal administrative entities.

077-17—February 9, 1977

WATER MANAGEMENT DISTRICTS

TRANSFER OF TAX REVENUES AND ACCOUNTS RECEIVABLE WHEN BASIN TRANSFERRED FROM ONE DISTRICT TO ANOTHER

To: L. M. Blain, Board Counsel, Southwest Florida Water Management District, Tampa

Prepared by: David K. Miller, Assistant Attorney General

QUESTIONS:

1. What funds, if any, must be transferred from the Southwest Florida Water Management District to the St. Johns River Water Management District pursuant to the transfer of territory between these two districts under Ch. 76-243, Laws of Florida?

2. What restraints are imposed on the use of the transferred funds by the St. Johns River Water Management District?

SUMMARY:

Chapter 76-243, Laws of Florida, changes and redraws the boundaries of the respective water management districts so as to transfer the Oklawaha River Basin, a subdivision of the Southwest Florida Water Management District, and certain other small amounts of territory in the Southwest Florida Water Management District to the St. Johns River Water Management District. Pursuant to that transfer, unspent basin tax revenue and receivables accrued to the benefit and use of the Oklawaha River Basin, its works and functions, and the properties situate within such basin should be transferred to the St. Johns River Water Management District. If the additional small amounts of transferred territory were included in one or more basin subdivisions of the Southwest Florida Water Management District, a proportionate share of the tax revenue and receivables from such basin or basins should also be transferred. The transferred revenue must be used by the St. Johns River Water Management District to finance basin functions as specified and required by s. 373.0695(2), F. S. Taxes levied to fund the district's general regulatory and administrative functions throughout the district may not be transferred pursuant to Ch. 373, F. S., as amended.

Your request, made on behalf of the Southwest Florida Water Management District, concerns the transfer of tax revenues from that district to another district pursuant to legislative changing or redrawing of district boundaries. Ordinarily this office will not render an opinion on the propriety of action by a public body at the request of another body not having supervisory authority. In the instant case, however, the requesting body has a direct and substantial interest in having the issues resolved. I note in passing that the members of the governing board of the Oklawaha River Basin, a subdivision of the requesting district, will become the members of the governing board of the newly formed Oklawaha River Basin in the St. Johns River Water Management District after transfer. Section 373.0693(8), F. S., as created by Ch. 76-243, Laws of Florida. The interests of this body and, consequently, the interests of the Southwest District, are affected by the St. Johns River Water Management District's use of any transferred tax revenues. I shall therefore answer your questions.

AS TO QUESTION 1:

Chapter 76-243, Laws of Florida, changes the boundaries of the respective water management districts and provides for the transfer of certain areas, personal property, and records pursuant to the change of boundaries. Under that act, the area presently constituting the Oklawaha River Basin, a subdivision of the Southwest Florida Water Management District (hereinafter called Southwest) will be transferred to the St. Johns River Water Management District (hereinafter called St. Johns). Section 373.0693(8), F. S. (1976 Supp.). In addition, your request states that very small amounts of territory outside the Oklawaha River Basin subdivision are also transferred from Southwest to St. Johns. *See* metes and bounds description in s. 373.069(3)(c) and (d), F. S. (1976 Supp.). These changes became effective at 11:59 p.m. on December 31, 1976. The Southwest District's fiscal year began October 1, 1976, and it appears that the Southwest District has on hand unspent tax receipts as well as accrued tax accounts receivable and perhaps tax lien interests arising from levies in the transferred areas. Your question concerns the ultimate disposition of this revenue.

The Southwest District has two separate and distinct taxing powers. It may levy taxes districtwide for district purposes (general regulatory and administrative functions), under s. 373.503(2), F. S. (1976 Supp.), and under Ch. 61-691, Laws of Florida. It may also levy taxes separately within subdivisions, known as basins, for basin purposes at the request of and with the approval of the respective basin governing boards. Section 373.0697, F. S. (1976 Supp.), and s. 8, Ch. 61-691, Laws of Florida. The functions of the respective basin governing boards are set forth in s. 373.0695, F. S. Notwithstanding that all taxes are formally levied by the district, the annual budget for the basin and required tax levy to fund it must be approved by formal action of the basin board; thus the respective basins appear to be in effect taxing authorities as well. In any event, the taxes are levied for the use and benefit of the basin for statutorily prescribed basin purposes and in proportion to the benefits to be derived by the properties within the basin. Section 373.0697, F. S. (1976 Supp.).

Both the title and the text of Ch. 76-243, Laws of Florida, are devoid of any specific reference to tax revenue or to the transfer thereof. This omission makes legislative intent very difficult to ascertain. I nevertheless conclude, until the matter is clarified by authoritative judicial construction, that the Legislature did intend to require the transfer of those unspent tax revenues and tax accounts receivable which had accrued to the benefit of and for the use of the Oklawaha River Basin and its works and functions. This conclusion is based on the language of s. 373.0695(2), F. S., which was left unchanged by Ch. 76-243, Laws of Florida, and which sets forth the uses to which basin revenues may be put:

> (2) Basin board moneys shall be utilized for:
> (a) Engineering studies of works of the basin.
> (b) Payment for the preparation of final plans and specifications for construction of basin works executed by the district.
> (c) Payment of costs of construction of works of the basin executed by the district.
> (d) Payment for maintenance and operation of basin works as carried out by the district.
> (e) Administrative and regulatory activities of the basin.
> (f) Payment for real property interests for works of the basin.
> (g) Payment of costs of road, bridge, railroad, and utilities modifications and changes resulting from basin works.

Reading this subsection in light of the rule of construction *expressio unius est exclusio alterius, see* Thayer v. State, 335 So.2d 815 (Fla. 1976); Interlachen Lakes Estate, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952), one may conclude that basin tax revenues may not be used for purposes other than those enumerated. Basin taxes in the Oklawaha River Basin were levied for these particular purposes, and the consequent tax revenue cannot be diverted to other purposes unless such diversion is expressly authorized by law. Dickinson v. Stone, 251 So.2d 268 (Fla. 1971); Taylor v. Williams, 196 So. 214 (Fla. 1940); Supreme Forest Woodmen Circle v. Hobe Sound Co., 189 So. 249 (Fla. 1939); Oven v. Ausley, 143 So. 558 (Fla. 1932); Keefe v. Adams, 143 So. 644 (Fla. 1932).

It is clear that the Oklawaha River Basin to be formed after transfer is substantially the same entity as the basin prior to transfer, with the same governing board. Section 373.0693(8), F. S. (1976 Supp.). In the absence of statutory language suggesting a contrary intent, or expressing a design to divert this revenue, I conclude that those tax revenues and receivables raised in basin tax levies within the Oklawaha River Basin must be transferred to the St. Johns District for use in the manner provided by s. 373.0695(2), F. S.

I find further support for this interpretation in s. 373.0697(3), F. S. (1976 Supp.), which determines that taxes levied thereunder are in proportion to the benefits derived by the several real estate parcels within the respective basins. This provision suggests that revenue raised by the Oklawaha River Basin tax levy cannot lawfully be spent in a manner which fails to benefit real property within that basin in proportion to the tax burden. *See also* s. 373.503(4), F. S. (1976 Supp.).

The reasoning above does not, however, apply to tax receipts and accounts receivable generated in the *districtwide* levy by the Southwest District for district purposes. Your request treats this issue as an assumption, and suggests that the Southwest District must determine the proper share of its district funds to be transferred. That revenue was raised to fund the district's general administrative and regulatory operating expenses and to finance district functions throughout the district. I note that Ch. 76-243, Laws of Florida, leaves the Southwest District intact as a viable governmental unit. I find no clear intent in the act to require the transfer of district revenue raised for district functions, either in express language or in restrictions on the use of that revenue. I therefore conclude that the act does not command such a transfer. *See* AGO 075-32, in which, among other things, I concluded that tax revenue collected by one special district could not be transferred to another special district; *also see* Okaloosa County Water and Sewer Dist. v. Hilburn, 160 So.2d 43 (Fla. 1964); W.J. Howey Co. v. Williams, 195 So. 181 (Fla. 1940).

Finally, Ch. 76-243, Laws of Florida, does not address the subject of tax revenue generated by areas or properties transferred along with the Oklawaha River Basin, but not a part of that basin. I am unable to determine from your request whether or not this additional property was part of some other basin subdivision within the Southwest District. If the property did form part of another basin subdivision, it would seem to be required by the statutory provisions cited above that a proportionate share of the basin revenue in *that* basin be transferred along with the territory which generated it. If not, then no such transfer of revenue seems required.

AS TO QUESTION 2:

Your second question concerns the uses to which the St. Johns District may put the transferred revenue. Because I have construed Ch. 76-243, Laws of Florida, to require the transfer only of tax receipts and accounts receivable from basinwide levies in the Oklawaha River Basin (and any other basins of the Southwest District in proportion to the area or property transferred therefrom), my answer will concern only that revenue. Section 373.0695(2), F. S. (quoted above), limits the use of funds raised in basinwide levies to specified purposes. I conclude the St. Johns District must use the transferred revenue for the purposes enumerated in that subsection.

077-18—February 10, 1977

MUNICIPALITIES

CHARACTERISTICS OF AREA TO BE ANNEXED—CONTIGUITY, COMPACTNESS, CREATION OF ENCLAVES

To: Roy Christopher, City Attorney, Mount Dora

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

May a parcel of land be voluntarily annexed into a city if such parcel is contiguous with the city only by virtue of a side of the parcel meeting one side of a highway previously annexed into the city?

SUMMARY:

A municipality should not undertake to voluntarily annex a parcel of land, pursuant to s. 171.044, F. S. (1976 Supp.), if contiguity of the municipality with the parcel to be annexed exists only through contact with a highway previously annexed by the municipality, or if such annexation would result in creation of an enclave. Use of a "strip" or "corridor," such as a highway, as a device to gain contiguity is disapproved by a majority of jurisdictions. Contiguity of the annexing municipality with the area to be annexed is required even in the absence of a statute such as s. 171.044, *supra*, which requires contiguity and compactness of the area to be annexed and which prohibits the creation of enclaves.

Voluntary annexation is controlled by s. 171.044, F. S. (1976 Supp.), the procedures of which are stated to be "supplemental to any other procedure provided by general or special law, except that this procedure shall not apply to municipalities in counties with charters which provide for an exclusive method of municipal annexation." Section 171.044(4). There are three specific requirements in s. 171.044 which must be applied to the annexation proposal in question: that the property to be annexed be compact; that the property to be annexed be contiguous to the annexing municipality; and that annexation under s. 171.044 not have the effect of creating enclaves.

In regard to compactness and contiguity, subsection (1) of s. 171.044 provides:

> The owner or owners of real property in an unincorporated area of a county which is contiguous to a municipality and reasonably compact may petition the governing body of said municipality that said property be annexed to the municipality.

And in regard to the creation of enclaves, subsection (5) of s. 171.044 provides that "[l]and shall not be annexed through voluntary annexation when such annexation results in the creation of enclaves."

The compactness requirement does not appear to present a problem in regard to the annexation proposal with which you are concerned. From the information and maps furnished to me, I must conclude that the parcel in question is of a rectangular configuration with no irregularities such as might prevent it from being considered reasonably compact.

However, the requirement of contiguity of the area to be annexed with the annexing municipality and the prohibition against creation of enclaves would appear to prevent annexation of the parcel in question. In prohibiting the creation of enclaves, the Legislature neglected to define the term "enclave." No Florida appellate decision of which I am aware has defined the term, and the only decision from any other jurisdiction I have found that defines "enclave" is City of Saginaw v. Board of Sup'rs of Saginaw County, 134 N.W.2d 378, 380 (Mich. 1965), wherein the court merely adopted the definition provided in Webster's Third New International Dictionary: "a tract of territory enclosed within foreign territory." Another such definition is provided in the Random House Dictionary of the English Language, which defines "enclave" as "a country, or esp., an outlying portion of a country, entirely or mostly surrounded by the territory of another country." I have applied these definitions to the instant proposal through the information and maps furnished to me and am of the opinion that the courts would probably view annexation of the parcel in question as resulting in the creation of a municipal enclave in violation of subsection (5) of s. 171.044.

It is also my opinion that use of the previously annexed highway as a device for satisfying the contiguity requirement of subsection (1) of s. 171.044 would not be viewed favorably by the courts. [I would note here that contiguity is a requirement even in the absence of a specific statutory requirement therefor. MacKinlay v. City of Stuart, 321 So.2d 620, 623 (4 D.C.A. Fla., 1975).] In AGO 071-315, I specifically considered whether a municipality could annex a state road right-of-way and thereafter use that road to satisfy the contiguity requirement of former s. 171.04, F. S., which authorized annexation by a municipality of "any unincorporated tract of land lying contiguous thereto." I pointed out, first, that "it is difficult to conceive of any municipal benefits that could be conferred upon a strip of land that may not be used for anything except transportation purposes . . . ." I then stated the following (under the assumption, for purpose of argument, that the actual annexation of a highway would be valid) in regard to whether such a previously annexed highway could be used to establish contiguity with a parcel of land having substantial contact only with that highway:

> This question has not been passed upon by appellate courts of this state. However, the courts of other jurisdictions have done so. While there is some authority to the contrary, *the great weight of authority is that contiguity existing only through a narrow "corridor," such as a highway, running from the city to a tract of land some distance from the city is not sufficient to justify the annexation of such tract as "contiguous" or "adjacent" territory.* See Ridings v. City of Owensboro, Ky. App. 1964, 383 S.W.2d 510; Watson v. Doolittle, Ohio App. 1967, 226 N.E.2d 771; In re City of Springfield, Ill. App. 1967, 228 N.E.2d 755; Clark v. Holt, 218 Ark. 504, 237 S.W.2d 483; State ex rel. Danielson v. Village of Chubbuck, 76 Idaho 453, 284 P.2d 414; People ex rel. Village of Worth v. Ihde, 23 Ill.2d 63, 177 N.E.2d 313, City of Denver v. Coulehan, 20 Colo. 471, 39 P. 425. In Watson v. Doolittle, supra, it was noted that the courts have characterized such attempted annexations by means of connecting strips as "strip, shoestring, subterfuge, corridor, and gerrymander" annexations and have struck down such annexations as "attempts to circumvent the annexation law requiring annexed property to be adjacent and contiguous." (Emphasis supplied.)

I reiterated the above conclusion from AGO 071-315 in AGO 074-61, stating:

> In AGO 072-282, it was ruled that a tract of land that is separated from a municipality only by a county road that runs parallel to the city limits is "contiguous" within the purview of s. 171.04, supra. That opinion applied the "common-sense rule" that "the existence of a highway or right-of-way does not prevent land from being contiguous." People ex rel. Strong v. City of Whittier, 24 P.2d 219 (2 D.C.A. Cal. 1933). *Such a minor geographical division, however, is to be distinguished from a situation in which a city attempts to annex territory that is physically separated from it by other territory and is connected to the city only by a road. In this latter circumstance—referred to as "strip" or "corridor" annexation—a city may not annex the territory involved. AGO 071-315.* (Emphasis supplied.)

I have researched this issue again and have concluded that the above statements from AGO's 071-315 and 074-61 remain accurate and correct. There are still no Florida appellate decisions on this point, and the majority of decisions from other jurisdictions continues to disapprove of so-called strip or corridor annexation, such as that which appears to be contemplated by your municipality. In the minority of decisions upholding this type of annexation, the courts often make a point of stating that they are allowing the municipalities to exercise a liberal interpretation and application of their powers of annexation under their states' statutes. However, it is not likely that such an approach would be taken by the courts of this state. Rather, the approach of a Florida court would probably follow the rule expressed by the court in Town of Mangonia Park v. Homan, 118 So.2d 585, 588 (2 D.C.A. Fla., 1960): "Where the power to extend boundaries has been delegated to a municipal corporation, the power must be exercised *in strict accord* with the statute conferring it." (Emphasis supplied.) Thus, I am of the opinion that your question may be answered by repeating what I stated in AGO 071-315, that "[u]nless and until it is judicially ruled to the contrary, I have the view that this type of annexation should not be attempted by a municipality."

In conclusion, I would offer for your consideration the following general statement on municipalities from 56 Am. Jur.2d *Municipal Corporations, Etc.* s. 69, which has frequently been quoted with approval by courts of various jurisdictions. It conveys clearly the underlying concepts on which the municipality, as a unit of social and political organization, is based and provides insight into the reasoning of those courts which have

repeatedly rejected annexation schemes tending to create disjointed, nonunified municipalities:

> The legal as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants—that is, a body of people collected or gathered together *in one mass, not separated into distinct masses,* and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of *unity, not of plurality,* of compactness or contiguity, not separation or segregation. (Emphasis supplied.)

077-19—February 18, 1977

CITY OF HIALEAH

REFERENDUM APPROVAL NOT REQUIRED TO PURCHASE HIALEAH RACETRACK

To: Dale Bennett, Mayor, Hialeah

Prepared by: Staff

QUESTION:

> **Must the City of Hialeah receive referendum approval prior to the purchase of Hialeah Racetrack?**

SUMMARY:

> **Premised upon described procedural and constitutional limitations and safeguards, the proposed purchase of Hialeah Racetrack by the City of Hialeah does not require a referendum pursuant to s. 7(b) of the Hialeah City Charter since the contractual and financial agreements relieving the city of any moral and/or legal responsibility and limiting any recourse to the property and to the lessee do not constitute the issuance of a true indebtedness within the meaning of said section.**

Section 7(b) of the city charter provides that:

> The City of Hialeah shall not be able to *issue* any type of bonds, *evidences of indebtedness* or revenue certificates in excess of $500,000.00 without referendum. (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, F. S., provides that the 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.) *See* s. 7(a) of the city charter.

As I stated in AGO 076-209, based upon the above statutory provision, the city council has the authority to borrow money to finance the track purchase and to secure it with a mortgage [maximum 30 years at 6 percent] on the track 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 Constitution. 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 purpose." 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., 153 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 purchase 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, *supra;* 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 Association v. Board 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 415-416.]

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 Constitution. 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); Nohr v.

Brevard County Educ. Fac. Author., 247 So.2d 304 (Fla. 1971). In *Nohr*, 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 statements made in AGO 076-209 concerning the referendum under the Florida Constitution appear equally applicable to the subject of the referendum under the Hialeah City Charter.

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. Thus, based upon the submitted agreements and data; the contractual assurances and references above, which preclude the city from having any legal or moral obligation to expend any municipal funds; together with the financial arrangements whereby the lending institutions have agreed never to look to the city for any financial relief, a true indebtedness cannot be deemed to have been "issued" by the city. Within the meaning of s. 7(b) of the city charter, clauses should be inserted in the agreement that clearly state that the city is not lending its credit, not pledging its tax power, and not financially liable for any nonpayment of the balance due to the lending institutions.

077-20—February 23, 1977

LEGISLATION

ACT ABOLISHING TRANSPORTATION AUTHORITY IS LOCAL, RATHER THAN GENERAL, LAW

To: Betty Easley, Representative, 56th District, Largo

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Should H.B. 76, filed for consideration in the 1977 Legislative Session, which upon passage would abolish the Tampa Bay Area Rapid Transit Authority as created and established under and pursuant to part IV of Ch. 163, F. S., be considered as a general law or as a special law?

SUMMARY:

Proposed H.B. 76 abolishing the Tampa Bay Area Rapid Transit Authority should be considered as a special law falling within the purview of the constitutional restrictions requiring publication of notice of intent to seek enactment of special legislation or a referendum of the electors within the affected area or region.

The Tampa Bay Area Rapid Transit Authority (TBART) was formed by mutual action of Hillsborough, Pinellas, and Pasco Counties as authorized and required by part IV of Ch. 163, *supra*, which provides, *inter alia*, for the creation of such an authority by any two or more counties having contiguous borders. This being so, the sole authority for the present existence of said organization is embodied in that statute, which is codified as a portion of the general law of this state.

The Legislature can pass any act which legislative wisdom dictates so long as such act is not either expressly or impliedly in conflict with any provision of the State or Federal Constitution, and, in the absence of any such conflict, the exercise of reasonable legislative discretion is the sole brake on the enactment of legislation, for state constitutions are limitations on, rather than grants of, power and the Legislature is therefore authorized to do those things not forbidden by the State or Federal Constitutions. Farragut v. City of Tampa, 22 So.2d 645 (Fla. 1945); State v. Board of Public Instruction for Dade County, 170 So. 602 (Fla. 1936); State *ex rel.* Cunningham v. Davis, 166 So. 289 (Fla. 1936); State *ex rel.* Collier Land Inv. Corp. v. Dickinson, 188 So.2d

871 (Fla. 1966); Sun Ins. Office, Limited v. Clay, 133 So.2d 735 (Fla. 1961). I find no such state or federal constitutional restrictions which, on their face, would operate to prevent the Legislature from abolishing TBART, and I therefore conclude that such an act is within the legislative power and province. However, I must caution that, as the bill currently makes no provision for the contractual rights of creditors and others which may by this time have vested, it may become subject to constitutional attack on these grounds, depending upon factual circumstances.

The bill, as submitted, would abolish a single regional transportation authority conceived under general law and operative only within a three-county area. A statute relating to particular subdivisions or portions of the state or to particular places of classified locality was held by the court to be a local law in State v. Daniel, 99 So. 804 (Fla. 1924); and a special law was therein held to be a statute relating to particular persons or things or particular subjects of a class, while a general law was held to be one which related to subdivisions of the state or to subjects or things as a class based on proper distinctions and differences that inhere in or are peculiar or appropriate to that class. *See also* Carter v. Norman, 38 So.2d 30 (Fla. 1949). Section 12(g), Art. X, State Const., has eliminated any practical difference between special and local laws by defining "special law" to include both special and local laws. Thus, statutes relating to particular subdivisions or portions of the state, to particular places of classified locality, or to particular persons or things or other particular subjects of a class will be treated by the courts as special laws for the purposes of ss. 10 and 11, Art. III, State Constitution.

In the enactment of general laws on subjects other than those prohibited under s. 11(a), Art. III, "political subdivisions or other governmental entities may be classified *only* on a basis reasonably related to the subject of the law." (Emphasis supplied.) Section 11(b), Art. III, State Constitution. General laws of local application were previously drafted as "population acts" which were required to meet a two-pronged test of reasonability of classification and open-endedness. Advisory Opinion to the Governor, 132 So.2d 163 (Fla. 1961).

In view of the foregoing, it seems doubtful that a reasonable classification of TBART, or Pinellas, Hillsborough, and Pasco Counties apart from all other areas or regions of the state in regard to transportation needs could be made; and I do not believe that mere administrative difficulties and factionalism such as delineated in the proposed legislation are a sufficient basis for such a distinct or separate classification. I am not aware of any legislative or judicial precedent sustaining any such distinctions and differences as a constitutionally permissible basis for classification for purposes of enacting legislation.

I also am of the opinion that such a statute would not properly qualify as a general law under the aforecited judicial criteria, for it relates to only one regional transportation authority within the class of all those authorities which might be created under part IV of Ch. 163, F. S., and, further, relates to particular subdivisions—Pasco, Pinellas, and Hillsborough Counties—of the state rather than to subdivisions generally. State v. Daniel, *supra*; Carter v. Norman, *supra*; State *ex rel.* Gray v. Stoutamire, 179 So. 730 (Fla. 1938); *and cf.* AGO 055-89; Housing Authority of the City of St. Petersburg v. City of St. Petersburg, 287 So.2d 307 (Fla. 1973).

As submitted, H.B. 76 relates only to TBART, which is a particular thing and a particular subject of a class and which is located within a particular region comprised of three particular subdivisions of the state, and thus seems to fall readily within the judicially established criteria for special laws and outside those criteria established for classification as a general law. Therefore, I am of the opinion that H.B. 76 should be treated as a special law or local law falling within the purview of the constitutional restrictions requiring either publication of notice of intent to seek enactment of special legislation or a referendum of the electors within the affected area or region.

077-21—February 23, 1977

REVENUE SHARING

CHARTER COUNTIES ESTABLISHING MUNICIPAL SERVICE UNITS NOT ENTITLED TO MUNICIPAL SHARE OF REVENUE-SHARING FUNDS

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

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

Are *charter* counties which have established municipal taxing and benefit units pursuant to s. 125.01(1)(q), F. S., and which meet all eligibility requirements as outlined in s. 218.23(1), F. S., entitled to a municipal share from the State Revenue Sharing Trust Fund established by the Revenue Sharing Act of 1972 (Part II, Ch. 218, as amended)?

SUMMARY:

A charter county which has established municipal service taxing or benefit units pursuant to its charter and s. 125.01(1)(q), F. S., is *not* entitled to receive a municipal share from the state revenue-sharing revenue fund established by the Revenue Sharing Act of 1972, part II, Ch. 218, F. S. Such a municipal service taxing or benefit unit is not within the definition of a "municipality" as defined in s. 218.21(3) and is not within the definition of a "unit of local government" as defined in s. 218.21(1) and accordingly would not be eligible to receive a municipal share of revenue-sharing trust funds created under s. 218.215 and as apportioned under s. 218.245(2).

Attached to your request is a letter from Mr. Kenneth Jenne, Chairman of the Board of County Commissioners of Broward County, wherein he explains in part the basis for the question presented. In his letter Mr. Jenne advises:

> Broward County, as a *charter county*, has established the unincorporated area of Broward County *as a municipal service taxing and benefit unit* pursuant to its charter and Chapter 125.01(q), Florida Statutes. This statute is an implementation of Article VII, Section 9(b) of the Constitution of the State of Florida, which states in part as follows: "A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes." The county provides various municipal services within the district such as the sheriff's road patrol, street lighting, etc. (Emphasis supplied.)

Mr. Jenne advises that the general counsel for Broward County is of the view that Broward County would be eligible for *municipal* revenue sharing funds pursuant to s. 218.20, *et seq.*, F. S., assuming that the revenue equivalent of 3 mills was met. Mr. Jenne states in his letter:

> Broward County, *in relation to its municipal service taxing and benefit unit* and the residents thereof, is *performing* the *function* of a *municipality* by providing municipal services. Such functions are separate and distinct and of a different nature from the county services that the county provides. (Emphasis supplied.)

Thus, the position of Broward County is that the municipal service taxing and benefit unit, which it has created pursuant to s. 125.01(1)(q), F. S., is a "municipality" or "unit of local government," as those terms are defined in s. 218.21, F. S. A reading of the involved statute compels me to conclude that the question must be answered in the negative.

The Revenue Sharing Act of 1972 is found in part II of Ch. 218, F. S., and is comprised of s. 218.20 through s. 218.26. Section 218.21(1) provides:

> "Unit of local government" means a county or municipal government *and shall not include any special district as defined in part III.* (Emphasis supplied.)

The italicized language was enacted by Ch. 74-194, Laws of Florida, so prior to the addition of such language a "unit of local government" was defined to mean a county or municipal government.

The term "special district" is defined in part III of Ch. 218, F. S., in s. 218.31(5), as follows:

> "Special district" means a local unit of special government, except district school boards and community college districts, *created pursuant to general or special law* for the purpose of *performing prescribed specialized functions, including urban service functions, within limited boundaries.* (Emphasis supplied.)

The municipal service taxing and benefit unit referred to in Mr. Jenne's letter, created pursuant to the Broward County charter and s. 125.01(1)(q), F. S., would appear to fall within the definition stated above. The benefit unit was created pursuant to general or special law for the purpose of performing prescribed specialized functions within the jurisdictional boundaries of the municipal service benefit unit. Inasmuch as the governmental head is the board of county commissioners, which is the local governmental authority, and inasmuch as the budget of the municipal service benefit unit is established by such local governmental authority, the municipal service benefit unit would be a "dependent" special district as opposed to an "independent" special district as defined in s. 218.31(7), F. S. Accordingly, the municipal service taxing and special benefit unit established by Broward County in the unincorporated areas of the county would not be a "unit of local government" as defined in s. 218.21(1), F. S. Only units of local government are eligible to participate in revenue sharing. *See* s. 218.23(1), F. S., which provides in part:

> To be *eligible* to participate in revenue sharing beyond the minimum entitlement in any fiscal year, a *unit of local government* is required to have: (Emphasis supplied.)
>
> * * * * *

Section 218.21(2) and (3), F. S., provides:

> (2) "County" means a political subdivision of the state as established pursuant to s. 1, Art. VIII of the State Constitution.
>
> (3) "Municipality" means a municipality created pursuant to *general or special law* and metropolitan and consolidated governments as provided in s. 6(e) and (f) of Art. VIII of the State Constitution. Such municipality *must have held an election* for its legislative body pursuant to law and established such a legislative body which meets pursuant to law. (Emphasis supplied.)

It is apparent that the Legislature has carefully considered what constitutes a "county" and what constitutes a "municipality" and has not seen fit to include within the definition of either municipal service taxing or benefit units established pursuant to charter or s. 125.01(1)(q). In fact, the Legislature has indicated a *contrary* intent by specifically providing that a "unit of local government" shall not include any "special district" as defined in part III of Ch. 218, F. S.

The entire concept of revenue sharing and the formula for the apportionment of funds is designed to embrace only those entities specifically included therein, *cf.*, AGO's 073-246 and 074-367. This is clearly recognized in s. 218.245, F. S. Therein the apportionment factor for all eligible *counties* is carefully delineated and the apportionment factor for all eligible municipalities is set forth in considerable detail. Furthermore, in s. 218.245(2)(d), the apportionment factor for a metropolitan or consolidated government, as provided by ss. 3 and 6(e) and (f), Art. VIII, State Const., is carefully spelled out. Said section provides:

(d) For a metropolitan or consolidated government, as provided by s. 3, s. 6(e), or s. 6(f) of Art. VIII of the State Constitution, the population or *sales tax collections of the unincorporated area* or *areas outside of urban service districts*, if such have been established, as determined in paragraphs (a) through (c) above and after adjustments made as provided therein, shall be *further adjusted* by multiplying the adjusted or recalculated population or sales tax collections, as the case may be, by a percentage which is derived by dividing:

1. The *total amount* of ad valorem taxes levied by the *county government* on real and personal property in the area of the county *outside* of municipal limits, as created pursuant to general or special law, or *outside* of urban service district limits, where such are established; by

2. The *total amount* of ad valorem taxes levied on real and personal property by the county and municipal governments. (Emphasis supplied.)

Here the Legislature has specifically spoken to the situations which may arise involving metropolitan or consolidated governments recognizing the distinctions between unincorporated areas, or areas outside of urban service districts, and areas within the entire county or the municipalities found therein. The specific attention given to metropolitan or consolidated governments provided for in s. 6(e) and (f), Art. VIII, *supra*, and ss. 218.21(3) and 218.245(2)(d), F. S., compels the inevitable conclusion that the Legislature did not intend for charter counties to establish municipal service taxing benefit units by ordinance pursuant to s. 125.01(1)(q), F. S., or pursuant to charters and capture a municipal share of revenue-sharing trust funds by asserting that the municipal service benefit unit was either a "municipality" or a "unit of local government." Succinctly stated, the Legislature has not seen fit to define "municipality" to mean a municipality created pursuant to general or special law and metropolitan and consolidated governments as provided for in s. 6(e) and (f) of Art. VIII, State Const., and municipal service taxing or benefit units created or established pursuant to s. 125.01(1)(q) or pursuant to county home rule charter. The Legislature's silence to specifically so define the term "municipality" is significant. Under the rule *expressio unius est exclusio alterius*, the statute operates on those things enumerated or expressly mentioned and excludes from its operation all things not expressly mentioned. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, 434 (Fla. 1974). It is further noted that, in defining the term "county," the Legislature expressly provided for such term to be a political subdivision of the state as established pursuant to s. 1, Art. VIII, State Const. This includes both *charter* and *noncharter* counties. Accordingly, a charter county would be within the definition of the word "county" as would a noncharter county. It is illogical to presume that the Legislature would include charter counties within the definition of the term "municipality" without clear and specific language to that effect. This is especially true when, in defining the term "municipality," the Legislature specifically included metropolitan and consolidated governments as provided in s. 6(e) and (f), Art. VIII, *supra*, and provided a specific apportionment factor relating to such consolidated and metropolitan governments. Had the Legislature intended for charter counties to be within the definition of "municipality," it could easily have so provided.

The monetary ramifications are quite significant also. For instance, Dade County and Duval County, because both are metropolitan and consolidated governments as provided in s. 6(e) and (f) of Art. VIII, *supra*, would be required to receive funds allocated based upon the apportionment factor found in s. 218.245(2)(d), F. S., while, if Broward County's contention is correct, Broward County would be eligible to receive both a county share and a municipal share based on the apportionment factor in s. 218.245. This would mean that a charter county would receive a considerably larger portion of revenue-sharing funds than a metropolitan or consolidated government because the formula defined by the Legislature in s. 218.245(2)(d) in apportioning funds to a metropolitan or consolidated government takes into consideration the areas of the county in the unincorporated area or areas outside of urban service districts and outside of municipal limits. That formula would be inapplicable if a charter county were a municipality or if a municipal service benefit unit were a municipality.

At the present time the eligibility test applied for both Duval and Dade Counties is based on their respective general countywide millages. The total general millage levied countywide is used for eligibility for the counties to participate in a county portion of revenue sharing. To participate in a municipal share, that portion of the county general millage levied only in the unincorporated area is the test of eligibility. Due to the ad

valorem reduction factor as defined by s. 218.245(2)(d), F. S., charter counties would have a clear advantage over the consolidated and metropolitan governments. Section 218.245(2)(d) requires that the apportionment factors for the metropolitan and consolidated governments (when treated as a city) be reduced by a ratio of total tax levied within the county (both municipal and county) to those levied in only the unincorporated area. The staff of the Department of Revenue advises that for Metro-Dade the reduction is currently 70 percent and for Jax-Duval the reduction is currently 37 percent. It appears that if the unincorporated area in a charter county or a municipal taxing and benefit unit is considered as a municipality, this reduction would not be applicable. This would give the unincorporated area or taxing benefit unit a 100 percent share as a city while the Department of Revenue is required to reduce the share for Metro-Dade and Jax-Duval.

Admittedly, the Legislature could have defined the term "municipality" to include charter counties and brought them within the apportionment factor set forth in s. 218.245(2)(d), F. S., but it did not. As stated earlier herein, the Legislature indicated quite clearly a contrary intent by providing that a "unit of local government" shall *not* include any special district as defined in part III of Ch. 218, F. S.

I have examined the cases of State *ex rel.* Volusia County v. Dickinson, 269 So.2d 9, and State *ex rel.* Dade County v. Brautigam, 224 So.2d 688, and AGO 074-341, and nothing contained in either of the two cases or the AGO alters the result reached herein. The Volusia County case involved a mandamus action to determine whether or not a charter county expressly authorized to exercise such municipal powers as might be required to fulfill the intent of its charter had the power to levy an excise tax upon the sale of cigarettes in the unincorporated areas of the county. In the *Volusia County* case the court stated at p. 10:

> When Section 1(g), Article VIII and Section 9(a), Article VII are read together, it will be noted that *charter counties* and *municipalities* are placed in the *same category* for all practical purposes. That upon a *county becoming a charter county it automatically becomes a metropolitan entity for self government purposes.* This is so because Section 1(g) of Article VIII provides a charter county "shall have all powers of local self-government not inconsistent with general law. . . . The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law." This all inclusive language unquestionably vests in a *charter county* the authority to levy any tax not inconsistent with general or special law *as is permitted municipalities.* (Emphasis supplied.)

As can be readily seen, the question there was whether or not a charter county had the *power* to levy an excise tax upon the sale of cigarettes. The court held that Volusia County *did* have such power because s. 1(g), Art. VIII, State Const., provided that a charter county "shall have all powers of local self-government not inconsistent with general law," and that the governing body of the county operating under a charter could enact county ordinances not inconsistent with general law. Thus it was the constitutional language above which gave Volusia County the *power* to levy such excise tax. Similarly, the question before the court in the *Brautigam* case was whether or not Dade County, a metropolitan county, had the power to levy an excise tax on cigarettes sold within the *unincorporated* areas of Dade County. The Supreme Court therein quoted from s. 6(f), Art. VIII, State Const., which provided that "[t]o the extent not inconsistent with the powers of existing municipalities or general law, the Metropolitan Government of Dade County may exercise all the powers conferred now or hereafter by general law upon municipalities," and held that this provision conveyed the power upon Dade County. Thus it is clear that in both the *Volusia County* and *Brautigam* cases the question before the Supreme Court was whether or not the respective counties had the *power* to levy an excise tax on the sale of cigarettes sold within the unincorporated areas of the respective counties as was permitted municipalities. This question is entirely *dissimilar* to the question presented by the instant request for opinion. Here the question is whether or not the Legislature has mandated that municipal service taxing or benefit units established by charter counties have been defined to be "municipalities" and "units of local government" so as to be entitled to a municipal share of the revenue-sharing trust fund.

Similarly, AGO 074-341 addressed itself to an analysis and interpretation of specific statutes. That opinion was limited solely to the specific statutes involved therein and

should not be extended to situations where the statutory provisions were clearly different.

From what has been previously said herein, it is readily apparent that the Legislature has not so defined a municipal service taxing or benefit unit.

Accordingly, until such time as the Legislature declares that a municipal service taxing or benefit unit established by a charter county is to be considered as a "municipality" and a "unit of local government," neither such municipal service taxing or benefit unit nor the charter county creating such unit would be entitled to receive a municipal share of revenue-sharing trust funds.

077-22—February 23, 1977

SPECIAL DISTRICTS

NOT REQUIRED TO PURCHASE COMMODITIES BY COMPETITIVE BID—APPLICABILITY OF CONSULTANTS' COMPETITIVE NEGOTIATION ACT

To: Colonel W. Loudin, Chairman, Estero Fire Protection and Rescue Service District Board of Commissioners, Estero

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

What provisions of the Florida Statutes control the expenditure of funds by the Estero Fire Protection and Rescue Service District in the purchase of supplies, equipment, construction, and modification of facilities?

SUMMARY:

The Estero Fire Protection and Rescue Service District is not subject to the competitive bidding requirements of part I of Ch. 287, F. S. (other than s. 287.055), and is not required by Ch. 76-208, Laws of Florida, the special act creating the district, to purchase through competitive bidding. In the absence of a statutory requirement, a public body such as the district is not required to purchase through competitive bidding. The acquisition of professional services such as architecture, professional engineering, etc., required by the district in connection with construction or modification of fire stations by the district, is subject to s. 287.055, the Consultants' Competitive Negotiation Act.

The purchasing and competitive bidding requirements set forth in part I of Ch. 287, F. S. (except s. 287.055, the "Consultants' Competitive Negotiation Act"), apply only to purchases by *state agencies.* I considered a situation analogous to that herein under consideration in AGO 074-7, with regard to an erosion prevention district created by special act. I stated in that opinion that "special districts and other separate statutory entities are not considered to be agencies of the state . . . ." The Estero Fire Protection and Rescue Service District, created by special act of the Legislature, Ch. 76-408, Laws of Florida (1976 H.B. 3908), is such a special district, and is not a state agency. Thus, since the district is not subject to the commodities purchasing requirements of part I of Ch. 287, purchases of the type about which you have inquired would be controlled by the provisions of Ch. 76-408, the special act creating the district and setting forth its powers and duties. (However, *see* AGO 075-56, explaining that under s. 287.042(2), a "local public agency" such as your district *may* elect to purchase under purchasing agreements and contracts negotiated and executed by the Division of Purchasing.) It should be noted that, as to "construction, and modification of facilities," the district would be subject to the requirements of s. 287.055 (the Consultants' Competitive Negotiation Act). That is, if such construction or modification of facilities requires professional services as set forth in s. 287.055 (architecture, professional engineering, landscape architecture, or registered land surveying), the district would be subject to any applicable competitive negotiation or other requirements of s. 287.055. (The district's authority to construct fire stations is set forth in s. 10(1) of Ch. 76-408.) *See* AGO's 075-56, 074-308, and 074-89 regarding the applicability to special districts of the Consultants' Competitive Negotiation Act.

My examination of Ch. 76-408, Laws of Florida, reveals no requirement that the district's purchases of commodities be made pursuant to competitive bidding. Subsection (2) of s. 10 of Ch. 76-408 simply authorizes the board of commissioners of the district to "purchase, acquire by gift, own, lease and dispose of firefighting equipment and property, real and personal, that the board may from time to time deem necessary or needful to prevent and extinguish fires within the district."

In AGO 071-366, I concluded that "in the absence of a statutory requirement, a public body has no legal obligation to let a contract under competitive bidding or to award the contract to the lowest bidder." Since the competitive bidding requirements of part I of Ch. 287, F. S. (except s. 287.055, as noted above), are not applicable to your district, and since Ch. 76-408, Laws of Florida, contains no such requirements, the Estero Fire Protection and Rescue Service District is not required to make purchases of the type mentioned in your letter through competitive bidding, absent promulgation of a district rule so requiring.

077-23—March 2, 1977

TAXATION

REIMBURSEMENT OF LOCAL GOVERNMENTS FOR REVENUES LOST THROUGH HOMESTEAD EXEMPTION

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

Prepared by: Larry Levy, Assistant Attorney General

QUESTION:

Since an applicant who qualifies for an exemption under either s. 196.081, s. 196.091, or s. 196.101, F. S., could also qualify for an exemption under s. 196.031(3)(a), F. S., may the department reimburse taxing authorities for revenues lost on the first $4,500 of the exemption granted under ss. 196.081, 196.091, and 196.101, even though s. 196.032(2), F. S., specifically limits the reimbursement to revenues lost due to exemption granted under s. 196.031(3)?

SUMMARY:

Qualified counties, municipalities, or special districts are entitled to receive an annual payment from the Local Government Additional Homestead Exemption Trust Fund in an amount equal to revenue lost as a result of the additional exemptions provided in s. 196.031(3), F. S. The Legislature has not authorized replacement funds for revenue lost as a result of exemptions claimed and received pursuant to s. 196.081, s. 196.091, or s. 196.101, F. S. The entitlement to and the receipt of an exemption authorized under s. 196.081, s. 196.091, or s. 196.101 would preclude any exemption under s. 196.031(3) and prevent all or any part of said exemption from being utilized as a basis for the calculation of the replacement funds authorized under s. 196.032, F. S. The legislative intent clearly expressed in ss. 196.032 and 196.031(4) is to replace only that revenue lost "as a result of the additional exemptions provided in Sec. 196.031(3), F. S." Revenue lost as a result of any exemptions found elsewhere in Ch. 196, F. S., was not intended to be replaced out of the Local Government Additional Homestead Exemption Trust Fund.

Your question is answered in the negative.

Section 196.032, F. S., has its genesis in Ch. 74-264, Laws of Florida, and created the Local Government Additional Homestead Exemption Trust Fund. Section 196.032(2) provides in part:

> Each qualified county, municipality, or special district is entitled *to receive an annual payment* from the fund in an amount equal to the revenue lost *as a result of the additional exemptions provided in s. 196.031(3)*. Revenue lost shall be calculated by multiplying 96 percent of the additional exemption granted in s. 196.031(3) by the applicable millage. A qualified local government is one which either: . . . . (Emphasis supplied.)

It is quite clear that the only exemptions contemplated are those found in s. 196.031(3), F. S. The exemptions provided for in ss. 196.081, 196.091, and 196.101, F. S., are *not* mentioned therein. The rule *expressio unius est exclusio alterius* applies—the express mention of one thing is the exclusion of another—so that by clear implication no other exemptions may be included in or written into ss. 196.031(3) or 196.032(2), F. S. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); Thayer v. State, 335 So.2d 815 (Fla. 1976). These last three mentioned statutes grant *total* exemption on property owned and used as a homestead by certain veterans and nonveterans, *cf.* AGO 076-228, who can qualify for such exemption under the pertinent statute, while s. 196.031 grants, in most instances, limited or partial exemptions.

It is readily apparent that some overlapping occurs and certain veterans and nonveterans who qualify under s. 196.081, s. 196.091, or s. 196.101, F. S., granting total exemption, could also qualify for the limited additional homestead exemption under s. 196.031(3), F. S., although they would lose their entitlement to exemption under the first cited statutes. The Legislature has not specifically spoken to this problem and thus the legislative intent must be gleaned from other authorized and recognized sources.

An examination of the title to the act is in order since the title may be considered to aid in determining legislative intent. State *ex rel.* Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529. The title provides:

> AN ACT relating to homestead exemption; amending *s. 196.031(3) and (4), Florida Statutes, 1973, to extend the additional exemption provided in subsection (3) for persons over sixty-five (65)* to ad valorem taxes levied by all local taxing authorities and to *increase* the exemption provided by s. 196.031(1), Florida Statutes, as to totally and permanently disabled persons; providing for a maximum combined exemption under *ss. 196.202* and *196.031,* Florida Statutes; creating *s. 196.032, Florida Statutes, providing replacement revenues through a trust fund;* adding subsection (4) to s. 196.011, Florida Statutes, 1973, relating to annual application requirement; amending s. 196.197, Florida Statutes, 1973, relating to exemption of property used by hospitals and similar institutions, to remove the limitation of its application to levies for school operating purposes; repealing chapter 74-11, Laws of Florida, relating to homestead exemption; providing an effective date. (Emphasis supplied.)

It is readily apparent that no reference is made therein to s. 196.081, s. 196.091, or s. 196.101, F. S. The entire thrust of the act, as evidenced by the title, is aimed at providing an *additional exemption* for certain persons, either by extension or increase, and creating a trust fund to provide replacement revenues for funds lost by virtue of the *additional or increased* exemption. *No* replacement fund was established for funds lost by virtue of *other exemptions,* including those prescribed in ss. 196.031(1) and 196.202, F. S. If no fund had been established, no right to replacement funds would exist. The establishment of the replacement fund was a legislative decision resting solely within its discretion.

Furthermore, a total exemption granted pursuant to either s. 196.081, s. 196.091, or s. 196.101, F. S., would *not* be a limited exemption granted pursuant to s. 196.031(3), F. S., and while in some instances, as aforementioned, an applicant might be able to qualify therefor, he would lose his entitlement to total exemption under the first mentioned statutes.

The Legislature has indicated that the fund is to be used to replace revenue lost as a result of *only* the additional or increased exemption provided for in s. 196.031(3), F. S. Section 196.031(4), F. S., provides:

> The [property appraisers] of the various counties shall each year *compile a list of taxable property* and its *value removed* from the assessment rolls of each local governmental unit as a *result of the increased exemptions provided in subsection (3)*, as well as a statement of the *loss of tax revenue* to each such governmental unit, and shall deliver a copy thereof to the Department of Revenue upon certification of the assessment roll to the tax collector. (Emphasis supplied.)

The language of the subsection clearly demonstrates that the Legislature is concerning itself only with the *financial effects* of the increased exemptions provided in subsection (3). Inasmuch as the exemptions provided for in ss. 196.081, 196.091, and 196.101, F. S., were in existence at that time, granting exemptions from ad valorem property taxation—thereby having financial impact on local governmental bodies—it is readily apparent that the Legislature in establishing the Local Government Additional Homestead Exemption Trust Fund was concerned only about the additional financial impact resulting from the additional or increased exemptions provided for therein. Nowhere within the act has the Legislature indicated that it was concerned about the financial impact of any other exemptions found in Ch. 196, F. S.

To illustrate, if ss. 196.031(3) and (4) and 196.032, F. S., had never been enacted, local governmental units would have experienced a financial impact resulting from loss of revenues from other tax exemptions found in Ch. 196, F. S., including ss. 196.031(1), 196.081, 196.091, and 196.101. The statutes make no provision for such revenue loss. Assuming that ss. 196.031(3) and (4) and 196.032 were repealed this session, the local governmental units would be in the same position, insofar as revenue loss resulting from other exemptions is concerned, as they would have been in had such statutes never been enacted.

It follows, therefore, as night follows day that it is *only* those revenues lost as a *direct result* of the enactment of the additional or increased exemption in s. 196.031(3), F. S., which the Legislature sought to replace. Revenues lost as a result of any other exemption, including, but not limited to, those authorized in s. 196.031(1), s. 196.081, s. 196.091, or s. 196.101, F. S., were not intended to be replaced from the trust fund. Had the Legislature intended differently, it could easily have said so or, for that matter, could so provide in the future.

There may be situations (probably rare) when a person qualified to receive an exemption under either s. 196.081, s. 196.091, or s. 196.101, F. S., elects not to seek such exemption but instead to seek exemption under s. 196.031(3), F. S. This would be a proper exemption to be allowed under s. 196.032(2), F. S. However, a person could *not* seek an exemption under s. 196.031(3) in addition to an exemption under s. 196.081, s. 196.091, or s. 196.101. A person's *entitlement to* and *receipt of* exemption under s. 196.081, s. 196.091, or s. 196.101 would *preclude* any exemption being granted under s. 196.031(3) and could not be included in part in the calculation for replacement funds under s. 196.032, F. S. Such loss of revenue would not be a loss of revenue "as a result of the additional exemptions provided in s. 196.031(3), F. S."

Your question is answered in the negative.

077-24—March 2, 1977

MUNICIPALITIES

MAY ADD FUEL ADJUSTMENT CHARGE TO UTILITY BILLS—CHARGE NOT SUBJECT TO MUNICIPAL PUBLIC SERVICE TAX

To: J. H. Phillips, General Manager, Sebring Utilities Commission, Sebring

Prepared by: William C. Sherrill, Jr., Assistant Attorney General, and J. Elisabeth Middlebrooks, Legal Research Assistant

QUESTION:

May the Sebring Utilities Commission disregard s. 166.231(1), F. S., and incorporate or "roll in" the "fuel adjustment charge" as defined in s.

166.231(1), into the base rate on its customers' bills, or must the "fuel adjustment charge" be shown separately?

SUMMARY:

A municipally owned utility may incorporate into its base rate the "fuel adjustment charge" or a portion thereof, as defined in s. 166.231(1)(b), F. S., as long as such "fuel adjustment charge" is separately stated on another part of the purchaser's bill and is not subject to the public service tax levied by the municipality.

Section 166.231(1), F. S., provides:

> (1)(a) A municipality may levy a tax on the purchase of electricity, metered or bottled gas (natural liquefied petroleum gas or manufactured), water service, telephone service, telegraph service, and cable television service. The tax shall be levied only upon purchases within the municipality and shall not exceed 10 percent of the payments received by the seller of the taxable item from the purchaser for the purchase of such service.
> (b) The tax imposed by paragraph (a) shall not be applied against any fuel adjustment charge, *and such charge shall be separately stated on each bill.* "Fuel adjustment charge" shall mean all increases in the cost of utility services to the ultimate consumer resulting from an increase in the cost of fuel to the utility subsequent to October 1, 1973. (Emphasis supplied.)

Section 166.231(5), F. S., then provides:

> The tax authorized hereunder shall be collected by the seller of the taxable item from the purchaser at the time of the payment for such service. The seller shall remit the taxes collected to the municipality in the manner prescribed by ordinance.

Thus, the seller of the taxable item (electricity in the case of the Sebring Utilities Commission) is required by s. 166.231 to collect the tax authorized by the section and to prepare the utilities bill in a manner that states the "fuel adjustment charge" (as defined by s. 166.231[1][b]) separately on the bill. This would, of course, logically follow because the seller of the taxable item also prepares the "bill" upon which the "fuel adjustment charge" must be separately stated.

The Sebring Utilities Commission is a seller of electricity and therefore must comply with s. 166.231(1) and separately state the "fuel adjustment charge" upon the bill.

The second portion of your question is whether the Sebring Utilities Commission may incorporate into its base rate a part or all of the increase in fuel costs since October 1, 1973.

The Sebring Utilities Commission has clear authority to establish base rates for utility services. This power is established in s. 9, Ch. 23535, 1945, Laws of Florida, which states:

> Said public Utilities Commission shall have full power and exclusive authority to fix rates and charges for electricity, gas and water, or other products furnished by said Utilities Commission, ...

Section 12.15, Ch. 27893, 1951, Laws of Florida, further provides:

> That the Commission shall prescribe and collect reasonable rates, fees or charges for the services and facilities of such municipal utilities and shall revise such rates, fees or charges from time to time whenever necessary.

Section 166.231, F. S., does not prohibit the inclusion of increased fuel costs since October 1, 1973, into the base rate, provided that the seller separately states on the bill the "fuel adjustment charge" as defined by the statutes. Moreover, s. 166.231 does not prohibit the incorporation of such increased fuel costs into the base rate, provided that the tax imposed by the municipality shall not be applied against ". . . all increases in the cost of utility services to the ultimate consumer resulting from an increase in the cost of fuel to the utility subsequent to October 1, 1973," s. 166.231(1)(b), which is the definition

of "fuel adjustment charge." Some accounting procedure thus would necessarily have to be devised to insure that the municipal tax would not be applied to the "fuel adjustment charge."

077-25—March 2, 1977

CONSTITUTIONAL LAW

RELIGIOUS SOCIETIES' RIGHTS TO ENGAGE IN PROTECTED ACTIVITIES AT FAIRS AND EXPOSITIONS

To: Betty H. Baggett, Director, Volusia County Fair Association, DeLand

Prepared by: Patricia R. Gleason and Sharyn L. Smith, Assistant Attorneys General

QUESTIONS:

1. May the Volusia County Fair Association [hereafter Association] refuse to rent a booth at the fair to the International Society for Krishna Consciousness, [hereinafter ISKCON], a religious society, on the grounds that said society intends to solicit funds on the fair premises?
2. If the answer to question 1 is in the affirmative, may the association evict ISKCON members if the society should breach an agreement not to solicit funds?
3. May the Volusia County Fair Association deny ISKCON the right to solicit funds on the grounds that the association has a general policy which prohibits all solicitation?

SUMMARY:

The members of the International Society for Krishna Consciousness (ISKCON), a religious society, are entitled, pursuant to the First Amendment of the United States Constitution and ss. 3 and 4, Art. I, State Const., to distribute literature to, and solicit contributions from, the public and propagate their religious beliefs on and in public areas of the Volusia County Fair. The fact that the members of ISKCON solicit and accept donations, and the fact that the Volusia County Fair Association has a general policy against all solicitation do not, according to Supreme Court and lower federal court decisions, abrogate ISKCON's right to engage in such activities. The association may, however, consistent with statutory authority, regulate ISKCON's religious activities to the extent necessary to preserve the purpose of the fair, as well as require the ISKCON members to pay the admission price, remain within the public areas, and conduct their activities during normal operating hours.

As these questions are interrelated, they will be answered together.

My opinion is desired as to the right of members of the International Society for Krishna Consciousness to distribute literature, solicit contributions from the public, and in general propagate their religious beliefs at the Volusia County Fair. Specifically, you are interested in whether the Volusia County Fair Association may require the members of ISKCON to remain in their rented booth at the fair while propagating their religious beliefs, and whether the association may prohibit or otherwise restrict the ISKCON members from soliciting funds from the public in attendance at the fair.

Chapter 616, F. S., generally regulates public fairs and expositions held in this state by, *inter alia*, providing trade standards for the operation of shows and amusement devices, s. 616.091; requiring licenses upon certain shows, s. 616.12; providing that no fair or exposition may be conducted by a fair association without a permit issued by the Department of Agriculture, s. 616.15; and providing for display of minimum exhibits, s. 616.17. Sections 616.08 and 616.11 set forth the powers and authority of fair associations established pursuant to the chapter. Section 616.08 provides, in pertinent part:

> Every association organized under this chapter shall have the power to hold, conduct and operate fairs and expositions as defined herein annually and for such purpose to buy, lease, acquire and occupy lands, erect buildings and improvements of all kinds thereon and to develop the same; to sell, mortgage, lease, or convey such property or any part thereof, in its discretion, from time to time; to charge and receive compensation for admission to such fairs and expositions, and the sale or renting of space for exhibitions, or other privileges; to conduct and hold public meetings; to supervise and conduct lectures and all kinds of demonstration work in connection with or for the improvement of agriculture, horticulture and stockraising and poultry raising and all kinds of farming and matters connected therewith; to hold exhibits of agriculture and horticultural products, livestock, chickens and other domestic animals; to give certificates or diplomas of excellence; and generally to do, perform and carry out all matters, acts and business usual or proper in connection with fairs and expositions as defined herein; . . . .

Moreover, s. 616.11 authorizes associations to enter into contracts, leases, or agreements with any municipality or county for the donation or use and occupation by any association of land owned, leased, or held by such municipality or county. Counties and municipalities are authorized to make contributions of money or property to associations to be used for fair or exhibition purposes. Such appropriations were held to be constitutional as serving a proper purpose in Barnett Nat. Bank v. Thursby, 150 So. 252 (Fla. 1933). *Accord:* Attorney General Opinion 069-118. *See also* Chs. 15558, 15561, and 15562, 1931, Laws of Florida. Furthermore, s. 616.07(1) provides, in pertinent part:

> . . . no money or property of any such association shall be distributed as profits or dividends among its members or officers, but all money and property of such association shall, except for the payment of its just debts and liabilities, be and remain perpetually public property, administered by the association as trustee, to be used exclusively for the legitimate purpose of the association, and shall be, so long as so used, exempt from all forms of taxation.

The answers to your questions are dependent upon the constitutional rights of freedom of speech and religion guaranteed by the First Amendment, and applicable to the states via the Fourteenth Amendment, and ss. 3 and 4, Art. I, State Const.

It appears beyond dispute that there exists sufficient "state action" to bring the activities of the association within the scope of the Fourteenth Amendment. *See, e.g.,* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Smith v. Young Men's Christian Association of Montgomery, 462 F.2d 634 (5th Cir. 1972). Moreover, the Volusia County fairgrounds appear to be within the class of public facilities that have been determined to be appropriate forums for the exercise of First Amendment rights. In this regard, the court in Wolin v. Port of New York, 392 F.2d 83, 89 (2d Cir. 1968), wrote:

> [W]here the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further; does the character of the place, the pattern of usual activity, the nature of its essential purpose, and the population who take advantage of the general invitation extended make it an appropriate place for communication of views of issues of political and social significance.

The *Wolin* court concluded that a bus terminal, like streets of a company town, the *grounds of a fair,* or the parking lot of a shopping center, was an appropriate place for the expression of First Amendment rights, reasoning at 392 F.2d 90:

> The terminal building is an appropriate place for expressing one's view precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies the rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum.

See also ISKCON v. City of New Orleans, 347 F.Supp. 945, 949 (E.D. La. 1972); ISKCON v. Dallas-Fort Worth Regional Airport Board, 391 F.Supp. 606 (1975).

Furthermore, in Farmer v. Moses, 232 F.Supp. 154 (D.C. N.Y. 1964), the court made clear that the fact that admission is charged is irrelevant for purposes of the First Amendment, reasoning that the public is not entitled to be insulated from unsolicited viewpoints or ideologies simply because it pays an admission price.

Moreover, it has also been held that religious groups may seek donations or sell religious material without forfeiting their First Amendment rights. In this regard, the following passage from Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943), is appropriate:

> The mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. . . . It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expense or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. [319 U.S. at 111.]

See also Tate v. Akers, 400 F.Supp. 987 (D.C. Wy. 1976); Shreveport v. Teague, 8 So.2d 642 (La. 1940). Similarly, the Supreme Court and lower federal courts have consistently enjoined the enforcement of ordinances prohibiting all solicitation as applied to members of religious or other organizations entitled to First Amendment protection. *See* Murdock v. Pennsylvania, *supra;* Martin v. Struthers, 319 U.S. 141 (1943); Follett v. McCormick, 321 U.S. 573 (1944); Cantwell v. Connecticut, 310 U.S. 296 (1940); Tate v. Akers, *supra;* ISKCON v. City of New Orleans, *supra;* 77 A.L.R.2d 1216.

In light of the foregoing Supreme Court and lower federal court decisions, I am of the opinion that, subject to the qualifications hereinafter noted, the members of ISKCON may distribute literature to, and solicit contributions from, the public and generally propagate their religious beliefs on and in the public areas of the Volusia County Fair, notwithstanding the fact that rented booths are available or that a general policy against all types of solicitation has been adopted by the association. This conclusion is in accord with opinions rendered on the same issues by the Attorneys General of Pennsylvania (Opinion of the Attorney General to The Honorable Raymond J. Kerstetter, December 30, 1976); New Mexico (Opinion of the Attorney General to Mr. Finlay MacGillivray, August 18, 1976); Arizona (Attorney General Opinion 76-37); and North Carolina (Opinion of the Attorney General to Mr. Arthur K. Fitzer). *See also* Opinion of the Legislative Counsel of California to The Honorable Pauline Davis, August 13, 1975.

It should be emphasized at this point, however, that the rights protected by the First Amendment are not absolute, and the activities and conduct of ISKCON may be regulated to the extent necessary to protect legitimate state interests. As noted by the Supreme Court in Cox v. State of Louisiana, 379 U.S. 536, 554 (1956):

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guaranty of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

Thus, it has been held that the state may act to prevent disruption or breach of the peace, Brown v. Louisiana, 383 U.S. 131 (1966); or to protect its property for the use to which it was dedicated, Adderley v. State of Florida, 385 U.S. 39 (1966). *See also* Hynes v. Mayor and Council of Borough of Oradell, 44 L.W. 4643 (1976); Singleton v. Woodruff, 13 So.2d 704 (Fla. 1943). Similarly, in Wolin v. Port of New York Authority, *supra,* the court held that reasonable regulations covering such activity as distributing pamphlets could be promulgated so as to protect a legitimate interest in maintaining a free flow of traffic, avoiding excessive disruption, and ensuring the convenience and movement of passengers and vehicles. More specifically, the court stated at 392 F.2d 94:

> In accommodating the interest of protesters and general public, the Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the rights of expression may be exercised.

The foregoing constitutional principles, read together with the authority delegated by the Legislature in s. 616.08, F. S., empowering fair associations to "perform and carry out all matters, acts, and business usual or proper in connection with fairs or expositions," lead me to conclude that the association may regulate the activities of ISKCON in the following areas when authorized by law: require the normal admission price; limit their activities to areas normally open to the public; restrict their activities to the normal hours of the fair's operation.

It is further suggested that s. 616.08, F. S., as well as ss. 616.255 and 616.256, F. S., relating to the powers and duties of the State Fair Authority, be amended so as to clarify the authority of such fair associations to regulate the activities of ISKCON and other similar organizations within the strict constitutional limitations. *See* ISKCON v. Rochford, 45 L.W. 2347 (N.D. Ill. 1977).

077-26—March 3, 1977

SCHOOLS

INTEREST ON INVESTMENT OF PROCEEDS OF REVENUE BONDS MAY NOT BE USED TO PAY SCHOOL BOARD OPERATING DEFICIT

To: Terry McDavid, Attorney, Columbia County School Board, Lake City

Prepared by: Caroline C. Mueller, Assistant Attorney General, and David Slaughter, Legal Research Assistant

QUESTION:

> **May the interest earned on the investment of the proceeds of a revenue bond issue in a construction trust fund established by the bond enabling resolution be used by the school board to meet a deficit in its operating budget?**

SUMMARY:

> **Interest earned on the investment of the proceeds of a revenue bond issue deposited in a construction trust fund established by resolution of a district school board may not be lawfully used by the school board to meet a deficit in its operating budget. The proceeds of such revenue bond issue and interest earned thereon may be used only for the projects and purposes defined and designated in the enabling statute and enabling resolution. Any diversion of moneys deposited in such trust fund or accrued interest thereon to any purpose other than those prescribed in the enabling legislation and bond enabling resolution, or in the bonds or certificates issued and sold thereunder, is invalid.**

Chapter 72-510, Laws of Florida, authorizes the School Board of Columbia County to institute a capital improvement program for the Columbia County school system. The school board is authorized to acquire, construct, enlarge, improve, furnish, and equip schools and school buildings and to carry out other purposes appurtenant and incidental thereto. The board is authorized to issue not exceeding $3,000,000 interest-bearing revenue certificates to pay for the costs of the capital improvement program. The principal of and interest on the revenue certificates are payable solely from the share of all race track funds and jai alai fronton funds accruing to Columbia County under the provisions of the Constitution of Florida and Chs. 550 and 551, F. S., and allocated by law to the school board.

The act defines the cost of acquisition, construction, furnishing, and equipping of the schools and school buildings to include the cost of acquisition of sites, legal, engineering, fiscal, and architectural studies, surveys, plans, and designs; the expenses of the issuance, authorization, and sale of certificates, including advertisements, notices, and other proceedings in connection therewith; and such other purposes as are necessary, incidental, or appurtenant to the purposes authorized thereunder.

The school board, pursuant to the authority granted by Ch. 72-510, *supra*, adopted a resolution on September 27, 1973, providing for the acquisition, construction, enlarging, improving, furnishing, and equipping schools and school buildings in the school district and authorizing the issuance of not exceeding $3,000,000 certificates of indebtedness to finance a portion of the cost thereof, subject to the terms and conditions set forth in the resolution. Presumably, the obligations were validated as directed by s. 21 of the enabling resolution, and the validity of the resolution and the revenue certificates has been put in repose.

Section 3.C. of the enabling resolution defines the cost of the projects particularly described in s. 3.A. of the resolution in substantially the same terms as the act. Section 3.A. reserves the right of the school board, in certain circumstances, to allocate additional sums to one of the projects from other projects listed in the resolution and to allocate moneys saved on one project to other projects designated in the resolution. Section 4 specifies that the resolution shall be deemed to be and shall constitute a contract between the school board and the bondholders.

Section 15 of the enabling resolution in pertinent part provides that all of the proceeds derived from the sale of the obligations issued (except certain amounts to be deposited in the sinking fund and the reserve account in the sinking fund) be deposited in the construction trust fund created and established by the resolution and that the moneys deposited therein be used only for the payment of the cost of the project as defined in s. 3 of the resolution. Pending such use of the construction fund moneys, they may be invested in authorized investments in accordance with a schedule to be approved by the consulting engineers and/or architects. Any unexpended moneys in the trust fund *after* the completion of the projects designated and described in the enabling resolution are to be retained in the construction fund and *used for school capital projects* as authorized by Ch. 72-510, *supra*.

It is clear that the resolution does not authorize the use of the interest earned on funds in the construction trust fund to meet a deficit in the operating budget of the school board, to defray operating expenses, or for any purpose other than for the cost of capital improvement projects specified in Ch. 72-510, *supra*. Under the language and terms of the resolution, any interest earned through the authorized investment of the bond proceeds deposited in the construction trust fund attaches or inures to, and is an addition to and for the benefit and use of, the construction trust fund and no other fund or purpose and may be used only for the purposes designated in s. 15 of the enabling resolution. The resolution does not in terms authorize any other use of such increments of interest, nor does it in any manner provide for the flow of such increments out of the construction trust fund or for the transfer thereof to any other fund or account.

The revenue bonds or certificates that were issued and sold under Ch. 72-510, *supra*, and the enabling resolution constitute a contract between the school board and the bond or certificate holders (*see* s. 4 of the resolution) that cannot be amended or modified without the written consent of two-thirds of the bondholders (*see* s. 19 of the resolution). The contract cannot otherwise be impaired by the district school board or the Legislature. *See* s. 10, Art. I, United States Constitution; s. 10, Art. I, State Const. Any action by the district school board or the Legislature to divert any part of the construction trust fund, including any increments of interest accruing to and for the benefit of such trust fund, to any use or purpose other than those designated in Ch. 72-510, *supra*, and in the enabling resolution is invalid. *See* AGO's 067-41, 072-171, 071-300, 074-329, and 075-92; Miami Bank & Trust Co. v. Board of Public Instruction of Broward County, 80 So. 307 (Fla. 1918); Oven v. Ausley, 143 So. 588 (Fla. 1932); and Bigham v. State, 156 So. 246 (Fla. 1934). It is a violation of an elemental principle in the administration of public funds for one who is charged with the trust of their proper expenditure not to apply those funds to the purposes for which they are raised. Dickinson v. Stone, 251 So.2d 268, 273 (Fla. 1971); Supreme Forest Woodmen Circle v. Hobe Sound Co., 189 So. 249, 250 (Fla. 1939); Oven v. Ausley, *supra*, at p. 589; Taylor v. Williams, 196 So. 214, 217 (Fla. 1940).

I conclude that no part of the construction trust fund in question, including any interest accruing to and for the use and benefit of the trust fund, may lawfully be used to meet a deficit in the school board's operating budget. Any diversion of such trust funds or the accrued interest thereon to any purpose other than those prescribed in Ch. 72-510, *supra*, and the enabling resolution, or in the bonds or certificates issued and sold thereunder, is invalid.

077-27—March 3, 1977

MUNICIPALITIES

LEASE OF PUBLIC PROPERTY TO NONPROFIT, QUASI-PUBLIC CORPORATION TO CARRY OUT PUBLIC PURPOSE

To: Roger G. Saberson, City Attorney, Delray Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General, and Joslyn Wilson, Legal Research Assistant

QUESTIONS:

1. **Does the proposed lease arrangement in which the City of Delray Beach proposes to lease a portion of municipally owned property, currently utilized as a park, to the Delray Beach Sickle Cell Fund, a private nonprofit corporation, violate s. 10, Art. VII of the Florida Constitution?**
2. **Would such a lease be valid if the city were given an absolute right to cancel the lease or the city council reserved the right to approve on a continuing basis the nature and extent of the programs to be carried out by the fund?**

SUMMARY:

The City of Delray Beach has both general statutory authority and specific authority in its ordinances to lease a portion of municipal realty currently being utilized as a park to the Delray Beach Sickle Cell Fund, a nonprofit quasi-public corporation, provided the governing body determines the lease to be in the best interest of the city and the governing provisions of existing ordinances of the city relating to the leasing of city property are complied with. Such lease arrangement would not constitute the employment of public funds or property or the pledging of public credit for private purposes in violation of the Florida Constitution.

As your questions are interrelated, they will be answered together.

According to your letter, the City of Delray Beach proposes to lease a portion of municipal real property, currently being utilized as a park, to the Delray Beach Sickle Cell Fund, a private nonprofit corporation. The fund proposes to construct a building on the property at its expense which, upon completion, would belong to the city. The city would then execute a 99-year lease of the property and the building constructed thereon to the fund. The facility would be used primarily for counseling, educational, and testing programs related to sickle cell disease, and such services furnished to the public by the fund would be available at no charge to all citizens of Delray Beach and the surrounding communities as well as to persons in the unincorporated areas of the county. It is my understanding that neither the lease nor the leasehold would be hypothecated in any way to fund the costs of construction or to secure any construction loan, nor would there be any enforceable lien on the property resulting from the proposed lease agreement or the proposed construction or any future improvements on the property.

This opinion is conditioned and predicated on the above-stated factual circumstances and other facts hereinafter recited. Section 10, Art. VII, State Const., prohibits the state; a county, municipality, a special district; or any agency thereof from lending or using its taxing power or credit to aid any private corporation, association, partnership, or person. The parameters of this constitutional provision have frequently been litigated within the state. The Florida Supreme Court has stated on several occasions that the purpose of this provision is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most incidentally benefited." Bannon v. Port of Palm Beach District, 246 So.2d 737, 741 (Fla. 1971). *Cf.* State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); Bailey v. City of Tampa, 111 So. 119 (Fla. 1926). However, when a public purpose is involved, the courts have recognized that a municipality may accomplish this purpose through the medium of a nonprofit quasi-public corporation. *See, generally,* Burton v. Dade County, 166 So.2d 445 (Fla. 1964); Raney v. City of Lakeland, 88 So.2d 148 (Fla. 1956). Thus, the applicability of the constitutional prohibitions contained in s. 10, Art. VII, State Const., to the proposed lease agreement is dependent in part on whether a valid public purpose is involved. While the presence of a public purpose is ultimately a factual determination which must be made by the Legislature or judiciary, various standards can be applied to make an initial determination. In O'Neill v. Burns, 198 So.2d 1, 4 (Fla. 1967), the Florida Supreme Court stated that there "must be some clearly identified and concrete public purpose as the primary objective and a reasonable expectation that such purpose will be accomplished . . . to justify the loan . . . [of] property to a nongovernmental entity such as a nonprofit corporation." *Cf.* AGO's 075-71 and 071-241. In an earlier case, Burton v. Dade County, 166 So.2d 445 (Fla. 1964), the court sustained a county plan to construct a planetarium on county-owned property. Under the plan, the planetarium would be operated by a nonprofit corporation. Although admission fees would be collected, all expenses of operation would be paid from the proceeds, and no part of the money would inure to the corporation. The court considered the corporation quasi-public in nature and held that the "fact that the county will use the services of a voluntary nonprofit quasi-public organization in handling operating details does not destroy the public nature of the facility." *Id.* at 448.

From your letter it appears that the Sickle Cell Fund may well qualify as a quasi-public organization—it is nonprofit, voluntary, open to the public, and dedicated to a valid public interest, *i.e.*, public health. Additionally, the programs provided by the fund would be available to *all* members of the community without charge, not merely restricted to members of the fund. In light of other judicial decisions which have sustained municipal actions as serving a valid public purpose, it appears that the proposed programs would qualify as serving a valid public purpose. Moreover, the benefits to be derived by the public from these programs appear to be substantial. *Cf.* Burton, *supra*; Raney v. City of Lakeland, 88 So.2d 148 (Fla. 1956) (horticultural library); State v. City of Miami, 72 So.2d 655 (Fla. 1954) (storage for Orange Bowl parade paraphernalia); State *ex rel.* Barnett Nat. Bank of Deland v. Thursby, 150 So. 252 (Fla. 1933) (county fair); Overman v. State Board of Control, 62 So.2d 696 (Fla. 1952) (student dormitories); State v. City of Tampa, 146 So.2d 100 (Fla. 1962) (convention center).

The principles set forth by the Florida Supreme Court in O'Neill, *supra*, also include a requirement that "some control [be] retained by the public authority to avoid frustration of the public purpose." 198 So.2d at 4. What constitutes sufficient control is not, however, set out in the opinion and apparently must be determined on a case-by-case basis. In Burton, *supra*, the court found that as "the planetarium will remain a public facility in every respect and will be operated for the public benefit, *subject always to the ultimate control of the county commissioners,*" (166 So.2d at 448; emphasis supplied), the constitutional prohibitions of s. 10, Art. VII, were avoided. In Raney, *supra*, the city retained the right to cancel the lease upon breach of any of its covenants. In your letter, you ask whether the lease, if not otherwise valid, would be validated by two additional provisions which specify that the city has the absolute right to cancel the lease and to approve on a continuing basis the programs carried on by the fund. The presence of these provisions in the proposed lease appear to satisfy the requirement of municipal "control" which the *O'Neill* court set forth. Thus, it appears advisable to include such provisions in the proposed lease arrangement to avoid any potential conflict with the standards enunciated by the courts. The lease should also contain provisions protecting the lessor with public liability insurance, protecting the city against any mechanics' liens or other liens of any nature, and covenants against assignment and subletting, as well as cancellation and reversion provisions.

For such a lease to be valid, however, the municipality must have the statutory authority to lease municipal property. From your letter, it appears that the property is presently being used as a park, although it has never been dedicated to the public for

such use. Municipalities were formerly empowered by the Legislature to discontinue or divert the use of public parks under s. 167.09(1), F. S. 1971, which provided in part:

> . . . said city or town council or commission may alter, widen, fill in, grade, pave, change, or divert the use of all or any part thereof or discontinue any public park, public square, street, avenue, highway, or any other way which has heretofore been or shall hereafter be laid out, either by cities or persons, natural or artificial, fixed or established in any manner whatsoever.

Chapter 167, F. S. 1971, was repealed in 1973, by the Municipal Home Rule Powers Act, Ch. 73-129, Laws of Florida (Ch. 166, F. S.). Under s. 5 of the act (now s. 166.042[1]), the repeal of certain chapters of the Florida Statutes, including Ch. 167, by Ch. 166 "shall not be interpreted to limit or restrict the powers of municipal officials." Chapter 167, although repealed, is still viable as a grant of municipal power under Ch. 73-129, *supra*. Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97, 101 (Fla. 1975). Moreover, the act states that it is the legislative intent that

> . . . municipalities . . . continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion, subject only to the terms and conditions which they choose to prescribe.

Under the former Charter of the City of Delray Beach, s. 7(3), Ch. 25786, 1949, Laws of Florida, the city was empowered to "pave, . . . close, vacate, discontinue, extend . . . parks . . . or any part thereof . . . ." The charter also *expressly* provided that:

> . . . any property, real or personal, acquired by the city may be used, maintained, sold, exchanged or *leased* whenever the city council shall determine that it is to the *best interests of the city* to do so. . . . [s. 7(2), Ch. 25786, 1949, Laws of Florida, as amended by Ch. 27509, 1951, and Ch. 59-1222, Laws of Florida; emphasis supplied.]

Paragraph (d) of s. 7(2) provides that certain conditions must be met prior to the city's leasing municipal real property.

> . . . [P]ublic notice shall be given, which notice shall state the terms of such proposed lease, the date, hour and place where the city council shall consider any objections to such proposed lease, and shall also consider any further competitive bids for such real property being leased.

These former charter provisions were converted into city ordinances, subject to modification or repeal, by s. 166.021(5), F. S. In 1976 the city adopted a home rule charter. Section 1.02, Art. I of the new charter provides that all former charter provisions are continued as ordinances. Another section of the new charter, s. 1.02, Art. I, provides the broad basis for the exercise of municipal authority.

> The City of Delray Beach shall have governmental, corporate and proprietary powers to enable it to conduct municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Thus, the city initially appears to have the statutory authority to lease the municipal property, *provided* the city council determines that the lease is in "the best interest of the city" and the provisions of s. 7(2)(d) Ch. 25786, 1949, Laws of Florida, as amended by Ch. 27509, 1951, and Ch. 59-1222, Laws of Florida, are met.

An additional problem arises since the property in question is already being used for a valid public purpose. While the city appears to have statutory authority to divert the use of a park (*see* s. 167.09, F. S. 1971; s. 166.042, F. S.; s. 7(3), Ch. 25786, 1949, Laws of Florida, *supra*), many cases permitting the lease of public property to a private nonprofit corporation involved property which was not currently being used for a governmental purpose. For example, in Raney, *supra*, the lease specifically recited that the property was not currently needed by the city. *Cf.*, 63 C.J.S. *Municipal Corporations* s. 964, (1950)

("Municipal corporations may lease its property to others when no longer required for its own purposes . . . ."), and s. 167.77(1), F. S. 1971. Where the property in question is in current use by a municipality, the courts have on occasion permitted such a change. Kumick v. City of St. Petersburg, 136 So.2d 5 (2 D.C.A. Fla., 1961), involved the "one question of whether or not a municipality has a right to divert part of lands dedicated for public park purposes to a roadway." *Id.* at 5. Earlier cases had permitted such a change only when it did not constitute an actual abandonment of the dedication of the property for park purposes. *E.g.* Ocean Beach Realty Co. v. City of Miami Beach, 143 So. 301 (Fla. 1932); Kramer v. City of Lakeland, 38 So.2d 126 (Fla. 1948). In *Kumick*, however, under s. 167.09, F. S. 1949, the Supreme Court of Florida permitted the city to divert a portion of the park for a purpose different from the purpose for which the property has been dedicated. Although not specified in *Kumick* as a requirement, both uses were valid public purposes.

Applying these principles to your inquiry, it appears that the city may substitute one public purpose for another in the use of its property, especially as there is no evidence based upon your information that the property remaining as a park would be detrimentally affected. Moreover, I have been informed that the property was never formally dedicated as a public park and has not been used for park purposes a sufficient period of time for any prescriptive rights to have been acquired or to have vested. No provision in the charter which would restrict or otherwise prevent the city from disposing of municipal property in the manner contemplated by your letter has been brought to my attention. I, therefore, conclude that, provided that the city council determines the lease to be in "the best interests of the city" and the provisions of s. 7(2)(d), Ch. 25786, 1949, Laws of Florida, as amended by Ch. 27509, 1951, and Ch. 59-1222, Laws of Florida, are complied with, the proposed lease is authorized by general law and the ordinances of the City of Delray Beach.

077-28—March 22, 1977

COASTAL ZONE MANAGEMENT

GOVERNOR'S AUTHORITY TO DESIGNATE AGENCY TO ADMINISTER GRANTS AND IMPLEMENT MANAGEMENT PROGRAM

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

Prepared by: Ross A. McVoy, Assistant Attorney General

QUESTION:

> **Do the statutory duties of the Department of Natural Resources limit the apparent discretion conferred upon the Governor by federal law to designate a single agency to receive and administer grants received for implementing a coastal zone management program?**

SUMMARY:

> **Gubernatorial discretion, under 16 U.S.C. 1455(c)(5), to designate a single agency to receive and administer grants to implement an appropriate Coastal Zone Management Program is not limited by the statutory duties of the Department of Natural Resources under s. 370.02(3)(g), F. S., because there is no express legislative grant of authority to the Department of Natural Resources to perform that duty and none should be implied.**

The answer to your question is that your discretion to designate a single agency to receive and administer grants to implement an approved Coastal Zone Management Program is not limited by the statutory duties of the Department of Natural Resources expressed in s. 370.02(3)(g), F. S.

The "Florida Environmental Reorganization Act of 1975" (Ch. 75-22, Laws of Florida) was enacted:

> . . . to promote the efficient, effective, and economical operation of certain environmental agencies by centralizing authority over, and *pinpointing responsibility for the management of, the environment* . . . and by consolidating compatible administrative, planning, permitting, enforcement, and operational activities. [Section 403.802, F. S. (s. 2, Ch. 75-22, *supra*); emphasis supplied.]

Section 20.25(7), F. S. (s. 18, Ch. 75-22, *supra*), abolished the Coastal Coordinating Council, created by s. 370.0211, F. S., and reassigned its powers, duties, staff, and functions to the Division of Resource Management of the Department of Natural Resources.

Section 370.02(3)(g), F. S. (s. 13(3), Ch. 75-22, *supra*), provides in pertinent part:

> The Division of Resource Management shall . . . develop plans *and carry out the programs of coastal zone management*, utilizing interagency cooperation and agreements to insure the participation of other state and local agencies involved in coastal zone management. (Emphasis supplied.)

The language of s. 370.02(3)(g), *supra*, must be compared with that of s. 370.0211, *supra*, in determining legislative intent. The Coastal Coordinating Council was created within the Department of Natural Resources only as an advisory body. Section 370.0211(1) referenced s. 20.03(7), F. S., which defines "Council" as:

> . . . an advisory body appointed to function on a continuing basis for the study of the problems arising in a specified functional or program area of state government and the recommendation of solutions and policy alternatives.

The most substantial duty exercised by the council was to ". . . develop a comprehensive state plan for the protection, development, and zoning of the coastal zone, making maximum use of any federal funding for this purpose. . . ." Section 370.0211(4). Other duties of the council included coastal zone research, review, upon request, of pertinent coastal zone activities, and coordination of those activities among various governmental levels; services requested by interested agencies; and employment of personnel to carry out these duties. Section 370.0211(4)(a)-(g).

The broadly worded language of s. 370.02(3)(g), *supra*, and the effect of s. 20.25(7), *supra*, represent an expansion of the coastal planning and management duties of the Department of Natural Resources compared to its duties during the council's existence. Consistent with the legislative declaration of policy in Ch. 75-22, *supra*, to ". . . [pinpoint] *responsibility* for management of the environment. . .", the division was required to ". . . develop plans and *carry out the programs of coastal zone management* . . . ." Section 370.02(3)(g). (Emphasis supplied.)

Pursuant to the authority of s. 19, Ch. 75-22, *supra*, the Bureau of Coastal Zone Management was established within the division and is presently developing Florida's Coastal Zone Management Program. Accordingly, it is evident that the Legislature pinpointed the Division of Resource Management, Department of Natural Resources, to carry out the programs of coastal zone management, which necessarily include implementation of an approved Coastal Zone Management Program utilizing interagency agreements, cooperation, and participation as authorized by s. 370.02(3)(g), *supra*.

However, in my opinion, the legislative grant of authority and responsibility to the Department of Natural Resources to carry out the programs of coastal zone management was not intended nor should it be construed to exclude other agencies from undertaking substantial roles in coastal zone management.

Considering the language is s. 370.02(3)(g), *supra*, in light of a comparison between 15 C.F.R. 923.22 and 923.23, it is evident that, although the Division of Resource Management, Department of Natural Resources, has been delegated authority to implement the coastal zone management programs, there is no express delegation in s. 370.02(3)(g) regarding the receipt and administration of grants to fund the implementation of the program. It is my opinion that, absent such express legislative authority, none should be implied.

15 C.F.R. 923.22 requires ". . . an organized and unified program . . ." with a ". . . clear *point of responsibility* for the program, although program implementation may be undertaken by *several* state entities." (Emphasis supplied.) This regulation further ". . . envisions the creation of a coastal zone management entity that has adequate *legislative* and/or executive authority to implement . . . the Act." (Emphasis supplied.) 15 C.F.R. 923.22 also provides that the Secretary of Commerce must find that you have certified that the coastal zone management entity has adequate authority to implement an approved program. 15 C.F.R. 923.22 provides in pertinent part:

> . . . [The] management program must contain a certification by the Governor of the State or his designated legal officer that the State has established its organizational structure to implement the management program.

15 C.F.R. 923.23, "Designation of a single agency," is closely related to, but distinguishable from, 15 C.F.R. 923.22. The purpose of 15 C.F.R. 923.23 is ". . . simply to identify a single agency which will be fiscally and programmatically *responsible for . . . the grants* . . . to implement the approved management program." (Emphasis supplied.) Thus, these regulations distinguish a program-implementing entity from an agency receiving and administering grants to implement the program. The regulations expressly recognize such functions may be lodged in more than one agency, although they do not preclude one authority responsible for both functions.

077-29—March 23, 1977

INDIAN RESERVATIONS

APPLICABILITY OF STATE AND LOCAL LAWS TO PERSONS AND PROPERTY THEREON

To: David J. Lehman, Representative, 97th District, Hollywood

Prepared by: J. Kendrick Tucker, Assistant Attorney General

QUESTION:

Are state and local police power regulations and ordinances applicable to Indian Trust Reservation lands in Broward County and activities thereon by non-Indians?

SUMMARY:

Generally, state and local regulations and taxation are applicable to non-Indians and non-Indian property located on Indian reservations so long as Indians, Indian activities or affairs, or Indian property is not unduly burdened, or tribal self-government frustrated, and so long as not prohibited by federal law. Local zoning ordinances applicable to Indian lands, leased to non-Indians, would appear to constitute a prohibited burden on Indian property, while local ordinances and regulations essentially applicable only to non-Indians or non-Indian property would not. The State of Florida has assumed jurisdiction over criminal offenses committed by or against Indians or other persons on Indian reservations, and has assumed jurisdiction over civil causes of action between Indians or other persons, or to which Indians or others are parties, arising within Indian reservations, and the civil and criminal laws of Florida are fully effective and to be enforced on Indian reservations in the same manner as elsewhere throughout the state so long as not in conflict with federal law. Local ordinances or regulations are not generally applicable or enforceable with respect to Indians or Indian reservation lands because s. 285.16, F. S., does not grant such authorization.

It is necessary to draw a firm distinction between state and local regulation of non-Indians and non-Indian property located on Indian reservation lands with regulation of Indians or Indian property located on reservations. The U. S. Supreme Court has long recognized the assertion of state sovereignty to subject non-Indians and non-Indian property located on Indian reservations to regulation and taxation so long as Indians,

Indian activities or affairs, or Indian property is not unduly burdened or tribal self-government not frustrated, and so long as not prohibited by federal law. *See* Utah & Northern Railway v. Fisher, 116 U.S. 28 (1885), wherein the lands and railroad of the Utah & Northern Railway Company were held to be subject to territorial taxation notwithstanding the fact that they were located and operated on Indian reservation territory; Thomas v. Gay, 169 U.S. 264 (1898), wherein cattle owned by non-Indians and being grazed by lease on Indian reservation lands were held to be subject to territorial taxation; Moe v. Salish & Kootenai Tribes, 48 L.Ed.2d 96 (1976), wherein a state statute requiring an *Indian retailer* to collect and remit to the state a cigarette sales tax imposed on non-Indian purchasers was upheld because the minimal burden on the Indian dealer was necessary to avoid the likelihood the non-Indian purchaser would avoid payment of the tax and such burden did not frustrate tribal self-government or run afoul of any congressional enactment dealing with the affairs of reservation Indians; and United States v. McBratney, 104 U.S. 621 (1881), wherein the court held that the state courts of Colorado had jurisdiction to prosecute a murder of one non-Indian by another committed on an Indian reservation located within that state. *See also*; Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), note 2, p. 658, *app. pending*, U.S. Sup. Ct.; 41 Am. Jur.2d *Indians* s. 66, p. 869; 42 C.J.S. *Indians* s. 72, pp. 781-782; and AGO 062-156.

As stated by the Supreme Court in Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930):

> A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards.

Whether a particular local ordinance applicable to non-Indians or non-Indian property unlawfully impacts on Indians or Indian property is in part a question of fact. Since I do not have the factual circumstances of the application of the local ordinances, I cannot in detail respond to your inquiry. However, it seems clear that local zoning ordinances, restricting the uses of Indian lands even though leased to non-Indians, would probably constitute an unlawful burden on Indian activities and property, unless permitted by federal law. On the other hand, local ordinances or regulations essentially applicable only to non-Indians or non-Indian property probably would not constitute such a burden.

With respect to the application of *state* laws on *Indians* or *Indian property*, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945). Congress has acted consistently upon the assumption that the states have no power to regulate the affairs of *Indians* on a reservation, Williams v. Lee, 358 U.S. 217 (1959), and therefore "State laws generally are not applicable to tribal Indians or an Indian reservation except where Congress has expressly provided that State laws shall apply." McClanahan v. Arizona Tax Commission, 411 U.S. 164, 170-171 (1973). *See also*, Bryan v. Itasca County, 48 L.Ed.2d 710 (1976).

Congress has previously authorized states to assume certain civil and criminal jurisdiction by affirmative state legislative action. Section 7 of 67 Statute 588 (P.L. 280 of the 83rd Congress, First Session, Aug. 15, 1953) states:

> The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Pursuant to s. 7, *supra*, the Florida Legislature in 1961 enacted s. 285.16, F. S., which assumed state jurisdiction over criminal offenses and civil causes of action and provided for the enforcement of the civil and criminal laws of Florida on Indian reservations. *See also* s. 285.061(4), F. S. Section 285.16 provides as follows:

> (1) The state of Florida hereby assumes jurisdiction over criminal offenses committed by or against Indians or other persons within Indian reservations and over civil causes of actions between Indians or other persons or to which Indians or other persons are parties rising within Indian reservations.
>
> (2) The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere throughout the state.

Although Congress repealed s. 7 of the act of August 15, 1953, in 1968, such repeal did not affect cession of jurisdiction made prior to repeal. 25 U.S.C.A. s. 1323(b). Barring any retrocession by the Florida Legislature to the United States based on 25 U.S.C.A. s. 1323, the laws of the State of Florida govern criminal offenses committed by or against Indians or other persons within Indian reservations, and the civil laws of the State of Florida control on such reservations as they do elsewhere in Florida, insofar as such criminal or civil laws do not conflict with federal law. *See* AGO's 072-403 and 074-77.

I find no indication that the Legislature intended that local ordinances be included in the term "civil and criminal laws of Florida" as used in s. 285.16, *supra*, so as to allow their operation over reservation Indians or reservation property within a particular county. Rather, s. 285.16 requires the civil and criminal laws of Florida to be enforced on Indian reservations "as elsewhere throughout the State." Since local ordinances are not applicable throughout the state, I do not believe they are included within the assumption of jurisdiction contained in s. 285.16, which is limited to civil and criminal laws of statewide application. *Cf.*, Santa Rosa Band of Indians v. Kings County, *supra*, pp. 659-664.

077-30—March 28, 1977

CONSTITUTIONAL LAW

LEGISLATURE MAY NOT GIVE PUBLIC SERVICE COMMISSION POWERS OVER AMTRAK WHICH CONFLICT WITH FEDERAL LAWS

To: John Vogt, Chairman, Senate Committee on Economic, Community and Consumer Affairs, Tallahassee

Prepared by: William C. Sherrill, Jr., Assistant Attorney General, and J. Elisabeth Middlebrooks, Legal Research Assistant

QUESTION:

Does the National Railroad Service Act of 1970, which established the National Railroad Passenger Corporation (AMTRAK), supersede state law so as to render unconstitutional proposed S.B. 8, which would authorize the Public Service Commission to require railroads in Florida to permit the use of their tracks for other passenger service at reasonable compensation?

SUMMARY:

Proposed S.B. 8, which authorizes the Public Service Commission to require railroads in Florida to permit the use of their tracks and facilities for other passenger service at reasonable compensation, would be unconstitutional to the extent that it conflicts with the National Railroad Service Act of 1970. Proposed S.B. 8 would conflict with the National Railroad Service Act of 1970 in that it would empower the Public Service Commission to require the National Railroad Passenger Corporation to permit the use of its tracks and facilities for other passenger service.

Proposed S.B. 8, which is being considered by the Senate Committee on Economic, Community and Consumer Affairs, amends s. 350.12, F. S., to read:

> 350.12 Duties and powers of commissioners.—

* * * * *

(2) And they shall have power:

* * * * *

(o) *To require railroads and railroad companies to permit the use of their tracks and other facilities for passenger service by the state, other governmental entities, or privately owned transportation companies at a reasonable and just compensation.* (Emphasis supplied.)

The question presented is what effect the Rail Passenger Service Act of 1970 has on the bill. In the Rail Passenger Service Act, Congress established the National Railroad Passenger Corporation with the purpose of developing the potential of modern rail service in meeting the nation's intercity passenger transportation requirements. 45 U.S.C. s. 541. The corporation's powers are set forth in 45 U.S.C. s. 545 as follows:

(a) The Corporation is authorized to own, manage, operate, or contract for the operation of intercity trains operated for the purpose of providing modern, efficient, intercity transportation of passengers and to carry mail and express on such trains; to conduct research and development related to its mission; and to acquire by construction, purchase, or gift, or to contract for the use of, physical facilities, equipment, and devices necessary to rail passenger operations. The Corporation shall, consistent with prudent management of the affairs of the Corporation, rely upon railroads to provide the employees necessary to the operation and maintenance of its passenger trains and to the performance of all services and work incidental thereto, to the extent the railroads are able to provide such employees and services in an economic and efficient manner. Insofar as practicable, the Corporation shall directly operate and control all aspects of its rail passenger service. To carry out its functions and purposes, the Corporation shall have the usual powers conferred upon a stock corporation by the District of Columbia Business Corporation Act.

The act also contains a provision, 45 U.S.C. s. 546(c), which states:

The Corporation shall not be subject to any State or other law pertaining to the transportation of passengers by railroad *as it relates to rates, routes, or service.* (Emphasis supplied.)

The act further provides in 45 U.S.C. s. 561(c):

No railroad or any other person may, without the consent of the corporation, conduct intercity rail passenger service over any route over which the Corporation is performing scheduled intercity rail passenger service pursuant to a contract under this section.

In view of these provisions, it is clear that, as drafted, S.B. 8 is in direct conflict with the Rail Passenger Service Act, to the extent that the bill affects rates, routes, and service of railroad passenger transportation within the authority of the corporation. The Supremacy Clause of the United States Constitution requires this interpretation, as state laws that conflict with the laws of the United States must yield to the federal statutes. U.S. Constitution, Art. VI, cl. 2; Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184 (1964). Therefore, the State of Florida cannot pass legislation to allow the Public Service Commission to *require* the National Railroad Passenger Corporation to permit the use of its tracks and facilities for other passenger service without violating 45 U.S.C. s. 546(c) and s. 561(c). The act, however, provides a mechanism by which states can *request* additional rail passenger service of the corporation by agreeing to reimburse the corporation for a reasonable portion of any losses incurred through such service. 45 U.S.C. s. 546(b).

The act does not seem to preclude *all* rail passenger service by the state or other privately owned transportation companies. The state might be able to provide rail passenger service as long as this service does not interfere with the service provided by the National Railroad Passenger Corporation. *See* informal Attorney General's letter to

Representative Jones, dated November 5, 1976. The state may provide rail passenger service over routes where the corporation has not established a scheduled service, but a problem may arise if the corporation should begin to provide a service over the same route. The state may also provide rail passenger service not within the authority of the corporation such as a commuter service, which is not considered "intercity" service as defined by the act. "Intercity" service is defined as all rail passenger service other than "commuter and other shorthaul service in metropolitan or suburban areas. . . ." 54 U.S.C. s. 502(5). *See In re* Penn Central Transportation Co., 457 F.2d 381 (3rd Cir. 1972). The state may not, however, conduct intercity rail passenger service over any route on which the corporation is conducting a service, unless the corporation consents to such service by the state. 45 U.S.C. s. 561(c).

Therefore, the State Public Service Commission may be authorized to regulate intrastate rail passenger service when not in conflict with federal authority as expressed in the National Railroad Service Act. Atlantic Coast Line R. Co. v. State, 143 So. 255 (Fla. 1932). The National Railroad Passenger Corporation is not a governmental agency, but is a private corporation organized under federal law, and is subject to the laws of the state in which it is located, if such laws do not interfere with the purpose of its creation or destroy its efficiency. National Railroad Passenger Corporation v. Miller, 358 F. Supp. 1321 (D. Kan. 1973), *aff'd*, 414 U.S. 948 (1973). But the question remains as to what state or privately provided rail passenger service would interfere with the National Railroad Passenger Corporation. This issue would have to be decided on a case-by-case basis and cannot be determined in this opinion.

077-31—March 28, 1977

DUAL OFFICEHOLDING

POSITIONS OF COMMUNITY COLLEGE COMPTROLLER AND STATE LEGISLATOR NOT INCOMPATIBLE

To: Curtis A. Golden, State Attorney, Pensacola

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Do the provisions of s. 5(a), Art. II, State Const., or s. 110.092(4)(a), F. S., prohibit a comptroller for a community college district from serving simultaneously as a state legislator?

2. Would said comptroller have to resign his position in order to run for the office of state legislator?

SUMMARY:

The comptroller of a community college is an employee of a community college district board of trustees; hence, the dual officeholding prohibition of s. 5(a), Art. II, State Const., does not preclude such comptroller from serving simultaneously as a state legislator, nor does such simultaneous service violate the public policy rule against holding two incompatible offices or positions. A community college comptroller is not a state employee within the Career Service System; hence, the provisions of s. 110.092(4)(a), F. S., which restrict the political activities of state employees are inapplicable to an employee of a community college district board of trustees. Section 104.31(1), F. S., does not operate to bar such employee from running for or holding legislative office, although a rule or regulation of the State Board of Education or local community college district board of trustees may prohibit such activity. Such comptroller is not required to resign to run for the office of state legislator, because s. 99.012, F. S., includes only those persons holding offices within its terms.

AS TO QUESTION 1:

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 . . . ." A legislator is clearly a state officer within the purview of the foregoing constitutional provision. *See In re* Advisory Opinion to the Governor, 79 So. 874 (Fla. 1918). Although you note in your letter that the comptroller would serve in such capacity only when not "sitting" as a legislator, this factor is not relevant for purposes of the foregoing constitutional provision. Clearly, a legislator is an officer within the meaning of s. 5(a), Art. II, for the duration of his term of office; therefore, the important consideration is whether the position of comptroller of a community college is also an "office" or whether such position is merely "employment" which is not within the scope of the constitutional prohibition. *See* AGO's 069-3, 071-209, and 074-73; and *cf.* Advisory Opinion to the Governor, 132 So.2d 1 (Fla. 1961). The State Constitution does not define "office" or "officers," but, as interpreted by the Florida Supreme Court,

> The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an employment does not comprehend a delegation of any part of the sovereign authority. The term office embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. [State v. Sheats, 83 So. 508 (1919).]

Previous opinions of this office have indicated that the statutory descriptions of the respective positions involved are important factors in determining whether or not such positions constitute "offices" or "employment." *See* AGO 071-263, holding that an assistant state attorney is not an officer for purposes of s. 5(a), Art. II, *supra*; and AGO 069-5, holding that an assistant public defender is not a governmental officer. *Compare*: *In re* Advisory Opinion to the Governor, 113 So. 913 (Fla. 1927), holding that a legislator could not be appointed to the office of State Motor Vehicle Commissioner, or to the office of "special assistant to the Attorney General," because the statute providing for such positions clearly conferred upon the incumbents ". . . governmental authority and functions with a term of office and duties prescribed by law."

In this regard, I find no statute which invests community college comptrollers with any official powers whatsoever. To the contrary, s. 230.759, F. S., states:

> Employment of all personnel in each community college shall be upon recommendation of the president, subject to rejection for cause by the board of trustees and subject to the rules and regulations of the state board relative to certification, tenure, leaves of absence of all types, including sabbaticals, remuneration, and such other conditions of employment as the Division of Community Colleges deems necessary and proper; and to policies of the board of trustees not inconsistent with law.

Moreover, it has been held that members of community college boards of trustees are not officers within the meaning of s. 5(a), Art. II, *supra*, as such persons are officers of a special district rather than of the state, county, or municipality. *See* AGO's 075-153 and 073-47.

Accordingly, I am of the view that the position of community college comptroller constitutes a position of employment; therefore, the simultaneous service of an individual as a comptroller of a community college and as a member of the Florida Legislature does not violate the dual officeholding prohibition contained in s. 5(a), Art. II, State Const.

There still remains, however, the question of whether such service would violate the common law rule prohibiting the holding of incompatible positions. Disqualifying incompatibility exists under the rule when there is a conflict or clash between the two employments or positions as 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.]

Applying this definition to the instant inquiry, I see no significant clash between the two respective positions which would constitute a violation of the common law. Although the Legislature in the exercise of its lawmaking powers appropriates funds to the Division of Community Colleges in the Department of Education, which funds may be used to pay the salary of the comptroller, the authority to set the comptroller's salary has been delegated to the community college district boards of trustees in accordance with regulations of the State Board of Education. *See* ss. 230.753(2)(a), 230.754(2)(a), 230.760, 230.752, and 230.769, F. S. *See also* Ch. 6A-14.247(5)(b) and (c), F.A.C.; *also* Ch. 6A-14.46, F.A.C., providing that "each board [of trustees] shall annually adopt . . . a salary schedule for employees of the community colleges . . . ."

As to whether the community college comptroller would violate the terms of s. 110.092, F. S., by serving as a state legislator, I believe this question must also be answered in the negative. Section 110.092(4)(a) provides, in pertinent part, that

> . . . no employee in the *classified service* shall:
> (a) Hold, or be a candidate for, public or political office *while in the employment of the state* or take any active part within any period of time during which he is expected to perform services for which he receives compensation from the state. . . . (Emphasis supplied.)

The application of the foregoing statute is limited by its terms to employees within the State Career Service System. The Legislature, however, has deemed each community college district authorized by law and the Department of Education to be "an independent, separate legal entity created for the operation of a community college." Section 230.753, F. S.

Moreover, s. 230.753(2)(a), F. S., provides that community college boards of trustees possess "all powers necessary and proper for the governance and operations of the respective community colleges." Further, s. 230.7535, F. S., provides that "no department, bureau, division, agency, or subdivision of the state shall exercise any responsibility and authority to operate any community college of the state, except as specifically provided by law or regulations of the State Board of Education."

In light of the foregoing statutory provisions, I am of the view that a community college comptroller is not an employee employed by a state agency within the meaning of ss. 110.042 and 216.011, F. S. *Cf.* AGO 076-202, wherein a similar conclusion was reached with respect to employees of district mental health boards. Accordingly, s. 110.092(4)(a), F. S., is not applicable to a community college comptroller.

Furthermore, although not raised by your letter, it should be noted that s. 104.31, F. S., the "Little Hatch Act," which regulates the political activities of state, county, and municipal employees, would likewise be inapplicable to a community college district comptroller seeking to run for or hold the office of state legislator. Assuming *arguendo* that s. 104.31, *supra*, is applicable to employees of a community college district, s. 104.31(1)(c) provides that "the provisions of this section shall not be construed so as to prevent any person from becoming a candidate for any elective office in this state." Accordingly, a community college district comptroller may serve simultaneously as a state legislator except as may otherwise be provided by rule or regulation of the State Board of Education or of the local community college district board of trustees. *Cf.* Resedean v. Civil Service Bd. of City of Pensacola, 332 So.2d 150 (1 D.C.A. Fla., 1976), wherein the court upheld a municipal code provision prohibiting municipal employees from becoming candidates; Jones v. Board of Control, 131 So.2d 713 (Fla. 1961), upholding a rule promulgated by the Board of Regents which prohibited university employees from seeking election to public office.

AS TO QUESTION 2:

Section 99.012(2), F. S., provides, in pertinent part:

> No individual may qualify as a candidate for public office who holds another elective or appointive office, whether state, county or municipal, the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office not less than 10 days prior to the first day of qualifying for the office he intends to seek. . . .

The Resign-To-Run Law is applicable only to public officers, and not to persons holding positions of employment; AGO 071-347. In view of the discussion set out in the answer to your first question, your second question must be answered in the negative.

077-32—March 28, 1977

CONSUMER PROTECTION

TELEPHONED SOLICITATION NOT "HOME SOLICITATION SALE"—DECEPTIVE COLLECTION PRACTICES—UNLAWFUL RECORDING

To: Jane W. Robinson, Director, Division of Consumer Services, Department of Agriculture and Consumer Services, Tallahassee

Prepared by: Bernard S. McLendon, Assistant Attorney General, and Laura Bamond, Legal Intern

QUESTION:

Do "telephone solicitations" made by business concerns qualify as "home solicitation sales" as defined in s. 501.021, F. S.?

SUMMARY:

"Telephone solicitations" made by business concerns do not qualify as "home solicitation sales" as defined in s. 501.021, F. S.

The recording of conversations between telephone solicitors and customers by telephone solicitors without the consent of the customer violates s. 934.03, F. S.

Threatening telephone calls made by business concerns to contracting consumers to the effect that their "credit rating will be ruined" and that, should the case go to court, they will "automatically lose" are acts and practices that violate s. 5 of the Federal Trade Commission Act and s. 501.204, F. S., which prohibit unfair and deceptive acts and practices in the conduct of any trade or business. These practices are also in violation of part V, Ch. 559, F. S., entitled "Consumer Collection Practices."

Your question is answered in the negative for the reasons set forth below.

In AGO 070-139, my predecessor opined that telephone solicitation sales do not qualify as home solicitation sales because:

> Section 501.025, F. S., provides that the buyer's rights arise when "the buyer *signs* an agreement or offer to purchase. . . ." (Emphasis supplied.) Section 501.031, F. S., provides that the "sale shall be evidenced by a writing. . . . The seller must obtain from the buyer his signature to a written agreement or offer to purchase. . . ." The solicitation, offer, and acceptance via telephone is necessarily an oral contract. The buyer's rights under the act only exist when there is a signed contract. Therefore, because of physical impossibility, this act does not apply to sales via telephone.

I further clarified this question in AGO 075-31, reasoning that central to the definition of a home solicitation sale is "personal solicitation." The opinion specifically states as follows:

> The dominant characteristic of a home solicitation sale is *personal* contact between the seller and the buyer at a place other than the seller's business. It is that *person-to-person* contact that is being defined by the word "personal." (Emphasis supplied.)

The above-cited opinions are consistent with the Trade Regulation Rules promulgated by the Federal Trade Commission relating to the cooling-off period for door-to-door sales (16 C.F.R. 429.1). This rule explicitly excepts from home solicitation sales those sales conducted and consummated entirely by mail or telephone and without any other contact between the buyer and seller or its representatives prior to delivery of the goods or performance of the services.

The factual basis for your inquiry involves situations wherein consumers are contacted by telephone at home and offered a particular product or service. Should the consumer accept, a verification call is placed by the company and tape recorded as "proof" of such acceptance. Shortly thereafter, the consumer receives a payment booklet and begins making payments. Subsequently, if problems occur and the consumer wishes to cancel, the company uses the tape-recorded telephone conversation as "leverage" to force the individual to continue making payments. Often, when further payments are not received, the consumer receives dunning letters and threatening telephone calls to the effect that his "credit rating will be ruined" and that, should the case go to court, he will "automatically lose." Throughout the entire transaction, the consumer is not provided an opportunity to sign a written contract.

The above acts and practices come within the proscription of s. 5 of the Federal Trade Commission Act and s. 501.204, F. S., which prohibits unfair and deceptive acts and practices in the conduct of any trade or business, for such telephone solicitations are misleading in themselves. Furthermore, these collection efforts are deceptive and in violation of Ch. 501, F. S., in addition to the Guides Against Debt Collection Deception promulgated by the Federal Trade Commission (16 C.F.R. 237). Under these guides, any person or organization attempting to collect money debts for itself or others "shall not use deceptive representation or deceptive means to collect or attempt to collect debts or to obtain information concerning debtors" (16 C.F.R. 237.1). The practices you have described also violate certain provisions of part V, Ch. 559, F. S., entitled "Consumer Collection Practices." The prohibited practices specifically outlined in s. 559.72 apply to any "person"; and "person" has been held to mean persons generally and not just collection agencies. Cook v. Blazer Financial Services, Inc., 332 So.2d 677 (1 D.C.A. Fla., 1976).

Although not specifically asked, the background situation you have presented raises the question of whether telephone solicitations where the seller records the consumer's acceptance, apparently without the knowledge or consent of the consumer, violate the "Security of Communications" provisions of Ch. 934, F. S. This question is answered in the affirmative for the reasons set forth below.

In State v. News Press Publishing Co., 338 So.2d 1313 (2 D.C.A. Fla., 1976), the court, in discussing Florida's "Security of Communications Act," noted that, effective October 1, 1974, s. 934.03(2)(d), F. S., was amended to prohibit a party to a conversation from recording the conversation without the consent of *all* parties to the same, provided the conversation is not public as provided by s. 934.02(2) or the intercept is not conducted for the purpose of obtaining evidence of a criminal act under s. 934.03(2)(c). The court observed that this amendment to s. 934.03 strongly implied ". . . that the legislature intended to allow each party to a conversation to have an expectation of privacy from interception by the other party." State v. News Press Publishing Co., *supra* at 1316. This requirement, of course, differs from that contained in the Omnibus Crime Control Act of 1968, 18 U.S.C. 32510, *et seq.*, the federal counterpart to the Florida intercept law, which has been interpreted to mean that if one of the parties to a conversation is engaged in recording the same, an illegal intercept cannot be said to have occurred. United States v. Turk, 526 F.2d 654 (5th Cir. 1976); Smith v. Wenker, 356 F.Supp. 44 (S.D. Ohio 1972).

Similarly, in AGO 076-195 this office advised a police chief that the monitoring or recording of conversations on department-owned telephones pursuant to a police regulation known to all members and employees of the police department violated s. 934.07, F. S., since it did not remove the expectations of privacy of individuals placing calls *into* the department under certain circumstances described therein. It was suggested that, prior to any recording or monitoring, a system be utilized whereby, prior to the conversation, the party on the line who did not have knowledge of the monitoring be informed of this fact so that if the conversation began, consent to monitoring, either express or implied, had been given by each party, thus complying with s. 934.03, F. S.

Accordingly, the procedure outlined in your letter whereby telephone solicitation companies record verification calls without the consent of the consumer violates s. 934.03, F. S.

077-33—March 29, 1977

PUBLIC RECORDS LAW

APPLICABILITY TO FILES OF COMMISSION ON ETHICS

To: Lawrence A. Gonzalez, Executive Director, Commission on Ethics, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Are all documents contained in the advisory opinion files of the Commission on Ethics public records open to public inspection even if they contain the name of a public officer or employee who has not consented to the use of his or her name in a published advisory opinion?

SUMMARY:

Documents contained in the advisory opinion files of the Commission on Ethics are subject to public inspection and examination even if they contain the name of a public officer or employee who has not consented to the use of his or her name in a published advisory opinion rendered by the commission.

Section 112.322(3)(a), F. S. (1976 Supp.), provides:

> . . . An advisory opinion shall be rendered by the commission, and all of said opinions shall be numbered, dated, and *published without naming the person making the request, unless such person consents to the use of his name.* (Emphasis supplied.)

In those cases in which public officers and employees choose to remain anonymous, the Ethics Commission publishes its advisory opinion with the names of such persons omitted. However, the commission has received requests for documents contained in the opinion request files which often contain the requesting person's name. The commission is unclear as to whether those documents should be disclosed, since to release them would appear to thwart the language emphasized above.

Section 119.011, F. S., defines public records 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.

Documents and other materials received by the commission in connection with the transaction of its official business under s. 112.323(3), F. S. (1976 Supp.), *i.e.*, the rendering and publication of advisory opinions establishing standards of public duties under part III of Ch. 112, F. S., are clearly public records within the contemplation of s. 119.011. *Cf.* ss. 112.322(2)(c) and (d), F. S. (1976 Supp.), 112.3146, and 112.324, F. S. Section 119.07(1), F. S., requires that every person having custody of public records permit any person to inspect and examine public records at reasonable times, under reasonable conditions, and under supervision by the custodian of the records, unless exempted from the provisions of ss. 119.01 and 119.07(1), F. S., by the terms of s. 119.07(2), F. S.

Nothing in s. 112.322(3)(a), F. S. (1976 Supp.), purports to limit access to the opinion files of the commission or to make the same confidential or to specifically exempt *any* document or record made or received by the commission in the course of rendering advisory opinions to public officers, candidates for public office, or public employees from the mandatory inspection provisions of s. 119.07(1), F. S. It only provides for the publication of anonymous opinions in certain circumstances. *Cf.* s. 112.322(2)(c) and (d), F. S. (1976 Supp.), *with* s. 112.324, F. S., and Gannett Co., Inc. v. Goldtrap, 302 So.2d 174 (2 D.C.A. Fla., 1974); Caswell v. Manhattan Fire & Marine Insurance Co., 399 F.2d 417

(5th Cir. 1968). The question is then presented as to whether s. 112.322(3)(a) constitutes an implied exception to s. 119.07(1), F. S., so as to exempt such documents from the operation of s. 119.01 and s. 119.07(1), F. S. *Cf.* State v. Pace, 159 So. 679, 681 (Fla. 1935), stating that "where the Legislature has preserved no exception to the provisions of the statute (C.G.L. 490, from which s. 119.01, F. S., is derived), the courts are without *legal sanction* to raise such exceptions by implication, the policy of state statutes being a matter for the Legislature and not for the judiciary to determine."

Generally, statutes enacted for the public's benefit, such as those relating to open public meetings or records, are entitled to a liberal construction in favor of the public; in the instant case, to personal inspection by any member of the public in accordance with s. 119.07(1), F. S. *Cf.* AGO 075-48. Being in derogation of the express public policy of the state, *see* s. 119.01, F. S., statutes purporting to create exceptions to the rule favoring "openness" in government should not be given broader interpretation than is necessary to accomplish their *specific purpose. See* Stivahtis v. Juras, 511 P.2d 421 (Ore. 1973). Since the specific purpose of s. 112.322(3)(a) appears to be addressed to the publication of anonymous opinions by the commission in those cases where the person requesting the opinion has not consented to the use of his or her name, this purpose should not be expanded by implication to exclude from ss. 119.01 and 119.07(1) other documents contained in the files of the commission but not specifically mentioned at s. 112.322(3)(a). Moreover, under the rule *expressio unius est exclusio alterius*, the statute operates on those things enumerated or expressly mentioned and excludes from its operation all things not expressly mentioned. Thayer v. State of Florida, 335 So.2d 815, 817 (Fla. 1976); Interlachen Lakes Estates, Inc. v. R. Snyder, Jr., 304 So.2d 433, 434 (Fla. 1974); Dobbs v. Sea Isle Hotel *et al.*, 56 So.2d 341, 342 (Fla. 1952); and *cf.* State v. Pace, *supra.* Section 112.322(3)(a) is addressed only to the publication of advisory opinions and to no other documents or records. Since no other statute has been found which exempts documents and records in the advisory opinion files of the commission from s. 119.01 and s. 119.07(1), or limits public access thereto, or makes such documents and such files confidential, your question must, therefore, be answered in the affirmative.

077-34—March 29, 1977

TAXATION

OCCUPATIONAL LICENSE ON COIN-OPERATED MACHINES—PAYABLE BY MACHINES' LESSEE WHEN LESSOR NOT IN MUNICIPALITY

To: Robert R. Crittenden, Lake Alfred City Attorney, Winter Haven

Prepared by: Harold F. X. Purnell, Assistant Attorney General

QUESTIONS:

1. Is the nonresident owner/lessor of coin-operated machines, who does not operate a permanent place of business in a city, liable for city occupational license tax based on the leasing of said machines to X, where such machines are to operate in X's place of business within the city?

2. Is the lessee of such machines subject to the occupational license tax authorized by Ch. 205, F. S.?

SUMMARY:

The operation of coin-operated amusement devices within a municipality constitutes a taxable business or occupation under s. 205.042, F. S. Where a nonresident owner of coin-operated machines leases such machines to a lessee who will operate and manage such machines at the lessee's place of business within the municipality, the lessee is liable for the municipal occupational license tax upon said machines.

Your questions involve essentially the following situation. The City of Lake Alfred has an occupational license tax on gaming and similar devices which are coin operated. The owner of certain coin-operated machines, who is not a resident of the city and who maintains no place of business within the city, leases certain coin-operated gaming machines to X for use by the general public at X's place of business, which is located within the city. You desire to know whether either the lessor or the lessee, or both, are liable for the occupational license tax.

The case law in this state leaves no doubt that the operation of coin-operated gaming machines within a municipality on a permanent basis constitutes a taxable occupation pursuant to s. 205.042, F. S.

In City of Miami v. I.C. Sales, Inc., 276 So.2d 214 (3 D.C.A. Fla., 1973), two vending machine companies challenged the City of Miami's municipal occupational license tax imposed on vending machines operated within said city. The court, in upholding the tax in question, noted the enactment, during the pendency of the appeal, of Ch. 72-306, Laws of Florida, which created the present Ch. 205, F. S. In reference to this new enactment the court held:

> The City of Miami was duly empowered to impose the occupational license taxes in question. Operation of such machines in the city was properly conditioned upon the issuance of licenses therefor, and the city was entitled to withhold the issuance of such licenses, for the period involved, in the absence of payment of the occupational license fees thus imposed. (*Supra* at 218)

In City of Lakeland v. Lawson Music Company, Inc., 301 So.2d 506, 507 (2 D.C.A. Fla., 1974), the court had before it the issue of whether a nonresident owner of amusement devices could be held liable for the occupational license tax of the municipality in which the machines were located. The court posed the question before it in the following manner:

> Do coin-operated music and amusement machines and devices constitute "permanent business locations" within a municipality which are subject to an occupational license tax for their operation within the limits of a municipality under s. 205.042, Florida Statutes?

The court in answering this question in the affirmative noted that the owner of the music and amusement devices had its principal place of business in Winter Haven, rather than in Lakeland, where the machines upon which the tax was sought to be imposed were located. The court further noted that the owner leased the space upon which the machines were located from Lakeland business establishments. The court then concluded:

> Suffice to say, that in this case it can be safely said that more than a minimum contact exists, for it is clear that Lawson's business may very well cease to exist but for the space it leases from commercial enterprises for placement of its machines. These satellites, therefore, are, in logic, Lawson's business locations.

As to the question of permanency of the location of the music and amusement devices at the place of business within which Lawson rented space, the court ruled:

> In tax cases the requirement of permanency has been found satisfied where presence is consistent with continuity and not sporadically or temporarily present. (*Supra* at 508)

Finally, in AGO 073-399, a vending machine was considered to be a permanent business location or a branch office, the operation of which constituted a single taxable privilege upon which one license tax may be levied.

Pursuant to s. 205.042, F. S., the municipal occupational license tax is assessed for the "privilege of engaging in or managing a business, profession, or occupation" within the taxing municipality's jurisdiction. Since the operation of coin-operated gaming devices clearly constitutes a taxable business or occupation, it therefore becomes necessary to determine which individual or entity is exercising the privilege of engaging in or managing such business or occupation.

In both I.C. Sales, Inc. v. City of North Miami, *supra*, and City of Lakeland v. Lawson Music Company, *supra*, it was the machine owner who provided for the operation and

management of the machines at a permanent business location within the taxing municipality. In both such cases, the owner-operator of the coin-operated machines leased space in commercial establishments upon which the machines were located, rather than leasing the actual machines themselves. Hence, in each case, it was the machine owner-operator who was held to be exercising the taxable privilege of engaging in or managing the business of coin-operated machines at a permanent business location within the taxing municipality.

Your inquiry notes that rather than the owner-operator leasing space within the business on which the machines will be located, the owner of the coin-operated machines leases the actual machines themselves to individuals for use by the general public at the lessee's place of business within the City of Lake Alfred. It must therefore be assumed that the lessee operates and manages the machines at the lessee's place of business. This being so, the lessee is therefore liable for the payment of the occupational license tax on such machines.

It appears from your opinion request that s. 10-4 of the Lake Alfred Municipal Code may be applicable in the instant situation. Such section provides:

> Whenever in any reasonable construction of this chapter one or more license taxes shall be collectible from the same person for the carrying on of any business, profession or occupation where the same are jointly conducted at the same place of business, only the license which requires the payment of the largest sum of money shall be required.

It is uncertain from the opinion request whether the lessee of the gaming devices is carrying on more than one taxable business or occupation at the same place of business, and, therefore, consideration must be given to the possible application of s. 10-4 to the instant factual situation.

Subject to the above-stated factual conditions, question number 1 posed at the outset of this opinion is answered in the negative, and question number 2 is answered in the affirmative.

077-35—March 29, 1977

MUNICIPALITIES

POLICE OFFICERS SERVING MORE THAN ONE MUNICIPALITY—PROCEDURE FOR AUTHORIZATION

To: Grace D. Walker, Mayor, Melbourne Village

Prepared by: Charles F. McClamma, Assistant Attorney General

QUESTION:

> **Is it legal for police officers to exercise their police powers in two jurisdictions?**

SUMMARY:

> **A police officer may exercise his police powers outside the territorial limits of his municipality under certain limited circumstances, such as when in fresh pursuit or when summoned by another officer. However, if a municipality is to routinely utilize a police officer, who is employed by another municipality, there must be compliance with the provisions of s. 4, Art. VIII, State Const., including the approval of the electorate of the municipality.**

Previous Attorney General Opinions have outlined circumstances in which a police officer may exercise police power outside the territorial limits of his municipality. In AGO 073-59 this office noted that s. 901.25, F. S., gives a municipal police officer the authority to make fresh pursuit arrests outside of his municipality but within the same county. It

was opined that, if in the course of such pursuit or after an arrest following the pursuit, a person knowingly obstructs the officer, contrary to ss. 843.01 and 843.02, F. S., the officer may arrest such person even though he is outside the officer's municipality. And, in AGO's 056-29 and 060-9, it was noted that a municipal police officer, in response to a request from a highway patrolman or deputy sheriff, has the authority, pursuant to s. 901.18, F. S., to assist the summoning officer in effecting an arrest outside his municipality's boundaries.

Thus, the answer to your question is "yes." Police officers may exercise their police powers in two jurisdictional limits, although only in certain narrowly prescribed circumstances. However, from the factual context out of which your question arose, it appears that what you really seek to know is whether a municipality may on a regular basis utilize a police officer employed by another municipality to enforce its own laws.

You informed me that Melbourne Village police officers took oaths of office in West Melbourne, and that West Melbourne police officers took oaths of office in Melbourne Village. Coordinated schedules were established and police officers routinely patrolled in both municipalities. There appear to be no statutory or constitutional prohibitions against what you have attempted to accomplish. However, the method used to achieve the goal is insufficient. More is needed than merely requiring police officers to take oaths of office.

Under s. 4, Art. VIII, State Const., any function or power of a county, municipality, or special district "may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee. . . ." As was said in AGO 074-220:

> . . . [U]nder this constitutional authority, with electorate approval, each city could contract with the other for the performance of law enforcement duties by its police officers in the other city, under the general supervision of a board composed of the chiefs of police of each city. Under such a plan, the integrity of the police forces of each city would be maintained; and as the policemen of one city would be enforcing the laws of the other city under contractual authority *expressly authorized by the constitution*, no charge of unlawful delegation of authority could be made.

Thus, your question, as restated, is also answered in the affirmative, but with the proviso that the requirements of s. 4, Art. VIII, State Const., be met.

077-36—March 29, 1977

ANTINEPOTISM LAW

OFFICER WHO MARRIES EMPLOYEE—MAY NOT RECOMMEND SPOUSE FOR PROMOTIONS

To: David L. Reid, Palm Beach County Property Appraiser, West Palm Beach

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

If a county property appraiser marries an employee of his office, may that employee continue working under the county property appraiser?

SUMMARY:

If a county property appraiser marries an employee of the property appraiser's office, that employee may continue working in his or her same position and may participate in routine salary increases, but may *not* be promoted or advanced, or recommended or advocated for same, by the property appraiser who has become the employee's spouse.

In your letter, you emphasized that you are an "elected constitutional officer." Neither the inclusion of a county property appraiser among those county officers set forth in s. 1(d), Art. VIII, State Const., nor the elective nature of the office of property appraiser has any effect on the applicability to a county property appraiser of the prohibitions of s. 116.111, F. S., the antinepotism statute. The prior opinions of this office construing s. 116.111 have often involved elected constitutional officers such as clerk of the circuit court (AGO 073-444), tax assessor (AGO 073-3), sheriff (AGO 073-347), and county commissioner (AGO 073-75). The clear language of s. 116.111(1)(a) and (b), in which "agency" and "public official" are defined for purposes of application of s. 116.111, leaves no doubt that a county is an "agency" and a county property appraiser—as a county officer—is a "public official."

Having established that you are subject to the prohibitions of s. 116.111, F. S., I turn to the question of whether your contemplated marriage to an employee working under you in the property appraiser's office would result in a violation of s. 116.111 if that employee continues working after your marriage. In your letter, you stated your view that this question has been answered by previous opinions of this office. I agree. The official view of this office regarding situations such as yours is that the marriage does not require termination of a validly hired employee who becomes the spouse of the appointing or employing officer. The employee in such a situation may continue working in his or her same position, but may not be promoted or advanced thereafter by the related public official or upon the official recommendation of the related public official. In AGO 070-18, it was held:

> . . . a change in the marital status of the appointing officer, or of a relative of such officer, could effect a change in the relationship of an existing employee to the official. In these circumstances, since the *original* appointment was not based on a blood or marital relationship, the reason for the anti-nepotism rule ceases insofar as the *employment* of such employee is concerned and should not be applied to require the discharge of such employee. Our statute prohibits the "promotion or advancement" of an employee by an official when the prohibited relationship exists; and it is this provision of the statute, rather than the "appointment" or "employment" provision, that is applicable when a prohibited relationship comes into existence subsequent to a valid appointment or employment.

In regard to the prohibition against promotion or advancement, which would be applicable in your situation, it was held in AGO 070-76 that a public official may include a relative in a routine salary increase. That holding was based on the premise that the terms "advance" and "promote" contemplate an elevation in station or rank, rather than merely an increase in salary in the same position. This interpretation was recently approved in the case of Slaughter v. City of Jacksonville, 338 So.2d 902 (1 D.C.A. Fla., 1976).

The court quoted from AGO 070-76 and stated, at 904:

> [H]ad the legislature intended for the term "advancement" to include a salary increase without an increase in grade, it could very easily have said so. It is our view that it is only an increase in grade which elevates an employee to a higher rank or position of greater personal dignity or importance and is an advancement or promotion.

The specific relationship of husband and wife was the subject of AGO 074-255, in which approval was given to a husband and wife working together in the same agency, so long as neither promotes or advances the other or recommends or advocates the promotion or advancement of the other. In AGO 074-255, I stated the following in regard to the purpose and effect of s. 116.111:

> The antinepotism statute was clearly not intended to prevent relatives from working together in public employment. The statute simply prohibits one who has the authority to employ, appoint, promote, advance, or recommend same, from using that authority with respect to his or her own relative.

It is thus my opinion that, should you marry an employee of your office whose initial hiring was valid, that employee may continue working in her same position and may

participate in routine salary increases, but may *not* be promoted or advanced, or recommended or advocated for same, by you.

077-37—March 31, 1977

CAREER SERVICE SYSTEM

WHEN EMPLOYEES MAY BE REIMBURSED LEGAL FEES IN PROCEEDINGS RELATING TO TERMINATION

To: Jack D. Kane, Executive Director, Department of General Services, Tallahassee

Prepared by: Betty Steffens, Assistant Attorney General

QUESTIONS:

1. What status is to be accorded a hearing for state career service employees held before the Governor and Cabinet sitting as the head of a state agency to determine if just cause for dismissal existed?
2. Would legal fees incurred by employees for such a hearing be reimbursable under provisions of Ch. 110, F. S.?

SUMMARY:

Legal fees incurred by career service employees at pretermination hearing before an agency head are not reimbursable under s. 110.061(3), F. S.; only the Career Service Commission may award legal costs to state career service employees and only if incurred during the prosecution of an appeal against a state agency conducted before the commission.

A special subcommittee of the House Appropriations Committee transmitted to Governor Askew a resolution that stated that the committee failed to find confidence in, among others, two permanent career service employees of the Department of General Services. The Governor directed that the matter be presented, at a special hearing, to the Governor and Cabinet who, sitting as the head of the Department of General Services, considered the report of the special subcommittee over a period of several days. The purpose of the hearing was to determine whether the permanent career service employees should be dismissed.

The hearing before the Governor and Cabinet sitting as the head of the Department of General Services to determine if "cause" existed for dismissal of career service employees took place *prior* to any disciplinary action by the agency and as such constituted a pretermination hearing. Chapter 110, F. S., governing the Career Service System, and companion personnel rules and regulations, Ch. 22A, F.A.C., do not provide for pretermination hearings within the Career Service System. Such hearings are, for purposes of Ch. 110, discretionary with the agency. Thus, the hearing before the Governor and Cabinet sitting as the head of the Department of General Services to determine whether "cause" existed for dismissal of career service agency employees is not a proceeding specifically within the parameters of the State Career Service System. Your first question is answered accordingly.

In answer to your second question concerning recoupment of legal expenses incurred by career service employees at a pretermination hearing before an agency head, I must refer to the direct statutory provision. Section 110.061(3), F. S., grants the Career Service Commission power to award ". . . reasonable attorney's fees, witness fees, and other out-of-pocket expenses incurred during the prosecution of appeal against an agency in which the commission sustains the employee." Under this provision *only* the Career Service Commission may award legal costs and *only* if incurred during an appeal against the affected agency before the commission. Thus, legal costs incurred by career service employees in pretermination hearings before an agency head other than the Career Service Commission are not reimbursable under s. 110.061(3).

The issue of attorney's fees in postcommission proceedings was addressed by the court in Board of Regents v. Mahler, 321 So.2d 99 (1 D.C.A. Fla., 1975). Upon examination of s. 110.061(3), F. S., the court denied attorney's fees and stated, at p. 100:

> It is settled law that attorney's fees under such circumstances may not be awarded unless provided by statute or contract. This issue, therefore, to be by us resolved is whether F. S. 110.061(3) authorizes the award of attorney's fees incurred during the prosecution of a proceeding in this Court or whether same only authorizes such fees incident to procedures before the Career Service Commission. Our reading of the above quoted statute leads us to the inescapable conclusion that the statute by its very own terms *relates only to proceedings before the Career Service Commission.* Proceedings subsequent to the disposition of a cause by the Career Service Commission are neither mentioned nor alluded to. There is no language in the statutes which we find may be construed to be applicable to post-commission proceedings. (Emphasis supplied.)

I believe the same rationale used by the court in dealing with attorney's fees incurred in postcommission proceedings can be applied to precommission proceedings such as outlined in your letter. *Cf.* AGO 075-152. Thus, I must conclude that neither the Department of General Services nor the Governor and Cabinet sitting as its agency head is authorized by Ch. 110, F. S., to award legal costs or expenses to state employees in the circumstances implicit in your questions. Authorization for the department to expend funds for reimbursement of legal fees would have to be found under some other statute. *Cf.* ss. 111.07 and 111.08.

077-38—March 31, 1977

COUNTIES

NONCHARTER COUNTIES NOT EMPOWERED TO LEND MONEYS TO DISTRICT SCHOOL BOARDS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: David K. Miller, Assistant Attorney General

QUESTION:

Under general law, may a board of county commissioners in a noncharter county lend county funds to the district school board, if such funds are derived from county ad valorem taxes or other sources?

SUMMARY:

Noncharter counties are not authorized by general law to lend county funds derived from ad valorem tax revenue or from other sources to district school boards.

The powers of a noncharter county to use county funds are the same regardless of whether the funds are derived from county ad valorem tax revenue or some other source. Consequently, I shall treat your questions as a single question. Until the matter is settled by judicial action, it appears that the question should be answered in the negative.

Noncharter counties have no constitutional powers of their own. Rather, they may exercise only those powers which are conferred on them by general or special law. Section (1)(f), Art. VIII, State Const. *See also* State *ex rel.* Volusia County v. Dickinson, 269 So.2d 9, 11 (Fla. 1972); Davis v. Gronemeyer, 251 So.2d 1 (Fla. 1971); Weaver v. Heidtman, 245 So.2d 295 (1 D.C.A. Fla., 1971); and the Commentary in 26A F.S.A. 270 (1970). The authority for noncharter counties to lend county funds to a district school board must therefore appear, if at all, in the powers granted to noncharter counties by the Legislature.

