ANNUAL REPORT

of the

ATTORNEY GENERAL

STATE OF FLORIDA

January 1 through December 31, 1978

JIM SMITH
Attorney General

Tallahassee, Florida
1979

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 $11.70 per book for 1100 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

JIM SMITH
ATTORNEY GENERAL

TALLAHASSEE, FLORIDA 32304

January 15, 1979

LETTER OF TRANSMITTAL

Honorable Bob Graham
Governor of Florida
The Capitol

Dear Governor:

In accordance with the constitutional requirement that each officer of the Executive Department report to the Governor annually on the official actions of his or her office, I submit herewith the report of the Attorney General for the year 1978.

The report includes the opinions rendered during 1978 by my predecessor, Robert L. Shevin. However, the organizational chart and personnel list reflect changes made under my administration.

The opinions are indexed alphabetically by subject in the back of the book, together with a table of constitutional and statutory sections cited in the opinions.

Most respectfully,

JIM SMITH
ATTORNEY GENERAL

JS/gc

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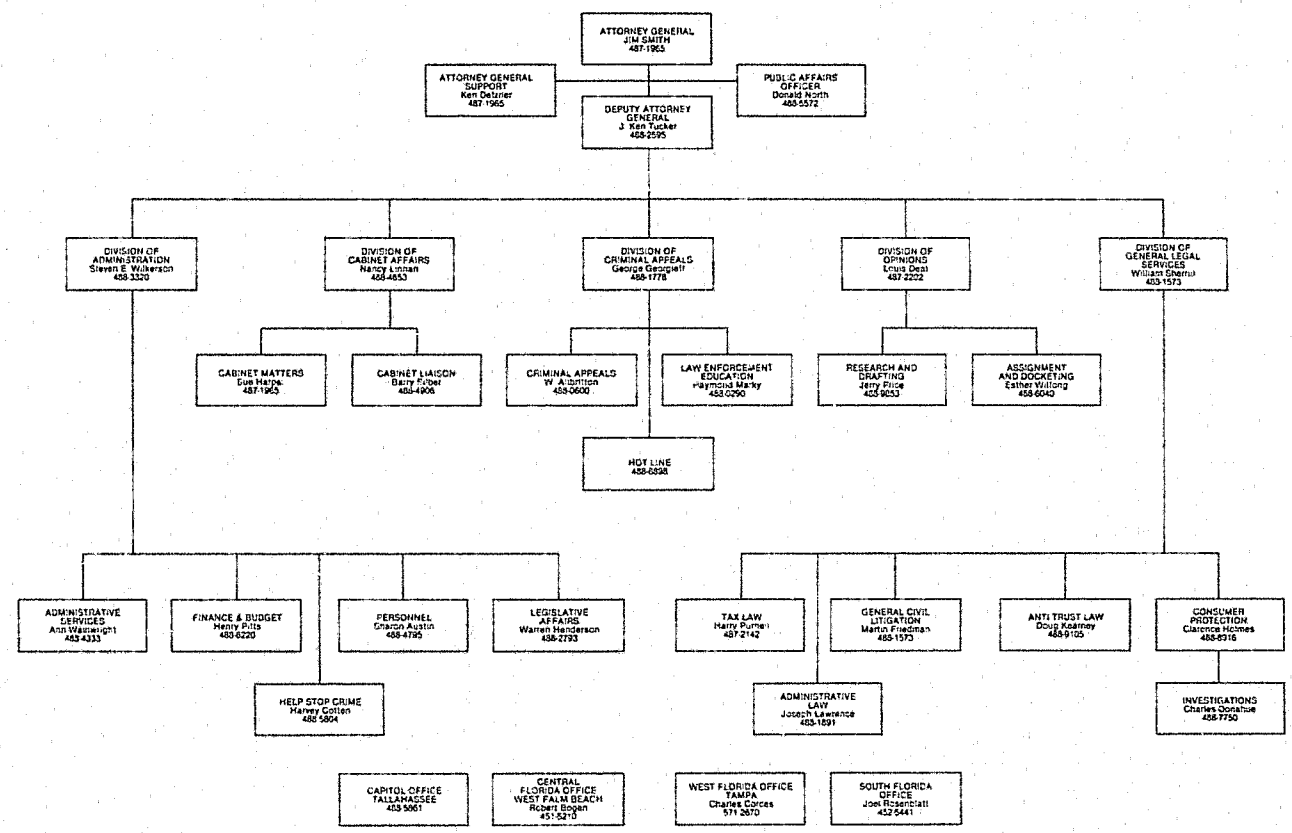

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Jim Smith
The Capitol
Tallahassee

ANNUAL REPORT

of the

ATTORNEY GENERAL

State of Florida

January 1 through December 31, 1978

078-1—January 1, 1978

JACKSONVILLE TRANSPORTATION AUTHORITY

EXPRESSLY DESIGNATED BY STATUTE, SINCE 1955, AS AN AGENCY OF THE STATE

To: James H. Davis, Director, Finance and Administration, Jacksonville Transportation Authority, Jacksonville

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Is the Jacksonville Transportation Authority an agency or instrumentality of the State of Florida?
2. If the Jacksonville Transportation Authority is a state agency or instrumentality, how long has it enjoyed such status?

SUMMARY:

The Jacksonville Transportation Authority is expressly designated by statute (and has been so designated since its creation as the Jacksonville Expressway Authority in 1955) as an agency of the State of Florida, and thus should be deemed to be a state agency for purposes of disposition of interest earned on undisbursed grant-in-aid funds pursuant to s. 203 of Pub. L. No. 90-577 (42 U.S.C.A. s. 4213), the Intergovernmental Cooperation Act of 1968.

You have stated that confirmation by this office of the Jacksonville Transportation Authority's status as an agency of the State of Florida for purposes of Pub. L. No. 90-577 (the Intergovernmental Cooperation Act of 1968) has been requested by the Urban Mass Transportation Administration (UMTA) of the United States Department of Labor. Such confirmation is necessary to determine the applicability to the authority of s. 203 of Pub. L. No. 90-577 (42 U.S.C.A. s. 4213) providing in pertinent part: "*States* shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes." (Emphasis supplied.) Section 102 of Pub. L. No. 90-577 (42 U.S.C.A. s. 4201[2]) provides that "State" means "any of the several States of the United States . . . or *any agency or instrumentality of a State*, but does not include the governments of the political subdivisions of the State." (Emphasis supplied.)

Section 1.01(9), F. S., provides that the term "political subdivision" includes "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge

districts, and all other districts in this state." That statutory definition has been provided by the Legislature for application where the context permits, and where a specific or different definition is not provided as a part of and in the context of some other statute. The Jacksonville Transportation Authority does not fall within any of the categories of "political subdivision" enumerated in s. 1.01(9). In addition, and more important, is the language used by the Legislature in creating the authority, whereby it is expressly designated as an agency of the state. The authority was originally created as the Jacksonville Expressway Authority by Ch. 29996, 1955, Laws of Florida, section 3 of which provides in pertinent part:

> There is hereby created and established a body politic and corporate *and agency of the State of Florida,* to be known as the "Jacksonville Expressway Authority", (hereinafter referred to as "Authority"). (Emphasis supplied.)

Section 3, above, was encoded as s. 349.03, F. S. Eleven years later, by Ch. 71-101, Laws of Florida, the authority's name was changed to the Jacksonville Transportation Authority, and s. 349.03 now reads:

> There is hereby created and established a body politic and corporate *and an agency of the state* to be known as the Jacksonville Expressway Authority, redesignated as the Jacksonville Transportation Authority, and hereinafter referred to as the authority. (Emphasis supplied.)

It is also provided in s. 349.02(1), F. S., that "[t]he term 'authority' shall mean the body politic and corporate, *an agency of the state* created by this chapter." (Emphasis supplied.) Section 349.02(1), *id.*, was originally enacted as s. 2(a) of Ch. 29996, *supra.*

While the language of ss. 349.03(1) and 349.02(1), *supra,* is clear in providing that the Jacksonville Transportation Authority is an agency of the state, I would also note that the authority's status as an agency of the state has been specifically affirmed in AGO's 055-326 and 057-208, as to the applicability of then-existing provisions of state purchasing and retirement laws. The conclusions of those Attorney General Opinions were based primarily on the language of the statutes creating the authority, which language must be followed and presumed valid unless ruled otherwise by the courts. Also, reference to the authority as a "state agency" was made by the Florida Supreme Court (although that point was not at issue) in State v. Jacksonville Expressway Authority, 139 So.2d 135, 137 (Fla. 1962), wherein the court stated:

> It is a proper function of the Attorney General, in the interest of the public, to test the exercise, or threatened exercise, of power of such a *corporate state agency* [the authority] through the process of a quo warranto proceeding. (Emphasis supplied.)

Thus, by virtue of its express designation as such by the Legislature, the Jacksonville Transportation Authority must be deemed to be (and to have been since its creation as the Jacksonville Expressway Authority in 1955) an agency of the State of Florida. As such, it would appear that the authority is subject to the above-quoted provision in s. 203 of Pub. L. No. 90-577 (42 U.S.C.A. s. 4213) regarding disposition of interest earned on grant-in-aid funds pending disbursement.

Your questions are answered accordingly.

078-2—January 3, 1978

COUNTIES

NONCHARTER COUNTY COMMISSION NOT AUTHORIZED TO PROVIDE INSURANCE TO CIRCUIT COURT JUDGE WHO RESIDES IN ANOTHER COUNTY

To: Robert L. Nabors, Brevard County Attorney, Titusville

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Does the Board of County Commissioners of Brevard County have the discretion under Ch. 72-425, Laws of Florida, or any other law to provide medical, health, accident, and life insurance programs for a Judge of the Circuit Court of the Eighteenth Judicial Circuit who resides in Seminole County?

SUMMARY:

Section 1, Ch. 72-425, Laws of Florida, imposes a residency requirement which pertains to county court judges and to circuit court judges. In addition, a circuit court judge may participate in a county's insurance program under s. 112.081, F. S., only if on July 1, 1967, he was participating in the program and if he is a resident of the county. Thus, the Board of County Commissioners of Brevard County does not have the authority to provide medical, health, accident and life insurance to a judge of the Circuit Court of the Eighteenth Judicial Circuit who resides in Seminole County.

As a noncharter county, Brevard County may exercise only those powers which have been granted by general or special law. *See generally* AGO 077-38 in which I concluded that noncharter counties have no constitutional powers of their own, but rather they may exercise only those powers which are conferred on them by general or special law. Section 112.08, F. S., in pertinent part empowers counties as local government units to provide life, health, accident, hospitalization, or annuity insurance, or all of any kinds of such insurance for its officers and employees upon a group insurance plan. Section 1 of Ch. 72-425, Laws of Florida, expressly grants certain county court judges and circuit judges the right to participate in the county's insurance program by stating:

> *Each judge of the circuit court and each county judge of Brevard County who is a resident of Brevard County* shall be entitled to participate in the same manner and on the same basis as the employees of Brevard County in the county's medical, health, accident and life insurance programs. (Emphasis supplied.)

According to your letter, a question has arisen regarding the interpretation of Ch. 72-425 as to whether the residency requirement contained therein is applicable to both the county court judges and the circuit court judges or to the county court judges alone.

Under the Florida Constitution, county court judges are required to be residents of the county in which they serve. *See* s. 8, Art. V, State Const., adopted by special election March 12, 1972, which provides for the eligibility of judges by stating in pertinent part that "[n]o person shall be eligible unless he is an elector of the state and *resides in the territorial jurisdiction of his court.*" (Emphasis supplied.) A similar provision was present in the 1885 Constitution. *See* s. 13A, Art. V, State Const. 1885, as amended, which required that "judges of other courts [other than the Supreme Court, district courts of appeal and circuit courts] shall be citizens of the county served." If the residency requirement contained in s. 1, Ch. 72-425, Laws of Florida, is considered to pertain only to "each county judge of Brevard County," the phrase "who is a resident of Brevard County" is mere surplusage, as the judges are already required by the Constitution to be residents of the county.

Generally, words in a statute will not be construed as surplusage if a reasonable construction which will give them some force and meaning is possible. *See* Pinellas County v. Wooley, 189 So.2d 217 (2 D.C.A. Fla., 1966); *see also* State Department of Public Welfare v. Bland, 66 So.2d 59 (Fla. 1953), State *ex rel.* Florida Industrial Commission v. Willis, 124 So.2d 48 (1 D.C.A. Fla., 1960), *cert. denied*, 133 So.2d 323 (Fla. 1961); *cf.* 82 C.J.S. *Statutes* s. 343. The Legislature is presumed to intend that each word or phrase within a statute has meaning. Therefore, an interpretation of the residency requirements in Ch. 72-425 which would make that phrase mere surplusage generally will not be favored.

In addition, such an interpretation would remove any limitation within the act as to which circuit court judges may participate in the county's insurance program; under the express terms of the act, any circuit court judge would be eligible. It is a well-settled rule

of statutory construction that statutes should not be construed in a way which will lead to untenable conclusions. *See* Austin v. State *ex rel.* Christian, 310 So.2d 289 (Fla. 1975); School Board of Marion County v. Florida Public Employee Relations Commission, 341 So.2d 819 (1 D.C.A. Fla., 1977) (statute should not be construed so as to create absurd or unreasonable consequences); Thomas v. State, 317 So.2d 450 (3 D.C.A. Fla., 1974); Miller v. State, 297 So.2d 36 (1 D.C.A. Fla., 1974), *aff'd sub nom*, Winston v. State, 308 So.2d 40 (Fla. 1975). Therefore, based upon the foregoing, I am of the view that the residency requirement contained in s. 1, Ch. 72-425, Laws of Florida, pertains to each county court judge of Brevard County *and* to each circuit court judge. It should be noted that the residency requirement contained in s. 8, Art. V, State Const., *supra*, also applies to circuit court judges. Therefore, in order for a circuit court judge to reside in Brevard County, the county must be within the territorial jurisdiction of his court. Thus, a circuit court judge who resides in Brevard County would also serve that county as a part of his judicial circuit.

As previously stated, the county is authorized under s. 112.08, F. S., to provide group insurance programs for its officers and employees. Section 112.081, F. S., extends this coverage by stating:

> All circuit judges who, on July 1, 1967, are participating in an insurance program for county employees are hereby deemed to be county employees for the purpose of such participation even though there is no actual cash salary supplement received from the county.

Section 112.081 has been interpreted by this office to extend a county's insurance programs provided for in ss. 112.08-112.114, F. S., *only* to those circuit judges who reside within the county. Attorney General Opinion 069-50. Therefore, a circuit court judge residing in Seminole County would not be eligible to participate in Brevard County's insurance programs under s. 112.081. It should be noted that a circuit court judge is eligible, however, to participate in the State Officers and Employees Group Insurance Program under s. 112.075, F. S.

078-3—January 3, 1978

MUNICIPALITIES

TRUSTEE OF MUNICIPAL PENSION FUND FOR POLICEMEN AND FIREMEN IS CITY OFFICER

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

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

> **Is a trustee of the City of Delray Beach's pension plan for policemen and firemen a city officer or employee as those terms are used in the Delray Beach Downtown Development Authority Statute?**

SUMMARY:

> **A trustee of the municipality's pension fund for policemen and firemen may not serve as a member of the downtown development authority under s. 4(c) of Ch. 71-604, Laws of Florida, which prohibits city officers or employees from serving as members of the authority.**

According to your letter, the City Council of Delray Beach is interested in appointing a bank president, presently serving on the board of trustees of the city's pension plan for firemen and policemen, to the Delray Beach Downtown Development Authority. The council is concerned as to whether such an appointment would violate the provisions of Ch. 71-604, Laws of Florida, the enabling legislation for the downtown development authority.

The Delray Beach Downtown Development Authority (hereafter the authority) was established as a body corporate and an agency of the city by Ch. 71-604, Laws of Florida, to perform a specific municipal function, *i.e.*, to formulate and recommend long-range plans for the more efficient use of the downtown area and to implement those downtown development plans approved by the city council. *See generally* s. 6, Ch. 71-604, regarding the functions of the authority. In the performance of these functions, the authority is empowered to, *inter alia*, enter into contracts, sue and be sued as a body corporate, use a corporate seal, borrow money, and issue and sell revenue certificates. *See* s. 7, Ch. 71-604. Members of the authority are appointed by the City Council of Delray Beach. Section 4(a), Ch. 71-604.

Section 4(c) of Ch. 71-604, states in pertinent part:

> To qualify for appointment to the Authority and to remain qualified for service on it, a *prospective member* or a member already appointed shall reside in or have his principal place of business in the city, [and] *shall not be serving as a city officer or employee* . . . . (Emphasis supplied.)

This opinion is expressly limited as to whether the language contained in the foregoing statutory provision prohibits the appointment of a trustee of the municipal pension plan to the authority. You inquire as to whether a trustee of the board of trustees of the firemen's and policemen's pension trust fund, established pursuant to Chs. 175 and 185, F. S., respectively, is a municipal officer or employee within the purview of s. 4(c), Ch. 71-604, Laws of Florida.

Chapters 175 and 185, F. S., provide for the establishment of pension trust funds for firemen and policemen, respectively, in each municipality of the state. Sections 175.041 and 185.03, F. S. The funds consist in part of moneys derived from municipal license taxes levied upon fire insurance companies (firemen's pension trust fund) and casualty insurors (policemen's pension trust fund) and other contributions made by the municipalities. *See generally*, ss. 175.091-175.101 and ss. 185.07-185.08, F. S., regarding the creation and maintenance of these funds. The general administration and responsibility for the proper operation of the pension trust funds are vested in the boards of trustees. *See generally*, ss. 175.071 and 185.06, F. S. and ss. 19-36(1) and (11) and 19-37, Code of City of Delray Beach, regarding the powers of these boards. *See also* ss. 175.061 and 185.05, F. S., which statutorily provide for the composition of the board of trustees of the pension funds; s. 19-36(1), Code of City of Delray Beach, provides for a board of nine trustees composed of the mayor, the fire chief, the police chief, two firemen, two policemen, and two members appointed by the city council.

This office has previously concluded that the boards of trustees of municipal pension trust funds for firemen and policemen, created pursuant to Chs. 175 and 185, F. S., respectively, are municipal boards and agencies of the municipalities and are not autonomous entities. *See* AGO 074-109. This conclusion is based in part on the consideration that the creation of pension funds is generally considered a part of the compensation for services to the municipality. *See generally* 62 C.J.S. *Municipal Corporations* s. 614; Voorhees v. City of Miami, 199 So. 313 (Fla. 1940); 3 McQuillan *Municipal Corporations* s. 12.142. *See also* AGO 074-217 in which I concluded that the board of trustees of the City of Tampa Pension Fund for Firemen and Policemen, created by special law, is a municipal board and therefore must use the services of the city attorney in transacting its business. *See* 62 C.J.S. *Municipal Corporations* s. 695(d) which states generally the duties of a city attorney are to render legal services to a municipality and its agencies. It should be noted that in AGO 074-109, I concluded that the apparent legislative grant of authority in ss. 175.291 and 185.29, F. S., by which the board of trustees may determine which actions may be brought by the city attorney in their behalf, did not alter the board's status as a municipal board or agency.

Therefore, based upon the foregoing, I am of the view that the board of trustees of the City of Delray Beach's pension fund for policemen and firemen is a municipal board and agency; its officers and employees are also officers and employees of the municipality. Thus under the express terms of s. 4(c), Ch. 71-604, Laws of Florida, which prohibits city officers and employees from serving as members of the authority, it appears that the city council may not appoint a trustee of the city's pension plan for policemen and firemen to the City of Delray Beach Downtown Development Authority.

078-4—January 10, 1978

FLORIDA CRIMES COMPENSATION ACT

COURT MAY WAIVE SURCHARGE

To: Eric Smith, Chairman, Committee on Criminal Justice, Select Committee on Organized Crime, Tallahassee

Prepared by: Thomas A. Beenck, Assistant Attorney General

QUESTION:

May the 5 percent surcharge imposed under s. 960.25, F. S., be waived, modified, or deferred by the court if it finds that such surcharge would impose a severe financial hardship?

SUMMARY:

The 5 percent surcharge on bail bonds, fines, and civil penalties imposed in Ch. 77-452, Laws of Florida, may be waived by the court if it is deemed by the court to impose a severe financial hardship.

Your question is answered in the affirmative.

Section 1 of Ch. 77-452, Laws of Florida, creating s. 960.20, F. S., imposes a $10 additional cost to be imposed in addition to any other cost required to be imposed by law where any person pleads nolo contendere or guilty to, or is convicted of, a felony or misdemeanor. The section further provides in pertinent part:

> The court may waive, modify, or defer payment of the additional *costs* imposed by *this act* if it finds *they* would impose a severe financial hardship. (Emphasis supplied.)

Coupled with the additional $10 cost imposed in s. 960.20, F. S., s. 6 of Ch. 77-452, Laws of Florida, creates s. 960.25, F. S. This section creates a 5 percent surcharge on all fines, bail bonds, and civil penalties prescribed by law, said surcharge to be deposited in the Crimes Compensation Trust Fund pursuant to s. 2 of Ch. 77-452, amending s. 142.01, F. S. There is no specific language in s. 960.25 permitting a court to waive, modify, or defer payment of the 5 percent surcharge. Your question, whether the statutory language of s. 960.20, which permits a waiver, modification, or deferral of the $10 additional cost applies to s. 960.25, is one of legislative intent. To determine the intent of the Legislature in passing Ch. 77-452, it is necessary to apply a rule of statutory construction.

The Legislature is presumed to have a working knowledge of the English language, and if part of a statute appears to have a clear meaning if considered alone, but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia*, it is necessary to ascertain the overall intention of the Legislature. Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). Further, it is never presumed that the Legislature intended to enact purposeless, and therefore useless, legislation. Dickinson v. Davis, 224 So.2d 262 (Fla. 1962); Shares v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962).

With these presumptions in mind, the Legislature's use of the plurals, "costs" and "they" in s. 960.20, F. S., leads me to the conclusion that it was the intent of the Legislature to allow the 5 percent surcharge provided for in s. 960.25, F. S., to be waived, modified, or deferred by a court if the court determines the surcharge would impose a severe financial hardship. Further, supporting this conclusion is the wording of s. 960.20 that the court may waive the additional costs imposed, ". . . by this act." If it had been the Legislature's intention to limit the waiver of the costs to the $10 additional cost, the word used would have been "section" in place of "act," thereby specifically referring to the additional $10 cost provided for in that section.

I point out that the final interpretation and construction of statutory language is within the province of the judicial branch of the government of this state, and that it is possible that if considered by the courts, a different interpretation of the legislative intent in enacting Ch. 77-452, Laws of Florida, may be reached.

078-5—January 10, 1978

MARRIAGE LICENSES

ISSUANCE TO MINORS

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

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTIONS:

1. Does the repeal of s. 741.06, F. S., do away with the county court judges' discretion in the issuance of a marriage license to anyone under the age of 18?

2. Does a county court judge now have to issue a marriage license to a minor, no matter how young, if he has the written consent of his parents?

SUMMARY:

Former s. 741.06, F. S., which granted county court judges a limited discretion in issuing marriage licenses to minors, regardless of parental consent, when the minors are parents or expectant parents of a child has been removed or revoked by s. 2, Ch. 77-19, Laws of Florida, repealing s. 741.06 effective October 1, 1977. Therefore, county court judges and clerks of the circuit court are bound by the terms of s. 741.04, F. S., which authorizes and requires the issuance of a marriage license to persons under the age of 18 years when they have obtained the properly acknowledged written consent of their parents or guardian. In the absence of a controlling statute to the contrary, the common-law rule at which persons were deemed competent to contract a valid marriage, *i.e.*, 14 years of age for males and 12 years of age for females, should be applied in issuing marriage licenses to minors with the properly acknowledged written consent of such minors' parents or guardian.

AS TO QUESTION 1:

Prior to the 1977 legislative session, s. 741.04, F. S., provided, *inter alia*, that no marriage license could be issued to persons under the age of 21 without the written consent of the minor's parents or guardian. Section 741.06, F. S., provided an exception to, and limitation upon, this provision by stating:

> The county court judge of any county in the state may, in the exercise of his discretion, issue a license to marry to any male or female under the age of 21 years, upon sworn application of both applicants under oath that they are the parents or expectant parents of a child. The consent of the parents or guardian of such applicants shall not be required for the issuance of a license to marry under the provisions of this section. No license to marry shall be granted to any male under the age of 18 years, nor to any female under the age of 16 years, with or without the consent of their parents except as hereinabove provided.

Although both ss. 741.04 and 741.06, F. S. 1975, used the age of 21 years as the age of majority, the Legislature in Ch. 73-21, Laws of Florida, removed the disability of nonage for persons 18 years of age or older. *See* AGO's 076-60 and 074-201 in which I concluded that s. 741.04 required parental consent prior to the issuance of a marriage license only for persons under the age of 18 years; *see also* AGO 073-241.

Sections 741.04 and 741.06, F. S. 1975, read together, clearly established that a marriage license could not be issued, regardless of parental consent, to males under the age of 18 and females under the age of 16 unless they were parents or expectant parents of a child. *See also* AGO 076-60, question 1. While both the county court judge and the clerk of the circuit court possess the authority under s. 741.04 to issue marriage licenses, only the county court judge was granted the limited discretion to issue licenses to minors

who were parents or expectant parents of a child as provided in s. 741.06. *See* the title and s. 1, Ch. 74-372, Laws of Florida, which amended s. 741.04 to empower the clerk of the circuit court to issue marriage licenses.

The 1977 Legislature, in regular session, passed Ch. 77-19, Laws of Florida, amending Ch. 741, F. S., effective October 1, 1977. Section 1 of the act in pertinent part revised the language in s. 741.04, F. S., to lower the age of consent to 18 years of age and eliminated the requirement of posting a copy of the application for marriage license at the front door of the county courthouse except for those counties which have fewer than 75,000 residents. *See* title of Ch. 77-19. Section 63 of Ch. 77-121, Laws of Florida, a reviser's bill relating to the disability of nonage, amended s. 741.04 to conform it to Ch. 73-21, Laws of Florida, which defined "minor" to include persons under age 18 and removed the disabilities of nonage for all persons 18 years of age or older. *See* title of Ch. 77-121. Section 741.04 now provides that the age of consent is 18 years of age. Section 2 of Ch. 77-19, however, provides a more substantive change to Ch. 741 by expressly stating that "[s]ection 741.06, Florida Statutes, as created by [Ch.] 39-18021, Laws of Florida, is hereby repealed," effective October 1, 1977. *See also* the title of Ch. 77-19, providing, "repealing s. 741.06." While the Legislature made subsequent amendments to ss. 741.04 and 741.06 these later acts do not indicate any repeal of s. 2, Ch. 77-19 and do not therefore militate against or reverse the operative force and effect of s. 2. For example, ss. 64 and 65, Ch. 77-121, respectively, merely revise the language of these sections to conform them to Ch. 73-21 which removed the disabilities of nonage for all persons of 18 years of age or older; s. 1, Ch. 77-139, Laws of Florida, amends s. 741.04 to prohibit the issuance of a marriage license unless one party is a male and the other party is a female, and limits marriage application posting requirements to counties under 75,000 residents. *See* title of Ch. 77-139. Moreover, I have been informed by the Statutory Revision Division that while s. 741.06, F. S., will be included in the 1977 edition of the Florida Statutes in keeping with its policy of publishing any statute which has been repealed or amended effective October 1 or later, the section will be footnoted to reflect that it was repealed by s. 2, Ch. 77-19 effective October 1, 1977.

Your inquiry is directed to the effect of the express repeal of s. 741.06, F. S., on a county court judge's discretion in issuing marriage licenses to persons under the age of 18 years. Except as limited by the Constitution, it is the State Legislature which possesses the authority and power to regulate and control the matrimonial contracts of its citizens. *See* 55 C.J.S. *Marriage* s. 2 and Light v. Meginniss, 22 So.2d 455, 456 (Fla. 1945), in which the Florida Supreme Court stated that

> marriage, being of vital public interest, is subject to the state and to legislative power and control with respect to its inception, duration and status, conditions and termination, except as restricted by Constitutional provisions. (Emphasis deleted.)

See also Posner v. Posner, 233 So.2d 381, 383 (Fla. 1970); Todd v. Todd, 9 So.2d 279 (Fla. 1944); and 55 C.J.S. *Marriage* s. 2 (the courts have jurisdiction over marriage and its incidents *only to the extent* such jurisdiction has been conferred by the Legislature by statute). The Florida Legislature has delegated some of its power to the county court judges in the area of domestic relations. Specifically, s. 741.04, F. S., represents a delegation by the Legislature of essentially an administrative task in the issuance of marriage licenses to the county court judges and the clerks of the circuit court. Section 741.06, F. S. 1975, also represented a delegation of the Legislature's power to regulate and control marriage to the county court judges. Only in s. 741.06 were the county court judges granted limited discretion in issuing marriage licenses to minors; moreover, this discretion was limited to the specific circumstances set forth in s. 741.06, *i.e.*, when both of the minor applicants for a marriage license swear or make oath that they are the parents or expectant parents of a child.

The Legislature, having the power to grant the county court judges the authority to administer certain incidents of marriage, also has the power to revoke its previous grants of authority. *Cf.* Tamiami Trail Tours v. Lee, 194 So. 305, 306 (Fla. 1940) ("like any other legislative act, it can be amended or repealed by the legislature") and Straughn v. Camp, 293 So.2d 689 (Fla. 1974), *appeal dismissed*, 419 U.S. 891 (Legislature cannot bind its successors). With respect to the instant inquiry, the limited discretion granted to the county court judges by the Legislature in s. 741.06, F. S. 1975, has been removed or revoked by the express terms of s. 2, Ch. 77-19, Laws of Florida, which repealed s. 741.06, effective October 1, 1977. The language is plain and unambiguous; there is no necessity

for any construction or interpretation of the statute, and effect need only be given to the plain meaning of the terms. *See* State v. Egan, 287 So.2d 1 (Fla. 1973); *see also* Hanley v. Liberty Mutual Insurance Company, 323 So.2d 301 (3 D.C.A. Fla., 1975), *aff'd*, 334 So.2d 11 (Fla. 1976) (purpose of Legislature should be determined where possible from language of statute); Swartz v. State, 310 So.2d 618 (1 D.C.A. Fla., 1975), *cert. denied*, 333 So.2d 465 (Fla. 1976); Leigh v. State *ex rel.* Kirkpatrick, 298 So.2d 215 (1 D.C.A. Fla., 1974); and McDonald v. Roland, 65 So.2d 12 (Fla. 1953).

Accordingly, I am of the view that the repeal of s. 741.06, F. S., by s. 2, Ch. 77-19, Laws of Florida, has removed or revoked the limited discretion previously granted to county court judges by the Legislature in issuing marriage licenses to minors.

AS TO QUESTION 2:

I concluded in question 1 that s. 741.06, F. S., and its limited grant of discretion to county court judges in issuing marriage licenses to certain minors had been effectively removed or revoked by operation of s. 2, Ch. 77-19, Laws of Florida, repealing s. 741.06. With the repeal of s. 741.06 which provided in pertinent part that "[n]o license to marry shall be granted to any male under the age of 18 years or to any female under the age of 16 years, with or without the consent of their parents except as hereinabove provided," there is no longer any statutory provision which prohibits the issuance of a marriage license to a person under the age of 18 years who has obtained the properly acknowledged written consent of his parents or guardian. *See* s. 741.04, F. S. 1977, which provides in pertinent part that

> [i]f either of such parties shall be under the age of 18 years, such county court judge or clerk of the circuit court shall not issue a license for the marriage of such party unless there shall be first presented and filed with him the written consent of the parents or guardian of such minor to such marriage, acknowledged before some officer authorized by law to take acknowledgments and administer oaths.

You inquire as to the responsibility and duty of a county court judge to issue a marriage license to a minor, regardless of age, who has obtained his parents' written consent, properly acknowledged as provided by law. As more fully discussed in the previous question, it is the Legislature which possesses the power to regulate the marriages of its citizens. The statutes do not appear to grant a county court judge or clerk of the circuit court any discretion in issuing licenses to those persons who meet the requirement as established by statute. The repeal of s. 741.06, F. S., removed any statutorily imposed minimum age below which a license shall not be issued, regardless of parental consent. *See* the last sentence of s. 741.06 which placed a minimum age of 16 years for females and 18 years for males below which a license could not be issued with or without the parents' or guardian's consent, unless the minor was a parent or an expectant parent of a child. Section 741.04, F. S., as amended, does not in terms purport to prohibit the issuance of a license to an infant regardless of age where the written consent of the parents or guardian, properly acknowledged, is given, or presented to, and filed with the county court judge or clerk of the circuit court. The statutes do not bestow any discretion on either the county court judge or clerk in issuing licenses under these circumstances; only the written consent of the parents or guardian is required. *Cf.* Hunt v. Hunt, 161 So. 119, 122 (Miss. 1935), in which the court stated that a statute which prohibited the issuance of a license to a female under the age of 18 years without the consent of her parents or guardian did not affect the right of the minor under the age of 18 years to consent to a marriage as that right remains at common law; "[i]t only authorizes their parents or guardian to object to the issuance of a license for the marriage." Initially, therefore, it appears that a county court judge and a clerk of the circuit court do not possess the power to refuse to issue a marriage license to persons under 18 years of age who have obtained their parents' or guardians' properly acknowledged written consent and otherwise satisfied the statutory requirements, regardless of the age of the parties to the proposed marriage.

Assuming that former s. 741.06 changed the preexistent common law with regard to the age of consent, *cf.* Hunt v. Hunt, *supra*, when s. 741.06 was repealed, the common-law rule of age was restored to its former state before s. 741.06 was enacted. *See* Florida Fertilizer & Manufacturing Company v. Boswell, 34 So. 241, 242 (Fla. 1903), in which the court stated that "when a statute changing the common law is repealed, the common law

is restored to its former state." *See also* North Shore Hospital, Inc. v. Barber, 143 So.2d 849, 853 (Fla. 1962). In the absence of a controlling and inconsistent statute, the common-law rule of age has been adopted as a part of the common law of the state. *See* Green v. Green, 80 So. 739 (Fla. 1919), in which the Florida Supreme Court stated that in the absence of a statute, the age at common law at which persons were deemed competent to contract a valid marriage "is adopted as part of the common law of the country" and s. 2.01, F. S., providing that the common and statutory law of England of a general, not local, nature are of force within the state unless inconsistent with the Constitution and laws of the United States and of the State of Florida. *Cf.* State v. Egan, 287 So.2d 1, 3 (Fla. 1973). At common law, a male was deemed competent to contract a valid marriage at 14 years of age; for females the age of consent was 12 years. Green v. Green, *supra*; 55 C.J.S. *Marriage* s. 11. Any marriage, however, occurring between the age of 7 years and the age of consent was merely voidable, but a marriage where one or both of the parties were under the age of 7 years was void and without legal significance. 55 C.J.S. *Marriage* s. 11. A marriage by one above the age of consent but below the age of contract generally is fully valid. 55 C.J.S. *Marriage* s. 11 at p. 823; *also see* Hunt v. Hunt, 161 So. 119, 122 (Miss. 1935). Although not required at common law, the state may require the consent of the parents or guardian as a preliminary to the marriage of minors. 55 C.J.S. *Marriage* s. 23.

Therefore, although a county court judge or clerk of circuit court may be required to issue a marriage license to persons under the age of 18 years who have obtained the written and properly acknowledged consent of their parents or guardians, in the absence of legislative authority to the contrary, and until legislatively or judicially decreed otherwise, I am of the opinion that the common-law rule regarding the age at which persons become capacitated to marry (14 years for males and 12 years for females) should be applied in issuing marriage licenses to persons under the age of 18 years who present properly acknowledged written consent of the parents or guardian of such minors.

078-6—January 10, 1978

MARRIAGE LICENSES

ISSUANCE TO MINORS

To: Edwin W. Malmquist, Hernando County Court Judge, Brooksville

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTIONS:

1. May a 17-year-old male be issued a marriage license upon the consent of his parents?

2. What are the minimum ages, for both males and females, for issuance of a marriage license to minors with the consent of parents?

SUMMARY:

The repeal of s. 741.06, F. S., by s. 2, Ch. 77-19, Laws of Florida, effective October 1, 1977, removed any statutorily imposed age requirement for receiving a marriage license when the person, although a minor, has obtained the written consent of his parents or guardians. In the absence of such a statute, the common-law rules regarding the age at which a person is deemed competent to contract a valid marriage should be adopted.

AS TO QUESTION 1:

Your question is answered in the affirmative.

Section 741.04, F. S., as amended by s. 1, Ch. 77-19 and s. 64, Ch. 77-121, Laws of Florida, provides in pertinent part:

> If either of such parties shall be under the age of 18 years, such county court judge or clerk of the circuit court shall not issue a license for the marriage of such party unless there shall be first presented and filed with him the written consent of the parents or guardians of such minor to such marriage, acknowledged before some officers authorized by law to take acknowledgments and administer oaths.

Prior to October 1, 1977, the foregoing statutory provision was limited by s. 741.06, F. S. 1975, which prohibited the issuance of a marriage license to males under the age of 18 years or females under the age of 16 years, regardless of parental consent, unless the minor was a parent or expectant parent of a child. Section 741.06, however, was expressly repealed by s. 2, Ch. 77-19, Laws of Florida, effective October 1, 1977. In AGO 078-5, I considered the effect of the repeal of s. 741.06 by s. 2, Ch. 77-19 on the issuance of marriage licenses to persons under the age of 18 years. In that opinion, I concluded that with the repeal of s. 741.06 the provisions contained in s. 741.04 must govern the issuance of these licenses to minors. Accordingly, under the terms of s. 741.04, it appears that a 17-year-old male may be issued a marriage license provided there appears to be no impediment to the marriage (other than age) and he has received the written consent of his parents or guardians. *See also* AGO 075-18 in which I concluded that the parents of a minor may revoke their consent to the marriage of the minor prior to the issuance of a marriage license. However, once the license has been issued, the parental consent is not a precondition to the solemnization of the marriage and, accordingly, the revocation of the parental consent after the valid issuance of a marriage license will not prevent the solemnization of the marriage.

AS TO QUESTION 2:

As discussed in question 1, the repeal of s. 741.06, F. S., removed any statutorily imposed age requirement for receiving a marriage license when the person, although a minor, had obtained the written consent of his parents or guardian. You specifically inquire as to the minimum age for the issuance of a marriage license to minors with the consent of the parents. Since October 1, 1977, there appears to be no such minimum age under the Florida Statutes; however, in the absence of such a statute, the Florida Supreme Court has in the past applied the common-law rule regarding the age of consent. *See* Green v. Green, 80 So. 739 (Fla. 1919), in which the court stated that in the absence of statute, the age at common law at which persons were deemed competent to contract a valid marriage should be adopted as part of the common law of the state. *See also* AGO 078-5 in which I reached a similar conclusion.

Therefore, I am of the view that, in the absence of any legislative or judicial authority to the contrary, the common-law rules regarding age should be applied. It should be noted that under the common law, the age of consent for marriage was 14 years of age for a male and 12 years of age for a female. Any marriage occurring before the age of 7 was void while a marriage occurring between the age of 7 years and the age of consent was merely voidable. 55 C.J.S. *Marriage* s. 11.

078-7—January 10, 1978

MARRIAGE LICENSES

APPLICATIONS FOR ISSUANCE—ACCEPTANCE

To: Arthur H. Beckwith, Jr., Clerk, Circuit Court, Sanford

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Should an application for a marriage license be accepted if at the time of application there appears to be an impediment to the marriage?

SUMMARY:

An application for a marriage license must be accepted by the county court judge or the clerk of the circuit court. If, however, upon consideration of the application, there appears to be an impediment to the marriage, the judge or clerk, as the issuing officers of marriage licenses, cannot be compelled to issue a license until the applicant, when called upon to do so, has demonstrated that there is no impediment to the marriage.

Section 741.01, F. S., states in pertinent part:

> Every marriage license shall be issued by a county court judge or clerk of the circuit court under his hand and seal. Said county court judge or clerk of the circuit court shall issue such license, upon application therefor, if there appears to be no impediment to the marriage.

This office has previously considered the authority of the Legislature to regulate the marriages of its citizens; *see* AGO 078-5 in which I stated that the courts possess only such jurisdiction over marriage and its incidents as has been granted by the Legislature. Section 741.01, F. S., represents a delegation of some of the Legislature's power by clearly designating the county court judge and the clerk of the circuit court as the issuing officers of marriage licenses. Section 741.01 does not, however, appear to grant the clerk or the judge any discretion in accepting or refusing to accept an application for a marriage license. Rather, once the application is on file, it appears that the clerk or judge upon consideration of the application may determine whether there appears to be an impediment to the marriage. In AGO 074-338 I concluded that it is the duty of a judge or clerk to issue a license to marry when, upon consideration of the application, there appears to be no impediment to the marriage and all legal requirements for the issuance of a license have been met. *See also* AGO 076-60 which sets forth the general procedure in issuing these licenses. The judge or clerk cannot, however, be compelled to issue a marriage license until the applicant, when called upon to do so, has demonstrated to the judge's or clerk's satisfaction that there is no impediment to the marriage; *see also* State *ex rel.* Richardson v. Lawrence, 163 So. 231 (Fla. 1935) in which the Florida Supreme Court stated that a county court judge is authorized and required to issue a marriage license *only* in the event that there appears to be no impediment to the marriage; moreover, it is the duty of the parties seeking a marriage license to demonstrate, if the judge so requires, that there is no impediment to the marriage.

Accordingly, I am of the opinion that a county court judge or clerk of the circuit court must accept an application for a marriage license. He is not, however, required to issue a marriage license unless there appears to be no impediment to the marriage. Moreover, he may require a showing by the applicant that no such impediment exists. However, if there does not appear to be any impediment to the marriage, it is the duty of the clerk or county court judge to issue a marriage license upon application therefor, provided all legal requirements for a license have been met.

078-8—January 10, 1978

ABORTION

MINOR NOT REQUIRED TO HAVE PARENTAL CONSENT

To: Ralph C. Dell, Attorney for The Hospital and Welfare Board of Hillsborough County, Tampa

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May a pregnant, unmarried woman under 18 years of age execute a valid and binding consent for an abortion without the consent of a parent, custodian, or legal guardian?

SUMMARY:

A pregnant, unmarried woman under 18 years of age may execute a valid and binding written consent and request for termination of her pregnancy in the first trimester without the consent of a parent, custodian, or legal guardian.

Section 458.22(3), F. S., provides that one of the following shall be obtained by a physician prior to terminating a pregnancy:

> (a) The written request of the pregnant woman and if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife, or
> (b) If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the written consent of a parent, custodian, or legal guardian must be obtained, or
> (c) Notwithstanding paragraphs (a) and (b), a physician may terminate a pregnancy provided he has obtained at least one corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman.

In Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1974), *aff'd sub nom.*, Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd*, Gerstein v. Coe, 428 U.S. 901, a three-judge federal court entered a declaratory judgment holding s. 458.22(2)(a) and (b), F. S., invalid, stating:

> As we learn from Roe v. Wade, 410 U.S. 113 (1973), the State has no authority to interfere with a woman's right of privacy in the first trimester to protect maternal health nor can it interfere with that right before the fetus becomes viable in order to protect potential life. It follows inescapably that the state may not statutorily delegate to husbands and parents an authority the state does not possess.
>
> We do not learn from the opinion in Roe v. Wade, supra, the age of plaintiff *Roe*, the pregnant woman who enjoyed the "fundamental," "*personal* right of privacy" recognized by the Supreme Court. But we do know that a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to "fundamental," "*personal*," constitutional rights.
>
> In holding the Florida "spousal or parental consent" requirement unconstitutional, this Court, of course, does not limit the traditional and substantial right which husbands and parents have in asserting their respective interests within the family unit. Certainly husbands ought to participate with their wives in decisions relating to whether or not their mutual procreation should be aborted or allowed to prosper and parents ought to advise and guide their unmarried, minor daughters in a decision of such import. But a state which has no power to regulate abortions in certain areas simply cannot constitutionally grant power to husbands and parents to regulate in those areas. Therefore, husbands and parents cannot look to the state to prosecute and punish the physician (or other participants) who performs an abortion against the wishes of the husbands and parents.

Since s. 458.22(3)(a) and (b), F. S., were declared unconstitutional by the federal courts, the Florida Legislature has not attempted to revise those provisions of s. 458.22(3). To

the contrary, s. 1, Ch. 77-457, Laws of Florida, repeals Chs. 458 and 459, F. S., as of July 1, 1979.

Additionally, s. 458.215(1), F. S. (1976 Supp.), presently provides that an unwed pregnant minor may consent to the performance of medical or surgical care or services *relating to her pregnancy* by a hospital, clinic, or physician licensed under Ch. 458 or Ch. 459, and such consent is as valid and binding as if she had achieved her majority. The provision contains no proviso as to age; the minor is only required to be pregnant. Although s. 458.215(3) states that nothing in the act (Ch. 76-215, Laws of Florida) shall affect the provisions of s. 458.22, F. S., there are, due to the aforecited federal decisions, no longer any valid provisions contained in s. 458.22(3)(b) which it could affect.

Accordingly, since no constitutional statute presently exists which validly requires the additional written consent of a parent, custodian, or legal guardian as a condition or prerequisite to the termination of a pregnancy of a pregnant unmarried woman under the age of 18, there is no lawful impediment for such person, upon her written request, to validly consent to and request in writing the termination of her pregnancy in the first trimester of such pregnancy. *Cf.*, Jones v. Smith, 278 So.2d 339 (4 D.C.A. Fla., 1973), *cert. denied*, 415 U.S. 958.

078-9—January 10, 1978

MUNICIPALITIES

ORDINANCES AFFECTING COMPREHENSIVE PLAN

To: Neal D. Bowen, City Attorney, Sanibel

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

Under the amendments to the Local Government Comprehensive Planning Act and the Municipal Home Rule Powers Act contained in Ch. 77-331, Laws of Florida, may the city now proceed to adopt changes, amendments, or variances in the Sanibel land-use plan at only one hearing of the city council rather than comply with the two-hearing requirement and other requirements of the Municipal Home Rule Powers Act?

SUMMARY:

The city is not authorized to proceed to adopt changes, amendments, or variances in its land-use plan at only one hearing of the city council rather than comply with the two-hearing requirement and other requirements of the Municipal Home Rule Powers Act, notwithstanding the amendments to the Local Government Comprehensive Planning Act and the Municipal Home Rule Powers Act contained in Ch. 77-331, Laws of Florida. The one-hearing requirement applies only in cases of adoption or amendment of the future land-use element of a comprehensive plan under ss. 163.3161-163.3211, F. S.

The background for your request is as follows. The Local Government Comprehensive Planning Act of 1975, ss. 163.3161-163.3211, F. S. 1975, requires each county and each municipality of the state to adopt a comprehensive plan, the minimum requirements of which are set forth in the act. Section 163.3167, F. S. Prior to the 1977 legislative session and adoption of Ch. 77-331, Laws of Florida, s. 163.3184 provided that the local governing body "may in a manner prescribed by law adopt the proposed comprehensive plan or element or portion thereof or adopt it with changes or amendments." Section 163.3187 provided prior to amendment that amendments to a proposed comprehensive plan "shall be as for the original adoption of the plan or element or portion thereof . . . ." It appears from your letter that Sanibel has already fully complied with the act and that a plan is in effect. I assume that adoption was by ordinance and that, hence, amendments to the

plan would also be effected by ordinance. The Legislature has prescribed by law the procedure to be followed by municipalities in enacting ordinances. Section 166.041(3). Therefore, I also assume that Sanibel has followed the procedures set forth therein in enacting the ordinances and amendments thereto since a municipality, of course, may not act in a contrary manner except as an exception or authorization to proceed differently is provided by the Legislature. *See* Alsop v. Pierce, 19 So.2d 799, 805 (Fla. 1944).