Section 125.01(1), F. S., spells out the general powers of noncharter counties. Your inquiry focuses particularly on paragraph (w) of that subsection, which reads:

> 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:
>
> * * * * *
>
> (w) Perform any other acts not inconsistent with law which are in the common interests of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

The meaning of this provision has not been extensively litigated. If construed literally, it would vest plenary powers of self-government in the noncharter counties and would eliminate the necessity for the remaining provisions in s. 125.01(1). This result would negate the spirit and meaning of s. 1(f), Art. VIII, State Const.

There is, however, substantial authority which requires that this provision be narrowly construed. The courts have frequently limited county powers to those which are expressly granted in the statutes, or necessarily implied therein, and have declined to assume that county actions are authorized where the statutory authority is not clear. Crandon v. Hazlett, 26 So.2d 638 (Fla. 1946); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); White v. Crandon, 156 So. 303 (Fla. 1934); State *ex rel.* Burr v. Jacksonville Terminal Co., 71 So. 474 (Fla. 1916); Fla. Ind. Comm'n *ex rel.* Special Disability Fund v. Nat'l Trucking Co., 107 So.2d 397 (1 D.C.A. Fla., 1951). *Also see* AGO's 076-173, 076-20, and 075-120. Moreover, the courts have construed provisions like that in s. 125.01(1)(w), F. S., under the principle of *ejusdem generis,* which limits general words or phrases following an enumeration of specific things to things of the same class or genus as those comprehended by the preceding specific terms. *See* Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968); Roberts v. American Nat'l Bank, 121 So. 554 (Fla. 1929); Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918). Applied to s. 125.01(1)(w), *ejusdem generis* requires that only activities in the nature of those described elsewhere in the subsection be deemed authorized. *Cf.* State v. Orange County, 281 So.2d 310, 314 (Fla. 1973) (Dekle, J., dissenting), stating that the rule of *ejusdem generis* applied to s. 6(b) of Art. VIII, State Const., so as to eliminate the possibility of other powers being inferred from a general provision as to the continuance of the status of counties of the state.

The only authorities directly construing s. 125.01(1)(w), F. S., suggest that a narrow construction is appropriate. In Janis Development Corp. v. City of Sunrise, 40 Fla. Supp. 41 (17th Jud. Cir., 1973), *aff'd,* 311 So.2d 371 (4 D.C.A. Fla., 1975), the circuit court construed the provision as not authorizing Broward County to impose a variable "land use fee" on new dwelling units, the amount of the fee depending on the intensity of the development. The provision is not discussed in the opinion of the Fourth District Court of Appeal. In State v. Orange County, *supra,* Justice Dekle's dissenting opinion suggested that the provision was not "sufficiently definite" to authorize counties to issue capital improvement bonds repayable from racetrack and jai alai revenue without a referendum. A majority of the court validated the bonds under the authority of s. 125.01(1)(c), (r), and (t), F. S. Based on these authorities, I construed the provision in AGO 075-91 not to allow a noncharter county to adopt a rent control ordinance. These authorities are not directly related to the instant question, but they do augur a restrictive construction of the statute.

The remainder of s. 125.01(1), F. S., contains no provision authorizing noncharter counties to lend money to district school boards or to any other governmental unit. Under the 1885 Constitution there developed a large body of case law which specifically forbade the appropriation or transfer of public funds from one governmental unit to another. *See, e.g.,* Okaloosa County Water and Sewer Dist. v. Hilburn, 160 So.2d 43 (Fla. 1964); Prescott v. Board of Public Instruction of Hardee County, 32 So.2d 731 (Fla. 1947); Amos v. Matthews, 126 So. 308 (Fla. 1930). The only exception made was that authorized and provided for under s. 15, Art. IX, State Const. 1885, with respect to pari-mutuel pool excise tax revenue, essentially restated in s. 7, Art. VII, State Const. Further, county funds were required to be spent only for "county purposes." Town of Palm Beach v. City of West Palm Beach, 55 So.2d 566 (Fla. 1951); Lynn Haven v. Bay County, 47 So.2d 894 (Fla. 1950). County purposes were held to be separate and distinct from school district purposes. Hamrick v. Special Tax Dist. No. 1, 178 So. 406 (Fla. 1938). *See also* AGO 071-109 and the authorities cited therein. Moreover, the Florida Supreme Court has held on

several occasions that it is a violation of an elemental principle in the administration of public funds for one who is charged with the trust of their proper expenditure not to apply those funds to the purposes (here, "county purposes") for which they are raised. *See* Dickinson v. Stone, 251 So.2d 268, 273 (Fla. 1971); Taylor v. Williams, 196 So. 214, 217 (Fla. 1940); Supreme Forest Woodmen Circle v. Hobe Sound Co., 189 So. 249, 250 (Fla. 1939); Oven v. Ausley, 143 So. 588, 589 (Fla. 1932). This case law supports the proposition that lending money to a district school board is not a proper "county purpose" under the 1968 Constitution for which county funds may be spent.

I have examined other statutory provisions which generally authorize county spending and contracting activity. *See* s. 125.01(1)(p), F. S. (allowing counties to enter into agreements with other governmental agencies for performance of authorized functions); s. 125.01(1)(r), F. S. (allowing counties to borrow and expend money); s. 125.01(3), F. S. (allowing counties to expend funds, enter into contracts, and carry out all implied powers necessary or incident to the enumerated powers); and s. 163.01, F. S. (allowing local governmental units to enter interlocal agreements). In none of these provisions does there appear any authority or intent to abrogate the well-established case law rule limiting county expenditures to "county purposes." On the contrary, the use of county tax revenue for "county purposes" is still required under the terms of s. 125.01(1)(r).

Likewise, I have examined statutory provisions which govern the sources and use of district school board funds. Section 235.34(1), F. S., provides in part:

> **Expenditures authorized.**—
>
> (1) 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 or for the maintenance or improvement of the property of any public school or of any facility on such property. Expenditures may also be made for sanitary improvements and for the installation, operation and maintenance of traffic control and safety devices . . . [land] trees, flowers, shrubbery, and beautifying plants. . . .

This subsection permits county expenditures for the specific purposes enumerated therein, but does not contemplate the transfer or lending of county funds to the school board. Section 236.24(1), F. S., reads:

> The district school fund shall consist of funds derived from the district school tax levy; state appropriations; *appropriations by county commissioners*; local, state, and federal school food service funds; any and all other sources for school purposes; national forest trust funds and other federal sources. (Emphasis supplied.)

This subsection was carried forward from the time when counties were responsible for levying taxes to support schools. *See* s. 8, Art. XII, State Const. 1885; ss. 236.33 and 237.18, F. S. (1965). The subsection does not purport to authorize a county to lend or appropriate county funds to school districts, but only permits the school districts to receive and use such funds where such a loan or appropriation is otherwise legislatively authorized as a county purpose. As stated in Weaver v. Heidtman, *supra,* a county is a creature of the Legislature, created under s. 1, Art. VIII, State Const., and is subject to the legislative prerogatives in the conduct of its affairs. I therefore find no statutory authority for a noncharter county to lend or appropriate county funds to school districts and conclude that such action is not authorized by general law. *See* AGO 045-291, Sept. 18, 1945, Biennial Report of the Attorney General, 1945-1946, p. 241, which ruled on the same grounds that Liberty County could not lend surplus county funds in its courthouse building fund to the county board of public instruction.

In reaching this conclusion, I have kept in mind the constitutional provisions which establish the structure of local government. Section 4, Art. IX, State Const., establishes a system of local school districts completely independent of the county governments established under s. 1, Art. VIII, State Const. These school districts have their own elected governing bodies and own taxing powers; they are charged with the specific responsibility to operate free public schools within their respective boundaries. The constitutional structure may therefore require that counties and school districts be fiscally separate. *See* AGO's 075-91 and 071-109. *Cf.* Amos v. Matthews, *supra,* at 320, in

which the court engaged in a similar process of reasoning with respect to state and county powers.

Moreover, s. 9, Art. VII, State Const., limits county and school district taxing powers to levies for their "respective purposes":

> (a) *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.
> (b) Ad valorem taxes, . . . 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.* . . . (Emphasis supplied.)

This provision appears to separate county and school district purposes into mutually exclusive categories and to require that the tax revenue of each unit be used only for that unit's specified purposes. These specific limitations on taxing power have been held not to be superseded or replaced by any provisions of Art. VIII, State Const. City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 4-6 (Fla. 1972).

If county purposes and school district purposes are mutually exclusive categories, then there may be an implied constitutional prohibition against appropriating or lending county funds to school districts. The Constitution expressly authorizes the transfer of funds between levels or units of government only with respect to the allocation of taxes upon the operation of pari-mutuel pools to the counties and the appropriation of state funds to the counties and school districts, among others, under such conditions as may be provided by general law. Sections 7 and 8, Art. VII, State Const. Under the rule *expressio unius est exclusio alterius,* the express mention of one thing is the exclusion of other things. *See generally* Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); *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, 434 (Fla. 1973); State *ex rel.* Judicial Qualifications Comm'n v. Rose, 286 So.2d 562, 563 (Fla. 1973); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952). Application of this rule to the instant question would require that county funds be used only for authorized county purposes and that any allocations, transfers, or uses of county funds for other purposes be deemed prohibited. *See* Prescott v. Board of Public Instruction of Hardee County, *supra; cf.* Amos v. Matthews, *supra.* The Florida Supreme Court has not, however, squarely addressed this or the other constitutional issues discussed herein.

Your inquiry refers to two previous opinions from this office, AGO's 073-58 and 071-54, which relate to the powers of noncharter counties to grant garbage collection and water and sewer service franchises. These opinions were in part based upon former s. 125.65, F. S. 1969, purporting to delegate broad powers of self-government not inconsistent with general or special law, and on the general powers delegated to the counties pursuant to s. 125.01(1)(k), and (3)(a) and (b), F. S., describing the powers of noncharter counties in broad terms. To the extent that general language in those opinions may be deemed to hold that noncharter counties possess constitutional powers of self-government, the same are inconsistent with the requirement in s. 1(f), Art. VIII, State Const., that noncharter counties "shall have such power of self-government as is provided by general or special law," and with the observation made and case law discussed herein that noncharter county powers are limited to those expressly granted by statute or necessarily implied therefrom. To that extent, the discussion in AGO's 073-58 and 071-54 is superseded by this opinion.

077-39—May 2, 1977

PAROLE AND PROBATION

PRISONERS RELEASED ON MANDATORY CONDITIONAL RELEASE NOT LIABLE FOR $10 MONTHLY SUPERVISION PAYMENT

To: Charles J. Scriven, Chairman, Parole and Probation Commission, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

> **Is an individual released on so-called mandatory conditional release (based on accumulation of statutory gain-time allowances and deductions) and under supervision by the Department of Offender Rehabilitation pursuant to s. 944.291, F. S., required to contribute $10 monthly toward the cost of supervision and rehabilitation pursuant to s. 945.30, F. S. (1976 Supp.)?**

SUMMARY:

> **The $10 monthly payment duty imposed by s. 945.30, F. S. (1976 Supp.), applies only to persons placed on parole by the Parole and Probation Commission and persons placed on probation by the courts. It does not apply to those persons on so-called mandatory conditional release (those who have been released by virtue of statutory gain-time allowances or deductions).**

In AGO 076-184, I concluded that persons on so-called mandatory conditional release "are excluded from the operation of s. 945.30." Subsection (1) of s. 944.291, F. S., provides that a prisoner who has served his term or terms, less allowable statutory gain-time deductions and extra good-time allowances, as provided by law, shall, upon release, be under the supervision and control of the Department of Offender Rehabilitation "as if on parole . . . ." You have asked whether the latter provision for supervision of persons so released, that they be supervised "as if on parole," would constitute sufficient statutory authority to require the application of s. 945.30 to individuals on so-called mandatory conditional release.

I must reiterate my conclusion in AGO 076-184 and state my opinion that the language of s. 944.291, F. S., does not provide the kind of clear, express statutory authority which would have to exist in order for the payment duty imposed upon parolees and probationers by s. 945.30, F. S. (1976 Supp.), to be extended to persons released by virtue of having been granted statutory gain-time deductions and allowances. Such releasees constitute a separate, identifiable class of releasees, apart from either parolees (who are those persons actually placed on parole by the Parole and Probation Commission) or probationers (who are those persons actually placed on probation by the courts). It is a fundamental rule of statutory construction that the express mention by the Legislature of one thing excludes from the operation of the statute other things not mentioned. Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952). *Accord:* Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973). Application of this rule of construction to s. 945.30 leads me to conclude that the Legislature's express mention of persons on *parole* or *probation* has the effect of excluding from the operation of that statute those persons released by virtue of statutory gain-time allowances and deductions. The granting of gain-time allowances, by virtue of which a prisoner is released on so-called mandatory conditional release, is placed by statute (ss. 944.27 and 944.271, F. S. [1976 Supp.]) with the Department of Offender Rehabilitation, not with the Parole and Probation Commission or the courts. In addition, not all of such releasees are even subject to the supervision provision of s. 944.291. Subsection (2) of s. 944.291 excludes from the operation of that statute's supervision requirement those "prisoners, who, at the time of sentence, could not have earned at least 180 days' gain-time." Thus, a certain, and possibly sizable, percentage of those released by virtue of statutory gain-time allowances and deductions do not even require supervision by the Department of Offender Rehabilitation. It is my understanding that the Legislature reasoned that there is a basic,

minimum period of supervision required if any meaningful rehabilitation is to be possible, and that supervision for a period of time less than 180 days would not be worthwhile.

In a previous opinion (AGO 075-253) concerning s. 945.30, F. S., I concluded that parolees and probationers from another state under supervision in Florida by Florida officials, and Florida parolees and probationers under supervision in another state, because of lack of clear statutory requirement therefor, are not subject to the $10 monthly payment duty imposed by s. 945.30. To hold that persons on so-called mandatory conditional release are subject to the duty imposed by s. 945.30, absent clear statutory language establishing such a duty, would be inconsistent with the reasoning and conclusion of AGO 075-253 and with the decision in State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla., 1974), *cert. dismissed,* 300 So.2d 900 (Fla. 1974), wherein the court 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." *Accord:* Edgerton v. International Company, 89 So.2d 488, 490 (Fla. 1956).

It would seem most appropriate that this matter be brought to the attention of the Legislature, so that a policy determination may be made as to whether persons on so-called mandatory conditional release (or at least those actually receiving supervision) should be required by statute to pay $10 per month toward the cost of their supervision and rehabilitation, along with parolees and probationers. In this regard, it would also be advisable to seek legislative clarification as to what, if any, conditions the Parole and Probation Commission or the Department of Offender Rehabilitation may impose upon persons released by virtue of statutory gain-time allowances and deductions and as to what procedures exist or should be provided in regard to revocation of statutory gain-time allowances and deductions. Until such legislative clarification is provided, and unless judicially determined otherwise, it is my opinion that the payment duty imposed by s. 945.30, F. S. (1976 Supp.), applies only to those individuals placed on parole by the Parole and Probation Commission and those individuals placed on probation by the courts.

077-40—May 2, 1977

LEGISLATION

LEGISLATURE MAY REPEAL OR AMEND SPECIAL ACT WITHOUT SUBMITTING LATER ACT FOR REFERENDUM APPROVAL

To: Dorothy Eaton Sample, Representative, 61st District, Tallahassee

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **Is the Legislature precluded from repealing or amending a special act of the Legislature relating to saltwater fishing which, pursuant to a referendum provision contained in said act, was approved by a referendum of the electors within the affected area?**

SUMMARY:

> **A special act of the Legislature which regulates the use of, or prohibits, certain nets and seines in the waters of Pinellas County, and which was approved by a favorable vote of the electors in the affected area, may be repealed or amended by the Legislature without a provision requiring approval by vote of the electors of the area affected if the constitutional requirements for publishing notice of intention to seek enactment thereof are complied with. Special laws which prohibit or otherwise regulate the manner of taking saltwater fish through the use of nets or seines in county waters have not been superseded or impliedly repealed by general law.**

Your question is answered in the negative.

Chapter 29432, 1953, Laws of Florida, known as "The Pinellas County Salt Water Fishing Law," is a special act of the Legislature which regulates the use of nets and seines for the catching of, and fishing for, saltwater fish in the waters of Pinellas County. The stated purpose of the act is to conserve the supply of fish in said waters so as to protect the fisheries and fishing industry. Section 2, Ch. 29432. To accomplish this purpose, the act prohibits the use of seines and nets in certain ways and manners in the waters of said county; prohibits the possession of certain nets and seines; prohibits stop-netting, dragging, and hauling nets and seines in said county; and regulates the size of twine, size of mesh, and length of nets and seines used in the waters of said county. Sections 4-14, Ch. 29432. *See also* Ch. 29433, 1953, Laws of Florida, a special act prohibiting the use of nets or seines, except cast nets, in Pinellas County within 100 yards of any bridge, dock, pier, causeway, or ferry. Section 15 of Ch. 29432 provides that a person violating any of the provisions of the act shall be guilty of a misdemeanor and punished as provided by general law. Section 17 of Ch. 29432, upon which your question is founded, provides in pertinent part:

> This act shall not become effective until approved in a referendum election called and held in Pinellas County, Florida, wherein a majority of the qualified electors voting on the question shall vote in favor of the adoption of this act. . . .

The foregoing provision requiring referendum approval of the special law is consistent with the terms of s. 10, Art. III, State Const., which states:

> No special laws shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. *Such notice shall not be necessary when the law, except the provision for referendum,* is conditioned to become effective only upon approval by vote of the electors of the area affected. (Emphasis supplied.)

It is clear that published notice of the intention to seek enactment of the special legislation or referendum approval of such legislation by the electors in the affected area are alternative *conditions precedent* to the validity and effectiveness of the subject legislation. *See* State *ex rel.* Cotterill v. Bessinger, 133 So.2d 409 (Fla. 1961); Dickinson v. Bradley, 298 So.2d 352 (Fla. 1974). In the absence of published notice or referendum provision, the special legislation is invalid and inoperative. Horton v. Kyle, 88 So. 757 (Fla. 1921); Harrison v. Wilson, 163 So. 233 (Fla. 1935); Gray v. Stoutamire, 179 So. 730 (Fla. 1938); Budget Commission of Pinellas County v. Blocker, 60 So.2d 193 (Fla. 1952).

However, where there has been published notice or the law has received favorable referendum approval pursuant to a referendum provision contained in the law, the law is effective and operative in the same manner as any other law enacted by the Legislature. And, consistent with its power to pass any act which it deems necessary so long as such act is not expressly or impliedly in conflict with the state or federal constitutions, the Legislature may repeal a previously enacted special law. Farragut v. City of Tampa, 22 So.2d 645 (Fla. 1945); Kirklands v. Town of Bradley, 139 So. 144; State *ex rel.* Collier Land Inv. Corp. v. Dickinson, 188 So.2d 871 (Fla. 1966). *Accord:* Attorney General Opinion 077-20.

Therefore, the fact that Ch. 29432, *supra,* became effective as a result of a favorable referendum vote does not in any manner whatsoever preclude legislative repeal or amendment of said act, provided s. 10, Art. III, State Const., is complied with. Nor must any special act of the Legislature amending or repealing Ch. 29432 contain a provision requiring referendum approval of such act, if the constitutional requirements for publishing notice of intention to seek enactment thereof are complied with. Clearly, the plain language of s. 10, Art. III, State Const., permits a special law to be enacted and to become effective by voter referendum of the affected electors; *or,* alternatively, by published notice of intention to enact the law; or both. *See* AGO 059-98.

I have also considered whether or not Ch. 29432, *supra,* and other special or local laws relating to the regulation of the taking or possession of saltwater fish have been superseded and impliedly repealed by s. 370.102, F. S., which provides:

> The power to regulate the taking or possession of saltwater fish, as defined in s. 370.01, F. S., is expressly reserved to the state.

Section 370.01(2), F. S., defines "saltwater fish" to include "all classes of pisces, shellfish, sponges and crustacea indigenous to salt water."

Section 370.102, F. S., was brought into the statutes by s. 1 of Ch. 73-208, Laws of Florida, which was "an act relating to county government; reserving the power to regulate saltwater fisheries to the state exclusively." Section 2 of that act, codified as s. 125.01(4), F. S., provides:

> (a) The legislative and governing body of a county shall not have the power to regulate the taking or possession of salt water fish as defined in s. 370.01, F. S., with respect to the method of taking, size, number, season or species; provided, however, that this subsection shall not be construed to prohibit the imposition of excise taxes by county ordinance.
>
> (b) All county ordinances purporting to regulate in any manner the taking or possession of salt water fish, as defined in s. 370.01, F. S., are hereby repealed.

Thus, it is evident that the purpose of Ch. 73-208, *supra*, is to prohibit any *local governmental unit*, including municipalities (*see* s. 1, Ch. 73-208, and s. 166.021(3)(c), F. S.) from enacting local legislation or ordinances purporting to regulate the taking or possession of saltwater fish. *See* AGO's 071-337, 074-161, 075-167, and 075-213. Accordingly, inasmuch as Ch. 29432, 1953, Laws of Florida, preserves *state* regulation with respect to the possession or taking of saltwater fish in the waters of Pinellas County, and does not purport to vest any regulatory powers in the *county commission* or empower said body to enact any ordinances or resolutions regarding the taking or possession of saltwater fish, the two statutes are actually not on the same subject and do not possess the same purpose or objective. *See* 82 C.J.S. *Statutes* s. 291, at nn. 20, 22, and 24, at pp. 491-492; Harrison v. McLeod, 194 So. 247 (Fla. 1940); Scott v. Stone, 176 So. 852 (Fla. 1937). In the absence of positive repugnancy between the two statutes, therefore, the later statute does not impliedly repeal the earlier statute.

Moreover, even if s. 1, ch. 73-208 (s. 370.102, F. S.), covers some of the subject matter of Ch. 29432, *supra*, it is a well-established principle in this state that a general law will not ordinarily repeal by implication an earlier special or local law. Sanders v. Howell, 74 So. 802 (Fla. 1917); State v. Sanders, 85 So. 333 (Fla. 1920); American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938). However, where the general law is a general revision of the whole subject, or where the two acts are so repugnant as to indicate a legislative intent that the general law should prevail, then the special act will be presumed to have been superseded and repealed. Stewart v. DeLand-Lake Helen Special Road and Bridge District, 71 So. 42 (Fla. 1916); Apalachicola v. State, 112 So. 618 (Fla. 1927); City of Miami v. Kichinko, 22 So.2d 627 (Fla. 1945); Town of Palm Beach v. Palm Beach Loc. 1866, I.A.F.F., 275 So.2d 247 (Fla. 1974).

Applying the foregoing principles to the instant inquiry, my examination of Ch. 73-208, Laws of Florida (s. 370.102, F. S.), and the title thereof, read with other relevant portions of Ch. 370, F. S., reveals no general revision of the entire subject of saltwater fishing or any positive repugnancy between the two laws. *Cf.* Town of Palm Beach v. Palm Beach Local 1866, I.A.F.F., *supra*, wherein the court held that Ch. 72-275, Laws of Florida (codified as former ss. 447.20-447.34, F. S. 1973, and repealed by s. 8, Ch. 74-100, Laws of Florida), the Fire Fighters Bargaining Act, represented such an overall revision on the subject of collective bargaining as evidenced by the extensive duplication inherent in both the prior special law and the later general law that the general law superseded the special law.

To the contrary, s. 370.08, F. S. (1976 Supp.), represents an acknowledgment of existing special acts prohibiting the use or regulation of nets or seines for saltwater fishing purposes in county waters. *See* s. 370.08(1) providing "[n]o person may have in his custody or possession in any county of this state any fishing seine or net, the use of which for fishing purposes in such county is prohibited by law"; *also* s. 370.08(6) and (7), F. S.; *also* Rule 16B-6.01, F.A.C., promulgated by the Division of Marine Resources in the Department of Natural Resources. *Compare* s. 370.083, F. S., prohibiting special laws or general laws of local application affecting the sale or purchase of speckled sea trout or weakfish.

077-41—May 2, 1977

ADMINISTRATIVE PROCEDURE ACT

APPLICANT MAY WAIVE 90-DAY TIME LIMIT FOR CONSIDERING AND APPROVING LICENSE APPLICATIONS

To: Joseph W. Landers, Jr., Secretary, Department of Environmental Regulation, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Are the 30-day or 90-day time limits in subsection 120.60(2), F. S. (s. 10, Ch. 76-131, Laws of Florida), subject to waiver by an applicant for a license?

SUMMARY:

The 90-day time limitation prescribed by s. 120.60(2), F. S. (s. 10, Ch. 76-131, Laws of Florida), for the approval or denial of license applications is subject to waiver by the applicant for an environmental license. However, the 30-day time limitation and 30-day period cannot be waived by the applicant or the licensing agency.

You state that the staff of the Joint Legislative Committee on Administrative Procedure has suggested that these time limits are jurisdictional limitations on an agency and thus cannot be waived by the licensee. You suggest that these time limits establish certain rights for the benefit of license applicants to ensure an expeditious decision by the regulatory agencies and, therefore, may be waived by the applicant. Further, an applicant may find such waiver advantageous in a case involving a project where the licensing agency determines that the project cannot comply with applicable standards and the applicant desires to discuss any modifications with the licensing agency in order to avoid a denial of the application. You state that in complex cases there might not be enough of the 90-day time period left for the applicant and the licensing agency to discuss and evaluate possible modifications of the proposed project.

Section 120.60(2), F. S. 1975, provided that:

> When an application for a license is made as required by law, the agency shall conduct the proceedings required with *reasonable dispatch* and with due regard to the rights and privileges of all parties or aggrieved persons. . . . (Emphasis supplied.)

This provision, which operated on the agencies subject to s. 120.60, F. S., contained no specific time limitations for agency action and instead only required that proceedings be conducted with "reasonable dispatch." In 1976, the Legislature significantly amended s. 120.60(2), F. S., by s. 10, Ch. 76-131, Laws of Florida, and imposed the following specific limitations upon licensing agencies subject to the requirements contained therein:

> . . . *Within 30 days* after receipt of an application for a license the agency shall examine the application, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. Failure to correct an error or omission or to supply additional information shall not be grounds for denial of the license unless the agency timely notified the applicant within this 30 day period. The agency shall notify the applicant if the activity for which he seeks a license is exempt from the licensing requirement and return any tendered application fee within 30 days after receipt of the original application or within 10 days after receipt of additional timely requested information, correction of errors or omissions. Every application for license shall be approved or denied within 90 days after receipt of the original application or receipt of the additional timely requested information, correction of errors or omissions. Any application for license not

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approved or denied within the 90 day period or within 15 days after conclusion of a public hearing held on the application, whichever is latest, shall be deemed approved and, subject to the satisfactory completion of an examination if required as a prerequisite to licensure, shall be issued. (Emphasis supplied.)

The effect of s. 10, Ch. 76-131, Laws of Florida, is to require the licensing agency to do certain things and to make certain decisions by a time certain. The law deems or considers the failure to so act the equivalent of an approval of the application and requires the issuance of the license forthwith. Section 10, Ch. 76-131, does not repose or vest any discretion in the licensing agency with respect to the issuance of the license in the statutorily specified circumstances.

An examination of s. 120.60(2), F. S., as amended by s. 10, Ch. 76-131, Laws of Florida, reveals that the 90-day time limitations contained therein are directed against the licensing agency and in favor of and for the benefit of the applicant for the license. However, s. 120.63, F. S., as amended, permits licensing agencies to avoid the requirements of s. 120.60(2) by applying to the Administration Commission for an exemption as provided for at s. 120.63. However, each exemption granted by the commission shall be for a single application only and shall not be renewable. Section 120.60(6), F. S. (1976 Supp.).

The obvious legislative intent in rewording s. 120.60(2), F. S., to impose additional requirements and time limitations associated therewith upon licensing agencies was to ensure that said agencies acted in a prescribed manner upon applications for licenses within specified time limitations or their authority to deny the license, subject to the designated exception with respect to the satisfactory completion of any required examination for licensing, would be foreclosed and, upon the agency's failure to so act, to require the license to be issued forthwith. This is apparent from the title of Ch. 76-131, Laws of Florida, which states in pertinent part:

> . . . amending s. 120.60(2), F. S., and adding a subsection; *setting limits upon the time permitted an agency* to request additional information and *to make decisions on license* applications; *providing for automatic issue of licenses under specified circumstances* and limited permissible exceptions. . . . (Emphasis supplied.)

Thus, as to the applicant, the limitations imposed upon the licensing agencies have the effect of also creating a substantive right for the benefit of the license applicant, and as to him the statute is a substantive law. *Cf.* Johnson v. State, 336 So.2d 93, 95 (Fla. 1976); *In re* Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972) (Adkins, J., concurring); AGO 077-10.

However, the precise issue raised by your inquiry is whether the 90-day time limitations contained in s. 120.60(2), F. S., which seek to expedite the rights and privileges of the applicant can be intelligently, freely, and voluntarily waived by a beneficially interested applicant. This, of course, presupposes that no coercion or pressure, direct or indirect, will be placed upon the license applicant by the licensing agency to induce the waiver by the applicant.

The Department of Environmental Regulation issues a variety of environmental permits and licenses, dealing with such matters as pollution of the air and water by stationary installations and weather modification, *see* ss. 403.061(16), 403.087, 403.088, and 403.301, and regulation, disposal, and recycling of solid wastes, s. 403.707, F. S. Such permits and licenses involve the conduct and operation of commercial and utility businesses, manufacturing, mining, exploration and exploitation of natural resources, and recovery of natural resources. The privilege to develop and use property in order to conduct business or operate commercial and utility facilities involves certain property rights or interests which, while subject to reasonable regulation, may not be totally divested by the state.

The situation which your letter discusses is one in which the environmental licensing agency has the application under consideration during the course of the prescribed 90-day period and has provisionally determined that the project, as proposed in the application, cannot comply with the applicable and lawfully established standards, and, therefore, should be denied by the licensing agency unless modifications are made in the proposed project and the application for licensing thereof. In this circumstance, the waiver of the prescribed 90-day time limitations by the applicant is for the purpose of giving the applicant and the agency time to evaluate modifications to the proposed

project and to negotiate and agree upon the requisite modifications so as to avoid a denial of the license or permit which would force the applicant to reapply for the license or permit or seek judicial review of the agency's final denial thereof.

As a general proposition, a person may waive any matter which affects his property or any alienable right which he owns, which belongs to him, or to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided such rights and privileges rest in the individual, are intended for his sole benefit, do not interfere with the rights of others, and are not forbidden by law or public policy. Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945); 92 C.J.S. *Waiver*, at 1066-1067.

Since an obvious purpose of s. 120.60(2), as amended, with respect to the 90-day time limitation for the approval or denial of the license application, is to create beneficial rights for the applicant, it would appear that, in conformity with the general rule, such rights can be waived when the applicant intelligently, freely, and voluntarily determines that such waiver is in his best interest. In circumstances such as those outlined by your letter, such waiver would serve the ultimate purpose of the statute, which is to expedite administrative environmental licensing and permitting procedures. A contrary conclusion would frustrate the legislative intent of attempting to more expeditiously and fairly deal with licensing procedures in environmental matters by encouraging denials and reapplications or litigation when certain circumstances are present. The 30-day time limitation, however, does not appear to raise the denial and reapplication problems which could exist under the 90-day time requirements and apparently instead was intended to operate on the agency to either perform certain functions and give certain notices to the applicant within 30 days or be estopped in the future from asserting such matters as grounds for the denial of the license applied for. It is not evident that the waiver of the 30-day requirement would in any way benefit an applicant or further the purposes of the statute. Therefore, the 30-day time limitation or requirement prescribed by s. 120.60(2), F. S. (1976 Supp.), cannot be waived by the applicant for a license or the licensing agency. Accordingly, unless judicially interpreted to the contrary, an applicant for an environmental license may intelligently, freely, and voluntarily and without any pressure or coercion by the licensing agency waive his rights under the 90-day time limitation prescribed by s. 120.60(2), F. S., in order to suspend the operation of the 90-day time limitation prescribed therein.

077-42—May 4, 1977

ELECTIONS

CONVICTED FELON NOT DISQUALIFIED FROM VOTING DURING PENDENCY OF APPEAL

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

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **Does a conviction of a felony disqualify the defendant as an elector during the pendency of an appeal from such conviction?**

SUMMARY:

> **In Florida, if an appeal has been taken from a judgment of guilty in the trial court, that conviction does not become final until the judgment of the lower court has been finally affirmed by the appellate courts. Therefore, a felon adjudicated as such is not "convicted" within the meaning of the constitutional disqualification from voting while an appeal from such conviction is pending or while the time for an appeal from the judgment or sentence has not yet expired. Accordingly, the duty of the clerk of the circuit court to report "convicted" felons to the supervisor of elections does not include the duty to report felons**

adjudicated and sentenced as such during the pendency of an appeal from said conviction or prior to the expiration of the time for appeal from judgment or sentence. It follows, therefore, that the supervisor of elections is not authorized to remove the names of such persons from the registration books until the judgment and sentence have been finally affirmed by the appellate courts or the time for such appeal has expired.

Section 106.23(2), F. S., as amended by Ch. 76-233, Laws of Florida, requires the Division of Elections of the Department of State to issue advisory opinions

> when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take.

In DE 076-13, the Director of the Division of Elections concluded that a convicted felon, adjudicated as such and sentenced, but with an appeal pending, was disqualified from voting. In her opinion, the director reasoned as follows:

> Section 98.313, F. S., requires the supervisor to remove from the registration books the names of convicted felons upon the list of same being furnished to the supervisor pursuant to Section 98.312, F. S.
>
> Only qualified electors may vote.

However, as noted in your letter, in AGO 060-45, this office reached the opposite conclusion with respect to this issue, holding that:

> A conviction of a felony in a trial court will not disqualify the defendant as an elector, candidate for office or office holder, when an appeal is prosecuted from such conviction, until the appeal is disposed of by the appellate court.

The conclusion adopted in AGO 060-45 was subsequently reaffirmed in AGO 069-119, wherein it was held that "until a person charged with a felony has been actually convicted, *and the time for an appeal from judgment of conviction has expired*, he may qualify for and run for public office." (Emphasis supplied.)

It is beyond dispute that finally convicted felons whose civil rights have not been restored are disqualified from voting. Section 4, Art. VI, State Const., provides:

> No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

Section 1, Art. VI, *supra*, further states, in pertinent part, that "[r]egistration and elections shall . . . be regulated by law."

Consistent with the foregoing constitutional provisions, the Legislature has enacted ss. 98.312, 98.313, and 98.201(1), F. S. Section 98.312 requires the clerk of the circuit court at least once a month to deliver to the supervisor of elections a list of persons who have been "convicted of felonies during the preceding calendar month." Section 98.313 requires the supervisor of elections, upon receipt of the list as provided in s. 98.312, to "remove the names of electors listed thereon from the registration books." Section 98.201(1) provides, in pertinent part:

> Whenever it shall come to the supervisor's knowledge that any elector has become disqualified to vote by reason of conviction of any disqualifying crime . . ., the supervisor shall notify the person at his last known address by certified or registered mail. Should there be evidence that the notice was not received, then notice shall be given by publication in a newspaper of general circulation in the county where the person was last registered or last known. The notice by publication shall run one time. The notification shall plainly state

> that the registration is allegedly invalidated and shall be in the form of a notice to show cause why the person's name should not be removed from the registration books. The notice shall state a time and place for the person so notified to appear before the supervisor to show cause why his name should not be removed. Upon hearing all evidence in an administrative hearing, the supervisor of elections shall determine whether or not there is sufficient evidence to strike the person's name from the registration books. If the supervisor determines that there is sufficient evidence he shall strike the name forthwith. . . .

Applying the aforementioned constitutional and statutory provisions to your inquiry, it appears that the question as to whether a convicted felon is disqualified from voting pending appeal from his conviction is dependent upon the meaning of the word "convicted" as employed therein. An examination of textual authorities and judicial decisions on this subject reveals that such authorities are somewhat divided as to whether a felon is finally "convicted" and hence disenfranchised immediately upon adjudication and sentencing or whether such felon is not finally "convicted" until disposition of the appeal by the appellate courts. *See, generally, Annot.*, 36 A.L.R.2d 138; *Annot.*, 39 A.L.R.3d 290; *Annot.*, 71 A.L.R.2d 593, s. 6; 21 Am. Jur.2d *Criminal Law* s. 619; 29 C.J.S. *Elections* s. 33, n. 6; 9A Words and Phrases *Convicted, Conviction*, pp. 283-284; and cases cited thereunder.

In Florida, however, there is substantial authority to support the view that a felon does not stand finally "convicted" until the time for an appeal from judgment or sentence has expired or final disposition is made of his appeal by the appellate courts. Thus, in State *ex rel.* Volusia Jai-Alai v. Department of Business Regulation, 304 So.2d 473 (1 D.C.A. Fla., 1974), the court quashed a suspension order which had suspended the petitioners' racing permits on the grounds that said petitioners had filed false applications for racing dates by answering negatively to a question as to whether any director, officer, or stockholder had been convicted of a criminal offense. The court reasoned as follows on p. 475 of the opinion:

> Although the evidence did establish that the stockholder, Emprise Corporation, had been convicted of a felony under federal laws, it was further established that said conviction had not become final because it was then on appeal and that on advice of counsel, the applicants did not consider that they had been "convicted" within the meaning of the question propounded on the application form. Since the conviction had not yet become final, the applicants were justified in their belief that their stockholder had not yet been "convicted". See Page v. State Board of Medical Examiners, 141 Fla. 294, 193 So. 82 (1940); In Re Advisory Opinion to the Governor, 75 Fla. 674, 78 So. 673 (1918); and Joyner v. State, 158 Fla. 806, 30 So. 2d 304, 305 (1947), wherein the court stated in material part: ". . . If an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court."

Moreover, I am also of the view that a convicted felon's qualification as an elector during the pendency of his appeal from judgment or sentence may not be conditioned upon whether or not said felon has entered into an appeal or supersedeas bond (which appears to be simply a bail bond by another name, *see* Cash v. State, 73 So.2d 903, 904 [Fla. 1954]) pursuant to s. 924.065, F. S. *See* ss. 924.14, 924.15, 924.16, and 924.17, F. S. Such a requirement would raise severe constitutional problems, as it is well established that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution proscribes invidious discrimination against indigents. *See* Burns v. State of Ohio, 360 U.S. 252 (1959); Lindsey v. Normet, 405 U.S. 56 (1972); Griffin v. Illinois, 351 U.S. 12 (1956); *cf.*, State *ex rel.* Cheney v. Rowe, 11 So.2d 585 (Fla. 1943), and Gaston v. State, 106 So.2d 622 (1 D.C.A. Fla., 1958), as to the rule under s. 924.17, and s. 11 of the Declaration of Rights, State Const. 1885 (now s. 16, Art. I, State Const.). The Legislature is presumed to have knowledge of the judicial construction of the term "convicted"; and its reenactment of s. 98.312, F. S., carries, with the language adopted, also the judicial construction put upon it. *In re* Advisory Opinion to the Governor, 96 So.2d 541 (Fla. 1957); Collins Inv. Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964); Depfer v. Walker, 169 So. 660 (Fla. 1936).

Accordingly, s. 98.312 does not require the clerk of the circuit court to report persons who have been convicted of felonies to the supervisor of elections until the time for appeal from judgment or sentence has expired, or until the conviction has been finally affirmed by the appellate courts. In like respect, s. 98.313, F. S., does not authorize the supervisor of elections to disenfranchise such persons or to remove their names from the registration books. *Cf.* AGO's 074-15 and 077-1.

Similarly, the duty of the supervisor of elections under s. 98.201(1), F. S., to institute administrative proceedings to strike an elector's name from the registration books upon the supervisor's knowledge of an elector's "conviction of any disqualifying crime" does not arise until said elector's felony conviction has been finally affirmed by the appellate courts, or the time for the appeal from judgment or sentence has expired.

Your question is accordingly answered in the negative.

077-43—May 4, 1977

SUNSHINE LAW

APPLICABILITY TO SCREENING COMMITTEE, SERVING AT REQUEST OF SCHOOL BOARD, TO RECOMMEND APPOINTEES FOR SCHOOL DISTRICT COUNSEL

To: Norma Howard, Executive Secretary, Broward County Bar Association, and Broward County School Board, Fort Lauderdale

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Is a committee selected by the Broward County Bar Association at the request of and pursuant to delegated authority by the district school board, to screen applicants for the position of school district attorney and to make recommendations or nominations to the school board for its consideration in the appointment of a school district attorney, subject to the Government-in-the-Sunshine Law, s. 286.011, F. S.?

SUMMARY:

A committee selected by a county bar association at the request of, and pursuant to delegated authority by, a district school board to screen applicants for the position of school district attorney and to make recommendations or nominations to the district school board for its consideration in the appointment of a school district attorney is subject to the Government-in-the-Sunshine Law, s. 286.011, F. S.

The Government-in-the-Sunshine Law, s. 286.011, F. S., requires that all meetings of two or more members of a board or commission subject to the act at which said members discuss matters upon which foreseeable action might be taken by the board or commission of which they are members be open to the public and that minutes of all such meetings be recorded and open to public inspection and examination. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). Additionally, reasonable notice of all such meetings must be furnished to the public. Hough v. Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1973); AGO 073-170.

In Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), the court held an *ad hoc* citizens planning committee which was appointed by the town in order to make recommendations to the town concerning land use controls subject to the Sunshine Law. In so ruling, the court noted that the citizens planning committee functioned as an "arm of the town council."

The only apparent distinguishing feature between the instant case and *Town of Palm Beach* is that, in the instant case, the members of the school board will not choose or appoint the individual members of the screening committee but, instead, will delegate this authority to the county bar association. This, however, does not appear to be a

distinction which would serve to exempt this particular screening committee from the Sunshine Law. For example, the school board specifically requested that the bar association form such a committee in order to screen applicants for the vacant school board attorney's position and make recommendations or nominations to the school board on the appointment by the board of its school district attorney. The fact that the individual members of the screening committee have not *directly* been appointed by the school board is of no importance for they would not have been appointed were it not for the request and delegated authority of and by the board. The committee, once appointed, acts for and on behalf of the school board in screening the applicants for the vacant school district attorney position and in making recommendations or nominations for appointment to such position. The applications for the school district attorney position are, in legal effect, made to the school board. The applicants are screened for the school board by the committee, and its recommendations are in effect nominations for the appointment by the board to the vacant position. The school board utilizes such recommendations or nominations in order to appoint the school district attorney. Accordingly, under the *Town of Palm Beach* decision, I am of the opinion that the members of the screening committee acting on behalf of the district school board are subject to the Government-in-the-Sunshine Law, s. 286.011, F. S., and may not hold closed or private sessions in order to screen applicants and make recommendations or nominations to the school board with regard to its appointment of an attorney for the school district.

While not dealing with the Sunshine Law, this conclusion is also supported by a recent amendment to Ch. 119, F. S., the Public Records Law, which redefined the term "agency," s. 119.011(2), to include public or private agencies, persons, corporations, or business entities acting on behalf of a public agency, and served to make such private agencies or persons the agents of the public agency for whom they act and to subject them and their records to ss. 119.01 and 119.07. *See* Ch. 75-225, Laws of Florida. This amendment was in response to the court's decision in State *ex rel.* Tindell v. Sharp, 300 So.2d 750 (1 D.C.A. Fla., 1976), which held, among other things, that the personal files, papers, and the work product of an independent contractor-consultant employed by a school board to seek out suitable prospects for recommendation to the school board for its consideration for the vacant position of school superintendent were not subject to s. 119.01, F. S. 1971. The effect of the 1975 amendment is to require that an individual or committee appointed to screen applicants for public positions at the request of and acting on behalf of a public agency "stands in the shoes" of the public agency for which he or it acts insofar as the application of Ch. 119 is concerned and is subject to the terms of ss. 119.01, and 119.07(1).

077-44—May 16, 1977

DEVELOPMENTS OF REGIONAL IMPACT

APPLICABILITY OF CH. 380 TO DISNEY WORLD

To: Guy Spicola, Chairman, Senate Committee on Natural Resources and Conservation, Tallahassee

Prepared by: Staff

QUESTION:

What is the effect of Ch. 380, F. S., relating to developments of regional impact, on Reedy Creek Improvement District?

SUMMARY:

Absent a judicial or legislative declaration to the contrary, s. 23 of Ch. 67-764, Laws of Florida, exempts the Reedy Creek Improvement District (Disney World) from the Ch. 380, F. S., requirements for a development of regional impact.

You have advised me that the Reedy Creek Improvement District (Disney World) is planning a major project and addition (EPCOT) to the Disney World Complex, and the district is concerned as to whether or not it must comply with Ch. 380 requirements for developments of regional impact.

The district was created by Ch. 67-764, Laws of Florida, which provides the governing board of supervisors with broad, diverse powers to implement the purposes of the district as exemplified in the legislative preamble to the special act. The Florida Supreme Court upheld the constitutionality of the act in State v. Reedy Creek Improvement District, 216 So.2d 202 (Fla. 1968), by affirming the circuit court order which found that the act "did not violate any provision of the Constitution of Florida." The court approved a legislative finding that creation of the district would foster, among other objectives, "the conservation of natural resources."

In s. 23(1) of the act, the Legislature found and declared that the powers accorded the board of supervisors under that section were essential "to guide and accomplish the coordinated, balanced and harmonious development of the District in accordance with existing and future needs." The Legislature, in s. 23(2), granted the board of supervisors exclusive jurisdiction and powers with respect to matters provided for in that section notwithstanding "any other laws of the State now or hereafter enacted." This exclusive grant of powers is reflected by this sentence:

> The jurisdiction and powers of the Board of Supervisors provided for herein shall be exclusive of any law now or hereafter enacted providing for land use regulation, zoning or building codes, by the State of Florida or any agency or authority of the State and the provisions of any such law shall not be applicable within the territorial limits of the District.

Chapter 380, F. S., in pertinent part, provides a regulatory process for developments of regional impact [s. 380.06] for the legislative purposes expressed in s. 380.021. This chapter is administered and implemented by the Division of State Planning, Department of Administration. By memorandum of July 20, 1976, the division has administratively concluded that s. 380.06 does not apply to developments within the district:

> This section specifically exempts the Reedy Creek Improvement District from state land use regulation laws, "now or hereafter enacted." This would include Chapter 380.06, F. S., developments of regional impact. Therefore, by law the Reedy Creek Improvement District is exempt from the jurisdiction of Chapter 380.06, F. S.

Cf. s. 163.317(4), F. S. An administrative determination by an agency empowered with the authority to enforce the statute is entitled to great weight. Green v. Home News Publishing Co., 90 So.2d 295 (Fla. 1956); State *ex rel.* Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1974). Absent a judicial or legislative declaration to the contrary, this administrative determination is persuasive and binding. *See also* 30 Fla. Jur. *Statutes* ss. 151-158.

077-45—May 17, 1977

LEGISLATION

LEGISLATURE MAY SUBDIVIDE DRAINAGE DISTRICT INTO UNITS AND APPORTION ASSESSMENTS UPON LANDS THEREIN

To: Lawrence R. Kirkwood, Representative, 38th District, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

> **May the Legislature, by special act, divide the lands within the Ranger Drainage District (organized under the general drainage district law) into two units or zones and apportion assessments imposed on such lands according to special benefits received from improvements or special benefits bestowed?**

SUMMARY:

> **In the absence of any constitutional provision, expressly or by necessary implication prohibiting the exercise of the lawmaking power of the state, the Legislature may enact a special act dividing the lands within a drainage district organized under the general drainage district law (Ch. 298, F. S.) into two units or zones and apportioning assessments imposed on such lands according to the improvements made or special benefits bestowed.**

Your question is answered in the affirmative, subject to compliance with constitutional requirements relating to the enactment of special laws.

I would first note that the procedure provided in Ch. 298, F. S., for forming drainage districts (under which the circuit court must issue a decree upon finding that the statutory requirements have been satisfied) may no longer be used to create such districts, even though such provisions of Ch. 298 remain on the statute books. In AGO 075-108, I expressed my opinion that Ch. 165, F. S. (as enacted by Ch. 74-192, Laws of Florida), operates to supersede conflicting provisions of general or special law regarding the methods of creation of special districts for drainage and water management purposes. The crucial language appears in s. 165.022, providing:

> It is further the purpose of this act to provide viable and useable general law standards and procedures for forming and dissolving municipalities and special districts in lieu of any procedure or standards now provided by general or special law. The provisions of this act shall be *the exclusive procedure pursuant to general law* for forming or dissolving municipalities and special districts in this state except in those counties operating under a home rule charter which provides for an exclusive method as specifically authorized by s. 6(e), Art. VIII of the State Constitution. Any provisions of a general or special law existing on July 1, 1974 in conflict with the provisions of this act shall not be effective to the extent of such conflict. (Emphasis supplied.)

Also see s. 163.603, F. S. (1976 Supp.), relating to new community districts under part V of Ch. 163, F. S., excepting independent special districts established pursuant to Ch. 298 from the operation of part V of Ch. 163, but requiring all independent special districts (other than those excepted therein) created by ordinance or by a court or state agency order to be established pursuant to part V of Ch. 163 and in accordance with Ch. 165, F. S.

It is further clear, under general principles of legislative power and under ss. 165.041(2) and 165.051(1)(a), F. S., that the Legislature may, by special act, create and abolish special districts. If the power to create and abolish is established, the power to amend or alter such a district can reasonably be inferred. The power of the Legislature to alter the structure of a drainage district organized under the general drainage district law was recognized by the Florida Supreme Court in Ronald v. Ryan, 26 So.2d 339 (Fla. 1946). That decision upheld Ch. 22968, 1945, Laws of Florida, which dissolved and abolished the Board of Supervisors of the Halifax Drainage District and established the Board of County Commissioners of Volusia County as the ex officio board of supervisors of the district with all duties and obligations devolving upon such board of supervisors under the statutes theretofore enacted. Sections 1 and 2, Ch. 22968. The court applied the rule that, for a statute to be held unconstitutional, it must be shown to be contrary to express or necessarily implied prohibitions found in the State or Federal Constitution. The court held that the petition for declaratory judgment in that case entirely failed to meet this rule and affirmed the declaratory decree entered by the trial court holding Ch. 22968 valid. It is fundamental that the Legislature may exercise any lawmaking power not forbidden by organic law. Hopkins v. Special Road & Bridge Dist. No. 4, 74 So. 310 (Fla. 1917); Savage v. Board of Public Instruction, 133 So. 341 (Fla. 1931). The Halifax Drainage District and its board of supervisors and other officers were thereafter abolished by another act of the Legislature, Ch. 30235, 1955, Laws of Florida.

I have found no case involving the Legislature's division into zones or units of a drainage district created under Ch. 298, F. S. (or its earlier equivalents). However, in

Bannerman v. Catts, 85 So. 336 (Fla. 1920), the court upheld a special act of the Legislature dividing the Everglades Drainage District (originally created by special act) into zones and proportioning the assessments accordingly, in much the same manner as is being contemplated in regard to the Ranger Drainage District. *Also see* Lainhart v. Catts, 75 So. 47 (Fla. 1917), involving the same issues.

In AGO 077-20, I concluded that it would be within the power of the Legislature to abolish by special act a regional rapid transit authority which had been formed, not by special act, but by mutual action of three counties pursuant to authority provided by general law (part IV of Ch. 163, F. S.). That conclusion was based, as was Ronald v. Ryan, *supra*, on the principle that the Legislature can pass any act which legislative wisdom dictates, so long as it does not collide with any provision of the State or Federal Constitution. As I stated in AGO 077-20, in the absence of any such conflict, "the exercise of reasonable legislative discretion is the sole brake on the enactment of legislation, for State Constitutions are limitations on, rather than grants of, power and the Legislature is therefore authorized to do those things not forbidden by the State or Federal Constitutions." This principle was simply and directly stated in State v. Davis, 166 So. 289, 297 (Fla. 1936): "The test of legislative power is constitutional restriction; what the people have not said in their organic law their representatives shall not do, they may do." *Accord*: State v. Board of Public Instruction for Dade County, 170 So. 602 (Fla. 1936); Farragut v. City of Tampa, 22 So.2d 645 (Fla. 1945); Sun Insurance Office, Limited v. Clay, 133 So.2d 735 (Fla. 1961).

I am unaware of any constitutional provision which expressly or by necessary implication operates to prohibit the Legislature from enacting into law a bill such as the one here in question. Based on this absence of constitutional prohibitions, and on the decisions cited above, recognizing the power of the Legislature to alter the structure of drainage districts (both those created by special act and those created pursuant to general law) and to divide lands in a district upon which a charge is to be imposed into different classes of zones, for the purpose of apportioning such charges, I am of the opinion that the division of the lands within the Ranger Drainage District into two units and the apportioning of the assessments in each unit according to the special benefits bestowed may validly be effected by special act of the Legislature. (It is assumed, of course, that the provisions of s. 10, Art. III, State Const., as to enactment of special acts—requiring publication of notice of intent to seek enactment of special legislation, or a referendum of the electors within the affected area—will be complied with.)

077-46—May 19, 1977

ELECTIONS COMMISSION

MUST PUBLISH NOTICE AND AGENDAS OF MEETINGS NOTWITHSTANDING EXEMPTION FROM PUBLIC RECORDS AND SUNSHINE LAWS

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

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Frank A. Vickory, Legal Research Assistant

QUESTION:

Is the Florida Elections Commission required to give public notice of its hearings on alleged Ch. 106 violation and to publish an agenda for such hearings?

SUMMARY:

Pursuant to s. 106.25(1), F. S., all complaints received by the Elections Commission and all relevant reports and recommendations are made confidential and, thus, exempted from the operation of ss. 119.01 and 119.07(1), F. S., of the Public Records Law, until the Department of State concludes that disposition of such complaint has occurred pursuant to Ch. 106, F. S., at which time the complaints and all other relevant material become matters of public record and subject to Ch. 119, F. S.

Hearings of the commission, pursuant to s. 106.25(1), F. S., are required by law to be held in closed session and are hence impliedly excepted from the operation of the Government-in-the-Sunshine Law.

Even though Ch. 106, F. S., hearings are excepted, either expressly or impliedly, from the requirements of the Public Records Law and the Government-in-the-Sunshine Law, they are not thereby also exempted from the requirements of the Administrative Procedure Act (Ch. 120, F. S.), since neither Ch. 106 nor Ch. 120 in terms makes or provides for any exception from any provision of Ch. 120. The commission must therefore comply with the notice and agenda requirements of Ch. 120 unless and until, upon proper application to the Administration Commission, it is excepted from those requirements pursuant to the provisions of s. 120.63. However, the Elections Commission need not disclose the identity of the parties or the nature and details of the proceeding in satisfying the requirements of Ch. 120.

Section 106.25, F. S. 1975, provides the procedures through which the Elections Commission hears complaints of alleged violation of the State's Campaign Financing Law (Ch. 106, F. S.). Section 106.25(1) provides in pertinent part that any complaint filed with the commission "shall be kept confidential until such time as the Department of State concludes that disposition of such complaint has occurred pursuant to this chapter," at which time the complaint and all relevant reports, recommendations, etc., become matters of public record. Until such time as the complaint and other related materials are declared to be matters of public record, it is a first degree misdemeanor to disclose the contents of the complaint or the testimony or findings or other transactions of the commission. Section 106.25(4) and (5). It is clear, therefore, that the Elections Commission's hearings and dispositions of alleged violations of Ch. 106 are meant to be strictly confidential until the Department of State declares otherwise.

The requirements of confidentiality in s. 106.25, F. S., must be read with reference to Ch. 119, F. S., the Public Records Law. Section 119.01 specifically declares that it is the public policy of Florida that all state records shall be open at all times to anyone for personal inspection. Section 119.07(1) requires any custodian of public records to permit any person desiring to do so to inspect and examine such records at any reasonable time, under reasonable conditions, and under supervision of the custodian. However, s. 119.07(2)(a) provides that "[a]ll 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 provision of subsection (1)." Hence, by virtue of s. 119.07(2)(a), the complaint and other material relevant to the commission's hearings on alleged Ch. 106 violations are made confidential and are exempt from the mandatory inspection provisions of ss. 119.01 and 119.07(1) until such time as they are declared "public records" by the Department of State. *Cf.*, s. 112.324(1), F. S., making the records relating to preliminary investigations of the Ethics Commission confidential, with certain exceptions, notwithstanding the provisions of Ch. 119.

Section 286.011(1), F. S., Florida's Government-in-the-Sunshine Law, provides that all meetings of a commission of any state agency at which official action is to be taken must be open to the public at all times and that no official action may be taken *except* at such a meeting. It appears that this statute conflicts with the equally forceful mandate of s. 106.25, F. S. Any hearing of the Elections Commission for alleged Ch. 106, F. S., violations is to be a closed, confidential meeting, attended only by those persons necessary to the carrying out of the commission's duties, with criminal penalties prescribed for violation of these provisions. Long-established rules of statutory construction command that we attempt to reconcile these two seemingly conflicting statutes. However, it is clear that reconciliation is impossible in the instant situation, since if the commission conformed to one of the statutory requirements, it would be in direct violation of the other. Section 106.25 is the later of the two statutes to be adopted (1973, amended 1974; s. 286.011 was adopted in 1967, amended 1971). In such a case, where two statutes cannot be interpreted in a consistent or reconcilable way, it is a rule of statutory construction that, while implied modifications of statutes are not favored, a later statute will modify an earlier statute to the extent that consistent interpretation is not reasonably possible. Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194 (Fla. 1946). Florida courts have consistently held that the latest expression of legislative intent is the law,

when two irreconcilable statutes are involved. Johnson v. State, 27 So.2d 276 (Fla. 1964); City of Jacksonville Beach v. Albury, 295 So.2d 297 (Fla. 1974). Hence, pending legislative or judicial clarification, it is the view of this office that s. 106.25 is an implied modification of or exception from Florida's Government-in-the-Sunshine Law. *Compare* s. 112.324(1), F. S., making confidential and exempt from s. 286.011, F. S., certain proceedings of the Commission on Ethics.

Section 120.55(1)(c)3., F. S., provides that the Department of State shall publish a weekly publication, the "Florida Administrative Weekly," which shall contain all notices of meetings, hearings, and workshops conducted in accordance with the provisions of s. 120.53(1)(d), F. S. That section provides that each agency, in addition to other requirements imposed by law, shall adopt rules for the scheduling of meetings, hearings, and workshops, including the establishment of agenda therefor. This section provides no exception from its requirements for the Elections Commission in performing its Ch. 106, F. S., responsibilities. *Compare* s. 112.324(1), F. S., providing that all proceedings, the complaint, and other records relating to the preliminary investigations of the Ethics Commission shall be confidential notwithstanding any provision of Ch. 120, F. S. It may appear that the requirement to publish notice of and to prepare an agenda for a meeting or hearing which is by law closed to the public is of little effectiveness. However, a cardinal rule of statutory construction is that statutes must be interpreted so as to give full effect to them all, so long as they are consistent and reconcilable with one another. There is no inconsistency between s. 106.25, F. S., and Ch. 120. Section 106.25 does not deal with questions of notice, scheduling, agenda or other such procedural questions which are covered by Ch. 120. It simply directs that commission hearings be closed and that attendance be restricted. Neither Ch. 106 nor Ch. 120 contains any language that the commission need not conform to Ch. 120 requirements. These requirements can be easily met by the commission by giving notice of an election violation hearing and preparing an agenda for such hearing but without disclosing in any manner the identity of the parties involved or the exact nature of the proceedings or the details of the proceeding or transaction of the commission. In that manner, the requirements of each of the applicable statutes would be met.

Finally, it is not necessarily true that notice and publication of an agenda would serve no useful purpose regarding Ch. 106, F. S., hearings. It may be persuasively argued that the Ch. 120, F. S., requirements serve an important function if they do no more than to let the public know that the Elections Commission is performing its duties, even though members of the public are not permitted to attend or to know the identity of the parties involved in, or the details of, a particular investigation until the time such matters become "public records" by operation of law. However, it is not the prerogative of this office to determine the usefulness of the commission's conforming to Ch. 120. The statute in effect assigns that function to the Administration Commission. Upon application from the Elections Commission, the Administration Commission may exempt any process or proceeding from Ch. 120 requirements if it finds that conformity therewith would be "so inconvenient or impractical as to defeat the purpose of the agency proceeding involved or the purpose of this act and would not be in the public interest in light of the nature of the intended action and the enabling act or other laws affecting the agency." Section 120.63(1)(c).

Until the Administration Commission acts on an exception request from the Elections Commission, it is the opinion of this office that the Ch. 120, F. S., notice and agenda requirements must be met regarding Ch. 106, F. S., election violation hearings, but without disclosing the identity of the parties or the nature of the proceeding.

077-47—May 19, 1977

PUBLIC BUILDINGS

CONTRACTORS FOR PUBLIC BUILDINGS FOR LOCAL GOVERNMENTS NOT AUTHORIZED TO SUBSTITUTE SECURITIES FOR RETAINAGES

To: Kenneth H. Mackay, Jr., Senator, 6th District, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Frank A. Vickory, Legal Research Assistant

QUESTION:

Is s. 255.052, F. S., authorizing contractors to elect to substitute securities, including municipal bonds, for retainages on state contracts for construction of state buildings applicable to and binding upon county, municipal, or other local governments or local government contracts for construction of public buildings for such local governments?

SUMMARY:

Section 255.052, F. S., authorizing contractors to elect to substitute securities, including municipal bonds, for retainages on state contracts for construction of state buildings is not applicable to or binding upon county, municipal, or other local governments or local government contracts for construction of public buildings for such local governments. Any such authority regarding local government contracts must come from an amendment authorizing such substitution by an act of the Legislature.

Section 255.052, F. S., provides essentially that, under any contract made or awarded by the *state* or by one of its departments or officials, the contractor may withdraw all or a part of the amount retained by the state contracting authority for payments to the contractor pursuant to the terms of the *state* contract, upon depositing with the *State* Treasurer any of several enumerated securities, including bonds of any political subdivision of the state.

Section 255.052, F. S., was brought into the statutes by Ch. 70-70, Laws of Florida, "[a]n [a]ct relating to state contracts," codified as s. 255.052 and providing "for substitution of securities for retainages on state contracts." Chapter 74-253, Laws of Florida, "[a]n [a]ct relating to amounts retained on state contracts," amended s. 255.052(1)(d) by adding certificates of deposit from state or federal savings and loan associations to the securities listed in Ch. 70-70 authorized to be substituted for the amounts retained on state contracts.

Chapter 70-70, Laws of Florida, as amended by Ch. 74-253, Laws of Florida, nowhere mentions county, municipal, other local government contracts or the construction of public buildings for such local governments or retainages on any such contracts. These statutes unequivocally apply only to state contracts and retainages on state contracts. It is well settled that where a statute expressly enumerates the things on which it is to operate, all things not expressly mentioned therein are excluded from its operation. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 443 (Fla. 1973); Thayer v. Florida, 335 So.2d 815 (Fla. 1976). Therefore, contractors under any contract awarded by county, municipal, or other local governments for the construction of public buildings for such local governments are not authorized by s. 255.052, F. S., to substitute the securities listed therein, including municipal bonds, for any retainages for payments to the contractor pursuant to the terms of such contract.

It might be parenthetically noted that s. 255.053, F. S., providing for retainages for payments to contractors by the contracting authority has been expressly repealed by Ch. 76-4, Laws of Florida, effective on the 60th day after final adjournment of the 1976 Legislature.

In order for the provisions of s. 255.052, F. S., or like terms, to apply to and be binding upon local governments and to authorize contractors on local projects under local contracts to substitute the same or similar securities for retainages on or under local contracts, s. 255.052 or other appropriate statutory provision will have to be amended by an act of the Legislature.

077-48—May 19, 1977

SUNSHINE AND PUBLIC RECORDS LAWS

APPLICATIONS FOR MUNICIPAL DEPARTMENT HEAD NOT CONFIDENTIAL—APPLICANTS MAY NOT BE DISCUSSED USING CODED NUMBERS—EMPLOYEE RECORDS MAY NOT BE MADE CONFIDENTIAL

To: William E. Brant, Palm Beach Gardens City Attorney, Lake Park

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. Does the holding of Wisher v. News-Press Publishing Co., 310 So.2d 345 (2 D.C.A. Fla., 1975), extend to exempt applications for employment of municipal department heads from the requirements of Ch. 119, F. S., the Public Records Law?

2. Do discussions of the applicants by preassigned number in a public meeting violate s. 286.011, F. S., the Government-in-the-Sunshine Law?

3. Does a clause contained in a collective bargaining agreement which permits personnel records of police officers to be kept confidential except upon legal process or with the consent of the employee violate Ch. 119?

SUMMARY:

Unless and until judicially determined to the contrary, applications for the position of municipal department head are public records, within the meaning of s. 119.011(1), F. S., which must be produced for inspection and examination by any person.

A state or local agency or official subject to Ch. 119, F. S., is not empowered to promise an applicant for the position of municipal department head that his application will be kept confidential or otherwise be exempted from the operation of s. 119.01 or s. 119.07(1).

The use of preassigned numbers or codes at public meetings in order to avoid the identification of persons who have applied for the position of municipal department head, violates the Sunshine Law, s. 286.011, F. S.

Neither a public employer nor a duly executed collective bargaining agreement between a public employer and its employees may validly make the personnel records of public employees confidential or except the same from s. 119.07(1), F. S.

According to your letter, the city administration is concerned about the proper procedures to be employed in conducting the appointive or selection process for city department heads. Under the charter of the city, appointment of department heads is the responsibility of the city council following a recommendation from the city manager. Some applicants for such positions have requested that their names not be made public unless their application is under final consideration. In order to comply with this request, numbers would be assigned to each application for preliminary review. Copies of the applications would be provided to members of the city council for review.

The policy of the city administration is to narrow an applicant list down to three to five applicants and conduct interviews and at that point disclose publicly the applicants who are part of the final selection process.

AS TO QUESTION 1:

Subsequent to the receipt of your request for an opinion, the Supreme Court of Florida quashed the decision of the District Court of Appeal, Second District, in Wisher v. News-Press Publishing Co., 310 So.2d 345 (2 D.C.A. Fla., 1975). *See* News-Press Publishing Co. v. Wisher, (Fla. 1977), Case No. 47,088, opinion filed February 25, 1977 (petition for rehearing and clarification pending). However, in quashing the decision of the Second District Court of Appeal, the court declined to rule on the broad policy question of general access to the personnel files of public employees presented by the case, *i.e.*, whether the judiciary possesses the authority to determine what records are "deemed by law" to be confidential as a matter of public policy for the purposes of the Public Records Law, and instead confined the opinion to the narrow issue of whether documents authored and discussed by a public body acting in an open public meeting are exempted from the operation of the Public Records Law. *Compare* s. 119.07(2)(a), F. S. 1967, which read, in pertinent part, "[a]ll public records which presently are *deemed by law* to be confidential or which are prohibited from being inspected by the public whether by general or special acts of the legislature . . . ." and s. 4, Ch. 75-225, Laws of Florida, amending s. 119.07(2)(a), which now states in pertinent part, "[a]ll 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 . . . ." (Emphasis supplied.)

However, in the case of applications for positions in the public employ, the Legislature in 1975 specifically amended s. 119.011(2), F. S., at s. 3, Ch. 75-225, Laws of Florida, by redefining the term "agency" to include public or private agencies or persons acting on behalf of a public agency in an attempt to insure that applications for public employment such as those here under consideration would be available for public inspection and examination under the Public Records Law regardless of whether they were received by a public board or an individual or group acting on behalf of the public board. This amendment was in response to the decision of the District Court of Appeal, First District, in State *ex rel.* Tindell v. Sharp, 300 So.2d 750 (1 D.C.A. Fla., 1974), in which the court held, among other things, that the personal files, papers, and the work product of an independent contractor-consultant employed by a school board to seek out suitable prospects for recommendation to the school board for its consideration for the vacant position of school superintendent were not subject to s. 119.01, F. S.

In light of the legislative and judicial history of s. 119.011(2), F. S., I do not believe that either the Second District Court of Appeal's decision in Wisher v. News-Press Publishing Co. 310 So.2d 345 (2 D.C.A. Fla., 1975), or the Supreme Court's decision in News-Press Publishing Co. v. Wisher, *supra*, quashing the Second District Court of Appeal decision, is applicable to applications for positions of municipal department heads. The Second District Court of Appeal's decision did not deal with such applications but was concerned instead with the confidentiality of the personnel files of public employees or a county department head. The Supreme Court's decision in Wisher, *supra*, did not pass upon such applications but dealt with documents authored by, and discussed, acted, and voted upon in, an open public meeting, which documents it held to be nonexempt from disclosure.

The 1975 Amendments to the Public Records Law evidence a legislative declaration of *general state policy* in favor of access to all state, county and municipal records. *See* s. 2, Ch. 75-225, Laws of Florida, stating that "[i]t is the policy of the state that all state, county, and municipal records shall at all times be open for a personal inspection by any person," and s. 3, Ch. 75-225, which amended the definition of "agency" at s. 119.011(3), F. S., in an attempt to insure that certain records of public or private agencies, persons, partnerships, corporations, or business entities acting on behalf of public agencies would be subject to public inspection, examination, and copying. Moreover, it can be persuasively argued that the amendment to s. 119.07(2)(a), found at s. 4, Ch. 75-225, and set forth, *supra*, should be construed as a legislative mandate that *only* records made confidential by general or special law are intended to be excluded from the operation of s. 119.07(1), F. S.

Additionally, in State *ex rel.* Cummer v. Pace, 159 So. 679, 681 (Fla. 1935), the court held that

> . . . where the Legislature has preserved no exception to the provisions of the statute [C.G.L. 490, from which s. 119.01, F. S. is derived], *the courts are without legal sanction to raise such exceptions by implication*; the policy of state statutes being a matter for the Legislature and not the judiciary to determine. (Emphasis supplied.)

State *ex rel.* Cummer v. Pace, *supra*, was found by the Supreme Court to be in conflict with Wisher v. News-Press Publishing Company, 310 So.2d 345 (2 D.C.A. Fla., 1975), and was not receded from in the court's decision in News-Press Publishing Co. v. Wisher, *supra*. Under the rule *expressio unius est exclusio alterius*, s. 119.07(2)(a), F. S., operates on those things enumerated or *expressly mentioned* and excludes from its operation all things *not expressly mentioned*. Thayer v. State of Florida, 335 So.2d 815, 817 (Fla. 1976); Interlachen Lakes Estates, Inc. v. R. Snyder, Jr., 304 So.2d 433, 434 (Fla. 1974); Dobbs v. Sea Isle Hotel, *et al.*, 56 So.2d 341, 342 (Fla. 1952); and *cf.* State *ex rel.* Cummer v. Pace, *supra*. It was on the basis of this familiar rule of statutory construction that the court in Caswell v. Manhattan Fire and Marine Ins. Co., 399 F.2d 417, 425 (5th Cir. 1969), refused to infer an exception to Ch. 119, F. S., for investigative reports of the State Fire Marshal, stating:

> The Florida legislature has chosen to grant a privilege from public disclosure of some records of state agencies.
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> * * * * *
>
> The legislature has accorded no such privileged status to investigation reports of the State Fire Marshal. . . . No section contains even a hint that the reports are privileged. In light of the existence of specific statutory privileges for reports of other state agencies, we conclude the Florida legislature has chosen not to confer such status on reports of the Fire Marshal.
>
> The Courts have recognized that public policy may require restrictions on the right to inspect public records. See Patterson v. Tribune Co., 146 So.2d 623 (Fla. App. 1962).
>
> * * * * *
>
> While certain records of the Fire Marshal may be analogous to investigative police reports, the Florida courts have not extended the public policy exception to the Fire Marshal's records.
>
> In the absence of statutory privilege, and in light of a general policy favoring public inspection of government records, we conclude the district court erred. . . .

The Legislature has seen fit to create well over one hundred express statutory exceptions to Ch. 119, but, in so doing, has not created an exception for the records here under consideration. To the contrary, the Legislature has acted affirmatively to broaden s. 119.011(2), F. S., in an attempt to, among other things, make certain records of "search committees" composed of private or public professionals, hired or appointed or employed in order to make recommendations concerning positions in the public employ, public records. *Also see* Gannett Co. Inc. v. Goldtrap, 302 So.2d 174 (2 D.C.A. Fla., 1974), holding that a preliminary land appraisal report obtained by a county in connection with negotiations for the proposed acquisition of a landfill site was a "public record" and not exempt by virtue of s. 119.07(2), F. S., notwithstanding that premature disclosure of the report would be harmful to the county and citing with approval AGO 072-63 to like effect.

In AGO 071-394 this office first expressed the view that a person who sends an application to a public body may not make such application confidential by labeling it as such. To allow such a procedure would permit private persons to exempt documents from Ch. 119, F. S., thereby defeating the intent of s. 119.07(2)(a), as amended, that the prerogative of designating a document confidential and excepting it from the Public Records Law belongs exclusively to the Legislature. The New York Court of Appeals, facing a similar question, stated:

> But it is said that the papers sought to be inspected are private and confidential, and hence do not fall within the purview of the statute. As to this argument, it is to be observed, in the first place, that a person who sends a communication to a public officer, relative to the public business, cannot make his communication private and confidential simply by labeling it as such. The law determines its character, not the will of the sender . . . . It is true that a

> disclosure of the objections . . . may restrain objectors from writing thus freely to similar boards in the future; but if such is a consequence of complying with the plain command of a statute it must be endured. [Egan v. Board of Water Supply, 98 N.E. 467, 470 (N.Y.C.A. 1912).]

See also the following cases decided under the Federal Freedom of Information Act, 5 U.S.C. s. 552, to like effect: Ackerley v. Ley, 420 F.2d 1336, 1339-1340, n.3; Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1974); Petkas v. Staats, 501 F.2d 887 (D.C. Cir. 1974); Legal Aid Society of Alameda County v. Schultz, 349 F.Supp. 771 (D.C. Cal. 1972).

Accordingly, unless and until judicially determined that applications for public employment are privileged as a matter of "public policy" notwithstanding ss. 2, 3, and 4 of Ch. 75-225, Laws of Florida, a state or local agency or official subject to Ch. 119, F. S., would not be empowered to promise an applicant for the position of department head that his application would be kept confidential or exempt any such application from the operation of s. 119.01 or s. 119.07(1), since the Legislature has required that such application be made available for public inspection and examination. To permit such a practice would allow public officials to do indirectly that which they are prohibited from doing directly and would be contrary to the clear intent of Ch. 119, as amended. *Cf.* I.D.S. Properties, Inc. v. Town of Palm Beach, 279 So.2d 353 (4 D.C.A. Fla., 1973).

AS TO QUESTION 2:

In News-Press Publishing Co. v. Wisher, *supra*, the Supreme Court discussed the procedure utilized by the Lee County Commission in reprimanding a department head and declared that such circumvention of s. 286.011, F. S., cannot be tolerated.

> . . . The policy of this state expressed in the public records law *and the open meeting statute* eliminate any notion that the commission was free to conduct the county's personnel business by pseudonyms or cloaked references. We cannot allow the purpose of our statutes to be thwarted by such obvious ruses. . . . (Emphasis supplied.)

Similarly, to permit discussions of applicants for the position of a municipal department head by a preassigned number or other coded identification in order to keep the public from knowing the identities of such applicants and to exclude the public from the appointive or selection process would clearly frustrate or defeat the purpose of the Sunshine Law. The use of preassigned numbers or codes at public meetings in order to avoid identification of applicants for the position of a municipal department head would violate the Sunshine Law, s. 286.011, F. S. *Accord*: Marks v. Broward County School Board, 26 Fla. Supp. 175, 179 (17th Jud. Cir., 1971); AGO's 073-264 and 073-344. To the extent AGO 071-58 is in conflict with this response, it is hereby receded from.

AS TO QUESTION 3:

This question involves a relatively simple issue, whether a public body and a private group can by agreement adopt or make an exemption from ss. 119.01 and 119.07(1), F. S. *Cf.* s. 447.605(3), F. S., exempting all work products developed by the public employer in preparation for negotiations and during negotiations from Ch. 119, F. S. No other collective bargaining documents or records or agreements are exempted from, or made confidential under, Ch. 119.

While the Supreme Court in News-Press Publishing Co. v. Wisher, *supra*, declined to discuss the broad policy issues of a court's power to imply exceptions to s. 119.01 and 119.07(1), F. S., previous decisions of the Supreme Court have indicated that only the Legislature has the power to except documents from the Public Records Law, *e.g., see* Cummer v. Pace, 159 So. 679 (Fla. 1935). Unless and until these decisions are expressly receded from by the Supreme Court of Florida, or the court in the future rules that personnel records of public employees are confidential as a matter of public policy, thus "provided by law to be confidential" within the purview of s. 119.07(2)(a), F. S. (s. 4, Ch. 75-225, Laws of Florida), I am of the view that a public employer, or a duly executed collective bargaining agreement between a public employer and its employees, may not validly make the personnel records of public employees confidential or except or exempt the same from the Public Records Law. If the police officers in question believe that

public access to certain of their personnel records without their consent would violate some applicable and material provision of a duly adopted or executed collective bargaining agreement or their privacy rights, an action for declaratory judgment under Ch. 86, F. S., could be brought in the appropriate circuit court in order to adjudicate their rights under Ch. 119, F. S., and such collective bargaining agreement.

077-49—May 24, 1977

PUBLIC RECORDS LAW

TRAFFIC ACCIDENT REPORTS REQUIRED BY MUNICIPAL ORDINANCE—CONFIDENTIALITY

To: Raymond E. Beary, Chief of Police, Winter Park

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

May a municipal police department permit public examination and copying of motor vehicle accident reports required by municipal ordinance?

SUMMARY:

A written motor vehicle accident report made by a person involved in an accident and filed with a municipal police department is within the purview of s. 316.066(4), F. S., which provides that such reports are for the *confidential use* of the municipal police department and other municipal agencies having use of the records for accident prevention purposes. Since such motor vehicle accident reports have been provided by law to be confidential, they are therefore exempt from the public inspection requirements of the Public Records Law, Ch. 119, F. S. However, notwithstanding s. 316.066(4), a driver or other participant involved in an accident or a duly authorized representative of such driver or participant may inspect and copy his or her own accident report. Nothing herein should be construed to extend the confidentiality which has been legislatively mandated by s. 316.066(4) to accident reports filed by the police officer investigating the same.

Section 316.066(1), F. S., requires the driver of a vehicle which is in any manner involved in an accident resulting in bodily injury to or death of any person or total damage to property to an apparent extent of $100 or more to forward a written report of such accident to the Department of Highway Safety and Motor Vehicles. However, when the investigating officer has made a written report of the accident, no written report need be forwarded to the department by the driver. Section 316.066(2), F. S., authorizes the department to require the driver of a vehicle involved in an accident to file supplemental written reports whenever the department deems the original report to be insufficient and to require witnesses of accidents to render reports to the department. Section 316.066(3), F. S., requires every law enforcement officer who in the regular course of duty investigates a motor vehicle accident in the circumstances prescribed in subsection (1), either at the time of and at the scene of the accident, or thereafter by interviewing participants or witnesses, to forward a written report of the accident within 24 hours after completing the investigation of such accident. Section 316.066(4), upon which your question is founded, provides:

> All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or other state agencies having use of the records for accident prevention purposes, except that the department may disclose the identity of a person involved in an accident when such identity is not otherwise known or

> when such person denies his presence at such accident, and except that the department shall disclose the final judicial disposition of the case indicating which if any of the parties were found guilty. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department shall furnish upon demand of any person who has, or claims to have, made such a report or upon demand of any court a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the requirements that such a report be made to the department.

Pursuant to s. 316.008(1)(k), F. S., municipalities are empowered with respect to streets and highways within their jurisdiction and within the reasonable exercise of their police powers to require written accident reports. Thus, the question initially arises as to whether or not an accident report required by a municipal ordinance adopted pursuant to the authorization granted under s. 316.008(1)(k) is also governed by the terms of s. 316.066(4), *supra.*

An examination of the language contained in s. 316.066(4), F. S., does not clearly indicate whether or not *municipal* accident reports are within the purview of that section. Under such circumstances, it is appropriate to look to the legislative history of the subject statute, as well as that of other closely related statutes, to determine the legislative intent. Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). To arrive at the meaning of a statute, the prior law, the mischief for which it had not provided, the remedy appointed by the Legislature, the reason for such remedy, and the facts which led to its enactment should be considered. Curry v. Lehman, 47 So. 18 (Fla. 1908).

In this regard, my research discloses that, prior to the enactment of the Uniform Traffic Law, Ch. 71-135, Laws of Florida, now codified as Ch. 316, F. S., state and local traffic regulation was governed by former Ch. 186, F. S. 1969, the Model Traffic Ordinance for Municipalities and former Ch. 317, F. S. 1969, which provided for regulation of traffic on highways. With respect to municipal accident reports, former s. 186.08(2) stated:

> The police department shall receive and properly file all accident reports made to it under state law, or under any ordinances of this municipality, but all such accident reports made by drivers shall be solely for the confidential use of the police department, the traffic engineer, the department of highway safety and motor vehicles, and the department of transportation, and no such report shall be admissible in any civil or criminal proceeding other than upon request of the person making such report or upon request of the court having jurisdiction to prove a compliance with the laws requiring the making of any such report.

Similarly, s. 186.9989 provided:

> All accident reports and supplemental reports required by drivers of vehicles by s. 186.9983(1) and (2) shall be without prejudice to the individual reporting, and shall be for the confidential use of the police department and of the department of highway safety and motor vehicles, except that the police department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the police department shall furnish upon demand of any court, a certificate showing that a specified accident report has or has not been made to the police department solely to prove a compliance or a failure to comply with the requirement that such a report be made to the department.

Moreover, s. 317.191 stated:

> Any incorporated city, town, village, or other municipality may, by ordinance, require that the driver of a vehicle involved in an accident shall also file with a designated city department a written report of such accident or a copy of any report herein required to be filed with the department. All such written reports shall be for the confidential use of the city department and subject to the provisions of s. 317.171 [now 316.066(4), F. S.].

Chapter 71-135, Laws of Florida, repealed both Chapters 186 and 317, F. S., and replaced them with a single chapter, present Ch. 316, F. S. In the preamble of Ch. 71-135, the Legislature indicated that the purpose of the revision was to ensure greater uniformity in traffic regulation throughout the state. This intent is reflected in the numerous "whereas clauses" which precede the enacting clause of the subject law, as exemplified by the following:

> WHEREAS, nonuniform laws and ordinances are a source of inconvenience and hazard to the motorist and pedestrian alike, and contribute to accidents, traffic snarls, and congestion, increase the administrative and enforcement burdens of governmental agencies, and raise serious barriers to interstate and intrastate travel and commerce, and
>
> WHEREAS, the following proposed chapter 316, Florida Statutes, is a consolidation of the existing state traffic laws contained in chapter 317, Florida Statutes, the traffic ordinances contained in chapter 186, Florida Statutes, and the suggested laws and ordinances contained in the Uniform Vehicle Code and the Model Traffic Ordinance into one workable, uniform law throughout the state and all its municipalities and political subdivisions . . . .

Accordingly, s. 1 of Ch. 71-135, Laws of Florida, now s. 316.002, F. S., in pertinent part states:

> . . . The legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. Section 316.008 enumerates the areas within which municipalities may control certain traffic movement or parking in their respective jurisdictions. . . .

In view of the foregoing, I am of the opinion that the legislative intent expressed by the enactment of Ch. 71-135, *supra*, was to ensure that municipal accident reports, where authorized by ordinances adopted pursuant to s. 316.008(1)(k), F. S., were governed by the same provisions as those which regulate accident reports required by the state through the Department of Highway Safety and Motor Vehicles. Thus, such reports are for the confidential use of the municipal police department or other city agencies having use of the records for accident prevention purposes. In addition, such reports may not be used as evidence in a civil or criminal trial arising out of such accident, except as otherwise provided in the statute. My conclusion in this regard is buttressed by several judicial decisions which have held that the purpose of s. 316.066(4), F. S., is at least in part to protect the constitutional rights against self-incrimination and to facilitate the ascertainment of the cause of accidents. Wise v. Western Union Telegraph Co., 177 So.2d 765 (1 D.C.A. Fla., 1965); Herbert v. Garner, 78 So.2d 727, 728 (Fla. 1955); State v. Coffey, 212 So.2d 632, 635 (Fla. 1968). Accordingly, a construction of s. 316.066(4) which would exclude municipal accident reports from the purview of that section might well be found to clash with the constitutional guarantee against self-incrimination, in addition to defeating the uniformity in traffic regulation intended by the Legislature.

Having determined that municipal accident reports fall within the purview of s. 316.066(4), *supra*, the remaining consideration is whether or not such reports are thereby exempted from the Public Records Laws, Ch. 119, F. S.

Florida's Public Records Law makes all state, county, and municipal records open to public inspection by any person. Sections 119.01 and 119.07(1), F. S. A municipal police department is an "agency" within the meaning of s. 119.011(2), F. S.; thus an accident report made or received by such department pursuant to law or ordinance or in connection with the transaction of official business is a public record open for inspection and copying unless s. 119.07(2)(a) is applicable. That section provides:

> 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).

My research discloses no judicial decision which has analyzed the relationship between s. 119.07(2)(a), *supra*, and s. 316.066(4), F. S. *Cf.* School Board of Marion County v. Public

Emp. Rel. Commission, 334 So.2d 582, 584-585, at n. 10 (Fla. 1976), wherein the court indicated that a statute which limited access to otherwise public records to a narrowly defined class of interested persons might operate as an exemption to s. 119.01, F. S., as recognized in s. 119.07(2)(a), F. S.

An examination of decisions in other jurisdictions reveals, however, that courts have construed statutes restricting the use of an otherwise public record to a particular governmental agency or department and, declaring such record to be "confidential," have also exempted such record from the disclosure requirements of the applicable Public Records Law. *See* Gerry v. Worcester Consol. St. Ry. Co., 143 N.E. 694, 697 (Mass. 1924); Lord v. Registrar of Motor Vehicles, 199 N.E.2d 316 (Mass. 1964). In light of the language in s. 316.066(4), F. S., which makes accident reports "for the *confidential* use of the department or other state agencies having use of the records for accident prevention purposes," (Emphasis supplied.) I am of the opinion that such reports have been *provided* by law to be confidential and, by virtue of s. 119.07(2)(a), are exempt from the provisions of ss. 119.01 and 119.07(1), F. S. *Cf.* Patterson v. Tribune Co., 146 So.2d 633 (2 D.C.A. Fla., 1962), *cert. den'd*, 153 So.2d 306 (Fla. 1963), wherein the court held that certain public records might be kept "secret and free from public inspection" when required by public policy.

As to whether a driver or other participant "involved in an accident" or a duly authorized representative of same may inspect and copy his *own* accident report, I am of the opinion that a different result must be reached. It has been held that the evidentiary privilege afforded by s. 316.066(4), *supra*, may be waived. Soler v. Kukula, 297 So.2d 600 (3 D.C.A. Fla., 1974); Southern Life and Health Ins. Co. v. Medley, 161 So.2d 19, 21 (3 D.C.A. Fla., 1964). Similarly, it is my opinion that the confidentiality provision of s. 316.066(4), F. S., may be waived by those persons whom the statute was designated to protect. *Cf.* Stivahtis v. Juras, 511 P.2d 421 (Ore. Ct. App. 1973), holding that a welfare recipient had a right to view his own file, notwithstanding a statute which prohibited disclosure of information contained in the files of welfare recipients. This conclusion appears to be consistent with the legislative intent as expressed in s. 321.05(1), F. S., which requires the members of the Florida Highway Patrol to, *inter alia*, "investigate traffic accidents, secure testimony of witnesses and persons involved and make report thereof with copy, when requested in writing, to any person in interest or his or her attorney . . . ." Accordingly, I am of the opinion that a driver or other participant of same may inspect and copy his own accident report.

It should also be noted that in AGO 072-158 I concluded that an accident report made *by the officer investigating the accident* (as opposed to a report made by a person involved in an accident) is not immune from public inspection and examination. *Accord:* Attorney General Opinion 056-286, stating that, although accident reports made by persons involved in accidents are confidential *by statute*, a report by the investigating officer was a public record subject to inspection as provided in then-existing s. 119.01, F. S. Accordingly, this response should not be construed to extend the confidentiality legislatively mandated by s. 316.066(4), F. S., to accident reports filed by the police officer investigating the same.

077-50—June 3, 1977

PUBLIC EMPLOYEES

BUDGET APPROVAL FOR SPECIALIZED TRAINING COURSES—GUIDELINES FOR APPROVAL

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: Staff

QUESTIONS:

1. Can the Division of Ad Valorem Tax approve a budget wherein a property appraiser proposes to expend public funds to cover the cost of sending his employees to various schools and training courses with the purpose of obtaining Certified Florida Evaluator (CFE) designations, and

then grant to such employees special qualification salaries as a result of having obtained the designation?

2. Can the Division of Ad Valorem Tax approve a budget wherein a county property appraiser proposes to expend public funds to cover his costs in attending various schools and training courses for the purpose of obtaining the Certified Florida Appraiser (CFA) designation, which designation automatically qualifies him for a special salary increase, as provided in s. 145.10(2), F. S.?

SUMMARY:

The Department of Revenue may approve a county property appraiser's budget containing expenditures for sending the appraiser to a Certified Florida Appraiser course conducted pursuant to ss. 195.002 and 145.10(2), F. S. Approval may be given to expenditures for sending certain employees of a property appraiser to a Certified Florida Evaluator course conducted pursuant to s. 195.002, provided the employing property appraiser certifies in writing that such employees are already qualified and trained for their positions and will be attending the course only to improve their efficiency in performing their official duties, and provided only those employees are sent whose duties pertain directly to the assessment of property. Public employees are assumed to be qualified to perform the duties of their positions as of the time they are hired.

The county property appraiser is specifically authorized by statute to receive a special qualification salary upon the completion of the Certified Florida Appraiser course. As to the employees of the county property appraiser, while there is no specific statutory provision authorizing automatic payment to an employee of a property appraiser—as opposed to the county property appraiser himself—of a special qualification salary, the amount to be paid a specific employee of a county property appraiser, in the future—absent a county civil service or job classification system—is subject to the sound and reasonable discretion of the property appraiser (and to Department of Revenue review), and that discretion might well include consideration of an employee's educational credits or training beyond those considered as basic education or training for the position filled.

As to those employees of county property appraisers who have already received, and are presently receiving, special qualification salary increments as previously approved by the Department of Revenue, they may continue to receive such increments, and such increments previously paid are *not* subject to reimbursement, because any amounts previously approved and funded for employees by the appraiser, funding authority and Department of Revenue are presumed to be in recognition of such employees' productivity and efficiency.

Section 195.087, F. S., provides for the submission of a county property appraiser's budget to the Division of Ad Valorem Tax of the Department of Revenue. Under s. 195.087(1)(a), the division may amend the budget if it finds the budget to be either inadequate or excessive. Such action by the division may be appealed by the property appraiser affected to the Governor and Cabinet sitting as the Administration Commission pursuant to s. 195.087(1)(a). While considerable discretion is vested in the division as to the propriety of budget items, it is fundamental that the division may not, by the budget approval process, authorize the use of public funds by a property appraiser for a purpose not authorized by express or necessarily implied statutory authority.

Section 195.002, F. S., provides that the Department of Revenue "shall conduct schools to upgrade assessment skills of both state and local assessment personnel." And in s. 145.10(2), F. S., it is provided:

> 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]. Any [property appraiser] who is certified during a calendar year shall receive in that

> year a pro rata share of the special qualification salary based on the remaining period of the year. *The department shall establish and maintain a certified Florida [property appraiser] program.* (Emphasis supplied.)

Under the above statutory provisions, it is clear that a county property appraiser who receives certification as a Certified Florida Appraiser upon completion of the requisite courses maintained by the Department of Revenue is entitled to a special qualification salary in the amount of $2,000 per year. However, neither of the above statutory provisions, nor any other statutory provision of which I am aware, specifically authorizes the payment of any special qualification salary to an *employee* of a county property appraiser based on attaining Certified Florida Evaluator certification.

I am also informed that the Department of Revenue has been authorizing payment to employees of county property appraisers of the special qualification salary for several years and that many such employees in the state have received, and are continuing to receive, such a salary increment.

While persons offering themselves for elective public office may not always have, at the time of their election, full expertise in all matters pertaining to the duties of the office, it is to be assumed that the person who is hired as an employee of such a public officer is already qualified and trained for his or her position when initially employed.

Of course, any employee may be compensated for his or her individual productivity or efficiency as determined appropriate by the property appraiser, subject to the funding authority and the Department of Revenue's review and approval, which productivity or efficiency after a reasonable period of time of job performance might have been stimulated by such educational training. Likewise, any amounts previously approved and funded for employees by the appraiser, funding authority, and the Department of Revenue are presumed to be in recognition of such employees' productivity and efficiency, are *not* subject to reimbursement, and may continue as such. As to future cases of employees completing the course, while there exists no specific statutory authority providing for special qualification salary for *employees* equivalent to that authority contained in s. 145.10(2) with regard to county property appraisers, the amount to be paid a specific employee of a county appraiser, in the future—absent a county civil service or job classification system—is subject to the sound and reasonable discretion of the property appraiser (and to Department of Revenue review), and that discretion can certainly consider the possession by an employee of educational credits or training beyond those considered as basic education or training for the position filled.

The expenditure of public funds to cover the cost of sending the appraiser and the appraiser's employees to courses leading to certification as Certified Florida Appraiser (in the case of the appraiser) and Certified Florida Evaluator (in the case of the employees of the appraiser), which courses are authorized by ss. 195.002 and 145.10(2), *supra*, was addressed by one of my predecessors in office in AGO 064-136. The conclusion therein answers your question as follows:

> It is a proper expense of the office of the assessor of taxes to expend public moneys for the cost of the tax assessor and/or his deputies attending schools to take "short courses" covering various phases of up-to-date appraisal of real property, provided, however, it is *not* a proper expense of the office of tax assessor to expend public moneys for the initial schooling and training of those persons who are not in the first instance qualified to perform the duties for which they are employed. While we have answered your first question in the affirmative, the only training which is hereby authorized is that training which is designed to improve the efficiency of an otherwise qualified employee.

The difference between training which qualifies one for a particular position of employment and training which improves the efficiency of an otherwise qualified employee was also emphasized in AGO 062-97. It was therein stated:

> There is clearly no authority for expenditures from public funds to provide employee training or education of a formal nature, although such training may indirectly benefit the public. *Public employees when employed should have the basic training necessary for their employment.* There is no general rule which may be applied equally to all factual situations—each case must stand on its own—and in the consideration of each case the primary test to be applied is whether the training program is one which, although designed to improve the

efficiency of the employee, will benefit the public. Unless the training will be of direct public benefit it may not be given, in the absence of specific legislative authority. Training and education of a formal nature for employees to fit them basically for the performance of their duties, as distinguished from training specifically designed to improve the efficiency of a qualified employee, may not be given at public expense. (Emphasis supplied.)

Thus, under AGO 064-136, the Department of Revenue may approve a budget containing expenditures for sending the county property appraiser and certain assistants to those official courses authorized by ss. 195.002 and 145.10(2), F. S. However, as to the expenses of such courses with respect to the *employees* of the appraiser, the guidelines in AGO's 062-97 and 064-136 differentiating between training to qualify one for a position and training which merely improves the efficiency of an already qualified and trained employee must be strictly applied and followed. Inclusion in an appraiser's budget of an amount to cover the cost of sending an employee to such a course, or a voucher for payment of such a budgeted amount, should be accompanied by written certification by the property appraiser to the effect that the employee whose educational expenses are to be paid from public funds is already qualified for his or her position and that the training is only for the purpose of improving that employee's efficiency in performing official duties. It should also be emphasized that an employee may not be sent to a course at public expense unless that employee is engaged in duties, the performance of which would be made more efficient by the course. (In other words, an employee engaged solely in clerical or administrative functions, and who does not have any duties regarding the actual assessment of property, could not be sent at public expense to a course designed to increase the efficiency of employees engaged in assessing property. If such an employee were to be sent to such a course at public expense, it would have to be assumed that the purpose was to train that person for a position for which he or she was not already qualified; such an expenditure of public funds would be clearly unlawful under the guidelines set forth in AGO's 062-97 and 064-136.)

077-51—June 9, 1977

REGIONAL WATER SUPPLY AUTHORITIES

AUTHORITY TO APPROVE OR DISAPPROVE—IN WHOM VESTED

To: Joseph W. Landers, Jr., Secretary, Department of Environmental Regulation, Tallahassee

Prepared by: J. Kendrick Tucker, Assistant Attorney General

QUESTIONS:

1. Do the Governor and Cabinet sitting as the head of the Department of Natural Resources retain the authority to approve or deny the establishment of a regional water supply authority?

2. If such authority was transferred to the Department of Environmental Regulation along with other functions under Ch. 373, F. S., does that authority reside in the secretary or the Environmental Regulation Commission?

SUMMARY:

The authority to approve or deny agreements establishing regional water supply authorities pursuant to s. 373.1962, F. S., has been transferred from the Governor and Cabinet, sitting as head of the Department of Natural Resources, to the Department of Environmental Regulation pursuant to Ch. 75-22, Laws of Florida. The Secretary of the Department of Environmental Regulation is the authority to take final action on the approval or denial of agreements establishing regional water supply authorities pursuant to s. 373.1962, F. S., rather than the

Environmental Regulation Commission. Appeals from such determinations are to the Environmental Regulation Commission, pursuant to Ch. 75-22, Laws of Florida.

Your questions are answered as discussed below.

In 1974 the Legislature created the mechanism for establishment and approval by the Governor and Cabinet of regional water supply authorities. Section 7 of Ch. 74-114, Laws of Florida, provides in pertinent part as follows:

> (1) By agreement between local governmental units created or existing pursuant to the provisions of Article VIII of the Constitution of the State of Florida, pursuant to the Florida interlocal cooperation act, section 163.01, Florida Statutes, and *upon the approval of the governor and cabinet sitting as head of the department of natural resources to insure that such agreement will be in the public interest and complies with the intent and purposes of this act,* regional water supply authorities may be created for the purpose of developing, storing and supplying water for county or municipal purposes in such a manner as will give priority to reducing adverse environmental effects of excessive or improper withdrawals of water from concentrated areas. In approving said agreement the governor and cabinet sitting as head of the department of natural resources shall consider, but not be limited to, the following: (Emphasis supplied.)

Thus, as created by Ch. 74-114, *supra,* the Governor and Cabinet sitting as the head of the Department of Natural Resources had the authority to approve or deny the agreement establishing regional water supply authorities. By specifically mentioning the Governor and Cabinet as the head of the Department of Natural Resources to carry out this function, the Legislature apparently intended such duty to be actually exercised by the Governor and Cabinet and not just by the staff of the Department of Natural Resources, which department, pursuant to s. 373.026, F. S. 1973, was responsible for the administration of Ch. 373, F. S., and had general authority over the water management districts. *Cf.* s. 20.05(1)(b), F. S. (1974 Supp.).

However, in 1975 the Legislature reorganized the environmental agencies. Section 11 of Ch. 75-22, Laws of Florida, provides in pertinent part as follows:

> *All* powers, duties and functions of the Department of Natural Resources relating to water management as set forth in chapter 373, Florida Statutes, *and chapter 74-114, Laws of Florida,* are transferred by a type four transfer, as defined in s. 20.06(4), Florida Statutes, to the department [Department of Environmental Regulation] . . . and provided further that, notwithstanding the provisions of s. 373.026(7), Florida Statutes, the governor and cabinet, sitting as the Land and Water Adjudicatory Commission, shall have the exclusive power by a vote of four of the members, to review, and may rescind or modify any rule or order of a water management district . . . to insure compliance with the provisions and purposes of chapter 373, Florida Statutes. (Emphasis supplied.)

Thus, by type four transfer *all* functions of the Department of Natural Resources relating to water management contained in Ch. 373, *supra, and* Ch. 74-114, *supra,* were transferred to the Department of Environmental Regulation. A type four transfer is defined in s. 20.06(4), F. S., as follows:

> A type four transfer is the merging of an identifiable program, activity, or function of an existing agency into a department. Any program or activity transferred by a type four transfer shall have *all* its statutory powers, duties, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds transferred to the department to which it is transferred. . . . (Emphasis supplied.)

The Department of Natural Resources is created pursuant to s. 20.25, F. S., and pursuant to s. 20.25(1) the Governor and Cabinet are the head of that department. While sitting as the head of the Department of Natural Resources the Governor and Cabinet are part and parcel of that department and exercise their authority as, for, and on behalf

of, that department. I, therefore, conclude that Ch. 75-22, *supra*, transferred to the Department of Environmental Regulation the approval of agreements establishing regional water supply authorities, since it transferred *all* functions of the Department of Natural Resources under Ch. 74-114, *supra*, to the Department of Environmental Regulation, including all the functions of the head of the Department of Natural Resources, the Governor and Cabinet.

While it might be argued that the Governor and Cabinet are best suited to determine whether the public interest will be served by creation of a regional water supply authority, nevertheless, such determination can certainly be made under the Constitution by other agencies. *See* s. 6, Art. IV, State Const. Additionally, since the Department of Environmental Regulation is now vested with the responsibility for the administration of Ch. 373, *supra*, and has general supervisory authority over all water management districts pursuant to s. 373.026, it likewise is certainly in a position to determine whether a proposed regional water supply authority created by agreement between local governmental units "complies with the intent and purposes" of Ch. 373, as required by s. 373.1962. Your first question is therefore answered in the negative.

Your second question asks that if such authority to approve the establishment of regional water supply authorities is vested in the Department of Environmental Regulation, does that authority reside in the Secretary of the Department of Environmental Regulation or in the Environmental Regulation Commission. With respect to the Secretary of the Department of Environmental Regulation, s. 20.261(1), F. S., provides that the head of the Department of Environmental Regulation is the secretary who is appointed by the Governor subject to confirmation by the Senate. Section 20.05(1)(a), F. S., provides that each head of a department shall 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.

With respect to the Environmental Regulation Commission, s. 6 of Ch. 75-22, *supra*, provides the duties of the commission as follows:

> The commission shall exercise the *exclusive standard-setting authority of the department*, except as provided in s. 6(1)(b) and s. 11 of this act. The commission shall also act as an *adjudicatory body for final actions taken by the department*, except for those appeals and decisions authorized in s. 5 of this act. (Emphasis supplied.)

In order to determine precisely how the approval of agreements establishing regional water supply authorities is to be accomplished, it is necessary to first determine whether such approval constitutes an order or a rule within the meaning of the Administrative Procedure Act. With a few exceptions, most all agency actions are either a rule or an order. *See* City of Titusville v. Florida Pub. Emp. Rel. Comm'n, 330 So.2d 733 (1 D.C.A. Fla., 1976), and State of Florida *ex rel.* Department of General Services, *et al.* v. Ben C. Willis, etc., *et al.* Case No. DD. 104 (1 D.C.A., Fla., 1977). Section 120.52, F. S. (1976 Supp.), defines rule and order as follows:

> (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.
>
> * * * * *
>
> (14) "Rule" means 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 any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also 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 and which have no application outside the agency issuing the memorandum. (Emphasis supplied.)

In Price Wise Buying Group v. Nuzum, 343 So.2d 115 (1 D.C.A. Fla., 1977), the court held that a declaratory statement issued pursuant to s. 120.565, F. S., that is an agency statement of general applicability that implements and prescribes policy was a rule within the meaning of s. 120.52(14), F. S. In Straughn v. O'Riordan, 338 So.2d 832 (Fla. 1976), the Supreme Court invalidated agency "guidelines" which were determinative whether bonds for sales tax collections were necessary under a statute that authorized such bonds when "necessary to insure compliance with the provisions of [sales tax laws]." The court held such guidelines to be rules and required their adoption under the Administrative Procedure Act.

As stated in AGO 076-123:

> This quasi-legislative act [rule making] 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 policy making conclusions to be drawn from facts; action affecting an entire class rather than individuals of the class, and action when particular members of the class are not singled out for special consideration based on their own facts.

In approving a proposed agreement establishing a regional water supply authority pursuant to s. 373.1962, *supra*, the Department of Environmental Regulation is to consider the following factors:

> (a) Whether the geographic territory of the proposed authority is of sufficient size and character to reduce the environmental effects of improper or excessive withdrawals of water from concentrated areas.
> (b) The maximization of economic development of the water resources within the territory of the proposed authority.
> (c) The availability of a dependable and adequate water supply.
> (d) The ability of any proposed authority to design, construct, operate, and maintain water supply facilities in the locations, and at the times necessary, to insure that an adequate water supply will be available to all citizens within the authority.
> (e) The effect or impact of any proposed authority on any municipality, county, or existing authority or authorities.
> (f) The existing needs of the water users within the area of the authority.
> [Section 373.1962, F. S.]

In making the determination whether a proposed agreement establishing a regional water supply authority is in the public interest and complies with the intent and purposes of Ch. 373, *supra*, by considering the above enumerated factors, it is my opinion that the agency is not implementing or prescribing law or policy so as to constitute the adoption of a rule within the meaning of s. 120.52(14), *supra*. Rather, this agency action seems primarily concerned with a determination of evidentiary facts affecting individual governmental entities or individual members of a class whose interests are singled out for special consideration. I, therefore, conclude that such agency action is not a rule but constitutes an order under s. 120.52(9), *supra*. Final action on such orders is vested in the Secretary of the Department of Environmental Regulation as head of the department pursuant to ss. 20.05(1)(a), and 20.261(1), F. S. Furthermore, from a reading of ch. 75-22, *supra*, I find no authority granted to the commission to exercise final action on such orders. However, pursuant to s. 6 of Ch. 75-22, as above quoted, the commission acts "as an adjudicatory body for final actions taken by the department" with certain exceptions not pertinent herein. Therefore, even though the secretary as head of the Department of Environmental Regulation takes final action on the approval or denial of agreements establishing regional water supply authorities pursuant to s. 373.1962, *supra*, nevertheless, the commission shall hear such determinations in an appellate capacity. Your question is therefore answered that the Secretary of the Department of Environmental Regulation is to take final action in approving agreements establishing regional water supply authorities pursuant to s. 373.1962, *supra*, but appeals of such determinations are made to the Environmental Regulation Commission.

077-52—June 9, 1977

TAXATION

PROCEDURE FOR SALE OF PROPERTY ACQUIRED BY FORECLOSURE OF COUNTY-HELD TAX SALE CERTIFICATES

To: Robert L. Nabors, Brevard County Attorney, Titusville

Prepared by: Patricia J. Turner, Assistant Attorney General

QUESTION:

What is the proper procedure for the sale of real property acquired by the foreclosure of county-held tax sale certificates under s. 197.670, F. S. 1971?

SUMMARY:

Property, subject to the lien of privately held tax sale certificates, acquired by the county prior to December 31, 1972, by judicial foreclosure of county-held tax sale certificates, must be sold in accordance with the procedures set forth in Ch. 197, F. S. 1971.

In situations where the 2-year period has expired, bringing the sale under s. 125.35, F. S., the property can be sold upon published notice and in the manner prescribed by s. 125.35 and cannot be sold by negotiation with a prospective purchaser without new advertisement or readvertisement.

Prior to December 31, 1972, the county acquired title to property subject to the lien of county-held tax certificates by judicial foreclosure. Upon entry of a final decree, title to the property was vested in the county free of all liens and claims of every kind. Individual holders of tax sale certificates were "restricted and confined solely to the right to participate in proceeds received from said lands upon the sale thereof by the board of county commissioners . . . pro rata," s. 197.650(6), F. S. 1971.

Within 90 days from the date of the entry of the final decree, the board of county commissioners was required to establish a value for each parcel "not less than fifty percent of the amount of the last assessed valuation appearing upon the county tax roll," s. 197.700(1), F. S. 1971.

Upon the deposit of the statutorily prescribed amount with the clerk of the circuit court by any person desiring to purchase the parcel and after publication of the notice of sale in a newspaper of general circulation in the county where the parcel was situated once each week for 2 successive weeks by said clerk, the county could dispose of the land at public sale to the highest bidder, s. 197.700(2), F. S. 1971.

If no application to purchase the property was submitted within 2 years after said property had been available for sale, the county was authorized to dispose of the land in any method provided by law, s. 197.700(2), F. S. 1971.

Section 125.35, F. S., provides the method for the sale of property belonging to the county. The sale of said property can be made only after notice of the sale has been published in a newspaper of general circulation in the county once a week for at least 2 weeks. The board of county commissioners is then authorized to accept the highest bid, unless said board rejects all bids as too low, s. 125.35, F. S.

Although Ch. 72-268, Laws of Florida, effective December 31, 1972, and Ch. 73-332, Laws of Florida, made major changes in Ch. 197, F. S. 1971, the above procedures set forth in the now repealed sections of Ch. 197 govern the sale and disposition of property acquired by the county prior to December 31, 1972, by the foreclosure of county-held tax sale certificates.

It is well established that the rights of holders of tax sale certificates other than governmental agencies are to be determined by the laws in force at the time the certificates are acquired. *See* Leland v. Andrews, 176 So. 418 (Fla. 1937); Northern Inv. Corporation v. Mutual Realty Co., 174 So. 849 (Fla. 1937); and AGO 074-202.

Under Ch. 197, F. S. 1971, an individual certificate holder was assured that for a period of 2 years following the entry of the final decree, property, if sold, would produce an

amount not less than 50 percent of the last assessed valuation. Upon termination of the 2-year period, the property could be sold to the highest bidder without any guarantee that said property would generate a definite return, unless the board of county commissioners, in its discretion, rejected all bids as too low. Therefore, the individual certificate holder, participating on a pro rata basis in proceeds from the sale, would desire said proceeds to be as high as possible.

Each time county-owned property is offered for sale, the provisions of Ch. 197, F. S. 1971, and s. 125.35, F. S., must be complied with, including the necessity to republish the notice of sale. The sale of said property cannot be effected by negotiation with a prospective purchaser without readvertisement, even though the property was advertised previously as required by s. 125.35. Where a controlling statute directs the procedure for accomplishing some object, it is, in effect, a prohibition against accomplishing the object in any other manner [*See* Alsop v. Pierce, 19 So.2d 799, 805, 806 (Fla. 1944); and *In re* Advisory Opinion of the Governor, Civil Rights, 306 So.2d 520, 523 (Fla. 1975)]; and, where a statute expressly mentions one procedure (*e.g.*, the sale by notice published for 2 weeks to the highest bidder), it impliedly excludes another procedure. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1972); and Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974).

Based upon the above-quoted statutory and case authority, it is my opinion that property, subject to the lien of privately held tax sale certificates, acquired by the county prior to December 31, 1972, by foreclosure of county-held tax sale certificates must be sold in accordance with the procedures set forth in Ch. 197, F. S. 1971.

Although more than 2 years have elapsed since the amendment of Ch. 197, F. S. 1971, thus bringing the sale of said property under the provisions of s. 125.35, F. S., the individual certificate holder still has an interest that the proceeds be distributed pursuant to the prior act.

077-53—June 9, 1977

LOCAL GOVERNMENT COMPREHENSIVE PLANNING ACT

ORDINANCE AFFECTING LESS THAN 5 PERCENT OF LAND AREA—ONLY ONE PUBLIC HEARING REQUIRED

To: Neal D. Bowen, City Attorney, Sanibel

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

In the enactment of ordinances which deal with the land use element of a comprehensive plan pursuant to the provisions of the Local Government Comprehensive Planning Act, when such ordinances deal with less that 5 percent of the total land area of the local governmental unit, must there be a second public hearing on a date set for the adoption of such ordinances?

SUMMARY:

Section 163.3181(3)(a), F. S. (1976 Supp.), governing the procedures to be followed in noticing and holding public hearings regarding the enactment of an ordinance affecting the land use element of a comprehensive plan of a local governmental unit under the Local Government Comprehensive Planning Act when the total land area to be affected by such ordinance is less than 5 percent of the total land area of the governmental unit, requires only one duly noticed and held public hearing, provided that the meeting at which such an ordinance is adopted is noticed and conducted in compliance with the Government in the Sunshine Law, as judicially construed.

The Local Government Comprehensive Planning Act has been amended by Ch. 76-155, Laws of Florida, which, *inter alia*, provides specific procedures governing the enactment of an ordinance dealing with the land use element of a comprehensive plan. Section 3 of the 1976 act amends s. 163.3181, F. S., to read, in material part:

> (3) . . . [W]henever a local governing body considers the enactment of an ordinance dealing with the land use element of a comprehensive plan, the following procedures shall be followed.
>
> (a) In cases where the proposed ordinance deals with less than 5 percent of the total land area of the local governmental unit, the governing body shall direct the clerk of the governing body to notify by mail each real property owner whose land the governmental agency will restrict or limit the use of 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 nor less than 30 days prior to the date *set for adoption* of the ordinance. (Emphasis supplied.)

Section 2 of Ch. 76-155, *supra*, in pertinent part, amends subsection (3) of s. 166.041, F. S., so as to except those ordinances which deal with land use enacted pursuant to the provisions of the Local Government Comprehensive Planning Act from the procedural requirements prescribed by s. 166.041(3) for enactment of municipal ordinances in general. This section further operates to prohibit the adoption of emergency ordinances which enact or amend a land use plan and to require ordinances which deal with land use pursuant to the provisions of the Comprehensive Planning Act to be enacted under the procedures prescribed in s. 163.3181(3), F. S.

The second sentence of s. 163.3181(3)(a), F. S. (1976 Supp.), permits, but does not require, more than one public hearing on ordinances dealing with the land use element of a comprehensive plan and which deal with less than 5 percent of the total land area of the affected local governmental unit. The last sentence of s. 163.3181(3)(a) requires the local governing body to hold only "a public hearing," *i.e.*, only one public hearing, on a proposed ordinance dealing with the land use elements of a comprehensive plan within the specified 30-day to 60-day time period prescribed by the statute. *See* Random House Dictionary of the English Language, p.1, defining "a" as "one, a certain, a particular," *and also* Lente v. Clarke, 1 So. 149, 152 (Fla. 1886), defining "a" as an adjective of singular specificity. There is no statutory requirement for public hearing on the date set for adoption of such an ordinance. However, all meetings of the governing bodies of all municipalities at which official acts are to be taken are required to be public meetings open to the public at all times, s. 286.011, F. S., upon reasonable notice thereof to the public, Hough v. Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1973). Further, s. 163.3181(3)(a) does not require the giving of advertised notice of the public hearing in a newspaper of general circulation; rather, it requires the local governing body to direct its clerk to notify by mail each affected real property owner, the use of whose land the local governmental agency proposes to restrict or limit by enactment of the ordinance. Such notice must state the substance of the proposed ordinance as it affects the particular property owner and set a time and place for the public hearing or hearings on the ordinance.

Additionally, the conclusion that only one duly noticed hearing is required to satisfy the requirements of s. 163.3181(3)(a), F. S. (1976 Supp.), is buttressed by a reading of s. 163.3181(3)(b)1., which expressly and specifically requires two advertised public hearings on proposed ordinances which deal with more than 5 percent of the total land area of the local governing unit and particularizes the time within which each of the two advertisements and hearings is to be made and held. If the Legislature had intended to require two duly noticed public hearings to meet the requirements for s. 163.3181(3)(a), *supra*, it could have, and presumably would have, done so as in s. 163.3181(3)(b)1.

Therefore, I am of the opinion that only one properly and timely noticed and held public hearing is required to meet the requirements of "a public hearing" on a proposed

land use ordinance dealing with less than 5 percent of the total land area of the local governmental agency under and as provided by the provisions of s. 163.3181(3)(a), F. S. (1976 Supp.), provided that the meeting at which such ordinance is adopted is noticed and conducted in compliance with the Government in the Sunshine Law, as judicially construed (s. 286.011, F. S.).

077-54—June 9, 1977

SPECIAL TAX DISTRICT

CHANGE IN COMPOSITION OF FIRE CONTROL DISTRICT HEAD—EFFECT ON FIREMEN'S EXISTING PENSION PLAN

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

Prepared by: Sharyn L. Smith, Assistant Attorney General and Joslyn Wilson, Legal Research Assistant

QUESTION:

> **What effect would a change in the composition of the St. Lucie County-Fort Pierce Fire Prevention and Control District Governing Board have on its firemen's pension plan?**

SUMMARY:

> **House Bill 651 (1977), which changes the composition of the St. Lucie County-Ft. Pierce Fire Prevention and Control District's governing board by making the board of county commissioners the ex officio governing head of the fire district will not affect the district's existing firemen's pension plan established under Ch. 175, F. S., the "Municipal Firemen's Pension Trust Fund Act."**

According to your letter, a question has been raised by firemen employed by the St. Lucie County-Ft. Pierce Fire Prevention and Control District as to the probable effects House Bill 651 (1977) will have on the district's existing firemen's retirement system. The 1977 amendment to Ch. 59-1806, Laws of Florida, which created the district, makes the Board of County Commissioners of St. Lucie County the ex officio governing board of the fire district. The fire control district is presently providing a pension program for its retired employees under the "Municipal Firemen's Pension Trust Fund Act," Ch. 175, F. S. Section 18 of Ch. 59-1806 provides:

> The board is authorized to employ the fire fighting personnel heretofore employed by the City of Fort Pierce and by the Fire Control District herein and hereby abolished. All rights of such personnel under the civil service and retirement laws and ordinances of the City of Fort Pierce and all rules and regulations pertaining thereto are hereby respectively preserved unto such personnel.

The firemen are concerned that the change in board membership will adversely affect their participation in their existing pension plan established under Ch. 175, F. S.

The fact that the St. Lucie County Commissioners serve as the ex officio commissioners and governing head of the fire district does not mean that they lack the authority to do all things necessary to carry out the purpose of the district. The term "ex officio" means "by virtue or because of an office" and simply describes the manner in which an official may validly serve as a member of another board or commission; that is, he serves as a member of another board or commission because of an office already held by him, provided, however, that the duties of the two offices are not incompatible or inconsistent. Attorney General Opinion 075-296. *See* State v. Florida State Turnpike Authority, 80 So.2d 337 (Fla. 1955) (member of State Road Board serving as ex officio member of State Improvement Commission); Advisory Opinion to the Governor, 1 So.2d 636 (Fla. 1941)

(chairman of State Road Department serving as ex officio member of State Planning Board); Amos v. Mathews, 126 So. 308 (Fla. 1930) (Governor, Comptroller, and State Treasurer serving ex officio as the State Board of Administration); Whitaker v. Parsons, 86 So. 247 (Fla. 1920).

Whether an officer as a member of both boards holds one or two offices is dependent on the nature of the duties of each.

> [I]f the duties of the two capacities are separate and distinct so that the officer, while acting in one capacity, is governed by one law and, while acting in the other, is governed by a different and independent law, then he holds two distinct and separate offices. [67 C.J.S. *Officers* s. 9, p. 120.]

The Fort Pierce-St. Lucie County Fire District was created by the Legislature in 1959 for the purpose of performing a prescribed, specialized function, that is, providing and coordinating fire protection within the district. The district's governing board was granted the authority "to establish, contract for, operate and maintain whatever facilities may be required to so reduce fire hazards and to prevent the destruction of the properties located within the . . . district and to exercise the powers incident to the operation of a fire prevention and control district . . . ." Chapter 59-1806, Laws of Florida. To implement the purpose of the district, the board is authorized to levy and collect taxes for the payment of notes that may be issued by the district. *See* ss. 12 and 20, Ch. 59-1806. While the duties imposed upon the fire district's board of commissioners are not inconsistent with those imposed upon the county board of commissioners, they are separate and distinct. The fire district is a separate political entity from the county, and its governing board of commissioners is governed by a different and independent law. Accordingly, a public officer serving as county commissioner for St. Lucie County and as an ex officio member of the fire district's board serves in two distinct and separate capacities and holds two distinct and separate offices.

The Chief of the Governments Division of the Bureau of the Census of the United States Department of Commerce has informed the county that if the board of county commissioners is also the ex officio governing board of the fire district, the district would be classified as a dependent agency of the county for federal revenue sharing purposes. Section 218.31(5), F. S., defines a "special district" as "a local unit of special government, except district school boards and community college districts, created pursuant to general or special law for the purpose of performing prescribed specialized functions, including urban functions, within limited boundaries." Section 218.31(6), F. S., defines a "dependent special district" as 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" for the purposes of part III of Ch. 218, F. S., the Uniform Local Financial Government and Reporting Act. Under these definitions, it appears that amending s. 6, Ch. 59-1806, Laws of Florida, so as to make the board of county commissioners the ex officio governing head of the fire district would operate to bring the district within the purview of part III of Ch. 218 as a "dependent special district," thereby subjecting it to the budget requirements of s. 218.34(2), which provides:

> The proposed budget of a dependent special district shall be contained within the general budget of the local governing authority and clearly stated as the budget of the dependent special district. Financial reporting shall be made in the same fashion as provided by rules of the department.

This designation of the fire control district as a "dependent special district" is, however, only pertinent to the Uniform Local Government Financial Management and Reporting Act and does not, in itself, affect the district's status with respect to state revenue sharing or the district's firemen's pension plan.

Accordingly, I am of the opinion that the aforesaid amendment to Ch. 59-1806, Laws of Florida, as amended by Ch. 65-2191, Laws of Florida, will not affect the district's existing firemen's pension plan regardless of the composition of its government head, ex officio or otherwise.

077-55—June 17, 1977

CONSTITUTIONAL LAW

PROVISION OF RELIGIOUS FACILITIES AND SERVICES OF CHAPLAIN IN COUNTY JAIL BY SHERIFF—DOES NOT VIOLATE ESTABLISHMENT CLAUSE

To: A. L. Johnson, Santa Rosa County Attorney, Milton

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Are any of the following practices prohibited by either the Establishment Clause of the First Amendment to the United States Constitution or s. 3, Art. I of the Florida Constitution: maintenance of an area within a county jail which is used for the conducting of religious services for the inmates; maintenance of a rent-free office within a county jail for the use of the prison chaplain; or use of public funds to employ a chaplain to minister to the inmates at the county jail?

2. If the answer to question 1 is in the negative, is the board of county commissioners authorized to establish such religious facilities at the county jail or compensate the prison chaplain from the general revenue fund of the county?

SUMMARY:

Neither the Establishment Clause of the First Amendment to the United States Constitution nor s. 3, Art. I, State Const., prohibits the maintenance of religious facilities within the confines of the county jail or the compensation from public funds of a chaplain to minister to the religious needs of the inmates provided that such facilities and clergy are made available to all inmates regardless of religious belief and that no one religion is given preference over another.

The internal operation and equipment of the county jail is the responsibility of the sheriff, subject to applicable rules and regulations promulgated by the Department of Offender Rehabilitation. Accordingly, the nature of religious facilities provided at the jail is within the discretion and jurisdiction of the sheriff, provided that no expenditure of funds for construction, repair, or capital improvement of the county jail is involved. Should repair or capital improvement of the county jail be required to provide religious facilities at the county jail, expenditures for such purpose would have to be authorized by the board of county commissioners.

Public funds may not be expended by the board of county commissioners to compensate a prison chaplain to service inmates of the county jail. However, the compensation of such chaplain may be included in the office budget of the sheriff and paid out of duly appropriated and budgeted moneys of that office.

AS TO QUESTION 1:

Your first question is answered entirely in the negative.

The Establishment Clause of the First Amendment to the U. S. Constitution prohibits the state from aiding, endorsing, or promoting particular religions. Abington School District v. Schempp, 374 U. S. 203 (1963); Engel v. Vitale, 370 U. S. 421 (1962); Everson v. Board of Education 330 U. S. 1 (1946). The Free Exercise Clause embraces the freedom to believe, and the freedom to act according to those beliefs, and thus prohibits the state from inhibiting the practice of religion. Cantwell v. Connecticut, 310 U. S. 296 (1940); Walz v. Tax Commission, 397 U. S. 664 (1970). Both of these principles embodied in the First Amendment are applicable to the states by operation of the Fourteenth Amendment. Torcaso v. Watkins, 367 U. S. 488 (1961); Cantwell v. Connecticut, *supra.*

Similar concepts of religious freedom have also been guaranteed by the Florida Constitution under s. 3, Art. I:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The establishment of religious facilities in penal institutions, and, in particular, the payment of clerics by the state to minister to inmates in such institutions, has required the judiciary to examine the relationship between the Establishment and Free Exercise Clauses. In O'Malley v. Brierley, 477 F.2d 785 (3rd Cir. 1973), the court described its dilemma in the following manner:

> Is the creation by the state of an official position for a cleric, granting to him in a state building access to members of a state-controlled prison population state "sponsorship, financial support, and active involvement . . . in religious activity?" (Walz v. Tax Commission, 397 U. S. 664, 668 (1970).) Conversely, is the refusal by a state official to permit officially designated ministers of religion to counsel state-controlled prisoners on state property, state "inhibition" of religion? [447 F.2d at 792.]

Although the Supreme Court has not yet expressly decided whether or not state-supported religious facilities and clerics in prisons violate the Establishment Clause, *see* Abington School Dist. v. Schempp, *supra* (J. Brennan concurring 297-298), this issue has been explored by the lower federal courts. Thus, in Kahane v. United States, 396 F. Supp. 687, 698 (E.D.N.Y. 1975), *aff'd*, 527 F.2d 49 (2nd Cir. 1975), the court analyzed the "unique area of tension" between the Free Exercice Clause and Establishment Clause in which prisons are located:

> [W]here the government has total control over people's lives, as in prisons, a niche has necessarily been carved into the establishment clause to require the government to afford opportunities for worship. . . . Thus, in the prison setting the establishment clause has been interpreted in light of the affirmative demands of the free exercise clause.

See also Horn v. People of California, 321 F. Supp. (D.C. Cal. 1968), *aff'd*, 436 F.2d 1375 (9th Cir. 1970), *cert. den'd*, 401 U. S. 976 (1971), holding that the payment of funds to prison chaplains does not constitute an establishment of religion.

The impact of the Fourteenth Amendment upon the right of prison inmates to practice their religion has also been considered in recent years. It has been held that the Fourteenth Amendment precludes prison authorities from indirectly and unreasonably disfavoring the practices of some religions by prison inmates. *See* Cruz v. Beto, 405 U. S. 319, 322 (1972) (while clergy need not be provided for every sect "regardless of size," comparable opportunities for religious practices must be afforded); Knuckles v. Prasse, 302 F. Supp. 1036, 1057 (E. D. Pa. 1969) (inmates entitled to have access to Muslim minister where prison officials permitted visits by Catholic, Protestant, and Jewish clergy); X (Bryant) v. Carlson, 363 F. Supp. 928 (E.D. Ill. 1973) (no willful religious discrimination exists where prison officials demonstrated they were willing to contract for, and pay, on a per visit basis, a Muslim minister in same manner as for Catholic, Protestant, and Jewish clergy); Long v. Parker 390 F.2d 816 (3rd Cir. 1968) (case remanded to determine whether prison's failure to provide Muslim ministers constitutes discrimination when other faiths were provided clergy); Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971) (state that provides Protestant, Catholic, and Jewish clergy to prison inmates must also pay Muslim minister pursuant to and in accordance with rates paid to other faiths); *Annot.*, 12 A.L.R.3d 1276. *But cf.* Gittlemacker v. Prasse, 428 F.2d 1 (3rd Cir. 1970) (the requirement that the state impose no unreasonable barriers to free exercise of inmates' religion cannot be equated with suggestion that the state has an affirmative duty to supply every inmate with a clergyman or religious services of his choice).

Applying the foregoing principles to your inquiry, I am of the opinion that the Establishment Clause of the First Amendment does not prohibit either the maintenance of an area within the Santa Rosa County Jail to be used for the conducting of religious services or the maintenance of a rent-free office within the confines of the jail for the purpose of religious counseling or other religious communications between the chaplain and the inmates or the use of public funds to compensate the chaplain. [A number of model penal and correctional codes advocate the provisions of religious facilities or chaplains to minister to the religious needs of prisoners confined in county or municipal jails as well as state and federal prisons. *See* American Bar Association, Joint Committee on the Legal Status of Prisoners, *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, s. 6(3)(b), (c), (e), (f) (1977); National Sheriffs' Association Manual of Jail Administration, s. 21(7), (1970); Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, Rules 41, 42 (1955); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, s. 2.16 (1973).] Moreover, such practices are not, in my opinion, proscribed by s. 3, Art. I, State Const. Although the Florida Supreme Court has not yet considered whether or not religious facilities or clergy may, consistent with s. 3, Art. I, be provided for prisoners serving sentences in Florida penal institutions, Florida courts have generally been guided by cases decided under the First Amendment to the United States Constitution, when considering the meaning of s. 3, Art. I. *See* State *ex rel.* Singleton v. Woodruff, 13 So.2d 704, 705 (1943), holding that s. 5 of the Declaration of Rights, State Const. 1885 (now s. 3, Art. I, State Const.) "merely reinforced the Federal immunization of religious liberties"; and the *Commentary* in 25 F.S.A. 83 (1970). Accordingly, I am of the opinion that, in the absence of, and pending, judicial determination, the maintenance of religious facilities in county jails or the payment of public funds to compensate a chaplain serving the religious needs of such prisoners does not violate s. 3, Art. I, State Const., provided that such religious facilities are provided on a nondiscriminatory basis, with no sect or denomination given preference over another. *See and compare* Brown v. Orange County Board of Pub. Inst., 128 So.2d 181 (2 D.C.A. Fla., 1960); Nohrr v. Brevard County Educational Fac. Auth., 247 So.2d 304 (Fla. 1971); Johnson v. Presbyterian Homes of Fla., Inc., 239 So.2d 256 (Fla. 1970); Paul v. Dade County, 202 So.2d 833 (3 D.C.A. Fla., 1967); Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla. 1959). [It should also be noted that chapels may be found in *state* penal institutions and that nondenominational chaplains are employed by the Department of Offender Rehabilitation to serve the religious needs of inmates confined in such institutions. *See* s. 944.11, F. S., providing, *inter alia*, that the Department of Offender Rehabilitation "shall adopt such regulations as it may deem proper . . . for the proper instruction of the prisoners in their basic moral and religious duties."] Additionally, it should be emphasized that the use of religious facilities or the conducting of religious services within the confines of the county jail is subject to such regulation and restriction as may be necessary to ensure the efficient functioning of the jail. *Cf.* Wolf v. McDonnell, 418 U. S. 539, 556 (1974), in which the U. S. Supreme Court recognized that there must be mutual accommodation between the institutional needs and objectives and the provisions of the Constitution that are of general application. *See also* State *ex rel.* Singleton v. Woodruff, 13 So.2d 104 (Fla. 1943); and AGO 057-250 concluding that a sheriff may deny permission to religious groups seeking to hold services in jail corridors and hallways where such services would interfere with the normal functioning of the jail or endanger prison security.

AS TO QUESTION 2:

Although the sheriff "has no exclusively inherent or constitutional right to the custody, care and keeping of county convicts" [Lang v. Walker, 55 So. 78, 80 (Fla. 1903)], it has been held that in the absence of a constitutional description of his duties, "the operation of the [county jail] and the control and custody of the inmates therein are in the hands of the sheriff." Baugher v. Alachua County, 305 So.2d 838, 839 (1 D.C.A. Fla., 1975). *Accord:* Brown v. St. Lucie County, 153 So. 906, 908 (Fla. 1933), wherein it was stated that the county jail is county property which the law requires the sheriff to "manage and look out for"; AGO 074-266, holding that the sheriff is responsible for "efficient operation of the jail"; 60 Am. Jur.2d *Penal and Correctional Institutions* s. 9.

The sheriff's responsibility for the operation of the county jail is made apparent by s. 30.49, F. S., which provides in pertinent part:

(1) At the time fixed by law for preparation of the county budget, each sheriff shall certify to the board of county commissioners a proposed budget of expenditures for the carrying out of the powers, duties, and operations of his office for the ensuing fiscal year of the county. The fiscal year of the sheriff shall henceforth commence on October 1 and end on September 30 of each year.
(2) The sheriff shall submit with the proposed budget his sworn certificate, stating that the proposed expenditures are reasonable and necessary for the proper and efficient operation of the office for the ensuing year. Each proposed budget shall show the estimated amounts of all *proposed expenditures for operating and equipping the sheriff's office and jail other than construction, repair, or capital improvement of county buildings during the said fiscal year.* The expenditures shall be itemized as follows:

(a) Salary of the sheriff.
(b) Salaries of deputies and assistants.
(c) Expenses, other than salaries.
(d) Equipment.
(e) Investigations.
(f) Reserve for contingencies. (Emphasis supplied.)

Section 30.49(4), F. S., authorizes the board of county commissioners to "amend, modify, increase or reduce any or all items of expenditures." This section, however, only authorizes the board to increase or reduce by *lump sum* the six items set out in the statute and does not empower the board to "dictate how the monies [*sic*] allocated by any one item can be used." Weitzenfeld v. Dierks, 312 So.2d 194, 196 (Fla. 1975). The *Weitzenfeld* court further held:

We find the internal operation of the sheriff's office and the allocation of appropriated monies [*sic*] within the six items of the budget is a function which belongs uniquely to the sheriff as chief law enforcement officer of the county. [*Id.* at 196.]