Section 166.041(3)(a), F. S., sets forth the procedures for adoption of ordinances including requirements for two hearings and notice by newspaper. Prior to its amendment by Ch. 77-331, it specifically exempted from its requirements ordinances which rezone private real property or which deal with the land-use element of a comprehensive plan. The section further operated to prohibit the adoption of emergency ordinances which enact or amend a land-use plan and to require ordinances which deal with the land-use element of a comprehensive plan to be enacted under the procedures prescribed in s. 163.3181(3), F. S., (now repealed).

Section 163.3181(3)(a), F. S. (1976 Supp.), prior to its repeal by Ch. 77-331, governed 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 when total land area to be affected thereby was less than 5 percent of the total land area of the governmental unit. It required only one duly noticed and held public hearing prior to adoption of the ordinance with notice sent individually to each property owner who stood to be affected by the proposed ordinance. *See* discussion of these requirements in AGO 077-53.

Chapter 77-331, Laws of Florida, has amended or repealed each of the sections referred to above. Section 166.041 continues to provide the procedures applicable in general to adoption of municipal ordinances. However, these requirements are now subject only to the exception stated in newly amended s. 166.041(3)(c), pertaining to enactment of ordinances "initiated by the governing body or its designee which rezone private real property." A separate procedure is provided for adoption of such enactments. *Cf.* AGO 076-224. The exception for ordinances dealing with the land-use element of a local government comprehensive plan has been deleted. Accordingly, the provision of s. 166.041(3)(c), F. S. (1976 Supp.), as it stood *prior* to amendment, that the procedure for enacting such ordinances was to be that set forth in s. 163.3181(3), has also been repealed, as has s. 163.3181(3) itself. Hence, s. 166.041(3)(a) now provides the procedure for enacting local ordinances [retaining the provision for adoption of emergency ordinances under s. 166.041(3)(b)] with the only exception being that contained in *amended* s. 166.041(3)(c). There are no other exceptions provided. I should note that s. 125.66, F. S. (1976 Supp.), which relates to enactment procedures for county ordinances, also contained the exception for land-use ordinances enacted pursuant to the planning act, providing that the procedures set forth in s. 163.3181(3) were to be followed by the counties in enacting such ordinances. This exception was also repealed by Ch. 77-331, Laws of Florida.

Section 163.3184 dealing with adoption of comprehensive plans or elements thereof and s. 163.3187 providing the amendment procedure were also amended by Ch. 77-331. Section 163.3184 now provides:

> (7)(a) The procedure for adoption of a comprehensive plan or element or portion thereof, *except for the future land use plan element*, shall be by not less than a majority of the total membership of the governing body *in a manner prescribed by law.* (Emphasis supplied.)

The future land-use plan element, when it involves less than 5 percent of the total land area of the local government unit, is to be adopted pursuant to s. 163.3184(7)(b), providing:

> 1. The governing body shall direct the clerk of the governing body to notify by mail each real property owner the use of whose land the governmental agency will restrict or limit by enactment of the proposal and whose address is known by reference to the latest ad valorem tax records. The notice shall state the substance of the proposal as it affects that property owner and shall set a time and place for one or more public hearings on such proposal. 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 available for public inspection during regular business hours of the office of the clerk of the governing body.

2. *The governing body shall hold a public hearing on the proposal and may, upon the conclusion of the hearing, adopt the proposal.* (Emphasis supplied.)

Section 163.3187 has been amended to read thusly:

> **Amendment of adopted comprehensive plan.**—The procedure for amendment of an adopted comprehensive plan or element or portion thereof, other than for a future land use plan element or portion thereof involving less than 5 percent of the total land area of the local governmental unit, shall be as for the original adoption of the comprehensive plan or element or portion thereof set forth in s. 163.3184. The procedure for amendment of the future land use plan element or portion thereof which involves less than 5 percent of the total land area of the local governmental unit shall be the same as the procedure provided in s. 163.3184(7)(b).

As can be seen, then, the adoption of, and amendments to, a comprehensive plan when such is accomplished by ordinance, are to be enacted, with only one exception, pursuant to the procedures set forth in s. 166.041 as discussed above. However, the exception, the future land-use plan element, may be adopted or amended [subject to the notice requirements of s. 163.3184(7)(b)1.] at one hearing of the council so long as less than 5 percent of the total land area of the governmental unit is involved. Section 163.3184(7)(b)2. Specifically, you inquire as to whether this procedure may be used to process amendments or changes (and applications therefor) in the Sanibel land-use plan. There is no exception to the mandate of ss. 163.3184(7)(a) and 163.3187 that enactment or amendment of a plan be accomplished "in a manner prescribed by law," (*e.g.*, pursuant to ordinances enacted under s. 166.041[3]) for any element of the plan other than *future* land-use plan elements. You point out in your letter that the language of the procedure outlined in amended s. 163.3184(7)(b) is similar, with several major exceptions, to the procedure discussed above as set forth in s. 163.3181(3)(a) (now repealed) for enactment of ordinances dealing with the land-use elements of the comprehensive plan except that reference to the "proposed ordinance" are replaced by references to the "proposal." You appear, then, to inquire essentially whether the procedures set out in newly enacted s. 163.3184(7)(b)2. effectively enlarge the scope of repealed s. 163.3181(3)(a) and may be used whenever the city adopts a "proposal" involving less than 5 percent of the total land area of the city, *e.g.*, a variance. Since the "proposal" referred to by the section can logically refer only to a proposal for adoption of a, or (by virtue of s. 163.3187) amendment of a previously adopted, "future land use element or portion thereof, which involves less than 5 percent of the total land area of the governmental unit," your question is answered in the negative.

I therefore conclude that the procedures set forth in s. 166.041(3)(a) apply to the adoption of a, or amendment of a previously adopted, comprehensive plan or any element or portion thereof except for the adoption of a future land-use element of the plan (concerning less than 5 percent of the total land area of the governmental unit) or an amendment of an adopted future land-use element (concerning less than 5 percent of the total land area of the governmental unit) in which case the procedures contained in s. 163.3184(7)(b)2. apply.

In light of my conclusion in this matter, discussion of the related issues raised in your letter appears unnecessary.

078-10—January 10, 1978

PUBLIC AGENCIES

MAY PURCHASE IMPORTED BEEF IF STATE OR FEDERAL STANDARDS ARE MET

To: Wayne Mixson, Chairman, House Committee on Agricultural and General Legislation, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does Ch. 77-61, Laws of Florida, require a supplier or vendor of fresh or frozen beef or imported beef to certify on an invoice that such beef complies with the requirements contained therein and is domestic or does Ch. 77-61 authorize the purchase by public agencies of imported beef which complies with Ch. 77-61, without certification that it is domestic?

SUMMARY:

Chapter 77-61, Laws of Florida, does not require a supplier or vendor of fresh or frozen imported beef to certify that such beef is domestic. The act does require such supplier or vendor to certify that fresh or frozen beef or imported beef complies with the provisions of s. 585.3401, F. S. Public agencies enumerated in Ch. 77-61 may purchase imported beef which complies with the requirements therein without certification that it is domestic.

According to your letter, Ch. 77-61, Laws of Florida, in its original form prohibited the purchase by public agencies of fresh or frozen beef imported from outside the United States. By amendments on the House floor, the act was modified to allow the purchase of imported fresh or frozen beef provided it has been inspected by and meets the standards set by the United States Department of Agriculture or the Florida Department of Agriculture for fresh or frozen beef produced in the United States.

However, during the amendatory process, an ambiguity was created in the last sentence of s. 1, Ch. 77-61. In its present form it provides:

> The supplier or vendor shall certify on the invoice that the fresh or frozen beef or imported beef which complies with the provisions of this subsection supplied is domestic.

The apparent conflict has arisen because it is obviously impossible for suppliers to comply with the statute by certifying imported beef as domestic. Government agencies and suppliers are uncertain as to their responsibilities under the act since it imposes personal liability upon any person who knowingly causes public funds to be spent in violation of the act's requirements.

It is a well-established rule of statutory construction that where the last sentence in one section of a statute is plainly inconsistent with preceding sentences of the same section and preceding sections which conform to the Legislature's obvious policy and intent, such last sentence, if operative at all, must be so construed as to give it effect consistent with such other sections and parts of sections and with the policy they indicate. Hall v. State, 23 So. 119 (Fla. 1897); Johnston v. Bessenger, 21 So.2d 343 (Fla. 1945); Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962). This rule constitutes an exception to the general rule that the last expression of the legislative will is the law and, in the case of conflicting provisions in the same statute or different statutes, the last in point of time or order of arrangement prevails. Compare State v. City of Boca Raton, 172 So.2d 230 (Fla. 1965), and State v. City of Hialeah, 109 So.2d 368 (Fla. 1959), with Johnson v. State, 27 So.2d 276 (Fla. 1946). In the instant case, it is apparent that the last sentence of s. 1, Ch. 77-61 set forth above is in direct conflict with the obvious purpose of the statute. The title to the act, which states that the act prohibits ". . . the purchase by public agencies of certain fresh or frozen beef for certain purposes. . . ." is consistent with the body of the act, as amended, which seeks to ensure that imported beef meet the requirements set forth therein. If read literally, the last sentence of s. 585.3401(1), F. S., would negate the remainder of the act since it would create a situation in which no imported beef could be accepted for consumption by certain designated agencies. It seems apparent that this result was neither desired nor intended by the Legislature when it amended Ch. 77-61, Laws of Florida. Accordingly, consistent with the rules of construction set forth above and the fundamental rule of statutory construction that statutes must be construed to give effect to rather than defeat legislative intent, [*see* American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938)] vendors or suppliers are not required to certify on invoices that fresh or frozen imported beef is domestic but are required to certify that such beef complies with the provisions set forth at s. 585.3401(1), F. S. Public agencies enumerated within the statute are authorized to purchase (and are

not prohibited from purchasing) domestic or imported beef if inspected by federal or state agriculture officials and if in compliance with standards set by the federal or state agriculture department.

It should also be noted that this construction of Ch. 77-61, Laws of Florida, has apparently been adopted by the Division of Statutory Revision in the as yet unpublished Florida Statutes 1977. The Division of Statutory Revision in such statutes has by notation suggested the third sentence of s. 1, Ch. 77-61 be phrased:

> The supplier or vendor shall certify on the invoice that the fresh or frozen beef or imported beef [supplied is either domestic or complies with the provisions of this subsection].

078-11—January 10, 1978

SPECIAL TAXING DISTRICTS

VOTING CONFLICTS AND REQUIREMENTS

To: Robert E. Mathews, Jr., Attorney for Southwestern Palm Beach County Public Hospital Board, Belle Glade

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **Does s. 286.012, F. S., require the chairman of the Southwestern Palm Beach County Public Hospital Board to vote on every matter before the board, in the absence of an actual or apparent conflict of interest; or does said statute require the chairman to vote only in the case of a tie vote?**

SUMMARY:

> **The Southwestern Palm Beach County Public Hospital Board is the governing board of a special taxing district. Therefore, members of the hospital board, including its chairman, are not within the purview of s. 286.012, F. S., which prohibits abstention from voting by members of the governing boards or agencies of state, county, and municipal governments. The Southwestern Palm Beach County Public Hospital Board is authorized and required to adopt rules and regulations for its guidance and proceedings; thus, the board would be empowered to adopt a rule prohibiting abstention from voting in specified circumstances by any member thereof, including its chairman.**

Chapter 26107, 1949, Laws of Florida, as amended by Chs. 59-1693, 61-2638, 70-855, and 74-566, Laws of Florida, establishes the Southwestern Palm Beach County Public Hospital Board. The board is composed of seven members who are appointed by the Governor. Section 1, Ch. 26107, as amended. One of the members of the board is to serve as chairman. Section 3(5), Ch. 26107, as amended.

The hospital board is established and declared by the enabling legislation to be a "body corporate" with jurisdiction over a designated geographical area of Palm Beach County. Sections 1 and 4, Ch. 26107, as amended. Within its area of operation, the board is empowered to construct and maintain hospitals, borrow money for public hospital purposes, and, when necessary, condemn property for such purposes. Sections 8 and 9, Ch. 26107, as amended. The hospital board is authorized to levy an ad valorem tax "on all property in said Hospital District." Section 14, Ch. 26107, as amended.

Thus, it is apparent from an examination of the enabling legislation creating the Southwestern Palm Beach County Public Hospital Board that it is the governing body of a special taxing district. The important consideration, therefore, is whether s. 286.012, F. S., is applicable to special taxing districts and the governing boards thereof. Section 286.012 reads:

> 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 member shall comply with the disclosure requirements of s. 112.3143. (Emphasis supplied.)

The foregoing statutory provision was brought into the statutes by Ch. 72-311, Laws of Florida, the title of which reads in part:

> AN ACT relating to *governmental boards and agencies of state, county and municipal governments*; prohibiting abstention from voting by members of *such boards and agencies* . . . . (Emphasis supplied.)

It has been held that while the title of a legislative act is not part of the basic act, it does serve an important function which is to determine the scope of the act. Finn v. Finn, 312 So.2d 726, 730 (Fla. 1975). *Accord*: Hillsborough County v. Pierce, 149 So.2d 912, 917 (2 D.C.A. Fla., 1963), in which the court noted that "[n]o valid provision can be embodied in an act if it is beyond the range of the subject as expressed in the title and matters properly connected therewith." Therefore, it seems evident that the provisions of s. 286.012, F. S., apply *only* to governmental boards or agencies of state, county, or municipal government.

A special taxing district, however, is a distinct and independent statutory entity created for definitely restricted purposes. Attorney General Opinions 074-169, 073-261, and 069-130. A special district is not a state agency because its prescribed powers are definitely confined to a less than statewide area. Bair v. Central and Southern Florida Flood Con. Dist., 144 So.2d 818, 820 (Fla. 1962). *See also* Town of Palm Beach v. City of West Palm Beach, 55 So.2d 566, 569 (Fla. 1951), holding that officers of a special district "are neither state nor county officers," and AGO 074-7, concluding that special districts or other separate statutory entities are not considered to be agencies of the state for purposes of the State Purchasing Law. Moreover, special taxing districts cannot be considered to be county agencies. *See* AGO 071-154, holding that a county may not amend by ordinance an act creating a special district or authority since a special district is not an agency of the county but is established by the Legislature "to carry out at a local level a public or governmental function that the Legislature could have delegated to the county to perform." *Accord*: Attorney General Opinions 071-102, 071-274, and 071-179. Finally, special taxing districts are not municipalities or agencies thereof. *See* AGO's 074-28 and 073-443, holding that special districts are not municipalities or agencies thereof for purposes of the Municipal Home Rule Powers Act.

Having determined that special taxing districts and the governing boards thereof are not boards or agencies of state, county, or municipal government, it is clear that the terms of s. 286.012, F. S., are not applicable to and do not operate on such districts or the governing boards thereof. Under the enabling legislation, the chairman of the hospital board is peculiarly a member of the board and possesses the same rights and obligations with respect to voting on propositions before the board as the remaining members of the board. The special act does not provide that the board's chairman may cast a deciding vote in case of a tie, a so-called casting vote; *see* 67 C.J.S. *Parliamentary Law* s. 5d.(4), nor may the board by rule grant such power to its chairman under the provisions of the enabling legislation considered in its entirety. Therefore, the prohibition against abstention from voting contained in s. 286.012 does not govern voting by members, including the chairman, of the Southwestern Palm Beach County Public Hospital Board.

However, it is well established that a local governmental unit may adopt its own rules of procedure when the enabling legislation does not provide any rules. 62 C.J.S. *Municipal Corporations* s. 400, p. 754; *see also* 67 C.J.S. *Parliamentary Law* s. 3. Moreover, the general rule at common law is that members of a deliberative body are disqualified to act on propositions in which they have a direct pecuniary interest adverse to the body politic (in this case the inhabitants of the district) which they represent; and if such body adopts a rule that no member immediately interested in a proposition shall vote thereon, such rule is binding on the members. 67 C.J.S. *Parliamentary Law* s. 5d.(3).

In this regard, s. 6 of Ch. 26107, as amended, requires the hospital board to "make and adopt such by-laws, rules and regulations for its guidance . . . as may be deemed expedient for the economic and equitable conduct thereof . . . ." Thus, it would appear competent for the hospital board to adopt a rule prohibiting abstention from voting in specified circumstances by any member thereof, including the chairman. Should the board be faced with a matter which involves an actual or apparent conflict of interest for one of its members, then the member would be considered a "public officer" for purposes of s. 112.3143, F. S., relating to voting conflicts which states that public officers shall not be prohibited from voting in their official capacities on any matter (but requiring disclosure of conflicting personal interest).

078-12—January 26, 1978

COMMUNITY COLLEGES

BOARD OF TRUSTEES NOT AUTHORIZED TO PAY FOR EMPLOYEES' VOLUNTARY PHYSICAL EXAMINATIONS

To: Herman A. Heise, President, Indian River Community College, Fort Pierce

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the board of trustees of a community college district authorized to pay the costs of employees' voluntary physical examinations?

SUMMARY:

The authority of a community college district board of trustees to fix the compensation of its employees is limited to the adoption of salary schedules and the fixing of the salaries of its employees on the basis thereof. The salary schedule so adopted is the sole instrument to be used by the board of trustees in determining the compensation of its employees. Any additional compensation over and above salary or fringe benefits or perquisites must be expressly authorized by statute or State Board of Education regulation authorized by law. Since no statute or rule of the State Board of Education expressly authorizes the board of trustees to pay for the costs of employees' voluntary physical examinations, such payments are unauthorized and should not be made.

According to your letter, the Indian River Community College Board of Trustees has adopted a rule authorizing the college to pay the costs of voluntary physical examinations undertaken by community college employees. You state that the costs of the examinations are to be paid from appropriations of state funds at a cost not to exceed $100 for the physician conducting the examination and up to $25 for related expenses. Your letter further indicates that the Auditor General has questioned the board's legal authority to pay for employees' voluntary medical examinations and has suggested that you seek an opinion of this office.

Section 230.753(2)(a), F. S., creates for each community college district a board of trustees which, under statutes and other rules and regulations of the State Board of Education, shall have "all powers necessary and proper for the governance and operation of the community college." A community college district board of trustees is vested with the responsibility to operate the community college with such necessary authority as may be needed for the proper operation thereof in accordance with regulations of the State Board of Education. Section 230.754(1), F. S. All funds accruing to the benefit of the community college shall be expended in accordance with the rules and regulations of the State Board of Education. Section 230.768, F. S.

A community college district board of trustees has no inherent or common-law powers. It has only those powers which have been conferred by statute. *Cf.* Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); Harvey v. Board of Public Instruction, 133 So. 868 (Fla.

1931); and AGO 075-148 holding that the powers of district school boards are limited by law, and the extent of their powers may be enlarged or modified only by the Legislature. If there are any doubts as to the existence of authority it should not be assumed. Hopkins v. Special Road & Bridge District No. 4, 74 So. 310 (Fla. 1917); Harvey v. Board of Public Instruction, *supra*; State v. Ausley, 156 So. 909 (Fla. 1934); State v. Culbreath, 174 So.2d 422 (Fla. 1937); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); and State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900.

Section 230.759, F. S., governs the employment of community college personnel and reads in part:

> Employment of all personnel in each community college shall be . . . subject to the rules and regulations of the [S]tate [B]oard [of Education] relative to certification, tenure, leaves of absence of all types, including sabbaticals, remuneration, and other such 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.

The regulations of the State Board of Education implementing the Florida School Code, Chs. 228-246, F. S., have "the full force and effect of law," if within the scope and intent of the statute. Section 229.041, F. S.; *see also* Florida Livestock Board v. Gladden, 76 So.2d 291, 295 (Fla. 1954).

The State Board of Education has promulgated Rule 6A-14.247(5), F.A.C., relating to the powers and duties of the board of trustees of a community college as to the employment of personnel. This rule requires the board of trustees to:

> (5) Personnel. Designate positions to be filled, prescribe the qualifications for those positions and provide for the appointment, compensation, promotion, suspension and dismissal of employees as follows, subject to the requirements of other state board of education regulations.
>
> * * * * *
>
> (b) Compensation and salary schedules. Adopt a salary schedule or salary schedules to be used as a basis for paying members of the instructional staff and other college employees . . . fix and authorize the compensation of members of the administration and instructional staff and other college employees on the basis of such schedules.

Rule 6A-14.46, F.A.C., reads:

> Each board shall annually adopt and spread on its minutes a salary schedule or schedules for employees of the community college. *The schedules so adopted shall be the sole instrument used in determining the annual, monthly, weekly, daily, or hourly compensation for such employees, whether paid on hourly, daily, weekly, monthly or annual rates.* Individual personnel records for each employee as required in section 6A-14.47, State Board of Education Regulations, shall contain evidence of each factor used in calculating that employee's compensation for each year. A copy of the official salary schedules shall be forwarded with the annual college budget document when it is submitted to the commissioner for approval. (Emphasis supplied.)

There is no statute or rule or regulation of the State Board of Education which expressly authorizes a community college district board of trustees to pay for voluntary physical examinations of its employees out of public funds. Moreover, Rule 6A-14.247(5)(b), F.A.C., read together with Rule 6A-14.46, F.A.C., appears to negate any implied authority which a district board of trustees might possess to provide and pay for additional compensation, fringe benefits, or perquisites. Both rules stipulate that the *sole* basis to be used by the board of trustees in determining the compensation of community college employees is the employees' salary schedule; any additional compensation or benefits must be authorized elsewhere by statute or State Board of Education regulation authorized by law.

Payment of the costs of an employee's physical examination would appear to fall clearly within the definition of additional compensation or fringe benefit or perquisite. *See* 70 C.J.S. *Perquisite* p. 685, defining "perquisite" to mean "any profit or pecuniary gain from services beyond the amount fixed as salary or wages"; Black's Law Dictionary 1299 (4th Ed.), defining "perquisites" as "emoluments or incidental profits attaching to an office or an official position beyond the salary or regular fees"; and s. 216.011(1)(f), F. S., defining "perquisites" for purposes of the chapter as:

> Those things, or the use thereof, or services of a kind which confer on the officers or employees receiving same some benefit that is in the nature of additional compensation, or which reduces to some extent the normal personal expenses of the officer or employee receiving the same, and shall include, but not be limited to, such things as quarters, subsistence, utilities, laundry services, medical services, use of state-owned vehicles for other than state purposes, servants paid by the state, and other similar things.

In particular, the courts have concluded that the provision of pensions is in the nature of compensation. Vorhees v. City of Miami, 199 So. 313 (Fla. 1940) and State *ex rel.* Holton v. City of Tampa, 159 So. 292 (Fla. 1935). Annual leave has also been considered to be compensation (Green v. Galvin, 114 So.2d 187 [1 D.C.A. Fla., 1959]) as has the payment of medical and life insurance benefits. Riddlestorffer v. Rahway, 196 A.2d 550 (N.J. Super. 1963); Local 456 Int. Bro. of Teamsters v. Town of Cortlandt, 327 N.Y.S.2d 143 (S.Ct. Westchester County, 1971); and State *ex rel.* Parsons v. Ferguson, 348 N.E.2d 692, 694 (Ohio 1976). *Cf.* AGO 071-121 supplemented by AGO 071-157, holding that the payment of the premium of an insurance policy constitutes compensation to a public officer, and AGO 071-308 concluding that community college funds could not be used to provide accident insurance for a member of a community college board of trustees since such trustees were required by law to serve without compensation.

This office has consistently ruled that express statutory authority must exist before public funds may be used to pay additional compensation, or benefits in any form, over and above salary to public officers and employees. *Cf.* AGO 071-28 stating, among other things, that to perform any function for the state or to expend any moneys for the state, the public officer seeking to perform such function or to incur such obligation must point to a constitutional or statutory provision authorizing him to do so. Thus, in AGO 073-148 I concluded that neither a sheriff nor a county was authorized to pay a clothing and maintenance allowance for plainclothes deputies or a maintenance allowance for uniformed officers, in the absence of express statutory authority. In that opinion, I reasoned as follows:

> To pay a plainclothes deputy a clothing or maintenance allowance or to pay a uniformed officer a maintenance allowance in addition to his regular legal salary or wages would and must be considered as a gain or profit incidental to his legal salary or wages and, as such, a perquisite. *A perquisite by its very nature would be an unauthorized public expenditure of public funds for private benefit and, in the absence of absolute clear legislative direction, prohibited by law.* (Emphasis supplied.)

See also AGO 041-309, Biennial Report of the Attorney General, 1941-42, p. 245 (in the absence of express or implied statutory authority, a county board of instruction may not make a payment or allowance to or for a teacher to defray his expenses in summer school) and AGO 045-129, Biennial Report of the Attorney General, 1945-46, p. 319 (board of trustees of school district not authorized to increase the compensation of a principal or teacher by allowing him free rent of a house or school building).

Similarly, with respect to the payment of group insurance premiums for public officers and employees, it has been held that statutory authority must be found before public funds may be expended for such purposes. Thus, in AGO 067-20, it was held that the board of directors of an anti-mosquito district was not empowered to provide health insurance for its employees when not expressly authorized to do so by law. *Accord:* Attorney General Opinion 074-299 in which it was held that the board of commissioners of a fire control district was not authorized to utilize district funds to purchase life or health insurance for district employees, in the absence of express authorization in either the special legislation creating the district or general law. Moreover, statutes providing for the payment of additional compensation (such as group health insurance) to public

officers and employees are to be strictly construed. *See* AGO 072-359 concluding that a statute authorizing district school boards and other designated governmental entities to pay out of public funds all or any part of the premium for certain types of group insurance for its officers and employees did not authorize the district school board to pay any part of the premiums for such insurance coverage for persons (family dependents) other than officers or employees of the board. *Accord:* Attorney General Opinion 076-8 stating in part that former s. 112.08, F. S. 1975, authorizing the payment of designated types of group insurance premiums by specified government units must be strictly construed.

Application of the foregoing principles of law to your inquiry leads me to conclude that the payment from public funds of the costs of voluntary physical examinations undertaken by community college personnel is in the nature of additional compensation or a fringe benefit or perquisite. Accordingly, since the authority of the district board of trustees to fix the compensation of community college personnel is limited to the adoption of *salary* schedules and fixing the salaries of its employees on the basis thereof (which schedule is the sole instrument to be used in determining the compensation of the college's employees) the board of trustees would not be authorized to pay additional compensation, fringe benefits, or perquisites over and above salary unless otherwise expressly authorized to do so by statute or State Board of Education regulation authorized by law. *Compare* Rule 6A-14.42 *et seq.* (administrative and personal leave); Rule 6A-14.431 *et seq.* (vacation, military, and sick leave, maternity leave); and Rule 6A-14.733 (authorizing board to pay all or any part of the premium charges for group life, health, accident, and hospitalization insurance provided for its employees pursuant to the provisions of s. 112.08, F. S. [1976 Supp.]).

078-13—January 26, 1978

PUBLIC DOCUMENTS

PRESS RELEASES NOT PUBLIC DOCUMENTS REQUIRING STATEMENT OF COSTS

To: Robert M. Brantly, Director, Florida Game and Fresh Water Fish Commission, Tallahassee

Prepared by: Richard A. Hixson, Assistant Attorney General

QUESTION:

Would press releases be "public documents" within the purview of s. 257.05, F. S., and therefore require the statement of costs under s. 283.27, F. S., when a state agency sends over 500 copies to various news media?

SUMMARY:

The issuance and delivery of press releases by state agencies is not a promulgation of a public document within the meaning of s. 283.27(1), F. S., and a press release issued by a state agency is not a periodic or special report or publication of a state agency within the meaning of s. 257.05(1), F. S. Therefore, the cost and purpose data requirement set forth in s. 283.27(1), F. S., does not apply to such press releases by a state agency.

For purposes of this opinion, it is assumed that the Game and Fresh Water Fish Commission is authorized by law to engage in public relations and educational activities and functions. (*See* s. 9, Art. IV, State Const., as to the regulatory and executive powers of the commission, which, pursuant to s. 372.021, F. S., are to be exercised by the adoption of rules and regulations or otherwise in its discretion, and Rules 16E-30.01(2), 16E-30.02(2) and (3), 16E-30.04(1) and (5), and 16E-30.13(3), F.A.C., relating to the information, education, and promotion functions of the commission.)

Section 283.27(1), F. S., was brought into the statutes by Ch. 72-377, Laws of Florida, which was an act relating to public documents and providing that every state agency which promulgates public documents must cause a statement of cost data and purpose to be reflected on each publication. The body of the act in pertinent part provides:

> Every department or agency of the state which promulgates public documents as defined in subsection (1) of Section 257.05, Florida Statutes, shall cause the following statement . . . to be printed on the publication . . . .

Chapter 283, F. S., generally pertains to public printing, including reports of state agencies and other documents.

Subsection (1) defining "public document" was added to s. 257.05 by Ch. 67-233, Laws of Florida, which was an act relating to the State Library and Historical Commission and authorizes the State Library and Historical Commission (now the Division of Library Services of the Department of State) to provide for the distribution of public documents and legal publications to depository libraries. The body of that act defines a "public document" as referred to in s. 257.05 as: ". . . any annual, biennial, regular or special report or publication of which at least five hundred (500) copies are printed and which may be subject to distribution to the public." This definition in its statutory context and history necessarily is concerned with and limited to state documents and publications issued and published by the state through its officers, departments, boards, courts, or other agencies of the state. It may also be noted that ss. 283.22 and 283.23, F. S., respectively relating to general libraries of institutions in the State University System and to certain law libraries, refer to "each officer of the state empowered by law to distribute such public documents" or "legal publications," respectively, in authorizing such state officers to transmit copies of such documents and publications to such libraries and state legal depositories. All such documents and publications are, of course, by necessary implication required to be published by or under the authority of the state, *i.e.*, under the authority of the duly enacted acts of the State Legislature. *See* State *ex rel.* Greenberg v. Florida State Bd. of Dent., 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970); AGO 071-28; and *see generally* 67 C.J.S. *Officers* ss. 102a., 103 and 81 C.J.S. *States* s. 58.

In view of the foregoing, it would appear that the public or state documents which are the subject of s. 283.27, F. S., and defined in s. 257.05(1), F. S., mean those state documents and publications issued and published by the state through its officers and its agencies, institutions, and instrumentalities under and in accordance with the statutory law and reports of officers and agencies of the state authorized or required by state laws and which are distributed or may be subject to distribution to the public and to those state agencies, institutions, instrumentalities, and depositories designated in and provided for by Chs. 257 and 283, F. S., respectively. *Cf.* AGO 073-147 holding among other things that a manual of instructions for tax assessors (property appraisers) required by statute for a specific purpose and not intended for distribution to anyone other than state and local officials connected with the administration of property taxes was not subject to distribution to the public and therefore was not a public document within the meaning of, or for the purposes of, s. 283.27(1).

To fall within the requirements of s. 283.27(1), F. S., a state department agency must *promulgate* public documents. The word "promulgate" generally means "publish." United States v. Stoehr, 100 F.Supp. 143, 164 (M.D. Pa. 1951) and 73 C.J.S. *Promulgate*, p. 131. *See also* Black's Law Dictionary p. 1380.

Carrying this definition further, the word "publish" generally means to give to the public. Reimel v. Alcoholic Beverage Control Appeals Board, 257 C.A.2d 158 (Cal. 1967); Estill County v. Norlend, 175 S.W.2d 341, 346 (Ky. 1943). While the meaning of the term "publish" may depend on the subject with which it is connected, it has been said that the word is usually associated with printing by book, circular, pamphlet, or newspaper or the like. *See* 73 C.J.S. *Publish*, p. 1250. *See also* Black's Law Dictionary 1397 *Publish*. Equating "publish" with the term "promulgate" appears to be in keeping with the context of s. 257.05 and Ch. 283, F. S., generally and s. 283.27(1), F. S., in particular which goes on to require that cost and purpose data "be *printed* on *the publication* adjacent to the identification of the agency responsible for *publication* . . . ." (Emphasis supplied.) The definition of "publication" lends further support for this construction.

> Inseparable from the term [publication] is the idea of publicity, circulation, and

> intended distribution, and the thought running through all the uses of the word is an advising of the public, a making known to the public for a purpose . . . . [73 C.J.S. *Publication*, p. 638.]

The term ordinarily means the act of making public or known, William G. Meier Glass Co. v. Anchor Hocking Glass Corp., 95 F.Supp. 264, 267 (D.C. Pa. 1951), and in its ordinary acceptance means to print, or cause to be printed, and to issue from the press either for sale or general distribution as a book, newspaper, piece of music, engraving, etc. Tiffany Publications v. Deming, 50 F.2d 911, 914 (D.C. Md. 1931); *see also* Black's Law Dictionary 1396, *Publication*. In this sense "publication" means that which is published or made known to the public either by writing or printing, as a book or print which has been published and made public. 73 C.J.S. *Publication*, p. 638.

Press releases do not readily fall within any such definitions. Courts have generally characterized press releases in the nature of announcements, and not publications or public documents. In Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941), press releases were characterized as ". . . *announcements* [which] serve a useful if not an essential role in the functioning of the democratic processes of government." (Emphasis supplied.) *Id.* 117 F.2d at 278 n.9. In Reed v. Morton, 480 F.2d 634 (9th Cir. 1973), *cert. denied*, 414 U.S. 1064 (1973), the court described a press release as ". . . an *announcement* of the fact of lower echelon governmental action, nothing more." (Emphasis supplied.) *Id.* 480 F.2d at 642 n.9. In F.T.C. v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968), Judge Robinson comprehensively discussed the use and function of press releases by a governmental agency:

> . . . "The effective functioning of a free government like ours depends largely on the force of an informed public opinion." Relatively few matters attract more readily the interest of the people than what government is doing for the people. News releasing by the agencies of government has become a standard technique in the operations by which the people are kept knowledgeable as to governmental affairs. Press releases by public officials, we have said, "serve a useful if not essential role in the functioning of the democratic processes of government."
>
> An incidental and wholesome consequence of general publicity of proceedings challenging the fairness and honesty of particular commercial practices may well be the generation of a desirable if unnecessary measure of public caution in dealings with those identified with such practices. Publicity, or the specter of publicity, may also, in a very practical way, achieve on its own a degree of informal regulation by deterring those who otherwise might be tempted to take liberties with the law. But beyond these factors is the consideration that the business of an important governmental agency is everybody's business. The people want to know, and are entitled to know, what goes on in government, and the thirst for information is not limited to those who may have or may contemplate a direct commercial relationship with the subject of governmental concern at the moment. The activities of the Federal Trade Commission constitute news, and any restriction upon its machinery for public accessibility to that news must be taken for what it really is. [*Id.* at 1317-1318; footnotes omitted.]

While recognizing that press releases provide a valuable means of serving the public interest by informing the public of governmental action, courts have not gone so far as to characterize press releases themselves as publications or public documents.

Similarly, Webster's Seventh New Collegiate Dictionary 673 (7th Ed. 1963) defines press release not as a publication but only as "any material given or sent to a newspaper before a prearranged date of publication." Indeed, if press releases were construed as printed state publications or reports, the release would certainly fall within the definition of Class B public printing set forth in s. 283.04, F. S., and each press release or purchase in excess of $50 of such printing would therefore require individual competitive bids and contracts under regulations adopted by the Division of Purchasing of the Department of General Services under s. 283.10 and s. 287.102, F. S. There is nothing within the legislative definition of public document which warrants such a result. Other sections of Ch. 283 provide relevant examples of the types of state documents considered to be promulgated by state agencies for purposes of this chapter. These include annual and biennial reports of state agencies as required by law, s. 283.101; general laws, special acts,

memorials and resolutions of the Legislature, and pamphlet-form copies of general acts of the Legislature, s. 283.12; journals of the Legislature, s. 283.15; pamphlet copies of the general laws, s. 283.18; and copies of reports of state officers and agencies, volumes of periodic reports of cabinet officers and copies of reports or other publications by state boards or institutions, ss. 283.22 and 283.24. As indicated above, press releases do not possess the same characteristics as public documents or publications of this type.

Moreover, Ch. 283 further provides for the storage of these documents in libraries of the State University System, s. 283.22, in designated law libraries and state legal depositories, s. 283.23, for the exchange of such documents with other states, s. 283.22, and authorizes and directs distributions of such documents to the Library of Congress, at such time as the same are published and made available for public distribution, s. 283.24.

Section 257.05, F. S., further provides for the furnishing to the Division of Library Services of the Department of State 25 copies of public documents issued by state officers and agencies for deposit in and distribution by the division to designated state depositories for such documents and authorizes the exchange of such copies of documents for those of other states and countries. These statutes indicate a legislative concern to preserve and distribute state documents of informational and historical significance to the state, to state government, and to the public. In this context, it does not appear under the usual and customary definition of the terms that the announcement or delivery of a press release rises to the level of a "promulgation" of a public document as contemplated by s. 283.27(1), F. S.

Assuming, however, that the term "promulgate" is broad enough to include the issuance and delivery of a press release, s. 283.27(1), F. S., before becoming operative, imposes the additional requirement that a press release be a "public document" as that term is defined in s. 257.05(1), F. S.

The statutory definition of "public document" in s. 257.05(1) refers to "any *annual, biennial, regular* or *special* report or publication of which at least 500 copies are printed. . . ." (Emphasis supplied.) "Annual" and "biennial" in this context mean yearly or once every two years, and connote periodic reports or publications. *See* 3A C.J.S. *Annual*, p. 862 and 10 C.J.S. *Biennial*, p. 358. In some instances the Legislature has specifically required such reports. *See, e.g.*, s. 624.315, F. S., relating to reports of the Department of Insurance and s. 947.15, F. S., relating to reports of the Parole and Probation Commission.

Similarly, the term "regular" also connotes a periodic occurrence, usually steady or uniform in course. *See* 76 C.J.S. *Regular*, p. 608. The Legislature has expressly required such reports to be submitted by some departments or agencies of the state. *See, e.g.*, s. 20.315, F. S. As indicated above, however, a press release is not characterized by issuance on a periodic or uniform basis, but instead is inherently bound to the particular news event it announces. Thus, the remaining statutory category under s. 257.05(1), F. S., which might be applicable to a press release is that of a "special report or publication."

The word "special" generally means "distinguished by some unusual quality; uncommon; noteworthy; extraordinary." Board of Trustees of Public Employees Retirement System v. Lowry, 88 So.2d 585, 589 (Miss. 1956). *See also* 81 C.J.S. *Special*, p. 898. In this context, press releases have not been characterized as unusual, uncommon, extraordinary, or noteworthy functions of government, but as normal informational techniques of government. F.T.C. v. Cinderella Career and Finishing Schools, Inc., *supra*; *see also* Barr v. Mateo, 360 U.S. 564, 576 (1959), Black, J. concurring opinion. In light of the accepted use and functions of press releases, there is no basis to construe such announcements as special or extraordinary in nature.

Additionally, under s. 257.05(1), F. S., the statutory regulations of s. 283.27, F. S., do not become operative unless the state agency prints 500 copies of a report or publication, and also makes such reports or publications subject to distribution to the public. Your question assumes that the state agency prints 500 copies of a press release and that the agency itself also sends the 500 copies to various news media. The question then becomes whether distribution to news media is equivalent to distribution to the public under the statutes.

"Distribution" is a word of many definitions, but usually means to dispense, or in another accepted sense, to transfer ownership. *See* 27 C.J.S. *Distribution*, pp. 615-616. The meaning of the phrase "to the public" was examined in a similar context in the construction of s. 283.28, F. S., as discussed in AGO 076-76. In that opinion, it was recognized that the term "public" does not have any definite or fixed meaning, but depends for its meaning on the context in which it is used. That opinion concluded:

> Thus, it appears that the term "public" as used in s. 283.28, F. S., has reference to those entities and persons other than governmental entities and officials whose names appear on any one or more mailing or subscribers' lists kept and maintained by the agency to be used by it in making the periodic distributions of printed material without charge to such entities and persons.

The meaning of the phrase "to the public" was also discussed in a somewhat similar context in AGO 073-147, *supra*, where it was held that a manual of instructions for the tax assessors prepared by the Department of Revenue to instruct and assist taxing officials in the administration of property taxes was not a document "subject to distribution to the public" within the meaning of s. 257.05(1) and, accordingly, the statement of cost and purpose data of s. 283.27(1) was not required. There it was observed that general public distribution would be inconsistent with the statutory purpose of the promulgation of the tax assessor's manual.

In the same manner, the press release itself is actually intended for distribution to the news media, which may or may not publish or broadcast the information contained therein. Therefore, while the information contained in a press release may ultimately be disseminated or distributed to the public, distribution to the public is within the discretion of the news media, and the press release itself is intended for the news media, and the transfer of the press release is to the news media. Indeed, by the time information, or any portion thereof, contained in the press release is reproduced by the news media, it is the product and property of the particular news media. *See* International News Service v. Associated Press, 248 U.S. 215 (1918). Accordingly, in final form, the information distributed to the public is subject to journalistic license which, depending on the individual news account, makes it difficult and unwarranted to characterize a press release as being directly distributed to the public.

For the foregoing reasons, I am of the opinion that the issuance and delivery of press releases by state agencies does not constitute the promulgation of a public document within the meaning of s. 283.27, F. S., and that a press release is not a periodic or special report or publication of a state agency within the meaning of s. 257.05(1), F. S.

078-14—January 27, 1978

STATE MOBILE HOME TENANT-LANDLORD COMMISSION

MAY CONTINUE TO FUNCTION PENDING APPEAL OF DECISION DECLARING ENABLING LEGISLATION UNCONSTITUTIONAL

To: J. Jackson Walter, Executive Director, Department of Business Regulation, Tallahassee

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTIONS:

> **1. Pending a final decision on the appeal of the decision declaring Ch. 77-49, Laws of Florida [ss. 83.770-83.794, F. S.], unconstitutional, are there any limitations on the powers vested in the State Mobile Home Tenant-Landlord Commission by s. 7 of Ch. 77-49 [s. 83.782, F. S.]? And, more specifically, can the commission, once organized, commence rulemaking pursuant to Ch. 120, F. S.?**
>
> **2. Pending a final decision on the appeal, are there any changes in the relationships explained in AGO 077-111, dated October 20, 1977, between the commission, the Board of Business Regulation, and the Department of Business Regulation? And, are there any changes with respect to the appropriate handling of petitions filed by tenants pursuant to s. 8(1) of Ch. 77-49, Laws of Florida [s. 83.784(1)(a), F. S.]?**
>
> **3. Pending a final decision on the appeal, what authority does the commission have to collect funds? And, more specifically:**

a. Can the commission, once organized, collect registration fees from park owners as provided in s. 6(2) of Ch. 77-49, Laws of Florida [s. 83.780(2), F. S.]?

b. If the Supreme Court affirms the circuit court decision, must any registration fees deposited in the Mobile Home Tenant-Landlord Trust Fund be returned to the registrants? If not, what would be the proper disposition of the trust funds?

c. If the park owners pay registration fees and the Supreme Court affirms the circuit court decision, can park owners nonetheless charge back the fees to the mobile home owners?

d. If the commission makes any expenditures from the trust fund prior to the Supreme Court affirming the circuit court decision, would your answer to question 3b remain unchanged, and would there be any liability by the state?

SUMMARY:

Upon appeal by a state agency of a trial court's declaration of the unconstitutionality of a state statute, and injunction from enforcement of such statute, the trial court's order is stayed pending determination on appeal. Pending the final decision on appeal, the State Mobile Home Tenant-Landlord Commission may continue its functions, including the acceptance of registration fees. Whether registration fees are refunded should Ch. 77-49, Laws of Florida, be ultimately held unconstitutional is a decision to be made by the Comptroller or the court. Registration fees probably can be charged back to tenants even if the act is held unconstitutional. Any refunds allowed by the Comptroller should be made from the fund benefited by the original payment.

AS TO QUESTION 1:

Chapter 77-49, Laws of Florida [ss. 83.770-83.794, F. S.], creating the Mobile Home Tenant-Landlord Commission, was recently declared unconstitutional by a Leon County Circuit Judge. The defendants, the Department of Business Regulation and the Governor and Attorney General, immediately filed an appeal to the Florida Supreme Court.

Rule 5.12(1), Florida Appellate Rules, provides:

> . . . When the state or any of its political subdivisions, or any officer, board, commission or other public body of the state or any of its political subdivisions, in a purely official capacity, takes an appeal or petitions for certiorari, the filing of the notice of appeal or the petition for certiorari as the case may be shall perfect the same and stay the execution or performance of the judgment, decree or order being reviewed and no supersedeas bond need be given unless expressly required by the court.

The Florida Supreme Court in Powell v. Florida Land & Improvement Co., 26 So. 700 (Fla. 1899), stated the effect of a supersedeas at p. 701:

> . . . a supersedeas upon an appeal from an order granting an injunction operates to prevent the court from enforcing the injunction, and thereby enables the party enjoined to do those things which the injunction forbids without fear of punishment during the pendency of the supersedeas.

Florida law does not distinguish between a mandatory and prohibitive injunction as to the *effect* of supersedeas. Powell v. Florida Land & Improvement Co., *supra. Contra*, City of Miami v. Cuban Vill-Age Co., 143 So.2d 69 (3 D.C.A. Fla., 1962), *and see*, City of Miami Beach v. Lansburgh, 217 So.2d 348, fn. 1 (3 D.C.A. Fla., 1969).

The lower court in the instant lawsuit enjoined the state "from implementing the procedures of Chapter 77-49, Laws of Florida, and from exercising the authority, power and discretion contained therein." Pursuant to Rule 5.12, Florida Appellate Rules, the effect of this order is automatically stayed and the State Mobile Home Tenant-Landlord

Commission may legally proceed to function. The commission may, therefore, exercise those powers granted by the act, which include rulemaking powers.

Your first question is answered in the affirmative.

AS TO QUESTION 2:

In AGO 077-111, I delineated the relationship between the State Mobile Home Tenant-Landlord Commission and the Department of Business Regulation. Therein I also discussed the authority of the commission with regard to the acceptance of registrations and handling of petitions. IN AGO 077-111, I concluded:

> 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 Section 8(1) of the Act.

In light of the answer to question 1 hereinabove, the opinions expressed in AGO 077-111 are unaffected by the recent circuit court decision rendering Ch. 77-49, Laws of Florida, unconstitutional.

Your second question is, therefore, answered in the negative.

AS TO QUESTION 3:

You have asked a series of questions regarding the collection and disposition of funds by the State Mobile Home Tenant-Landlord Commission.

Section 6 of Ch. 77-49, Laws of Florida [s. 83.780, F. S.], requires the registration of all mobile home parks containing 100 or more dwelling units. A registration fee of $1 for each dwelling unit contained in the mobile home park shall accompany the application for registration. Presumably by this date those parks required to register have made such application accompanied by the appropriate fee.

Discussed in question 1 hereinabove is the general effect of a stay pending disposition on appeal. The conclusions expressed in that response are equally applicable to the commission's authority to collect registration fees from mobile home parks. Pending the determination of the constitutionality of Ch. 77-49, Laws of Florida, by the Florida Supreme Court, the commission is not only authorized, but is required, to collect registration fees.

Your next query relates to the disposition of the registration fees should the Florida Supreme Court affirm the circuit court's decision rendering Ch. 77-49, Laws of Florida, unconstitutional. Although this question is premature, and its answer may depend upon the Supreme Court's opinion, the following comments are offered.

Section 5 of Chapter 77-49, Laws of Florida [s. 83.778, F. S.], creates the State Mobile Home Tenant-Landlord Trust Fund which consists of registration fees and is used to finance the duties and functions of the commission. Such funds are public funds although not placed in the General Revenue Fund. *Cf.* Irion v. Lyons, 113 So. 857 (Fla. 1927).

Section 215.32, F. S., provides that moneys received by the state are to be deposited into the State Treasury in various named funds, including the trust funds. Paragraph (2)(b) further provides:

> (b)1. The trust funds shall consist of moneys received by the state which under law or under trust agreement are segregated for a purpose authorized by law. . . .
>
> * * * * *
>
> 3. All such moneys are hereby appropriated for the purpose for which they were received, to be expended in accordance with the law or trust agreement under which they were received, subject always to other applicable laws relating to the deposit or expenditure of moneys in the State Treasury.

The State Mobile Home Tenant-Landlord Trust Fund, therefore, is a trust fund within the meaning of s. 215.32(1)(b), F. S.

The general rule regarding refunds from the State Treasury was set forth in State *ex rel.* Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954) at p. 562:

> . . . unless there is some statute which authorizes a refund or the filing of a claim for a refund, money cannot be refunded or recovered once it has been paid *although levied under the authority of an unconstitutional statute.* (Emphasis supplied.)

Section 215.26, F. S., which governs refunds of payments into the State Treasury, provides in part:

> (1) The Comptroller of the state may refund to the person who paid same, or his heirs, personal representatives or assigns, any moneys paid into the State Treasury which constitute:
> (a) An overpayment of any tax, license, or account due;
> (b) A payment where no tax, license or account is due; and
> (c) Any payment made into the State Treasury in error.

Therefore, in order for the State to refund moneys deposited in the State Mobile Home Tenant-Landlord Trust Fund, such deposit must be within one of the three types of payments set forth in s. 215.26, F. S.

In AGO 075-293, I concluded:

> Refunds of examination fees collected and paid under Ch. 491, F. S., may be allowed under s. 215.26, F. S., if the Sanitarians' Registration Board has not initiated any investigations or action concerning the application to take the examination or concerning the applicant's qualifications. When said investigations are begun, the fee is earned, or is *due,* and no part may be refunded, although the applicant is not permitted to take the examination or the applicant's surviving spouse or estate later requests a return of the fee.

In AGO 076-107, I was confronted with the question of whether the Comptroller could refund moneys from the Land Acquisition Trust Fund, when an application for a dredge and fill permit is canceled or withdrawn by the applicant prior to issuance of the permit. Therein, I concluded:

> Refunds of moneys paid as the sales price of fill materials by applicants for dredge and fill permits who have received the permits may not be refunded because such sales are consummated, fully executed contracts selling the fill material and which are not contingent upon applicants actually dredging the fill. As such, there is no basis for a claim for refund for a transaction fully completed, and likewise no statutory authorization exists for same. If the application for a dredge permit is canceled or withdrawn prior to issuance of the permit, moneys deposited with the application for payment of fill material may be refunded by the Comptroller from the Land Acquisition Trust Fund pursuant to ss. 215.26, 215.32, and 374.041, F. S., because such payments are made on an account not legally due, but only conditionally due, per s. 215.26(1)(b). The right to the refund accrues when the claimant has a right to recover the moneys paid or, in this instance, upon cancellation or withdrawal of the application for the dredge and fill permit.

These opinions in effect hold that a payment is due when the state agency takes some action with regard to such payment.

In the instant case, there appears to be no affirmative duty placed upon the State Mobile Home Tenant-Landlord Commission when the application and registration fee is received and the fee is earned upon receipt by the commission.

In State *ex rel.* Hardaway Contracting Co., Inc. v. Lee, 21 So.2d 211 (Fla. 1945), the Florida Supreme Court ordered the Comptroller to make a refund for taxes paid pursuant to a statute subsequently held unconstitutional, relying upon Ch. 22008, 1943, Laws of Florida, (which is substantially identical to and the predecessor of s. 215.26, F. S.). The court held that, since the statute was declared to be a nullity, taxes paid

pursuant to it were payments made when none were due, and also were payments "made into the State Treasury in error." This case was cited with approval in State v. Green, 174 So.2d 546 (Fla. 1965).

In AGO's 061-4 and 073-464, it was stated that the payment of taxes levied pursuant to a statute which was subsequently held unconstitutional and void by the courts was a "payment where no tax was due." Although a different refund statute was relied upon, the language is similar to s. 215.26, F. S., so that the rationale would be applicable to s. 215.26.

Compare those decisions with City of Tampa v. Birdsong Motors, 261 So.2d 1 (Fla. 1972), wherein the Florida Supreme Court ruled a municipal license tax unconstitutional. As for refunds for payments made while the ordinance was in effect, the court concluded at p. 7:

> This decision is prospective only, is not retroactive, and affords no remedy for taxes previously paid by persons not making a judicial attack on the ordinance.

A corporation sought to recover refund of taxes paid pursuant to the ordinance held unconstitutional in City of Tampa v. Birdsong Motors, Inc., *supra*. The Second District Court of Appeal held that in view of the prospective nature of the Supreme Court decision invalidating the ordinance, the taxpayer was not entitled to recover for taxes paid prior to the court's decision without a judicial attack on the ordinance. City of Tampa v. G.T.E. Automatic Electric, Inc., 337 So.2d 845 (2 D.C.A. Fla., 1976). Merely bringing an action for a refund within the statute of limitation is not an "attack on the ordinance."

Therefore, should Ch. 77-49, Laws of Florida, ultimately be held unconstitutional by the Florida Supreme Court, it will be the Comptroller's obligation to determine whether to make such refunds should the Supreme Court not address the issue. If the act is ultimately declared unconstitutional, and the registration fees are not refunded, then the disposition of the moneys in the trust fund is within the sole prerogative of the Legislature.

You also ask if the park owners may charge back to the mobile home owners this registration fee if Ch. 77-49, Laws of Florida, is held unconstitutional. Section 6(2) of the act [s. 83.780(2), F. S.] authorizes mobile home park owners and operators to pass on the $1 per dwelling unit registration fee to the mobile home owners. Generally, when a statute authorizing an act is held unconstitutional, the authority for the act is extinguished. Should Ch. 77-49 be held unconstitutional, parks cannot charge back the registration fee pursuant to s. 6(2) of the act.

It is important to note, however, that a mobile home park could probably charge back this registration under the provisions of Ch. 83, part III, F. S. There is no prohibition against charging back $1 a year as increased rent in those instances where the tenancy is not by written lease. Where the tenancy is by written lease, s. 83.760(3), F. S., allows mobile home parks to pass on to the tenants costs which are incurred due to the actions of any state or local government. The registration fee required by s. 6(2) of Ch. 77-49 [s. 83.780(2)] would appear to be a cost "incurred due to the actions of any state or local government."

Finally, you query as to the effect of expenditures from the trust fund should Ch. 77-49, Laws of Florida, be ultimately held unconstitutional, and the state's liability for such expenditures. This question presupposes that the Comptroller has elected to refund fees pursuant to s. 215.26, F. S.

Section 215.26(1), F. S., provides for a continuing appropriation from which to make such refunds. This section also provides that the appropriation credited with the payment shall, at the time of making any refund, be charged therewith. The fund that benefited from the original payment is the fund from which the refunds are made. State *ex rel.* Hardaway Contracting Co., Inc. v. Lee, *supra*.

Refunds, if provided for, may only be made from the fund benefited. If such fund does not have sufficient moneys from which to make such refunds, then the refunds simply cannot be made, absent a specific legislative appropriation or claims bill.

078-15—January 31, 1978

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

NOT REQUIRED TO NOTIFY LAW ENFORCEMENT AGENCIES OF REPORTED INSTANCES OF CHILD ABUSE PENDING INVESTIGATION

To: Janet Reno, State Attorney, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Does s. 827.07(6), F. S., require the Department of Health and Rehabilitative Services to notify police agencies upon receipt of a report of abuse of a child?

SUMMARY:

Pending legislative or judicial clarification, the Department of Health and Rehabilitative Services is not under a statutory duty to directly notify appropriate police agencies of each reported instance of child abuse received by the department. The department is under a duty to conduct an immediate investigation and if the department has reason to believe that a child has been criminally abused to immediately and orally notify the state attorney. Reports of abuse concerning employees or agents of the department acting in an official capacity are to be investigated by the state attorney rather than the department. Reports of suspected criminal child abuse forwarded to the state attorney and the circuit court should not contain the name or identity of the person reporting the abuse without the written consent of such individual. The department may in its discretion directly contact the police when an urgent situation exists which requires immediate police intervention.

Section 827.07(6), F. S. (1976 Supp.), as amended by s. 3, Ch. 77-429, Laws of Florida, provides:

> RESPONSIBILITIES OF PUBLIC AGENCIES.—Upon receipt of a report of abuse of a child, the department shall cause an immediate investigation to be made. If the department has reason to believe that a child has been criminally abused, it shall immediately and orally notify the State Attorney, who shall assist local law enforcement officers in the investigation of the case. The department shall secure the cooperation of law enforcement officials, courts of competent jurisdiction, and other appropriate state and local agencies providing human services. All state, county, and local agencies have a duty to give full cooperation to the department, to transmit reports of abuse to the department, to protect and enhance the welfare of abused children, and to protect and enhance the welfare of other children potentially subject to abuse detected by a report made pursuant to this section. Any report which alleges that an employee or agent of the department, acting in an official capacity, has committed an act of child abuse shall be investigated by the State Attorney in whose circuit the alleged act of child abuse occurred.

According to your letter, the state attorney's office has taken the position that the first sentence of s. 827.07(6), F. S., obligates the department to immediately notify the police of all reports of child abuse, thereby causing an immediate investigation to be made by the police.

However, the department has furnished this office with memoranda from the office of the general counsel and district legal counsel which dispute this interpretation of the statute and instead argue that the department is under a duty to report to the state attorney only those cases where, upon receipt of a complaint, the department has reason

to believe that criminal abuse has occurred or, following an initial investigation, the department suspects that criminal abuse has occurred.

Initially, it should be stated that this office is not empowered to alter, ignore, or set aside the provisions of s. 827.07(6), F. S., or any other pertinent provision of the Child Abuse Act, Ch. 827, F. S., because of disagreement with the Legislature over the policies and procedures set forth in the act. *See, e.g.*, Ball v. Branch, 16 So.2d 524 (Fla. 1944) and Griffin v. Stonewall Insurance Co., 346 So.2d 97 (3 D.C.A. Fla., 1977). This is true even though this office might believe this problem should be handled in a different fashion. Twomey v. Clausohm, 234 So.2d 338 (Fla. 1970); Williams v. Newton, 236 So.2d 98 (Fla. 1970); and Florida Real Estate Commission v. McGregor, 268 So.2d 529 (Fla. 1972). It is the responsibility of this office to ascertain and give effect to, rather than defeat, the intent of the Legislature in enacting and amending the Child Abuse Act, Ch. 827.

While your statements that the department is not a law enforcement agency and does not possess the expertise to determine whether a violation of the criminal law has occurred are generally accurate, it appears at the same time that the Legislature did not intend that the thrust of the department's duties under Ch. 827, F. S., be of a criminal nature. In the 1975 amendments to Ch. 827, Ch. 75-185, Laws of Florida, the Legislature made significant changes in the purpose and requirements of the act. Prior to the 1975 amendments, the purpose of the act was said to

> . . . provide for the detection and correction of the abuse or maltreatment of children who are unable to protect themselves. . . . [Section 828.041(2), F. S. 1973 (now s. 827.07[2], F. S. 1977).]

In amending this section in 1975, by s. 1, Ch. 75-185, Laws of Florida, the Legislature added the following italicized language:

> . . . to provide for the detection and correction *through the provision of rehabilitative and ameliorative services* of the abuse or maltreatment of children who are unable to protect themselves. . . . [Section 827.07(2), F. S. 1977.]

Additionally, prior to 1975, s. 828.041(8), F. S. 1973, transferred to s. 827.07(8) by s. 65, Ch. 74-383, Laws of Florida, provided:

> With regard to *any case* of reported child abuse, the department shall transmit the report received by it to the circuit court of the county where the incident occurred, which report shall contain the results of the investigation. (Emphasis supplied.)

This section was amended by Ch. 75-185 by adding the following italicized language to presently require that:

> If, upon investigation of a report, as provided in subsection (6) of this section, it is suspected that a child has been *criminally abused*, the department shall *immediately* transmit the report received by it to *the state attorney and the circuit court* of the county where the incident occurred. [Section 827.07(8), F. S. (1974 Supp.), renumbered s. 827.07(9) by s. 3, Ch. 77-429, Laws of Florida.]

Thus, prior to 1975, the department was under a statutory duty pursuant to former s. 828.041(8), F. S., transferred to s. 827.07(8), F. S. (1974 Supp.), to report *all cases* of reported child abuse—both civil and criminal—to the circuit court along with the results of the department's investigation. In amending s. 828.041(8), transferred to s. 827.07(8), the Legislature has limited the reports furnished to the state attorney and the circuit court to those reports which *upon investigation* reveal suspected criminal abuse. Such an interpretation is consistent with the purpose of the act, as amended, which focuses on the department's role in providing rehabilitation and ameliorative services.

Such an interpretation is also consistent with s. 827.07(7), F. S. 1977, which provides in pertinent part that:

> In addition, the names of persons reporting abuse shall in no case be released to any person, *other than employees of the department involved in the*

investigation of reports of abuse, without the written consent of the person reporting. (Emphasis supplied.)

Also see Ch. 77-429, Laws of Florida, which created s. 827.07(4)(c), F. S., relating to photographs of suspected child abuse and requiring reimbursement to the *department* for the cost of photographs and that photographs or reports on X-rays taken pursuant to this section be sent *to the department.*

Section 827.07(6), F. S., also requires that any report which alleges that an employee or agent of the department, *acting in an official capacity*, has committed an act of child abuse be investigated by the state attorney in whose circuit the alleged act of abuse occurred. In these limited cases, the obvious purpose of the statute is to ensure that the department, in its initial investigation, is not investigating alleged wrongdoing by one of its own employees or agents. In such cases involving an employee of the department acting in an official capacity, the Legislature has made it the responsibility of the state attorney, rather than the department, to conduct the investigation into reports of abuse.

Section 827.07(7), F. S., establishes a central abuse registry in which presumably all reports and other information concerning child abuse is maintained by the department. The department is required to maintain information as to the name of the abused child, the name of the family or other persons responsible for his or her care, *and the result of the investigation.* All information maintained in the registry is confidential and may be released only as provided within the act.

However, while the department is not *required* to directly contact law enforcement officials without first contacting the state attorney, I do not believe that the act *prohibits* the department from so proceeding when an urgent situation exists requiring immediate police action or the protection of the safety and welfare of children. *Accord*: Attorney General Opinion 076-21. However, as noted in AGO 076-21, the name of the person reporting the abuse may not be released to the state attorney or the police without the written permission of the person reporting the abuse.

In sum, pending legislative or judicial clarification, I do not believe that s. 827.07(6), F. S., places a duty on the department to directly notify the police of each reported instance of child abuse received by the department. The department is under a duty to conduct an immediate investigation, and if the department has reason to believe that a child has been criminally abused, to immediately and orally notify the state attorney. Reports of abuse concerning employees or agents of the department acting in an official capacity are to be investigated by the state attorney rather than the department. Reports of suspected criminal child abuse forwarded to the state attorney and the circuit court should not contain the name or identity of the person reporting the abuse without the written consent of such individual. The department may, however, in its discretion, directly contact the police when an urgent situation exists which requires immediate police intervention.

In AGO 076-21, this office urged the Legislature to amend the Child Abuse Act, Ch. 827, F. S., because of the very real possibility that individuals who have committed crimes involving criminal child abuse or maltreatment could avoid prosecution because of certain of the requirements and prohibitions contained in the act. Although the 1977 session of the Legislature amended Ch. 827, by Ch. 77-429, Laws of Florida, it did not amend those provisions of the act which have impeded the investigative and prosecutorial functions of criminal justice agencies. I intend to again recommend in 1978 that the Legislature revisit Ch. 827 in order to consider the problems which have been confronted by law enforcement agencies throughout the state by the requirements and prohibitions contained therein. Ultimately, it is the responsibility of the Legislature to formulate a solution to this problem. If the legislative purpose behind Ch. 827 remains one of seeking a solution to the problem of child abuse by providing social services as opposed to criminal remedies, then it is unlikely that any major changes in Ch. 827 should be anticipated.

078-16—January 31, 1978

COMMISSION ON ETHICS

NONDISCLOSURE PROVISIONS OF THE CODE OF ETHICS

To: Michael J. Satz, State Attorney, Fort Lauderdale

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

1. Did the allegations of Sunrise Councilman Shaw and Councilwoman Brown published September 28, 1976, violate the nondisclosure provisions of s. 112.317(6), F. S.?

2. Did Councilwoman Brown's pronouncements at the February 8, 1977, city council meeting, which were later publicized by the news media, violate the nondisclosure provision of the statute?

SUMMARY:

Based upon the facts supplied to this office by the state attorney for the seventeenth judicial circuit, it does not appear that a sufficient factual basis exists in order to sustain a conviction under s. 112.317(6), F. S.

STATEMENT OF FACTS:

In the September 28, 1976, editions of the *Fort Lauderdale News* and *The Miami Herald* there appeared articles whereby Councilman Walter Shaw and Councilwoman Pat Brown alleged a conflict of interest on the part of Sunrise Councilman Theodore Bradshaw.

The facts indicate that in the September 28, 1976, editions of the *Fort Lauderdale News* and *The Miami Herald* there appeared articles whereby Councilman Walter Shaw and Councilwoman Pat Brown alleged a conflict of interest on the part of Sunrise Councilman Theodore Bradshaw because All-City Security Corporation, partially owned and operated by Bradshaw's wife, had the contract to provide the security for the construction site of the Sunrise Convention Center. In response to this publicity, the general contractor terminated the use of All-City Security on the date the articles appeared.

In a letter received by the Commission on Ethics on November 19, 1976, Councilman Bradshaw requested an advisory opinion as to whether or not a conflict of interest existed. In CEO 76-213 dated December 17, 1976, Donald H. Reed, Jr., Chairman of the Commission on Ethics, and Lawrence A. Gonzalez, Executive Director of the commission, concluded:

> We find there is no prohibitive conflict of interest where a city councilman's spouse owns or is an officer of a security agency which provides guards for a general contractor at the site of building being constructed for the City.

Councilman Bradshaw has testified he provided a copy of this opinion to his fellow members of the city council.

Subsequently, at a city council meeting held on February 8, 1977, Councilwoman Brown requested travel funds for the purpose of traveling to Tallahassee to confer with the Commission on Ethics in regard to the above-described situation concerning Councilman Bradshaw. In a letter dated March 1, 1977, Mr. Gonzalez advised Councilman Bradshaw a complaint had been lodged and a confidential preliminary investigation was under way. In a letter dated April 22, 1977, Mr. Gonzalez informed Councilman Bradshaw of the results of the preliminary investigation report. In a letter dated May 3, 1977, Councilman Bradshaw was informed by Mr. Gonzalez that a probable cause hearing would be held on May 18, 1977.

In the February 12, 1977, edition of the *Broward Times* there appeared an article on Ms. Brown's request for travel funds to travel to Tallahassee to confer with the Commission on Ethics as to the alleged conflict of interest by Councilman Bradshaw. The article stated her complaint was concerning the All-City Security contract, and, further,

the fact that Councilman Bradshaw's son was employed by the city fire department. The article also stated she was concerned about a possible conflict of interest as to Councilman Cecil Shine's employment at the Sunrise Convention Center while he was serving as a councilman.

In the March 5, 1977, edition of *The Broward Times* there appeared an article stating Ms. Brown had returned from her trip to meet with the Commission on Ethics. She refused comment on her discussions with the commission because of the confidentiality provision. The article then described her prior allegations.

AS TO QUESTION 1:

It does not appear from the information furnished to this office that either Councilman Shaw or Councilwoman Brown willfully *disclosed their intention* to file a complaint or the existence or contents of a complaint *which had been filed* with the commission by the publication of their remarks in the September 28, 1976, editions of the *Fort Lauderdale News* or *The Miami Herald.* Nothing in s. 112.317(6), F. S., purports to prohibit an individual from alleging certain misconduct against a public official subject to part III, Ch. 112, F. S. Section 112.317(6), by its terms, and in pertinent part, *only* prohibits the willful disclosure of an intention to file a complaint or the existence or contents of a complaint which has been filed with the commission. The remarks attributed to Councilman Shaw and Councilwoman Brown did not mention any complaint which they filed or intended to file with the commission against Councilman Bradshaw. Accordingly, I do not believe that the remarks of September 28, 1976, would be found to violate the nondisclosure provisions of s. 112.317(6).

AS TO QUESTION 2:

It would not appear that s. 112.317(6), F. S., was violated by Councilwoman Brown's remarks at the February 8, 1977, city council meeting. Her remarks could reasonably be construed to be directed to the substance of the advisory opinion issued December 17, 1976, by the Commission on Ethics as opposed to a confidential complaint. Councilman Bradshaw apparently freely and voluntarily waived the protection of s. 112.322(2)(a), F. S., by providing copies of the opinion to fellow members of the city council.

The remarks published in the February 12, 1977, edition of the *Broward Times* when read in conjunction with the February 8, 1977, statements could possibly be construed as violative of s. 112.317(6), F. S. However, I believe it is significant that the remarks dealt specifically with the alleged conflict of interest of Councilman Bradshaw and could also be reasonably construed to relate to the commission's previous opinion on this subject. If Councilwoman Brown's remarks were in reference to her continued concern and disagreement with the commission over CEO 76-213, the statute would not apply since, at that point in time, the advisory opinion process of the commission was a matter of public record. The statements attributed to Councilwoman Brown concerning her "complaint" with the All-City Security contract can obviously be interpreted to refer to a specific complaint filed with the commission *or* to her general dissatisfaction with the contract and Councilman Bradshaw. The former construction would obviously implicate s. 112.317(6), while the latter would not. Obviously, this is a question of fact as to what was intended by her remarks.

While the ultimate responsibility for deciding whether to prosecute rests with you as the state attorney, *see* Imparato v. Spicola, 238 So.2d 503 (2 D.C.A. Fla., 1970), I am compelled to note that a prosecution instituted under the facts as stated in your letter would assuredly invite a constitutional challenge to s. 112.317(6), F. S.

Section 112.317(6), F. S., does not purport to regulate time, place, or manner of expression; nor does it proscribe conduct. What it does attempt to prohibit is expression itself, when the expression deals with a particular subject, *i.e.*, allegations of official misconduct.

It has long been recognized that "[t]he constitutional guarantees of freedom of speech forbid the states to punish the use of words or language not within 'narrowly limited classes of speech.' " Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). Gooding v. Wilson, 405 U.S. 518, 521-522 (1972). *Chaplinsky* delineated the classes of proscribed speech to include: "[T]he lewd and the obscene, the profane, the libelous and the insulting or 'fighting words.' " The Florida statute has, for all practical purposes, made it a crime to speak the truth. In Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940), it was stated:

> The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern, without previous restraint or fear of subsequent punishment.

In New York Times v. Sullivan, 376 U.S. 254, 270, the court observed the following regarding free speech in the context of attacks on government officials and institutions:

> [S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Similarly in Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964), the court concluded that:

> In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.
>
> * * * * *
>
> Truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned.

When First Amendment rights are directly implicated, the courts have engaged in the closest judicial scrutiny of the questioned legislation. *See* Buckley v. Valeo, 422 U.S. 1, 64-65 (1975). The government interest advanced must be paramount—one of vital importance—and the burden is on the government to show the existence of such an interest. Elrod v. Burns, 427 U.S. 347, 363 (1972).

Assuming that a prosecution was brought under s. 112.317(6), F. S., and the statute was challenged on First Amendment grounds, a number of state interests could be asserted to demonstrate a compelling state interest. Among the interests which could be asserted are: The protection of the reputation of public officials by shielding them from publicity involving frivolous complaints; the protection of public confidence in government officials by preventing disclosure of a complaint until a determination is made that the charge is well-founded; and the protection of complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that a complaint is meritorious. Ultimately, whether any of these interests can be characterized as compelling or meet the clear and present danger test is a judicial determination. *Cf.* Landmark Communications, Inc. v. Commonwealth of Virginia, 233 S.E.2d 220 (Va. 1977), probable jurisdiction noted June 13, 1977. Prior to instituting criminal proceedings under s. 112.317(6), F. S., I would hope that a careful consideration is given, not only to the facts of this situation as applied to the statute, but also the possible constitutional issues which will inevitably be faced by such a prosecution.

078-17—February 3, 1978
(See also 078-70)

MUNICIPALITIES

PENSION PLAN DEATH BENEFITS

To: Sydney H. McKenzie III, City Attorney, Fort Lauderdale

Prepared by: Martin Friedman, Assistant Attorney General, and Horace Schow II, Legal Research Assistant

QUESTION:

Are the death benefits provided for in the City of Fort Lauderdale Pension Plan in the nature of a contract for life insurance and, therefore, subject to the requirements of s. 112.08, F. S., that city employees be insured through an insurance company or professional administrator to provide such insurance and only after competitive bidding?

SUMMARY:

A death benefit provided for in a municipality's pension plan is in the nature of a contract for life insurance and, therefore, is subject to the requirements of s. 112.08, F. S. (1976 Supp.), regarding contracts with insurance companies or professional administrators and competitive bidding.

Section 112.08, F. S. (1976 Supp.), provides:

> Every 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 [or] 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. Before entering any contract for insurance, the governmental unit shall advertise for competitive bids, and such contract shall be let upon the basis of such bids.

Section 624.602, F. S. 1975, defines life insurance:

> "Life insurance" is insurance of human lives. The transaction of life insurance includes also the granting of endowment benefits, additional benefits in event of death or dismemberment by accident or accidental means, additional benefits in event of the insured's disability, and optional modes of settlement of proceeds of life insurance. Life insurance does not include workmen's compensation coverages.

In his treatise, Couch discusses life insurance:

> Life insurance is in substance defined . . . as a contract, whereby one for a stipulated consideration, customarily called a premium, agrees to pay another a certain sum of money upon the happening of a given contingency which is the death of the insured under the ordinary contract and is the termination of a specified period under a contract in which the endowment feature is incorporated. Life insurance must contain an element of risk in so far [*sic*] as the particular individual contract is concerned, and must involve the shifting of loss from the realization of that risk to a fund created by the payment of designated premiums. [Couch *Cyclopedia of Insurance Law Second* s. 1:68.]

In his treatise, Appleman discusses life insurance:

> A life policy is a contract to pay a sum certain upon the insured's death in consideration of stated premiums. Being fixed in amount, and not contingent upon the amount of loss occasioned by the death of the insured, it is not considered to be a contract of indemnity . . . . The rules applicable to life insurance policies are those which govern contracts generally . . . . A contract of life insurance must contain an element of risk in so far [*sic*] as a particular individual contract is concerned . . . . The word "policy" refers to the insurance contract. There must be three parties to such a contract, namely, the insurer, insured, and beneficiary, and without any one of these parties the ordinary life insurance contract cannot stand. [Appleman *Insurance Law and Practice* s. 7421.]

A reading of the Fort Lauderdale Code, particularly s. 31-5 and s. 31-15, indicates that the requirements of the above-cited Florida statute, as well as the general concepts of life insurance, have been met. Section 31-5, which pertains to city employees other than police and firefighters, reads:

> (1) Normal retirement benefit.
>
> * * * * *
>
> (b) Duration, survivor benefits. A member retiring hereunder shall receive a monthly benefit which shall commence on his retirement date and be continued thereafter during his lifetime; upon his death the full retirement benefit shall be continued to his spouse as of date of retirement for one (1) year and sixty per cent (60%) of said amount continued thereafter until the earlier of death or remarriage.
>
> * * * * *
>
> (4) Preretirement death.
> (a) Service incurred. A death benefit shall be payable in behalf of any member who dies as a direct result of an occurrence arising in the performance of service, the determination of which shall be by the board. The benefit shall be payable as follows:
> (1) To the spouse, until the earlier of death or remarriage, a benefit equal to fifty per cent (50%) of the member's earnings . . . .

Section 31-15, which pertains to police and firefighters, has provisions similar to Section 31-5.

Although there appears to be no direct Florida precedent, the case law of other states yields the rule that provisions of state employees' retirement laws which provide for a death benefit are in the nature of a contract of life insurance and are to be governed generally by the principles applicable to such contracts. Shaw v. Board of Administrators, 241 P.2d 635 (Cal. App. 1952). *In Re* Newton's Estate, 32 N.Y.S.2d 473 (N.Y. Sur. Ct. 1941). *In Re* Burtman's Estate, 41 N.Y.S.2d 778 (N.Y. Sur. Ct. 1943). Although there is contrary authority to the effect that death benefits payable under city and state retirement systems on the death of a schoolteacher during her term of active service did not constitute "proceeds" of an "insurance policy" within the statutory provision granting exemption from an inheritance tax, this decision pertained to inheritance tax law rather than to the law governing the initial formation of the life insurance or death benefit policy. *In Re* Richartz' Estate, 288 P.2d 857 (Cal. 1955).

078-18—February 3, 1978

STATE BOARD OF NURSING

QUALIFICATIONS FOR LICENSING NON-ENGLISH-SPEAKING RESIDENTS

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

Prepared by: Charles S. Ruberg, Assistant Attorney General

QUESTIONS:

1. Does the Board of Nursing have authority to administer an English competency examination under the provisions of Ch. 77-255, Laws of Florida, to any person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida?

2. Does the Board of Nursing have authority to administer an English competency examination under the provisions of s. 464.111(5), F. S.?

3. Under the provisions of Ch. 77-255, Laws of Florida, must the Board of Nursing administer a licensing examination in English to a person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida, and who is taking such examination for the first time?

4. Does the board, under the provision of Ch. 77-255, Laws of Florida, have authority to administer a licensing examination in a foreign language to a person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida, and who is taking such examination for the first time?

5. Does the board have authority to license a person who has passed a licensing examination administered under the provisions of Ch. 77-255, Laws of Florida?

6. Does the board have authority to refund money paid by a person to take a licensing examination if a change in statutes had rendered the person ineligible to take the examination?

SUMMARY:

The Board of Nursing has no authority to administer an English competency examination under the provisions of Ch. 77-255, Laws of Florida, nor pursuant to the authority of s. 464.111(5), F. S., to any person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida, or to any applicant seeking to qualify for a license to practice as a licensed practical nurse pursuant to s. 464.111(5).

The Board of Nursing must administer licensing examinations in English to persons who have successfully completed or are currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177 regardless of whether such persons are taking the examination for the first time or as a reexamination. However, where 15 or more such persons request such examinations in their native language and bear the cost of preparing and administering the examinations in that foreign language, the board has authority to, and, in fact, must, administer the examination to the requesting persons in their native language, regardless of whether they are taking the examination for the first time or as a reexamination.

The board not only has the authority to, but must, issue a license to any person who has passed a licensing examination administered under the provisions of Ch. 77-255, because the Legislature has conclusively deemed qualified for examination and reexaminations any person within that class of persons described in s. 1 of Ch. 77-255.

The board has no authority, under any circumstances, to refund any money accepted pursuant to the provisions of ss. 464.071(3) and 464.121(3), F. S., which provide for the fees to be paid upon filing an application to be licensed as a registered professional nurse or licensed practical nurse, respectively.

AS TO QUESTION 1:

Pursuant to s. 2 of Ch. 77-255, Laws of Florida, which became effective on July 1, 1977, s. 455.015, F. S., created as s. 20.30(13), (14), and (15), F. S., by Ch. 74-105, Laws of Florida, as amended by Ch. 75-177, Laws of Florida, is specifically repealed. Section 455.015, also known as the Foreign Citizens Licensure Act, applied to all persons who, prior to July 1, 1974, lawfully practiced, in a country other than the United States, a profession, for which they seek to be licensed by a board or commission within the Department of Professional and Occupational Regulation in order to practice that profession in the State of Florida. Section 455.015(1)(a). Among the provisions of this act was a requirement that each such applicant demonstrate his or her ability to communicate orally in basic English. Section 455.015(2)(a). However, as has been

previously noted, all of s. 455.015 was repealed by s. 2 of Ch. 77-255 and has had no legal force or effect since July 1, 1977.

Section 1 of Ch. 77-255, Laws of Florida, clearly and unequivocally states that:

> Any person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chapter 74-105 and Chapter 75-177, Laws of Florida, *shall be deemed qualified for examination and reexaminations* . . . . (Emphasis supplied.)

Consequently, by his or her status as a person who has successfully completed or is currently enrolled in such an educational program, an applicant has the right to take a licensing examination and reexaminations without need to meet any other standards or criteria. By application of the well-established principle of *expressio unius est exclusio alterius*, where a statute enumerates the things on which it is to operate (here, completion of, or current enrollment in, the prescribed course of study), it must be construed as excluding all things not expressly mentioned therein (an English competency examination).

With specific regard to the Board of Nursing, I note that ss. 464.061 and 464.111, F. S., set out the qualifications which applicants must possess in order to be qualified for a license to practice as a registered professional nurse or licensed practical nurse, respectively, and that these qualifications include the "ability to communicate in the English language." Sections 464.061(4) and 464.111(5). Nevertheless, it is my opinion that this requirement does not now apply to the class of persons who have successfully completed or are currently enrolled in an approved course of study created pursuant to Ch. 74-105 and Ch. 75-177, Laws of Florida, which class the statute, without qualification, directs to "be deemed qualified for examination and reexaminations."

My opinion results from the specific, unambiguous, and mandatory language contained in s. 1 of Ch. 77-255, Laws of Florida, that persons within the above-described class "shall be deemed qualified for examination and reexaminations." No other qualification, criterion, or condition is prescribed or required by this statute. *See* s. 1, Ch. 77-255.

Under the applicable principles of statutory construction, where a later legislative enactment restricts the operation of antecedent legislation and thus by implication modifies it, and there is a positive and irreconcilable repugnancy between the two as to indicate that the later statute was intended to prescribe the only rule which should govern the case provided for, the last expression of the legislative will prevails. *See* Lake v. State, 18 Fla. 501 (1882), Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194 (Fla. 1946), and AGO 057-287. However, a statute, covering a subject in comprehensive terms, is qualified by a later statute, embracing a particular part of the subject, only to the extent of the repugnancy between them. State v. Johnson, 72 So. 477 (Fla. 1916).

In the situation presented by your inquiry, ss. 464.061 and 464.111, F. S., comprehensively provide the qualifications required for applicants for licensure in the two above-specified categories of nurses. Section 1 of Ch. 77-255, Laws of Florida, a later enactment, was clearly intended to apply to such applicants as well, and because it requires no qualifications other than membership in the prescribed class, the repugnancy between the two statutes is manifest, and s. 1 of Ch. 77-255 must prevail but only with respect to members of that class.

Therefore, I conclude that no board or commission within the Department of Professional and Occupational Regulation, including the Board of Nursing, has the authority to impose any additional qualification or requirement, such as an English competency examination, on the right of any person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida, to take a licensing examination or reexaminations.

Question 1 is answered in the negative.

AS TO QUESTION 2:

My response to question 1 adequately answers this question as well, insofar as it concerns that class of persons described and discussed pursuant to question 1. In summary, persons who have successfully completed or are currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida, have been deemed by the Legislature to be qualified to take the licensing examination

and reexaminations administered by the Board of Nursing without any showing of other qualifications or prerequisites to take such examination and reexaminations.

However, pursuant to those principles of statutory construction cited and discussed in my response to question 1, there is no implied modification to s. 464.111, F. S., except for the particular class of persons heretofore described. Therefore, all other applicants for a license to practice as a licensed practical nurse must demonstrate that they possess the qualifications enumerated in s. 464.111 before they may take the licensing examination described in s. 464.121(1), F. S. One such qualification is "the ability to communicate in the English language." Section 464.111(5).

Administrative bodies have no common-law powers; they are creatures of the Legislature and what powers or authority they have are limited to the statutes that create them. State *ex rel.* Greenburg v. Florida State Board of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla., 1974). Therefore, when a question is raised as to the existence of a particular authority or the absence thereof, it is necessary to carefully examine the enabling statute.

Section 464.111, F. S., provides in relevant part:

> Any person who makes application to the [B]oard [of Nursing] for a license to practice as a licensed practical nurse after the effective date of this act shall *submit to the board written evidence, verified by oath*, that the applicant:
>
> * * * * *
>
> (5) Has the ability to communicate in the English language. (Emphasis supplied.)

Since the statute itself sets forth the means by which an applicant is to demonstrate that he or she possesses the requisite qualifications (*i.e.*, by submission of written evidence, verified by oath), there is reasonable doubt as to the authority of the board to require any alternative demonstration of qualifications by means of an English competency examination. In view of such reasonable doubt the question of the board's exercising its authority by so administering an English competency examination must be construed against such an exercise of authority. *See* Greenburg, *supra*, at 636.

An applicant for a license to practice as a licensed practical nurse must submit written evidence, verified by oath, that he or she has the ability to communicate in the English language before being entitled to take the licensing examination. Regardless of the nature or form of the applicant's verified submission, it constitutes the written evidence from which the existence or absence of the ability to communicate in the English language must be ascertained. If the evidence demonstrates that the applicant has this ability and the applicant possesses the other qualifications as well, the applicant is entitled to take the licensing examination. If the evidence fails to demonstrate that the applicant has this ability, he or she is not qualified to take the examination.

Question 2 is answered in the negative.

AS TO QUESTION 3:

As has been previously discussed, by enacting Ch. 77-255, Laws of Florida, the Legislature has determined that certain classes of persons, who may be applicants for licenses to practice those professions and occupations for which licenses are required in this state, should be accorded specialized treatment with respect to meeting the requirements for licensure.

In s. 1, Ch. 77-255, one such class was defined to include:

> . . . any person who has successfully completed or is currently enrolled in an approved course of study created pursuant to chapter 74-105 and chapter 75-177, Laws of Florida . . . .

With respect to this class of persons, s. 1, Ch. 77-255 goes on, in unequivocal and mandatory language, to deem them "qualified for examination and reexamination . . . ." This mandate is then followed by the phrase:

> . . . same [*i.e.*, examination and reexamination] *to be* administered in the English language. (Emphasis supplied.)

Again, the language employed is mandatory, so that if this section, as thus far described, were standing alone, your inquiry could be simply answered in the affirmative.

However, the Legislature went further and created an exception or proviso to this general statement, saying:

> . . . unless 15 or more such applicants request that said reexamination be administered in their native tongue. [Section 1, Ch. 77-255, Laws of Florida.]

With respect to this proviso clause, there appears to me to be substantial ambiguity and doubt as to what the Legislature intended by use of the term "reexamination." This apparent ambiguity results from the following: The class of persons upon whom s. 1 is clearly intended to operate is defined by reference to Chs. 74-105 and 75-177, Laws of Florida. These enactments had the effect of creating ss. 455.014 and 455.015, F. S. 1975, with the latter now being repealed by s. 2 of Ch. 77-255, Laws of Florida.

It is s. 455.015(1)(a), F. S. 1975, created by s. 2 of Ch. 74-105, as amended by Ch. 75-177, which described the educational courses of study by which membership in the class of persons affected by s. 1 of Ch. 77-255 is determined. These courses are themselves to be given in the applicants' native language upon the request of 15 or more such applicants. Section 455.015(1)(a).

It is clear that the purpose of granting the opportunity, in s. 1 of Ch. 77-255, Laws of Florida, under the delineated circumstances therein, for certain licensing examinations to be administered in a foreign language is to facilitate focusing the examination process on testing the applicant's professional education and skills rather than his or her linguistic ability. Similarly, the purpose of the parallel opportunity pursuant to s. 2 of Ch. 74-105, Laws of Florida, to have the courses of study taught in a foreign language was to focus those courses on the refreshing of professional educational background rather than on linguistic skills. Therefore, there is an evident ambiguity as to whether or not the use of the term "reexamination" in the proviso clause of s. 1 of Ch. 77-255 was intended by the Legislature to include only examinations administered to members of the affected class who had previously failed a licensing examination, or to include every licensing examination administered to members of the affected class, where 15 or more persons request a foreign language examination or reexamination.

This ambiguity is even more apparent when one considers that for any given licensing examination there will be applicants who have successfully completed, or are currently enrolled in, the prescribed courses of study. Some of these applicants will be seeking to take the examination for the first time and others will be seeking reexamination. Therefore, a strictly literal application of s. 1, Ch. 77-255, Laws of Florida, could have the unfair, unreasonable, and ridiculous result of requiring, with regard to a group of applicants who all received their professional training in the same foreign country and who all took the same refresher courses designed to ensure that their training met the standards required by this state, that some applicants take the examination in their native language while others take the same examination in English. No literal interpretation should be given to a statute which leads to an unreasonable or ridiculous conclusion or a purpose not designed by the Legislature. State v. Sullivan, 116 So. 255 (Fla. 1928).

It is axiomatic that the intent of a statute is the law. State v. Patterson, 65 So. 659 (Fla. 1914). Thus where ambiguity is present in a statute, as herein above described, the fundamental rule in construction of statutes, to which all other rules are subordinate, is that the intent thereof is law and should be duly ascertained and effectuated. American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938). *See also* AGO 057-279. Consequently, the legislative intent should be followed even though it appears to contradict the strict letter of the statute and even well-settled canons of statutory construction. Smith v. Ryan, 39 So.2d 281 (Fla. 1949); Beebe v. Richardson, 23 So.2d 718 (Fla. 1945); and State v. Sullivan, 116 So. 255 (Fla. 1928).

The title of a statute is part of the statute and may be resorted to in construing the statute where ambiguity exists. Jackson Lumber Co. v. Walton County, 116 So. 771 (Fla. 1928) *appeal dismissed*, 49 S. Ct. 338. The title to Ch. 77-255, Laws of Florida, states in relevant part:

> An Act relating to licensing of professions by administrative boards, providing that certain persons who have completed or enrolled in certain courses of study are qualified for *certain examinations*; providing for the administration of *such examinations* in a language other than English . . . . (Emphasis supplied.)

The "certain examinations" first referred to in the title are included in the body of s. 1 by the language "examination and reexamination," referring to those examinations members of the affected class are deemed qualified to take. In referring to those examinations for which administration in a language other than English is provided, the title uses the term "such examinations," evincing a clear intent that the same examinations are included in the field of operation of both provisions, *i.e.*, examinations and reexaminations.

Every statute must be construed as a whole and the legislative intent determined, if possible, from what is said in the statute, with proviso clauses being construed together with the enacting clause to give effect to each part of an act and to carry out the legislative intent as manifested by the entire act and other acts *in pari materia*. Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (1 D.C.A. Fla., 1960); Therrell v. Smith, 168 So. 389 (Fla. 1936).

Construing the proviso clause of s. 1 together with the preceding clause thereof reveals a conflict between them, on the basis of the legislative intent apparent from the title. The general rule that, in cases of conflicting provisions of the same statute, the last expression of the Legislature in order of arrangement will prevail is subject to an exception that, if a later expression in one section is plainly inconsistent with the preceding expressions in the same section which conform to the Legislature's obvious intent, such last expression must be construed as to give an effect consistent with such previous expressions and with the policy they indicate. Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962).

Therefore, I conclude that the intent of the Legislature was that the exception to the general policy that examinations administered to members of the affected class are to be in English encompasses both initial examinations and reexaminations where 15 or more such applicants request an examination in their native language and bear the full cost to the board of preparing and administering the examination in the foreign language.

This conclusion finds further support from the principle that, if part of a statute appears to have a clear meaning if considered alone, but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia*, the entire act and those *in pari materia* will be examined to ascertain the overall legislative intent. Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). One such statute *in paria materia* is s. 455.014, F. S., which was also created by Chs. 74-105 and 75-177, Laws of Florida, but which was not repealed by s. 2 of Ch. 77-255, Laws of Florida.

Section 455.014(2) provides:

> It is the declared purpose of this section, therefore, to encourage the use of foreign-speaking Florida residents duly qualified to become actively qualified in their professions or occupations so that all Florida citizens may receive better services.

Consequently, construing s. 1 of Ch. 77-255, Laws of Florida, literally, so that in no case would a person, deemed duly qualified to become actively qualified in his or her profession by virtue of his or her membership in the affected class, be able to take a licensing examination for the first time in his or her native language, would discourage rather than encourage the active qualification of such persons because, in comparative terms, the focus of the licensing examination would be more on language ability, rather than on professional education and skills.

Wherefore, I respond to question 3 of your inquiries as follows: Under the provisions of Ch. 77-255, Laws of Florida, the Board of Nursing must administer a licensing examination in English to a person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida, and who is taking such examination for the first time, unless such person is part of a group of 15 or more applicants who have also successfully completed or are currently enrolled in such a course of study, who have requested that the licensing examination be administered in their native language, and who bear the costs of preparing and administering the examination in that language, regardless of whether the members of such group of applicants are taking the examination for the first time or as a reexamination. Where these last-described circumstances exist, the board must administer the examination to such persons in their native language.

AS TO QUESTION 4:

Having construed the applicable provisions of Ch. 77-255, Laws of Florida, in order to adequately respond to the previous question, a straight-forward application of s. 1 of Ch. 77-255, as construed, provides the answer to this question.

The board has the authority to administer a licensing examination in a foreign language to a person who has successfully completed or is currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida, and who is taking such examination for the first time, only where such person is part of a group of 15 or more applicants who have also successfully completed or are currently enrolled in such a course of study, who have requested that the licensing examination be administered in their native language, and who bear the cost of preparing and administering the examination in that language, regardless of whether the members of such a group are taking the examination for the first time or as a reexamination.

In fact, where these last-described circumstances exist, the board not only has authority to administer the licensing examination in the requested foreign language, but must so administer it.

AS TO QUESTION 5:

Pursuant to Ch. 464, F. S., with respect to both categories of nurses to whom the board is authorized to issue licenses, the format for establishing an applicant's qualifications are the same. There are certain qualifications which an applicant must possess as demonstrated by his or her application to the board for a license to practice as a registered professional nurse or a licensed practical nurse. Sections 464.061 and 464.011, F. S. Applicants who qualify pursuant to these statutes must then pass a licensing examination administered by the board, whereupon the board must issue them a license. Sections 464.071 and 464.121, F. S.

As discussed in my response to question 1, s. 1 of Ch. 77-255, Laws of Florida, operates to exclude the class or persons described therein, and only that particular class, from the necessity to demonstrate that they possess the qualifications for a license to practice as a registered professional nurse or as a licensed practical nurse, respectively, as required by ss. 464.061 and 464.111, F. S. The class of persons so benefited are those persons who have successfully completed or are currently enrolled in an approved course of study created pursuant to Chs. 74-105 and 75-177, Laws of Florida. Licensing for all nurse candidates is, of course, subject to successful completion of the examination.

Therefore, it is my opinion that where an applicant in such class of persons has passed the licensing examination required by ss. 464.071 and 464.121, F. S., irrespective of the language the examination was administered in, as contemplated by s. 1 of Ch. 77-255, *supra*, not only does the board have authority to issue a license to practice nursing, but it must issue the license, unless there should exist grounds to refuse issuance thereof pursuant to s. 464.21, F. S.

Question 5 is answered in the affirmative.

AS TO QUESTION 6:

Sections 464.071(3) and 464.121(3), F. S. (1976 Supp.), address the matter of fees and refunds regarding applications for licenses to practice as a registered professional nurse and licensed practical nurse respectively. In both instances the required fees must be paid upon filing of the application, and in both instances the respective statutes specify that such fees "shall be nonrefundable."