See also s. 30.53, F. S., providing in pertinent part the "[t]he independence of the sheriffs shall be preserved, concerning the purchase of supplies and equipment, selection of personnel, and the hiring, firing, and setting of salaries of such personnel . . . ."

Applying the foregoing statutes and authorities to your inquiry, it appears that the establishment of religious facilities within the confines of the county jail constitutes part of the operation of the jail; and hence, the nature of such religious facilities so provided is within the discretion and jurisdiction of the sheriff, provided that no expenditures for construction, repair, or capital improvement of the county jail are involved. Attention should also be directed, however, to s. 951.23(2)(a) and (b), F. S., which authorizes and directs the Department of Offender Rehabilitation to adopt rules and regulations prescribing standards and requirements with reference to:

(a) The construction, equipping, maintenance, and operation of county and municipal detention facilities;
(b) The cleanliness and sanitation of county and municipal detention facilities; the number of county and municipal prisoners who may be housed therein per specified unit of floor space; the quality, quantity, and supply of bedding furnished to such prisoners; the quality, quantity, and diversity of food served to them and the manner in which it is served; the furnishing to them of medical attention and health and comfort items; and the disciplinary treatment which may be meted out to them.

Pursuant to the foregoing statutory authority the Department of Offender Rehabilitation has promulgated Rule 33-8.09 F.A.C. providing in relevant part:

(1) The officer-in-charge [sheriff] should make maximum use of programs available through local community resources.

(2) The following is a partial list of agencies that may provide services to prisoners . . . Ministerial Associations.

* * * * *

(7) Rules and regulations shall be adopted to permit visits with prisoners by the following . . . his pastor . . . any persons who are participating in any rehabilitative or service program approved and authorized by the officer-in-charge of the detention facility.

Additionally, the payment of funds to a prison chaplain may be included within the sheriff's budget submitted in accordance with s. 30.49, F. S.

As to whether the *board of county commissioners* may independently authorize the expenditure of county funds to compensate a prison chaplain, I am of the opinion that a different conclusion must be reached. Noncharter counties may exercise only those powers which have been conferred upon them by law. Section 1(f), Art. VIII, State Const. *See also* State *ex rel.* Volusia County v. Dickinson, 269 So.2d 9, 11 (Fla. 1972); AGO 077-38. In this regard, I find no statutory provision authorizing counties to expend county funds to compensate or employ chaplains to minister to inmates at the county jail. *Compare* s. 951.06, F. S., requiring the board of county commissioners to employ a captain and such personnel as may be necessary to guard county prisoners who are laboring on the public works of the county and providing that salaries of such employees be paid out of the general revenue fund of the county. *See also* s. 951.03, F. S. Nor do I find a statutory provision which purports to vest any authority in the board of county commissioners with respect to the *internal* operation of the county jail. *Cf.* Baugher v. Alachua County, *supra*, in which it was stated: "[t]hat the defendant county has a duty to construct and provide funds for the operation of the jail can hardly be the basis for holding that it thereby becomes responsible for the day-to-day operation of the jail . . . ."

Accordingly, the *maintenance* of *existing* religious facilities or a chapel at the county jail is the responsibility of, and within the discretion and jurisdiction of, the sheriff, subject to applicable rules promulgated by the Department of Offender Rehabilitation pursuant to the provisions of s. 951.23, F. S. However, the board of county commissioners may authorize the repair or capital improvements of the county jail to provide for or establish such facilities or chapel. *See* s. 30.49, F. S., requiring the sheriff to include in his budget "estimated amounts of all proposed expenditures for operating and equipping the sheriff's office and jail *other than construction, repair, or capital improvement of county buildings.* . . ." (Emphasis supplied.) Section 125.01(1)(c), F. S., *cf.* s. 130.01, F. S.

077-56—June 17, 1977

LEGISLATION

"LEGISLATIVE APPROVAL" FOR USE OR PLEDGE OF FIRST GAS TAX FUNDS MEANS STATUTE AND NOT JOINT RESOLUTION

To: Dan I. Scarborough, Senator, 7th District, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Joslyn Wilson, Legal Research Assistant

QUESTION:

May the Legislature authorize the use of, or pledge, the first gas tax by joint resolution?

SUMMARY:

The Legislature may not authorize the use or pledge of the first gas tax by joint resolution under s. 339.12(5)(d), F. S.

Section 339.12(5)(d), F. S., provides:

(d) The department shall not use or pledge the proceeds of the first gas tax on any revenue-producing transportation project *without legislative approval.* (Emphasis supplied.)

The funds collected from the first gas tax are transferred into the "State Transportation Trust Fund," to be used for "the construction and maintenance of state roads as otherwise *provided by law,* under the direction of the Department of Transportation." (Emphasis supplied.) Section 206.46, F. S. *Also see* s. 206.45(1), F. S., establishing the "State Transportation Trust Fund" for use as *provided by law.* The plain language of the foregoing statutory provision limits approval for the use of the first gas tax to laws enacted by the Legislature. The important consideration is, then, whether legislative approval of the use of the first gas tax by *resolution* for the proposed Dames Point Bridge Project and related North/South Connectors satisfies the statutory requirements of ss. 339.12(5)(d), 206.45(1), and 206.46, F. S.

Most jurisdictions recognize a distinction between "resolutions" and "laws." *See, e.g.,* Baker v. City of Milwaukee, 533 P.2d 772, 775 (Ore. 1975) (resolution is not law but merely expression of Legislature's opinion); State *ex rel.* Jones v. Asherbury, 300 S.W. 2d 806, 817 (Mo. 1957); Village of Altamont v. Baltimore & O.S.W. Ry. Co., 56 N.E. 340, 341 (Ill. 1900). Although some constitutions provide to the contrary, "the general rule is that a joint or concurrent resolution adopted by the Legislature is not a statute, does not have the force or effect of law, and cannot be used for any purpose for which an exercise of legislative power is necessary." 73 Am. Jur.2d *Statutes* s. 3, p. 270. *Accord:* 77 C.J.S. *Resolutions,* p. 314 (a resolution is not a law). Resolutions are generally considered to be a temporary act, a declaration of the will of the Legislature in a given matter, unlike laws which are a continuing and permanent rule of government. *See* Certain Lots Upon Which Taxes are Delinquent v. Town of Monticello, 31 So.2d 905 (Fla. 1947); Brown v. City of St. Petersburg, 153 So. 141 (Fla. 1933).

In Florida, joint resolutions are often regarded as similar to bills. *See, e.g.,* s. 7, Art. III, State Const. (signing of bills or joint resolutions); s. 15.07, F. S. (deposit of joint resolutions with Department of State, *cf., In re* Apportionment Law, 281 So.2d 484 [Fla. 1973]) (due process requires that resolutions meet same basic requirements as laws). Once a bill has been passed by the Legislature, however, it must be presented to the Governor for approval. Section 8, Art. III, State Const. The State Constitution vests in the Governor as the chief executive of the state a qualified power to veto legislation. This power cannot be abrogated or limited by the Legislature. *See* Amos v. Gunn, 94 So. 615 (Fla. 1922). A bill becomes law if approved and signed by the Governor or if he fails to veto it within 7 consecutive days after presentation (15 if the Legislature adjourns or takes recess). Section 8, Art. III, State Const. The purpose of this provision is to insure the Governor's consideration of every bill before it becomes law.

A resolution passed by the Legislature is not subjected to the Governor's scrutiny. The Governor has no authority to review these resolutions prior to their becoming effective. *Cf.* Ginley v. Scott, 164 A.2d 424, 430 (Pa. 1960) (resolution may be adopted by either or both houses of Legislature, does not require Governor's signature or approval to validate it, and is not subject to be vetoed by Governor). Thus, it appears that distinction between a resolution and a law is, in part, due to the method of approving these measures. A resolution ordinarily is passed without the forms and delays normally required by the Constitution as a prerequisite to the enactment of valid laws. 77 C.J.S. *Resolutions,* p. 314. To permit a resolution, therefore, to satisfy the statutory mandate that approval be *by law* circumvents the safeguards contained in the Constitution and the Governor's authority and constitutional duty to review legislation. On the basis of the foregoing, I must conclude that a resolution is not a law.

However, a more difficult question is whether the "legislative approval" standard of s. 339.12(5)(d), F. S., is satisfied by the passage of a concurrent resolution. Section 206.46, F. S., appropriates annually all sums of money necessary to provide for the payment of the construction and maintenance of state roads by the Department of Transportation from the State Transportation Trust Fund. *Compare* s. 1(c), Art. VII, State Const. I am unaware of any Florida decision which has construed the language in question in s. 339.12(5)(d), or any other statute containing a similar provision. However, because public moneys contained in the State Treasury and the taxing power of the state are involved in this issue, I am inclined to the view that, pending legislative or judicial clarification, the phrase "legislative approval" as used in s. 339.12(5)(d) contemplates an official act of the Legislature as opposed to a concurrent resolution.

It should be noted, however, that a bill is presently before the Legislature which provides that, subject to certain conditions, the Legislature is not required to approve the use of the funds for the Jacksonville Expressway System under s. 339.12(5)(d), F. S.: H.B. 1558 (1977).

077-57—June 20, 1977

TAXATION

NONPROFIT CORPORATION NOT EXEMPT FROM COLLECTION OF ADMISSIONS TAXES

To: Tom Lewis, Representative, 83rd District, North Palm Beach, and Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: Staff

QUESTION:

Must a nonprofit corporation selling tickets to a fundraising event and inadvertently collecting admissions tax from the buyers of the tickets remit the taxes collected to the state?

SUMMARY:

Transactions in which a tax-exempt nonprofit corporation charges admission to a fundraising event held in a municipal auditorium are taxable under the Florida admissions tax law, s. 212.04, F. S., and are not tax exempt by virtue of the nonprofit corporation's holding a sales and use tax exemption granted under s. 212.08(7)(a), F. S., with respect to the purchase or lease of articles of tangible personal property by religious, charitable, and educational institutions and used in carrying on the customary activities of such institutions.

Your question is answered in the affirmative.

Your letter states that the Mid County Medical Center (hereinafter called "the center") is a Florida nonprofit corporation and holder of a Florida sales tax exemption number. The center held a fundraising event in West Palm Beach Auditorium. The auditorium's public relations firm had tickets printed for the event which reflected the admissions price plus a 4 percent admissions tax. While the center did not request that this tax be collected, it was nevertheless collected from ticket buyers and deposited in the center's bank account. Your question, simply stated, is whether the center may keep these funds or must pay them to the state.

A nonprofit corporation does not become exempt from the admissions tax by virtue of holding a sales tax exemption number. The admissions tax is separate and distinct from the sales tax in this respect. Section 212.04, F. S., which imposes the admissions tax, is broadly worded:

Admissions tax; rate, procedure, enforcement, etc.—It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who sells or receives anything of value, by way of admissions. For the exercise of said privilege a tax is levied as follows . . . .

Likewise, the term "admissions" is broadly defined in s. 212.02(16), F. S.:

The term "admissions" means and includes the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons to any place of amusement, sport, or recreation, or for the privilege of entering or staying in any place of amusement, sport or recreation, including but not limited to theaters, shows, exhibitions, games, races or any place where charge is made by way of sale of tickets, gate charges, seat charges, box charges,

season pass charges, cover charges, greens fees, participation fees, entrance fees or other fees or receipts of anything of value measured on an admission or entrance or length of stay or seat box accommodations in any place where there is any exhibition, entertainment, including admissions to performances of philharmonic associations, opera guilds, little theaters, and similar organizations, amusement, sport or recreation, and all dues paid to private clubs providing recreational facilities, including but not limited to golf, tennis, swimming, yachting, and boating facilities.

Other provisions in Ch. 212, F. S., which express the intent of the Legislature are also broadly worded. *See, e.g.*, s. 212.21(2), which reads in part:

> It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption or rental levied and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental, as shall be specifically exempted therefrom by this chapter, subject to the conditions appertaining to such exemption. . . .

Certain exemptions to the tax on admissions are set forth in s. 212.04(2)(b), F. S., which reads:

> No tax shall be levied on admissions to athletic or other events held by elementary schools, junior high schools, middle schools, high schools, community colleges, deaf and blind schools, facilities of the [youth services program of the Department of Health and Rehabilitative Services], and state correctional institutions when only student, faculty, or inmate talent is utilized.

This exemption provision must be strictly limited to the transactions described therein. *See* s. 212.21(3), F. S., which reads:

> *It is further declared to be the specific legislative intent to exempt from the tax or taxes or from the operation or the imposition thereof only such sales, admissions, uses, storages, consumption or rentals* in relation to or in respect of the things *set forth by this chapter* as exempted from the tax to the extent that such exemptions are in accordance with the provisions of the constitution of the state and of the United States. *It is further declared to be the specific legislative intent to tax each and every taxable privilege made subject to the tax or taxes, except such sales, admissions, uses, storages, consumptions or rentals as are specifically exempted* therefrom by this chapter to the extent that such exemptions are in accordance with the provisions of the constitution of the state and of the United States. (Emphasis supplied.)

See also Thayer v. State, 335 So.2d 815 (Fla. 1976); Interlachen Lake Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); and Wanda Marine Corp. v. State Dept. of Revenue, 305 So.2d 65 (1 D.C.A. Fla., 1975), applying the principle *expressio unius est exclusio alterius* to limit statutory enumerations to the things mentioned therein. Furthermore, tax exemptions generally are strictly construed against the party claiming the exemption. *See, e.g.*, State *ex rel.* Szabo Food Services v. Dickinson, 286 So.2d 592 (Fla. 1973).

Returning to the instant question, I conclude that s. 212.04(2)(b), F. S., provides no exemption for nonprofit corporations. The Department of Revenue's rules likewise provide no exemption for these corporations. *See* Rule 12A-1.05(2) and (3), F.A.C. Nonprofit corporations are therefore subject to the general provisions in s. 212.04, F. S., imposing an admissions tax.

The only remaining issue is whether the center's tax exemption under s. 212.08(7)(a), F. S., may be construed to cover admissions transactions. That provision reads:

> *Religious, charitable and educational.*—There shall be exempt from the tax imposed by this chapter *articles of tangible personal property* sold or leased direct to or by churches or *sold or leased to,* nonprofit religious, nonprofit educational, or nonprofit charitable institutions *and used by such institutions in carrying on their customary* nonprofit religious, nonprofit educational, or nonprofit charitable activities, including church cemeteries. (Emphasis supplied.)

Assuming that the center meets all the requirements for this exemption under s. 212.08(7)(c), F. S., this exemption appears to be limited by its own wording to transactions in which an exempt party buys or leases and uses tangible personal property in carrying on the customary nonprofit activities of the exempt institutions. Admissions transactions are therefore not within the scope of the exemption. *See* s. 212.21(2) and (3), F. S., quoted above.

Although no judicial authority exists which directly deals with this question, the case of Zero Food Storage v. Dept. of Revenue, 330 So.2d 765 (1 D.C.A. Fla., 1976), appears to support the conclusion reached herein. In that case, Zero Food Storage, the lessee of a cold storage warehouse for food, sought to avoid payment of rental taxes under s. 212.031, F. S., under the exemption for grocery transactions in s. 212.08(1), F. S. The court rejected this contention, holding that the exemption relied on applied only to tangible personal property and not to the rental of real property. A similar process of reasoning would require limiting the exemption in s. 212.08(7), F. S., to tangible personal property transactions in which the property is both purchased and used by the exempt institution in carrying on its customary nonprofit religious, charitable, or educational activities and not applying it to admissions transactions.

077-58—June 20, 1977

INDIGENTS

TREATMENT AT SHANDS TEACHING HOSPITAL—WHEN COUNTY OF RESIDENCE MAY BE BILLED FOR TREATMENT

To: Gerald Lewis, Comptroller, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

> **Does s. 241.471, F. S., require the Department of Banking and Finance to ascertain, prior to paying moneys held in the State Treasury for distribution to the counties to Shands Teaching Hospital, whether the counties or one of their duly authorized officials, agencies, or employees has transferred indigent residents to the hospital or utilized the hospital facilities to care for their indigent residents without referral approval through normal hospital admission procedures?**

SUMMARY:

> **Pursuant to s. 241.471(3), F. S., a county is not liable to Shands Teaching Hospital for the costs of providing care and treatment of its resident indigents unless it properly authorizes such hospital services or refers or transfers county indigents to the hospital. Liability under s. 241.471(3) can occur only when such transfer or utilization is effectuated with referral approval through normal hospital admission procedures.**

From information furnished this office by some of the involved counties and from correspondence from such counties to the department, a composite of the material factual allegations and contentions of the several involved counties suggests that the indigent patients whose hospital bills are the subject of this inquiry were not referred to or transferred to the Shands Teaching Hospital by the board of county commissioners or by any authorized county agency or employee such as a county health department or a county social services or welfare agency. Neither the county nor any of its authorized agencies, officials, or employees authorized Shands Teaching Hospital to provide care and treatment to the involved indigent patients. Neither the board of county commissioners of the respective involved counties nor any authorized county agency, official, or employee thereof has made any determination of county residency or of indigency of the patients involved.

Two of the indigent patients were referred by physicians in the private practice of medicine. These two patients may have been referred by private physicians on the staff of the county hospital, which is an independent public corporation and not under the control of the board of county commissioners, and may have been transported to Shands Teaching Hospital by the county ambulance service, which is directly operated and controlled by the county hospital and is independent of and not under the control of the board of county commissioners. One indigent patient was admitted to Shands Teaching Hospital by one of its staff physicians following contact by a public health nurse in the county health department (a cooperative county/state agency or entity under Ch. 154, F. S., serving a dual county/state purpose under the supervision of the Department of Health and Rehabilitative Services) inquiring as to examination and observation of the patient at the hospital's diabetic clinic on an outpatient basis at no charge. No referral to the hospital or medical treatment has been made or authorized by such county health department.

It is in the context of the above-stated factual circumstances, which for the purposes of this opinion are assumed to be correct, that I now consider the above-stated question.

The statute in question is presumptively valid and must be given effect until it is judicially declared invalid or inoperative. State *ex rel.* Gillespie v. Thursby, 139 So. 372 (Fla. 1932); White v. Crandon, 156 So. 303 (Fla. 1934); Evans v. Hillsborough Co., 186 So. 193 (Fla. 1938). Accordingly, no opinion is expressed as to the constitutionality *vel non* of s. 241.471(3), F. S. Section 241.471(2), F. S., declares as state policy that the hospital operations of the medical center at the University of Florida are to be financed from patient fees and payments from charity, welfare, and county agencies referring part-pay and nonpay patients to the medical center, so that the hospital will be as nearly self-sustaining as possible. Section 241.471(3) provides:

> Each *county transferring indigent patients* to the hospital *without referral approval through* the *normal admission procedure* shall be liable for all costs incurred by the hospital in providing care and treatment of such patients. *Each county utilizing the facilities* of the hospital *to care for its indigent patients,* other than those referrals approved prior to admission, *shall budget, set moneys aside, and pay for all services based upon statements rendered by the hospital.* If payment is not received within 30 days of billing, the hospital may certify the amount due and unpaid to the Department of Banking and Finance. *The Department* of Banking and Finance, upon receipt of a nonpayment certification, *shall remit payment* to the hospital, deduct the amount from any moneys held in the state treasury for distribution to the county failing to make prompt payment, and issue *a notice to the county of payments made on its behalf.* (Emphasis supplied.)

In the statutorily specified circumstances in which a county is liable for and required to budget and pay for the costs of care and treatment and hospital services provided and rendered to its indigent residents, such duty and liability is founded or premised upon "statements rendered by the hospital." Such statements or claims against the county and the disbursement of county funds for such purposes must be approved or disapproved by the board of county commissioners and preaudited by the clerk of the circuit court as the ex officio county auditor. *See generally,* State *ex rel.* Allied Engineering Corp. v. Bailey, 190 So. 445 (Fla. 1939); Davis v. Keen, 192 So. 200 (Fla. 1939); AGO's 071-150 and 073-113. *Also see* State *ex rel.* Landers v. Wheat, 137 So. 277 (Fla. 1931); Mayes Printing Co. v. Flowers, 154 So.2d 859 (1 D.C.A. Fla., 1963), and s. 129.09, F. S., as to the duties of the clerk acting as the ex officio county auditor, and ss. 129.06 and 129.08, F. S., as to the duties and expenditure responsibilities of the board of county commissioners.

Where such statements and other data or information available to the board of county commissioners or to the clerk as ex officio county auditor do *not* establish that the county referred or transferred or duly authorized the referral or transfer of indigent residents of the county to the Shands Teaching Hospital or utilized or duly authorized the utilization of the hospital facilities to care for its indigent patients, neither the board of county commissioners nor the clerk, as ex officio county auditor, is lawfully authorized to audit and approve or pay or authorize payment of such statements or claims against the county out of county funds.

Since s. 241.471(3), F. S., imposes liability or an obligation on the counties *only* for their indigent residents referred or transferred to the Shands Teaching Hospital by the counties, or where the counties utilize the facilities of the hospital to care for their

indigent resident patients, the certification and any supportive documentation by the hospital of unpaid statements rendered by it to the counties for the cost of care and treatment of indigent patients of the counties should facially establish that the counties referred or transferred such indigent patients to the hospital or utilized the hospital facilities to care for their indigent patients or they or their duly authorized agencies, officials, or employees duly authorized such referral or transfer or utilization. Such claims or vouchers for payment of public funds, whether state or county, 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, failing in which the paying agency is justified in turning down the request for payment cr requesting clarification or further proof of such claim. Attorney General Opinions 068-12 and 075-299. Since the statute specifies that any payments remitted to the hospital by the department are made on *behalf of the county,* it would follow that *any* payment remitted must be in satisfaction of a lawful claim against the county and an obligation of the county imposed on it by law. (Section 241.471(2)-(3), F. S.)

Moreover, s. 241.471(3), F. S., imposes an obligation on the counties transferring indigent patients or utilizing hospital facilities *only* when such transfer or utilization occurs "without referral approval through the normal admission procedures." Rule 6C-10.07, F.A.C., which implements, *inter alia,* s. 241.471, F. S., provides at subsection (1) that admission of indigent patients at Shands Teaching Hospital *shall be controlled by the hospital director.* When the account of an indigent patient is found to be uncollectible, the hospital is authorized at subsection (3) of Rule 6C-10.07 to write off such account. The hospital director has the authority and responsibility to operate the hospital and all of its activities and departments subject to policies and procedures issued by the health center, Board of Regents, and governmental boards of the state. Rule 6CL-5.72, F.A.C. Thus, the provisions of s. 241.471 can be asserted by Shands Teaching Hospital against a county only when a county or a duly authorized county agency, official, or employee thereof has transferred patients to, or utilized services of, Shands Teaching Hospital without obtaining referral approval through the normal admission procedures which are controlled by and are the responsibility of the hospital director.

I am advised that the involved counties have refused to authorize payments to Shands for the treatment of indigents because they question the propriety of the transfer and admission of such patients by persons or agencies not authoriz[illegible] by the county to effect the same, as well as the respective patients' status as indigent [illegible]esidents of the involved counties. *Compare* Rule 6C-10.07(2)(a), F.A.C., establishing guidelines to be used by the hospital for determining indigency. Unless and until it is determined that the county or one of its authorized agents or employees in fact transferred these specific patients without referral approval through normal hospital admission procedures, no county obligation could be found to exist under s. 241.471, F. S.

If you are unable to determine from the face of the nonpayment certification and any supportive documentation presented to you by Shands Teaching Hospital whether a transfer of indigent residents or utilization of the hospital facilities to care for indigent patients by the county or one of its duly authorized officials, agencies, or employees without referral approval through normal hospital admission procedures occurred, you should refuse to pay the amount claimed on the nonpayment certification until you are satisfied that the requirements of s. 241.471, F. S., as outlined in this response have been met.

077-59—June 20, 1977

POLICE STANDARDS AND TRAINING

PAYMENT OF TRAVEL AND PER DIEM EXPENSES—TRAINEES—POLICE STANDARDS AND TRAINING COMMISSION MEMBERS

To: Neil C. Chamelin, Director, Division of Standards and Training, Police Standards and Training Commission, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Joslyn Wilson, Legal Research Assistant

QUESTIONS:

1. May travel and per diem expenses be considered part of the costs borne by the state in s. 943.25(2), F. S.?

2. May travel and per diem expenses of regular employees of the Division of Standards and Training be expended from the administration and special training appropriation from the Law Enforcement Training Trust Fund when incurred while implementing the statewide specialized and technical training program?

SUMMARY:

The state is statutorily required to provide for the training, room, and board of those police officers participating in special training programs established and supervised by the Division of Standards and Training as approved by the Police Standards and Training Commission. The state's liability is limited to those expenses enumerated in s. 943.25(2), although local and state law enforcement agencies may authorize per diem and travel expenses incurred by their police officers en route to and from the special training programs and facilities as part of, or in the nature of, "compensation" of such officers. As compensation, traveling expenses may be reimbursed to the trainee incurred en route to and from training programs and facilities; however, in absence of any statutory or judicial interpretation to the contrary and as the agencies themselves receive the benefit of their officer's special training, the state and local law enforcement agencies are liable for any per diem or travel expenses which they authorize for their respective police officer-trainees.

Members of the Police Standards and Training Commission are entitled to be reimbursed for duly authorized travel expenses. Such expenses, however, should be paid from appropriations to the Department of Criminal Law Enforcement for expenses, unless the moneys for such expenses are appropriated to the Division of Standards and Training for and as a part of its expenses. Authorized travel expenses for division employees generally are to be paid out of moneys appropriated in Item 280, s. 1, Ch. 76-285, Laws of Florida, for the division's expenses. Only if the travel is in connection with the administration and special technical training provided for by Item 282 of the 1976 Appropriations Act and such travel is necessary to the performance of the employee's duties in this regard may such travel expenses be expended from the moneys appropriated from the Law Enforcement Training Trust Fund in Item 282, s. 1, Ch. 76-285.

According to your letter, the Police Standards and Training Commission has adopted a 15-region plan to implement the disbursement of moneys which had accumulated in a fund designed for a Florida Police Academy. The regional plan basically reallocated all of the money in the police academy fund to state and local law enforcement agencies through regional councils to underwrite programs to train and educate law enforcement officers, with two exceptions. A portion of the moneys has been withheld to be applied statewide in training concepts to meet the needs and priorities in highly specialized and technical areas, and an appropriation was made by the 1976 Legislature for the administration of the special technical training programs. *See* Item 282, s. 1 of Ch. 76-285, Laws of Florida, the General Appropriations Act.

Section 943.25(1), F. S., requires the Division of Standards and Training of the Department of Criminal Law Enforcement 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 in the prevention, investigation, detection, and identification of crime and, upon request, to instruct law enforcement agencies in such highly advanced and specialized areas. Item 280, s. 1, ch. 76-285, Laws of Florida, provides generally for the division's expenses from the General Revenue Fund and the Grants and Donation Trust Fund.

Section 943.25(6), F. S., transferred all funds which had accumulated to the Florida Police Academy as of August 1, 1974, to the Department of Criminal Law Enforcement for implementation of these training programs and training facilities. However, the

department was authorized to expend any such funds for the establishment or construction of, or improvement to, any facility for law enforcement training on a regional basis. Additionally, the collection of $1 as court costs, assessed in state and municipal courts (now abolished) against persons convicted of violating a state criminal or penal statute or municipal or county ordinance, was authorized and required under the provisions of s. 943.25(3), F. S. A portion of these funds is earmarked for, and distributed to, the Department of Criminal Law Enforcement for disbursement from such allocated funds of those sums necessary and required for the implementation of training programs and the establishment of training facilities submitted by the Department of Criminal Law Enforcement and approved by the Police Standards and Training Commission. Section 943.25(3) and (7), F. S.

In 1976, the Legislature created the Law Enforcement Training Trust Fund and appropriated from such trust fund the necessary moneys for implementation of the commission's regional plan for the disbursement and reallocation of the accumulated funds in the Florida Police Academy Fund on a regional basis through regional councils. *See* Item 281, s. 1, Ch. 76-285, Laws of Florida. This appropriation is subject to the proviso that the funds appropriated for *grants and aids* for special education and technical training shall not fund projects which will require future expenditures from general revenue for continuing operations. Item 282, s. 1, Ch. 76-285, made a lump sum appropriation for the costs of administration and special technical training from the trust fund.

AS TO QUESTION 1:

You inquire as to whether under s. 943.25(2), F. S., the state must bear per diem and travel expenses incurred en route to and from the training programs and facilities. Section 943.25(2) provides:

> No fee or other charge shall be assessed against any person, municipality, sheriff, county, or state law enforcement agency for the *training, room, or board of any person; said expenses shall be borne by the state.* Any compensation to any person during the period of his or her training shall be fixed and determined by the proper authority within the municipality, county, or state law enforcement agency sponsoring the person, and such compensation, if any, shall be paid directly to the person. (Emphasis supplied.)

The foregoing statutory provision clearly provides that the state shall not charge any fee or other charge against a "trainee" or local or state law enforcement agency for the training, room, or board of participants in these programs; these costs are to be borne by the state. Section 112.061(6), F. S., which provides generally for per diem rates and subsistence allowances for public employees, permits the trainee to be reimbursed only for actual expenses of lodging and meals, not to exceed $25, as provided in s. 112.061(6)(a)2. *But see* s. 943.25(9)(a) and (b), F. S., which grants the Department of Criminal Law Enforcement the authority to contract with "any state university or community college in the state, or any other organization" to provide training for, or facilities for training, police officers. These officers, if approved by the department, are to receive such training "without cost." Paragraphs (a) and (b) of s. 943.25(9), F. S., must be read *in pari materia* with s. 112.061, F. S. Therefore, should the department contract with an organization to provide training or facilities for training police officers as specified in s. 943.25(9)(a), the costs of the foregoing are not to be charged to the trainee or the state or local law enforcement agency. The costs of training, room, or board of any trainee must be borne by the state out of duly appropriated moneys for those purposes at the actual costs thereof, even though the same might exceed the $25 per diem limit set by s. 112.061(6)(c)2.

Section 943.25(2), F. S., deals directly with the state's liability for a trainee's expenses. The section does *not* apply generally to implementing the commission's regional plan, to administering the special training program, or to disbursing moneys for grants or aids as specified in Item 281 of the 1976 General Appropriations Act. Accordingly, per diem and travel expenses of individuals engaged in the foregoing activities are not included within this statutory provision.

Moreover, s. 943.25(2), F. S., enumerates those expenses of the trainee for which the state will be liable. Under the rule *expressio unius est exclusio alterius,* the mention of one thing excludes the other, the state's liability for a trainee's expenses under s.

943.25(2) is limited to training, room, and board. *Cf.* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). However, the last sentence of s. 943.25(2) provides that the payment of "compensation" to trainees is left to the discretion of the local or state law enforcement agency sponsoring the trainee. Compensation has been defined as "[t]he remuneration or wages given to an employee or, especially, to an officer," Black's Law Dictionary, p. 354 (4th ed. 1968), and encompasses the concept of making one "whole." Under this definition, compensation has been used to comprehend a wide variety of purposes such as fees, mileage, and traveling expenses. 15A C.J.S. *Compensation*, p. 105; *cf.* Lechenby v. Post Printing and Publishing Co., 176 P. 490, 492 (Colo. 1918) (mileage); Lowden v. Washita Co. Excise Board, 113 P.2d 370, 372 (Okl. 1941) (travel expenses); State v. Pitzenbarger, 214 N.E.2d 849, 852 (Ohio 1965).

Reimbursing a trainee for traveling expenses incurred while participating in these training programs encompasses the concept of making the trainee "whole." Thus, it appears that the last sentence of s. 943.25(2), F. S., may permit, but does not require, local and state law enforcement agencies to authorize, in their discretion, the payment of per diem and traveling expenses for police officers who attend these programs. The local and state law enforcement agencies receive the benefit of the specialized training of their police officers; therefore, in the absence of a statutory provision to the contrary, these agencies should be liable for those costs which they authorize. Accordingly, it is my opinion that, while the state is liable for costs incurred in the training, room, and board of police officers, other expenses such as travel expenses and per diem may be but are not required to be authorized by the local or state law enforcement agencies. As these agencies will receive the benefit of such training of their officers, they are liable for per diem and traveling expenses of the police officers' training incurred while traveling to and from the training programs and facilities.

AS TO QUESTION 2:

Members of the Police Standards and Training Commission serve without compensation; however, they are statutorily authorized "to be reimbursed for per diem and traveling expenses as provided by s. 112.061, F. S." Section 943.11(6), F. S. Section 943.11(5), F. S., provides that the commission "shall hold at least four regular meetings each year at the call of the chairman or upon the written request by three members of the commission." Thus, members of the commission may be reimbursed for per diem and travel expenses incurred while attending these duly authorized meetings. There is, however, no special appropriation for the commission's expenses. Although the commission is a part of the Department of Criminal Law Enforcement, it is not a part of the Division of Standards and Training and, accordingly, the per diem and travel expenses of the members of the commission should be paid from moneys appropriated to the department, unless the moneys for such expenses are appropriated to the division for and as a part of its expenses. *See* the appropriation to the office of the executive director and the Division of Staff Services for expenses, *and* appropriation to the division for expenses, Items 270 and 280, respectively, s. 1, Ch. 76-285, Laws of Florida.

The officers and employees of the Division of Standards and Training of the department, when traveling on official business of the state, also may be reimbursed for travel expenses necessarily incurred by them while administering and implementing the commission's plan and for the administration and special technical training referred to in Item 282 of the General Appropriations Act. The traveling expenses of all travelers are 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 s. 112.061(3)(b), F. S. All travel must be duly authorized and approved by the agency head. Section 112.061(3)(a), F. S.

The moneys appropriated in Item 281, s. 1, Ch. 76-285, Laws of Florida, from the Law Enforcement Training Trust Fund are earmarked for grants and aids for special education and technical training. It is well recognized within this state that public funds may be expended only for public purpose or function which the public body is expressly authorized to carry out or which must be necessarily implied in order to carry out the purpose or function expressly authorized. *See* 81 C.J.S. *States* s. 167, p. 1226; 20 C.J.S. *Counties* ss. 129 and 207, pp. 941 and 1052, respectively; O'Neill v. Burns, 198 So.2d 1 (Fla. 1967); Florida Development Comm. v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970); AGO 075-120. Moreover, if there is any doubt as to the lawful existence of a particular power being exercised with respect to public funds, it should not be exercised. *See* AGO's 075-299 and 075-120; *cf.* State *ex rel.* Greenberg v.

Florida State Board of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974) ("If there is a reasonable doubt as to the lawful existence of a particular power which is being exercised, the future exercise of the power should be arrested.").

Applying the foregoing to your inquiry, Item 281 clearly specifies the use for which the moneys contained in this appropriation may be expended—*grants and aids* for special education and technical training. As public funds are involved, the purposes for which the appropriation contained in Item 281 may be used should be strictly construed and limited to those enumerated in the appropriation. The funds appropriated in Item 281 are not funds earmarked for the benefit of, or expenses of, the division, but rather are appropriated *to* the division for disbursement to local agencies. The division acts as a conduit for the moneys contained in Item 281 for the benefit of such local agencies, and, therefore, the division may not, in my opinion, expend the moneys contained in Item 281 for its own purposes. Accordingly, per diem and expenses incurred by division employees may not be paid out of the Item 281 funds from the Law Enforcement Training Trust Fund.

The division may, however, pay travel expenses to division employees when such travel is duly authorized and necessarily incurred on official business of the division. Such expenditures may be classified as "expenses" of the division and expended from the moneys appropriated to the division for expenses under Item 280, s. 1, Ch. 76-285, Laws of Florida. Only when the travel is in connection with "administration and special technical training" within the purview of the Item 282 lump sum appropriation of the 1976 General Appropriations Act and is necessary to the performance of the division employee's official duties in those regards may the expenses of such travel be expended from the Law Enforcement Training Trust Fund under the moneys appropriated by Item 282. Moreover, the "activity associated with implementation of the program" referred to in your inquiry also must be primarily associated with or in connection with "administration and special technical training" within the meaning of Item 282. Otherwise, any travel expenses necessarily incurred by the division must be paid out of the Item 280 appropriations from the General Revenue Fund or the Grants and Donation Fund.

077-60—June 29, 1977

EDUCATION

TEACHER EDUCATION CENTERS TO BE ESTABLISHED BY JUNE 30, 1979

To: Ralph D. Turlington, Commissioner of Education, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Frank A. Vickory, Legal Research Assistant

QUESTION:

Does the provision contained in s. 231.611, F. S., relating to establishment of teacher education centers that "statewide implementation should be accomplished prior to June 30, 1979," mean that every school district will be involved with teacher centers by that date, or does it mean that after that date there will be no further teacher centers?

SUMMARY:

The language of s. 231.611, F. S., regarding implementation of teacher education centers, and requiring that "[s]tatewide implementation should be accomplished prior to June 30, 1979," means that such centers are to be established and in operation by that date and every school district should be involved or participating in teacher education centers and programs by June 30, 1979.

Sections 231.600-231.610, F. S., are known as the Teacher Education Center Act of 1973, which provides for the establishment of teacher learning centers in Florida. Section 231.611, F. S., was added to the act in 1974 by Ch. 74-227, Laws of Florida, and provides, *inter alia*, that the planning, development, and implementation of teacher education centers shall be carried out "in an orderly, systematic manner." In order to assure that implementation of these centers and effectuation of the purposes of the teacher education center act be accomplished as expeditiously as possible, s. 231.611(1) provides that "[s]tatewide implementation should be accomplished prior to June 30, 1979," and authorizes the Department of Education to approve up to 10 centers during fiscal year 1974-1975. Your concern about interpretation of this section apparently results from uncertainty about whether the Legislature contemplated that all of the school districts be involved with teacher centers and that such centers be in full, continuing operation by June 30, 1979, or whether it was contemplated that after that date there be no further teacher centers established.

In seeking to resolve the problem of interpreting the statutory language, I am guided by long-established rules of statutory construction. Initially, legislative intent is to be ascertained if possible from a consideration of the entire act and of others *in pari materia*. Effect should be given to all material portions of the law in order to carry out and effectuate to the greatest degree possible the intention of the lawmakers. State v. Amos, 79 So. 433 (Fla. 1918); State v. Burr, 84 So. 61 (Fla. 1920); Mixon v. Keller, 372 F. Supp. 51 (N.D. Fla. 1974), *aff'd in part, remanded in part*, 516 F.2d 898 (5th Cir. 1975). Where the legislative intent is clear from the language used in the entire act, considered in the ordinary and grammatical sense of the terms employed, rules of construction are unnecessary and inapplicable. State v. Burr, *supra*; Clark v. Kreidt, 199 So. 333 (Fla. 1941). For the following reasons, I am of the opinion that the language involved means that teacher education centers should be established and in full operation by June 30, 1979, and that all the school districts should be involved or participating in such centers by that date.

While the language in question may lend itself to varied interpretation when read in isolation, it becomes unambiguous when read together with the clearly enunciated legislative intent and within the context of all the language of the act. The act has as its declared purpose the introduction and implementation of a "new state policy for the education of teachers." Section 231.601(1), F. S. The Legislature has found that "[t]eachers can best assist with improving education when they directly and personally participate in identifying needed changes and in designing, developing, implementing, and evaluating solutions to meet the identified needs." Section 231.601(2), F. S. Further, "[t]he education of teachers is a *career-long process*." (Emphasis supplied.) Section 231.601(3), F. S. Therefore, the Legislature has provided that the State Board of Education shall issue regulations providing for establishment of teacher education centers in school districts. The purpose of such centers is to coordinate the joint utilization of resources of both the state's colleges and universities and the local school districts in order to further preservice and inservice education programs and to provide a facility for interaction among teachers and faculty and staff of the universities and the districts. Section 231.601(4), F. S. Section 231.603, F. S., sets forth the programs of the teacher education centers which are to include, *inter alia*, assessment of inservice training needs, providing the necessary clinical preservice training experiences, facilitating the entry or reentry of educational personnel into the profession, and facilitating internal and external evaluation, including process and product evaluation and validation of teaching competency.

Hence, the Legislature has found that teacher education is a dynamic process the needs of which are constantly changing and that, therefore, constant preservice and inservice teacher education and training and evaluation of the processes, programs, and progress thereof are necessary to enable teachers to keep pace with these changes. It is clear from the language quoted above that the Legislature perceives teacher learning centers as performing a continuous function both because of frequent new developments in the nature and quality of education and educational programs of the schools and because new teachers will constantly enter the system and require exposure to the experiences the centers are designed to offer. For these reasons, I find that the language of s. 231.611, F. S., means that the centers are to be established and in operation by June 30, 1979, and that each school district should be involved or participating in such teacher education centers and programs by that date.

077-61—June 29, 1977

PUBLIC FUNDS

INVESTMENT IN SECURITIES BY SCHOOL BOARDS AND BOARDS OF COUNTY COMMISSIONERS—INFORMATION TO BE RECORDED

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Frank A. Vickory, Legal Research Assistant

QUESTIONS:

1. What information is required to be set forth on bank trust receipts which are received by a board of county commissioners in lieu of actual physical possession of securities purchased with surplus county funds pursuant to a "repurchase agreement" or otherwise?

2. When a district school board purchases securities pursuant to an investment program, is physical custody of such securities required, or is an alternative procedure permitted by law?

3. What effect do the answers to the questions above have upon such investments in light of a new federal system whereby U.S. treasury bills are issued only by means of a book entry of record at the federal reserve bank and at another bank acquiring ownership thereof from which the governmental body in question purchased the treasury bills?

SUMMARY:

Neither the school boards nor the several boards of county commissioners are required to list or otherwise record the serial numbers of the securities in which they invest, even though they never receive actual physical custody of the various securities. Hence, there is no obstacle to investment in treasury bills issued by a new book-entry method. The boards of county commissioners, however, are required to list the various types of securities held and the total number of each of the various types.

AS TO QUESTION 1:

Your first question appears to arise out of the following fact situation. Pursuant to s. 125.31(1), F. S., several boards of county commissioners have begun short-term investment programs for investment of surplus county funds. Essentially, under these programs, the board will purchase securities for a short time, generally for less than a month. Each program contains a repurchase arrangement whereby at the end of the investment period the original seller agrees to buy back the securities. Under these plans, the governmental body never actually receives *physical* custody of the securities; rather, the securities are retained by the original seller or by a third party financial institution during the entire period the board owns the securities. It is this lack of physical custody of the securities by the boards that prompts your inquiry.

Section 125.31(1), as noted, authorizes the board to invest surplus funds in designated securities. Section 125.31(2) sets forth two permissible ways the board may maintain custody over securities it has purchased. At the outset, it should be noted that, in my opinion, these two methods of custody set forth in the statute constitute the sole methods of custody; that conclusion is based on a well-established rule of statutory construction which holds that if a statute specifically sets forth certain ways by which something is to be done, alternative methods, not specifically authorized, of doing the thing are not permitted. *See* Alsop v. Pierce, 19 So.2d 799 (Fla. 1944).

Section 125.31(2)(a) addresses the manner in which the board may maintain physical custody and safekeeping of its securities. From your letter, it is clear that, under the repurchase agreements in question, the boards never obtain actual physical custody of the securities. In such a situation, the statute specifies an alternative procedure. Section 125.31(2)(b) authorizes the board of county commissioners to receive bank trust receipts

in return for its investment in securities and authorizes the designated bank depositories to hold the actual securities on which the trust receipts are issued. It requires that any such trust receipts obtained or received "enumerate the various securities held together with the specific number of each security held." You state that you find this last quoted requirement somewhat ambiguous and are, therefore, unclear as to the meaning of the phrase "specific number of each security held." Specifically, the problem is whether the phrase refers to the class of various securities held and the specific number of a particular security within a given class held by the county or whether the phrase, read with the requirement that the various securities be enumerated, means that the receipt must list the *serial number* of each security.

To my knowledge, no court has yet interpreted the provision in question. Furthermore, I have found no extraneous evidence of legislative intent which would indicate the meaning of the phrase. My opinion must, therefore, rest solely upon the wording of the statute itself construed according to the context and the common usage of the words employed by the Legislature. Since the Legislature is presumed to know the meanings of words and grammar, a rule of statutory construction dictates that we construe words in common use according to their plain and ordinary signification, unless it appears they were used in a technical sense. State v. Tunnicliffe, 124 So. 279 (Fla. 1929); Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); and *cf.* State v. Jacksonville, 50 So.2d 532 (Fla. 1951). Based upon an analysis of the wording of the statute employing this rule of construction, I conclude that the various types of securities held must be listed separately along with the exact number (quantity) of each type; serial numbers, however, need not be recorded.

The word "enumerate" may be defined variously as "mention specifically . . . expressly name . . . as in speaking of 'enumerated' governmental powers, items of property, or articles in a tariff schedule," Black's Law Dictionary 629 (Revised 4th Ed. 1968); or as "to designate or specifically mention . . . to specify singly," 30 C.J.S. *Enumerate; and see* 14A Words and Phrases *Enumerate*, also defining the term as "specifically mention." This is the common, understood meaning of the word and it is apparently not used in any technical sense; according to C.J.S., *supra*, the word "has no peculiar or appropriate meaning in law, and it is to be construed according to the context and approved use of the language." The statutory phrase requires that receipts " *enumerate* the *various* securities held." (Emphasis supplied.) Applying the meaning of "enumerate," I find that the receipts must "specifically mention" the various securities held in the sense of listing by class or type the kinds of securities held by the board. The statute requires enumeration "together with the *specific number of each security held.*" This is the troubling phrase. "Specific number" is an ambiguous term to which can be attributed more than one meaning. The word "number" is generally defined as "a collection of units . . . proportion and ratio." 67 C.J.S. *Number; see also* 28A Words and Phrases *Number.* Webster's Third New International Dictionary defines "number" as "the sum of the units involved." Under this accepted definition "specific number of each security held" would mean the precise sum or total of each of the various types of securities held by the board, or the "ratio" of each type of security to the total amount. The word "number," however, is also defined by Webster's, *supra*, to mean "digit or group of digits used as a means of identification." If this were the meaning of the word intended by the Legislature, however, the term "serial number" would probably have been used rather than "number" alone. It should be noted that Webster's, *supra*, contains a separate entry listed under "serial number" which is defined as a "number indicating place in a series and used as a means of identification." The fact of a separate listing is significant, because it indicates that the term "number" used separately does not generally take on such a specialized meaning; rather, that meaning is reserved for the compound phrase "serial numbers." Webster's, *supra*, also indicates under its entry "number" that, when the word is followed by the preposition "of," it usually refers to quantity, while the preposition "on" is commonly used when the term means "identification." Thus, the phrase "specific *number of* each security held," as used in the statute, would commonly be understood to mean quantity or sum of each security, while "specific *number on* each security" would commonly be understood to mean some sort of identification number. Hence, I conclude that the statute requires that bank trust receipts list the various types of securities held and the exact number (quantity) of each of the various types. The serial or other identification numbers on each security need not be listed.

AS TO QUESTION 2:

Your second question is apparently prompted by the fact that several district school boards use the same investment scheme as discussed above in relation to the boards of county commissioners, *i.e.*, a repurchase plan is employed which involves investment in securities of which the board never actually takes physical custody. You inquire as to the legality of this procedure in view of the absence of any statutory authorization for the board to invest in securities when it does not actually take physical custody thereof.

Your letter correctly states the proposition enunciated by this office in AGO 076-61 that a school board has no inherent powers of its own. It may exercise only those powers specifically or by necessary implication authorized by the Legislature. *See also*, Florida Citrus Commission v. Golden Gift, Inc., 91 So.2d 657 (Fla. 1956); Peters v. Hansen, 157 So.2d 103 (2 D.C.A. Fla., 1963); State v. Mitchell, 188 So.2d 684 (4 D.C.A. Fla., 1966); Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973). Section 230.23, F. S., enumerates the powers and duties conferred upon the school boards. Section 230.23(10)(k) authorizes the district school board to adopt policies for the investment of funds not immediately needed for expenditures:

> *Investment policies*—[The school board shall] [a]dopt policies pertaining to the investment of school funds not needed for immediate expenditures, after considering the recommendations of the superintendent. The adopted policies shall make provisions for investing or placing on deposit all such funds in order to earn the maximum possible yield under the circumstances from such investments or deposits.

Section 230.33(12)(j), F. S., requires the district school superintendent, *inter alia*, to cause to be invested at all times all school moneys not immediately needed for expenditure in accordance with the policies set by the school boards. It is clear, then, that the superintendent must invest pursuant to policies set by the board under its statutory authority. There appears to me to be no limitation either in s. 230.23(10)(k) or s. 230.33(12)(j), F. S., upon either the board or the superintendent corresponding to s. 125.31(2), F. S., which relates to the boards of county commissioners and concerns custody of the securities in which those boards invest. That section, by its terms, applies solely to, and governs only investments made by, the several boards of county commissioners. The district school boards are controlled and governed in their investment program by the Florida School Code, of which Ch. 230, F. S., is a part. In view of the broad statutory language empowering the board to adopt its own policies in regard to investing surplus funds and requiring the superintendent to invest such funds in accordance therewith, and in view of the absence of any limitation concerning custody of securities, it is my opinion that the custody question is one which should be formulated as part of the policy adopted by the board and executed by the superintendent. As noted, the board may exercise those powers *specifically* granted to it and by necessary *implication* the law also confers "every particular power necessary or proper for complete exercise or performance of the duty that is not in violation of law or public policy." State v. Michell, *supra*, at 687. Accordingly, the board is impliedly authorized to formulate a policy with regard to custody of securities as part of its overall investment policy. Until a court of competent jurisdiction declares otherwise, the investment practice of the board, in which the board never has actual custody of securities, is *prima facie* valid and is controlling.

AS TO QUESTION 3:

Your third question relates to the effect that the new book-entry method of issuing treasury bills will have upon the investment of school boards and boards of county commissioners in such securities. It appears that under the new system, such bills will no longer be serialized or otherwise individually identified. In light of my opinion that serial numbers are not required to be recorded in lieu of actual physical custody, I see no obstacle to continued investment in treasury bills.

077-62—June 29, 1977

PUBLIC FUNDS

INVESTMENT IN SECURITIES BY STATE BOARD OF ADMINISTRATION—INFORMATION TO BE RECORDED

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Frank A. Vickory, Legal Research Assistant

QUESTIONS:

1. When the State Board of Administration deposits securities with a bank or a trust company for "safekeeping," for the collection of principal and interest or of the proceeds thereof, must the board receive some type of written receipt which sets forth the particulars of the "safekeeping" agreement and, if so, what type of information is required thereon?

2. Is the board prohibited from acquiring ownership of direct obligations of the United States Government when such are not serialized or otherwise individually identified but are rather issued by means of a book entry of record at the federal reserve bank of issue and at another banking institution from which the purchase in question was made?

SUMMARY:

The State Board of Administration is not required by law to obtain or receive written trust receipts setting forth the particulars of a "safekeeping agreement" relating to securities it deposits with a financial institution in safekeeping for the collection of principal and interest, or of the proceeds of sale thereof. The board is not inhibited by law from purchasing United States treasury bills or any other form of direct or guaranteed obligations of the United States issued, recorded, and accounted for by means of a new, so-called book-entry system, even though such obligations are not individually issued and serialized.

Both of your questions are answered in the negative.

AS TO QUESTION 1:

Your question appears to arise out of the following fact situation. The Board of Administration, pursuant to authority granted it by s. 215.44(1), F. S., has undertaken to purchase securities as part of an investment program involving a repurchase agreement by which the original seller of securities agrees with the board to buy back the securities at the termination date set forth in the agreement. Under the plan, the board never actually receives physical custody of the securities; rather, they are retained either by the original seller or by a third party financial institution during the entire period the board owns them. Your specific inquiry concerns how the board is required to maintain accountability for the securities it purchases. You note that, under a similar provision, s. 125.31, F. S., granting investment authority to the boards of county commissioners, physical custody of securities is required unless the board receives bank trust receipts for all securities held in lieu of such actual custody. The question has arisen whether the Board of Administration is likewise required to obtain or receive written trust receipts, in the interest of accountability, for any securities it owns which are held in safekeeping for it by a financial institution.

At the outset, it should be noted that s. 125.31, F. S., by its terms, applies solely to investments by the boards of county commissioners. Investments by the Board of Administration and the duties relative thereto are covered by a separate statute. Section 215.44, F. S., as noted, authorizes the board to invest "all the trust funds and all agency funds of each state agency, as defined in s. 216.011, to the fullest extent that is consistent with the cash requirements and investment objectives of the particular trust fund or agency fund." Along with this authority, the statute imposes numerous responsibilities

upon the board relative to its investment powers. Section 215.50(1), F. S., states that all securities purchased or held by the board may, with board approval, be held in custody of the State Treasurer *or* "be deposited with a bank or trust company to be *held in safekeeping* by such bank or trust company for the collection of principal and interest, or of the proceeds of the sale thereof." (Emphasis supplied.) This last quoted section of the statute provides the sole alternative to actual physical custody of the securities by the board or the State Treasurer. It does not, by its terms, require that the board obtain or receive trust receipts setting forth the particulars of a "safekeeping agreement" governing securities held for the board by an authorized financial institution, although presumably some adequate record of the transaction would be kept by the board in its possession and among its records. Neither, in my opinion, can a requirement for a "safekeeping agreement" be inferred from the language "held in safekeeping." The word "safekeeping" is defined as the "act of keeping or preserving in safety, from injury, loss, or escape; care, custody, protection." Webster's Second International Dictionary. Clearly, then, s. 215.50(1) requires the bank or trust company to hold safely in protective custody the securities deposited with it by the board for the statutorily designated purposes as well as the principal and interest therefrom, but does not imply a requirement that the board receive a written safekeeping agreement.

I would, however, note that a "safekeeping agreement" or other record of a given transaction should be in the possession of the board and a part of its records and investment accounts; indeed, such data should be the basis for, and necessary in, the accounting procedures and the reports to interested state officials and agencies prescribed by the statute. *See* s. 215.51, F. S. The statute imposes upon the board the duty "to see that moneys invested under the provisions of ss. 215.44-215.53 are at all times handled in the best interests of the state." Section 215.44(2), F. S. Further, the board is required to pay all income from investments as collected into investment accounts of the fund or funds to which the investments belong and to keep for each fund for which investments are made separate accounts and records of the individual amounts and the totals of all investments belonging to each such fund or funds. Additionally, every receipt and collection or disbursement when received or made must be reported to the board for recording to the particular fund to which it belongs, and written monthly reports detailing any changes in investments made during the preceding month for their respective fund or funds must be made to each and every interested official or agency. *See* ss. 215.50(2) and 215.51, F. S., *and cf.*, s. 215.49(3), F. S. In light of such fiduciary duties, it would appear incumbent upon the board to utilize the best standard procedure possible for maintaining adequate and strict accountability for the securities it purchases. I conclude, however, that the board is not required by Ch. 215, F. S., to obtain written trust receipts detailing the particulars of a "safekeeping agreement" with an authorized financial institution relating to securities deposited with it by the board to be held in safekeeping by such financial institution for the collection of principal and interest or of the proceeds of the sale thereof.

AS TO QUESTION 2:

In view of my answer to question 1, I find no reason that the board should be precluded from purchasing and owning direct obligations of the United States or obligations guaranteed by it or for which its credit is pledged, including treasury bills [it is specifically authorized to purchase these obligations "without limitation" by virtue of s. 215.47(1)(a)], solely because any of such securities may not be serialized or individually issued. The book-entry system is claimed by the Federal Reserve Bank to be a "modern, efficient, safe, and expeditious method of dealing in securities . . . [which] . . . protects the investor against loss, theft, and counterfeiting . . . ." Circular Letter 544-76, Federal Reserve Bank of Atlanta, November 11, 1976.

Hence, the new method is not in conflict with any statutory requirement and also furthers the aim of maintaining accountability and protection or safety of securities deposited in the bank for safekeeping. I therefore conclude that there is no obstacle imposed by Ch. 215, F. S., to the board's purchase of treasury bills, or any other form of direct or guaranteed obligations of the United States, issued, recorded, and accounted for by means of the new so-called book-entry system, even though such obligations are not individually issued and serialized.

077-63—June 29, 1977

DUAL OFFICEHOLDING

OFFICES OF MAYOR OR CITY COUNCILMAN INCOMPATIBLE WITH THAT OF RESERVE POLICE OFFICER

To: Clyde King, Edgewood City Council President, Orlando

Prepared by: Patricia R. Gleason, Assistant Attorney General, and Joslyn Wilson, Legal Research Assistant

QUESTIONS:

1. May an elected city council member, or candidate for that office, also serve as a certified reserve police officer under the Florida Constitution and Florida Statutes?

2. Does the Charter of the City of Edgewood prohibit the above-stated activity?

3. What effect does the charter provision which prohibits candidates for the office of council member or mayor, upon qualifying, from serving as appointed officials of the city have upon present or "sitting" council members?

SUMMARY:

A part-time auxiliary or reserve police officer, certified by the Police Standards and Training Commission, is an "officer" within the purview of constitutional prohibition against dual officeholding and, therefore, may not simultaneously serve as a city council member. Such an officer whose term runs concurrently with that of chief of police, who serves until just cause for replacement, should resign his office under the Resign-to-Run Law effective as of the date upon which the duties of the office of council member would be assumed.

The prohibition against dual officeholding contained in the City of Edgewood charter is applicable only when two elective offices are involved. The city charter provision prohibiting a candidate for the office of council member or mayor from serving as a salaried or nonsalaried appointed official of the city may operate to create a vacancy in the office of reserve police officer when such officer qualifies as a candidate for council member. Since the charter provision is not self-executing, a reserve police officer should resign his office upon qualifying as a candidate for the city council or for mayor.

AS TO QUESTION 1:

Your first question is answered in the negative.

Section 5(a), Art. II, State Const., prohibits a person from simultaneously holding "more than one office under the government of the state and the counties and municipalities therein . . . ." Although the term "office" has not been constitutionally defined, the Florida Supreme Court has stated:

> The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. . . . The term "office" embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. [State *ex rel.* Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919).]

A city council member is clearly a municipal officer within the purview of s. 5(a), Art. II, State Const. The important consideration is whether a "certified reserve police officer" is also an officer or merely an employee. Previous opinions of this office have indicated that a municipal policeman is an officer within the scope of this constitutional provision.

Cf. AGO's 057-165; 058-26; 069-2; 071-167; 072-348; and 076-92. Moreover, the Florida Supreme Court in Curry v. Hammond, 16 So.2d 523 (Fla. 1944), stated:

> It can hardly be questioned that a patrolman on a city police force is clothed with sovereign power of the city while discharging his duty. . . . True, he is an employee of the city but he is also an officer. It is the character of duty performed that must determine his status.

Accord, Paquin v. City of Lighthouse Point, 330 So.2d 866 (4 D.C.A. Fla., 1976); Maudsley v. City of North Lauderdale, 300 So.2d 304 (4 D.C.A. Fla., 1974). The powers which a police officer may exercise, particularly the authority to arrest without a warrant, and not the salary or certification requirements, determine that a police officer is an "officer." Maudsley, *supra; cf.* State *ex rel.* Gibbs v. Martens, 193 So. 835, 837 (Fla. 1940), in which the court held that a probation officer was an "officer" since he had the right to arrest without a warrant for "no right is more sacred or more jealously guarded than the one that liberty will not be infringed except by due process of law."

Your inquiry is, however, directed to those police officers who serve part time without compensation. *See* s. 943.10(4), F. S., which defines "part-time" or "auxiliary" police officers as persons who are "employed, with or without compensation, less than full time by the state or any political subdivision or municipality thereof, whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state." The Police Standards and Training Commission of the Department of Criminal Law Enforcement is charged with the responsibility of establishing uniform minimum standards for the employment and training of these officers, s. 943.12(2), F. S., and the issuance of certificates of compliance to those persons satisfactorily completing or complying with the prescribed training program, s. 943.14, F. S. No person may be employed as a part-time or auxiliary police officer until he has obtained such a certificate of compliance with certain exceptions not material to the present inquiry. If the part-time or auxiliary police reserves of a municipality fail to meet the requirements of ss. 943.12-943.14, F. S., and the rules and regulations of the Police Standards and Training Commission, their authority to act and function as auxiliary police officers is limited and their power to arrest is no greater than that of a private citizen. *See* AGO 073-398; *cf.* AGO 073-14. It is assumed for the purposes of this inquiry that a "certified reserve police officer" referred to in your letter has satisfied the requirements set by the Police Standards and Training Commission. Such an officer may carry arms and exercise the power of arrest.

Accordingly, I am of the opinion that the position of "certified reserve police officer" constitutes an "office" within the purview of s. 5(a), Art. II, State Const.; therefore, the simultaneous service of an individual as a reserve or auxiliary police officer and as a city council member violates the prohibition against dual officeholding contained in the foregoing constitutional provision.

You also inquire as to whether a *candidate* for the office of city council member may serve as "certified reserve police officer." Section 99.012(2), F. S., Florida's Resign-to-Run Law, provides in pertinent part:

> No individual may qualify as a candidate for public office who holds another elective or *appointive office, whether state, county or municipal,* the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office not less than 10 days prior to the first day of qualifying for the office he intends to seek. . . . (Emphasis supplied.)

The foregoing statutory provision requires that an officer resign at the time and in the manner prescribed in s. 99.012, F. S., only when his present term for elective or appointive office, or any part thereof, would run concurrently with or overlap the term of the office for which he seeks to qualify. Such resignation becomes effective at that time and has the effect of creating a vacancy in the office of police officer, as provided in the statutes, but the officer may continue to serve until such time as his successor is appointed and qualified on or following the effective date of the resignation as specified in s. 99.021, F. S. *Cf.* AGO's 075-67, 074-210, 072-203, and 072-201. *But see* Art. III, s. 3.07, City Charter (1975) of the City of Edgewood which *prohibits* any candidate for elective office of council member or mayor, subsequent to qualifying, from serving as a salaried or nonsalaried appointive official in the city. Thus, the provisions contained in s. 99.021,

F. S., may not be applicable to your inquiry since s. 3.07 of the City Charter appears to create a vacancy in the office of "certified reserve police officer" at a point in time earlier than that required by s. 99.021. *See* question 2, *infra*, for a further discussion of the impact of this charter provision.

If the office of "certified reserve police officer" has no definite term fixed by law, under the common-law rule "the office is held for the term of the appointing power, or at the will or pleasure of the authority which conferred it, provided the term so conferred does not extend beyond that of the appointing power." 62 C.J.S. *Municipal Corporations* s. 497, p. 936; 67 C.J.S. *Officers* s. 46, p. 200; *cf.* State *ex rel.* Gibbs v. Bloodworth, 184 So. 1, 6 (Fla. 1938); 67 C.J.S. *Officers*, p. 196 (officer removable at pleasure of appointing power has no "term" of office). Even if an officer serves without a fixed term, "he will be able to use the prestige and power of his office in seeking election to another office and . . . the spirit and intent of the law, if not its letter, dictate that such an official should comply with the Resign-to-Run Law." Attorney General Opinion 072-203.

"Whether a public officer has a fixed term of office can be determined only by reference to the law creating the office . . . ." State *ex rel.* Gibbs, *supra*, at 6. The revised city charter (1975) is silent as to the appointment of part-time reserve or auxiliary police officers; however, it does provide for the appointment of the police chief by the city council, Art. IV, s. 406. The chief of police serves until just cause for replacement and is charged with the responsibility of administering "the working hours, assignments, training, performance, etc., of the regular members of the Police Department, the Reserves, and the Dispatchers." Article IV, s. 4.06A. Thus, it appears that the chief of police is the appointing power for the reserves with regard to the Resign-to-Run Law, and, accordingly, the term of office for a member of the reserves coincides with that of the chief of police. Therefore, it appears that a reserve police officer should resign his office under the terms of s. 99.012, F. S., as his tenure of office, which is the same as that of the chief of police, would not ordinarily expire until after the date he would assume the position of city council member, if elected. Accordingly, for purposes of the Resign-to-Run Law, a reserve police officer seeking the office of council member should resign, effective as of the date upon which the duties of the new office would be assumed. Attorney General Opinion 072-203. *But see*, Art. III, s. 3.07 of the city charter (1975), *infra*.

AS TO QUESTION 2:

Your second question is directed to the effect the provisions contained in the city charter have on a "certified reserve police officer" also serving as city council member or as a candidate for that position. Under Art. III, s. 3.06, of the present charter,

> No Council member or Mayor may hold two (2) *elective* offices, whether such offices are Federal, State, County or Municipal. Any City Council member or Mayor upon formally qualifying for any elected office other than the Mayor's or City Council member's office in the City of Edgewood, such office, Mayor or City Council member, shall become vacated or be filled as provided herein this Charter. (Emphasis supplied.)

The prohibition against dual officeholding contained in this section of the charter is applicable only when two elective officers are involved. Council members are elected to the city council under Art. III, s. 3.01 of the charter. Thus, the charter's prohibition against dual officeholding would be applicable to your inquiry only if the office of "certified reserve police officer" is an elected office. It should be noted, however, that s. 5(a), Art. II, State Const., does not distinguish between elective and appointive officers. The *constitutional* prohibition against dual officeholding is, therefore, applicable to city council members and police officers whether they are elected or appointed.

The city charter also provides that "[n]o candidate for elected office of Council member or Mayor shall, subsequent to qualifying, serve as a salaried or nonsalaried appointed official in the City of Edgewood." Article III, s. 3.07, charter (1975). Therefore, a "certified reserve police officer," as an appointive officer of the city, who qualifies as a candidate for the office of council member or mayor is prohibited from serving as a reserve police officer and, by operation of the city charter, may well have, in legal effect, vacated his appointive office. The prohibition contained in Art. III, s. 3.07 of the charter appears to create such a vacancy; however, the section is not self-executing. *See In re* Advisory Opinions to the Governor, 79 So. 874 (Fla. 1918), in which the court stated that, when a

person holding one office is appointed to and accepts another office, such appointment and acceptance vacates the person's right and status to the first office. *Cf.* Holley v. Adams, 238 So.2d 401 (Fla. 1970) (acceptance of incompatible office by one already holding office operates as resignation of first). Accordingly, to avoid conflict, a reserve police officer who intends to run for the office of council member should resign his position as police officer. *Cf.* AGO 072-203.

Therefore, until legislatively or judicially settled, I am of the view that a certified reserve police officer should resign his office upon qualifying as a candidate for the city council.

AS TO QUESTION 3:

You also inquire as to the effect of the charter provision, Art. III, s. 3.07, on present or "sitting" council members. As council members are elected pursuant to Art. III, s. 3.01, and, as discussed under question 1, may not simultaneously serve as a reserve or auxiliary police officer, s. 3.07 in terms would not operate on any such "sitting" council members. However, a "sitting" council member who is a candidate for reelection or is a candidate for the office of mayor is also prohibited from serving as a salaried or nonsalaried appointed official (including a reserve or auxiliary police officer) of the city.

077-64—June 29, 1977

TAXATION

REDEFINITION OF "CHARITABLE PURPOSES"—LEGAL EFFECT

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General

QUESTION:

What is the legal effect of the amendment of "charitable purposes" in s. 196.012(6), F. S., by Ch. 76-234, Laws of Florida?

SUMMARY:

The amendment by Ch. 76-234, Laws of Florida, to s. 196.012(6), F. S., was merely intended to clarify rather than change the law and as such does *not* affect the validity of the resolution of the Governor and Cabinet, acting as head of the Department of Revenue, adopted on September 3, 1974, relating to fraternal and benevolent organizations and promulgated as Rule 12D-7.18, F.A.C. Therefore, Rule 12D-7.18, F.A.C., as to tax exemptions for fraternal and benevolent organizations, is still valid and in effect in Florida. It reads as follows:

(1) The property of nonprofit fraternal and benevolent organizations is entitled to full or predominant exemption from ad valorem taxation when used exclusively or predominantly for charitable, educational, literary, scientific or religious purposes. The extent of the exemption to be granted fraternal and benevolent organizations shall be determined in accordance with those provisions of Chapter 196, F. S., which govern the exemption of all property used for charitable, educational, literary, scientific or religious purposes.

(2) The exclusive or predominant use of property or portions of property owned by fraternal and benevolent organizations and used for organization, planning and fund-raising activity under s. 196.193(3), F. S., for charitable purposes constitutes the use of the property for exempt purposes to the extent of the exclusive or predominant use. The incidental use of said property for social, fraternal or similar meetings shall not deprive the property of its exempt status.

(3) Any part of [sic] portion of the real or personal property of a fraternal or benevolent organization leased or rented for commercial or other nonexempt purposes, or used by such organization for commercial purposes, or for uses such as a bar, restaurant or swimming pool shall not be exempt from ad valorem taxes.

The 1976 Session of the Florida Legislature enacted Ch. 76-234, Laws of Florida, by which s. 196.012(6), F. S., was amended with the insertion of the word "legally" so as to read:

> (6) "Charitable purposes" means a function or service which is of such a community service that its discontinuance could *legally* result in the allocation of public funds for the continuance of the function or service. (Emphasis supplied.)

You also pointed out that there is considerable doubt in your mind and in the minds of the various property appraisers as to what are the ramifications of this change and how the change affects the resolution of the Governor and Cabinet, acting as head of the Department of Revenue, adopted on September 3, 1974, relating to fraternal and benevolent organizations and promulgated as Rule 12D-7.18, F.A.C. In view of these doubts, you raise the question of the continuing validity of the resolution and the rule.

Although a presumption of change in legal rights is probably reasonable in that an amendment is more frequently used to add or take a provision from a law than to interpret it, the fact of amendment by itself does not indicate whether the change is of substance or form—whether a right is added to or taken from the original act or whether a provision in the original act is merely being interpreted, that is, made more detailed and specific. State *ex rel.* Szabo Food Serv., Inc. of N.C. v. Dickinson, 286 So.2d 529 (Fla. 1974); 1A Sutherland *Statutory Construction* s. 22.30 (4th ed. 1972).

The question that arises is what the Legislature meant by the term "legally" as it is used in s. 196.012(6), F. S.

It must be remembered that statutes must be given their plain and obvious meaning. Fixel v. Clevenger, 285 So.2d 687 (3 D.C.A. Fla., 1973). Furthermore, when terms and provisions of a statute are plain, there is no reason for judicial or administrative interpretation; thus, it is presumed the Legislature meant what it said. Leigh v. State *ex rel.* Kirkpatrick, 298 So.2d 215 (1 D.C.A. Fla., 1974).

The term "legally" as it appears in s. 196.012(6), F. S., is an adverb, used to modify the word "result" and is defined in Webster's New Twentieth Century Dictionary (1971 unabr. ed.) at p. 1034 as: "Legally: 'lawfully; according to law; in a legal manner.'"

In viewing the above definition of the term "legally," it would appear that the inclusion of this language in the amendment in 1976 was intended to make the statute correspond to what had previously been supposed or assumed to be the law. That is, the allocation of public funds referred to in s. 196.012(6), F. S., could only be done pursuant to some constitutional, statutory, or decisional authority. Thus, it is my opinion that the circumstances here are such that the Legislature merely intended to clarify its original intention rather than change the law.

The remaining question is what, if any, effect the amendment of 1976 to s. 196.012(6), F. S., had on the resolution which was adopted by the Governor and Cabinet, acting as head of the Department of Revenue, and promulgated as Rule 12D-7.18, F.A.C.

A departmental construction of a statute by an agency charged with the enforcement of an act and authorized to make reasonable rules and regulations is presumed to be valid and is accorded considerable weight unless it is shown to be clearly erroneous or unauthorized and contrary to the intent of the statute before a court of competent jurisdiction. State *ex rel.* Szabo Food Serv., Inc. of N. C. v. Dickinson, *supra*; State *ex rel.* Bennett v. Lee, 166 So. 565 (Fla. 1936); 1 Fla. Jur. *Admin. Law* s. 73, pp. 292-293.

Thus, Rule 12D-7.18, F.A.C., is presumed to have been valid when promulgated and continues to enjoy that presumption in view of the fact that the amendment of 1976 to s. 196.012(6), F. S., was merely intended to clarify rather than change the law.

Accordingly, the resolution which was adopted by the Governor and Cabinet, acting as head of the Department of Revenue, and promulgated as Rule 12D-7.18, F.A.C., would appear to be unaffected by the amendment of 1976 to s. 196.012(6), F. S.

077-65—June 30, 1977

ADMINISTRATIVE PROCEDURE ACT

NOT APPLICABLE TO CONSTITUTION REVISION COMMISSION

To: Talbot D'Alemberte, Florida Constitution Revision Commission, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Is the Administrative Procedure Act, Ch. 120, F. S., applicable to proceedings of the Constitution Revision Commission?

SUMMARY:

The Administrative Procedure Act, Ch. 120, F. S., is not applicable to proceedings of the Constitution Revision Commission.

Section 120.52, F. S., defines "agency" to include:

> Each other state officer and state department, departmental unit described in s. 20.04, *commission*, regional planning agency, board, district, and authority, including, but not limited to, those described in chapters 160, 163, 298, 373, 380 and 582. [Section 120.52(1)(b), F. S.; emphasis supplied.]

Thus, by its terms, s. 120.52, F. S., is applicable to all state commissions including, presumably, the Constitution Revision Commission.

The Constitution Revision Commission is created at s. 2, Art. XI, State Const. The Constitution establishes the number and method of selection of the commission's membership and when such selection shall occur. *But see In re* Advisory Opinion of the Governor, 343 So.2d 17 (Fla. 1977). Section 2(c), Art. XI, State Const., provides that:

> Each constitution revision commission shall convene at the call of its chairman, *adopt its rules of procedure*, examine the constitution of the state, *hold public hearings*, and not later than one hundred eighty days prior to the next general election, file with the secretary of state its proposal, if any, of a revision of the constitution or any part of it. (Emphasis supplied.)

The touchstone for determining the intent of a constitutional provision has always been the intent of the people at the time the document was adopted. *See, e.g., In re* Advisory Opinion to the Governor, 243 So.2d 573 (Fla. 1971); *In re* Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969). As the Supreme Court of Florida has indicated, the documents which were submitted to the public in mid-1968 as explanatory material for the proposed constitution uniformly indicate an intention to create a Constitution Revision Commission which, *inter alia*, would act without intervention by the Legislature. *See In re* Advisory Opinion, 343 So.2d at 22. The Constitution revision process was, in the opinion of the court, ". . . patently designed to bypass input from the legislative branch. . . ." *In re* Advisory Opinion, 343 So.2d at 23.

The commission which was established by the people through their constitution, has been granted the constitutional authority to establish its own rules of procedure (subject only to the constitutional requirement that it must hold *public* hearings) in order to ensure that the commission be independent and free from interference from any branch of government.

In a similar context, the Supreme Court has recognized that in order for *judicial nominating commissions* to be constitutionally independent as the electorate intended the members of the various commissions throughout the state must have the power to promulgate rules of procedure for their hearings and findings, independent of any of the three standard recognized divisions of state government. In *In re* Advisory Opinion, 276 So.2d 25, 30 (Fla. 1973), the court stated that:

> The power and duty for promulgating rules for the commissions must rest with

the members of the commissions. To serve the purposes sought by the people, it is necessary that the Commissions remain independent. . . .

To permit one branch of government to impose rules of procedure upon another coordinate constitutional branch or entity would destroy the constitutional independence of such branch or entity. *Cf. In re* Advisory Opinion, 276 So.2d 30; *In re* Advisory Opinion, 334 So.2d 561 (Fla. 1976). When the Constitution grants to a constitutionally created commission the power to adopt its own rules of procedure and such power is, therefore, derived solely and exclusively from the Constitution, legislative intervention into the manner of exercise of such power is unwarranted. *In re* Advisory Opinion, 334 So.2d at 562.

The Constitution requires the commission to adopt its own rules of procedure independent of any of the three branches of government. The commission is not subject to the requirements of Ch. 120, F. S., when discharging its constitutional duties pursuant to s. 2, Art. XI, State Const.

077-66—July 5, 1977

CONSTITUTION REVISION COMMISSION

MAY DELEGATE MINISTERIAL FUNCTIONS TO EXECUTIVE DIRECTOR

To: Talbot D'Alemberte, Chairman, Florida Constitution Revision Commission, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Does Ch. 77-201, Laws of Florida (s. 286.035, F. S.), which authorizes the chairman of the Constitution Revision Commission to perform certain ministerial-type functions in regard to expenses of the commission, prevent the commission from assigning or delegating functions of that nature to the executive director employed by the commission?

SUMMARY:

Pursuant to its constitutional power and duty to adopt its own rules of procedure, the Constitution Revision Commission may adopt a rule of procedure assigning or delegating to the executive director of the commission certain ministerial functions, such as the signing of travel vouchers. Neither Ch. 77-201, Laws of Florida, nor any other act of the Legislature, can restrict the power of the commission to determine its own rules of procedure.

The existence, powers, and duties of the Constitution Revision Commission are derived solely from the Constitution of this State (s. 2, Art. XI). In s. 2(c), Art. XI, State Const., it is provided:

Each constitution revision commission shall convene at the call of its chairman, *adopt its rules of procedure*, examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the secretary of state its proposal, if any, of a revision of this constitution, or any part of it. (Emphasis supplied.)

In AGO 077-65, I stated my opinion that the proceedings of the Constitution Revision Commission are not subject to the requirements of Ch. 120, F. S., the Administrative Procedure Act. In that opinion I emphasized the constitutional derivation of the commission's powers, particularly as to procedural matters, and the lack of authority on the part of the Legislature to determine such matters:

When the Constitution grants to a constitutionally created commission the power to adopt its own rules of procedure and such power is, therefore, derived solely and exclusively from the Constitution, legislative intervention into the manner of exercise of such power is unwarranted.

I further stated in AGO 077-65 that it is the constitutional duty of the commission "to adopt its own rules of procedure *independent* of any of the three branches of government." (Emphasis supplied.)

Thus, I am of the opinion that the Legislature's express recognition, in Ch. 77-201, Laws of Florida (s. 286.035, F. S.), that the chairman of the Constitution Revision Commission is authorized to "incur expenses related to the official operation of the commission or its committees, to sign vouchers, and to otherwise expend funds appropriated to the commission for carrying out its official duties" does not—and cannot, in the face of the language of s. 2(c), Art. XI, *supra*—prevent the commission from adopting a rule of procedure by which certain ministerial functions, such as the signing of travel vouchers, could be assigned or delegated to the executive director employed by the commission.

077-67—July 6, 19

MUNICIPAL HOUSING AUTHORITY

MAY NOT BIND SUCCESSORS IN OFFICE THROUGH CONTRACT FOR PERFORMANCE OF GOVERNMENTAL DISCRETIONARY POWERS

To: Paul B. Steinberg, Representative, 101st District, Miami Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the Miami Beach Housing Authority, created under Ch. 421, F. S., authorized to enter into an employment contract with its secretary and executive director for a 5-year period?

SUMMARY:

The employment of a secretary and executive director of a municipal housing authority created and operating under Ch. 421, F. S., would appear to be an exercise of the governmental function of such housing authority in light of statutory authorization which permits such authority to delegate any or all of its governmental powers or duties to the secretary-executive director. Moreover, the relationship between the secretary-executive director and the governing board of the housing authority appears to be confidential and personal; and, therefore, a contract employing such secretary-executive director would probably not be considered binding upon a successor governing board of a housing authority. Accordingly, pending judicial determination, a proposed 5-year employment contract entered into by a municipal housing authority and its secretary-executive director would probably be invalid and unenforceable.

Section 421.04(1), F. S., authorizes the creation of housing authorities and provides in part, "[i]n each city (as herein defined) there is hereby created a public body corporate and politic to be known as the housing authority of the city . . . ." (Emphasis supplied.)

A housing authority created pursuant to Ch. 421, F. S., is empowered to exercise and perform

public and essential governmental functions set forth in [Ch. 421] and [has] all the powers necessary or convenient to carry out and effectuate the purposes

> and provisions of [Ch. 421] including the . . . powers . . . to sue and be sued . . . make and execute contracts and other instruments . . . acquire, lease and operate housing projects . . . to . . . contract for the furnishing by any person or agency . . . of services . . . to acquire by the exercise of the power of eminent domain any real property . . . issue subpoenas . . .

and to do other things necessary in connection with the operation of a housing authority. Section 421.08, F. S.

Pursuant to s. 421.05(2), F. S., a housing authority is authorized to "employ a secretary, who shall be executive director" and to determine the "qualifications, duties, and compensation" of the executive director. Moreover, a housing authority is further empowered to "delegate to one or more of its agents or employees such powers or duties as it may deem proper." Pursuant to s. 421.08(7), F. S., the authority, acting through one or more of the commissioners or persons designated by it, is authorized to conduct investigations and private or public hearings and to take sworn testimony thereat and issue subpoenas requiring the attendance of witnesses or the production of books and papers.

The general rule with respect to contracts entered into by municipal corporations or municipal boards having power to contract is that such bodies may bind successors in office by a contract made in the exercise of proprietary or business powers but may not by contract prevent or impair the exercise by successors of legislative functions or governmental discretionary powers unless statutory authorization exists. *See* 63 C.J.S. *Municipal Corporations* s. 687, p. 549; 10 McQuillen *Municipal Corporations* s. 29.101, p. 492; and *Annot.*, 149 A.L.R. 336. As a housing authority created under Ch. 421, F. S., is a public corporation possessing the legislative and governmental powers listed above, it is within the purview of this principle. *See* Mitchell v. Chester Housing Authority, 132 A.2d 873 (Pa. 1957); and Parent v. Woonsocket Housing Authority, 132 A.2d 873 (Pa. 1957); and Parent v. Woonsocket Housing Authority, 143 A.2d 146 (R. I. 1958), which reach this conclusion. *Cf.* AGO 074-234 holding that a housing authority created pursuant to Ch. 421 is an independent special district within the purview of and for the purposes of the Uniform Local Government Management and Reporting Act, part III, Ch. 218, F. S. Accordingly, inasmuch as the commissioners of housing authorities are appointed to serve staggered 4-year terms and the governing board is a continuing body, the validity of the proposed contract for the employment of a secretary and executive director for the authority depends upon the proprietary or governmental nature of the subject matter of the contract.

There is no precise dividing line between the exercise of governmental and proprietary functions. They are difficult of distinction and tend to overlap. 23 Fla. Jur. *Municipal Corporations* s. 67, p. 93. *Accord:* American Yearbook Company v. Askew, 339 F. Supp. 719, 721 (M. D. Fla. 1972), *aff'd*, 409 U. S. 904 (1972).

In Daly v. Stokell, 63 So.2d 644 (Fla. 1953), the Florida Supreme Court distinguished the two concepts as follows:

> We understand the test of a proprietory [*sic*] power to be determined by whether or not the agents of the city act and contract for the benefit and welfare of its people; any contract, in other words, that redounds to the public or individual advantage and welfare of the city or its people is proprietory [*sic*], while a governmental function, as the term implies, has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty.

Applying the foregoing to your inquiry, it is clear that it is the nature of the duties to be performed by the prospective employee which determines whether or not the contract of employment of such person represents an exercise of proprietary or governmental powers by the contracting governmental body. Other relevant factors include the extent to which the employee serves in a confidential relationship with the governing body, *see* Douglas v. City of Dunedin, 202 So.2d 787, 789 (2 D.C.A. Fla., 1967); and the extent to which the governing body exercises supervisory control over the employee, *see* 10 McQuillen *Municipal Corporations*, s. 29.101, p. 497.

Thus, in City of Riviera Beach v. Witt, 286 So.2d 574 (4 D.C.A. Fla., 1973) *cert. den'd*; Witt v. City of Riviera Beach, 295 So.2d 305 (Fla. 1974), the court held that the employment of a city prosecutor is a governmental and not a proprietary function. Therefore, an employment contract which purported to extend beyond the terms of office

of the contracting officers could not effectively bind their successors. In reaching this conclusion, the court stated:

> The operation of a Municipal Court by the City under its charter and the employment of a City Prosecutor to prosecute all persons arrested and brought to trial before the court for the violation of municipal ordinances "has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty. . . ." See Daly v. Stokell, supra. The employment of a city prosecutor, in our opinion, relates to the performance of a governmental function; the employment of a City Prosecutor cannot be considered as having been made in the exercise of the City's business or proprietary powers, as that phrase is commonly understood. [286 So.2d at 576.]

Similarly, in Mitchell v. Chester Housing Authority, 132 A.2d 873, 880 (Pa. 1957), the Pennsylvania Supreme Court held that a 5-year contract of employment between a municipal housing authority and its secretary-executive director was invalid and unenforceable. The court noted that testimony at trial described the secretary-executive director as the "chief officer" and "right arm" of the housing authority and that the secretary-executive director was in charge of implementing the policies of the housing authority and administrating its business. In reaching its conclusion, the court stated:

> The principle . . . is clear, namely, good administration requires that the personnel in charge of implementing the policies of an agency be responsible to, and responsive to, those charged with the policy-making function, who in turn are responsible to a higher governmental authority, or to the public itself, whichever selected them. This chain of responsibility is the basic check on government possessed by the public at large. A contract which will have the effect of, and indeed appears to have been executed with the express purpose of, violating this rule runs counter to public policy and will not be enforced against the public interest. [132 A.2d at 880.]

Applying the foregoing judicial decisions to the instant inquiry, and pending judicial determination, it is my opinion that a municipal housing authority would not be authorized to enter into a 5-year employment contract with its secretary-executive director. A housing authority created and operating under Ch. 421, F. S., is *statutorily* empowered to delegate any or all of its *governmental* powers or duties to its secretary-executive director. The executive director, as the secretary of the governing board, apparently serves the board in that capacity much the same as a corporate officer in that capacity serves a private corporation for profit; and, in his dual capacity as secretary-executive director of the governing board, he carries out the executive function of implementing and enforcing the policies and regulations and administrative functions of the governing board. Moreover, a housing authority is also authorized by statute to designate its secretary-executive director to conduct investigations, and public or private hearings, and issue subpoenas requiring the attendance of witnesses thereat and take sworn testimony. These latter duties fall clearly within the scope of *governmental* functions as that term is defined in Daly v. Stokell, *supra*. Furthermore, the relationship between the secretary-executive director or a housing authority and the members of the authority must, in my opinion, be characterized as confidential and personal. *See* Mitchell v. Chester Housing Authority, *supra*, at 876, wherein the court stated that the executive director and secretary of the housing authority was "an executive officer whose functions with respect to the board [were] necessarily confidential and most intimate . . . ." *Also see* City of Riviera Beach v. Witt, *supra*, at 576, wherein the district court noted that the fact that the services of the city prosecutor were procured pursuant to a "contract of employment" as distinguished from an "appointment" to the office of city prosecutor did not change the character of the governmental function being performed.

Accordingly, your question is answered in the negative.

077-68—July 11, 1977

DEPUTY OFFICIAL COURT REPORTERS

ENTITLED TO REIMBURSEMENT FOR TRAVEL AND PER DIEM INCURRED IN PERFORMING OFFICIAL DUTIES

To: John F. Harkness, Jr., State Courts Administrator, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Is a deputy official court reporter authorized by statute to be reimbursed by the state for authorized travel expenses and per diem necessarily incurred in performing official duties for the state (in criminal proceedings)?

SUMMARY:

Deputy official court reporters are authorized, under s. 112.061, F. S. (1976 Supp.), as either employees or authorized persons to be reimbursed by the state for properly approved (by the chief judge of the judicial circuit) travel expenses and per diem and subsistence necessarily incurred in performing official duties for the state in criminal proceedings. Such authorization was not affected by the repeal of s. 29.08, F. S. 1971, when the statutes relating to the number and method of appointing or selecting official and deputy official court reporters were revised by Ch. 72-404, Laws of Florida.

You have raised this question because of the amendment—5 years ago by Ch. 72-404, Laws of Florida—of the statutory provisions in Ch. 29, F. S., relating to official court reporters. In the process of amending those provisions, s. 29.08, F. S. 1971, was repealed. That section had provided for the appointment of deputies by the official court reporter, made such reporter responsible for the actions of such deputies, and expressly provided for the reimbursement of deputies' travel expenses pursuant to s. 112.061, F. S. At present, the reimbursement of official circuit court reporters' traveling expenses pursuant to s. 112.061 is expressly provided for by s. 29.04(1), which subsection was not amended by Ch. 72-404, *supra*. Section 29.01, which was substantially amended and reworded by s. 6 of Ch. 72-404, now provides for the appointment of deputy court reporters for the circuit courts by the chief judge with the approval of a majority of the circuit judges in each circuit. Section 29.01(2). However, that section nowhere provides for the traveling expenses of deputy court reporters. Thus, the question at issue is whether, notwithstanding the repeal of s. 29.08, F. S. 1971, and amendment of s. 29.01 omitting express reference to s. 112.061 with respect to deputy circuit court reporters, there exists authorization by statute for the reimbursement of official deputy court reporters for their authorized travel expenses and per diem and subsistence necessarily incurred in performing official duties for the state in criminal proceedings.

There is no indication that, in enacting Ch. 72-404, *supra*, the Legislature was concerned with the subject of travel expenses of official or deputy official court reporters. Rather, the primary purpose of the relevant portion of Ch. 72-404 was to provide for the number and method of selecting official court reporters and deputy court reporters, changing from the executive (the Governor) and the official circuit court reporter, respectively, to the judiciary (the chief judges of the several judicial circuits, with the approval of a majority of the circuit judges), the authority to appoint official court reporters and deputy court reporters. As noted above, s. 29.04(1), F. S., providing for the travel expenses of official court reporters, was not affected or amended by Ch. 72-404. Nevertheless, the fact remains that, in the process of carrying out the substantial revision necessary to accomplish that purpose, the Legislature failed to carry over the express language to the effect that deputy circuit court reporters shall be reimbursed for travel expenses as provided in s. 112.061, F. S. As to such omissions, it was stated in Davis v. Florida Power Co., 60 So. 759, 765 (Fla. 1913):

> Where it is apparent that substantive portions of a statute have been omitted and repealed by the process of revision and reenactment, courts have no express or implied authority to supply the omissions that are material and substantive and not merely clerical and inconsequential; for that would in effect be the enactment of substantive law.

Thus, it is necessary to determine whether sufficient statutory authority exists independent of former s. 29.08, F. S., so as to authorize deputy court reporters' travel expenses and per diem reimbursement notwithstanding the omission by revision described above. It is provided in s. 112.061(1)(b)1., F. S. (1976 Supp.), and was so provided at the time of passage of Ch. 72-404, Laws of Florida:

> The provisions of this section shall prevail over any conflicting provisions in a general law, present or future, to the extent of the conflict; but if any such general law contains a *specific exemption from this section, including a specific reference to this section*, such general law shall prevail, but only to the extent of the exemption. (Emphasis supplied.)

Nowhere in Ch. 72-404 is there to be found any such "specific exemption" or exclusion from the operation of s. 112.061, F. S., with respect to deputy official court reporters' travel expenses and per diem and subsistence. The courts have often stated that "[i]t is a rule of statutory construction that the Legislature is presumed to know the existing law when a statute is enacted." Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806, 809 (Fla. 1964). *Accord*: Dickinson v. Davis, 224 So.2d 262, 264 (Fla. 1969). I must therefore assume that, had the Legislature intended to prevent deputy official court reporters from being reimbursed by the state for official travel expenses and per diem and subsistence (in criminal proceedings) pursuant to s. 112.061, there would have been included in Ch. 72-404 some language expressly and specifically exempting or excluding deputy official court reporters from those provisions of s. 112.061 which would otherwise authorize reimbursement of their travel expenses and per diem and subsistence. Thus, if deputy official court reporters fall within one of the classes of persons authorized under s. 112.061 to be reimbursed for travel expenses and per diem and subsistence (*i.e.*, officers, employees, and authorized persons), then the omission of the express reference to travel expenses for deputy official circuit court reporters contained in former s. 29.08 (repealed by Ch. 72-404) should be of no effect.

It is my opinion that deputy official court reporters are entitled, as either employees or authorized persons, to be reimbursed for properly authorized (by the chief judge of the circuit) travel expenses and per diem and subsistence incurred in carrying out their official duties in criminal proceedings. It is not necessary for the purposes of this opinion to determine whether they should come under s. 112.061, F. S., as employees or as authorized persons, although it might be noted that in Robbin v. Brewer, 236 So.2d 448 (4 D.C.A. Fla., 1970), the court held that official court reporters are employees, rather than officers, in light of the nature of their official duties.

Your question is answered in the affirmative.

077-69—July 11, 1977

PUBLIC RECORDS LAW

APPLICABILITY TO RECORDS RELATING TO APPLICATIONS FOR TENANCY IN PUBLIC HOUSING

To: Murray Gilman, Executive Director, Housing Authority, Miami Beach

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Are papers and applications of tenants addressed to and in the possession of the Housing Authority of the City of Miami Beach public

records which must be produced for inspection and examination pursuant to s. 119.07(1), F. S.?

SUMMARY:

Tenant applications and accompanying and related documents, letters, papers, and the like received by a housing authority in connection with the transaction of its official business are public records within the purview of the Public Records Law and must be made available for personal inspection and examination by any person at reasonable times, under reasonable conditions, and under the supervision of a public custodian of such records.

Florida's Public Records Law, Ch. 119, F. S., provides at s. 119.07(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 . . . .

For the purpose of Ch. 119, F. S., agency is defined by s. 119.011(2) 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* and any other public or private agency, person, partnership, corporation, or business entity acting in behalf of any public agency.

It seems clear that the authority is subject to s. 119.07(1), F. S., as both an "authority" and a "separate unit of government created or established by law." *See* s. 421.04, F. S., creating municipal housing authorities, and s. 421.08, F. S., relating to the constitution and powers of the authorities as public bodies corporate and politic (or governmental agencies).

Section 119.011(1), F. S., defines public records to include all documents, papers, or letters made or received pursuant to law or in connection with the transaction of official business by any governmental agency. Clearly the tenant applications and accompanying and related documents, letters, and papers constitute public records within the purview of s. 119.07(1), F. S. Since tenant applications and accompanying documents and papers are made and received in connection with the transaction of official business by the housing authority, and as such are "public records" as defined at s. 119.011(1), it must now be determined whether such applications and accompanying and related documents, letters, and papers are exempt or excepted from the mandatory inspection provisions of s. 119.07(1).

Section 119.07(2)(a), F. S., states:

> 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). (Emphasis supplied.)

I am unaware of any statute presently in existence which purports to make tenant applications and accompanying or related documents and records submitted to the authority confidential or prohibits their inspection and examination by any person. Accordingly, under the clear and unambiguous terms of the statute, tenant applications and accompanying or related documents and records are public records within the purview of the Public Records Law and must be made available for personal inspection and examination by any person desiring to do so at reasonable times, under reasonable conditions, and under the supervision of the custodian of such records or his designee.

However, notwithstanding s. 119.07(1), F. S., it has been submitted that the records in question should be kept confidential consistent with "public policy" and so as not to

violate any federal constitutional privacy rights of applicants or tenants or potential tenants of the housing authority.

Regarding the first of these contentions, I do not believe that this office has the power to imply or write into the statutes a "public policy" exception to s. 119.07(1), F. S., in the face of prior judicial decisions and the 1975 amendments to Ch. 119, F. S., Ch. 75-225, Laws of Florida. In State *ex rel.* Cummer v. Pace, 159 So. 679, 681 (Fla. 1935), the court held that

> . . . where the Legislature has preserved no exception to the provisions of the statute [C.G.L. 490, from which s. 119.01, F. S., is derived], *the courts are without legal sanction to raise such exceptions by implication*; the policy of state statutes being a matter for the Legislature and not the judiciary to determine. (Emphasis supplied.)

This decision was found by the Supreme Court to be in conflict with Wisher v. Ft. Myers News Press, 310 So.2d 345 (2 D.C.A. Fla., 1975), holding, *inter alia*, that public policy dictates that public employee personnel records be deemed confidential in order to protect public employees' right of privacy with respect to such records, notwithstanding the absence of a statute exempting the same from Ch. 119; and was not receded from in the court's decision in News-Press Publishing Co. v. Wisher, (Fla. 1977), case no. 47,088, opinion filed February 25, 1977, quashing the decision of the Second District Court of Appeal. Unless and until Pace, *supra*, is overruled or modified by the Supreme Court, it remains the law of this state and must be followed by this office. *See* United States Steel Corp. v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974), and AGO 077-48 concluding in part that applications for position of a municipal department head are public records, that a state or local official is without authority to promise an applicant for such position that his application will be kept confidential or exempted from s. 119.01 or s. 119.07(1), and that neither a public employer nor a collective bargaining agreement between the employer and its employees may validly make personnel records confidential or excepted from s. 119.07(1).

Moreover, it is doubtful that such a "public policy" exception could be judicially inferred, because of the existence of s. 119.01, F. S. 1975, which constitutes a general legislative statement of public policy that ". . . all state, county, and municipal records shall at all times *be open* for a personal inspection by any person," and s. 119.07(2)(a), F. S. 1975, providing that records *provided by law* to be confidential or which are prohibited from being inspected *by general or special law* are exempted from s. 119.07(1), F. S. Sections 119.01 and 119.07(2)(a), F. S., were amended after litigation was initiated in Wisher v. Ft. Myers News Press, *supra.*

I also do not believe that the constitutional right of privacy extends to documents such as applications for tenancy and accompanying and related documents and papers in the possession of a housing authority. The parameters of this federal right were discussed in *Laird v. State*, U. S. Sup. Ct. Case No. 48,889, filed February 10, 1977. Simply stated, this federal privacy right does not extend to financial or other similar information or data which normally would be required to be disclosed in a housing application form. *Also see* Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 688 (Tex. 1976).

No opinion is expressed as to the applicability of any federal laws to this question. Such an inquiry should be directed to the federal agency or agencies involved in administering applicable federal housing laws. Additionally, no opinion is expressed as to the applicability of any Dade County Charter provisions or ordinances to this issue. If such a response is desired, the inquiry should be initially directed to the office of the Dade County attorney. It should also be noted that the housing authority is a governmental agency or unit of government created and established and organized and existing under the laws of Florida, ss. 421.04, 421.05, and 421.08, F. S., and controlled and regulated by the laws of Florida and not the federal laws or the ordinances of Dade County.

077-70—July 13, 1977

FINES AND PENALTIES

GOOD DRIVERS' INCENTIVE FUND—ADDITIONAL PENALTY APPLICABLE ONLY TO OFFENSES ON OR AFTER EFFECTIVE DATE OF ACT

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

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Does s. 42 of C.S. for S.B. 1181 (Ch. 77-468, Laws of Florida, s. 318.22, F. S. 1977) require the assessment and collection of an additional civil penalty or fine for the conviction of certain violations where the violation itself occurred prior to the effective date of the act, or does it require the collection of such an additional civil penalty for those violations which occurred on or after the effective date of the act?

SUMMARY:

Under either the prohibition against ex post facto laws contained in the Federal and State Constitutions, or the statutory construction rule against retroactive application of statutes, and pending judicial clarification, the "additional civil penalties or fines" provided for in s. 42 of Ch. 77-468, Laws of Florida, for violation of one of the traffic laws specified in s. 42, should not be collected from a driver whose offense occurred before July 1, 1977. The additional penalty should be collected only from drivers convicted on and after July 1, 1977, of violations occurring on and after July 1, 1977, which date is the effective date of s. 42.

Section 42 of Ch. 77-468, Laws of Florida (C.S. for S.B.'s 1181, 925 & 792, s. 318.22, F. S.), which section took effect July 1, 1977, creates a "Good Drivers' Incentive Fund" whereby distributions are to be made to eligible drivers beginning July 1, 1978. Such distributions are to be funded through imposition of "additional civil penalties or fines" when a driver is convicted of one of a number of specified moving traffic violations. Section 42(4)(a) provides:

> (4) *On and after the effective date of this act:*
> (a) *Any driver convicted of a moving traffic violation* shall be assessed an additional civil penalty or fine of $30 in addition to the amount normally levied for such conviction. For purposes of this section the term "moving traffic violation" means an infraction of ss. 316.029, 316.030, 316.040, 316.053, 316.054, 316.055, 316.056, 316.0565, 316.057(9), 316.061, 316.081, 316.082, 316.083, 316.084, 316.085, 316.086, 316.087, 316.088, 316.089, 316.090, 316.091, 316.092, 316.094, 316.095, 316.096, 316.098, 316.100(1), 316.102, 316.104(2) or (4), 316.107, 316.108, 316.109, 316.110, 316.1105, 316.113, 316.121, 316.122, 316.123, 316.125, 316.126(1) or (3), 316.133, 316.134, 316.138, 316.139, 316.151, 316.152, 316.153, 316.154, 316.155, 316.157, 316.158, 316.159, 316.162, 316.181, 316.182, 316.183, 316.184, 316.185, 316.186, 316.196, 316.197, 316.198, 316.205, 316.206, 316.217, 316.236, 316.238, 316.2431, or 339.30(1)(a), (b), (c), (d), (g), or (h). (Emphasis supplied.)

Section 42(4)(b) similarly assesses an "additional civil penalty or fine of $200" upon conviction of violation of s. 316.028 (driving under the influence of intoxicants).

I am of the opinion that both the prohibition against enactment of ex post facto laws (proscribed by s. 10, Art. I, U.S. Const., and s. 10, Art. I, State Const.) and the presumption against retroactive application of laws (a fundamental rule of statutory construction) make it advisable that the additional penalty imposed by s. 42 of Ch. 77-468, Laws of Florida, be applied only to those persons convicted on and after July 1, 1977, of *violations occurring on and after July 1, 1977.*

Section 10, Art. I, U.S. Const., provides in pertinent part that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." Section 10, Art. I of Florida's Constitution similarly provides: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." (A similar prohibition applies to Congress pursuant to s. 9, Art. I, U.S. Const.) In Wilensky v. Fields, 267 So.2d 1, 5 (Fla. 1972), the ex post facto prohibition was described as follows:

> An ex post facto law is "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." Higginbotham v. State (Fla. 1924) 88 Fla. 26, 101 So. 233. (Emphasis supplied.)

The following definition was provided by the United States Supreme Court in Beazell v. Ohio, 269 U.S. 167, 169 (1925):

> . . . any statute which punishes as a crime an act previously committed, which was innocent when done, *which makes more burdensome the punishment for a crime, after its commission,* or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.* (Emphasis supplied.)

(*See* the recent decision of the United States Supreme Court in Dobbert v. Florida, Case No. 76-5306, decided June 17, 1977, for the most recent interpretation of the federal ex post facto prohibition, as applied to changes in *procedural* matters.)

I would note here that some doubt might be cast on the application of the ex post facto prohibition as to imposition of the additional penalty for violation of the sections listed in s. 42(4)(a). While s. 316.028, F. S., listed separately in s. 42(4)*(b),* is punishable by imprisonment and is unquestionably a "criminal" statute (and thus clearly falls within the above ex post facto definitions), the sections set forth in s. 42(4)*(a)* are designated in Ch. 318, F. S., as "noncriminal" infractions punishable by "civil" penalties. Section 318.13(3), F. S. (1976 Supp.). (Section 316.028 is expressly excluded from the decriminalization provisions of Ch. 318 by s. 318.17, F. S. [1976 Supp.].) However, the fine applicable to such an infraction must be deemed a penalty or punishment for commission of a proscribed act, and thus such infractions must be considered at least penal in nature, even if expressly designated as "noncriminal."

As is stated in 70 C.J.S. *Penal,* p. 386, "The word 'penal' is one of the most elastic known to the law, and has many different shades of meaning." It is generally defined as any law imposing a penalty. That a criminal law is always a penal law, but that the converse need not necessarily follow, was emphasized by the court in State v. Lowry, 230 A.2d 907, 913 (N.J. 1967): " 'Penal' is inherently a much broader term than 'criminal,' since it pertains to any punishment or penalty and relates to acts which are not necessarily delineated as criminal." Since s. 42, by its terms, imposes an additional "penalty," it is thus a *penal* statute as are the "infractions" listed in paragraph 4(a), even if such are not *criminal* statutes. Earlier expressions of the United States Supreme Court on the subject of ex post facto laws used the broader term "penal" along with the narrower term "criminal." *See* Calder v. Bull, 3 Dall. 386 (1798); and Locke v. New Orleans, 4 Wall. 172 (1866). (It appears the various discussions of the limitation of the ex post facto prohibition to criminal or penal laws have been primarily aimed at distinguishing cases where a law is retroactive, but relates to a civil matter and does not constitute "punishment" per se. In such cases, other constitutional prohibitions would then become relevant, such as that against impairment of contracts.) However, *see* Bankers' Trust Co. v. Blodgett, 260 U.S. 647 (1923); and Surf Club v. Tatem Surf Club, 10 So.2d 554 (Fla. 1942), wherein application of the ex post facto prohibition was rejected because the actions complained of were found not to have been punishment for *criminal* violations.

However, even if it were to be ruled by a court that the infractions listed in s. 42(4)(a) are not subject to the ex post facto prohibition, my opinion would remain the same because of the rule of statutory construction that statutes (other than curative or remedial measures) are presumed to operate only prospectively from the effective date.

In Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 524 (Fla. 1973), the Florida Supreme Court stated:

> A statute will be construed as prospective only unless the intention of the Legislature to give it a retroactive effect is expressed in language too clear and explicit to admit to reasonable doubt.

In accord: Foley v. Morris, 339 So.2d 215 (Fla. 1976); Yamaha Parts Distributions Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975); *In re* Seven Barrels of Wine, 83 So. 627 (Fla. 1920). In Heberle v. P.R.O. Liquidating Company, 186 So.2d 280, 282 (Fla. 1966), it was stated:

> A law is retroactive or retrospective if it takes away or impairs vested rights acquired under existing laws, or if it *creates a new obligation, imposes a new duty, or attaches a new disability* in respect to transactions or considerations already past. (Emphasis supplied.)

That the rule against retroactive application is applied in an especially strict manner as to laws imposing new penalties or obligations was noted by the court in Larson v. Independent Life & Accident Ins. Co., 29 So.2d 448 (Fla. 1947), wherein it was stated that "[a]cts which create new obligations and impose new penalties, have been more rigidly construed as being governed by this rule."

Thus, it is my opinion that, pending judicial ruling to the contrary, the "additional civil penalties or fines" provided for in s. 42 of Ch. 77-468, Laws of Florida, should be collected only from those drivers convicted on and after July 1, 1977, of specified violations ocurring on and after July 1, 1977. The additional penalty should not be applied where a driver is convicted on or after July 1, 1977, based on a violation which occurred before July 1, 1977.

077-71—July 15, 1977

MUNICIPALITIES

MAY PROVIDE HEALTH AND HOSPITALIZATION INSURANCE FOR EMPLOYEES' DEPENDENTS

To: Ralph Miles, City Attorney, Hialeah

Prepared by: Staff

QUESTION:

> **May a municipality under s. 112.08, F. S., and its home rule powers provide and pay out of municipal funds all or part of the premiums for health and hospitalization insurance for the dependents of its officers and employees?**

SUMMARY:

> **Subject to judicial or legislative clarification, the City of Hialeah may under its home rule powers pursuant to Ch. 166, F. S., provide and pay out of municipal funds all or part of the premiums for health and hospitalization insurance for the dependents of its officers and employees.**

According to your letter, the City of Hialeah is presently paying 75 percent of the premiums under an employee group insurance plan which also provides coverage for the dependents of city employees. These payments by the city are apparently the result of a contractual agreement with employee bargaining units.

Chapter 166, F. S., the Municipal Home Rule Powers Act, seeks to implement the broad grant of power authorized by s. 2(b), Art. VIII, State Const., which provides that "[m]unicipalities shall have government, 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 as otherwise provided by law." In particular, s. 166.021 provides that a municipality may exercise any power for municipal purposes, "except when expressly prohibited by law." Municipal purpose is defined as "any activity or power which may be exercised by the state or its political subdivisions." Section 166.021(2). *See also* s. 166.021(3)(b), (c), and (d), which provide that the legislative body of each municipality may enact legislation on any subject matter upon which the State Legislature may act except when the subject is *expressly* prohibited by the Constitution or is *expressly* preempted to the state or county government by the Constitution or general law or pursuant to the county charter. *Cf.* AGO's 076-199 and 075-176.

The use of public funds to pay all or a portion of the premiums of group life and hospitalization insurance for public employees and officers has generally been upheld by courts against the contention that such payments constitute a gratuity or donation of public money in violation of a state's constitution. Attorney General Opinion 075-147, 3 McQuillan *Municipal Corporations* s. 12.173; *see e.g.* State *ex rel.* Thompson v. City of Memphis, 251 S.W. 46 (Tenn. 1923). Generally, these payments have been upheld as representing a form of "compensation" to the employee or officer as well as aiding a municipality in obtaining and retaining competent personnel.

Although s. 10, Art. VII, State Const., prohibits a municipality from giving, lending, or using its taxing power or credit to aid any private corporation, association, partnership, or person, the applicability of the foregoing constitutional provision is dependent in part on whether a valid public purpose is involved. In O'Neill v. Burns, 198 So.2d 1, 4 (Fla. 1967), the Florida Supreme Court stated that there "must be some clearly identifiable and concrete public purpose as the primary objective and a reasonable expectation that such purpose will accomplish . . . ." *See also* AGO 075-241.

The benefit to the public must be substantial, not merely incidental; if, however, this test is met, the prohibition contained in s. 10, Art. VII, State Const., will not be violated even though a private individual may be incidentally benefited.

I am not aware of any Florida case which has directly considered the issue of a municipality providing and paying out of municipal funds the premiums for an employee group insurance program. The Florida Legislature, however, in the past has expressly authorized municipalities to provide such group insurance coverage to their officers and employees. *See* s. 167.421, F. S. 1971, which permitted the payment of all or part of the insurance premiums by the municipality. The underlying rationale for permitting such payments under the statute was

> . . . to make available upon a voluntary participation basis to the employees and officers of municipalities the economic protection and benefits of group insurance not available to each employee as an individual; and to *aid municipalities in obtaining and holding competent, skilled, and experienced employees and officers by authorizing participation by municipalities in the cost of such group insurance.* [Section 167.421(7), F. S. 1971; emphasis supplied.]

Chapter 167, F. S. 1971, was repealed in 1973 by the Municipal Home Rule Powers Act, Ch. 73-129, Laws of Florida (Ch. 166, F. S.); however, under s. 5 of the act (now s. 166.042[1]), the repeal of certain chapters of the Florida Statutes, including Ch. 167, by Ch. 166 "shall not be interpreted to limit or restrict the powers of municipal officers." Thus, Ch. 167, although repealed, is still viable as a grant of municipal power under Ch. 73-129. *Cf.* Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97, 101 (Fla. 1975). The Municipal Home Rule Powers Act also states that it is the Legislature's intent that

> . . . municipalities . . . continue to exercise all powers heretofore conferred on municipalities by [Ch. 167, F. S.] . . . but shall hereafter exercise these powers at their own discretion, subject only to the terms and conditions which they choose to prescribe. [Section 166.042, F. S.]

See AGO 075-236 in which this office concluded that under s. 167.421, F. S. 1971, as continued by Ch. 166, a municipality could provide and pay any part of the premiums for group insurance for its employees and officers without violating s. 10, Art. VII, State Const.

Thus it appears that the Legislature left the issue as to whether a municipality should provide insurance for its officers and employees, and the extent of that coverage, to the particular municipality. The important consideration is, then, whether extending such a program to the dependents of a municipality's officers and employees would constitute a valid public purpose. Insurance coverage for public employees' and officers' dependents would obviously provide an additional incentive for individuals to work for a municipality. Moreover, the program encompasses more than the initial enticing, as the extension of insurance coverage to dependents would contemplate a continuation of employment of the officers and employees in order to maintain their participation in the program. The plan would assist the municipality not only in obtaining skilled employees, but also in retaining them. *Cf.* AGO 075-147. The city clearly has an interest in providing efficient municipal services to the community. In order to accomplish this, it must be able to attract skilled and competent employees. It is, in practical terms, competing with private business and, to some extent, must be able to offer somewhat comparable terms and conditions of employment. Sections 167.421(7), F. S. 1971, and 166.042, F. S., illustrate the Legislature's recognition of this problem by authorizing municipalities to provide group insurance for their employees in order to obtain and keep competent, skilled, and experienced employees, and when s. 167.421, F. S., was repealed in 1973, by expressly authorizing municipalities, in addition to their general home rule powers, to retain, change, or nullify any of the provisions of s. 167.421, F. S. 1971.

In a related area, Florida courts have upheld payments out of public funds for a pension plan for public employees based upon a rationale similar to that put forth in support of employee group insurance programs, that is, to aid municipalities in obtaining and keeping skilled and experienced employees and officers. *See, e.g.,* Voorhess v. City of Miami, 199 So. 313 (Fla. 1940); State v. Lee, 24 So.2d 798 (Fla. 1946); State *ex rel.* Holton v. City of Tampa, 159 So. 292 (Fla. 1935). *See also* AGO 074-19; 3 McQuillan *Municipal Corporations* ss. 12.141 and 12.142. In particular, payments out of public funds to the dependents of deceased employees and officers have also been upheld under these pension plans. *Cf.* s. 122.08(9), F. S., which provides for payments to spouses of deceased participants in state and county retirement systems; 3 McQuillan *supra* at s. 12.154; 62 C.J.S. *Municipal Corporations* s. 727.

The strong public policy in providing an efficient and effective government and the need for competent and skilled officers and employees in order to accomplish this are, in my opinion, sufficient to permit a municipality to include dependents in its employee group insurance program in order to retain skilled and experienced personnel. (*But see* State *ex rel.* Sanders v. Cervantes, 480 S.W.2d 888 (Mo. 1972), in which the Missouri Supreme Court struck down a portion of a state statute which authorized the payments of group health and life insurance premiums out of public funds for coverage of the dependents of public employees and officers. Although recognizing that a municipality must compete with private businesses and the benefits they offer, the court held that it was bound by the provisions of the state constitution which prohibited a city from granting public money to any private individual. Missouri's constitution contained certain exceptions to the foregoing provision within the constitution itself. For example, payments to dependents of public employees and officers under the pension and retirement plan were expressly authorized within the constitution. Since a group insurance program providing coverage to the dependents of public employees and officers was not expressly authorized by the constitution, the *Cervantes* court, considering itself bound by the constitution, struck down that portion of the statute authorizing such payments.)

Moreover, the authority to make such payments is not expressly preempted to the state. Section 112.08, F. S. (1976 Supp.), provides in pertinent part that "[e]very local government unit is hereby authorized to provide and pay out of its available funds for all or part of the premium for life, health, accident, hospitalization, or annuity insurance, or all of any kinds of such insurance, for the officers and employees of the unit, upon a group insurance plan. . . ." The foregoing statutory provision merely authorizes local governments to provide group insurance. Under ss. 167.421 and 166.042, F. S., and its home rule powers, a municipality already possesses the authority to provide such insurance coverage. Section 112.08 simply constitutes supplemental legislation; it neither expressly preempts nor prohibits anything with respect to the instant inquiry, nor does it add or detract from the municipality's home rule powers. It should be noted that, prior to 1977, municipalities were not among those governmental units enumerated in s. 112.08, F. S. 1975, which granted "each and every county, school board, governmental unit, department, board, or bureau of the state" the authority to establish a group insurance plan. Under s. 112.12, F. S. 1975, these governmental units were authorized to pay all or part of the insurance premium for coverage under s. 112.08. In 1976, the Legislature substantially modified s. 112.08 to include municipalities by extending the section's application to "every local government unit," effective January 1, 1977. *See* ss. 1 and 12, Ch. 76-208, Laws of Florida. Section 112.12 was repealed by s. 4, Ch. 76-208, Laws of Florida, effective January 1, 1977 (*see* s. 12, Ch. 76-208); however, provisions substantially similar to s. 112.12 are now contained in s. 112.08.

Therefore, subject to judicial or legislative clarification, a municipality possesses the authority pursuant to Ch. 166, F. S., the Municipal Home Rule Powers Act, to provide and pay out of municipal funds all or part of the premiums for health and hospitalization insurance for the dependents of its officers and employees.

077-72—July 15, 1977

MUNICIPALITIES

HEALTH AND HOSPITALIZATION INSURANCE FOR EMPLOYEES' DEPENDENTS—MAY BE SUBJECT TO COLLECTIVE BARGAINING

To: Ralph Miles, City Attorney, Hialeah

Prepared by: Staff

QUESTION:

May a municipality bargain and negotiate with its employees to provide and pay out of municipal funds all or part of the premiums for health and hospitalization insurance for its employees' dependents?

SUMMARY:

The City of Hialeah may bargain and negotiate with its employees to provide and pay out of municipal funds all or part of the premiums for health and hospitalization insurance for its employees' dependents.

In AGO 077-71, this office concluded that the City of Hialeah, pursuant to the Municipal Home Rule Powers Act, Ch. 166, F. S., has the authority to provide and pay out of municipal funds all or part of the premiums for health and hospitalization insurance for its officers and dependents. Since it appears that the city possesses the authority to provide such health and hospitalization insurance, it follows that it has the authority to collectively bargain for, and to agree to provide, such benefits for its employees under part II of Ch. 447, F. S. Section 112.08, F. S. (1976 Supp.), has no adverse effect upon any such collective bargaining agreement or contract.

Part II of Chapter 447, the Collective Bargaining Act, provides for the labor organization of public employees. In particular, s. 447.309 provides for collective bargaining in determining wages, hours, and the terms and conditions of employment for public employees. The act does not provide a definitive answer as to what constitutes a proper subject for collective bargaining; rather it simply states that a proper subject for such agreements would include all items dealing with the terms and conditions of employment as well as a determination concerning wages and terms. It appears, therefore, that matters included in a collectively bargained agreement can be all-encompassing and may in fact touch almost every element and facet of the relationship between public employer and employee when authorized by law.

Therefore, it appears that the city has the authority to collectively bargain for and to agree to provide for such benefits for its employees under part II of Ch. 447, F. S., as part II of Ch. 447 does not expressly prohibit or preempt the above action taken by the city. *Cf.* AGO 076-212. Nor does it appear that s. 112.08, F. S. (1976 Supp.), would have any adverse effect upon any such collective bargaining agreement or contract. The charter for the City of Hialeah is silent with regard to an employee group insurance program, although the charter does provide for a pension plan for city employees. *See* ss. 6(40) and 107 of the Hialeah City Charter. In addition, no provision of the Dade County

Charter with regard to a municipality's group insurance program which would supersede or preempt the city's authority to provide such insurance has been brought to my attention.

Accordingly, based on the foregoing, I am of the view that the City of Hialeah may bargain and negotiate with its employees to provide all or part of the premiums for health and hospitalization insurance for its employees' dependents.

077-73—July 26, 1977

PAROLE AND PROBATION COMMISSION

DUTY TO INTERVIEW INMATES ELIGIBLE FOR PAROLE UNAFFECTED BY ACT PROVIDING FOR CONTRACT PAROLE

To: Charles J. Scriven, Chairman, Florida Parole and Probation Commission, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

> **Has the Florida Parole and Probation Commission's statutory responsibility to interview eligible inmates for parole consideration pursuant to ss. 947.16 and 947.17, F. S., been eliminated when the commission enters into a contract parole pursuant to s. 947.135, F. S. (1976 Supp.), with an eligible inmate?**

SUMMARY:

> **The statutory duty imposed upon the Florida Parole and Probation Commission by s. 947.16(3), F. S., that the commission conduct parole interviews with inmates "not less often than annually," was not abrogated or modified by the enactment of s. 947.135, F. S. (1976 Supp.), and is not abrogated or modified when an inmate enters into a "contract parole" agreement pursuant to s. 947.135.**

The 1976 Legislature enacted Ch. 76-274, Laws of Florida (the "Mutual Participation Program Act of 1976"), which has been codified as s. 947.135, F. S. (1976 Supp.). The program created under s. 947.135 is commonly referred to as "contract parole," and, as stated in the title to Ch. 76-274, was designed to provide a "pilot program whereby the terms of institutional confinement, a guaranteed parole date, the terms of parole supervision, and release from parole are agreed to by the Department of Offender Rehabilitation, the Parole and Probation Commission, and an offender . . . ."

Sections 947.16 and 947.17, F. S., are the primary statutory sections granting to the Parole and Probation Commission the power to grant paroles. In these sections are provided the various procedures, such as hearings and investigations, which are to be followed by the commission in exercising its power to grant paroles. While some matters are placed within the discretion of the commission and some are left to be implemented by rules of the commission, s. 947.16 clearly and expressly imposes upon the commission the *duty* to interview inmates eligible for parole at least once a year. In the pertinent part of s. 947.16(1), it is provided:

> An inmate who has been sentenced for a term of 5 years or less shall be interviewed by a member of the commission or its representative within 6 months after the initial date of confinement in execution of the judgment. An inmate who has been sentenced for a term in excess of 5 years shall be interviewed by a member of the commission or its representative within 1 year after the initial date of confinement in execution of the judgment. An inmate convicted of a capital crime shall be interviewed at the discretion of the commission.

And, the pertinent part of s. 947.16(3) provides that, "[s]ubsequent to the initial interview [as provided in s. 947.16(1), *supra*], the inmate *shall be interviewed* for parole at periodic intervals *not less often than annually*." (Emphasis supplied.)

I have found in s. 947.135, F. S. (1976 Supp.), no reference to s. 947.16 or to the duty therein imposed regarding yearly interviews. There is no language in s. 947.135, or in the title to Ch. 76-274, Laws of Florida, providing that the participation by an eligible inmate in the Mutual Participation Program (so-called contract parole) in any way abrogates or modifies the commission's duty to conduct parole interviews "not less often than annually."

Since there is no express repeal of the annual interview requirement, an affirmative answer to your question would necessitate my finding that the clear requirement of s. 947.16(3), *supra*, was repealed by implication by the enactment of s. 947.135, *supra*. In light of the well-established rules of statutory construction with respect to the circumstances under which it is permissible to infer repeal of an earlier statute by a later statute, which rules emphasize that implied repeal is not favored, I am of the opinion that the yearly interview provision of s. 947.16(3) should not be considered to have been repealed by implication in instances where an inmate is participating in "contract parole" pursuant to s. 947.135. In Beasley v. Coleman, 180 So. 625, 628 (Fla. 1938), it was stated:

> It is well settled in this jurisdiction that, in order that a court may declare that one statute impliedly repeals another, it must appear that there is a *positive repugnancy* between the [illegible]n, or that the last was clearly intended to prescribe the only rule which sh[illegible]vern the case provided for, or that it revises the subject matter of the fo[illegible] (Emphasis supplied.)

In accord: Ellis v. City of Winter Haven, 60 So.2d 620 (Fla. 1952); State v. Digman, 294 So.2d 325 (Fla. 1974). I find no such "positive repugnancy" between s. 947.16(3) and s. 947.135, nor do I find that s. 947.135 was intended as a revision of the entire parole procedure set forth in ss. 947.16 and 947.17, F. S. Thus, the inference of implied repeal is not warranted. In the absence of any clear indication of legislative intent to the contrary, I am of the opinion that the annual interview duty imposed on the commission by s. 947.16(3) should be complied with, whether or not an inmate has entered into an agreement pursuant to s. 947.135.

Your question is answered in the negative.

077-74—July 26, 1977

DUAL OFFICEHOLDING

LEGISLATOR MAY SERVE ON ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS

To: Lew Brantley, Senate President, 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 Advisory Council on Intergovernmental Relations?**

SUMMARY:

> **Section 5(a), Art. II, State Const., does not prohibit a legislator from serving simultaneously in the Legislature and on the Florida Council on Intergovernmental 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.)

While this prohibition on "dual officeholding" appears in the 1885 Constitution in substantially similar form, *see* s. 15, Art. XVI, State Const. 1885, the italicized language above was added during the 1968 revision in order to except statutory advisory boards from the scope of the prohibition.

Since the position of state legislator is clearly an "office," the issue which must be decided is whether membership on the Florida Advisory Council on Intergovernmental Relations also constitutes the holding of an office which would prohibit a legislator from serving on the same during his term of office.

In AGO 076-241, this office stated that s. 5(a), Art. II, State Const., prohibits a legislator from serving simultaneously in the Legislature and on the Florida Commission on Human Relations. This opinion was based on the statutory powers of the commission which included, *inter alia*, the authority to recruit, initiate, investigate, hold hearings on, and pass upon complaints alleging discrimination and to adopt, promulgate, amend, and rescind rules and regulations to effectuate the purposes and policies of part II, Ch. 13, F. S. An examination of the then existent powers of the commission indicates that the commission could not be characterized as a purely advisory body, but instead the members thereof were authorized to exercise powers associated with those of an office. *Compare* State *ex rel.* Clyatt v. Hocker, 22 So. 721 (Fla. 1897).

By contrast, the powers exercised by the members of the Florida Advisory Council on Intergovernmental Relations are advisory and as such excluded from the prohibition of s. 5(a), Art. II, State Const. Moreover, s. 163.704(2), F. S., states:

> Each member of the council shall perform the duties of a member of the council as additional duties required of him in his other official capacity.

An officer who holds an additional office as a member ex officio does not violate s. 5(a), Art. II, State Const., when the Legislature directs such official to serve as a member and carry out the powers and duties of another office "because of an office already held, so long as the duties of the two offices are not incompatible or inconsistent." *See* Whitaker v. Parson, 86 So. 247, 252 (Fla. 1920); State *ex rel.* Gibbs v. Gordon, 189 So. 437, 440 (Fla. 1939); Miller v. Davis, 174 So.2d 89 (Fla. 1964); AGO 074-50. Significantly, s. 163.704(3) and (5), F. S., provide that legislative members' terms shall correspond to their terms of office and that, if a legislator ceases to be an officer or member of the unit he is appointed to represent, his membership on the commission shall terminate immediately and a vacancy shall exist. It does not appear that the office of legislator and member ex officio of the Advisory Council on Intergovernmental Relations are inconsistent or incompatible. To the contrary, it would seem that the Legislature structured this overlapping membership to promote legislative input and participation in solving intergovernmental problems. *See* s. 163.702(1) and (2), F. S. Moreover, this statute and all appointments made thereunder are entitled to every presumption in favor of their 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).

Accordingly, pending judicial clarification, a legislator may serve as a member of the Florida Advisory Council on Intergovernmental Relations without violating s. 5(a), Art. II, State Const.

077-75—July 26, 1977

REGULATION OF PROFESSIONS

ADVERTISING BY OUT-OF-STATE FUNERAL ESTABLISHMENTS—WHEN PERMISSIBLE

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

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

> **Is advertising by out-of-state funeral establishments in the yellow page sections of local telephone directories indicating that such out-of-state establishments have branch establishments in Florida or are represented by Florida's licensed funeral establishments in violation of s. 470.10, s. 470.12, or s. 470.30, F. S., and Rule 21J-7.08, F.A.C.?**

SUMMARY:

> **Advertising by out-of-state funeral establishments in the yellow pages of Florida telephone directories in association with Florida licensed funeral establishments is not contrary to Ch. 470, F. S., if the advertising does not misleadingly suggest that the out-of-state establishment is engaged in practicing funeral directing in the State of Florida and does not misleadingly suggest the Florida establishment is merely a branch establishment of the out-of-state firm. Such advertising should only indicate that the Florida establishment represents the out-of-state funeral establishment and may make local arrangements for services by the out-of-state funeral establishment.**

Your letter is accompanied by copies of the yellow pages of telephone directories serving Dade and Broward Counties containing advertisements by out-of-state funeral establishments. The advertisements are basically of two categories. The first identifies the out-of-state establishment and names a Florida licensed funeral home or funeral director as its representative. The second category consists only of an out-of-state establishment and local address and telephone number and no indication of association with a Florida licensed representative.

Section 470.10(6), F. S., in applicable part, provides:

> . . . . No person not licensed as a funeral director or embalmer shall be permitted to perform the functions of a funeral director or embalmer as herein defined, or hold himself out to the public as such by reason of his ownership in a funeral home or by reason of his ownership of stock owned in or office held in a corporation authorized by the preceding subsection to own or operate a funeral home. No funeral home owned by any person, whether incorporated or not, may utilize the name or picture of any unlicensed person in connection with any advertisement or telephone listing or firm letterheads or other printed material. Such use of the name or picture of any unlicensed person shall be deemed to constitute the holding out of such person as a funeral director in violation of this chapter. After the effective date of this act no firm or corporation authorized to own or operate a funeral home may change or amend its name or charter so as to include in its firm or corporate name the name of any person who is not individually licensed as a funeral director in this state . . . .

Section 470.12(2)(j), F. S., provides that it shall be grounds for the revocation of the license of any licensed funeral director if:

> The licensee has knowingly engaged in any advertising which is misleading or inaccurate in any material particular. For the purpose of this paragraph

misleading advertising shall include, but not be limited to, the use of the picture or name of unlicensed persons in connection with advertisements or other written material published by the licensee or the funeral home with which he is connected.

Related to the foregoing provisions are others which define and provide for registration of funeral homes. Section 470.01, F. S., defines a funeral home, mortuary, funeral establishment, or funeral chapel as "a place at a specific street address or location where the profession of funeral directing and embalming, as defined in this chapter, is practiced." Additionally, s. 470.10(7), F. S., states for the purposes of Ch. 470, F. S.:

> [E]ach funeral establishment located at a specific address shall be deemed to be a separate entity and require separate licensing and compliance with the requirements of this chapter.

Finally, the provisions of s. 470.30, F. S., governing registration of funeral establishments, require every establishment to obtain a license, to show that a licensed funeral director is regularly employed by the establishment on a full-time basis at the specific location and address of such establishment, and to show that the establishment is under the full charge, control, and supervision of an individually designated licensed funeral director. This section is specific in requiring all material changes, including any change in ownership, in location, or in funeral directors in charge, in funeral home registration to be reported within 10 days.

The evident legislative intent of the foregoing provisions is to require funeral establishments to be separate entities at identifiable locations, under the control of a specified licensed funeral director. This intent is reaffirmed by the provisions of s. 470.30, F. S., which preclude, except under certain limited circumstances, the establishment of branch funeral chapels. This intent, coupled with cited provisions prohibiting any establishment from utilizing the name or picture of any unlicensed person in any advertising, leads to the conclusion that the Legislature considered it important, hence material, that each funeral establishment be separately identified and licensed and that licensed establishments refrain from advertising associating them with any unlicensed person.

Accordingly, bearing in mind that where the context of the Florida Statutes will permit, s. 1.01, F. S., broadly defines "person" to include both individuals and fictional entities, it is my opinion that any licensed (Florida) funeral director or funeral establishment which advertises or permits the placement of advertising in the yellow pages of telephone directories in Florida solely under the name of an unlicensed (in Florida), out-of-state funeral establishment would be engaging in advertising misleading or inaccurate in a material particular and thus subject to action by the State Board of Funeral Directors and Embalmers seeking to revoke such licensee's license. On the other hand, I conclude that a licensed (Florida) funeral establishment which only indicates in its advertising that it may make local arrangements for services by an out-of-state funeral establishment would not be acting contrary to the provisions of Ch. 470, F. S., so long as the advertisements did not otherwise suggest that the out-of-state firm is engaged in funeral directing within the State of Florida and does not misleadingly suggest the Florida establishment is merely a branch establishment of the out-of-state firm. This conclusion is consistent with the provisions of Rule 21J-7.08, F.A.C., which prohibits a licensee lending his license to any funeral establishment, of which he is not owner or part owner or bona fide employee, in order that the establishment may pretend or represent that it is legally qualified to perform funeral directing or embalming by any such improper use of his license.

077-76—July 26, 1977

CIRCUIT COURT CLERKS

NOT AUTHORIZED TO SERVE AS CLERK, ACCOUNTANT, OR SECRETARY/TREASURER TO COUNTY COMMISSION ACTING AS HEAD OF COUNTY HOSPITAL SYSTEM

To: Newman C. Brackin, Clerk, Circuit Court, Crestview

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

> **Does the Clerk of the Circuit Court of Okaloosa County have a duty to act as clerk, accountant, or secretary/treasurer to the board of county commissioners of Okaloosa County when acting as the ex officio board of the county hospital system?**

SUMMARY:

> **In the absence of statutory direction, the Clerk of the Circuit Court of Okaloosa County is not authorized or required by law to serve as the clerk, accountant, or secretary/treasurer for the governing body of the county hospital system or the county commissioners acting ex officio as the governing head of the county hospital system.**

Section 2(1) of Ch. 71-789, Laws of Florida, authorized the Board of County Commissioners of Okaloosa County to establish, operate, and maintain or direct, regulate, and control the operation and maintenance of the county hospital system. Section 2(2) of Ch. 71-789 authorizes the county commission to terminate and abolish the board of trustees of the hospital existing under Ch. 155, F. S. Section 1, Ch. 71-789 conferred on the board all authority and powers as provided in Ch. 155 with respect to hospitals, their establishment, construction, maintenance, and operation, and as provided in all other general laws of Florida related thereto.

Chapter 71-789, *supra*, does not impose any duties or responsibilities upon the clerk of court or any county official or employee of the board of county commissioners or the hospital system nor does it authorize the clerk or any county officer (other than county commissioners) or any employee of the board of county commissioners or the county hospital to act as clerk, accountant, or secretary/treasurer to the county commissioners as the ex officio governing head of the hospital system in operating the county hospital system. However, s. 155.07, F. S., provides:

> *The said trustees shall within 10 days after their appointment, qualify by taking the oath of office and organize a board of hospital trustees by the election of one of their members as chairman, one as secretary and treasurer, and by the election of such other officers as they deem necessary.* Such chairman shall be executive officer of the board of trustees and shall enforce and carry out all the orders of the board of trustees contained in resolutions duly adopted and entered on the minute books of the meetings of the board of trustees. He shall preside at all meetings, countersign all vouchers and warrants issued by the secretary and treasurer hereinafter provided for. In the absence of the chairman, vouchers and warrants may be countersigned by any other member of the board of trustees selected by the members of the board of trustees as chairman pro tem. The chairman shall give bond in a sum to be fixed by the board of county commissioners for the faithful performance of his duties in some reputable bonding company authorized to do business in the state, and said bond shall be made payable to the Governor of Florida and his successors in office. No member of said board of trustees shall receive any compensation for his services as such trustee; but shall be reimbursed for traveling expenses as provided in s. 112.061. (Emphasis supplied.)

Section 155.09, F. S., further states:

> *The board of trustees shall elect from its members a secretary and treasurer whose duties it shall be to keep full and correct minutes of all the proceedings of the board of trustees, and keep a separate itemized account of all the expenditures and disbursements by said board of trustees.* Said minutes and accounts shall be open to public inspection at any time on demand of any taxpayer in such district. The secretary and treasurer shall give bond in a sum to be fixed by the board of county commissioners for the faithful performance of his duties in some reputable bonding company authorized to do business in the state, and said bond shall be made payable to the Governor of Florida and his successors in office. (Emphasis supplied.)

Regarding the duties of the secretary and treasurer, s. 155.11, F. S., provides:

> All moneys received for such hospital shall be deposited in any bank designated by the said board of trustees, and placed to the credit of the hospital fund and can be paid out only as bills for material supplies, equipment, wages, salaries, or other items of expense, whatsoever, shall have been audited by the secretary and treasurer and approved by a majority of the members of the board of trustees in regular session. When so approved by a majority of said members, upon vouchers issued by the secretary and treasurer, warrant may be drawn for same and when countersigned by the chairman of said board of trustees shall be authenticated. Provided, it shall be unlawful to pay any money out of said hospital fund until the provisions of this section have been complied with.

While the hospital board possesses the power to make and adopt bylaws and rules and regulations for its own guidance and government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, such bylaws, rules, and regulations may not be inconsistent with Ch. 155, F. S., or the ordinances of the city or town wherein the hospital is located. Section 155.10.

The circuit court clerk is required to be the clerk and accountant of the board of county commissioners and to keep its minutes and accounts and perform such other duties *as its clerk* as the board may direct. *See* s. 125.17, F. S. However, no statute imposes a duty on the clerk to perform these functions for the county commissioners when they are acting ex officio as the governing board of the county hospital and operating the same under the provisions of Ch. 155, F. S. The clerk's authority is entirely statutory, and for his official actions to be binding, they must be in conformity with the statutes. Security Finance v. Gentry, 109 So. 220, 222 (Fla. 1926). The authority of public officers to proceed in a particular way or only upon specific conditions implies a duty not to proceed in any manner than that which is authorized by law. White v. Crandon, 156 So. 303, 305 (Fla. 1934). Thus, since no statute exists which imposes a duty upon or authorizes the circuit court clerk to be clerk, accountant, or secretary/treasurer for the hospital board or the county commissioners acting ex officio as the governing head of the county hospital system, said clerk is *not* authorized or *required* to perform such functions or serve in such capacities.

077-77—July 26, 1977

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

NOT EXCLUSIVE MEANS OF COLLECTING CHILD SUPPORT—ERRONEOUS DISMISSAL—RETROACTIVITY—SCOPE OF ENFORCEABLE DUTIES OF SUPPORT

To: Robert E. Stone, State Attorney, Stuart

Prepared by: Barry Silber, Assistant Attorney General

QUESTIONS:

1. May arrearages for child support be collected only pursuant to a Uniform Reciprocal Enforcement of Support Act (URESA) order, or may arrearages be collected under the original divorce order of the petitioning party?

2. In a case where the clerk erroneously dismisses a petition filed under URESA for lack of prosecution when, in fact, there is an order outstanding from the responding state which the local clerk has not received, would the correct procedure be to file another petition or to file a motion and order to reinstate the original petition?

3. When an order is entered on a URESA petition, can said order be retroactive, commencing the date said petition was filed in the petitioning state, or should it commence on the date the respondent is actually in court and the order is made?

4. Does the URESA law cover alimony, or strictly child support, and if it does cover alimony, are there certain conditions or restrictions or does it cover all alimony?

SUMMARY:

A URESA order rendered pursuant to Ch. 88, F. S., is not the exclusive means in which outstanding child support payments may be collected.

A timely motion to reinstate, rather than the initiation of a new URESA petition, is the preferable procedure in a case where the court clerk has erroneously dismissed a pending URESA petition for lack of prosecution.

The URESA order ultimately rendered by the court of the responding state may properly encompass within its scope both unpaid, due and owing support arrearages as well as continued support payments, where applicable.

The scope of URESA, Ch. 88, F. S., is not limited exclusively to the recovery of child support, but encompasses within its scope other lawfully imposed duties of support, including alimony, with certain qualifications.

For purposes of this response to your aforementioned inquiries as to the scope of URESA, I must assume that in each of your questions, except No. 2, the original support order was rendered by a court of competent jurisdiction outside the Florida jurisdiction, and in each case herein the Florida courts and officials are acting in the capacity of responding state authorities.

The URESA provisions of the Florida Statutes were adopted as Ch. 88, F. S., pursuant to Ch. 29901, 1955, Laws of Florida, which codified ss. 88.011 through and inclusive of 88.311 substantially as they appear at present. Section 88.041 provides that "[t]he remedies herein provided are in addition to and not in substitution for any other remedies." In the original URESA enactment, provision was made for the several offices of the state attorneys in Florida, upon request, to represent the interests of the sister state plaintiff/petitioner when the Florida jurisdiction is the responding state. Section 88.121.

Chapter 59-393, Laws of Florida, amended Ch. 88, F. S., by adding ss. 88.321-88.371, which provide for additional remedies by means of authorizing the obligee to register a foreign support order, when claim of support is based thereon, by filing of a verified petition therefor with a circuit court, and which shall be maintained by the clerk of the circuit court in a registry of foreign support orders, and which becomes registered upon the filing of a complaint thereon, subject only to a subsequent order of confirmation. For the purposes of this act, the term "obligee" is defined by s. 88.031(8) to mean "any person to whom a duty of support is owed." Based upon the foregoing it is apparent that arrearages for child support may be enforced through the reciprocal procedures provided in ss. 88.011-88.311, through the additional remedies available by registering a foreign support order pursuant to ss. 88.321-88.371, through any alternate statutory method available, or through any remedies available at common law.

In a situation where the court clerk of the initiating state erroneously dismisses a petition filed under URESA for lack of prosecution when, in fact, there is an order outstanding from the responding state which the local clerk has not received, I am of the

opinion that the appropriate procedure under these circumstances would be to move the court for an order to reinstate the original petition rather than filing another petition and initiating the entire reciprocal process over again. When Florida acts as the initiating state, a finding is required by the courts of this state that the petition sets forth facts from which it may be determined that the defendant owes a duty of support and that a court of the responding state may obtain jurisdiction of the defendant or his property, and a certification of the same shall be transmitted to the responding state's court with copies of the complaint and Ch. 88, F. S., all in triplicate. Section 88.141. Presumably, the Florida court has satisfied all of these conditions prior to transmitting the original documentation to the responding state. Section 88.271 provides with respect to hearings conducted under this act, among other things, that they shall be conducted in such informal manner as will best conduce to the ends of justice. I am of the opinion that a motion for reinstatement based upon the factual situation outlined above, when properly served upon all affected parties in order that they might be noticed to appear and be heard, if they so elect, is the preferable procedure to follow, both in the interests of justice and rapid resolution of the pending cause, as well as to enhance the ends of judicial economy. Having already satisfied the duties and obligations of the court of the initiating state in the original certification and transmittal of the necessary documentation, it would not appear to be the best use of judicial resources to require a repetition of that same process where a motion for reinstatement would lie as an alternative.

Thirdly, s. 88.081, F. S., provides that duties of support applicable under the URESA provisions of Ch. 88, F. S., *are those imposed or imposable* under the laws of any state where the obligor was present during the period for which support is sought. The term "duty of support" is defined by s. 88.031(6) to mean *any duty of support imposed or imposable* by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for dissolution of marriage, judicial separation, separate maintenance, or otherwise. By both the plain language of the aforecited provisions of the act and the experience of most causes brought under the act it is apparent that the scope of the URESA provisions extend to and include an action for the recovery of outstanding support payments already accrued and in arrears, as well as to assure that the obligor's duty of continuing support, if any, is met. (*See also*, s. 88.091.) Once the responding state court has been satisfied that the plaintiff/petitioner or its representative has met its burden and shown that the respondent obligor owes a duty of support, the responding state court may order the respondent obligor to furnish support or reimbursement therefor and subject the property of the respondent obligor to such order. Section 88.211. I am of the opinion that the foregoing provisions contemplate an order of the responding state court covering, retroactively, both the unpaid and due and owing support payments, or reimbursement for the state or political subdivision furnishing the same to the obligee in the absence of the obligor's timely payments of the same, and providing prospectively for the continuing payment of support, where applicable, to be embodied in the court's order properly rendered upon the conclusion of such appropriate proceedings.

With regard to your final inquiry, I have noted above that s. 88.031(6), *supra*, defines the duty of support coming within the scope and breadth of URESA as *any* duty of support imposed or imposable by law or by any court order, decree, or judgment, whether interlocutory or final, whether incidental to a dissolution of marriage proceeding, judicial separation proceeding, separate maintenance proceeding, or otherwise. Alimony has long been recognized by the Florida courts as one type of sustenance and support, originally emanating from the common-law obligation of a husband to support his wife, and couched within the equitable powers of the court to grant an allowance to the wife from the husband for her support in a divorce action. Floyd v. Floyd, 108 So. 896 (Fla. 1926); Burger v. Burger, 166 So.2d 433 *conformed to* 166 So.2d 694 (Fla. 1964); Simon v. Simon, 123 So.2d 41 (3 D.C.A. Fla., 1960). In reviewing the provisions of the act as embodied within Ch. 88, *supra*, I find no express language or intent which would indicate that the scope of the act should be limited to child support alone. In fact, the definition provided for the term "duty of support" clearly indicates otherwise as does the plain language of s. 88.101, which provides that "[a]ll duties of support are enforceable by complaint *irrespective of relationship between the obligor and obligee . . . .*" (Emphasis supplied.) Additionally, s. 88.131 provides for the manner in which a complaint on behalf of a minor obligee may be brought, but is in no way an exclusive provision for initiating a cause of action under the URESA provisions.

As to the nature of said alimony orders, judgments, or decrees of sister states sought to be enforced for the collection of arrears in the Florida jurisdiction, it is clear that to

be so enforceable in the Florida courts the order, judgment, or decree must be a final order, judgment, or decree not subject to modification, alteration, or nullification, pursuant to statutory authority vested in the courts of the state where rendered, and only upon these conditions does said order, judgment, or decree gain the protection of the Full Faith and Credit Clause of the federal Constitution with respect to past due and unpaid alimony installments, and become enforceable in the courts of this state. Cohen v. Cohen, 30 So.2d 307 (Fla. 1947); Sackler v. Sackler, 47 So.2d 292 (Fla. 1950); Fugassi v. Fugassi, 332 So.2d 695 (4 D.C.A. Fla., 1976); West v. West, 301 So.2d 823 (2 D.C.A. Fla., 1974). I would note that it has been held that every reasonable implication should be resorted to against the existence of the power of the foreign court which rendered the decree, order, or judgment to modify its alimony award, as to past due installments, in the absence of clear statutory language manifesting a clear intention to confer such power in order to bring the past due alimony within the protection of the Full Faith and Credit Clause of the United States Constitution. Montell v. Montell, 46 So.2d 715 (Fla. 1950); Collins v. Collins, 36 So.2d 417 (Fla. 1948).

Finally, past due and unpaid alimony claims may be enforced judicially through the additional remedies provided for in ss. 88.321-88.371, *supra*, or through available common-law remedies. *See*: Friedly v. Friedly, 303 So.2d 50 (2 D.C.A. Fla., 1974); *see also*: ss. 61.11, 61.12, and 61.17-61.181, F. S.

077-78—July 26, 1977

MOBILE HOME PARKS

DETERMINATION OF REASONABILITY OF FEE INCREASE TO OFFSET MODIFICATIONS TO GAS SYSTEM—MOBILE HOME TENANT-LANDLORD COMMISSION

To: Douglas Cheshire, Jr., State Attorney, Titusville

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

May a mobile home park owner collect a minimum fee for providing propane gas through a central tank, when such gas is not purchased from a public utility or municipally owned utility?

SUMMARY:

There is no statutory prohibition against a mobile home park imposing and collecting a minimum fee for providing propane gas through a central tank to its tenants, where such gas is not purchased from a public utility or municipally owned utility. Whether such a minimum fee is justified under the attending circumstances is within the jurisdiction of the newly created Mobile Home Tenant-Landlord Commission.

Your correspondence states that this minimum fee was imposed to help defray the costs of modifications to the park's gas system which were ordered by a state agency. As this question does not relate to electricity or gas purchased from a public utility or municipally owned utility, s. 83.764(7), F. S. (1976 Supp.), would not apply.

As I understand that tenants are occupying under written leases, s. 83.760(3), F. S. (1976 Supp.), would be applicable.

This statute requires that written leases contain the amount of rent, any security deposit, installation charges, fees, assessments, and any other financial obligation of the mobile home owner, except that the park may pass on to the mobile home owner any costs, including increased cost of utilities, which are incurred due to actions of any state or local government.

The plain language of this section appears to authorize a mobile home park to pass on as increased rental fees such costs as those in question here. There are no fixed guidelines

upon which to judge the manner in which this financial obligation (brought on due to the action—order—of a state agency) may be passed on to the residents.

The question involved here is compounded by the fact that the park has a rule which prohibits gas usage from bottles (or supply containers) on mobile homes. The park has stated in recent correspondence to one of your assistant state attorneys that this is not an absolute prohibition against individual gas bottles or containers, but that for aesthetic reasons the gas containers cannot be on the mobile home, but must be buried in the ground. Whether such regulation is reasonable depends upon the particular factual situation and is a question more proper for a judicial determination. The Legislature has recognized that the park may regulate the style or quality of equipment placed on or appurtenant to the mobile home, presumably both for aesthetic and safety reasons. *See* s. 83.764(1), F. S. (1976 Supp.).

Chapter 77-49, Laws of Florida (s. 83.776, F. S.), creates a Mobile Home Tenant-Landlord Commission which, upon petition of 51 percent of the tenants of a park, shall determine whether a rental or service charge increase is unconscionable or unjustified under the facts and circumstances of the particular situation. The commission may examine any rental increase which took place between January 1, 1977, and July 1, 1977, upon petition within 60 days after July 1, 1977.

Therefore, it appears that your inquiry is not such that a definitive answer may be given. Whether the imposition or the amount of the minimum gas service charge is justified in the attending circumstances would depend entirely upon the facts peculiar to the particular case.

077-79—July 27, 1977

UNIFORM TRAFFIC CONTROL LAW

CIRCUIT JUDGE'S AUTHORITY TO ARREST TRAFFIC VIOLATOR—PROCEDURES

To: Benjamin C. Sidwell, Judge, Circuit Court, Tampa

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTIONS:

1. Does a circuit judge have the authority to arrest one violating the traffic statutes in the presence of said judge?

2. If so, what would be the proper procedure for him to follow in effectuating such an arrest without warrant?

3. What would be the role in the subsequent prosecution thereof?

SUMMARY:

Section 901.15(5), F. S., authorizes "peace officers" to make warrantless arrests for violations of the Uniform Traffic Control Law (Ch. 316, F. S.) committed in their presence. A circuit judge as a "conservator of the peace" is also a peace officer and, accordingly, has the authority to arrest without a warrant as provided in s. 901.15(5). In making such an arrest, he must state his authority and the cause for arrest to the alleged traffic violator subject to the conditions specified in s. 901.17, F. S.

A circuit judge who does not have a uniform traffic complaint in his possession to issue to the alleged traffic violator must take the arrested person before a neutral and detached magistrate and file a sworn complaint against the arrested person and have a summons issued as provided in s. 901.09, F. S. By making an arrest as a conservator of the peace and peace officer under s. 901.15(5), F. S., a circuit judge places himself in the role of a prosecuting witness, and he must maintain that role through the subsequent prosecution thereof.

AS TO QUESTION 1:

Section 901.15(5), F. S., provides that a "peace officer" may make an arrest without a warrant when a violation of Ch. 316, F. S., the Uniform Traffic Control Law, has been committed in his presence. Such arrests may be made immediately or upon fresh pursuit.

Section 901.01, F. S., provides in pertinent part that "[e]ach state judicial officer is a conservator of the peace . . . ." *Also see* s. 19, Art. V, State Const., providing that all state judicial officers shall be conservators of the peace. Whether a circuit judge as "conservator of the peace" is also a "peace officer" for purposes of s. 901.15, F. S., has not been directly considered by the courts of this state, but in AGO 070-167, this office concluded that a circuit judge is a law enforcement officer within the purview of s. 790.001(8)(a) and (e), F. S., thereby permitting him to carry a gun "because he is a state officer who has the authority to make arrests for breaches of the peace committed in his presence, and he is a peace officer." This conclusion was based, in part, upon a consideration of judicial decisions in other states which considered the terms "conservator of the peace" and "peace officer" to be synonymous. *See, e.g.*, Jones v. State, 65 S.W. 92 (Tex. Crim. App. 1901); Vandiver v. Endicott, 109 S.E.2d 775, 777 (Ga. 1959); *also see* 15A C.J.S. *Conservator*, at pp. 579-580.

On the basis of the foregoing, I must conclude that a circuit judge, as conservator of the peace, has the authority to make arrests as a peace officer under s. 901.15(5), F. S., for violations of Ch. 316, F. S., committed in his presence.

Your first question, therefore, is answered in the affirmative.

AS TO QUESTION 2:

The authority of a circuit judge to make arrests, as a conservator of the peace and peace officer, for violations of Ch. 316, F. S., committed in his presence is established by Ch. 901, F. S., and, accordingly, the proper procedure to be followed in effectuating such arrests is also prescribed by Ch. 901. Section 901.17 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.

A circuit judge, in exercising his arrest powers, must comply with the foregoing statutory provision. *Generally, also see* 6A C.J.S. *Arrest* ss. 48, 63. The present inquiry is directed to arrests for violations of the Uniform Traffic Control Law. Section 318.14, F. S., provides that violations of Ch. 316, with the exception of those offenses enumerated in s. 318.17, F. S., shall be deemed noncriminal infractions. *See also* Florida Rules of Practice and Procedure for Traffic Courts [hereinafter "Traff.Ct.R."], Rule 6.040 which generally defines criminal and noncriminal traffic offenses and infractions.

In order for an alleged traffic offender to be properly tried and penalized, he first must be brought before a court of competent jurisdiction. It is well established that a formal accusation is essential before any valid prosecution for a criminal offense may be instituted. Such a formal accusation may be by indictment, information, or, in some instances, by complaint or affidavit. *Cf.* s. 16, Art. I, State Const. With regard to the present inquiry, Rule 6.160 Traff.Ct.R. provides:

> All prosecutions for *criminal traffic offenses* by law enforcement officers shall be, by uniform traffic complaint as provided for in section 316.018, of Florida Statutes, or other applicable statutes, *or by affidavit, information,* or indictment *as provided for in the Florida Rules of Criminal Procedure. If prosecution is by affidavit,* information, or indictment, *a uniform traffic complaint shall be prepared by the clerk and submitted to the Department of Highway Safety and Motor Vehicles.* (Emphasis supplied.)

Generally a person charged with a criminal violation of Ch. 316, F. S., will be issued a uniform traffic complaint by the law enforcement officer. Section 316.018. These complaints, which contain a notice to appear, are issued in prenumbered books for citations in quadruplicate and are supplied to every traffic enforcement agency within the state by the Department of Highway Safety and Motor Vehicles. Section 316.018(1). A circuit judge acting as a conservator of the peace and peace officer in making an arrest

under s. 901.15(5), F. S., for a criminal traffic offense is unlikely to have these forms in his possession to issue to the accused traffic violator; therefore, he would be required to proceed under the provisions contained in Ch. 901, F. S., and the Florida Rules of Criminal Procedure.

Section 901.28, F. S., provides that an arresting officer or booking officer may issue a notice to appear to a person arrested for an offense declared to be a misdemeanor of the first or second degree or for a violation of a municipal or county ordinance triable in the county court, provided the accused does not demand to be taken before a magistrate. *See also* Rule 3.125 CrPR. Section 775.08(1), F. S., in defining misdemeanor, specifically excludes any violation of Ch. 316, F. S. This definition of a misdemeanor raises the question as to whether a circuit judge acting in his capacity as conservator of the peace and peace officer may issue a notice to appear to a person arrested for violating any criminal traffic offense provision of Ch. 316. In the absence of any legislative or judicial determination to the contrary, it appears that a criminal violation of Ch. 316 may not be classified as a misdemeanor and, accordingly, an arresting officer or booking officer may not issue a notice to appear for such violations under s. 901.28.

The Florida Rules of Criminal Procedure provide an additional method of charging a person with the commission of a criminal offense. Rule 3.115 states in pertinent part:

> The state attorney shall provide the personnel or procedure for criminal intake in the judicial system. All sworn complaints charging the commission of a criminal offense shall be filed in the office of the clerk of the circuit court and delivered to the state attorney for further proceeding.

I am advised that in order to avoid the cumbersome procedure prescribed in the foregoing rule, it is the usual practice within the state for the state attorney to take the affidavit and then, with the powers attendant to his office, file a direct information. *See* Comment, Rule 3.115 CrPR, 33 F.S.A. Under this procedure, the state attorney is responsible for screening complaints of criminal violations and determining whether an accusatory document should be issued. Generally the accused will not be taken into custody until after an information has been filed. Thus, the general language of the criminal intake Rule 3.115 in terms does not appear to be applicable to those instances where an arrest for a criminal violation of Ch. 316, F. S., has been made by a conservator of the peace and peace officer under the authority of s. 901.15(5), F. S.

It therefore appears that, under the existing laws of this state, a circuit judge making an arrest under s. 901.15(5), F. S., for a criminal violation of Ch. 316, F. S., must take the person so arrested before a magistrate and cause to be filed a sworn complaint against such person in order that a summons may be issued to such person by the magistrate. *See* s. 901.09, F. S., and Rule 3.120 CrPR. The summons which serves as the accusatory document against the alleged traffic offender provides that the accused appear before the magistrate at a stated time and place. Rule 3.120, which is more explicit than s. 901.09, requires that the complaint be in writing and sworn to before an authorized official and set forth sufficient facts to establish probable cause that a criminal offense has been committed and that the accused committed it. A detached and impartial magistrate may then

> . . . take testimony under oath to determine if there is reasonable grounds to believe the complaint is true. The magistrate may commit the offender to jail, may order the defendant to appear before the proper court to answer the charge in the complaint, or may discharge him from custody or from any undertaking to appear. The magistrate may authorize the clerk to issue a summons. [Rule 3.120 CrPR.]

If the alleged violation is for a noncriminal infraction, Rule 6.320 Traff. Ct.R. provides:

> All citations for traffic infractions shall be by uniform traffic complaint as provided in section 316.018 of Florida Statutes, or other applicable statutes, *or by affidavit. If a complaint is made by affidavit, a uniform traffic complaint shall be prepared by the clerk and submitted to the [Department of Highway Safety and Motor Vehicles.]* (Emphasis supplied.)

A uniform traffic citation as provided in s. 316.018, F. S., is generally issued for these noncriminal infractions. The issuance of a traffic citation qualifies as an "arrest" as contemplated in s. 901.15(5), F. S., *see* AGO 076-6, although the alleged traffic offender ordinarily is not taken into custody for these noncriminal infractions which are "not punishable by incarceration and for which there is no right to a trial by jury or a right to court appointed counsel." Rule 6.040 Traff.Ct.R.; *see also* s. 318.13(3), F. S. A circuit judge making an arrest under s. 901.15(5) for a noncriminal traffic offense and who does not have the necessary forms to issue a uniform traffic citation must take the person so arrested before a magistrate and file a sworn complaint against such person and cause a summons to be issued to such person by the magistrate as provided by s. 901.09, F. S. Rule 6.320 of the Florida Rules of Practice and Procedure for Traffic Court, *supra*, provides that if a complaint is made by affidavit, a uniform traffic complaint shall be prepared by the clerk and submitted to the Department of Highway Safety and Motor Vehicles.

On the basis of the foregoing, it appears that when a circuit judge who, as a conservator of the peace and peace officer, makes a warrantless arrest under s. 901.15(5), F. S., for a noncriminal violation of Ch. 316, F. S., committed in his presence and does not have the necessary forms in his possession to issue a uniform traffic complaint to the accused must take the person so arrested before a magistrate and cause to be filed a sworn complaint against the arrested person in order that a summons may be issued to such person as provided in s. 901.09, F. S.

AS TO QUESTION 3:

By making an arrest under s. 901.15(5), F. S., as a peace officer, a circuit judge places himself in the role of a prosecuting witness in the subsequent prosecution of the alleged traffic offender. He is a direct witness to the events which led to the arrest and, in many cases, may be the only witness. Consequently, his testimony probably is essential to the state's prosecution. Therefore, a circuit judge, who by making an arrest as a peace officer under s. 901.15(5) places himself in the role of a complaining or prosecuting witness, must maintain that role in the subsequent prosecution thereof.

077-80—July 27, 1977

NORTH BROWARD HOSPITAL DISTRICT

INVESTMENT OF FUNDS IN SAVINGS AND LOAN ASSOCIATION CERTIFICATES OF DEPOSIT

To: Ellen Mills Gibbs, Attorney for North Broward Hospital District, Ft. Lauderdale

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Frank A. Vickory, Legal Research Assistant

QUESTION:

> **May the North Broward Hospital District, as a special tax district of the state, invest funds, without limitation, in savings and loan association certificates of deposit beyond the 10 percent limit set forth in s. 215.47(2)(b), F. S., if said account is secured in the manner expressly authorized for bank certificates of deposit in s. 215.47(1)(b), F. S.?**

SUMMARY:

> **The North Broward Hospital District falls within the purview of ss. 665.231 and 665.321, F. S., and pursuant to authorization granted by s. 665.321(1), F. S., may invest district funds in certificates of deposit of state and federal savings and loan associations without limitation as to the amount or amounts thereof and without conditions thereon so long as such associations deposit and pledge sufficient securities with the Department of Banking and Finance to secure and safeguard such investments of the district in the same manner as is required with respect to deposit of such funds in banks.**

The North Broward Hospital District was created in 1951 by special act. Chapter 27438, 1951, Laws of Florida, amended by Chs. 61-1931, 61-1937, 63-1192, 65-1316, 65-1319, 67-1170, 67-1171, 69-895, 69-898, 69-914, 71-578, 73-411, 73-412, 73-413, 74-449, 75-348, and 76-338, Laws of Florida. The governing body of the special district is known as the Board of Commissioners of the North Broward Hospital District and is vested with "all powers of a body corporate." Section 4, Ch. 27438, *supra*. The district's enabling legislation as amended, however, is silent as to investment of district funds, neither specifically authorizing nor prohibiting investments in certificates of deposit of savings and loan associations. Our inquiry, then, is whether there is, nevertheless, statutory authorization for, and possible limitation upon, such investments by the district.

Initially, I note that s. 215.47, F. S., concerning investments in certain authorized securities is not applicable to the present situation. That section by its terms applies only to funds available for investment under ss. 215.44-215.53, F. S. These sections apply solely to investments by the State Board of Administration of *state* funds for *state* agencies and to no other entities. Investments by a special district are, therefore, not subject to s. 215.47. *See* AGO 069-45.

Section 665.321, F. S., states:

> . . . [M]unicipalities and other *public* corporations and *bodies*, and *public officials* hereby are specifically authorized and empowered to invest funds held by them without any order of any court, in savings accounts of savings associations which are under state supervision and in accounts of federal associations organized under the laws of the United States and under federal supervision, and such investments shall be deemed and held to be legal investments for such funds. However, the investment of public funds and the funds of municipalities and other public corporations and bodies and public officials shall be subject to the same requirements relating to the deposit and pledge of securities to secure such investments as may be provided from time to time by law or regulation with respect to the deposit of such funds in banks, except to the extent that said savings accounts may be insured by the United States or an agency or instrumentality thereof. (Emphasis supplied.)

The investment authorization contained in this quoted section is specifically declared to be supplemental to any and all other laws relating to and declaring what shall be legal investments for the bodies mentioned. Section 665.321(3).

Your inquiry specifically concerns investment in certificates of deposit. Section 665.021(19), F. S., defines "savings account" as used in s. 665.321(1), F. S., as "that part of the savings liability of the association which is credited to the account of the holder thereof. A savings account also may be referred to as a savings deposit." This definition has been previously interpreted by me to include certificates of deposit. I, therefore, find that the term "savings accounts" as utilized in s. 665.321(1) includes certificates of deposit. *See* AGO's 071-36 and 075-57.

Section 665.231(1), F. S., relates to ownership of savings accounts and savings deposits. It provides that "savings accounts or savings deposits may be opened and held solely and absolutely in his own right by, or in trust or other fiduciary capacity for, any person . . . or political subdivision or public or governmental unit."

We must now determine whether the North Broward Hospital District falls within the definition of "public corporations and bodies" which are specifically authorized by s. 665.321(1), *supra*, to invest funds in savings accounts, including certificates of deposit, of savings and loan associations. The term "public body" is defined by s. 1.01(9), F. S., to include, where the context will permit, "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and *all other districts in this state*." (Emphasis supplied.) The context of ss. 665.321(1) and 665.231(1) permits application of this definition of "public body," which includes "all other districts in this state," to the hospital district. Therefore, for purposes of investing funds in certificates of deposit pursuant to s. 665.321(1), the hospital district is a "public corporation and body" as well as a "political subdivision or public or governmental unit" within the purview of and for purposes of s. 665.231(1) authorizing the holding of savings accounts or savings deposits by those units. *See* AGO's 075-57 and 074-169.

I further find that, under s. 665.321(1), F. S., authorizing the investments your letter contemplates, there are no restrictions or limitations as to amount of such investments or conditions thereon, AGO 071-36, except that the savings and loan association is required to deposit and pledge securities with the Department of Banking and Finance

to secure such investments of the district in the same manner as is required by law or regulation relating to depositing such funds in banks. Attorney General Opinions 073-244, 074-214, and 075-57; *and see* s. 659.24, F. S.

077-81—August 4, 1977

COUNTIES

TOURIST DEVELOPMENT ACT—COUNTY MAY NOT CREATE MORE THAN ONE TAXING DISTRICT OR TAX COUNTYWIDE IN ADDITION TO CREATING DISTRICT

To: Betty Lynn Lee, Broward County General Counsel, Ft. Lauderdale

Prepared by: Daniel C. Brown, Assistant Attorney General

QUESTIONS:

1. Does H.B. 2064 (Ch. 77-209, Laws of Florida, s. 125.0104, F. S.), the Local Option Tourist Development Act, authorize the creation of more than one subcounty special taxing district within a single county?

2. Does Ch. 77-209, Laws of Florida, authorize a county to levy a 1 percent tourist development tax countywide and an additional 1 percent tourist development tax in one or more subcounty special districts?

SUMMARY:

A county may not, pursuant to Ch. 77-209, Laws of Florida, impose a 1 percent tourist development tax countywide and an additional tourist development tax in a subcounty special district, nor may a county create more than one subcounty special district within which to impose the tax. Under Ch. 77-209, if a county decides to impose the tax, it must do so on a countywide basis or within a single subcounty special district which must embrace all or a significant contiguous portion of the county.

Section 3(2) of Ch. 77-209, Laws of Florida (s. 125.0104(3)(b), F. S.), provides in pertinent part as follows:

> Subject to the provisions of this act, any county in this state may impose a tourist development tax. . . . A county may *elect* to levy and impose the tourist development tax in *a* subcounty special district of the county; provided, however, if a county so elects to levy and impose the tax on *a* subcounty special district basis, *the district shall embrace all or a significant contiguous portion of the county*. . . . (Emphasis supplied.)

Section 4(1) of Ch. 77-209, *supra* (s. 125.0104(4)(a), F. S.), provides in part:

> The ordinance levying and imposing the tourist development tax shall not be effective unless the electors of the county *or* the electors in *the* subcounty special district in which the tax is to be levied approve the ordinance authorizing the levy and imposition of the tax in accordance with s. 6 of this act. (Emphasis supplied.)

In addition, s. 4(3)(s. 125.0104(4)(c), F. S.) provides that the tourist development plan to be prepared by a county's tourist development council prior to imposition of the tourist development tax shall set forth, among other things, "*the* tax district in which the tourist development tax is proposed." (Emphasis supplied.)

On its face, the language of the act contemplates and authorizes the creation of only one taxing district for purposes of imposing the tourist development tax within a given county, and that district must embrace, at a minimum, a significant contiguous portion of the county. Every reference to the creation of such a district is in the singular.

Furthermore, in the context in which the term "elect" is used by the Legislature (in referring to a county's decision to levy the tax in a subcounty special district), the language manifests an intent that the county be put to a choice of exclusive alternatives, *i.e.*, the imposition of the tax by the county on a countywide basis or the imposition of the tax in a special district of which the county commission is the governing head. *See, generally* 28 C.J.S. *Elect, Election*, pp. 1052-53. *See also* First Nat'l Bank of St. Petersburg v. MacDonald, 130 So. 596, 599 (Fla. 1930); State *ex rel.* Van Ingen v. Panama City, 171 So. 760, 762 (Fla. 1937); Alexander v. Booth, 56 So.2d 717, 719 (Fla. 1952); Williams v. Duggan, 140 So.2d 69, 72 (1 D.C.A. Fla., 1962). Nowhere does the plain language of Ch. 77-209, *supra*, express a clear legislative intent that a county may impose the tourist development tax simultaneously on a countywide basis and in a subcounty special district or create more than one subcounty special district for levy of the tax.

It is settled law that nonchartered counties and special districts have only such authority as expressly granted by statute and such authority as necessarily implied to enable the governmental unit to carry out an expressly granted power. *See, e.g.*, White v. Crandon, 156 So. 303 (Fla. 1934); Harvey v. Board of Pub. Instr., 133 So. 869 (Fla. 1931); Hopkins v. Special Rd. & Tax Dist. No. 4, 74 So. 310 (Fla. 1917). The foregoing rules apply with equal force to chartered counties, except that such counties are governed and limited by their charters and by special laws approved by a vote of county electors as well as by general law. Section 1(c) and (g), Art. VIII, State Const. *See also* General Elec. Credit Corp. v. Metropolitan Dade County, 346 So.2d 1049, 1054 (3 D.C.A. Fla., 1977), holding Ch. 380, F. S., a general law equally at force throughout the state, prevails over code of Metropolitan Dade County to extent of conflict. Chapter 77-209, *supra*, being a general law equally at force throughout the state, applies to chartered counties as well as to nonchartered counties. Indeed, under s. 9(a), Art. VII, of the State Constitution, a charter county is without power to levy an excise tax such as the tourist development tax unless authorized by general law to do so. City of Tampa v. Birdsong Mtrs., Inc., 261 So.2d 1 (Fla. 1972); Belcher Oil Co. v. Dade County, 271 So.2d 118 (Fla. 1972); AGO 074-379. Chapter 77-209 expressly authorizes only two modes of imposing the tourist development tax: countywide or within a subcounty special district. Nothing within the statute allows the implication that, to carry out the purposes of the enabling act, the counties must be able to create more than one taxing district or to levy the tax in such district in addition to a countywide levy. Additionally, with regard to the mode by which a local government may proceed to carry out a legislative mandate, it has been held:

> When the Legislature has prescribed the mode, that mode must be observed. When controlling laws directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way.

Alsop v. Pierce, 10 So.2d 799, 805-806 (Fla. 1944). *See also In re* Advisory Opinion of the Governor Civil Rights, 306 So.2d 520, 523 (Fla. 1975).

Moreover taxation and revenue laws are to be strictly construed and will not be construed to extend taxing power beyond that clearly expressed. Department of Revenue v. Brookwood Associates, Ltd., 324 So.2d 184 (1 D.C.A. Fla., 1975). *See also* T. Cooley *Law of Taxation*, pp. 266-67 (1972 rev.). In accordance with that rule, statutes which delegate to local government the power to impose a tax are also narrowly construed. No power of taxation will be held valid if not within the clear terms of the enabling statute. *See* Tampa v. Birdsong Mtrs., Inc., *supra*; Belcher Oil Company v. Dade County, *supra*; 3 Sutherland *Statutory Construction* ss. 66.01 and 66.05 (1974 ed.)

Without any definitive expression of legislative intent to the contrary, the language of Ch. 77-209, *supra*, and the foregoing principles of statutory construction compel the conclusion that a county may not levy a 1 percent tourist development tax countywide and an additional tourist development tax in a subcounty special district. Nor may the county create two or more subcounty special districts for the purposes of Ch. 77-209 or levy the tourist development tax within two or more such districts.

Accordingly, both questions are answered in the negative.

077-82—August 22, 1977

MUNICIPALITIES

MAY NOT REQUIRE VEHICLES ENTERING FOR BUSINESS PURPOSES TO PURCHASE IDENTIFICATION STICKER

To: Edward J. Healey, Representative, 81st District, West Palm Beach

Prepared by: Patricia S. Turner, Assistant Attorney General, and Edwin Walborsky, Legal Research Assistant

QUESTION:

May a municipality legally require any vehicle entering the municipal limits for business purposes to purchase an identification sticker?

SUMMARY:

A municipality cannot legally require any vehicle entering the municipal limits for business purposes to purchase an identification sticker, since such a requirement is an invalid application of municipal police power.

Your question is answered in the negative.

In AGO 074-21, I determined that a municipal ordinance requiring "any and all trucks and other vehicles operated or used in connection with any business or occupation . . . conducted within the municipal limits" to purchase and display an identification bumper decal was an invalid application of municipal police power.

As further stated in AGO 074-21:

> Municipalities have only such powers as granted by the legislature and may not do indirectly what they are prohibited from doing directly. Solomon v. City of Miami Beach, 187 So.2d 373 (3 D.C.A. Fla., 1966), *cert. denied* 196 So.2d 927 (Fla. 1967). Chapter 73-129, Laws of Florida, created the "Municipal Home Rule Powers Act" [Ch. 166, F. S.] which grants municipalities the power to levy reasonable regulatory fees on such classes of business, professions, and occupations *not* preempted by the state or by the county pursuant to county charter. Sections 166.021(2) and (3) and 166.221. Chapter 205, F. S., preempts the area of local occupational license taxes, specifically excluding local regulatory fees, and prohibits local governing authorities from levying additional licenses on vehicles used by persons or businesses otherwise licensed under Ch. 205. (Emphasis supplied.)

The specific section of Ch. 205, F. S. (Local Occupational License Tax), referred to in the above-quoted passage is s. 205.063, which states:

> Vehicles used by any person licensed under this chapter for the sale and delivery of tangible personal property at either wholesale or retail from his place of business on which a license is paid shall not be construed to be separate places of business, and no license may be levied on such vehicles or the operators thereof as salesmen or otherwise by a county or incorporated municipality, any other law to the contrary notwithstanding.

Furthermore, s. 320.24, F. S., preempts all licensing of motor vehicles and declares it "unlawful for any county or municipality to collect any license or registration fee on any motor-driven vehicle, trailer, semi-trailer or motorcycle sidecar in this state."

Based upon the aforementioned opinions and statutory and case authority, it is my determination that the municipality's requiring the purchase of an identification sticker for vehicles entering the municipal limits for business purposes is not legal.

077-83—August 22, 1977

DIVISION OF MOTOR POOL

FUNDS RECEIVED FOR ADMINISTRATION OF ANNUAL AIRPORT RENTAL CAR CONTRACT—DEPOSIT IN GENERAL REVENUE FUND

To: Thomas R. Brown, Executive Director, Department of General Services, Tallahassee

Prepared by: Edwin J. Stacker, Assistant Attorney General

QUESTION:

Does the Department of General Services, Division of Motor Pool, pursuant to the provisions of part II, Ch. 287, F. S., as read in conjunction with Ch. 215, F. S., have the authority to collect dividends received as the administering state agency under the terms of the annual state contract for airport rental car services and deposit said dividends in the Motor Vehicle Operating Trust Fund, to be utilized for payment of the division's administrative expenditures?

SUMMARY:

Dividends received by the Department of General Services, Division of Motor Pool, as the administering state agency under the terms of the annual state contract for rental vehicles must be deposited in the State Treasury within or to the credit of the General Revenue Fund, pursuant to the provisions of ss. 215.31 and 215.32, F. S., and cannot be properly deposited in or credited to the Motor Vehicle Operating Trust Fund which was established for the purpose of segregating moneys received by the division from other state agencies as payment for the utilization of the Division of Motor Pool's aircraft and motor vehicle pools as authorized by s. 287.16, F. S.

This question is answered in the negative.

Your predecessor's letter of inquiry and accompanying bidding or proposal and specifications documents indicate that the Division of Purchasing of the Department of General Services negotiated a 1-year state purchasing agreement, on a competitive bid basis, with two 1-year successive renewal options, under which state agencies are required to purchase (and all political subdivisions of the state may purchase) airport rental automobile services at major airports and cities within the state where the successful bidder provides such rental services. The successful bid and agreement was approved and the contract for the services was awarded the successful bidder by the Governor and Cabinet sitting as the head of the Department of General Services on June 1, 1976, with the effective date of such contract being July 1, 1976. The purchasing contract provides, among other things, for the payment of certain rate discounts by the vendor of the rental services, which the state has a reserved right under the contract to apply to direct quarterly or monthly dividend payments on gross rentals payable to the administering state activity or apply to a combination of counter discount and dividend payments, among other options. According to the letter of inquiry, the Division of Motor Pool is responsible for administering the annual purchasing contract for airport rental automobile services, *i.e.*, the division is "the administering state activity" under such contract to whom the aforesaid dividends are payable.

Your predecessor expressed the view that under the language of s. 287.16(4) and (9), F. S., the Division of Motor Pool is empowered to utilize the aforementioned dividend payments for defraying the administrative or operating expenses of the division.

No state agency may purchase, lease, or acquire any motor vehicle without approval first being obtained from the division, except for the lease for casual use of motor vehicles, and all purchases are required to be made in compliance with the rules and regulations of the Division of Purchasing. Section 287.15, F. S. The Division of Motor Pool is empowered to establish and operate central facilities for the acquisition, disposal, operation, maintenance, repair, storage, supervision, control, and regulation of all state-owned or leased motor vehicles and to operate state facilities for those purposes. Section

287.16(1), F. S. Such acquisition may be by purchase, lease, or loan or in any other legal manner. Section 287.16(1). Upon requisition and showing of need by a state agency, the division may assign motor vehicles on a temporary basis (for a period of up to 1 month) or permanent basis (1 month up to 1 full year) to any state agency. Section 287.16(3), F. S. It may also allocate and charge fees to any state agency to which motor vehicles are furnished, based upon reasonable criteria. Section 287.16(4), F. S. The division is further empowered to adopt and enforce rules and regulations for the efficient and safe use, operation, maintenance, repair, and replacement of all state-owned or leased motor vehicles and may delegate to the respective heads of state agencies to which motor vehicles are assigned the duty of enforcing the rules and regulations adopted by the division. Section 287.16(5), F. S. Pursuant to s. 287.16(9), F. S., the division has the duty:

> (9) To establish and operate central facilities to determine the mode of transportation to be used by state employees traveling on official state business and to schedule and coordinate use of state-owned or leased aircraft and passenger-carrying vehicles to assure maximum utilization of state aircraft, motor vehicles, and employee time by assuring that employees travel by the most practical and economical mode of travel. The division shall consider the number of employees making the trip to the same location, the most efficient and economical means of travel considering time of employee, transportation cost and subsistence required, the urgency of the trip, and the nature and purpose of the trip.

It is readily apparent from a review of the powers and duties of the Division of Motor Pool, as set out in s. 287.16, F. S., that the sole authority for the division to allocate and charge fees to other state agencies is found in s. 287.16(4). Said authority is clearly limited to the charging or fixing and the allocation of fees by the division to state agencies to which aircraft or motor vehicles are furnished by the division and in no way pertains to or authorizes the division to utilize for its operating expenses the discounts or dividends paid to the state, notwithstanding the fact that said moneys are received by the division. The operating expenses or administrative expenses of the division for fiscal year 1976-1977 are provided for and are payable from Item 485, s. 1, Ch. 76-285, Laws of Florida, or, if data processing services are involved, from Item 487, s. 1, Ch. 76-285. The moneys in said items are appropriated from the Motor Vehicle Operating Trust Fund to the Division of Motor Pool for fiscal year 1976-1977, to be expended accordingly, and are in lieu of all moneys appropriated for said purposes in other statutory provisions. Section 1, Ch. 76-285.

Pursuant to the provisions of s. 287.16(9), F. S., quoted above, the division has the responsibility of operating central facilities to determine the mode or method of transportation to be used by state employees and scheduling and coordinating the use of state-owned or leased passenger carrying vehicles, *i.e.*, in connection with the use of state-owned or leased motor vehicles, watercraft, or airplanes which are under the control and supervision of the division. This authority clearly does not pertain to rental automobiles owned or leased and under the control of private leasing or rental companies which are leased by state employees for casual use. Section 287.15, F. S. The rental of cars from established rental car firms (*see* s. 112.061(2)(h), F. S.) by authorized travelers is generally governed by the provisions of s. 112.061, F. S. Said rentals are authorized by the agency head of the particular state agency, s. 112.061(3), F. S. (*see also* s. 112.061(2)(g), (7)(c), and (8)(a)-(c), F. S.). It is clear that the division's duty or authority pursuant to s. 287.16(9), F. S., does not relate to the appropriation of state moneys for the operating expenses of state agencies, nor does it pertain to discounts or dividends resulting from state contracts for services to be rendered by a private vendor or the utilization or the appropriation of such discounts or dividends by any state agency. Thus, s. 287.16(9) has no application to the subject matter of this inquiry or to revenues derived from these private rental service vendors. Reference to s. 13, Ch. 76-285, Laws of Florida, reflects a contrasting situation, in that therein the Legislature has specifically authorized the Department of General Services, Division of Building Construction and Property Management, to levy and assess an amount for the supervision of construction of fixed capital outlay projects on which that division serves as the owner-representative on behalf of the state, said amount to be transferred to the Architect's Incidental Trust Fund of said division from appropriate construction funds upon the award of construction contracts.

The Motor Vehicle Operating Trust Fund was apparently created by the Legislature, *see* Items 338, 339, 340, and 341, s. 1, Ch. 70-95, Laws of Florida, the 1970 General Appropriations Act, and appropriations have since been made by the Legislature to the Division of Motor Pool for its operating expenses in that act and subsequent General Appropriations Acts, as well as from the General Revenue Fund. By way of comparison, it is noted that the Legislature established the Bureau of Aircraft Trust Fund through the enactment of s. 2, Ch. 72-207, Laws of Florida, s. 287.161(3), F. S., and these provisions relate specifically to the disposition of fees collected for aircraft travel by aircraft in the executive aircraft pool and deposited in that trust fund, requiring that any excess of fees on deposit at the end of each fiscal year shall be transferred to the General Revenue Fund unallocated. Item 341 in s. 1 of Ch. 70-95, Laws of Florida, transferred by lump sum appropriation $150,000 from the General Revenue Fund to the Motor Vehicle Operating Trust Fund, and a proviso appended thereto provided that it was the intent of the Legislature that the Bureau of Motor Vehicles and Watercraft be self-supporting to the extent possible from *trust funds generated through operation of motor vehicle pools therein* and that such trust funds be utilized prior to utilization of general revenue funds for operations of the Bureau of Motor Pools or motor pools therein. No money may be paid from the Motor Vehicle Operating Trust Fund or from the State Treasury except as appropriated and provided for by the annual General Appropriations Act or as otherwise provided by law. Section 1(c), Art. VII, State Const.; s. 215.31, F. S.

Section 215.31, F. S., stipulates that any revenue, including, but not limited to, licenses, fees, imposts, or exactions, collected or received under the authority of state laws by any state official or agency be promptly deposited in the State Treasury and credited to the appropriate fund as provided by law, and no money be paid from the State Treasury except as appropriated and provided by the annual General Appropriations Act or as otherwise provided by law. Other than the 1970 General Appropriations Act and subsequent successive appropriations acts, there is no existent law or laws specifically designating or providing for the Motor Vehicle Operating Trust Fund or segregating or allocating any moneys received by the state for the purposes of such fund; nor does there exist any law governing the receipt of moneys under the terms of the aforementioned purchasing agreement for airport rental car services or the use or disposition of such moneys. *Cf.* s. 215.37(2), F. S. Therefore, any such receipts of money by the Division of Motor Pool must be deposited in the State Treasury.

Section 215.32(1), F. S., requires all moneys received by the state to be deposited in the State Treasury *unless specifically provided otherwise by law* and deposited in and accounted for by the State Treasurer and the Department of Banking and Finance within the four designated funds. I am unaware of any law specifically authorizing the moneys received by the state as dividends under the annual airport rental car services contract to be deposited in any account or financial institution outside of the State Treasury. *Cf.* s. 240.095, F. S., relating to the deposit outside of the State Treasury of certain funds received by institutions or agencies in the State University System. Of the four funds denominated in s. 215.32, F. S., only the General Revenue Fund and the trust funds are relevant to or necessary to be considered by or for the purposes of this opinion. The source and use of the General Revenue Fund "consist of all moneys received by the state from every source whatsoever, except as provided (for the Trust Funds and the Working Capital Fund)" and such moneys are required to be expended pursuant to General Revenue Fund Appropriations Acts. Section 215.32(2)(a). The source and use of the trust funds "consist of moneys received by the state which under law or under trust agreement are segregated for a purpose authorized by law," and the state agency receiving or collecting such moneys is responsible for their proper expenditure as provided by law. Section 215.32(2)(b)1. Section 215.32(2)(b)3. operates to appropriate all such moneys 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 to other applicable laws relating to the deposit or expenditure of moneys in the State Treasury.

With respect to the dividend moneys which are the subject of this opinion, I am aware of no statutory authority to segregate said moneys for any purpose, and there is no extant trust agreement segregating such moneys for a purpose authorized by law or for any specific use or purpose authorized by law. Insofar as the Division of Motor Pool is concerned, part II of Ch. 287, F. S., does not expressly or by necessary implication authorize said division to use the dividend moneys for its operating expenses, does not prescribe any purposes for which such moneys are to be expended, and does not authorize or require such moneys to be deposited in the Motor Vehicle Operating Trust Fund or to be credited to that fund by the State Treasurer or Department of Banking

and Finance. A review of ss. 215.37(2) and 287.161(3), F. S., and s. 13, Ch. 76-285, Laws of Florida, is illustrative of specific authority to that effect having been vested in state agencies by the Legislature. The Legislature has been and is appropriating money for the division's operating expenses from the Motor Vehicle Operating Trust Fund in the annual General Appropriations Act, thus no trust agreement under s. 215.32(2)(b)1., F. S., is controlling the expenditure of the moneys in the trust fund, and s. 215.32(2)(b)3., F. S., does not operate to appropriate such moneys in such trust fund for any specific use or purpose for which received or any purpose authorized by law. Furthermore, part II of Ch. 287 and the prescribed duties and responsibilities of the division, especially s. 287.16(4) and (9), upon which the division relies in its inquiry, do not relate to car rental services to state agencies and employees or to the rental of such cars by authorized state travelers of the various state agencies. As has been previously stated, these activities must be authorized by the various agency heads and paid for by the various state agencies out of expense appropriations of the particular affected agency and are not authorized or paid for by the Division of Motor Pool.

077-84—August 22, 1977

UNIFORM TRAFFIC CONTROL LAW

MUNICIPALITY MAY NOT REGULATE MOPED DRIVERS WHO ARE REGULATED BY UNIFORM STATE LAW

To: J. T. Frankenberger, City Attorney, Hollywood

Prepared by: David J. Baron, Assistant Attorney General

QUESTION:

> **Is the City of Hollywood authorized by law to regulate the operation of motor-propelled bicycles or "mopeds" by requiring that "moped" operators and riders wear protective headgear and eye-protective devices, while operating or riding such motor-propelled bicycles within the city limits, which would otherwise be required for operators and riders of motorcycles?**

SUMMARY:

> **The Uniform Traffic Control Law expressly provides for uniform traffic laws and traffic ordinances throughout the state and in all its municipalities and prohibits the enactment or enforcement of any traffic ordinances in conflict therewith; the regulation of the operation of motor-propelled bicycles or "mopeds" upon the roadways of municipalities, the manner and places of their operation, equipment required thereon, and equipment, if any, for the operators or riders thereof is governed by s. 316.111, F. S., as amended, and other related statutes. Chapter 316, F. S., as amended, effectively preempts to the state the regulation of motor-propelled bicycles or "mopeds." Therefore, municipalities are not authorized by law to require that motor-propelled bicycles or moped operators and riders wear protective headgear and eye-protective devices, while operating or riding such bicycle/mopeds within the city limits, which would otherwise be required by law for motorcycle operators and riders.**

Your question is answered in the negative.

Chapter 316, F. S., is entitled "State Uniform Traffic Control" and its stated purpose is provided in s. 316.002, F. S., as follows:

> It is the legislative intent in the adoption of this chapter to make *uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities.* The legislature recognizes that there

are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the *movement* of traffic outside such municipalities. Section 316.008, F. S., enumerates the areas within which municipalities may control certain *traffic movement or parking* in their respective jurisdictions. This section shall be supplemental to the other laws or ordinances of this chapter and *not in conflict* therewith. It is *unlawful* for any local authority *to pass or attempt to enforce any ordinance in conflict* with the provisions of this chapter. (Emphasis supplied.)

Section 316.008, F. S., provides in pertinent part as follows:

> (1) The provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:
>
> * * * * *
>
> (h) Regulating the operation of bicycles.

Section 316.003(2), F. S., defines "bicycle" to include a "moped" propelled by a pedal-activated helper motor with a maximum rating of 1 ½ brake horsepower. No provision of s. 316.008, F. S., empowers municipalities to require any equipment on motor-propelled bicycles or "mopeds" (*cf.* ss. 316.243-316.249, F. S., with respect to motorcycles and motor-driven cycles) or any protective equipment or devices for the operators or riders of bicycles/mopeds (*cf.* s. 316.287, F. S., for motorcycle operators or riders). Section 316.111, F. S., does require certain lighting and reflector equipment on bicycles after sundown and generally prescribes regulations for the manner of operating or riding upon bicycles and the places bicycles may be operated.

The answer to your question depends on what the Legislature meant by allowing municipalities to regulate the operation of bicycles. Section 316.111(3), F. S., provides that the provisions of s. 316.111, F. S., governing bicycle regulations shall not apply upon a street set aside as a play street as authorized by Ch. 316, F. S., or as designated by municipal authority. *Also see* s. 316.008(1)(p) authorizing municipalities to designate and regulate traffic on play streets. In all other respects the operation of motor-propelled bicycles or "mopeds" upon the roadways or streets of municipalities, the manner of their operation, the equipment required thereon, and any equipment for the operators and riders thereof is governed and regulated by s. 316.111, F. S., (1976 Supp.), and related statutes such as Chs. 320, 322, and 324, F. S.

As the purpose section provides above and as the title of the chapter indicates, the intent of the Legislature is to have uniform traffic laws and ordinances applicable throughout the state and in all municipalities. While that section provides that municipalities "may control certain traffic movement or parking in their respective jurisdictions," the purpose section makes clear that any such ordinance-making authority is "supplemental to the other laws or ordinances of this chapter and not in conflict therewith." That section further clarifies the purpose of the Florida Uniform Traffic Control Law by declaring action by a local authority to pass or enforce any ordinance in conflict with the provisions of Ch. 316, F. S., to be unlawful.

The Legislature defines a moped as a bicycle in s. 316.003, F. S., and changed the definition of "bicycle," "motorcycle," and "motor-driven cycles" and excludes motor-propelled bicycles or "mopeds" from the definition of "motor vehicle," "motor-driven cycles," and "vehicle" by Ch. 76-286, Laws of Florida, as reference to the title thereof clearly discloses, and provides regulations for such motor-propelled bicycles or "mopeds" in s. 316.111, F. S. In the latter section the Legislature provided special regulations in subsections (14) and (15) applicable only to the operation of bicycle/mopeds. More importantly, the Legislature did not prescribe in these special regulations for moped operators the requirements imposed on motorcycle riders by s. 316.287, F. S., which include the wearing of protective headgear and eyegear. Effectively, by reclassifying mopeds from motorcycles or motor-driven cycles to bicycles, the Legislature has said that the uniform law throughout the state is that moped operators shall not be subject to the requirements placed on motorcycle operators and riders of wearing protective headgear and eyegear and, in fact, shall be treated as bicycle operators except for the requirements

of s. 316.111(14) and (15), which are special regulations or exceptions operating uniformly throughout the state and in all municipalities.

Further evidence that the intent of the Legislature in enacting Ch. 316, F. S., was to provide uniform traffic laws and traffic ordinances is found in s. 316.007, which provides in pertinent part as follows:

> The provisions of this chapter shall be *applicable and uniform throughout the state and in all* political subdivisions and *municipalities* therein, and *no local authority shall enact or enforce any ordinances on a matter covered by this chapter unless expressly authorized* . . . . (Emphasis supplied.)

On consideration of the foregoing it is clear that the Legislature intended, by its comprehensive action in enacting Ch. 76-286, Laws of Florida, classifying motor-propelled bicycles or "mopeds" as bicycles and determining how they were to be regulated on a uniform state-wide basis, to require that moped operators or riders be treated as bicycle operators or riders uniformly throughout the state and in all the municipalities therein. The Legislature by enactment of Ch. 316, as amended aforesaid, and by making it unlawful to enact, and prohibiting the enactment or enforcement of, any traffic ordinances in conflict therewith has effectively preempted the regulation of bicycles/mopeds to the state. Furthermore, because moped operators had, prior to such action, been required to wear the same protective devices as other motorcycle riders according to the Department of Highway Safety and Motor Vehicles, the reclassifying of mopeds as bicycles clearly demonstrates that the Legislature intended that moped riders be relieved of the requirements of wearing such protective devices throughout the state.

Looking beyond the express purpose and intent found in the language of the statute, it is clear from the legislative history that the Legislature intended that the law treating bicycle/mopeds as bicycles be applied uniformly throughout the state and in all municipalities in the state, and that the Legislature in enacting Ch. 76-286, *supra*, has demonstrated its intent to free moped operators from the requirements imposed on motorcycle operators and riders of wearing protective headgear and eyegear throughout the state and all municipalities therein.

Chapter 71-135 creating Ch. 316, F. S., expressed the clear legislative purpose of its enactment in pertinent part as follows:

> . . . WHEREAS, the traffic in the remaining incorporated municipalities not controlled by chapter 186 is controlled by a hodgepodge of ordinances which vary as to the language and penalty, and . . . WHEREAS, from the standpoint of the public, observance of traffic rules is largely conditioned on the clarity . . . and uniformity of the regulations, and . . . WHEREAS, nonuniform laws and ordinances are a source of inconvenience and hazard to the motorist and pedestrian alike, and contribute to accidents, traffic snarls, and congestion, increase the administrative and enforcement burdens of governmental agencies, and raise serious barriers to interstate and intrastate travel and commerce, and . . . WHEREAS, the following proposed chapter 316, Florida Statutes, is a consolidation of the existing state traffic laws . . . the traffic ordinances contained in chapter 186, Florida Statutes, . . . into one workable uniform law throughout the state and all its municipalities . . . .

It is just such a situation as the one in question, in which a municipality seeks to impose requirements on bicycle/moped riders that are inconsistent with the rest of the state, that the Legislature sought to avoid by passing the Uniform Traffic Control Law. Consider, for example, the plight of the moped rider who begins to travel from his home outside the city limits, enters Hollywood where he would be required to put on protective headgear and eye-protective devices, and then travels to Ft. Lauderdale which has additionally required him to wear other protective ear, nose, and throat or other protective devices. Such "serious barriers to interstate and intrastate travel" are to be avoided under the Florida Uniform Traffic Control Law, as amended.

Furthermore, in the 1977 legislative session, the Legislature considered requiring protective headgear and eye-protective devices for moped operators and riders but did not do so. Such action or nonaction demonstrates both that the Legislature did not want to impose such protective gear or device requirements on moped operators and riders

CONTINUED

2 OF 5

and that it was the legislative body who possessed the power to make this decision rather than a municipality.

077-85—August 22, 1977

TRUSTS

STATE ATTORNEY—NO DUTY TO REPRESENT BENEFICIARIES OF CHARITABLE TRUST

To: Richard E. Gerstein, State Attorney, Miami

Prepared by: David J. Baron, Assistant Attorney General

QUESTION:

When s. 737.251, F. S. 1973, provided that in charitable trust proceedings the state attorney shall represent unknown or unascertainable beneficiaries of said trust and when said section has been repealed by s. 3, Ch. 74-106, Laws of Florida, does the state attorney have a duty to represent any other group, institution, agency, or entity in a charitable trust proceeding?

SUMMARY:

The charitable trusts statute (part V of Ch. 737, F. S.) does not impose any duty on the several state attorneys to represent any unknown or unascertainable beneficiaries of any charitable trusts or any other charitable trust beneficiary or other individual, institution, or entity in any charitable trust or in any charitable trust proceeding. However, the charitable trusts statute impliedly authorizes the state attorneys to take any action reasonably contemplated by the statute to inform or suggest to the court and participate in charitable trust proceedings to the extent contemplated by the statute in order to effectuate the purposes of the charitable trusts statute and serve the purposes of a charitable trust and to protect the charitable cestui que trust and the state's general interest in public charities and charitable trusts and the application of the trust assets to the charitable purposes for which placed in the trust by the settlor.

Your question is answered in the negative.

Former s. 737.251, F. S. 1973, in pertinent part provided that "[i]n all proceedings under this chapter involving charitable trusts with unknown or unascertainable beneficiaries, the state attorney for the judicial circuit having original jurisdiction of said trust shall be deemed to be the representative of such beneficiaries for all the purposes of this chapter." This provision was repealed by s. 3 of Ch. 74-106, Laws of Florida, and no other similar provision with respect to the state attorney's duty in relationship thereto is contained in the existing law, part V of Ch. 737, F. S.

Part V of Ch. 737, F. S., governs the administration of charitable trusts and trust proceedings incidental thereto. Section 737.505 provides that the trustee of a private foundation trust or a split interest trust, if it is determined by the trustee that the trust instrument contains provisions concerning the power to make distributions that are more restrictive than s. 737.504(2), or if the trust contains other powers inconsistent with s. 737.504(3), shall notify the state attorney when the trust becomes subject to part V of Ch. 737. Section 737.504 does not apply to any trust for which such notice has been given to the state attorney unless such trust is amended to comply with the terms of part V of Ch. 737. (*See* ss. 737.506 and 737.507.)

Section 737.506(2), F. S., provides that, in those cases of charitable trusts that are not subject to or governed by subsection (1) of s. 737.506, F. S., providing for the amendment of certain specified trust instruments by the trustee with the consent of designated

beneficiary organizations, the trustee may amend the trust instrument to comply with s. 737.504(2), F. S., with the consent of the state attorney.

Section 737.507, F. S., provides in pertinent part that a court may relieve a trustee from any restrictions on his powers and duties placed upon him by the governing instrument or applicable law for cause shown and upon complaint of, among others, the state attorney.

Section 737.508(4)(b), F. S., requires that copies of certain written releases of power to select charitable donees operating to reduce the classes of permissible charitable organizations in whose favor the power is exercisable be delivered to the state attorney. (A release of power to select charitable donees may not be made by the trustee where the creating trust instrument provides otherwise.)

Section 737.509, F. S., provides that a trustee of a trust for the benefit of a public charitable organization, with the consent of that organization, may bring the trust under s. 737.508(5), F. S., relating to releases specifying a public charitable organization as the beneficiary of the trust and the operation of the trust exclusively for the benefit of the specified organization, by filing with the state attorney an election, accompanied by proof of the required consent of the affected charitable organization. Thereafter the trust is subject to ss. 737.508(5) and 737.510, F S., relating to supervision of the trust administration by the specified public charitable organization.

None of the aforecited sections of the governing statute impose any duty on the state attorney to represent any unknown or unascertainable beneficiaries of any charitable trust in any charitable trust proceeding or any other trust beneficiary or other individual, institution, or entity. With the exception of s. 737.507, F. S., authorizing the state attorney (among others) to file a complaint with the court for the relief of a trustee from restrictions on the trustee's powers and duties placed upon the trustee by the governing trust instrument or applicable law for cause shown, the governing statutes do not in any way operate to make the state a formal or indispensable party to a charitable trust administration or trust proceeding. It may well be that due to the bad faith neglect or refusal of the trustee to make such complaint to the court, or the legal inability or failure or bad faith refusal of an affected beneficiary to file such complaint with the court, in order to bring the matter before the court and activate its equitable power to relieve the trustee from such restrictions in and for the beneficial interest of the charitable cestui que trust, the state, in that sense and for that particular purpose, becomes a party to the trust proceeding on the relation of the state attorney in order to protect the state's interest in public charities and charitable trusts and to insure the application of the assets and moneys of the trusts to the charitable purposes for which they were placed in the trust. *Cf.* Jordan v. Landis, 175 So. 241, 244 (Fla. 1937); Bradshaw v. American Advent Christian Home and Orphanage, 199 So. 329, 332 (Fla. 1940); *and see* Hillsborough County Tuberculosis and Health Association v. Florida Tuberculosis and Health Association, 196 So.2d 203 (2 D.C.A. Fla., 1967), holding that nonprofit organizations chartered for charitable purposes are peculiarly within the inherent, original jurisdiction of courts of equity. However, s. 27.02, F. S., pertaining to the duties of the state attorney before the courts, does not in terms impose any such duty upon the state attorney or make the state attorney a party to any such trust proceedings or any other action or proceeding in the courts, including actions or proceedings for declaratory relief pursuant to ss. 86.021, 86.041, and 86.091, F. S.

Since s. 737.507, F. S., operates to authorize the state attorney to file a complaint with the court to relieve the trustee from any restrictions on the trustee's powers and duties contained in the trust instrument or provided by applicable law for good cause shown (presumably, circumstances inimical to the charitable cestui que trust and the purposes of the trust), and ss. 737.505, 737.506, 737.508, and 737.509, F. S., respectively, provide for or require certain notifications to or the consent of or the delivery of copies of releases to or the filing of certain elections and proofs with the state attorney, as hereinbefore recited, there is an implied if not express authorization for the state attorney to take any action reasonably contemplated by the statute or to inform or to suggest to the court and participate in the proceedings to the extent contemplated by the charitable trusts statute, in order to accomplish and carry out the powers and duties and functions granted to or imposed upon the state attorney by the statute. Basic rules of statutory construction require the assumption that the Legislature intended to empower the state attorney to take such action on the prescribed matters as in the exercise of his sound judgment the circumstances within his knowledge dictate is necessary to effectuate the purposes of part V of Ch. 737, F. S., and to serve the purposes of the charitable trust and protect the charitable cestui que trust and the state's interests in such charitable trusts and the

application of the trust assets to the charitable purpose for which they were placed in trust by the trust settlor. It is settled in this state that if a statute imposes a 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. *In re* Advisory Opinion to the Governor, 60 So.2d 285 (Fla. 1952); State v. Mitchell, 188 So.2d 684 (4 D.C.A. Fla., 1966), decision adopted by the Supreme Court as its ruling and certiorari discharged, Martin v. State, 192 So.2d 281 (Fla. 1966). The ratio decidendi of such cases applies equally well to state attorneys and their aforementioned authority, duty, and function granted to or imposed upon them under part V of Ch. 737 in order to effectuate the purposes thereof. *See* Peters v. Hansen, 157 So.2d 103 (2 D.C.A. Fla., 1963); and *cf.* AGO 071-399, regarding former part II of Ch. 691, F. S., now part V of Ch. 737, wherein I stated that if notice under former s. 691.15 (now s. 737.505) is given to the state attorney because the trust instrument required the trustee to perform acts prohibited under s. 4942 of the Internal Revenue Code in the case of a trust which is not subject to s. 691.16(1) (now s. 737.506(1)) the trust instrument and the consent of the state attorney thereto as provided for in present s. 737.506(2) might be accomplished by the submission of duplicate copies of the trust instrument and the proposed amendments thereto to the state attorney within a reasonable time for affirmative or negative endorsement by the state attorney. I further held that in case a notice was given to the state attorney pursuant to s. 691.15 (now s. 737.505) because the trust instrument required the trustee to perform acts prohibited under s. 4941, s. 4943, s. 4944, or s. 4945, of the Internal Revenue Code (*see* s. 737.504[3]), the trust might be amended only by petitioning the court for reformation.

While the state attorney is given authority in charitable trust proceedings to carry out all action reasonably contemplated by the charitable trusts statute, in any such action on the part of the state attorney he would presumably be representing the state or the general interest of the state in public charities and charitable trusts or the indigent beneficiaries of the charitable trust as a general indefinable class of the public or charges upon the public. Such implied or express duties placed on the state attorney by virtue of part V of Ch. 737, F. S., do not require the state attorney to represent any particular trust beneficiary or any other individual, institution, or entity in charitable trust proceedings.

077-86—August 23, 1977

WITNESS

COUNTY MEDICAL EXAMINER APPEARING BEFORE GRAND JURY—STATE LIABLE FOR EXPERT WITNESS FEES

To: Warren O. Tiller, Volusia County Attorney, DeLand

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Should the county pay its medical examiner, who is a salaried employee of the county, an expert witness fee in connection with testimony before the grand jury concerning an investigation of the state attorney?

SUMMARY:

A county is not liable for expert witness fees to its medical examiner for testimony given under subpoena before a grand jury in the capacity of an expert or skilled witness. A county medical examiner who appears and testifies before a grand jury as an expert or skilled witness under process of court is entitled to payment of expert witness fees as provided in s. 90.231, F. S. Section 406.09, F. S., which provides for the payment of expert witness fees to medical examiners testifying in civil actions or at a coroner's inquest as provided in s. 90.231, does not impliedly modify, limit or restrict the terms of s. 90.231 or its application to a medical examiner testifying before a grand jury under process of the court. Such expert witness fees are to be paid in the manner and in the amount prescribed by s. 90.231 and paid or disbursed as provided for in ss. 40.29-40.35, F. S. The state, having in legal effect commanded the witness to appear and testify before the grand jury, is liable for such expert witness fees.

Your question, as stated, is answered in the negative.

According to your letter of inquiry and supplemental letter, the county has received a statement for expert witness fees from its medical examiner for testimony before the grand jury. The medical examiner had been subpoenaed to appear before the grand jury in connection with an investigation concerning a murder charge and testified as an expert witness as to the cause of death of a deceased person or victim of criminal action. You express the view that s. 406.09, F. S., entitling the medical examiner to witness fees as provided in s. 90.231 when giving testimony in a civil action or at a coroner's inquest, operates to prohibit the county from paying expert witness fees to its medical examiner for expert testimony in any other judicial tribunal. You suggest that s. 406.09 and its alleged implied prohibition prevail over the provisions of s. 90.231(2), F. S., requiring the payment of expert witness fees of at least $10 per hour to any expert or skilled witness subpoenaed to testify in such capacity before a grand jury. Your supplemental letter makes it evident that the medical examiner was subpoenaed to testify before the grand jury in the capacity of an expert or skilled witness.

Section 406.07, F. S., provides:

> District medical examiners and associate medical examiners shall be entitled to compensation and such reasonable salary and fees as are established by the boards of county commissioners in the respective districts.

The fees, salaries, and expenses of the medical examiner may be paid from any county funds under the control of the board of county commissioners, but payment for services to the medical examiner may be made by the state either in part or on a matching basis. Section 406.08, F. S. *See also* s. 925.09, F. S., which states that physicians performing certain autopsies upon order of the state attorneys are to be paid reasonable fees for such services from the county fine and forfeiture fund upon the approval of the county commission and the state attorney. Section 406.11(1), F. S., authorizes the state attorney to request autopsies to be performed by the medical examiner.

Section 905.185, F. S., provides that, when required by the grand jury, the state attorney shall issue process to secure the attendance of witnesses. *See also* State v. Mitchell, 188 So.2d 684, 687-688 (4 D.C.A. Fla., 1966), *cert. discharged,* 192 So.2d 281 (Fla. 1966), as to the common law rule and the implied constitutional and statutory authority and duty of the courts and the state attorney with respect to the issuance and service of witness subpoenas to secure witnesses to testify before the grand jury. The machinery for obtaining state funds for paying witnesses appearing before the grand jury and the manner of payment of such witnesses is provided for by ss. 40.29-40.35, F. S.

Section 90.231, F. S., which provides generally for "expert witness fees," states:

> (1) The term "expert witness" as used herein shall apply to any witness who offers himself in the trial of any civil action as an expert witness *or who is subpoenaed to testify in such capacity before a state attorney* in the investigation of a criminal matter, *or before a grand jury,* and who is permitted by the court to qualify and testify as such, upon any matter pending before any court.
>
> (2) *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.)

[The transfer of s. 90.231, F. S., to s. 92.231, F. S., by s. 3, Ch. 76-237, Laws of Florida, has been postponed by Ch. 77-77, Laws of Florida, until July 1, 1978.]

Statutes which relate to the same subject without positive inconsistency or repugnancy should be construed together with and in harmony with any other statute relating to the same subject or having the same purpose, even though not enacted at the same time.

Mann v. Goodyear Tire and Rubber Co., 300 So.2d 666 (Fla. 1974); Garner v. Ward, 251 So.2d 252 (Fla. 1971). Therefore, ss. 406.07, 406.08, and 925.09, F. S., construed in proper context, provide for the compensation to a medical examiner for performing examinations, autopsies, and other clinical or laboratory investigations and services in connection with a determination as to the cause of death in the circumstances prescribed in ss. 406.11 and 925.09, F. S. Sections 406.07, 406.08, and 925.09, F. S., do not, however, encompass witness fees, expert or otherwise, for medical examiners. Therefore, these sections do not expressly or by necessary implication authorize or require the county to pay its medical examiner expert witness fees from county funds for testifying before a grand jury.

Section 406.09, F. S., provides for the payment of expert witness fees to medical examiners testifying in civil actions or at a coroner's inquest *as provided in s. 90.231, F. S.* The adverb "as" in this context means "in the same manner, in the manner in which" prescribed by s. 90.231. Black's Law Dictionary 145 (4th rev'd ed.); Van Pelt v. Hilliard, 78 So. 693, 697 (Fla. 1918); *and see* Terry v. Ferreria, 51 So.2d 426 (Fla. 1951), defining the phrase "in the same manner" to mean one of procedure, not of restriction or limitation, and to mean by similar proceedings to the extent that such proceedings are applicable.

Section 406.09, F. S., is not cast in restrictive or prohibitory terms and does not appear to require, as the county contends, any construction which prohibits the payment of expert witness fees (authorized or required by other statutes) except in those instances specifically prescribed in s. 406.09. Furthermore, the language of s. 406.09 does not in terms appear to effect an implied repeal, modification, or limitation on s. 90.231, F. S., as that section relates to grand jury investigations or to a medical examiner testifying as an expert witness before a grand jury under process of the court. In fact, s. 406.09 does not relate to the payment of expert witness fees for testifying before the grand jury or otherwise deal with the same subject as s. 90.231. The two statutes thus are not positively repugnant and, accordingly, the rules applicable to implied repeal, modification, or limitation do not apply to or control the instant question.

> Before the court may declare that one statute amends or repeals another by implication it must appear that the statute later in point of time was intended as a revision of the subject matter of the former, or that there is such a positive and irreconcilable repugnancy between the law as to indicate clearly that the later statute was intended to prescribe the only rule which should govern the case provided for, and that there is no field in which the provisions of the statute first in time can operate lawfully without conflict. [Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194, 196 (Fla. 1946).]

Accord: Sweet v. Josephson, 173 So.2d 444 (Fla. 1965); Scott v. Stone, 176 So. 852 (Fla. 1937). Section 406.09 simply bestows entitlement to the same expert witness fees payable for testifying before a grand jury to a medical examiner who testifies at a coroner's inquest or in a civil action. Such fees are payable in the manner and amount prescribed by s. 90.231, rather than under such statutes as ss. 936.11 and 936.17, F. S., which provide for medical testimony at coroner's inquests and post mortem examinations and compensation therefor from the county fine and forfeiture fund. While the county is liable for expert witness fees for its medical examiner's testimony at a coroner's inquest at the prescribed $10 flat rate under s. 936.17, s. 406.09 operates to require that such expert witness fees be paid at the prescribed rate or amount provided for by s. 90.231.

Section 406.09, F. S., also authorizes the same fees in the amount and manner as provided in s. 90.231, F. S., for expert testimony in civil actions. These fees, however, are payable by the party to the civil action who calls the expert witness and are ultimately taxed as costs by the court in favor of the prevailing party and against the losing party. Moreover, s. 406.09 has nothing to do with the costs, mileage, transportation, or witness fees and expenses for which the state is liable in proceedings before the grand jury or the process of the court for witnesses before the grand jury. Section 90.231 provides the only legal authorization or requirement under which a physician, including a medical examiner, is to be paid expert witness fees when subpoenaed to testify as an expert or skilled witness before a grand jury. With respect to the instant inquiry, the legal effect is that the state has commanded the witness to appear and testify before the grand jury; the state, therefore, is liable for the costs and witness fees incurred under the process of its court as is provided by law. *Cf.* AGO's 058-313 and 074-301. The county is not involved; thus, ss. 406.07, 406.08, 406.09, and 925.09, F. S., are not applicable to such cases where a grand jury subpoenas a witness to appear before it and give evidence. Moreover, the foregoing statutory sections do not appear to operate as a modification of or limitation on s. 90.231.

Accordingly, I am of the opinion that, in the absence of a judicial determination to the contrary, a county medical examiner who appears and testifies before a grand jury as an expert or skilled witness under process of the court is entitled to payment of expert witness fees as provided in s. 90.231, F. S. Moreover, it is the state, not the county, who is liable for such fees, and payment is to be made as provided for in ss. 40.29-40.35, F. S.

077-87—August 23, 1977

ELECTIONS

SUCCESSFUL CANDIDATE MAY NOT USE PUBLIC FUNDS TO DEFEND CONTESTED ELECTION RESULT

To: Willie Mae Jones, Gilchrist County Supervisor of Elections, Trenton

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **May county funds or funds available in the office budget of the supervisor of elections be expended to provide a defense for a supervisor of elections who has been made a party defendant in an election contest in his or her individual capacity as the successful candidate or nominee and where the county canvassing board of which such supervisor is a member is a party defendant as required by s. 102.161, F. S.?**

SUMMARY:

> **Neither county funds nor funds available in the office budget of the supervisor of elections may be expended to defend a supervisor of elections who has been made a party defendant as the successful candidate or nominee in an election contest instituted pursuant to s. 102.161, F. S. Such litigation is personal to the candidates involved and, therefore, the county has no interest in expending funds to defend the supervisor in such proceedings.**

According to your letter, you were made a party defendant in an election contest proceeding instituted pursuant to s. 102.161, F. S. That section provides in pertinent part:

> The certification of election or nomination of any person to office may be contested in the circuit court . . . by any unsuccessful candidate for such office. . . . *The successful candidate and the canvassing board or election board shall be the proper party defendants.* (Emphasis supplied.)

An examination of the complaint filed by the unsuccessful candidate for nomination to the office of supervisor of elections, a copy of which you have attached to your letter, reveals that you were made a party defendant in your individual capacity as the successful candidate for nomination to the office of supervisor of elections and that the county canvassing board was also made a party defendant as required by the terms of s. 102.161, F. S., above quoted. The complaint further reveals that no charges are made against or relief sought from the defendant canvassing board with respect to any act on the part of such board in carrying out its statutorily assigned duties and functions. (*See* ss. 101.68, 102.141, 102.151, and 102.166, F. S., as to the duties and functions of the county canvassing board.) To the contrary, the complaint alleges that the supervisor of elections unlawfully solicited the casting of absentee ballots. Thus, the complaint prays that "the returns from the absentee ballots in said election be rejected" and that the unsuccessful candidate be "declared the rightful winner of said election."

The foregoing analysis of the allegations contained in the complaint makes clear that the action is simply an election contest predicated upon the validity of certain absentee votes and challenging the right of the successful candidate or nominee to hold the office to which she was elected. The question of whether or not public funds may properly be expended to provide a legal defense for the successful candidate in such an election contest proceeding has been recently considered by the court in Markham v. State By and Through the Department of Revenue, 298 So.2d 210 (1 D.C.A. Fla., 1974). The *Markham* case involved an election contest challenging the action of the Broward County Canvassing Board in canvassing and counting certain absentee ballots. The unsuccessful candidate for the office of Broward County Tax Assessor sued both the successful candidate in his individual capacity and the county canvassing board. The question under consideration by the court was whether or not the successful candidate for the office of tax assessor could use funds available in his office budget for legal expenses to pay attorneys he had retained to defend him in the election contest. In ruling that such an expenditure would be improper, the court held:

> The suit giving rise to the incurring of the attorney's fees was not against the [tax assessor] in his official capacity nor did it arise from a discharge of his official duties nor serve a public purpose. The suit was a pure and simple election contest relating to the validity of certain absentee votes. The questioned absentee votes were sufficient in number to affect the result of the election. Under the law of Florida as announced in cases too numerous to cite, had the contestant been successful in his attack upon the votes the appellant would have ceased to be tax assessor and his opponent would have taken office. The office, functions and duties of tax assessor would not have been in any manner altered. There would simply have been another man filling the position. The legal battle between the political contestants was purely personal. Each wanted to be tax assessor of Broward County and the challenged absentee votes furnished the key to the door. [298 So.2d at 212.]

Accord: Peck v. Spencer, 7 So. 642, 644 (Fla. 1890) (town council was without authority to authorize the acting mayor to defend at the town's expense a suit which had been filed against the acting mayor by a defeated candidate to test the validity of the town election); Williams v. City of Miami, 42 So.2d 582 (Fla. 1949) (city had no interest in defending a suit arising out of a recall election); AGO's 071-185 and 071-276.

Applying the foregoing cases and Attorney General Opinions to your inquiry, it is my opinion that the expenditure of public funds, either from your office income or budgeted funds or county funds, to defend you in your capacity as the successful candidate or nominee in an election contest proceeding brought pursuant to s. 102.161, F. S., would be improper. To the extent that the lawsuit represents a "legal battle" between an unsuccessful and a successful candidate or nominee to determine who is entitled to the office of supervisor of elections, it would appear that the outcome of such litigation is dependent upon the validity of the absentee ballots cast and is, therefore, personal to the candidates involved. Furthermore, no additional factors which would indicate sufficient public interest in the outcome of the election contest are made apparent from the face of the complaint. *Compare* Estes v. City of North Miami Beach, 227 So.2d 33, 34 (Fla. 1969), wherein the Supreme Court found that it was not an abuse of discretion for the city council to engage special counsel to defend a law suit filed against four of the seven members of the city council and the city attorney by a defeated candidate for city councilman. The court held that the challenged appropriation of municipal funds to pay such special counsel must be considered in light of the following facts: a *majority* of the city council were defendants in the law suit; the plaintiff sought a judicial construction of the provisions of the municipal election code and an injunction against the defendants restraining them from performing all their official duties on behalf of the municipality other than legislative action. *See also* Miller v. Carbonelli, 80 So.2d 909 (Fla. 1955), holding that the town council was authorized to engage an attorney to defend the mayor in a quo warranto proceeding brought by one councilman against the new mayor elected by the council from their own number challenging both the right of the newly elected mayor to assume office and the action of the council electing him where "the issue not only immediately and directly affected the proper governance and administration of village affairs but the official action of the councilmen as electors was challenged."

The fact that the supervisor of elections is a member of the county canvassing board does not alter the conclusion set forth above. Section 102.161, *supra*, requires that the canvassing board be made a party defendant, *as an entity*, to an election contest proceeding brought pursuant to that section. The members of such canvassing board, therefore, are only nominal defendants who are required to be joined by statute. [It should be noted that the Legislature has recently amended s. 102.141, F. S., to provide for the replacement of a member of the county canvassing board if such member is unable to serve or "is a candidate who has opposition in the election being canvassed or is an active participant in the campaign or candidacy of any candidate who has opposition in the election being canvassed . . . ." Section 26 of Ch. 77-175, Laws of Florida, effective January 1, 1978. With specific regard to the supervisor of elections, s. 26 of Ch. 77-175 provides that if the supervisor of elections is unable to serve or is disqualified pursuant to the section, then the chairman of the board of county commissioners shall appoint a member of the board of county commissioners who is not a candidate with opposition in the election being canvassed; however, the supervisor is required to act in an advisory capacity to the canvassing board.] *Cf.* State *ex rel.* Hutchins v. Taylor, 143 So. 754, 757 (Fla. 1932), holding that, in the absence of statutory authorization, a county judge cannot be replaced as a member of the canvassing board because he is a candidate in the election canvassed. The duties imposed upon the county canvassing board "to canvass the returns of a[n] . . . election are *ministerial* in their nature, involving no discretion." (Emphasis supplied.) State *ex rel.* Knott v. Haskill, 72 So. 651 (Fla. 1916); *See also* State *ex rel.* Peacock v. Latham, 170 So. 472 (Fla. 1936). Accordingly, a county canvassing board possesses no authority to pass upon the regularity of an election or the qualifications of persons thereat. State v. McLin, 16 Fla. 17 (1876). County canvassers have no power to go beyond the inspectors' returns except to determine their genuineness, nor may the canvassing board reject returns which are genuine on their face. State *ex rel.* Bisbee v. Board of Canvassers of Alachua County, 17 Fla. 9 (1878). Applying these principles to your inquiry, it is clear that the canvassing board is not authorized to determine whether or not the supervisor of elections unlawfully solicited absentee ballots; such a determination can only be made by the judiciary by means of the election contest. Thus, while the county is authorized to defend the *canvassing board* as an *entity* in an election contest (*see* AGO 068-70), neither county funds nor funds budgeted in the office account of the supervisor of elections may be used to defend the *supervisor of elections* who was the successful candidate or nominee in an election contest predicated on the validity of absentee ballots, which absentee ballots were alleged to have been unlawfully solicited by the supervisor of elections.

Your question is accordingly answered in the negative.

077-88—August 30, 1977

COUNTIES

MAY NOT PROVIDE OFFICERS' SALARIES BY ORDINANCE

To: Richard I. Lott, Escambia County Attorney, Pensacola

Prepared by: Joseph W. Lawrence, II, Assistant Attorney General

QUESTION:

> **May s. 125.83(4), F. S., constitutionally require that a county charter provide that salaries of all county officers be provided by ordinance?**

SUMMARY:

> **Until judicially determined otherwise, and pursuant to the mandate of s. 5(c), Art. II, State Const., s. 125.83(4), F. S., probably cannot constitutionally prescribe that a county charter provide that salaries of all county officers be provided by ordinance or delegate to the county commission the authority to fix by ordinance the compensation of all county officers.**

Section 125.83(4), F. S., which concerns provisions to be included within optional county charters, adopted under the provisions of s. 1(c), Art. VIII, State Const., and part IV of Ch. 125, F. S., provides as follows:

> The County *charter shall provide* that the *salaries of all county officers shall be provided by ordinance* and shall not be lowered during an officer's term in office. (Emphasis supplied.)

However, s. 5(c), Art. II, State Const., provides:

> The powers, duties, *compensation* and method of payment of state and *county officers shall be fixed by law.* (Emphasis supplied.)

It is settled in this state that a statute found on statute books must be presumed to be valid and must be given effect until it is judicially declared unconstitutional. White v. Crandon, 156 So. 303, 305 (Fla. 1934); Evans v. Hillsborough County, 186 So. 193, 196 (Fla. 1938); Pickerill v. Schott, 55 So.2d 716, 719 (Fla. 1951). I am of course without authority to rule any duly enacted act of the Legislature invalid. But inasmuch as the legislative enactment cited above appears to delegate to counties the power to declare what the compensation of all county officers shall be, I feel it is constitutionally suspect.

The Florida Supreme Court has recognized that the Legislature may grant additional powers to and impose additional duties upon constitutional and statutory officers where not forbidden or inconsistent with the Constitution. State *ex rel.* Watson v. Caldwell, 23 So.2d 855 (Fla. 1946); Whittaker v. Parsons, 86 So. 247 (Fla. 1920). Such inhibition or inconsistency was found by the high court in a factual and legal situation strikingly similar to that presented herein. In State *ex rel.* Buford v. Spencer, 87 So. 634 (Fla. 1921), the court held that a legislative enactment which vested in the county commissioners the power and duty to fix the compensation of all county officers who were paid fees was violative of s. 27, Art. III, State Const. (1885), the precursor to s. 5(c), Art. II, dealt with herein. The court stated:

> The provision giving the county commissioners power to fix the salaries of the officers according to the fancy of the board of county commissioners, which may vary in each of the 52 counties of the State, destroys that uniformity which is contemplated by the Constitution requiring the compensation of county officers to be fixed by law . . . . . [*Supra* at 636.]

See also State *ex rel.* Douglass v. Board of Public Instruction of Duval County, 123 So. 540 (Fla. 1929), holding unconstitutional a legislative enactment conferring upon the county board of public instruction powers to fix compensation of school attendance officers; Musleh v. Marion County, 200 So.2d 168 (Fla. 1967), to the same effect regarding a legislative enactment authorizing board of county commissioners to determine compensation of an elected county prosecutor; and AGO 073-356, concluding that a county charter probably cannot delegate to the county commission the authority to fix by ordinance the compensation of county officers.

Until judicially determined otherwise, it is my opinion that s. 125.83(4), F. S., may well prove to be an invalid delegation of legislative power in its authorization for the fixing of salaries of all county officers by ordinance, and I cannot in good conscience advise or suggest to the county that it attempt to exercise the purported authority prescribed in s. 125.83(4) until the courts have resolved the question.

In this vein, it is well to point out that if Escambia County contemplates either adoption of the county manager form of government pursuant to s. 125.84, F. S., or provisions for the appointment of other county officers, provisions for fixing of salaries of such officers are found solely within the terms of s. 125.83(4), F. S., and s. 5(c), Art. II, State Const. As such, and given the doubts expressed herein concerning the constitutionality of s. 125.83(4), F. S., remedial legislation for this class of appointed officers may be necessitated. It is otherwise with those county officials enumerated within Ch. 145, F. S., wherein the Legislature has given definite guidelines concerning salaries.

077-89—August 30, 1977

DUAL OFFICEHOLDING

DEPUTY SHERIFF MAY NOT ALSO SERVE AS MAYOR—SHOULD COMPLY WITH RESIGN-TO-RUN LAW

To: J. Love Hutchinson, Gadsden County Supervisor of Elections, Quincy

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. May a deputy sheriff serve simultaneously as mayor of a municipality where such mayor receives no compensation for his services?

2. Should a deputy sheriff resign to run for the office of mayor?

SUMMARY:

A deputy sheriff is an "officer" and is, therefore, prohibited from simultaneously serving as mayor of a municipality. If the term of office of deputy sheriff, which coincides with that of the sheriff who appointed him, would not ordinarily expire until after the date upon which he would assume the duties of the new office, if elected, the deputy sheriff should comply with the Resign-to-Run Law.

AS TO QUESTION 1:

Your first question is answered in the negative.

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." It is clear that a mayor is a municipal officer, notwithstanding the fact that he serves without compensation. As to whether or not a deputy sheriff is also an officer, the courts have answered this question in the affirmative. *See* Blackburn v. Brorein, 70 So.2d 293 (Fla. 1954), holding that deputy sheriffs are "officers" rather than "employees"; *and see* Parker v. Hill, 72 So.2d 820 (Fla. 1954), and Johnson v. Wilson, 336 So.2d 651 (1 D.C.A. Fla., 1976), which reach the same conclusion. *Cf.* State v. Hurlbert, 20 So.2d 693 (Fla. 1945), holding that a statute authorizing a board of county commissioners to employ a county detective to be appointed by the Governor and vesting such detective with the same powers of arrest and of summoning witnesses in behalf of the state in criminal cases as sheriffs created an office and not an employment; Curry v. Hammond, 16 So.2d 523 (Fla. 1944), in which the Supreme Court stated that a city patrolman was "clothed with the sovereign power of the city while discharging his duty" and that therefore such patrolman was an officer of the city; Pacquin v. City of Lighthouse Point, 330 So.2d 866 (4 D.C.A. Fla., 1976); Maudsley v. City of North Lauderdale, 300 So.2d 304 (4 D.C.A. Fla., 1974); State *ex rel.* Gibbs v. Martens, 193 So. 835 (Fla. 1940); AGO's 069-2 and 077-63.

In AGO 071-167, this office ruled that a deputy sheriff is precluded by the terms of s. 5(a), Art. II, State Const., from also serving as a county commissioner. The conclusion reached therein applies with equal force to your inquiry; and, therefore, a deputy sheriff may not serve simultaneously as mayor.

AS TO QUESTION 2:

Your second question is answered in the affirmative.

The Resign-to-Run Law, s. 99.012(2), F. S., provides in pertinent part:

> No individual may qualify as a candidate for public office who holds another elective or appointive office, whether state, county or municipal, the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office not less than 10 days prior to the first day of qualifying for the office he intends to seek. . . .

The above-quoted statutory provision requires that an officer resign only when his present term for elective or appointive office would run concurrently with or overlap the term of office for which he seeks to qualify. Attorney General Opinions 075-67, 074-210, and 072-203. With respect to deputy sheriffs, s. 30.07, F. S., authorizes the sheriff to appoint deputy sheriffs who shall have the same power as the sheriff appointing them. *See also* s. 30.53, F. S., providing that the "independence of the sheriffs shall be preserved concerning . . . the hiring, firing and setting of salaries of . . . personnel." Thus, it is clear that deputy sheriffs have no fixed term of office; they are "mere appointees of the sheriff without tenure of office and removable at the will of the appointing power . . . ." Attorney General Opinion 073-91. In the absence of a definite term fixed by law, under the common law rule "the office is held for the term of the appointing power, or at the will or pleasure of the authority which conferred it provided that the term so conferred does not extend beyond that of the appointing power." 62 C.J.S. *Municipal Corporations* s. 497, p. 936; *cf.*, State v. Hurlbert, *supra*, holding that a statute creating the office of county detective to be filled by appointment by the Governor, though it did not fix the term of such office but was entirely silent on the matter, did not violate constitutional provisions prohibiting the creation of any office the term of which shall exceed 4 years, since it is presumed that the Legislature enacted the statute with such constitutional limitations in mind and intended a constitutional result; therefore, the statute was to be construed as though it provided for a term of 4 years. Thus, the term of office of a deputy sheriff coincides with that of the sheriff who appointed him. Under such circumstances, even in the absence of a fixed term of office, a deputy sheriff should resign pursuant to s. 99.012, F. S., if his tenure of office, which is the same as that of the sheriff, would not ordinarily expire until after the date he would assume the office of mayor, if elected. *See* AGO 072-203, in which it was stated that, even though an officer serves without fixed term, "he will be able to use the prestige and power of his office in seeking election to another office and the spirit and intent of the law, if not its letter, dictate that such an official should comply with the resign-to-run law." *See also* DE 076-04, in which the Division of Elections advised that deputy sheriffs "ought to comply with s. 99.012, F. S."

077-90—August 30, 1977

CIRCUIT COURT CLERKS

METHOD OF NOTING SATISFACTION OF LIEN WHEN RECORDS KEPT ON MICROFILM

To: Freda Wright, Clerk, Circuit Court, Vero Beach

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

When the official records required to be kept by the clerk of circuit court are on microfilm, what is the proper method of making marginal notations such as satisfaction of a mortgage or partial release or discharge of a lien?

SUMMARY:

A clerk of the circuit court whose official records are kept on microfilm may note satisfaction or partial release or discharge of mortgages or liens by making notations on the *index* to the photographic or microfilm record of such mortgage or lien [pursuant to s. 696.05(1), F. S.] or by recording a separate instrument showing satisfaction or partial release or discharge of a mortgage, lien, or judgment or showing final determination of the action in question [pursuant to ss. 701.04 and 713.21, F. S.].

Your question may be answered by reference to ss. 696.05(1), 701.04, and 713.21, F. S., which provide both a method of making marginal notations when microfilm is used and a method which may be used as an alternative to marginal notation.

Section 696.05, F. S., provides the necessary statutory authorization whereby clerks of the circuit court "may record any and all instruments filed for record by photographic process . . . including microfilming . . . ." Section 696.05(1). It is expressly provided in subsection (1) of s. 696.05 that "[t]he clerk of the circuit court may note *on the index to* the photographic (microfilm) record of a mortgage or lien a note of assignment or a note of satisfaction of the mortgage or lien." (Emphasis supplied.) This provision for noting satisfaction of a mortgage or lien is broad enough to include noting on the index to the microfilm record of a mortgage or lien a partial release or discharge thereof.

However, I would note that there is also provided, in ss. 701.04 and 713.21, F. S., an alternate method, whereby a separate instrument may be recorded to show satisfaction of a mortgage, lien or judgment.

Section 701.04, F. S., provides:

> Whenever the amount of money due on any mortgage, lien or judgment shall be fully paid to the person or party entitled to the payment thereof, the mortgagee, creditor or assignee, or the attorney of record in the case of a judgment, to whom such payment shall have been made, shall enter on the margin of the record of such mortgage, notice of lien or judgment, in the presence of the custodian of such record, to be attested by said custodian, satisfaction of said mortgage, notice of lien or judgment, and sign the same with his, her, or their hand; *or shall execute in writing an instrument acknowledging satisfaction of said mortgage, lien, or judgment, and have the same acknowledged or proven, and duly entered of record in the book provided by law for such purposes in the proper county.* (Emphasis supplied.)

Section 713.21, F. S., provides five alternative methods of discharging a "lien properly perfected under this chapter." Subsection (1) of s. 713.21 provides for marginal notation of satisfaction of the lien upon the margin of the record thereof in the clerk's office. Subsection (2) provides for the recording of a separate satisfaction of lien, by the lienor, in the official records. And subsection (5) provides for recording in the clerk's office of the original or certified copy of a judgment or decree of a court showing final determination of the action in question.

077-91—August 30, 1977

COUNTY HOSPITALS

MAY REQUIRE PHYSICIANS TO MAINTAIN MALPRACTICE INSURANCE AS A CONDITION OF PRACTICING THEREIN—LIMITATION

To: Robert Besserer, Administrator, Seminole Memorial Hospital, Sanford

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Frank A. Vickory, Legal Research Assistant

QUESTION:

May rules and regulations promulgated by a hospital existing under Ch. 155, F. S., require that physicians, as a condition to being granted or continuing to hold the privilege of treating patients in such hospital, file proof that they have in force professional liability coverage in an amount established by the board of trustees?

SUMMARY:

A hospital existing under Ch. 155, F. S., may promulgate rules and regulations requiring physicians, as a condition to being granted or

continuing to hold the privilege of treating patients in such hospital, to file proof that they have in force professional liability coverage in an amount established by the board of trustees. The amount that a physician may be required to carry, however, is apparently limited to $100,000 when a physician elects to participate in a new statutory scheme permitting him to limit liability to that amount by participating in the "Florida Patients' Compensation Fund."

The Seminole Memorial Hospital is a county hospital organized and existing under the authority of Ch. 155, F. S. The board of trustees of the hospital is statutorily authorized to promulgate rules and regulations concerning the privilege of treating patients in the hospital. Section 155.18 provides:

> The board of trustees of any hospital organized under this chapter is authorized to promulgate rules and regulations governing the granting and revoking of privileges to treat patients in the hospital. Such rules shall provide that only those persons licensed to practice medicine and surgery, *i.e.*, medical doctors and osteopathic physicians, may be granted privileges to treat patients in the hospital. Such doctors and physicians may retain their privileges so long as they comply with the rules and regulations of the board of trustees.

As I read the statute, it grants to the board a wide latitude of authority to regulate the conditions under which physicians will be allowed to practice in the county hospital. I interpret the second sentence quoted above to mean that *at a minimum* such rules must require that all physicians permitted to practice in the hospital be licensed but that the board may adopt additional regulations as it sees fit in regard to granting to physicians the privilege of treating patients in the hospital. Certainly, this is not to suggest that the board possesses unbridled discretion; rather, the board, pursuant to its enabling legislation, may exercise reasonable, judicially reviewable discretion which comports with the constitutional guarantees of due process and equal protection of the laws. It is, however, settled law that a physician has no unqualified constitutional right to be granted staff privileges in a public hospital merely because he is otherwise licensed to practice medicine. North Broward Hospital District v. Mizell, 148 So.2d 1 (Fla. 1962); Taylor v. Horn, 189 So.2d 198 (2 D.C.A. Fla., 1966); Monyek v. Parkway General Hospital, 273 So.2d 430 (3 D.C.A. Fla., 1973).

Assuming, of course, that the malpractice insurance requirement you refer to is to be applied equally, without distinction or discrimination, to all staff physicians who seek to practice in Seminole Memorial Hospital, the question essentially becomes whether the requirement that a physician be covered by malpractice insurance is a reasonable criterion or standard for admission to practice on the hospital staff. That is, does this requirement bear a reasonable or causal relationship to: the hospital's responsibility to its patients and the hospital's responsibility for providing patients with adequate and reasonable care and treatment; the physician's competency and skill or proficiency; and the preservation and protection of the health, safety, welfare, and well-being of the physician's patients? In my view, these questions are to be determined initially by the hospital board of trustees, which is charged by the statute with promulgating regulations governing the privilege of practicing in the hospital. Hence, any rule or regulation duly adopted and promulgated by the board of trustees and the enabling legislation pursuant to which it is adopted is prima facie valid and, until declared otherwise by a court of competent jurisdiction, continues to govern the admission of physicians to the hospital staff. It should be noted that in North Broward Hospital District v. Mizell, 148 So.2d 1 (Fla. 1962), the Supreme Court of Florida held that a statute authorizing a hospital district board of commissioners to give, grant, or revoke staff members' licenses and privileges for practice in public hospitals in the district so that the patients' welfare and health and the best interests of the hospital might at all times be best served was not an invalid denial of due process or an improper delegation of legislative power.

A discussion of several cases in this area may help to delineate the permissible scope of regulation by the board. In a leading case, Sosa v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971), the U. S. Court of Appeals for the Fifth Circuit said, regarding the selection procedure for the medical staff of a public hospital:

> It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors . . . . The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. [437 F.2d at 177.]

A short time later, the same court reaffirmed its view that the hospital's governing board is charged with setting standards regarding the privilege of physicians to practice, with the court's function limited to assessing the reasonableness and fairness of such regulations in accordance with the Constitution. Woodbury v. McKinson, 447 F.2d 839 (5th Cir. 1971).

Specifically addressing the case of a physician whose practice privileges were suspended by a hospital for failing to procure adequate malpractice insurance, the federal district court for the Eastern District of Louisiana found such regulation valid. Pollock v. Methodist Hospital, 392 F.Supp. 393 (E.D. La. 1975). The court found the regulation to be a reasonable exercise of financial responsibility on the hospital's part, motivated by its concern that otherwise it would be forced to carry the entire burden of a negligent physician's liability. Regarding the amount of insurance the hospital could require, the court said that "the hospital must be afforded wide discretion in setting a proper amount."

Finally, I would call attention to Ch. 77-64, Laws of Florida, an act relating to medical malpractice. It appears to provide a method by which a physician may limit his liability for medical malpractice to $100,000 by posting a $100,000 bond per claim, proving financial responsibility in that amount by establishing an escrow account, obtaining that amount of medical malpractice insurance, and participating in the "Florida Patients' Compensation Fund" which pays any amount of a medical malpractice claim over $100,000 so long as the other conditions are met. This act would appear to place a limit of $100,000 upon the amount of insurance a hospital could require a physician electing to participate in the program to carry.

077-92—September 2, 1977

COUNTY HOUSING AUTHORITIES

EXISTENCE NOT AFFECTED BY INACTIVITY—COUNTY COMMISSION MAY NOT ABOLISH AUTHORITY

To: James T. Humphrey, Lee County Attorney, Fort Myers

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is the Lee County Housing Authority a valid public corporation even though it has been inactive for a period of approximately 10 years?
2. Is the Lee County Board of County Commissioners authorized to rescind its resolution of February 23, 1966, adopted pursuant to s. 427.27, F. S., which declared a need for the housing authority to function in Lee County and thereby declare the housing authority to be nonexistent?

SUMMARY:

The Lee County Housing Authority created under Ch. 421, F. S., remains a valid public corporation or public quasi corporation even though it has been inactive for a period of approximately 10 years. A county housing authority is a distinct and independent entity created by the Legislature; therefore, only the Legislature may dissolve or terminate the existence of a county housing authority. Once the board of county commissioners has adopted a resolution declaring the need for a housing authority to function in the county, the repeal of such resolution or the adoption of a new resolution by the board declaring that there is no

longer a need for the housing authority to function in the county will not operate to dissolve or terminate or suspend the functioning of the county housing authority.

Section 421.27(1), F. S., in pertinent part, reads:

> In 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; provided, however, that such housing authority shall not transact any business or exercise its powers hereunder until or unless the governing body, by proper resolution shall declare at any time hereafter that there is a need for a housing authority to function in and for said county . . . .

Section 421.27(2), F. S., provides that, upon notification of the adoption of such resolution, the commissioners of a housing authority created for a county shall be appointed by the Governor. This section further states that "each housing authority created for a county and the commissioners thereof . . . shall have the same functions, rights, powers, duties, immunities and privileges provided for housing authorities created for cities and the commissioners of such housing authorities, in the same manner as though all the provisions of law applicable to housing authorities created for cities were applicable to housing authorities created for counties . . . ." In this regard, s. 421.04(3), F. S., provides:

> In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers hereunder upon proof of the adoption of a resolution by the governing body declaring the need for the authority. Such resolution or resolutions shall be sufficient if it declares that there is such need for an authority and finds in substantially the foregoing terms, no further detail being necessary, that either or both of the above enumerated conditions exist in the city. . . .

Your letter advises that pursuant to s. 421.27(1), F. S., the Board of County Commissioners of Lee County on February 23, 1966, adopted a resolution declaring that there was a need for a housing authority to function in the county, and the Governor appointed the commissioners of the housing authority, which appointments were confirmed by the board of county commissioners on July 6, 1966. (It should be noted that s. 421.27 does not in express terms qualify or limit the Governor's appointive powers, other than requiring his appointees to be qualified electors of the county, or his suspension power and does not require the approval or the concurrence of the county commission for the appointment or removal or suspension of the commissioners of a county housing authority.) You state that "there is no evidence of any work being accomplished by the commission[ers] and, upon expiration of their terms, no new appointments were made to the authority."

You also advise that the housing authority remained dormant and inactive until March 1977, when a group of citizens requested that new members be appointed to the housing authority. However, the Lee County Board of County Commissioners adopted a resolution stating that there was no need to "reactivate" the authority or to appoint new members to said body. Nevertheless, on June 20, 1977, the Governor appointed five members to the housing authority, which members are "prepared to conduct the activities of the authority pursuant to Florida law." Your question must be considered, therefore, in light of these circumstances.

AS TO QUESTION 1:

Section 421.27(1), F. S., states that "[in] 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 . . . ." (Emphasis supplied.) Pursuant to s. 421.08(1), F. S., a housing authority shall have perpetual succession. Thus, it is clear that it is the *Legislature* which has created the housing authority as a public or public quasi corporation. *See* O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9, 11 (Fla. 1971), wherein the court

listed housing authorities as examples of public corporations in Florida since "they are organized for the benefit of the public."

In the absence of constitutional restriction, the Legislature is empowered to create a public corporation for the purpose of carrying out a state function. 81A C.J.S. *States* s. 141, p. 583. The Legislature defines the powers of such corporations, and they have only such authority as has been delegated to them by law. Forbes Pioneer Boat Line v. Board of Commissioners, 82 So. 346 (Fla. 1919). As they are creatures of the Legislature, public corporations or public quasi corporations may be abolished or eliminated by that body. 81A C.J.S. *States* s. 141.

The Legislature, however, has permitted the counties through their boards of county commissioners to decide whether or not they wish to *activate* the *functioning* of a housing authority within the confines of the county. It is well established that statutes may become effective on the happening of certain conditions or contingencies specified in the act or implied therefrom. Town of San Mateo v. State *ex rel.* Landis, 158 So. 112 (Fla. 1934); Gaulden v. Kirk, 47 So.2d 565 (Fla. 1950); Stewart v. Stone, 130 So.2d 577 (Fla. 1961). Such is the case with housing authorities, since s. 427.27(2), F. S., provides that a county housing authority may not transact any business or exercise its powers under Ch. 421, F. S., *until* or *unless* the board of county commissioners by proper resolution declares a need for such authority to function in the county. However, the language of s. 421.27(1) makes clear that it is the *Legislature* which has created and *established* the housing authority as a public body corporate and politic; the role of the county is to *activate* or *initiate* the *functioning* of the authority in the county. Under such circumstances, it is evident that the continued existence of the Lee County Housing Authority as a distinct and independent entity must be examined with reference to general principles relating to the status of public bodies created by the Legislature.

As county housing authorities are created by legislative act, the sole method of termination of their legal status is by legislative act. *See* AGO 076-236 wherein it was held that legislative failure to provide funds for travel expenses and staff of the State Board of Building Codes and Standards did not operate to abolish said board, and that the board continued in existence until statutory authority for its existence was either expressly or impliedly repealed by the Legislature.

The courts have often applied this rule when considering the status of municipal corporations which have remained dormant for long periods of time. Thus, in Treadwell v. Town of Oakhill, 175 So.2d 777 (Fla. 1965), the court held that the town of Oakhill was a "valid, subsisting municipality" notwithstanding the fact that the last meeting of the town commissioners was held on July 2, 1930. The court ruled that only the Legislature had the authority to abolish municipalities and that "*[a] non-user of municipal powers does not result in dissolution.*" (Emphasis supplied.) *Accord*: Brown v. City of Marietta, 142 S.E.2d 235 (Ga. 1965), holding that a municipal charter had not expired or been forfeited although it had not been activated for 79 years and no city officials had even been elected or appointed; 62 C.J.S. *Municipal Corporations* s. 103, p. 230, stating that a municipal corporation may not surrender the municipal charter unless authority to do so has been conferred by law; AGO 076-96.

Applying these principles to the analogous situation presented by your inquiry, I find no provision in either Ch. 421, F. S., or elsewhere in the statutes providing for the dissolution of a housing authority following the adoption of a resolution of need by the board of county commissioners as prescribed in s. 421.27(1) under circumstances where such housing authority has ceased to function or exercise its statutory powers. *Compare* s. 421.261, providing that within certain counties a municipal housing authority shall continue to function in all respects should the municipality be abolished; s. 421.28, providing that if the governing bodies of two or more contiguous counties declare by resolution that there is a need for a regional housing authority, each county housing authority created by s. 421.27 shall immediately cease to exist except for the purpose of winding up its affairs; and s. 421.50, providing for the exclusion of a county from the area of operation of a regional housing authority. In this regard, it should be noted that legislation in other states provides for the dissolution of a housing authority if such authority has been inactive for a specified period of time. *See, e.g.,* Mont. Rev. Code s. 35-146, providing that if, after a lapse of 2 years from the date of the creation of the housing authority, no housing project has been commenced or contract entered into for such purposes, then the governing body may adopt a resolution stating that there is no need for the housing authority to exist and that it should be dissolved. Upon serving a copy of such resolution upon the Secretary of State, the housing authority is dissolved, all its functions cease, and the commissioners are discharged. Thus, if the Legislature had

intended to establish a procedure whereby the existence of an inactive housing authority could be terminated, it could have easily done so. *Cf.* s. 165.051, F. S., providing for the dissolution of the charter of any existing municipality or special district. In the absence of such legislation, I can only conclude that the Lee County Housing Authority remains and is a valid public corporation or public quasi corporation even though it has been inactive for approximately 10 years.

Your first question is answered in the affirmative.

AS TO QUESTION 2:

At the outset, it should be noted that, as discussed in question 1, the *Legislature* has created and established a housing authority as a public body corporate and politic in each county of the state, and it alone possesses the power to abolish, dissolve, or terminate such authorities. Moreover, the *commissioners* of said housing authority are appointed by the Governor, he alone may fill vacancies in office of the commissioners of the authority, and they may be removed or suspended only by him "in the same manner and for the same reasons as other officers appointed by the Governor." Section 421.27(2), F. S. And, pursuant to s. 7(a), Art. 4, State Const., only the Governor may suspend such public officers for the reasons enumerated therein, and, upon the suspension, such officials may be removed only by the Senate. Accordingly, the board of county commissioners may neither "deactivate" the housing authority nor remove the duly appointed commissioners of said body. *See* State *ex rel.* Kelly v. Sullivan, 52 So.2d 422 (Fla. 1951).

The remaining consideration is whether or not the board of county commissioners may suspend or terminate the operation and functioning of the county housing authority by rescinding its resolution of February 23, 1966, declaring the need for the authority to function in the county. In other words, since the board of county commissioners is not authorized to abolish or dissolve the authority or to remove its commissioners from office, may the board by rescinding its earlier resolution effectively prohibit the authority from transacting any business or exercising its powers under Ch. 421, F. S.?

As noted in question 1, county housing authorities are public corporations or public quasi corporations. They are independent of, and with an identity separate from that of, the county or its governing body. Attorney General Opinion 064-117. In State *ex rel.* Burbridge v. St. John, 197 So. 131, 134 (Fla. 1940), the Supreme Court discussed the nature of a municipal housing authority created pursuant to Ch. 421, F. S.:

> Thus there is created in substance and effect a *real* corporation, a separate and distinct corporate entity from that of the municipality, having power to contract with the municipality, and furthermore, a corporation which is *not* a municipality, its prime purposes being the construction and renting of dwellings or housing accommodations to tenants of a low income group for a reasonable rental price, in competition with private citizens.
>
> Nor is the Housing Authority of Jacksonville a mere agency of the City of Jacksonville. If such were the case, then the City of Jacksonville might be liable for the large indebtedness created or to be created by the Housing Authority. But the Act under which it was created did not intend that the Housing Authority should be a mere agency of the City Government.

A county housing authority possesses the same powers and functions as a municipal housing authority; thus, the principles expressed in State *ex rel.* Burbridge v. St. John apply with equal force to a county housing authority. Although a county housing authority may be considered to be an agency of the county under certain statutes for certain purposes (*see* AGO 055-245), it retains an independent and separate corporate existence and is not a subordinate body of the county.

Moreover, I find no provision in Ch. 421, F. S., which authorizes the board of county commissioners to divest the county housing authority of any of its powers under Ch. 421, should the board determine that there is no longer any need for the housing authority to function in the county. *Cf.* Moran v. La Guardia, 1 N.E.2d 961 (N.Y. 1936), indicating that the legislature could provide in the original law that the act shall cease to operate upon the adoption of a joint resolution determining that the emergency was at an end. Upon the adoption of a resolution declaring a need for a housing authority to function in the county, the discretion of the board with respect to the operation of a housing authority is at an end.

In Orange City Water Company v. Town of Orange City, 188 So.2d 306, 309 (Fla. 1966), the Florida Supreme Court held that, once a board of county commissioners had by resolution invoked the provisions of Ch. 367, F. S., by bringing the water systems of the county under the jurisdiction of the Public Utilities Commission [now Public Service Commission], the board's repeal of said resolution "was of no legal effect" and did not oust the jurisdiction of the commission to regulate the water systems in the county. The court relied upon a Wisconsin case—Northern Trust Co. v. Snyder, 89 N.W. 460 (Wis. 1902)—in holding that a special limited power, once executed, is exhausted and that, in the absence of legislative authority, the adoption of an option law is final, and cannot be undone. *Accord*: Attorney General Opinion 071-372.

Similarly, with respect to county housing authorities, the act of the board of county commissioners in adopting a resolution declaring the need for a housing authority to function exhausts the role of the board of county commissioners. The Legislature has not empowered the board to supervise or otherwise control the housing authority in any manner following the adoption of the resolution. In the absence of such legislative authorization, the board may not exercise any further control over the functioning of the authority. Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla., 1974); *cert. dismissed,* 300 So.2d 900 (Fla. 1974).

An examination of decisions rendered in other jurisdictions supports the conclusions stated herein. In Housing Authority v. City of Los Angeles, 243 P.2d 515 (Cal. 1952), a municipal housing authority sought a writ of mandamus to compel the city to perform certain specified acts contemplated by a cooperation agreement entered into between them pursuant to California's housing authorities law (which is similar to Ch. 421, F. S.). The city had adopted a resolution which declared a need for the housing authority to operate, and subsequently passed an ordinance approving the development and construction of a low income housing project.

It then entered into a cooperative agreement with the housing authority. [Section 1401(7)(b)(1) of the United States Housing Act (s. 42 U.S.C.A., s. 1401 *et seq.*) states that federal funds may not be expended for a housing project constructed pursuant to the act unless the governing body of the locality involved has entered into a cooperation agreement with the public housing authority.] Subsequently, the city passed a resolution canceling the cooperation agreement and setting aside the council's approval of the housing project. The court issued a writ of mandamus compelling the city to perform the acts stipulated in the cooperation agreement. In reaching its conclusion, the court rejected the city's contention that its action was justified because present conditions no longer necessitated the housing project:

> The city acted within its discretion in determining the local need for the functioning of the housing authority created by state act. All considerations of wisdom, policy and desirability connected with the functioning of a housing authority in the city . . . became settled adversely to the adherents of the city's present position by the actions of the state and of the city in declaring the existence of need. Upon the formation of the housing authority the state law thereupon and thereafter controlled the city and the housing authority and no other law concerning the acquisition, operation or disposition of property is applicable to the authority except as specifically provided. [243 P.2d at 519.]

Accord: State v. City Council of City of Helena, 242 P.2d 257 (Mont. 1952), holding that a city council may not collaterally impeach its finding of fact that there was a need for low income housing in the city.

Similarly, in City of Paterson v. Housing Authority of Paterson, 233 A.2d 98 (N.J. 1967) a city sought to rescind the power theretofore given the authority to carry out redevelopment projects and transfer such undertakings to the city. The court noted that no statutory authority existed which would empower a municipality to effect a transfer of functions from the housing authority, and that no such authority would be implied. The court went further to note, at p. 105 of its opinion:

> *To acknowledge that the city possesses the power it here purports to exercise is tantamount to a determination that it may dissolve the Authority almost at will.* It is significant to note that in certain other statutes creating instrumentalities of a like nature and intended to perform functions similar to

those entrusted to local housing authorities, the Legislature has made no specific provisions for dissolution . . . . The inclusion of such provisions in certain acts and their exclusion in others, when all of the statutes are directed toward effectuating a single public purpose and were all enacted at or about the same time lends strong support to the conclusion that such exclusion was purposeful. (Emphasis supplied.)

It is likewise significant to note that, in other jurisdictions, legislatures have provided for the dissolution of housing authorities by the appropriate governing body. *See, e.g.*, 7 Gen. Law R. I. s. 45-25-32, providing either the housing authority or the governing body may apply to superior court for dissolution of the authority upon a showing of payment or satisfaction of all the outstanding obligations of the authority. The failure of the Florida Legislature to make provisions for the exercise of any control or supervision over the housing authority by the county commission following the adoption of the resolution finding and declaring a need for it to function in the county or to authorize the county to thereafter dissolve or terminate or suspend the functioning of a county housing authority further supports my view that a county may not do so by rescinding its earlier resolution declaring a need for the housing authority to function in the county or by adopting a new resolution stating that there is no longer any need for the housing authority to function in the county.

Your second question is answered in the negative.

077-93—September 13, 1977

TAXATION

WATER MANAGEMENT DISTRICTS—LEVY FOR 1977 TAX YEAR—METHOD OF PRORATION

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: Larry Levy, Special Assistant Attorney General

QUESTIONS:

1. Does s. 373.503(3), as amended, authorize the levying of ad valorem taxes for tax year 1977?

2. Should the property appraiser extend on the county tax roll a millage rate which is equivalent to 361/365ths of the rate certified, or should the rate certified be shown on the bill and the amount of tax levied be reduced to 361/365ths of the total tax levied?

3. In the alternative, could a water management district simply compute a budget to operate for a fiscal year less 4 days, determine a millage rate to yield revenues to fund this budget, and so certify that rate for extension without further adjustment?

SUMMARY:

Section 373.503(3), F. S., as amended by Ch. 76-243, Laws of Florida, authorizes the water management districts enumerated therein to levy ad valorem taxes on property within the districts solely for the purposes of Ch. 373, F. S., and of Ch. 25270, 1949, Laws of Florida, as amended, and Ch. 61-691, Laws of Florida, as amended, commencing with the tax year 1977. The statute mandates that the districts' governing boards are required to establish or fix the millage or tax rates to be levied for 1977 in such manner as to insure that no such taxes will be levied for the first 4 days of the 1977 tax year. The tax rate so calculated by such governing boards is the rate to be certified to the several property appraisers for extension on the county tax rolls. The statute does not set forth the manner or method whereby such tax proration for the 1977 tax year is to be accomplished and accordingly the manner or method of such proration lies within the sound discretion of such governing boards.

Section 373.503(3), F. S. (1976 Supp.), as amended by ch. 76-243, Laws of Florida, now provides in part:

> The districts *may levy ad valorem* taxes on property within the district solely for the purpose of this chapter (Ch. 76-243) and of chapter 25270, Laws of Florida, as amended, and chapter 61-691, Laws of Florida, as amended. The authority to levy ad valorem taxes as provided in this act *shall commence with the year 1977.* However, the *taxes levied for 1977 by the governing boards* pursuant to this section *shall be prorated to ensure that no such taxes will be levied for the first 4 days of the tax year,* which days *will fall prior to the effective date of the amendment to s. 9(b), Art. VII of the Constitution of the State* of Florida, which was *approved March 9, 1976.* When appropriate, *taxes levied* by each governing board *may be separated* by the governing board *into a millage* necessary *for the purposes of the district* and *a millage necessary for* financing *basin functions* specified in s. 373.0695. *Beginning with the taxing year 1977,* and notwithstanding the provisions of any other general or special law to the contrary, the maximum total *millage rate* for district and basin purposes shall be: . . . . (Emphasis supplied.)

AS TO QUESTION 1:

Question number 1 is answered in the affirmative.

Section 9(a), Art. VII, State Const., provides that special districts may be authorized by law to levy ad valorem taxes. Section 12 of Ch. 76-243, Laws of Florida [s. 373.503(3), F. S. (1976 Supp.)], implements this constitutional provision. The language of the statute is quite clear that the districts set forth in Ch. 373, F. S., are authorized to levy ad valorem taxes for water management purposes on property within the districts for tax year 1977. The authorization for such tax levy is clear and unequivocal. By the plain language of the statute the Legislature has intended to authorize such tax levy commencing with the tax year 1977 and to require proration of the 1977 tax levies by the governing boards of such districts to insure that no such tax will be levied for the first 4 days of the tax year, which days will fall prior to the effective date of the amendment to s. 9(b), Art. VII, State Const., which was approved March 9, 1976. There exist no constitutional restrictions on the power of the Legislature to determine the time or period of a tax levy (*see* 84 C.J.S. *Taxation* s. 357) or the time when tax liability is to be determined (*see* 84 C.J.S. *Taxation* s. 60), and in the absence of any such restrictions it may select the time as of which tax liability shall be determined and the taxable status of persons and property will be determined as of the time specified in the particular statute applicable. *Cf.* State v. Green, 101 So.2d 805, 807-808 (Fla. 1958); AGO's 074-120, 072-268, and 071-52. Further, it is axiomatic that a duly enacted general law is presumptively valid and must be given effect.

Accordingly, taxes may be levied as prescribed by s. 373.503(3), F. S., (1976 Supp.), and the property appraiser is authorized and required to certify values for such taxing purposes to the district taxing authorities (*see* s. 373.539(4), F. S.).

AS TO QUESTION 2:

In discussing proration, the statute speaks clearly and mandates that it is the taxes levied which are to be prorated. The statute states that:

> . . . the taxes levied for 1977 by the governing boards pursuant to this section shall be prorated to insure that no such taxes will be levied for the first four days of the tax year . . . .

The term "levy" is statutorily defined to mean the imposition of a tax, stated in terms of "millage," against property by a governmental body authorized by law to impose ad valorem taxes. Section 192.001(9), F. S. The millage authorized for water management purposes by s. 9(b), Art. VII, State Const., as amended at the special election on March 9, 1976, *see* s. 373.503(2)(a), F. S. (1976 Supp.), may be levied only by the designated water management districts, and such districts are authorized to "levy" such millage or ad

valorem taxes on property within the several districts by s. 373.503(3) and required thereby to prorate the taxes or millage levied for 1977 by the governing boards of the districts as prescribed therein. Subsection (3) of s. 373.503 expressly refers to "millage" in authorizing the governing boards of such districts to separate the "taxes levied" into a millage for district purposes and a millage for basin purposes. The extension of such millage or taxes on the county tax roll means the arithmetic computation whereby the "millage" is converted to a decimal number representing one one-thousandth of a dollar and then multiplied by the assessed value of the property to determine the tax on the property. Section 192.001(6), F. S.

Accordingly, the governing boards of the affected districts should establish or fix the millage or tax rates or the taxes to be levied by each district for 1977 in such manner as to insure that no such taxes will be levied for the first 4 days of the 1977 tax year. The tax rate, or millage, so calculated is the rate to be certified to the several property appraisers, and by them extended on the county tax rolls. *See* s. 373.539, F. S., as amended by Ch. 77-102, Laws of Florida. The statute mandates that such tax proration is to be accomplished by the *governing boards* of such districts, as opposed to the property appraiser. *Also see* s. 373.539(1) and (4), F. S., Rules 12D-8.14 and 12D-8.15, F.A.C.

AS TO QUESTION 3:

The statute does not mandate any particular manner or method by which the tax proration for the 1977 tax year is to be accomplished. Apparently, the manner and method of the proration was intended to be left to the discretion of the various governing boards of the affected districts. What is readily clear and unequivocal from the language of the statute is that *no taxes* levied for 1977 are to be levied for the first 4 days of the tax year 1977. Accordingly, if the governing boards choose to exercise their discretion in accomplishing the proration commanded by the statute by computing a budget to operate for a fiscal year less 4 days and calculate a millage or tax rate to yield sufficient revenues to fund only such budget, such determination would appear to be within the discretion of the governing board and would appear to be authorized by the statute. Such discretion could not be exercised arbitrarily or capriciously and could certainly not be exercised in any manner so as to defeat the plain intent of the statute requiring proration so that no such tax will be levied for the first 4 days of the tax year 1977.

077-94—September 13, 1977

TAXATION

UTILITY FRANCHISE CHARGE—NOT CONSIDERED "TAX" FROM WHICH COMMUNITY COLLEGE IS EXEMPT

To: Winifred L. Wentworth, General Counsel, State Board of Education, Tallahassee

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General

QUESTION:

Is the franchise charge or fee imposed upon the Florida Gas Company pursuant to its franchise agreement with the City of St. Petersburg, and a proportionate part of which is separately stated on its bills rendered to the St. Petersburg Community College, a tax from which the college is immune?

SUMMARY:

A contractual franchise charge or fee imposed upon or exacted from a public utility by a municipality in consideration for special privileges granted the utility by the municipality and separately stated on bills rendered to the utility's customers is not a tax, but constitutes a part of the utility's operating costs and rate base, and a community college is not exempt or immune therefrom under existing constitutional and statutory law. The college must pay its proportionate share of such fee or operating costs as a part of the total charges for utility services rendered to and received by the college the same as any other public or private consumer of such services.

Your question is answered in the negative.

In AGO 075-231, I addressed a similar question and I concluded that a franchise charge or fee imposed upon a public utility by a local government for granting a franchise to a utility company furnishing utility services within the local government's territorial jurisdiction was not a franchise tax or any other form of tax, but rather a contractual fee or charge negotiated or contracted for by the local government for granting such franchise or special privilege to such utility company. In that opinion, I stated:

> Initially it should be noted that the referenced Order of the Florida Public Service Commission does not, nor could it legally, authorize any tax—it is not a "general law" within the purview of s. 9(a), Art. VII, State Const. which provides that units of local government may be authorized by general law to levy other taxes [*i.e.*, other than ad valorem taxes] for their respective purposes (Emphasis supplied.); nor is it a "law" within the purview of s. 1(a), Art. VII, State Const., which provides that "[n]o *tax* shall be levied except in pursuance of law." (Emphasis supplied.) Secondly, if the Order is referring to a franchise *tax* levied under the authority of a city charter act or special law or local law of any kind enacted prior to or after the adoption of the 1968 State Const., whether labeled a "franchise tax," a "license tax" or any other form of excise tax, such charter or special or local law was superseded, preempted and invalidated by s. 9(a), Art. VII, *supra*, and is of no viability or legal efficacy. City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972). In addition, I am unaware of any constitutional or general law authorization for the levy by a unit of local government of a "franchise tax," or any other form of excise tax on the franchise granted by such unit of local government to a public utility company to furnish utility service, within its jurisdictional or territorial limits. Thus, although denominated as "franchise taxes" in the order, it appears more likely that the charges referred to therein are contractual fees or charges negotiated or contracted for by the government bodies under, and as consideration for, franchise agreements between the company and the respective governmental bodies for the privilege of using the public rights-of-way and places and conducting business thereon within the territorial limits of the respective governmental bodies or the exercise therein of other special privileges granted by the governmental body concerned.

Enclosed with your inquiry are communications suggesting that Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975), might apply to the franchise charge or fee imposed upon the Florida Gas Company pursuant to its franchise contract with the City of St. Petersburg, a proportionate part of which has been charged to and separately stated on bills to the St. Petersburg Community College for utility services. *Dickinson* holds that the state and its agencies, the counties, and the county school boards are immune from the 10 percent utility tax which may be lawfully levied by the municipalities pursuant to s. 166.231, F. S. However, that case involved excise taxes levied directly on or against the consuming governmental agencies and not contractual exactions such as franchise fees which are in reality an additional cost or expense of doing business and regarded as a legitimate expense of operation.

The contractual franchise fee imposed by the City of St. Petersburg is exacted directly from the Florida Gas Company in consideration for special privileges granted it by the municipality to enable the utility to carry on the business of furnishing utility services within the city's territorial jurisdiction. This fee represents one segment of the utility company's operating costs, which forms a part of the company's rate base and is part of the total charges paid by a consumer for utility services received by it. The Public Service Commission (Docket No. 750361; Order No. 7538), and not the municipality, requires that the utility company break down its charges or rates for utility services on its customer bills to reflect the amount attributable to the franchise fee which is a part of the company's total charges to the consumer for utility services. As noted in AGO 075-231, however such franchise charges or fees may be characterized by the Public Service

Commission, they are not in fact and in law taxes, and the community college therefore is not exempt or immune therefrom under existing constitutional and statutory laws of the state. Therefore, there exists no basis for invoking the doctrine of sovereign immunity explicated in Dickinson, *supra*, and the college must pay the charges for the utility services furnished it by the utility (including the proportionate part of the franchise charge or fee which is a part of the total charge for services supplied) the same as any other public or private consumer of such services, just as it pays for sewer and water and telephone services.

It should be noted that an ad valorem tax is an operating expense of the utility which constitutes a portion of its rate base or total charge for utility services it furnishes the consumer. The community college is no more immune or exempt from the payment of the proportion of its utility bill which goes to ad valorem taxes than it is immune from the payment of the franchise charge or fee which is not a tax levied against the college. *Cf.* AGO 074-390, holding that a county school board, as a consumer of petroleum products, was not exempt or immune from that portion of the purchase price reflecting an excise or license tax paid by a registrant or terminal facility operator for the privilege of operating terminals and transferring pollutants, including petroleum products, over Florida waters, such excise tax being an additional cost of doing business by the terminal operator from whom distributors and the ultimate consumers purchased their petroleum products. As noted in 13 C.J.S. *Public Utilities*, at p. 1042, taxes of whatever kind or nature to which a public utility is subject in the performance of its public duties, including taxes on real and personal property, are to be considered as part of its operating expenses.

In AGO 070-56, this office concluded that a franchise fee imposed by a municipality on a telephone company, which, by then existent regulations of the Public Service Commission, was authorized to be indicated on its bills to its consumers as an increase in its charges for telephone services and thus passed on to the consumers, was legally required to be paid by state agencies. Attorney General Opinion 076-137 held that an impact fee, in the nature of a user charge, established by city ordinance and imposed on a county school board for the privilege of connecting to a city's water and sewer system was not a tax or special assessment and the school board was liable therefor the same as it was for any other utility fees or charges of publicly or privately owned utilities. It was further found that the then existing provisions of the Florida School Code regulating the levying of assessments for special benefits on school districts and the payment of such assessments had no application to the imposition of such impact fees or user charges against the school board and did not shield it from the payment of such fees or charges.