The Legislature has not provided the board with discretionary power in this regard, nor does the board possess powers beyond that which the Legislature grants. State *ex rel.* Greenburg v. Florida State Board of Dentistry, *supra.* Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, the plain and obvious provisions must control. Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964); Phil's Yellow Taxi Co. v. Carter, 134 So.2d 230 (Fla. 1961). If the language of the statute is clear and admits of only one meaning, the Legislature should be held to have intended what it has plainly expressed. Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951).

I can envision no circumstances in which any of the statutory changes thus far discussed would render an otherwise qualified applicant ineligible to take the examination, and certainly no such statutory change has occurred which would affect the

applicability of the "no refund" provisions of ss. 464.071(3) and 464.121(3), F. S. (1976 Supp.).

However, in the event that some unforeseen set of circumstances were to arise which would render these provisions inapplicable, the board would still lack the authority to make any refunds. Pursuant to s. 464.171, F. S., the board is required to deposit all moneys received pursuant to the provisions of s. 215.37, F. S. Section 215.37(2) provides that:

> All fees . . . shall be deposited in the State Treasury into a separate trust fund to the credit of the individual board.

Once such fees have been so deposited, only the Comptroller may make disbursements, and then only as provided by law for all agencies of government. Section 215.37(6). Therefore, even if ss. 464.071(3) and 464.121(3) were inapplicable for some unforeseen reason, any claim for a refund of moneys deposited in the State Treasury would be a matter between the claimant and the state acting through the Comptroller, and not the board.

As a general rule, the Comptroller would also lack authority to make any such disbursement once the board has initiated any investigations or other action regarding the application, thus placing the fees paid therewith in the "earned fee" category. For a more detailed discussion of this point, *see* AGO 075-293.

Question 6 is answered in the negative.

078-19—February 7, 1978

COUNTIES

APPLICABILITY OF STATE PURCHASING LAW AND CONSULTANTS' COMPETITIVE NEGOTIATION ACT TO COUNTY HOUSING AUTHORITIES

To: William E. Casady, Chairman, Broward County Housing Authority, Fort Lauderdale

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is the Broward County Housing Authority an agency as that term is defined in s. 287.012(1), F. S., therefore making the State Purchasing Law applicable to it?
2. Is the Broward County Housing Authority an agency as that term is defined in s. 287.055(2)(b), F. S., therefore making the Consultants' Competitive Negotiation Act applicable to it?
3. If neither question 1 nor 2 is answered in the affirmative, does Ch. 421, F. S., or any other statute control the awards of contracts or the purchasing of commodities by the Broward County Housing Authority?

SUMMARY:

The Broward County Housing Authority is not a state agency within the purview and for the purposes of the State Purchasing Law, and is not, therefore, required to purchase commodities through competitive bidding. The Broward County Housing Authority is subject to the Consultants' Competitive Negotiation Act and thus required to comply with the act in contracting for the professional services of architects, engineers, or registered land surveyors. No provision in Ch. 421, the Housing Authorities Law, controls the awarding of other contracts or the purchasing of commodities by housing authorities; and, therefore, they are not required to award other contracts or to purchase commodities through competitive bidding.

AS TO QUESTION 1:

The purchasing and competitive bidding requirements set forth in part I of Ch. 287, F. S. (except s. 287.055, F. S., the "Consultants' Competitive Negotiation Act"), apply only to purchases by *state* agencies. Attorney General Opinion 077-22. Section 287.012 makes this abundantly clear by defining "agency" as "any of the various *state* officers, departments, boards, commissions, divisions, bureaus, councils, and any other unit or organization, however designated." (Emphasis supplied.) *See also* s. 287.032, F. S. (1976 Supp.), as amended by Ch. 77-316, Laws of Florida, which declares that the purpose of the Division of Purchasing of the Department of General Services is "to promote efficiency, economy, and the conservation of energy, and to effect coordination in the purchase of commodities for the *state*." (Emphasis supplied.); and s. 287.042(1), F. S., providing that the division has the power and duty to "contract for the purchase, lease or acquisition in any manner of all commodities required by the *state government* or any of its agencies under competitive bidding . . . ." (Emphasis supplied.) Thus, the important consideration is whether or not a county housing authority is a state agency.

Section 421.27(1), F. S., provides for the creation of county housing authorities and states: "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. . . ." According to the legislative declaration found at s. 421.02, F. S., the general purpose of a housing authority is to clear, repair, and reconstruct the areas in which unsanitary conditions exist and to provide safe and sanitary housing for persons of low income within the housing authority's area of operation. The area of operation of a county housing authority includes "all of the county for which it is created except that portion of the county which lies within the territorial boundaries of any city as defined in the Housing Authorities Law. . . ." Section 421.27(3). Within the area of its operation, a housing authority is empowered to exercise "the public and essential governmental functions" set forth in Ch. 421, F. S., which include, *inter alia*, the power of eminent domain, as well as the power to lease and rent dwellings, operate housing projects, and issue debentures. Sections 421.08(2), (3) and 421.14, F. S.

Accordingly, a county housing authority may be considered to be a distinct and independent entity since its prescribed powers are definitely confined to a specific area of less than statewide application. *See* Bair v. Central and Southern Florida Flood Control Dist., 144 So.2d 188 (Fla. 1962). Moreover, a housing authority is a public corporation or public quasi-corporation created for a definite purpose with only such authority as may be delegated to it by law. *See* Forbes Pioneer Boatline v. Board of Commissioners of Everglades Drainage Dist., 82 So. 346 (Fla. 1919); *see also* 81 C.J.S. *States* s. 141, p. 554. In O'Malley v. Florida Insurance Guaranty Ass'n, 257 So.2d 9, 11 (Fla. 1971), the court listed housing authorities as examples of public corporations in Florida since "they are organized for the benefit of the public." *See also* State *ex rel.* Burbridge v. St. John, 197 So. 131, 134 (Fla. 1942), in which the court stated that a municipal housing authority was "a *real* corporation, a separate and distinct corporate entity from that of the municipality," and not a "mere agency of the municipality."

This office has on several occasions considered whether or not entities created by the Legislature as public corporations are within the purview of the State Purchasing Law. In AGO 072-210, I concluded that the Central and Southern Florida Flood Control District, which was specifically designated in its enabling legislation as a public corporation, was not a state agency within the meaning of s. 287.26, F. S. Furthermore, in AGO 075-26, I ruled that the Sarasota-Manatee Airport Authority created by Ch. 31263, 1955, Laws of Florida, as a "body politic and corporate" for the purpose of acquiring and maintaining airport facilities on behalf of four participating political subdivisions, served "primarily a local rather than a state purpose" and was not a state agency within the purview of the law.

Application of the foregoing Attorney General Opinions to your inquiry leads me to conclude that a county housing authority is not a state agency for purposes of the State Purchasing Law. However, a county housing authority is a "local public agency" within the purview of the State Purchasing Law and, therefore, is authorized but not required to purchase under purchasing agreements and contracts negotiated and executed by the Division of Purchasing. *See* AGO 075-56.

AS TO QUESTION 2:

The Consultants' Competitive Negotiation Act (hereafter CCNA) applies to any agency (subject to the act) with the power or duty to contract for professional services as set forth in s. 287.055, F. S., (architecture, professional engineering, landscape architecture, or registered land surveying). A housing authority is empowered to "prepare, carry out, acquire, lease and operate housing projects; to provide for the construction, reconstruction, alteration or repair of any housing project, or any part thereof" and "to arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works, or facilities for, or in connection with a housing project. . . ." Section 421.08(2), (3), F. S. Clearly, therefore, a housing authority is authorized to contract for those professional services contemplated by the CCNA; the remaining consideration is whether a housing authority is an "agency" for purposes of the act.

Section 287.055(2), F. S., defines "agency" to mean "the state or a state agency, municipality, or *political subdivision*, a school district or a school board." (Emphasis supplied.) Section 1.01(9), F. S., provides that, where the context of the statute will permit, 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.)

This office has stated on several occasions that special districts are "political subdivisions" within the purview of the CCNA. *See* AGO's 074-89 and 077-22. Furthermore, in AGO 074-308, I concluded that the Orange County Civic Facilities Authority, established as a "public body, politic and corporate" was subject to the CCNA. In reaching this conclusion, I relied in part upon AGO 073-216 which noted that the CCNA "was enacted for the public benefit and should be interpreted most favorably to the public." *See also* AGO 075-56 which held that the Sarasota-Manatee Airport Authority was within the purview of the CCNA. *Cf.* AGO 074-234 holding that a public housing authority is an independent special district within the purview and for the purposes of part III of Ch. 218, F. S., the Uniform Local Government Management and Reporting Act, and AGO 074-367 concluding that a regional housing authority is a special district and unit of local government within the meaning of part III of Ch. 218 and stating that it was not inconsistent for a housing authority as a public corporation and body politic to be characterized as a special district or a political subdivision or a unit of special government for certain definite purposes.

In light of the foregoing, therefore, I am of the view that a county housing authority is an "agency" within the purview and for the purposes of the CCNA.

AS TO QUESTION 3:

An examination of Ch. 421 reveals no requirement that a county housing authority's purchases of commodities be made pursuant to competitive bidding; nor has any special law imposing such a requirement upon the Broward County Housing Authority been brought to my attention.

In the absence of a statutory requirement, a public body is under no obligation to let a contract under competitive bidding or to award the contract to the lowest bidder. Attorney General Opinion 071-366. *See also* William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So.2d 550 (2 D.C.A. Fla., 1960) and AGO's 073-291 and 077-22. Accordingly, since the competitive bidding requirements of part I of Ch. 287, F. S. (except s. 287.055, F. S.), do not govern a county housing authority, and since Ch. 421 contains no such requirements, the Broward County Housing Authority is not obligated to purchase commodities through competitive bidding.

078-20—February 15, 1978

STATE AGENCIES

AGENCIES MAY NOT WAIVE SOVEREIGN IMMUNITY WITHOUT AUTHORIZATION BY GENERAL LAW

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

Prepared by: Joslyn Wilson, Assistant Attorney General, and Dennis J. Wall, Legal Research Assistant

QUESTION:

Are there any legal constraints which would limit the power of a state agency to enter into an indemnification agreement?

SUMMARY:

In the absence of any general law authorizing or directing such contracts to be made, or authorizing or consenting to a suit against the state on the same, indemnification contracts imposing liability upon the state entered into by a state agency as a county subgrantee of federal funds under the Federal Comprehensive Employment and Training Act of 1973 are nugatory and unenforceable as against the state or its agencies. State agencies are without statutory power to enter into such contracts, and the state is immune from actions thereon.

You state in your letter that Palm Beach County is a "prime sponsor" under the Comprehensive Employment and Training Act of 1973 (29 U.S.C.A. ss. 801-992 [1977]), in which capacity Palm Beach County accepts job opportunity grants from the United States Department of Labor and makes "subgrants" to various legal and governmental entities, including agencies of the state. Your letter further states that Palm Beach County is directly responsible to the United States Department of Labor for the expenditure of all grant funds, and that Palm Beach County exercises no direct control over the programs carried out pursuant to subgrant agreements. As a result, Palm Beach County has incorporated an indemnification clause into the writings which make up each subgrant agreement, the purpose of which is to have each subgrantee indemnify the county, as prime sponsor, from liability of any kind or from damages rising out of acts of the program participants or in instances where federal funds are misused or misspent by the subgrantee. Finally, you advise that several state agency/subgrantees have refused to execute the indemnification agreements, contending that they lack authority to execute, and are prohibited from entering into, such agreements.

To begin with, sovereign immunity may be waived only by general law. *See* s. 13, Art. X, State Const. (carried over without change from s. 22, Art. III, State Const. 1885), which provides that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968); State *ex rel.* Davis v. Love, 126 So. 374, 379 (Fla. 1930). In the absence of any such waiver or provision for bringing suit, the state cannot be sued without its consent (except in certain instances not material here). The courts are without jurisdiction over actions against the state for breach of contract. The state is not within the reach of the process of the courts, and agencies of the state are immune from such contract action. *e.g.*, Cone v. Wakulla County, 197 So. 536, 537 (Fla. 1940); Hampton v. State Board of Education, 105 So. 323, 326 (Fla. 1925); Bloxham v. Florida Cent. & Pen. R. R., 17 So. 902, 918 (Fla. 1895), *aff'd on other grounds sub nom.* Florida Cent. & Pen. R. R. v. Reynolds, 183 U. S. 471 (1902); State *ex rel.* Division of Administration v. Oliff, 350 So.2d 484, 486 (1 D.C.A. Fla., 1977); Department of Natural Resources v. Circuit Court, 317 So.2d 772, 775 (2 D.C.A. Fla., 1975), *aff'd*, 339 So.2d 1113 (Fla. 1976). *Cf.* Davis v. Watson, 318 So.2d 169 (4 D.C.A. Fla., 1975), *cert. denied*, 330 So.2d 16 (Fla. 1976) (power to waive state's immunity vested exclusively in the Legislature) and AGO 075-61 (no state officer, agent, or employee can waive the state's sovereign immunity by contract). *See also* State *ex rel.* Florida Dry Cleaning and Laundry Board v. Atkinson, 188 So. 834, 838 (Fla. 1938), in which the court stated that no suit may be maintained against the state

or its agencies or instrumentalities "where the interest of the state in such suit is through some contract or property right, except by consent of the State, which consent may only be effectuated by legislative Act" and Hampton v. State Board of Education, *supra*, in which the court dismissed a suit for specific performance of a contract made by the State Board of Education since there was no statute authorizing or directing the contract to be made on which suit was brought, nor was there any statute authorizing or consenting to such a suit against the state. Thus, it was held in Seaboard Air Line R. Co. v. Sarasota-Fruitville Drainage Dist., 255 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 358 U. S. 836 (1958), that an indemnification agreement entered into by a drainage district established and created by Florida statute was void, absent an appropriate waiver of sovereign immunity, and of no legal force or effect under Florida law, and that the district, not then being liable for its torts, was therefore without power to make a contract indemnifying others for such torts. *Cf.* Palm Beach County v. South Florida Conservancy Dist., 170 So. 630, 633 (Fla. 1936), in which the court observed that an injunction sought by the district in order to restrain the county from interfering with the agents of the district in the execution of their official duties should have been granted, inasmuch as these state officers were being arrested and prosecuted by county authorities for acts done by them solely as agents of the district, a state agency, and were entitled to the same immunities from criminal prosecution as their principal, the district or agency of the state.

An examination of the several general laws abrogating sovereign immunity reveals no provision waiving the state's immunity on or relating to contracts of indemnification in general, nor to any type of contract made as a subgrantee of funds under the Federal Comprehensive Employment and Training Act of 1973. Indeed, even assuming the existence of a general law abrogating sovereign immunity as to suits on legislatively authorized indemnification contracts, I have found no law authorizing any of the state agencies mentioned in your letter to bind the state by entering into an indemnification contract as a subgrantee of any federal funds, let alone federal funds disbursed under the Federal Comprehensive Employment and Training Act of 1973. State agencies may exercise only those powers which are expressly granted by statute or which are necessarily implied from such express powers. State v. Atlantic Coast Line R. Co., 47 So. 969, 978-79 (Fla. 1908); State *ex rel.* Greenberg v. Florida State Board, 297 So.2d 628, 636 (1 D.C.A.), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); *see* Mitchell v. Maxwell, 2 Fla. 594, 597 (1849), (powers expressly granted by statute are accompanied by implied powers necessary to carry the express powers into effect) and AGO 076-95. If there is any doubt as to the lawful existence of a particular power, such doubt must be resolved against the exercise of that power. State v. Atlantic Coast Line R. Co., *supra*, at 979; *cf. Ex Parte* J.C.H., 17 Fla. 362, 368-69 (1879) (necessary power implied where no doubt as to its necessity nor as to existence of express statutory power). There being no express statutory power here, the state agencies acting as your county's subgrantees are without authority to execute indemnification contracts of the type you have mentioned or to anywise bind the state in that regard. If any of these state agencies did enter into such an indemnification contract, any judgment in a suit thereupon would be of no legal force or effect, not merely because consent thereto has not been duly given nor sovereign immunity duly waived as to such a suit, but also because a claim against the state cannot be paid by a state agency unless a statute exists empowering it to pay such claims, *and* the Legislature has appropriated funds for such purpose, *and* the claim has been audited and approved as provided by law. Florida Development Commission v. Dickinson, 229 So.2d 6, 8 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970); AGO 071-28; *accord*: Attorney General Opinions 077-12 and 076-46.

I am therefore of the opinion that constitutional and legal constraints limiting the power of a state agency to enter into an indemnification agreement imposing contractual liability upon the state do exist, and that, at least with regard to indemnification agreements of the type you have mentioned, these constraints render nugatory and unenforceable as against the state or its agencies any such agreement entered into by a state agency.

078-21—February 15, 1978

PUBLIC PRINTING

CONTRACTS FOR CLASS B PRINTING MAY BE LET TO OUT-OF-STATE FIRMS IN THE ABSENCE OF BIDS FROM FLORIDA FIRMS

To: George H. Sheldon, Representative, 69th District, Tallahassee

Prepared by: Joseph W. Lawrence II, Assistant Attorney General

QUESTION:

If the low bid made for class B public printing is submitted by an out-of-state printing firm, and if the particular printing services required are not reasonably procurable within the State of Florida, may the contract be let to the out-of-state firm when no Florida firms have submitted bids for the same job?

SUMMARY:

Public printing of the state based upon reasonable specifications, where there are no Florida concerns prepared to submit responsible competitive bids thereto, may be let out to and executed by out-of-state printing firms. Sections 283.03, 283.10, and 287.102, F. S.

Section 283.03, F. S., provides that "[a]ll the public printing of this state shall be done in the state . . . ." Additionally, s. 283.10, F. S., specifically requires class B printing be let to the ". . . lowest responsible bidder who shall manufacture the same within the state." And, under the provisions of ss. 287.012(2) and 287.102, F. S., class B printing is also defined as a commodity within the purview of Ch. 287, F. S., regulating purchasing by state agencies, and requires state printing be done in the state. *See also* Division of Purchasing Rule 13A-1.13(2), F.A.C.

Statutes relating to the same thing or class of things may be regarded *in pari materia*. *See* Sanders v. State *ex rel.* Shamrock Properties, Inc., 46 So.2d 491 (Fla. 1950). To ascertain legislative intent, statutes *in pari materia* must be examined regarding language used and purpose. State *ex rel.* Harris v. Bowden, 150 So. 259 (Fla. 1933); Whiddon v. State, 32 So.2d 577 (Fla. 1947). As required by the foregoing rules of statutory construction, Chs. 283 and 287, F. S., must be read together.

Your question appears to assume the fact that the specifications for the proposed printing contract were reasonable in nature and intended to accomplish a valid need and were not comprised in an arbitrary manner or designed for the purpose of eliminating competitive bidding within Florida. Such capriciousness, if present in the specifications, would lead to an invalid bid offering. *See* Robinson's, Inc. v. Short, 146 So.2d 108 (1 D.C.A. Fla., 1962); Mayes Printing Co. v. Flowers, 154 So.2d 859 (1 D.C.A. Fla., 1963); and AGO's 068-77 and 068-50.

Given the situation presented wherein reasonable specifications brought forth no response from Florida bidders but did evoke responsible bids from out-of-state printing firms, the Florida Supreme Court appears to have spoken dispositively on the issue. In the case of State *ex rel.* W. R. Clark Printing and Binding Co. v. Lee, 158 So. 461 (Fla. 1934), the high court was presented with a mandamus proceeding by an out-of-state printing firm whose bill for printing services performed was refused by the Comptroller based on Ch. 283, F. S., (formerly codified as Ch. 14324, 1931, Laws of Florida). The facts demonstrated that no Florida printing firms were able to bid on the project due to their inability to meet the specifications. The court first noted the purpose and effect of the statutory requirement as follows at p. 462:

> The requirement of the Florida Statutes that all public printing shall be so awarded that it will be done within the State of Florida within printing plants located within the State carries with it the necessary implication that the particular service essential to the execution of a particular "job" shall be reasonably procurable in the State of Florida at the time the job or contract for

> it is to be let; the purpose of the law being to favor with the state's printing business those printing plants and shops doing business in Florida, which may be capable and desirous of fulfilling the particular printing requirements of state departments and other state agencies having need for the procurement of public printing for their use.

After noting the statutory requirement that printing must be done in the State of Florida, the court set forth the following exception to the statutory prescription at p. 464:

> But if there were, at the time, within the State of Florida, no such competing Florida firms who were prepared to furnish to the state motor vehicle commissioner required blanks or forms (though printed) of the particular design or special type, kind, or character specified by him, . . . then the state motor vehicle commissioner committed no violation of the statute in making a purchase of same elsewhere, or in having the work done by a plant or firm not carrying on its work within the State of Florida.

The Court went on to state at pp. 464-465:

> Such statutory requirements necessarily imply that conditions shall exist in the state under which the particular requirements for a particular job can be fulfilled, because no purpose is evidenced by the statute to handicap or restrain officers and departments in the kind of printing that they may have done. The only limitation is that, if the work can be procured to be done within the State of Florida by one of two or more competing Florida firms having plants in this state, and prepared to execute the work in this state, then the class of persons who are eligible to become bidders shall be restricted to Florida concerns and Florida printing establishments only, and that no such work shall be let to any other class of bidders, nor any funds disbursed to the latter class therefor.

See also State *ex rel.* Kudner v. Lee, 7 So.2d 110 (Fla. 1942), and AGO 052-218.

Your question is answered in the affirmative.

078-22—February 21, 1978

FLORIDA CRIMES COMPENSATION ACT

RETROACTIVE CLAIMS NOT ALLOWED

To: C. Bette Wimbish, Chairperson, Florida Crimes Compensation Commission, Tallahassee

Prepared by: David K. Miller, Assistant Attorney General, and Greg Kimball, Legal Intern

QUESTIONS:

> **1. Is the one-year limitation on the filing of claims under the Florida Crimes Compensation Act, Ch. 960, F. S., made retroactive to January 1, 1977, under s. 960.07(2), F. S.?**
>
> **2. Where public funds are collected for a trust fund disbursable to victims of crime, can a claim for said funds be retroactive to the starting date of said collections?**

SUMMARY:

> **The Florida Crimes Compensation Act, Ch. 960, F. S., is not made retroactive by the 1-year limitation on filing claims for awards under s. 960.07(2), F. S., and does not permit disbursements of funds from the Crimes Compensation Trust Fund in payment of claims for awards**

arising out of incidences or occurrences of crimes committed prior to the act's effective date.

Your questions are answered in the negative.

The Florida Crimes Compensation Act, Ch. 960, F. S., provides compensation for victims of crimes, intervenors in criminal acts, and their families and dependents under specified conditions set forth in the act. This remedy or right to claim an award of compensation was created in the 1977 legislative session as Ch. 77-452, Laws of Florida. Initially, it must be determined at what point the act became effective as a law. Section 8 of that act provides:

> This act shall take effect January 1, 1978; provided, however, that ss. [960].17, [960].20, [960].21, Florida Statutes, as created by this act, and sections 2, 3, 4, 5 and 6 of this act shall take effect upon becoming law.

It seems evident that by phrasing s. 8 as it did, the Legislature intended the remedy or right to claim an award of compensation under the act to take effect on January 1, 1978. Section 1 of the act contains the essence or heart of the act. Contained therein are, *inter alia*, provisions regarding the establishment of the Florida Crimes Compensation Commission and the rights, remedies, and responsibilities of prospective claimants. Sections 2 through 6 and ss. 960.17, 960.20 and 960.21, F. S., which took effect upon becoming law, prior to January 1, 1978, merely supplement the act and do not constitute the essential right or remedy created by the act. These provisions deal with the establishment and funding of the Crimes Compensation Trust Fund from specifically enumerated sources. These provisions apparently were deemed necessary to provide a reserve of funds to implement the compensation remedy established under s. 1 and to defray the administrative costs of the act. *See* s. 7, Ch. 77-452 and s. 960.21(1). Nevertheless, it does not appear that such provisions make the remedy itself retroactive. *Cf.* 82 C.J.S. *Statutes* s. 414, n. 37, p. 990 (1953).

In the first place, s. 8 by its plain language does not make the remedy provisions in s. 1 effective as law until January 1, 1978. Second, the Legislature, as a fiscally responsible body, cannot be presumed to have intended a result which might well lead to insolvency of the trust fund established by the act. Specifically, if claimants are allowed to recover for claims arising before January 1, 1978, there is a possibility that the trust fund will be inadequate to cover the costs of required payments and the administrative costs incurred in implementing the act. It seems reasonable to believe that the Legislature intended to provide for a start-up capitalization of the trust fund by staggering the effective dates for establishment and funding of the trust fund and for costs of administration and the remedy or provision for claims for awards payable from that fund.

The courts have ruled on many occasions that statutes will not be given retroactive application unless such application is required in clear and explicit terms. *See* Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521 (Fla. 1973), and authorities cited therein. This rule applies to statutes which create new rights and corresponding liabilities. *See* Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975), (holding franchise cancellation remedy prospective); Gordon v. John Deere Company, 264 So.2d 419 (Fla. 1972), (holding substitute service of process statute prospective); State *ex rel.* Bayless v. Lee, 23 So.2d 575 (Fla. 1945), (holding state officer's pay raise prospective); and Dept. of Business Regulation v. Stein, 326 So.2d 205 (3 D.C.A. Fla., 1976), (holding remedy for landlord's failure to pay interest on security deposit prospective). *See also* 82 C.J.S. *Statutes* s. 414, n. 34, p. 989 (1953), reciting the general rule that, in every case of doubt, the doubt must be resolved against the retrospective effect and in favor of prospective construction only.

The trust fund created by the act consists of contributions in the form of, *inter alia*, a 5 percent surcharge on all fines and forfeitures and a $10 additional charge for court costs which are imposed on defendants in criminal proceedings. *See* ss. 142.01 and 960.20, F. S. 1977, respectively. The mere establishment of this trust fund prior to January 1, 1978, in no way necessitates a retroactive application of the entire act.

Although it is sometimes held that statutes of a remedial nature may be given retroactive application, that exception to the general rule of construction will not be held to apply where a statute creates new rights which did not exist at the time of passage. *See* 82 C.J.S. *Statutes* ss. 416 and 421, nn. 16 and 17, p. 997 (1953). *Compare* City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961), and Maxwell v. School Board of Broward

County, 330 So.2d 177 (4 D.C.A. Fla., 1976), (statute confirming preexisting remedy is retrospective) with Heilman v. State, 310 So.2d 376 (2 D.C.A. Fla., 1975), and Marshall v. Johnson, 301 So.2d 134 (1 D.C.A. Fla., 1974) (statute creating new right is prospective).

The provisions of s. 960.07(2), F. S., in no way alter this result. That subsection reads:

> A claim must be filed not later than 1 year after the occurrence of the crime upon which the claim is based, or not later than 1 year after the death of the victim or intervenor; provided, however, that for good cause the commission may extend the time for filing for a period not exceeding 2 years after such occurrence.

This is merely a statute of limitations intended to bar stale claims. It does not meet the standard of clear or explicit language required for retroactive application. Accordingly, I conclude that the remedy or right to claim an award created by Chapter 960, F. S., until judicially construed otherwise, operates prospectively only.

078-23—February 21, 1978

PUBLIC RECORDS LAW

AUTOPSY REPORTS AND MEDICAL EXAMINERS' RECORDS ARE PUBLIC RECORDS UNLESS SPECIFICALLY EXEMPTED

To: Joseph H. Davis, M. D., Chairman, Medical Examiners' Commission, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTIONS:

> **1. Are records which are otherwise privileged and confidential and thus exempt from public disclosure required to be made public by the fact that they are received pursuant to the Medical Examiners Act, ss. 406.12, 406.13, and 406.14, F. S.?**
>
> **2. Do medical examiners' records, prepared pursuant to Ch. 406, F. S., of deaths under active investigation and felt to be caused by criminal conduct fall under the exception to Ch. 119, F. S., recognized for "police investigative records"?**

SUMMARY:

> **Autopsy reports made pursuant to law are public records which must be made available for public inspection and examination unless exempted by special act. If not exempted from disclosure by special act, an autopsy report may be kept confidential only to the extent necessary to ensure that a criminal investigation would not be significantly impeded and enable violators of the criminal laws to escape detection and apprehension. Documents or records made confidential by statute do not lose such status upon receipt by the medical examiner.**

Because these questions are interrelated, they will be addressed together. Your request has been prompted by a demand pursuant to Florida's Public Records Law, Ch. 119, F. S., to inspect and examine a particular file maintained by the Dade County Medical Examiner which contained specific and detailed information concerning a highly publicized murder. Included in the file was information concerning the murder weapon, time and place of the murder, identification of tools and instruments employed in the disposal of the body, the presence or absence of drugs used to immobilize the victim, presence or absence of evidence of physical torture prior to death, and presence or absence of mutilation of the body after death. Additionally, included in the file were letters and documents from investigative police files forwarded to the medical examiner pursuant to ss. 406.13 and 406.14, F. S., and hospital records of the victim filed pursuant to s. 406.12, F. S.

This office has previously stated in an informal opinion to Courtland Berry, dated August 21, 1974, that autopsy reports are public records which are not exempt as a class from the mandatory inspection requirements of s. 119.07(1), F. S. In AGO 076-156 this office expressed the view that the "police secrets rule" does not serve to exempt records such as arrest records, *autopsy reports*, business records, copies of informations and indictments and the like from s. 119.07(1). However, this conclusion was framed in relation to the question posed which included autopsy reports and other records compiled by and in the possession of the state attorney which do not result in a criminal prosecution. Your specific question, however, deals with an active ongoing police investigation into a probable homicide.

As contemplated by s. 406.11, F. S., it is the responsibility of the medical examiner to determine cause of death and to make and have performed such examinations, investigations, and autopsies as he shall deem necessary or shall be requested by the state attorney when, *inter alia*, any person dies in a manner prescribed by s. 406.11(1)(a)1.-12. *Compare* s. 925.09, F. S., empowering the state attorney to have an autopsy performed, before or after interment, when he decides it is necessary in determining whether or not death was the result of a crime. Pursuant to s. 406.14, F. S., law enforcement officers assigned to and investigating a death have a duty to maintain liaison with the medical examiner ". . . *during the investigation into the cause of death.*" (Emphasis supplied.)

Upon receipt of a notification filed pursuant to s. 406.12, F. S., the district medical examiner or his associate shall examine or otherwise take charge of the dead body. Section 406.13, F. S. When the cause of death has been established within a reasonable medical certainty by the district medical examiner or his associate, he shall so report or make available to the state attorney in writing his determination as to the cause of said death. *Id.* However, duplicate *copies of records and the detailed findings of autopsy and laboratory investigations shall be maintained by the district medical examiner. Id.* Any evidence or specimen coming into the possession of the medical examiner in connection with any investigation or autopsy may be retained by him or be delivered to one of the law enforcement officers assigned to the investigation of the death. *Id.*

Thus, "autopsy reports" are required to be made and maintained by the operation of s. 406.13, F. S. As such, they clearly fall within the definition of public record found at s. 119.011(1), F. S., which encompasses in pertinent part all records, documents, or other material ". . . made or received pursuant to law . . . ." The only question that remains, therefore, is whether any exemption exists which would permit such "detailed findings of autopsy" required by law to be maintained by the *district medical examiner* to be kept confidential pursuant to s. 119.07(2)(a), F. S.

In AGO 068-27, this office concluded that autopsy reports performed by a county medical examiner at the request of a state attorney were *not* to be released to a personal representative of the deceased. The opinion relied heavily on "public policy" considerations for keeping such reports confidential and a New York decision, People v. Preston, 176 N.Y.S.2d 542 (Ct. App. 1958), which construed a provision of the New York City Charter which provided that autopsy reports be kept confidential and not available for public inspection. In *Preston* there was no indication that dissemination of the autopsy report would "significantly impair or impede the enforcement of the law or enable violators to escape detection" (*see* AGO 075-9), but rather that confidentiality of the report was necessary in order to protect the rights of the accused. *But see* Westchester Rockland Newspapers, Inc. v. Mosczydlowski, 388 N.Y.S.2d 199 (N.Y. App. 1976), requiring disclosure of a report concerning a death in a city detention facility. In the instant case, however, we are faced with a far different situation. The absence of a legislative exception which would serve to make such reports confidential and public policy considerations which relate not to the rights of the accused but rather to the rights of the general public and the need to detect and apprehend violators of the criminal law.

While the Legislature has not made autopsy reports confidential by general law, it has addressed the subject in related general laws and special acts. For example, Ch. 27439, 1951, Laws of Florida, provides that:

> . . . the records, files and information kept, retained or obtained by the County Medical Examiner [of Broward County] under the provisions of this Act shall be confidential and privileged, unless released under and by the direction of the Assistant State Attorney or County Solicitor.

Chapter 59-1242, Laws of Florida, relating to the medical examiner of Duval County makes ". . . records, files and information kept by county medical examiner confidential and privileged unless released under and by the direction of the state attorney." *Also see, e.g.*, s. 10, Ch. 63-1142, Laws of Florida, (confidentiality of records of Brevard County medical examiner); s. 9, Ch. 59-1381, Laws of Florida, (confidentiality of records of Indian River County medical examiner); s. 12, Ch. 67-1704, Laws of Florida, (confidentiality of records of Martin County medical examiner and his assistants); s. 9, Ch. 31063, 1955, (confidentiality of records of Orange County medical examiner); s. 5, Ch. 61-2640, Laws of Florida, (confidentiality of records of Palm Beach County medical examiner); and s. 9, Ch. 31270, 1955, Laws of Florida, (confidentiality of records of Sarasota County medical examiner). An examination of the remaining special acts relating to the powers and duties of the medical examiners fail to disclose similar confidentiality provisions. Hence, it could be persuasively argued that, prior to 1970, autopsy reports were either public or confidential depending upon the county in which the autopsy was performed. However, in 1970, the Legislature enacted s. 11, Ch. 70-232, Laws of Florida, which superseded all parts of statutes, general laws, and special acts with which it may be in conflict. The obvious purpose was an attempt by the Legislature to impose certain minimum uniform procedures by enactment of the Medical Examiners Act, Ch. 70-232.

It is a basic rule of statutory construction that repeals by implication are not favored and will not be deemed to have been intended unless that intention is clearly manifest. State v. Gadsden County, 58 So. 232 (Fla. 1912). Before a court may declare that one statute impliedly repeals another, it must appear that there is a positive repugnancy between the two or that the last was clearly intended to prescribe the only governing rule or that it revises the subject matter of the former. Sweet v. Josephson, 173 So.2d 444 (Fla. 1965). While it could be argued that Ch. 406, F. S., constitutes an implied repeal of the confidentiality provisions of the special acts set forth above, I believe the better approach is to conclude that Ch. 406 is not in direct and absolute repugnancy with the special acts since it does not specifically address the question of confidentiality. Thus, the special acts, insofar as they mandate confidentiality of autopsy reports in the counties set forth above, constitute statutory exceptions to s. 119.07(2)(a), F. S., which were not impliedly repealed by the enactment of Ch. 406.

As further evidence that the Legislature did not intend all autopsy reports to be confidential, I would note s. 827.07(4)(b), F. S., Ch. 77-429, Laws of Florida, effective October 1, 1977. This section provides that autopsy reports maintained by the medical examiner which resulted from suspected instances of child abuse or maltreatment, *shall not be* subject to the confidentiality requirements imposed under the Child Abuse Act, Ch. 827, F. S.

In other words, such autopsy reports maintained by the medical examiner are, at least implicitly, intended to be part of the public records of that office.

The only exemption which could arguably serve to exempt autopsy reports as a category of records from s. 119.07(1), F. S., is the principle commonly known as the "police secrets rule." *See* Lee v. Beach Publishing Co., 173 So. 440, 442 (Fla. 1937); Patterson v. Tribune Co., 146 So.2d 623 (2 D.C.A. Fla., 1962); and Caswell v. Manhattan Fire and Marine Ins. Co., 399 F.2d 417 (5th Cir. 1968). As stated in AGO 075-9, this exception is applied only where the effect would be to *significantly* impair or impede the enforcement of the law *and* enable violators to escape detection. It would appear that in certain unusual cases, the medical examiner's autopsy report could contain information which if disclosed would defeat the very purpose of the report. Under such circumstances it would appear that the medical examiner could be justified in withholding those portions of the report which, if publicized, would significantly impair the ability of law enforcement officers to apprehend those suspected of committing the crime. This is not to say that the entire report should be suppressed until an investigation is complete; rather, only those portions of the report which would clearly fall within the rule could be withheld until such time as its release would not endanger a pending investigation. *Cf.* AGO 073-51. However, I would anticipate that such procedures would be necessary in relatively few cases.

This conclusion is also supported by the recent decision in State *ex rel.* Veale v. City of Boca Raton, 353 So.2d 1194 (4 D.C.A. Fla., 1977), in which the court refused to extend the police secrets rule which "arguably exists" under Lee v. Beach Publishing Co., 173 So. 440 (Fla. 1937), and Patterson v. Tribune Co., 146 So.2d 623 (2 D.C.A. Fla., 1962), to a report concerning suspected irregularities in the city's building department prepared by an assistant city attorney and city prosecutor and forwarded to the state attorney for further inquiry. The word "arguably" was apparently utilized by the district court due

to the fact that the rule has its basis in common law rather than statute. *See* Wait v. Florida Power and Light Company, 353 So.2d 1265 (1 D.C.A. Fla., 1978), holding that s. 119.07(2)(a), F. S., ". . . clearly waives *any* common law privileges of confidentiality . . . . This section exempts *only* those records expressly provided by general or special law to be confidential. . . ." (Emphasis supplied.) In holding the report not exempted from public disclosure, the court cited with approval Caswell v. Manhattan Fire and Marine Ins. Co., 399 F.2d 417(5th Cir. 1968). *Also see* s. 455.08, F. S., making investigative records made or received by a board or agency in the Department of Professional and Occupational Regulation confidential until a finding of probable cause.

Moreover, recent decisions in other jurisdictions have held autopsy reports and similar or related information available for public inspection notwithstanding public policy arguments against disclosure. *see, e.g.,* Matter of Rome Sentinel Co. v. Boustedt, 252 N.Y.S.2d 10 (N.Y. App. Ct. 1964); Meriden Record Co. v. Browning, 294 A.2d 646 (Conn. App. 1971); Denver Publishing Co. v. Dreyfus, 520 P.2d 104 (Colo. 1974); Evansville-Vanderburgh C.D.H. v. Evansville P.C., 332 N.E.2d 829 (Ind. Ct. App. 1975); 378 N.Y.S.2d 894 (N.Y. App. Ct. 1975); and Westchester Rockland Newspapers, Inc. v. Mosczydlowski, *supra.*

In concluding that autopsy reports must be made available for public inspection subject to the limitations contained herein, I have not overlooked the recent decision in City of Tampa v. Harold, 352 So.2d 944 (2 D.C.A. Fla., 1977), which held that a widow seeking pension benefits from a city had no right under s. 119.01, F. S., to receive a copy of a homicide report concerning the death of her late husband. This report, however, was apparently prepared by the city police and was part of an active investigatory file. This office concurs in the view expressed in that decision that ". . . police reports are ordinarily confidential," only to the extent that the reports fall under the exception recognized in Lee, *supra.* The type of police information which ordinarily would be considered confidential under *Lee* would include, for example, synopses of purported confessions, officers' speculations on a suspect's guilt, officers' views on credibility of witnesses, statements by and names of informants, ballistics reports, fingerprint comparisons and blood or other laboratory tests.

In sum, autopsy reports made pursuant to law are public records which must be made available for public inspection and examination unless exempted by special act. If not exempted from disclosure by special act, an autopsy report may be kept confidential only to the extent necessary to ensure that a criminal investigation would not be significantly impeded and enable violators of the criminal laws to escape detection and apprehension. Documents or records made confidential by statute do not lose such status upon receipt by the medical examiner. *See, e.g.,* ss. 458.16, 794.03, and 827.07(7), F. S. To the extent AGO 068-27 is in conflict with this opinion, it is hereby receded from.

078-24—February 21, 1978

SUNSHINE LAW

PRIVATE, NONPROFIT HOSPITAL CORPORATION WHICH ENTERS INTO AN AGREEMENT WITH A GOVERNMENT AGENCY NOT SUBJECT TO LAW

To: Lealand L. Lovering, Attorney for Brevard County Health Facilities Authority, Rockledge

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Are meetings of the directors of the Eugene Wuesthoff Memorial Hospital subject to s. 286.011, F. S., by virtue of a lease agreement entered into between the hospital and the Brevard County Health Facilities Authority?

SUMMARY:

Meetings of the directors of the Eugene Wuesthoff Memorial Hospital are not subject to s. 286.011, F. S., by virtue of a lease agreement entered into between the hospital and the Brevard County Health Facilities Authority.

According to your letter, the Eugene Wuesthoff Memorial Hospital, a private, nonprofit corporation, entered into a ground lease of the hospital facility with the Brevard County Health Facilities Authority. In return, and pursuant to said ground lease, the health authority entered into a lease-back of the hospital facility with the hospital. By virtue of this lease-back, the private, nonprofit corporation exercised control over the operation, maintenance, supervision, and all other aspects pertaining to the function of the health facility. This lease was executed in order to facilitate the issuance and selling of Brevard County Health Facility revenue bonds.

In AGO 074-22, this office concluded that local health-related commissions, councils, or agencies which are private, nonprofit organizations are not subject to the Government in the Sunshine Law, s. 286.011, F. S., even though such organizations may receive state or federal funds. In Times Publishing Co. v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969), the court stated that the Sunshine Law was intended to apply to "every board or commission . . . over which [the Legislature] has dominion and control."

Since the nonprofit corporation in question, *i.e.*, the Eugene Wuesthoff Memorial Hospital is not a state or local government agency, is not under the control of the Legislature, and, apparently, does not act in an advisory capacity to a governmental unit subject to the Sunshine Law, I do not believe that meetings of the board of directors of the hospital corporation are subject to s. 286.011, F. S. *Accord:* Attorney General Opinions 071-191 and 072-158.

As a caveat, I would note that in this particular instance it does not appear that the lease and lease-back agreement were entered into between the authority and the hospital in order to avoid the requirements of the Sunshine Law. If evidence existed that such agreement was entered into for purposes of avoiding the requirements of the Sunshine Law, a different conclusion could possibly be reached. *Cf.* I.D.S. Properties, Inc. v. Town of Palm Beach, 279 So.2d 353, 356 (4 D.C.A. Fla., 1973).

078-25—February 21, 1978

COUNTY HOSPITALS

MAY REQUIRE STAFF PHYSICIANS TO CARRY MEDICAL MALPRACTICE INSURANCE

To: Robert Bruce Snow, Attorney for Lykes Memorial Hospital, Brooksville

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

Does the board of trustees of a county-owned hospital created by special act have the authority or responsibility to require physicians, as a condition for membership on the medical staff of the hospital, to carry medical liability insurance, to establish minimally acceptable policy limits, and to deny membership to physicians who refuse to comply with such requirements?

SUMMARY:

The board of trustees of a county hospital created by special act of the Legislature, which is vested by enabling statute with the same powers and privileges as are vested in the governing bodies of county hospitals by Ch. 155, F. S., may regulate the admission to practice on the hospital staff and privilege of treating patients in the hospital. Therefore, it may

require that staff physicians carry medical malpractice insurance in any amount established by the board of trustees. Such regulations must be applied in a fair and nondiscriminatory manner to all staff physicians who seek to practice in the hospital. They must bear a reasonable relationship to the hospital's operation and purposes and to its responsibility of providing a competent staff of physicians as well as to its responsibility to its patients and their care and well-being. The amount of malpractice insurance that may be required, however, is apparently limited to $100,000 where a physician elects to participate in a new statutory scheme permitting him to limit liability to that amount by participating in the "Florida Patient's Compensation Fund."

Your question is based upon the following factual situation. Lykes Memorial Hospital is a hospital owned by Hernando County and governed by a board of trustees. The hospital and governing board were established by special legislative enactment in Ch. 65-1619, Laws of Florida. Section 3 of the 1965 act gave the board of trustees the power to "operate and control the operation of the hospital" and the authority to promulgate and establish reasonable rules and regulations under which the hospital shall be operated, which rules and regulations shall be subject to review and approval or disapproval of the board of county commissioners.

Chapter 67-1452, Laws of Florida, amended Ch. 65-1619, and now provides as follows:

> Section 3 (1) The board of hospital trustees of Hernando County are hereby vested with all of the authority and powers, [sic] and privileges vested in hospital boards by Ch. 155, Florida Statutes.

Your question therefore becomes whether under Ch. 155, F. S., the board of trustees is authorized to require physicians to carry professional liability insurance as a condition for admission to practice on the hospital staff and for the privilege of practicing in the county hospital. That chapter affords the board of trustees of a county hospital the authority to promulgate rules or regulations concerning the privilege of treating patients in such 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.

I have considered the powers of a county hospital board of trustees under this section in AGO 077-91. I there stated that the provision grants the board a wide latitude of authority to regulate the conditions under which physicians will be allowed to practice in a county hospital. As shown above, the board of trustees of the hospital in question, though created by special act, possesses the same powers and, hence, in my opinion, may regulate in its sound (judicially reviewable) discretion the privilege of treating patients and the granting of staff privileges in the hospital in any reasonable way comporting with the constitutional guarantees of due process and equal protection.

This power, under the authority of Ch. 155, F. S., to regulate the admission to practice on the hospital staff in the county hospital includes, as stated in my earlier opinion, the power to 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 insurance in an amount established by the board of trustees. There are, however, two limitations upon the trustees' discretion. First, all regulations must be applied equally and fairly, without discrimination, to all staff physicians who seek to practice in the hospital. They must bear a reasonable relation to the hospital's operation and purpose and to its responsibility of providing a competent staff of physicians as well as to its responsibility to its patients and their care and well-being. The governing board is, as noted, permitted wide latitude in setting the standards regarding a physician's privilege to treat patients in the hospital and the granting of staff privileges with the court's function limited to assessing their reasonableness and fairness in accordance with constitutional requirements. *See* Sosa v.

Board of Managers of the Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971); Woodbury v. McKinson, 447 F.2d 839 (5th Cir. 1971); and Pollock v. Methodist Hospital, 392 F. Supp. 393 (E.D. La. 1975).

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, or obtaining that amount of medical malpractice insurance and participating in the "Florida Patient's 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.

078-26—February 21, 1978

ADMINISTRATIVE PROCEDURE ACT

NOT APPLICABLE TO LOCAL, ONE-COUNTY DISTRICT UNLESS SPECIFICALLY MADE SO

To: Hugh R. Papy, Attorney for Monroe County Mosquito Control District, Key West

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

Does the Administrative Procedure Act, Ch. 120, F. S., apply to the Monroe County Mosquito Control District?

SUMMARY:

The Monroe County Mosquito Control District, having jurisdiction in only one county or part thereof, is not an intergovernmental or regional agency as described in s. 120.52(1)(b), F. S., and as an "other unit of government located in the state," as described in s. 120.52(1)(c), is 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. Absent either such an act or decision, the Administrative Procedure Act does not apply to the Monroe County Mosquito Control District.

Your question is substantially similar to the question I recently addressed in AGO 077-142 concerning application of the Administrative Procedure Act to Lower Florida Keys Hospital District. There, I determined that the answer to the question depended on whether the hospital district is an agency as that term is defined in Ch. 120, F. S.:

> 120.52 Definitions.—As used in this act:
> (1) "Agency" means:
> (a) The Governor in the exercise of all executive powers other than those derived from the Constitution.
> (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 160, 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. . . .