The community college is paying for the use of the utility service. The franchise fee, which has been found not to be a tax levied on or against the college, represents a part of the utility company's operating costs or expenses that it legitimately passes on to its customers. Therefore, the college is not exempt or immune from payment of the same and must pay its proportionate share of such fee or operating costs of the utility as a part of the price or total charges for utility services rendered to and received by it.

077-95—September 13, 1977

DEPARTMENT OF ENVIRONMENTAL REGULATION

RULEMAKING POWERS—WATER MANAGEMENT AND QUALITY

To: Joseph W. Landers, Jr., Secretary, Department of Environmental Regulation, Tallahassee

Prepared by: Staff

QUESTION:

As between the Secretary of the Department of Environmental Regulation and the Environmental Regulation Commission, who is vested with the authority to adopt regulations under Ch. 373, F. S., relating to the conservation, protection, management, and control of the waters of the state?

SUMMARY:

The Environmental Regulation Commission established by s. 4(7) of Ch. 75-22, Laws of Florida, is authorized to set standards and make rules relating to water quality. The Governor and Cabinet as the Land and Water Adjudicatory Commission possess the exclusive authority, notwithstanding the provisions of s. 373.026(7), F. S., to review policies, rules, regulations, and orders of the water management districts. The Department of Environmental Regulation and the water management districts created by s. 373.069, F. S. (1976 Supp.), have authority relating to water quantity; water use; and storage and conservation, protection, management and control of water resources of the state.

Section 11 of Ch. 75-22, Laws of Florida, transferred all powers, duties and functions of the Department of Natural Resources relating to water management as set forth in Ch. 373, F. S., and Ch. 74-114, Laws of Florida, to the Department of Environmental Regulation. *See* s. 20.261(7), F. S. Section 4(7) of Ch. 75-22 created an Environmental Regulation Commission as part of the Department of Environmental Regulation. *See* s. 20.261(3), F. S. Section 8 of Ch. 75-22 transferred the Department of Pollution Control to the Department of Environmental Regulation, except for those duties vested in the Governor and the Cabinet under s. 5 of Ch. 75-22, and except for certain duties and powers relating to open burning of certain lands transferred to the Department of Agriculture and Consumer Services. *See* s. 20.261(4), (12), F. S. *See also* ss. 403.031(1), 403.061(7), (11), (13), and (14), 403.1822(2) and 403.1823(1).

Section 6(1)(a) of Ch. 75-22, Laws of Florida, provides that the Environmental Regulation Commission shall exercise the exclusive *standard*-setting authority of the department, except as provided in ss. 6(1)(b) and 11 of Ch. 75-22. *See* s. 403.804(1), F. S. Section 6(1)(b) of Ch. 75-22 deals with studies of proposed *standards* (as well as *standards* existing on the effective date of Ch. 75-22), which set a stricter or more stringent *standard* than one set by federal agencies pursuant to federal law or regulation. Such standards as are provided for in s. 6(1)(b) of Ch. 75-22 are required to be submitted to the commission, which shall initially adopt the standards referred to in s. 6(1)(b), but final action thereon shall be by the Governor and the Cabinet, who may accept, reject, or modify the same or remand the standards for further proceedings. In effect, the commission and the Governor and Cabinet have concurrent authority with respect to adoption of those standards delineated in s. 6(1)(b) of Ch. 75-22, with final authority being vested in the Governor and Cabinet. *See* s. 403.804, F. S.

Section 11 of Ch. 75-22, in pertinent part, transferred all powers, duties, and functions of the Department of Natural Resources *relating to water management* as set forth in Ch. 373, F. S., and Ch. 74-114, Laws of Florida, an act relating to water management districts and regional water supply authorities, to the Department of Environmental Regulation. However, such transfer shall not affect the existence of, or membership on, any water management district board, and notwithstanding the provisions of s. 373.076(7), the Governor and Cabinet sitting as the Land and Water Adjudicatory Commission have the *exclusive* power, by vote of four of the members thereof, to review and to rescind or modify any rule or order of a water management district to insure compliance with the provisions and purposes of Ch. 373, except those rules which involve only the internal management of the district.

In essential part, the provisions of s. 11 of Ch. 75-22 operate to remove and supersede the power theretofore vested in the Department of Natural Resources (before and upon the transfer of its powers to the Department of Environmental Regulation by s. 11, ch. 75-22) to review and to rescind or modify any rule or order of a water management district except for those involving only the internal management of the district, to insure compliance with the provisions and purposes of Ch. 373, F. S., and to vest such power solely in the Governor and Cabinet as the Land and Water Adjudicatory Commission. *See* s. 373.114. As to such rules or orders of the several water management districts, neither the Environmental Regulation Commission nor the head of the Department of Environmental Regulation is vested with any authority to review or to rescind or modify in order to insure compliance with the provisions and purposes of Ch. 373. With respect to such water management districts' rules or orders, s. 11 operates as an exception from the standard-setting or rulemaking authority vested in the Environmental Regulation Commission by s. 6(1)(a) of Ch. 75-22, leaving such rulemaking power initially with the water management districts, subject to the review power and final action of the Governor

and Cabinet, sitting as the Land and Water Adjudicatory Commission. The commission may, however, initiate such review, as may the head of the department, among others, as prescribed by statute. *See* s. 373.114.

Section 3(12) of Ch. 75-22, Laws of Florida, codified as s. 403.803(12), F. S., defines "standard" to mean any rule of the Department of Environmental Regulation relating to air and water quality, noise, and solid waste management, except for rules relating solely to the internal management of the department, and the procedural matters listed in the statute. The rules of the water management districts (*see* ss. 373.044, 373.113 and 373.171, F. S., and s. 373.171, F. S. [1976 Supp.]) which are reviewable by the Land and Water Adjudicatory Commission (s. 373.114, F. S.), and the regulations of the Department of Environmental Regulation adopted *to administer the provisions of Ch. 373, F. S.* (not Ch. 403, F. S.), primarily are not concerned with "air and water quality, noise and solid waste management," such matters being primarily the concern of Ch. 403. It is only incidentally under Ch. 373 that "water quality" is expressly addressed, *e.g., see* ss. 373.023(2), 373.026(1), 373.036(2)(g), 373.039, 373.087 and 373.206, and that in the main in connection with the State Water Use Plan, *see* s. 373.036, and the Water Quality Standards System of the department (*see* s. 373.039). *Also see* s. 403.061(13), F. S. The standard or rule and the standard-setting or rulemaking authority mentioned in s. 6(1)(a) and (b) of Ch. 75-22, codified as s. 403.804, F. S., has reference to the standards or rules defined by s. 3(12) of Ch. 75-22, codified as s. 403.803(12), F. S. For the purposes of this opinion, such standards or rules relate to *water quality* as distinguished from rules of the water management districts or the Department of Environmental Regulation relating to water quantity; water use, storage, and consumption; and the conservation, protection, management, and control of the water resources of the state. *See* s. 373.016(3). This bifurcation of functions is discussed in Wershow, Water Management, the Future of Florida, Legal Implications, 51 Fla. Bar. J., No. 3 (March 1977). It should be noted parenthetically that, although water management districts created pursuant to s. 373.069, F. S (1976 Supp.), do not have rulemaking authority concerning water quality, it is implicit in Ch. 373 that the district should not, by permit, authorize unlawful degradation of water quality. Attorney General Opinion 075-16. In general, the Environmental Regulation Commission, under Ch. 75-22 and the provisions of Ch. 403, F. S., supplants and exercises the powers of the former Pollution Control Board as the head of the former Department of Pollution Control (transferred to the Department of Environmental Regulation, *see* s. 8 of Ch. 75-22, and s. 20.261(4), F. S.), in establishing and enacting water quality standards for the state as a whole. *See* s. 403.061(13).) The commission shares the designated part of such rulemaking authority with, and is subject to the final action and approval of, the Governor and the Cabinet as to such designated rulemaking authority only. Section 403.804. The commission does, however, serve as the adjudicatory body for final actions taken by the department, except for those appeals and decisions authorized in ss. 20.261(12) and 253.76, F. S. (s. 5, Ch. 75-22.). *See* s. 403.804(1).

Chapter 75-22, Laws of Florida, does not affect the secretary's authority with regard to Ch. 373, F. S. Section 6(1)(b) of Ch. 75-22 (s. 403.804(2), F. S.) is a limitation on, or an exception to, the commission's power with respect to water quality rulemaking. Such exceptions must be strictly construed. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); State v. Nourse, 340 So.2d 996 (2 D.C.A. Fla., 1976). And, of course, the express mention of the exception of certain powers would necessarily exclude any other exceptions. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952) and Williams v. American Surety Co. of N. Y., 99 So.2d 877 (2 D.C.A. Fla., 1958). However, such an exception does not grant or vest in the secretary any rulemaking power regarding water quality rules or standards.

The pertinent part of s. 11, Ch. 75-22 (s. 373.114, F. S.) operates as a limited or partial deprivation of the secretary's power otherwise possessed under s. 373.026(7), F. S., to review and rescind or modify any rule or order of a water management district, except the internal management of the district. This section places such power in the Governor and Cabinet as the Land and Water Adjudicatory Commission, but does not vest any power in that regard in the Environmental Regulation Commission, nor does it take from the secretary any other powers he may have over the districts or the administration of Ch. 373, F. S.

077-96—September 13, 1977
(See also 077-96A)

MEDICAL PRACTICE ACT

NURSES' DUTY TO CARRY OUT MEDICATION AND DRUG TREATMENT ORDERS GIVEN BY PHYSICIANS' ASSISTANTS

To: Dr. E. T. York, Chancellor, State University System, Tallahassee

Prepared by: Walter Kelly, Assistant Attorney General

QUESTIONS:

1. Must a registered nurse carry out medication and treatment orders given her by a physician's assistant?

2. Has a nurse the responsibility to inquire into the delegation of authority to the physician's assistant each time she receives a drug or treatment order from a physician's assistant?

3. May a nurse refuse to carry out an order she receives from a physician's assistant which she believes or has reason to believe is contrary to or exceeds his delegated authority?

SUMMARY:

Nurses administering medication or drug treatment orders executed by a certified physician's assistant under the supervision of, or at the direction of, a licensed physician to whom such physician's assistant is assigned are not violating any provision of the state nursing law, Ch. 464, F. S. Nurses are required to carry out such medication or drug treatment orders without inquiry as to the delegated authority of such physician's assistant on every such order each time he or she receives one. All such medication or drug treatment orders should be routinely administered or performed by nurses as directed, to prevent arbitrary or capricious reasons for failure to administer such orders and impairment or nullification of the vital functions of the physician's assistants pursuant to s. 458.135, F. S., and nurses may not refuse to carry out such orders.

As these questions are interrelated, they will be answered together.

An overview of s. 458.135, F. S., as to the role of the physician's assistant is appropriate in answering your questions.

The Legislature, by enactment of s. 458.135, F. S., sought to alleviate the problem of insufficient and maldistributed health care services in this state. A new category of health care manpower, the physician's assistants, was established, a designation given to qualified medical personnel trained to perform medical services and assist licensed physicians in providing medical services to patients under their care. The definition as provided in s. 458.135(2)(d) is:

> "Physician assistant" means a person who is a graduate of an approved program or its equivalent *and is approved by the board to perform medical services under the supervision of a physician* or group of physicians *approved by the board* to supervise such assistant. (Emphasis supplied.)

Section 458.135(3), F. S., explicates that, notwithstanding any other provision of law, a physician's assistant *may perform medical services when* such services are rendered under the supervision of a licensed medical practitioner or group of physicians approved by the State Board of Medical Examiners in the specialty area or areas for which the physician's assistants are trained or experienced. *Also see* s. 458.13(4), F. S., providing that the definitional section relating to the practice of medicine shall not be construed to prohibit services rendered by a trained physician's assistant, and Rule 21M-17.01(5), F.A.C., in part defining a physician's assistant as one who performs tasks or a

combination of tasks traditionally performed by a physician, including medical treatment.

Also included with the statute is a definition of supervision:

> "Supervision" means responsible supervision and control with the *licensed physician assuming legal liability for the services rendered by the physician's assistant.* Except in cases of emergency, supervision shall require the easy availability or physical presence of the licensed physician for consultation and *direction of the actions of the physician's assistant.* The Board of Medical Examiners shall further establish rules and regulations as to what constitutes responsible supervision of the physician's assistant. [Section 458.135(2)(e), F. S.; emphasis supplied.]

It is important to note that the foregoing placed legal liability and responsibility for patients' medical services upon licensed physicians approved by the Board of Medical Examiners to supervise physicians' assistants. *See* s. 458.135(2)(d), (6), and (9), F. S. Section 458.135(14), F. S., further provides, "all physicians or physician groups utilizing physicians' assistants shall be liable for any acts or omissions of physicians' assistants while acting under their supervision and control." Section 458.135(2)(e), F. S., directs the Board of Medical Examiners to establish rules and regulations as to responsible supervision of physicians' assistants. Section 458.135(5)(d), F. S., further provides:

> The board shall adopt and publish standards to insure that such programs operate in a manner which does not endanger the health and welfare of the patients who receive services within the scope of the program. The board shall review the quality of the curriculum, faculty, and facilities of such programs, issue certificates of approval, and take whatever other action is necessary to determine that the purposes of this section are being met.

It is evident from the foregoing sections that the Legislature intended that the physician's assistant play a major role in delivery of health care or medical services under the prescribed supervision and consistent with the patient health and welfare.

Section 458.135(3), F. S., enumerates the places where certified physicians' assistants may perform medical services. Section 458.135(3)(c) specifically denotes a hospital, such as Shands Teaching Hospital, where the supervising physician to whom the physician's assistant is assigned is a member of the staff, as a place where medical services may be performed by certified physicians' assistants.

In reference to your question as to whether s. 464.021(2)(a)2., F. S., of the nursing chapter conflicts with s. 458.135, F. S., s. 464.021(2)(a)2. provides that the practice of professional nursing includes: "the administration of medications and treatments as prescribed or authorized by a person licensed in this state to prescribe such medications and treatments." You also indicated by your letter that the nursing staff at the hospital was apprehensive in administering medication or drug treatment orders executed by a physician's assistant; that they believe to administer such order would be in violation of s. 464.021(2)(a)2. Therefore, s. 464.021(2)(a)2. hindered performance contemplated and expected by the Legislature in enacting s. 458.135, F. S.

In my opinion s. 464.021(2)(a)2., F. S., in no way prevents a nurse from administering a medication or drug treatment order from a certified physician's assistant. The section specifically operates as the definitional statute of the practice of nursing and has nothing to do with what constitutes the practice of medicine and the performance of medical services or the regulation thereof by the state through the Board of Medical Examiners. Indeed, s. 464.25, F. S. (1976 Supp.), specifies that nothing in Ch. 464, F. S., shall be construed to confer the authority to practice medicine. It does not indicate that a medication or drug treatment order has to be handed directly from a licensed physician into a registered nurse's hand in order to be administered. The important words to note from s. 464.021(2)(a)2. are "as *prescribed* or *authorized* by a person licensed in this state. . . ." If a certified physician's assistant is performing such a task or executing medication or drug treatment order forms under supervision authorized or directed by the supervising licensed physician, administering of that medication or drug treatment order by the registered nurse does not violate s. 464.021(2)(a)2.

The nursing staff should be informed that the supervising licensed physician to whom the physician's assistant has been assigned has the legal liability and responsibility for medical services rendered by such physician's assistant. Medication or drug treatment orders executed by a certified physician's assistant under the supervision of or at the direction of a licensed physician to whom such assistant is assigned are required to be carried out without inquiry into the delegation of authority to the physician's assistant as to every order each time he or she receives one. It is also my opinion that any medication or drug treatment order issued by a certified physician's assistant, authorized or directed by the supervising physician, should be routinely administered or performed by the nursing staff, and nursing personnel may not refuse to carry out such orders. To conclude otherwise could lead to arbitrary or capricious reasons for failure to administer or carry out medication or drug treatment orders authorized by the prescribing physician and, therefore, impair or impede and nullify a vital function of the physician's assistants under the Medical Practice Act.

077-96A—November 18, 1977
(Supplement to 077-96)

MEDICAL PRACTICE ACT

NURSES' USE OF JUDGMENT IN CARRYING OUT PHYSICIANS' ASSISTANTS' DRUG TREATMENT ORDERS

To: Helen P. Keefe, R.N., Executive Director, Board of Nursing, Department of Professional and Occupational Regulation, Jacksonville

Prepared by: Walter Kelly, Assistant Attorney General

(See 077-96 for questions)

SUMMARY:

Nursing personnel, based upon their training and experience, and exercising their professional duty, have an obligation to question medication and drug treatment orders given by a certified physician's assistant that appear, in their judgment, to be in error.

This is in response to your letter requesting clarification of AGO 077-96, regarding the obligation of nursing personnel to carry out medication and drug treatment orders given by physicians' assistants without inquiry as to the delegated authority of such physicians' assistants. That opinion in seeking to clarify the role of physicians' assistants under the recent amendments to the Medical Practice Act, observed:

> . . . It is also my opinion that any medication or drug treatment order issued by a certified physicians' assistant, authorized or directed by the supervising physician, should be routinely administered or performed by the nursing staff, and nursing personnel may not refuse to carry out such orders. . . .

The quoted part of AGO 077-96 was *not* intended to infer that licensed nurses have no right to exercise their professional judgment when effectuating medication and drug treatment orders given by a certified physicians' assistant pursuant to Ch. 458, F. S. By statutory definition, the practice of professional nursing means, "the performance of any act requiring *substantial specialized knowledge, judgment, and nursing skill* based on the principles of psychological, biological, physical, and social sciences and the application of the nursing process." Section 464.021, F. S.; emphasis supplied.

It would be a misconstruction of my earlier opinion to interpret it as limiting the existing statutory and professional obligation of licensed nurses to exercise professional judgment in effectuating their duties and responsibilities. A licensed nurse does have the obligation and responsibility to effectuate the medication and drug treatment orders given by certified physicians' assistants, but this obligation and responsibility includes the necessity, by licensed nurses, to exercise their professional judgment when administering medication and drug treatment orders. In the exercise of that professional judgment they can certainly, when indicated, refuse to administer medical or drug treatment orders given by a certified physician's assistant when in the nurses'

professional judgment the administration of such medical or drug treatment order would be detrimental to the patient.

077-97—September 21, 1977

COUNTIES

MUST PARTICIPATE IN FUNDING MENTAL HEALTH PROGRAMS—
MAY NOT MAKE LUMP-SUM PAYMENT

To: Horace Thomas, Circuit Court Clerk and Gilchrist County Auditor, Trenton

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTIONS:

1. May a county contract with and pay funds to a mental health board to provide mental health services within the district?

2. Under part IV of Ch. 394, F. S., may a county appropriate and pay county funds in a lump sum to a mental health board to fund mental health services under the jurisdiction of the board of county commissioners?

SUMMARY:

Under s. 394.76(9), F. S. 1977, a county is required to participate in the funding of mental health services under its jurisdiction. The county may fund these services as required by s. 394.76(9) through the medium of a district mental health board, a nonprofit quasi-public corporation, without destroying the public nature or objective of the expenditure of county funds. Furthermore, the county is authorized to contract with the district boards to provide for and be provided with these services. The county commission is not, however, authorized by law to appropriate and pay funds to the mental health board in lump sum to fund the county's proportionate share. The duties and function of the clerk of the circuit court as county auditor must be preserved, and some control over the disbursement of county funds must be retained by the board of county commissioners in any contract between the district board and county in order to insure that public funds are properly expended.

AS TO QUESTION 1:

According to your inquiries, the board of county commissioners of one of the sixteen counties served by the District III Mental Health Board has refused to release funds for mental health services through the district board since it considers such payments to be a "lump sum" payment contrary to existing constitutional and statutory preauditing requirements. In addition, the county is advised that it should not contract with, or provide funds to, a "private, nonprofit corporation"; therefore, the county is reluctant to approve the District Mental Health Plan prepared by the District III Mental Health Board, a nonprofit corporation.

The Community Mental Health Act, part IV, Ch. 394, F. S., establishes a system of locally administered and controlled community mental health services under the supervision of the Department of Health and Rehabilitative Services. Section 394.68. The community mental health programs established under this chapter are to be integrated with state operated programs to provide a unified mental health system within the state. Section 394.66(3) and (8). The district mental health boards have been established to provide coordinated mental health services within the department's service districts or subdistricts as defined in s. 20.19, F. S., *see* ss. 394.67(1), (10), and (11) and 394.69, and serve as a direct link between the department and community programs. *Cf.* Rule 10E-4.09(2)(a), F.A.C. Members of the boards are appointed by the governing bodies of those counties having jurisdiction in the board district, ss. 394.67(2) and 394.70, F. S., and each

board must be duly incorporated within the state as a nonprofit corporation. Section 1 of Ch. 77-372, Laws of Florida (s. 394.69[5], F. S. 1977). Each board is charged with the responsibility of preparing a district mental health plan which reflects the program priorities established by the department and the needs of the district. This plan is to be submitted to the district administrator and to the governing bodies of the counties for review, comment, and approval. *See* s. 394.75.

Financing of mental health services is based upon a uniform ratio of the state government responsibility and local participation. Section 394.66, F. S. The state's share of financial participation is 75 percent of the total operating costs of services and programs specified in s. 394.75(3), F. S., less nonreimbursable expenditures as provided in s. 394.76(7), F. S., federal grants excluding funds earned under Title XX of the Social Security Act, 42 U.S.C.A. s. 1397, and inpatient and third-party payments for services rendered to individual eligible inpatients for which reimbursement has been requested from the state. Section 394.76(4), F. S., as amended by s. 33 of Ch. 77-312, Laws of Florida. The expenditures of 100 percent of all third-party payments and fees for noninpatient services are also eligible for state financial participation if such expenditures are in accordance with s. 394.76(7). Section 394.76(4)(d).

Counties are required to participate in the funding of mental health services under their jurisdiction. Section 394.76(9), F. S. 1977, specifically provides:

> State funds for community mental health services shall be matched by local funds on a three to one basis respectively. 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. The amount of the participation shall be at least that amount which, when added to other available local matching funds, is necessary to match state funds.

"Governing bodies" means "the chief legislative body of a county, a board of county commissioners or boards of county commissioners acting jointly, or their counterparts in a charter government." Section 394.67(2), F. S. (1976 Supp.) A municipality contributing funds may be added into the local funds making up the three-to-one basis set forth in s. 394.76(9), thereby decreasing the required amount of a county's participation in the funding of mental health services.

Your first inquiry is directed as to whether the county may participate in providing and funding mental health services within its jurisdiction as required by s. 394.76(9), F. S., through the medium of a district mental health board, a nonprofit corporation. Section 10, Art. VII, State Const., prohibits the state or a county, municipality, special district, or any agency thereof from lending or using its leasing power or credit to aid any private corporation, association, partnership or person. The purpose of this provision is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most incidentally benefited." Bannon v. Port of Palm Beach District, 246 So.2d 737, 741 (Fla. 1971); *cf.* State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); Baily v. City of Tampa, 111 So. 119 (Fla. 1926). However, when a public purpose is involved, the courts have recognized that a county may accomplish this purpose through the medium of a nonprofit quasi-public corporation. *See, generally,* Burton v. Dade County, 166 So.2d 445 (Fla. 1964); *cf.* Raney v. City of Lakeland, 88 So.2d 148 (Fla. 1956). Thus, the applicability of the constitutional prohibitions contained in s. 10, Art. VII, are dependent in part on whether a valid public purpose is involved. The determination of what constitutes a valid public purpose for the expenditure of public funds is, at least initially, a determination for the Legislature. *Cf.* Watson v. Larson, 33 So.2d 155 (Fla. 1947), *cert. denied,* 333 U.S. 862 (1948). With respect to the establishment of mental health programs within this state, the Legislature has considered those services to be a proper subject for the expenditure of public funds. *See also* s. 125.01(1)(e), F. S., which authorizes counties to provide and operate health and welfare programs. If the purpose to be achieved constitutes a valid public purpose, then the means to be applied to obtain such a purpose is largely within the discretion of the Legislature, *see, generally,* 81A C.J.S. *States* s. 205(b), p. 729. *Cf.* Florida Power Corporation v. Pinellas Utility Board, 40 So.2d 350 (Fla. 1949). The Florida Supreme Court, discussing public or quasi-public corporations, has stated:

> Their business ordinarily is stipulated by the Legislature to fill a public need without private profit to any organizers or stockholders. Their function is to promote the public welfare and often they implement governmental regulations

> within the state's police power. In a word, they are organized for the benefit of the public. [O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9 (Fla. 1971).]

See also Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 82 So. 346 (Fla. 1919), in which the Florida Supreme Court discussed the distinction between private, quasi-public, and public corporations and public quasi-corporations. District mental health boards, organized under Ch. 394, F. S., and incorporated as nonprofit corporations under Ch. 617, F. S., *see* s. 394.69(5), F. S. 1977, appear to qualify as quasi-public organizations; they are nonprofit, their services are available to the general public within the board district, and they serve a valid public purpose—mental health. *Cf.* AGO 073-40. The fact that a county under its home rule powers utilizes the services of a nonprofit organization to handle the operating details of mental health facilities or programs does not destroy the public nature or objective of the expenditure made for that specific county purpose. *Cf.* AGO 073-40 and cases cited therein.

On the basis of the foregoing authorities, it appears that a county can utilize a private nonprofit corporation to carry out public purposes. Therefore, county participation in mental health programs through the medium of the district mental health boards is not violative of s. 10, Art. VII, of the Florida Constitution.

Moreover, s. 394.73(1), F. S., provides that any county within the board district may contract for mental health services with the same authority as does the Department of Health and Rehabilitative Services. Since under s. 394.457, F. S., the department is authorized to contract with district boards to provide for, and be provided with, mental health services and facilities, it appears that a county, possessing the same authority as the department in this respect under s. 394.73(1), may also contract with the district boards to provide for these services. *See also* s. 394.73(2), (3), and (4), F. S., which provides that counties within a board district may enter into agreements with each other for the establishment of joint mental health programs and, in certain circumstances, may withdraw from such programs. However, under s. 394.76(9), F. S., the county is required to participate in the funding of these programs, and the foregoing statutory requirements of county participation may not be frustrated by a county's refusal to contract or to include in its budget funds for these services to the extent mandated by the statute.

AS TO QUESTION 2:

As discussed in question 1, a county must participate in the funding of mental health services. The county's required participation in the funding of these mental health services may be accomplished through the medium of a district mental health board. However, neither the County Mental Health Act nor the rules promulgated by the Department of Health and Rehabilitative Services established guidelines as to the manner and procedure to be followed in budgeting, appropriating, and disbursing the county's respective proportionate share of the funding of mental health services under the county's jurisdiction. The Community Mental Health Act requires the district mental health board 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. The total operating budget of a single board within a service district is limited to $200,000; if there are two or more boards within a district, the budget may be no greater than $225,000. Section 394.69(4), F. S. 1977. All funds received by the board must be disbursed in accordance with the district mental health plan approved by the counties and department and an annual report submitted containing, *inter alia*, a fiscal accounting. *See* ss. 394.75 and 394.71(4), F. S. However, the manner in which local funds, both public and private, are to be received, should be determined jointly by the appropriate district boards, service providers and various funding sources within the board district. *See* Rule 10E-4.09(3)(a) F.A.C.; AGO 076-153.

This office has consistently recognized that, in accordance with constitutional and statutory requirements, the clerk of the circuit court as county auditor has a duty to audit and approve the disbursement of county funds. *See* s. 1(d), Art. VIII, State Const., s. 129.09, F. S.; *cf.* AGO's 056-151 and 059-92. While a public purpose may be accomplished through a nongovernmental entity such as a nonprofit corporation, "[t]here must be some control retained by the public authority to avoid frustration of the public purpose." O'Neill v. Burns, 198 So.2d 1, 4 (Fla. 1967). Therefore, in the absence of constitutional or statutory authority, county funds may not be turned over in a lump sum

to a noncounty agency or corporation to be expended by that organization in its discretion and not by county warrant. *See, e.g.*, AGO 059-92 in which this office determined that, although a county could arrange with a state or county welfare board to administer a welfare program within the county, it could not turn over its funds to a governmental agency without preserving the preaudit function of the clerk of the circuit court as county auditor. A county could not make a lump-sum payment to a governmental agency without express statutory or constitutional authority. *Accord:* Attorney General Opinion 064-96. Similarly, a county may not turn over its funds in lump sum to a nonprofit quasi-public corporation. In an informal opinion to Bruce Jones, County Attorney for Palm Beach County, dated January 22, 1968, this office advised that lump-sum contributions by county commissions to other agencies were not authorized. The statute upon which that opinion was based was substantially amended to expressly provide that the county could transfer money budgeted for the Palm Beach County Industrial Development Board to the board at the beginning of each fiscal year or in equal monthly payments. *See* informal advisory opinion to George H. Bailey, County Attorney for Palm Beach County, dated October 15, 1969. *See also* s. 160.01, F. S., which expressly authorizes lump-sum payments of county or municipal funds to regional planning councils. Section 160.01 was amended in 1969 by Ch. 69-63, Laws of Florida, to expressly authorize such payments.

It is clear, therefore, that under the present language of part IV, Ch. 394, F. S., and in particular, s. 394.76, a county is not authorized to make lump-sum payments to a district mental health board. Thus, since the county is required to budget and fund mental health services under its jurisdiction, an alternative method of payment must be agreed upon by the county and district mental health board. The clerk of the circuit court as county auditor may audit and approve claims for mental health services on an item-by-item basis, paying such claims by county warrant upon submission of a proper voucher. The county's contract with the district board may provide an alternative method of payment; however, any contract with the district board to provide these services must preserve the preauditing function of the clerk as county auditor. For example, the district board may set up a revolving fund which would be reimbursed by the county only after proper vouchers for the disbursement of such fund were audited by the clerk as county auditor and approved by the board of county commissioners. *Cf.* AGO 059-92. I would also refer you to the method set forth in s. 394.76(6), F. S. (1976 Supp.), for state reimbursement which is presently being implemented. I am advised by the Department of Health and Rehabilitative Services that under the "purchase of service approach," the state in effect purchases mental health services for which the respective boards are compensated. *See also* informal advisory opinion to Harry A. Johnson, II, Attorney for the Clerk of the Circuit Court of Palm Beach County, dated November 22, 1971, supplemented by letter to John B. Dunkle, Clerk of the Circuit Court of Palm Beach County, dated December 16, 1971, in which this office 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 center's operating and capital expenses 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. Such payments could be made by the county after a review by the clerk, as county auditor, of such certified copy of the previous month's list of warrants submitted to him with the monthly requisitions.

Accordingly, the county must participate in the funding of these mental health services to the extent specified in s. 394.76(9), F. S. 1977, and is therefore required to contract and include the required funding in the county's annual budget. Some control over the disbursement of these funds, however, must be retained by the board of county commissioners, *see* O'Neill, *supra*, and the duties and function of the clerk of the circuit court as county auditor must be preserved. Therefore, the county, in funding mental health services as required by s. 394.76(9), F. S. 1977, may provide by contract with the district mental health board for the disbursement of county funds. For example, the county may warrant claims submitted by voucher on an item-by-item basis, or the district board may establish a revolving fund which will be reimbursed by the county after the clerk properly audits and approves claims. However, any contract with the board for disbursement of county funds must insure that the payments are subject to proper disbursement controls and accounting procedures.

077-98—September 21, 1977

SOVEREIGN IMMUNITY

DEPARTMENT OF CRIMINAL LAW ENFORCEMENT—MAY NOT PAY JUDGMENT AGAINST SPECIAL AGENT—MAY NOT PAY PUNITIVE DAMAGES

To: William A. Troelstrup, Commissioner, Department of Criminal Law Enforcement, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

1. Assuming funds are available in the Department of Criminal Law Enforcement budget and in light of s. 111.07, F. S., and s. 111.065, F. S. (1976 Supp.), would it be proper for the department to either pay the total $5,000 judgment for compensatory damages levied against the two special agents of the department (one of whom is still currently employed and one of whom is not), or, alternatively, reimburse them if they pay said judgment?

2. Assuming funds are available in the department budget and in light of s. 111.07, F. S., and s. 111.065, F. S. (1976 Supp.), would it be proper for the department to either pay the $2,500 judgment for punitive damages levied against the former special agent of the department or, alternatively, reimburse him if he pays said judgment?

SUMMARY:

The Department of Criminal Law Enforcement is not authorized by law to pay judgment for compensatory or punitive damages rendered against a special agent of the department in a civil suit arising prior to the enactment of s. 768.28, F. S. Even if s. 768.28 applied, payment of punitive damages would not be authorized because this provision expressly prohibits payment of punitive damages judgments.

I note that the lawsuit upon which the judgment in question was based was filed prior to Florida's waiver of sovereign immunity by s. 768.28, F. S.

Both questions involve the same legal principles; therefore, they will be considered together and answered accordingly.

One must start from the basic premise that public funds may be expended only as authorized by law. *See* Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.3d 530 (Fla. 1970); AGO's 071-28, 075-120, and 077-8. The Legislature possesses the exclusive power in determining how, when, and for what purpose public moneys should be applied in conducting the government. State v. Lee, 163 So. 859 (Fla. 1938); State v. Green, 116 So. 66 (1928).

Section 111.07, F. S., under certain circumstances, authorizes the state or political subdivision of the state to defend actions in tort brought against any of its officers or employees arising out of and in the scope of their employment. This statute relates only to the defense of tort suits and does not mention or authorize the payment of any judgment subsequently rendered in the action. Likewise, s. 111.065, F. S. (1976 Supp.), refers only to payment of legal costs and attorney fees for law enforcement officers in civil and criminal actions in the specified circumstances and does not mention or authorize the payment of any judgment that might be recovered. It is a settled rule in this state that, where a statute enumerates the things on which it is to operate (here, the defense of certain tort actions and the payment of legal costs and attorney fees in certain instances), it impliedly excludes from its operation all other things not expressly mentioned therein (payment of judgments rendered in civil actions against state officers or employees individually). *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); Thayer v. State, 335 So.2d 815 (Fla. 1976).

As previously indicated, the action upon which the judgment in question is predicated took place prior to the effective date of Florida's waiver of sovereign immunity, s. 768.28, F. S. Section 768.28(5) now expressly forbids payment of punitive damages. This statute is not applicable to the instant cases, but does show the express policy of the Legislature as to future cases.

There is therefore no specific statutory authority under these circumstances for the Department of Criminal Law Enforcement to pay the judgments in question. Under certain circumstances there is statutory authority to indemnify a warden or a deputy sheriff or a sheriff for a judgment rendered in a civil suit against such person arising out of performance of his duties (s. 111.06, F. S.). Moreover, the Department of Health and Rehabilitative Services is authorized to compensate an officer, employee, or agent who has been held personally liable for the payment of a judgment rendered in a civil suit as a result of an act or omission within the scope of his employment or function in an amount equal to the amount of such judgment. [Section 111.08, F. S.] No such statutory provision has been made for special agents of the Department of Criminal Law Enforcement. By thus specifically authorizing payment of judgments under certain circumstances to certain state officers and employees, the Legislature impliedly rejected such authority under all circumstances for all state officers and employees or the special agents of your department. As hereinbefore noted, the express mention of one thing in a statute is the exclusion of another. Mitchell v. Cotton, 3 Fla. 134 (1850); Bergh v. Stephens, 175 So.2d 787 (1 D.C.A. Fla., 1965); Wanda Marine Corp. v. State Dept. of Revenue, 305 So.2d 65 (1 D.C.A. Fla., 1974); and *cf., In re* Advisory Opinion of the Governor Civil Rights, 306 So.2d 520, 523 (Fla. 1975).

It might be noted that the Legislature, if it acknowledges or determines that there is a liability on the part of the state to discharge the state's moral obligation to the affected special agents of your department, may enact a general law granting such relief to such special agents as it may determine is justified in the attending circumstances and appropriate moneys for payment of any such claims bill out of the General Revenue Fund. *Cf.* Dickinson v. Bradley, 298 So.2d 352 (Fla. 1974), and *see* ss. 11.065 and 215.425, F. S. and AGO 072-99.

Considering the foregoing discussion, both of your questions are answered in the negative.

077-99—September 21, 1977

TAXATION

TAX SALES—DISTRIBUTION OF PROCEEDS—SURPLUS

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee, and Harold Mullendore, Clerk, Circuit Court, Clearwater

Prepared by: Staff

QUESTIONS:

1. In the event that a surplus from a tax deed sale exists after ad valorem tax and special assessment liens are first satisfied, and assuming no private liens exist, should the clerk distribute said surplus to satisfy in full, or if the surplus is insufficient, on a pro rata basis, all liens of varying priorities held by any government unit including, for example, Internal Revenue Service liens, State of Florida liens for sales tax, intangible tax, Workmen's Compensation, county welfare liens, etc.?

2. In the event that said surplus exists and both public and private liens are of record, what is the clerk's duty as to distribution of said surplus; for example, assuming three liens in the following order of priority exist, *i.e.*, an Internal Revenue Service lien, a mortgage, and a county welfare lien, and the federal and private lien in the absence of a tax deed sale would have priority over the county welfare lien, should the clerk satisfy the federal lien and not the others; or, assuming

sufficient funds exist, should the clerk satisfy all three in order that the county lien will be satisfied?

3. In the event that said surplus exists and only private liens are of record, what is the clerk's duty as to distribution of said surplus?

SUMMARY:

Section 197.291(2), F. S., requires the clerk of circuit court to distribute the excess proceeds from a tax deed sale to satisfy any liens of record held by governmental units against the property. In the event that such proceeds are insufficient to satisfy all such liens in full, the clerk is directed to disburse the surplus proceeds to the governmental units pro rata in full satisfaction of the liens. Any remaining balance of undistributed funds is to be retained for the benefit of the legal titleholder.

Application of this statute in certain circumstances involving perfected federal tax liens, state liens for sales or intangible taxes, workmen's compensation liens, county welfare liens, and perfected private mortgage and other liens may encounter constitutional difficulty, however, because compliance with its mandate could alter the lawfully established and the normal priority of liens and extinguish a lienholder's or property owner's rights in or to the surplus proceeds of the tax deed sale. Such application and distribution of such proceeds may operate to divest or impair constitutionally protected contractual and lien or property rights in violation of the Due Process and Contract Clauses of the Florida and United States Constitutions, in the absence of statutory notice that such rights may be so divested or impaired by operation of the distribution scheme prescribed by the statute. To the extent that such distribution displaced or impaired a federally held lien, the statute would appear to be violative of the Supremacy Clause of the United States Constitution.

The Attorney General cannot declare a statute unconstitutional or advise any officer to disregard a legislative direction or mandate. On the contrary, the statute is presumed to be constitutional and must be given effect until judicially declared invalid. In the event that the clerk of circuit court has reasonable doubts as to the statute's validity or its application in the foregoing circumstances or his duties thereunder, he has standing to bring an appropriate judicial proceeding for declaratory relief against the property owner and the holders of perfected and recorded liens to determine its validity and his duties thereunder.

Section 197.291(2), F. S., as amended by s. 4 of Ch. 77-354, Laws of Florida, which governs the distribution of excess proceeds from a tax sale, reads 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. The 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. In the event the excess is not sufficient to pay all of such liens in full, the governmental units shall be paid the excess pro rata in full satisfaction of the lien. If, after all liens of record of the governmental units 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 person who on the day of the sale was the legal titleholder of record. . . .

The Department of Revenue has promulgated an administrative rule construing and implementing s. 197.291(2), F. S., the material part of which, for the purposes of this opinion, was not affected by the amendatory provisions of s. 4 of Ch. 77-354, *supra*. Rule 12D-12.38, F.A.C., reads in pertinent part:

> If the property is purchased for an amount in excess of the statutory (opening) bid the excess shall be distributed to governmental units for the payment of any lien of record held by a governmental unit against the property. If the excess is not sufficient to pay all of such liens in full, then the governmental units shall be paid the excess on a pro rata basis in full satisfaction of the liens.
>
> If, after all liens for general taxes are paid in full, there remains a balance of undistributed funds, the clerk shall retain said funds for the person who on the day of the sale was the legal titleholder of record.

The quoted portion of the rule essentially tracks the language of s. 197.291(2), but then departs from the ordinary meaning of that language by limiting the scope of disbursement to "all liens for general taxes." *Compare* the language of the statute requiring disbursement to satisfy "any lien of record held by a governmental unit."

A proper response to your questions must begin with some observations about lien priorities under the law and the constitutional protection given to lienholders. A lien is a species of property protected by the due process clauses of the United States and Florida Constitutions. *See* Amendment XIV, United States Constitution; s. 9, Art. I, State Const.; City of Sanford v. McClelland, 163 So. 513 (Fla. 1935); Seaboard All-Florida Rwy. v. Leavitt, 141 So. 886 (Fla. 1932). A lien or right against the security of a mortgage or other lien is founded on contract, the impairment of which is prohibited by the contract clauses in the United States and Florida Constitutions. Section 10, Art. I, United States Constitution; s. 10, Art. I, State Const.; Morton v. Zuckerman-Vernon Corp. 290 So.2d 141 (3 D.C.A. Fla., 1974).

Florida has by statute made all ad valorem taxes first liens, superior to all other liens, on any property against which the taxes have been assessed, which continue in force from January 1 of the year the taxes were levied until discharged by payment as provided in Ch. 197, F. S., or until barred by Ch. 95, F. S. *See* ss. 192.053 and 197.056(1), F. S. A lien created through the sale of a tax certificate may not be foreclosed or enforced in any manner except as prescribed in Ch. 197. *See* s. 197.056(2). Other statutes give certain special assessment liens a priority equal to that of liens for general taxes and superior to all other liens. *See, e.g.*, ss. 153.05(10) and 170.09, F. S. For all other liens, the general rule at common law is that liens take precedence in the order of their creation unless a lien prior in time is intrinsically defective or is destroyed by some action of the lienholder. *Richardson Tractor Co. v. Square Deal Machinery Co.*, 149 So.2d 338 (3 D.C.A. Fla., 1963); 51 Am. Jur.2d *Liens* s. 52 (1970). Therefore, absent statutory authority to the contrary, lien priorities are determined by the chronological order in which they are perfected and recorded in the official records of the appropriate county or counties as may be required by statute to be effectual against creditors on subsequent purchasers for value without notice. *See, e.g.*, s. 695.01. F. S.

I note, parenthetically, that the intangible tax and sales tax liens mentioned in your first question are accorded a priority based on their chronological order of perfection and recordation. *See* ss. 199.262 and 212.15(3), F. S. *See also* s. 214.45, F. S. The special act creating the county welfare lien provides that it shall be enforceable "in the same manner as mortgages." Chapter 63-1787, Laws of Florida. Therefore, such liens are also governed by the common law rule, *i.e.*, their priority is determined by chronological order of perfection and recordation. The workmen's compensation lien is given the same preference of lien against the assets of an insurance carrier or employer as is allowed by law to the claimant for unpaid wages or otherwise. Section 440.23, F. S. Compensation orders of a judge of industrial claims or orders of the Industrial Relations Commission, in the event of default or failure to comply with such order, are enforceable by the appropriate circuit court having jurisdiction by a writ of execution or such other process of the court as may be necessary to enforce such orders. Section 440.24, F. S. Such compensation liens or writs of execution therefore take priority in the order of their perfection and recordation. *See also* ss. 713.07 and 713.50, F. S., for the priorities and recordation and perfection of mechanics' liens of laborers against real property and the priority and enforcement of other miscellaneous liens on personal property respectively.

Section 197.291(2), F. S., does not in terms expressly alter this well-established scheme of priorities. Nothing in the statute purports to make any lien superior to any other lien or give any priority to a public charge or nonproperty tax lien. Rather, the statute deals exclusively with the distribution of excess proceeds from a tax sale, by commanding the clerk to distribute the surplus to "the governmental units for the payment of any lien of record. . . ." Nevertheless, if the clerk obeys this statutory mandate his action may result in an unconstitutional deprivation or impairment of lien or property rights or impairment of contract rights.

In the first place, such a distribution would operate to destroy any rights of private or public lienholders of record in or to the excess proceeds of a tax deed sale, which rights

might otherwise take priority. Although Florida courts appear not to have addressed the question, a number of other jurisdictions protect a private lienholder's rights to a tax sale surplus. 72 Am. Jur.2d *State and Local Taxation* s. 911 (1954); 85 C.J.S. *Taxation* s. 817(b) (1974). These other jurisdictions include "lien" states, where the lienor receives no title or estate in the mortgaged property. *See* 59 C.J.S. *Mortgages* s. 1(b)(1), n. 15 (1949). Florida is a "lien" state. Section 679.02, F. S.; Georgia Casualty Co. v. O'Donnell, 147 So. 267 (Fla. 1933); Hoffman v. Semet, 316 So.2d 649 (4 D.C.A. Fla., 1975). If presented with the issue, the Florida courts might well follow this body of authority in recognizing a private or public lienholder's rights in or to the tax deed sale surplus proceeds.

Moreover, strict compliance with the statutory mandate would destroy the normal priority *inter se* of liens held by the governmental units. The statute requires that such liens be satisfied *pro rata* rather than in their normal order of priority whenever the excess proceeds fail to cover the full amount of such liens. To that extent liens for special assessments and various other public liens prior in time will be partially subordinated to subsequent nonproperty tax public liens.

Finally, although the statute commands that recorded public liens held by a governmental unit against the affected property be satisfied, there is no requirement that such public liens be choate. Inchoate public liens (*e.g.*, contingent liens and liens not fixed in amount) might thus be elevated to parity with choate public liens and be given superiority over choate private liens. The statutory distribution may therefore offend the general rule that choate liens are superior in dignity to inchoate liens. *Cf.* United States v. Security Trust and Savings Bank of San Diego, 340 U.S. 47 (1950), upholding a federal tax lien against an existing inchoate attachment lien.

The holders of liens which are in effect wholly or partially subordinated by the clerk's distribution of the surplus proceeds stand to lose their security interests entirely. The effect of a tax deed sale is to extinguish existing interests in or liens upon the property (with exceptions not relevant here), so that the purchaser may acquire an independent and unencumbered title. Section 197.271, F. S. *See* Stuart v. Stephanus, 114 So. 767 (Fla. 1927); Torreyson v. Dutton, 188 So. 805 (Fla. 1939), modified 190 So. 430 (Fla. 1939); Lee v. Carpenter, 132 So.2d 433 (2 D.C.A. Fla., 1961). Therefore, the holders of such existing liens are barred from foreclosing or obtaining execution on their liens on or against the property, although they may still proceed in personam on the debt. The divestment or impairment of lien rights by a statute regulating only the distribution of the excess proceeds of a tax deed sale may, however, offend the constitutional due process and contract rights guarantees described above.

It has been held that a state legislature may, by statute, alter prospectively the priority of liens arising under state law so as to give priority to a public charge. *See* Provident Inst. For Savings v. Mayor and Alderman of Jersey City, 113 U.S. 506 (1885); Glisson v. Hancock, 181 So. 379 (Fla. 1938); 51 Am. Jur.2d *Liens* s. 57 (1970). It is questionable, however, whether this result can be accomplished through the medium of a statute which purports only to govern the distribution of tax deed sale surplus proceeds, without any express language in the text or title of the act relating to lien priority. *See* Ch. 73-332, Laws of Florida. *Cf.* City of Lake Worth v. McLeod, 151 So. 318 (Fla. 1933), holding that a statute requiring officers making sales of property under judicial process (in an action to foreclose a state and county tax certificate) to pay from the proceeds of such sale all state, county, and municipal taxes did not regulate liens and priorities of taxes and special assessments. *See also* State *ex rel.* Housing Auth. of Plant City v. Kirk, 231 So.2d 522 (Fla. 1970), in which the court held that an excise tax exemption for public housing authorities, established by longstanding legal precedent, could not be repealed by implication in an amendment to the statute when the amendment did not expressly mention public housing authorities and when the title to the amendatory act conveyed no notice that the term "business" had been redefined or that there was any purpose to impose such tax on public housing authorities. It is also questionable whether this result can be accomplished without any limitation whatsoever on the nature of the public charge(s) or liens to be given priority. For example, the application of this statute to publicly or privately held liens (other than liens for general taxes and special assessments given priority by statute) would permit a property owner to subordinate a prior mortgage or other perfected lien, thereby obtaining a personal benefit through his unilateral action in granting a county welfare lien which is by law enforceable in the same manner as a mortgage. The consideration for such lien (welfare funds or services) does not improve or enhance the value of the encumbered or mortgaged property, nor does the mortgagee or other lienor have any statutory notice in advance that his lien priority or constitutionally protected contract and property rights may be so divested or impaired.

These difficulties may well be grounds for objection under the Due Process and Contract Clauses, *supra*.

Wholly apart from the foregoing discussion, your questions raise the additional problem of how s. 197.291(2), F. S., applies to a *federal* tax lien. Liens arising under federal law are governed by federal law and may not be subordinated or displaced by a state statute. *See* United States v. Equitable Life Assur. Soc., 384 U.S. 323 (1966); United States v. Roessling, 280 F.2d 933 (5th Cir. 1960); United States v. First Federal Savings & Loan Ass'n, 155 So.2d 192 (2 D.C.A. Fla., 1963). In Roessling, *supra*, the Fifth Circuit ruled that a federal mortgage lien which was prior in time to a Florida ad valorem tax lien was superior to the tax lien, absent a federal statute to the contrary. With respect to federal tax liens arising under the Internal Revenue Code, it appears that Congress has now consented to the subordination of such liens to state-created liens for ad valorem taxes and special assessments, where state law gives such liens priority over all other liens arising under state law. 26 U.S.C. s. 6323(b)(6)(A) and (B).

This federal statute does not, however, permit a federal tax lien to be wholly or partially subordinated to any lien not enumerated in the federal statute or liens not given the requisite priority by state law or to subsequent state liens for sales or intangible taxes, workmen's compensation, or county welfare payments or services. It certainly does not permit a perfected federal tax lien to be wholly or partially subordinated to an inchoate lien arising under state law. United States v. Security Trust and Savings Bank of San Diego, *supra*. Finally, the federal courts have held that, in the event property subject to a federal tax lien is sold for ad valorem taxes, the federal tax lien is converted to a right in or to the surplus proceeds of the tax sale, superior to the rights of the previous record owner (who, incidentally, was not the party liable for the federal tax). Moyer v. Mathas, 332 F.Supp. 357 (S.D. Fla. 1971), *aff'd*, 458 F.2d 431 (5th Cir. 1972). Under these authorities a state statute operating to divest or impair federal rights in the surplus proceeds of a tax deed sale would appear to be violative of the supremacy clause of the federal constitution. Article VI, paragraph 2, United States Constitution.

The foregoing observations and authorities lead me to the conclusion that the application of s. 197.291(2), F. S., in the circumstances aforesaid, may impair constitutionally protected contract and lien or property rights and contravene the Supremacy Clause of the United States Constitution. The statute is presumed to be constitutional, however, and must be complied with until such time as it is judicially declared invalid. Evans v. Hillsborough County, 186 So. 193 (Fla. 1938); White v. Crandon, 156 So. 303 (Fla. 1934). This office has no authority either to declare the statute invalid *vel non* or in its application to the facts delineated in your inquiry, or to advise noncompliance with its direction or mandate.

The clerk of circuit court will have to follow the requirements of s. 197.291(2), F. S., in disbursing the excess proceeds of a tax deed sale *unless* he has reasonable doubts as to its validity in the circumstances specified in the questions posed herein. In that event, however, he has standing to institute legal proceedings to determine the validity of the statute and his duties thereunder. State *ex rel.* Harrell v. Cone, 177 So. 854 (Fla. 1938); State v. Hale, 176 So. 577 (Fla. 1937); White v. Crandon, *supra*. I therefore suggest that, if the clerk is unsure as to the validity of the statute or its application to the property owner and the liens and lienors hereinabove discussed, he bring proceedings for declaratory relief against the property owner and all holders of recorded liens to determine the statute's validity *vel non* or in its application to the property owner and the lienors in question and his duties thereunder.

077-100—September 28, 1977

TAXATION

MILLAGE LIMITATION INAPPLICABLE TO TAXES PLEDGED AS SECURITY FOR BOND ISSUE

To: Josie L. Davis, Jr., Baker County Property Appraiser, Macclenny

Prepared by: Harold F. X. Purnell, Assistant Attorney General

QUESTION:

Would ad valorem taxes levied by the Baker County Hospital District, created by Ch. 28887, 1953, Laws of Florida, be subject to the millage limitation set forth by s. 200.071(1), F. S.?

SUMMARY:

The millage limitations contained in s. 9(b), Art. VII, State Const., and s. 200.071(1), F. S., do not by the express terms of such provisions apply to ad valorem taxes pledged as security for the payment of a bond issue.

The information provided this office in connection with this opinion request discloses that the Baker County Hospital District was created by Ch. 28887, 1953, Laws of Florida, a general law of local application, which was approved by the county electorate. The act provides that the district boundaries are coterminous with the county and authorizes the levy of a "Hospital Tax" of no more than 5 mills on the dollar value of all taxable property in the county. Pursuant to s. 10(b) of the act, the governing board of the district, the hospital authority, certifies to the county commission the amount of millage necessary for the ensuing fiscal year, and the commission "shall be compelled to levy the amount of millage so certified." Finally, the act authorizes the issuance of bonds or revenue certificates secured by a pledge of the "Hospital Tax" or the anticipated revenues to be received by the hospital authority.

Such factual basis, standing alone, is insufficient to take the district outside of the purview of AGO 072-340, in which it was held that the millage limitations of s. 200.071(1), F. S., apply to a countywide hospital district created by an electorate approved special act which expressly provided that the millage limitations of s. 200.071(1) would not be applicable. Such opinion was predicated on s. 11, Art. III, State Const., which prohibits special laws or general laws of local application which pertain to the "assessment or collection of taxes for state or county purposes." Since s. 200.071(1) is a general law providing for uniformity in assessment levels of county ad valorem taxes, the opinion concluded that a special act authorizing an exception to such uniform levels would be "constitutionally inappropriate."

One additional factor, however, not present in AGO 072-340, inures to the instant situation. It is noted that the 5-mill tax levy provided for in Ch. 28887, 1953, Laws of Florida, has been pledged as security for the repayment of a district bond issue. In 1957, the district sold a bond issue secured in whole or in part by the district's ad valorem taxing power. Pursuant to s. 12(b), Art. VII, this bond issue was retired through the issuance and sale of a refunding bond series in 1976. Again the district's ad valorem taxing power has been pledged as security for refund bond issue.

The millage limitations on ad valorem taxes find their constitutional authorization in s. 9(b), Art. VII, which applies said millage limitations to all "[a]d valorem taxes, *exclusive of taxes levied for the payment of bonds*. . . ." (Emphasis supplied.) Further, s. 15, Art. XII, State Const., provides that ad valorem taxing powers vested by law in special districts at the time of adoption of the 1968 Constitution "shall not be abrogated by Section 9(b) of Article VII" but may be restricted or withdrawn by law unless "necessary to pay outstanding debts." Indeed, it appears that s. 200.071, F. S., is a restriction within the contemplation of s. 15, Art. XII. In enacting such restriction, however, the Legislature expressly provided in s. 200.071(1) that:

> . . . no aggregate ad valorem tax millage shall be levied against real and tangible personal property by counties and districts as herein defined in excess of 10 mills on the dollar of assessed value, *except for . . . debt service on obligations issued in connection therewith*, and except for that millage authorized in s. 9, Art. VII of the State Constitution. (Emphasis supplied.)

Further, the Legislature provided in s. 200.181(1), F. S., that:

> None of the provisions of this chapter or of any other law, whether general, special or local or of the charter of any municipality or county, shall limit or restrict the rate or the amount of the ad valorem taxes levied for the payment of the principal of and the interest on any debt service whether secured by revenue certificates or by bonds for which the full faith and credit of any county, municipality or taxing district may be pledged, and such taxes shall be in addition to all other taxes authorized or limited to law.

In the instant matter, it is noted that application of s. 200.071(1), F. S., to the combined county and hospital district levy would leave the hospital district with insufficient funds to satisfy its debt service obligations, which are backed by its 5-mill taxing power. This being so, the aforementioned constitutional and statutory provisions would provide an exception to the millage limitation found in s. 200.071(1) and would authorize the levy of the hospital tax "in addition to all other/taxes authorized or limited by law." Section 200.181(1), F. S.

077-101—September 28, 1977

FLORIDA RETIREMENT SYSTEM

CONFLICT WITH FEDERAL REGULATIONS FOR CETA EMPLOYEES

To: William H. Ravenell, Secretary, Department of Community Affairs, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does state law governing the Florida Retirement System permit the administration of retirement funds in the manner required by Federal Comprehensive Employment and Training Act regulations 29 C.F.R. s. 98.25, effective October 1, 1977?

SUMMARY:

Chapter 121, F. S., the Florida Retirement System, does not permit the administration of retirement funds in the manner required by Federal Comprehensive Employment and Training Act regulations, 29 C.F.R. s. 98.25, effective October 1, 1977.

According to information furnished this office by the Department of Community Affairs, the United States Department of Labor has promulgated a revised regulation, 29 C.F.R. s. 98.25, effective October 1, 1977, in an attempt to ensure that Comprehensive Employment and Training Act (hereafter CETA) funds are not used for retirement programs where CETA participants are not employed long enough to benefit from the retirement program. Under the revised regulation, CETA funds may be paid into retirement systems only in cases where CETA employees derive an actual benefit from such participation. After October 1, 1977, CETA funds may be paid into a retirement system only on behalf of those participants in on-the-job training, work experience, and public service employment in public or private nonprofit agencies who obtain vested rights in the program or unsubsidized employment and retain the retirement benefit. *See* 29 C.F.R. s. 98.25(a)(1)-(3). However, because some states currently require that CETA employees become members of state retirement systems, the regulations permit the regional administration, with the approval of the regional solicitor, to grant an extension of time to a prime sponsor or eligible applicant who is located in a state where state law prohibits the implementation of procedures required by s. 98.25. Such an extension may be granted for not more than 1 calendar year or up to the end of the next regular session of state legislature, whichever occurs first. An extension may be granted only upon a showing by a legally supported opinion of the state attorney general that the legislature must change or modify a particular state law or laws so that the prime sponsor or eligible applicant may comply with s. 98.25 in the case of CETA funds and that the procedures required by s. 98.25 may not be legally implemented by order of the governor or by other executive authority.

Section 121.051, F. S., requires participation in the Florida Retirement System by all officers and employees employed on or after December 1, 1970. As used in Ch. 121, F. S., an officer or employee is defined at s. 121.021(11) as

> . . . any person receiving salary payments for work performed in a regularly established position and, if employed by a city or special district, employed in a covered group.

According to the department, while state-employed CETA participants are considered "OPS—Other Personnel Services" and are not considered filling regularly established positions by the state, many local governmental CETA participants are covered by the definition of officer or employee and are required by state law to participate in the Florida Retirement System, Ch. 121. While coverage of this latter class of local participants is required by state law, the revised federal regulation in question, 29 C.F.R. s. 98.25, conflicts with Ch. 121 in the manner in which administration of the fund is prescribed.

Specifically, Ch. 121, F. S., provides for purchase of retirement credits retroactively only for certain limited types of prior service. *See, e.g.*, ss. 121.08, 121.111, and 121.121, regarding, respectively, contributions for past or prior service, military service, and leaves of absence. The purchase of prior CETA employment credits is not included under the statutes. Further, a covered employee vests membership in the Florida Retirement Service after 10 years of creditable service. Section 121.091(5). If an employee terminates his employment prior to vesting, he is entitled to a refund of contributions he paid, but no provision is made for refund of the employer's contributions. *See* AGO 074-331.

Further, I am unaware of any provision of the Florida Constitution or state statute which would permit the Governor or other executive authority to implement the procedures required by 29 C.F.R. s. 98.25 independent of the Legislature. Attorney General Opinions 075-62 and 076-51. To the contrary, before the procedures outlined in 29 C.F.R. s. 98.25 could be met by the State of Florida, legislative action in the form of amendments to Ch. 121, F. S., would be required.

Your question is, therefore, answered in the negative.

077-102—September 29, 1977

DRIVER'S LICENSES

NONPROFIT CHILD CARE AGENCY MAY SIGN MINOR'S APPLICATION FOR LICENSE

To: Ralph Davis, Executive Director, Department of Highway Safety and Motor Vehicles, Tallahassee

Prepared by: David J. Baron, Assistant Attorney General

QUESTION:

> **May an officer or representative of a licensed nonprofit child care agency that has the care and custody of a person under 18 years of age sign the application of such person for a driver's license pursuant to s. 322.09(1)(a) and (3), F. S., on behalf of such agency and bind the agency instead of the officer or representative that signs on behalf of the agency?**

SUMMARY:

> **A licensed nonprofit child care agency having custody of a minor may sign such minor's application for an instruction permit or operator's license under s. 322.09(1)(a), F. S., if neither parent of such minor is living, if incorporated, or if unincorporated and so provided by its governing charter, contract, constitution, or bylaws, and the execution binds and makes the child care agency if incorporated, and if an unincorporated association, the members thereof, liable under s. 322.09(3), F. S., for any negligence or willful misconduct of such minor applicant and not the authorized individual officer, agent, or representative who signed the application in such capacity for and on behalf of such child care agency.**

Section 322.09(1)(a), F. S., provides:

> The application of any person under the age of 18 years for an instruction permit or operator's license shall be signed by both the father and mother of the applicant, if both are living and have custody of him, or *in the event neither parent is living, then by the person . . . having such custody* . . . who is willing to assume the obligation imposed under this chapter upon a person signing the application of a minor. (Emphasis supplied.)

Section 322.09(3), F. S., provides:

> Any negligence or willful misconduct of a minor under the age of 18 years when driving a motor vehicle upon a highway shall be *imputed to the person* or head of a family *who has signed the application* of such minor for a permit or license, which person shall be jointly and severally liable with such minor for any damages caused by such negligence or willful misconduct. (Emphasis supplied.)

Section 1.01(3), F. S., provides that in construing the Florida Statutes and each word or phrase thereof, where the context permits, the word "person" includes ". . . associations, . . . fiduciaries, corporations, and all other groups or combinations." For the purposes of Ch. 322, F. S., s. 322.01(5) defines "person" to mean "[e]very natural person, firm, copartnership, association or corporation."

A licensed nonprofit child care agency, whether incorporated or an association, is a "person" within the purview of ss. 322.01(5) and 322.09(1)(a) and (3), F. S., because the context permits and, therefore, is authorized (where the association's contract, constitution, or bylaws authorize or permit such action) to sign the application of a minor (any person under the age of 18 years) for an instruction permit or operator's license under s. 322.09(1)(a) and assume liability under s. 322.09(3) for any negligence or willful misconduct of such minor when driving a motor vehicle upon a highway if it has custody of the minor applicant *and if neither parent of such minor is living.*

Such a licensed child care agency if incorporated, and if unincorporated and so provided by its governing contract, constitution, or bylaws, operates through its duly authorized officers, agents, and representatives acting under and as provided for by its charter, constitution, or bylaws. *See, generally,* Covert v. Terri Aviation, Inc., 197 So.2d 12, 13 (3 D.C.A. Fla., 1967); Brown v. Cahill, 157 So.2d 871, 873 (3 D.C.A. Fla., 1963); Mease v. Warm Mineral Springs, Inc., 128 So.2d 174, 179 (2 D.C.A. Fla., 1961); Hunt v. Adams, 149 So. 24, 25 (Fla. 1933). *See also* 19 C.J.S. *Corporations* ss. 993, 999. 7 C.J.S. *Associations* ss. 11, 12, 19, 20. Such minor's application for an instruction permit or operator's license must, of necessity, be executed or signed for such child care agency by such officers, agents, or representatives as authorized by its charter, constitution, or bylaws, and such execution binds and makes the child care agency if incorporated, and if an unincorporated association, the members thereof, the "person" liable under s. 322.09(3), F. S., for any negligence or willful misconduct of such minor applicant and not the authorized individual officer, agent, or representative who signed the application in such representative capacity for and on behalf of such incorporated or unincorporated child care agency.

It should be noted that whoever owns any motor vehicle and consents to a minor operating the same should fully comply with the existing insurance and financial responsibility laws of the State of Florida. However, to the extent that damages caused by the negligence or willful misconduct of any such minor operator exceed such insurance coverage, the licensed child care agency signing the minor's application for an instruction permit or operator's license under s. 322.09(1)(a), F. S., would remain jointly and severally liable with such minor for any damages caused by such negligence or willful misconduct as provided in s. 322.09(3), F. S. The authorized officer, agent, or representative who signed such minor's application when acting in such capacity for and on behalf of the licensed child care agency, pursuant to s. 322.09(1)(a) does not assume, and is not legally charged with, any personal liability because in legal effect it is the licensed child care agency that is the "person" signing the minor's application and assuming the liability imposed under s. 322.09(3), assuming that in the case of an association the contract, constitution, or bylaws of the association so authorizes or permits and the application is signed by the authorized officer or representative in the name of the association and the manner of signing clearly imputes an intention to bind only the association and not the individual agent, officer, or representative personally.

It is a settled rule that where a statute enumerates the things on which it is to operate (here, a person having custody of a minor where neither parent of such minor is living), it impliedly excludes from its operation all things not expressly mentioned, Thayer v. State, 335 So.2d 815, 817 (Fla. 1976), Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, 434 (Fla. 1973), or where it sets forth exceptions (here, in the event neither parent of a minor applicant is living), no other exceptions may be implied to be intended. Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952), Biddle v. State Beverage Department, 187 So.2d 65, 67 (4 D.C.A. Fla., 1966); *also see* Farrey v. Bettendorf, 96 So.2d 889, 893 (Fla. 1957). Moreover, a statutory direction as to how a thing is to be done is, in effect, a prohibition against its being done in any other way. Alsop v. Pierce, 19 So.2d 799, 805-806 (Fla. 1944). Therefore, since s. 322.09(1)(a), F. S., authorizes an incorporated or unincorporated child care agency having custody of a minor to sign the application of a minor for an instruction permit or operator's license *only* when neither parent is living, the statute cannot be construed as permitting such agency to sign a minor's application for an instruction permit or operator's license where either or both parents are living.

In situations where a child care agency has either temporary or permanent custody of a minor and either parent of such child is living, remedial legislation is required to provide for a child care agency to sign such minor's application for an instruction permit or operator's license, because the existing statute does not authorize the agency to sign such application in such situations, nor does it authorize the Department of Highway Safety and Motor Vehicles to issue an instruction permit or operator's license to a minor on an application signed by the agency in such situations. The Attorney General, of course, is without power to rewrite the statute or by construction to add additional exceptions or conditions to include situations where either or both parents are living.

077-103—September 29, 1977

PUBLIC FUNDS

BOARD OF MEDICAL EXAMINERS NOT OBLIGATED TO PAY COSTS OF DEFENDING PERSONS IN LITIGATION ARISING OUT OF TESTIMONY BEFORE THE BOARD

To: George S. Palmer, M.D., Executive Director, Board of Medical Examiners, Tallahassee

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

Is the Board of Medical Examiners or the Department of Legal Affairs authorized or obligated to provide either legal counsel or funds to obtain private counsel to physicians involved in litigation specifically arising from statements made by them during an investigation by the board of the conduct or competence of another physician?

SUMMARY:

Neither the Board of Medical Examiners nor the Department of Legal Affairs is authorized by law to provide legal services for any private person involved in litigation arising from communications made by that person in any disciplinary investigation conducted by the Board of Medical Examiners.

Chapter 458, F. S., the Medical Practice Act, establishes within the Department of Professional and Occupational Regulation the State Board of Medical Examiners and in s. 458.1201 grants authority to the board to conduct disciplinary proceedings against licensed physicians that are found to be unqualified or guilty of misconduct. In particular, s. 458.1201(2)(d) provides:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, the board, its agents, its employees, or any organization or its members identified in paragraph (1)(p) for any statements made by them in any reports or communications concerning an investigation of the conduct or competence of a physician.

Paragraph (1)(p) of s. 458.1201, F. S., identifies the organizations included under the immunity provision to include "any professional medical association, society, professional standards review organization . . . or similarly constituted professional body, whether or not such association, society, organization, or body is local, regional, state, national, or international in scope . . . ."

The basic premise is that public funds may be expended only as authorized by law. Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied,* 237 So.2d 530 (Fla. 1976); AGO's 071-28, 075-120, and 077-8. The Legislature exercises exclusive powers in determining how, when, and for what purpose moneys should be applied in conducting the government. State v. Lee, 163 So. 859 (Fla. 1938); State v. Green, 116 So. 66 (1928). In AGO 074-192, I observed:

> Thus, it is clear that, *if available and properly budgeted and appropriated,* public funds may be expended in proper circumstances to defend public officials against damage suits arising out of the performance of their public duties. [Emphasis supplied.]

Later, in AGO 075-39, I reiterated that public funds could be expended to defend a public official in a damage suit arising from his official actions if funds were available and appropriated. Within that opinion, I noted:

> Section 20.11(3), F. S. [transferred and renumbered s. 16.015, F. S., by s. 2 of Ch. 77-105, Laws of Florida] provides that the Department of Legal Affairs shall provide all legal services for any state department unless otherwise provided by law, or a professional conflict exists.

Section 16.015, F. S. 1977, now provides:

> The Department of Legal Affairs shall be responsible for providing all legal services required by any department, unless otherwise provided by law. However, the Attorney General may authorize other counsel where emergency circumstances exist and shall authorize other counsel when professional conflict of interest is present.

Relevant to consideration of your question are several legislative enactments specifying situations in which the state may provide legal representation to officers and employees. Section 111.07, F. S., authorizes agencies of the state, under certain circumstances, to defend officers and employees in negligent tort actions arising out of and in the scope of their officers' or agents' employment. Likewise, s. 111.06, F. S., authorizes the state agencies to provide for and pay for the defense of wardens and deputy sheriffs in civil suits arising from the performance of their duties. Finally, s. 111.065, F. S. (1976 Supp.), authorizes the payment, by municipalities or state political subdivisions, of legal costs and attorney's fees incurred by law enforcement officers.

The question presented here concerns legal representation of private persons who have assisted the board in the conduct of an investigation of a licensed physician and does not relate to the board's authority to employ counsel for representation of a member or employee of the board in a legal proceeding arising from a board investigation. Accordingly, I conclude there is no specific authority authorizing the Board of Medical Examiners or the Department of Legal Affairs to provide legal services for private persons, notwithstanding the immunity clause existing in the disciplinary provisions of the Medical Practice Act. The private physicians to whom your question relates are neither officers nor employees of the Board of Medical Examiners and, hence, are not included under the provisions of s. 111.07, F. S. Neither are they within the specifically mentioned groups covered by ss. 111.06 or 111.065, F. S.

As the foregoing discussion indicates, public funds may be used to defend a public official in a civil suit only if the funds are properly available and appropriated. Considering your question as relating to private persons, and lacking any specific statutory authority authorizing the expenditure of and appropriations of public funds for the defense of such persons, your question is answered in the negative.

077-104—September 29, 1977

PUBLIC DEFENDER

ASSISTANT PUBLIC DEFENDER MAY ASSOCIATE WITH LAW FIRM UNDER STATED FACTUAL CIRCUMSTANCES

To: Louis O. Frost, Jr., Public Defender, Jacksonville

Prepared by: Raymond L. Marky, Assistant Attorney General

QUESTION:

May an assistant public defender have a relationship with an existing law firm under certain specific and unique facts?

SUMMARY:

An assistant public defender may have a relationship with an existing law firm under certain specific and unique facts.

Your question is answered in the affirmative.

It is my understanding that: The part-time assistant public defender will be a partner in a law firm which has offices in two cities located in separate counties, to-wit: Jacksonville, in Duval County, and Fernandina Beach, in Nassau County; the part-time public defender resides in and will work exclusively in the Fernandina Beach, Nassau County, office and his duties as assistant public defender will be limited to Fernandina Beach and Nassau County; no partner or associate in the Fernandina Beach, Nassau County, office will practice criminal law in the state or federal courts; no partner or associate in the Jacksonville, Duval County, office will practice criminal law in the state courts in Fernandina Beach and Nassau County, nor will they handle criminal cases in the federal courts for clients who reside in Nassau County or for clients when the cause of action accrues or takes place in Nassau County; the offices in Jacksonville, Duval County, and Fernandina Beach, Nassau County, each maintains its own separate banking and trust accounts in its respective city, and no funds are divided in a general fashion; the two offices do not and will not share space, bank accounts, books, clients, or fees except when the clients or fees are connected with *civil* matters in which partners or associates from both offices contribute their time and effort.

Section 27.51(3), F. S., as amended by Ch. 72-327, Laws of Florida, requires assistant public defenders to give priority and preference to their official duties and authorizes them to engage in the private practice of law "only to the extent that it will not interfere with or prevent performance of their duties as assistant public defenders. . . ." As noted in AGO 069-108, an assistant public defender may not engage in the private practice of criminal law, either alone or in partnership with another who does engage in this type of practice. However, based upon these unique facts it would appear that there would be no benefit whatever to the out-of-town partners because of the relationship by this individual with the public defender's office.

The spirit and intent of the law is obeyed because of the separateness of activity and responsibility and division geographically by these relationships. Any improper effect would be de minimus because of the inconsequential relationship among the parties herein as described by the unique factual situation and has little or no effect as anticipated by the passage of s. 27.51(3).

As is discussed in AGO 072-208, certain circumstances are allowable under this statute. Thus, based upon the unique factual situation, I find that one attorney does not serve as the agent for the other in that there is an absence of agency by the separateness of these relationships. Therefore, I find nothing to prohibit this assistant public defender from serving based upon the unique facts as set out herein.

077-105—September 29, 1977

TAXATION

MULTICOUNTY DISTRICT—AGENCY OF STATE—METHOD OF LEVYING TAX

To: Richard M. Cowen, Attorney, and Rick Schmidt, Chairman, Sebastian Inlet Tax District Board of Commissioners, Melbourne

Prepared by: Patricia S. Turner, Assistant Attorney General, and Gary Preston, Legal Research Assistant

QUESTIONS:

1. Is the Sebastian Inlet Tax District a "governmental unit of Brevard County"?

2. Do the provisions of s. 200.065, F. S., govern the procedures whereby the Sebastian Inlet Tax District establishes its budget, adopts its budget, and levies a tax on the real property within said district for the fiscal year 1977-1978?

SUMMARY:

The Sebastian Inlet Tax District, a multicounty taxing agency, is a governmental agency of the state for certain definite purposes, and not a governmental unit of Brevard County. Therefore, Ch. 74-430, Laws of Florida, an act relating to Brevard County and local governments therein, does not apply to such multicounty taxing authority. Section 200.065, F. S., sets out the procedures by which a multicounty taxing authority, such as the Sebastian Inlet Tax District, establishes and adopts its budget and levies a tax on the real property within its boundaries.

Question 1 is answered in the negative, and question 2 is answered in the affirmative.

AS TO QUESTION 1:

The authority of the Legislature to create special taxing districts is inherent in its power to tax. Pinellas County v. Mosquito Control District of Pinellas County, 194 So.2d 596 (Fla. 1967); State v. Board of County Com'rs of Indian River County, 138 So. 625 (Fla. 1931); 31 Fla. Jur. *Taxation* s. 39 (1974). The Sebastian Inlet Tax District was created by Ch. 7976, 1919, Laws of Florida; as amended by Ch. 12259, 1927, Laws of Florida; Ch. 22891, 1945, Laws of Florida; and Ch. 76-329, Laws of Florida. The district is comprised of certain lands in Brevard County and Indian River County and is, therefore, a "multicounty taxing authority."

Your first question was prompted in part by the fact that the Sebastian Inlet Tax District levied no taxes for the years 1976 and 1977, but now requires funds for the 1977-1978 fiscal year to be raised by an ad valorem tax levy. However, Ch. 74-430, Laws of Florida, imposes upon "[a]ll governmental units of Brevard County" the following requirement:

> If the ad valorem tax revenues for the proposed budget of a governmental unit for operating funds exceeds by 10 percent the ad valorem tax revenues for operating funds of the preceding year exclusive of the revenues to be raised from new construction and improvements not appearing on the previous year's assessment roll, then the governmental unit shall submit the following question to a referendum of the registered voters within that governmental unit, to-wit:
>
> Shall the budget of (insert name of governmental unit) be final as approved by the governing body?

Hence, it must be initially determined whether Ch. 74-430 is applicable to the Sebastian Inlet Tax District.

The question of whether the Sebastian Inlet Tax District is a "governmental unit of Brevard County" for the purposes of Ch. 74-430 is governed by the rationale of my previous opinion in AGO 074-28. That opinion discussed the South Lake Worth Inlet District, a special taxing district created by Ch. 7080, 1915, Laws of Florida, and the applicability of Chs. 71-14 and 73-129, Laws of Florida, governing home rule powers of counties and municipalities.

The purpose of creating the South Lake Worth Inlet District was to ". . . carry out a restricted, specialized governmental function . . . and not for general community government." Attorney General Opinion 074-28. Said district was further described as:

> . . . an autonomous, separate legal entity created by statute. It is headed by an elective governing body which is independent and separate from any county or municipal government. The district is a *governmental agency of the state* for certain definite purposes having only such authority as is delegated to it by law. . . . The South Lake Worth Inlet District is neither a county, a municipality, nor an agency thereof. [Attorney General Opinion 074-28; emphasis supplied.]

The Sebastian Inlet Tax District was created to ". . . construct and maintain an Inlet between the Indian River and the Atlantic Ocean . . . " for the purpose of ". . . shipping . . . transportation and . . . extension of commerce . . . " and is governed by an elective body. Chapter 7976, 1919, Laws of Florida.

Since the Sebastian Inlet Tax District and the South Lake Worth Inlet District are substantially similar in nature, powers, and functions, it appears that, for the purposes of this opinion, the Sebastian Inlet Tax District is also a "governmental agency of the state," and not a governmental unit of Brevard County. *See also* AGO 071-95, in which I stated that special districts ". . . are not a part of but are in place of county government."

In support of the above reasoning, the Supreme Court of Florida in Forbes Pioneer Boat Line v. Board of Com'rs, 82 So. 346, 350 (Fla. 1919), described the Everglades Drainage District as a ". . . public quasi corporation, and, as such, a governmental agency of the state for certain definite purposes . . . ."

Moreover, as a multicounty agency, the Sebastian Inlet Tax District does not operate in Brevard County alone. Chapter 74-430, Laws of Florida, is a local or special act relating to, and operating solely in, Brevard County and local governments therein. It has no operative force in Indian River County or in the Sebastian Inlet Tax District's operations or taxing power in Indian River County. Our State Constitution also requires that ad valorem taxation be at a uniform rate throughout a taxing district. Section 2, Art. VII, State Const. *Cf.* Williams v. Jones, 326 So.2d 425, 430 (Fla. 1975).

Based upon the foregoing authority, it appears that, for the purposes of Ch. 74-430, Laws of Florida, the Sebastian Inlet Tax District is a governmental agency of the state and not a governmental unit of Brevard County. As such, the district's government, taxation, and procedures cannot be bifurcated, and the referendum requirement contained in Ch. 74-430 is not applicable to such multicounty district. *Cf.* s. 200.111, F. S., excluding multicounty districts from the operation of s. 200.071, F. S.

AS TO QUESTION 2:

Since the referendum requirement of Ch. 74-430, Laws of Florida, does not apply to the Sebastian Inlet Tax District, your second question is answered in the affirmative. Section 200.065(9), F. S., specifically states:

> Multicounty taxing authorities shall be subject to the provisions of this section.
>
> . . . This section shall not apply to any multicounty taxing authority wherein the district or board is limited by law to ad valorem tax revenues based on separate levies of one mill or less.

Chapter 76-329, Laws of Florida, enables the Sebastian Inlet Tax District to levy a special tax not exceeding 1½ mills, thereby bringing the district within the purview of s. 200.065(9), F. S.

The necessary procedures establishing the method for fixing the millage rate based upon a proposed increase in ad valorem tax revenues over the previous year by a multicounty taxing authority are set forth in s. 200.065(2), F. S. In summary, the guidelines found in s. 200.065, F. S., are as follows: The multicounty taxing authority must receive a certified millage from the Executive Director of the Department of Revenue; the taxing authority must finalize the budget for the district; the taxing authority must advertise its intent to increase the millage in a newspaper of general circulation in the county or mail a copy of the notice to each elector within the jurisdiction of the taxing authority; approximately 7 days subsequent to the first advertisement, a public hearing must be held to discuss the planned millage increase; after the first public hearing, the proposed increase must be readvertised and approximately 2 weeks later the taxing authority must meet again to adopt a resolution levying the millage rate; a copy of the adopted resolution must be forwarded to the property appraisers of both counties, the tax collectors of both counties, and the Department of Revenue.

Since the district cannot exceed the taxing authority conferred upon it by the Legislature, the maximum tax that the district can levy is 1½ mills. Chapter 76-329, Laws of Florida.

077-106—September 29, 1977

TAXATION

VALUATION OF PROPERTY NOT COMMONLY BOUGHT AND SOLD—PROCEDURES

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: Harold F. X. Purnell, Assistant Attorney General

QUESTIONS:

1. Would it be proper for a property appraiser, in situations where there is insufficient market activity on similar properties to establish a market value for such properties (as where similar properties are not commonly bought and sold), to reassess a particular piece of property on which a verified sale has occurred by applying the following formula to the property sold:

$$\frac{\textbf{Net Sales Price} + \textbf{Previous Assessed Value}}{2} = \textbf{New Assessed Value?}$$

2. Where a single verified sale has occurred on property which is not commonly bought and sold, may the property appraiser in his discretion use net sales price alone to reassess that particular property?

SUMMARY:

A formula which derives just value by averaging the net sales price of a verified sale of property which is not commonly bought and sold and the previous year's assessed value would not legally comply with the requirements of s. 193.011, F. S. 1977. Net sales price alone of a verified sale may not be utilized as constituting just value where similar property is not commonly bought and sold, since utilization of net sales price without considering and weighing other factors would not legally comply with the requirements of s. 193.011. Just value is to be determined by giving careful consideration to each of the factors contained in s. 193.011 and by giving such weight to a factor as a particular factual situation may justify.

We must approach the questions presented with the view that "the appraisal of real estate is an art, not a science," Powell v. Kelley, 223 So.2d 305, 309 (Fla. 1969), and that "the tax assessor is, of necessity, provided with great discretion due to the difficulty in fixing property values with certainty." District School Board of Lee County v. Askew, 278 So.2d 272, 276 (Fla. 1973). Additionally, in Osborne v. Yeager, 155 So.2d 742, 743 (2 D.C.A. Fla., 1963), it was noted:

> For purposes of taxation, the value of property is determined by taking into account all favorable and unfavorable circumstances that would control the admeasurement of its present market value were it placed on the market to be sold by the owner. If similar property is commonly bought and sold, the price which it brings is the best test of value. But where an established market is nonexistent, the process of valuation must comprehend not only one but all of the influencing factors going to make up the intrinsic value. Formulae may be authorized as a detail of the method of arriving at the ultimate conclusion as to value, but valuation for tax purposes does not depend on matters of formulae alone.

Finally, in Lanier v. Walt Disney World Company, 316 So.2d 59, 62 (4 D.C.A. Fla., 1975), it was noted:

> In discussing the factors as set forth in F. S. 193.011 the assessor was of the opinion that he was not obliged under the law to give each factor equal weight. *The court agrees with this interpretation provided each factor is first carefully considered and such weight is given to a factor as the facts justify.*

With these factors in mind, it can readily be seen that the above two questions must be answered in the negative. While this office is not qualified to render advice on the art of real estate appraising, the formula stated in question 1 and the use of net sales price alone in question 2 are legally insufficient to constitute compliance with the mandate of s. 193.011, F. S., as amended by Ch. 77-363, Laws of Florida, which delineates the factors which must be taken into consideration in deriving the just valuation of a parcel of real property. Additionally, the methods of valuation comprehended by questions 1 and 2 run afoul of the general principles as to evaluation enunciated in the above-cited case of Osborne v. Yeager, *supra. See also* Hillsborough County v. Knight and Wall Company, 14 So.2d 703 (Fla. 1943).

This method of achieving just valuation on parcels of real property is statutorily delineated in s. 193.011, F. S. 1977, and such factors must be considered and weighed according to the factual situation presented. Lanier v. Walt Disney World Company, *supra.*

077-107—October 4, 1977

DRUGS

ACT AUTHORIZING PRESCRIPTION OF LAETRILE—DOES NOT AFFECT DUTIES UNDER CH. 500 TO SAFEGUARD PUBLIC FROM HARMFUL DRUGS

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

Prepared by: Charles S. Ruberg, Assistant Attorney General

QUESTION:

Does Ch. 77-30, Laws of Florida, supersede the provisions of Ch. 500, F. S., so as to permit the marketing of laetrile, or any new drug, in the State of Florida?

SUMMARY:

Chapter 77-30, Laws of Florida, does not supersede the provisions of Ch. 500, F. S., regarding the marketing of laetrile (amygdalin). The applicable rule of statutory construction requires this conclusion because the two enactments have different fields of operation. In the absence of a specific factual context, opinions or comments as to the application of Florida or federal law to the usage, manufacture, or marketing of laetrile (amygdalin) are unwise.

Chapter 77-30, Laws of Florida, creates ss. 458.24 and 459.24, F. S., within Ch. 458, F. S., relating to the licensing of and practice by medical doctors within this state, and Ch. 459, F. S., relating to the licensing of and practice by osteopathic physicians in this state, to read identically as follows:

> (1) No physician licensed under Chapter 458 or 459, Florida Statutes, shall be subject to disciplinary action by the State Boards of Medical Examiners and Osteopathic Medical Examiners for prescribing or administering amygdalin (laetrile) to a patient under his care who has requested the substance unless the State Boards of Medical Examiners and Osteopathic Medical Examiners, in a hearing conducted under the provisions of the Administrative Procedure Act, chapter 120, Florida Statutes, has made a formal finding that the substance is harmful.
>
> (2) The patient, after being fully informed as to alternative methods of treatment and their potential for cure and upon request for the administration of amygdalin (laetrile) by his physician, shall sign a written release, releasing the physician and, when applicable, the hospital or health facility from any liability therefor.
>
> (3) The physician shall inform the patient in writing that amygdalin (laetrile) has not been approved as a treatment or cure by the Food and Drug Administration of the United States Department of Health, Education and Welfare.

Chapter 77-30, Laws of Florida, also creates s. 395.066, F. S., within Ch. 395, F. S., relating to hospital licensing and regulation, to read:

> No hospital or health facility shall interfere with the physician-patient relationship by restricting or forbidding the use of amygdalin (laetrile) when prescribed or administered by a physician licensed under chapter 458 or 459, Florida Statutes, and requested by a patient unless the substance as prescribed or administered by the physician is found to be harmful by the State Boards of Medical Examiners and Osteopathic Medical Examiners in a hearing conducted under the provisions of the Administrative Procedure Act, chapter 120, Florida Statutes. Furthermore, no hospital or health facility shall remove the staff privileges of a physician solely because said physician prescribed or administered amygdalin (laetrile) to a patient under the conditions set forth in this act.

It is clear from the language of Ch. 77-30, Laws of Florida, and from its title, *i.e.*,

> An Act relating to *prescription and administration of laetrile*; prohibiting hospitals and health facilities from interfering with the physician-patient relationship by restricting use of amygdalin (laetrile); providing conditions; providing for written release; providing for disclosure by the physician; providing an effective date. (Emphasis supplied.)

that this enactment was intended to have a particular field of operation. More specifically, it operates within the context of the physician-patient relationship by providing protections for those physicians described within the act who may determine that it is appropriate to administer or prescribe a particular substance, *i.e.*, amygdalin

(laetrile), to a patient after otherwise complying with the conditions imposed by the enactment.

On the other hand, Ch. 500, F. S., the Florida Food, Drug and Cosmetic Law, has a much broader field of operation. It is an overall statutory scheme intended, *inter alia*:

> (1) To safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use and the purchasing public from injury by merchandising deceit, flowing from intrastate commerce in food, drugs, devices, and cosmetics . . . . [Section 500.02(1), F. S.]

There is some connection between the two enactments, since laetrile (amygdalin) is a drug which could be marketed through intrastate commerce. Nevertheless, I conclude that the acts cover different fields and, therefore, under a long-established rule of statutory construction, the latter enactment 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. *See* Scott v. Stone, 176 So. 852, 853 (Fla. 1937).

There can be no repugnancy between the statutory provisions under examination here, because Ch. 77-30, Laws of Florida, does not in any way address itself to the circumstances under which a physician may lawfully obtain laetrile (amygdalin) for the purpose of administering it to a patient, nor to the circumstances under which a patient may obtain it, upon its being prescribed by a physician.

Consequently, your inquiry must be answered in the negative. Chapter 77-30, Laws of Florida, does not supersede the provisions of Ch. 500, F. S. Therefore, laetrile (amygdalin) may not be marketed in the State of Florida unless there is compliance with all applicable provisions of Ch. 500, F. S. In other words, with respect to the requirements of Ch. 500, F. S., laetrile (amygdalin) is in no different posture than any new drug.

As noted above, your letter presents the apparent position of your department that ss. 500.16 and 500.341(6), F. S., prohibit the marketing of laetrile in the absence of a superseding effect from Ch. 77-30, Laws of Florida. I refrain from commenting upon your construction and interpretation of those statutes for the following reasons.

It is a well-established legal doctrine that, with respect to statutes administered by a public agency, the views of the administrator merit great weight on the basis of the special expertise of the agency, Brennan v. General Tel. Co. of Florida, 488 F.2d 157 (5th Cir. 1973). In addition, your letter presented no factual circumstances nor description of hypothetical or proposed conduct by any person upon which a legal analysis could be made and an opinion offered with respect to the application of the appropriate provisions of Ch. 500, F. S.

Since there is an ongoing public and scientific debate regarding the usage of laetrile (amygdalin), and pending legal proceedings in regard to various aspects of this debate, I believe it unwise to offer opinions or comments as to the applicability of the Florida Food, Drug, and Cosmetics Law, or analogous federal legislation in the absence of a specific factual context.

077-108—October 18, 1977

WITNESSES

POLICE OFFICERS—COMPENSATION FOR APPEARING DURING OFF-DUTY HOURS

To: Paul Mannino, Chief of Police, Lighthouse Point

Prepared by: Sharyn L. Smith, Assistant Attorney General and Frank A. Vickory, Legal Research Assistant

QUESTIONS:

1. May a municipality direct its police officers appearing in court off duty to obtain subpoena fees under s. 90.141, F. S., and require them to

remit such fees to the city and in return pay the officers overtime as a result of such off-duty appearance?

2. May a municipality in such situation direct its officers to obtain and retain such fees as permitted by statute and then pay them the difference between such fee and the off-duty overtime pay that would be received but for the witness fee?

SUMMARY:

A police officer who appears as a witness off duty during time not compensated as a part of his normal duties may receive and retain the daily witness pay authorized by s. 90.14, irrespective of any local scheme providing additional compensation for the officer.

Your questions appear to arise from the following fact situation. The Lighthouse Point Police Department pays an officer overtime pay at a minimum rate of 2 hours at time-and-a-half his normal rate when such officer appears in court outside his regularly scheduled duty assignment. This system of compensating for court appearances established by your department is independent of the statutory scheme set forth to compensate witnesses by ss. 90.14 and 90.141, which provide as follows:

> 90.14 **Witnesses; pay.**—Witnesses in all cases, civil and criminal, in all courts, now or hereafter created, and witnesses summoned before any arbitrator or master in chancery shall receive for each day's actual attendance $5 and also 6 cents per mile for actual distance traveled to and from the courts.

> 90.141 **Law enforcement officers; per diem, expenses; witnesses, pay.**—Any law enforcement officer of any municipality, county or the state who shall appear 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 shall be entitled to per diem and traveling expenses at the same rate provided for state employees under s. 112.061. In addition thereto, such officer shall be entitled to receive the daily witness pay, exclusive of the mileage allowance, as provided by s. 90.14, except when such officer is appearing as a witness during time compensated as a part of his normal duties.

Your questions specifically address the situation in which the officer serves as a witness at a time not compensated as part of his normal duties; *i.e.*, when he is appearing in court at a time outside his regularly scheduled duty assignment. Section 90.141 clearly requires that the officer receive the daily witness pay provided in s. 90.14. Your own procedures for paying time-and-a-half overtime are independent of and may not supplant the scheme provided for by a state statute of uniform, statewide application and which authorizes no local alternatives to its application. On the other hand, there appears to be no prohibition against a municipality's provisions of *additional* compensation when an officer makes an off-duty appearance.

In answer to your first question, it seems to me that an officer appearing in court "off duty" or not receiving compensation "as a part of his normal duties" is entitled to receive the daily witness pay, regardless of any locally devised compensation scheme. Hence, you may not require that officers remit their witness fees to the city in return for overtime pay received. Answering your second question, however, it seems that if the city wishes to employ a method by which an *additional* amount, however calculated, is paid to officers making such appearance, it may do so. Hence, there is no prohibition against your paying an amount over and above the witness pay calculated, as you suggest, as the difference between the witness fee and the amount that would be received at time-and-a-half the normal salary paid.

077-109—October 18, 1977

ELECTIONS

SUPERVISOR OF ELECTIONS' DUTY TO REGISTER MUNICIPAL ELECTORS—WHEN BRANCH OFFICES PERMISSIBLE

To: H. Jerome Davis, Manatee County Supervisor of Elections, Bradenton

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is a supervisor of elections required to register qualified electors of a municipality, where a charter provision of that municipality stipulates that the city clerk must register such electors?

SUMMARY:

The permanent single registration system established by s. 98.041, F. S., is binding upon all municipalities regardless of size. The terms of s. 98.041 require that all qualified municipal electors be registered in pursuance of this system by the supervisor of elections or the deputy supervisors of elections. The Legislature has preempted the field of voter registration; thus a municipal charter provision requiring that the city clerk register municipal electors has been superseded by general law. The supervisor of elections is not required to establish permanent branch offices or to maintain a set of indexes or records or provide registration services to the electors in municipalities of less than 25,000 persons; qualified electors who are residents of such municipalities may register at the office of the supervisor of elections or at permanent branch offices at which a deputy supervisor is on duty.

Your question is answered in the affirmative.

Your letter indicates that it is your understanding that the charter of the City of Palmetto requires the city clerk to register electors of the city. For purposes of this opinion, I am assuming the existence of such a requirement.

Section 98.041, F. S., provides:

> A permanent single registration system for the registration of electors to qualify them to vote in all elections is provided for the several counties and municipalities. *This system shall be put into use by all municipalities prior to January 1, 1974, and shall be in lieu of any other system of municipal registration. Electors shall be registered in pursuance of this system by the supervisor or by precinct registration officers.* . . . (Emphasis supplied.) [Under former s. 98.271, F. S. 1953, supervisors of elections were authorized to appoint both deputy supervisors of elections and "as many precinct registration officers for each precinct as may be necessary . . . who shall register electors in the precincts." This section was amended by s. 19, Ch. 65-134, Laws of Florida, to delete all reference to the appointment of precinct registration officers. Thus, s. 98.041, F. S., should be read so as to require the registration of electors by the supervisors of elections or by deputy supervisors of elections. The Legislature has recently amended s. 98.041 to reflect this conclusion by striking "precinct registration officers" and substituting "a deputy supervisor." Section 5, Ch. 77-175, Laws of Florida, effective January 1, 1978.]

Section 98.091(3), F. S., in pertinent part provides that any person who is a duly registered elector pursuant to Ch. 98, F. S., "and who resides within the boundaries of a municipality" is qualified to participate in all municipal elections, the provisions of special acts or local charters notwithstanding. (Section 5 of Ch. 77-175, effective January 1, 1978, adds to s. 98.091(3) the express provision that "[e]lectors who are not registered under the permanent registration system shall not be permitted to vote.") Section 166.032, F. S., conforms with the permanent single registration system established by Ch.

98 by providing that any person who is a resident of a municipality, who has qualified as an elector of this state, "and who registers in the manner prescribed by general law . . . shall be a qualified elector of the municipality."

See also s. 98.051, F. S., providing where relevant that "[a]pplication for voter registration shall be accepted each weekday in the office of supervisor and at all permanent branch offices at which a deputy supervisor is on duty. . . ."

The several statutes cited above insofar as they relate to the permanent single registration system are *in pari materia* and must be construed together in order to ascertain the legislative intent or purpose so as to harmonize their respective provisions and roles in the legislative scheme. Markham v. Blount, 175 So.2d 526 (Fla. 1965); State *ex rel.*, McClure v. Sullivan, 43 So.2d 430 (Fla. 1950); Curry v. Lehman, 47 So. 18 (Fla. 1908). So construing the aforementioned statutes, it seems clear that the Legislature intended the permanent single registration system mandated by s. 98.041, F. S., to be binding upon all municipalities regardless of size. *See* Richey v. Town of Indian River Shores, 337 So.2d 410 (4 D.C.A. Fla., 1976); *also see* AGO 074-90. And it is equally clear that the office of the supervisor of elections is responsible for registering municipal electors pursuant to such system.

In Town of Indian River Shores v. Richey, 348 So.2d 1 (Fla. 1977), on writ of certiorari to the District Court of Appeal, Fourth District, the Supreme Court found that irreconcilable conflict existed between the general law establishing the permanent single system of voter registration (Ch. 73-155, Laws of Florida) and a municipal charter provision governing municipal elector qualifications and held that the Legislature intended for the general law to repeal the charter provisions. *Accord*: Attorney General Opinion 073-484. This decision applies with equal force to a charter provision requiring the city clerk to register the electors of the city.

Similarly, in AGO 073-426, I concluded that, with the adoption of the permanent registration system (Ch. 73-155, Laws of Florida), the "Legislature has preempted local authority in matters of voter registration." *Cf.* AGO's 071-330 and 073-345 regarding the state preemption of the regulation of campaign financing in municipal elections. Thus, as stated in AGO 073-426, "special acts and charter provisions shall not prevail over the general election laws of this state relating to the registration of electors in this state qualified to vote in municipal elections." *See also* s. 166.021(3)(c), F. S., providing that a municipality is empowered to enact any legislation concerning any matter upon which the State Legislature may act except, *inter alia*, any subject "expressly preempted to state or county government . . . by general law."

Accordingly, a municipal charter provision which purports to require the city clerk to register municipal electors has been superseded by the provisions of s. 98.041, F. S., establishing the permanent single registration system and requiring the supervisor of elections or deputy supervisors of elections to register all qualified electors of any municipality.

In reaching the foregoing conclusion, I am not unaware of s. 98.181, F. S., to which you refer in your letter. That section requires the supervisor of elections to keep a set of "indexes or records" as the supervisor may direct in cities with a population in excess of 25,000 (when any such city is not the county seat) as will enable the supervisor to provide "all of the services to the electors in such city as are provided by the supervisor at the supervisor's office at the county seat." Presumably, an office established pursuant to s. 98.181 would be designated by the supervisor as a "permanent branch office" at which voter registrations must be accepted. *See* s. 97.021(19), F. S., defining "permanent branch office" as "a substantial structure, fixed or movable, or a motor vehicle, bus, or other mobile units, in which voter registration will be accepted, which office and location shall be designated by the supervisor."

In your letter you note that the population of the City of Palmetto is under 25,000; therefore, you imply that the supervisor is not required, by the terms of s. 98.181, to *register* electors residing in a municipality with a population of less than 25,000. Such a conclusion is inconsistent with the meaning of the subject statute. Section 98.181 merely requires the supervisor to establish an *office* and maintain the designated records in certain municipalities and to provide registration services to the electors of any such municipality *at such location*; s. 98.181 in no way mitigates or otherwise qualifies the duty of the supervisor or of deputy supervisors of elections to *register* qualified electors of *any and all* municipalities regardless of the size thereof. Such electors may register at the office of the supervisor of elections or at permanent branch offices designated by such supervisor at which a deputy supervisor of elections is on duty. (*See* s. 98.271, F. S., as

to appointment of deputy supervisors, and s. 5 of Ch. 77-175, Laws of Florida, effective January 1, 1978.)

077-110—October 18, 1977

PUBLIC LANDS

PRIVATE LANDS SUBJECT TO GOVERNMENTALLY HELD EASEMENTS NOT "PUBLIC LANDS"

To: D. Byron King, Attorney for Florida Inland Navigation District, Rivera Beach

Prepared by: J. Kendrick Tucker, Assistant Attorney General

QUESTION:

Are lands owned by private entities and imposed with the following easements held by governmental entities:
Perpetual Easements. These run for an unlimited period and do not contain provisions for termination at the option of the grantor. These are usually for rights-of-way and maintenance spoil areas;
Temporary Easements. These generally expire on a stated date and are usually used for construction projects;
Contingent Easements. These generally run for an indefinite period and expire upon achievement of certain conditions, *i.e.* spoil deposits reaching a specified average elevation, etc.;
Revocable Easements. These generally run for an indefinite period but contain provisions whereby the grantor may revoke the easement;
Substitutive Easements. These may run for an unlimited period but contain provisions whereby the grantor may provide substitute lands and thereby secure a release for those lands initially given in the easement;
Easements which combine features of two or more of the above, with modified conditions set out therein;

"public lands" within the meaning of s. 253.03(9), F. S.?

SUMMARY:

Lands owned by private entities and imposed with various easements held by governmental entities are not "public lands" within the ambit of s. 253.03(9), F. S., so as to be eligible for deposit of dredged materials from sovereignty lands without payment for such materials. Such lands are simply privately owned lands subject to governmentally owned easements.

Section 253.03(9), *supra*, initially provides that the State of Florida is prohibited from levying any charges for dredged materials from sovereignty lands, except as enumerated, when the materials are dredged by or on behalf of the United States for federal navigation projects. Dredged materials to be placed on private lands or dredged materials placed on public lands which lands are sold or leased are subject to charges by the State of Florida. Section 253.03(9) provides in pertinent part with respect to "public lands" as follows:

> (a) No materials dredged from state-sovereignty tidal or submerged bottom lands by a public body shall be deposited on private lands until:
> 1. The United States Army Corps of Engineers shall first have certified that *no public lands* are available within a reasonable distance of the dredging site, and
> 2. The public body shall have published notice of its intention to utilize certain private lands for the deposit of materials . . . and therein advised the general public of the opportunity to bid on the purchase of such materials for deposit on the purchaser's designated site, provided any such deposit shall be at no increased cost to the public body. . . .
> (b) When *public lands* on which are deposited materials dredged from state-sovereignty tidal or submerged bottom lands by the public body, are sold or leased for a period in excess of 20 years . . . 50 percent of any remuneration received shall forthwith be remitted to the Trustees of the Internal Improvement Trust Fund and the balance shall be *retained by the public body owning the land.*
> (c) Any materials which have been dredged from state-sovereignty tidal or submerged bottom lands by the public body and deposited *on public lands* may be removed by the public body to private lands or interests only after due advertisement for bids . . . . If no bid is received, the public body shall have the right to fully convey title to, and dispose of, any such material *on its land,* with no requirement of payment to the Trustees of the Internal Improvement Trust Fund. (Emphasis supplied.)

Thus, prior to depositing dredged materials from sovereignty lands on private lands, the Corps of Engineers must have first certified that no "public lands" are available and the sale of such materials must be submitted to bid, and when "public lands," on which are deposited dredged materials, are to be leased or sold, half of the proceeds go to the Trustees of the Internal Improvement Trust Fund (Department of Natural Resources) and half to the public body owning the land. Furthermore, dredged materials deposited on "public lands" are to be sold pursuant to public bids if sold to private entities.

Ordinarily the term "public lands" means lands belonging to or in the ownership of the United States or individual states or governmental entities.

> The terms "public lands" and "public domain" are usually regarded in the United States as being synonymous. These terms are habitually used in this country to designate lands *belonging to* the United States or to individual states *that are subject to sale or other disposal* under the general laws. [26 Fla.Jur. *Public Lands* s. 2, p. 9; emphasis supplied.]

In my opinion the term "public lands" is employed similarly in s. 253.03(9), *supra*, to mean lands actually belonging to or in the ownership of the State of Florida or some other governmental unit. This conclusion is especially compelling since s. 253.03(9) in certain instances requires payment for dredged materials from "public lands" to the "public body owning the land" and allows in certain instances waiver of payment by a public body for certain dredged material "on its land."

The ownership of an easement in lands is entirely different and distinct from the ownership of the lands the subject of the easement. Easements give no title to the land on which they are imposed and confer no right to participate in the profits arising therefrom. 25 Am. Jur.2d *Easements and Licenses* s. 2, pp. 417-418.

> The essential elements or qualities of easements are: (1) they are incorporeal; (2) they are imposed upon corporeal property; (3) they confer no right to a participation in the profits arising from such property; (4) they are imposed for the benefit of corporeal property; (5) *there must be two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the burden lies.*
>
> . . . Obviously, a person cannot have an easement in his own land, *and it follows no easement exists so long as there is a unity of ownership of the involved properties.* [11 Fla.Jur. *Easements and Licenses* s. 4, p. 224; emphasis supplied.]

Therefore, lands owned by private entities but which are subject to the various above-described easements are not "public lands" within the meaning of s. 253.03(9), F. S., because they are privately owned lands subject to governmentally owned easements. Indeed, any contrary construction of s. 253.03(9) would appear to defeat the legislative purpose of imposing charges for dredged materials taken from sovereignty lands when such materials are transferred to private ownership. Depositing such materials on private lands subject to a governmentally owned spoil easement would ordinarily

transfer such materials to private ownership and therefore be subject to the statutory procedures for charges as specified in s. 253.03(9).

077-111—October 20, 1977

STATE MOBILE HOME TENANT-LANDLORD COMMISSION

STATUS IN DEPARTMENT OF BUSINESS REGULATION—UNABLE TO ACT UNTIL OFFICIALLY CONSTITUTED

To: J. Jackson Walter, Executive Director, Department of Business Regulation, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

1. Given that the commission was created with the Department of Business Regulation (s. 4(1) Ch. 77-49, Laws of Florida [83.776(1)]), what is the relationship between the commission and the Board of Business Regulation, which is the head of the department (s. 20.16(1), F. S.)? This question seems to turn upon a construction of s. 20.03(10), F. S., the definition of "commission." Do the board's rules control the commission as they do the department's five divisions? Under s. 20.16, F. S., the divisions have rulemaking powers. Does the board Rule 7-2.11 (as recently amended) on rulemaking control the commission as it does the divisions? What is the effect of Rule 7-2.05 regarding the executive director? Section 11 of Ch. 77-49 (s. 83.790) on appeals from commission decisions refers only to ratesetting decisions under s. 9 (s. 83.786). Does this mean that the board retains jurisdiction by its own rules over all other activities of the commission? For example, legislative budget requests? hiring staff? awarding consulting contracts? purchasing equipment? renting office space?
2. Can the commission's staff be administratively responsible to the director of a division within the department? Is the staff director legally equal to a division director and is the commission to be treated for budgetary and personnel classification purposes as a separate entity?
3. Prior to appointment of commission members, can the Department of Business Regulation accept registrations or fees submitted by mobile home parks (s. 6 [s. 83.780])?
4. Prior to appointment of commission members, can the Department of Business Regulation accept petitions filed by tenants (s. 8 or s. 15 [s. 83.784])?

SUMMARY:

Generally, the rules of the Board of Business Regulation control administrative activities of the Mobile Home Tenant-Landlord Commission. The commission is not within one of the divisions of the Department of Business Regulation but is a separate entity within that department. Until a form is approved by the commission, the department cannot officially accept registrations by mobile home parks regulated by the act. The department, however, may accept petitions filed by tenants pursuant to s. 8(1) of the act (s. 83.784[1]).

AS TO QUESTION 1:

Chapter 77-49, Laws of Florida, created the State Mobile Home Tenant-Landlord Commission (hereinafter "commission") with authority to determine if a rental or service charge increase, or a decrease in services, is so great as to be unconscionable or not justified under the facts and circumstances of the particular situation.

To achieve maximum efficiency and effectiveness, the Legislature implemented s. 6, Art. IV, State Const., by enacting the Governmental Reorganization Act of 1969, Ch. 20, F. S. The Legislature has specifically provided that structural reorganization "should be a continuing process through careful executive and legislative appraisal of the placement of proposed new programs. . . ." Section 20.02(3), F. S. Therefore, it can be presumed that the Legislature created the commission with this policy in mind. Williams v. Jones, 326 So.2d 425 (Fla. 1974). In fact, the Legislature specifically provided for the commission to be "within the Department of Business Regulation." A "commission" is defined in s. 20.03(10), F. S., as

> . . . a body established within a department and exercising limited quasi-legislative or quasi-judicial powers or both *independently of the head of the department*. (Emphasis supplied.)

It is clear that a commission within the Department of Business Regulation (hereinafter "department") cannot be equated with a division within the department. A commission possesses greater authority, yet it must answer administratively to the department. *See* s. 20.02(2), F. S. The authority which the commission possesses is in the exercise of its quasi-legislative or quasi-judicial powers. As it must function administratively as a part of the department, the rules of the Board of Business Regulation, Ch. 7-2, F.A.C., must necessarily apply to the commission, although Rule 7-2.05, F.A.C., would not because it by its terms is limited to "Rules of the Divisions." Similarly, other references to divisions are not applicable to the commission, as it is not a division of the department, although it may be on the same administrative plane. Amendments to the board's rules, within its authority, may cure this defect. Generally, the commission's rulemaking power is exercised pursuant to s. 7(7) of the act (s. 83.782[7]).

The commission is autonomous only in the exercise of its quasi-legislative and quasi-judicial powers. Hence, the department would control the activities mentioned in your above question.

Therefore, question 1 is answered generally in the affirmative.

AS TO QUESTION 2:

As discussed previously, the commission is within the department and is autonomous only in the exercise of its quasi-legislative and quasi-judicial powers. However, because of such autonomy, the commission cannot be responsible to a division within the department. It would appear to operate independent of a division, but on the same administrative level. However, the commission being part-time and unsalaried, it is necessary that there be employed a person to handle the day-to-day administrative chores of the commission. This employee, although not on the level of a division director, would appear to be answerable to the executive director of the department. As the commission is not within a specific division of the department, for budgetary and personnel classification purposes it would appear more appropriate to treat it as a separate entity within the department.

AS TO QUESTION 3:

Section 6, ch. 77-49 (s. 83.780), provides for registration of mobile home parks regulated by the act. The registration is made with the commission on a form approved by the commission. The original registration pursuant to the act shall be filed by November 1, 1977. Accompanying each registration is the fee prescribed by s. 6(2). The fact that the commissioners have not been appointed, that regulated parks *shall* register by November 1, 1977, and that such regulation *shall* be on a form approved by the commission has created an impossible situation. The department is without authority to approve the form. These requirements cannot be complied with. Therefore, technically, the department cannot accept registrations. It would appear that the most appropriate manner in which to handle any registrations which may be submitted to the department pursuant to this act would be to retain them informally pending appointment of the commissioners. When the commissioners are appointed, emergency rules pursuant to s. 120.53(8), F. S., may be appropriate to implement s. 6(1) of the act (s. 83.780[1]).

AS TO QUESTION 4:

Section 8(1) of the act (s. 83.784[1]) provides for invoking the commission's jurisdiction by filing a petition with the commission. As discussed previously, the staff of the commission is under the authority of the executive director for administrative purposes. There is no statutory requirement that the commissioners do any act prior to receiving petitions; therefore, there is no impediment to the department accepting petitions filed by tenants pursuant to s. 8(1) of the act.

Therefore, question 4 is answered in the affirmative.

077-112—October 25, 1977
(Reconsideration of 077-4)

CRIMES AND OFFENSES

PENALTIES FOR ATTEMPTED BURGLARY

To: E. J. Salcines, State Attorney, Tampa

Prepared by: Michael H. Davidson, Assistant Attorney General

(See 077-4 for question)

SUMMARY:

Upon reconsideration of AGO 077-4, in view of recent appellate court decisions on the same subject as earlier treated in said opinion, I now must conclude that an attempted third degree felony burglary is punishable as a completed offense of the same degree, and hereby recede from the contrary conclusion reached in said opinion.

The First District Court of Appeal of Florida, in Massey v. State, No. FF-417, filed August 18, 1977, ruled upon the following question:

> Should an attempt at a third degree felony burglary be punishable as a third degree felony or as a first degree misdemeanor?

In AGO 077-4 I opined that in view of the interrelationship between ss. 777.04(4) and 810.02, F. S., such an attempt should be punished as a misdemeanor offense of the first degree. The First District Court of Appeal, in ruling upon Massey, *supra*, concluded that such an offense was punishable as a third degree felony. The conclusions reached in AGO 077-4 and in Massey, *supra*, are obviously apart, and the First District has reaffirmed the Massey decision in Burgans v. State, Case No. GG-146, Opinion filed September 19, 1977.

The court in Massey, *supra*, stated that it was well within the province of the Legislature to punish attempted burglaries more severely than other attempted third degree felonies. The court further stated that the pertinent statutes were clear in their operation and did not require any construction.

In this reconsideration of AGO 077-4, I am also aware of the decision in Bownes v. State, 345 So.2d 787 (4 D.C.A. Fla., 1977), which at first blush appears to support the proposition that attempted burglary may be a first degree misdemeanor. The court in Bownes, *supra*, was faced with questions regarding the propriety of a split sentence imprisonment/probation term entered by the lower court upon appellant's conviction of attempted burglary. The pertinent portion of the court's decision reads as follows:

> This Appellant was convicted of *a first degree misdemeanor, attempted burglary*, and a second degree misdemeanor, petit larceny. On the first degree misdemeanor he was sentenced to one year in the county jail and three years probation after he had served six months of that imprisonment. Since the maximum jail term he could have received was one year the sentence was excessive by two years and six months. . . . (Emphasis supplied.)

Thus, although the Fourth District Court of Appeal appears in dictum to have accepted the proposition that an attempted burglary may be punishable as a first degree misdemeanor, it does not seem that the court in Bownes was squarely presented with the same question decided in Massey, *supra*, and I, therefore, conclude that Massey, *supra*, is controlling authority in regard to the question raised there and in AGO 077-4.

With the benefit of the appellate court decisions cited herein, it appears, upon reconsideration, that the construction placed upon the statutes pertinent to the subject matter of AGO 077-4 was improvident. The rationale behind that construction appears, unfortunately, to have been prompted more by a concern for legislative draftsmanship than legislative prerogative, and therefore was askew in its attitudinal approach to the subject matter, forcing a conflict where there was none and creating ambiguities where there were none, contrary to sound construction principles. State v. Beardsley, 94 So. 660 (1922); Richardson v. City of Miami, 198 So. 51 (Fla. 1940); State *ex rel.* Green v. City of Pensacola, 126 So.2d 566 (Fla. 1961); Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1941); American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938); American Bankers Life Assurance Co. of Fla. v. Williams, 212 So.2d 777 (1 D.C.A. Fla., 1968); Florida State Racing Commission v. Bourquardez, 42 So.2d 87 (Fla. 1949). An unfortunate result of this improper approach (as noted in this office's appellate brief in Massey, *supra*, which urged that AGO 077-4 was the result of an unwise application of the rules of statutory construction) was that the words "or any burglary" were effectively stricken from s. 777.04(4)(c), F. S. Under the construction urged in said opinion, the statute would then have operated as though those words were totally absent therefrom. Such a result is contrary to well-established principles of law that all portions of a statute must be given effect. Goode v. State, 39 So. 461 (Fla. 1905); Atlantic Coast Line Railroad Company v. Boyd, 102 So.2d 709 (Fla. 1958); *In Re* Horners Estate, 188 So.2d 386 (3 D.C.A. Fla., 1966). Such a construction cannot stand.

Therefore, in view of the foregoing reconsideration of AGO 077-4 and in view of the aforecited appellate decisions, the same is hereby receded from and withdrawn as an official opinion of this office and is superseded by the instant opinion which here concludes, in light of definitive appellate court treatment of the subject, that an attempted third degree felony burglary is punishable as a third degree felony.

077-113—October 25, 1977

MUNICIPALITIES

MAY PARTICIPATE IN RECIPROCAL INSURANCE ASSOCIATION—CONTRIBUTION TO ASSOCIATION PERMISSIBLE—NONCASH CONTRIBUTION NOT AUTHORIZED

To: J. H. Roberts, Jr., City Attorney, Lakeland

Prepared by: Daniel C. Brown, Assistant Attorney General

QUESTIONS:

1. Would participation by the City of Lakeland in the formation of a reciprocal insurance association composed entirely of Florida municipalities and organized under Ch. 629, F. S., contravene s. 10, Art. VII, State Const.?

2. Would the expenditure of city funds for contribution to the required expendable surplus of a reciprocal insurer owned and operated entirely by the subscribing municipalities be a lawful expenditure for a municipal purpose?

3. Could the participating municipalities create the expendable surplus required of reciprocal insurer by Ch. 629, F. S., through contribution of revenue certificates or other certificates of indebtedness of the participating municipalities in lieu of cash for payment of the proportionate shares of the surplus requirement for the issuance of nonassessable insurance policies to the subscribers of such reciprocal insurer?

SUMMARY:

Assuming that it could qualify as a subscriber to a reciprocal insurance association under s. 629.191, F. S., a municipality may subscribe to and join in the formation of a reciprocal insurer organized under Ch. 629, F. S., and composed entirely of Florida municipalities without contravention of s. 10, Art. VII, State Const. Municipal funds contributed pro rata to the required expendable surplus of the reciprocal insurer would constitute expenditures for municipal purposes, *i.e.*, indemnity against municipal tort liability, casualty losses, and property losses at reasonable costs. In the absence of clarification or administrative determination otherwise by the Department of Insurance, it appears that a municipality could not make its pro rata contribution to the required surplus fund of the reciprocal insurer in the form of certificates of indebtedness in lieu of cash.

The questions which you pose necessarily assume that municipalities qualify under s. 629.191, F. S., to become subscribers to a reciprocal insurance association. The discussion of your inquiries is likewise premised upon that assumption.

AS TO QUESTION 1:

Section 10, Art. VII, where pertinent, provides:

> Neither the state nor any . . . municipality . . . 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. . . .

The reciprocal insurer which the City of Lakeland proposes to join is apparently one authorized by Ch. 629, F. S. Such an insurer is an unincorporated association which transacts business as a legal entity through an attorney-in-fact. The members of the association agree to indemnify each other from designated risks of loss. Sections 629.011, 629.021, 629.061, 629.081, and 629.101, F. S.

The statement of facts submitted in your request indicates that membership in the proposed reciprocal association will be limited to Florida municipalities. In view of that, it is my opinion that no violation of s. 10, Art. VII, State Const., would result from the joinder of such municipalities in a reciprocal insurance association or from the contribution of city funds to the required surplus of the insurance fund.

Political subdivisions of the state, including municipalities, are not associations, persons, or corporations to which the proscription of s. 10, Art. VII, *supra*, applies. Attorney General Opinions 058-9 and 072-382 and cases therein cited. *Cf.* Overman v. State Board of Control, 62 So.2d 696 (Fla. 1953) [holding a nonprofit educational institution was not within the prohibition against pledging public credit for benefit of individual company, corporation or association under s. 10, Art. IX, State Const. 1885.]

Likewise, the fact that the cities will contribute to the required expendable surplus of the reciprocal insurance association and, in effect, become joint owners of an association which is not itself a municipality would not constitute a violation of s. 10, Art. VII, *supra*, under the facts presented in your inquiry. The proposed association would not constitute a private association, one having no official duties or concern with the affairs of government and organized primarily for the personal emolument of its members. *See* O'Malley v. Florida Ins. Guaranty Association, 257 So.2d 9 (Fla. 1971). Rather, the association would be in the nature of a public or quasi-public entity organized primarily to discharge duties to the public or to provide a governmental benefit. *See* Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage Dist., 82 So. 346, 350 (Fla. 1919); O'Malley v. Florida Ins. Guaranty Association, *supra*. *Cf.* AGO 051-168, concluding that a county school board could insure school buildings against loss by fire, etc., under a policy issued by a mutual fire insurance company if the policy stipulated that it was issued without contingent liability and was nonassessable. The opinion concluded that such a participating policy did not make the state or any political subdivision a "joint owner or stockholder" within the purview of former s. 10, Art. IX, State Const. 1885 [now s. 10, Art. VII, State Const.]. *See also* Dade County Bd. of Pub. Instr. v. Michigan Mut. Liability Co., 174 So.2d 3 (Fla. 1965), holding that the purchase of a nonassessable liability insurance policy from a mutual company would not make a county school board

a joint owner or stockholder in any company, association, or corporation in violation of s. 10, Art. IX, even though the school board, as an insured, would become a member of the mutual company entitled to vote for directors, where the only interest obtained by the board as an insured in addition to insurance protection would be the availability of rebates if the loss experience of the mutual company justified them.

The primary purpose in joining a reciprocal insurer would be to obtain indemnity against liabilities and casualty losses of the municipality. Municipalities have historically been held subject to tort liability in varying degrees, even prior to the advent of s. 768.28, F. S., as amended by Ch. 77-86, Laws of Florida. *See, generally*, Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Gordon v. City of West Palm Beach, 321 So.2d 78 (4 D.C.A. Fla., 1975); Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967); AGO 076-41. *Cf.* AGO 075-114 (hospital districts not possessed of sovereign immunity). Parenthetically, I would note at this juncture that the Legislature has expressly provided in Ch. 77-86 that the limitations of liability established by s. 768.28, as amended, apply to all agencies and subdivisions of the state, including municipalities, regardless of whether those agencies and subdivisions possessed sovereign immunity prior to July 1, 1974. Accordingly, the statements in AGO's 075-114 and 076-41 to the effect that the liability limits of s. 768.28, F. S., do not apply to municipalities or hospital districts no longer obtain, and, to that extent, those opinions are hereby modified. With regard to the public nature of the contemplated expenditure, it follows that, if municipal treasuries are vulnerable to claims of tort victims and casualty losses, then, under the broad home rule powers authorized for municipalities by s. 2(b), Art. VIII, State Const., and s. 166.021, F. S., the protection of the treasury by provision for insurance or indemnity against such claims or losses by any means not expressly prohibited by law would be a legitimate municipal purpose, unless prohibited by a city's charter enacted subsequent to July 1, 1973. *See* s. 166.021(1)-(4).

Similarly, the prevention of casualty loss to a municipality's property has historically been recognized as a valid municipal purpose which may be achieved by contracting for property protection services from a private entity. *See, e.g.*, State v. Kansas City, 4 S.W.2d 427 (Mo. 1928). *Cf.* Dade County Bd. of Pub. Instr. v. Michigan Mut. Liability Co., *supra*. Thus, under the provisions of s. 2(b), Art. VIII, State Const., and s. 166.021, F. S., the protection of the municipality from property loss by obtaining insurance in a manner not expressly prohibited by law would be a legitimate municipal purpose.

Moreover, the preamble to Ch. 77-86, *supra*, clearly recognizes that the Legislature deems the provision of liability insurance to be a legitimate public purpose of local government. One purpose of Ch. 77-86, as recited by its preamble, is to aid local governments in obtaining insurance at reasonable rates. There is, therefore, a strong presumption that the contemplated expenditure is primarily for a public or municipal purpose.

Since the proposed reciprocal insurance association would be formed primarily to serve as the instrument for achieving such municipal purposes, it would constitute a public or quasi-public entity not within the proscription of s. 10, Art. VII, *supra*.

Nor would the fact that the business of the association will be administered by a private entity appointed by its constituent governmental agencies as attorney-in-fact result in a violation of s. 10, Art. VII, *supra*. The attorney-in-fact will obviously perform services for the association and its members and will no doubt be compensated for those services. To that extent the members' contributions will benefit a private person or corporation. But, municipalities may expend moneys which incidentally benefit a private person or business without detracting from the public nature of the expenditure, so long as there is some clearly identified public purpose which is the primary objective of the expenditure and so long as some control over the expenditure is retained by the public authority to avoid frustration of the public purpose. Attorney General Opinions 075-71 and 073-394. *See* Betz v. Jacksonville Transp. Auth., 277 So.2d 769 (Fla. 1973), holding that a management contract between a public transportation authority and a private bus company for operation of a municipal transit system, although in excess of 1 year, did not constitute the constitutionally proscribed lending of public credit to a private firm or corporation since the contract primarily furthered the public purpose of providing public transportation and only incidentally benefited the private management company. The requisite degree of control over the expenditure may be maintained pursuant to s. 629.101, F. S., which provides, *inter alia*, that the subscribers may impose restrictions upon the power of attorney granted to the attorney-in-fact and may provide for the revocation of the powers granted.

For the foregoing reasons, your first question is answered in the negative.

AS TO QUESTION 2:

The issue comprehended within question 2 is whether the contribution by a given city to the required surplus fund of the reciprocal insurance association would be an expenditure for that municipality's purpose, since the surplus fund is intended and will be used to satisfy claims against other member cities. The discussion in reference to your first question essentially answers your second question as well. As noted above, s. 166.021, F. S., provides broad authority to municipalities to exercise powers for municipal purposes. For example, s. 166.021(1) provides:

> . . . [M]unicipalities 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(4), expressing the legislative intent to like effect.]

In addition, Ch. 77-86, *supra*, clearly indicates that obtaining reasonably priced liability insurance by municipalities is a legitimate municipal purpose. There being no express prohibition in law against the employment of the reciprocal insurance form or mechanism by municipalities, and the purpose of each city joining the reciprocal insurer being primarily to obtain indemnity against its own liabilities or losses at reasonable expense, I see no impediment to a city's joinder in the proposed reciprocal insurance association (if qualifed to become a subscriber to the association under Ch. 629, F. S.) should the city find that course is advisable in reducing its insurance costs.

Your second question is accordingly answered in the affirmative.

AS TO QUESTION 3:

Your third question requires interpretation of the insurance laws of Florida. Section 629.071(1) and (2), F. S., governs the general surplus requirements of reciprocal insurers and s. 629.261, F. S., governs additional surplus requirements for reciprocals to issue nonassessable policies. Section 629.071 provides:

> (1) A domestic reciprocal insurer hereunder formed, if it has otherwise complied with the applicable provisions of this code, may be authorized to transact insurance if it has and thereafter maintains *surplus funds* as follows:
> (a) To transact property insurance, surplus funds of not less than *$200,000*;
> (b) To transact casualty insurance (other than workmen's compensation), surplus funds of not less than *$200,000*.
> (2) In addition to surplus required to be maintained under subsection (1), the insurer shall have, when first so authorized, expendable surplus in amount as required of a like foreign reciprocal insurer under s. 624.408. (Emphasis supplied.)

Section 629.261 allows a reciprocal insurer to issue nonassessable policies if it "has a surplus of assets over all liabilities at least equal to the minimum paid-in capital stock required of a domestic stock insurer authorized to transact like kinds of insurance. . . ."

The Department of Insurance is charged with the duty of administering and enforcing the insurance laws of this state and has the final decision-making authority with regard to whether revenue certificates, revenue bonds, or other like obligations of the city payable from non-ad valorem taxes and made payable to the proposed reciprocal insurer could be used in lieu of cash as the city's proportionate share of the surplus funds required by Ch. 629, F. S. I am not advised as to that department's practices in that regard or as to its administrative construction of the governing statutes. However, for the following reasons it appears to me that such certificates of indebtedness would not be acceptable to make up the required surplus fund.

Firstly, although the term "funds" is subject to a variety of meanings, it may be synonymous with cash, and in common usage suggests money. *See, e.g.*, Owen v. Bank of Glade Springs, 81 S.E.2d 565 (Va. 1934); McCammon v. Cooper, 69 N.E. 658 (Ohio 1904); 37 C.J.S. *Fund*, p. 1401. With respect to the amount of surplus required to be maintained to transact property insurance and casualty insurance within s. 629.071, F. S., the Legislature stated the amount to be maintained in figures ($200,000). This description of the amounts required to be maintained as surplus funds in order to transact property

and casualty insurance would seem to connote and contemplate legal United States tender—cash—and no other form or kind of assets or contributions to the required surplus. *Cf.* AGO 074-374.

Secondly, the inference that the term "funds" as used in s. 629.071, *supra*, is synonymous with cash or its equivalent is strengthened by other provisions of the Insurance Code dealing with the formation of a reciprocal insurer and with accounting by insurance companies.

Section 629.081(2)(h), F. S., requires the attorney-in-fact for the proposed reciprocal insurer upon application for authority to transact business to certify:

> [t]hat all *moneys* paid to the reciprocal shall, after deducting therefrom any sum payable to the attorney, be held in the name of the insurer and for the purposes specified in the subscribers' agreement. (Emphasis supplied.)

Thus, specific reference to money is made by statute in the context of determining the authority of a reciprocal insurer to initially transact business.

Moreover, it must be recalled that, with reference to the issuance of nonassessable policies, a reciprocal insurer must demonstrate that it has a surplus of assets over liabilities equal to a certain amount. Section 629.261, F. S., *supra*. Chapter 625, F. S., deals generally with the acceptability of assets for purposes of determining the financial condition of an insurer. Section 625.031(2) provides:

> In addition to assets impliedly excluded by the provisions of s. 625.012, the following expressly shall not be allowed as assets in any determination of the financial condition of an insurer:
>
> * * * * *
>
> (2) Advances (other than policy loans) to officers, directors, and controlling stockholders, whether secured or not, and advances to employees, agents and other persons on personal security only.

Such advances are excluded in calculating assets because the need for financial soundness of insurers precludes an insurance company from claiming what is essentially a loan to itself (its owners and officials) as an asset in determining solvency. It can readily be seen that creating a surplus fund for a reciprocal insurer from the subscribers' promises to pay, in lieu of cash, is closely analogous to a stock insurance company's counting a loan to a principal stockholder as an asset. It therefore appears that the use of certificates of indebtedness of the member cities, in lieu of cash or other acceptable assets, to constitute the proposed reciprocal insurer's surplus fund would contravene the Insurance Code. Additionally, I would note that the use of tax anticipation certificates payable from ad valorem taxes for the stated purpose would contravene s. 12, Art. VII, State Constitution.

However, a municipality could issue revenue certificates pledging non-ad valorem tax moneys or other revenues of the municipality to secure such certificates or other like obligations and apply the proceeds of such certificates or obligations to make the required contribution to expendable surplus.

Subject to the foregoing discussion, your third question is answered in the negative.

Though not directly involved in response to your inquiry, I would note for your information that s. 627.351, F. S., was amended by Ch. 77-380, Laws of Florida, to require the Department of Insurance to adopt a joint underwriting plan to assist political subdivisions of the state in acquiring casualty insurance coverage. Since municipalities are, in the context and for the purposes of Ch. 77-380, political subdivisions of the state, s. 1.01(9), F. S., the city could elect to participate in such a plan as an alternative to the proposal to which your inquiries relate.

077-114—November 2, 1977

ANATOMICAL GIFTS

MEDICAL EXAMINERS' AUTHORITY TO REMOVE CORNEAS

To: Mattox Hair, Senator, 9th District, Jacksonville

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTIONS:

1. Is it mandatory that the medical examiner or associate medical examiner provide the cornea of a decedent to an eye bank upon request, when all of the conditions in Ch. 77-172, Laws of Florida, are met?

2. Does Ch. 77-172 apply only to medical examiners and associate medical examiners?

SUMMARY:

Under Ch. 77-172, Laws of Florida, the medical examiner or associate medical examiner may, within his discretion, provide a cornea upon request of an authorized eye bank whenever the decedent from whom a suitable cornea may be transplanted is under the jurisdiction of the medical examiner, there is no objection by the next of kin known by the medical examiner, and the removal of the cornea will not interfere with the subsequent course of an investigation or autopsy. The new act does not, however, extend authority or immunity to any persons other than the district or associate medical examiner to authorize the removal of decedent's cornea.

Chapter 77-172, Laws of Florida, is entitled:

> An Act relating to corneal transplant; creating s. 732.9185, Florida Statutes, *permitting medical examiners to remove the cornea* of a decedent for purposes of corneal transplant under certain conditions; relieving medical examiners and eye banks of liability for failure to obtain consent of next of kin; providing effective date. (Emphasis supplied.)

The new act creates s. 732.9185 providing:

> (1) Upon the request of any eye bank authorized under s. 732.918, in any case in which a patient is in need of corneal tissue for a transplant, a *district medical examiner or associate medical examiner* may provide a cornea whenever all of the following conditions are met:
> (a) A decedent who may provide a suitable cornea for the transplant is under jurisdiction of a medical examiner and an autopsy is required in accordance with s. 406.11.
> (b) No objection by the next of kin of the decedent is known by the *medical examiner.*
> (c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy. (Emphasis supplied.)

In subsection (2) the act immunizes the district or associate medical *examiner* or any authorized eye bank from civil or criminal liability on account of any failure to obtain consent of the next of kin.

The foremost principle in construing statutes is to ascertain the legislative intent as determined primarily from the language of the statutes. VanPelt v. Hilliard, 78 So. 693 (Fla. 1918); Vocelle v. Knight Brothers Paper Co., 118 So.2d 664 (1 D.C.A. Fla., 1960). Legislative intent as deducible from the language employed in the statutes is the law. State v. Knight, 124 So. 461 (Fla. 1929). Statutes are to be given their plain and obvious meaning. A.R. Douglas, Inc. v. McRainey, 137 So. 157 (Fla. 1931).

With respect to your first question, the determination of whether a statute is mandatory or prohibitory as opposed to discretionary, permissive, or directory hinges primarily on the language used. As a general principle, statutory provisions defining the duties of public officials are construed as directory only, unless a contrary legislative intent is manifest. Lomelo v. Mayo, 204 So.2d 550 (1 D.C.A. Fla., 1967). The word "may" commonly has a permissive rather than mandatory connotation. Fixel v. Clevenger, 285 So.2d 687 (3 D.C.A. Fla., 1973). Given the professional discretion which the statute vests in the medical examiner to determine if the conditions precedent to authorizing a transplant are present, I conclude the word "may" is used in its permissive sense. Accordingly, your first question is answered in the negative.

Florida follows the rule of statutory construction that the express mention of one thing is an exclusion of another not mentioned. *See* Bergh v. Stephens, 175 So.2d 787 (1 D.C.A. Fla., 1965). Where the Legislature makes an express designation or condition in the statute, it is presumed the Legislature thoroughly considered and purposely omitted other designations and conditions. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1953). Because Ch. 77-172, *supra,* expressly mentions only district or associate medical examiners, I conclude no authority or immunity is extended other persons to permit the removal of decedent's cornea. Accordingly, your second question is answered affirmatively.

077-115—November 2, 1977

PUBLIC FUNDS

PAYMENT OF PROFESSIONAL ASSOCIATION DUES—WHEN AUTHORIZED

To: Judge C. Luckey, Jr., Public Defender, Tampa

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. Does s. 216.345, F. S., authorize the payment of The Florida Bar dues for the public defender and his full-time assistant public defenders out of the agency's appropriations?

2. Does s. 216.345, F. S., authorize the payment of dues for the public defender and his assistant public defenders, investigators, and administrative aides for the Florida Public Defender Association out of the budgets for the respective public defender circuits?

SUMMARY:

Section 216.345, F. S., as amended by Ch. 77-39, Laws of Florida, does not authorize the payment of Florida Bar dues for the public defender and his full-time assistant public defender from the agency's appropriation. Section 216.345 authorizes the payment of dues for the public defender and his assistant public defenders, investigators, and administrative aides for the Florida Public Defender Association out of the budgets for the respective public defender circuits when the association certifies that it does not accept institutional memberships and the agency head determines that individual membership is essential to the statutory duties and responsibilities of the public defender's office.

Since your questions essentially involve a construction of the same statute, they will be addressed together.

In 1977, the Florida Legislature amended s. 216.345, F. S., relating to the payment of professional or other organization membership dues from public funds. *See* Ch. 77-39, Laws of Florida. Section 216.345, as amended, provides that, upon approval of the agency head or designated agent thereof, a state department agency, bureau, commission or other component of state government may utilize state funds for the purpose of paying

dues for membership in a professional or other organization *only* when such membership is essential to the statutory duties and responsibilities of the state agency. Section 216.345(1).

However, insofar as individual memberships are concerned, s. 216.345(2) provides as follows:

> Upon certification by a professional or other organization that it *does not accept institutional memberships*, the agency may authorize the use of state funds for the payment of individual membership dues when such membership is essential to the statutory duties and responsibilities of the state agency by which the individual is employed. *However, approval shall not be granted to pay membership dues for maintenance of an individual's professional or trade status in any association or organization, except in those instances where agency membership is necessary and purchase of an individual membership is more economical.* (Emphasis supplied.)

It appears that, since membership in The Florida Bar is a precondition to the practice of law in the State of Florida, membership dues could not be paid from public funds since the purpose of such membership would be to maintain an individual's "professional status." Pursuant to s. 216.345(2), F. S., public funds can be expended for membership dues to maintain an individual's professional or trade status *only* when two conditions prescribed by the statute are met; first, the state agency which employs the individual must be required to hold a membership and, second, purchase of an individual membership must be more economical, presumably, than an agency membership.

Since state agencies cannot hold membership in The Florida Bar, it seems apparent that the Legislature intended to exempt from the prohibition of s. 216.345(2), F. S., relating to maintenance of professional or trade status, organizations other than The Florida Bar.

Accordingly, I am of the view that Ch. 77-39, Laws of Florida, which amends s. 216.345, F. S., does not serve to alter or modify the views expressed by this office in AGO 072-4 wherein it was concluded that a county judge who was required by law to be a member of The Florida Bar and prohibited from engaging in the private practice of law could not charge his bar dues as an expense of his office.

Insofar as membership in the Florida Public Defender Association is concerned, s. 216.345(1), F. S., authorizes payment of membership dues by the agency head or the designated agent thereof when it is determined that agency membership is essential to the statutory duties and responsibilities of the state agency. If the association certifies that it does not accept institutional memberships, the agency may authorize the payment of individual membership dues when such membership is essential to the statutory duties and responsibilities of the state employing agency, *i.e.*, the public defender. Since membership in such an association does not serve to maintain an individual's professional or trade status, the second sentence of s. 216.345(2) is not applicable to your second question. It would appear, however, to be the initial responsibility of the agency head to determine whether membership in a particular organization is essential to the statutory duties and responsibilities of the state agency. If the membership is essential, then state funds may be utilized for such purposes providing the conditions imposed by the statute are met.

It should also be noted that prior to the payment of any dues or membership contribution to any professional or other organization from state or public funds the provisions of s. 119.012, F. S., must be considered and the procedural requirements thereof as set forth in AGO 074-351 followed by the public agency.

077-116—November 2, 1977

MUNICIPALITIES

AUTHORITY TO CONTRACT FOR SERVICES OF AUTONOMOUS MUNICIPAL AGENCY IN BILLING AND ACCOUNTING FOR TRASH COLLECTION FEES

To: Carl V. M. Coffin, City Attorney, Lake Worth

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

> **May the City of Lake Worth contract for and utilize the services of Lake Worth Utilities Authority, an independent agency of the city, for the purposes of billing, collecting, and accounting for waste removal fees imposed by ordinance for the collection of garbage and trash by the city?**

SUMMARY:

> **A municipality may validly provide for the collection and disposal of solid waste and other refuse as a municipal or public service and may by ordinance impose a user fee or charge for such services. Subject to the restrictions of the City of Lake Worth's 1975 charter regarding competitive bidding, the City of Lake Worth may contract for and utilize the services of the Lake Worth Utilities Authority, a separate and independent agency of the city, for the purpose of billing, collecting, and accounting for waste removal fees imposed by the city on its residents and businesses for the collection of garbage and trash by the city.**

According to your letter, the City of Lake Worth has enacted an ordinance which provides for the imposition of a waste removal fee on city residents and businesses for the collection of garbage and trash by the city. The waste removal fee is to be added as a designated additional element or item on the monthly bills for water and electricity rendered by the Lake Worth Utilities Authority to its customers. Collection of the waste removal fee is made by the authority for the city, and an appropriate sum for the aggregate waste removal fees so collected is turned over to the City Finance Director. The authority was created by special act, Ch. 69-1215, Laws of Florida, and operates as a separate, autonomous unit of city government, free from the jurisdiction and control of the city commission and other city officers except as otherwise provided in the act. Section 1, Ch. 69-1215.

Under the broad home rule powers granted by Ch. 166, F. S., municipalities have the authority to provide for the collection and disposal of solid waste and other refuse. Section 166.021(1) grants municipalities "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services . . . ." It further empowers them to exercise any power for municipal services except when expressly prohibited by law. *See* City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla. 1974); *cf.*, Stone v. Town of Mexico Beach, 348 So.2d 40 (1 D.C.A. Fla., 1977), holding in pertinent part that a town has the authority to impose a flat rate, regardless of use, to fees charged for the collection and disposal of garbage. The collection and disposal of solid waste and other refuse constitutes a valid municipal function or purpose; thus, in the absence of an express statutory prohibition, a municipality has the authority under its home rule powers to provide this municipal service. *See* United Sanitation Service, Inc. v. City of Tampa, 302 So.2d 435, 436 (2 D.C.A. Fla., 1974), and cases cited therein, in which the court described the collection of garbage as "an essential part of a 'public service'—by municipalities and other governmental subdivisions," subject to the plenary power of government. *See also* the City of Lake Worth's former charter which provided that the city had the power to "furnish any and all local public services" and to collect and dispose of sewage, garbage and other refuse. Sections 3(8) and (15), Ch. 25962, 1949, Laws of Florida. These former charter provisions were converted into city ordinances, subject to modification or repeal, by s. 166.021(5), F. S. The present charter contains similar provisions. *See* s. 3(8) and (15), 1975 charter.

In addition, the city has the authority to impose a fee for the use of this municipal service. *Cf.* Stone v. Town of Mexico Beach, 348 So.2d 40 (1 D.C.A. Fla., 1977), holding in pertinent part that the town could impose a flat rate, regardless of use, to fees charged for the collection and disposal of garbage. Section 166.201, F. S., provides in pertinent part that a municipality may impose "user charges or fees authorized by ordinance . . . [and] enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law." *See also* s. 1, Ch. 77-50, Laws of Florida [now s. 166.043(1), F. S. 1977], which provides that the provision of the act regarding ordinances and rules imposing price controls "shall not prevent the enactment by local governments of public service rates otherwise authorized by law; including . . . solid waste . . . ." Even prior to the enactment of Ch. 166, F. S., municipalities maintaining or operating a service for the collection and disposal of garbage, trash, and other refuse were expressly empowered by the Legislature to provide by ordinance for the establishment and collection of reasonable charges to be paid to the city for the use of such services. Section 167.73(1), F. S. 1971. The statute also provided that, if the charges were not paid when due, the service could be discontinued and the delinquent charges recovered by due process of law. Chapter 167, F. S. 1971, was repealed in 1973 by the Municipal Home Rule Powers Act, Ch. 166; however, under s. 166.042(1) the repeal of Ch. 167 "shall not be interpreted to limit or restrict the powers of municipal officials." Thus, Ch. 167, and s. 167.73 specifically, although repealed, are still viable as a grant of municipal power under Ch. 166. *Cf.* Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97, 101 (Fla. 1976). Moreover, municipalities may continue to exercise those powers conferred by Ch. 167 at their own discretion and subject only to those terms and conditions which they choose to prescribe. Section 166.042. The present charter provides that the city has the power to impose rates for public utilities or other services furnished by the city or any other person or corporation. Contracts between the city and public utility companies fixing rates are, under the present city charter, legal and enforceable contracts. Section 3(11) of the 1975 charter. *See also* s. 3(3) of the 1975 charter which provides that the city may impose special or local assessments upon real property upon nonpayment by the owners thereof for waste removal fees for garbage and trash collection services. The assessments are payable at the time and in the manner determined by the city commission. *Cf.* Stein v. City of Miami Beach, 250 So.2d 289 (3 D.C.A. Fla., 1971), upholding an ordinance of the City of Miami Beach which provided for the imposition of special assessment liens upon real property following nonpayment by the owners of such property for garbage fees; and Stone v. Town of Mexico Beach, 348 So.2d 40 (1 D.C.A. Fla., 1977), holding that a town had legal authority to impose a lien on property for the property owners' nonpayment of garbage collection charges. On the basis of the foregoing provisions, it appears that the City of Lake Worth may establish the manner in which user charges or fees for the collection and disposal of garbage and other refuse will be billed and collected. In so providing, the city may contract for and utilize the services of a public or quasi-public agency or organization provided ultimate control remains with the city commission. *Cf.* O'Neill v. Burns, 198 So.2d 1 (Fla. 1967).

Section 4(16)(i) of the 1975 charter, as amended, provides:

> Contracts for services, construction, materials or supplies of any nature amounting to five thousand dollars ($5,000.00) or more, shall not be let without the approval of the city commission and on competitive bidding on a public call for bids with proper notice, except such services as cannot be contracted for upon the basis of competitive bidding.

The foregoing charter provision must be complied with before the city may enter into a contract with a separate autonomous public agency or utilities authority, such as the Lake Worth Utilities Authority, for the necessary billing, collecting, and accounting services. Assuming that the terms of the foregoing charter provisions are met, the city under its home rule powers may contract with the Lake Worth Utilities Authority for these services. The authority may, but is not required to, contract with the city to bill, collect, and account for these fees. *Cf.* s. 7, Ch. 69-1215, Laws of Florida. It should be noted that the special act creating the utility authority specifies that the flow of funds collected by the authority from prescribed fees and charges shall be as follows:

> First: The payment of all operating and maintenance expenses of the utilities and the capital outlay provided in the current annual budget;

> Second: Debt service payments and any deposits required to be made in Sinking Funds or Reserve Funds for bonds, revenue certificates, or promissory notes, heretofore issued by the City or hereafter issued by the Authority for the utility systems;
>
> Third: The payment to the general fund of the City under control of the City Commission of a sum equal to 10% of the gross revenues of the utility systems, and such payment be made monthly. In the event of a deficiency in any monthly payment to the general fund, increased payments shall be made from the first revenues which are available in succeeding months after the first and second payments required by this section have been made until the deficinecy [*sic*] is eliminated.
>
> The accumulated earnings retained after first, making the payments required herein; and, second, reserving an adequate balance for the payment of current expenses and for the extension and replacement of the capital assets of the systems, as determined by the Authority but subject to review by the City Commission, shall be paid annually to the general fund of the City under control of the City Commission. [Section 11, Ch. 69-1215, Laws of Florida.]

The utilities authority should receive reasonable compensation for the billing, collection, and accounting services it renders to and for the city; such compensation should be provided for in the contract for these services between the city and the utilities authority. In addition, the contract should set forth in detail responsibilities of each entity with respect to these services and the distribution of and accountability for the waste removal fees so collected.

Your question, as stated, is answered in the affirmative.

077-117—November 2, 1977

PUBLIC OFFICERS AND EMPLOYEES

EXECUTIVE COMMITTEE AND EMPLOYEES OF REGIONAL PLANNING COUNCIL—WHEN ENTITLED TO TRAVEL AND PER DIEM—AMOUNT

To: Owen N. Powell, Attorney for Northwest Florida Planning and Advisory Council, Bonifay

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Is the executive committee of the Northwest Florida Planning and Advisory Council, Inc., which is composed of council members representing municipalities and counties, subject to the restrictions regarding per diem and travel expenses set forth in s. 112.061, F. S.?

SUMMARY:

The executive committee of a regional planning council is subject to, and its members' travel expenses and per diem allowances controlled by, the terms and limitations of s. 112.061, F. S., the state uniform travel expense law governing all public officers and employees. Such planning council may not, therefore, reimburse its members or its executive committee (or its staff or employees) for per diem or travel expenses incurred while traveling to the council's official headquarters to attend meetings or to perform any other official duty or function at the headquarters city. The municipalities and counties which participate in, are represented on, and send representatives to the regional planning council may, however, pay the per diem and travel expenses of their

representatives on the council from the official headquarters of such counties and municipalities to the headquarters city of the planning council incurred in attending council meetings or in carrying out or performing other official duties and functions at such headquarters city.

Your question is answered in the affirmative.

According to your letter, the Northwest Florida Planning and Advisory Council, Inc., was established pursuant to s. 160.01, F. S., which provides for the establishment of a regional planning council comprised of two or more counties and municipalities. The functions, powers, and duties of these councils are set forth in s. 160.02, F. S., which provides in part that a council is "[t]o act in an advisory capacity to the constituent local governments in regional, metropolitan, county and municipal planning matters . . . ." Section 160.02(10). The membership of the council consists of one representative appointed by the mayor of the county seat of each participating county and two representatives appointed by the board of county commissioners of each county. *See* Art. III, Council By-Laws, Revised October 1974. One member representing a county must be an elected county official; the other representative must not be an elected county official. Those counties with a population over 50,000 are entitled to appoint one additional representative for each additional 50,000 persons residing in the county. The officers of the council are elected by the members from among their own membership on an annual basis. Article V, Council By-Laws, Revised October 1974. *See also* Art. VI, Articles of Incorporation. The executive committee, which is responsible for establishing council policy and guidelines for all council and staff activities, is composed of the officers of the organization. Article IX, Council By-Laws, Revised October 1974. The business affairs of the council are managed by the board of directors which is elected from council members, Art. VII, Articles of Incorporation, and the executive committee of the council executes the directions received from the council and transacts routine business matters between the quarterly meetings of the council. Article V, Council By-Laws, Revised October 1974.

Your inquiry is concerned with whether the executive committee is subject to the terms and limitations of s. 112.061, F. S., regarding per diem and travel expenses of all public officers and employees, or is governed by the bylaws of the council. Section (c), Art. V, Council By-Laws, Revised October 1974, provides in pertinent part:

> The Board of Directors of the Council shall have the authority to provide for the reimbursement of actual expenses (for travel, telephone and similar expenses) incurred by members of the Executive Committee when on business for the Council, and, in addition, to provide for reimbursement in the form of a per diem of $50.00 per day. . . . The Executive Director is authorized and directed to reimburse each Executive Committee member as above prescribed, simply upon the submission to the Executive Director of a request for reimbursement upon a voucher form to be prepared by the Executive Director . . . .

Originally, members of such planning councils were "entitled to receive their actual and necessary expenses incurred in the performance of their duties." *See* s. 1(2), Ch. 59-369, Laws of Florida. The provision regarding travel expenses, however, was subsequently amended by s. 19 of Ch. 63-400, Laws of Florida, which substantially revised s. 112.061, F. S., to provide that per diem or travel expenses to any person authorized by any general law not amended or exempted by Ch. 63-400 are subject to Ch. 63-400 (now s. 112.061). Furthermore, Ch. 63-400 provided that certain general laws, including s. 160.01(2), F. S., were to be revised by the statutory revision department by substitution of the words "shall be reimbursed for travel expenses as provided in Section 112.061, Florida Statutes, or words of similar meaning." Section 160.01(2), F. S., now contains the foregoing provision.

The officers of the council who also comprise the executive committee are elected from the council membership as provided in Art. V of the Council By-Laws, Revised October 1974. As the membership of the council is comprised of representatives appointed by municipalities or counties as provided in Art. III of the By-Laws, it appears that the members of the executive committee are "members of the regional planning council representing counties and municipalities." Therefore, s. 160.01(2), F. S., which provides that such members "shall be reimbursed for traveling expenses as provided in s. 112.061" appears to be applicable to members of the executive committee and thus controls their travel expenses and per diem allowances.

The language contained in s. 160.01(2) clearly limits members of the council to reimbursement for travel expenses at the rate specified in s. 112.061, F. S. While s. 160.02(1), F. S., authorizes the council to adopt rules of procedure for the regulation of its affairs and the conduct of its business, the council is not authorized to adopt any such bylaw as s. C, Art. V, Council By-Laws, Revised October 1974, or otherwise provide for or fix the travel expenses and per diem of the executive committee or the members or staff of the council. The council's powers are clearly set forth in ss. 160.01 and 160.02, F. S., and the council lacks the authority to act beyond the scope of those powers granted to it by statute. *See, e.g.*, Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla.); *cert. dismissed*, 300 So.2d 900 (Fla. 1974); *see also* Lewis v. Florida State Board of Health, 143 So.2d 867 (1 D.C.A. Fla., 1962), *cert. denied*, 149 So.2d 41 (Fla. 1963), as to rule making power of administrative boards. Thus, the rates specified in s. 112.061 prevail over any inconsistency with the rates set forth in the Council By-Laws. *See, e.g.*, s. 112.061(6)(c)1., F. S. 1977, which provides that "[a]ll other travelers may be allowed . . . up to $35 per diem"; the foregoing statutory provision prevails over s. C, Art. V, Council By-Laws, which purports to authorize "a per diem of $50.00 per day." *See also* Ch. 77-174, Laws of Florida (s. 112.061(11), F. S.), which requires that any claim for per diem or travel expenses under s. 112.061 contain a statement that the expenses were actually incurred by the traveler as necessary traveling expenses in the performance of his official duties and be verified by a written declaration that the claim is true and correct as to every material matter. *Compare with* s. C, Art. V, Council By-Laws.

Chapter 160, F. S., is silent with regard to travel expenses of the staff and employees of the council although the council clearly has the authority to employ and compensate its personnel, consultants, and technical and professional assistants. *See* s. 160.02(4). Section 112.061(1)(a), F. S., however, states that it is the Legislature's intent that the provisions of s. 112.061 are applicable "to all public officers, employees, and authorized persons whose travel expenses are paid by a public agency." Public agency is defined as:

> Any office, department, agency, division, subdivision, political subdivision, board, bureau, commission authority, district, public body, body politic, county . . . municipality or any other separate unit of government created pursuant to law. [Section 112.061(2)(a), F. S.]

It is clear that a planning council, created pursuant to Ch. 160, F. S., is included within the foregoing definition of an "agency or public agency." While the council is advisory, it possesses some governmental authority or power of a public body as above defined; for example, the authority to sue and be sued and to make and enter into contracts and receive and expend public moneys appropriated for its use. Under s. 112.061(1)(b)2., F. S., a special or local law will prevail over any conflicting provisions of s. 112.061 to the extent of the conflict; however, a bylaw of a planning council created under Ch. 160 is not a special or local law, *cf.* AGO 071-121, holding in part that a county could not, by a home rule ordinance, vary the uniform plan for reimbursing county officials for their travel expenses as provided by s. 112.061; accordingly, s. 112.061, F. S., applies not only to members of the council but also to its officers, staff, and employees.

This office has uniformly interpreted s. 112.061, F. S., to authorize reimbursement for per diem and travel expenses only for travel away from the traveler's official headquarters as defined in s. 112.061(4). *See* AGO 075-275 in which I concluded that, if travel to a city other than the official headquarters commences from the city in which the traveler resides, when this is different from his or her official headquarters, the mileage should be computed on the basis of the shorter distance to the point of destination. I have been informed that the official headquarters of the planning and advisory council is located in Panama City; accordingly, any authorized travel must occur away from that location or point of origin. *Cf.* AGO 075-237 which states that mileage should be calculated from the headquarters office to the place where the official duties are to be carried out if the travel originates from the travel headquarters; if the travel originates from the individual's residence and it is a shorter distance from there to the point of destination, then travel should be calculated from the residence. *See also* AGO 074-132 in which I stated that mileage is computed on the basis of the distance from the headquarters city to the city in which the duties are to be performed unless the actual distance (*i.e.*, from the place of residence) is shorter. The traveling expenses of all travelers are 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 s. 112.061(3)(b). *And see* Ch. 77-174, Laws of Florida (s. 112.061[11]), which requires that any authorized claim under s. 112.061 must be verified by a written declaration that it is "true and correct as to every material matter." Submitting a fraudulent claim is a misdemeanor of the second degree, and an individual receiving reimbursement or an allowance by means of a false claim is civilly liable for the amount of the overpayment for the reimbursement of the public fund from which the claims were paid. All travel must be duly authorized and approved by the agency head, s. 112.061(3)(a).

Since the official headquarters of the planning council is located in Panama City, any per diem or travel expenses incurred by council members or members of the executive committee (or the staff or employees of the council) in traveling to the headquarters city to attend meetings or to perform any official duties or functions may not be reimbursed by the planning council. Such travel does not for the purposes of s. 112.061, F. S., constitute authorized travel away from the official headquarters, as this office has uniformly interpreted s. 112.061. The members of the planning council, however, are also representing their respective counties and municipalities. *Cf.* s. 160.01(1), F. S., authorizing the appointment of representatives to the council by the constituent governmental bodies and s. 160.02(10) empowering the council to act in an advisory capacity to the constituent governments in a number of specified matters. Each member serves as a representative of his constituent local government to the planning council. The function of the planning council itself is to advise these "constituent local governments" in county and municipal planning matters. Thus, while the planning council may not pay the per diem and travel expenses of members of the council or its executive committee attending meetings or performing other official duties in Panama City, the cities and counties which participate in and are represented on the planning council may authorize the payment of these expenses to those individuals who represent them in the council. *Cf.* AGO 070-94. Section 112.061 provides that, when applicable, travel expenses may be paid to all public officers, employees and "authorized persons." Authorized person is defined as:

> A person other than a public officer or employee as defined herein, whether elected or commissioned or not, who is authorized by an agency head to incur travel expenses in the performance of his official duties. [Section 112.061(2)(e)1.]

Those members of the council who are not public officers or employees as defined in s. 112.061(2)(c) and (d) appear to satisfy this definition of "authorized person." They are appointed by the governing body of a municipality or county to represent their respective local governments on the planning council. The travel expenses incurred in attending council meetings or performing other official duties at the council's headquarters city satisfy the requirement that such expenses be incurred in the performance of their official duties for such constituent governments and in the performance of an authorized public purpose. Moreover, the attendance of these meetings or the carrying out of other official duties at the council's official headquarters in Panama City constitutes authorized travel away from the official headquarters of the respective constituent municipalities and counties. Accordingly, I am of the opinion that, subject to the limitations prescribed by s. 112.061, a municipality or county may pay the per diem and travel expenses of its representatives on the council to the headquarters city of the planning council.

077-118—November 8, 1977

CITY OF HIALEAH

AUTHORITY TO PURCHASE HIALEAH RACE TRACK

To: Ralph Miles, City Attorney, Hialeah

Prepared by: Staff

QUESTION:

> **Does the City of Hialeah have the authority to purchase Hialeah Racetrack?**

SUMMARY:

> **The City of Hialeah has the authority pursuant to AGO's 076-209 and 077-19 and s. 6(8), City of Hialeah Charter, to purchase the Hialeah Race Track.**

In AGO's 076-209 and 077-19, I concluded that the city could purchase the track under the terms and restrictions contained in those opinions. I have also been informed that the electors of Hialeah recently approved, by referendum, the purchase of this facility. This fact reaffirms the strength of the referenced opinions.

A copy of the Internal Revenue Service's September 29, 1977, letter of approval has also been submitted. In this letter, the IRS concluded that:

> (1) The loan obtained by City M for the purchase of real property, with Facility Z thereon, qualifies as an obligation issued to finance "sports facilities" as that term is used pursuant to section 103(b)(4)(B) of the Code;
> (2) Since the subject of City M's loan is the financing of an exempt activity, interest payable to the recipient banks on this loan shall not be subject to Federal income tax pursuant to section 103(a)(1) of the Code.

Thus, it is appropriate to ascertain whether this facility may be classified as a "stadium" which is within the ambit of s. 6(8):

> *Recreational and cultural institutions.* To acquire and maintain and operate, aviation fields, playgrounds, golf courses, swimming pools, *stadiums*, auditoriums, libraries, aquariums, art museums and other cultural and educational institutions. (Emphasis supplied.)

The Supreme Court of Pennsylvania, in Martin v. City of Philadelphia, 215 A.2d 894, 896 (Penn. 1966), stated, "[a] sports stadium is for the recreation of the public and is hence for a public purpose"; *see also* Ginsberg v. City and County of Denver, 436 P.2d 685, 689 (Colo. 1966).

There is a dearth of sources from which to determine, precisely and unequivocally, what may be deemed to be a stadium. I have found no cases from Florida or other jurisdictions containing any discussion of whether a horse racing facility may properly and reasonably be included under the term stadium. However, from the limited sources which are available, I must conclude that the scope of the term is quite broad. Two basic, general elements common to a stadium are emphasized. The first such element is that a stadium is an outdoor structure containing seating for spectators. Steinberg v. Forest Hills Golf Range, 105 N.E.2d 93, 95 (N.Y. 1952); Alexander v. Phillips, 254 P. 1056, 1057-1058 (Ariz. 1927). The second element is that the spectators occupying such a structure do so in order to view athletic or sporting competition in which there are winning and losing contestants. Steinberg v. Forest Hills Golf Range, *supra*. Both elements appear to be present to the necessary extent with respect to the Hialeah facility.

In Webster's Third New International Dictionary (unabridged), "stadium" is defined as "a large usually unroofed structure with tiers of seats for spectators built in various shapes (as circular or elliptic) and enclosing a field usually used for *sports events* (as baseball, football, track and field)." (Emphasis supplied.) In United States v. Pinto, 503 F.2d 718, 724 (2d Cir. 1974), the court considered whether horse racing (in that case, harness racing) qualified as a "sporting contest" for purposes of a federal statute proscribing bribery in sporting contests and defining sporting contest as a contest between "individual contestants." The court held that such racing does constitute a sporting contest between individuals to the same extent as other events such as football or basketball.

It is my opinion that the Hialeah facility, because of both its physical structure and the nature of the events held therein, may reasonably and properly be labeled as such. Thus, the city's official determination that its power to acquire stadiums allows it to acquire the

Hialeah facility is, in my view, reasonable, tenable, and in accord with the above authorities.

077-119—November 17, 1977

COUNTIES

HOME RULE CHARTER MAY PROVIDE FOR COMMISSION SIZE AND METHOD OF ELECTION DIFFERENT FROM GENERAL LAW

To: Richard I. Lott, Escambia County Attorney, Pensacola

Prepared by: Patricia R. Gleason, Assistant Attorney General, and Dennis J. Wall, Legal Research Assistant

QUESTIONS:

1. May a county charter provide for a board of county commissioners composed of more than five members, notwithstanding s. 124.01, F. S.?

2. May a county charter employ single-member districts in connection with board of county commissioners' elections?

SUMMARY:

Section 1(e), Art. VIII, State Const., authorizes a county to provide by charter for more or less than five members of its governing body and to provide for their election from single-member districts.

AS TO QUESTION 1:

Your first question is answered in the affirmative.

Section 1(e), Art. VIII, State Const., provides for the composition, reapportionment, and election of the board of county commissioners in the following language:

> Commissioners. *Except when otherwise provided by county charter*, the governing body of each county shall be a board of county commissioners composed of five members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected by the electors of the county. (Emphasis supplied.)

The exception relating to county charters provided in s. 1(e), Art. VIII, *supra*, relates to the whole of that subsection. Socash v. Volusia County, Case No. 51,920, 7th Judicial Circuit (July 24, 1972), *aff'd mem.*, 267 So.2d 77 (Fla. 1972). A county charter may, therefore, provide for a form of county government different from that provided for by the remaining language of s. 1(e), Art. VIII. (Charter counties may not, however, abrogate the duties imposed by the Constitution or by law upon their governing bodies. *See, e.g.*, AGO's 074-265 and 073-356.) Given this specific constitutional authorization, a county charter may provide for a form of county government different from that provided by general law. *See* Dade County v. Young Democratic Club, 104 So.2d 636, 639 (Fla. 1958); AGO's 071-294 (chief distinction between charter and noncharter counties is in form of government former may adopt) and 071-109 (county charter may not be inconsistent with general law unless express constitutional authority can be found therefor); *cf.* General Electric Credit Corp. v. Metropolitan Dade County, 346 So.2d 1049, 1054 (3 D.C.A. Fla., 1977) (general law equally at force throughout the state prevailed over zoning review procedures of County Code of Metropolitan Dade County to the extent that the two conflicted). In such a case, there is no "inconsistency" between the county charter and general law within the meaning of s. 1(g), Art. VIII, State Const.; the exception provided for county charters in s. 1(e), Art. VIII, necessarily constitutes an exception to the provisions of general law as well. *See* Dade County v. Young Democratic Club, 104 So.2d at 639; AGO 071-109. It has therefore been expressly held that a county charter providing for other than five members of its governing body is "constitutional" and "valid." Socash v. Volusia County, No. 51,920, 7th Judicial Circuit (July 24, 1972), *aff'd mem.*, 267 So.2d 77 (Fla. 1972).

It should be pointed out that the foregoing relates only to charter counties. Noncharter counties are strictly subject to the provisions of the Constitution and of general law pertaining to the composition and election of their governing bodies. Section 1(e) and (f), Art. VIII, State Const.; s. 124.01(1), F. S.; *see* AGO 077-38 (noncharter counties may exercise only those powers conferred by general or special law); *cf.* Flagler County Board of Commissioners v. Likins, 337 So.2d 801, 803 (Fla. 1976) (provisions of Constitution and of general law pertaining to election of county commissioners applied to noncharter county); Townley v. Marion County, 343 So.2d 1312, 1313 (1 D.C.A. Fla., 1977) (noncharter counties have only such power of self-government as provided by general or special law and may not enact zoning regulations inconsistent with part III of Ch. 163, F. S.).

AS TO QUESTION 2:

In the *Socash* case discussed above, it was also argued that the Charter of Volusia County was "in fatal conflict" with s. 1(e), Art. VIII, State Const., insofar as it provided for the election of members of that county's governing body from single-member districts. Section 301, Art. III, Charter of Volusia County, Ch. 70-966, Laws of Florida. Holding that the previously quoted charter county exception of s. 1(e), Art. VIII, applies to that entire subsection, the lower court upheld this provision of the Charter of Volusia County. As was also previously stated, the Supreme Court of Florida affirmed, despite a strong expression of views to the contrary by Ervin, J. Socash v. Volusia County, 267 So.2d at 77 (Ervin, J., dissenting). Counties may therefore provide by charter for the election of members of their governing bodies from single-member districts.

In reaching this conclusion, I have not overlooked the case of Ervin v. Richardson, 70 So.2d 585 (Fla. 1954), which effectively construed s. 5, Art. VIII, State Const. 1885 ("county commissioners shall be elected by the qualified electors of said county"), to require that all county commissioners be elected countywide. Ervin v. Richardson, 70 So.2d at 587. While s. 1(e), Art. VIII, *supra*, contains substantially similar language, I have pointed out above that all matters contained in the subsection are subject to the exception given in favor of county charters. Had the framers of the present Constitution intended to mandate the at-large election of all county commissioners, irrespective of any county charter provisions to the contrary, they would have carried forward without change the words of the 1885 Constitution. *See* Gray v. Bryant, 125 So.2d 846, 856 (Fla. 1960); *cf.* Stern v. Miller, 348 So.2d 303, 307-308 (Fla. 1977).

Since it is the gravamen of this opinion that s. 1(e), Art. VIII, State Const., allows counties to adopt by charter alternatives to the form of county government provided for by that section and by general law, it should be pointed out that a county charter may not only provide for single-member districts but may adopt whatever form of at-large election it may desire. Your preference for single-member districts is in line with that of the United States Supreme Court, as expressed in Connor v. Finch, 97 S.Ct. 1828, 1834 (1977), a preference founded upon a judgment that single-member districts are a more efficient means of securing equal representation. Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976).

Finally, it should again be pointed out that those provisions of the Constitution and of general law relating to the composition and election of a board of county commissioners are binding upon noncharter counties, so that in such counties the board of county commissioners must be elected on an at-large basis. Section 1(e) and (f), Art. VIII, State Const.; s. 124.01(1)-(2), F. S.; Informal Opinion Letter from Attorney General to Honorable Grover C. Robinson, III, June 8, 1977; *cf.* Flagler County Board of Commissioners v. Likins, 337 So.2d at 803 (principle applied to noncharter county commission); Townley v. Marion County, 343 So.2d at 1313 (noncharter counties have only such powers of self-government as provided by general or special law); AGO 077-38 (same).

077-120—November 17, 1977

PUBLIC OFFICERS

MUST COLLECT FEES AT THE TIME OF OR BEFORE THE RENDITION OF SERVICES

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Where services primarily benefiting a private party are performed by a public agency *prior* to the payment for the services by said party, does the same constitute an unlawful giving, lending, or using of the public taxing power or credit to aid said private party; what different answer to this question, if any, is necessary because of distinctions between governmental and proprietary functions?

SUMMARY:

Statutorily authorized or required fees or service charges collected by public officers represent charges which the state or a county makes for services rendered by it through its officers and constitute a fund subject to the control of the Legislature. Unless otherwise provided by law, such fees or service charges are due and payable in advance of or upon the rendition of services which the public officer is authorized or required by law to perform. If a public officer fails to collect fees or service charges for services performed, he must bear the loss unless otherwise provided by law. Accordingly, explicit statutory authorization is required to enable a public officer to extend credit for the payment of fees or service charges or to authorize an officer to bill and collect the fees earned after the services are performed.

Public officers may collect fees and service charges for services rendered only when and to the extent authorized by law. 67 C.J.S. *Officers* s. 90, p. 328; Bradford v. Stoutamire, 38 So.2d 684 (Fla. 1949); Furnia v. Grays Harbor County, 291 p. 1111 (Wash. 1930); Duclos v. Harris County, 291 S.W. 611, *aff'd*, 298 S.W. 417 (Tex. 1927). An officer demanding fees or service charges from the public or the state or other governmental bodies must point to a particular statute authorizing them. 67 C.J.S. *Officers* s. 90; State *ex rel.* Holcombe v. Stone, 166 So. 602 (Ala. 1936). Moreover, such statutes are to be strictly construed. Bradford v. Stoutamire, *supra* at 685; McQuay, Inc. v. Hunter, 105 So.2d 476 (Miss. 1958). Fees or service charges collected by public officers represent charges which the *state* (or county) makes for services rendered by it through its officers and constitute a fund "subject to the control of the state to be applied as the Legislature directs." Flood v. State, 129 So. 861, 864 (Fla. 1930). *See* Flood v. State, 117 So. 385, 386 (Fla. 1928), defining fee as "a charge fixed by law for the services of public officers. . . ." *Accord*: Covington v. Quitman County, 17 So.2d 597 (Miss. 1944); Webster County v. R. T. Nance, 362 S.W.2d 723 (Ky. 1962).

In light of the foregoing, therefore, it is unnecessary to distinguish between governmental and proprietary functions, since all fees or other charges collected by public officers constitute public funds subject to the control of the Legislature. In this regard, an examination of the Florida Statutes reveals several examples of legislative authorization for the collection of fees and other charges by state and county officers and requirements relative to the accounting for and reporting of such fees or charges. *See e.g.*, s. 111.03, F. S., providing for the collection, accounting, and depositing of fees which are collected or received by any person connected with any state administrative office; s. 113.02, F. S., stating that no commission shall be issued by the Governor or attested by the Secretary of State until the fee fixed and required by s. 113.01, F. S., ($10) shall first be paid; s. 116.03, F. S., requiring each state or county officer who receives all or any part of his compensation in fees or commissions or other remuneration to keep a complete report of fees and commissions or other remuneration collected by him and to report

same annually to the Department of Banking and Finance; s. 218.36, F. S., mandating that each county officer who receives any compensation in fees, commissions, or other remuneration must keep a complete record of same and make an annual report thereof to the county commission; s. 215.31, F. S., providing that revenue, including licenses, fees, imposts, or exactions, collected or received under the authority of the laws of the state by each state official or other agency of the state shall be promptly deposited in the State Treasury; s. 215.37, as amended by Ch. 77-147, Laws of Florida, providing that state examining and licensing boards are to be financed from fees collected; s. 219.06, F. S., providing procedures for the collection of fees, commissions, and other compensation by county officers.

In other statutes, the Legislature has specifically prescribed the fees which are to be paid for the rendition of certain services. *See, e.g.*, s. 15.09, F. S. (1976 Supp.), providing for fees to be collected by the Department of State; s. 28.222(3), F. S., requiring the clerk of the circuit court to record certain kinds of instruments "upon payment of the service charges prescribed by law"; s. 28.2401, F. S., as amended by Ch. 77-284, Laws of Florida, providing for "the fees to be charged" by the clerk in probate matters; s. 320.081(1), F. S., as amended by s. 12, Ch. 77-357, Laws of Florida, providing for the issuance of license plates to evidence payment of annual license fees for certain mobile homes; and ss. 322.12 and 322.121, F. S., providing that prescribed drivers license examination and periodic reexamination fees shall be collected at the time of examination or reexamination.

When the Legislature has prescribed the manner in which fees or service charges are to be paid, this method is controlling. 67 C.J.S. *Officers* s. 99(a), p. 359; Anderson v. City of Rockford, 59 N.E.2d 327, 328 (Ill. App. 2d, 1945). However, where a statute prescribes the fees which an officer shall receive and omits to provide when, how, and by whom they shall be paid, the person at whose request the service is rendered shall be liable, and the officer is entitled to payment *as the services are performed.* 67 C.J.S. *Officers* s. 99; Baldwin v. Kouns, 2 So. 638, 639 (Ala. 1887).

Moreover, unless otherwise authorized to do so by law, a public officer charged with the collection of fees may not accept anything but money (*i.e.* cash) in payment thereof. *See* Baker v. State Highway Department, 165 S.E. 197, 202 (S.C. 1932) in which the court held that the state highway commission had no power to accept cashier's checks or personal checks in payment of license fees; AGO 073-26 concluding that in the absence of statutory authority a state agency may not accept credit cards in payment of goods or services—or licenses or taxes—supplied or collected by it; AGO 074-374 holding in part that the Department of Professional and Occupational Regulation was not authorized to require payment of license fees by any medium of payment other than United States legal tender or money. *Cf.* 84 C.J.S. *Taxation* s. 623, p. 1242, stating the general rule that taxes must be paid in cash; Peninsula Land Co. v. Howard, 6 So.2d 384, 390 (Fla. 1942); Wadsworth v. State, 142 So. 529, 530 (Ala. 1932). Thus, the acceptance of a check by a public officer constitutes only conditional payment, and if the check is never presented or is dishonored, the tax or fee remains a charge. 84 C.J.S. *Taxation* s. 623, p. 1243; AGO's 074-374 and 073-26; *cf.*, s. 28.243, F. S., providing, in part, that the clerk of the circuit court shall be personally liable for worthless checks unless the clerk "after due diligence to collect the returned check, forwards the returned check to the state attorney of the circuit where the check was drawn for prosecution"; s. 215.34, F. S., providing the procedures for processing a worthless check given in any payment of any "license, fees, taxes, commission or charges of any sort authorized to be made under the laws of the state and deposited in the state treasury . . ."; and s. 832.06, F. S., providing for processing worthless checks given to county tax collectors for certain fees, licenses and taxes.

Similarly, with respect to the *time* at which public officers are required to collect payment for fees or service charges, the general rule is that payment is due at the time the services are performed, unless otherwise provided by law. 67 C.J.S. *Officers* s. 99. *See also* 70 C.J.S. *Payment* s. 5, p. 216, stating that one becomes liable for the payment of money when all the essential acts and happenings to fix liability on the person to be charged have transpired. Fees are sometimes payable in advance of the performance of the official service. *See* 67 C.J.S. *Officers* s. 99; and s. 30.51(2), F. S., providing that certain sheriff's fees, or a deposit sufficient to cover them, shall be collected in advance from the party who requests the service; however, services may be performed for any governmental agency without advance payment, and the sheriff shall bill and collect the fees earned from such agency after the service is performed. Clearly, therefore, a public officer has no inherent or implied authority to extend the time of payment or otherwise extend credit for the payment of fees or service charges which he is authorized and

required by law to collect. St. Louis County v. Magie, 269 N.W. 105, 108 (Minn. 1936). It is, of course, axiomatic that state and county officers have no inherent powers and can exercise such authority only as is prescribed by law; and if there is any doubt as to the existence of authority, it should not be assumed. *See, e.g.*, Hopkins v. Special Road and Bridge District No. 4, 74 So. 310 (Fla. 1917); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); Edgerton v. International Company, 89 So.2d 488 (Fla. 1956); State *ex rel.* Greenberg v. Florida Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 600 (Fla. 1974).

Moreover, public officials have been held strictly accountable in their positions as custodians of public funds. St. Louis County v. Magie, *supra.* Thus, it is well established that a public officer may be personally liable for a failure to collect the prescribed statutory fees for his services. 67 C.J.S. *Officers* s. 99, p. 360; United States Nat. Bank v. Underwriters at Lloyd's, 382 P.2d 851, 854 (Ore. 1963); Jacobsen v. Jeffries, 47 P.2d 892, 893 (Utah 1935), holding that, should an officer inadvertently or otherwise file a paper for which a fee is required to be paid, he is forthwith bound to account for such fee whether or not he collected the fee at the time the paper was left for filing.

Similarly, in an opinion issued on February 3, 1933, and found at p. 251, Biennial Report of the Attorney General, 1933-1934, one of my predecessors in office ruled as follows with respect to the collection of filing and recording fees by the clerk of the circuit court:

> Under the law filing and recording fees should be paid at the time of or prior to the service rendered, and it is the duty of the officer to see that these fees are collected and accounted for as they represent compensation to the county for services rendered by it through its officer, and the officer has no right under the law to extend the county's credit to anyone. If he fails in this duty, he would probably be liable on his bond therefor.

Accord: Attorney General Opinion 075-10, holding that the clerks of the circuit courts do not have the legal authority to record plats submitted for recording pursuant to s. 177.071, F. S., until the developer or subdivider has paid the prescribed recording fees.

Applying the foregoing cases, authorities, and Attorney General Opinions to your inquiry, it is my opinion that, unless explicitly authorized by law, a public officer may not extend credit for the payment of fees or service charges prescribed by law since such fees or charges are due and payable in advance of or upon the rendition of services which the public officer is authorized or required by law to perform. This conclusion is dispositive of the instant question and makes it unnecessary to consider the constitutional issue implicit in your question.

077-121—November 17, 1977

COUNTIES

ACCOUNTING PRACTICES—DEPARTMENT OF BANKING AND FINANCE MAY NOT ADOPT PRACTICES INCONSISTENT WITH STATUTORY REQUIREMENTS

To: Richard B. Shore, Clerk, Circuit Court, Bradenton

Prepared by: Staff

QUESTION:

> **Is the Department of Banking and Finance authorized under s. 218.33(2), F. S., to promulgate rules and regulations providing for uniform accounting practices and procedures and classification of accounts, which would be different from or inconsistent with the county budget system and budgetary funds prescribed by s. 129.01(1), F. S.?**

SUMMARY:

> **The Department of Banking and Finance is authorized under s. 218.33(2), F. S., to promulgate the rules and regulations providing for uniform accounting practices and procedures and classification of accounts, but such rules and regulations, may *not* be different from or inconsistent with the county budget system and budgetary funds prescribed by s. 129.01(1), F. S. Chapter 73-349, Laws of Florida, codified as s. 218.33, F. S., does not repeal or nullify, and is not irreconcilably repugnant to or inconsistent with, s. 129.01(1) and, accordingly, s. 129.01(1) is still operative and in full force and effect and will remain so until the Legislature repeals, amends, or alters said statute by proper legislative enactment.**

Your question is answered in the negative.

Chapter 129, F. S., relates to and regulates annual county budgets. Section 129.01 establishes the county budget system and requires the adoption of an annual budget for the several funds listed therein and sets forth certain directions and requirements regarding the preparation, adoption, and execution (as prescribed in Ch. 129) of such budget. Sections 129.01(1) and 129.011(1) were recently amended by Ch. 77-165, Laws of Florida, and the effect, if any, of such amendment on your question must also be considered.

Section 218.33(2), F. S., added by s. 2 of Ch. 73-349, Laws of Florida, provides:

> (2) The [D]epartment (of Banking and Finance) is empowered and authorized to make *such reasonable rules and regulations regarding uniform accounting practices and procedures by units of local government in this state, including a uniform classification of accounts*, as it deems *necessary* to assure the use of proper accounting and fiscal management techniques by such units. (Emphasis supplied.)

Section 218.31(1), F. S., defines "[u]nit of local government" to mean a county, municipality, or special district.

Section 218.33(4), F. S., provides:

> (4) Any word, sentence, phrase, or provision of any *special act, municipal charter, or other law that prohibits or restricts a unit of local government from complying with this section or any rules or regulations promulgated hereunder is hereby nullified and repealed to the extent of such conflict.* (Emphasis supplied.)

Thus, the statute (Ch. 73-349, *supra*, codified as s. 218.33, F. S.) empowers the Department of Banking and Finance to promulgate rules and regulations regarding uniform accounting practices and procedures by units of local government, including by specific language *uniform classification of accounts*, and *repeals* and *nullifies* any special act, municipal charter, or *other law* that restricts or prohibits a unit of local government from complying with s. 218.33 or any rules or regulations promulgated thereunder.

The title to ch. 73-349, Laws of Florida, provides in part:

> AN ACT relating to local government . . . amending chapter 218, Florida Statutes, by adding a new part III, relating to local financial management and reporting; providing for financial reporting by *all units of local government*; providing *uniform fiscal years and authority to develop and implement uniform accounting procedures*; providing certain budgeting requirements and procedures; providing optional procedures for counties and municipalities in relation to special districts within their boundaries; providing procedures, reports and penalties for failure to comply; *providing for removal or modification of special act or charter restrictions inconsistent with this act*; repealing Chapter 128, Florida Statutes, and sections . . . 216.111[2] and 145.12, Florida Statutes, relating to . . . county finances . . . . (Emphasis supplied.)

The title of an act defines the scope of the act, County of Hillsborough v. Price, 149 So.2d 912 (2 D.C.A. Fla., 1963); Finn v. Finn, 312 So.2d 726 (Fla. 1963); and where any doubt or ambiguity exists, it may be considered in determining the legislative intent, Curry v. Lehman, 47 So. 18; State v. Yeats, 77 So. 262; Jackson Lumber Co. v. Walton County, 116 So. 771. If the language of an act is susceptible to more than one interpretation, the legislative intent is to be gleaned from a consideration of the act as a whole, the evil to be corrected, the language of the act, including its title, and the state of the law already in existence bearing on the subject, and the act given that construction which comports with the evident legislative intent. Foley v. State, 50 So.2d 179. The fundamental rule, to which all other rules are subordinate, in construction of statutes is that the intent thereof is law and should be duly ascertained and effectuated. American Bakeries Co. v. Haines City, 180 So. 524; Pillans & Smith Co. v. Lowe, 157 So. 649; Smith v. Ryan, 39 So.2d 281; *see also* Associated Dry Goods Corp. v. Department of Revenue, 335 So.2d 832, Smith v. City of St. Petersburg, 302 So.2d 756.

Applying the foregoing rules of construction to the issue raised by the above-stated question, it is manifest from the title of Ch. 73-349, *supra*, that the Legislature did not intend to nullify or repeal s. 129.01(1), F. S., or any other section or provision of Ch. 129, F. S. The pertinent part of the title provides only for the "removal or modification of *special act or charter* restrictions *inconsistent* with this act (newly added part III of Ch. 218, F. S.)." (Emphasis supplied.) It did provide for "amending subsections . . . 129.01(2)(a) and (b) and 129.03(2)(b)-(f), Florida Statutes" thereby evidencing the intent that those sections of Ch. 129 were to remain operative and continue in full force and effect, as so amended. Reading that part of s. 218.33(4), F. S., as enacted by s. 2 of Ch. 73-349, providing for the repeal of "any special act, municipal charter *or other law* (that) prohibits or restricts a unit of local government from complying with (s. 218.33, F. S.) . . . to the extent of such conflict" (Emphasis supplied.) in light of the legislative intent and purpose expressed in the title of Ch. 73-349, it becomes evident that the term "other law" as used in the context of s. 218.33, F. S., must have reference to other laws of the same nature, character, and effect as "special act(s) or charter(s)," such as local acts and general laws of local application pertaining to local governmental agencies (*cf.*, s. 12(g), Art. X, State Const., defining a special law to mean a special or local law, and s. 11(a), Art. III, referring to general laws of local application and including such laws in the same category or classification as special laws for the purpose of s. 11 of Art. III), and not to general laws such as Ch. 129 uniformly regulating the county budget system and the county annual budget and funds included therein. The body of the act provides "any special act, municipal charter or *other law*"; (Emphasis supplied.) the special words "special act (or) municipal charter" being followed by the more general words "or other law," would seem to require application of the rule of construction, *ejusdem generis*. By that rule, where general words follow the enumeration of particular or specific classes of things, the more general words or phrases will be construed to refer only to things of the same general nature or class as those particularly enumerated, unless there is clearly manifested a legislative intent to the contrary. In this instance, the word "other" following the enumeration of particular kinds or classes of laws should be read "as such like" and include only other laws of a like kind or character (as those specifically enumerated). *See* Van Pelt v. Hilliard, 78 So. 693, 697; *In re* Ratliff's Estate, 188 So. 128, 133; State v. Town of Davie, 127 So.2d 671, 673. The Legislature did express its intent in the title of Ch. 73-349 to repeal certain general laws, *i.e.*, "repealing Chapter 128, Florida Statutes (relating to the making and filing of financial reports and statements by the County Commissioners and Clerk of the Circuit Court), and sections . . . 216.111(2) and 145.12, F. S. (relating to annual financial statements to be submitted by the counties and other governmental units, and annual reports of fees collected by county officers and disposition of excess fees of such officers)," and certain other general laws relating to municipal finances. However, the title makes no provision whatever for the repeal of any part of Ch. 129 (to the contrary, it provides for the amendment of ss. 129.01 and 129.03, as hereinbefore noted), and it must be presumed that, had the Legislature intended to repeal Ch. 129 or any part thereof, to make any further modification thereof than that made in both the title and body of Ch. 73-349, or to authorize the promulgation of any rules governing the annual county budgets and the statutorily specified funds therein inconsistent with the terms and provisions of Ch. 129, it would have done so. Failing to have done so, it evidenced its intent that Ch. 129 was to continue to control and govern and regulate the annual county budgets, the funds included therein, and the levying of taxes and the expenditure of county moneys for county purposes. Consistent with such intent, neither the title nor the purview of Ch. 73-349 provides for any repeal of any part of Ch. 129 or for any further amendment or modification thereof than indicated therein.

Enacted as part of Ch. 73-349, *supra*, were amendments to ss. 129.01(2)(a) and (b) and 129.03(2)(b)-(f), F. S. This is significant inasmuch as your question involves reconciling the commands of ss. 218.33 and 129.01(1), F. S., which were not altered or amended by Ch. 73-349.

It is a settled rule that the interpretation of a statute leading to the repeal of an existing or prior law not expressly repealed by the Legislature should not be adopted unless it is inevitable and unless it is made to appear there is a positive repugnancy between the two or that the later statute was clearly intended to prescribe the only governing rule. Tamiami Trail Tours v. City of Tampa, 31 So.2d 468; Sweet v. Josephson, 173 So.2d 444; *accord* State *ex rel.* School Board of Martin County v. Department of Education, 317 So.2d 68. Where a statute has been passed with knowledge of prior existing laws (both the title and body of Ch. 73-349 manifest legislative knowledge of Ch. 129, F. S.), a construction is favored which gives each statute a field of operation rather than a construction that would leave one statute meaningless or repealed by implication. State Department of Public Welfare v. Galilean Children's Home, 102 So.2d 388, 392-393; City of Punta Gorda v. McSmith, Inc., 294 So.2d 27, 29; *cf.* State *ex rel.* Housing Authority of Plant City v. Kirk, 231 So.2d 522, 523-524; Mann v. Goodyear Tire & Rubber Company, 300 So.2d 666, 667. Applying these principles to the questions at hand, both the title and body of Ch. 73-349 demonstrate that the Legislature not only had knowledge of s. 129.01 but specifically undertook to amend that section along with several subsections of s. 129.03. In so doing it removed the then requirement that the county file its annual budget with the Department of Banking and Finance, substituted "appropriate state agency" for "the department" relating to the prescribing of uniform classification of accounts, and added a requirement that the county budget reflect the approximate division of locally raised receipts and all expenditures between the incorporated and unincorporated areas of the county; it made no other substantial changes in s. 129.01 and makes no reference to the provisions of s. 218.33(2) nor to any authority vested in the Department of Banking and Finance to promulgate any rules conflicting with or superseding or prevailing over the terms of s. 129.01 relative to the establishment of the county budget system and the adoption of an annual budget for the several budgetary funds designated therein. Likewise, the Legislature made the same substitution ("[a]ppropriate state agency") in s. 129.03 but, as related to the Department of Banking and Finance, it made no substantial changes in that section, except to remove the authority of that department to examine the county budget and to report deficiencies to the board of county commissioners and the requirement that the annual budget be transmitted to and approved by that department. Again, the Legislature indicated its intent that Ch. 129, as amended by Ch. 73-349, continued to govern and to control and regulate the annual county budget and the several budgetary funds included therein, as designated in s. 129.01(1). The amendments made to ss. 129.01(1) and 129.011(1) by Ch. 77-165, Laws of Florida, further evince such legislative intent. In light of such legislative action and history, I am unable to find such positive repugnance and irreconcilable conflict between s. 218.33, as enacted by s. 2 of Ch. 73-349, and the provisions of s. 129.01, as amended, (or any other provision of Ch. 129, as amended, relating to the annual county budget for the statutorily prescribed funds, the consolidation of such separate budgetary funds into a single general fund, except for the county transportation trust fund, the prescribed requisites of such budgets, and the specified requirements for the preparation, adoption and execution of such annual budgets) as is required by law in order to justify my concluding that s. 2 of Ch. 73-349 (s. 218.33) operated to impliedly repeal or modify or supersede s. 129.01 or any other section of Ch. 129, as amended. To conclude otherwise would leave Ch. 129 utterly meaningless and of no operative force. The several boards of county commissioners are and continue to be governed by the provisions of s. 129.07 making it unlawful for such boards to expend or contract for the expenditure of more than the amount budgeted for each item in each of the enumerated budgetary funds or to exceed the total appropriations of any such county budgets, except as otherwise provided in Ch. 129.

Section 129.011, F. S., was enacted in 1970 and amended in 1977, and subsection (1) of said section now provides:

> (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 *all revenue and expenditures of the county transportation trust fund established pursuant to s. 339.083 (created by this act) shall be* shown as a separate budgetary fund. (Emphasis supplied.)

The italicized language was added by s. 2 of Ch. 77-165, Laws of Florida, in 1977. Thus, in 1977, the Legislature recognized the continued force and effect of said section by enacting an *exception* thereto. Since the section *authorizes* the board of county commissioners, by resolution duly adopted, to consolidate any of its separate budgetary funds into a single general fund, with certain exceptions, the enactment of the amendment recognizes the continued force and effect of s. 129.01(1), F. S. The Legislature, therefore, must have intended that the requirements of s. 129.01(1) remain in full force and effect.

Furthermore, since s. 1 of Ch. 77-165, Laws of Florida, also amended s. 129.01(1), F. S., by changing the name of the "road and bridge fund" to the "county transportation trust fund" (created and established by s. 14 of Ch. 77-165 and codified as s. 339.083, F. S.), this also is legislative recognition of the continued existence and force of s. 129.01(1) and the enumerated budgetary funds therein. The newly established "county transportation trust fund" simply replaces, expands on, and substitutes for the former "road and bridge fund" and is included among the other specified funds making up the annual county budget which controls the levy of taxes (including those levied under s. 336.59(1), F. S., which have not been amended) and the expenditure of money for all county purposes.

And, finally, Ch. 73-349, *supra*, which provided the genesis for s. 218.33, F. S., also amended ss. 129.01(2)(a) and (b) and 129.03(2)(b)-(f), F. S., but did *not* amend s. 129.01(1), F. S., thus exemplifying a legislative intent that those sections remain viable and operative.

For all of the above and foregoing reasons, I am compelled to conclude that s. 129.01(1), F. S., as amended, is still in full force and effect. This being so, s. 218.33, F. S., must be reconciled with s. 129.01(1) so as to give full force and effect to both. Thus, any rules and regulations promulgated by the department must be operative *within* and in harmony with the requirements of s. 129.01(1) and uniform accounting practices and procedures, and uniform classification of accounts with respect to the several counties must operate within the various budgetary funds enumerated therein. The boards of county commissioners may but are not required to utilize the provisions of s. 129.011, F. S., to consolidate any of the separate budgetary funds enumerated in s. 129.01(1) into a single general fund, except for the county transportation trust fund which must continue to be shown as a separate budgetary fund.

Should the Legislature desire to abolish or alter the nomenclature or structural classification of the various budgetary funds enumerated in s. 129.01(1), F. S., as amended, it can easily express such intent by proper legislative enactment. At the present time, a contrary intent has been clearly indicated, as set forth above.

077-122—November 18, 1977

SUNSHINE LAW

SPECIAL DISTRICT MAY NOT PROHIBIT THE TAPE RECORDING OF PROCEEDINGS AT DISTRICT MEETINGS

To: Dennis A. Hedge, Attorney for Lee County Commissioners, Fort Myers Beach

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. **Can the Fort Myers Beach Fire Control District deny an individual the opportunity to record the monthly meetings of the district?**
2. **If the individual cannot record, what action can the board take to prevent the recording?**

SUMMARY:

The Fort Myers Beach Fire Control District may not prohibit a citizen from tape recording the public meetings of the district through the use of silent, nondisruptive tape recorders.

The Fort Myers Beach Fire Control District was established by Ch. 27676, 1951, Laws of Florida, as amended by Chs. 63-1539 and 63-1553, Laws of Florida. It does not appear that any of the above-cited special acts empower the district to adopt rules of government or procedure.

In AGO 072-297 this office stated that a rule which arbitrarily prohibited any and all tape recordings of the proceedings of the board of trustees of a county hospital might be struck down as being too arbitrary and unreasonable. However, it was further noted that a rule which reasonably regulated the use of tape recording devices in recording public meetings would be presumptively valid and might be upheld. This conclusion was based in part upon s. 155.10, F. S., which empowered the hospital board to "make and adopt such bylaws and rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof . . . ." *See also* 67 C.J.S. *Parliamentary Law* s. 3; and 56 Am. Jur.2d *Munic. Corp.* s. 156, which recognize the general rule that deliberative and quasi-legislative bodies may adopt such rules of parliamentary procedure *as are necessary* in order to function in an orderly and businesslike manner.

In Nevins v. City of Chino, 44 Cal. Rptr. 50 (1965), the court invalidated a city rule which prohibited the use of all tape recorders at public council proceedings. In invalidating the measure, the court found the action of the city council arbitrary, capricious, restrictive, and unreasonable. Because of recent technical developments in the area of noiseless tape recorders and the fact that accuracy in reporting public events should not be penalized in a democracy where truth is often said to be supreme, the ban, which was based on the city's police power, was found to be unreasonable.

In Sudol v. Borough of North Arlington, 348 A.2d 216 (N.J. 1975), the court adopted the reasoning of *Chino* and permanently restrained a local school board from interfering with or prohibiting a citizen from tape recording the board's public meetings. In the opinion, the court specifically noted that New Jersey, like California, had adopted "sunshine laws" which declare that it is the public policy of the state that the general public has the right to be fully informed of the actions of its elected officials. In Florida, the Sunshine Law, s. 286.011, F. S., has been similarly construed to constitute a statement of public policy that all meetings of any board or commission over which the Legislature has dominion and control be open and accessible to the public. Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969).

The only contrary case, Sigma Delta Chi v. Speaker, Maryland House of Delegates, 310 So.2d 156 (Md. 1973), rejected a *constitutional* challenge to a rule promulgated by the Maryland House of Delegates which prohibited possession of tape recorders at sessions of the Legislature. In upholding the rule, the court noted that it had its basis in the Maryland Declaration of Rights which provided that "[e]ach House shall . . . determine the rules of its own proceedings. . . ."

In the instant case, however, we are not dealing with a legislative rule promulgated pursuant to constitutional authority but rather a local ordinance, resolution, or rule enacted in the absence of statutory authorization.

Moreover, the Legislature has apparently recognized that the public should be permitted to silently tape record public meetings. This is evidenced by the amendment of Ch. 934, the Security of Communications Act, at s. 934.02, F. S., to provide that "oral communication" does *not* mean any public oral communication uttered at a public meeting.

Accordingly, unless legislatively or judicially clarified to the contrary, a rule which prohibits the use of all tape recorders, including silent recorders that are neither distracting nor disruptive, is probably unreasonable and arbitrary and in conflict with the public policy of the state as interpreted under s. 286.011, F. S., and as impliedly recognized by the Legislature through the enactment of s. 934.02(1), F. S.

077-123—November 29, 1977

TRAVEL EXPENSES

EMPLOYEE MAY ONLY BE REIMBURSED FOR SHORTER OF ACTUAL DISTANCE OR CONSTRUCTIVE DISTANCE

To: Kendall G. Sharp, Attorney for Indian River County School Board, Vero Beach

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

May a school board properly reimburse an employee for official travel when the point of origin is not the employee's official headquarters because the employee is on authorized leave for military purposes?

SUMMARY:

A district school board may reimburse its employee for authorized official travel expenses when the point of origin of travel is not the employee's official headquarters, provided that the travel distance and travel period from the point of origin to the point of destination and return are less than the constructive travel distance and travel period from the employee's official headquarters to the point of destination and return. If the actual distance traveled and travel period are greater, then reimbursement for travel expenses must be calculated on the basis of the constructive distance and travel period from the employee's official headquarters to the point of destination and return thereto.

According to your letter, an employee of the Indian River County School Board who was in Jacksonville on authorized leave for military purposes proceeded from Jacksonville to Fort Lauderdale to attend a conference on behalf of the school board. The employee was reimbursed for a round trip commercial flight from Jacksonville to Fort Lauderdale by the school board. You indicate in your letter that the Auditor General has requested that the school board seek an opinion from this office regarding the payment of these expenses.

Section 230.201, F. S., limits members of the district school board to reimbursement from the district school fund for travel expenses at the rates specified in s. 112.061, F. S., as amended. Chapter 230, F. S., is silent with regard to the travel expenses of the staff and employees of the school board, although the school board clearly has the authority to employ and compensate its officers and employees. *See, e.g.*, s. 230.23(5). Section 112.061(1)(a), F. S., however, states that it is the Legislature's intent that the provisions of s. 112.061 are applicable "to all public officers, employees, and authorized persons whose travel expenses are paid by a public agency." (Except that the provisions of any special or local law prevail over any conflicting provisions of s. 112.061 to the extent of the conflict, s. 112.061(1)(b)2.) As defined in s. 112.061(2)(a), it is clear that a district school board is an "agency or public agency" within the purview of and for the purposes of s. 112.061, as amended. (*See also* s. 1.01(9), F. S.) Therefore, the staff and employees of a district school board are subject to, and their travel expenses and per diem allowances controlled by, the rates and limitations set forth in s. 112.061, as amended. The travel expenses of all travelers are limited to those expenses necessarily incurred by them in the performance of a public purpose authorized by law to be performed by the agency. Section 112.061(3)(b). Moreover, all travel must be duly authorized and approved by the head of the agency from whose funds the traveler is paid. Section 112.061(3)(a).

This office has consistently interpreted s. 112.061, F. S., to authorize reimbursement for per diem and travel expenses only for travel away from the traveler's official headquarters as defined in s. 112.061(4). *See, e.g.*, AGO's 076-56 and 074-132. *Cf.* AGO 076-46 concluding that 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. *See also* AGO 075-237 in which this office concluded that district school board members are not entitled to reimbursement for mileage in traveling from their homes to the district's administative headquarters; they are, however, entitled to

"vicinity" mileage when necessary to carry out their official duties. In computing travel expenses, the mileage allowance is generally computed on the basis of the distance from the headquarters office to the place where the official duties are to be carried out. Where, however, the travel commences from a place other than the officer's or employee's official headquarters, *e.g.*, the traveler's place of residence, the mileage should be computed on the basis of the shorter distance, whether that is the distance actually traveled from the place of residence or the constructive distance from the headquarters city to the point of destination. *See* AGO 075-275. For example, in AGO 074-132, I stated that mileage is computed on the basis of the distance from the headquarters city to the city in which the duties are to be performed unless the actual distance, that is, from the place of residence, is shorter. *See also* AGO 075-237, in which this office concluded that mileage for school board members should be calculated from the official headquarters to the place where the official duties are to be carried out if the travel originates there; however, travel should be calculated from the traveler's place of residence when travel originates there, if it is a shorter distance than from the official headquarters to the place where the official duties are to be carried out. In AGO 075-275 this office, in considering the definition of "point of origin" as used in s. 112.061(7)(d)2. in computing travel expenses or mileage, determined that the reimbursable travel mileage should be computed on the basis of the distance from the point of origin city (headquarters city) to the city of destination, if possible by using the mileage shown on the official map of the Department of Transportation, without regard to the point within the city from which the official or employee begins his or her trip. If the travel commences from the city in which the traveler resides and which is different from his official headquarters, then reimbursable travel mileage should be calculated on the basis of the shorter distance when he travels directly from his home to the place where the official duties are to be performed, whether this is the actual distance traveled from the city of residence or the constructive distance from the headquarters city to the point of destination. *Compare with* AGO 072-386, in which I concluded that a state attorney who must travel from his official headquarters to the county seat of another county within the same judicial circuit is entitled to mileage from that county seat to his official headquarters or to his home, whichever is the shorter distance; he is not, however, entitled to per diem or mileage from his home to the county seat of the county in which he resides and return thereto.

Applying the foregoing AGO's to the instant inquiry, it appears that, while the employee may under s. 112.061, F. S., as amended, be reimbursed for properly authorized travel expenses incurred in attending the conference in Fort Lauderdale on behalf of the school board, the reimbursable mileage or common carrier fare should be calculated on the basis of the shorter distance to the point of destination, whether this is the actual distance traveled from Jacksonville to Fort Lauderdale or the constructive distance from the official headquarters city to Fort Lauderdale.

According to your letter, the employee was in Jacksonville pursuant to official orders of the United States Naval Reserve and the military leave provisions of s. 115.07, F. S. (*see also* s. 231.39(2), F. S.), and proceeded from Jacksonville to Fort Lauderdale to attend the school board conference. The employee was not temporarily stationed in Jacksonville as an employee of the school board nor was he performing any official duties for the school board at that location, and the school board had not designated that area as the official headquarters of the employee for travel purposes pursuant to s. 112.061(4), F. S. Apparently, the employee had not completed his military tour of duty and had not returned from a leave status to a duty status with the school district. The actual distance traveled and time away from his regular place of employment in attending the conference was greater than if the travel had originated from the employee's official headquarters in Indian River County. Therefore, while the employee may be entitled to travel expenses for attending the conference in question on behalf of the school board, the reimbursable travel expenses should be calculated on the basis of the travel distance and travel period from the employee's official headquarters to the point of destination and return thereto upon completion of the conference, since this is the shorter distance and travel period, regardless of the actual distance traveled or the actual travel period.

077-124—November 29, 1977

MUNICIPALITIES

MAY NOT REQUIRE EMPLOYEES WHO SERVE AS JURORS TO REMIT JUROR FEES TO THE MUNICIPALITY

To: W. R. Scott, City Attorney, Stuart

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

May a municipality require its employees on full-time pay status who serve as jurors to remit the juror fees to the municipality?

SUMMARY:

A municipality may not require its employees to remit to the municipality any juror fees or mileage allowances received or resulting from their services as jurors; however, a municipality, pursuant to its home rule powers, may determine whether a municipal employee may take administrative leave with pay when summoned to serve as a member of a juror panel.

Your question is answered in the negative.

The method and procedure for the selection, qualification, and payment of jurors is set forth in Ch. 40, F. S. Specifically, s. 40.24, as amended by Ch. 77-431, Laws of Florida, provides for the compensation of jurors:

> Grand and petit jurors of the regular panel and jurors summoned to complete a jury after the regular panel is exhausted in all the courts of the state, as well as jurors summoned upon inquest of the dead, shall receive for each day of active attendance upon the court or inquest $10. Jurors summoned to complete a panel after the regular panel is exhausted and who are not accepted and not required to serve on the jury shall receive compensation of $10 per day, and a fractional part of a day shall be counted as a day. In addition to the compensation above provided, all jurors shall receive 14 cents per mile for every mile necessarily traveled each day in going to and returning from court by the nearest practicable route. Jurors who attend on any of the days of the term when the presiding judge is absent or, being present, does not hold the session of the court shall be entitled to receive the same compensation as if the court were in session. A juror who elects to be on call as provided in s. 40.231 shall receive the compensation provided in this section for only those days such juror actually attends court and not for those days he remains on call. Any juror who is excused from serving on any jury at his own request shall not be entitled to receive any compensation either for travel or for attendance upon the court.

Your question specifically addresses the situation in which an individual serves as a juror at the same time he or she is being compensated by the city as a full-time municipal employee.

Under the broad home rule powers granted to municipalities by Ch. 166, F. S., the Municipal Home Rule Powers Act, a municipality may enact legislation on any subject upon which the State Legislature may act unless expressly prohibited or preempted to state or county government by the Constitution, general or special law, or county charter. Section 166.021. Section 40.24, F. S. 1977, clearly requires that all individuals serving as jurors receive the juror fees and mileage expenses (paid from state funds) specified in that statute. The question of whether a specific legislative authorization or requirement such as s. 40.24 constitutes an express preemption for the purposes of Ch. 166 does not appear to have been considered by the courts of this state; however, previous opinions of this office have indicated that a municipality may not supplant the scheme provided for by a state statute which has uniform statewide application and which does not authorize a local alternative to its application. *See* AGO 077-108, concluding that a police

officer who appears as a witness off duty during a time not compensated as a part of his normal duties may receive and retain the daily witness pay authorized by s. 90.14, F. S., irrespective of any local scheme providing additional compensation for the officer and, hence, the affected municipality could not require such officer to remit such fees or pay to the city in return for overtime pay received; AGO 074-189, concluding that municipalities should not adopt a policy inconsistent with s. 115.07, F. S., which requires that municipal employees be paid their full municipal salary while on military leave, regardless of any pay received from the military. *See also* Acme Specialty Corporation v. City of Miami, 292 So.2d 379, 380 (3 D.C.A. Fla., 1974), in which the court, although not specifically construing Ch. 166, stated that "a municipality may not prohibit that which is specifically authorized by a general state statute."

Therefore, your own procedures for paying a city employee wages while he or she is also serving as a juror are independent of and may not supplant the scheme provided for by s. 40.24, F. S. 1977. Accordingly, I am of the opinion that a city employee duly called and serving as a juror is entitled to receive the prescribed juror pay and mileage allowance regardless of any locally devised compensation scheme, and a municipality may not require its employees to remit to the municipality any juror fees or mileage allowances received or resulting from their service as jurors. *Cf.* Rule 22A-8.13(1)(a) F.A.C., which states, in pertinent part, that a state employee "who is summoned as a member of a juror panel shall be granted administrative leave with pay, and any jury fees shall be retained by the employee." It should be noted, however, there appears to be no prohibition against a municipality providing additional compensation when a municipal employee serves as a juror. *Cf.* AGO 076-212, concluding that, while the Legislature has required a certain prescribed minimum wage be paid on public work 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 this action. Thus, it is within the discretion of the municipality to determine whether a municipal employee may take administrative leave with pay when summoned to serve as a member of a juror panel.

077-125—November 30, 1977

PUBLIC RECORDS

AVAILABILITY OF ARREST RECORDS

To: William A. Troelstrup, Commissioner, Department of Criminal Law Enforcement, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. Is Ch. 119, F. S., the Public Records Law, applicable to the criminal history records (rap sheets) compiled and maintained in the computers of FDCLE?

2. Assuming an affirmative response to question 1, does Ch. 119 qualify as the type of Public Records Law described in Ch. 1, 28 C.F.R., 20b and commentary thereto so as to authorize dissemination of "nonconviction data"?

3. Should Ch. 119 be read *in pari materia* with Ch. 1, 28 C.F.R., 20b, *supra*, so that, for example, the requesting party might be required to execute an agreement wherein the purpose of the request and identity of the requester is stated and it is agreed that the information derived shall only be used for the purpose for which requested, etc., consistent with such regulations?

4. Having in mind that the practice of searching for criminal histories without use of fingerprint identification procedures is fraught with dangers and that the subjects of these records may have a privacy interest or are owed some duty of care, could Ch. 119 be offended if the information was withheld until the requesting party complied with the

above conditions, and, additionally, provided enough identifying information on the subject so as to eliminate all but one possible record?

SUMMARY:

Chapter 119, F. S., Florida's Public Records Law, is applicable to criminal history information compiled and maintained by the Florida Department of Criminal Law Enforcement.

Chapter 119, F. S., qualifies as the type of public records law described in 28 C.F.R. s. 20 and commentary thereto so as to authorize dissemination of nonconviction as well as conviction data.

Chapter 119, F. S., should not be read *in pari materia* with 28 C.F.R. s. 20b, since the state public records law does not permit a custodian of public documents to require a person to execute an agreement for purposes of ascertaining the identity of the requester and the purpose for such request in the absence of a state statute authorizing the same.

The United States Supreme Court decision in Paul v. Davis, 424 U.S. 693 (1976), has apparently foreclosed the possibility that a federal constitutional privacy interest exists in relation to state dissemination of nonconviction arrest data.

Your questions are apparently prompted, in part, by recent activity at both the state and federal levels concerning the question of access to criminal history information. On May 20, 1975, regulations were published in the Federal Register, 40 Fed. Reg. 11714, which related to the collection, storage, and dissemination of criminal history record information. Hearings were held during December 1975 to consider comments from interested parties on the limitations placed on dissemination of criminal history information to noncriminal justice agencies. The purpose of these hearings was to determine whether the regulations, as they were drafted, appropriately balanced the public's right to know with the individual's right to privacy.

Upon examining the regulations proposed by the Department of Justice, Law Enforcement Assistance Administration, a number of states, including Florida, objected to the restrictions placed on dissemination of criminal history information insofar as the same conflicted with state law governing access to state records. On January 6, 1976, the Governor and Cabinet, as head of the Florida Department of Criminal Law Enforcement, adopted a resolution urging the Department of Justice, Law Enforcement Assistance Administration, to adopt rules recognizing the State of Florida's right to make criminal history information a matter of state public record pursuant to Ch. 119, F. S., the Public Records Law, without running the risk of incurring a fine of up to $10,000 or the loss of Law Enforcement Assistance Administration funds.

As a result of the objections raised by Florida and other states, the federal regulations were modified to recognize that access to state and local public records is an area that should appropriately be left to regulation by the states.

The regulations were drawn in order to implement s. 524(b) of the Crime Control Act of 1973 which provides in pertinent part:

> All criminal history information collected, stored and disseminated through support under this title shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein: The Administration shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, and maintained in violation of this title, shall, upon satisfactory verification of his identity, be entitled to review such information to obtain a copy of it for the purpose of challenge or correction.

The dispute between the states and the federal government centered on whether access mandated pursuant to state or local public records laws was a "lawful purpose" as contemplated by the federal act set forth above. The amended regulations, 41 Fed. Reg.

11714, proposed March 19, 1976, 28 C.F.R. s. 20.1-20.28, now provide that conviction data may be disseminated without limitation and that criminal history record information relating to the offense for which an individual is currently within the criminal justice system may be disseminated without limitations. Insofar as nonconviction record information is concerned, the regulations now provide that after December 31, 1977, most noncriminal justice access would require authorization pursuant to a statute, ordinance, executive order, court rule, decision, or order. The regulations no longer require express authority authorizing access to such information. Such a requirement can now be construed from a general requirement in a statute or order. A state public records law which has been interpreted by a state to require that criminal history information, including nonconviction data, be made available to the public is an example of such a general requirement. Determinations as to the purposes for which dissemination of criminal history record information is authorized by state law, executive order, local ordinance, court rule, decision, or order are left to the appropriate state or local officials.

It should also be noted that, prior to the amendments, the regulations contained a requirement that criminal history record information in court records of public judicial proceedings be accessed on a chronological basis. As amended, the regulations are inapplicable to records of public judicial proceedings whether accessed on a chronological or alphabetical basis.

On the basis of this background information, your questions will now be addressed.

AS TO QUESTION 1:

Pursuant to Ch. 119, F. S., records of arrest have been considered matters of public record which are subject to public inspection and examination. *See, e.g.,* Grays v. State, 217 So.2d 133 (3 D.C.A. Fla., 1969); Malone v. State, 222 So.2d 769 (3 D.C.A. Fla., 1969); Williams v. State, 285 So.2d 13 (Fla. 1973); AGO's 057-157, 072-168, 073-166, 075-9, and 076-156. The "police secrets" rule recognized in the cases and opinions previously cited does not make records of arrest confidential. Similarly, I am unaware of any general or special law which prohibits or limits access to such information. There are, however, statutes which do serve to make certain arrest information confidential. *See, e.g.,* ss. 39.03(6)(a) and 39.12(3)-(4) and AGO's 070-113 and 070-75 relating to records of juvenile offenses; s. 905.26, concerning disclosure of the finding of an indictment against a person not in custody until the person has been arrested. In the absence of such a statutory provision, arrest information compiled by FDCLE is subject to s. 119.07(1).

AS TO QUESTION 2:

As contemplated by the federal regulations, Ch. 119, F. S., constitutes a state public records law which has been construed to authorize dissemination of arrest information. Pursuant to 28 C.F.R. s. 20.21(b)(2), after December 31, 1977, dissemination of *nonconviction data* is limited to, *inter alia,* individuals and agencies authorized to receive such information by *statutes,* ordinance, executive order, or court rule, decision, or orders as construed by appropriate state or local officials of agencies. Accordingly, your question is answered in the affirmative.

AS TO QUESTION 3:

It has been consistently held that Ch. 119, F. S., does not require a citizen to demonstrate a particular or special interest in a record as a condition to obtaining access to public documents. Thus, mere curiosity or commercial purposes do not vest in either the courts or the custodian discretion to deny inspection. *See* State *ex rel.* Davis v. McMillan, 38 So. 666 (Fla. 1905), holding that abstract companies may copy public documents from the clerk's office for their own use and sell such copies to the public for a profit. Chapter 119 concerns itself solely with what may be disclosed and not to whom, in the absence of a particular statute setting forth such a special requirement for inspection. *Accord*: State *ex rel.* Davidson v. Couch, 156 So. 297 (Fla. 1934), in which the court noted that one does not have to be a taxpayer or have a "special interest" in public documents to inspect them, and Warden v. Bennett, 340 So.2d 977, 978 (2 D.C.A. Fla., 1977), holding that a person need not show a special interest or proper motive or purpose in order to inspect public records. *Also see* AGO's 074-113, in which it was stated that a private person may inspect, copy, and/or photograph worthless check affidavits without demonstrating a personal interest therein, and AGO 073-167, which held that a person

may inspect records maintained by the abandoned property section of the Department of Banking and Finance without being required to show a special interest in such inspection.

Accordingly, a person who demands access to arrest records which are public records under Ch. 119, F. S., cannot be required as a condition of inspection to execute an agreement such as that contemplated by your third question.

AS TO QUESTION 4:

Since the answer to your third question is in the negative, it would appear that your fourth question is now moot. I would note, however, that in Paul v. Davis, 424 U. S. 693 (1976), the United States Supreme Court refused to recognize that the dissemination by the police of defamatory nonconviction arrest information violated an individual's right to privacy. As one federal court has recognized, the court's decision in *Paul* appears to have cut short the full development of nascent doctrines which sought some accommodation between values of individual privacy and the recordkeeping responsibilities of the executive branch. Hammons v. Scott, 423 F.Supp. 618 (N.D. Calif. 1976); Hammons v. Scott, 423 F.Supp. 625 (N.D. Calif. 1976). The issue of what, if any, restraints should be imposed upon the practices of public agencies regarding the maintenance and dissemination of arrest records of persons who were never convicted of the crime for which they were arrested has concerned numerous courts. *See, e.g.*, Utz v. Crellinane, 520 F.2d 467 (D.C. Cir. 1975); Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974); Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970); United States v. Dooley, 364 F.Supp. 74 (E.D. Pa. 1973); United States v. Kalish, 271 F.Supp. 968 (D.P.R. 1967); *see also*, Davidson v. Dill, 503 P.2d 157 (Colo. 1972); Eddy v. Moore, 487 P.2d 211 (Wash. 1971). The decision in *Paul* suggests that the constitutional right to privacy claim underlying the above decisions would not be adopted by the United States Supreme Court.

Accordingly, the question of access to arrest records is a matter not of federal constitutional law but rather state statutory law, and the conditions which may be imposed as a precondition inspection must either be found in Ch. 119, F. S., or in other applicable state statutes.

077-126—December 1, 1977

BANKS

INTERNATIONAL BANKING CORPORATION TREATED AS BANK FOR INCOME TAX PURPOSES

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared By: Staff

QUESTION:

Is an international banking corporation which establishes an international bank agency or representative office pursuant to Ch. 77-157, Laws of Florida, subject to the provisions of part II or part VII, Ch. 220, F. S.?

SUMMARY:

An international bank agency organized and licensed pursuant to Ch. 77-157, Laws of Florida, is authorized to maintain credit balances. A credit balance, for this purpose, is a limited purpose deposit. An international bank agency, may upon a proper factual showing, as described above, qualify as a "bank" within the purview of part VII, Ch. 220, F. S.

Chapter 220, F. S., imposes a corporate income tax on income of corporations. Corporations defined in s. 220.03(1)(b) are subject to the direct income tax imposed pursuant to part II of the chapter. Part VII of the chapter imposes a corporate franchise tax measured by the income of banks and savings associations as defined in s. 220.62. The defined banks and savings associations are subject to a corporate "franchise tax measured by net income" in an "amount equal to 5 percent" of the entity's franchise tax base for the taxable year. Section 220.63. The tax imposed by part VII on defined "banks" is in lieu of the tax imposed in part II of the chapter on all other defined corporations. "Banks" within the statutory definition of s. 220.62 are entitled to a tax credit against the corporate franchise tax imposed by part VII if certain audit procedures are permitted by the designated federal agencies. The corporate franchise tax credit authorized by s. 220.68 shall not exceed the lesser of:

> (1) The intangible tax imposed upon [pursuant to s. 199.032(1), F. S.] and paid by [the defined bank]; or
> (2) Forty percent of the corporate franchise tax due pursuant to part VII.

If an international bank operation authorized by Ch. 77-157, Laws of Florida, is within the purview of the "bank" definition provided in s. 220.62(1), F. S., the international bank operation may qualify for any tax credit made available pursuant to s. 220.68, F. S.

Section 220.62, F. S., was originally enacted by Ch. 72-278, Laws of Florida, and defined a "bank" to mean "any bank as defined in s. 658.02(1), F. S. [the banking code]." In 1973, the Legislature, through the House of Representatives, held extensive hearings concerning the issue of Florida's taxation of all financial institutions operating or doing business in Florida. Chapter 73-152, Laws of Florida, was a product of those hearings. This law amended the definition of "bank," s. 220.62(1), F. S., to provide:

> The term "bank" shall mean a bank holding company registered under the Bank Holding Company Act of 1956 of the United States, 12 U.S. Code, ss. 1841-1849, as amended, or a *bank or trust company incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia), of any state, or of any territory, a substantial part of the business of which consists of receiving deposits and making loans and discounts or of exercising fiduciary powers similar to those permitted to national banks under authority of the Comptroller of the Currency* and which is subject by law to supervision and examination by state, territorial, or federal authority having supervision over banking institutions. (Emphasis supplied.)

Thus, an international bank agency, to qualify for the s. 220.68, F. S., tax credit, must meet two pertinent statutory requirements: it must be a bank or trust company incorporated and doing business under the laws of the United States or of any state or any territory, and a substantial part of the business must consist of receiving deposits, making loans and discounts, or exercising fiduciary powers.

International bank agencies are subject to all provisions of the Florida Banking Code except those identified in s. 659.67(2)(a), F. S. These bank agencies are also subject to all provisions of Ch. 607, F. S., that are not inconsistent with the Florida Banking Code, relating to foreign corporations Section 659.67(2)(b), F. S. An international banking corporation may not, pursuant to s. 659.67(4)(a), F. S., transact banking business or maintain an office within the state for the purpose until it has, among others, complied with the applicable requirements of Ch. 607. The Comptroller's office has also advised me that the present license applicants have complied with the incorporation requirements of Ch. 607.

The second standard of the s. 220.62(1), F. S., bank definition provides that a substantial part of the "bank's" business must consist of "receiving deposits and making loans and discounts or of exercising fiduciary powers similar to those of national banks." Section 659.67(2), F. S., subjects international bank agencies to the Florida Banking Code but applies some restrictions that are not applicable to Florida domestic banks. Section 659.67(6)(e), F. S., expressly states that international banking corporations are authorized to transact limited business in Florida:

> An international banking corporation licensed under the terms of this act is authorized to transact only such limited business in this state as is clearly related to and is usual in international or foreign business and financial

> international commerce. *No such international banking corporation shall exercise fiduciary powers or receive deposits, but it may maintain for the account of others credit balances necessarily incidental to, or arising out of, the exercise of its lawful powers.* (Emphasis supplied.)

This operative statutory authority is similar or analogous to that provided in 12 U.S.C. s. 611, *et seq.*

The international bank corporation is prohibited from receiving general deposits similar to those received by Florida domestic banks, but it is expressly authorized to maintain "credit balances" which appear to be a type of limited purpose deposit. The "credit balance" proviso in s. 659.67(6)(e), F. S., appears to relate back to and modify the general deposit prohibition. The phrase "credit balance" is not defined or described in Ch. 77-157, *supra*, or the Florida Banking Code. The Comptroller, by letter of November 29, 1977, has advised me that a proposed rule, drafted pursuant to the authority of s. 659.67(12), F. S., will define credit balance for Florida's international banking purposes:

> No international corporation shall receive deposits at its agency office in Florida but its agency office may maintain for the account of others credit balances necessarily incidental to, or arising out of, the exercise of its lawful powers. Credit balances may include proceeds of loans to customers where such proceeds are not immediately disbursed; proceeds of incoming remittances; proceeds of collections made for customers' accounts; funds delivered by customers to settle letters of credit accounts with the banking agency prior to settlement date; proceeds of export bills negotiated (*i.e.*, drafts drawn under letters of credit issued by and received from other financial institutions); cash collateral or compensating balances from a customer; funds delivered prior to execution of money transfers undertaken on behalf of customers; funds delivered or received on account of the purchase or sale of securities for the account of customers; and funds received from customers to cover currency transactions or as the result of currency transactions on behalf of customers.
>
> Credit balances are offset, reduced or disbursed in accordance with the arrangement between the banking agency and its customers and the underlying transaction giving rise to the credit balance. For example, if a credit balance were the result of honoring drafts on the customer, the credit balance would be offset by the amounts paid against such drafts. Credit balances do not include domestic accounts in which business or personal banking customers utilize the account balances for purposes unrelated to the business of the banking agency, such as the payment of customers' rent, telephone bills, taxes or other such purely domestic purposes. Customer credit balances must always be necessarily incidental to or arise out of the banking agencies' involvement with international or foreign business and the financing of international commerce.

An international bank agency would not be violating the deposit prohibition of s. 659.67(6)(e), F. S., since the same sentence expressly authorizes credit balances as a limited purpose deposit. Clearly, the legislative intent and purpose of s. 659.67, F. S., is to attract international banking activity, international investment, and foreign trade to the State of Florida. The restrictions placed on international banking corporations and agencies, prohibiting them from exercising fiduciary powers or receiving deposits, was for the obvious purpose of minimizing the competitive effect that international banking corporations and agencies may have on Florida domestic banks. This intent strongly supports the position that the word "deposit," as found in s. 659.67(6)(e), was used in a very particular manner to indicate the type of deposits, *i.e.*, the normal type of deposits which the average Florida bank would be involved with in its operations.

The same legislative intent and purpose of the 1973 amendment, Ch. 73-152, *supra*, to the s. 220.62(1), F. S., definition of "banks" is apparent. The result of this definitional change was to broaden the definition of the term "bank," by permitting additional types of financial institutions to be included within the definition of a "bank." This amendment also indicates that the Legislature's use of the word "deposit" in s. 220.62(1) was not in a traditional or narrow sense, but in a very general sense, so that any financial institutions exercising banking powers, as applied to that class of "bank," could qualify as a "bank" within the ambit of s. 220.62(1).

The classification of credit balances held by an international banking agency as a limited purpose deposit within the meaning of s. 220.62(1), F. S., partially satisfies the second requirement that an international banking corporation must meet under s. 220.62(1) to constitute a bank. The final step in satisfying the second requirement is met by the international bank agency showing that a substantial part of the business of the international banking agency consists of receiving deposits, making loans, and discounts. This determination must be made by the Department of Revenue upon a sufficient factual showing made by the international banking agency.

I have reviewed the Department of Revenue's October 18, 1977, Statement of Position regarding the applicability of part VII, Ch. 220, F. S., to an international bank agency. This position is quite persuasive, but a complete review of the history of s. 220.62 and Ch. 77-157, *supra*, and the Comptroller's proposed rules defining "credit balance" leads me to the opinion, absent judicial or legislative clarification, that an international bank agency is a "bank" within the purview of s. 220.62.

077-127—December 8, 1977

LAW ENFORCEMENT OFFICERS

TRAINING PROGRAMS—LIABILITY FOR REIMBURSEMENT WHEN TERMINATING EMPLOYMENT

To: Jack M. Skelding, Attorney for Florida Sheriffs Association, Tallahassee

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTIONS:

> **1. Must police officer trainees who attended an approved training program at the expense of a municipality, state agency, or political subdivision and who terminate their employment on their own initiative within 1 year reimburse employing agency for the actual costs of their participation in such training programs?**
>
> **2. Does a sponsoring municipality, state agency, or political subdivision have discretion as to whether to institute a civil action to collect such tuition costs incurred by trainees terminating employment within 1 year of such training programs?**

SUMMARY:

> **A police officer trainee who attends an approved police training program at the expense of an employing municipality, state agency, or political subdivision and who terminates his employment on his own initiative with such employing agency within 1 year is required by law to reimburse the employing agency only for those charges paid by the employing agency to the police training school or program for instruction in the field of police education, police science, and allied fields for the training of police recruits or police officers and is not obligated to reimburse the employing agency for other costs such as ammunition used, auto expense, food expense, and salary during training. The employing municipality, state agency, or political subdivision is authorized but not required to institute a civil action to collect such charges or payment for instruction or tuition costs for attendance at approved training programs as may have been incurred by police trainees terminating employment on their own initiative within 1 year, if not reimbursed to the employing agency.**

Section 943.10(1), F. S., defines a police officer to include "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." Section 943.10(2), F. S., then defines "employing

agency" to mean "any municipality or the state or any political subdivision thereof employing police officers as defined in (s. 943.10(1), F. S.)." Section 943.11, F. S., creates the Police Standards and Training Commission within the Department of Criminal Law Enforcement, which, pursuant to s. 943.12, F. S., is empowered to establish uniform minimum standards for the employment and training of police officers and minimum curricular requirements for police training schools and programs.

The commission is also granted authority by s. 943.14(1), F. S., to "establish and maintain a police training program with such curriculum, and administered by such agencies and institutions, as it approves," and to "issue a certificate of completion to any person satisfactorily completing the training program established." Specifically, s. 943.14(2), F. S., provides: "no person shall be employed as a police officer by any employing agency until he has obtained such certificate of compliance" as issued by the commission.

Your first question relates to the provision of s. 943.16, F. S., providing:

> (1) An employing municipality, state agency, or political subdivision of the state is authorized to pay any *costs of tuition* of trainees in attendance at approved training programs.
> (2) A trainee who attends such approved training program at the expense of a municipality, state agency, or political subdivision must remain in the employment of such municipality, state agency, or political subdivision for a period of not less than one year. If his employment is terminated on his own initiative within one year he shall reimburse the municipality, state agency, or political subdivision for his participation in *such training program*, and such municipality, state agency, or political subdivision *may* institute a civil action to collect such tuition costs if not reimbursed. (Emphasis supplied.)

By your letter you inquire whether a trainee who so terminates his employment is responsible for payment of such things as tuition, ammunition used on the firing range, auto expense, food expense, and salary during training or whether the training costs are only the money which is used directly from the education funds provided under s. 943.25(5), F. S.

As set forth above, s. 943.16, F. S., first authorizes the employing agency "to pay any costs of tuition of trainees in attendance at approved training programs" and then establishes an obligation on the part of such trainees terminating their employment on their own initiative within 1 year to reimburse the employing agency for their participation in such training programs. The section concludes by authorizing such agency "to institute a civil action to collect such *tuition costs* if not reimbursed." (Emphasis supplied.) *Cf.* AGO 074-54. Additionally, the title of Ch. 74-386, Laws of Florida, enacting the provisions of s. 943.16, states that it is an act, "providing for payment of tuition by employing agency." The statute is express only as to tuition costs. Tuition is the act or business of teaching the various branches of learning, Black's Law Dictionary, Rev'd 4th Ed.; teaching or instruction, the Random House Dictionary of the English Language, The Unabridged Edition. The word is also used to signify the price of, or payment for, instruction, Webster's New Collegiate Dictionary; the charge or fee for instruction, the Random House Dictionary, *supra*. Thus, the language employed in s. 943.16, *i.e.*, "costs of tuition" and "tuition costs," in its common significance or usage refers to the charges made for instruction in the fields of police education, police science, police administration, and allied fields for the training of police recruits or police officers.

Florida courts apply the general principle of statutory construction that express mention of one thing implies the exclusion of another not mentioned. Thayer v. State, 335 So.2d 815 (Fla. 1976); Ideal Farms Drainage District v. Certain Lands, 19 So.2d 234 (Fla. 1944). When the Legislature makes an express reference to one subject, presumably it considered and purposely omitted other related subjects. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1953). In s. 943.16, F. S., there are direct and specific references to "costs of tuition" and "tuition costs." In contrast, s. 943.15, F. S., provides "the commission shall, subject to the availability of funds, reimburse an employing agency an amount equivalent to 50 percent of the salary, if any, and allowable living expenses of recruit trainees in attendance at approved training programs." Based on the foregoing rules of construction and definitions, I conclude that the Legislature purposely omitted such things as salary and living expenses from the costs which must be reimbursed, and that police trainees who attend an approved training program at the expense of an employing agency and who terminate their employment on their own initiative within 1 year are

required by the terms of s. 943.16 to reimburse the employing agency only for the charges made by the police training school or program for the instruction in the areas of police education and training aforementioned and paid for by the employing agency.

You question the impact of the provision of s. 943.25, F. S., relating to advanced and highly specialized training programs and their costs and funding, on an agency's right to such reimbursement. In respect to the advanced and specialized training programs for law enforcement officers established and supervised by the Division of Training and Standards, s. 943.25(2) provides "no fee or other charge shall be assessed against any person, municipality, sheriff, county or state law enforcement agency for the training, room or board of any person; said expenses to be borne by the state." In addition, with respect to the authorized training and training facilities for training of police officers in police techniques in detecting crime, apprehending criminals, and securing and preserving evidence by any state university or community or other organization, s. 943.25(9)(b) states:

> All law enforcement officers selected by the various law enforcement agencies, if their selection is approved by the department, shall receive such training without cost.

From review of the other provision of s. 943.25, F. S., I must assume your inquiry is in reference to the provisions of s. 943.25(5), providing that municipalities and counties may assess an additional $1 as court costs against persons convicted for violations of state penal or criminal statutes, or municipal and county ordinances, for law enforcement education expenditures for their respective law enforcement officers. Section 943.16, F. S., makes no reference to or provision for reimbursement or recovery by an employing agency of any of the expenses for the advanced specialized training programs enumerated in s. 943.25(2), and s. 943.16(2) does not require such reimbursement by a trainee. In AGO 077-59, I observed that s. 943.25(2) was concerned with the state's liability for trainees' expenses and concluded:

> The state is statutorily required to provide for the *training, room, and board of those* police officers participating in special training programs established and supervised by the Division of Standards and Training as approved by the commission. The state's liability is limited to those expenses enumerated in s. 943.25(2). (Emphasis supplied.)

Additionally, s. 943.16(2) does not authorize an employing agency to institute a civil action to collect such expenses or any expenditures for law enforcement education which might have been made under s. 943.25(2) by the state or by the employing agency under s. 943.25(5). Further, s. 943.16(2) does not require reimbursement of any costs or expenses other than the charges or fees for instruction or tuition. Accordingly, I conclude that, had the Legislature intended to include such costs and expenses as those provided for in s. 943.25 within the purview of s. 943.16(2), it would have done so explicitly. Therefore your first question, as stated, is answered in the negative.

Your second question concerns whether the last sentence of s. 943.16, F. S., is mandatory in providing: "such municipalities, state agencies, or political subdivisions *may* institute a civil action to collect such tuition costs if not reimbursed." (Emphasis supplied.) The word "may" generally has a permissive rather than a mandatory connotation. Fixel v. Clevenger, 285 So.2d 687 (3 D.C.A. Fla., 1973). By contrast, within s. 943.16, the Legislature provided trainees attending approved programs at the expense of municipalities "*must* remain in the employment of such municipality" and if terminating on own initiative within 1 year "*shall* reimburse the municipality," yet it only *authorized* the employing agency to institute civil actions to collect such tuition costs by use of the language "may institute." (Emphasis supplied.) Brooks v. Anastasia Mosquito Control District, 148 So.2d 64, 66 1 D.C.A. Fla., 1963). Moreover, defining the word "may" as used in s. 943.16 in its permissive sense is consistent with the understanding that the determination to file a civil action to collect such costs necessarily involves an evaluation of a variety of factors including a weighing of benefits as well as costs and risks of recovery. Accordingly, I conclude that the determination to institute a civil action to recover tuition costs is discretionary on the part of the employing agency; that is, the employing agency is authorized, but not required in all circumstances, to bring such action. *Cf.* AGO 074-54 (in part concluding that employing agency is

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3 OF 5

specifically authorized to institute a civil action to collect such costs). Accordingly, your second question is answered in the affirmative.

077-128—December 8, 1977

TAXATION

HOUSEHOLD GOODS AND PERSONAL EFFECTS OF NONRESIDENTS NOT EXEMPT FROM AD VALOREM TAXATION

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: Harold F. X. Purnell, Assistant Attorney General, and Maxie Broome, Jr., Legal Intern

QUESTION:

Are the household goods and personal effects of a nonresident of Florida exempt from ad valorem taxation?

SUMMARY:

Section 3(b), Art. VII, State Const., expressly limits the exemption from taxation of household goods and personal effects to residents of Florida. Section 196.181, F. S., in conformity with s. 3(b), Art. VII, also limits this exemption to permanent residents of Florida. Hence, the household goods and personal effects of nonresidents of Florida are not exempt from ad valorem taxation.

In my opinion, the answer to your question is in the negative.
Section 3(b), Art. VII of the Florida Constitution states:

> There shall be exempt from taxation cumulatively, to every head of a family *residing in this state*, household goods and personal effects to the value fixed by general law, not less than one thousand dollars, and 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.)

Section 196.001, F. S., provides:

> Unless expressly exempted from taxation, the following property shall be subject to taxation in the manner provided by law:
> (1) all real and personal property in this state and all personal property belonging to persons *residing in this state* . . . . (Emphasis supplied.)

Section 196.181, F. S., provides:

> 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. (Emphasis supplied.)

Rule 12D-7.02, F.A.C., provides:

> Only household goods and personal effects of the taxpayer which are actually employed in the use of serving the creature comforts of the owner and not held for commercial purposes are entitled to the exemption provided by Section 196.181, F. S. "Creature comforts" are things which give bodily comfort, such as food, clothing and shelter. Commercial purposes includes owning household goods and personal effects as stock in trade or as furnishings in rental dwelling units. *Household goods* and personal effects *belonging* to persons *not residing and making their permanent home in this state are not exempt.* (Emphasis supplied.)

Section 3(b), Art. VII, State Const., expressly limits the exemption from taxation to household goods and personal effects of residents of Florida. Section 196.181, F. S., and Rule 12D-7.02, F.A.C., are consistent with the Florida State Constitution inasmuch as they also expressly limit the exemption from taxation to household goods and personal effects of residents of Florida. *See also* AGO's 055-341 and 055-328. Nowhere can there be found any constitutional or statutory provision for exempting from taxation household goods and personal effects located in this state but owned by nonresidents of Florida.

077-129—December 20, 1977

FINE AND FORFEITURE FUND

MONEYS TO BE DEPOSITED

To: Hal S. McClamma, Leon County Court Judge, Tallahassee

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

Of what does the fine and forfeiture fund provided for in ss. 142.01 and 142.03, F. S., consist since these sections were amended by Ch. 77-452, Laws of Florida?

SUMMARY:

The amendments to ss. 142.01 and 142.03, F. S., by Ch. 77-452, Laws of Florida, operate to exclude from the fine and forfeiture fund only those additional fines imposed under s. 775.0835(1), F. S., which fines are required by s. 3 of Ch. 77-452 (s. 775.0835[1]) to be deposited in the Crimes Compensation Trust Fund created and established by s. 1 of Ch. 77-452 (s. 897.21, F. S.) and are earmarked for compensating the victims of crime.

Your question arises from the recent amendments to ss. 142.01 and 142.03, F. S. (by s. 2 of Ch. 77-452, Laws of Florida), which provide for and regulate a fine and forfeiture fund in each county. In pertinent part, the newly amended sections read as follows (the italicized portions being the amending phrases added by virtue of Ch. 77-452):

> **142.01 Fine and forfeiture fund contents.**—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, *except those fines imposed under s. 775.0835(1)*; 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.

> **142.03 Disposition of fines, forfeitures, and civil penalties; reports.**—Except as to fines, forfeitures, and civil penalties collected in cases involving violations of municipal ordinances . . . *and except as to fines imposed under s. 775.0835(1)*, all fines imposed under the penal laws of this state in all other cases . . . shall be paid into the fine and forfeiture fund. . . . (Emphasis supplied.)

Section 775.0835(1), added by Ch. 77-452, Laws of Florida, provides:

> When any person pleads guilty or nolo contendere to, or is convicted of, any felony or misdemeanor under the laws of this state which resulted in the injury or death of another person, the court may, if it finds that the defendant has the present ability to pay the fine and finds that the impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare, in addition to any other penalty, order the defendant to pay a fine, commensurate with the offense committed and with the probable impact upon the victim, but not to exceed $10,000. The fine shall be deposited in the Crimes Compensation Trust Fund.

The placement of the italicized exception or proviso phrase in s. 142.01, F. S., as amended and above quoted has prompted your request. Prior to the amendment, the section provided that the fund consisted 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 . . . ." Section 142.01, F. S. 1975. The question you pose is whether the addition of the exception proviso excludes from the fine and forfeiture fund all the items which follow the word "except" or only the fines imposed pursuant to newly created s. 775.0835(1). The effect of the first alternative would be to include within the fund only those fines and forfeitures collected in the county pursuant to the penal laws of the state (except those collected under s. 775.0835[1]). The other items previously included would, under this construction, now be excluded, even though, I might add, there appears to be no alternative provision directing placement of these moneys. Under the second of the alternative constructions, the fine and forfeiture fund would remain totally unchanged, the only effect of the amendment being to exclude from the fund the newly authorized fine under s. 775.0835(1). For the following reasons, it is my opinion that the latter construction prevails.

Although the language of these two sections, as amended, construed *in pari materia* does not appear to be necessarily ambiguous and susceptible of more than one interpretation, the title to Ch. 77-452, *supra*, may be considered since it operates to define the scope of the statute. *See, e.g.*, County of Hillsborough v. Price, 149 So.2d 912 (2 D.C.A. Fla., 1963); Finn v. Finn, 312 So.2d 726 (Fla. 1975); *cf.* Jackson Lumber Co. v. Walton County, 116 So. 771 (Fla. 1928).

The title of Ch. 77-452, Laws of Florida, in pertinent part provides that the act is "amending ss. 142.01 and 142.03, F. S., providing *an exception* for inclusion in the fine and forfeiture fund; adding subsection (3) to s. 775.083, F. S., to provide for fines for crimes compensation." (Emphasis supplied.) It seems clear that the Legislature intended to and did provide for an exception to those fines and forfeitures required by law to be deposited in the county fine and forfeiture fund, namely the fines for crimes compensation provided for by newly added s. 775.0835(1), F. S. No other changes in ss. 142.01 and 142.03, F. S., as the same existed before the enactment of Ch. 77-452 are made manifest by the title thereto, and the body of the act is limited to the scope defined in its title.

It is well settled that exceptions or provisos are to be strictly construed and limited to objects fairly within their terms. *See* Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); Cragin v. Ocean & Lake Realty Co., 133 So. 569 (Fla. 1931). In construing a statute, a court must ascertain and give effect to legislative intent regarding provisos as well as other parts of the statute. The proviso should be construed together with the enacting clause to give effect to each part of the act and carry out the Legislature's intent. Therrell v. Smith, 168 So. 389 (Fla. 1936); State v. Nourse, 340 So.2d 966 (3 D.C.A. Fla., 1976).

The amendment in question, as noted, is effected by Ch. 77-452, Laws of Florida, and is entitled *Crimes Compensation Act.* Among its several provisions, the act establishes the Crimes Compensation Trust Fund, its moneys earmarked for the purpose of compensating the victims of crime, and creates s. 775.0835(1), F. S., which provides for the imposition of additional fines for persons adjudicated guilty or convicted of a felony or misdemeanor which results in the injury or death of another person. Such additional fines are to be deposited in the Crimes Compensation Trust Fund, created by s. 1 of Ch. 77-452 (s. 897.21, F. S.) and thus have been excluded from the Fine and Forfeiture Fund and are disbursed and used for other purposes. There is simply no indication in the title or in any provision of the act which indicates a legislative intent to change the composition of the fine and forfeiture fund; such a change has nothing whatsoever to do with victims' crime compensation, the subject of Ch. 77-452. Moreover, no provision is made by s. 142.01 or s. 142.03 for disposition or distribution of the moneys which would be excluded from the fine and forfeiture fund if the alternative construction of the proviso were adopted. Consequently, I am of the opinion that only fines collected pursuant to s. 775.0835(1) can fairly be said to fall within the operative force of the proviso or exception clauses added by Ch. 77-452.

077-130—December 20, 1977

ANTINEPOTISM LAW

EMPLOYMENT OF WIFE OF MEMBER OF MUNICIPAL GOVERNING BODY; SPOUSE OF FIRST COUSIN; ABSTENTION FROM VOTING

To: J. B. Walkup, Jr., McIntosh Town Attorney, Ocala

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Would s. 116.111, F. S. (the Antinepotism Law) be violated if a municipal governing body employs the wife of one of the members of the governing body to serve as the municipal clerk?

2. Would such hiring be in violation of s. 116.111 on the basis that the applicant's husband is the first cousin of a member of the governing body?

3. Does abstention by the related governing body member from voting on the employment of his relative avoid violation of s. 116.111?

SUMMARY:

A municipal governing body is prohibited by s. 116.111, F. S., from employing the wife of one of the members of that body as municipal clerk. The prohibition cannot be avoided by the abstention of the related member of the governing body from voting on the employment of his wife. No violation of s. 116.111 would occur solely upon the employment by a board of the spouse of a first cousin of a member of the board, as the relationship of "cousin-in-law" is not among the classes of relationship specified in s. 116.111(1)(c). The exception in s. 116.111(4) for temporary employment of a relative in emergencies is limited to emergencies resulting from natural disasters and the like and does not allow the employment of a relative as a substitute for a regular employee who is on sick leave. A person employed in violation of s. 116.111 is prohibited by s. 116.111(3) from receiving payment for such employment, and an agency is likewise prohibited from paying a person employed in violation of s. 116.111. Pending judicial or legislative clarification of the term "any other political subdivision of the state," as used in s. 116.111(1)(f), it cannot be unequivocally determined whether the prohibitions of s. 116.111 apply to all municipalities, irrespective of their designation as "cities," "towns," etc. Statutory distinctions between "cities" and "towns" based on population and cited in Baillie v. Town of Medley, 262 So.2d 693 (3 D.C.A. Fla., 1972), were abolished by the 1974 revision of Ch. 165, F. S. Section 1.01(9), F. S., specifically defines "political subdivision" to include "towns."

Your second question may be disposed of first, by reference to the language of s. 116.111(1)(c), F. S., and to AGO 070-71. Section 116.111(1)(c) sets forth those classes of relationship which are covered by the prohibitions of s. 116.111, as follows:

> "Relative" with respect to a public official, means *an individual who is related*

> to the *public official* as father, mother, son, daughter, brother, sister, uncle, aunt, *first cousin*, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister. (Emphasis supplied.)

In AGO 070-71 it was concluded that the relationship of "nephew-in-law" is not covered by the prohibitions of s. 116.111. In that opinion it was emphasized that the specification of various relationships in s. 116.111(1)(c) excludes from the operation of the statute those classes of relationship not specifically included in s. 116.111(1)(c). In the instant case, it is not the job applicant who is the first cousin of the council member, but the husband of the job applicant. The relationship of the job applicant to the council member would be "cousin-in-law." While several "in-law" relationships are specified in s. 116.111(1)(c), there is no mention of the relationship of "cousin-in-law," just as there is no mention of "nephew-in-law." Thus, the fact that a job applicant's spouse is a cousin of a member of the employing body would not, by itself, constitute a violation of s. 116.111.

A violation of s. 116.111 would occur, however, upon the council's hiring of the wife of one of the council members to be the municipal clerk. In two prior opinions of this office concerning s. 116.111 (AGO's 073-75 and 073-335), it was concluded that a board or commission may not hire the relative of one of the members of that body. And, in AGO 073-335, it was expressly concluded that a violation of s. 116.111 could not be avoided under such circumstances by the abstention of the related board member from voting on the employment of that member's relative. As was observed in AGO 073-335, "[i]f each member of a commission were allowed to abstain, the board could conceivably employ a relative of each of its members." *Cf.* s. 286.012, F. S., which prohibits members of boards and commissions from abstaining from official votes unless a conflict of interest exists under part III of Ch. 112, F. S.; and s. 112.3143, requiring disclosure of voting conflicts. (Questions requiring interpretation of part III of Ch. 112 should be referred to the Commission of Ethics.)

Another prior opinion, AGO 073-444, also applies to your question. You explained in your letter that the council member's wife has been acting in a temporary capacity because of the illness of the former clerk. In AGO 073-444, it was concluded that "[t]he temporary employment of a relative as a substitute employee during the time the regular employee is on vacation or sick leave is violative of s. 116.111, F. S." It was emphasized in that opinion that the provision in s. 116.111(4) authorizing temporary employment of a relative in an emergency is limited to "emergencies resulting from natural disasters or similar unforeseen events or circumstances . . . ." It was concluded in AGO 073-444 that the illness of an employee does not constitute the sort of emergency contemplated by s. 116.111(4). It is a rule of statutory construction that an exception or proviso in a statute is to be strictly construed. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); Coe v. Broward County, 327 So.2d 69 (4 D.C.A. Fla., 1976). It is also a rule of construction that, where a statute sets forth certain exceptions, no other exceptions may be inferred. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Williams v. Surety Company of New York, 99 So.2d 877 (Fla. 1958).

However, one other matter is implicitly raised by your inquiry and should be considered. The municipality you represent is designated as a "town," rather than a "city." In 1972, in a two-to-one decision, the Third District Court of Appeal held that the prohibitions of both the former nepotism statute (s. 116.10, F. S. 1969) and the current statute (s. 116.111, F. S.) apply only to "cities" and not to "towns" (as those terms were defined in s. 165.02, F. S.). Baillie v. Town of Medley, 262 So.2d 693 (3 D.C.A. Fla., 1972); *cert. dismissed*, 279 So.2d 881 (Fla. 1973). The former nepotism statute had referred to "[a]ny state officer, member of state board, county officer, member of county board or commission, *city* official, or his appointee . . . ." (Emphasis supplied.) The court construed that language as being limited to those municipalities meeting the statutory definition of "city" and as excluding those municipalities meeting the statutory definition of "town." (The basis for the statutory distinction was population.) However, the court also applied that limiting construction to the present statute [s. 116.111(1)(e) and (f), F. S.], notwithstanding the fact that the present provisions expressly refer, not only to "[a] city," but also to "[a]ny other political subdivision of the state."

It is here that I must emphasize two points. First, the court did not mention, and apparently did not consider with regard to the *present* statute, the language of s. 1.01(9), F. S., which expressly provides that a "town" is a "political subdivision":

> 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.)

The definitions provided in s. 1.01, F. S., are to be applied in construing any section of the Florida Statutes, where the context will permit (and where a specific definition is not provided for use with the particular section being construed). As s. 116.111 provides no definition of the term "city" or of the term "political subdivision," I assume that s. 1.01(9), *supra*, governs. (Also, note that certain agencies and political subdivisions, *e.g.*, district school boards, are expressly excluded from the operation of s. 116.111, thus disallowing the inference of exclusion as to other agencies and political subdivisions which are not expressly excluded from s. 116.111. *See* Dobbs v. Sea Isle Hotel, and Williams v. Surety Company of New York, *supra.*) Second, I would point out that the statutory provision (s. 165.02) on which the court based its distinction between "cities" and "towns" was repealed by Ch. 74-192, Laws of Florida, when Ch. 165, F. S. (Formation of Local Governments), was revised by the 1974 Legislature. There is no longer any language in Ch. 165 (or anywhere else in the Florida Statutes or Constitution, of which I am aware) which makes any distinction among municipalities based on population, or which could be used to label a particular municipality as a city, town, village, or the like. The statutes now refer, as does the Constitution, simply to "municipalities."

Therefore, until such time as the decision in Baillie v. Town of Medley, *supra*, is reconsidered in light of the revision of Ch. 165, F. S., and in light of the definition of "political subdivision" in s. 1.01(9), *supra*, I cannot unequivocally determine whether the various prohibitions of s. 116.111, as discussed above and in our prior opinions, apply to the situation existing in the Town of McIntosh. Thus, it might be advisable to seek a declaratory judgment, as was done regarding the Town of Medley, to determine the status of the instant situation. This course of action would seem particularly advisable in light of s. 116.111(3), which provides:

> Except as provided herein, an individual appointed, employed, promoted, or advanced in violation of this section is not entitled to pay, and money may not be paid to an individual so appointed, employed, promoted, or advanced.

077-131—December 20, 1977

SCHOOL DISTRICTS

MAY PURCHASE GROUP INSURANCE FOR SCHOOL BOARD MEMBERS

To: Leauna D. Carlton, Finance Officer, Hernando County School Board, Brooksville

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **Are school board members "officers" within the context of s. 112.08, F. S. (1976 Supp.)?**

SUMMARY:

District school board members are "officers" within the context and purview of s. 112.08, F. S. (1976 Supp.); therefore, district school boards are authorized to provide and pay out of available school district funds all or part of the premiums for the designated group insurance for school board members.

Section 112.08, F. S., as amended by Ch. 77-89, Laws of Florida provides in pertinent part:

> Every local government unit is hereby authorized to provide and pay out of its available funds for all or part of the premiums for life, health, accident, hospitalization, or annuity insurance, or all of any kinds of such insurance, for the officers and employees of the unit, upon a group insurance plan and, to that end, to enter into contracts with insurance companies or professional administrators to provide such insurance. . . . Each county, municipality, school board, local governmental unit, and special taxing district of the state may self-insure any plan for health, accident, and hospitalization coverage, subject to approval based on actuarial soundness by the Department of Insurance. Each shall contract with an insurance company or professional administrator qualified and approved by the Department of Insurance to administer such plan.

The foregoing statutory provision was brought into the statutes by s. 1, Ch. 76-208, Laws of Florida. Section 1 of Ch. 76-208 substantially reworded former s. 112.08, F. S. 1975, which had authorized "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." Furthermore, former s. 112.12, F. S. 1975, repealed by s. 4, Ch. 76-208, authorized school boards, as well as other specified governmental units, to pay the premiums for the designated types of group insurance. Section 112.081, F. S. (1976 Supp.), in pertinent part authorizes the district school boards which provide group insurance plans for their officers and employees to allow retired former personnel the option of continuing to participate in such group insurance plans, at the cost of such retired personnel. Section 112.08, F. S., as amended by Ch. 76-208, expressly authorizes every school board to self-insure any plan for the designated insurance coverage, subject to approval by the Department of Insurance. Section 112.09, F. S., specifically provides that, in case of a school district, the school board shall exercise its authority to provide such group insurance coverage by resolution duly recorded in its official minutes. Section 112.10, F. S., specifically authorizes the school board to deduct from the wages of any officer or employee of the school district, periodically, the amount of the premiums which such officer or employee has agreed to pay for such insurance and to remit the same to the insurance company issuing such group insurance. It, therefore, seems clear from the aforementioned statutes as well as the legislative history of s. 112.08, F. S. (1976 Supp.), that district school boards are, for the purpose of the statute, "local government units" which may enter into contracts with insurance companies or professional administrators to provide the designated group insurance for their officers and employees.

That school board members are public officers is beyond question, requiring no citation of precedent to substantiate. *See* s. 4, Art. IX, State Const., and ss. 230.01, 230.03, 230.05, 230.12, 230.22, and 230.23, F. S. Section 112.08, F. S. (1976 Supp.), among other things, provides for the designated group insurance coverage "for the officers . . . of the unit." School board members are officers of the school district, the unit for the control, organization, and administration of schools in the district (*see* s. 230.01), and constitute the governing body of the school district, a body corporate (*see* s. 230.21, F. S.). They are not excepted or excluded from the operation of s. 112.08, nor is the term "officers" limited to any particular officers of the local governmental units by any statutory provision of which I am aware. The language, "for the officers and employees of the unit," is all-inclusive. Where the Legislature uses a comprehensive term ("officers . . . of the unit") without qualification, it must be considered that it intended to include everything embodied within the term unless the context of the statute clearly suggests otherwise. *See* Florida Industrial Commission 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).

Moreover, s. 112.14 expressly authorizes the payment of group insurance premiums "for county officers whose compensation is fixed by Chapter 145 [F. S.], in addition to the compensation provided in Chapter 145 [F. S.]." School board members, except in those counties excluded by s. 145.041(2), are compensated or paid salaries pursuant to the provisions of s. 145.041(1). And, even though s. 145.17 prohibits officers whose compensation is fixed by Ch. 145 from receiving supplemental income [*see also* s. 145.131(1) and (2)], s. 145.131(3) expressly permits the payment of all or any portion of the costs of the designated group insurance authorized by s. 112.08, F. S. (1976 Supp.), for such officers, since such payments are deemed not to be compensation within the purview of Ch. 145.

077-132—December 20, 1977

SUNSHINE LAW

COUNTY PERSONNEL COUNCIL NOT EXEMPTED

To: John Antoon, II, Attorney for Brevard County Personnel Council, Cocoa

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May the Brevard County Personnel Council deliberate in private prior to reaching a decision as to whether or not the disciplinary action taken by the county against an employee is appropriate?

SUMMARY:

The Brevard County Personnel Council may not deliberate in private prior to reaching a decision as to whether or not the disciplinary action taken by the county against an employee is appropriate.

According to your letter, the Brevard County Personnel Council is a quasi-judicial body created by county ordinance. The council is composed of citizens appointed by members of the Brevard County Commission. The function of the personnel council is to hear appeals from Brevard County employees who have been dismissed, suspended, or otherwise disciplined by their supervisors. It is customary for the council to meet as soon as possible after receiving notice that an appeal has been taken. The hearings themselves consist of a presentation by the employee of his case as well as a presentation by a representative of the appointed authority. These hearings are being conducted in the sunshine.

The council wishes to know whether its deliberative discussions after the presentation of all testimony and evidence are also subject to the Government in the Sunshine Law, s. 286.011, F. S.

In Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973), the court held that no quasi-judicial exception exists under s. 286.011, F. S., which could be utilized to allow closed door hearings during a school board's deliberative process even when such board is acting in a quasi-judicial capacity. As succinctly summarized by Justice Adkins:

> The correct understanding of the terminology "quasi-judicial" means only that the School Board is acting under certain constitutional structures which have been enforced upon all administrative boards and not that a 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. The judiciary should not encroach upon the Legislature's right to require that the activities of the School Board be conducted in the "sunshine."

On the basis of *Canney*, this office has concluded that all deliberations of a civil service board, AGO's 071-29 and 073-370, assessment administration review commission, AGO 075-37, and fair housing and employment appeals board, Informal opinion to Ms. Nikki Beare, April 20, 1977, were subject to the Sunshine Law notwithstanding the fact that said boards were acting in a quasi-judicial capacity.

Since the adoption of the present Sunshine Law in 1967, the courts have stated, almost without exceptions, that all phases of the decision-making process must be conducted in the sunshine.

> Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire *decision-making process* that the legislature intended to affect by the enactment of the statute before us.

* * * * *

. . . It is also how and why officials *decided* to act which interest the public . . . .[T]he legislature could only have meant to include therein the *acts* of *deliberating, discussion,* and *deciding* occurring prior and leading up to affirmative "formal action." [Times Publishing Co. v. Williams, 222 So.2d 470, 474 (2 D.C.A. Fla., 1969).]

It should be noted, however, that, in State of Florida Department of Pollution Control v. Career Service Commission, 320 So.2d 846 (1 D.C.A. Fla., 1975), the court found the deliberations of the Career Service Commission to be exempt from the Sunshine Law since such proceedings are ". . . quasi-judicial and not subject to Chapter 286, Florida Statutes." Subsequent to the issuance of Career Service Commission, *supra*, the Supreme Court again cited *Canney* for the proposition that the deliberations of the Public Service Commission were subject to the Sunshine Law notwithstanding the fact that such deliberations have been characterized as "quasi-judicial." Occidental Chemical Company v. Mayo, ... So.2d ....., Case No. 47, 928, filed July 14, 1977. This office recognizes the apparent conflict between these two decisions; however, until the Supreme Court recedes from its decision in *Canney*, no quasi-judicial exception exists under s. 286.011, F. S., which would permit a board which exercises quasi-judicial powers to deliberate in secret.

Your question is, therefore, answered in the negative.

077-133—December 20, 1977

MUNICIPALITIES

ANNEXATION—REFERENDUM NOT REQUIRED FOR VOLUNTARY ANNEXATION—PROCEDURE IN CONFLICT WITH CH. 171, F. S., PROHIBITED

To: Hubert C. Normile, Jr., Satellite Beach City Attorney, Melbourne

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Is a referendum as required under s. 171.0413, F. S. (1976 Supp.), necessary when a voluntary annexation ordinance is adopted pursuant to s. 171.044, F. S. (1976 Supp.)?

2. If the answer to question 1 is in the negative, does a municipality have the power to require a referendum even though such is not required by statute?

3. Does Ch. 171, F. S., permit the adoption by a municipality of annexation procedures which may be contrary to the procedures for municipal annexation set forth in Ch. 171?

SUMMARY:

No referendum is required when a municipality voluntarily annexes unincorporated territory pursuant to s. 171.044, F. S. (1976 Supp.). Because of s. 2(c), Art. VIII, State Const., and the expressions of intent in Ch. 171, F. S., regarding statewide uniformity of annexation procedures, municipalities are not empowered (absent express special law authorization) to require referendum approval of voluntary annexation or to enact any annexation procedure which is contrary to the procedures set forth in Ch. 171.

Any consideration of municipal annexation should be begun with an awareness of the controlling organic law provision, s. 2(c), Art. VIII, State Const., which provides:

Municipal annexation of unincorporated territory, merger of municipalities,

and exercise of extra-territorial powers by municipalities *shall be as provided by general or special law.* (Emphasis supplied.)

The effect of this provision of the Constitution is that any annexation must be effected either directly by the Legislature (by special law) or by a municipality in accordance with the authorization and procedures provided by a general law (Ch. 171, F. S.). Where annexation is carried out by a municipality pursuant to general law, the procedures of the general law must be strictly followed. In Town of Mangonia Park v. Homan, 118 So.2d 585, 588 (2 D.C.A. Fla., 1960), the court stated: "Where the power to extend boundaries has been delegated to a municipal corporation, the power must be exercised *in strict accord* with the statute conferring it." (Emphasis supplied.) Thus, the provisions of s. 2(c), Art. VIII, constitute a specific exception to otherwise applicable constitutional and statutory municipal home rule powers.

Your first question is answered in the negative. There is no referendum requirement in Ch. 171 in regard to *voluntary* annexation. Chapter 171 provides two methods by which a municipality may annex unincorporated territory: voluntary and involuntary. Involuntary annexation is authorized under s. 171.0413, F. S. (1976 Supp.), wherein approval by double referendum (separate majorities in the annexing municipality *and* the area to be annexed) is required. In s. 171.0413(4), it is provided that "*[e]xcept as otherwise provided in this law*, the annexation *procedure* as set forth in this section shall constitute a *uniform method* for the adoption of an ordinance of annexation by the governing body of any municipality in this state . . . ." (Emphasis supplied.) This office has consistently interpreted the "except as otherwise provided" language in s. 171.0413(4) as referring to s. 171.044, F. S. (1976 Supp.), which authorizes *voluntary* annexation, without a referendum, upon petition of all of the owners of real property in an unincorporated area. The two annexation procedures in Ch. 171—voluntary and involuntary—are alternative procedures. While there are provisions in Ch. 171 which appear to apply to voluntary and involuntary annexation (*e.g.*, the standards set forth in s. 171.043, F. S. [1976 Supp.]), the two procedures set forth in ss. 171.0413 and 171.044 clearly constitute two distinct options as to the procedure for obtaining approval of an annexation ordinance.

It is also my opinion that your second and third questions should be answered in the negative. First, as I pointed out above, the language of our Constitution makes it clear that municipalities have no inherent power to annex unincorporated territory. Rather such power must be delegated to municipalities by the Legislature and must be strictly followed. Town of Mangonia Park v. Homan, *supra*. Second, the Legislature has expressed its intention, in Ch. 171, that the method therein provided is to be uniform throughout the state. In s. 171.021(2) it is provided that one of the purposes of Ch. 171 is to "[e]stablish uniform legislative standards throughout the state for the adjustment of municipal boundaries." In accord is the above-quoted provision in s. 171.0413(4), F. S. (1976 Supp.), in which an intent of uniformity of annexation procedures is also clearly expressed. Thus, even were it not for s. 2(c), Art. VIII, *supra*, providing for annexation only by general or special law, the provisions of Ch. 171 would probably be sufficient evidence of legislative intent to preempt to the state the subject of annexation procedures, irrespective of the home rule powers of municipalities. [As I noted above, the provisions of s. 2(c), Art. VIII, provide a specific exception to otherwise applicable constitutional and statutory municipal home rule powers, as expressly recognized in s. 166.021(3)(a), F. S.]

It is therefore my opinion that a municipality is precluded (absent express general or special law authorization) from enacting any annexation procedures contrary to Ch. 171, F. S., irrespective of whether such procedures would be less stringent or more stringent than those provided in Ch. 171. As referendum approval is not presently required by general law in regard to *voluntary* annexation, a municipality—absent valid special law authorization—is not empowered to impose such a requirement.

077-134—December 21, 1977

STATUTES

SPECIAL ACT ESTABLISHING PARK BOARD—WHEN CONSTITUTIONAL

To: Henry B. Sayler, Senator, 20th District, St. Petersburg

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is Ch. 59-1736, Laws of Florida, as amended, which creates the Pinellas County Park Board, violative of s. 11(a)(1), Art. III, State Const., in that it provides that the park director may be removed only upon the concurrence of both the board of county commissioners and the park board?
2. Is the above-cited special act in violation of s. 13, Art. III, State Const., in that it provides for a 5-year term of office for members of the park board?
3. Has the above-cited special act been superseded in part by ss. 5(3) and 9 of Ch. 69-1484, Laws of Florida, which authorizes the board of county commissioners to appoint a county administrator to supervise all departments and employees of the county commission?

SUMMARY:

Ch. 59-1736, Laws of Florida, as amended, creating the Pinellas County Park Board is presumed to be constitutional and must be given effect until judicially declared to be invalid. The portion of Ch. 59-1736, as amended, which provides for a 5-year term for the members of the park board would probably be construed by the judiciary as though it provided a 4-year term. Furthermore, that part of the act which provides that the park director may be removed for cause only upon the concurrence of both the park board and the board of county commissioners does not appear to violate the constitutional prohibition against special laws pertaining to the election, jurisdiction, or duties of certain officers. Finally, Ch. 59-1736, as amended, does not appear to have been superseded by Ch. 69-1484, Laws of Florida, a special act authorizing the board of county commissioners to appoint an administrator to supervise all departments and employees of the county commission.

Chapter 59-1736, Laws of Florida, as amended by Chs. 61-2671, 69-1491, 70-901, and 72-662, Laws of Florida, establishes the Pinellas County Park Board and further provides for the employees, compensation, duties, and authority of said board. The park board, with the approval of the board of county commissioners, is empowered to supervise, manage, operate, and maintain all parks, playgrounds, and recreational areas in the county and regulate the use by the general public of such facilities. Section 3, Ch. 59-1736, as amended. The act further authorizes the board of county commissioners to acquire property by eminent domain proceedings for park purposes, as well as to levy an ad valorem tax for such purposes. Sections 5 and 6, Ch. 59-1736, as amended.

At the outset, it should be emphasized that Ch. 59-1736, as amended, like other legislative enactments is presumed to be constitutional and must be complied with until such time as it is judicially declared to be invalid. Evans v. Hillsborough County, 186 So. 193 (Fla. 1938); White v. Crandon, 156 So. 303 (Fla. 1934). This office has no authority either to declare the special law invalid *vel non* or to advise noncompliance with its terms. *Cf.* AGO 077-99. With these comments in mind, I will proceed to comment generally on the constitutional issues raised by your letter.

AS TO QUESTION 1:

Section 4, Ch. 61-2671, Laws of Florida, amended s. 4 of Ch. 59-1736, Laws of Florida, to provide in part as follows:

> The park board, with approval of the board of county commissioners is hereby authorized and empowered to employ a park director to act as general manager of all parks, playgrounds, and recreational facilities in Pinellas County. The park director shall be selected upon his professional qualifications and shall be removed only for cause determined at public hearing before the board of county commissioners and the park board upon a majority vote of both bodies.