In AGO 77-142, I first noted that the agencies enumerated in s. 120.52(1)(b), F. S., appear to be various types of intergovernmental programs and regional governmental agencies or districts existing in the state and that the adjective "state" evidently modifies each of the described units, such as commission, regional planning agency, board, and

district thereafter listed. After considering the decision in Sweetwater Utility Corp. v. Hillsborough County, 314 So.2d 194 (2 D.C.A. Fla., 1975), and the observations of the Chairman of the Law Revision Council Committee on the Administrative Procedure Act Project, I concluded that units of local government having jurisdiction in only one county or a part thereof which are not intergovernmental or regional agencies or programs described in s. 120.52(1)(b) are subject to the provisions of Ch. 120, F. S., *only* if expressly made subject thereto by special or general legislative act or existing judicial decision.

Similar to the Lower Florida Keys Hospital District, the Monroe County Mosquito Control District is a special tax district existing only in Monroe County. Chapter 67-1726, Laws of Florida, as amended by Chs. 74-537 and 76-440, Laws of Florida. Accordingly, I conclude that the Monroe County Mosquito Control District is not included as an agency within s. 120.52(1)(a) or (b), F. S., and thus, as an "other unit of government in the state," is exempt from the Administrative Procedure Act unless expressly made subject thereto by judicial decision or legislative act. Since there is neither a special or general legislative act nor an existing judicial decision applying or extending the Administrative Procedure Act to the Monroe County Mosquito Control District, your question is answered in the negative.

078-27—February 21, 1978

ADMINISTRATIVE PROCEDURE ACT

APPLICABLE TO METROPOLITAN PLANNING ORGANIZATION

To: Gerald L. Knight, Attorney for Broward County Metropolitan Planning Organization, Fort Lauderdale

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

Does the Administrative Procedure Act, Ch. 120, F. S., apply to the Broward County Metropolitan Planning Organization?

SUMMARY:

Since the Broward County Metropolitan Planning Organization is a regional agency, board, district, or authority described in Ch. 163, F. S., it is expressly made subject to the Administrative Procedure Act by the provisions of s. 120.52(1)(b), F. S.

The Administrative Procedure Act broadly defines agency in s. 120.52(1), F. S., to include in pertinent part:

> (a) The Governor in the exercise of all executive powers other than those derived from the Constitution.
> (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 160, 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.

As set out in your letter, and the accompanying material, the Broward County Metropolitan Planning Organization is created pursuant to an agreement under the Interlocal Cooperation Act of 1969, s. 163.01, F. S., the Local Government Comprehensive Planning Act of 1975, ss. 163.3161-163.3211, F. S., and under the authority of certain federal acts. In AGO 077-15 I observed that metropolitan planning organizations formed under s. 163.01 and applicable federal laws may consist of a public agency of this state, such as a county, and other agencies either in the county or in other counties or other

states. Hence a planning organization may be entirely intracounty in nature or it may be intercounty or interstate. *See also* AGO 077-16.

As I recently noted in AGO 077-142, s. 120.52(1)(b), F. S., expressly enumerates the various types of intergovernmental programs and regional governmental agencies or districts which are designated state agencies for the purposes of the Administrative Procedure Act. That section expressly includes within the purview of the Administrative Procedure Act regional planning agencies, boards, districts, and authorities such as those described in Ch. 163, F. S. This express inclusion is not conditioned on whether the planning organization is intercounty or solely intrastate.

I recognize that the Broward County Metropolitan Planning Organization is a creature of the county and municipalities therein and that counties and municipalities are subject to the Administrative Procedure Act only to the extent they are included by general or special law or existing judicial decision. *See* AGO 075-140. However, given the Legislature's express inclusion in the definition of "agency" of regional planning agencies, boards, districts, and authorities, including those described in Ch. 163, F. S., irrespective of whether they are intercounty or intracounty, I conclude that pursuant to s. 120.52(1)(b), F. S., the Broward County Metropolitan Planning Organization is an agency subject to the provisions of Ch. 120, F. S.

078-28—February 21, 1978

MUNICIPALITIES

CITY COUNCILMAN OR EMPLOYEE MAY PURCHASE CITY REVENUE CERTIFICATES AT FACE VALUE AT LAWFUL RATES OF INTEREST

To: James T. Russell, State Attorney, Dade City

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Is it unlawful for a city councilman or employee to purchase and own revenue certificates issued by the city?

SUMMARY:

City council members as municipal officers are generally subject to the proscription contained in s. 839.05, F. S., which prohibits municipal officers from purchasing at a discount or otherwise speculating in any scrip or other evidence of indebtedness issued by the municipal corporation. However, when a city council member purchases revenue certificates at full face value, at lawful rates of interest, and does not otherwise speculate in such certificates, the general proscription contained in s. 839.05 is inapplicable.

According to your letter, certain council members and employees of a municipality within the Sixth Judicial Circuit have purchased and presently own revenue certificates issued by the municipality. You state that the certificates were properly issued by the municipality for the construction of capital improvements and are payable solely from anticipated fees and cigarette tax rebates from the State of Florida. The municipality retains the right to call or redeem any of the revenue certificates remaining outstanding on any interest payment date without penalty or premium or the payment of the additional interest to accrue over the remainder of the life of the certificates. I have been informed that the council members and municipal employees purchased the revenue certificates at face value directly from the city. The certificates bear interest at the rate of 5 percent and 6 percent per annum. The only control that the city council has over the payment of these certificates is that it may elect not to call or redeem any of the certificates remaining outstanding on any interest payment date, thereby insuring that

the certificate holders continue to receive the interest accruing over the remaining term of the certificates.

This opinion is limited to the interpretation and application of s. 839.05, F. S., to the instant inquiry. This office cannot render opinions as to the interpretation and application of the Standards of Conduct Law; any question arising under s. 112.313(7)(a), F. S., would be within the domain of the Ethics Commission and must, accordingly, be submitted to that body by the affected public officers or employees or by the officer or employee possessing the authority to hire or discharge the affected employees for an advisory opinion. Section 839.05, as amended by s. 242, Ch. 77-104, Laws of Florida, however, provides:

> Any mayor, marshal, treasurer, clerk, tax collector or other officer of any incorporated city or town, or any deputy of such officer, who buys up at a discount, or in any manner, directly or indirectly, speculates in any scrip or other evidence of indebtedness issued by the municipal corporation of which he is an officer, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, and shall be removed from office.

As a statute which imposes criminal liability, s. 839.05, F. S., must be strictly construed. *See* Negron v. State, 306 So.2d 104 (Fla. 1974), in which the court stated that criminal statutes are to be strictly construed and applied in the light most favorable to the party against whom they are asserted; *see also* Nell v. State, 277 So.2d 1 (Fla. 1973), and State v. Alonso, 345 So.2d 740 (3 D.C.A. Fla., 1977). The prohibition contained in s. 839.05 is by its own terms applicable only to municipal officers and any deputies of such officers of the municipality. Therefore, insofar as your question regards municipal employees, s. 839.05 is inapplicable (unless they are deputies of municipal officers). *Cf.*, McQuillin *Municipal Corporations* ss. 12.136 and 29.97 holding that provisions prohibiting municipal officers from having an interest in contracts of any character of the municipality are merely declaratory of the common-law doctrine and apply to all public officers; they are, however, generally inapplicable to employees. A city council member, however, by virtue of the powers and duties of his office clearly qualifies as a municipal "officer." *See* State *ex rel.* Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919), in which the Florida Supreme Court defined the term "office" as embracing some portion of the sovereign power conferred or defined by law and not by contract. Therefore, with respect to the instant inquiry, the prohibition contained in s. 839.05 is applicable to members of the city council as "other officer[s] of" the municipality.

Section 839.05, F. S., seeks to regulate the ownership of "scrip or other evidence of indebtedness" by municipal officers. The revenue certificates issued by the municipality for capital improvements in the instant inquiry are payable from anticipated fees and cigarette tax rebates collected by the State of Florida and distributed to the various municipalities of the state. While such certificates have been deemed to be within the definition of scrip(t) or other evidence of indebtedness, *see generally* City of Alma v. Guaranty County Savings Bank, 60 F. 203, 207 (8th Cir. 1894); Hall v. United States, 10 F. Supp. 739, 740 (D.C. Cal. 1935); 79 C.J.S. *Script*; Black's Law Dictionary 1514-15 (4th ed. 1968); and Webster's Dictionary p. 2041, the instant inquiry can be resolved on the issue as to whether the municipal officers purchased at a discount or otherwise speculated in the revenue certificates.

Section 839.05, F. S., only prohibits municipal officers from purchasing scrip or other evidences of indebtedness at a discount or otherwise speculating in these instruments. I have been informed that the city council members referred to in your letter did not buy the revenue certificates at a discount but rather paid the full face value. According to your letter of inquiry, the interest rates on these certificates "are five percent and six percent," which are less than the maximum rate prescribed by law. Therefore, the application of s. 839.05 to the instant inquiry is dependent in part on the definition of "speculates" within the foregoing statutory provision. The concept of speculation in a business sense differs from that of investment. While the concept of investment involves the laying out of money or capital with the view of obtaining an income or profit, speculation encompasses the elements of risk and uncertainty; a greater degree of risk is involved for the chance of unusually large profits. *See* Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Bocock, 247 F. Supp. 373, 379 (D.C. Tex. 1965); Wild v. Brown, 183 A. 899, 900 (N.J. App. Ct. 1936) (a speculative investment is one in which there is a substantial danger of loss of principal balanced by a prospect of appreciation of principal or by the receipt of an abnormal rate of income); and Clucas v. Bank of Montclair, 166 A. 311, 313

(N.J. 1933). *See also* Martin v. Citizens' Bank of Marshallville, 171 S.E. 711, 714 (Ga. 1933), in which the court defined speculation as:

> . . . the art of speculating by engaging in business out of the ordinary or dealing with a view of making profits from conjectural fluctuations in price rather than from the earnings or the ordinary profit of trade, or by entering into a business venture involving unusual risks, for a chance of an unusually large gain or profit.

See also 81A C.J.S. *Speculates* and *Speculation.*

Applying the foregoing authorities to the instant inquiry, it does not appear that the city council members "speculated" in the purchase of these revenue certificates. The payment on the certificates involved little risk or uncertainty or substantial danger of loss of principal, and it appears unlikely that there was any prospect of appreciation of principal or of receiving an abnormal rate of income or return on the certificates. It might be noted that under the provisions of s. 215.685, F. S., the certificates or other obligations of any type or character issued by municipalities may bear interest at a rate not to exceed 7.5 percent per annum, and when authorized by the State Board of Administration specific issues may bear a rate of interest in excess of the maximum rate. In the instant case, the involved certificates were purchased at full face value and bear interest at rates of 5 percent and 6 percent per annum. There is no evidence that the purchase of these certificates involved any undertaking out of the ordinary course of business. Therefore, I am of the opinion that the city council members, as "other officer[s] of" the municipality, who purchased the revenue certificates at full face value and at lawful rates of interest did not speculate in these revenue certificates within the purview of s. 839.05, F. S., and, accordingly, did not violate and were not within the purview of the general prohibition contained in s. 839.05.

078-29—February 21, 1978

PAROLE AND PROBATION COMMISSION

INMATE MAY WAIVE RIGHT TO PAROLE INTERVIEW

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

Prepared by: Joe Belitzky, Assistant Attorney General

QUESTIONS:

1. May an inmate eligible under ss. 947.16 and 947.17, F. S., for consideration for parole waive an interview by the Parole and Probation Commission required by s. 947.17(1)?

2. Assuming that an inmate may waive this interview, at what point should the commission's hearing examiner accept the inmate's waiver of the interview required by s. 947.17(1), F. S.?

SUMMARY:

A state prisoner eligible for consideration for parole under ss. 947.16 and 947.17, F. S., has a statutorily created right to be periodically interviewed and considered for parole. That right, being personal to the inmate, is a right which he may waive either expressly, impliedly, or by conduct. A waiver by an inmate of his right to be considered for parole is a unilateral act, not requiring any act of the commission to perfect it and not requiring the commission's approval. Upon due waiver by an inmate the commission is not required to conduct a parole interview. However, if due notice of a waiver has not been conveyed to the commission's interviewing official before convening a duly scheduled interview, the hearing examiner must make himself available at the

scheduled time and place. The subsequent absence or failure of the inmate to appear at the interview for which he has received due notice may be treated as a waiver unless circumstances exist which are inconsistent with an intent to waive, are otherwise known to the examining official, or are such as to put him on notice to make inquiry.

AS TO QUESTION 1:

Your first question is answered in the affirmative.

Section 947.16(1), F. S., as amended by s. 88 of Ch. 77-120, Laws of Florida, provides in part as follows:

> 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.

Section 947.16(3) provides that, subsequent to the initial interview, the inmate shall be interviewed for parole at periodic intervals not less often than annually.

Section 947.17(1), F. S., as amended by s. 89 of Ch. 77-120, Laws of Florida, provides:

> Upon the commission's own initiative or within 30 days after receipt of a recommendation of the Department of Offender Rehabilitation that an inmate be paroled, a hearing examiner of the commission shall interview the person. . . .

In AGO 077-73, I stated that s. 947.16, F. S., "clearly and expressly imposes upon the commission the *duty* to interview inmates eligible for parole at least once a year," and concluded that the annual interview duty thereby imposed on the commission should be complied with, regardless of whether the inmate had entered into an agreement (contract parole) pursuant to s. 947.135, F. S. (1976 Supp.). The statutory duty of the commission to conduct the parole interview specified in and required by ss. 947.16 and 947.17 would appear to be primarily for the inmate's benefit and assures an orderly and timely consideration of the inmate's eligibility for parole. It may be said to raise a correlative right of the inmate to be periodically interviewed and considered for parole.

In Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974), the Supreme Court of Florida held that:

> [w]hile there is no absolute right to parole, there is a right to a proper consideration for parole.

However, it is clear that:

> [a] party may waive any right to which he is legally entitled, whether secured by contract[s], conferred by statute, or guaranteed by the Constitution. [Bellaire Securities Corporation v. Brown, 168 So. 625, 639 (Fla. 1936).]

See also Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945), and cases cited therein. It is also clear that a right which is personal and created by statute may be waived. *See, In re* Shambow's Estate, 15 So.2d 837 (Fla. 1943); Board of Public Instruction of Dade County v. State, 24 So.2d 105 (Fla. 1945); and Gay v. Whitehurst, 44 So.2d 430 (Fla. 1950).

Furthermore, implicit in the law governing paroles and the acceptance thereof by parolees is the fact that a parole may be accepted or rejected by the prospective parolee. *See, e.g., Ex. Parte* Alvarez, 39 So. 481 (Fla. 1905). *See also* 67 C.J.S. *Pardons* s. 21, p. 609. If an inmate may refuse a parole itself, certainly he may waive his right to be interviewed for that parole. It has also been recognized, in the context of a parole revocation hearing, that a parolee may waive his right to a revocation hearing before more than one parole commissioner. *See* Gibbs v. Cochran, 142 So.2d 276 (Fla. 1962). It has also been recognized, in the context of parole revocation, that a parolee may waive

his constitutional right to a preliminary hearing before the commission on the parole violation charges. *See* Albritton v. Wainwright, 313 So.2d 763 (Fla. 1975), where the Supreme Court held:

> Obviously, in those instances in which the prisoner waives a preliminary hearing, none should be required.

Your attention is also directed to AGO 077-41, wherein I stated, in part:

> As a general proposition, a person may waive any matter which affects his property, any alienable right which he owns or 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 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.

Accordingly, the inmate's right to a parole interview is a corollary to the statutory duty of the Parole and Probation Commission to conduct a parole interview. Said right being personal to the inmate eligible to be interviewed, it is a right which may be waived by him.

AS TO QUESTION 2:

In your second question, you requested my opinion as to when the hearing examiner should accept the inmate's waiver of his right to a parole interview. The answer to this question is determined by the commonly accepted definition of a waiver. A waiver has been defined as a voluntary or intentional relinquishment of a known right. It is essentially unilateral, resulting as the legal consequence from some act or conduct of the person against whom it operates. Thus, no act of the commission is necessary to complete or perfect the waiver, nor does the waiver require any acceptance or approval by the commission to be complete. Furthermore, a waiver may be either express or implied, and may occur by words or by conduct. *See* 92 C.J.S. *Waiver* at pp. 1041-1049, 1053-1055, and 1061-1062 and Black's Law Dictionary 1751-1752 (Rev. 4th Ed.).

Thus, the answer to your question is dependent on the manner in which an inmate manifests his intention to waive his right to the parole interview. Provided that an interview is properly and timely scheduled, and the inmate and appropriate custodial officials have been properly and timely notified of such interview, but the inmate fails to appear therefor, it may be assumed that his absence at the interview constitutes a waiver of his right to such interview unless other exculpatory circumstances inconsistent with the right to the interview or the inmate's intention to claim or rely on such right are made known to the hearing examiner or interviewing official or other circumstances exist putting such interviewing official on notice to make due inquiry. Additionally, an inmate's expressed intention to forego his right to a parole interview, conveyed to the hearing examiner or some other appropriate commission official, coupled with his failure to appear at the scheduled interview of which he has been timely notified should be treated by the commission as a waiver of the inmate's statutory right to be interviewed for parole. As stated in Albritton v. Wainwright, 313 So.2d 763 (Fla. 1975):

> Obviously, in those instances in which the prisoner waives a preliminary hearing, none should be required.

Thus, where an inmate has duly and validly expressed his intention to relinquish or waive his right to a parole interview, the commission is not required to accept or approve of the inmate's waiver or to conduct a parole interview. However, in those cases where no express waiver has been conveyed to the hearing examiner, or other appropriate official, prior to the convening of the scheduled interview, the hearing examiner should make himself available at the scheduled time and place. Upon the absence or failure of the inmate to appear upon due and timely notice, it may be considered that he has impliedly waived the statutory right to be interviewed by the hearing examiner unless circumstances exist inconsistent with the right, or intent to claim or rely on the right, and are known or made known to the examiner, or sufficient circumstances exist to put the interviewing official on notice to make due inquiry.

078-30—February 21, 1978

MIGRANT LABOR CAMPS

LANDLORD WHO RENTS TO THE GENERAL PUBLIC AND ONLY INCIDENTALLY TO MIGRANT WORKERS NOT REQUIRED TO OBTAIN LICENSE TO OPERATE CAMP

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

Prepared by: Walter Kelly, Assistant Attorney General

QUESTION:

Is a landlord who rents housing to the public on a first come, first served basis, regardless of occupation and to migrant, temporary, or seasonal workers by accident and not by design or as a condition of employment, subject to the licensure requirement of s. 381.432, F. S., whenever five or more of his tenants happen to be migrant, temporary, or seasonal workers?

SUMMARY:

Facilities not designed for and primarily established, operated, or used as living quarters for five or more seasonal, temporary, or migrant laborers or workers are not "migrant labor camps," as defined by s. 381.422(1), F. S., and do not have to obtain a migrant labor camp license from the Department of Health and Rehabilitative Services as provided for in s. 381.432, F. S.

Your question is answered in the negative.

Section 381.422, F. S., provides the statutory definition of a migrant labor camp for the purposes of ss. 381.432-381.482, F. S., as follows:

> (1) "Migrant Labor Camp."—One or more buildings, structures, tents, trailers, or vehicles, or any portion thereof, together with the land appertaining thereto, *established, operated, or used as living quarters for five or more seasonal, temporary, or migrant workers*, whether or not rent is paid or reserved in connection with use or occupancy of such premises. (Emphasis supplied.)

Section 381.432, F. S., provides:

> No person *shall establish, maintain, or operate any migrant labor camp* in this state without first obtaining a license therefor . . . and unless such license is posted and kept posted in the camp to which it applies at all times during maintenance or operation of the camp. (Emphasis supplied.)

The above-quoted sections, in my opinion, apply only to facilities that are designed for and primarily established, operated, or used as living quarters for five or more seasonal, temporary, or migrant workers. It is evident from your letter of inquiry that the landlord in question rents housing to the general public and does not designedly let out living quarters to seasonal or migrant laborers or workers or in any way operate or propose to operate a migrant labor camp. The facility and operation you describe cannot reasonably be considered or deemed to be a migrant labor camp within the purview of ss. 381.432-381.482, F. S. Moreover, a statutory definition of a word or phrase for the purposes of the statute in which such term is defined is controlling, and where a statute defines a term, that definition and meaning must be ascribed to such term whenever repeated or used in the same statute, unless a contrary legislative intent clearly appears on the face of such statute. Ervin v. Capital Weekly Post, 97 So.2d 464 (Fla. 1957); Vocelle v. Knight Brothers Paper Co., 118 So.2d 664 (1 D.C.A. Fla., 1960). The statute in terms refers only to migrant labor camps which are established, operated, and used as living quarters for

five or more seasonal or migrant laborers, regardless of whether rent is reserved in connection with the use or occupancy of the facilities by such migrant laborers. It does not purport to include facilities rented to the general public such as are described in your inquiry. One factor in determining what is a migrant labor camp would be its primary function or the use to which it is designed or intended to be put, that is providing living quarters for five or more seasonal, temporary, or migrant workers. A determination based upon the above factor and other factors may have to be made in any given situation, but I must conclude that the intent or purpose of s. 381.432 is not to require a facility that "rents housing to the public on a first come, first served basis, regardless of occupation and to migrant, temporary, or seasonal workers by accident and not by design or as a condition of employment" to obtain a license for a migrant labor camp from your department.

078-31—March 2, 1978

CITY OF WINTER SPRINGS

MAYOR MAY APPOINT COUNCILMEN TO HEAD CITY DEPARTMENTS

To: Gary E. Massey, Winter Springs City Attorney, Altamonte Springs

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Under the Charter of the City of Winter Springs, who has the authority to appoint councilmen to head the departments of the city?

SUMMARY:

A municipal charter which vests all powers of the city in the governing body and which authorizes the mayor "to appoint a member of the city council to supervise and direct any particular phase of the government of the city . . ." contemplates a commission form of government wherein executive and legislative power is vested in the city council. Under such charter, the mayor is authorized to select a councilman and assign or appoint him to supervise and direct a particular phase of the municipal government.

As a general rule, the council or other governing body of a municipal corporation is the general agent of the corporation for all purposes and exercises all the corporate powers not expressly committed by law to other boards or officers. 63 C.J.S. *Municipal Corporations* s. 153, p. 313. With respect to the power of appointment to municipal boards or agencies, the general rule is that, in the absence of a charter provision authorizing the mayor or some other officer to exercise such power, the council or governing body is the only agency which may exercise the power to appointment. *Ex Parte* Stone, 192 P. 71 (Cal. 1920); City of Princeton v. Woodruff, 104 N.E.2d 748 (Ind. 1952); Foti v. Montero, 146 So.2d 789 (La. 1962). Thus, unless the charter so directs, the mayor has no authority to appoint municipal officers.

The mayor, on the other hand, is generally deemed to be the chief executive officer of the city. 63 C.J.S. *Municipal Corporations* s. 542, p. 998. However, the actual functions and powers of the mayor are derived from and depend entirely on the municipal charter; the mayor possesses only those powers expressly granted or necessarily implied therefrom. *Cf.*, Municipal Court, City of Fort Lauderdale v. Patrick, 241 So.2d 195 (Fla. 1970), *aff'd* 254 So.2d 193 (Fla. 1971), in which the court held that a city charter provision authorizing the mayor to take command of the police force and govern by proclamation under the direction of the city commission during times of grave public emergency did not confer authority on the mayor to establish a curfew in an area of the city affected by riot, in view of another provision of the city charter which vested the legislative power in the council and required that enactments of a penal nature be effected by ordinance.

The mayor's functions as prescribed in the municipal charter differ in various municipalities. The mayor's power may be legislative, executive, or judicial, according to the particular governing law. In some cities, the mayor as chief executive has supervision over the minor officers of the municipality not expressly made subject to the control of other officers or boards, while in others his powers are primarily executive and administrative and, as the executive head of the municipality, he has general supervision over all the departments of the city government. *See* 63 C.J.S. *Municipal Corporations* s. 543(a), p. 999.

It would appear that an important factor in considering the relationship of the mayor to the city council, and the allocation of legislative and executive power between elected municipal officers, is the form of city government which is contemplated by the city charter. In McQuillan *Municipal Corporations* s. 912, p. 643, the author lists various types of municipal government, the most common of which are the mayor-and-council or aldermanic plan, the commission-manager plan, and the commission plan. Each of these plans comprehends different powers and functions of the mayor and the governing body.

In the mayor-and-council system, the executive and administrative affairs of the municipality are in the hands of the mayor, while the legislative power is vested in the council. McQuillan *Municipal Corporations* s. 9.17, p. 655. The municipal charter generally gives to the mayor the power of appointment of all principal officers, except those who are elected. *Id.*

In the commission form of government, the commissioners or members constitute a municipal board and exercise all municipal powers, including legislative, executive, administrative and judicial powers. McQuillan *Municipal Corporations* s. 9.18, p. 661. The commission plan has been held constitutional in most states, the courts reasoning that constitutional principles of separation of powers are not applicable to municipalities. *Id; also see* Kaufman v. City of Tallahassee, 94 So. 697, 699 (Fla. 1923). In some cities possessing the commission form, the electors vote by name for an individual commissioner to take charge of a department; in others, the commissioners as a body assign the commissioners to various departments. *Id.* at 667. Each commissioner then serves as the head of, and administers, the department for which he is responsible. *Id.*

The commission-manager form of government places the executive and administrative functions in the hands of a city manager. McQuillan *Municipal Corporations* s. 9.21, p. 678. 63 C.J.S. *Municipal Corporations* s. 543(b), p. 999. The commission constitutes a legislative or policymaking body which generally supervises the city manager. *See* Bryant v. City of Lakeland, 28 So.2d 106 (Fla. 1947). The city charter may authorize the city manager to appoint department heads. *See* Glendinning v. Cherry, 14 So.2d 794 (Fla. 1943).

An examination of the Winter Springs City Charter (Ch. 72-718, Laws of Florida) reveals that the form of government provided therein does not exactly conform to any of the three forms discussed above. The charter provides for a five-member city council and a mayor. Sections 4.01, 4.05, Art. IV, Winter Springs City Charter. The general powers and duties of the council are set forth at s. 4.06, Art. IV:

> All powers of the city *shall* be vested in the council, *except as otherwise provided by law or this charter*, and the council *shall provide for the exercise thereof and for the performance of all duties* and obligations imposed on the city by law. (Emphasis supplied.)

In addition, s. 7.01, Art. VII, states that the council

> *may* establish city departments, officers or agencies in addition to those created by this charter and may prescribe the functions of all departments, offices and agencies. (Emphasis supplied.)

The powers and duties of the mayor are provided in s. 4.05, Art. IV:

> At each regular election, a mayor shall be elected for a term of two years. He shall preside at meetings of the council, shall be recognized as head of the city government for all ceremonial purposes, and be the governor for purposes of military law. . . . *[T]he mayor of the city shall be the chief executive officer of the city* and shall act and serve as chairman of the city council. The mayor shall not vote except in case of a tie vote of the council. *The mayor may appoint a member of the city council to supervise and direct any particular phase of the*

> *government of the city.* Within ten days after the adoption of any ordinance by the city council, the mayor shall have the power to veto said ordinance and return it to the council at the next regular meeting with a written message. It shall require a two-thirds vote of the city council to pass the ordinance after the mayor's veto. (Emphasis supplied.)

Other duties of the mayor are set forth in other parts of the charter and include, *inter alia*, the authority and duty, subject to the approval of the council, to appoint a city clerk (s. 4.10, Art. IV), to appoint a city attorney (s. 7.02, Art. VII), and to prepare the city's budget for submission to the city council (s. 8.02, Art. VIII).

It should be noted that under Art. VI of the charter, the city council is authorized, but not required, to appoint a city manager who shall be "chief administrative officer" of the city. However, I have been informed that the city council has not appointed a city manager; the town is currently governed by the mayor and council.

When ss. 4.01 and 4.05, Art. IV of the charter are read together, it is apparent that all power (executive, legislative, and administrative) is vested in the city council, except as otherwise provided by law or the charter. Thus, although the mayor is designated "chief executive officer," in reality the mayor possesses only those executive powers which have been expressly granted him; the council is vested with all other executive powers. *Cf.* s. 6.03, Art. VI, Ch. 72-718, Laws of Florida, providing, *inter alia*, that the city manager shall be responsible to the city council for all administrative affairs placed in his charge by or under the charter and shall perform such other duties as may be required of him by the council.

It appears, therefore, that the charter (absent implementation of ss. 6.01-6.03, Art. VI of the charter by the city council by appointment of a city manager) essentially contemplates a commission form of government where the mayor is authorized to determine which councilman shall administer a particular phase of the municipal government. There is no provision in the charter which makes the mayor's assignment or appointment of the councilmen to supervise and direct particular phases of city government subject to the approval of the council; therefore, the council is not authorized to approve or disapprove the mayor's choices. *Cf.* Indyk v. Klink, 297 A.2d 5 (N.J. 1972), holding that, where a governing statute provided that all administrative functions were to be allocated to one or another of the municipal departments with the head of each department appointed by the mayor, the town council was unauthorized to appoint a city attorney or city manager. Moreover, it might further be noted that the authority of the mayor to appoint a councilman to supervise and direct any particular phase of the city government relates to the form of government and the distribution of powers among elected officers. *See* s. 166.021(4), F. S. Changes in the form of municipal government and the distribution of powers among elected officials cannot be made by the city council pursuant to its home rule powers under Ch. 166, F. S., without approval by referendum of the city's electors as provided in s. 166.031, F. S. In the absence of such approval, the cited provisions of the charter act govern and control both the city council and the mayor in this regard.

The foregoing analysis of the City of Winter Springs Charter harmonizes and gives effect to each of the subject provisions of the charter and further permits the mayor and the council to each possess their own "lawful spheres of operation." *See generally*, Alsop v. Pierce, 19 So.2d 799 (Fla. 1942).

078-32—March 2, 1978

MUNICIPALITIES

MAY ESTABLISH CITY COMMISSION DISTRICTS IF AUTHORIZED BY CHARTER

CITY COMMISSION DISTRICTS MUST BE BASED ON POPULATION

To: John H. Schoeberlein, City Manager, Pompano Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General, and Dennis J. Wall, Legal Research Assistant

QUESTIONS:

1. Does a municipality have the power to "split" or otherwise alter election precincts established by the board of county commissioners in order to create uniform city commission districts for the election of members of the governing body of the municipality?

2. Must city commission district boundaries be based solely upon population figures, or may they be established upon the basis of voter registration figures?

SUMMARY:

The governing body of a municipality, if authorized to do so by the city charter, has the power to delineate city commission election districts, but in doing so may not "split" or otherwise alter election precincts established by the board of county commissioners.

City commission districts may be formed upon the basis of population figures or voter registration figures, but voter registration figures may be used only insofar as the distribution of registration figures approximates the distribution of a population base.

AS TO QUESTION 1:

Your first question presupposes that the governing body of the city possesses the power to redistrict the city for the purpose of requiring that the city commissioners be elected solely by voters in the designated city commission districts in which they reside. Your letter states that the city commissioners are now required to be elected by a citywide vote, presumably by the terms of the existing charter act. Section 166.021(4), F. S. 1977, in pertinent part specifies that no changes in a special law or municipal charter are permitted with respect to "the terms of elected officers *and the manner of their election*" (Emphasis supplied.) without the approval by referendum of the electors of the municipality as provided in s. 166.031, F. S., relating to charter amendments. Similar language was employed in s. 11(1)(a), Art. VIII, State Const. 1885, which provided that the Dade County Charter would, *inter alia*, fix the "method of election" of the Board of County Commissioners of Dade County. In construing this provision, the Supreme Court of Florida in the case of Dade County v. Young Democratic Club, 104 So.2d 636, 638 (Fla. 1958), stated as follows:

> "Method" has to do with the way or means of doing a thing. It is often referred to as the mode, plan, design or manner in which a project is executed.

Accord: *In Re* Advisory Opinion to the Governor, 116 So.2d 425, 428 (Fla. 1959), and AGO 075-158 (applying the above definition to the similar phrase "manner of their election" in s. 166.021(4) and concluding that said section governs "the filling of all vacancies on a municipal legislative body").

It is clear that a change from subdistrict residency requirements for city commissioners who are elected by citywide vote to the election of city commissioners from single-member districts, which is the substance of the proposal outlined in your letter, is a

change in the method, way, means, plan, design, or manner in which city commissioners are elected. *Compare* Dade County v. Young Democratic Club, *supra*, in which the court held that conducting county commission elections on a nonpartisan basis was a "method of election" controlled by the Dade County Charter within the meaning of s. 11(1)(a), Art. VIII, State Const. 1885, *with* AGO 074-25, in which I gave my opinion upon the applicability of s. 166.021(4), *supra*, to a proposed change in the Pensacola City Charter. The Pensacola City Charter provided for the election of ten city council members, two from each of five wards. Although elected by citywide vote, each city council member was required to reside in the particular ward from which he or she ran for office. Any city council member who ceased to do so would immediately forfeit his or her office under the terms of the charter. It was proposed that the charter be amended to permit a council member who changed legal residence from the ward from which he or she was elected to another ward during the term of office to serve out the unexpired portion of the term. I was of the opinion that such a proposed change of the city charter was not subject to the requirements imposed with reference to the "manner" of election of city commissioners by s. 166.021(4):

> The requirement that a councilman be a resident, qualified voter of his ward is a qualification for office. There is nothing in [s. 166.021(4)] which requires a referendum of the electorate in order to change charter provisions relating to qualifications for office. [Attorney General Opinion 074-25.]

The proposal outlined in your letter would do more than establish qualifications for office; it would, as above noted, change the manner in which city commissioners in the City of Pompano Beach are elected. Therefore, the proposal you describe is subject to s. 166.021(4), F. S. 1977, so that, before the city charter may be amended in this fashion, the proposal you describe must be submitted to a referendum of the electors of the city pursuant to s. 166.031, F. S.

With reference to providing for city commission districts by charter amendment, s. 2(a), Art. VIII, State Const., provides that city charters may be amended pursuant to general or special law. Sections 166.031 and 166.021(4), F. S. 1977, are such general laws. Further, under s. 2(b), Art. VIII, State Const., municipalities have such governmental, corporate, and proprietary powers as are not "otherwise provided by law." No law provides for the delineation of *city* commission districts. *Cf.* Ch. 165, F. S., providing for municipal incorporation, and Ch. 98, F. S., part of the Florida Election Code, neither of which contains any provisions even remotely related to the area under discussion.

Neither does s. 6, Art. VI, State Const., present a bar to the exercise by a municipality of the power to establish city commission districts for the municipal purpose (defined in s. 166.021(1) and (2)) of electing city commissioners solely by vote of the electors residing in each defined district. That constitutional provision states as follows:

> Registration and elections in municipalities shall, and in other governmental entities created by statute may, be provided by law.

"Registration" is the method provided for ascertaining those individuals who qualify as voters. State *ex rel.* Morford v. Tatnall, 21 A.2d 185, 189 (Del. 1941); People *ex rel.* Stapleton v. Bell, 23 N.E. 533, 535 (N.Y. 1889). It has no apparent relation to the power to define city commission districts. "Elections" is a term which has primary reference to the very act of selecting a person to fill an office, as opposed to the acts necessary to prepare for the exercise of such a selection:

> The word "election", when standing alone, is defined as the act of choosing; choice; the act of selecting one or more from others. [Alexander v. Booth, 56 So.2d 716, 719 (Fla. 1952).]

Accord: In Re Advisory Opinion to the Governor, 116 So.2d at 428 (primary meaning of "election" is the act of choosing); Nelson v. Robinson, 301 So.2d 508, 510 (2 D.C.A.), *cert. denied*, 303 So.2d 21 (Fla. 1974) ("paramount purpose of an election" is to afford the means and opportunity for "a full, free and open choice"); and AGO 074-311 (primary meaning of "election" is the act of choosing). Thus, in the case of Pearson v. Taylor, 32 So.2d 826 (Fla. 1947), the Florida Supreme Court directed the trial court to dismiss an election contest of a local referendum held on the question of prohibiting the sale of

liquor, a contest filed on the ground that the referendum was initiated by a petition which contained fewer than the minimum number of signatures established by statute for initiating such a referendum. The court's action was based upon the rationale that matters occurring before an "election" form no part thereof:

> To hold an election is to make a choice. . . . The duties required to be done leading up to the election, while in many respects may be mandatory, are in no respect a part of the election. [Pearson v. Taylor, *supra*, at 827.]

Similarly, the apportionment of city commission districts prior to an election does not form a part of the election. Apportionment or districting or redistricting is a geographical division of territory for the purpose of electing representatives of the people of such territory to governments, not an election. Section 6, Art. VI, *supra*, would therefore appear to be inapplicable to the exercise of such power by municipalities in connection with the election of members of the city council. Since the power to define city commission districts is not a power prohibited to municipalities (s. 166.021(1), F. S.) or "expressly preempted to state or county government by the constitution or by general law" (s. 166.021(3)(c)) or "otherwise provided" by law (s. 2(b), Art. VIII, State Const.), it would appear that the governing body of a municipality may by ordinance submit a charter amendment to the city electors for approval to establish the districts from which members of the municipality's governing body will be elected solely by the vote of the voters residing therein.

Turning now to the specific question presented by your inquiry, s. 98.031, F. S. 1977, vests the board of county commissioners with limited authority to "alter or create" county precincts upon recommendation and approval of the county supervisor of elections. The only involvement in the alteration or creation of county precincts which the governing body of a municipality may have is stated in s. 98.091(1), F. S. 1977:

> The board of county commissioners, with the concurrence of the supervisor of elections, may arrange the boundaries of the precincts in each municipality within the county to conform to the boundaries of the municipality, subject to the concurrence of the governing body of the municipality. . . .

The division of a county into county voting precincts cannot be said to be a municipal, governmental, corporate, or proprietary power, nor something done for a municipal purpose. This power is instead one "otherwise provided" by law (*i.e.*, by ss. 98.091, 98.031, *supra*) within the meaning of s. 2(b), Art. VIII, State Const. The only "power" municipalities may exercise in this regard is to concur or disagree with the exercise of the discretionary authority granted by s. 98.091 to the board of county commissioners to establish (with the concurrence of the county supervisor of elections) the boundaries of the county precincts in a municipality within the county in conformity with the boundaries of the municipality.

As a result of the foregoing analysis, it would appear that a municipality must, after an amendment of the city charter where such would be necessary as earlier indicated, redistrict in such a manner as to align the boundaries of its proposed city commission districts with the lines or geographic boundaries of the county precincts within the municipality and with the boundaries of the municipality. Even if, and I express no opinion on this subject, a municipality possesses the power to create its own precincts or wards for use in city commission elections, a municipality possesses no powers of voter registration. The registration of electors for all elections is a function confided to the office of the *county* supervisor of elections by s. 98.041, F. S. 1977:

> 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 and shall be in lieu of any other system of municipal registration. Electors shall be registered in pursuance of this system by the supervisor [of elections] or by a deputy supervisor, and electors registered shall not thereafter be required to register or reregister except as provided by law.

See, e.g., Richey v. Indian River Shores, 337 So.2d 410, 412-13 (4 D.C.A. Fla., 1976), *aff'd*, 348 So.2d 1 (Fla. 1977), (the registration system provided for in s. 98.041 is "in lieu of all other registration systems") and AGO 072-221 (Florida Election Code vests responsibility

for registration of voters "in the several county supervisors of elections"). *Also see* AGO 074-90 (permanent single registration system established by s. 98.041 "is mandatory for all municipalities"); AGO 073-484 (Legislature, by enacting s. 98.041, "has preempted all matters of municipal voter registration"); and AGO 073-426 (same). Thus, municipalities have no legal or practical alternative but to use county precincts as the basis for city commission districts. Otherwise, the city will first have to seek the assistance of the county supervisor of elections in recommending to the board of county commissioners any feasible changes in the boundaries of county precincts lying either wholly within or partly within and partly without the city limits.

AS TO QUESTION 2:

It is clear that population figures must be used as the basis for city commission districts, and that voter registration figures may not be used except insofar as the distribution of registration figures approximates the distribution of a population base. Avery v. Midland County, 390 U.S. 474, 481, 484-85 (1968) (equal population basis of one person, one vote principle extended to districts for all "units of local government having general governmental powers over the entire geographic area served by the body"); Moore v. City of Pacific, 534 S.W.2d 486, 503-04 (Mo. App. 1976) (applying principle stated in text to basis of districting for city aldermanic wards). *See* Perry v. City of Opelousas, 515 F.2d 639, 641 & n. 2 (5th Cir. 1975) (court-ordered city council districts based upon population figures); Yelverton v. Driggers, 370 F. Supp. 612, 614-15 (M.D. Ala. 1968) (violation of one person, one vote principle alleged as to city voting wards; such claim must be based primarily upon population figures); and AGO 075-143 (one person, one vote requirement founded on concept of "population equality"). *Cf. In re* Apportionment Law, 263 So.2d 797, 802 (Fla. 1972) (quoting United States Supreme Court to effect that population is controlling criterion of validity of legislative apportionment plans). The reason that population figures are used as the basis of districting was stated by the Supreme Court of the United States in the case of Burns v. Richardson, 384 U. S. 73, 92-93 (1966), as follows:

> Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment."

078-33—March 2, 1978

MUNICIPAL HOUSING AUTHORITY

APPLICABILITY OF LAW WAIVING SOVEREIGN IMMUNITY

To: John A. Grant, Jr., General Counsel, Tampa Housing Authority, Tampa

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **Is a municipal housing authority a "state agency or subdivision" for the purposes of and within the scope of s. 768.28, F. S., as amended; and, if so, what effect does that statute have on the tort liability of the authority?**

SUMMARY:

> **A municipal housing authority is included within the definitional scope of s. 768.28, F. S., as amended. Although a municipal housing authority may not have possessed sovereign immunity prior to the Legislature's waiver of sovereign immunity contained in s. 768.28, as amended, the**

statute now expressly provides that the limitations of liability contained in the statute are applicable to all agencies and subdivisions of the state (as defined in s. 768.28[2]) regardless of whether they possessed sovereign immunity prior to July 1, 1974. Therefore, pending judicial determination to the contrary, the provisions of s. 768.28, as amended, including the monetary limitations on tort liability set forth therein, are applicable to a municipal housing authority.

Section 768.28, F. S., as amended by Chs. 77-47 and 77-86, Laws of Florida, provides in part:

> In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against *the state or any of its agencies or subdivisions* to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. (Emphasis supplied.)

Section 768.28(5), as amended by s. 1, Ch. 77-86, Laws of Florida, establishes monetary limitations on the liability of "the state, its agencies and subdivisions." Section 768.28(2) defines the phrase "state agencies and subdivisions" to include:

> . . . the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; *and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.* (Emphasis supplied.)

It seems clear that a municipal housing authority created and operating under Ch. 421, F. S., is within the purview of the above-quoted definition. Section 421.04(1), F. S., states in pertinent part:

> In 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 to perform "the public and essential governmental functions" set forth therein becomes operative when the governing body of the city declares a need for the housing authority to function (s. 421.04), and the mayor, with the approval of the governing body of the city, appoints the housing authority commissioners (s. 421.05). A municipal housing authority is legislatively declared to constitute "a public body corporate and politic" (s. 421.07), and is vested with some ordinary corporate powers as well as the power to, *inter alia*, issue debentures (s. 421.14), operate housing projects (s. 421.08(4)), and acquire real property by the exercise of eminent domain (s. 421.12). Therefore, there is no doubt but that a municipal housing authority is a public corporation or public quasi-corporation which discharges duties delegated to it by law within the boundaries of the municipality. *See* Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage Dist., 82 So. 346, 350 (Fla. 1919), and O'Malley v. Florida Ins. Guaranty Association, 257 So.2d 9 (Fla. 1971), in which the court listed housing authorities as examples of public corporations in Florida. *Accord*: Attorney General Opinion 077-92.

It should be noted, however, that no Florida court has determined whether or not a housing authority is subject to tort liability. This question has, however, been litigated in other jurisdictions, and a majority of courts have concluded that a housing authority does not possess sovereign immunity. *See* Muses v. Housing Authority of City and County of San Francisco, 189 P.2d 305 (Cal. 1948); Tyhurst v. Housing Authority of Los Angeles, 29 Cal. Rptr. 239 (Cal. 1963); Knowles v. Housing Authority, 95 S.E.2d 659 (Ga. 1956); Hill v. Housing Authority of Allentown, 95 A.2d 519 (Pa. 1953); Goldberg v. Housing Authority of City of Newark, 175 A.2d 433 (N.J. 1962); and *also see Annot.*, 61

A.L.R.2d 1247 and cases cited therein. An examination of judicial decisions which have considered housing authorities laws virtually identical to Ch. 421, F. S., discloses that the courts have found that a housing authority was subject to tort liability because the activities of an authority were proprietary rather than governmental in nature. *See, e.g.*, Muses v. Housing Authority, *supra*, in which the court noted that the business of a housing authority (*i.e.*, providing low-income housing) was commercial in nature even though it was required to operate without profit, and that when the state

> steps out from its all supreme position as ruler and competes with industry or labor then, so far as tort liability is concerned, it must be held to be acting in a proprietary capacity and be subject to the same liability for its torts as private parties.

Compare Suwannee County Hospital Corp. v. Golden, 56 So.2d 911, 913 (Fla. 1952), in which the court held that a hospital district was not possessed of sovereign immunity because its activities fell "more clearly in the category of 'proprietary' functions than 'governmental' . . . ," and Circuit Court v. Dept. of Nat. Resources, 339 So.2d 1113, 1115 (Fla. 1976), in which the court noted that *Suwannee* stood for the principle that "a public corporation whose functions are local rather than state-wide does not share the sovereign immunity of the state."

However, in light of recent legislative amendments to the provisions of s. 768.28(5), F. S. (assuming the validity *vel non* thereof), it appears that the monetary limitations on liability specified therein are now applicable to *all* state agencies and subdivisions of the state, as defined in s. 768.28(2), regardless of whether these agencies and subdivisions possessed sovereign immunity prior to July 1, 1974. *See* s. 1, Ch. 77-86, Laws of Florida, amending s. 768.28(5). Thus, in AGO 077-113, I stated, in part:

> . . . the statements in AGO 075-114 and AGO 076-41 to the effect that the liability limits of s. 768.28, Florida Statutes, do not apply to municipalities and hospital districts [because such entities possessed no sovereign immunity and have been held to be subject to tort liability] no longer obtain, and to that extent, those opinions are hereby modified.

Accordingly, I am of the opinion that a municipal housing authority is within the purview of s. 768.28, F. S., as amended, and that, in the absence of a judicial determination to the contrary, the monetary limitations on liability contained in s. 768.28(5) as amended, are applicable to such authority.

078-34—March 2, 1978

CONSTITUTIONAL AMENDMENTS

CONSTRUCTION OF s. 14, ART. X, STATE CONST.

To: Barry Richard, Representative, 112th District, Coral Gables

Prepared by: David K. Miller, Assistant Attorney General

QUESTIONS:

1. Does the language appearing on the ballot by which the voters adopted s. 14, Art. X, State Const., have any bearing on the construction of the constitutional provision?

2. If so, what is the meaning of the phrase "fully funded" in the ballot provision?

3. What is the meaning of the phrase "sound actuarial basis" in the constitutional provision?

SUMMARY:

Section 14, Art. X, State Const., prohibits all governmental unit retirement and pension systems supported by public funds from granting increases in benefits unless those increases are funded on a "sound actuarial basis." The summary of this amendment which appeared on the amendment election ballot was worded to provide that such increases be "fully funded." The courts may use an amendment election ballot provision as a guide in construing the constitutional amendment, where the amendment's purpose is unclear, but there is no assurance that the courts will give the ballot provision great weight. In the instant case, considering the context in which the terms are used, the ballot language "fully funded" is not substantially different in meaning from the constitutional language "sound actuarial basis."

In November 1976, the voters of Florida approved an amendment to Art. X of the Florida Constitution, adding a new s. 14. The new section provides:

> **State retirement systems benefit changes.**—A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a *sound actuarial basis.* (Emphasis supplied.)

The voters approved this provision in the election of November 1976. The proposed amendment was reflected on the ballot as follows:

> Proposing to add Section 14 to Article X of the State Constitution to provide that increases in the benefits payable under any governmental supported retirement system after January 1, 1977, be *fully funded* by the governmental unit. (Emphasis supplied.)

Your first question concerns whether the ballot provision may be used in construing the constitutional provision. I cannot answer this question with absolute assurance, because the question is primarily one for the judiciary to resolve on a case-by-case basis. As a general rule of constitutional construction, however, the courts will consider materials extrinsic to the Constitution where necessary to determine the intent of the framers. These extrinsic materials may include the particular provision's historical background and contemporaneous statements of purpose. *See In re* Advisory Opinion to the Governor, 276 So.2d 25 (Fla. 1973); State v. Florida State Improvement Commission, 60 So.2d 747 (Fla. 1952); and Lummus v. Florida Adirondack School, 168 So. 233 (Fla. 1934).

Conceivably the ballot language quoted above could have some significance in reflecting the intentions of the voters who ratified s. 14, Art. X, State Const. I therefore cannot conclude that the ballot language is of *no* significance or must be completely disregarded.

In order to answer your question thoroughly, however, I must qualify this response. The courts will resort to use of extrinsic materials only when the purpose of a constitutional provision is unclear from its language and context. City of St. Petersburg v. Briley, Wild and Associates, Inc., 239 So.2d 817 (Fla. 1970); 16 C.J.S. *Constitutional Law* s. 29 (1956). Therefore the courts will probably not refer to the contents of the ballot provision at all unless the constitutional language is unclear on its face.

I further note that, even if the courts consider the language of the ballot provision in construing the Constitution, the courts may not accord that language great weight. The courts will not invalidate a constitutional amendment which has been approved by the voters based on a formal or technical defect in the submission. Sylvester v. Tindall, 18 So.2d 892 (Fla. 1944); State *ex rel.* Landis v. Thompson, 162 So. 270 (Fla. 1935); Collier v. Gray, 156 So. 40 (1934). This rule may be based on an unspoken assumption that the voters are familiar with the provisions they have approved. This assumption is supported by the constitutional requirement that the actual text of the proposed amendment be published in each county prior to the amendment election. Section 5(b), Art. XI, State

Const. For this reason, I qualify my conclusion with the suggestion that the courts may not regard the ballot language as highly persuasive in construing the Constitution.

Your second and third questions concern the meaning of the phrases "fully funded" in the ballot provision and "sound actuarial basis" in the constitutional provision. These questions may be considered together. Florida law does not require the ballot provision to reflect the exact text of the proposed amendment so long as it reflects the substance of the amendment. Section 101.161, F. S.; AGO 076-189. Presumably the Legislature, which drafted the ballot provision, intended it to reflect the substance of the proposed amendment.

The purpose of this constitutional amendment was to assure that public employee retirement pay or pension increases are adequately funded. Retirement or pension systems by their nature are subject to future claims which are potentially almost infinite, and which cannot be presently determined with mathematical certainty. For this reason, the phrase "fully funded" appearing on the ballot provision cannot mean that a system is required to maintain reserves sufficient to cover *all* potential claims, to a mathematical certainty. That result would be impractical, if not impossible. Rather, the phrase must mean that a system is required to maintain reserves sufficient to cover its probable claims, as prudently determined with reference to risk based on statistical and demographic computations. The term "fully" means abundantly provided or sufficient or ample. *See* City of Orlando v. Evans, 182 So. 264, 268 (Fla. 1938).

The phrase "sound actuarial basis" appearing in the Constitution has substantially the same meaning. The phrase requires retirement and pension systems to accumulate and administer their reserves in accordance with the principles of the actuarial profession so as to cover probable claims resulting from benefit increases. An actuary is defined as:

> One whose profession is to calculate insurance risks and premiums; a person skilled in the theories and mathematical problems involved in making these calculations. [1 C.J.S. *Actuary*, pp. 1448-49 (1936).]

I conclude that the ballot provision is not substantially different in meaning from the constitutional provision.

078-35—March 2, 1978

DEPARTMENT OF OFFENDER REHABILITATION

CONTINUED APPLICABILITY OF STATE INSTITUTIONS CLAIMS FUND TO DEPARTMENT

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

Prepared by: William C. Sherrill, Jr., Chief Trial Counsel

QUESTION:

Does Ch. 77-120, Laws of Florida, change the conclusion of AGO 077-12 regarding the applicability of s. 402.181, F. S., to the Department of Offender Rehabilitation?

SUMMARY:

Section 402.181, F. S., continues to be applicable to the Department of Offender Rehabilitation created by Ch. 75-49, Laws of Florida, and claims against the Department of Offender Rehabilitation arising from property damages and direct medical expenses for injuries caused by escapees or inmates committed to the custody of the Department of Offender Rehabilitation may be processed and paid.

In AGO 077-12, I concluded that s. 402.181, F. S., was not applicable to the Department of Offender Rehabilitation because Ch. 75-49, Laws of Florida, which created the

Department of Offender Rehabilitation, made no reference to s. 402.181, F. S. I further noted in AGO 077-12 that:

> 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.

Subsequent to the writing of AGO 077-12, the 1977 Legislature met and enacted a reviser's bill, Ch. 77-120, Laws of Florida, which provided in s. 9 the following amendment to s. 402.181(1), F. S.:

> **402.181 State Institutions Claims Fund.—**
> (1) 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 or the Department of Offender Rehabilitation. 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 and the Department of Offender Rehabilitation.

With the enactment of the reviser's bill, Ch. 77-120, Laws of Florida, it is now clear that the Legislature's intent was that the newly created Department of Offender Rehabilitation continue to be covered under the provisions of s. 402.181, F. S., with respect to payment of claims for damages caused by escaping inmates. It is noted that s. 2 of Ch. 75-49, Laws of Florida, which created the Department of Offender Rehabilitation, transferred all powers, duties, and functions of the Division of Corrections of the Department of Health and Rehabilitative Services by type four transfer to the Department of Offender Rehabilitation. While it was not entirely clear when AGO 077-12 was issued that the Legislature intended that such type four transfer also have the effect of continuing the coverage of payment for damages caused by inmates committed to the custody of the new Department of Offender Rehabilitation, it is now apparent that the amendment of s. 402.181 by reviser's bill, Ch. 77-120, was intended by the Legislature to confirm that the newly created Department of Offender Rehabilitation has been covered by the provisions of s. 402.181 since its creation by Ch. 75-49.

It is therefore my opinion that s. 402.181, F. S., continued to be applicable to the Department of Offender Rehabilitation created by Ch. 75-49, Laws of Florida, and claims against the Department of Offender Rehabilitation arising from property damages and direct medical expenses for injuries caused by escapees or inmates committed to the custody of the Department of Offender Rehabilitation may be processed and paid.

078-36—March 2, 1978

DUAL OFFICEHOLDING

MEMBER OF PUBLIC HEALTH TRUST BOARD OF TRUSTEES MAY SERVE ON BOARD OF BUSINESS REGULATION

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

Prepared by: Staff

QUESTION:

May a member of the Board of Trustees of the Dade County Public Health Trust also serve on the Board of Business Regulation?

SUMMARY:

A member of the Board of Trustees of the Dade County Public Health Trust may also serve on the Board of Business Regulation, since membership on the board of trustees does not constitute a public office.

Section 5(a), Art. II, State Const., provides in pertinent part:

> No person shall hold at the same time more than one office under the government of the state . . . except that . . . any officer may be a member of a . . . statutory body having only advisory powers.

It seems clear that a member of the Board of Business Regulation is an "officer" within the purview of the above-quoted constitutional provision. Therefore, the important consideration is whether or not a member of the board of trustees of a public health trust is also an "officer."

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. 503 (Fla. 1919); emphasis supplied.]

In AGO 074-232, I concluded that a town councilman could serve as a member of a planning commission since

> the commission appears to be statutorily vested with no authority to exercise any aspect of the sovereign power of the state, the possession and exercise of such power being an identifying characteristic of an "office."

That opinion also noted that the exception of s. 5(a), Art. II, *supra*, with respect to statutory bodies having only advisory powers appeared to be a constitutional recognition and restatement of this long-established definition.

An examination of part II of Ch. 154, F. S., which authorizes the creation and establishment of public health trusts, reveals that such entities have *not* been statutorily vested with independent powers, but rather possess only such powers as the governing body of the county may choose to bestow. For example, s. 154.10, F. S., provides for the relationship of the county public health trust to the board of county commissioners, and provides that the

> county governing body shall, by ordinance, by contract or lease with the public health trust, or by a combination of the foregoing, provide for each of the following:
>
> (1) A method whereby the public health trust shall account to the county governing body for all receipts and expenditures of money.
>
> (2) A method whereby the public health trust shall request, and the county governing body *may approve*, the appropriation and payment of county funds to support the lawful purposes of the trust.
>
> (3) A method whereby the public health trust shall request, and said county governing body *may effectuate*, the issuance of bonds or the borrowing of money, pursuant to authority vested in said governing body of the county.
>
> * * * * *
>
> (7) A procedure whereby the county governing body *may approve or disapprove* of contracts between the board of trustees and labor unions.

> (8) A method whereby the county governing body may declassify facilities as "designated facilities" and provide for the county to assume the ownership, operation, governance, or maintenance of such facilities. (Emphasis supplied.)

Similarly, s. 154.11, F. S., in setting forth the powers of the board of trustees of a county public health trust, states that its powers are "*subject to limitation* by the governing body of the county in which such board is located . . . ." (Emphasis supplied.)

In light of the foregoing, therefore, I am not persuaded that a board of trustees of a county public health trust possesses the *independent* attributes of sovereignty which are characteristic of an office. Moreover, as was stated in AGO 071-324, it is a generally established principle that the right to hold office is a valuable one which should not be curtailed except by plain provisions of law. Attorney General Opinion 071-324 also quoted extensively from 42 Am. Jur. *Public Officers* s. 61, p. 928, providing:

> . . . the rule that provisions imposing disqualifications should be strictly construed is applicable to those which prohibit dual office holding. They should not be extended by implication beyond the office or offices expressed, or to persons not clearly within their meaning. In other words, they should be construed in favor of eligibility.

Accordingly, in the absence of legislative or judicial determination, I am of the view that a member of the Board of Trustees of the Dade County Public Health Trust may also serve on the Board of Business Regulation.

078-37—March 3, 1978

DOCUMENTARY STAMP TAX

ASSESSMENT ON OPEN-END MORTGAGE

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

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

QUESTION:

Is documentary stamp tax required upon a so-called "open-end mortgage" at the time of recordation based upon the maximum amount recited therein which could be advanced, or is tax required based upon the portion of the advances authorized which had been made and evidenced by the documents presented for recordation?

SUMMARY:

The assessment of documentary stamp taxes upon an "open-end mortgage" at the time of recordation should be based upon the fixed amount of the initial or original debt or obligation and promise to pay (exclusive of future advances) and not the maximum amount specified in and authorized or which could or may be advanced or loaned under the terms of such mortgage. Any additional or future advances or loans made pursuant to such mortgage, if evidenced by a separate promissory note, nonnegotiable note, or other written obligation to pay money upon which payment of the future advances or loans might be enforced in court and which may include the original instruments or papers signed by the maker of the note or obligation or supplemental instruments evidencing such advances or loans, are subject to documentary stamp taxes if and when such future advances or loans are made.

Section 201.01, F. S., as amended by Ch. 77-414, Laws of Florida, now provides in essential part that the taxes specified in Ch. 201, F. S., as amended, shall be paid with respect to the several documents or instruments therein described, including mortgages,

by any person who makes or *records* the same or for whose benefit or use the same are made or *recorded.* With respect to mortgages which do not incorporate the certificate of *indebtedness,* a notation shall be made on the note or certificate that the tax has been paid and that the proper stamps have been *affixed to the mortgage.*

Section 201.08(1), F. S., as amended by s. 2 of Ch. 77-414, provides in pertinent part that on mortgages filed or *recorded* in the state, and for each renewal of the same on each $100 *of the indebtedness or obligation* evidenced thereby, the tax specified therein shall be paid. Mortgages *recorded* in the state which incorporate the *certificate of indebtedness* not otherwise shown in separate instruments are subject to the same tax as other written evidences of indebtedness or obligations to pay money and at the same rate. Where there is both a mortgage *and* a certificate of indebtedness, or obligation, the tax shall be paid on the mortgage at the time of recordation, and a notation made on the note, certificate of indebtedness, or obligation that the tax has been paid and the proper stamps *affixed to the mortgage or obligation.*

In the several situations designated in ss. 201.01 and 201.08, F. S. 1977, construing the two sections *in pari materia,* it is manifest that the tax required to be paid on mortgages filed or recorded in this state by the person who makes and records the mortgages or for whose benefit or use the same are made and recorded is calculated or computed on the amount of the indebtedness or obligation evidenced by or secured by said mortgage. Therefore, whether the tax required to be paid upon an open-end mortgage at the time of recordation is to be based upon the maximum amount recited in such mortgage which could or might be advanced thereunder or only the amount initially advanced or loaned, *i.e.,* the initial debt or obligation secured by the mortgage, exclusive of any future advances, must be determined by the meaning of the terms "indebtedness or obligation" as used in and for the purposes of s. 201.08. *Cf.* s. 199.052(7)(d), F. S. (1976 Supp.), and s. 697.04, F. S. 1975, which provide that any mortgage given for the purpose of creating a lien on real property if so expressed therein shall secure not only existing indebtedness but also such future advances, whether obligatory or to be made at the option of the lender or otherwise, as are made within 20 years from the date of the mortgage (s. 697.04(1)); and any such mortgage (subject to the tax levied by Ch. 199, F. S.) securing future advances shall be paid at the time of execution on the initial debt or obligation secured (excluding future advances), which future advances become subject to the intangible tax at the time of and upon the sum of any such future advances (s. 199.052(7)(d)).

In construing the precursor of s. 201.08, F. S., the Fifth Circuit Court of Appeals in the case of Lee, State Comptroller v. Kenan, 78 F.2d 425 (5th Cir. 1935), held that an obligation to pay money usually refers to a direct written promise to pay a stated sum and not to the duty to pay an amount that may be established by proof of extrinsic facts. The case involved a contract for the sale of electric current over a period of years. The court held that the contract did not fix a debt and promise its payment and was not an obligation to pay money within the meaning of the statute.

Similarly, in Metropolis Pub. Co. v. Lee, 170 So. 442 (Fla. 1936), the Supreme Court of Florida held that advertising agreements between newspapers and their customers to secure commercial advertising space wherein the customers agreed to pay for the space as used, after the advertising has been run, on a sliding scale according to the amount of space used were not subject to documentary stamp tax, since the agreements were on their face merely executory agreements to purchase advertising space, the amount of which was uncertain, and no obligation to pay arose until the advertising was run. The court also stated that a stamp tax could not be sustained under the former statute, the essential terms of which are the same as the present law, unless the transaction is clearly within the terms of the statute and that the statute levying and imposing excise taxes on documents must be strictly construed and all doubts and ambiguities resolved in favor of the taxpayer.

The conclusion reached herein is further supported by Maas Brothers, Inc. v. Dickinson, 195 So.2d 193 (Fla. 1967). There the Supreme Court of Florida expressed the view that s. 201.08(1), F. S. 1963, the material terms of which for the purposes of this opinion are the same as the present statute, did not contemplate the taxation of instruments when the actual debt or liability thereunder was dependent upon a contingency. In this case, the court ruled that a retailer's flexible charge account application agreement was dependent upon the happening of a contingency before any obligation was created, that is, the purchase of goods and the signing of a sales slip for the goods. The happening of this contingency was in the future and might or might not ever come to pass.

Also, in Devore v. Lee, 30 So.2d 924 (Fla. 1947), the Supreme Court of Florida ruled that documentary stamp taxes were not payable on short term leases in which a lessee agreed to pay rents in the future under former s. 201.08, F. S., which imposed documentary stamp taxes on notes and "written obligations to pay money" since the statute contemplated an outright obligation to pay a fixed and certain sum of money and not a promise to pay at some time in the future for rents accruing in the future if and when they accrued. The court stated that the obligation at issue therein, to pay rent, was executory and ripened into a debt only as the times for payment arrived. The court reasoned as follows at p. 926:

> An obligation for the full amount that the lessor would eventually receive from the lessee for the occupancy of the property for the entire time mentioned in the lease would not be established merely upon the execution of the instrument, for "rent does not accrue to the lessor as a debt or claim, unless payable in advance, until the lessee has enjoyed the use of the premises. It may never become due; for the lessee may be evicted, or the premises become untenable. . . ."

In the situation now under consideration, there is an arrangement whereby a fixed debt or obligation, *i.e.*, the amount of the original loan, is created and any additional or future obligation or debt is subject to the contingency of a future advance being requested by the mortgagor and made by the mortgagee. The arrangement in effect grants the borrower the privilege of securing future advances or loans wherein the borrower promises *in futuro* to pay a future advance or loan of money to the lender if and when extended. It is impossible to tell from the face of the open-end mortgage, at the time it is recorded, what total amount of money will actually be loaned other than the amount of the original loan.

Applying the aforementioned judicial decisions and principles of law to your specific question, I am of the opinion that the indebtedness or obligation created by an open-end mortgage at the time of recordation is the fixed amount of the initial or original debt or obligation and promise to pay, exclusive of future advances, and that the documentary stamp tax should be based upon this amount and not the maximum amount specified in and authorized or which could or may be advanced or loaned under the terms of such mortgage. Any additional or future advance or loan made pursuant to such open-end mortgage would also be subject to documentary stamp taxes if and when such advance or future loan is made, if evidenced by a separate promissory note, nonnegotiable note, or other obligation to pay money upon which payment of the future advance might be enforced in court and which may include the original papers signed by the maker of the note or obligation or any supplemental instrument evidencing such future advance or loan. Any enforcement problems that may result could, in large part, be remedied by the enactment of a provision similar to s. 199.052(7)(d), F. S. (1976 Supp.). This section provides that as to any mortgage subject to the intangible tax securing future advances as provided in s. 697.04, F. S., the intangible tax shall be paid at the time of execution on the initial debt or obligation secured, excluding any future advances, with the intangible tax paid at the time and so often as any future advances are made. Failure to pay the appropriate intangible tax on the future advances renders the mortgage unenforceable in any court of the state as to any advance made until such time as the tax due thereon has been paid.

078-38—March 3, 1978

ELECTIONS

APPLICABILITY OF NEW ELECTION CODE TO SPECIAL DISTRICT ELECTIONS

To: T. W. Miller, Jr., Director, Lee County Mosquito Control District, Fort Myers

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Should persons seeking to qualify as candidates for election to the office of Commissioner of the Lee County Mosquito Control District qualify before the clerk of the circuit court, or should they qualify before the supervisor of elections?

2. Should the sum charged by the supervisor of elections to validate signatures on such candidates' qualifying petitions be deemed a filing fee?

3. Is the payment of such validation charges an "expenditure" within the meaning of s. 106.011(4), F. S. 1977, and, therefore, required to be paid from campaign funds on deposit in a campaign depository?

SUMMARY:

The procedures established in the enabling legislation creating the Lee County Mosquito Control District relating to the time, manner, and person before whom candidates for the office of commissioner of the district are to qualify have been superseded and impliedly repealed or modified by Ch. 77-175, Laws of Florida. Such candidates must now qualify at the time and in the manner provided by general law.

AS TO QUESTION 1:

Chapter 67-1630, Laws of Florida, as amended by Ch. 72-598, establishes the Lee County Mosquito Control District. The district is governed by a six-member board of commissioners, each representing a geographical area or portion of the district. Section 3(2) of Ch. 67-1630 provides for the election of commissioners to the board and states, in part:

> Members of said board shall thereafter be elected for a term of four (4) years each by a vote of the district at large, at an election to be held on the date set for the general election of each year in which a general election is held. The board of county commissioners shall cause to be printed on the ballots for said election the names of any qualified persons as candidates for the office of the board of commissioners of said mosquito control district upon petition having been filed with the clerk of the circuit court of Lee county signed by not less than twenty-five (25) qualified electors for said election, which petition shall be filed with said clerk of circuit court not more than seventy-five (75) and not less than sixty (60) days before said election. All members of the board shall be elected on a nonpartisan basis. No filing fees shall be required as a requisite for qualifying as a candidate for the office of commissioner of said district. Blank lines shall be placed on said ballots so that write-in votes may be written thereon.

See also s. 3 of Ch. 67-1630 providing, *inter alia*, that "[t]he person from each area receiving the highest number of votes cast by the district at large at such election shall be declared the commissioner for said area under this law."

Prior to the enactment of Ch. 77-175, Laws of Florida, effective January 1, 1978, the provisions of the Florida Election Code which set forth procedures for qualification of candidates for nomination or election to office applied only to candidates for national, state, or county office. *See* s. 99.061, F. S. 1975, entitled "nomination of candidates for *state, county and United States offices*; sworn statement, receipt and filing fee." (Emphasis supplied.) Section 99.061(1) and (2) required candidates for state and national office to file qualification papers and pay the qualification fee and party assessment, if any had been levied, to the Department of State during the qualifying period. Section 99.061(3) imposed the same requirements on candidates for county office, except that the qualifying papers were to be filed with, and qualifying fees paid to, the clerk of the circuit court of the county. An alternate method of qualifying by means of the petition process was provided under s. 99.095, F. S. 1975, for those candidates who filed an oath that they were unable to pay the filing fee imposed by s. 99.092, F. S. *See also* ss. 99.152 and 99.153, F. S. 1975, relating to procedures to be followed by independent candidates seeking to

have their names placed on the general election ballot and ss. 101.261 and 101.262, F. S. 1975, relating to minor party candidates.

That the foregoing statutory provisions were limited to candidates for nomination or election to national, state, or county office is also made evident by an examination of the definitions used in the prior Election Code. Section 97.021, F. S. 1975, provided that "when used in this code" the terms "primary election," "general election," and "special election" were to be construed as elections held for the purpose of nominating or voting for persons to fill national, state, or county offices. *See also* s. 101.25(1), F. S. 1975, providing in part that "[t]he nomination of all candidates for all elective state, congressional and county offices, for United States Senator . . . is made in the manner provided in this code."

The courts in this state have on several occasions ruled that officers of a special taxing district are not generally considered to be officers of the state or a county. *See* Town of Palm Beach v. City of West Palm Beach, 55 So.2d 566 (Fla. 1975); Martin v. Dade Muck Land Co., 166 So. 449 (Fla. 1928); and State *ex rel.* Landis v. Reardon, 154 So. 868 (Fla. 1934). *Cf.* AGO's 069-49 and 071-324 holding that an officer of a special district was not within the purview of the dual officeholding prohibition contained in s. 5(a), Art. II, State Const., because that provision prohibited a person from holding more than one office "under the government of the state and the counties and municipalities therein . . ." and this language could not be extended to include special districts. *And cf.* AGO 078-11 holding that s. 286.012, F. S., prohibiting abstention from voting by members of the governing boards of the state, counties, or municipalities or agencies thereof, was not applicable to the governing board of a special district. Under the rationale of the foregoing authorities, therefore, the statutory provisions in Ch. 99, F. S. 1975, relating to the procedures to be followed by candidates for nomination or election to office did not apply to candidates for special district offices.

However, with the enactment of Ch. 77-175, Laws of Florida, the Legislature has broadened the scope of the Election Code to provide procedures for the nomination and election of candidates for special district offices. The definitions of primary and general elections found at s. 97.021(2) and (4), F. S. 1977, have been broadened to include district offices as well as national, state, and county offices. More specifically, s. 99.061(2), F. S. 1977, now provides:

> (2) Each person seeking to qualify for nomination or election to a county office, *or district office* not covered by subsection (1), shall file his qualification papers and pay the qualification fee and party assessment, if any has been levied, *to the supervisor of elections of the county,* or qualify by the alternative method with the supervisor of elections, at any time after noon of the first day for qualifying, which shall be the 63rd day prior to the first primary, but not later than noon the 49th day prior to the first primary. The supervisor of elections shall remit to the secretary of the state executive committee of the political party to which the candidate belongs within 30 days after the closing or qualifying time the amount of the filing fee, two-thirds of which shall be used to promote the candidacy of candidates for county offices and the candidacy of members of the Legislature. (Emphasis supplied.)

It is evident that the provisions of s. 99.061(2), F. S. 1977, are in direct conflict with the provisions of s. 3(2) of Ch. 67-1630, Laws of Florida, as to the time and manner in which persons seeking election to district office are to qualify as candidates. I find no provision in Ch. 77-175, *supra,* which expressly repeals special acts which are in conflict therewith; however, I am of the opinion that for the reasons stated herein, Ch. 77-175 has superseded and impliedly modified or repealed s. 3(2) of Ch. 67-1630 to the extent of any positive and irreconcilable conflict between the two acts.

It is well established that a general law will not ordinarily modify or repeal by implication an earlier special or local law. *See* Sanders v. Howell, 74 So. 802 (Fla. 1917), and State v. Sanders, 85 So. 333 (Fla. 1920). However, where the general law is a general revision of the whole subject, or where the two acts are so repugnant and irreconcilable 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 or modified. Steward 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. Kicheako, 22 So.2d 627 (1945); Town of Palm Beach v. Palm Beach Loc. 1866, I.A.F.F., 275 So.2d 247 (Fla. 1973).

In State *ex rel.* Limpus v. Newell, 85 So.2d 124 (Fla. 1956), the Supreme Court held that a statute [Ch. 29936, 1955, Laws of Florida] which set forth a period in which candidates for state and county offices should qualify for office was "a restatement or general revision of the election laws of this state" and as such had the effect of repealing all special or local laws on the same subject. The court noted that the primary intention of the Legislature was to establish uniform qualifying dates for candidates for state and county offices; and that, therefore, a special law which established different qualifying dates for offices in a particular county was repealed.

Similarly, Ch. 77-175, *supra*, represents a general revision of the entire Election Code (Chs. 97-106, F. S.), and it seems to have been clearly intended to prescribe the only rule governing the subject matter provided for, such as the qualification of candidates and the holding and conduct of, and campaigns for, elections to elect public officers. *See* American Bakeries v. Haines City, 180 So. 524 (Fla. 1938); Sanders v. Howell, *supra*; and the title to Ch. 77-175. One of the purposes of Ch. 77-175 as expressed in the title of the legislation is to prescribe the "powers and duties of election officials and duties of other officials with respect to elections, registration and official records. . . ." This intent is manifested throughout Ch. 99, as amended, since the duties of the clerk of the circuit court to receive qualifying papers and fees of candidates for county office have been transferred to the supervisor of elections. Thus, I am of the view that, insofar as s. 3(2) of Ch. 67-1630, *supra*, provides that candidates for the board of commissioners of the district shall qualify before the clerk of the circuit court, it has been superseded and impliedly repealed or modified by s. 6 of Ch. 77-175, amending s. 99.061(2), F. S., to provide that such candidates shall qualify before the supervisor of elections.

Moreover, I am also of the opinion that s. 3(2) of Ch. 67-1630, *supra*, has also been superseded and impliedly repealed or modified by s. 6 of Ch. 77-175, *supra*, as to the *time and manner* in which candidates for election to district office must qualify. The title to Ch. 77-175 evidences the legislative intent to prescribe "regulations for the qualification of candidates and the campaign and election of public officers . . . ." Under s. 99.061(2), F. S. 1977, *each* candidate for district office is required to qualify during the time period specified therein. Section 6 of Ch. 77-175 establishes uniform qualifying dates for *all* nonjudicial, nonmunicipal offices, whether national, state, county, or district. Thus, the qualifying dates established in s. 3(2) of Ch. 67-1630 should be deemed to be superseded and impliedly repealed or modified, and candidates for the office of commissioner of the district should now qualify during the qualification period set forth in s. 99.061(2) (at any time after noon on the first day for qualifying which shall be the 63rd day prior to the first primary, but not later than noon the 49th day prior to the first primary). *See* State *ex rel.* Limpus v. Newell, *supra*.

In addition, under the principles of law enunciated above, I believe that s. 3(2) of Ch. 67-1630, *supra*, has been impliedly repealed or modified insofar as it directly conflicts with procedures established by s. 6 of Ch. 77-175, *supra*, as to the manner in which candidates for district office shall qualify. Section 99.061(2), F. S. 1977, authorizes two methods by which candidates for county or district offices shall qualify: The first is to file qualification papers and pay a filing fee; the second, the alternative method of qualifying, is set forth in s. 99.095, F. S. 1977, and permits candidates who file an oath that they are unable to pay the filing fee to have their names placed on the ballot by means of the petitioning process. The procedures outlined above are the only two means authorized for candidates (who are not independent candidates or minor party candidates) to qualify for office. Moreover, s. 100.051, F. S., as amended by s. 12 of Ch. 77-175, reads:

> The supervisor of elections shall print on ballots to be used in the county at the next general election the names of candidates who have been nominated by a political party, other than a minor political party, *and the candidates who have otherwise obtained a position on the general election ballot in compliance with this code.* (Emphasis supplied.)

It should be noted that s. 99.023, F. S. 1975, relating to write-in candidates has been repealed by s. 66 of Ch. 77-175. Although s. 3(2) of Ch. 67-1630 authorizes the election of write-in candidates, it would appear that the supervisor of elections is no longer authorized to place "blank lines" on the ballot for the election of such candidates. *Cf.* State *ex rel.* Lamar v. Dillion, 14 So. 383, 393-94 (Fla. 1893).

The courts have consistently ruled that only those candidates who have qualified and been nominated in the manner prescribed by law are entitled to have their names printed on the general election ballot. *See* State *ex rel.* Barnett v. Gray, 144 So. 349 (Fla. 1932)

and State *ex rel.* Jackson v. Gray, 170 So. 137 (Fla. 1936). Accordingly, in light of the language contained in s. 100.051, F. S. 1977, quoted above, I am of the view that candidates for the office of Commissioner of the Lee County Mosquito Control District should qualify in the manner provided by s. 99.061(2), F. S. 1977, or alternatively by s. 99.095, F. S. 1977.

Another issue relative to your request must also be considered. Section 3(2) of Ch. 67-1630, Laws of Florida, states in part that "[n]o filing fees shall be required as a requisite for qualifying as a candidate for the office of commissioner of this district." However, s. 99.061, F. S. 1977, expressly requires payment of a filing fee unless the candidate is indigent. *See also* s. 99.092(1), F. S. 1977, providing that

> [e]ach person seeking to qualify for nomination *or election* to any office, except a person seeking to qualify pursuant to s. 99.095, shall pay a filing fee to the officer with whom he qualifies . . . at the time he files his other qualifying papers. (Emphasis supplied.)

I find no provision in Ch. 99, as amended, or elsewhere in the new Election Code, which exempts a candidate from paying the filing fee required by s. 99.092 unless such candidate qualifies by the alternative method set forth in s. 99.095, as amended. The filing fee is required of candidates for nomination and candidates for election. Moreover, the language in s. 99.092, as amended, is broad enough to require a filing fee of a nonpartisan candidate. In such circumstances, the filing fee would be paid to the supervisor of elections and deposited in the general revenue fund of the county. *Cf.* s. 105.031, F. S., as amended by s. 36 of Ch. 77-175, *supra*, providing that a candidate for judicial office (which office is legislatively declared by s. 105.011, F. S. 1977, to be a nonpartisan office) shall pay to the Division of Elections a qualifying fee of 3 percent of the annual salary of the office to which he seeks election or retention or qualify by the alternative method, and further providing that the Division of Elections shall forward all such qualifying fees to the Department of Revenue for deposit in the General Revenue Fund. *And cf.* AGO 070-100, in which it was held that a county charter provision which required that elections for all offices shall be on a nonpartisan basis did not obviate the mandate of s. 99.092 requiring payment of a filing fee. Since such fees cannot in this case be remitted to a political party, they should be remitted to the general revenue fund of the county.

In light of the foregoing, therefore, I am of the view, pending legislative or judicial clarification, that candidates for the office of Commissioner of the Lee County Mosquito Control District should pay the filing fee required by s. 99.092, F. S. 1977.

AS TO QUESTION 2:

Your second question requires an examination of s. 99.097, F. S. (1976 Supp.), as amended by s. 10 of Ch. 77-175, *supra*, which provides procedures to be used by the supervisor of elections in verifying signatures on qualifying petitions. Section 99.097(4) authorizes the supervisor to charge the candidate the sum of 10 cents for each signature checked, unless the candidate is qualifying pursuant to the alternative method, described in s. 99.095(1), and has filed the oath provided therein.

As noted in question 1, a candidate for the office of Commissioner of the Lee County Mosquito Control District must qualify either in the manner provided in s. 99.061(2), F. S. 1977, or in the manner provided in s. 99.095, F. S. 1977. Clearly, such a candidate cannot qualify as an independent or minor party candidate (who must qualify by filing qualifying petitions; *see* ss. 99.096 and 99.0955, F. S.) since the enabling legislation creating the district requires that the office of commissioner be nonpartisan. Therefore, there is no need to answer your question since the only candidate for such office who would qualify by means of the petitioning process would be a candidate qualifying by the alternative method provided in s. 99.095, as amended; and the supervisor is not authorized to charge such candidate for the costs of verifying the signatures.

AS TO QUESTION 3:

As noted in questions 1 and 2, the provisions of s. 99.097(4), F. S. 1977, authorizing the supervisor of elections to charge candidates a fee for verification of signatures on qualifying petitions would not, in fact, be applicable to candidates for the office of Commissioner of the Lee County Mosquito Control District. It is, therefore, not necessary to answer your third question.

078-39—March 3, 1978

SPECIAL TAX DISTRICTS

AIRPORT AUTHORITY NOT REQUIRED TO SUBMIT LEASE OF ITS FACILITIES TO COMPETITIVE BID

To: Nathan I. Weinstein, Attorney for St. Augustine Airport Authority, St. Augustine

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Is the St. Augustine Airport Authority required to submit to public bidding the proposed 20-year lease of portions of its facilities to fixed base operators?

SUMMARY:

The St. Augustine Airport Authority, as the governing body of the St. Augustine Airport Authority District, pursuant to its enabling statute, Ch. 63-1853, Laws of Florida, as amended, has the express power to lease a part or all of its facilities. The authority is not, however, required by Ch. 63-1853, as amended, or the Airport Law of 1945 (Ch. 322, F. S.), to submit the proposed lease of part of its facilities to competitive bidding in the absence of a statute so requiring.

The St. Augustine Airport Authority District was created pursuant to special law as a special taxing district and "body politic and corporate and political subdivision of the state." Chapter 63-1853, Laws of Florida, as amended by Chs. 65-2169 and 69-2172, Laws of Florida. The St. Augustine Airport Authority, as the governing body of the district, is empowered by the Legislature to own and acquire property and "acquire, construct, maintain and operate airport facilities . . . and all other facilities incident to the operation of an airport." Section 5, Ch. 63-1853. The district's governing body is further authorized to enter into contracts with any person, corporation, or public agency and "to enter into operating contracts and/or leases for facilities owned by [the district]" and possesses "the right to lease any and all airport facilities and appurtenances to individuals, corporations or government entities." Section 6, Ch. 63-1853. *See also* s. 11, Ch. 63-1853, Laws of Florida, which empowers the authority, upon consent of the St. Augustine City Commission as evidenced by resolution, to exercise any power relating to aviation conferred upon municipalities by general law, including the provisions of the Airport Law of 1945, Ch. 332, F. S. Section 332.08(3), F. S., authorizes municipalities to lease for a term not exceeding 30 years such airports, air navigation facilities, or real property acquired or set apart for airport purposes to a private party or municipal, state, or national government, or any department thereof, for operation or use consistent with the purposes of Ch. 332. *Cf.* s. 125.35, F. S., as amended by Ch. 77-475, Laws of Florida, relating to county-owned property and county airport facility leases.

Neither Ch. 63-1853, Laws of Florida, as amended, nor Ch. 322, F. S., provides for or requires the governing body of the airport authority district to take competitive bids on its property or its contracts and leases of its facilities. In the absence of a statutory requirement, a public body has no legal obligation to let a contract under competitive bidding or to award a contract to the lowest bidder. *See* William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So.2d 550 (2 D.C.A. Fla., 1960), and AGO's 077-22, 074-7, and 071-366. In addition, Ch. 332, the Airport Law of 1945, contains no such requirement. *Cf.* s. 125.35, F. S., as amended by s. 1, Ch. 77-475, Laws of Florida, which authorizes a board of county commissioners

> . . . to lease real property, belonging to the county, whenever such board shall determine it is in the best interest of the county to do so, to the highest and best bidder for the particular use it deems to be the highest and the best, *or, alternatively, in the case of an airport operation or facility lease, after negotiating for such length of term and such conditions as the governing body may in its discretion determine.* (Emphasis supplied.)

CONTINUED

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078-39—March 3, 1978

SPECIAL TAX DISTRICTS

AIRPORT AUTHORITY NOT REQUIRED TO SUBMIT LEASE OF ITS FACILITIES TO COMPETITIVE BID

To: Nathan I. Weinstein, Attorney for St. Augustine Airport Authority, St. Augustine

Prepared by: Joslyn Wilson, Assistant Attorney General

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> . . . to lease real property, belonging to the county, whenever such board shall determine it is in the best interest of the county to do so, to the highest and best bidder for the particular use it deems to be the highest and the best, *or, alternatively, in the case of an airport operation or facility lease, after negotiating for such length of term and such conditions as the governing body may in its discretion determine.* (Emphasis supplied.)

Therefore, in the absence of any statutory provision to the contrary, I am of the opinion that the St. Augustine Airport Authority is not required to submit the proposed lease of a part of its facilities to competitive bid procedures.

You also inquire as to whether the airport authority is subject to the competitive bidding requirements contained in part I, Ch. 287, F. S., the State Purchasing Law. Part I, Ch. 287 (except s. 287.055, F. S.) applies only to the purchase of commodities by state agencies. In AGO 075-56, this office concluded that the Sarasota-Manatee Airport Authority was not a state agency as that term is defined in s. 287.012, F. S., for purposes of the State Purchasing Law and thus was not subject to the competitive bidding requirements therein. *See also* AGO's 077-22 (fire protection and rescue district created by special act not a state agency and therefore not subject to state purchasing law), 076-202, and 074-7. While state agencies are required under the State Purchasing Law to purchase commodities under the purchasing agreements and contracts executed by the Division of Purchasing of the Department of General Services, counties, municipalities, and other local public agencies may utilize these agreements and contracts negotiated by the division. The purchase, however, by "any county, municipality, or other local public agency 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), F. S. This office previously concluded that an airport authority was a "local public agency" for the purposes of part I, Ch. 287 (except s. 287.055) and thus was entitled to utilize in its discretion the state purchasing agreements and contracts. Attorney General Opinion 075-56. Thus it appears that the airport authority as a local public agency may utilize the state purchasing agreements and contracts in purchasing commodities. It is not, however, subject to the competitive bidding requirements contained in the State Purchasing Law. It should be noted, however, that if the construction and modification of facilities require professional services as set forth in s. 287.055, the Consultants' Competitive Negotiation Act (CCNA), the authority may be subject to any applicable competitive negotiation or other requirements contained in s. 287.055. *See* AGO's 077-22, 075-56, 074-308, and 074-89 regarding the applicability of the CCNA to special districts.

Your question, as stated, is answered in the negative.

078-40—March 3, 1978

SUNSHINE LAW

NOT APPLICABLE TO ENVIRONMENTAL PROTECTION COMMITTEE ESTABLISHED BY PRIVATE DEVELOPER

To: J. Sam Owens, Jr., Belle Isle City Attorney, Orlando

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Is an environmental protection committee created by a private developer and comprised of the development corporation's president and secretary and three members recommended by the Mayor of the City of Belle Isle subject to the provisions of the Government in the Sunshine Law, s. 286.011, F. S., where said committee is created by deed restrictions to enforce and control drainage provisions within a subdivision?

SUMMARY:

An environmental protection committee created by a private developer and comprised of the development corporation's president and secretary and three members recommended by the Mayor of the City of Belle Isle is not subject to the provisions of the Government in the Sunshine Law, s. 286.011, F. S., where said committee is created by deed restrictions to enforce and control drainage provisions within a subdivision.

Florida's Government in the Sunshine Law, s. 286.011, F. S., provides in pertinent part that:

> (1) All meetings of any board or commission . . . of any agency or authority of any county, municipal corporation or any political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times . . . .

The test as to whether or not a particular board, commission, or committee falls within the parameters of s. 286.011 has been judicially determined to be whether or not said board, commission, or committee is subject to the dominion and control of the Legislature. Times Publishing Co. v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). The environmental protection committee which was established by deed restriction in order to approve all lot drainage facilities required by said deed restrictions is not a "board or commission . . . of an agency or authority of" the city involved, nor is it a state or local governmental agency, nor is it connected with city or county government, nor does it serve in an advisory capacity to the City of Belle Isle. *Cf.* Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), wherein the Florida Supreme Court held that a citizens' planning committee appointed and established by a municipal governing body to act in an advisory capacity to the town council was required to meet in the sunshine. Moreover, in AGO 074-22 it was stated that the fact that a private nonprofit organization which was not a state or local governmental agency or subject to the control of the Legislature received public funds did not subject such organization to the Sunshine Law.

Two city commissioners' and a city zoning board member's participation in the nongovernmental activities of the committee do not require in and of themselves that committee meetings be conducted in accordance with s. 286.011, F. S. The Sunshine Law applies to two or more members of a *public* board or commission or ad hoc boards or committees established by governmental agencies where those members deal with some matter on which foreseeable official action will be taken. City of Miami Beach v. Berns, *supra*; Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969); AGO 074-22.

Your question is, therefore, answered in the negative.

078-41—March 9, 1978

MUNICIPALITIES

MAY EXPEND PUBLIC FUNDS TO SUPPORT BOND ISSUE—GOVERNING BODY NOT A POLITICAL COMMITTEE

To: David Bludworth, State Attorney, West Palm Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. May a municipal governing body expend municipal funds to support a bond issue for acquisition and development of parks and recreation areas within the city?

2. Does such an appropriation and expenditure of municipal funds require the municipal governing body to register as a political committee?

SUMMARY:

Municipal funds may be appropriated and expended to support a bond issue to raise funds to acquire and develop parks and recreational areas within the municipality since this is an issue which affects and is of interest to the citizens of the municipality. Neither the municipality nor

the municipal governing body acting in its official capacity is a "political committee" within the purview of Ch. 106, F. S. 1977.

AS TO QUESTION 1:

Pursuant to s. 2(b), Art. VIII, State Const., municipalities are authorized to "exercise any power for municipal purposes except as otherwise provided by law." Section 166.021(1), F. S., states that a municipality may exercise any power for municipal purposes "except when expressly prohibited by law."

My research discloses no statutory provision which precludes a municipality from appropriating and expending funds in the manner contemplated by your letter. *Cf.* s. 11.062, F. S., which sets forth a general state policy of prohibiting the use of *state* funds for lobbying purposes. Moreover, as I noted in AGO 074-113, the question of whether such an expenditure is valid as a public municipal purpose is ultimately one for judicial determination, although the legislative determination will be given due weight. Attorney General Opinion 074-113 involved a substantially identical question, and in that opinion I concluded that a municipality may expend municipal funds to purchase newspaper advertisements in support of, or in opposition to, the repeal of a county utilities tax which affects and involves the interests of the municipality and its citizens. *See also* AGO 074-227, in which I opined that municipal funds may be used to support or oppose the question of the annexation of territory to the municipality as this is a matter that affects the interests of the municipality and its citizens. *Compare* AGO's 072-320 and 077-8, concluding, *inter alia*, that under Florida law public funds may not be expended by a county or district or other statutory entity for lobbying purposes or to "propagandize" actions taken by the public body unless expressly and specifically authorized by law.

Accordingly, since the proposed bond issue seems to "affect and involve the interests of the municipality," and in light of the foregoing Attorney General Opinions, I am of the view that your first question must be answered in the affirmative.

AS TO QUESTION 2:

Section 106.011(1), F. S. 1977, defines the term "political committee" to mean:

> . . . a combination of two or more individuals, or a person other than an individual, the primary or incidental purpose of which is to support or oppose any candidate, issue, or political party and which accepts contributions or makes expenditures during a calendar year in an aggregate amount in excess of $100.

In AGO 074-113, I concluded that a municipal corporation was not included in the definition of "political committee" found at former s. 106.011(2), F. S. 1973. This conclusion was based upon the general rule noted in AGO 071-75:

> . . . ordinarily, the state and its agencies are not considered as within the purview of a statute unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. See 82 C.J.S. *Statutes*, s. 317, p. 554.

See also State v. Peninsular Telephone Co., 75 So. 201 (Fla. 1917), and City of St. Petersburg v. Charter, 39 So.2d 804 (Fla. 1949), holding that a municipal corporation was not a "person" or a "corporation" within the meaning of the statutes there under construction. *Accord*: Attorney General Opinion 074-227. I have examined the provisions of Ch. 106, as amended by Ch. 77-175, effective January 1, 1978, and the Legislature has not amended either the definition of "political committee" or "person" to include a municipal corporation within the purview of that chapter. Accordingly, I am of the view that your second question should be answered in the negative.

In reaching the foregoing conclusion, I have not overlooked an advisory opinion of the Division of Elections, DE 77-24, dated October 27, 1977, in which the Director of the Division of Elections opined:

> If City Commissioners, or any other individuals, collectively expend the statutory sum "to support an issue on the ballot," they would be encompassed by the category of Political Committee. The source of the contribution—defined

as "anything of value"—is immaterial. That is, individuals acting in concert would qualify as a political committee, under these circumstances, whether they expend their own funds or monies contributed to them or general revenues of a corporation or municipality.

It is well established, however, that the actions of a municipal governing body are not considered to be separate actions of individual municipal officers. *See* Turk v. Richard, 47 So.2d 543 (Fla. 1950), holding that individual or separate acts of a member or the official agreements of a part of the members of the city council are ineffectual and without binding force; joint official deliberation and action as provided by law are essential to give validity to the acts of such a body. *See also* Beck v. Littlefield, 68 So.2d 889 (Fla. 1953). The governing body of the municipality is vested with all corporate powers of the municipality and is chosen by the electors to act for the municipality. 23 Fla. Jur. *Municipal Corporations* s. 49, p. 73. Therefore, the members of a city council, when voting in their official capacities as municipal officers to appropriate and expend municipal funds for municipal purposes cannot be deemed to be "individuals" or "a person" within the purview or for the purposes of the definition of "political committee" found at s. 106.011(1), F. S. 1977. Accordingly, in light of the statutory duty imposed upon the Attorney General to give legal advice whenever requested to do so by a state attorney (*see* s. 16.08, F. S.), and in further consideration of your request for "direction" in this matter from this office, I must advise that, in the context of your questions, reliance on DE 77-24 would be misplaced. Thus, as has been previously stated, your second question is answered in the negative.