In your letter you suggest that Ch. 59-1736, Laws of Florida, as amended, is in violation of s. 11(a)(1), Art. III of the State Constitution by virtue of the aforementioned provision which "usurps the powers, prerogatives, rights, responsibilities and obligations" of the board of county commissioners, by permitting the park board to "veto" the removal of the park director. Section 11(a)(1), Art. III, states that the Legislature shall not enact any special law or general law of local application pertaining to "election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agencies."

It is well established that s. 11(a)(1), Art. III, *supra*, (formerly s. 20, Art. III, State Const. 1885) does not prohibit the Legislature from enacting special laws which establish agencies to perform county functions. Wilson v. Hillsborough County Aviation Authority, 138 So.2d 65, 67 (Fla. 1962); State v. Dade County, 62 So.2d 904 (Fla. 1953); Lainhart v. Catts, 75 So. 47, 52 (Fla. 1917). Special laws creating county offices other than those provided in the Constitution have also been upheld, and the Legislature is empowered to confer administrative duties pertaining to the affairs of the county upon officers other than the county commissioners. Thursby v. Stewart, 138 So. 742, 750 (Fla. 1931); State *ex rel.* Landis v. Wheat, 137 So. 277, 283 (Fla. 1931). *Cf.* State v. Escambia County, 52 So.2d 125, 130 (Fla. 1951), in which the court held that a provision of a special act authorizing the Board of County Commissioners of Santa Rosa County to delegate to and invest power and authority in the Santa Rosa Island Authority to exercise, do, and perform authority, powers, duties, and acts therein prescribed with reference to Santa Rosa Island facilities did not constitute an unlawful delegation to said county commissioners of legislative powers.

Moreover, the courts have repeatedly sustained such legislation, even though the law would impose additional duties upon county officers, in order to accomplish the overall purpose of the statute. State v. Reedy Creek Improvement District, 216 So.2d 202, 207 (Fla. 1968); Kirkland v. Phillips, 106 So.2d 909, 912 (Fla. 1958); State v. City of Tampa, 72 So.2d 371 (Fla. 1954); Martin v. Dade Muckland Co., 116 So. 449 (Fla. 1928).

In State v. Holbrook, 176 So. 99, 101 (Fla. 1937), the court considered a special law providing for tenure of employment for school teachers in Orange County. The court noted that the act made "certain radical limitations" upon the powers of nomination vested in the trustees of special school districts and the powers of appointment and employment vested in the county board of public instruction. The court upheld the statute, however, against the respondent's contention that the special law regulated the duties and jurisdiction of officers. The court explained at p. 102:

> By a long line of authorities this court has held that, *where the main purpose of a local or special act is valid and constitutional, and where the effect of such act upon the jurisdiction or duties of state or county officers is merely incidental to such main purpose*, the act will not be held to be in violation of that provision of section 20 of article 3 of the [1885] Constitution [now s. 11(a)(1), Art. III, State Const.] which prohibits the passage of special or local laws regulating the jurisdiction or duties of any class of officers except municipal officers. (Emphasis supplied.)

Similarly, in Cooley v. State, 21 So.2d 347, 348 (Fla. 1945), the Florida Supreme Court wrote:

> It was contended in the court below, and that court so held, that this Act violates Sec. 20, Article III of the Constitution of Florida in that it is a special or local Act regulating the jurisdiction and duties of a county officer. With this

conclusion we do not agree. This Act designates the supervisor of registration of Pinellas County as registration officer of the City of Clearwater. This does not result in regulating the jurisdiction of Pinellas County and in no way changes or affects the performance of his duties as such county officer. The effect of the statute is to make him registration officer of the municipality of Clearwater and to define his jurisdiction and duties as such registration officer.

Another case which may serve to illustrate the parameters of the constitutional prohibition under discussion is Budget Commission of Pinellas County v. Blocker, 60 So.2d 193, 196 (Fla. 1952). The *Blocker* case involved a population act, Ch. 26465, 1949, Laws of Florida, which established a Budget Commission in Pinellas County which was authorized and empowered to "change, alter, amend, increase, or decrease any item and total amount or amounts of any estimate of expenditures or receipts prepared or submitted by any board pursuant to this Act. . . ." Section 9, Ch. 26465. The court ruled that the legislation was unconstitutional and stated:

> Manifestly, the power conferred upon the Budget Commission by Section 9 of the 1949 act does not constitute a mere incidental unintended encroachment upon the free employment of the discretion granted to duly elected county officers in respect to fiscal affairs, but amounts to a complete usurpation of the rights, powers and privileges conferred by general law upon such officers. Thus, the special act, in effect, reduces these constitutionally established offices to positions of virtually complete subordination and the performance of merely such ministerial acts and duties, especially in respect to fiscal budgeting and expenditures, as the Budget Commission sees fit to ordain.

Board of County Commissioners of Palm Beach County v. Hibbard, 292 So.2d 1, 6 (Fla. 1974), involved a special act which transferred the power to issue gun permits in Palm Beach County from the county commissioners to the sheriff. The court struck down the law as violative of s. 11(a)(1), Art. III, *supra*, and reasoned as follows:

> But we reiterate that the purpose of the Special Act in question sub judice was to affect the duties of the Sheriff and the County Commissioners relative to the issuance of gun permits in direct violation of Article III, Section 11, Florida Constitution. As the trial court opined this act curtails the duties of certain constitutional officers and shifts such duties to another constitutional officer. This transference of duties is not incidental to another primary and valid purpose of the act . . . .

Application of the foregoing cases to your inquiry leads me to conclude that Ch. 59-1736, Laws of Florida, as amended, is probably not violative of s. 11(a), Art. III, *supra*. The purpose of the legislation does not appear to be the transference or curtailment of the duties of the board of county commissioners. *See* Hibbard v. Board of County Commissioners, *supra*. To the contrary, as stated in s. 1 of Ch. 59-1736, the purpose of the act is:

> To create a park board in Pinellas County, Florida, composed of responsible citizens, dedicated to the enhancement of the beauty of Pinellas County; the expansion of recreational facilities in that county and the conservation of public owned lands for public use; for the health and welfare of the public at large.

Furthermore, the major function of the park board is to make reports and recommendations to the county commission; and the supervision, management, and regulation of the use of parks, playgrounds, and recreation in the county by the park board is subject to the approval of the county commission. *See* s. 3, Ch. 59-1736, as amended. Thus, I do not find in the subject legislation a "complete usurpation of the rights, powers, and privileges conferred by general law" upon the board of county commissioners as was found to exist in the law struck down in Budget Commission of Pinellas County v. Blocker, *supra*. As to that portion of Ch. 59-1736, as amended, which provides that the park director may be removed for cause upon the concurrence of both the park board and the county commission, I believe that this limitation upon the board of county commissioners would be characterized as "incidental" to the main purposes of the legislation and, therefore, not in violation of s. 11(a), Art. III, State Const.

AS TO QUESTION 2:

Section 2 of Ch. 59-1736, Laws of Florida, as amended, provides that each member of the Pinellas County Park Board shall serve a 5-year term of office. However, s. 13, Art. III, State Const., prohibits the creation of any office "the term of which shall exceed four years except as provided herein."

The Florida Supreme Court has on several occasions construed the substantially similar predecessor of s. 13, Art. III, *supra*, found at s. 7, Art. XVI of the 1885 Constitution. In early cases, the court struck down as violative of s. 7, Art. XVI, several statutes which either provided for terms of office which were longer than 4 years or which were silent as to the length of term of office. *See* State *ex rel.* Davis v. Botts, 134 So. 219, 220 (Fla. 1931); State *ex rel.* Swearington v. Jones, 84 So. 84, 87 (Fla. 1920); State *ex rel.* Clyatt v. Hocker, 22 So. 721, 723 (Fla. 1897).

In later cases, however, the judiciary adopted the position that the Legislature would be presumed to have enacted legislation with the Constitution in mind; and that this presumption would be employed to sustain the validity of the statute "if such may be done without doing complete violence to the language used by the law-making body." State *ex rel.* Watson v. Hurlbert, 20 So.2d 693, 695 (Fla. 1945). Applying this principle, the court construed statutes which omitted to fix a term of office as though they provided a 4-year term. *See* State *ex rel.* Watson v. Hurlbert, *supra*; State *ex rel.* Axelrod v. Lee, 181 So. 9, 10 (Fla. 1938). *But see* State *ex rel.* Investment Corp. v. Harrison, 247 So.2d 713 (Fla. 1971), in which the court ruled that s. 13, Art. III, State Const. 1968, could no longer be construed to "imply" a 4-year term where a statute creating an office failed to specify a term, because the 1968 Constitution expressly delimits the 4-year provision by adding "except as provided herein." *Accord*: *In re* Advisory Opinion to Governor, Term. of Appoint., 306 So.2d 509, 511 (Fla. 1975).

Similarly, in State *ex rel.* Landis v. Green, 144 So. 681, 682 (Fla. 1932), the court considered a special act which provided in part for 6-year terms of office for two of the members of the board of commissioners of the Halifax Hospital District. The court ruled that the portion of the act providing for 6-year terms was invalid and could be eliminated, but that such appointments could validly be made for terms of 4 years, as contemplated by the Constitution. *Accord*: Attorney General Opinion 066-95, in which this office advised the Governor that, where a special act stipulated a 5-year term of office for one of the members of the Citrus County Port Authority, the preferable course of action would be for the Governor to issue a commission for a term of 4 years in place of the office designated for 5 years.

Applying the foregoing principles to your inquiry, it would appear that the judiciary would decline to invalidate Ch. 59-1736, *supra*, in its entirety notwithstanding the fact that it provides a term of office for the members of the park board that is in excess of 4 years. However, the language providing for a 5-year term of office would probably be stricken, and a term of 4 years substituted therefor.

AS TO QUESTION 3:

Your third question involves ss. 5(3) and 9 of Ch. 69-1484, Laws of Florida, providing for a county administrator for the board of county commissioners. Section 5 of Ch. 69-1484 sets forth the duties of the county administrator, which duties include the following:

> Supervise all departments, department heads, and employees *of the county commission* and, in his discretion, terminate for cause the employment *of any employees of the county commission* except for department heads. (Emphasis supplied.)

Section 9 of Ch. 69-1484 provides:

> To the extent necessary to fully effectuate the purpose of this act the provisions hereof shall supersede all laws of local application or special laws *relating to the duties and functions of the county commission.* (Emphasis supplied.)

Your letter suggests that the above-cited portions of Ch. 69-1484, *supra*, operate to repeal or supersede portions of Ch. 59-1736, *supra*, relating to the authority of the "Park Board to supervise the department and department head."

There is no provision in Ch. 69-1484, *supra*, which *expressly* repeals Ch. 59-1736, *supra*, or any specific portion thereof. The aforementioned terms of s. 9 of Ch. 69-1484 operate to supersede only inconsistent special acts "relating to the duties and functions of the county commission" to the extent necessary to effectuate the purposes of the act. Thus, in legal effect, this provision adds nothing to the repealing effect of the act of which it is a part, since without such a provision all prior conflicting laws would be repealed by implication. 82 C.J.S. *Statutes* s. 285, p. 476; Payne v. Buchanon, 150 N.E.2d 250 (Ind. 1958); People v. Downen, 108 P.2d 224, 226 (Colo. 1940).

The judiciary has often declared that implied repeal of earlier laws by later legislation is not favored. Sanders v. Howell, 74 So. 802 (Fla. 1917); American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938). An interpretation leading to implied repeal of a law should not be adopted unless it is inevitable, the rule of construction being that if the court can by any fair, strict, or liberal construction find for the two provisions a reasonable field of operation without destroying their evident intent, then both statutes should be given the effect designed for them. Dade County v. City of Miami, 82 So. 354 (Fla. 1919); Ellis v. City of Winter Haven, 60 So.2d 620 (Fla. 1952). It has also been held that, in order for a court to declare that one statute impliedly repeals another, it must appear that there is a positive repugnancy between the two, that the last was clearly intended to prescribe the governing rule, or that it revises the subject matter of the former. Beasley v. Coleman, 180 So. 625 (Fla. 1938).

Applying the foregoing principles to your question, I do not believe that a positive repugnancy exists between the two special laws which would result in the implied repeal of Ch. 59-1736, as amended, or any portion thereof. The purpose of Ch. 59-1736, as amended, is to establish a distinct entity, the park board, to supervise county parks and recreation areas and make recommendations regarding same. Chapter 69-1484, however, is directed in part toward the administration of departments of the *county commission* and employees of the commission. *See* s. 3, Ch. 69-1484, *supra*. Since the park board is not a department of the county commission, and the park director is not an employee of the county commission (*see* s. 4, Ch. 59-1736, as amended, authorizing the park board, with the approval of the county commission, to employ a park director "to act as general manager of all parks, playgrounds, and recreational facilities in Pinellas County"), the two statutes are not actually upon the same subject and do not possess the same objective or purpose. *Cf.* AGO 058-66 holding that no rule of statutory construction permits implied repeal of one special act by a later special act on a *different subject*.

077-135—December 21, 1977

MUNICIPALITIES

"FORM OF GOVERNMENT" DEFINED

To: Paul J. McDonough, City Attorney, Coral Springs

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

What type of change is contemplated by the term "any change in the form of government" as that term is used in s. 166.021(4), F. S.?

SUMMARY:

The phrase "any change in the form of government" in s. 166.021(4), F. S., contemplates a change in the allocation of the basic policymaking and administrative functions of municipal government (as from a strong mayor form to a city manager form). Amendments to municipal charter provisions adopted prior to July 1, 1973, the effective date of the Municipal Home Rule Powers Act, may be made by ordinance if such changes do not affect the basic organizational and administrative structure of the municipality's government (and if such changes do not fall within any of the other excluded areas—such as rights of municipal employees—set forth in s. 166.021[4]). Charter provisions adopted or readopted subsequent to the effective date of the Municipal Home Rule Powers Act may be amended only pursuant to s. 166.031, F. S.

In previous opinions of this office construing the Municipal Home Rule Powers Act (part I, Ch. 166, F. S.), we have noted that provisions of municipal charters and special acts which were in effect on July 1, 1973, and which constituted limitations on municipal power or which pertained exclusively to the power or jurisdiction of a municipality were nullified and repealed or converted into ordinances by subsections (4) and (5) of s. 166.021. (*See*, for example, AGO's 074-371 and 075-176.) However, as was stated in AGO 075-176, s. 166.021(4) also "states that nothing in Ch. 166, *id.*, is to be construed as permitting any changes in a special law or municipal charter which affect certain subject matters enumerated therein without approval by referendum of the electors as provided in s. 166.031, *id.*" One of the subject matters so enumerated in s. 166.021(4) is "any change in the form of government" of a municipality.

There is no elaboration in Ch. 166, F. S., as to what constitutes a "change in the form of government," nor has that language been previously construed in any opinion of this office or in any appellate decision of which I am aware. However, in 2 McQuillen *The Law of Municipal Corporations* s. 9.12, p. 643, the following is set forth under the heading "forms of municipal government":

> A rough classification of form of organization (each class presenting characteristic features) would include (1) the mayor-and-council, or what is commonly called the aldermanic or councilmanic; (2) the autocratic mayor as the chief power in city government with the council having little real authority; (3) the commission plan; (4) (a slight modification of the last) the city or commission-manager plan; (5) division of powers into executive, legislative and judicial, incorporating the system of so-called checks and balances in like manner as the national and state governments and creating independent departments, often mentioned as "the federal plan"; and (6) when executive or administrative powers are exercised by various departments or boards it is sometimes called "the board system."

I am of the opinion that the term "form of government," as used in s. 166.021(4), was intended to refer to one of the basic organizational forms as exemplified in the above quotation and that the referendum requirement regarding changes in the form of government is not invoked unless there is a change from one basic form to another (*e.g.*, from strong mayor form to city manager form). Thus, any contemplated change in a charter provision which was in existence on July 1, 1973, should be examined in the context of its effect on the basic form of government under which the municipality operates and should be considered in light of other changes which might be made at the same time. (Even though none of a number of changes—when considered alone—would constitute an actual change in the basic form of organization and overall distribution of powers, a number of such changes, when made at the same time and considered together, could effect a transfer of powers so substantial as to have the effect of changing the municipality's "form of government," thereby requiring a referendum.)

If a change is to be made only in regard to the internal, administrative operations of a municipality (such as the reallocation of duties among various appointed officers or department heads or the reorganization of municipal departments) and there is no alteration of the basic distribution of policymaking and administrative functions, there would be no "change in the form of government" as contemplated by s. 166.021(4), F. S. Thus, such a change could be effected by ordinance, as to a charter provision in effect on the effective date of the Municipal Home Rule Powers Act, July 1, 1973. (Any charter provision adopted or readopted subsequent to the effective date of the Municipal Home Rule Powers Act can be amended only in accord with the provisions of s. 166.031, F. S. *See* AGO 075-223.)

077-136—December 29, 1977

CONSTITUTIONAL LAW

SUNSHINE AMENDMENT—RESTRICTION ON LOBBYING SELF-EXECUTING

To: Sidney Martin, Chairman, House Committee on Standards and Conduct, Tallahassee

Prepared by: Sharyn L. Smith and Frank A. Vickory, Assistant Attorneys General

QUESTIONS:

1. Is s. 8(e), Art. II of the Florida Constitution a self-executing constitutional amendment?

2. Is the prohibition against lobbying contained in s. 8(e), Art. II, violative of either the United States or Florida Constitution?

SUMMARY:

Section 8(e), Art. II, is a self-executing provision of the Florida Constitution insofar as it prohibits conduct by legislators and statewide elected officers. It is not self-executing regarding other public officers or employees, and hence legislative direction is required to bind such other officers and employees by its prohibitions. In accordance with decisions of the federal courts, it would appear that s. 8(e), Art. II, is in harmony with and would withstand challenge under the United States Constitution. No definitive response to this question may be given, however, absent specific judicial clarification of the matter.

Your first question appears to be motivated by the recent decision of the Second Judicial Circuit Court (Leon County) in Williams v. Smith, Case #77-1534, which held that s. 8(d), Art. II, State Const., is not self-executing, *i.e.*, will not become operative without the aid of supplemental or enabling legislation. You ask whether the court's reasoning should also be applied to s. 8(e), resulting in the need for legislation in order for its provisions to be operative. For the following reasons, it is my opinion that the two constitutional provisions are not analogous and that s. 8(e), Art. II, does not require implementing legislation, though the Legislature is specifically empowered to extend its provisions to other public officials or employees.

Section 8(d) and (e), Art. II, reads as follows:

> (d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan *in such manner as may be provided by law.*
>
> (e) No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before tho government body or agency of which the individual was an officer or member for a period of two years following vacation of office. 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.* (Emphasis supplied.)

In determining whether a constitutional provision is self-executing, the Florida Supreme Court has stated that there is a presumption that constitutional provisions are self-operating. Gray v. Bryant, 125 So.2d 846 (Fla. 1960).

In elaborating upon this position the court said:

> The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment.
>
> * * * * *
>
> The will of the people is paramount in determining whether a constitutional provision is self-executing and the *modern doctrine favors the presumption that constitutional provisions are intended to be self-operating.* This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people. [*Id.* at 851; emphasis supplied.]

See also State v. Harris, 136 So.2d 633 (Fla. 1962), and Alsdorf v. Broward County, 333 So.2d 457 (Fla. 1976); *cf.* Jackson v. Consolidated Gov't of City of Jacksonville, 225 So.2d 497 (Fla. 1969); *and see* 6 Fla. Jur. *Constitutional Law* s. 32 and cases cited therein.

Clearly, in determining whether, in any given case, legislative enactment is required to give effect to a constitutional provision, the language of the provision may be determinative and is a principal criterion to be considered. *See* 16 C.J.S. *Constitutional Law* s. 48 and cases cited therein; *cf.* Lewis v. Florida State Board of Health, 143 So.2d 867 (1 D.C.A. Fla., 1962), *cert. denied* 149 So.2d 41, and Porter v. First National Bank of Panama City, 119 So. 130 (Fla. 1928), both cases construing provisions specifically addressed to legislative action, and, therefore, held to be not self-executing.

In Williams v. Smith, *supra*, the defendant had been convicted in federal court of violating the federal drug laws. The state sought, under s. 8(d), Art. II, to deny him his rights and privileges under the state retirement system. (Apparently the question of whether this was in fact a "felony involving a breach of public trust" was not at issue.) He argued that the provision was not self-executing and that, therefore, it could not be applied to him since it required legislative action to effectuate it. The court agreed, apparently finding that the phrase ". . . in such manner as may be provided by law," precludes administration of the provision absent direction from the Legislature. Section 8(e), Art. II, however, contains no such qualifying phrase. Rather, it contains a clear prohibition. A legislator or elected officer may not personally represent another person or entity for compensation before the agency with which he was employed for at least 2 years after leaving office; and no legislator may represent anyone for compensation before any agency, other than a court, during his term of office. Therefore, since there is no language contemplating legislative action as a prerequisite to the provision's having effect, and since the language unambiguously provides a sufficient rule by which an individual may govern his conduct, the presumption that the provision is self-executing should in my opinion prevail. Though the provision further provides that its prohibitions may be extended by law to cover other governmental officers and employees, it does not require any legislation whatsoever prior to its becoming effective in regard to the offices it specifically enumerates. When two clauses of a provision are divisible, as in the provision under consideration, one may be self-executing while the other may require the Legislature to act. 16 C.J.S. *Constitutional Law* s. 48. Hence, the Legislature need only act if it wishes to extend the prohibitions of s. 8(e) to officers not specifically covered therein. Finally, please note that this opinion is consistent with my earlier opinion in AGO 076-242, in which I presumed, without discussion, that s. 8(e) required no legislation to give it force or effect.

Your second question asks whether the prohibition contained in s. 8(e) is violative of either the Federal or State Constitution. Our office may not make a definitive determination as to the constitutionality of the provision, as such is within the sole province of the judiciary. However, the following discussion may prove helpful in this regard.

It has often been said that there is no constitutional or fundamental right to public employment. Board of Regents v. Roth, 408 U.S. 564 (1972), Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), Talbot v. Pyke, 533 F.2d 331 (6th Cir. 1976). However, the Supreme Court has further stated that while there is no right to such employment, and that it may be regulated, it may not be deprived or taken away for just any reason. Elrod v. Burns, 427 U.S. 347 (1976). There must be a rational basis for any such deprivations. In this regard, it has long since been the rule that it is not the constitutional prerogative of the federal judiciary to question the necessity or the widsom of state or federal legislative directives or state constitutional provisions. Olsen v. Nebraska *ex rel.* Western Reference and Bond Ass'n, 313 U.S. 236 (1941); Whalen v. Roe, 51 L.Ed. 64, 72 (1977). Rather, the role of the

federal judiciary extends only to a determination of whether a provision is arbitrary, unreasonable, capricious, or discriminatory and whether it serves a valid purpose in a rational manner. *See* 16A C.J.S. *Constitutional Law* s. 569(5) and cases cited therein.

In the instant case our query is whether s. 8(e) is a rational and reasonable way to deal with a problem the state has a valid interest in controlling. A federal court recently applied the rational basis test to the Illinois Corrupt Practices Act in Shoresman v. Burgess, 412 F.Supp. 831 (E.D. Ill. 1976). A conflict-of-interest provision in the act was challenged under the Fourteenth Amendment as a violation of the Federal Constitution because it had the probable result of forcing a plaintiff to resign his elected position on a school board due to a conflict of interest created by his wife's position as a district school teacher. The court found any right to hold public office was not absolute "for the liberty guaranteed under the due process clause of the Fourteenth Amendment applies to *arbitrary* interferences." (Emphasis supplied.) The court held that the restriction on employment was reasonable since the state's interest in protecting the faith of its citizens in their elected and appointed officials was clearly significant and outweighed the plaintiff's interest in the position he held. An Illinois state court has noted in this regard:

> The purpose of the general conflict-of-interest statute is not to deny a class of individuals public office, rather it is to deter a public officer from participating in official decisions which would benefit him financially to the prejudice of those whom he is to serve. [Brown v. Kirk, 342 N.E.2d 137, 142 (Ill. 5th Dist. Ct. 1975).]

The Alaska Supreme Court has commented upon a provision in that state's constitution making it illegal for a legislator to hold a public office during his term or for 1 year thereafter, if the position was created or the salary thereof increased during his term of office:

> The purpose sought to be accomplished by that section is not merely to prevent an individual legislator from profiting by an action taken by him with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious selfish motives. There is nothing in the provision making its restriction dependent on the intent of an individual legislator in voting for the bill in question. [Warwick v. Chance, 548 P.2d 384 (Alaska 1976).]

See also Gonzalez v. Manzagol, 531 P.2d 1203 (N.M. 1975). It can be seen that an individual who is or seeks to be a public official is subject to certain state regulations and may, under certain circumstances, be validly and constitutionally deprived of a public office or the right to run for one when the applicable law is enacted to further the legitimate governmental goal of preserving trust in and minimizing corruption of public officials.

Granting a motion to dismiss, a federal court sitting in Florida applied the rational basis test to a constitutional challenge of s. 8(a) and (b), Art. II, the financial disclosure portions of our Constitution. Plante v. Gonzalez, TCA 77-8052 (N.D. Fla. 1977). Under that test, the court found the provision to be "undeniably constitutional" because

> [i]t constitutes a reasoned effort to deal with the problems posed by governmental corruption and the loss of public confidence in the integrity of elected and appointed state officials. [*Plante*, Op. at 6-7.]

In Buckley v. Valeo, 424 U.S. 1 (1976), the United States Supreme Court applied a stricter standard than this "rational basis" test to provisions of the Federal Election Campaign Act of 1971, since it was challenged on the basis of First Amendment and other fundamental rights which warrant application of the strict scrutiny test. Even under this strict standard the court upheld certain provisions of the act, aimed, as is s. 8, Art. II, at ethics in government. The court held that the danger of infringing the fundamental constitutional rights involved was outweighed by the important governmental interest of, *inter alia*, deterring governmental corruption and its appearance. The *Plante* court, though it found no fundamental rights involved which would invoke the strict scrutiny test, also reviewed the provision under the *Buckley* standard as well as the rational basis standard. The court held that the overriding governmental interests involved prevailed over the possible danger of infringing any constitutional rights:

> . . . [T]he amendment could act as a valuable deterrent to political corruption and conflicts of interest. . . . [I]t is undeniable that the disclosure requirement will tend to discourage those who might otherwise use public office as a means toward improperly enriching themselves. . . . [T]he amendment may [also] help to create an atmosphere of trust and confidence between the citizens of The State of Florida and the persons they choose to represent them in government. [*Id.* at 9-10.]

See also Fritz v. Gorton, 517 P.2d 911 (Wash. 1974); Illinois State Employees Association v. Walker, 315 N.E.2d 9 (Ill. 1974).

The Florida Supreme Court, faced with the constitutionality of a state statutory disclosure provision, has held that the state has a "*compelling* interest in protecting its citizens from abuse of the trust placed in their elected officials. . . ." (Emphasis supplied.) Goldtrap v. Askew, 334 So.2d 20, 22 (Fla. 1976).

Finally, a federal statute analogous to s. 8(e), Art. II, has withstood federal constitutional challenge in U.S. v. Nasser, 476 F.2d 1111 (7th Cir. 1973). The case concerned 18 U.S.C. s. 207 and regulations promulgated thereunder. 32 C.F.R. s. 40.15. Section (i) provides that a former officer or employee "may not, at any time after his government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the government." Section (ii) provides that a former employee "may not for one year after his government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which was within the boundaries of his official responsibility during the last year of his government service." The definition of "regular officer or employee" would include elected or legislative officials. The *Nasser* court upheld the restrictions as a rational means of pursuing a "legitimate legislative purpose":

> The purpose of protecting the government, which can act only through agents, from the use against it by former agents of information gained in the course of their agency, is clearly a proper one. The restriction, against acting as agent or attorney for another in a matter in which the person participated personally and substantially as an officer or employee, is clearly a wholly rational means of pursuing that purpose.
>
> * * * * *
>
> The conclusion underlying s. 207(a), before us, that one who, after leaving government employment, acts for another in a matter in which he participated while in such employment, is likely to use against the government an advantage gained out of being the government's agent is a common sense conclusion. . . .
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> * * * * *
>
> Section 207(a) does not disqualify former government employees from all or a segment of the practice of law. It disqualifies only from particular cases where Congress could rationally make the judgment that participation would be evil as a result of an individual's previous activity as a government employee in the same manner. [476 F.2d 1116-1117.]

The court concluded that the law was neither an unlawful bill of attainder nor an ex post facto law.

It should also be noted that s. 12, Art. V, of the Florida Constitution was adopted in 1968 to achieve the same purpose as 18 U.S.C. s. 207(a) and the subsequently adopted s. 8(e), Art. II, Florida Constitution: to protect the government. Section 12, Art. V, states:

> No member of the [judicial qualifications] commission except a justice or a judge shall be eligible for state judicial office so long as he is a member of the commission and for a period of two years thereafter.

Incidentally, in this regard, The Florida Bar Code of Professional Responsibility, Canon 9, E.C. 9-4, states:

> After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he has had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Hence, a Florida attorney is already bound by legal ethics possibly more stringent than s. 8(e), Art. II.

It can be seen that the state's vital interest in ethical government is accorded great deference by the courts. Assuming that a court would find s. 8(e), Art. II, a rational and reasonable way to achieve its objective of preventing corruption in government, as I believe it would, the state constitutional provision in question would, in my opinion, survive challenge under the Federal Constitution.

You also inquire as to whether the constitutional provision might be violative of the State Constitution itself. You do not mention any particular provision that might be violated by s. 8(e), Art. II. However, a cardinal rule of constitutional construction is that all parts of the document are to be construed as a whole and any interpretation which would render any part of it void or inoperative should be scrupulously avoided. As stated by the Supreme Court of Florida, "[It is] in accord with well-settled principles of construction that, where a constitutional provision will bear two constructions, one of which is consistent with, and the other inconsistent with, an intention clearly expressed in another section, the former construction should be adopted so that 'both provisions may stand and have effect.' " Advisory Opinion to the Governor, 96 So.2d 541 (Fla. 1957). *See also* State *ex rel.* Miami Herald Pub. Co. v. McIntosh, 340 So.2d 904 (Fla. 1976); Smathers v. Smith, 338 So.2d 825 (Fla. 1976); Askew v. Game and Fresh Water Fish Comm., 336 So.2d 556 (Fla. 1976); Burnsed v. Seaboard Coast Line R. Co., 290 So.2d 13 (Fla. 1974); Gray v. Bryant, 125 So.2d 846 (Fla. 1961); *and see* 6 Fla. Jur. *Constitutional Law* s. 20, and cases cited therein. Hence, since I find no provision of the Constitution which directly and irreconcilably conflicts with s. 8(e), Art. II, it is my opinion that it is a fully effective constitutional provision.

077-137—December 29, 1977

SUNSHINE LAW

APPLICABLE TO COUNTY BOARDS OF VISITORS

To: William J. Roberts and Wilson W. Wright, Attorneys for State Association of County Commissioners, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

> Is a board of visitors established under the provisions of s. 416.07, F. S., for the purpose of visiting juvenile detention homes governed by the Sunshine Law?

SUMMARY:

> A board of visitors established under the provisions of s. 416.07, F. S., for the purpose of visiting juvenile detention homes is governed by the Government in the Sunshine Law, s. 286.011, F. S.

The Government in the Sunshine Law, s. 286.011, F. S., 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 . . . . (Emphasis supplied.)

The county board of visitors was created and its members appointed pursuant to s. 416.07, F. S. Its purposes, duties, and functions have been prescribed by law. Section 416.08, F. S. It would appear that the committee is an agency of the county for the purposes of and subject to the provisions of the Sunshine Law, 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.

In Times Publishing Co. v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969), the court expressed the view that the Legislature intended to extend the application of the Sunshine Law so as to bind ". . . every board or commission of the state or of any county or political subdivision over which it has dominion or control." In City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971), Justice Adkins noted that the Legislature was aware of this judicial interpretation at the time it met in 1970 and did not amend the law. The court further held the Sunshine Law to be applicable to government at the municipal as well as state and county level.

Since the Legislature has, by statute, created and empowered the county board of visitors, it would appear that this particular board falls under the "dominion and control" test adopted in *Berns.* Although the board is appointed by and reports to the circuit court and, on request, the board of county commissioners, I do not believe that this fact serves to exempt the board from the requirements of s. 286.011, F. S. I am also mindful that the Supreme Court has consistently stated that the Sunshine Law should be liberally construed and that doubts involving its applicability should be resolved in favor of the public. Town of Palm Beach v. Gradison, 296 So.2d 438 (Fla. 1974). Accordingly, unless judicially determined to the contrary, county boards of visitors established pursuant to s. 416.07, F. S., should conduct their meetings in accordance with s. 286.011, the Government in the Sunshine Law.

077-138—December 29, 1977

SUNSHINE LAW

CITY COMMISSIONERS NOT PROHIBITED FROM ATTENDING MEETING OF SUBORDINATE BOARD AND SUBSEQUENTLY VOTING ON BOARD'S RECOMMENDATIONS

To: Charles H. Spooner, City Attorney, Coral Gables

Prepared by: Staff

QUESTION:

> **May two members of a 5-man city commission attend a public meeting of one of its recommending boards and subsequently vote at a public meeting of the 5-man commission relative to the recommendation made by the board, or would such action constitute a violation of Florida's Government in the Sunshine Law?**

SUMMARY:

> **The Government in the Sunshine Law does not prohibit members of city commission from attending public meetings of a board established by the commission and subsequently voting at a public meeting of the commission on recommendations submitted by the board.**

Your letter indicates that the City of Coral Gables has adopted an ordinance which creates the historic preservation board of review. The purpose of the board is to make recommendations to the city commission on various subjects relative to the preservation of historical structures, buildings, and roadways and the designation of various

structures or sites within the city as historical landmarks. The board is composed of 10 members who are either appointed or approved by the city commission. In addition, the city commission appoints one of its members to serve as a "liaison officer" between the commission and the board. This commissioner may or may not enter into the discussion of certain matters before the board. You further advise that the meetings of both the board and the commission are open to the public.

The Government in the Sunshine Law, s. 286.011(1), F. S., reads:

> 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.

The Sunshine Law imposes three requirements which govern meetings of public agencies: The meetings must be open to the public; written minutes must be kept and open to public inspection; reasonable notice to the public must be given as to the time and place of the meeting.

The first two requirements are evident from an examination of the statutes; the third has been read into the law by the judiciary. *See* Hough v. Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1973). *Accord*: Attorney General Opinions 073-170 and 072-400. Since your letter advises that both the historical preservation board of review and the city commission have complied with all three requirements, I fail to find any violation of the Sunshine Law resulting from the situation described in your inquiry. Section 286.011, F. S., does not purport to govern the circumstances under which public officers are authorized to cast their votes; the statute requires only that when public officials *do* vote, they must do so in the sunshine.

It would appear that you are really inquiring as to whether or not the public officials described in your letter should abstain from voting because of a possible conflict of interest. *See* s. 286.012, F. S., providing in part that no member of a state, county, or municipal governmental board, commission, or agency may abstain from voting at any meeting at which official action is to be taken "except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases said member shall comply with the disclosure requirements of s. 112.3143." Any question as to the existence of a possible conflict of interest within the meaning of the Code of Ethics for Public Officers and Employees, part III of Ch. 112, F. S., is within the jurisdiction of, and should be referred to, the Florida Commission on Ethics.

077-139—December 30, 1977

MUNICIPALITIES

EXTENT OF POLICE POWER TO REGULATE CLOSING HOURS OF CERTAIN BUSINESSES

To: William F. Fann, Jr., Village Attorney, Miami Shores Village

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

> **To what constitutional limitations is a municipality subject when it attempts to restrict the business hours of restaurants, gasoline service stations, and grocery stores presently operating on a 24-hour daily basis?**

SUMMARY:

> **The question of a municipality's right to regulate the hours of business operation of retail businesses pursuant to its police power depends upon**

> **whether the regulation is required for the public health, morals, peace, safety, or welfare and whether the regulation is reasonable and substantially connected with the public interest sought to be served.**

The issues raised by your request deal with the authority for and limitations on a local government's exercise of its police power to prescribe regulations for the conduct of lawful retail businesses in the interest of the public peace, health, morals, safety, or welfare.

The Fourteenth Amendment to the United States Constitution, applicable to the states, provides that no person may be deprived by the state of life, liberty, or property without due process. Section 9, Art. I, State Const., contains a similar provision. As a general proposition, due process of law is deprived by arbitrary or unreasonable regulations of hours or days of business when such regulation serves no public purpose. Reasonable prohibitions upon doing business at such hours as are injurious to the public health, however, do not result in a violation of the due process clauses of either the Florida or the United States Constitution. *See* 16A C.J.S. *Constitutional Law* s. 671 and cases cited therein; *see also* 16 Am. Jur.2d *Constitutional Law* s. 325 and cases cited therein; *and see* discussion in Wednesday Night, Inc. v. City of Ft. Lauderdale, 272 So.2d 502 (Fla. 1972); Robbins v. Webb's Cut Rate Drug Co., 16 So.2d 121 (Fla. 1943); State v. Ives, 167 So. 394 (Fla. 1936).

It is undisputed that an individual has an inherent right to engage in a lawful business or trade. It is also axiomatic, however, that a municipal corporation (as an arm of the state) may impose reasonable restrictions upon the conduct of such activities in the interest of the public peace, health, morals, or general welfare, so long as such regulation is exercised reasonably, within constitutional limitations, not arbitrarily, and not in such a manner as to restrain trade or to unfairly discriminate. Of course, a municipality may not, under the guise of protecting the public, arbitrarily interfere with, or unnecessarily restrict, a lawful business or occupation. In every case, a court, to determine the validity of certain regulations as applied to certain business, must consider both the general character or scope of the business and whether the limitations on its conduct have a reasonable relation to a legitimate public purpose. *See* 62 C.J.S. *Municipal Corporations* ss. 234-236, and cases cited therein. *See also* Griffin v. Sharpe, 65 So.2d 751 (Fla. 1953), and Wiggins v. Jacksonville, 311 So.2d 406 (1 D.C.A. Fla., 1975).

Clearly, the issue of constitutional limits on the exercise of the police power to regulate the conduct of business in the interest of the public defies an easy or "black-letter" answer. Since the answer to your request would depend so heavily upon the facts and reasons behind the particular restrictions proposed, and since, of course, the courts are the final judges as to what are proper subjects of the police power, I can only attempt in this opinion to set forth general guidelines concerning exercise of the police power in the manner contemplated by your letter. As stated by the Florida Court in Miami v. Shell's Super Store, Inc., 50 So.2d 883 (Fla. 1951), the authorities touching the power of municipalities to enact and enforce regulations such as the proposed restrictions do not all point the same way.

In many instances where regulations restricting business hours have been upheld, it is because the court has found a link between the *type* of business regulated and the health or safety of the public. For instance, several cases have dealt with regulation of business hours of barbershops, a type of business which is subject to strict regulation in any event for protection of the public against contagious diseases. In Amodio v. West New York, 43 A.2d 889 (N.J. 1945), the New Jersey Supreme Court upheld regulation of business hours as "necessary in order to protect the general welfare and health of persons working in barber shops" who are apparently more vulnerable to contagious diseases if they work long, exhausting hours (*id.* at 891, 892). The Florida Supreme Court, however, has held that regulation of barbers can go to "competency of the barbers, sanitation and protection of the public against the spread of communicable disease" and that so long as it is confined to those subjects it is valid, but otherwise such regulation of business hours is "apt to be an unreasonable restriction on one's right to engage in a lawful business and make an honorable living." Miami v. Shell's Super Store, Inc., 50 So.2d 883, 884 (Fla. 1951). *Cf.* Robbins v. Webb's Cut Rate Drug Co., 16 So.2d 121 (Fla. 1943), and State v. Ives, 167 So. 394 (Fla. 1936), cited in *Shell's Super Store* for the proposition that if it becomes necessary for the health or safety of barbers or the public, closing hours or any other reasonable regulation may be imposed.

Regulation of business hours has also been upheld in numerous other instances based upon the type of business involved. In Connecticut v. Gordon, 125 A.2d 477 (1956), the

Connecticut Supreme Court of Errors upheld a regulation forbidding auction sales after 6:00 p.m. The court found that such businesses usually involve itinerant salespersons who conduct auctions on an infrequent enough basis that great crowds of people are brought together for relatively short periods of time. The court noted that "[w]henever crowds of people congregate, especially after dark, whether at regular or irregular periods, problems of safety, health and morality which affect orderly and peaceful living are created" (*id.* at 481) and that the local regulation in question was a reasonable means of dealing with these attendant problems. Likewise, several cases have upheld regulation of business hours when the business involved is of a coin-operated, unsupervised nature, *e.g.*, coin laundries or car washes. In People v. Raub, 155 N.W.2d 878 (Ct. App. Div. 1 Mich. 1968), the court upheld the conviction of the owner of a self-service car wash for violating a city ordinance prohibiting operation of such businesses between 10 p.m. and 7 a.m. The court found the ordinance valid since it was based upon protection of the public safety and welfare. The record apparently showed that such businesses are conducive to "rowdiness, 'gang' groupings, and like activity." Specifically, residents in the vicinity of defendant's business complained of excessive litter, noise, beer drinking, and other disturbances at late evening and during early morning hours. The court also determined in upholding the ordinance that it was not violative of equal protection by singling out only certain types of business. It found specifically that it was the unsupervised nature of such coin-operated businesses that resulted in the evils sought to be cured by regulation, indicating that a supervised car wash at a service station, *e.g.*, could not be similarly regulated. *See also, e.g.*, Gibbons v. Chicago, 214 N.E.2d 740 (Ill. 1966), *cert. denied* 385 U.S. 829 (1966); Township of Little Falls v. Husni, 352 A.2d 595 (N.J. 1976).

My research has revealed, however, that the greater number of the courts considering restrictive business hour regulations have held them invalid. As a general rule, and especially with regard to retail establishments, it can be said that a community must show a very clear need, based upon problems which attend operation of a certain type of business in a particular community at certain times of the day, before such regulations are held valid. The Florida Supreme Court has so held in *Ex Parte* Harrell, 79 So. 166 (Fla. 1918), which involved a Tallahassee ordinance requiring all places of business selling "goods, wares, and general merchandise" to close by 6:30 p.m. The city defended the ordinance by saying only that it was necessary to conserve the public health, morals, and safety. The court found on the contrary that the regulation does not "in any manner, directly or remotely, even tend to promote public health, public morals, the public safety, or the good order and peace of the community; but, on the contrary, we think that the provision . . . is an unwarranted governmental interference with the personal rights of the merchant class of the citizens of the town . . . ." *Id.* at 167. *See also* Perry Trading Co. v. City of Tallahassee, 174 So. 854 (Fla. 1938); City of Miami *et al.* v. Shell's Super Store, Inc., *supra*; and *cf.* Zaconik v. City of Hollywood, 85 F. Supp. 52 (S.D. Fla. 1949), holding that where a retail business adopted a method of effecting sales embracing some of the features of public auction sales but differing in certain respects, application of an ordinance prohibiting the sale of certain goods after 6 p.m. to such retail business and its method of doing business would be violative of rights guaranteed by the Federal Constitution.

A number of courts have held, even if the municipality can show that crime control and other problems result when a certain business operates on a 24-hour basis, that regulation of business hours cannot be upheld. A leading case is Fasino v. Borough of Montvale, 300 A.2d 195 (N.J. Sup. Ct. 1973), in which the court found unconstitutional an ordinance requiring retail and grocery stores to be closed during the hours from 11 p.m. to 6:30 a.m. The town advanced two reasons to support its ordinance: It eliminates noise, light, and traffic that accompany all-night operations and it fosters more effective law enforcement of an area with an inadequately staffed police department. The court rejected both arguments as insufficient to justify the regulation. The right of individual business persons to operate unfettered by regulation was seen as too fundamental to yield to any but a very clear public need for such regulation. The court concluded, therefore, in response to the first basis advanced by the town for its ordinance, that "more appropriate legislation would have been directly aimed at the detriment perceived by the [town], *i.e.*, direct regulation of traffic speed on local streets, direct prohibition of glaring lights, or prohibition of raucous noises." *Id.* at 202; *accord*: Dyess v. Williams, 444 S.W.2d 701 (Ark. 1969), in which the Arkansas Supreme Court said, "There is no need for the town to attain its objective indirectly by closing all places engaged in lawful business after midnight. . . . [T]he sweep of the ordinance goes too far beyond the

necessities of the situation." *Id.* *Cf.* Singer v. Ben How Realty, 33 So.2d 409 (Fla. 1948), holding that an ordinance prohibiting the use of machines emanating annoying noises during certain periods of week days and at any hour on Sundays was not per se void and unconstitutional.

As to the second argument, the court found that the town simply could not attempt to solve the problems of an inadequate police force by regulating legitimate businesses so as to reduce the need for such protection. In effect, the court found that the public had a right to adequate police protection and that the town could not use a restrictive ordinance on business to avoid the additional expense that would be required to provide it. *See also* Jackson v. Murray-Reed-Sloane and Co., 178 S.W.2d 847 (Ct. App. Ky. 1944).

It should be noted that the same reasons advanced by the court in *Fasino* to hold a closing ordinance unconstitutional might also be applied to coin laundries, car washes, barbershops, auctions, etc., all discussed above; *i.e.*, it is arguable in regard to such businesses that the town has no power to enact closing ordinances to control indirectly the problems caused by the operation of such businesses. Yet, *Fasino* apparently viewed with favor the cases upholding restrictive ordinances regulating such businesses. It distinguishes its own situation largely based upon the fact that it involved a retail establishment selling food and other essential items. The court noted that such stores serve a valuable community interest by providing basic human needs. The court quoted at length from Olds v. Klotz, 3 N.E.2d 371, 373 (Ohio 1936), in which the Ohio Supreme Court said:

> Food is vital to health, and even to life itself . . . . All the authorities seem to be in accord with the proposition that *the police power does not extend to the limitation of hours within which retail stores, selling either groceries or other commodities or both, may be kept open to customers.* Every business has some relation to the public welfare . . . ; but the regulation thereof is not within the police power unless the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character. (Emphasis supplied.)

A number of cases in other jurisdictions have also struck down regulations applied to food and other retail stores. *See, e.g.*, Town of McCool v. Blaine, 11 So.2d 801 (Miss. 1943); Goodin v. Philadelphia, 75 So.2d 297 (Miss. 1954); Justesen's Food Stores, Inc. v. Tulane, 84 P.2d 140 (Cal. 1938).

Your letter also specifically addresses itself to the question of business hour regulation regarding restaurants and service stations. In State v. Grant, 216 A.2d 790 (N.H. 1965), the New Hampshire Supreme Court was faced with an ordinance requiring all restaurants to be closed between midnight and 6 a.m. The court upheld the ordinance, finding that the record established that all-night restaurants fostered excessive noise and other similar disturbances, and hence that the regulation "could be found to bear a substantial relation to the maintenance of order and protection of persons and property in the area." *See also* Burlington v. Jay Lee, Inc., 290 A.2d 23 (Vt. 1972), in which the Vermont Supreme Court reached essentially the same conclusion in regard to a similar ordinance. *But cf.* Goodin v. Philadelphia, 75 So.2d 279 (Miss. 1954), in which the Mississippi Supreme Court struck down a business hour ordinance challenged by a restaurant owner but directed to all businesses. The court, however, noted that its decision was based upon the lack of a showing that there was "a causal relationship between this sweeping ordinance and [the preservation of good order and peace of the municipality] . . . . It makes no distinction between the good and the bad."

Research has revealed only one case involving regulation of business hours for service stations. Such a regulation was upheld in Bi-Lo Stations, Inc. v. Alsip, 318 N.E.2d 47 (1 D.C.A. Ill., 1974). The court found that all-night stations had become the target of serious crimes against persons and property, particularly between midnight and 6 a.m., the hours covered by the closing regulation. The court was "satisfied, *upon this record*, that the compulsory closing provisions . . . are neither arbitrary nor unreasonable, and that the regulation is a constitutional one, reasonably related to the public health, safety, and welfare of the Village." Fasino, *supra*, was distinguished by the court from the situation before it because *Fasino* dealt with a *general* closing ordinance not directed to a single type of business shown to cause an increase in crime if open 24 hours a day. It should be again noted, however, that the distinction is difficult to make, since *Fasino* did say that closing regulations cannot be used to solve indirectly such problems as noise and

inadequate police protection which could be directly addressed through noise regulations or an improved police force.

In sum, it is clear that a categorical answer to your inquiry is not possible. As the Supreme Court said in Nebbia v. New York, 291 U.S. 502, 525 (1933):

> [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that *a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.* (Emphasis supplied.)

Because each fact situation is unique, I have attempted by the foregoing discussion of leading decisions on closing regulations to provide you with guidelines that can be applied in your particular set of circumstances. Ultimately, of course, this is a question subject to judicial determination.

077-140—December 30, 1977

MUNICIPALITIES

NOT REQUIRED TO TAKE COMPETITIVE BIDS IN PURCHASE OF COMMODITIES IN ABSENCE OF CHARTER PROVISION

To: Charles H. Spooner, City Attorney, Coral Gables

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Can the City of Coral Gables award a bid for slurry seals when there is only one bidder?

SUMMARY:

In absence of a charter provision and unless otherwise prohibited by city ordinance, a municipality is not required to take competitive bids in the purchase of commodities, and may accordingly accept a bid even though only one bid has been received.

According to your letter, the City of Coral Gables advertised for bids for slurry seals. Four parties were solicited by the city to pick up the plans and specifications and to enter a bid. Two sealed envelopes were subsequently received by the city and opened at a public commission meeting. One of the envelopes contained a bid of $50,000 from a responsible bidder; the other envelope contained a statement that the party was unable to bid. Your inquiry is directed to whether the city, given the above circumstances, may accept the one bid received.

Part I of Ch. 287, F. S., establishes the competitive bidding requirement for the purchase of commodities by state agencies. The requirement set forth in part I, however, with the exception of s. 287.055 (the Consultants' Competitive Negotiation Act), applies only to state agencies as defined by s. 287.012 as "any of the various state officers, departments, boards, commissions, divisions, bureaus, councils and other units of organization however designated." Although counties, municipalities, and special districts are not included within the foregoing definition (*see* AGO's 077-22 and 074-7 holding that special districts and other separate statutory entities are not considered state agencies), counties and municipalities, as local public agencies, may utilize the state purchasing agreements and contracts negotiated by the Division of Purchasing of the Department of General Services in making their purchases. Section 287.042(2). These purchases, however, "under the provisions in the state purchasing contracts shall be exempt from the competitive bid requirements otherwise applying to their purchases."

Section 287.042(2); *see* AGO 075-56. This office has previously stated that "[i]n the absence of any statutory requirement, a public body has no legal obligation to let a contract under competitive bidding or to award the contract to the lowest bidder." Attorney General Opinion 071-366.

Thus, since the municipality is not subject to the competitive purchasing requirements of part I, Ch. 287, F. S. (except s. 287.055), the purchase of a commodity such as slurry seals would be controlled by the provisions of the city charter which sets forth the municipality's powers and duties. An examination of the Charter of the City of Coral Gables which you forwarded to this office reveals several provisions relating to the execution of public works or improvements. Section 57 of the city charter requires all such contracts in excess of $2,500 to be awarded to the lowest bidder, after public advertisement and competition as may be prescribed by ordinance. The city commission has the authority to reject all bids and advertise again. Section 71 of the city charter sets forth the requirements for the publication with the notice for bids for the construction of the work or improvements. These provisions, however, appear to relate to services rather than the purchase of commodities. An examination of the city charter fails to reveal any provision which specifically requires competitive bidding in the purchase of commodities; moreover, no city ordinance which requires that there be more than one bid received has been brought to my attention. Any such requirement in the charter or the city ordinance would, of course, be controlling.

Therefore, since the competitive bidding requirements of part I of Ch. 287, F. S. (except s. 287.055), are not applicable to municipalities in the absence of an election by the municipality to participate in the state purchasing contracts and since the Charter of the City of Coral Gables does not require that there be more than one bid received, the city, in the absence of an ordinance to the contrary, may award the bid for slurry seals even though only one bid has been received. It should be noted, however, that if the construction or modification of the facilities requires professional services as set forth in s. 287.055, the consultants' Competitive Negotiation Act, the municipality would be subject to any applicable competitive negotiation or other requirements of s. 287.055. *See* s. 287.055(2)(b), which defines agency for the purposes of s. 287.055 as "the state or a state agency, municipality or political subdivision, a school district or a school board." *See also* AGO 076-142 in which I concluded that municipalities and other nonstate agencies are still subject to the notice requirements and the competitive selection and negotiation requirements of s. 287.055.

077-141—December 30, 1977

PUBLIC RECORDS LAW

DEFINITION OF DOCUMENTS RECEIVED "IN CONNECTION WITH THE TRANSACTION OF OFFICIAL BUSINESS"

To: Thomas A. Bustin, City Attorney, Clearwater

Prepared by: Patricia R. Gleason and Sharyn L. Smith, Assistant Attorneys General

QUESTION:

Where individual citizens or newspaper reporters provide copies of letters or other documents that they have received to the mayor, are such letters and other documents to be considered as public records received "in connection with the transaction of official business," within the meaning of s. 119.011, F. S.?

SUMMARY:

Copies of letters or other documents which are received by the mayor of a municipality in his official capacity constitute records received "in connection with the transaction of official business" and, therefore, are public records which must be produced for inspection unless exempted by law.

Florida's Public Records Law requires that every person having custody of public records permit any person to inspect and examine public records at reasonable times, under reasonable conditions unless the records are exempted from the provisions of ss. 119.01 and 119.07(1), F. S., by the terms of s. 119.07(2), F. S. Section 119.011(1), F. S., defines public records to mean:

> "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., was brought into the statute by s. 1, Ch. 67-125. Prior to that time, the Public Records Law contained no definition of the term "public record." As a result, the courts and this office limited the definition of public records to those documents which were "required by law to be kept or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial or evidence of something written, said, or done." *See* AGO's 061-102 and 065-23. However, by the insertion of the phrase "or in connection with the transaction of official business by any agency" within the statutory definition of public record, "the Legislature significantly broadened the definition of what construed a public record beyond the more restrictive definition which has been supplied by the courts in the absence of a controlling statutory definition. *See e.g.,* Amos v. Gunn, 92 So. 615 (Fla. 1922)." Attorney General Opinion 074-215. In addition, AGO 074-215 concluded:

> Presently, the only relevant concern in deciding whether a document is a public record is *whether the document in question is in the legal possession of a public official.* If no specific exemption exists for the documents, then the right of inspection cannot be denied to a citizen. (Emphasis supplied.)

Similarly, in City of Gainesville v. State *ex rel.* Int'l Ass'n of Firefighters, 298 So.2d 478 (1 D.C.A. Fla., 1974), the court held that the definition of public record contained in s. 119.011(1), *supra,* includes all documents made or received in the "normal" course of business. *Cf.* Gannett v. Goldtrap, 302 So.2d 174 (2 D.C.A. Fla., 1974); and Warden v. Bennett, 340 So.2d 977 (2 D.C.A. Fla., 1976), holding that preliminary documents or "working papers" are not exempt for the inspection requirements of s. 119.07(1), F. S.

Moreover, statutes enacted for the public's benefit such as those relating to open meetings or records, are entitled to a liberal construction in favor of the public, in the instant case to personal inspection by any member of the public in accordance with s. 119.07(1), F. S. Attorney General Opinion 077-33. *Cf.* AGO 075-48. *See also* MacEwan v. Holm, 359 P.2d 413, 419 (Ore. 1960), in which the court noted that public policy favored broad access to documents received by public officers:

> Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully, and competently performing their functions as public servants.

Accordingly, I am of the view that the phrase "in connection with the transaction of official business" as used in the context of s. 119.011(1), F. S., contemplates any documents made or received by the mayor, in his official capacity as a municipal officer. *See* 67 C.J.S. *Officers* s. 104, defining "official capacity" as "the capacity in which a person acts, *because he is an officer,* lawfully appointed and qualified." (Emphasis supplied.)

077-142—December 30, 1977

ADMINISTRATIVE PROCEDURE ACT

NOT APPLICABLE TO HOSPITAL DISTRICT UNLESS SPECIFICALLY MADE SO BY LEGISLATIVE ACT OR JUDICIAL DECISION

To: Michael H. Cates, Attorney for Lower Florida Keys Hospital District, Key West

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

Does the Florida Administrative Procedure Act, Ch. 120, F. S., apply to the Lower Florida Keys Hospital District.

SUMMARY:

Units of local government having jurisdiction only in one county or part thereof and which are not intergovernmental or regional agencies or programs described in s. 120.52(1)(b), F. S., are subject to the provisions of Ch. 120, F. S., *only* if expressly made subject thereto by special or general legislative act or an existing judicial decision. Since neither the courts by decision nor the Legislature by special or general act has expressly extended the provisions of the Administrative Procedure Act to the Lower Florida Keys Hospital District, the district is not subject to the act.

The answer to your question hinges on whether the Lower Florida Keys Hospital District is an agency as that term is defined in Ch. 120, F. S. The Administrative Procedure Act broadly defines "agency" in s. 120.52(1) to include in pertinent part:

> (b) Each *other state* officer and each *state* department, departmental unit described in s. 20.04, commission, regional planning agency, board, district, and authority, including, but not limited to, those described in chapters 163, 298, 373, 380 and 582.
>
> (c) Each *other unit* of government in the state, including counties and municipalities to the extent they are expressly made subject to this act by general or special law or existing judicial decisions. (Emphasis supplied.)

This expansive definition of agency is consistent with the stated intent of the act:

> The intent of the legislature in enacting this complete revision of chapter 120, Florida Statutes is to make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state. To that end, it is the express intent of the legislature that the provisions of this act shall replace all other provisions in the Florida Statutes, 1973, relating to rulemaking, agency orders, administrative adjudication, or judicial review of administrative action . . . . [Section 120.72(1), F. S.]

The enumeration of agencies in s. 120.52(1)(b), F. S., appears to be directed to the various types of intergovernmental programs and regional governmental agencies or districts existing in the state. The adjective "state" evidently modifies each of the described units, such as commission, regional planning agency, board, and district thereafter listed. Moreover, the expressly inclusive reference to boards, commissions, and districts described in Chs. 160, 163, 298, 373, 380, and 582, F. S., such as regional transportation authorities, intergovernmental programs, drainage and water management districts, water resource boards, regional planning councils, and land and water control districts, reflects a legislative purpose to include within the ambit of Ch. 120, F. S., all intergovernmental or regional agencies and programs. For the purposes of Ch. 120, such agencies and programs are designated state agencies.

In contrast, however, the Lower Florida Keys Hospital District, as created by special act of the Legislature, is a special tax district existing only in Monroe County, Florida, or a part thereof, Ch. 67-1724, Laws of Florida, as amended by Chs. 69-1322 and 73-558. While the Lower Florida Keys Hospital District is evidently not of the character included under the provisions of s. 120.52(1)(b), F. S., the question remains whether it is brought within the definition of "agency" by the provisions of s. 120.52(1)(c), F. S. In Sweetwater Utility Corp. v. Hillsborough County, 314 So.2d 194 (2 D.C.A. Fla., 1975), the court considered the issue of whether the Board of County Commissioners of Hillsborough County is an agency within the meaning of s. 120.52(1)(c). Noting that the board of county commissioners, just as a special tax district, is recognizable as a "unit of government in the state," the court observed:

> One might reasonably contend that the Board of County Commissioners is necessarily a "unit of government *in* the state." Yet, the legislature specifically chose to include counties within the definition only if "expressly made subject to this act by general or special law or existing judicial decisions." [Sweetwater Utility Corp. v. Hillsborough County, *supra,* 195.]

The import of the distinction drawn by the court, and of the particular punctuation appearing in s. 120.52(1)(c), is that the phrase "to the extent they are expressly made subject to this act by general or special law or existing judicial decisions" is in limitation of applicability of the Administrative Procedure Act *only* to counties and municipalities. Such a construction of the limiting clause in the agency definition would result in the conclusion that the act applies to every unit of government within the state, with the exception of counties and municipalities, and counties and municipalities would be included only by legislative act or judicial decision.

The foregoing possible construction of the provisions of s. 120.52(1)(c), F. S., led a former member of the Law Revision Council, who served as chairman of the council's Committee on the Administrative Procedure Act Project, to observe:

> The punctuation of this provision is troublesome. If a comma had been inserted after the word "municipalities," the provision would be a reasonably clear expression of the intent of the Law Revision Council, as expressed in its Reporter's Comments to the similarly worded draft approved by the Council. [Footnote omitted.]
>
> Under this interpretation, the Act would cover: (1) the state and (2) each other unit of government (including but not limited to counties and municipalities) to the extent that they are made subject to the act by general or special law, or by existing judicial decisions (that is, decisions rendered before enactment of the 1974 revision of the APA, which declared the 1961 APA applicable). The absence of a comma in the location indicated could lead to a different interpretation, to the effect that the Act covers: (1) the state; (2) counties and municipalities to the extent they are made subject to the Act by general or special law, or by "existing" judicial decisions; and (3) all units of government in the state other than the state, counties and municipalities, without the need for a law or judicial decision to make the Act applicable—this last category can include such units as school boards and tax adjustment boards, which arguably do not fall within the categories of state, county or municipal government. No indication can be found that the legislature intended this latter interpretation. This author prefers to view the statutory langauge as a carelessly punctuated attempt to carry out the intent of the Law Revision Council. [Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments,* 29 U. Miami L.Rev. 617, 625 (1975).]

The Reporter's Comments, cited in the text above as a footnote, provide:

> "Local and regional government units of all types are brought under the act to the extent that the legislature chooses to do so . . . ." Reporter's comments on Proposed Administrative Procedure Act for the State of Florida, submitted to the Florida Law Revision Council, March 9, 1975, at 9 . . . . These comments accompanied the Reporter's Draft of the proposed statute, dated March 1, 1974. The comments were generally available to legislators and others during the following few weeks while the legislative process leading to the enactment of the APA took place. [*Levinson* at 625.]

Arguably, the lack of comma after the word "municipalities" within s. 120.52(1)(c), F. S., suggests that the provision requiring either legislative act or judicial decisions to extend application of the act is limited only to counties or municipalities. The Supreme Court has addressed the role of punctuation in construction:

> We realize that punctuation is considered to be the most fallible and the least reliable indication of the legislative intent in interpreting a statute. Historically, parliamentary enactments originally were not punctuated at all. However, the Legislatures of our country have consistently attempted to follow the rules dictated by the grammar books with the result that statutes now are punctuated prior to enactment.
>
> The better rule now seems to be that the punctuation is a part of the Act and that it may be considered in the interpretation of the Act but it may not be used to create doubt or to distort or to defeat the intention of the legislature. [Wagner v. Botts, 88 So.2d 611, 613 (Fla. 1956).]

Choosing to rely upon the informative expressions of intent of the original drafters of the act, I conclude that each "other unit of government in the state," if not specifically included by the provisions of s. 120.52(1)(a) or (b), just as are counties and municipalities, is exempt from the Administrative Procedure Act unless expressly made subject thereto by judicial decision or legislative act. *Cf.* AGO 075-140 concluding in part that "[t]he inclusion of counties within definitional s. 120.52(1)(c), F. S., is very limited and is restricted to the direct inclusion by reference to general or special law, or judicial decision . . . ."

Accordingly, I am of the opinion the Lower Florida Keys Hospital District, as a unit of local government with jurisdiction in only one county or a part thereof, is therefore not a state agency as defined in s. 120.52(1)(a) and (b), F. S.; rather, as a unit of government within the state as specified in s. 120.52(1)(c), F. S., it is subject to the Administrative Procedure Act only if expressly made subject thereto by legislative act or judicial decision. Therefore, since there is neither a special nor general legislative act, nor an existing judicial decision, applying or extending the Administrative Procedure Act to the Lower Florida Keys Hospital District, your question is answered in the negative.

077-143—December 30, 1977

SUNSHINE LAW

TAPE RECORDING OF MEETING BETWEEN MAYOR AND PRIVATE INDIVIDUALS

To: J. H. Roberts, Jr., City Attorney, Lakeland

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Is there a violation of the Sunshine Law under the facts described hereinbelow?

SUMMARY:

It is not a violation of the Sunshine Law, s. 286.011, F. S., for individual members of a city commission to individually listen to a tape recording of a meeting between the mayor of the city, representatives of a local newspaper, and an investor who has leased land from the city when no evidence exists to indicate that the tape recording was made in order to

permit commissioners to secretly communicate with one another or to evade the requirements of the law.

In 1974, the City of Lakeland leased certain land to a private investor for the purpose of constructing a hotel to be operated on the site of its new civic center. A local newspaper arranged a meeting between the investor, representatives of the newspaper, and the mayor. At the request of the newspaper, the discussions were taped. In response to a request by the investor, the newspaper agreed not to publish the full content of the tapes because of certain statements which the investor requested to be confidential.

One of the city commissioners requested that the city commission be permitted to hear the tape, but the newspaper representative said the tape would be available to individual commissioners but not to the commission collectively in a public meeting because of the newspaper's inability to keep confidential certain of the investor's statements.

As city attorney, you have advised the commissioners that they could individually listen to the tape without violating the Sunshine Law, s. 286.011, F. S. Your reasoning was that no planned effort to communicate information outside a public meeting was present, there was no violation at the time of the original meeting, and it follows that there would likewise be no violation if the commissioners listened individually to the tape.

It does not appear from either your letter or the information you enclosed whether the mayor of the city is also the chief executive officer. Assuming that she is, the commissioners' fears regarding listening to the tape are groundless since she would not ordinarily be subject to the law when acting in her capacity as chief executive. *See* Bennett v. Warden, 333 So.2d 97 (2 D.C.A. Fla., 1976), and AGO 074-47. If, however, she is a voting member of the city commission, I do not believe that, under the facts outlined above, the commissioners would be found in violation of the Sunshine Law by listening individually to the tape.

The test of when the Sunshine Law is applicable to a given situation requires the presence of two or more commissioners who discuss matters on which they will take foreseeable action. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). In the instant case two or more commissioners were not actually present at the original meeting. Additionally, there is no allegation that the meeting was taped in order to permit the mayor to secretly communicate with fellow commissioners on an individual basis. Under these circumstances, I do not believe that the Sunshine Law would prohibit the action contemplated. This is not to say, however, that similar situations *could not* be found to violate the law. If such a procedure were to be utilized to purposely evade the Sunshine Law's requirements, a court could find that such procedures were in violation of the law. *See* Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974).

077-144—December 30, 1977

ANTINEPOTISM LAW

RELATIVES NOT PROHIBITED FROM WORKING FOR SAME AGENCY WHEN NEITHER HAS SUPERVISORY AUTHORITY OVER THE OTHER

To: Lawrence Braisted, City Attorney, Winter Haven

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Would the appointment of the brother-in-law of the assistant fire chief and personnel officer, who has the authority and duty to perform department personnel functions including interviewing prospective applicants, to the position of fireman by the (unrelated) fire chief violate the Florida Nepotism statute s. 116.111, F. S.?

2. If question 1 is answered in the negative, would the fireman be prevented from receiving promotions, pay increases, and other economic benefits during the term both he and his brother-in-law (the assistant fire chief) are employed?

SUMMARY:

The relative of the assistant chief and personnel officer of a fire department may be appointed or employed to the position of fireman by the (nonrelated) fire chief, if the assistant fire chief and personnel officer is not vested with and has not been delegated the authority to employ, appoint, promote, or advance (or recommend same). A nonrelated official may hire the relative of an existing department employee or official. Promotion or advancement, for purposes of the prohibitions in s. 116.111, requires an elevation in station or rank, not merely an increase in pay in the same position. Violation of s. 116.111 by *recommendation* of a relative requires that the official or employee making such a recommendation of his or her relative be vested with or delegated, by law, rule, or regulation, the power or duty to make recommendations for appointment, employment, promotion, or advancement.

I would first note that the relationship of brother-in-law is covered by the antinepotism statute (s. 116.111, F. S.), as it is among those classes of relationship specifically set forth in s. 116.111(1)(c). However, the fact which must be determined in this instance, and whenever the prohibitions of s. 116.111 are applied, is the relationship of the job applicant to the official in whom is vested, or to whom has been delegated, the authority to employ, appoint, promote, or advance (or to recommend same). The prohibitions of s. 116.111 apply only to a "public official" as defined in s. 116.111(1)(b):

> "Public official" means an officer, including a member of the legislature, the governor, and a member of the cabinet, or employee of an agency *in whom is vested the authority by law, rule, or regulation, or to whom the authority has been delegated, to appoint, employ, promote, or advance individuals or to recommend individuals* for appointment, employment, promotion, or advancement in connection with employment in an agency . . . . (Emphasis supplied.)

The employee in question is not, according to your letter, related to the official in whom is vested the appointing or employing authority (the fire chief). The employee is related only to the person holding the position of assistant fire chief and personnel officer. In AGO 071-258, this office concluded:

> A department head or other official having the appointing power who is not related to a prospective appointee may appoint such person to an office or position of employment even though the prospective appointee is related to an existing officer or employee in the department.

It was emphasized in AGO 071-258 that s. 116.111 "applies only to those *officials who have the power* to appoint (or to promote, or to recommend for appointment or promotion) persons to public office or employment. And it prohibits such public officials from appointing (or promoting or recommending) their *own* relatives . . . ." In AGO 073-397, this office approved the appointment of a police lieutenant's daughter to the position of police officer where a third party was vested with the authority to hire and promote. And, it was emphasized in AGO 074-255:

> The antinepotism statute was clearly not intended to prevent relatives from working together in public employment. The statute simply prohibits one who has the authority to employ, appoint, promote, advance, or recommend same from using that authority *with respect to his or her own relatives.* (Emphasis supplied.)

Thus, it would appear to be the prohibition against *recommending* one's relative for employment or appointment which would have to be considered in regard to the initial hiring of the employee in question. If, "by law, rule, or regulations," the assistant fire chief and personnel officer has been vested with or delegated the authority or duty to

recommend individuals to be firemen, and he uses such authority to recommend his own relative, there would appear to be a violation of s. 116.111(2)(a), F. S., which provides in pertinent part:

> An individual may not be appointed, employed, promoted, or advanced in or to a position in an agency if such appointment, employment, promotion, or advancement has been *advocated by a public official*, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual. (Emphasis supplied.)

In the instant matter, it appears that the assistant fire chief and personnel officer merely performs functions such as administering aptitude tests to job applicants, conducting background investigations, etc. If the duties of the assistant fire chief and personnel officer pertaining to job applicants are, in fact, limited to such administrative tasks, and if the assistant fire chief and personnel officer has not been assigned "by law, rule, or regulation" the duty of making recommendations from among the job applicants in regard to whom he has performed such administrative functions, the fire chief could appoint or employ the relative of the assistant fire chief and personnel officer without violating any provision of s. 116.111.

If the relative of the assistant fire chief and personnel officer is validly appointed or employed by the fire chief under the circumstances already discussed, there would have to be made a second determination as to precisely where the authority to promote or advance rests. If such authority is vested solely with the fire chief (and the assistant fire chief and personnel officer does not have the duty of making recommendations for promotion or advancement), the fireman in question could be promoted or advanced *by the chief.* In considering the prohibition against promotion or advancement of a validly hired employee, it should also be noted that the terms "promotion" and "advancement" have definite, limited meanings in the context of s. 116.111. It was concluded in AGO 070-76 that a public official may include a relative in a routine salary increase. That conclusion was based on the premise that the terms "advance" and "promote" contemplate an elevation in station or rank, rather than merely an increase in salary in the same position. That interpretation by this office was confirmed in the case of Slaughter v. City of Jacksonville, 338 So.2d 902 (1 D.C.A. Fla., 1976). The court in *Slaughter* quoted from AGO 070-76 and stated, at 904:

> [H]ad the legislature intended for the term "advancement" to include a salary increase without an increase in grade, it could very easily have said so. It is our view that it is only an increase in grade which elevates an employee to a higher rank or position of greater personal dignity or importance and is an advancement or promotion.

I trust that the matter with which you are concerned may be resolved finally and unequivocally by your application of the general statements contained herein and in the prior nepotism opinions of this office referred to above to all aspects of the instant factual situation (particularly the precise allocation of authority between the fire chief and the assistant fire chief and personnel officer).

FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE

AND

PUBLIC RECORDS LAW MANUAL

ROBERT L. SHEVIN
Attorney General

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Assistant Attorney General

CONTENTS

Page

Introduction 317

Part I — The Government-in-the-Sunshine Law
Text of s. 286.011, F. S. 319

A. What Public Agencies Are Covered By The Sunshine Law? 319

1. Can the Sunshine Law apply to a single individual or a situation where two members are not actually present? 320
2. Are advisory boards subject to the Sunshine Law? 321
3. Does the Sunshine Law apply to the Governor, the Legislature or legislative committees? 322

B. To What Agency Actions Or Activities Is The Sunshine Law Directed? .. 323

1. Does the term "meeting" include such things as briefing sessions, workshop meetings, informal discussions, and other meetings of the public body where no formal vote is taken? 323
2. Are quasi-judicial hearings or meetings at which personnel or other matters are discussed and deliberated upon exempt from the act? 324
3. Are consultations with legal counsel subject to the Sunshine Law? 326
4. Are negotiations for the sale or purchase of real property by a public agency required to be conducted openly? 327
5. Where a public agency is charged by law with making certain investigations, does the Sunshine Law apply to a meeting held to receive investigative information? 327
6. Are labor negotiations subject to the Sunshine Law? 327

C. Procedural Requirements Of The Law 328

1. Does the Sunshine Law require the giving of notice to members of the public and the media as to the time and place of a proposed meeting of a public agency and the subject matter to be discussed or voted upon? 328
2. May there be qualifications or restrictions placed on the public's attendance at a public meeting? 329
3. May the members of a public body vote by secret ballot at a public meeting or vote upon various matters by the use of coded letters or numbers? 330
4. Must written minutes be kept of all sunshine meetings? 331

D. The Sanctions Or Penalties For Noncompliance 331

1. Are members of a public body criminally liable for violations of the Sunshine Law of which they have knowledge? 331
2. What is the validity of action taken in violation of the Sunshine Law? 331
3. Under what circumstances should injunctive relief be sought? 332

E. Agencies To Which The Sunshine Law Is Inapplicable 332

1. What kinds of meetings may be held in private concerning public officers and employees? 332

2. What are the statutory exceptions to the law? 333

F. Miscellaneous Matters 333

1. May public officials meet together at luncheons, meetings, social gatherings, inspection trips, etc.? 333
2. Are all telephone conversations within the scope of the Sunshine Law? 334

Part II — The Public Records Law
Text of Ch. 119 335

A. What Constitutes A Public Record Which Is Open To Inspection? 336

1. Are preliminary or tentative drafts or proposals public records which are open to inspection? 337
2. Are records of advisory boards or other persons or groups acting at the request of a public agency subject to the inspection provisions of Ch. 119? 338
3. Must personnel records be made available for public inspection? 339
4. May a public agency, officer or employee keep confidential a document made or received in the normal course of business if requested to do so by the maker or sender of such document? 340

B. Who May Inspect, Receive Copies Of, And Photograph Public Records? 340

C. To What Extent May A Governmental Entity Regulate Or Condition Inspection Of Public Records? 341

1. Must an individual show a "special interest" or "legitimate interest" in public records before being allowed to inspect or copy same? 341
2. May an individual be lawfully required to state particularly the records desired, reduce such request to writing or the like? 342
3. To what extent may a local agency legislate via ordinance or resolution on the subject of access to public records? 342
4. To what extent does federal law preempt state law in this area? 343

D. What Are the Express Statutory Limitations On Inspection And Copying Of Documents? 344

1. Personnel and students within the public and university school systems. 344
2. Inmate records maintained by the Division of Corrections and Records of the Parole and Probation Commission 345
3. Medical and birth records 345
4. Tax records 346
5. Unemployment compensation records 346
6. Juvenile records 346
7. Grand jury records 346
8. Investigative records 347
9. Sexual battery records 347
10. Collective bargaining records 347

E. What Are The Nonstatutory Limitations On Inspection? 347
1. Police records and files 347
2. Judicial records and related records subject to judicial control 348
3. Legislative records concerning constitutionally confidential functions 349

F. What Fees May Be Lawfully Imposed For Inspecting And Copying Public Records? 349
G. What Remedies Are Available To A Person Who Has Been Denied The Right To Examine Or Obtain Copies Of Public Records? 351

Appendix — Privileged, confidential, and limited-access public documents 352

FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE

AND

PUBLIC RECORDS LAW MANUAL

INTRODUCTION

> At different times and for different subjects some men impose and other men accept a particular standard of secrecy. The frontier between what is concealed because publication is not, as we say "compatible with the public interest," fades gradually into what is concealed because it is believed to be none of the public's business. Walter Lippman, Public Opinion, Penguin Books, First Ed. (New York, 1946).

Since the enactment of Florida's Government-in-the-Sunshine Law in 1967, and the Public Records Law in 1909, as amended, the courts of this state have, on a number of occasions, decided questions regarding the applicability of these acts to particular meetings or records. Additionally, the Office of the Attorney General has been frequently requested to render advisory opinions based upon these judicial decisions when questions regarding the applicability or requirements of these laws have arisen throughout the state.

As the number of requests for opinions concerning access to government meetings and information has multiplied through the years, so too has the volume of information issued by this office concerning these two areas. Because these topics are ones of increasing public concern and inquiry, the Attorney General believes that a concise and complete reference manual outlining the scope and requirements of these laws should prove to be an invaluable tool for those interested in the operation of state and local government.

Presently, all 50 states and the federal government have enacted some form of legislation guaranteeing to citizens the right to attend public meetings. Forty-nine states and the federal government have laws regulating access to and use of public documents. An examination of these various laws reveals that Florida's Sunshine and Public Records Laws are among the broadest and most all-encompassing of their kind in the entire nation. Florida has also been fortunate in possessing a judiciary genuinely concerned with the public's "right to know" and which has, almost without exception, steadfastly refused to weaken these laws by restrictive interpretation. This combination of strong and comprehensive open government laws and a judiciary which has zealously safeguarded the rights of Florida citizens has served to establish Florida as a leader among states in the fight for open and accountable government. The people of the State of Florida owe particular thanks to Justice James C. Adkins for his immeasurable and consistent contributions in this area.

It has been accurately observed that public officials, whether career civil servants, elected or political appointees, seem all too often to have one thing in common — they like secrecy. Confidential memos, secret documents, closed meetings and the like were at one time the rule in this state rather than the exception they are today. The road that Florida has elected to pursue has often been a difficult one which has been delayed by lengthy judicial skirmishes. Today, however, the people of this state can be justifiably proud of the national reputation which Florida has gained regarding citizen control over and participation in government decisionmaking. While other

states and the federal government are in the process of debating the merits of expanding their Sunshine and Public Records Laws, Florida has served as a working example of what can be accomplished when officials in policymaking positions sincerely believe in and follow the spirit and the letter of open government laws. Many of the negative side effects of open government, which opponents of the Sunshine and Public Records Laws predicted would befall the state when such laws were being considered, have failed to materialize. Instead, we have learned over the past ten years that government can deal with its citizenry in an open and candid manner without suffering any of the serious adverse consequences predicted by those who for various reasons oppose these laws.

What follows are some of the more commonly asked questions presented to the Attorney General's Office for resolution and the answers which the courts and this office have provided. This manual is divided into two sections, the first dealing with the Sunshine Law and the second with the Public Records Law.

Finally, I would like to express my sincere thanks to Sharyn Lynn Smith, Chief of the Opinions Division, Attorney General's Office, for her efforts in compiling this manual and the New York Times Company for making this publication possible through a public interest research grant.

PART I

FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE LAW

The Sunshine Law reads as follows:

286.011 Public meetings and records; public inspection; penalties.—

(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.

(2) 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. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

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

286.012 Voting requirement at meetings of governmental bodies. — No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting in regard to any such decision, ruling, or act, and a vote shall be recorded or counted for each such member present, except when, with respect to any such member, there is or appears to be a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases said members shall comply with the disclosure requirements of s. 112.3143.

A. WHAT PUBLIC AGENCIES ARE COVERED BY THE SUNSHINE LAW?

In Times Publishing Company v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969), the Court expressed the view that the Legislature intended to extend the application of the Sunshine Law so as to bind ". . . every board or commission of the state or of any county or political subdivision over which it has dominion or control." In City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971), Justice Adkins noted that the Legislature was aware of this judicial interpretation at the time it met in 1970 and did not amend the law. The Court further held the Sunshine Law to be applicable to government at the municipal as well as state and county level.

Based upon the specific terms of the statute, and the test of "dominion or control" which was approved by the Court in **Berns**, the following public entities have been specifically found by this office to be within the scope of s. 286.011, F. S.: Civil service boards, AGO's 071-29 and 073-370; special taxing districts, AGO 071-171; district school boards, AGO 071-389; mosquito control districts, AGO 073-8; regulatory boards under the Department of Professional and Occupational Regulation, AGO's 072-400 and 074-84; Public Service Commission, AGO 073-344; Board of Governors of a municipal country club, AGO 073-366; special fire control districts, AGO 074-169; regional

planning councils, AGO 074-364; Board of Regents, AGO 074-267; human relations boards, AGO 074-358; Assessment Administration Review Commission, AGO 075-37; Florida Barbers' Sanitary Commission, AGO 075-307; appointed board of commissioners of municipal housing authorities, AGO 076-102; Central Florida Commission on the Status of Women, AGO 076-193; District Mental Health Boards, AGO 076-202; State Board of Accountancy, AGO 076-225; Broward County Beautification Committee, AGO 076-230; Florida Condominium Association, Inf. Op. to James Ewing, January 29, 1973; Metropolitan Dade County Commission on the Status of Women, Inf. Op. to Mrs. Betty Murphy, March 8, 1972; police complaint review boards, Mailgram sent to Mr. Ben Bolar, January 23, 1975; mental health district boards, Inf. Op. to Mr. Stanley Wolfman, June 20, 1975; Board of Trustees of the Bass Museum, Inf. Op. to Representative Joe Gersten, August 30, 1976. Additionally, in an Inf. Op. to Mr. Martin Dyckman, May 18, 1972, political parties of the state were advised to comply with the Sunshine Law.

In AGO 073-223, it was stated that the Sunshine Law was equally applicable to elected and appointed bodies.

The issue of whether members-elect of boards or commissions are subject to the law was decided in Hough v. Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1973). In **Hough**, the court held, at 289, that "members-elect of boards, commissions, agencies, etc., are within the scope of the Government-in-the-Sunshine Law." Attorney General Opinion 074-40 applied this decision in concluding that elected officials prior to taking office can be liable for "sunshine" violations.

The Sunshine Law is also applicable to meetings between a mayor and a city council member if the mayor is a member of the council or has a voice in decisions. Inf. Op. to Mrs. Virginia Mercer, December 13, 1973. The Sunshine Law is applicable to the mayor when exercising a legislative function such as voting in case of a tie. It is not applicable, however, when the mayor's functions are purely administrative or when he is acting in an executive capacity, i.e., exercising veto power over ordinances and resolutions. AGO 075-210. The fact that a city councilman is owner and publisher of the local newspaper does not serve to exempt such councilman from the scope of s. 286.011, F. S. Inf. Op. to Mr. Johnie A. McLeod, November 2, 1976.

1. CAN THE SUNSHINE LAW APPLY TO A SINGLE INDIVIDUAL OR A SITUATION WHERE TWO MEMBERS ARE NOT ACTUALLY PRESENT?

While ordinarily s. 286.011, F. S., is applicable to "two or more members" of a board or commission, see Hough v. Stembridge, supra, and City of Miami Beach v. Berns, supra, at 41, certain factual situations have arisen where this office has, in order to assure public access to decisionmaking processes of boards and commissions, felt compelled to state that in order to prevent the circumvention of the statute, the presence of two individuals might not always be necessary in order for a violation of the law to occur. **cf.** Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974), in which Justice Adkins expressed the view of a majority of the court that "[t]he statute should be construed so as to frustrate all evasive devices.'"

For example, the first such incident which came to this office's attention involved the use of memorandums to conduct city business. One member of a city commission initiated a memorandum reflecting his or her thoughts on a given subject. Appended to this would be writing space for other members to concur or disapprove in the position taken by the originator. The originator would then place the memorandum in an agreed-upon receptacle at the offices of the public body. Upon completion of all the signatures, the substance of the memorandum would have the effect of becoming the official action of the entire body. This procedure was said to violate the Sunshine

Law despite the absence of a "meeting" between two or more members. Inf. Op. to John J. Blair, June 29, 1973.

In AGO 074-84, it was concluded that a proceeding authorized by and under the direction of a state board where a single member of the board or a single member of the board and the executive director directed such meeting was subject to the Sunshine Law.

A school board was advised in AGO 074-197 to refrain from holding weekly private luncheon meetings between individual board members and staff the day before regularly scheduled board meetings. At these meetings individual board members would go over the next day's agenda and discuss problem areas with a member of the staff. This office advised the Board to discontinue such meetings because of possible adverse effects such private meetings could have on the subsequent public meeting. **But cf.** Occidental Chemical Co. v. Mayo, **et al.**, 351 So. 2d 336 (Fla. 1977).

In AGO 074-294, s. 286.011, F. S., was held applicable to a single member of a board or commission to whom the authority to act on behalf of the board in matters such as lease of land, etc., had been delegated, and, therefore, such member was prohibited from secretly negotiating any such lease.

Similarly, AGO 075-41 expressed the view that the Sunshine Law was applicable to any investigative hearing dealing with the morale problems of a police department regardless of whether the mayor, city council or outside parties presided at such hearing.

By way of contrast, AGO 074-47 held that a city manager who was the chief executive officer of a local governmental body was not subject to the Sunshine Law so long as he did not act as "liaison" for board members or attempt to act in the place of board members at their direction. Additionally, city managers and other executive administrative officers who serve public bodies should refrain, whenever possible, from contacting each member of the public body which they serve in order to ascertain the member's vote on a particular matter pending before such body. AGO 075-59.

Attorney General Opinion 075-210 stated that a mayor of a city who has a voice in decisionmaking through the power to break tie votes should not confer privately with members of the city council regarding matters of pending business if such matters would come before the council and could require the mayor to exercise this power.

2. ARE ADVISORY BOARDS SUBJECT TO THE SUNSHINE LAW?

The Supreme Court has held that an ad hoc advisory board, whose powers were limited to making recommendations to a public agency and which possessed no authority to bind said agency in any way whatsoever, was subject to the Sunshine Law. Town of Palm Beach v. Gradison, **supra. Also see** IDS Properties v. Town of Palm Beach, 279 So.2d 353 (4 D.C.A. Fla., 1973), holding that there is no "government by delegation" exception to the Sunshine Law; therefore, public agencies may not conduct the public's business in secret through the use of an "alter ego." Since this significant opinion was issued, this office has, on numerous occasions, been requested to render opinions regarding the applicability of this judicial decision to various types of advisory bodies. Prior to the issuance of these decisions, various governmental agencies throughout the state had attempted, often successfully, to conduct public business privately, through the use of ad hoc committees composed of private citizens or employees. Even prior to **Town of Palm Beach**, Justice Adkins had expressed concern with the growing practice of "government by committee" as a means of circumventing the Sunshine Law. Jones v. Tanzler, 238 So.2d 91 (Fla. 1970) (Adkins J., concurring specially). While the question of whether and to what extent advisory boards are subject to s. 286.011, F. S., was not unequivocally answered until **Town of**

Palm Beach, this office had, prior to the issuance of that decision, advised public bodies throughout the state that advisory boards were subject to the Sunshine Law. See AGO 073-159 in which the meetings and proceedings of the City of Venice Planning Commission were said to be subject to s. 286.011, F. S.

In AGO 074-267 an ad hoc advisory committee which was appointed by a university president in order to make recommendations to the president concerning the operation of the university which either required the approval of the Board of Regents before being implemented or were implemented by the president based upon authority delegated to him by the Board of Regents, was subject to the Sunshine Law. It was noted that the discussions and recommendations of the committee constituted an important part of the decisionmaking process and the meetings at which the recommendations were discussed and finalized were often the only meetings at which meaningful input from the university community and the public could be heard and considered before the final action was taken. Accord: Cathcart v. Anderson, 530 P.2d 313 (Wash. 1975) en banc, citing Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969), and holding that Washington's Open Public Meetings Act, which is strikingly similar to s. 286.011, F. S., was applicable to monthly meetings of a university law school faculty. But see Marston v. Gainesville Sun Publishing Co., 341 So.2d 783 (1 D.C.A. Fla., 1976).

Career service grievance proceedings were said to be subject to s. 286.011 in AGO 074-290. It was stated that when a university, through its president and with the approval of the Department of Administration, delegates the statutory authority over grievance proceedings of career service personnel to an employee committee, such committee cannot avoid the requirements of the Sunshine Law. But see Bennett v. Warden, 333 So.2d 97 (2 D.C.A. Fla., 1976).

Similarly, a university "search committee" whose purpose was to interview candidates for positions and make recommendations to the university president based upon such interview was said to be prohibited from holding such interviews in secret. Inf. Op. to Senator Jack D. Gordon, October 14, 1974.

In Inf. Op. to Mr. Frank Kernberger dated August 28, 1974, it was stated that if three members of a city commission form an ad hoc committee to investigate charges against the city's police chief, the members' meetings were subject to s. 286.011, F. S. Also, meetings of the "Admissions Advisory Committee" of the Escambia Nursing Home at which members decide the eligibility of patients for admission or make recommendations concerning admissions must be held in the sunshine. Inf. Op. to Senator W. D. Childers, October 3, 1974.

The Central Florida Commission on the Status of Women, an advisory board appointed to make recommendations to several county commissions that created it and appointed the members thereof, was advised in AGO 076-193 to comply with the law. Attorney General Opinion 077-43 found a committee selected by a county bar association at the request of and pursuant to delegated authority by a district school board to screen applicants for the position of school district attorney and to make recommendations or nominations to the board for its consideration in the appointment, likewise subject to the law.

3. DOES THE SUNSHINE LAW APPLY TO THE GOVERNOR, THE LEGISLATURE OR LEGISLATIVE COMMITTEES?

In an Inf. Op. to Mr. William Muntzing, January 17, 1973, this office expressed the view that the Governor is not subject to the Sunshine Law when he is discharging his constitutional duties as the state's chief executive officer. On the other hand, the law is applicable to the Governor and Cabinet when sitting in their capacity as a board created by the Legislature such as the Board of Trustees of the Internal Improvement

Trust Fund, the State Board of Education, the Department of Natural Resources, etc. In such limited circumstances, the Governor and Cabinet are not exercising powers derived from the Constitution and are, therefore, subject to legislative "dominion and control" when so presiding. See s. 3, Art II, State Const.

In AGO 072-16 it was stated that the law was applicable to the Legislature and, hence, two or more legislators could not hold a "secret meeting" with the intention of excluding the public and the press for the purpose of deciding upon a "mutual voting pattern" or other course of action with respect to a particular legislative matter. Subsequently, however, in City of Safety Harbor v. City of Clearwater, Case No. 40,269, order filed May 14, 1974, a circuit judge ruled that since s. 286.011 had criminal sanctions it was entitled to a strict construction and, therefore, the Legislature did not fall within the plain meaning of the statute. Compare Board of Public Instruction of Broward County v. Doran, supra, at 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."

Because of this apparent conflict, this office continues to be of the view that, until stated otherwise by the Supreme Court, the Sunshine Law is indeed applicable to the Legislature. Also see AGO 077-10 which sets forth in detail the legal position which this office has taken regarding this matter and which construed the legislative history and language of the Sunshine Law as it relates to this issue.

B. TO WHAT AGENCY ACTIONS OR ACTIVITIES IS THE SUNSHINE LAW DIRECTED?

1. DOES THE TERM "MEETING" INCLUDE SUCH THINGS AS BRIEFING SESSIONS, WORKSHOP MEETINGS, INFORMAL DISCUSSIONS AND OTHER MEETINGS OF THE PUBLIC BODY WHERE NO FORMAL VOTE IS TAKEN?

The Sunshine Law extends to discussions and deliberations as well as formal action taken by a public body. As succinctly stated by Justice Adkins in Board of Public Instruction of Broward County v. Doran, supra, at 699:

> The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard **at all deliberations** wherein decisions affecting the public are being made. (Emphasis supplied.)

Accordingly, the law is applicable to any gathering where the members deal with some matter on which **foreseeable action** will be taken by the board. Id., at 968. Similarly, in Times Publishing Co. v. Williams, supra, at 473, the Second District held that under s. 286.011, F. S.:

> Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire **decision-making process** that the legislature intended to affect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the

public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an "official act," an indispensable requisite to "formal action," within the meaning of the act.

Furthermore, it clearly is the how and the why officials decided to so act which interests the public. Also see Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 69 Cal. Rptr. 480, 487 (1968), quoted with approval in Town of Palm Beach v. Gradison, supra, at 477, in which the Court held:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion of public business.

With these judicial principles in mind, this office has consistently 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 074-62; "conciliation conferences" of a Human Relations Board, AGO 074-358; "fact-finding" discussions between two or more city council members and a planning firm, AGO 074-273; discussions by special districts of preaudit reports, AGO 073-8; "executive work sessions" of a municipal housing authority, AGO 076-102; "work sessions" of a city council, Inf. Op. to Hon. Glen Darty, March 24, 1972; "executive sessions" held to discuss personnel matters, Inf. Op. to Ms. Margaret Bosarge, December 22, 1972; and "courtesy meetings" of a town council, Inf. Op. to the Hon. Richard Gerstein, November 18, 1975, are all subject to the commands of the Sunshine Law.

Additionally, the law is applicable to all deliberations of a public body. For example, in AGO 074-364, s. 286.011, F. S., was said to apply to deliberations of a Regional Planning Council when considering a Development of Regional Impact.

In particular regard to what business must be discussed in an open, public meeting, this office stated in AGO 075-37 that a covered board must conduct its non-substantive business in the sunshine if such business requires board action or appropriately should be brought before the board for consideration.

2. ARE QUASI-JUDICIAL HEARINGS OR MEETINGS AT WHICH PERSONNEL OR OTHER MATTERS ARE DISCUSSED AND DELIBERATED UPON EXEMPT FROM THE ACT?

In specific regard to personnel matters, the court in Times Publishing Co. v. Williams, supra, at 473 stated:

> Concerning personnel matters, it [the school board] contends that innocent school personnel may be ruined for life or their character assassinated if hearings relating to charges of misconduct are aired publicly and prove to be ill-founded. Be that as it may, the act is regulatory in nature and deals with the powers and discretion of certain governmental agencies. It is not in and of itself concerned with any rights or privileges of third parties dealing with such agencies. Any rights or privileges these third parties might have must be found elsewhere, and the governmental agencies involved cannot rely on such rights or privileges of third parties to extend their own powers and discretion regarding closed meetings contrary to the clear prohibition of the act.
>
> Appellee submits also that the public interest is best served in many instances when matters relating to the hiring of school personnel can be discussed privately in an atmosphere conducive to uninhibited inquiry into such persons' background, qualifications, character, and so forth. Regardless of the wisdom of its position and regardless of good motive on its part, the power or discretion to decide questions of closed meetings for such purposes is no longer the appellee's to exercise. We are certain that the public-at-large is as interested in the good quality of school personnel as is appellee; and it must always be kept in mind that appellee, no less than any other governmental body, is an agency of the public-at-large, and possesses just so much delegated authority and privileges as the public (in this case through the constitutional vehicle of legislation) chooses to give it. The public has chosen to deny any privilege or discretion in appellee and similar governmental bodies to conduct closed meetings.
>
> Furthermore, "personnel matters" are not sacred nor legally privileged, nor do they enjoy any insulation from legislative control. Here we are aided by the history of the act's passage, and conclude that the legislature specifically intended to include "personnel matters" within the "open meetings" mandate of the act. After the Senate had passed Senate Bill 9, which became Chapter 67-356, the House of Representatives informed the Senate that they had passed the bill with several amendments. One amendment sought by the House read as follows: "This act shall not apply to hearings involving individuals charged with violation of laws or regulations respecting employment." I Journal of the House 950 (June 5, 1967). The Senate refused to concur in this amendment and returned the bill to the House where it subsequently passed it in its present form.

Subsequently, in Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973), the Court held that there is no "quasi-judicial" exception under the Sunshine Law which could be utilized to allow closed-door hearings during the deliberative process even when a board or commission is acting in a "quasi-judicial" capacity. On the basis of these decisions, this office concluded that all deliberations of a Civil Service Board, AGO's 071-29 and 073-370, Assessment Administration Review Commission, AGO 075-37, and Fair Housing and Employment Appeals Board, Inf. Op. to Nikki Beare, April 20, 1977, were subject to s. 286.011, F. S., notwithstanding the fact that said boards were at the time acting in a "quasi-judicial" capacity. Moreover, in an Inf. Op. to Ms. Margaret Bosarge, December 22, 1972, it was stated that "executive sessions" could not be held in secret in order to privately discuss personnel matters. In another Inf. Op., this time to J. T. Frankenberger, June 6, 1974, it was further stated that two or more members of a city council may not meet in secret to discuss personnel matters such as salaries, fringe benefits, etc. However, in State of Florida Department of Pollution Control v. State of Florida Career Service Commission, 320 So.2d 846 (1 D.C.A. Fla., 1975), the First District found the deliberations of the Career Service Commission to be exempt from the Sunshine Law since such proceedings are ". . . quasi-judicial and not subject to Chapter 286, Florida Statutes." In Inf. Op's. to Ben R. Patterson, November 10, 1976, and Nikki Beare, April 20, 1977, this office

discussed the conflict between Canney and Department of Pollution Control, supra, and stated that until Canney was receded from by the Supreme Court of Florida, no quasi-judicial exception exists under the Sunshine Law. Also see Occidental Chemical Company v. Mayo, et al., supra, citing Canney for the proposition that the fact that the Public Service Commission's decisionmaking process has been characterized as "quasi-judicial" does not exempt the same from s. 286.011, F. S.

AGO 071-394 advised a district school board that interviews with applicants for the position of superintendent were subject to the Sunshine Law.

3. ARE CONSULTATIONS WITH LEGAL COUNSEL SUBJECT TO THE SUNSHINE LAW?

This office in AGO 073-56 stated that s. 286.011 is applicable to meetings between a governmental agency and its attorney when such meetings are held to discuss proposed or pending litigation.

Such a conclusion follows from the specific holding of the Court in City of Miami Beach v. Berns, supra, at 40:

> The question of whether secret sessions could be held concerning privileged matter was definitely determined in Board of Public Instruction of Broward County v. Doran, supra. The opinion contains the following:
>
> "The final judgment, inter alia, enjoins the defendant from the holding of any meeting or conference sessions,
>
> " ' . . . at which are held any discussions on current, or foreseeably so, matters not privileged, pertaining to the duties and responsibilities of the Board of Public Instruction of Broward County.'
>
> "Fla. Stat., s. 286.011 (F.S.A.) contains no exception. Therefore, this portion of the final judgment is amended so as to read as follows:
>
> " ' . . . at which are held any discussions on matters pertaining to the duties and responsibilities of the Board of Public Instruction of Broward County.' " (p. 700)
>
> Whether Fla. Stat. s. 286.011, F.S.A., should authorize secret meetings for privileged matter is the concern of the Florida Legislature and unless the Legislature amends Fla. Stat. s. 286.011, F.S.A., it should be construed as containing no exceptions.

But see Marston v. Gainesville Sun Publishing Co., 341 So.2d 783 (1 D.C.A. Fla., 1976), which exempts meetings of the Honor Court at the University of Florida from s. 286.011, F. S., on the ground that such body considers privileged or confidential documents, i.e., student disciplinary records.

Prior to the issuance of the reported opinions in Berns, another opinion was filed by the Supreme Court. This first opinion gave the impression of approving the "attorney-client" privilege exception delineated by the Second District in Times Publishing Co. v. Williams, supra. When this was brought to the Court's attention, the original opinion was withdrawn, rehearing was granted and a new revised opinion was published which stated that no exceptions exist under the law. On April 8, 1971, following the release of Berns, the chairman of The Florida Bar Committee on Professional Ethics advised a government attorney that it does not violate professional ethics to discuss pending or prospective litigation in open meetings if such is required by law. (Letter Opinion on file in the Attorney General's Office.)

It might also be noted that much of the confusion surrounding this question arises because of a basic misunderstanding regarding the scope and purpose of the privilege. The "attorney-client" privilege does not belong to the attorney, but rather to the public body which the attorney represents and must be asserted by said body.

The Legislature in enacting the Sunshine Law exercised its legislative prerogative and waived any privilege which might have existed on behalf of covered boards and commissions throughout the state vis-a-vis this exception. The judiciary clearly recognized the power of the Legislature to so provide when it excepted conversations required by law from the scope of the confidentiality privilege. Compare Askew, et al. v. City of Ocala, et al., —— So.2d —— (Fla. 1977), Case No. 50,221, June 7, 1977, and Mitchell v. School Board of Leon County, 335 So.2d 354 (1 D.C.A. Fla., 1976) with State of Florida ex rel. Veale v. City of Boca Raton, —— So.2d —— (4 D.C.A. Fla., 1977), Case No. 75-2257, filed December 29, 1977 and Wait v. Florida Power & Light Co., —— So.2d —— (1 D.C.A. Fla., 1977), Case No. HH-406, filed January 18, 1978, holding that the Legislature has waived the "attorney-client privilege" for all public agencies through the enactment of s. 119.07(2)(a), F.S.

During the 1977 legislative session, HB 1107 was enacted which permitted public agencies to meet in secret with their attorneys in order to discuss pending litigation. However, after careful consideration, the Governor vetoed HB 1107 at the urging of various concerned citizens and public interest organizations throughout the state.

4. ARE NEGOTIATIONS FOR THE SALE OR PURCHASE OF REAL PROPERTY BY A PUBLIC AGENCY REQUIRED TO BE CONDUCTED OPENLY?

This question was likewise answered in City of Miami Beach v. Berns, supra. As the Court noted, had the Legislature intended to exempt land acquisitions and condemnation matters from the scope of the law it could have easily done so. Since the Legislature has not seen fit to exempt such transactions, they must be held in the sunshine. Also see Gannett Co. Inc. v. Goldtrap, 302 So.2d 174 (2 D.C.A. Fla., 1974), holding a preliminary land appraisal report obtained by a county in connection with the proposed acquisition of property for a landfill site a public record which must be produced for inspection and examination pursuant to s. 119.07(1), F. S.

Following this principle, in AGO 074-294 this office concluded that a single member to whom the authority to acquire or lease land has been delegated is subject to the restrictions of s. 286.011, F. S., and, therefore, is prohibited from negotiating for such acquisition in secret.

5. WHERE A PUBLIC AGENCY IS CHARGED BY LAW WITH MAKING CERTAIN INVESTIGATIONS, DOES THE SUNSHINE LAW APPLY TO A MEETING HELD TO RECEIVE INVESTIGATIVE INFORMATION?

In AGO 074-84 it was held that the Sunshine Law was applicable to investigative inquiries of public bodies. The fact that a meeting concerns alleged violations of laws or regulations does not remove it from the scope of the law. Canney v. Board of Public Instruction of Alachua Co., supra. Moreover, under the holding of Berns, the fact that privileged or confidential information may or will be discussed during the course of the meeting does not serve to exempt such meeting from the scope of the Sunshine Law. Inf. Op. to Jack S. Graff, March 25, 1974.

In State of Florida ex rel. Ross and Shevin v. Cagnina, Case No. 75-2034, (Cir. Ct., Manatee County 1976, aff'd, 333 So.2d 24 (2 D.C.A. Fla., 1976), the court held that an investigation conducted by a group of citizens appointed by a town council and made special deputies by the mayor in order to secretly investigate and take testimony concerning charges of misconduct against the town police chief, was subject to s. 286.011, F. S., and ordered the transcripts of private sessions conducted by the special deputies released to the public.

6. ARE LABOR NEGOTIATIONS SUBJECT TO THE SUNSHINE LAW?

Pursuant to the Public Employees Collective Bargaining Act, Ch. 447, all

discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining are exempt from the Sunshine Law. Section 447.605(1), F. S. However, pursuant to s. 447.605(2), collective bargaining negotiations between a chief executive officer and a bargaining agent are not exempt from s. 286.011.

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 or collective bargaining. It is the belief of this office that the exemption extends only to the collective bargaining process itself and, accordingly, is inapplicable in the absence of actual or impending collective bargaining negotiations.

A circuit court judge in State ex rel. Crago v. Hunter, Case No. 75-515, filed August 14, 1975 (Cir. Ct., Indian River Co.), entered an injunction requiring a school board to conduct collective bargaining negotiations in such a manner that a person of reasonable experience and average intelligence and reading ability listening to the negotiations could comprehend what was transpiring. The school board had been conducting public bargaining sessions through written proposals and references which were not available to the public and representatives of the media present at such bargaining sessions.

In an Inf. Op. to Don Slesnick, January 12, 1977, the exemption found at s. 447.605(2), F. S., was said to be applicable to meetings between a public employer and its negotiator to discuss whether or not to accept a special master's recommendations.

Prior to the enactment of the Public Employees Collective Bargaining Act, Ch. 447, the Supreme Court created a constitutional exception to the Sunshine Law for collective bargaining negotiations under s. 6, Art. I, State Const., Bassett v. Braddock, 262 So.2d 425 (Fla. 1972). To the extent that **Bassett** directly conflicts with s. 447.605(2), this office is of the view that the statute must be considered as controlling. Moreover, it should be noted that **Bassett** dealt specifically with actual or impending negotiations as opposed to collective bargaining in general. However, because of the ambiguities of the exemption found in Ch. 447, several important questions remain unanswered. As specific issues arise, this office will attempt to answer such inquiries via formal published opinion so that all affected parties are aware of the Attorney General's views regarding this important area.

C. PROCEDURAL REQUIREMENTS OF THE LAW.

1. DOES THE SUNSHINE LAW REQUIRE THE GIVING OF NOTICE TO MEMBERS OF THE PUBLIC AND THE MEDIA AS TO THE TIME AND PLACE OF A PROPOSED MEETING OF A PUBLIC AGENCY AND THE SUBJECT MATTER TO BE DISCUSSED OR VOTED UPON?

In Hough v. Stembridge, 278 So.2d 288, 291 (3 D.C.A. Fla., 1973), the court held the following:

> The second feature of the challenged injunction deals with the question as to the necessity for reasonable notice for governmental meetings to be given to the public as a requirement of the Sunshine Law. Although F. S. s. 286.011, F.S.A., does not specifically mention such a requirement, as a practical matter in order for a public meeting to be in essence "public," **we hold reasonable notice thereof to be mandatory.** (Emphasis supplied.)

Accord: Sullivan v. Credit River Township, 217 N.W.2d 502 (Minn. 1974).

Prior to **Hough**, this office expressed the same view regarding mandatory public

notice in AGO 073-170 in which it was also stated that reasonable public notice is variable depending upon the facts of each situation. In every case, however, the notice must reasonably convey all the information required in a particular situation and it must afford a reasonable time for interested persons to make an appearance if they wish.

Subsequently, in an Inf. Op. to Mr. W. W. Caldwell, Jr., February 10, 1975, suggested notice guidelines under s. 286.011 were issued.

In AGO 071-346 it was stated that due public notice was required for committee meetings even in the absence of a quorum. Attorney General Opinion 072-400, which was directed to regulatory boards under the Department of Professional and Occupational Regulation, stated that such boards must give reasonable and ample notice to the public and the press of all meetings. Moreover, if any applicable statute prescribes notice, such statute controls and must be strictly observed. In AGO 074-273 this office concluded that if no notice of a meeting is given to the public or press, a potential violation of the law exists.

This is not to say, however, that each item discussed by a public agency must be noticed via a published prior agenda under s. 286.011. To the contrary, such a specific requirement was rejected in **Hough** because it could effectively preclude access to meetings by members of the general public who wished to bring specific issues before a governmental body. **Accord:** AGO 075-305.

It should also be mentioned that any board or commission subject to Ch. 120, the Administrative Procedure Act, **must** also consider that Act in conjunction with s. 286.011, when any question regarding sufficient notice arises. **Compare** AGO 077-46 which discusses the notice requirements under Ch. 120, F. S., as the same relate to confidential proceedings of the Elections Commission.

2. CAN THERE BE QUALIFICATIONS OR RESTRICTIONS PLACED ON THE PUBLIC'S ATTENDANCE AT A PUBLIC MEETING?

Reasonable rules and policies which insure orderly conduct of a public meeting and require orderly behavior on the part of those persons attending may be adopted by any public agency whose meetings come within the purview of the Sunshine Law. However, in Baron v. City of Los Angeles, 82 Cal. Rptr. 515 (1969), it was stated that a public agency cannot require, as a condition of attendance at a public meeting, that all persons attending register their names and addresses or other information.

In Nevens v. City of Chino, 44 Cal. Rptr. 50 (Cal. App. 1965), the court nullified a city council rule which forbade the use of silent tape recorders at open council meetings as being an unreasonable interference with a reporter's right to attend the meeting and make an accurate record of what transpires for the benefit of his readers or listeners. The court was of the opinion that accuracy in reporting the transactions of a public body should not be penalized. Similarly, this office is of the view that any rule or policy which prohibited the use of silent or nondisruptive tape recording devices is unreasonable and arbitrary and is, accordingly, invalid. AGO 077-122.

The same may also be said for the use of cameras by newsmen and other individuals. So long as their presence is not disruptive of the conduct of the meeting, they should be allowed since they aid in making an accurate report to members of the public, who, for various reasons, could not be present at that particular meeting.

This office advised the Hon. Richard Gerstein in an Inf. Op. July 16, 1976, that it was not a violation of s. 943.03, F. S., for a city manager to electronically record a meeting between the city manager and two town councilmen since such discussions were subject to s. 286.011, F. S., and s. 943.03, F. S., specifically exempts "any public

oral communication uttered at a public meeting." Since the nature of the discussions were such that they should have occurred at a properly noticed public meeting, the councilmen could not complain that they were secretly recorded.

3. CAN THE MEMBERS OF A PUBLIC BODY VOTE BY SECRET BALLOT AT A PUBLIC MEETING OR VOTE UPON VARIOUS MATTERS BY THE USE OF CODED LETTERS OR NUMBERS?

In AGO 073-264 it was held that members of a personnel board may not vote by secret ballot during a hearing concerning a public employee. Specifically noted in that opinion was s. 286.012 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.)

The Public Service Commission was advised in AGO 073-344 not to withhold from the news media and the public for any length of time the final votes of that body. It had been the practice of the Commission to circulate "vote sheets" among members so that voting could be done privately. In advising the Commission to discontinue the practice of private voting, this office relied, in part, on s. 286.011(2) which requires all minutes to be "promptly recorded" and "open to the public at all times." Similarly, AGO 071-32 stated if at any time during the 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, imposed by the phrase "open to the public at all times."

In Marks v. Broward County School Board, 26 Fla. Supp. 175, 179 (Cir. Ct., Broward County 1971), the court held the following in regard to secret or coded voting or deliberations:

> 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 . . . .

Moreover, while language exists in **Bassett** which indicates that any initial secret ballot can be rendered "sunshine bright" by a corrective, open, public vote which follows, this pronouncement is in conflict with Town of Palm Beach, **supra**, in which it was stated an action which was taken in violation of the law is **void ab initio**. As the latest expression of the court, this statement should be considered as controlling. **Also see** AGO 072-326 in which this office expressed the view that any initial knowing and intentional secret votes subject the members of a public body to possible criminal penalties under s. 286.011. Recently, in News-Press Publishing Co. v. Wisher, 345 So.-2d 646, 648 (Fla. 1977), the Court noted that ". . . [t]he policy of this state as expressed in the public records law and the open meeting statute eliminate any notion that the

commission was free to conduct the county's personnel business by pseudonyms or cloaked references. We cannot allow the purpose of our statutes to be thwarted by such obvious ruses." **Accord:** AGO's 076-240 and 077-48 stating that the use of preassigned numbers of codes at public meetings in order to avoid identifying the names of applicants for public positions violates s. 286.011, F. S.

4. MUST WRITTEN MINUTES BE KEPT OF ALL SUNSHINE MEETINGS?

Section 286.011 specifically requires the minutes of a meeting of any public agency to be promptly recorded and open to public inspection. In AGO 075-45 it was stated that sound or tape recordings may be used to record all of the proceedings before a public body so long as **written minutes** of such meetings are promptly recorded for public inspection as required by s. 286.011. There is no requirement, however, that voice recordings be made at each public meeting. Inf. Op. to Alice Hufer, March 1, 1977. Attorney General Opinion 074-294 expressed the view that minutes for a previous meeting may be circulated for corrections and studying prior to an open meeting so long as any changes or corrections or deletions are discussed during the properly noticed open meeting and are duly approved by the affected board at such meeting.

The minutes required to be kept for "workshop" meetings are no different from those required for any other meeting of a public agency. AGO 074-62.

D. THE SANCTIONS OR PENALTIES FOR NONCOMPLIANCE

1. ARE MEMBERS OF A PUBLIC BODY CRIMINALLY LIABLE FOR VIOLATIONS OF THE SUNSHINE LAW OF WHICH THEY HAVE KNOWLEDGE?

Section 286.011, F. S., provides that a criminal violation of the law is a misdemeanor of the second degree. This means that a criminal violation of the Sunshine Law by a public body or member thereof is an offense punishable by imprisonment in the county jail for a period not to exceed 60 days, a fine not to exceed $500, or both.

Although this statute contains no express requirement of scienter or criminal intent, the Supreme Court has construed the statute as requiring a charge and proof of scienter. Board of Public Instruction of Broward County v. Doran, supra. Moreover, although the statute contains a penal sanction, courts have not strictly construed the statute when the proceedings were civil as opposed to criminal. In civil proceedings, the statute has been given a liberal interpretation consistent with the well-established rule that statutes enacted for the public's benefit should be interpreted most favorably to the public. See Wolfson v. State, 344 So.2d 611 (2 D.C.A. Fla., 1977), holding that the "official act" test formulated by the Second District in Times Publishing Co. v. Williams, was equally applicable to criminal as well as civil proceedings under s. 286.011, F. S. Additionally, city funds or the services of the city attorney may not be used to defend a city councilman against a criminal charge of violating the Sunshine Law. **But see** Askew v. Green, Simmons, Green and Hightower, 348 So. 2d 1245 (1 D.C.A. Fla., 1977), **petition for writ of certiorari pending.**

2. WHAT IS THE VALIDITY OF ACTION TAKEN IN VIOLATION OF THE SUNSHINE LAW?

Section 286.011 provides that no resolution, rule, regulation or formal action shall be considered binding except as taken or made at an open meeting. In Town of Palm Beach, supra, the latest decision of the Supreme Court which dealt with this question, the court held that an action taken in violation of the law was **void ab initio**. Although

this pronouncement apparently conflicts with the earlier decision in Bassett, **supra**, as the latest decision of the Supreme Court it must be considered as controlling.

3. UNDER WHAT CIRCUMSTANCES SHOULD INJUNCTIVE RELIEF BE SOUGHT?

The most widely used and effective enforcement mechanism has been the injunctive relief provided by statute. The judiciary has significantly eased the burden of prevailing in a "sunshine" suit requesting injunctive relief by formulating certain rules unique to public interest statutes. For example, while normally irreparable injury must be proved by the moving party before an injunction may issue, in sunshine cases it has been held that a **mere showing** that the law has been violated constitutes an "irreparable public injury." Town of Palm Beach, **supra**; Times Publishing Co. v. Williams, **supra**.

In regard to enjoining future violations, the Court in Board of Public Instruction of Broward County v. Doran, at 699-700, stated:

> While it is well established that courts may not issue a blanket order enjoining any violation of a statute upon a showing that the statute has been violated in some particular respects (see **Moore v. City Dry Cleaners & Laundry**, 41 So.2d 865 (Fla. 1949), nevertheless they do possess authority to restrain violations similar to those already committed. **See Interstate Commerce Commission v. Keeshin Motor Express**, 134 F.2d 228 (C.C.A. Ill. 1943). This Court may enjoin violations of a statute where one violation has been found if it appears that the future violations bear some resemblance to the past violation or that danger of violations in the future is to be anticipated from the course of conduct in the past. **See National Labor Relations Board v. Express Publishing Company**, 312 U.S. 426, 437, 61 S. Ct. 693, 700, 85 L. Ed. 930 (1941).

In State of Florida **ex rel.** Crago v. Hunter, Case No. 75-515 (19th Circuit, Indian River County), filed August 14, 1975, the court, on application of State Attorney Robert Stone who had been granted standing to sue on behalf of all citizens of Indian River County, permanently enjoined a school board from conducting meetings in violation of s. 286.011. However, in Askew **et al.** v. City of Ocala, **et al.**, **supra**, the Court refused to permit a city and school board to obtain a declaratory judgment against a state attorney with whom they disagreed as to whether an "attorney-client" privilege exists under the Sunshine Law since no actual controversy was present and such action would effectively infringe on the prosecutorial discretion of the state attorney.

E. AGENCIES TO WHICH THE SUNSHINE LAW IS INAPPLICABLE

1. WHAT KINDS OF MEETINGS MAY BE HELD IN PRIVATE CONCERNING PUBLIC OFFICERS AND EMPLOYEES?

In AGO 071-191, this office held that s. 286.011 was inapplicable to local officials when they are serving on executive committees of public bodies such as community action agencies created by and subject to federal law. Similarly, AGO 074-22 stated that private organizations receiving state or federal funds do not fall under the Sunshine Law merely because of the receipt of public moneys.

The Orlando-Orange County Industrial Board was said to be not subject to the Sunshine Law in AGO 076-194 notwithstanding the receipt of contributions from governmental agencies. Likewise, meetings of staff of covered boards or commissions are not ordinarily subject to the law. Inf. Op. to William Candler, December 17, 1974. **Accord**: Occidental Chemical Co. v. Mayo, **et al**, 351 So.2d 336 (Fla. 1977).

Grand jury proceedings were said not to be subject to s. 286.011 in AGO 073-177. Since grand juries have been characterized as an "arm of the judicial branch of government" and s. 905.24 specifically states that grand jury proceedings are secret, this office is of the belief that such proceedings do not fall within the ambit of the Sunshine Law.

In AGO 073-348 it was held that judicial nominating commissions are not subject to the Sunshine Law since they are constitutional bodies created under revised s. 11, Art.V, State Const., and do not fall under the "dominion and control" of the legislative branch of government. **Accord: In re** Advisory Opinion to Governor, 276 So.2d 25 (Fla. 1973), in which it was held that the commissions themselves possess the independent authority to promulgate rules of procedure governing their proceedings.

2. WHAT ARE THE STATUTORY EXCEPTIONS TO THE LAW?

Presently, there are five statutory exceptions in general law to s. 286.011, F. S. Certain proceedings of the Commission on Ethics concerning complaints of violations of part III, Ch. 112, F. S., are exempt, see s. 112.324(1), F. S., and **compare** s. 8(f), Art. II, State Const., as are certain proceedings of the Elections Commission, see s. 106.25(1), F. S., as amended by s. 60, Ch. 77-175, Laws of Florida, effective January 1, 1978. Deliberations of the Public Employee Relations Commission are exempted at s. 447.205(10), F.S. Additionally, Ch. 77-60, Laws of Florida, created s. 229.782(3)(c), F. S., which provides that hearings held in order to challenge material found in student records may be exempt from s. 286.011, F. S., if requested by the parent, guardian, pupil or student. As discussed, **infra**, collective bargaining negotiations are exempt from the Sunshine Law to the extent provided at s. 447.605 (1), F. S.

F. MISCELLANEOUS MATTERS

1. MAY PUBLIC OFFICIALS MEET TOGETHER AT LUNCHEONS, MEETINGS, SOCIAL GATHERINGS, INSPECTION TRIPS, ETC.?

It has been the position of this office to discourage "luncheon meetings" of public boards whenever possible. In AGO 071-159 it was observed that such meetings could have a "chilling" effect upon the public's willingness or desire to attend the meeting since there would undoubtedly be many persons who would be reluctant to enter a public dining room without making a dinner purchase and who would be financially unable or personally unwilling to do so. Additionally, it was stated that discussions among city council members and staff members that would be audible only to a select few seated at a table with them might not satisfy the "openness" requirement of the law.

This view was again expressed in AGO 071-295 in which this office advised public bodies to avoid secret meetings from which the public and press are effectively excluded.

However, in AGO 072-158, it was stated that a luncheon meeting held by a private organization for city, county and school board officials and other members of the public, at which there was no discussion among the public officials relating to public business, is not subject to the Sunshine Law merely because of the presence of two or more members of a covered board or commission.

In specific regard to inspection trips, it was stated in AGO 071-361 that an inspection trip made by members of a public body, together with staff members and officials of other organizations and members of the press, is not a secret meeting within the purview of s. 286.011 even though the general public is not invited to participate therein. However, subsequently, in Bigelow v. Howze, 291 So.2d 645 (2 D.C.A.

Fla., 1974), a case dealing specifically with inspection trips, the court held that in order for a meeting to be truly public, requisite advance notice must be given and a reasonable opportunity to attend must exist. Because of this decision, it is the view of this office that public officials who participate in out-of-state or out-of-town inspection trips should avoid discussions with fellow board members regarding public business while on such trips. This is not to say that public officials should discontinue all inspection trips. Rather, if they are continued, an added degree of caution should be observed.

Attorney General Opinion 076-141 discussed whether a city council could conduct regularly scheduled bus tours of the city accompanied by staff members. This office approved such tours subject to the proviso that if discussions of city matters take place on such tours, advance notice must be given, the public must be afforded a reasonable opportunity to attend and minutes must be promptly recorded and available for inspection.

In an Inf. Op. to Representative John Ryals, November 22, 1972, it was stated that meetings may be held, upon proper notice to the public, in a building other than a county courthouse. Private buildings should be utilized only when there are no available public facilities. Municipalities, however, must meet solely within their territorial jurisdiction. AGO 075-139. **Compare** s. 230.17, F. S., as amended by Ch. 77-35, Laws of Florida, which relates to the place of meetings of school boards and requires, **inter alia**, such meetings to be held at any appropriate public place in the county upon the giving of due public notice.

In an Inf. Op. to Rivers Buford, March 17, 1972, it was held that two or more trustees of a district school board or junior college could travel and room together when attending conferences and conventions in other cities without violating the Sunshine Law so long as they did not engage in discussions involving matters on which foreseeable action could be taken by the board of which they were members.

In another Inf. Op. to Hon. Glen Darty, March 24, 1972, it was stated that a gathering of county and city commissioners and legislators at a private fishing camp hosted by Florida Power Corporation is not a "meeting" within the purview of the Sunshine Law unless two or more members of a board represented at such meeting discussed matters on which foreseeable action would be taken by said board.

2. ARE TELEPHONE CONVERSATIONS WITHIN THE SCOPE OF THE SUNSHINE LAW?

In AGO 071-32, this office expressed the view that telephone conversations are not illegal per se unless held in a place inaccessible to members of the public and the press for the specific purpose of avoiding public scrutiny. As stated in that opinion:

> It will be clear that public officials will or should be spending substantial portions of their time in offices furnished them in which to conduct public or official business. Members of the public and media who wish to view the conduct of the public's business should feel free to enter these public offices provided at public expense and witness and listen to the conduct of their business. Thus, in our view, the telephone conversations envisaged by your question would become secret and unlawful if members of the public and press were deliberately excluded from the public offices furnished for the conduct of the public's business.

PART II

THE PUBLIC RECORDS LAW

Florida's Public Records Law provides, in pertinent part, as follows:

119.01 **General state policy on public records.** — 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.

119.011 **Definitions.** — For the purpose of this chapter:

(1) "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.

(2) "Agency" shall 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.

119.012 **Records made public by public fund use.** — If public funds are expended by an agency defined in subsection 119.011(2) in payment of dues or membership contributions to any person, corporation, foundation, trust, association, group, or other organization, then all the financial, business and membership records pertaining to the public agency from which or on whose behalf the payments are made, of the person, corporation, foundation, trust, association, group, or organization to whom such payments are made shall be public records and subject to the provisions of s. 119.07.

119.02 **Penalty.** — Any public official who shall violate the provisions of subsection 119.07(1) shall be subject to suspension and removal or impeachment and, in addition, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

119.021 **Custodian designated.** — The elected or appointed state, county, or municipal officer or officers charged by law with the responsibility of maintaining the office having public records shall be the custodian thereof.

119.041 **Destruction of records regulated.** — No public official may mutilate, destroy, sell, loan or otherwise dispose of any public record without the consent of the Division of Archives, History and Records Management of the Department of State.

119.07 **Inspection and examination of records; exemptions.** —

(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).

(b) All public records referred to in ss. 794.03, 198.09, 199.222, 658.10(1), 624.319(3), (4), 624.311(2), and 63.181, are exempt from the provisions of subsection (1).

(c) Examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure, certification, or employment shall be exempt from the provisions of subsection (1). However, an examinee shall have the right to review his own completed examination.

119.10 Violation of chapter a misdemeanor. — Any person willfully and knowingly violating any of the provisions of this chapter shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

119.11 Accelerated hearing; immediate compliance. —

(1) Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.

(2) Whenever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within 48 hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such 48-hour period. The filing of a notice of appeal shall not operate as an automatic stay.

(3) A stay order shall not be issued unless the court determines that there is substantial probability that opening the records for inspection will result in significant damage.

119.12 Attorney's fees. —

(1) Whenever an action has been filed against an agency to enforce the provisions of this chapter and the court determines that such agency unreasonably refused to permit public records to be inspected, the court shall assess a reasonable attorney's fee against such agency.

(2) Whenever an agency appeals a court order requiring it to permit inspection of records pursuant to this chapter and such order is affirmed, the court shall assess a reasonable attorney's fee for the appeal against such agency.

A. WHAT CONSTITUTES A PUBLIC RECORD WHICH IS OPEN TO INSPECTION?

Section 119.07(1) defines "public records" to encompass

> . . . 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.

This definition includes virtually every document a public official or employee makes or receives in the ordinary course of conducting public business. **Accord:** City of Gainesville v. State ex rel. Int'l Ass'n of Firefighters, 298 So.2d 478 (1 D.C.A. Fla.,

1974), holding that all documents made in the "normal" course of business are public records. The question that must be addressed under Florida's Public Records Law is generally not whether a document is a "public record" as defined above, but rather whether such document, being a public record, is open to public inspection and examination. Generally, the answer to this question turns upon two variables, first whether such document is made or received by a public agency as defined by s. 119.01 and, second, whether any exemption, statutory or otherwise, exists which would require a public official to keep such document confidential.

Based upon these two primary considerations this office has concluded that the following documents were required to be open to public inspection and examination: Docket books of small claims courts and justice of the peace courts, AGO 065-32; inspection reports made at the request of or received by a school board in connection with an official investigation concerning the collapse of a school roof, AGO 071-243; inspection reports of nursing homes compiled by and in the possession of the Department of Health and Rehabilitative Services, AGO 071-360; applications for the position of district school superintendent, AGO 071-394; appraisal reports made by a city in connection with land acquisitions, AGO 072-63; medical reports submitted by a licensed physician to the Department of Highway Safety and Motor Vehicles, AGO 072-303; advance itineraries or plane reservations made by authorized officials for the use of executive aircraft, AGO 072-356; tax rolls, AGO 072-407; salaries paid to assistant state attorneys, AGO 073-30; records maintained by the abandoned property section of the Department of Banking and Finance, AGO 073-167; investigative reports of the Division of Pari-mutuel Wagering supplied in connection with license and permit applications, AGO 073-278; complaints made by private citizens to state Division of Health officials or investigators, AGO 073-336; vote sheets, final orders and all other documents and memoranda of the Public Service Commission, AGO 073-344; records of a city-owned and operated utility authority, AGO 074-35; developers' detailed engineering plans which are submitted to the South Florida Flood Control District for review, AGO 074-245; poll lists in the possession of the supervisor of elections following an election, AGO 074-284; lists of names and addresses of all persons requesting absentee ballots, AGO 075-17; documents contained in the advisory opinion files of the Commission on Ethics, AGO 077-33; applications for tenancy and accompanying documents received by a municipal housing authority, AGO 077-69; statistical information compiled by the board of nursing, Inf. Op. to Ms. Virginia Albaugh, August 27, 1974; health inspection restaurant reports, Inf. Op. to Mr. Joe Hodges, June 17, 1974; correspondence from a state senator to a division head in the Department of Revenue, Inf. Op. to Sen. Ralph Poston, February 21, 1974; financial operating budget of the athletic department of a state university, Inf. Op. to Mr. Danny Pietrodangelo, November 29, 1972; license plates of law enforcement officers, Inf. Op. to Mr. Ralph Davis, February 7, 1973; gross receipt taxes paid to the Okaloosa Island Authority, Inf. Op. to Curtis Golden, May 14, 1975; and drivers' license photographs, Inf. Op. to Sen. Lori Wilson, February 2, 1976.

1. ARE PRELIMINARY OR TENTATIVE DRAFTS OF PROPOSALS PUBLIC RECORDS WHICH ARE OPEN TO INSPECTION?

In AGO 074-215, this office expressed the view that no "work-product" or "working-paper" exemption exists under Ch. 119 and, accordingly, preliminary or tentative documents, such as "inter-office" memoranda, working drafts, and the like, as well as finalized documents, are required to be open to public inspection. In so holding, this office specifically noted that Ch. 119 classifies all documents as public records regardless of whether they are preliminary or finalized and, even more

impo[illegible]ntains no general confidentiality exemption for "working-papers" as do other [illegible] statutes as well as the Federal Freedom of Information Act. This opinion followed the reasoning of Copeland v. Cartwright, 38 Fla. Supp. 6 (17th Cir. Broward Co., 1971), aff'd, 282 So.2d 45 (4 D.C.A. Fla., 1973), which specifically held that no "work-product" or "working-paper" exemption exists under Florida law which would allow a tentative site plan proposal to remain confidential until approved and finalized. Prior to Copeland, supra, the Supreme Court in Shell v. State Road Department, 135 So.2d 857, 860 (Fla. 1962), held that "work-product" immunity does not extend to the files of a governmental agency whose files should be and probably are subject to inspection by the public at all reasonable hours. As noted by the Court, the fact that information may be used in litigation is no justification for nondisclosure, the Legislature having made no such "litigation" exception in the statute. State ex rel. Cummer v. Pace, 159 So. 679, 682 (Fla. 1935). Also see State of Florida ex rel., Veale v. City of Boca Raton, —— So.2d —— (4 D.C.A. Fla., 1977), Case No. 75-2257 filed December 20, 1977, and Wait v. Florida Power and Light Co., —— So.2d —— (1 D.C.A. Fla., 1978), Case No. HH-406, filed January 18, 1978, holding that the Legislature has waived the "attorney-client" privilege for public agencies through the enactment of s. 119.07(2), F. S.

Since **Copeland**, the First and Second District Courts of Appeal have likewise held that documents which were preliminary or tentative are required to be open to public inspection. In City of Gainesville v. State ex rel. Int'l Ass'n of Firefighters, supra, the First District held that city budget proposals concerning a fire department were required to be open to public scrutiny. In State ex rel. City of Bartow v. Public Employees Relations Commission, 341 So.2d 1000 (1 D.C.A. Fla., 1976), the court found records, affidavits, papers and notes in the possession of a PERC investigator to be public records within the broad definition found at s. 119.011(1), F. S. Likewise, in Gannett v. Goldtrap, 302 So.2d 174 (2 D.C.A. Fla., 1974), the Second District held that since the statute does not speak solely to finalized documents, preliminary land appraisal reports must be open to public inspection. Judge Grimes, writing for the Court in Warden v. Bennett, 340 So.2d 977 (2 D.C.A. Fla., 1976), held that "working papers" used in preparing the budget of a community college were public records within the purview of Ch. 119, F. S.

These relatively recent decisions, decided under the present Public Records Law, follow the reasoning applied under the original Public Records Law, former s. 119.01, in State ex rel. Cummer v. Pace, 159 So. 679 (Fla. 1935), in which the Court held that the judiciary was without the legal sanction to raise exceptions to the Public Records Law by implication, such being a policy matter for the Legislature and not the judiciary to determine. Moreover, sound and well-established principles of statutory construction compel the conclusion that had the Legislature intended a "work-product" or "working-paper" exemption to exist, it would not, for example, have specifically exempted the "work-papers" of the auditor general, s. 11.45(5)(b), the draft orders of PERC developed for or preliminary to the issuance of a final written order, s. 447.205(10), and "work-products" developed during the course of collective bargaining negotiations, s. 447.605(3), from Ch. 119.

In AGO 074-294 it was stated that tentative drafts of minutes and suggested corrections thereof made by a public body must be open for inspection while being discussed prior to finalization.

2. ARE RECORDS OF ADVISORY BOARDS OR OTHER PERSONS OR GROUPS ACTING AT THE REQUEST OF A PUBLIC AGENCY SUBJECT TO THE INSPECTION PROVISIONS OF CH. 119?