078-42—March 9, 1978

SPECIAL TAX DISTRICTS

HOSPITAL DISTRICT SUBJECT TO GENERAL LAW WAIVING SOVEREIGN IMMUNITY AND MONETARY LIMITATIONS THEREIN

To: Joel J. Strawn, Attorney for Southeastern Palm Beach County Hospital District, Delray Beach

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

In light of the amendment to s. 768.28, F. S., by Ch. 77-86, Laws of Florida, is the Southeastern Palm Beach County Hospital District within the definitional purview of s. 768.28, and is any recovery by an intentionally or negligently injured patient in the district's hospital restricted to the monetary limitations on tort liability established by s. 768.28?

SUMMARY:

A legislatively established hospital district is included within the definitional purview of s. 768.28, F. S., as amended. Although the hospital district may not have possessed sovereign immunity prior to the Legislature's waiver of sovereign immunity in s. 768.28, the statute now expressly provides that the limitations on liability contained therein are applicable to all state agencies and subdivisions as defined in s. 768.28(2), regardless of whether they possessed sovereign immunity prior to July 1, 1974. Therefore, pending judicial determination to the contrary, the provisions of s. 768.28, as amended, including the monetary limitations on tort liability specified therein, are applicable to the hospital district.

By the enactment of s. 768.28, F. S. (Ch. 73-313, Laws of Florida), as amended by Chs. 74-235 and 77-86, Laws of Florida, the Florida Legislature waived the state's immunity from tort liability to the extent provided therein. *See* s. 768.28(1) which provides:

> In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of the state, may be prosecuted subject to the limitations specified in this act.

See also s. 768.28(5), as amended, which establishes the monetary limitations on the state's waiver, and s. 768.28(9), which precludes the personal liability of officers, employees, or agents of the state or its subdivisions for their negligent acts or omissions in the scope of their employment unless committed "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property."

Section 768.28(2), F. S., defines the phrase "state agencies and subdivisions" to include

> . . . the executive departments, the legislative, the judicial branch, and the independent establishments of the state; counties and municipalities; and *corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.* (Emphasis supplied.)

See also s. 1.01(9), F. S., which generally defines "political subdivision" to 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.) In AGO 075-114, I concluded that the Southeastern Palm Beach County Hospital District, established by Ch. 29387, 1953, Laws of Florida, as a special taxing district with all the powers of a body corporate, including the power to establish, construct, lease, operate, and maintain hospitals within the district's boundaries (*see* ss. 3 and 5, Ch. 29387), is included within the definitional purview of s. 768.28(2). Section 768.28(2) has not been amended since that opinion was rendered; thus, I am of the opinion that the hospital district is still within the definitional purview of s. 768.28(2).

In AGO 075-114, I also concluded that

> with the possible exception of immunity from tort claims of its "charity patients," the district apparently possessed no aspect of the sovereign immunity of the state upon which the state's waiver of sovereign immunity contained in s. 768.28 could operate.

Thus, it was my opinion that the recovery of a negligently injured paying patient in the district's hospital would not be restricted to the monetary limitations on tort claims established by s. 768.28(5) and (10), F. S. My opinion was based in part on the Florida Supreme Court's decision in Suwannee County Hospital Corporation v. Golden, 56 So.2d 911 (Fla. 1952), in which the court stated that the activities of a legislatively established hospital district fall within the category of proprietary rather than governmental function as to those patients who pay for the services. The *Suwannee* court held that those patients who pay for the expert services they receive are entitled to expect that the services will be free of negligence; they may not be divested of their constitutional right of redress for wrongs by an attempted statutory immunization. *See also* State v. Sarasota County, 74 So.2d 542 (Fla. 1954), and Smith v. Duval Welfare Board, 118 So.2d 98 (1 D.C.A. Fla., 1960), in which the holding in *Suwannee* was limited to paying patients and was not extended to charity patients. Since the hospital neither possessed nor discharged any of the functions of sovereignty with the possible exception of service to charity patients, it possessed no aspect of the state's sovereign immunity and thus was not affected by the state's waiver of immunity contained in s. 768.28. *See* Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959), in which the court considered the Supreme Court's decision in *Suwannee*; if the hospital in *Suwannee* had been part of the statewide system maintained at public expense treating all without cost, it "would have been considered a state agency, discharging a governmental purpose, and therefore immune from tort liability just as are counties and county boards of public instruction." Buck, *supra*, at 766.

The 1977 Florida Legislature amended s. 768.28 to expressly provide in pertinent part that the "limitations of liability set forth in [s. 768.28(5)] shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974." *See* s. 1, Ch. 77-86, Laws of Florida. In light of the legislative amendment to the provisions of s. 768.28(5) (assuming the constitutionality *vel non* thereof), it appears that the monetary limitations are now applicable to *all* state agencies and subdivisions as defined in s. 768.28(2), regardless of whether these agencies and subdivisions possessed the sovereign immunity of the state prior to July 1, 1974. In AGO 077-113, I stated in pertinent part:

> . . . 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 and hospital districts [as these bodies possessed no sovereign immunity and have been held subject to tort liability] no longer obtain, and to that extent, these opinions are hereby modified.

See also AGO 078-33 holding that the monetary limitations on tort liability set forth in s. 768.28 are applicable to a municipal housing authority although that body may not have possessed sovereign immunity prior to the Legislature's waiver of sovereign immunity contained in s. 768.28, as amended. Accordingly, I am of the opinion that the Southeastern Palm Beach Hospital District is within the purview of s. 768.28, as amended, and that, in the absence of a judicial determination to the contrary, the monetary limitations on liability contained therein are applicable to the hospital district.

078-43—March 9, 1978

MUNICIPALITIES

MAY NOT UNILATERALLY ALTER EXISTING FRANCHISE

To: James A. Devito, St. Petersburg Beach City Attorney, St. Petersburg

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Can the City of St. Petersburg Beach unilaterally adopt an ordinance altering or modifying an existing ordinance which constitutes a franchise contract between the municipality and a public service company without violating the Florida Constitution or the United States Constitution?

SUMMARY:

A municipality may not unilaterally adopt an ordinance which alters, modifies, or amends an existing franchise contract between the municipality and a public service company, absent and express provision contained in such contract reserving that power. An ordinance purporting to amend an existing ordinance constituting a franchise contract between a municipality and a public service company is prohibited by s. 10, Art. I, State Const., and s. 10, Art. I, U. S. Const., which prohibit the passage of any law impairing the obligations of contracts.

You state in your letter that on February 16, 1971, the City of St. Petersburg Beach adopted Ordinance 177 which granted to the Florida Power Corporation a 30-year franchise to

> construct, operate and maintain in the said City of St. Petersburg Beach, all electric power facilities required by the Grantee for the purpose of supplying electricity to Grantor, its inhabitants and the places of business located within its boundaries. [Section 1, City of St. Petersburg Beach Ordinance 177.]

The franchise ordinance provides that the grantee, within 30 days after each anniversary of the effective date of the franchise grant, pay to the city:

> . . . an amount which added to the amount of all taxes, licenses, and other impositions levied or imposed by the Grantor upon the Grantee's electric property, business or operations, for the preceding tax year, will equal 6% of Grantee's revenues from the sale of electric energy to residential and commercial customers within the corporate limits of the Grantor for the twelve months preceding the applicable anniversary date. [Section 4, City of St. Petersburg Ordinance 177.]

The power company subsequently accepted the franchise by letter, dated March 29, 1971. You indicate that the city now proposes to amend s. 4 of Ordinance 177 to provide that the franchise grantee "pay to the [city] . . . 6% of the grantee's revenues from the sale of electrical energy to residential and commercial customers within the corporate limits of the [city]," and the fee "be calculated on a monthly basis and payable . . . on or within 30 days following the last day of the month on which the fee is based." The Florida Power Corporation, according to your letter, objects to any modification of the franchise contract evidenced by Ordinance 177.

A franchise is generally defined as a special privilege, conferred by the government on an individual or corporation, which does not belong to the citizens by common right. *See, e.g.*, Winter v. Mack, 195 So. 225 (Fla. 1940); Leonard v. Baylen Street Wharf Co., 52 So. 718 (Fla. 1910); and West Coast Disposal Service, Inc. v. Smith, 143 So.2d 352 (2 D.C.A. Fla., 1962); *see generally* McQuillin *Municipal Corporations* s. 34.03. While the power to grant franchises generally rests in the Legislature, this power may be conferred upon municipalities by the Legislature; *see* State *ex rel.* Buford v. Pinellas County Power Co., 100 So. 504 (Fla. 1924), and 62 C.J.S. *Municipal Corporations* ss. 192 and 253. Under the broad home rule powers granted by the Municipal Home Rule Powers Act (Ch. 166, F. S.) pursuant to s. 2(b), Art. VIII, State Const., municipalities possess the "governmental, *corporate and proprietary powers* to enable them to conduct municipal government, perform municipal functions and render municipal services . . . ." Section 166.021(1), F. S.; emphasis supplied. They may enact legislation on any subject matter upon which the State Legislature may act except those subjects expressly prohibited by the Constitution or expressly preempted to the state or county government by the Constitution, general law, or county charter. Section 166.021(3). Thus, under the broad grant of powers contained in Ch. 166, and in the absence of any express constitutional or statutory provision to the contrary, it appears that a municipality possesses the power to grant franchises. *See also* s. 180.14, F. S., which authorizes municipalities to grant to private companies or corporations

> the privilege or franchise of exercising its corporate powers for such terms of years [not to exceed 30 years] and upon such conditions and limitations as may be deemed expedient and for the best interest of the municipality . . . .

And see ss. 167.22 and 167.23, F. S. 1971, which provided for the term and conditions of a franchise granted by a municipality. Although Ch. 167 was repealed by Ch. 73-129, Laws of Florida, this repeal is not to be interpreted "to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers." Section 166.042(1), F. S.

In exercising this power to grant franchises, the municipality acts in its proprietary capacity or function. *See, e.g.*, Daly v. Stokell, 63 So.2d 644, 645 (Fla. 1953), in which the court stated that

> any contract . . . that redounds to the public or individual advantage and welfare of the city or its people is proprietory [sic] while 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.

See also St. Joe Natural Gas Co. v. City of Ward Ridge, 265 So.2d 714 (1 D.C.A. Fla., 1972) and cases cited therein; *cf.* 63 C.J.S. *Municipal Corporations* s. 1052a(2). In acting in such proprietary capacity, the municipality occupies the same position as that occupied by a private corporation and is generally governed by the same rules and subject to the same

restrictions and governmental supervision as any corporation engaged in the same or similar business. 63 C.J.S. *Municipal Corporations* s. 1050(b). Thus the franchise contract is governed by the ordinary law of contracts. Once the contract has been accepted, it becomes an irrevocable contract unless the right to revoke is expressly reserved within the terms of the contract; moreover, it is entitled to the same protection under constitutional guarantees as other property. *See Ex parte* Amos., 114 So. 760 (Fla. 1927), ("A franchise is property within the constitution, and in respect to its enjoyment and protection, it is regarded by law precisely as any other property."); Winter, *supra*; Leonard, *supra*; and McQuillin *Municipal Corporations* ss. 34.06 and 34.69. Thus, unless the power to do so is reserved in the contract, the municipality cannot modify or amend the franchise after it is granted when it lessens the rights and privileges of the company or imposes additional burdens on it. McQuillin, *supra*, at s. 34.44.

Both the United States and the Florida Constitutions prohibit the passage of *any law* impairing the obligations of contracts. *See* s. 10, Art. I, U. S. Const., and s. 10, Art. I, State Const. The laws existing at the time and place of the contract form a part of it and the contract rights acquired therein may not be impaired by subsequent legislation in the absence of provisions in the contract reserving such powers. *See* Yamaha Parts Distributions, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975), in which the Florida Supreme Court refused to apply to a franchise agreement legislation subsequently enacted. The courts of this state have previously held that the constitutional prohibition against the impairment of contracts is applicable to municipalities and municipal contracts. *See, e.g.*, Anders v. Nicholson, 150 So. 639 (Fla. 1933), (constitutional prohibition against laws impairing obligations of contract applies to contracts with state and municipalities as well as contracts between individuals) and City of Miami v. Bus Benches Co., 174 So.2d 49 (3 D.C.A. Fla., 1965), (party to contract with municipality entitled to constitutional protection against impairment of it if municipality attempts to unilaterally change its obligations under valid agreement); *see also* Broughton v. Pensacola, 93 U. S. 266 (1876), (inhibition of Constitution which preserves the sacredness of contracts against the state's interference applies to liabilities of municipal corporations created by its permission). The constitutional prohibition is against the passage of any *law* impairing the obligations of contracts. While the Legislature may confer upon municipalities the power to grant franchises, the exercise of this power by a municipality remains the act of the state. *See* Day v. City of St. Augustine, 139 So. 880, 884 (Fla. 1932), in which the court, considering the action of a municipality in granting a franchise to construct a bridge over a navigable river and collect tolls, stated that "such franchise cannot be assumed or exercised without legislative authority. The grant of a franchise when made binds the public, and is directly or indirectly the act of the state." *See also* Tampa Northern Railroad Co. v. City of Tampa, 107 So. 364 (Fla. 1926), in which the court stated that a "municipal ordinance within the power delegated by the Legislature is a state law within the meaning of the federal constitution." *See also* s. 166.041(1)(a), F. S., in which a municipal ordinance is defined as the "official legislative action of a governing body, which action is a regulation of a general and permanent nature and *enforceable as a local law.*" (Emphasis supplied.) In light of the foregoing, I am of the opinion that, until judicially determined to the contrary, a municipal ordinance, as an official act, enforceable as a local law and enacted pursuant to either a charter act or the home rule delegation of power under s. 2(b), Art. VIII, and the Municipal Home Rule Powers Act, is a "law" for the purposes of the prohibition against the passage of any *law* impairing the obligations of contracts.

Applying these principles to the situation presented in the instant inquiry, it appears that the City of St. Petersburg Beach entered into a binding franchise contract with the Florida Power Corporation when the agreement as represented by Ordinance 177 was accepted by the power company. *See generally* McQuillin *Municipal Corporations* s. 34.43 and 62 C.J.S. *Municipal Corporations* s. 258 regarding acceptance of franchise agreements. The franchise granted therein was for a term of 30 years. An examination of Ordinance 177 reveals no provision which reserves to the city the power to amend or modify its terms. Proposed Ordinance 343 as "an official legislative action of a governing body, which action is a regulation of general and permanent nature and enforceable as a local law," (*see* s. 166.041(1)(a), F. S.) operates to alter or modify the original terms of the franchise contract by increasing the franchise fee payable to the city and changing the method of calculating the fee from an annual basis to a monthly basis. Such an alteration or modification of the franchise contract is contrary to the constitutional prohibition contained in both the United States and the Florida Constitutions against the impairment of the obligations of contracts. Thus, until judicially determined otherwise, I am of the opinion that under the express terms of s. 166.021(3)(b), F. S., which prohibits

a municipality from acting on any subject expressly prohibited by the Constitution, the municipality, absent such reservation of authority to unilaterally amend or modify the terms of the franchise granted by the municipality and accepted by the public service company, may not unilaterally alter or modify the franchise contract in question.

Your question is therefore answered in the negative.

078-44—March 9, 1978

MUNICIPALITIES—TAXATION

EXEMPTION OF RELIGIOUS ORGANIZATION FROM MUNICIPAL PUBLIC SERVICE TAX

To: Donald J. Lunny, City Attorney, Plantation

Prepared by: William D. Townsend, Assistant Attorney General

QUESTION:

Does a so-called Society of Universal Love Church "consulate" or "rectory" fall within the exemption from municipal public service taxes provided by s. 166.231(4), F. S., which requires the exemption of "purchases by any recognized church in this state for use exclusively for church purchases"?

SUMMARY:

Application of the exemption from the municipal public service tax pursuant to s. 166.231(4), F. S., is dependent upon a determination by the taxing authority as to whether the purchases of the specified taxable items are by a recognized or publicly known church and are for use exclusively for church purposes, *i.e.*, apart from all other uses or purposes. Church purposes ordinarily are those services and functions usually carried on by churches generally, such as preaching, teaching, Bible and Sunday schools, prayer services, and meditation. Each claimed exemption must be determined on its own merits based upon clear evidence furnished by the church seeking the exemption which bears the burden of establishing its right to the exemption with any doubt resolved against the claimant.

According to your letter and accompanying material, the Society of Universal Love, Inc., a nonprofit corporation, was incorporated in Florida on April 13, 1970 (certificate of incorporation amended on January 11, 1971). The "consul" of the society has in the past maintained and now maintains that the society is a church and has maintained its "consulate" in the state at some eight individual locations in the counties of Brevard, Broward, and Palm Beach over the past 7 years, each of such locations being apparently an apartment or condominium and the residence of the "consul" at the time. The present "consulate" is a fourth-floor rental apartment in a seven-story residential apartment building. Apparently, the "consul" of the society is or claims to be a duly ordained, full-time minister in the service of the society and its religious teachings. Your letter refers to the "consulate" as a "rectory" or a "parsonage" and the enclosed correspondence from the society mentions ordained ministers living at the "consulate." The society's consul asserts that the consulate or parsonage is staffed by two duly ordained, full-time ministers who "in the performance of their exclusive service to our Father-God and his Society of Universal Love . . . also ate and slept at the Consulate."

I am not advised as to the membership of the society, either as to the nature or extent of any such membership, or the nature or extent of its communicants or followers of its religious beliefs and faith. I am further not advised as to the tenets of the organization or the nature, extent, or frequency of any religious meetings, services, or other religious ceremonies or rituals conducted, held, or observed at the "consulate" or "parsonage" or "rectory" by the "consul" or the ordained staff ministers or by the communicants or

The franchise ordinance provides that the grantee, within 30 days after each anniversary of the effective date of the franchise grant, pay to the city:

> . . . an amount which added to the amount of all taxes, licenses, and other impositions levied or imposed by the Grantor upon the Grantee's electric property, business or operations, for the preceding tax year, will equal 6% of Grantee's revenues from the sale of electric energy to residential and commercial customers within the corporate limits of the Grantor for the twelve months preceding the applicable anniversary date. [Section 4, City of St. Petersburg Ordinance 177.]

The power company subsequently accepted the franchise by letter, dated March 29, 1971. You indicate that the city now proposes to amend s. 4 of Ordinance 177 to provide that the franchise grantee "pay to the [city] . . . 6% of the grantee's revenues from the sale of electrical energy to residential and commercial customers within the corporate limits of the [city]," and the fee "be calculated on a monthly basis and payable . . . on or within 30 days following the last day of the month on which the fee is based." The Florida Power Corporation, according to your letter, objects to any modification of the franchise contract evidenced by Ordinance 177.

A franchise is generally defined as a special privilege, conferred by the government on an individual or corporation, which does not belong to the citizens by common right. *See, e.g.*, Winter v. Mack, 195 So. 225 (Fla. 1940); Leonard v. Baylen Street Wharf Co., 52 So. 718 (Fla. 1910); and West Coast Disposal Service, Inc. v. Smith, 143 So.2d 352 (2 D.C.A. Fla., 1962); *see generally* McQuillin *Municipal Corporations* s. 34.03. While the power to grant franchises generally rests in the Legislature, this power may be conferred upon municipalities by the Legislature; *see* State *ex rel.* Buford v. Pinellas County Power Co., 100 So. 504 (Fla. 1924), and 62 C.J.S. *Municipal Corporations* ss. 192 and 253. Under the broad home rule powers granted by the Municipal Home Rule Powers Act (Ch. 166, F. S.) pursuant to s. 2(b), Art. VIII, State Const., municipalities possess the "governmental, *corporate and proprietary powers* to enable them to conduct municipal government, perform municipal functions and render municipal services . . . ." Section 166.021(1), F. S.; emphasis supplied. They may enact legislation on any subject matter upon which the State Legislature may act except those subjects expressly prohibited by the Constitution or expressly preempted to the state or county government by the Constitution, general law, or county charter. Section 166.021(3). Thus, under the broad grant of powers contained in Ch. 166, and in the absence of any express constitutional or statutory provision to the contrary, it appears that a municipality possesses the power to grant franchises. *See also* s. 180.14, F. S., which authorizes municipalities to grant to private companies or corporations

> the privilege or franchise of exercising its corporate powers for such terms of years [not to exceed 30 years] and upon such conditions and limitations as may be deemed expedient and for the best interest of the municipality . . . .

And see ss. 167.22 and 167.23, F. S. 1971, which provided for the term and conditions of a franchise granted by a municipality. Although Ch. 167 was repealed by Ch. 73-129, Laws of Florida, this repeal is not to be interpreted "to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers." Section 166.042(1), F. S.

In exercising this power to grant franchises, the municipality acts in its proprietary capacity or function. *See, e.g.*, Daly v. Stokell, 63 So.2d 644, 645 (Fla. 1953), in which the court stated that

> any contract . . . that redounds to the public or individual advantage and welfare of the city or its people is proprietory [sic] while 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.

See also St. Joe Natural Gas Co. v. City of Ward Ridge, 265 So.2d 714 (1 D.C.A. Fla., 1972) and cases cited therein; *cf.* 63 C.J.S. *Municipal Corporations* s. 1052a(2). In acting in such proprietary capacity, the municipality occupies the same position as that occupied by a private corporation and is generally governed by the same rules and subject to the same

followers of the society and its faith or teachings. Indeed, it appears that the society does not own any church building or parsonage or rectory but rather it or its "consul" rents the residential apartment, denominated a "consulate" or "rectory" in which "two duly ordained and full-time" ministers live. It appears from the enclosed material that the society's consul has on one occasion represented to a county board of tax adjustment that, "[a] Church is people, it's not a building. . . . We meet at the Consulate and in the homes of our members." Finally, I am not advised as to whether the Society of Universal Love, Inc., a Florida nonprofit corporation, is recognized or publicly known in your community or in Florida as a church, nor have I been furnished any evidence or documentation concerning the ordination of the "consul" or his "staff ministers."

In light of the above, resolution of this matter requires discussion of certain general principles of taxation necessarily applicable to this matter. First, exemptions from taxation are to be strictly construed against the claimant and in favor of the taxing power. State *ex rel.* Wedgeworth Farms, Inc. v. Thompson, 101 So.2d 381 (Fla. 1958) and State *ex rel.* Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973). The person seeking the exemption bears the burden of establishing by clear evidence and law that he falls within the terms of the exemptive provision, with all doubt resolved against the existence of the exemption. United States Gypsum Co. v. Green, 110 So.2d 409 (Fla. 1959), and State *ex rel.* Szabo Food Services, Inc. v. Dickinson, *supra.* Previous opinions on subject matter similar to the case *sub judice* have followed this strict-construction rule and have allowed exemptions for Sunday school services, vacation Bible schools, and church day schools (AGO 076-42); have denied them to church purchases for schools, clinics, and playgrounds (AGO 075-209); and allowed the exemption under certain conditions for parsonages and convent buildings (AGO 057-255). The distinction between the opinions in AGO's 075-209 and 057-255 lies in whether or not the activity is a direct adjunct to the church or its congregation. Finally, each application for an exemption must be determined on its own essential and peculiar factual circumstances and the controlling law applicable thereto. Fleischer Studios v. Paxson, 2 So.2d 293 (Fla. 1941).

In light of the above principles, the determination of entitlement to the claimed exemption must be made by the municipal officers charged with the responsibility and may not be made by this office. This response therefore must necessarily be couched in general terms which set forth the general definitions and principles of law applicable to churches and church purposes.

The requested exemption found in s. 166.231(4), F. S., provides:

> A municipality . . . shall exempt purchases by any recognized church in this state for use exclusively for church purposes.

The purchases taxed by s. 166.231(1) include the purchase within the municipality of electricity, metered or bottled gas, water service, telephone service, telegraph service, and cable television service.

The exemption in effect requires that two conditions be met, each of which will be individually examined. First, the purchase must be made by a "recognized church in this state." Second, such purchase must be "use[d] exclusively for church purposes."

The noun "church" as used in the statute under consideration has been defined for various purposes as:

> A body or community of Christians, united under one form of government by the profession of the same faith, and the observance of the same ritual and ceremonies.
>
> * * * * * *
>
> [A]n organization for religious purposes, for the public worship of God.
>
> * * * * * *
>
> The term may denote either a society of persons who, professing Christianity, hold certain doctrines or observances which differentiate them from other like groups, and who use a common discipline, or the building in which such persons habitually assemble for public worship. [First Independent Missionary Baptist Church of Chosen v. McMillian 153 So.2d 337, 342 (2 D.C.A. Fla., 1963).]

a municipality from acting on any subject expressly prohibited by the Constitution, the municipality, absent such reservation of authority to unilaterally amend or modify the terms of the franchise granted by the municipality and accepted by the public service company, may not unilaterally alter or modify the franchise contract in question.

Your question is therefore answered in the negative.

078-44—March 9, 1978

MUNICIPALITIES—TAXATION

EXEMPTION OF RELIGIOUS ORGANIZATION FROM MUNICIPAL PUBLIC SERVICE TAX

To: Donald J. Lunny, City Attorney, Plantation

Prepared by: William D. Townsend, Assistant Attorney General

QUESTION:

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SUMMARY:

Application of the exemption from the municipal public service tax pursuant to s. 166.231(4), F. S., is dependent upon a determination by the taxing authority as to whether the purchases of the specified taxable items are by a recognized or publicly known church and are for use exclusively for church purposes, *i.e.*, apart from all other uses or purposes. Church purposes ordinarily are those services and functions usually carried on by churches generally, such as preaching, teaching, Bible and Sunday schools, prayer services, and meditation. Each claimed exemption must be determined on its own merits based upon clear evidence furnished by the church seeking the exemption which bears the burden of establishing its right to the exemption with any doubt resolved against the claimant.

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See also Abenkay Realty Corp. v. Dade County, 185 So.2d 777, 781 (3 D.C.A. Fla., 1966), and 14 C.J.S. pp. 1116 and 1117. *Cf.* Shipbaugh v. City of Sarasota, 94 So.2d 728, 729.

Contrasting to this is the phrase "church facility" which has been described as:

> . . . a thing devoted primarily to religious or church purposes and not something used primarily for residential purposes . . . . [Abenkay Realty Corp. v. Dade County, *supra*, at 781.]

Thus (in the context of s. 166.231(4), F. S.), purchase must be for the use of the communicants or members of the society (the congregation), or the church premises itself, and be directly and exclusively connected with or in furtherance of the objectives of the particular faith.

Additionally, consideration must be given to the modifying word "recognized." The generally accepted definition of this verb form is "publicly known." Black's Law Dictionary 1436 (4th Ed.); 36A *Words and Phrases* 14. *Cf.* Shipbaugh v. City of Sarasota, *supra*, and AGO 057-229.

It is also important to consider the meaning of the words "rectory" and "parsonage" as they relate to the factual situation and statute under consideration. Black's Law Dictionary 1441 (4th Ed. 1968) defines "rectory" as "an entire parish church" and "a rector's manor, or parsonage house." It further defines "rector" as "[t]he spiritual head and presiding officer of [a] church." The word "parsonage" has a similar meaning and is more accurately stated as a term "more generally used for the house set apart for the residence of the minister." Black's Law Dictionary 1273 (4th Ed. 1968).

It would appear from the facts presented in your letter that the predominant use of the apartment is as a residence for the "consul." Assuming that a "consul" enjoys the same rights as a "rector" or "parson" and has the same responsibilities, then it follows that a consul's residence provided for such use by the congregation or members of the society would be defined in the same way as parsonage or rectory.

It must then be determined if such a residence is exempted under s. 166.231(4), F. S. The Supreme Court has stated (in a case dealing with a city ordinance prohibiting sale of liquor within 500 feet of "church facilities") that a "church facility" means:

> . . . a thing devoted *primarily* to religious or *church purposes* and *not* something *used primarily* for *residential* purposes. [Shipbaugh v. City of Sarasota, 94 So.2d 728, 729 (Fla. 1957); emphasis supplied.]

The facts in this case are analogous to the factual situation in your question. In both situations the premises were or alleged to be owned or rented by the church, were used for some church meetings (other residences were also used as in this case), and members of the congregation could meet with the pastor there. In holding that the parsonage was not a church facility the court said at 729:

> The primary purpose of a parsonage is secular . . . it is not designed or intended as a place of worship. Actually, except for the goodness of its occupant, it is no different from any other home.

It should be noted, however, that in *Shipbaugh* no church services and no Sunday school or religious classes were held in the residence. It is also to be noted that *Shipbaugh* did not deal with a taxation issue, but it would appear from the court's discussion that a parsonage may not be a church facility *in all situations.*

In my predecessor's opinion, AGO 057-255, dealing with the exemption from utility taxes on parsonages, it is stated that "any building intended to be used primarily for purposes connected with the faith of such religious organization may be said to be used for church purposes." The exemption is further discussed in that opinion in situations where a parsonage was

> used as a part of the church . . . [and] . . . furnished the pastor or pastors of the church without cost of any nature including utility services . . . [it] . . . would seem to be an adjunct of the church . . . however, if the occupant of the parsonage is required to furnish his own utilities we *doubt* that such utilities would be within the exemption. . . . (Emphasis supplied.)

The considerations in this opinion must be accorded weight in determining the applicability of the exemption to the facts in your letter.

Accordingly, the Society of Universal Love, Inc., must bear the burden of establishing that it is a "recognized church." Even though it has received a nonprofit designation and a "religious organization" sales tax exemption, it may not be able to bring itself within the terms of s. 166.231(4), F. S., since the terms of the two statutes differ and they must be independently and separately interpreted and applied in any given case for the purposes of the particular statute. Further, it should be noted that the mere fact that it may be entitled to an ad valorem tax exemption under Ch. 196 is not determinative since the criteria for determining that exemption are also different than those under s. 166.231(4). Some factors which should be considered are: The nature and number of communicants or followers; whether the "services" conducted are open to the public; the place or places where the religious services or meetings are held and the frequency thereof; the sources of the moneys used to lease the residential apartment and pay the utilities and whether they are paid from the offerings or tithes of the congregation or from other sources; the free availability of the "consulate" facilities to the public for prayer, meditation, religious education, religious counseling, etc., on a daily basis; and documentation concerning the "duly ordained" status of the "consuls."

Secondly, the Society of Universal Love, Inc., must establish that the property sought to be exempted is used, according to s. 166.231(4), F. S., "exclusively for church purposes." The term "exclusively" as used in the statute under consideration does not permit the consideration of "primary use or predominant use" as in other statutes; *cf.* s. 196.012(1) and (3). "Exclusively" is a word of limitation defined as meaning "apart from all others." Lee v. Gulf Oil Corporation, 4 So.2d 868, 870 (Fla. 1941); Weiprecht v. Gill, 62 A.2d 253, 256 (Md. 1948); Kirby v. Columbian Institute, 243 A.2d 853 (N.J. 1968).

The next phrase which must be considered in determining the applicability of the exemption is the term "church purposes." In many tax statutes the term "church purposes" has been defined as those purposes related to the objectives of or the physical structure of a church. 84 C.J.S. *Taxation* s. 291 at 591. Most of these are, however, statutes relating to ad valorem taxation, and various statutory criteria and requirements differ, or the construction placed thereon in the several jurisdictions may differ. A more general definition in simple terms would be those purposes *directly* and exclusively connected with or in furtherance of the particular faith or its tenets and objectives.

It is a general rule that entitlement to the exemption in ad valorem tax cases is determined by use, not by the charter of the institution that owns or uses the property. It is only property held and used exclusively for "religious purposes" which may be exempt from property taxation. University Club v. Lanier, 161 So. 78, 79 (Fla. 1935); Jefferson Standard Life Ins. Co. v. City of Wildwood, 160 So. 208 (Fla. 1935); Haines v. St. Petersburg Methodist Home, Inc., 173 So.2d 177 (2 D.C.A. Fla., 1965); City of Ashland v. Calvary Protestant Episcopal Church, 278 S.W.2d 708 (C.A. Ky. 1959); Evangelical Lutheran Synod of Missouri, Ohio and Other States v. Hoehn, 196 S.W.2d 134 (Mo. 1946); Berean Fundamental Church Council, Inc. v. Board of Equalization, 183 N.W.2d 750 (Neb. 1971); House of Rest of the Presbyterian Church in the United States of America v. County of Los Angeles, 312 P.2d 392, 393-394 (2 D.C.A. Calif., 1957), stating that the criteria to be applied to the term "exclusively for religious purposes" was as follows:

> Property used exclusively for religious purposes is exempt from taxation if:
>
> 1. The owner is not organized or operated for profit . . . .
>
> * * * * *
>
> 3. The property is used for the actual operation of the exempt activity . . . .
> 4. The property is not used or operated by the owner or by any other person so as to benefit any officer . . . director . . . shareholder (or) member of the owner.
> 5. The property is not used by the owner or members thereof . . . for social . . . purposes except where such use is clearly incidental to the primary religious purposes.

These cases, however, all deal with property taxation and the same rules may not necessarily be applied to excise or utility tax situations. Additionally, there must be a determination as to whether "religious purpose" is synonymous with "church purpose."

For the purposes of utility tax exemption it appears that the terms are not necessarily the same as the "religious purpose" spoken of in these ad valorem property tax cases. In the statute under consideration herein, real property or its use is not at issue. Here it is *purchases of services by a church exclusively for the congregation's or church's or faith's purposes.*

In the case *sub judice*, the person claiming the exemption must show that the premises are used "exclusively for church purposes." It must therefore be determined by the taxing authority whether the use of the apartment by the society or congregation or by its "consul" is "exclusively for church purposes" which ordinarily are those services and functions usually carried on by churches generally, such as preaching, teaching, prayer services, Bible and Sunday schools, and meditation.

078-45—March 10, 1978

FELONS

RESTRICTIONS ON EXERCISE OF CIVIL RIGHTS APPLY REGARDLESS OF AGE AT TIME OF CONVICTION

To: Alice Ragsdale, Coordinator, Office of Executive Clemency, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General, and Dennis Wall, Legal Research Assistant

QUESTIONS:

1. Does a felony conviction of a person under 18 years of age disqualify such person from voting or holding public office upon reaching majority or deny to him the exercise or enjoyment of other civil or political rights or privileges under the laws?

2. Is such convicted felon qualified to vote or hold public office or to exercise and enjoy any other statutorily regulated civil or political rights or privileges without restoration of such rights or privileges under s. 8, Art. IV, State Const., by the Governor with the approval of three Cabinet members?

SUMMARY:

Constitutional and statutory restrictions on the exercise of civil and political rights and privileges by a person convicted of a felony apply regardless of the age of the person at the time of conviction. The operation of such constitutional and statutory provisions is not affected by the fact that a person was a minor (and thus not yet able to exercise such rights and privileges) at the time of conviction. The requirement that a convicted felon's civil rights be restored before certain civil or political rights or privileges may be exercised, and the procedures for restoration of civil rights by the Governor and three members of the Cabinet, also apply regardless of a person's age at the time of a felony conviction.

From your letter and accompanying enclosure, I assume for purposes of this opinion that your inquiry refers to persons under the legal age of majority who have been duly convicted of felonies and sentenced to imprisonment in the state penitentiary. I also assume that the sentences of some of these persons were commuted by the State Pardon Board (by substituting therefor the commitment of such minors to the Division of Youth Services until the age of 21 or until discharged by the State Pardon Board) under former s. 959.11, F. S. 1971, prior to its repeal by s. 10, Ch. 72-179, Laws of Florida, effective July 1, 1972; and that, pursuant to s. 959.116(1), F. S., some of them were transferred from the Division of Corrections (now Department of Offender Rehabilitation) to the Division of Youth Services (now the youth services programs of the Department of Health and Rehabilitative Services) for the remainder of their sentences or until they reached the

age of 21. If their sentences did not terminate on their reaching age 21, I assume that they were transferred to the Division of Corrections (now Department of Offender Rehabilitation) or to the supervision of the Parole and Probation Commission (the latter's supervisory duties now being assigned to the Department of Offender Rehabilitation).

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.

The above-quoted constitutional provision applies by its terms to all persons convicted of a felony without specification as to the age or time of conviction of such persons. This fact was impliedly accepted and announced in *In re* Advisory Opinion of the Governor Civil Rights, 306 So.2d 520, 521-22 (Fla. 1975), wherein the justices, referring to the above-quoted constitutional provision, stated: "Conviction of a felony removes many civil rights of a *person.*" (Emphasis supplied.) In addition, s. 944.293, F. S., delineating the procedure to be followed with regard to an application for restoration of civil rights, applies to "those *persons* convicted of a felony . . . ." (Emphasis supplied.)

Various statutes provide that convicted felons, "unless restored to civil rights," are disqualified from certain rights and responsibilities of citizenship, applying by their terms to "persons." *See,* for example, ss. 40.01(2) and 40.07(1), F. S. ("No person" convicted of a felony is qualified to serve as a juror unless restored to civil rights); s. 97.041(3)(b), F. S. ("Persons" convicted of any felony and whose civil rights have not been restored are not entitled to register or to vote); and s. 775.13(1) and (5), F. S. ("Any person" convicted of a felony in any Florida court must, within 48 hours after entering any county, register with the sheriff thereof unless, *inter alia,* the person has received a full pardon or his civil rights have been restored). *See also* s. 112.011(1)(a) and (b), F. S. ("A person" convicted of a felony or first degree misdemeanor may be denied certain described employment if the crime was "directly related" to the employment or to the occupation, trade, vocation, profession, or business for which a license, permit, or certificate is sought), and s. 561.15(2), F. S. (no license may be issued under the Beverage Law to "any person" convicted of any felony within the past 15 years in Florida, or of any offense designated a felony by any other state or by the United States).

Neither s. 4, Art. VI, State Const., nor any of the statutes enumerated above differentiates as to time of conviction or age at time of conviction. These statutes instead provide that *no* person may exercise the rights or fulfill the responsibilities regulated thereby if ever convicted of a felony (unless otherwise excepted or qualified by said statutes), unless and until civil rights have been restored. Exceptions are s. 112.011, F. S., providing in part that a person shall not be disqualified from employment by the state or political subdivisions or municipalities solely because of a prior conviction of a crime (except that a person may be denied employment by such governmental agencies if the crime was a felony or first-degree misdemeanor "directly related to the position of employment sought") and s. 561.15(2), F. S., prohibiting issuance of a license under the Beverage Law to persons convicted of specified crimes.

The Legislature has provided that use of the term "person" in the Florida Statutes shall, where the context of a particular statute will permit, be read as including "children." Section 1.01(3), F. S. There being nothing to the contrary in the context of any of the above-mentioned statutes, it clearly appears that these statutes include children—and therefore minors—within the scope of their operation. Further, s. 6, Rules of Executive Clemency of Florida (hereinafter "Rules"), outlining a specific procedure for restoration of civil rights, does not distinguish between minors and adults. It applies by its terms to "a person . . . convicted in a Florida state court and [who] has completed service of all sentences imposed or [who] has terminated from parole or probation" (s. 6A, Rules); to "[a]ny person" released prior to November 1, 1975, and "who otherwise qualifies" (s. 6B, Rules); and to "[e]ach applicant for restoration of civil rights in the State of Florida . . ." (s. 6D, Rules).

Disqualification of persons from the exercise of civil rights when such persons have been convicted of a felony and have not had their civil rights restored is the apparent rationale behind AGO 046-62, Biennial Report of the Attorney General, 1945-46, p. 162. That opinion dealt with the question of whether a person who had been convicted of a felony and served a sentence therefor prior to becoming of voting age should be allowed to vote upon reaching voting age even though said person's civil rights had not been

restored. The statute in question was an early version of s. 97.041(3)(b), *supra*, and provided that "*persons* who have been convicted of any felony by any court of record shall not be entitled to vote." [Section 98.01, F. S. 1941; emphasis supplied.] The conclusion reached in AGO 046-62 was that the person in question

> . . . would have no right to vote unless and until his civil rights have been restored to him. I can see no difference between the application of this law to one who was convicted prior to his becoming of voting age and to one who was convicted after he had become of voting age.

A like interpretation was given in the case of People v. Park, 41 N.Y. 21 (1896), in which one Corbin, a witness for the prosecution in a criminal trial, was objected to as incompetent under a statute preventing the testimony of a witness who had previously been convicted of a felony on the ground that Corbin had been convicted of, and sentenced to a reformatory for, the crime of burglary of the third degree. Corbin was "under the age of sixteen years" at the time of his conviction. *Id.* at 23. The New York Court of Appeals held that Corbin's testimony should have been excluded. In the course of its opinion, the court construed a statutory definition of the term "felony" similar to that given in s. 10, Art. X of the Florida Constitution and in s. 775.08(1), F. S., and concluded that the applicable statutes did not differentiate between minors and adults:

> The Revised Statutes declare the term "felony," where used therein, to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or imprisonment in State prison. (2 R.S., 702, s. 30.) . . . The statute is to be construed as declaring that the term "felony," as therein used, means any crime which is punishable by death or by imprisonment in the State prison, without reference to the personal exemptions or exceptions of the criminal. . . . Burglary in the third degree is *felony* [sic], within the statutory definition of that term; and in the view above taken it does not lose that character, because the convict is under sixteen years of age. . . . I therefore hold that burglary, in the third degree, is a felony, no matter what may be the age of the convict. . . . That being so, and the witness, Corbin, having been convicted of such offense and sentenced, and not restored to citizenship, was excluded by the statute, and was incompetent to testify as a witness. [*Id.* at 24-25.]

With specific regard to the procedure for securing "restoration of civil rights," the Legislature has provided in s. 944.292, F. S., as follows:

> Upon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution.

Therefore, only one means exists by which civil rights may be effectively restored or, alternatively, by which the disqualifications established with respect to the rights and responsibilities regulated by the above statutes and by s. 4, Art. VI, State Const., may be removed. That means is provided for in s. 8(a), Art. IV, State Const.:

> Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, *restore civil rights*, commute punishment, and remit fines and forfeitures for offenses. (Emphasis supplied.)

The power to restore civil rights vested in the executive by this provision is exclusive. *In re* Advisory Opinion of the Governor, 334 So.2d 561, 562 (Fla. 1976); *In re* Advisory Opinion of the Governor Civil Rights, 306 So.2d at 523; *Ex parte* White, 178 So. 876, 878-80 (Fla. 1938) (construing s. 12, Art. IV, State Const. 1885, the predecessor of s. 8, Art. IV, State Const.); Singleton v. State, 21 So. 21, 22-23 (Fla. 1896) (same). With regard to "restoration of civil rights" of minors who find themselves in the circumstances outlined earlier in this opinion, s. 944.293, F. S., imposes a duty upon the Department of Offender

Rehabilitation, through its authorized agents, to assist "those persons convicted of a felony" (including minors convicted of felonies; *see* s. 1.01[3], *supra*) in preparing all materials necessary for the restoration of civil rights:

> With respect to those persons convicted of a felony, the following procedure shall apply: Prior to the time an offender is discharged from supervision, an authorized agent of the Department of Offender Rehabilitation shall obtain from the Governor the necessary application and other forms required for the restoration of civil rights. The authorized agent shall assist the offender in completing these forms and shall insure that the application and all necessary material are forwarded to the Governor before the offender is discharged from supervision.

(While the above-quoted statute does not by its terms impose a similar duty upon authorized agents of the Department of Health and Rehabilitative Services with regard to minors who are or have been in the custody or under the supervision thereof, it would appear advisable—and I strongly recommend—that authorized agents of the Department of Health and Rehabilitative Services offer all necessary assistance to such minors in obtaining and completing all forms and materials necessary for the restoration of civil rights.) In addition, s. 940.05, F. S., provides:

> Any person who has been convicted of a felony may be entitled to the restoration of all the rights of citizenship enjoyed by him prior to his conviction if he complied with one of the following criteria:
> (1) Has received a full pardon from the board of pardons, or
> (2) Has served the maximum term of the sentence imposed upon him, or
> (3) Has been granted his final release by the Parole and Probation Commission.

This statute provides that convicted felons "may be entitled to the restoration" of all rights of citizenship and does not by its terms purport to grant restoration of such rights, and s. 940.06, F. S., requires the Parole and Probation Commission to submit to the Governor and Cabinet the names of persons who qualify for the restoration of civil rights in accordance with s. 940.05.

Therefore, until this matter is judicially determined otherwise, I am of the opinion that all minors who have been heretofore duly convicted of a felony as defined in s. 10, Art. X, State Const.—including minors transferred from the Department of Offender Rehabilitation to the youth services programs of the Department of Health and Rehabilitative Services pursuant to s. 959.116(1), F. S., and minors whose sentences were commuted pursuant to s. 959.11, F. S. 1971—who have completed their sentences or who have been terminated from parole or probation come within the operation of the statutes enumerated above which regulate rights and duties of "persons." Thus, such persons may not exercise the rights and duties enumerated in the statutes until they have been restored to civil rights in accordance with the statutory and constitutional provisions which outline the procedure for restoration of civil rights of such persons and in accordance with s. 6, Rules, *supra*.

078-46—March 15, 1978

DEATH

SHERIFF, DEPUTY SHERIFF, OR EMERGENCY MEDICAL TECHNICIAN NOT AUTHORIZED TO PRONOUNCE A PERSON DEAD

To: Edwin H. Duff II, Volusia County Sheriff, DeLand

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Does a sheriff or a deputy sheriff or an emergency medical technician assigned to an ambulance or rescue unit have the legal authority or duty, and therefore consequent immunity from liability, to declare or officially pronounce dead a person who dies unattended by a recognized medical practitioner?

SUMMARY:

No statute authorizes or requires a sheriff, deputy sheriff, or certified emergency medical technician to officially pronounce or officially declare a person dead. No immunity is provided by law to a sheriff, deputy sheriff, or certified emergency medical technician who undertakes to declare or pronounce a person dead. Procedures set forth in Chs. 382 and 406, F. S., must be followed in regard to a death which occurs without medical attendance.

Your question is answered in the negative. The Florida Statutes do not authorize or require a sheriff or his deputies or a certified emergency medical technician to declare or officially pronounce a person dead. In fact, no statute speaks to the subject of mere official declaration or pronouncements of death as such.

Section 382.081, F. S. 1977, provides for death registration:

> (1) A death certificate for each death which occurs in this state shall be filed with the local registrar of the district in which the death occurred within 3 days after such death and prior to final disposition or removal of the body from the state, and shall be registered by such registrar if it has been completed and filed in accordance with this section:
> (a) The certificate of death shall be in the form prescribed by the Department of Health and Rehabilitative Services;
> (b) If the place of death is unknown, a death certificate shall be filed in the registration district in which a dead body is found within 3 days after such occurrence; and
> (c) If death occurs in a moving conveyance a death certificate shall be filed in the registration district in which the dead body was first removed from such conveyance.
> (2) The funeral director or person acting as such who first assumes custody of a dead body shall file the death certificate. He shall obtain the personal data from the next of kin or the best qualified person or source available. The medical certification of cause of death shall be furnished to the funeral director, either in person or via certified mail, by the physician, medical examiner, or coroner responsible for furnishing such information.
> (3) The medical certification shall be completed and signed within 48 hours after death by the physician in charge of the patient's care for the illness or condition which resulted in death except when inquiry is required by the medical examiner or coroner.
> (4) When death occurred without medical attendance as set forth in subsection (3) or when inquiry is required by medical examiner or coroner, the responsible official shall investigate the cause of death and shall complete and sign the medical certification within 48 hours after taking charge of the case.