In State ex rel. Tindel v. Sharp, 300 So.2d 750 (1 D.C.A. Fla., 1974), this precise issue was litigated. The Duval County School Board hired a "special screening committee" composed of three individuals to receive applications for the position of school superintendent and to select, from the applications received, five nominees for the position. The committee entered into a contract with the board for which it was to receive $10,000 in return for making its recommendations. When a member of the news media requested access to the applications received by the committee for the position of school superintendent, his request was denied.

A lawsuit was then instituted in which the circuit court ruled that the committee was an "independent contractor" and, therefore, not within the scope of Ch. 119. The District Court of Appeal affirmed, noting that if the Legislature had intended such a committee to be within the scope of Ch. 119, it could have easily included the same within the definition of "agency" found at s. 119.011(2), F. S. State ex rel. Tindel v. Sharp, supra, at 751.

In amending Ch. 119, F.S., in HB 2040, Ch. 75-225, Laws of Florida, effective July 1, 1975, the Legislature amended the definition of "agency" found at s. 119.011(2) to include " . . . any other public or private agency, person, partnership, corporation or business entity acting on behalf of any public agency." This was done in order to ensure that the "independent contractor exception" which allowed a preliminary selection process to be conducted in secret would not reoccur. **Accord:** State ex rel. City of Bartow v. Public Employees Relations Commission, **supra**, at 1002, n. 2. Under this new definition, records of advisory bodies, public or private, agents or independent contractors, are now subject to Ch. 119. This new definition complements and follows the decision of Town of Palm Beach v. Gradison, **supra**, in which the Court ruled that groups, public or private, which act in an advisory capacity to a public board or commission are subject to the Sunshine Law, s. 286.011, F. S.

3. MUST PERSONNEL RECORDS BE MADE AVAILABLE FOR PUBLIC INSPECTION?

This office has received a large number of requests for opinions on the general topic of personnel records. This area is one which has been debated before the Legislature, the Governor and Cabinet and, recently, the courts. Opinions of this office have consistently expressed the view that "personnel records" of employees paid from public funds or otherwise subject to legislative control are subject to public inspection. For example, it has been held that records of salaries paid to assistant state attorneys are open to public inspection, AGO 073-30; that personnel records of civil service employees may not be maintained under two headings, one open and one confidential, AGO 073-51; and that general personnel records are subject to Ch. 119, AGO 075-9.

In AGO 077-48 this office discussed the recent case of News-Press Publishing Co. v. Wisher, 345 So.2d 646 (Fla. 1977), and its effect upon access to personnel records. In quashing the decision of the Second District Court of Appeal in Wisher v. News-Press Publishing Co., 310 So.2d 345 (2 D.C.A. Fla., 1975), the Court declined to rule on the broad policy question of general access to the personnel files of public employees presented by the case, **i. e.**, whether the judiciary possesses the authority to determine what records are "deemed by law" to be confidential as a matter of public policy for the purposes of the Public Records Law, and instead confined the opinion to the narrow issue of whether documents authored and discussed by a public body acting in an open public meeting are exempted from the operation of the Public Records Law. Both the appellate and Supreme Court decisions in Wisher concerned Ch. 119 as it existed in 1974 and did not discuss the 1975 amendments to the Act. See Ch. 75-225, Laws of Florida. The 1975 amendments to the Public Records Law evidence a

legislative declaration of general state policy in favor of access to all state, county and municipal records. Section 119.01, F. S. Additionally, the Legislature specifically broadened the definition of agency at s. 119.011(3), F. S., in response to an appellate court decision which effectively allowed a certain category of personnel records to remain confidential. **Compare** State ex rel. Tindel v. Sharp, 300 So.2d 750 (1 D.C.A. Fla., 1974). The decision which the Court found to be in conflict with Wisher, State ex rel. Cummer v. Pace, 159 So. 679, 681 (Fla. 1935), was not receded from in the Court's published opinion. Accordingly, unless and until legislatively or judicially determined to the contrary, this office continues to be of the view that personnel records are not excluded either statutorily or as a matter of public policy from the operation of s. 119.07(1), F. S. For the reasons expressed herein and in AGO 077-48, public agencies should continue to permit public access to personnel records of its employees when the same are not exempt from s. 119.07(1), F. S., by statute. **Accord**: State of Florida ex rel. Veale v. City of Boca Raton, —— So.2d —— (4 D.C.A. Fla., 1977), filed December 20, 1977.

4. MAY A PUBLIC AGENCY, OFFICER OR EMPLOYEE KEEP CONFIDENTIAL A DOCUMENT MADE OR RECEIVED IN THE NORMAL COURSE OF BUSINESS IF REQUESTED TO DO SO BY THE MAKER OR SENDER OF SUCH DOCUMENTS?

In AGO 071-394 this office expressed the view that records which are received and are marked "confidential" or "return to sender" must be open to public inspection unless exempted from disclosure by the Legislature. To hold otherwise would permit private parties to defeat the clear intent of Ch. 119 by a stroke of the pen. In this regard, AGO 071-394 adopted the holding of a New York Appellate Court which, when considering a similar question, stated the following:

> But it is said that the papers sought to be inspected are private and confidential, and hence do not fall within the purview of the statute. As to this argument, it is to be observed, in the first place, that a person who sends a communication to a public officer, relative to the public business, cannot make his communication private and confidential simply by labeling it as such. The law determines its character, not the will of the sender. . . . It is true that a disclosure of the objections . . . may restrain objectors from writing thus freely to similar boards in the future; but if such is a consequence of complying with the plain command of a statute it must be endured. [Egan v. Board of Water Supply, 205 N.Y. 147, 98 N.E. 467, 470 (C.A. 1912). **Accord**: Browning v. Walton, 351 So.2d 380 (4 D.C.A. Fla., 1977).]

B. WHO MAY INSPECT, RECEIVE COPIES OF, AND PHOTOGRAPH PUBLIC RECORDS?

Pursuant to s. 119.01, as amended by Ch. 75-225, Laws of Florida, the Legislature has decreed a general state policy on access to public records which provides 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**." (Emphasis supplied.) The state citizenship requirement of former s. 119.01 was deleted by HB 2040, Ch. 75-225, Laws of Florida, in order to comport with s. 119.07(1) which has reference to "persons" as opposed to "citizens." See AGO 075-175 which held that a public employee is a person within the meaning of Ch. 119 and, as such, possesses the same right of inspection as any other person.

Moreover, the new statement of policy on access to public records embodies the concept expressed in Maxwell v. Pine Gas Corp., 195 So. 2d 602 (4 D.C.A. Fla., 1967), in

which the court noted that the records of public agencies are not the personal property of a public officer but rather belong to the office itself. In AGO 075-192 this office held that when a particular statute authorized inspection by a particular individual, such right could also be exercised by that person's authorized representative.

C. TO WHAT EXTENT MAY A GOVERNMENTAL ENTITY REGULATE OR CONDITION INSPECTION OR COPYING OF PUBLIC RECORDS?

Pursuant to s. 119.07(1), as amended:

> Every person having custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times and under reasonable conditions and under supervision by the custodian of the records or his designee.

This office has taken the position that the "reasonable conditions" referred to above do not include anything that would hamper or frustrate, directly or indirectly, a person's right of inspection and copying. However, in State ex rel. City of Bartow v. Public Employees Relations Commission, supra, at 1003, the court discussed this provision and concluded that a PERC investigator could withhold his notes and papers made in the course of a preliminary investigation until the Commission or investigatory agent has either dismissed the charge as groundless or has determined that there is substantial evidence of a prima facie violation. This office is of the view that **City of Bartow** is limited to its unique facts and does not generally authorize preliminary documents to be withheld from public inspection by a public agency because of any alleged harm, embarrassment or misunderstanding that might be caused by inspection of such documents.

1. MUST AN INDIVIDUAL SHOW A "SPECIAL INTEREST" OR "LEGITIMATE INTEREST" IN PUBLIC RECORDS BEFORE BEING ALLOWED TO INSPECT OR COPY SAME?

Under the common law as it developed in the United States, a demandant often was required to demonstrate a "special interest" in a document in order to secure the right of inspection. While this apparently continues to be the rule in a handful of states, in Florida no such requirement has ever been imposed. Chapter 119 requires no showing of purpose or legitimate interest as a necessary condition of access. Thus, mere curiosity and even blatant commercial purposes do not vest to either the courts or the custodian discretion to deny inspection. See State ex rel. Davis v. McMillan, 38 So. 666 (Fla. 1905), holding that abstract companies may copy public documents from the clerk's office for their own use and sell such copies to the public for a profit. Chapter 119 ordinarily concerns itself solely with what may be disclosed and not to whom. **Accord**, State ex rel. Davidson v. Couch, 156 So. 297 (Fla. 1934), in which the court specifically noted that one does not have to be a taxpayer or have a "special interest" in public documents to inspect them, and Warden v. Bennett, supra, at 978, holding that a person need not show a special interest or proper motive or purpose in order to inspect public records.

The use to which a person intends to put the documents once copies are received is irrelevant in determining whether a person has a right of access under Ch. 119. As stated in State ex rel. Davidson v. Couch, supra, at 299:

> It is not a question of what the citizen intends to do with the information when he obtains it. He may if he desires disseminate the information among the people by means of the press in public address, pamphlets, or by the writing of a book by way of favorable or unfavorable criticism of the methods and practices of the people's servants in their positions of trust. It is a matter of

> history that famous writers in England and France notably, and perhaps in other countries, have been the means of affecting [sic] salutary reforms by their novelistic criticisms of abuses of public powers.

This view was followed by this office in AGO 074-413 in which it was stated that a private person may inspect, copy or photograph worthless check affidavits without demonstrating a "personal interest" in such records, and AGO 073-167 which held that a person may inspect records maintained by the abandoned property section of the Department of Banking and Finance without being required to show a "special interest" therein. Also see AGO 077-125 stating that a person who demands access to arrest records cannot be required to execute a written agreement stating the purpose of the request.

2. MAY AN INDIVIDUAL BE LAWFULLY REQUIRED TO STATE PARTICULARLY THE RECORDS DESIRED, REDUCE SUCH REQUEST TO WRITING, OR THE LIKE?

In State ex rel. Davidson v. Couch, supra, the Court specifically rejected a contention that Ch. 119 allows a custodian to require a demandant to specify the particular book or record desired to be examined. As noted by the Court at 300:

> It is sufficient to say that the statute imposes no such limitation and it is doubtful if any rule or regulation of the office requiring it would be reasonable, because the working of the rule would depend upon the applicant's knowledge of the name of the record he desired to inspect.

Similarly, in State ex rel. Davidson v. Couch, 158 So. 103 (Fla. 1934), the Court held that the right of inspection may not be frustrated or circumvented through indirect means such as the use of a code book.

Moreover, since access to public records is a statutory right, the custodian and the courts are without authority to limit access by a claim of interference with the day-to-day conduct of public business. Section 119.07(1) imposes an affirmative duty on record custodians to make whatever arrangements are necessary to ensure the free exercise of the right of inspection during reasonable hours and subject to reasonable conditions.

This office is of the opinion that the "reasonable conditions" referred to in s. 119.07(1) have reference to the custodian's duty of ensuring that the public records under his supervision are kept safe. See Fuller v. State, 17 So.2d 607 (Fla. 1944); State ex rel. Davis v. McMillan, 38 So. 666 (Fla. 1905). This is not to say that a custodian is required to constantly be "looking over the shoulder" of a person inspecting public records; only a general supervision by the custodian or his designee is required in order to ensure that records are not altered, destroyed or stolen. Compare State ex rel. City of Bartow v. Public Employees Relations Commission, supra.

3. TO WHAT EXTENT MAY A LOCAL AGENCY LEGISLATE BY ORDINANCE OR RESOLUTION ON THE SUBJECT OF ACCESS TO LOCAL PUBLIC RECORDS?

In AGO 075-50, this office stated that Ch. 119, when read in conjunction with Ch. 267, constitutes a state preemption of the field of public records and, therefore, this is not a proper or valid subject of attempted local regulation or legislation. State control regarding access, maintenance, management, retention, preservation, and disposal of public records is exclusive and operates solely on the custodian of public records. The requirements of Ch. 119 have been made mandatory by the Legislature at the local as well as the state level and hence do not vest in any local agency any discretion whatsoever to change, alter or condition the provisions of Ch. 119.

4. TO WHAT EXTENT DOES FEDERAL LAW PREEMPT STATE LAW IN THIS AREA?

This issue is one which occurs with some regularity throughout the state, especially when considering records of programs or departments which receive federal funding. This office has adopted a general policy of allowing nondisclosure of records otherwise public under state law only when there is absolute conflict between state and federal disclosure provisions. If a federal statute requires particular records to be closed and the state is clearly subject to the provisions of said statute, then pursuant to the Supremacy Clause of the United States Constitution, s. 2, Art.VI, the state is required to keep such records confidential.

This view of federal versus state regulation follows the decision of State ex rel. Cummer v. Pace, supra, in which the Court, in ordering information relating to the operation of the municipal docks of the City of Jacksonville open for public inspection, noted the following:

> The details of the management and operation of the municipal docks and terminals of Jacksonville are not within the exclusive control of the federal government, but are within the control of the Legislature of the state of Florida, which in the enactment of section 490, C. G. L., supra, has extended to any citizen of Florida the unrestricted privilege of examination of the books and records of municipalities in order that such citizens may advise themselves concerning the operation and conduct of the public affairs which such municipalities are authorized to carry on.
>
> * * * * *
>
> The protection of the federal statute was contrived for the particular benefit of the shippers and consignees of common carriers engaged in interstate commerce subject to the Interstate Commerce Act. There is nothing in its provisions to indicate that it was intended to so impinge upon the operation of state statutes, allowing an inspection of the public records of municipalities by citizens, as to completely deny to the citizen his statutory rights under the laws of this state, merely because some of the books and records sought to be examined might contain information of a character falling within the purview of the hereinbefore quoted federal law relating to disclosure of information by carriers subject to the Interstate Commerce Act. [159 So. 579, 682-683].

Accord: Citizens for Better Care v. Reizen, 215 N.W.2d 576 (Ct. App. Mich. 1974), indicating that clear conflict between federal law and state law relating to confidentiality of inspection or investigative records of nursing homes receiving Medicaid must be clearly demonstrated before such documents would be found to be exempt from disclosure under applicable state law.

In AGO 073-278, it was held that reports submitted to the Division of Pari-mutuel Wagering in connection with license and permit applications are open to inspection unless submitted by a consumer reporting agency whose reports are subject to the Fair Credit and Reporting Act, 15 U.S.C. s. 1681. Such reports specifically may be made available for inspection only in accordance with the provisions of that federal act. Similarly in AGO 074-372, drug treatment records of public agencies receiving federal funds were said to be confidential consistent with federal statutory requirements. Also see Ch. 77-60, Laws of Florida, which was enacted in response to the so-called "Buckley Amendments," 20 U.S.C. s. 1638(8) (Pub. L. No. 93-380).

As a note of caution, it should be added that any public official or employee

confronted with a situation involving apparently irreconcilable federal confidentiality regulations and the Public Records Law should first check the implementing legislation, i.e., the federal statute, to ensure that the federal regulation comports with the federal act and does not go beyond the confidentiality allowed by the Congress. It has been this office's experience that federal administrative and regulatory agencies display a desire for secrecy that quite often appears to transcend the intent of Congress. "Informal policy" letters and the like from federal officials do not have the force and effect of law and, accordingly, do not serve to supersede the state public records law.

Moreover, while mandating federal confidentiality in particular areas, Congress has specifically provided, in certain instances, an exemption for records otherwise open for inspection under state law. See, e.g., 42 U.S.C. s. 1306(a) which provides that no state shall lose grant assistance under Titles I, IV, X, and XIV or former Title XVI, because of any state law which allows public access to lists of names of public aid recipients or disbursement records.

D. WHAT ARE THE EXPRESS STATUTORY LIMITATIONS ON INSPECTION AND COPYING OF DOCUMENTS?

Section 119.07(2)(a) provides that 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, are exempt from the mandatory inspection and copying provisions of s. 119.07(1), F. S.

1. PERSONNEL AND STUDENTS WITHIN THE PUBLIC AND UNIVERSITY SCHOOL SYSTEMS.

Pursuant to s. 241.29(3), assessment files of all instructional, administrative and supervisory persons within a public school district are open for inspection only to the school board, the superintendent, the principal, the individual teacher and such other persons as the teacher or the superintendent may authorize in writing.

In AGO 073-212, this office stated that personnel files of faculty and administrators of institutions of higher learning are open to public inspection under s. 119.01. Such items as complaints, references, information concerning promotion qualifications and quality of professional works and confidential inquiries made by administrative personnel were said to be within the purview of Ch. 119, F. S. In a supplementary opinion, AGO 073-212A, it was noted that the Legislature enacted a statute during the 1973 session which allowed regulations of the Board of Regents to prescribe the "content and custody of limited access records which an institution in the state university system may maintain on its employees." Such records shall be limited to evaluative information and shall be open for inspection only by the employee and by officials of the instititutuion who are responsible for supervision of the employee. See Ch. 73-338, Laws of Florida, effective July 1, 1973, carried forward as s. 239.78, F. S.

Pursuant to this act, the Board of Regents submitted proposed rules limiting access to certain personnel records of university faculty and administrators to the State Board of Education for approval. On November 20, 1973, the state board unanimously rejected all proposed rules which clearly purported to allow closed files on state university campuses. Some time later, however, it came to the attention of the state board that it had inadvertently and mistakenly approved a rule which allowed faculty evaluations to remain confidential. When informed of this mistake, the board met on April 2, 1974, and repealed both confidentiality rules which it had approved relating to community colleges and universities.

Because the repeal took place more than 60 days after initial approval, attorneys for the Board of Regents adopted the view that the action of the state board had no effect on the validity of the rule as to universities. (Since the state board is the sole rulemaking authority for community colleges, there is no question regarding the power of the state board to mandate openness as to those institutions.) Subsequently, in a case involving the firing of the football coaching staff at Florida A & M University, the issue of the rulemaking power of the State Board of Education was decided. In Tallahassee Democrat v. Florida Board of Regents, 314 So.2d 164 (1 D.C.A. Fla., 1975), the court held that the state board did not have the authority to repeal a rule more than 60 days after approval and, accordingly, upheld the university's refusal to produce for public inspection a report of a committee inquiry into the circumstances surrounding the dismissal of the coaching staff.

The issue of access to student records is one which has prompted the Congress to enact specific legislation guaranteeing a student, or his parents or guardian if the student is under 18 years of age, access to his student records. See Pub. L. No. 93-380; 20 U.S.C. ss. 1232(q)-(i), commonly referred to as the "Buckley Amendments." Additionally, this act prohibits dissemination of student information without the knowledge and consent of the affected student.

If any specific questions arise under the "Buckley Amendments," it is suggested that the Department of Education be contacted for advice and assistance. Since this state has followed a policy of governmental openness, this particular federal law has not caused the problems in Florida which have apparently been encountered elsewhere. Even prior to the enactment by the Congress of the "Buckley Amendments," this office had consistently informed public schools and universities throughout the state that a student or his parents or guardian had the statutory right to view all records in the possession of such public agencies which related to said student.

2. INMATE RECORDS MAINTAINED BY THE DIVISION OF CORRECTIONS AND RECORDS OF THE PAROLE AND PROBATION COMMISSION.

In an Inf. Op. to Representative Richard S. Hodes, October 30, 1972, it was stated that a legislative standing committee has the authority under s. 11.143(2) to inspect the books and records of the Parole and Probation Commission. In AGO 074-247, this office opined that the commission had the authority to lawfully promulgate rules as to the privacy and privilege and use of information obtained by the commission and placed in its permanent records concerning every person who may become subject to parole, probation, or pardon and commutation of sentence. This exemption is applicable only to these persons and does not apply to any other files or records of the commission. Also see s. 945.10(1)-(4), F. S., relating to confidentiality of presentence investigation reports and access to information contained in the files of the Division of Corrections and the commission.

3. MEDICAL AND BIRTH RECORDS.

In AGO 072-59, it was stated that hospital clinical records of municipal, county, state or other tax-supported hospitals are public records. However, pursuant to s. 458.16, records of diagnosis, treatment and examination may not be released without the written authorization of the patient. AGO 073-419 expressed the view that information regarding the termination of pregnancy is privileged. Such information may not pass from the hospital and may lawfully be released only when authorized by a court of competent jurisdiction. Birth certificates were held to be confidential in AGO 074-70.

AGO 076-153 stated that a community mental health facility established and operating under the Community Mental Health Act, part IV, Ch. 394, F. S., is prohibited by s. 394.459 from releasing to the clerk of the circuit court, 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 or the guardian, attorney or designated representative for the patient or upon court order. This medical record exception does not extend to information such as budgeting, operating or financial data.

In an Inf. Op. to David Bludworth, May 3, 1977, this office considered the impact of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), upon s. 742.09 which prohibits the publishing of names of parties involved in a paternity suit. Noting that no statute exists which makes court records of such proceedings confidential, the holding of Cox was said to probably prohibit a prosecution against a newspaper for publishing such information which was obtained from a court clerk.

4. TAX RECORDS.

In AGO 071-252, the Department of Revenue was advised that it did not have the authority to furnish a county tax assessor with a complete listing of those paying sales taxes and the monthly amount paid because s. 213.072 serves to exempt such records from s. 119.07. Attorney General Opinion 073-109 held that s. 199.222 prohibits the Department of Revenue from disclosing in any manner, save for three express exceptions found in the statute, particulars set forth in intangible tax returns. In an Inf. Op. to the Honorable Curtis Golden, May 14, 1975, it was held that records of gross sales receipt taxes paid to and in the possession of the Okaloosa Island Authority were subject to public inspection.

However, a wide variety of tax information collected by the state is confidential by statute. Please refer to the appendix for a listing of the same.

5. UNEMPLOYMENT COMPENSATION RECORDS.

In AGO 072-192, it was held that the records of Florida State Employment Agencies are not accessible to the public except to the extent necessary to administer the Unemployment Compensation Law. See Also ss. 443.12(7) and 443.16(3).

6. JUVENILE RECORDS.

Juvenile records have traditionally been considered confidential and treated differently from many other records within the criminal justice system. An example of this is the record of arrests of juveniles which by law is confidential. See AGO 070-113. Chapter 39, F. S., prohibits a law enforcement agency or a state attorney from releasing the name, age and address of a juvenile taken into custody for an act of delinquency unless the juvenile is thereafter handled as an adult. In AGO 073-112, the Parole and Probation Commission was advised that a circuit judge handling juvenile matters had the authority to refuse to permit the commission to inspect juvenile court records of a prisoner being considered for parole or a person on whom the commission is conducting a presentence investigation.

Similarly, in an Inf. Op. to Jimmie J. Watford, July 29, 1976, it was stated that neither accident reports, nor police logs, nor any other record of a law enforcement agency which is open to public inspection should contain information revealing the identity of juveniles who are taken into custody for acts of delinquency.

7. GRAND JURY RECORDS.

It has been held that proceedings before a grand jury are "absolutely privileged." Buchanan v. Miami Herald Publishing Co., 206 So.2d 465 (3 D.C.A. Fla., 1968), aff'd,

230 So.2d 9 (Fla. 1969), and, accordingly, communications addressed to that body during the regular performance of its duties are not subject to s. 119.07. Such documents are made confidential pursuant to s. 905.24.

8. INVESTIGATIVE RECORDS.

This office has followed the holding of Caswell v. Manhattan Fire and Marine Insurance Co., 339 F.2d 417 (5th Cir. 1968), to the effect that, unless statutorily exempt, investigative records made or received by public bodies other than police or law enforcement agencies are subject to the requirements of Ch. 119. In Caswell, the Court, at 422-423, ordered certain investigative records of the State Insurance Commissioner produced for inspection under Ch. 119. In AGO 074-84, this office held that transcripts of hearings of investigative inquiries conducted by state agencies are subject to s. 119.07. During the 1975 session, the Legislature amended Ch. 119; see s. 1, Ch. 75-225, Laws of Florida, carried forward as s. 20.30(13) and transferred to s. 455.08, F. S., to provide that investigative records of boards under the jurisdiction of the Department of Professional and Occupational Regulation are exempt from disclosure until a finding of probable cause. It should be noted that this office in AGO 075-225 expressed the view that this exemption is not applicable to complaints received by the department because of the provisions of s. 455.013. AGO 076-225.

The Department of Health and Rehabilitative Services was advised in AGO 076-49 not to 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 because of the provisions of s. 827.09(7), F. S.

9. SEXUAL BATTERY RECORDS.

The name, address and any other identifying information of the victim of any sexual offense contained within law enforcement records are confidential and not subject to public disclosure in any manner. Pursuant to s. 794.03, F. S. 1974 Supp., the news media is prohibited from printing, publishing or broadcasting any such information until it is by law made a part of an open, public record or is made public in an open judicial proceeding or public court record. AGO 075-203.

10. COLLECTIVE BARGAINING RECORDS.

Section 447.605(3), F. S., provides that:

> All work products developed by the public employer in preparation for negotiations and during negotiations shall be exempt from Chapter 119.

In an Inf. Op. to Dr. Gus Sakkis, July 7, 1976, it was stated that in enacting s. 447.605-(3), F. S., the Legislature did not intend to exempt budgetary or fiscal information from the purview of Ch. 119, F. S. Accord: Warden v. Bennett, 340 So.2d 977 (2 D.C.A. Fla., 1976), ordering "working papers" used in preparing a college budget produced for inspection by a labor organizer.

Proposals and counter proposals presented during the course of collective bargaining are also subject to s. 119.07(1), F. S. State of Florida ex rel. Crago v. Hunter, supra.

E. WHAT ARE THE NONSTATUTORY LIMITATIONS ON INSPECTION?

1. POLICE RECORDS AND FILES.

In Lee v. Beach Publishing Co., 173 So. 440, 442 (Fla. 1937), the Court cited what has become known as the "Police Secrets Rule." This rule provides 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. This office has adopted the view that this rule became a part of the law of the State of Florida and was adopted as an exception to Ch. 119 in 1967, when the Legislature "grandfathered" into Ch. 119 exceptions which had been provided for "by law." Admittedly, this is the most difficult area in which to determine whether or not a document is public because of the absence of legislative direction. However, based upon the Lee decision, decisions of other jurisdictions and custom and usage, this office has developed general rules regarding access to police records and files. In AGO 072-168, it was stated that investigative police reports and records made in connection with an official police investigation of a suspected violation of the law or otherwise relating to the detection, apprehension or prosecution of criminals, are confidential; but such matters as a police officer's accident report, records of arrests (excluding those relating to juvenile offenses) and business records of a municipal police department are available for public inspection. Also see AGO 073-166, noting that this exemption is a narrow one and should be applied only where the sole effect of disclosure would be to significantly impair and impede enforcement of the criminal laws and to enable violators to escape detection.

In AGO 075-9, municipal police radio logs which do not contain investigative information regarding suspects, leads, tips, confidential information or sensitive information interrelated to criminal activities were said to be subject to public inspection. At least one case in Florida which has considered Ch. 119 and police records indicated that an arrest report of an arresting officer, police record, and FBI record are public records. Mahone v. State, 222 So.2d 769, 772 (3 D.C.A. Fla., 1969).

However, in Glow v. State, 319 So.2d 47 (2 D.C.A. Fla., 1975), the court ruled that "police reports" other than statements of witnesses, were not open to public inspection. The court in reaching this conclusion relied heavily on its earlier decision in Wisher v. News-Press Publishing Co., supra. The Court did not specifically state what it considered to be a "police report." Accordingly, this office has construed Glow to exclude only those investigative records which fall under the "Police Secrets Rule." Compare Williams v. State, 285 So.2d 13 (Fla. 1973), and State v. Johnson, 284 So.2d 198 (Fla. 1973).

The "Police Secrets Rule" and its effect upon the investigatory records and files of the state attorneys was discussed extensively in AGO 076-156. This opinion specifically notes that the rule does not exempt records such as arrest records, autopsy reports, business records, copies of informations or indictments or the like. The rule extends only to disclosure of information which would have the effect of significantly impairing or impeding enforcement of the criminal law and enabling violators to escape detection and apprehension. Also see Houston v. Rutledge, 229 S.E.-2d 624 (Ga. 1976), holding that pursuant to Ga. Code Ann. s. 340-2701 investigative records relating to deaths of jail inmates which were prepared by a sheriff should be made available for public inspection once the investigation was concluded and the sheriff's file on the matter closed.

Attorney General Opinion 077-125 found Ch. 119 applicable to criminal history information compiled and maintained by the Florida Department of Criminal Law Enforcement and rejected the assertion that access to such information violated an arrestee's federal constitutional right to privacy.

2. JUDICIAL RECORDS AND RELATED RECORDS SUBJECT TO JUDICIAL CONTROL.

The Court in Petition of Kilgore, 65 So.2d 30 (Fla. 1953), held that advisory opinions issued by the court to the Governor do not become public records within the meaning of s. 119.01 until filed in the Governor's office. During the period such opinion is within the "breast of the court" it is treated as any other case or matter under consideration and is not subject to public inspection or inquiry. To the extent that Ch. 119 purports to apply to judicial matters under consideration which have not been officially filed in the office of the clerk of the court, such applicability is probably rendered invalid through operation of the separation-of-powers doctrine or any court rule relating to confidentiality of documents.

The parameters of judicial discretion in ordering proceedings closed or records sealed have been the subject of recent litigation. In general, the limitations on judicial discretion do not arise through the operation of Ch. 119, a legislative enactment, but rather through constitutional guarantees relating to open and public judicial proceedings or the First Amendment. See, e.g., English v. McCrary, —— So. 2d ——, (Fla. 1977), Case No. 49,039, revised opinion filed July 13, 1977; State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1970); Collazo v. Miami Herald Publishing Co., 329 So.2d 333 (3 D.C.A. Fla., 1976); State ex rel. Gore Newspapers Co. v. Tyson, 313 So.2d 777 (4 D.C.A. Fla., 1975); State ex rel. Miami Herald v. Rose, 271 So.2d 483 (2 D.C.A. Fla., 1972).

Pursuant to the Florida Constitution, records of the Judicial Qualifications Commission and Judicial Nominating Commissions are not subject to Ch. 119 and may, likewise, be withheld from public inspection. See also In re Advisory Opinion to the Governor, 276 So.2d 25 (Fla. 1973), relating to the constitutional authority of the Judicial Nominating Commissions to adopt their own rules of procedure and Forbes v. Earle, 298 So.2d 1 (Fla. 1974), discussing the confidentiality which attaches to proceedings of the Judicial Qualifications Commission. (Note: this opinion has been modified through the ratification of a constitutional amendment, HJR 3911, revising s. 12, Art. V, State Const., and approved during the November, 1974, general election.)

The Court, in Johnson v. State, 336 So.2d 93 (Fla. 1976), held that s. 901.33, F. S., which authorized expunction of arrest records in certain instances, was invalid insofar as it attempted to require the judiciary to destroy records of judicial acts. Since "[t]he judicial department of government has the inherent power and duty to keep records of its proceedings," the statute was said to constitute an unlawful interference by the legislative branch on the procedural responsibility of the judiciary. Compare AGO's 075-29 and 076-70.

3. LEGISLATIVE RECORDS CONCERNING CONSTITUTIONALLY CONFIDENTIAL FUNCTIONS.

In AGO 072-416, this office advised the Legislature that a report of a special master appointed by the Senate to conduct a suspension hearing may be held confidential until such time as the Senate meets to debate the suspension.

AGO 075-282 discussed the applicability of Ch. 119, F. S., to public records made or received in connection with official business by legislators. The opinion concluded that, in the absence of a House or Senate rule to the contrary, Ch. 119 is applicable to legislative records and, accordingly, the permission of the Division of Archives, History and Records Management must be obtained before any such record is destroyed, sold, or mutilated or otherwise disposed of.

F. WHAT FEES MAY BE LAWFULLY IMPOSED FOR INSPECTING AND COPYING PUBLIC RECORDS?

In State ex rel. Davis v. McMillan, supra, the Court held that a custodian of public records is not entitled to a fee when a person asserts his right to inspect and make

extracts from public records. As noted by the Court, at 667, the supervision, observation and watchfulness over public records is one of the prime duties a custodian assumes when he takes office and the law fixes no fee or compensation therefor.

In AGO 075-50, this office, following the holding of **Davis**, held that a custodian may not charge a fee for the mere inspection of public documents. In that opinion a custodian of public records was imposing a fee of $20.00 for listening to tape recordings of city commission meetings. It was concluded that the fact that commission meetings were taped as opposed to stenographically recorded and, therefore, required the use of a tape recorder in order to listen to such meetings was irrelevant insofar as the imposition of a fee was concerned.

In the absence of a statute to the contrary, public information must be open for public inspection without charge. If a public agency chooses to gather and store public information through mechanical devices such as tape recorders, computers, and the like, the public agency itself must assume any added costs which might develop from providing access to such information. The mandatory inspection provision of Ch. 119 was clearly intended to operate regardless of the physical form or characteristics of a particular record.

Such items as "search or exploration" fees, employee time fees, fees imposed for ordinary wear and tear on machinery and the like may not be charged and collected by record custodians as a precondition or condition of inspection. These charges are not allowed under Ch. 119 and may not be imposed in the absence of specific statutory authorization. **Compare** ss. 15.09(1)(a), 28.24(26) and 382.35(7)(a) and (g) imposing fees for searching public records. **Also see** AGO 076-34 stating that search fees do not extend to searches done via computer terminal by a person seeking access to records as opposed to a public employee.

Simply stated, providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not generally be considered a profitmaking or fee-generating operation.

Insofar as providing copies is concerned, HB 2040, Ch. 75-225, Laws of Florida, the most recent amendment to Ch. 119, provides that record custodians **must** furnish copies of records, certified or otherwise, upon the payment of the actual cost of the duplication in the event specific fees are not prescribed by law. 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. Prior to this new provision, it had been the practice of some agencies to charge fees ranging from $1.00 per page to as much as $4.00 per page and more for copies of public records. Prior to the 1975 legislative session, this office recommended to the Legislature that the "loophole" contained within former Ch. 119 which permitted agencies to furnish only certified copies and charge exorbitant fees for the same, be amended to ensure that only the **actual cost of the copy** could be charged to the public. In enacting HB 2040, Ch. 75-225, Laws of Florida, the Legislature has statutorily implemented this recommendation.

Attorney General Opinion 075-304 held that pursuant to s. 119.07(1) and s. 120.57(1)(b)6. F. S., 1975, a public agency may not enter into an agreement with a court reporter which requires the agency to refer all requests for copies of transcripts of agency meetings and hearings or any part thereof to the court reporter who originally transcribed the transcripts.

In an Inf. Op. to Newman Brackin, March 10, 1977, a clerk was advised that pursuant to s. 28.24, F. S., he could not enter into an agreement with a title and abstract company to furnish copies of public records for less than the $1 per page fee imposed at s. 28.24(7), F. S.

G. WHAT REMEDIES ARE AVAILABLE TO A PERSON WHO HAS BEEN DENIED THE RIGHT TO EXAMINE OR OBTAIN COPIES OF PUBLIC RECORDS?

Any person denied the right of inspection or copying granted under Ch. 119 may institute a civil action in circuit court against a public agency which has violated the provisions of Ch. 119 in order to compel compliance with that law. Pursuant to s. 119.11(1), such actions, when filed, are entitled to an immediate hearing and take priority over other pending cases. If the complainant prevails in the trial court, the public agency must comply with the court's judgment within 48 hours unless otherwise provided by the trial court or such determination is stayed within that period by the appellate court. The filing of a notice of appeal does not operate as an automatic stay. **But see** Clark v. Walton, 347 So.2d 670 (4 D.C.A. Fla., 1977), declaring s. 119.11(2) invalid insofar as it conflicts with Rule 5.12 Fla. App. Rules and **compare** Wait v. Florida Power & Light Co., —— So.2d —— (1 D.C.A. Fla., 1978), filed January 18, 1978, upholding s. 119.11(2) and Duval County School Board v. Public Employees Relations Comm., 346 So.2d 1087 (1 D.C.A. Fla., 1977), upholding s. 120.68(3) against contentions that they conflict with Rule 5.12 Fla. App. Rules. A stay order shall not be issued unless the court determines that there is substantial probability that opening the records for inspection will result in significant damage. If the trial court determines that the public agency unreasonably withheld public records from inspection, the court sha[illegible]ess an attorney's fee against such agency. If a public agency appeals a trial c[illegible] order requiring inspection and the order is affirmed, the appellate court shall asses[illegible] reasonable attorney's fee for the appeal against the agency.

In addition to judicial remedies, any public official who violates the provisions of s. 119.07(1) is subject to suspension, removal or impeachment. A violation of s. 119.07(1) also constitutes a misdemeanor of the second degree which subjects a public official to possible criminal penalties of 60 days' imprisonment in county jail, a $500 fine, or both.

APPENDIX
PRIVILEGED, CONFIDENTIAL AND LIMITED ACCESS PUBLIC DOCUMENTS

Section 11.26(1)(a)	Legislative employees are forbidden from revealing to anyone outside their division the contents or nature of any request for services made by any member of the Legislature except with the written consent of the person making the request.
Section 11.45(6)(b)	Audit reports compiled by the auditor general become public records when final. Audit "work-papers" and notes are not public records.
Section 13.261(14)	All complaints filed with the Human Rights Commission under part II, Ch. 13, F. S., and all records and documents in the Commission's custody which relate to and identify a particular complainant, employer, employment agency, labor organization or joint labor-management committee are confidential and may not be disclosed except to the parties or in the course of a hearing or proceeding under this part. This restriction is not applicable to records [effective July 1, 1978].
Section 15.14(1)	Secretary of State shall not publish a report of the persons commissioned as notaries public.
Section 27.151	An executive order assigning or exchanging state attorneys pursuant to s. 27.14 and s. 27.15, F. S., and the Governor's report to the Legislature on the foregoing action, if designated by the Governor to be confidential, are exempt from disclosure.
Section 39.03(6)(a)	Fingerprints and photographs of juveniles are not public records. These records are not subject to use by anyone other than the officials of law enforcement agencies, the court, the child, his parents or legal custodians or their attorneys; they may, however, in the court's discretion be opened to inspection by anyone upon a showing of good cause. They must be kept in a separate file marked "Juvenile Confidential" and shall be kept until the child's 21st birthday and then destroyed.
Section 39.12(3)	Clerk shall keep official records required by Ch. 39 separate from court's other records. The record may be inspected only upon order of judge by persons deemed to have a proper interest therein except for child, parents or legal custodians of child and their attorney who have a right to inspect and copy records.
Section 39.12(4)	All information obtained pursuant to Ch. 39 in the discharge of official duty by any judge, court employee or authorized agent of the Department of Health and Rehabilitative Services is privileged and may not be disclosed to anyone other than the authorized personnel of the court, the department and others entitled under Ch. 39 to receive that information except upon order of the judge.
Section 40.101(2)	Information concerning prospective jurors gathered by mailed questionnaires shall be treated as confidential provided the questionnaires returned by persons whose names finally appear on jury list may be made available to the court and to counsel for use during voir dire examination.
Section 63.022(2)(j)	The records of all proceedings concerning custody and adoption of children are confidential.
Section 63.162(1)	Hearings held in proceeding under the Florida Adoption Act are closed.
Section 63.162(2)	All papers and records pertaining to an adoption, whether part of the permanent record of the court or of a file in the Department of Health and Rehabilitative Services or in any agency, are subject to inspection only upon order of the court.
Section 63.162(4)	Except when authorized in writing by adoptive parent or adopted child if 18 years or more or upon order of the court, no person shall disclose from records the identity of adoptive parent or adopted child.
Section 88.261	The husband-wife privilege is inapplicable to proceedings instituted under the Uniform Reciprocal Enforcement of Support Law.
Section 90.241(1)	No regular minister of any religious organization or denomination shall be allowed or required to disclose confidential communications when appearing as a witness in any litigation. [Repealed by s. 2, Ch. 76-237, Laws of Florida; as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]
Section 90.242(2)	Patient or his authorized representative possesses the privilege to refuse to disclose or prevent a witness from disclosing information relating to diagnosis or treatment of a patient's mental condition. [Repealed by s. 2, Ch. 76-237, Laws of Florida; as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]
Section 90.242(3)	Communications made to psychiatrist in course of examination are privileged except under certain specified circumstances. [Repealed by s. 2, Ch. 76-237, Laws of

Florida; as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]

Section 90.502(2) — Communications between lawyer and client confidential if they are not intended to be disclosed to third persons. [Section 1, Ch. 76-237, Laws of Florida; as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]

Section 90.503(2) — Patient has privilege to refuse to disclose and prevent any other person from disclosing confidential communications or records made for the purpose of diagnosis or treatment of his mental or emotional condition between himself and his psychotherapist or persons who are participating in the diagnosis or treatment under directions of the psychotherapist. [Section 1, Ch. 76-237, Laws of Florida; as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]

Section 90.504(1) — Spouse has privilege during and after marital relationship to refuse to disclose, and to prevent another from disclosing, communications intended to be made in confidence between spouses while they were husband and wife. [Section 1, Ch. 76-237, Laws of Florida; as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]

Section 90.505(2) — Person has privilege to refuse to disclose or to prevent another from disclosing a confidential communication by the person to a clergyman in his capacity as spiritual advisor. [Section 1, Ch. 76-237, Laws of Florida; as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]

Section 90.506 — A person has a privilege to refuse to disclose or to prevent other persons from disclosing a trade secret owned by him if the allowance of the privilege will not conceal fraud or otherwise work injustice [s. 1, Ch. 76-237, Laws of Florida as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978].

Section 106.25(1)[1] — Complaints received by the Division of Elections are confidential until the Department of State concludes that disposition of such complaint has occurred, at which time such complaint and all relevant reports and recommendations thereof shall become matters of public record.

Section 106.25(4)[1] — Proceedings of the Florida Elections Commission to consider alleged violations are to be closed sessions attended only by those persons, including their attorneys, necessary to the transaction of the commission's affairs.

[1] Section 106.25 was amended by s. 60, Ch. 77-175, Laws of Florida, effective January 1, 1978.

Section 106.25(5)[1] — Any person who willfully discloses the contents of any election complaint before such complaint is declared a public record by the Department of State shall be guilty of a misdemeanor of the first degree.

Section 106.25(5) — All sworn complaints filed pursuant to Ch. 106, F. S., with the Division or Commission, all division investigations and investigative reports or other papers of the division or commission or its proceedings with respect to violations of Ch. 106, F.S., are confidential and exempt from the provisions of Chs. 119 and 286. Any person who discloses any information or matter made confidential by the provisions of this subsection is guilty of a misdemeanor of the first degree. [s. 60, Ch. 77-175, Laws of Florida, amending s. 106.25, effective January 1, 1978.]

Section 112.317(6) — Any person who willfully discloses or permits to be disclosed his intention to file a complaint or the existence or contents of a complaint which has been filed with the Ethics Commission or any document, action or proceeding in connection with a confidential preliminary investigation of the commission before such complaint, document, action or proceeding becomes a public record shall be guilty of a misdemeanor of the first degree.

Section 112.324(1) — All proceedings, the complaint and other records relating to the preliminary investigation of the Ethics Commission, including a dismissal of the complaint, shall be confidential until either the alleged violator requests in writing that such investigation and records be made public records or the preliminary investigation is completed, notwithstanding any provisions of Chs. 119, 120 and 286, F. S.

Section 112.324(2) — If the Ethics Commission finds probable cause to believe that the law has been violated, it shall notify the complainant and the alleged violator in writing. Such notification and all documents made or received in the disposition of the complaint shall then become public records.

Section 112.324(3) — All evidence and material shall be kept in strict confidentiality by the Ethics Commission after a complaint against a legislator or other impeachable officer is dismissed.

[1] Section 106.25 was amended by s. 60, Ch. 77-175, Laws of Florida, effective January 1, 1978.

Section 119.07(2)(b)	All public records referred to in s. 198.09 (estate tax returns); s. 199.222 (intangible personal property tax returns); s. 794.03 (sexual battery); s. 658.10(1) and s. 658.10(3) (records of Division of Banking, Department of Banking and Finance); s. 624.319(3), s. 624.319(4) (examination reports of Department of Insurance); s. 624.311(2) (Department of Insurance Records); s. 288.075 (Division of Economic Development records); s. 657.061(3) (credit union records); s. 63.181, and s. 229.782[2] (educational records).
Section 119.07(2)(c)	Examination questions and answer sheets of examinations administered by governmental agencies for the purpose of licensure, certification or employment are exempt from s. 119.07 (1), F. S. However, an examinee shall have the right to review his own completed examination.
Section 195.027(3)	Access to taxpayers' records shall be granted to the assessor (now property appraiser), Department of Revenue and the Auditor General when it is required in order to determine the classification or the value of the taxable nonhomestead property.
Section 195.084(1)	This section shall supersede statutes prohibiting disclosure only with respect to the property appraiser and the Auditor General, but the Department of Revenue may establish regulations setting reasonable conditions upon access to and custody of such information. The Auditor General and the property appraisers shall be bound by the same requirements of confidentiality as the department.
Section 198.09	It is a second degree misdemeanor for the Department of Revenue or any examiner, appraiser, attorney or other employee to divulge or make known in any manner the value of any estate or any particulars set forth in any report or return required.
Section 199.222(1)	It is unlawful for the Department of Revenue or any examiner or employee to divulge or make known in any manner the values or any particulars set forth in any report or return filed pursuant to the Intangible Personal Property Tax Act.
Section 206.95	Any information obtained by the Department of Revenue or its agents or representatives as a result of a report, investigation or verification relating to special fuel taxes shall be confidential and any person unlawfully divulging such information shall be guilty of a second degree misdemeanor.

[2] Section 229.782 has been renumbered as s. 228.093 by the Division of Statutory Revision.

Section 211.33(3)	The information contained in any tax return on severance and production of minerals is confidential but this does not prohibit the publication of statistics so classified as to prevent the identification of particular returns when more than one return made by a particular segment of the industry and identification would adversely affect competition. [Now changed to s. 211.33(6) by s. 3, Ch. 77-406, Laws of Florida.]
Section 213.072(1)	Records of the Department of Revenue of individual accounts and reports required under Chapter 212 are confidential and may not be released except through judicial process or as otherwise provided for by law.
Section 214.21(1)	All information received by the Department of Revenue from returns filed under laws relating to the assessment of non-property taxes expressly made subject to Ch. 214, or from any investigation conducted under the provisions of Ch. 214, is confidential except for official or judicially ordered purposes.
Section 215.19(3)(c)	All information obtained from contractors or subcontractors during the course of an administrative hearing concerning disputes involving the prevailing wage law is privileged and shall not be made the subject matter of any suit for libel or slander.
Section 220.242	Estimated tax return filed under Florida Income Tax Code is confidential.
Section 229.782(3)(d)	Every student has right of privacy with respect to the educational records kept on him. Personally identifiable records or reports of the student, or of any personal information contained therein may not be released without written consent of the student, or his parents or guardian to any individual agency or organization except such reports may be released to a certain specified person or organization.[3]
Section 230.7591	State Board of Education may prescribe the content and custody of limited access records which community college may maintain on its employees. Custodian of limited access employee records may release information from such records only upon authorization in writing from employee or upon order of court of competent jurisdiction.
Section 230.7681	State Board of Education may prescribe the content and custody of records which community college may

[3] Section 229.782 has been renumbered as s. 228.093 by the Division of Statutory Revision.

maintain on its students. Such records are open to inspection only as provided in s. 229.782[3] or upon court order.

Section 231.29(3) — Assessment files of all instructional, administrative and supervisory personnel within a public school district are open for inspection only to the school board, the superintendent, the principal, the individual teacher and such other persons as the teacher or the superintendent may authorize in writing.

Section 232.23(1) — A permanent cumulative record for each pupil enrolled in public school shall be maintained in the form and contain all data prescribed by the rules of the State Board of Education. The record is open to inspection only as provided in s. 229.782[3] or upon court order.

Section 239.77 — Rules of the Board of Regents may prescribe the content and custody of limited access records which the state university system may maintain on its students. Such records shall be open to inspection only as provided in s. 229.782[3] or upon court order.

Section 239.78 — The Board of Regents has the authority to prescribe regulations concerning records of personnel which may be open only to the employee and supervisory officials. Such regulations are limited to information reflecting evaluations of employee performance.

Section 284.40(2) — Claim files maintained by the Division of Risk Management of the Department of Insurance are privileged and confidential and shall be open only for the use of the Department of Insurance in fulfilling its duties and responsibilities.

Section 288.075(1) — Upon written request from a private corporation, partnership, or person, information, records, reports, data and documents of the Division of Economic Development which contain or provide information concerning the plans or interests of such corporation, partnership or person to locate, relocate or expand its business activities in Florida are privileged and confidential. This privilege applies for a period not to exceed 18 months from date of initial inquiry unless the court, upon petition, determines that there is a need for access to such documents.

Section 316.066(4) — All accident reports made by persons involved in accidents are for the confidential use of the Department of Highway Safety and Motor Vehicles for accident

[3] Section 229.782 has been renumbered as s. 228.093 by the Division of Statutory Revision.

prevention purposes except the Department may disclose the identity of the person involved when such identity is not otherwise known or when such person denies his presence at the accident.

Section 320.025(1) — Confidential motor vehicle license may be issued only for motor vehicles of state, county, municipal, federal law enforcement agencies.

Section 322.125(3) — Reports received or made by the Medical Advisory Board or its members for the purpose of assisting the Department of Highway Safety and Motor Vehicles in determining whether a person is qualified to be licensed are for confidential use of the board or department and may not be divulged to any person except to the driver or applicant or used as evidence in any trial except proceedings under s. 322.271 or s. 322.31.

Section 322.126(3) — Disability report is confidential and may be used solely for the purpose of determining the qualifications of any person to operate a motor vehicle.

Section 324.051(1)(b) — Accident reports from individual owners or operators shall be for confidential use of department and may not be used as evidence in any trial arising out of an accident.

Section 371.141(3) — All accident reports involving boats made by persons involved in accidents are for the confidential use of the Divisions of Marine Resources or other governmental agencies having use of the record except the Division may disclose the identity of the person involved in the accident when the identity is not otherwise known or when person denies his presence at the accident.

Section 377.606 — Information or records of individual persons obtained by the Energy Data Center as a result of a report, investigation or verification required by the center shall be open to the public unless requested to be kept confidential by the person providing such information.

Section 377.701(4) — No state employee may divulge or make known in any manner any proprietary information under the Petroleum Allocation Act, except in accordance with a court order, as otherwise provided by law, or in the publication of statistical information compiled by methods which would not disclose the identity of individual suppliers or companies.

Section 381.231(4) — Information submitted on reports from physicians or veterinarians to the Department of Health and Rehabilitative Services concerning diagnosis of com-

municable diseases in humans or animals is confidential and shall be open only when necessary to public health.

Section 382.17(1) — Information concerning marital status and medical details recorded on separate section of original birth certificate shall not be open to inspection or copying to anyone other than the registrant or upon court order.

Section 382.35(1) — All birth records of this state are considered confidential and shall be open only as provided by law.

Section 382.35(2) — Disclosure of undetermined parentage or information from which it can be ascertained may only be made upon court order when such information is necessary for the determination of personal or property rights or upon application of the registrant if of legal age.

Section 382.35(3) — Certified copies of birth certificate, excluding the portion concerning medical details and marital status, may be issued only by state registrar and only to registrant, if of legal age, parents, guardian, or legal representative, health and social agencies upon approval of state registrar, state or federal agencies for official purposes or upon court order.

Section 382.35(5) — State Registrar shall furnish a certified copy of all or part of any marriage, dissolution of marriage or death certificate, excluding that portion which contains the medical certification as to cause of death, to any person requesting it. A certified copy of the medical certification of cause of death shall be furnished by the state registrar only to persons having a direct and tangible interest in the cause of death.

Section 384.10 — All reports of cases of venereal disease shall be filed in a place of safe-keeping in the office of the Department of Health and Rehabilitative Services and may not be disclosed except upon demand of judge or for use by the department for the purpose of requiring person so reported to take treatment.

Section 393.13(4)(m)2. — Unless waived by the client, if competent, or his parent or legal guardian if incompetent, the client's central record shall be confidential and no part released except under certain specified circumstances.

Section 394.459(9) — Clinical records of persons subject to "The Baker Act" are confidential and may be released only under certain specified circumstances.

Section 395.12 — Hospital inspection reports and other hospital information received by the licensing agency pursuant to Ch. 395 are

confidential and shall not be disclosed in any manner so as to identify individuals or hospitals except in a proceeding involving the question of licensure. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 396.112(1) — The registration and other records of emergency services and of other treatment resources whether inpatient, intermediate or outpatient, utilized under the Comprehensive Alcoholism Prevention, Control and Treatment Act are confidential.

Section 396.112(2) — Treatment records of alcoholics and intoxicated persons may not be disclosed without their consent except to treatment personnel for use in connection with their treatment and to counsel representing such persons in proceeding under s. 396.102 or upon court order.

Section 396.112(3) — Records may be open for research into the causes and treatment of alcoholism but patient's name and other identifying information may not be disclosed.

Section 397.053(1) — Records of drug abusers are confidential and may not be disclosed without the consent of the patient except under certain specified circumstances.

Section 397.096 — Information received by a DATE center or received by the Department of Health and Rehabilitative Services pursuant to Ch. 397 is confidential and may not be publicly disclosed in such a manner so as to identify individuals or facilities. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 400.321(1) — All matters before the state or district nursing home ombudsman committees concerning abuse or denial of rights of an individual client of a nursing home facility shall be confidential and exempt from the provisions of Ch. 119. All other matters before the committee shall be open to the public and subject to Ch. 119.

Section 400.494 — Information received by persons employed by, or providing services to, a home health agency or received by the licensing agency through reports or inspections is privileged and confidential and may not be disclosed without written consent of the patient or his guardian.

Section 402.19 — The Department of Health and Rehabilitative Services may authorize its agencies to copy confidential and public information.

Section 402.32(4)(h) — Records on individual children compiled under the "School Health Services Act" are confidential in accordance with law and regulations of the Department of

Health and Rehabilitative Services and the State Board of Education.

Section 403.111 — Any information, other than effluent data, relating to secret processes, methods of manufacture or production required, ascertained or discovered by the Department of Pollution Control shall not be disclosed in public hearings and shall be kept confidential.

Section 405.01 — Medical information may be released for the purposes of reducing morbidity or mortality and no liability of any kind shall attach to such release.

Section 405.03 — The identity of any person treated or studied shall be confidential and shall not be revealed under any circumstances.

Section 409.355(2) — Although public assistance rolls are open to public inspection, it is unlawful for any person to use such lists for political or commercial purposes of any nature.

Section 413.012(1) — All records furnished to the Division of Blind Services of the Department of Education in connection with state or local vocational rehabilitation programs containing information as to personal facts given or made available to the state or local vocational rehabilitation agency, its representatives or its employees in the course of the administration of the program, including lists of names and addresses and records of agency evaluation are confidential.

Section 413.22 — Department of Health and Rehabilitative Services shall prepare regulations for the protection of confidential information.

Section 443.12(7) — Information obtained from an employing unit or obtained pursuant to Ch. 443 shall, except to the extent necessary for the proper administration of unemployment compensation claim, be held confidential and shall not be open for public inspection.

Section 443.16(3) — All letters, reports, communications or any other matters, whether oral or written between the employer and employee and members of the division made in connection with the requirements of Ch. 443 are absolutely privileged.

Section 447.045 — Neither the Division of Labor of the Department of Commerce nor any investigator or employee of the division shall divulge in any manner the information obtained pursuant to the processing of applicant fingerprint cards.

Section 447.205(10) — All draft orders [of PERC] developed in preparation for or preliminary to the issuance of a final order shall be exempt from the provisions of Ch. 119, F. S.

Section 447.605(3) — All work products developed by the public employer in preparation for and during negotiations shall be exempt from Ch. 119.

Section 448.06(4) — No employee of the mediation and conciliation service or any other person authorized by Governor to engage in mediation shall be compelled to disclose to any administrative or judicial tribunal any information relating to or acquired from private employers, employees or their representatives in the course of official conciliation and mediation activities. Any reports, minutes, communications, or other matters, written or oral, are privileged and are thereby subject to complete immunities.

Section 455.08 — Investigative reports and records made or received by board or agency in or representing the Department of Professional and Occupational Regulation are exempt from s. 119.07 unless the board or agency finds probable cause to commence formal action.

Section 458.16 — Reports of physical or mental examinations shall be furnished only to authorized parties. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 458.22(4)(b) — Pregnancy termination records maintained by approved facilities are confidential and shall not be revealed except upon order of a court of competent jurisdiction in a civil or criminal proceeding. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 460.37 — Information received by the State Board of Chiropractic Examiners through inspections is confidential and may not be disclosed except in a proceeding involving the question of licensure. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 468.110(1) — All information required by the Construction Industry Licensing Board of any applicant for registration or certification shall be a public record except that financial records, examination grades and examination papers are confidential and may not be discussed with anyone except the board and its staff. Applicant may see his examination grades and paper. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 468.188(1) — All information required by the Florida Electrical Contractors' Licensing Board is a public record except that

financial records and examination grades are confidential. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 473.06(2) — The records of the State Board of Accountancy are confidential to the extent that the privacy of certificate or permit holders and of applicants for certificates or permits will not be unreasonably invaded, except that when deemed to be in the public interest, names and addresses of all applicants for examination may be revealed as public information. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 473.141 — Information obtained by public accountants from their clients is privileged information in all Florida courts except in disciplinary investigations or proceedings. [Repealed by s. 3, Ch. 76-237, Laws of Florida, as amended by Ch. 77-77, Laws of Florida, effective July 1, 1978.]

Section 474.101(1) — Information received by the Veterinary Board through inspection and investigations is confidential except in proceedings involving the question of licensure. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 474.101(2) — Examinations administered by veterinary board pursuant to s. 474.20, F. S., are confidential. Results of the examination are confidential until transmitted to applicant. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 475.06 — Papers, documents, reports or evidence of Florida Real Estate Commission are not subject to subpoena without commission's consent until after said documents have been published at a hearing held under Ch. 475 unless court determines the commission or accused will not be unreasonably hindered or embarrassed. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 493.14(3) — The Department of State shall hold confidential any information of a personal nature or that relates to the conduct of the trade or professional or investigative agencies. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1980.]

Section 493.19 — No private investigator shall divulge to anyone other than his principal or employer any information he has gathered without the written consent of those persons except as otherwise provided by law. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1980.]

Section 494.06(5) — Investigations and examination of mortgage brokers and solicitors performed by the Department of Banking and

Finance are confidential except as required in the administration, enforcement and prosecution of violations under Ch. 494, F. S.

Section 517.16(5) — Until entry of a final order, suspension of security dealer's registration shall be deemed confidential and shall not be published unless it shall appear that the order of suspension has been violated after notice. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1980.]

Section 550.021 — All books, records, maps, documents and papers of the Division of Pari-mutuel Wagering shall at all times be open for the personal inspection of any officer of the state, county or any official investigating body or committee.

Section 570.283(7) — Information in records of the Division of Consumer Services which would separately disclose the business transaction of any person, trade secrets or names of customers is confidential; however, such disclosure as may be necessary to enforcement procedures is not violative of this prohibition.

Section 573.26(2) — Information obtained by the Department of Agriculture pursuant to any marketing order issued under the Celery and Sweet Corn Marketing Law is confidential.

Section 573.75(2) — Information obtained by the Department of Agriculture pursuant to any marketing order issued under the Foliage Plant Marketing Law is confidential.

Section 573.826(2) — Information obtained by the Department of Agriculture pursuant to any marketing order issued under the Watermelon Marketing Law is confidential.

Section 573.855(2) — Information obtained by the Department of Agriculture pursuant to any marketing order issued under the Soybean Marketing Law is confidential.

Section 573.881(2) — Information obtained by the Department of Agriculture pursuant to any marketing order issued under the Flue-Cured Tobacco Marketing Law is confidential.

Section 573.907(2) — Information obtained by the Department of Agriculture pursuant to any marketing order issued under the Peanuts Marketing Law is confidential.

Section 580.141 — Department of Agriculture and Consumer Services may publish information concerning the production, sale and use of commercial feed and a summary report of the results of an analysis of official samples of commercial feeds sold within the state as compared to the analysis on the label provided the information concerning production and use shall not disclose the operations of any persons.

Section 601.57(6)	No more than three employees directly involved in the processing of citrus fruit dealers' license applications may be designated in writing by the Department of Citrus. These employees are a part of and shall have access to the Criminal Justice Information System set forth in Ch. 943 for the purposes of investigating license applications.
Section 601.77(1)	Citrus coloring formulas filed with the Department of Agriculture are confidential.
Section 617.68(28)(c)	Any information, document, record or statement furnished to Department of Insurance pursuant to the termination of the license or failure to renew or to continue the appointment or license of an agent or counselor under Ch. 617 is absolutely privileged.
Section 617.68(29)(b)	Information on applicants qualifying for the first time in state for license as agents or counselors which is contained in the files of the Department of Insurance is absolutely privileged.
Section 624.319(3)	The Department of Insurance may withhold from public inspection any examination or investigation report concerning an insurer for so long as it deems reasonably necessary to protect the insurer examined from unwarranted injury or to be in the public interest. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]
Section 626.491(2)	Any information, documents, records and statements furnished or disclosed to the Department of Insurance pursuant to the termination of the appointment of the adjuster, service representative, supervising or managing general agent, or claims investigator is absolutely privileged. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]
Section 626.511(3)	Any information, document, record or statement furnished to Department of Insurance regarding the termination by failure to renew or continue the appointment or license of an agent is absolutely privileged. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]
Section 626.521(3)	Any information furnished to the Department of Insurance regarding the character and credit of applicants for adjusters' licenses who are to be self-employed is absolutely privileged. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]
Section 626.631(8)	The Department of Insurance's statement of charges, papers, documents, reports or evidence relative to the hearing on the refusal, suspension or revocation of a license or permit is not subject to subpoena without the department's consent until after the information has been published at the hearing unless the court determines the department would not be unnecessarily hindered or embarrassed by such subpoenas. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 626.921(3)	Filings made by surplus lines agents with the examining office other than affidavits pursuant to s. 626.920 (1) (b), F. S., are confidential.
Section 626.989(4)	Department of Insurance papers, documents, reports or evidence relative to the subject of an insurance fraud investigation under s. 626.989 shall not be subject to public inspection for so long as the Department deems reasonably necessary to complete the investigation to protect the person investigated from unwarranted injury, or to be in the public interest. Such papers, documents, reports or evidence relative to the subject of an investigation under s. 626.989 shall not be subject to subpoena until opened for public inspection by the Department unless the Department consents; or after notice to the Department and a hearing, the court determines the Department would not be unnecessarily hindered by such subpoena.
Section 627.101(2)	Rate filings requested and received by the Department of Insurance are privileged communications prior to being placed on file for public inspection by the department. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]
Section 627.271	All information submitted for the examination of policies, daily reports, binders, renewal certificates, endorsements or other evidences of insurance or cancellation thereof is confidential. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]
Section 631.62(2)	Board of directors may request that the Department of Insurance order an examination of any member insurer which the board in good faith believes is in a financial condition hazardous to the policyholder and public. This request is not open to public inspection prior to the release of the examination report.
Section 631.62(4)	The board of directors may make reports and recommendations to the Department of Insurance on any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations are not public documents.
Section 633.527(1)	All information required by the Florida Fire Safety Board or the State Fire Marshal of any applicant for certification

is a public record except financial information and examination grades which are confidential. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1978.]

Section 634.201(8) The Department of Insurance's statement of charges, papers, reports or evidence relative to a hearing for the refusal, suspension or revocation of the registration of a salesman of automobile warranties is not subject to subpoena without the department's consent until after the same has been published at the hearing. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 648.26(3) The Department of Insurance's papers, documents, reports or evidence are not subject to subpoena without its consent until after the same have been published at a hearing unless the court determines the department will not be unnecessarily hindered or embarrassed. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 648.39(3) Information furnished to the Department of Insurance regarding the termination of the appointment of a limited surety agent is privileged. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 648.41(2) Information furnished to the Department of Insurance regarding the termination of runners is privileged. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 656.211 All reports of the examination and investigation of industrial savings banks are confidential except as otherwise provided by law. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1980.]

Section 657.061(3) Credit union records are open to the public with the exception of the following which are confidential: personal financial statements or information, personnel or medical records or information, records or information obtained or prepared by Department of Banking and Finance referring to the character or reputation of any person, records of a person's share, deposit or loan accounts, any information which constitutes a clear unwarranted invasion of personal privacy, investigatory records for civil or criminal law enforcement purposes, reports of, or relating to, examination or operation and records prepared by or on behalf of the department or any agency responsible for the regulation or supervision of credit unions relating to the ethics of any credit union. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1980.]

Section 658.10(1) All bank or trust company license applications filed with

the Department of Banking and Finance are open to the public except the classes or records and information in s. 658.10(3) is confidential and may not be disclosed except by court order, order of hearing officer under Ch. 120, or legislative subpoena, as provided by law. Materials supplied to department by other governmental agencies may be made public only with the consent of such agency or pursuant to court order or legislative subpoena.[4]

Section 658.10(2) Confidential records and information furnished in response to legislative subpoena remain confidential while in the possession of any legislative body or committee and after such records have been returned to the source that supplied them.[4]

Section 658.10(3) Banking records are to be open to the public except that personal financial statements or information, personnel or medical records, records obtained or prepared by Department of Banking and Finance referring to the character or reputation of any person, any records or information which clearly constitute an unwarranted invasion of personal privacy, investigatory records compiled for civil or criminal law enforcement purposes and records of examination, operation, or condition reports relating to the affairs of any bank or trust company are confidential.[4]

Section 665.111(1) The right of inspection and examination of records of savings and loan associations is limited to its members, the Department of Banking and Finance or its duly authorized representatives, to persons duly authorized to act for the association and any federal or state agency authorized to inspect the books and records of an insured association. Books and records pertaining to the accounts of members shall be kept confidential except when disclosure is compelled by a court order or by legislative subpoena as provided by law.

Section 741 0592 Physician's certifications, laboratory reports and court orders and all information contained therein relating to serological testing shall be confidential and shall not be divulged to or open to inspection by any person outside the office of the county court judge or circuit court clerk other than the Department of Health and Rehabilitative Services or local health officers or their duly authorized representatives.

Section 742.09 It is unlawful for the owner, publisher, manager or operator of any newspaper, magazine, radio station or

[4] Chapter 658 was repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1980.

any other publication, to publish the name of any parties to any court proceeding instituted under s. 742.09, regarding the determination of paternity.

Section 742.091 — Records of any proceeding under the determination of paternity statute which was subsequently dismissed when the mother of the illegitimate child and reputed father marry thereby making the child legitimate are sealed against public inspection.

Section 768.53(8) — All books, records, documents or audits relating to the Joint Underwriting Association or its operation are open for public inspection except the claim file is not available for review during the processing of claims. [Repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 768.55(3) — Reports of medical malpractice claims which resulted in settlement or final disposition filed with the Department of Insurance are confidential and will be released only for bona fide research or educational purposes. [Transferred from s. 624.431(3) by Reviser; repealed by s. 3, Ch. 76-168, Laws of Florida, effective July 1, 1982.]

Section 794.03 — It is unlawful to print, publish, or broadcast or cause or allow to be printed, published or broadcast in any instrument of mass communication the name, address or other identifying fact or information of the victim of any sexual offense.

Section 801.211 — Reports and information filed by any person who has treated, examined or has available information concerning persons committed to the custody of the Department of Offender Rehabilitation are confidential and are available only to a public officer or employee in the performance of a public duty, the accused or upon court order.

Section 812.081(2) — Copying or using a "trade secret" without authorization is a first degree misdemeanor.

Section 827.07(7) — Information contained in central child abuse registries and all reports and records transmitted to or maintained by any person permitted under s. 827.07, F. S., to receive such information, concerning known or suspected instances of child abuse or maltreatment are not open for public inspection. Disclosure may be made for treatment or for research provided adequate assurances are given that patients' names and other identifying information will not be disclosed.

Section 827.09(7) — Reports of abuse of developmentally disabled persons recorded in central registries are confidential and shall be open only as per s. 827.07 (7), supra.

Section 905.17(1) — Stenographic records, notes, and transcriptions made by a court reporter during a grand jury session shall be filed with the clerk who shall keep them in a sealed container not subject to public inspection.

Section 905.24 — Grand jury proceedings are secret and a grand juror shall not disclose the nature or substance of the deliberations or vote of the grand jury.

Section 905.26 — Unless ordered by court, a grand juror, reporter, stenographer, interpreter, or officer of the court may not disclose the finding of an indictment against a person not in custody or under recognizance, unless process is issued or executed, until the person has been arrested.

Section 905.27(1) — Grand juror, state attorney, reporter, stenographer, interpreter, or any other person appearing before grand jury may not disclose evidence received by it except when required by court.

Section 905.27(2) — It is unlawful for any person knowingly to publish, disclose or cause to be published or disclosed any witness' testimony before a grand jury unless such testimony is or has been disclosed in a court proceeding.

Section 905.28(1) — No report of grand jury relating to an individual which is not accompanied by true bill or indictment shall be made public until the individual concerned has been furnished a copy and given 15 days to file motion to repress or expunge report.

Section 917.22 — The clinical records maintained for each mentally disordered sex offender are confidential and privileged unless waived by the offender or his guardian and may not be released except to physicians, attorneys and government agencies as designated by the offender or his guardian or in response to a subpoena or by order of court. The record, or any part thereof, may be disclosed to qualified researchers, staff members of the treatment facility or an employee of the Department of Health and Rehabilitative Services when deemed necessary for the treatment of the offender, the maintenance of records or the evaluation of programs. The records may be used for statistical and research purposes provided the information is abstracted so as not to reveal the identity of individuals.

Section 918.16 — When any person under the age of 16 testifies about any sex offense in any civil or criminal trial, the courtroom shall be cleared of all persons except the parties to the cause, their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters and court reporters.

Section 934.091(1) — It is unlawful to print, publish or broadcast or cause to be printed, published or broadcasted in any newspaper, magazine, periodical, or other publication or from any television or radio broadcast, the name or identity of any person served with or to be served with an inventory or notification of interception of wire or oral communications until said person has been indicted or informed against.

Section 943.08(3) — The Criminal Justice Information Systems Council shall develop policies and procedures guaranteeing the physical security of criminal justice information to prevent unauthorized disclosure of information contained in the system.

Section 943.08(5) — The Criminal Justice Information Systems Council shall provide access to criminal justice information to persons or agencies not associated with criminal justice when such dissemination is authorized by law.

Section 943.08(6) — The Criminal Justice Information Systems Council shall provide access to criminal justice information maintained by any criminal justice agency by any person about whom such information is maintained for the purpose of challenge, correction or addition of explanatory material.

Section 945.10(1)-(3) — Information furnished in a presentence investigation report by the Department of Offender Rehabilitation shall be confidential. The Department of Offender Rehabilitation shall promulgate rules and regulations stating what portions of its files, reports and records are confidential and available only to court officers and employees, the Legislature, the Parole and Probation Commission, the Department of Health and Rehabilitative Services, the Department of Offender Rehabilitation and public law enforcement agencies performing a public duty or with the Department of Offender Rehabilitation, for research. No inmate shall have access to any information contained in the files of the division. The Department of Offender Rehabilitation may restrict access to information to any person except members of the news media and officers and employees of the court, commission, Legislature, the department and public law enforcement agencies when there is reasonable

cause to believe that such person or persons may divulge such information to the inmate.

Section 945.25(4) — The Department of Offender Rehabilitation may make such rules as to the privacy or privilege, of information, and its use by other than the department or the Parole and Probation Commission and its staff, relating to persons who may become subject to parole, probation or pardon and commutation, as the commission and its staff may deem expedient.

Section 959.225(2) — Records compiled by the Department of Health and Rehabilitative Services pursuant to Ch. 959, regarding children, shall not be open to inspection by the public.

CONTINUED

REPORTS

AND

STATISTICS

MONEYS COLLECTED BY THE DEPARTMENT OF LEGAL AFFAIRS

	January through December 1977
Escheat cases	$ 133,914.21
Consumer cases:	
Refunds obtained under Chapter 501, F. S.	1,550,467.09
Florida Commission on Ethics:	
Costs and fines assessed	6,175.00
Miscellaneous Collections:	
State ex rel. Robert L. Shevin v. Jarryl I. Brachman, et al	3,500.00
State v. Cities Service Corp.	298,000.00
Tax Cases:	
Aerospace Workers, Inc. v. DOR	2,000.00
Boca Cen Club v. Straughn	15,000.00
Marc Browmeyer, et al v. DOR	18,000.00
Butler Aviation v. DOR	2,300.00
State ex rel. Hugh Devlin v. Dickinson	1,000.00
Virginia W. Lucom v. David L. Reid	263,000.00
Lykes Brothers Inc. v. City of Plant City	50,000.00
William B. Mesmer v. DOR	15,000.00
Zuckerman-Vernon v. DOR	110,000.00
Robert Gailey, a/k/a K-9 of Orlando v. DOR	6,329.96
Keebler v. DOR	3,401.30
Kabler v. Reid	4,235.40
Lake Forest Homeowners v. DOR	10,350.54
Amoco Oil Co., et al v. DOR Santa Rosa	17,000,000.00
Amoco Oil Co., et al v. DOR Escambia	6,000,000.00
Service Facilities Corp. v. Wade	99,000.68
Mangum v. DOR	10,000.00
Daytona Beach Rac. & Rec. v. Volusia County	153,075.00
Merritt Square Corp. v. DOR	14,000.00
Raylu Corp. v. DOR	41,321.09
First National Bank of Florida v. DOR	27,563.88
Barnett Brass & Copper Inc. v. DOR	365.86
Earl E. Fisher v. Harry Schooley etc., et al	23,111.24
Jesse Jackson Parrish, Jr., etc., et al v. DOR	1,899.17
58th Street, Inc. v. DOR	559.53
Harry G. Boggs et al v. DOR	182.21

The Phoenix Inc., v. Lopez International Inc.	2,292.74
Sheridan Ventures, Inc. v. DOR	15,778.43
Maybell, Inc. v. DOR	3,596.34
A. J. Coyle v. DOR	1,122.11
Union Truck Terminal, Inc. v. DOR	36,119.99
Salvatore & Cecelia Patti v. DOR	177.88
Atico Mortgage Investors v. DOR	4,873.00
Lehigh Portland Cement Company v. DOR	16,435.00
Marciano Diaz & Carmon Diaz v. DOR	184.20
Raymond Hamlin Jr. v. Sherrill Dansby et al	196.18
Orlando Accommodations Inc. v. DOR	13,631.36
William & Harvey Rowland of Georgia, Inc.	239.77
American Contract Bridge v. DOR	6,306.62
Bizjet v. DOR	1,461.82
C. A. Atherton Fuel Oil Co. v. DOR	5,626.54
The Florida Bar v. DOR	2,700.00
Myron Friedman v. DOR	3,278.30
Lee County Bank v. DOR	677.88
M. D. Moody & Sons, Inc. v. DOR	23,443.16
Silver Sands v. DOR	154,644.50
Stan Musial & Biggie's Inc. v. DOR	25,713.26
Stewart Arms Apts., Ltd., v. DOR	4,824.50
James E. Corry v. DOR	96.09
James E. Corry v. DOR	271.47
Cathedral Health & Rehab Center Inc. v. DOR	5,085.00
Continental Mortgage Inc. v. DOR	3,900.64
Don Julio Corp. v. DOR	6,156.08
Fanpac Corp. v. DOR	6,519.00
National Sun Control v. DOR	1,083.91
Orthopaedic Publishing Corp. v. DOR	8,411.46
Imre J. Rosenthal v. DOR	4,395.00
St. Augustine Fed. Assoc. v. DOR	755.80
Tadco Construction Co. v. DOR	2,436.06
H. R. Thornton Jr. v. DOR	138.51
Total	$26,226,324.76

INDEX

AND

CITATOR

GENERAL INDEX

Subject *Opinion*

—A—

ACCOUNTS AND ACCOUNTING; county budget system, Banking and Finance Department may not promulgate rules inconsistent with ... 077-121
ACTIONS; criminal law enforcement special agents; compensatory or punitive damage liabilities ... 077-98
ADMINISTRATION, STATE BOARD OF
Securities deposited with banks or trust companies for safekeeping, written trust receipts not required ... 077-62
United States Treasury bills or guarantee obligations of the United States, purchases not inhibited ... 077-62
ADMINISTRATIVE PROCEDURE ACT
Constitution Revision Commission, applicability to proceedings ... 077-65
Election campaign financing violations alleged; Elections Commission notice and agenda publication ... 077-46
Hospital district; act not applicable ... 077-142
License procedures, waiver of certain time limits by applicant ... 077-41
ADULT RIGHTS LAW; billiard parlors, 18-year-old's right to frequent, visit, or play in ... 077-6
AGED PERSONS; homestead exemption, additional; residency determinative date ... 077-2
ANATOMICAL GIFTS
Cornea of decedent; removal without consent of next of kin; authority or immunity ... 077-114
Medical examiner supplying decedent's cornea upon request of eye bank, authorized but not required ... 077-114
ARRESTS
Arrest records; public records; restrictions on public access unauthorized ... 077-125
Circuit judge authority to arrest violator of traffic laws; procedure ... 077-79

—B—

BAIL BONDSMAN; estreature, arrest powers after surety cancels bondsman's license ... 077-3
BANKING AND FINANCE DEPARTMENT
Indigent patients at Shands Teaching Hospital, county financial liability ... 077-58
Rules inconsistent with county budget system prohibited ... 077-121
BANKS AND TRUST COMPANIES; international bank agency, classified as "bank" for corporate income tax purposes ... 077-126
BICYCLE/MOPEDS; operators wearing certain safety devices, regulation by municipalities prohibited ... 077-34
BIDS, COMPETITIVE; purchase of commodities by municipality, more than one bidder unnecessary ... 077-140
BILLIARD PARLORS; Adult Rights Law; 18-year-old's right to frequent, visit, or play in ... 077-6
BREVARD COUNTY PERSONNEL COUNCIL; private deliberations prohibited by Sunshine Law ... 077-132

Subject	*Opinion*
BROWARD COUNTY, Indian Trust Reservation, state and local police power laws and regulations; applicability	077-29
BURGLARY; attempts on unoccupied structure, degree of penalty	077-4, 077-112
BUSINESS AND COMMERCE; business hours, power of municipality to regulate	077-139
—C—	
CHARITABLE ORGANIZATIONS OR INSTITUTIONS; charitable purposes clarified and defined	077-64
CHARITABLE TRUSTS; state attorneys representation in charitable trust proceedings	077-85
CHILD CARE; agency officer may sign drivers' license application for minor in agency's custody if neither parent is living	077-102
CLEARWATER, CITY OF; mayor, letters or documents received by; public record status	077-141
CLERKS, CIRCUIT COURTS	
Elector adjudicated physically incompetent, voting eligibility report	077-1
Okaloosa County, clerk to serve as accountant, secretary-treasurer or clerk for governing body of county hospital prohibited	077-76
Photographic or microfilm records; satisfaction, partial release, or discharge of mortgages etc.; marginal notations procedure	077-90
Taxation, tax deeds or sales; distribution of excess proceeds under certain circumstances	077-99
COASTAL ZONE MANAGEMENT; grants, reception and administration	077-28
CODE OF ETHICS; Sunshine Amendment; prohibition of legislators representing clients before state agencies; self-executing; valid	077-136
COIN-OPERATED VENDING MACHINES; municipal license tax, resident lessee liability	077-34
COLLECTIVE BARGAINING; agreement to make employee personnel records confidential violative of Public Records Law	077-48
COLUMBIA COUNTY; school board revenue bond proceeds investment, interest use restricted	077-26
COMMUNITY COLLEGES; public utility contractual franchise fees; tax status	077-94
COMMUNITY MENTAL HEALTH SERVICES; mental health boards; county contract with board for use of county funds	077-97
CONDOMINIUMS AND COOPERATIVE APARTMENTS; mortgage foreclosure by lending institution, effect on declaration of condominium filing	077-13
CONFIDENTIAL OR PRIVILEGED INFORMATION; Ethics Commission files, inapplicable	077-33
CONSTITUTION REVISION COMMISSION	
Administrative Procedure Act applicability to proceedings	077-65
Executive director, delegation of certain ministerial functions; rules of procedure adopted	077-66
CONSUMER PROTECTION; telephone solicitation sales, applicable consumer protection laws	077-32

Subject	*Opinion*
CONTRACTORS; state building construction retainage, securities substitution	077-47
CORAL GABLES, CITY OF	
Commissioners attending meetings of city advisory board permitted under Sunshine Law	077-138
Purchase of commodities, more than one bidder unnecessary	077-140
CORAL SPRINGS, CITY OF; charter amendments affecting form of government defined	077-135
CORPORATE INCOME TAX; international bank agency, classified as "bank"	077-126
COUNTIES	
Budget system, Banking and Finance Department may not promulgate rules inconsistent with	077-121
Charter counties; revenue sharing eligibility, municipal service taxing or benefit units	077-21
Financial responsibility for indigent patients at Shands Teaching Hospital	077-58
Housing authority inactive; dissolution or termination procedure	077-92
Investments; securities, custody, "book-entry" method, lists, etc.	077-61
Juvenile detention homes, board of visitors; application of Sunshine Law	077-137
Medical examiner employed; expert witness fees, payment	077-86
Noncharter; loans to school board prohibited	077-38
Real property purchase, bank loan repayment from racetrack or revenue sharing funds	077-14
Realty acquired by foreclosure of tax certificates, sales procedure	077-52
Supervisor of elections, expenditure of county funds for defense in election contest	077-87
Tourist development tax; creation of subcounty special district within county; tax levies	077-81
COUNTY BUDGETS; budget system, Banking and Finance Department may not promulgate rules inconsistent with	077-121
COUNTY CHARTERS; county officials' compensation	077-88
COUNTY COMMISSIONERS	
Budgetary expenditures, religious facilities at county jail	077-55
Election; single-member districts	077-119
Limit on power to remove park director, valid	077-134
COUNTY COURTS; fines imposed to assist crime victims; disposition of funds	077-129
COUNTY FUNDS; community mental health services; mental health boards; county contract with board for use of county funds	077-97
COUNTY HOSPITALS	
Clerk of circuit court to serve as accountant, secretary-treasurer, or clerk for governing body of hospital prohibited	077-76
Physicians treating patients, proof of liability insurance coverage required	077-91
COUNTY OFFICERS AND EMPLOYEES; county charter; officials' compensation	077-88
COURT REPORTERS, COMPENSATION; deputy official court reporters' travel expenses when performing official duties	077-68

Subject	*Opinion*
CRIMES AND OFFENSES; burglary attempted on unoccupied structure, degree of penalty	077-4, 077-112
CRIMINAL LAW ENFORCEMENT DEPARTMENT	
Law enforcement training trust fund expenditures for travel and per diem	077-59
Special agents in civil suits; compensatory or punitive damage liabilities	077-98
CRIMINAL PROCEDURE; fines imposed to assist crime victims; disposition of funds	077-129
—D—	
DELRAY BEACH, CITY OF; municipal park, portion leased to private nonprofit corporation; validity	077-27
DEVELOPMENTS OF REGIONAL IMPACT	
Development permit or binding letter of interpretation of vested rights, local government comprehensive plans amending prohibited	077-7
Exemption; Reedy Creek Improvement District	077-44
DISSOLUTION OF MARRIAGE; alimony payments coverage, collection under URESA	077-77
DRIVERS' LICENSES; application; child-care agency officer may sign for minor in agency's custody if neither parent is living	077-102
DUAL OFFICEHOLDERS	
Certified reserve police officer, candidate for city council prohibited	077-63
Community college comptroller as State Legislator, inapplicable	077-31
Deputy sheriff simultaneously serving as mayor; Resign-to-Run Law, applicability	077-89
Florida Advisory Council on Intergovernmental Relations, Legislator serving as member	077-74
—E—	
EASEMENTS; privately owned lands subject to governmentally owned easements are not public lands	077-110
EDUCATION; teacher education centers, operational date for all school districts	077-60
ELECTIONS	
County commissioners; single-member districts	077-119
Elections Commission campaign finance alleged violations, notice and hearing under Administrative Procedure Act	077-46
Electors, felons; disqualification after final affirmation of conviction	077-42
Electors' physical incompetency adjudicated, effect	077-1
Registration of electors for municipal elections, procedure	077-109
Resign-to-Run Law	
Certified reserve police officer candidate for city council; dual officeholding prohibited	077-63
City councilman, effective date of resignation	077-5
Community college comptroller, candidate for State Legislature; inapplicable	077-31

Subject	*Opinion*
ELECTIONS (Cont.)	
Resign-to-Run Law (Cont.)	
Deputy sheriff simultaneously serving as mayor; applicability	077-89
Supervisor of elections; election contest, use of county funds in defense actions	077-87
ENVIRONMENTAL REGULATION DEPARTMENT	
Conservation, protection, management, and control of waters of state, agency head vested with power to regulate	077-95
Licensing procedures under Administrative Procedure Act, waiver of certain time limits by applicant	077-41
Water supply authorities, regional; final authority to approve establishment	077-51
ESCAMBIA COUNTY; election of county commissioners; single-member districts	077-119
ETHICS COMMISSION; file documents, public information	077-33
—F—	
FELONS; election voting privilege disqualification after final affirmation of conviction	077-42
FINE AND FORFEITURE FUND; fines imposed to assist crime victims; disposition of funds	077-129
FIRE CONTROL DISTRICTS; Fort Myers Beach Fire Control District, tape recording of public meeting authorized	077-122
FIRE PREVENTION AND CONTROL	
Estero Fire Protection and Rescue Service District, purchases of supplies, equipment, construction, etc.	077-22
St. Lucie County-Fort Pierce Fire Prevention and Control District governing body composition change, firemen's pension plan unaffected	077-54
FIREMEN AND FIREFIGHTERS; nepotism; fire chief hiring assistant fire chief's relative permitted	077-144
FOODS, DRUGS, AND COSMETICS; Laetrile; marketing law not superseded by law re prescription and administration	077-107
FORT MYERS BEACH FIRE CONTROL DISTRICT; tape recording of public meetings authorized	077-122
FRATERNAL INSTITUTIONS OR ORGANIZATIONS; charitable purposes clarified and defined	077-64
FUNERAL DIRECTORS AND EMBALMERS; out-of-state funeral establishments advertising in local telephone directories limited	077-75
—G—	
GENERAL SERVICES DEPARTMENT; contract for rental vehicles, dividends received as administering state agency; disposition of proceeds	077-83
GOOD DRIVERS' INCENTIVE FUND; traffic violations committed; additional penalty collected after certain date	077-70
GOVERNMENT IN THE SUNSHINE	
City commissioners attending meetings of city advisory board permitted	077-138

Subject — *Opinion*

GOVERNMENT IN THE SUNSHINE (Cont.)
City commissioners individually listening to recording of meeting permitted 077-143
Fort Myers Beach Fire Control District, tape recording of public meetings authorized 077-122
Juvenile detention homes, board of visitors; applicability 077-137
Organized Crime, Select Committee on; applicability 077-10
Personnel council, private deliberations prohibited 077-132
School board, delegated authority to County Bar Association for screening and nomination of attorney; applicability 077-43

GOVERNOR
Coastal zone management, federal grants; designation of agency to receive and administer 077-28
Contingent-Discretionary Fund, use for first-class air fare exceeding coach fare 077-11
Judge's resignation tender during pendency of removal proceedings, nonacceptance 077-9
Travel by commercial aircraft, first-class fare differential paid from Contingent-Discretionary Fund 077-11

—H—

HERNANDO COUNTY; school board members, group insurance, payment of premium from school district funds 077-131
HIALEAH, CITY OF
Hialeah Racetrack, purchase by city authorized 077-118
Hialeah Racetrack purchase, referendum for indebtedness 077-19
HOME RULE; county commissioners' election, single-member districts 077-119
HOME SOLICITATION SALES ACT; telephone solicitations, inapplicable 077-32
HOMESTEAD EXEMPTIONS; applicants for residency determinative date, aged person 077-2
HOSPITALS; Lower Florida Keys Hospital District, applicability of Administrative Procedure Act 077-142
HOUSING AUTHORITIES
Employment contract with secretary and executive director for a five-year period 077-67
Inactive authority, dissolution or termination procedure 077-92
Tenant applications and related documents; subject to inspection under Public Records Law 077-69

—I—

INDIANS AND INDIAN RESERVATIONS; state and local police power laws and ordinances, applicability 077-29
INSURANCE, DEPARTMENT OF
Group insurance for school board members, premium payment from school district funds 077-131
Reciprocal insurance association composed entirely of Florida municipalities permitted 077-113

Subject — *Opinion*

INTERLOCAL AGREEMENTS
Metropolitan Planning Organization, public agencies creating 077-16
Multicounty transportation planning, Metropolitan Planning Organization created 077-15
INVESTMENTS; public funds; physical custody of securities, "book-entry" method, securities list of types and amounts 077-61

—J—

JAILS; religious facilities and prison chaplain, public funds expended for; sheriff's budget 077-55
JUDGES; resignation tender during pendency of removal proceedings 077-9
JURY OR JURORS; juror fees; city employees required to remit to city; improper 077-124
JUVENILES; detention homes, board of visitors; application of Sunshine Law 077-137

—L—

LAETRILE; marketing law not superseded by law re prescription and administration 077-107
LAKE ALFRED, CITY OF; coin-operated vending machine occupational license, liability of resident lessee 077-34
LAKE WORTH, CITY OF; garbage collection fees; billing, collection, and accounting 077-116
LAKE WORTH UTILITIES AUTHORITY; garbage collection fees; administration by authority under contract with city 077-116
LAKELAND, CITY OF; commissioners individually listening to recording of meeting permitted 077-143
LANDLORD AND TENANT; mobile home park owner may impose minimum fee for providing tenant with propane gas under certain circumstances 077-78
LANDS; local government comprehensive plan land use elements, notice and hearing for ordinance adoption 077-53
LAW ENFORCEMENT OFFICERS; officer training; termination of employment during training year; reimbursement of training costs, civil action by employing agency 077-127
LEGISLATURE
Constitutional prohibition of legislators representing clients before state agencies; self-executing; valid 077-136
First gas tax expenditure approval procedure 077-56
Members serving on Florida Advisory Council on Intergovernmental Relations 077-74
Organized Crime Select Committee, Government in the Sunshine and Public Records Law applicability 077-10
LICENSES AND LICENSE TAXES; coin-operated vending machines, municipal occupational tax liability 077-34

Subject — *Opinion*

LOCAL GOVERNMENT
- Amendment of development permits or binding letters of interpretation of vested rights of regional impact development prohibited 077-7
- Public building construction, security substitution for retainage inapplicable 077-47

LOCAL GOVERNMENT ADDITIONAL HOMESTEAD EXEMPTION TRUST FUND; reimbursement of taxing authorities for lost revenues, restricted to specific statutory sections 077-23

LOCAL GOVERNMENT COMPREHENSIVE PLANNING LAW; land use elements, notice and hearing for ordinance adoption 077-53

LOCAL OPTION TOURIST DEVELOPMENT; creation of subcounty special district within county; tax levies 077-81

LOWER FLORIDA KEYS HOSPITAL DISTRICT; applicability of Administrative Procedure Act 077-142

—M—

MANATEE COUNTY; budget system, Banking and Finance Department may not promulgate rules inconsistent with 077-121

MARRIAGE; property appraiser marriage to employee, nepotism laws 077-36

McINTOSH, TOWN OF; council hiring councilman's spouse as municipal clerk prohibited; abstention from vote by related councilman, effect 077-130

MEDICAL EXAMINER
- Cornea of decedent; removal without consent of next of kin; authority or immunity 077-114
- Cornea of decedent supplied to eye bank upon request; authorized but not required 077-114
- County employed; expert witness fees, payment 077-86

MEDICAL EXAMINERS, STATE BOARD OF; legal services furnished to private persons; board unauthorized 077-103

MEDICAL PRACTICE ACT; physicians' assistants, medication and drug treatment ordered by; nurses' responsibilities 077-96, 077-96A

MEDICAL SERVICES; indigent patients at Shands Teaching Hospital, county liability for costs and Banking and Finance Department duties 077-58

MEDICINE; physicians' assistant, medication orders given by; nurse must exercise professional judgment in carrying out 077-96, 077-96A

MELBOURNE VILLAGE, TOWN OF; police department exercise of jurisdiction in neighboring towns 077-35

METROPOLITAN PLANNING ORGANIZATION; creation by interlocal agreement 077-15, 077-16

MIAMI SHORES VILLAGE, TOWN OF; business hours, power to regulate 077-139

MINORS; drivers' license application; child-care agency officer may sign for minor in agency's custody if neither parent is living 077-102

Subject — *Opinion*

MOBILE HOMES
- Landlord and tenant; park owner may impose minimum fee for providing tenants propane gas under certain circumstances 077-78
- Parks; Department of Business Regulation, registration procedure 077-111

MORTGAGES; foreclosure on condominium parcel, effect on declaration of condominium filing 077-13

MOTOR FUEL TAX; first gas tax expenditure or pledge, legislative approval procedure 077-56

MOTOR POOL DIVISION; state contract for rental vehicles, dividends received as administering state agency; disposition of proceeds 077-83

MOTOR VEHICLES
- Accident reports required by municipal ordinance, confidentiality 077-49
- Municipalities, vehicles entering for business purposes; identification stickers not required 077-82

MOUNT DORA, CITY OF; annexation, voluntary; contiguity and compactness of area, enclave creation prohibited 077-18

MUNICIPAL OFFICERS AND EMPLOYEES
- Employment applications and records, public records 077-48
- Resign-to-Run Law, effective date of resignation 077-5

MUNICIPALITIES
- Annexation, contiguity and compactness of area; enclave creation prohibited 077-18
- Bicycle/mopeds, operators wearing certain safety devices; regulation by city prohibited 077-84
- Business hours, power to regulate 077-139
- Charter amendment affecting form of government defined 077-135
- Coded identification of position applicants violative of Sunshine Law 077-48
- Commissioners attending meetings of city advisory board permitted under Sunshine Law 077-138
- Commissioners individually listening to recording of meeting permitted 077-143
- Council hiring councilman's spouse as municipal clerk prohibited; abstention from vote by related councilman, effect 077-130
- Elections; registration of electors, procedure 077-109
- Fuel adjustment charges on municipally owned utilities, separate statement on customer billings 077-24
- Garbage collection fees; billing, collection, and accounting 077-116
- Hialeah Racetrack purchase, referendum for indebtedness 077-19
- Home rule powers
  - Charter amendments affecting form of government defined 077-135
  - Group insurance for employees, city may bargain, negotiate, and pay premium from municipal funds 077-72
  - Group insurance for officers and employees, use of municipal funds for part or all premiums 077-71
  - Juror fees; city employees required to remit to city; improper 077-124
- Horse racetrack, authority to purchase 077-118
- Housing authority; five-year employment contract with secretary and executive director 077-67
- Mayor, letters or documents received by; public record status 077-141
- Nepotism; fire chief hiring assistant fire chief's relative permitted 077-144

Subject — *Opinion*

MUNICIPALITIES (Cont.)
Police department, exercise of powers in neighboring towns........ 077-35
Police officers, certified reserve officer candidate for city council; dual officeholding prohibited 077-63
Police officers, compensation for appearing as a witness while off duty 077-108
Public park, lease of portion to private nonprofit corporation; validity 077-27
Purchase of commodities, more than one bidder unnecessary 077-140
Reciprocal insurer's surplus, contribution authorized 077-113
Revenue bonds; issuance as contribution to surplus of reciprocal insurer unauthorized 077-113
Vehicles entering city limits for business purposes; identification stickers not required 077-82
Voluntary annexation, referendum not required........ 077-133

—N—

NEPOTISM
"Cousin-in-law" not prohibited relationship........ 077-130
Nonrelative hiring existing employee's relative permitted; promotion and pay increase distinguished 077-144
Property appraiser, marriage to employee; employment subsequent to marriage 077-36
Town council hiring councilman's spouse as municipal clerk prohibited, abstention from vote by related councilman, effect ... 077-130
NONPROFIT INSTITUTIONS; fundraising events, charitable, religious, or educational corporations; admissions tax........ 077-57
NONRESIDENTS; household goods and personal effects tax exempt.. 077-128
NORTH BROWARD HOSPITAL DISTRICT; district funds invested in certificates of deposits in federal and state savings and loan associations without limitations; procedure........ 077-80
NORTHWEST FLORIDA PLANNING AND ADVISORY COUNCIL; executive committee; per diem and travel expense restrictions..... 077-117
NURSES AND NURSING; medication and drug treatment orders given by certified physicians' assistant; nurses' responsibilities 077-96, 077-96A

—O—

OFFENDER REHABILITATION DEPARTMENT; State Institution Claims Fund claims inapplicable........ 077-12
ORANGE COUNTY CIVIC FACILITIES AUTHORITY; lobbyist employed by to assist in resort tax legislation, public funds expenditure prohibited 077-8

—P—

PAROLE AND PROBATION
Commission, statutory duty to annually interview inmates eligible for parole 077-73
Cost contribution exemption, mandatory conditionally released persons 077-39
PENAL AND CORRECTIONAL INSTITUTIONS; gain-time mandatory conditional release, supervision and contribution exemption........ 077-39

Subject — *Opinion*

PHYSICIANS AND SURGEONS
County hospitals privilege of treating patients; proof of liability insurance required........ 077-91
Physicians' assistant, medication orders given by; nurse must exercise professional judgment in carrying out........ 077-96, 077-96A

PINELLAS COUNTY HOSPITAL AUTHORITY; tax millage; limitation inapplicable........ 077-100
PINELLAS COUNTY PARK BOARD; limit on power to remove park director, valid; terms of office of board members; power of county administrator not conflicting 077-134
PUBLIC BUILDINGS; securities substitution for retainage restricted to state construction contracts 077-47
PUBLIC DEFENDERS
Assistant public defender; partner in private law firm engaged in practice of criminal law; permissible in certain circumstances .. 077-104
Association dues; payment from public funds; procedure 077-115
PUBLIC FUNDS
Board of Medical Examiners to furnish legal services to private persons; expenditure unauthorized........ 077-103
Fees and service charges, collecting; extension of credit unauthorized; exceptions........ 077-120
Lobbyist employed by civic facilities authority to assist in resort tax legislation prohibited 077-8
Public defender and staff; payment of Florida Bar and association dues; procedure........ 077-115
PUBLIC LANDS; privately owned lands subject to governmentally owned easements are not public lands........ 077-110
PUBLIC MEETINGS; fire control district meetings, tape recording authorized 077-122
PUBLIC OFFICERS AND EMPLOYEES; financial matters; credit, extension unauthorized; exceptions 077-120
PUBLIC UTILITIES
Community colleges contractual franchise fees; tax status 077-94
Municipally owned, fuel adjustment charges separately stated on customer billings........ 077-24

—R—

RACETRACK; purchase by city of Hialeah authorized........ 077-118
RAILROADS AND COMMON CARRIERS; proposed legislation requiring use of tracks, conflict with federal law 077-30
REAL ESTATE AND REAL PROPERTY
County purchase, bank loan repayment from racetrack or revenue sharing funds........ 077-14
Land use elements of local government comprehensive plan, notice and hearing for ordinance adoption 077-53
Privately owned lands subject to governmentally owned easements are not public lands 077-110

Subject — *Opinion*

RECORDS
- Arrest records; public records; restrictions on public access unauthorized 077-125
- Ethics Commission files, public records 077-33
- Housing authority, tenant application and related documents; subject to inspection under Public Records Law 077-69
- Mayor, letters or documents received by; public record status 077-141
- Motor vehicle accident reports required by municipal ordinance, confidentiality 077-45
- Municipal employment applications and employee records, public .. 077-48
- Organized Crime, Select Committee on; Public Records Law applicability 077-10
- Photographic or microfilm; satisfaction, partial release, or discharge of mortgages, etc.; marginal notations procedure 077-90

REEDY CREEK IMPROVEMENT DISTRICT; regional impact development, exemption 077-44

REGIONAL PLANNING COUNCILS; executive committee; per diem and travel expense restrictions 077-117

REGIONAL WATER SUPPLY AUTHORITY; final authority for approval of establishment 077-51

RELIGIOUS ORGANIZATIONS AND INSTITUTIONS; activities, solicitations and distribution of literature; regulation on public fairgrounds 077-25

RESORT TAX; local option tourist development; creation of subcounty special district within county; tax levies 077-81

RETIREMENT SYSTEMS; Florida Retirement System; impermissible to administer retirement funds for Federal Comprehensive Employment Training Act employees in manner prescribed by federal law 077-101

REVENUE BONDS
- Interest accrued on investment of proceeds, school board's use restricted 077-26
- Municipalities; issuance as contribution to surplus of reciprocal insurer unauthorized 077-113

REVENUE DEPARTMENT
- Budget approval, property appraiser expenditures for advanced specialized education and concomitant salaries 077-50
- Local Government Additional Homestead Exemption Trust Fund, reimbursements to taxing authorities restricted 077-23

REVENUE SHARING; charter counties; municipal service taxing or benefit units eligibility 077-21

—S—

SALES TAX; admissions tax, fundraising event by nonprofit charitable, religious, or educational corporation 077-57

SALTWATER FISHERIES; amendment of special law passed by favorable referendum 077-40

SATELLITE BEACH, CITY OF; voluntary annexation, referendum not required 077-133

Subject — *Opinion*

SAVINGS AND LOAN ASSOCIATIONS; North Broward Hospital District, public funds invested in certificates of deposits without limitations; procedure 077-80

SCHOOLS
- Loans from noncharter counties prohibited 077-38
- Revenue bond investment interest, restriction on uses 077-26
- School boards
  - Delegation of authority to screen and nominate attorney to County Bar Association, Sunshine Law applicable 077-43
  - Employees, travel expenses while on military leave; reimbursement by board; procedure 077-123
  - Investments; securities, custody, "book-entry" method, lists, etc. 077-61
  - Members, group insurance, payment of premium from school district funds 077-131
- Teacher education centers, operational date for all school districts 077-60

SEBASTIAN INLET TAX DISTRICT; multicounty taxing district, tax procedure 077-105

SEBRING UTILITIES COMMISSION; fuel adjustment charges, separate statement on customer billing 077-24

SHERIFFS
- Budgetary expenditures, jail religious facilities and prison chaplain 077-55
- Deputy sheriff simultaneously serving as mayor; Resign-to-Run Law applicability 077-89

SPECIAL AND LOCAL LAWS
- Amendment after law passed by favorable referendum 077-40
- Drainage district organized under general law; division of lands by special law 077-45

SPECIAL DISTRICTS
- Firemen's pension plan unaffected by governing body composition change, St. Lucie County-Fort Pierce Fire Prevention and Control District 077-54
- Hospital district, applicability of Administrative Procedure Act 077-142
- Purchasing by competitive bidding procedures, Estero Fire Protection and Rescue Service District 077-22

STATE AGENCIES; career service employee pretermination hearing before agency head, costs and fees not reimbursable 077-37

STATE ATTORNEYS; charitable trust proceedings; representation ... 077-85

STATE CAREER SERVICE SYSTEM; employee pretermination hearing before agency head, costs and fees not reimbursable 077-37

STATE INSTITUTION CLAIMS FUND; Offender Rehabilitation Department, claims against; inapplicable 077-12

STATE MOBILE HOME TENANT-LANDLORD COMMISSION; Business Regulation Department; commission administratively subject to; independent only in exercise of its quasi-judicial and quasi-legislative powers 077-111

STATUTES; proposed legislation, abolition of Tampa Bay Area Rapid Transit Authority 077-20

SUNSHINE AMENDMENT; prohibition of legislators representing clients before state agencies; self-executing; valid 077-136

Subject | *Opinion*

SUPPORT OF DEPENDENTS; child support payments, procedure for collections under URESA 077-77
SURETIES; bail bondsman license canceled by; post-estreature arrest powers of bondsman 077-3

—T—

TAMPA BAY AREA RAPID TRANSIT AUTHORITY; legislation proposal to abolish 077-20
TAXATION
Charitable purposes clarified and defined 077-64
Community colleges, public utility contractual franchise fees; status 077-94
Exemptions; nonresident of Florida, household goods and personal effects; eligibility 077-128
Local option tourist development tax; creation of subcounty special district within county; tax levies 077-81
Nonresidents, household goods and personal effects; exemption eligibility 077-128
Pinellas County Hospital Authority; millage limitation inapplicable 077-100
Property appraiser budget expenditures, advanced specialized education for self and employees; propriety 077-50
Real property not commonly bought and sold, valuation 077-106
Sebastian Inlet Tax District, multicounty taxing district, tax procedure 077-105
Tax deeds, distribution of excess proceeds of tax deed sales under certain circumstances 077-99
Tax sales, county property acquired by foreclosure of tax certificates 077-52
Water management district revenues, boundary changes effect on unspent revenue 077-17
Water management districts, tax levy; manner and method of tax proration 077-93
TELEGRAPHS AND TELEPHONES; telephone solicitation sales, consumer protection laws applicable 077-32
TRAFFIC CONTROL
Accident reports required by municipal ordinance, confidentiality... 077-49
Bicycle/mopeds, operators wearing certain safety devices; regulation by municipalities prohibited 077-84
Good Drivers' Incentive Fund; applicable to violations committed after a certain date 077-70
Traffic violation in presence of circuit judge; arrest authority; procedure 077-79
TRANSPORTATION; multicounty planning entity created by interlocal agreement; Metropolitan Planning Organization 077-15
TRAVEL EXPENSES AND PER DIEM
Deputy official court reporters performing official duties 077-68
Regional planning council, executive committee; per diem and travel expense restrictions 077-117
School board employee, travel expenses while on military leave; reimbursement by board; procedure 077-123
Standards and Training Division and Police Standards and Training Commission expenditures 077-59

Subject | *Opinion*

—V—

VOLUSIA COUNTY FAIR ASSOCIATION; regulation of International Society for Krishna Consciousness activities in public areas of fair 077-25

—W—

WATER MANAGEMENT DISTRICTS
Boundary changes; unspent tax revenues and accounts receivable, transfers 077-17
Drainage district organized under general laws, division of lands and apportionment of assessments by special law 077-45
Tax levy; manner and method of tax proration 077-93
WATER RESOURCES: Environmental Department agency head vested with power to regulate 077-95
WATER SUPPLY AUTHORITIES, REGIONAL; establishment, final authority to approve or disapprove 077-51
WINTER HAVEN, CITY OF; nepotism; fire chief hiring assistant fire chief's relative permitted 077-144
WITNESSES
County medical examiner; expert witness fees, payment 077-86
Police officers; compensation for appearing while off duty 077-108

CITATOR

CITATOR TO FLORIDA STATUTES, LAWS OF FLORIDA, AND STATE CONSTITUTION, CONSTRUED OR CITED IN OPINIONS RENDERED FROM JANUARY 1 THROUGH DECEMBER 31, 1977

CITATOR TO FLORIDA STATUTES

Section	Opinion No.
1.01	077-6
	077-75
	077-80
	077-102
	077-113
	077-130
11.062	077-8
11.065	077-98
15.07	077-56
15.09	077-120
16.015	077-103
20.02	077-111
20.03	077-28
	077-111
20.04	077-65
	077-142
20.05, 20.06	077-51
20.11	077-103
20.16	077-111
20.19	077-97
20.25	077-28
	077-51
20.261	077-51
	077-95
27.02	077-85
27.51	077-104
28.022, 28.2401, 28.243	077-120
29.01, 29.04, 29.08	077-68
30.07	077-89
30.49	077-55
30.51	077-120
30.53	077-55
	077-89
39.03, 39.12	077-125
40.231, 40.24	077-124

Section	Opinion No.
40.29-40.35	077-86
61.11, 61.12, 61.17-61.181	077-77
83.760, 83.764	077-78
83.776, 83.780, 83.782, 83.784, 83.786, 83.790	077-111
86.021, 86.041, 86.091	077-85
88.011, 88.011-88.311, 88.031, 88.041, 88.081, 88.091, 88.121, 88.131, 88.141, 88.211, 88.271, 88.311, 88.321-88.371	077-77
90.14	077-108
	077-124
90.141	077-108
90.231	077-86
92.231	077-86
97.021	077-109
97.041	077-1
98.041, 98.051, 98.091, 98.181	077-109
98.201	077-42
98.271	077-109
98.311	077-1

Section	Opinion No.
98.312, 98.313	077-42
99.012	077-5
	077-31
	077-63
	077-89
99.021	077-63
100.041	077-5
101.68	077-87
102.141, 102.151, 102.161, 102.166	077-87
104.31	077-31
106.23	077-42
106.25	077-46
110.042	077-31
110.061	077-37
110.092	077-31
111.03	077-120
111.06	077-98
	077-103
111.065	077-98
	077-103
111.07	077-37
	077-98
	077-103
111.08	077-37
	077-98
112.061	077-11
	077-59
	077-68
	077-76
	077-83
	077-108
	077-117
	077-123
112.08	077-71
	077-72
	077-131
112.081, 112.09, 112.10	077-131

CITATOR TO FLORIDA STATUTES

Section	Opinion No.
112.12	077-71
	077-131
112.14	077-131
112.311, 112.313	077-138
112.3143	077-130
	077-138
112.3146, 112.322, 112.323	077-33
112.324	077-33
	077-46
113.01, 113.02	077-120
115.07	077-123
	077-124
116.03	077-120
116.10	077-130
116.111	077-36
	077-130
	077-144
119.01	077-33
	077-43
	077-46
	077-48
	077-49
	077-69
	077-141
119.011	077-10
	077-33
	077-43
	077-48
	077-49
	077-69
	077-141
119.07	077-10
	077-33
	077-43
	077-46
	077-48
	077-49
	077-69
	077-125
	077-141
120.52	077-51
	077-65
	077-142

Section	Opinion No.
120.53	077-46
	077-111
120.55	077-46
120.565	077-51
120.60, 120.62	077-41
120.63	077-41
	077-46
120.72	077-142
121.021, 121.051, 121.08	077-101
121.091	077-9
	077-101
121.111, 121.121	077-101
122.08	077-71
124.01	077-119
125.01	077-14
	077-15
	077-21
	077-38
	077-40
	077-55
	077-97
125.031	077-14
125.17	077-76
125.31	077-61
	077-62
125.35	077-52
125.65	077-38
125.83, 125.84	077-88
129.01, 129.011, 129.03	077-121
129.06	077-58
129.07	077-121
129.08	077-58
129.09	077-58
	077-97
130.01	077-14
	077-55
130.012, 130.03	077-14
142.01, 142.03	077-129

Section	Opinion No.
145.041	077-131
145.10	077-50
145.12	077-121
145.131, 145.17	077-131
153.05	077-99
155.07, 155.09	077-76
155.10	077-76
	077-122
155.11	077-76
155.18	077-91
160.01	077-97
	077-117
160.02	077-117
163.01	077-15
	077-16
	077-38
	077-51
163.3161, 163.3161-163.3211, 163.3167	077-7
163.317	077-44
163.3171, 163.3174	077-7
163.3177	077-15
163.3181	077-53
163.3211	077-7
163.567, 163.568	077-15
163.603	077-45
163.702, 163.704	077-74
165.02	077-130
165.022	077-45
165.041	077-45
165.051	077-45
	077-92
166.021	077-19
	077-40
	077-71
	077-82
	077-109
	077-113
	077-116
	077-124
	077-133
	077-135

CITATOR TO FLORIDA STATUTES

Section	Opinion No.
166.031	077-135
166.032	077-109
166.041	077-53
166.042	077-27
	077-71
	077-116
166.043	077-116
166.101,	
166.111	077-19
166.201	077-116
166.221	077-82
166.231	077-24
	077-94
167.09	077-27
167.421	077-71
167.73	077-116
167.77	077-27
170.09	077-99
171.021	077-133
171.04	077-18
171.0413,	
171.043	077-133
171.044	077-18
	077-133
177.071	077-120
186.08,	
186.9983,	
186.9989	077-49
192.001	077-93
192.042	077-2
192.053	077-2
	077-99
193.011	077-106
195.002,	
195.087	077-50
196.001	077-128
196.011	077-23
196.012	077-64
196.031	077-2
	077-23
196.032,	
196.081,	
196.091,	
196.101	077-23
196.181	077-128
196.193	077-64

Section	Opinion No.
196.197,	
196.202	077-23
197.056,	
197.271,	
197.291	077-99
197.650,	
197.700	077-52
199.032	077-126
199.262	077-99
200.065	077-105
200.071	077-100
	077-105
200.111	077-105
200.181	077-100
205.042	077-34
205.063	077-82
206.45,	
206.46	077-56
212.02,	
212.031,	
212.04,	
212.08	077-57
212.15	077-99
212.21	077-57
214.45	077-99
215.31	077-83
	077-120
215.32	077-83
215.34	077-120
215.37	077-83
	077-120
215.425	077-98
215.44	077-62
215.44-215.53	077-62
	077-80
215.47	077-62
	077-80
215.49,	
215.50,	
215.51	077-62
215.685	077-14
216.011	077-31
	077-62
216.111	077-121
216.231	077-11
216.345	077-115
218.20,	
218.20-218.26	077-21

Section	Opinion No.
218.21	077-14
	077-21
218.215,	
218.23,	
218 245	077-21
218.25	077-14
218.31	077-21
	077-54
	077-121
218.33	077-121
218.34	077-54
218.36	077-120
219.06	077-120
220.03,	
220.62,	
220.63,	
220.68	077-126
230.01,	
230.03,	
230.05,	
230.12	077-131
230.201	077-123
230.21,	
230.22	077-131
230.23	077-61
	077-123
	077-131
230.33	077-61
230.752,	
230.753,	
230.7535,	
230.754,	
230.759,	
230.760,	
230.769	077-31
231.39	077-123
231.600-231.610,	
231.601,	
231.603,	
231.611	077-60
235.34	077-38
236.24,	
236.33	077-38
237.18	077-38
240.095	077-83
241.471	077-58
253.03	077-110

CITATOR TO FLORIDA STATUTES

Section	Opinion No.
253.76	077-95
255.052,	
255.053	077-47
285.061,	
285.16	077-29
286.011	077-10
	077-43
	077-46
	077-48
	077-53
	077-122
	077-132
	077-137
	077-138
	077-143
286.012	077-130
	077-138
287.012	077-140
287.042,	
287.055	077-22
	077-140
287.15,	
287.16,	
287.161	077-83
316.002,	
316.003,	
316.007	077-84
316.008	077-49
	077-84
316.018	077-79
316.028,	
316.029,	
316.030,	
316.040,	
316.053,	
316.054,	
316.055,	
316.056,	
316.0565,	
316.075	
316.061	077-70
316.066	077-49
316.081,	
316.082,	
316.083,	
316.084,	
316.085,	
316.086,	

Section	Opinion No.
316.087, (Cont.)	
316.088,	
316.089,	
316.090,	
316.091,	
316.092,	
316.094,	
316.095,	
316.096,	
316.098,	
316.100,	
316.102,	
316.104,	
316.107,	
316.108,	
316.109,	
316.110,	
316.1105	077-70
316.111	077-84
316.113,	
316.121,	
316.122,	
316.123,	
316.125,	
316.126,	
316.133,	
316.134,	
316.138,	
316.139,	
316.151,	
316.152,	
316.153,	
316.154,	
316.155,	
316.157,	
316.158,	
316.159,	
316.162,	
316.181,	
316.182,	
316.183,	
316.184,	
316.185,	
316.186,	
316.196,	
316.197,	
316.198,	
316.205,	

Section	Opinion No.
316.206, (Cont.)	
316.217,	
316.236,	
316.238	077-70
316.243-316.249	077-84
316.2431	077-70
316.287	077-84
316.30	077-70
317.171,	
317.191	077-49
318.13	077-70
	077-79
318.14	077-79
318.17	077-70
	077-79
318.22	077-70
320.081	077-120
320.24	077-82
321.05	077-49
322.01,	
322.09	077-102
322.12,	
322.121	077-120
334.02,	
334.021,	
334.211	077-15
336.59	077-121
339.083	077-121
339.12	077-56
350.12	077-30
370.01	077-40
370.02,	
370.0211	077-28
370.08,	
370.083,	
370.102	077-40
373.016,	
373.023	077-95
373.026	077-51
	077-95
373.036,	
373.039,	
373.044	077-95
373.069	077-17
	077-95
373.0693	077-17
373.0695	077-17
	077-93

CITATOR TO FLORIDA STATUTES

Section	Opinion No.
373.0697	077-17
373.076,	
373.087,	
373.113,	
373.114,	
373.171	077-95
373.1962	077-51
373.206	077-95
373.503	077-17
	077-93
373.539	077-93
380.012-380.10	077-7
	077-44
380.021	077-7
	077-44
380.031	077-7
380.06	077-7
	077-44
394.457,	
394.66,	
394.67,	
394.68,	
394.69,	
394.70,	
394.71,	
394.73,	
394.75,	
394.76	077-97
395.066	077-107
402.181	077-12
403.031	077-95
403.061	077-41
	077-95
403.087,	
403.088	077-41
403.1822,	
403.1823	077-95
403.301,	
403.707	077-41
403.802	077-28
403.803,	
403.804	077-95
406.07,	
406.08,	
406.09	077-86
406.11	077-86
	077-114
416.07,	
416.08	077-137
421.04	077-67
	077-69
	077-92
421.05	077-67
	077-69
421.08	077-67
	077-69
	077-92
421.261,	
421.27,	
421.28,	
421.50	077-92
440.23,	
440.24	077-99
447.20-447.34	077-40
447.309	077-72
447.605	077-48
458.1201	077-103
458.13,	
458.135	077-96
458.24	077-107
464.021	077-96
	077-96A
464.25	077-96
470.01,	
470.10,	
470.12,	
470.30	077-75
500.02,	
500.16,	
500.341	077-107
501.021,	
501.025,	
501.031,	
501.204	077-32
550.13,	
550.14	077-14
551.01	077-14
559.72	077-32
616.07,	
616.08,	
616.091,	
616.11,	
616.12,	
616.15,	
616.17,	
616.255, (Cont.)	
616.256	077-25
624.408	077-113
625.012,	
625.031	077-113
627.351	077-113
629.011,	
629.021,	
629.061,	
629.071,	
629.081,	
629.101,	
629.191,	
629.261	077-113
648.25	077-3
658.02	077-126
659.24	077-80
659.67	077-126
665.021,	
665.231,	
665.321	077-80
691.15,	
691.16	077-85
695.01	077-99
696.05	077-90
701.04	077-90
711.03,	
711.08,	
711.16,	
711.69,	
711.70,	
711.801,	
711.802	077-13
713.07	077-99
713.21	077-90
713.50	077-50
732.918,	
732.9185	077-114
737.251,	
737.504,	
737.505,	
737.506,	
737.507,	
737.508,	
737.509,	
737.510	077-85
743.07	077-6
744.331	077-1

CITATOR TO FLORIDA STATUTES

Section	Opinion No.
768.28	077-98
	077-113
775.08	077-79
775.082	077-4
775.083	077-4
	077-129
775.0835	077-129
775.084	077-4
777.04	077-4
	077-112
790.001	077-79
810.02	077-4
	077-112
832.06	077-120
843.01,	
843.02	077-35
849.06	077-6
897.21	077-129
901.01,	
901.09,	
901.15,	
901.17	077-79
901.18,	
901.25	077-35
901.28	077-79
903.29	077-3
905.185	077-86
905.26	077-125
924.065,	
924.14,	
924.15,	
924.16,	
924.17	077-42
925.09	077-86
934.02	077-32
	077-122
934.03,	
934.07	077-32
936.11,	
936.17	077-86
943.10	077-63
	077-127
943.11	077-59
	077-127
943.12	077-63
	077-127
943.12-943.14	077-63
943.14	077-63
	077-127
943.15,	
943.16	077-127
943.25	077-59
	077-127
944.11	077-55
944.27,	
944.271,	
944.291	077-39
945.30	077-39
947.135,	
947.16,	
947.17	077-73
951.03,	
951.06,	
951.23	077-55

CHAPTERS, FLORIDA STATUTES

Chapter	Opinion No.	Chapter	Opinion No.
13, part II	077-74	166 (cont.)	077-82
20	077-111		077-116
29	077-68		077-124
40	077-124		077-135
86	077-48	166, part I	077-135
88	077-77	167	077-27
95	077-99		077-71
98	077-109		077-116
106	077-46	171	077-133
110	077-37	175	077-54
112, part III	077-33	186	077-49
	077-130		077-84
	077-138	196	077-23
119	077-10		077-64
	077-43	197	077-52
	077-46		077-99
	077-48	205	077-34
	077-49		077-82
	077-69	212	077-57
	077-125	215	077-62
120	077-46		077-83
	077-65	218, part II	077-14
	077-66		077-21
	077-107	218, part III	077-21
	077-142		077-54
121	077-101		077-67
125, part IV	077-88		077-121
128, 129	077-121	220	077-126
145	077-88	220, part II, part VII	077-126
	077-131	230	077-61
154	077-58		077-123
155	077-76	287, part I	077-22
	077-91		077-140
160	077-65	287, part II	077-83
	077-117	298	077-45
	077-142		077-65
163	077-65		077-142
	077-142	316	077-49
163, part III	077-119		077-79
163, part IV	077-20		077-84
	077-45	317	077-49
163, part V	077-45	318	077-70
165	077-45	320	077-84
	077-130	322	077-84
166	077-27		077-102
	077-71	324	077-84
	077-72	367	077-92

CHAPTERS, FLORIDA STATUTES

Chapter	Opinion No.	Chapter	Opinion No.
370	077-40	458 (cont.)	077-107
373	077-17	459	077-107
	077-51	464	077-96
	077-65	470	077-75
	077-93	478	077-7
	077-95	500	077-107
	077-142	501	077-32
380	077-7	550, 551	077-26
	077-44	559, part V	077-32
	077-65	582	077-65
	077-81		077-142
	077-142	607	077-126
391	077-6	616	077-25
394	077-97	617	077-97
394, part IV	077-97	625, 629	077-113
395	077-107	691, part II	077-85
403	077-95	711	077-13
421	077-67	737, part V	077-85
	077-92	838	077-9
447, part II	077-72	901	077-79
458	077-96A	934	077-32
	077-103		077-122

STATE CONSTITUTION

Article	Opinion No.
DR, s. 5, 1885	077-55
DR, s. 11, 1885	077-42
I, s. 3	077-25
	077-55
I, s. 4	077-25
I, s. 9	077-99
	077-139
I, s. 10	077-26
	077-70
	077-99
I, s. 16	077-42
	077-79
II, s. 3	077-74
II, s. 5(a)	077-31
	077-63
	077-74
	077-89
II, s. 5(c)	077-88
II, s. 7	077-7
II, s. 8	077-136
II, s. 8(a)	077-136
II, s. 8 (b)	077-136
II, s. 8(d)	077-136
II, s. 8(e)	077-136
III, s. 4(a)	077-10
III, s. 6, 1885	077-10
III, s. 7	077-56
III, s. 8	077-56
III, s. 10	077-20
	077-40
	077-45
III, s. 11	077-20
	077-100
	077-121
	077-134
III, s. 11(a)	077-20
	077-121
III, s. 11(a) (1)	077-134
III, s. 11(b)	077-20
III, s. 13	077-134
III, s. 13, 1885	077-10
III, s. 17	077-9
III, s. 20, 1885	077-134
III, s. 27, 1885	077-88
IV, s. 6	077-51
	077-111
IV, s. 7(a)	077-92
V, s. 2(a)	077-10

Article	Opinion No.
V, s. 11	077-9
V, s. 12	077-9
	077-136
V, s. 12(a)	077-9
V, s. 12(f)	077-9
V, s. 19	077-79
VI, s. 1	077-42
VI, s. 2	077-1
VI, s. 4	077-1
	077-42
VII, s. 1	077-12
VII, s. 1(a)	077-94
VII, s. 1(c)	077-56
	077-83
VII, s. 2	077-105
VII, s. 3(b)	077-128
VII, s. 6	077-2
VII, s. 6(c)	077-2
VII, s. 7	077-38
VII, s. 8	077-38
VII, s. 9	077-38
	077-100
VII, s. 9(a)	077-21
	077-81
	077-93
	077-94
VII, s. 9(b)	077-21
	077-93
	077-100
VII, s. 10	077-19
	077-27
	077-71
	077-97
	077-113
VII, s. 10(c)	077-19
VII, s. 10(d)	077-19
VII, s. 12	077-14
	077-19
	077-113
VII, s. 12(b)	077-100
VIII	077-38
	077-51
VIII, s. 1	077-7
	077-21
	077-38
VIII, s. 1(c)	077-81
	077-88
VIII, s. 1(d)	077-36
	077-97

STATE CONSTITUTION

Article	Opinion No.
VIII, s. 1(e)	077-119
VIII, s. 1(f)	077-14
	077-38
	077-55
	077-119
VIII, s. 1(g)	077-21
	077-81
	077-119
VIII, s. 1(i)	077-14
VIII, s. 2(b)	077-113
VIII, s. 2(c)	077-133
VIII, s. 3	077-21
VIII, s. 4	077-35
VIII, s. 5, 1885	077-119
VIII, s. 6(b)	077-14
	077-38
VIII, s. 6(e)	077-21

Article	Opinion No.
VIII, s. 6(e) (cont.)	077-45
VIII, s. 6(f)	077-21
IX, s. 4	077-38
	077-131
IX, s. 10, 1885	077-113
IX, s. 15, 1885	077-38
X, s. 3	077-9
X, s. 12(g)	077-20
	077-121
XI, s. 2	077-65
	077-66
XI, s. 2(c)	077-65
	077-66
XII, s. 8, 1885	077-38
XII, s. 15	077-100
XVI, s. 7, 1885	077-134
XVI, s. 15, 1885	077-74

SESSION LAWS

Chapter	Year	Opinion No.
7080	1915	077-105
7976	1919	077-105
15558	1931	077-25
15561	1931	077-25
15562	1931	077-25
22968	1945	077-45
23535	1945	077-24
25270	1949	077-93
25786	1949	077-27
25962	1949	077-116
26465	1949	077-134
27438	1951	077-80
27509	1951	077-27
27676	1951	077-122
27893	1951	077-24
28887	1953	077-100
29432	1953	077-40
29433	1953	077-40
29901	1955	077-77
30235	1955	077-45
30807	1955	077-118
59-369		077-117
59-393		077-77
59-1222		077-27
59-1736		077-134

Chapter	Year	Opinion No.
59-1806		077-54
61-691		077-17
		077-93
61-1931		077-80
61-1937		077-80
61-2671		077-134
63-400		077-117
63-1192		077-80
63-1539		077-122
63-1553		077-122
63-1787		077-99
65-134		077-109
65-1316		077-80
65-1319		077-80
65-2191		077-54
67-125		077-141
67-764		077-44
67-1170		077-80
67-1171		077-80
67-1724		077-142
69-63		077-97
69-345		077-14
69-895		077-80
69-898		077-80
69-914		077-80

SESSION LAWS

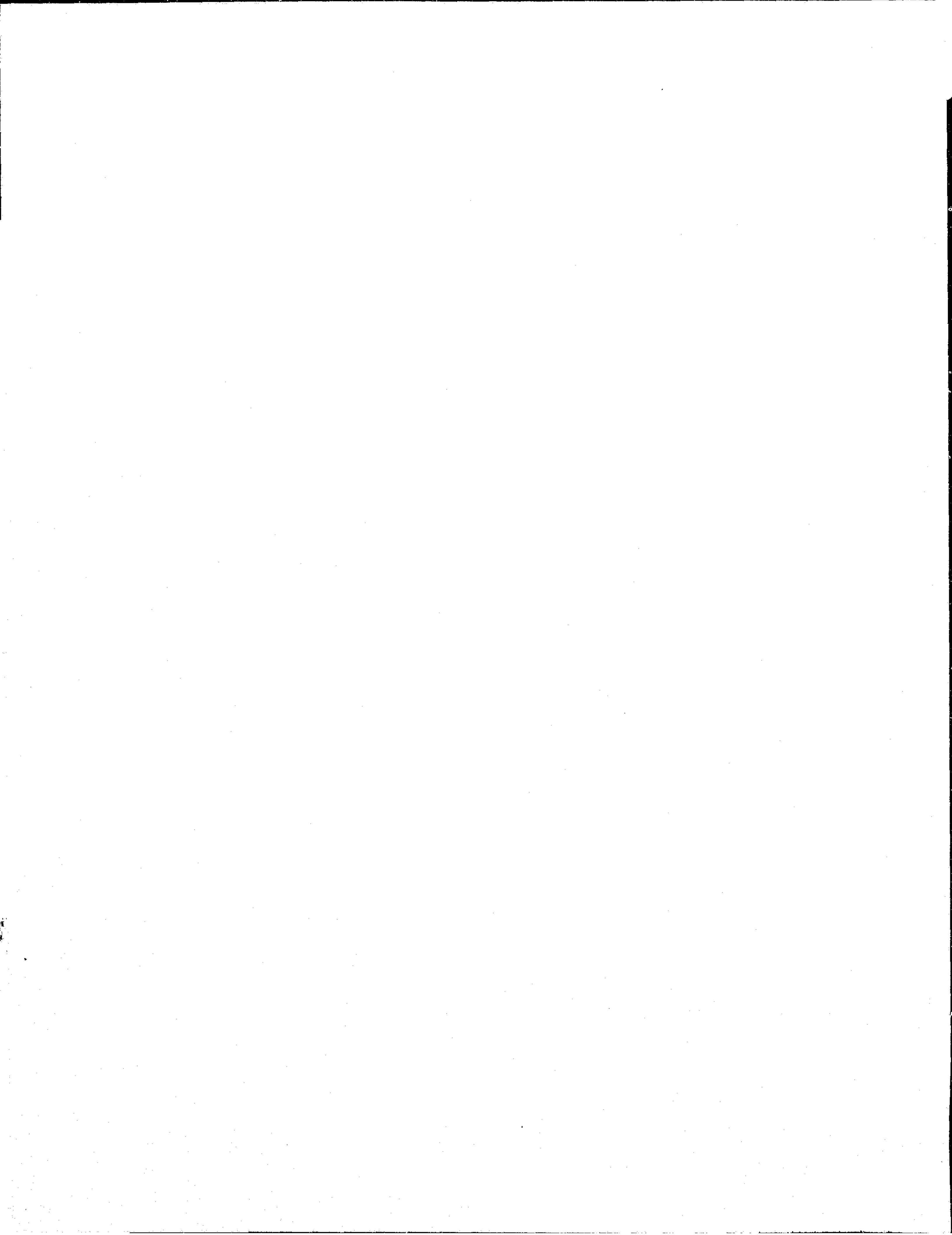
Chapter Year	Opinion No.
69-1215	077-116
69-1322	077-142
69-1484	077-134
69-1491	077-134
70-70	077-47
70-95	077-83
70-901	077-134
70-966	077-119
71-14	077-105
71-135	077-49
	077-84
71-578	077-80
71-789	077-76
71-803	077-8
72-207	077-83
72-268	077-52
72-275	077-40
72-278	077-126
72-306	077-34
72-327	077-104
72-372	077-2
72-404	077-68
72-510	077-26
72-625	077-8
72-662	077-134
73-21	077-6
73-129	077-27
	077-71
	077-82
	077-105
73-152	077-126
73-155	077-109
73-208	077-40
73-332	077-52
	077-99
73-349	077-121
73-411	077-80
73-412	077-80
73-413	077-80
73-558	077-142
74-11	077-23
74-100	077-40
74-106	077-85
74-114	077-51
	077-95
74-192	077-45
	077-130
74-194	077-21
74-227	077-60
74-253	077-47
74-264	077-2
	077-23
74-326	077-7
74-386	077-127
74-430	077-105
74-449	077-80
75-22	077-28
	077-51
	077-95
75-42	077-19
75-43	077-19
75-44	077-19
75-49	077-12
75-225	077-43
	077-48
75-348	077-80
76-4	077-47
76-131	077-41
76-155	077-53
76-208	077-71
	077-131
76-237	077-86
76-243	077-17
	077-93
76-274	077-73
76-285	077-11
	077-59
	077-83
76-286	077-84
76-329	077-105
76-338	077-80
76-408	077-22
77-30	077-107
77-39	077-115
77-49	077-78
	077-111
77-50	077-116
77-64	077-91
77-77	077-86
77-86	077-113
77-89	077-131
77-102	077-93
77-105	077-103

SESSION LAWS

Chapter Year	Opinion No.
77-157	077-126
77-147	077-120
77-165	077-121
77-172	077-114
77-174	077-117
77-175	077-87
	077-109
77-180	077-54
77-201	077-66
77-209	077-81
77-284	077-120
77-312	077-97
77-354	077-99
77-357	077-120
77-363	077-106
77-377	077-56
77-380	077-113
77-431	077-124
77-452	077-129
77-468	077-70

COMPILED GENERAL LAWS, 1927

Section	Opinion No.
490	077-33
	077-69



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