This statute expressly and specifically requires and authorizes only an *attending physician*, a *medical examiner*, or a *coroner* to make and sign medical certifications of cause of death. It is a settled rule of construction that where a statute enumerates the things on which it is to operate (here, the making and signing by certain designated officials and individuals) of certifications of cause of death it impliedly excludes from its operation all things not expressly mentioned (here, declaration of death by emergency medical technicians, sheriffs, and deputy sheriffs). Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234, 239 (Fla. 1944). Further, "[w]hen the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way." Alsop v. Pierce, 19 So.2d 799, 805 (Fla. 1944). I am not aware of any

statute authorizing or requiring nonattending physicians or the nonattending medical staff of the two hospitals referred to in your inquiry to officially make any determination that a person is dead or officially declare a person to be dead or to sign any medical certification of the cause of death of any person.

Section 382.10, F. S. 1977, provides in pertinent part that in cases where a death occurs without medical attendance, "the undertaker, or other person to whose knowledge the death may come," shall notify the local registrar thereof, who thereupon shall inform the "local health officer" and refer the case to him for immediate investigation and certification. When the local health officer is not a physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts. If the undertaker or the registrar has reason to believe that the death may have been due to an unlawful act or neglect, the registrar shall then refer the case to "the coroner or other proper officer" for his investigation and certification [*see* ss. 406.12 and 406.13, F. S. 1977]. In such circumstances, the coroner or other officer shall make the certificate of death. *See also* s. 406.11(1)(a) 5., F. S. 1977, requiring that the medical examiner determine the cause of death in cases where death occurs without medical attendance, and s. 925.09, F. S. 1977, authorizing a state attorney to have an autopsy performed to determine whether a death was the result of a crime.

Section 406.12, F. S. 1977, imposes on *any* person in the district where a death occurs who becomes aware of the death of *any* person occurring under the circumstances described in s. 406.11, F. S. [including cases where a person dies *unattended by a practicing physician* or other recognized practitioner (s. 406.11(1)(a) 5.)], to report such death and circumstances to the district medical examiner. Upon such notification, the medical examiner is required by the terms of s. 406.13, F. S., to examine or otherwise take charge of the dead body and by the provisions of s. 406.11(1) to determine the cause of death. In such cases, s. 382.081(4), F. S. 1977, operates to require the district medical examiner to make and sign the medical certification of cause of death.

Part III of Ch. 401, F. S., as amended by Ch. 77-347, Laws of Florida, the Florida Emergency Medical Services Act, regulating emergency medical services and emergency medical technicians, does not cover the subject matter of your question and does not purport to authorize or require certified emergency medical technicians to declare or officially pronounce a person dead or to make and sign medical certifications of cause of death or certificates of death.

Chapter 30, F. S., as amended, relating to sheriffs and deputy sheriffs, does not purport to authorize or require the sheriffs or their deputies to officially declare or pronounce a person dead, to make any official determination that a person is dead, or to make and sign medical certifications of cause of death or certificates of death. I am not aware of any other statute authorizing or requiring the sheriffs or their deputies to perform such acts.

It is settled law in this state that constitutional county officers such as sheriffs have no inherent powers and have only such authority as may be expressly granted by statute or necessarily implied from an express statutory grant of authority or imposition of duty. Lang v. Walker, 35 So. 78, 80 (Fla. 1903); White v. Crandon, 156 So. 303, 305 (Fla. 1934); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); AGO 075-161. *Also see* Edgerton v. International Company, 89 So.2d 488, 490 (Fla. 1956), and 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), for the rule that where there is reasonable doubt as to the lawful existence of a power being exercised by an administrative agency or officer, further exercise of that power should be stopped. For the purposes of this opinion, these rules apply with equal force and effect to certified emergency medical technicians who, with respect to the subject matter of your question, possess no authority and are charged with no duty other than as provided in the controlling statute, part III of Ch. 401, F. S., as amended.

Except in those situations specifically enumerated in s. 406.11, F. S. 1977, the attending physician in charge of a person's care for the illness or condition which resulted in that person's death is responsible for making out and signing a medical certification of cause of death and furnishing the same to the funeral director who has assumed custody of the dead body. *See* s. 382.081(3), F. S. 1977. If there is no such attending physician or other recognized medical practitioner, the medical certification of cause of death must be made out and signed by the medical examiner, the local health officer, or, in certain cases, the local registrar. Sections 382.031, 382.10, 406.11, 406.12, and 406.13, F. S. 1977. *See also* Ch. 77-294, Laws of Florida, providing that, except as provided in s. 936.003(1), F. S.

(created by Ch. 77-294), all duties and responsibilities of a coroner provided by law shall be vested in a medical examiner regulated pursuant to the provisions of Ch. 406, F. S., and repealing former Ch. 936, F. S., relating to inquests of the dead.

While Chs. 382 and 406, F. S., do not speak to the subject of mere official declaration or pronouncement of death as such, those chapters imply that persons required by law to complete and sign certifications of cause of death necessarily also perform the function of officially declaring or pronouncing persons dead (if, indeed, the function of merely pronouncing a person dead is required by law). The pronouncement of a person as dead in circumstances other than those set forth in Chs. 382 and 406, F. S., or by any person other than those enumerated therein, would be an act of no legal verity or force under existing law. As I have already indicated, no existing statute provides any other way of declaring or pronouncing persons dead. The certificates of death (including the medical certifications of cause of death) filed with the local registrar become a part of the permanent records of vital statistics maintained by the state and are the legal and official memorials or records of death in this state.

However, a sheriff, deputy sheriff, or emergency medical technician having knowledge of a death occurring without medical attendance (as prescribed by ss. 382.081, 382.10, 406.11, and 406.12, *supra*) is a person who becomes aware of a death (to whose knowledge a death may come) within the purview of ss. 382.10 and 406.12, respectively, and is accordingly required by law to notify the local registrar of such death and to report such death and related circumstances to the medical examiner. Neither the local registrar or the local health officer, nor the medical examiner, as the case may be, is authorized by law to decline to perform his or her prescribed duties or functions under s. 382.081, s. 382.10, s. 406.11, or s. 406.13 once such official is notified of an unattended death.

It is therefore my opinion that, under the statutes, rules of construction, and principles of law set forth above, the existing law of this state neither requires nor authorizes sheriffs, deputy sheriffs, or certified emergency medical technicians to officially declare or officially pronounce a person dead. As no such duty or authority is provided by law, I am unaware of any statute or principle of law which would grant any sort of immunity (as from tort liability) to a sheriff, deputy sheriff, or certified emergency medical technician who undertakes the responsibility of declaring or pronouncing a person dead.

078-47—March 15, 1978

SHERIFFS

FEES FOR SERVICE OF PROCESS ON INCOMPETENT PERSONS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Harold F. X. Purnell, Assistant Attorney General, and Maxie Broome, Jr., Legal Intern

QUESTIONS:

1. When a sheriff is requested to make proper service as to a party defendant who is an incompetent and is a patient in a state mental institution, and the sheriff acts in accordance with the provisions of s. 48.041(1), F. S., by reading the process to the incompetent to be served and to the person in whose care or custody the incompetent is and by delivery of a copy thereof to such person in whose care or custody the incompetent is, should the sheriff receive as his fee or fees under s. 30.231(1)(a), F. S., the amount of $7.50, as for one service of process, or $15, as for two separate services of process?

2. When, in addition to the circumstances outlined in question 1 above, a guardian ad litem or other person is appointed by the court to represent the incompetent, and the sheriff acts in accordance with the provisions of s. 48.041(1) by further serving said process on said guardian or other person, should the sheriff receive a fee of $7.50 under s. 30.231(1)(a) apart from and in addition to such other fee or fees received under question 1 above?

3. When the superintendent of a state mental institution has adopted the following rule: "When a legal pleading is served upon a patient in a hospital facility, a copy of the legal papers is to be given to the hospital administrator as custodian," what fee or fees should the sheriff receive, and from whom, as to a patient who is incompetent, and as to a patient who is competent?

SUMMARY:

A sheriff making service of original process (except subpoenas and executions) on one defendant or respondent (who is a patient in a state mental institution) at one time in one cause of action is entitled to but one, fixed fee for the docketing and service of such process regardless of the number of additional papers or copies of such process served and delivered with the original process and the service thereof.

All three questions can substantially be answered in the same discussion. Section 30.231(1)(a), F. S., provides:

> (1) The sheriffs of all counties of the state in civil cases shall charge *fixed*, nonrefundable fees for docketing and service of process, according to the following schedule:
> (a) All summons or writs except subpoenas and executions: $7.50 *for each person or respondent to be served.* (Emphasis supplied.)

The legislative intent of this section can be deciphered by way of analyzing the statutory language used. The section provides that the sheriffs shall charge "fixed" fees.
Section 48.031, F. S., provides:

> Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his usual place of abode with some person of the family who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

Section 48.041(1) and (2) F. S., provides:

> (1) By reading the process to the minor or incompetent to be served and to the person in whose care or custody the minor or incompetent is and by delivery of a copy thereof to such person in whose care or custody the minor or incompetent is and by further serving said process on the guardian ad litem or other person, if one is appointed by the court to represent the minor or incompetent. Service on the guardian ad litem is unnecessary when the guardian ad litem appears voluntarily or when the court orders him to appear without service of process on him.
> (2) When there is a legal guardian appointed for the minor or incompetent, by serving the guardian as provided in s. 48.031.

Rule 1.070(f), F.R.C.P., provides in pertinent part:

> The party seeking to effect personal service shall furnish the person making service with the necessary copies.

In AGO 063-96, one of my predecessors felt that s. 30.231, F. S. 1971, amended to its present form by Ch. 72-92, Laws of Florida, was intended

> to establish a flat average fee in connection with the service of process, etc., as distinguished from the former procedure of determining the total fee for service of process by addition of the several fees afforded for various activities of a sheriff . . . in connection with service of process. . . .

Further, this section provides that a fee of $7.50 shall be charged "for each person or respondent to be served." There is no distinction drawn on the basis of the number of documents served, whether the documents are attached or separate, or whether a single return or a return for each separate document is made by the sheriff. *See* AGO 074-140.

Attorney General Opinion 066-19 appears to be directly in line with your questions. There, my predecessor, in interpreting the original version of s. 30.231(1), F. S. 1971, stated:

> A sheriff making a service on one defendant at one time in one cause of action is entitled to but one fee . . . regardless of the number of additional papers served with the initial service of process, and regardless of the legal definition which might be attached to any of the additional papers.

The 1972 amendment of s. 30.231(1) by Ch. 72-92, *supra*, for the purposes of this opinion, made no substantial changes in the law except to explicate that the prescribed fee was to be charged "for each person or respondent to be served." *See* AGO 074-140.

Based upon the foregoing analysis, it would make no difference whether the patient or respondent upon whom service of original process (except subpoenas and executions) is to be served by the sheriff is competent or incompetent. Sections 48.031 and 48.041, F. S., cover service of original process upon, respectively, competents and legal guardians of incompetents and incompetents. When read in conjunction with AGO's 063-96, 066-19, and 074-140, the bottom line as to legislative intent appears to be that the sheriff is entitled to only one, fixed fee (as prescribed by s. 30.231(1)(a), F. S.) so long as the service of original process (except for subpoenas and exceptions) is made in one cause of action and the patient (in a state mental institution) is the defendant or respondent therein. The fact that additional papers or copies of the process are served on and delivered to persons in whose care or custody the patient is or guardians ad litem as required by s. 48.041 would not change the analysis so long as those additional papers or copies of the process are part of the original process and the service thereof.

078-48—March 16, 1978

OFFICERS—IMPEACHMENT

OFFICER NOT ENTITLED TO APPOINTED COUNSEL IN IMPEACHMENT PROCEEDINGS

HOUSE OF REPRESENTATIVES MAY NOT GRANT IMMUNITY FROM CRIMINAL PROSECUTION

To: Donald L. Tucker, Speaker, House of Representatives, and William J. Rish, Chairman, Select Committee on Impeachment, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Do constitutional concepts of due process and fundamental fairness require that the House of Representatives provide counsel to an officer subject to impeachment, who has been determined to be indigent, in proceedings before or in matters directly related to proceedings before a committee on impeachment or until the conclusion of proceedings against such officer by the committee or by the House of Representatives?

2. If the answer to question 1 is in the affirmative, may the House of Representatives contract with a state agency charged with the responsibility of representing indigent defendants in criminal cases to provide counsel to an officer subject to impeachment, who has been determined to be indigent, in proceedings before or in matters directly related to proceedings before a committee on impeachment or until the conclusion of proceedings against such officer by the committee or by the

House of Representatives, and will such representation be adequate to fulfill the requirements of due process and fundamental fairness?

3. If the answer to question 1 is in the affirmative, is there any basis precluding recovery, by civil suit or otherwise, of expenses incurred by the House of Representatives in providing counsel to an officer subject to impeachment, who has been determined to be indigent, in proceedings before or in matters directly related to proceedings before a committee on impeachment or until conclusion of proceedings against such officer by the committee or by the House of Representatives, in the event such officer loses his indigency status at a later date?

4. If the answer to question 1 is in the affirmative, may the House of Representatives contract with an officer subject to impeachment, who has been determined to be indigent, for repayment of expenses incurred by the House of Representatives in providing counsel for such officer in proceedings before or in matters directly related to proceedings before the committee on impeachment or until conclusion of proceedings against such officer by the committee or by the House of Representatives, in the event such officer loses his indigency status at a later date?

5. If the answer to question 1 is in the negative, does the House of Representatives run the risk of inadvertently granting immunity to an officer subject to impeachment, who may also be the subject of state criminal prosecution, by compelling his attendance by subpoena or by compelling the production of books, papers, or other documents by subpoena duces tecum in the absence of appointed counsel?

SUMMARY:

An indigent officer under impeachment investigation by the House of Representatives is not required to be provided with counsel, or to be reimbursed for attorney's fees, under existing standards of due process as enunciated by the United States Supreme Court. The right to be represented by counsel is distinguishable from the right of an indigent to have counsel provided at government expense. A legislative impeachment committee is not empowered by statute to grant immunity from criminal prosecution and, in the absence of such power, cannot compel testimony or production of documents in the face of an objection grounded on self-incrimination.

AS TO QUESTION 1:

I would note first that I have found nothing in the Florida Constitution or Florida Statutes expressly requiring or authorizing the expenditure of state funds to provide counsel to an officer under impeachment investigation by the House of Representatives. (*Cf.* s. 112.44, F. S., permitting the Senate—in a removal proceeding following suspension of an officer by the Governor—to pay the officer's reasonable attorney's fees and costs "upon his exoneration.") I also have found no decisions from Florida or other jurisdictions involving the right to provided counsel in the context of an impeachment proceeding.

You indicated in your letter your understanding that the officer in question "is not entitled to counsel under the Sixth Amendment to the United States Constitution [as applied to the States through the Fourteenth Amendment] or under Article I, Section 16 of the Constitution of the State of Florida," since these provisions apply to *criminal* prosecutions and proceedings. You further stated that "it is not clear whether counsel may be required in accordance with evolving concepts of due process and fundamental fairness" [under the Fourteenth Amendment to the United States Constitution and s. 9, Art. I of the Florida Constitution]. My research has disclosed no such requirement under existing or "evolving" due process concepts as enunciated by the United States Supreme Court. Your first question is, therefore, answered in the negative.

The only factor which clearly and consistently invokes the requirement that counsel be provided to an indigent at government expense is the threat of deprivation of liberty. Even in criminal proceedings, it is only where incarceration (or death) is threatened that counsel must be provided at each critical stage. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). In criminal prosecutions punishable

only by fine (deprivation of property, rather than liberty) there is presently no requirement that counsel be provided. The threat of deprivation of liberty is also the basis for imposition of the right to have counsel provided in juvenile delinquency proceedings; *Re* Gault, 387 U.S. 1 (1967); juvenile dependency proceedings, Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1977); and various commitment proceedings (*e.g.*, as a mentally disordered sex offender), Specht v. Patterson, 386 U.S. 605 (1967). In Woodham v. Williams, 207 So.2d 320, 322 (1 D.C.A. Fla., 1968), the court found no requirement that counsel be provided to one threatened with revocation of an insurance license, emphasizing that "[a] proceeding to revoke a license . . . is strictly civil in nature, and *does not involve the loss of liberty or threat of incarceration* in the common jail." (Emphasis supplied.)

However, even the threat of incarceration is, in certain instances, insufficient to require that counsel be provided. As to parole revocation proceedings, the United States Supreme Court at present does not recognize an unequivocal right to have counsel provided, even though revocation results in incarceration. The question of whether counsel must be provided to a parolee is now determined on a case-by-case basis, based on consideration of whether adequate due process can be provided without representation by counsel. For example, in Gagnon v. Scarpelli, 36 L. Ed.2d 656, 664 (1973), the court noted that an

> *unskilled* or *uneducated* probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examination of witnesses or the offering or dissecting of complex documentary evidence. (Emphasis supplied.)

There has been no suggestion that the officer presently under investigation is either "unskilled" or "uneducated," and I am unaware of any point in the impeachment proceedings of either the full House of Representatives or its impeachment committee at which the officer under investigation would have any right or opportunity to examine or cross-examine witnesses. In Gagnon, *supra*, at 665, the court also recognized (and balanced against the parolee's right to due process of law) the state's "significant interests in informality, flexibility, and *economy*" in its proceedings. (Emphasis supplied.)

I am aware of no line of cases requiring appointment of counsel where only deprivation of property—and not liberty—is threatened. As noted above, even in actual criminal proceedings, there is presently no requirement that counsel be provided where incarceration is not threatened (*i.e.*, where the threat is only of deprivation of property by the imposition of a fine). Argersinger v. Hamlin, *supra*. And, even were it established that counsel must be provided where only deprivation of property is threatened, I would point out that impeachment by the House of Representatives does not impose any fine or forfeiture or, in my opinion, otherwise deprive the officer of property.

The direct consequences of impeachment are as provided (and *only* as provided) in s. 17, Art. III, State Const. That section provides that impeachment by the House, *if accompanied by conviction by the Senate*, results in removal of the officer from the office held, and if the Senate chooses to exercise the discretion granted by s. 17(c), Art. III, State Const., "disqualification to hold any office of honor, trust or profit." However, even these direct constitutional consequences of impeachment do not inure because of the actions of either the House committee investigating impeachment or of the full House of Representatives. The only change in an officer's status resulting from impeachment by the House is that, pursuant to s. 17(b), Art. III, State Const., the impeached officer "shall be disqualified from performing any official duties until acquitted by the senate. . . ." [However, even that temporary consequence of impeachment is inapplicable to the officer now under investigation, as he has already been suspended from office without compensation by order of the Florida Supreme Court, upon the recommendation of the Judicial Qualifications Commission, following his conviction in Federal District Court of criminal conspiracy charges.] Any consequence of impeachment by the House (or, for that matter, of conviction by the Senate), other than those provided in the Constitution (such as forfeiture of retirement benefits as provided in s. 121.091(5)(g), F. S.) would be the result of the operation of the particular statute involved, and any challenge to such a consequence imposed by statute and conditioned on impeachment by the House and conviction by the Senate would properly be concerned only with the adequacy of the due process provided by the *statutory* scheme, not with the constitutional impeachment proceedings which constitute the event on which operation of the statute is conditioned or predicated.

Also pertinent is a consideration of the nature of the House proceedings. If the impeachment process set forth in s. 17, Art. III were compared with a criminal proceeding in the courts, it could be said that the role of the House of Representatives is to conduct an *investigation* (such an investigation may be by the full House or by a committee appointed for that purpose) to determine if *probable cause* exists that an officer has committed a "*misdemeanor* in office," and, upon a finding of probable cause, to bring formal charges against the officer (in much the same manner as a grand jury functions in the criminal justice system). And, it is expressly provided in s. 17(a), Art. III, State Const., that the role of an impeachment committee is to "*investigate* charges against any officer subject to impeachment." (Emphasis supplied.)

That the role of the House (and especially that of a House impeachment committee) is of a *preliminary* and *investigative* nature further reinforces my negative answer to your first question. It is my understanding that the only stage during House proceedings at which the officer under investigation might participate would be during the hearings conducted by the impeachment committee (should such a committee be formed—it is not a prerequisite to action by the full House). It is also my understanding that only House members participate in the impeachment deliberations of the full House of Representatives. Thus, it appears that the only point at which the issue of representation by counsel (whether provided by the officer or the state) would arise during the proceedings of the House of Representatives is during the impeachment *committee* hearings, should the officer appear in response to invitation or subpoena of the committee. Since the only point at which the officer might participate—if at all—in the House proceedings is before an impeachment committee, and since the committee proceedings are (as expressly provided in s. 17(a), Art. III, *supra*) investigatory, it may be that the officer would not have even the right to assistance or appearance of counsel (much less assistance or appearance of counsel provided at government expense) in light of Haines v. Askew, 368 F. Supp. 369 (M.D. Fla. 1973), *aff'd* 417 U.S. 901 (1974). In that case, the United States Supreme Court affirmed the district court's ruling that denial of participation by counsel during an investigative hearing to determine probable cause that a public school teacher had committed acts justifying imposition of disciplinary action (including suspension and dismissal) did not deprive the teacher of due process. The court emphasized that the [civil] proceedings were preliminary and investigative—not adjudicatory. The court stated, at 376-377:

> The Court concludes that the probable cause hearings before the P.P.C. [Professional Practices Council] . . . are *investigatory* proceedings, consistent with the stated purpose of such hearings set out in the Rule. A probable cause hearing is not called unless there are insufficient facts upon which to proceed to an adversary hearing before the P.P.C. under Rule 6B-2.15. There is no determination made by the P.P.C. at the probable cause hearings which is in the nature of an adjudication affecting legal rights. *Any determinations made are factual and in the nature of recommendations* to the executive committee of the Council and to the Commissioner of Education. *These recommendations are not binding.* (Emphasis supplied.)

The nature of the proceedings described above appears to be closely analogous to that of the impeachment proceedings of the House of Representatives and particularly that of the impeachment committee proceedings.

The role of the House in impeachment proceedings may also be directly analogized to that of the Governor in the exercise of his power of suspension of officers under s. 7, Art. IV, State Const. In fact, it can be stated that the power of impeachment vested in the House of Representatives by s. 17, Art. III constitutes an exception to the suspension powers of the Governor, the latter procedure being the primary and more widely applicable constitutional procedure for removal of officers. I am aware of no point during the process leading to suspension of an officer by the Governor, including the investigation customarily conducted by the Governor, at which any presently enunciated interpretation of due process would require that the officer—if indigent—be provided counsel at government expense, whether such counsel's role would be to represent the officer at any meeting or hearing which the Governor might choose to hold, or to represent the officer in any proceeding which the officer might wish to institute in the courts relating to the investigation or suspension. I have been advised that the Governor's office takes this view and that counsel has not been and would not be

provided at government expense to an officer whose suspension is being considered by the Governor.

It should finally be emphasized that there is a clear distinction between the right to assistance or appearance of counsel and the right to have counsel provided at government expense. The existence of a right to representation by counsel (of one's own choosing) in a particular context—even where expressly authorized by statute (in this case, by Rule 6.16 of the Rules of the House of Representatives)—does not carry with it a corresponding requirement that counsel be provided at government expense to an indigent in the same context. The distinction between the right to representation by counsel and the right to have counsel provided has been recognized by the courts in various contexts. In Paul v. United States Immigration and Nat. Serv., 521 F.2d 194, 197 (5th Cir. 1975), the court stated that, in a deportation proceeding in which the potential consequences are admittedly severe, "[a]liens have a statutory right to the presence of counsel, *but not at government expense.*" (Emphasis supplied.) The courts have also rejected claims of a right to government-provided counsel in the face of statutes granting the right to representation by counsel in hearings on denial of disability benefits under the Social Security Act, Jeralds v. Richardson, 445 F.2d 36 (7th Cir. 1971), and statutes authorizing representation by counsel in parole revocation proceedings, Wainwright v. Cottle, 414 U.S. 895 (1973), *reh. den.*, 414 U.S. 1086 (1973).

AS TO QUESTIONS 2, 3, and 4:

As your first question has been answered in the negative, your second, third, and fourth questions need not be addressed.

AS TO QUESTION 5:

This question may be answered by reference to AGO's 073-150 and 075-219, construing s. 914.04, F.S., which constitutes the statutory authority by which immunity from state criminal prosecution may be granted. Section 914.04 provides:

> No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper or other document before any *court having felony trial jurisdiction, grand jury, or State Attorney,* upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding. (Emphasis supplied.)

In AGO 073-150, I concluded that, under the above statute, "only the state, *acting through its prosecuting attorney,* can immunize a witness under said statute." In AGO 075-219, I considered the question of whether a legislative committee could grant immunity from criminal prosecution. I concluded in AGO 075-219, and here reiterate, that

> [a]n examination of Florida Statutes fails to disclose any statute authorizing a legislative committee to grant immunity from prosecution to a witness appearing before it, and *in the absence of such a statute, no legal power to grant immunity exists.* (Emphasis supplied.)

In accord is AGO 060-168, construing former s. 932.29, F. S., the predecessor of current s. 914.04, F. S. As to your suggestion that immunity might "inadvertently" be granted, I would emphasize that, since it is clear that a legislative committee is not empowered to grant immunity from criminal prosecution, any objection to testifying or producing documents interposed by the officer, grounded on a claim of self-incrimination, *must* be respected. *See* Kastigar v. United States, 406 U.S. 441 (1972).

078-49—March 24, 1978

REGULATION OF PROFESSIONS

NATUROPATHIC PHYSICIAN MAY NOT ASSOCIATE PROFESSIONALLY WITH AN OSTEOPATH

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

Prepared by: Joseph W. Lawrence II, Assistant Attorney General

QUESTION:

May an osteopathic physician associate professionally with a naturopath?

SUMMARY:

Since a naturopathic physician's medical and statutory standards and qualifications are not at least the same as those statutorily prescribed standards and qualifications governing the practice of osteopathic medicine, an osteopathic physician is prohibited by Rule 21R-3.14, F.A.C., from associating professionally with a practicing naturopathic physician.

Your question is answered in the negative.

Rule 21R-3.14, F.A.C., as adopted by the Florida State Board of Osteopathic Medical Examiners, states:

> An osteopathic physician shall not associate professionally with any other member of the healing arts *whose medical and statutory standards and qualifications* are not at least the same as those standards and qualifications governing the practice of osteopathic medicine. (Emphasis supplied.)

It is clear from the foregoing, therefore, that the test to be applied is whether a naturopathic physician's medical and statutory standards and qualifications are at least the same as those of an osteopathic physician. The test would not be based on an individual naturopathic physician's standards and qualifications but on naturopathy as a healing art, since the statutory standards and qualifications are the same irrespective of each individual physician's characteristics and background.

In this regard, one must first examine the naturopathy law, Ch. 462, F. S. Therein, naturopathy is defined as follows:

> For the purpose of this law, "natureopathy" and "naturopathy" shall be construed as synonymous terms and are hereby defined to mean the use and *practice of psychological, mechanical, and material health sciences to aid in purifying, cleansing, and normalizing human tissues* for the preservation or restoration of health, according to the fundamental principles of anatomy, physiology, and applied psychology, as may be required. Naturopathic practice employs, among other agencies, phytotherapy, dietetics, psychotherapy, suggestotherapy, hydrotherapy, zone therapy, biochemistry, external applications, electrotherapy, mechanotherapy, mechanical and electrical appliances, hygiene, first aid, sanitation, and heliotheraphy [sic]; *provided,* however, *that nothing in this chapter shall be held or construed to authorize any naturopathic physician licensed hereunder to practice materia medica or surgery or chiropractic,* nor shall the provisions of this law in any manner apply to or affect the practice of osteopathy, chiropractic, Christian Science, or any other treatment authorized and provided for by law for the cure or prevention of disease and ailments. [Section 462.01, F. S.; emphasis supplied.]

The naturopathy law reveals that only those naturopathic physicians who were practicing and licensed within the state on July 1, 1959, could renew their licenses thereafter, with no new license applications to be granted. This abolishment of the

licensing powers of the State Board of Naturopathic Examiners was prompted by an earlier legislative attempt, in 1957, to curtail drastically the practice of naturopathy in the state. The legislative history and reasoning is recounted in the case of Eslin v. Collins, 108 So.2d 889 (Fla. 1959), wherein Justice Thornal traces the 1957 Legislature's attempt at p. 894:

> In his message to the Legislature, the Governor urged the total prohibition of the practice of the profession in this State. He pointed out that only six other states currently recognize the profession and that there are no schools in the entire nation presently offering courses in naturopathy conforming to the requirements of the laws of the State of Florida. See p. 13, Journal of the House of Representatives, Regular Session 1957. The Legislature then proceeded to effectuate the Governor's recommendation.

Due to Eslin, *supra*, holding that legislative attempt unconstitutional, on grounds not pertinent to the issue now presented, the 1959 Legislature thereafter abolished all new or future licensing in the area.

The naturopathy law further reveals that a doctor of naturopathy must observe all regulations in regard to any and all matters pertaining to the public health in the same manner as is required of other practitioners of the healing arts. Section 462.11, F. S.

Posteducational requirements for renewal of licenses include annual attendance at the 2-day educational program of the Florida Naturopathic Physicians Association, Inc., or board-approved substitutes. Section 462.18, F. S.

Educational requirements for new licensing (prior to the 1959 abolishment thereof) were as follows:

> The said applicant shall furnish evidence, satisfactory to the board, that he is more than twenty-one years of age; that he is of good moral character; that he has completed a high school course and taken a four-year course of nine months each, or more, in a reputable, chartered school or college of naturopathy, wherein the curriculum of study included instruction in the following branches, namely: Anatomy, physiology, histology, pathology, hygiene and sanitation, chemistry, diagnosis, symptomatology, nonsurgical gynecology, midwifery, jurisprudence, first aid, philosophy, and the science and practice of naturopathy. [Section 462.05, F. S. 1955.]

There are presently no adopted rules for the State Board of Naturopathic Examiners.

Finally, concerning the statutory standards and qualifications of naturopathic physicians, the Florida Supreme Court has considered the naturopathy statute and the authority of naturopathic physicians to treat and prescribe for patients. The court stated, in State Department of Public Welfare v. Melser, 69 So.2d 347 (Fla. 1953), that in order to eliminate any doubt as to what a naturopathic physician could not do, consideration should be given to the first proviso of s. 462.01, F. S. The provision, in effect, prohibits a naturopathic physician from "practice (of) materia medica [generally, the usage and dosages of drugs] or surgery . . . ." A naturopathic physician, the court held, may treat sick and injured persons *only* for the purposes of purifying, cleansing and normalizing human tissue and, even then, is limited to certain prescribed methodologies: "Psychological, mechanical and material health sciences."

An examination of the osteopathic medical and statutory standards and qualifications show major apparent differences.

An osteopathic physician can be qualified by statute to practice surgery as well as other fields of medicine and has all the rights and is of equal rank and grade as physicians and surgeons of the allopathic, homeopathic, and eclectic schools of medicine. *See* ss. 459.02, 459.07(2) and 459.13, F. S.

Section 459.06, F. S., requires osteopathic applicants for examination to have had three years of preprofessional education, and to have served a resident internship of not less than 12 months in a hospital approved by the State Board of Osteopathic Medical Examiners and the American Osteopathic Association. Standards of professional education for practice as an osteopathic physician and surgeon are fixed in s. 459.07(1), F. S.:

> The applicant shall be a graduate of a professional school or college of osteopathy which requires as a prerequisite to graduation a 4 years' course or

> 36 months, covering the standard curriculum, as defined in s. 459.08, and giving instructions in all the subjects necessary to educate a thoroughly competent general osteopathic physician and surgeon, including but not limited to, obstetrics and surgery, and embodying instructions in drugs, anesthetics, antiseptics, germicides, parasiticides, narcotics, and antidotes, to teach principles of operative surgery and surgical diagnosis leading to the degree of doctor of osteopathy.

Section 459.08, F. S., sets forth the curriculum for a college of osteopathy, including many subject areas not mentioned by the pre-1959 legislation concerning professional educational standards of a naturopathy student. Examination of osteopathic physicians and surgeons embraces the general subjects and topics as set forth within s. 459.08.

Section 459.191, F. S., details the annual education requirements of an osteopathic license holder, requiring a minimum of 25 hours of refresher training or postgraduate study in approved areas as set forth in this section.

Importantly, in would appear that the Legislature has decisively set forth the answer to whether the medical standards and qualifications of naturopathic physicians are at least the same as those of an osteopath. Section 459.07(2), F. S., states:

> Physicians and surgeons of the osteopathic school of medicine are to have all rights and be of equal rank and grade as the physicians and surgeons of the other three schools of medicine designated as allopathic, homeopathic and eclectic.

And, s. 459.13(2), F. S., provides:

> Osteopathic physicians and surgeons licensed under this chapter shall have the same rights as physicians and surgeons of other schools of medicine with respect to the treatment of cases or holding of offices in public institutions.

The Supreme Court has held to the contrary concerning naturopathic physicians in State Department of Public Welfare v. Melser, *supra*, wherein the court upheld the right of the former Florida Department of Public Welfare to distinguish between naturopathic physicians' prescriptions and those of the various classes of other physicians in the agency's disbursal of welfare moneys.

It is readily apparent from the foregoing that the two schools of healing art differ widely in their medical and statutory standards and qualifications. Naturopaths, by virtue of the naturopathy statute, do not possess statutorily required qualifications equal to those prescribed for osteopathic physicians. Chapter 462, F. S., as construed by the Supreme Court in Melser, *supra*, prohibits naturopaths from practicing surgery or materia medica and, even in a naturopath's statutorily authorized areas of practice, he is limited to those agencies, uses, and practices specifically enumerated in s. 462.01, F. S. Osteopathic physicians are not so limited and possess a higher degree of statutorily granted rank and rights. Too, educational and posteducational requirements are dissimilar in major areas.

A naturopathic physician, therefore, does not possess "medical and statutory standards and qualifications . . . at least the same as those . . . governing the practice of osteopathic medicine," within the purview of Rule 21R-3.14, F.A.C. Application of the rule would therefore prohibit the professional association between practicing osteopathic and naturopathic physicians.

078-50—March 24, 1978

BURGLARY

DEFINITION OF "CURTILAGE"

To: E. Wilson Purdy, Director, Metropolitan Dade County Public Safety Department, Miami

Prepared by: Wallace E. Allbritton, Assistant Attorney General

QUESTION:

Does the term "structure" as defined in s. 810.011(1), F. S., for use in the burglary statute, redefine the common law definition of "curtilage" to include the area surrounding all buildings including those not used as dwellings?

SUMMARY:

The use of the term "curtilage" in the definition of "structure" in s. 810.011(1), F.S., evidences a legislative intent in derogation of the common law and expands its application to any building as opposed to only dwellings.

In an opinion filed February 7, 1978, the District Court of Appeal for the Third District answered your question in the affirmative. Greer v. State, ...So.2d.....(3 D.C.A. Fla., 1978), Case No. 76-1772. While the court did not discuss the issues at length, until such time as the Legislature or the Florida Supreme Court indicates an answer to the contrary this decision will be dispositive. Although legislation has been introduced for the 1978 session which would correct the problem caused by the enactment of the statutes at issue, I feel compelled to provide a discussion of the issues involved.

During the 1974 session, the Legislature enacted the Florida Criminal Code which provided a definition of the term "structure" which appears in s. 810.011(1), F. S., as follows:

> 810.011 **Definitions.**—As used in this chapter:
> (1) "Structure" means any building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof.

The term "structure" appears in s. 810.02(1), F. S., which defines the offense of burglary as follows:

> 810.02 **Burglary.**—
> (1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

The problem caused by these definitions is that at common law the definition of the word "curtilage" restricts it to a certain area surrounding a dwelling rather than any building of any kind. *See* Joyner v. State, 303 So.2d 60 (1 D.C.A. Fla., 1974), for a discussion of the definition of the term "curtilage."

It has long been held that laws in derogation of the common law must be strictly construed. This is especially true of penal statutes in derogation of common law because they too are to be strictly construed. Brooke v. State, 128 So. 814 (Fla. 1930). Any doubt as to the meaning of such statutes is to be resolved in favor of the citizen. Nell v. State, 277 So.2d 1 (Fla. 1973); Gibbs v. Mayo, 81 So.2d 739 (Fla. 1955); Catanese v. State, 251 So.2d 572 (4 D.C.A. Fla., 1971). In addition to this, the Legislature in its enactment of the Florida Criminal Code provided as part of its rules of construction of the code that the provisions therein be strictly construed. This stated legislative intent tracks the holdings stated above and evidences a specific intent which should be recognized by the courts.

The Florida Supreme Court in Atlantic Coast Line R. Co. v. State, 74 So. 595 (Fla. 1917), held:

> . . . statutes in derogation of common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature as found in the language actually used according to its true and obvious meaning.

Perhaps a better indication of the continued inclination of the Supreme Court to so find can be found in State v. Egan, 287 So.2d 1 (Fla. 1973), wherein the court upheld the provisions of s. 775.01, F. S., which provides that the common law in relation to crimes shall be in effect in this state except where there exists a statute on the subject. The court stated that where the legislative intent as evidenced by the statute is plain and

unambiguous there is no necessity for any construction or interpretation of it. The court then quoted the following from its decision in Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918), which appears to be on point with respect to the question you raise:

> The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reason against it. Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently the responsibility is with the Legislature and not the courts. Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction . . . .

While it would have been preferable for the Legislature to have stated that its definition of "curtilage" was in derogation of the common law, still it is my opinion that the Legislature must be understood to mean what it has plainly expressed. Therefore, until the *Greer* decision is modified by further legislation or judicial action, your question is answered in the affirmative.

078-51—March 24, 1978

GARNISHMENT

FUNDS DEPOSITED FOR GARNISHEE'S ATTORNEY'S FEES MAY NOT BE PAID IN ABSENCE OF DEMAND THEREFOR

To: Earl Rich, Highlands County Clerk of Courts, Sebring

Prepared by: Martin S. Friedman, Assistant Attorney General

QUESTION:

Should a garnishee be paid the $10 deposited by the garnishor pursuant to s. 77.28, F. S., even though no demand therefor is made?

SUMMARY:

Although the clerk may notify the garnishee (without charge) of his right to demand the $10 deposited into the registry of the court pursuant to s. 77.28, F. S., for garnishee's attorney's fees, there must be a demand therefor made by the garnishee before disbursement of such deposit is made by the clerk.

The relevant part of s. 77.28, F. S., states:

> Before issuance of any writ of garnishment, the party applying for it shall deposit $10 in the registry of the court which shall be paid to garnishee on his demand at any time after the service of the writ for the payment or part payment of his attorney's fee which he expends, or agrees to expend, in obtaining representation in response to the writ. . . .

The apparent intent of this provision is to compensate the person who is innocently drawn into the controversy for his attorney's fees in obtaining an attorney to respond to the writ of garnishment. *Cf.* U.S. Pipe and Foundry Co. v. Holcomb Pipe Lines, Inc., 465 F.2d 827 (5th Cir. 1972). Upon entry of the final judgment, the court determines the garnishee's costs and expenses, including reasonable attorney's fees, and taxes the same as costs. Section 77.28.

As clearly stated in the statute, the $10 deposit is "for payment or part payment of his [garnishee's] attorney's fee which he expends, or agrees to expend, in obtaining representation in response to the writ [of garnishment]." As such, these fees are available only to that person who engages the services of an attorney and pays or agrees to pay him for representing such person in responding to the writ, and not to that person who does not obtain legal representation in the proceeding but acts as his own attorney. *Cf.* Continental Insurance Co. v. U.S. Fidelity & Guarantee Co., 552 P.2d 1122 (Alas. 1976). Therefore, when a garnishee does not obtain legal representation in the garnishment proceeding but acts as his own attorney, he is not entitled to the $10 deposited in the registry of the court by the garnishor for the garnishee's attorney's fees.

As to the necessity that a demand be made by a garnishee who has retained the services of an attorney the statute merely requires that such demand be made. The statute does not require that the demand be made in any particular form or manner, written or oral. Although the statute neither authorizes nor requires such, there is no prohibition expressed against the clerk notifying garnishees (without charge) of the right to demand the $10 deposit for payment or part payment of their attorney's fees for representing them in the garnishment proceedings.

The condition that the deposit be paid to garnishee *for attorney's fees expended* in obtaining representation in responding to the writ prohibits the clerk from summarily paying the deposit to garnishee in absence of a demand therefor.

Therefore, your question is answered in the negative.

078-52—March 24, 1978

MUNICIPAL OCCUPATIONAL LICENSE TAXES

APPLICABILITY TO WHOLESALERS ENGAGED IN INTERSTATE COMMERCE LOCATED OUTSIDE CITY LIMITS

To: Charles H. Spooner, City Attorney, Coral Gables

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General, and Gary Preston, Legal Intern

QUESTION:

Does s. 205.042(3), F. S., permit the City of Coral Gables to levy an occupational license tax on wholesalers who are not licensable under s. 205.042(1) or (2), since a large percentage of the products of these wholesalers is shipped by interstate commerce to the wholesalers?

SUMMARY:

Section 205.042(3), F. S., permits a municipality to levy an occupational license tax on persons engaged in interstate commerce "within its jurisdiction," if not prohibited by the Commerce Clause of the United States Constitution. A wholesaler located outside the city limits, who purchases goods in interstate commerce for sale to retailers located in the city limits, may be engaged in interstate commerce "within [the municipality's] jurisdiction" depending on the nature of his contractual relationship with his customers. Municipal occupational license taxes will not be prohibited if there are sufficient "local incidents" separable from interstate commerce.

It is a fundamental principle that municipalities do not possess inherent licensing power; however, such licensing power is generally delegated to municipalities by the state. 9 McQuillin *Municipal Corporations* s. 26.22 (1964); 23 Fla. Jur. *Municipal Corporations* s. 149 (1959). Sections 166.201 and 205.042, F. S., have authorized municipalities to levy an occupational license tax in certain instances. Section 205.042(3) permits the imposition of an occupational license tax upon a person conducting business in interstate commerce who has no permanent business location or branch office in the taxing municipality, if such a tax is not prohibited by the Commerce Clause of the United States Constitution.

As a prerequisite to the imposition of an occupational license tax under s. 205.042(3), F. S., a person must be conducting business in interstate commerce. The factual situation you have presented depicts wholesalers warehoused outside the city limits who receive products shipped by interstate commerce and sell these products to retail stores within the city. Our first concern is whether these wholesalers are engaged in "interstate commerce." It is not sufficient to find that the wholesaler is engaged in interstate commerce anywhere at all. Rather, the wholesaler must be engaged in a business, occupation, or profession, in interstate commerce "within its (city's) jurisdiction." Section 205.042, F. S.

It is generally recognized that:

> [C]ommerce begins when the movement of the product actually begins, and ends when the product comes to rest at its destination. Every part or link of a continuous passage from a point in one state to a point in another state is a transaction of interstate commerce, and a temporary pause or break in the transportation does not necessarily divest a shipment of its interstate character. [15 C.J.S. *Commerce* s. 25 (1967).]

A similar wholesale warehousing operation was considered in the landmark case of Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943), wherein Justice Douglas enunciated three circumstances in which goods shipped into a state were considered to remain within the "flow of commerce." Those circumstances are:

> 1. Where the goods are purchased by the wholesaler or retailer upon the order of a customer with the definite intention that they are to go at once to the customer.
> 2. Where the goods are purchased by the wholesaler or retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer although not for immediate delivery.
> 3. Where the goods are purchased by the wholesaler or retailer based on anticipated needs of specific customers, rather than upon prior orders or contracts.

Cf. Galbreath v. Gulf Oil Corporation, 413 F.2d 941 (5th Cir. 1969); LoCicero v. Humble Oil and Refining Company, 319 F. Supp. 1133 (E.D. La. 1970); and Ford Wholesale Co., Inc. v. Fibreboard P.P. Corp., 344 F. Supp. 1323 (N.D. Cal. 1972), *aff'd.* 493 F.2d 1204 (9th Cir. 1974), *cert. den.* 419 U.S. 876 (1974). Goods in the third category above, however, require a greater particularity of evidence to show that they are "different from goods acquired and held by a local merchant for local disposition." Walling, *supra*, at 570. Galbreath, *supra*, at 945.

In Walker Oil Company v. Hudson Oil Company of Missouri, 414 F.2d 588, 590 (5th Cir. 1969), the court held that the three circumstances recognized in *Walling* were not applicable to its factual situation because "[t]he demands and identity of the indefinite members of the consuming public were unascertainable prior to the time of sale." The sales were found to be made after the flow of interstate commerce had ended and the goods were at rest within the state. *Cf.* Muhammed Temple of Islam v. City of Shreveport, La., 387 F. Supp. 1129, 1133 (W.D. La. 1974). In a companion case to *Walling*, the Supreme Court found that interstate movement had ended at the wholesaler's warehouse. It based its decision on the following facts summarized by the state court:

> It buys its merchandise from local dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of the produce and fruit is processed, much of it is sold in the condition in which it is received. The

> corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser. [Higgins v. Carr Brothers Co., 317 U.S. 572 (1943).]

Cf. Reliance Fertilizer Co. v. Davis, 169 So. 579 (Fla. 1936).

From the above analysis it is apparent that each case must be decided on the basis of its own unique factual circumstances, and for that reason I am unable to render a definite opinion on this issue. *See* Boston Stock Exchange v. State Tax Commission, 50 L. Ed.2d 514, 520 (1977). If the wholesalers in question are found to be selling goods that previously have come to rest in the state, then their business with retailers would be *intrastate* as opposed to interstate commerce and would not be within the licensing purview of s. 205.042(3). If, on the other hand, the wholesalers are found to be selling goods in the "current or flow of commerce," then their business with retailers would be *interstate* commerce and would initially qualify for licensing under s. 205.042(3), if not otherwise prohibited by the Commerce Clause of the United States Constitution.

Assuming *arguendo* that the wholesalers in question are transacting business in interstate commerce within your city's jurisdiction, we reach the next stage of analysis, *i.e.*, whether such an occupational license tax would be prohibited by the Commerce Clause of the United States Constitution. The Commerce Clause does not operate to relieve those engaged in interstate commerce from their just share of the tax burden occasioned by local incidents or activities of such instrumentalities of interstate commerce. *See* Armstrong v. City of Tampa, 118 So.2d 195 (Fla. 1960); Green v. Western Union Telegraph Company, 123 So.2d 712 (Fla. 1960); and City of Jacksonville v. Florida Fresh Water Corporation, 247 So.2d 739 1 D.C.A. Fla., 1971). The Armstrong decision, *supra*, at 199, sums up the cases interpreting the limitation of s. 8, Art. I, of the Constitution of the United States:

> The sum of the cases simply is that if the local tax has the effect of excluding or precluding or impeding the flow of commerce into and between the states then the tax is offensive to the quoted constitutional provision. . . . This is so even though it might not be discriminatory in nature or aimed at interstate commerce for the benefit of intrastate commerce . . . .

As a general rule, municipal occupational license taxes will not be prohibited if there are sufficient "local incidents" separable from interstate commerce. *See* AGO's 073-162 and 073-172 and Olan Mills, Inc. v. City of Tallahassee, 100 So.2d 164 (Fla. 1958). The factual determination of what is separable from the scheme of interstate or intermunicipal business activity is to be made in the first instance by local authorities. Attorney General Opinion 073-162. Note that the United States Supreme Court in Nippert v. City of Richmond, 327 U.S. 416 (1946), laid down the rule that it is not sufficient to find "some local incident which might be recognized as separate and distinct" from the interstate commerce because such an approach would subject all interstate commerce to state taxation and without regard to the substantial economic effects of the tax upon the commerce:

> . . . For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves "incidents" occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.

The United States Supreme Court expressed in *Nippert* concern for the cumulative effect of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town. It is apparent that the Florida Supreme Court recognizes the concern expressed in *Nippert*, for in the Armstrong case, *supra*, the court found a flat sum license tax, which the City of Tampa attempted to impose, exclusory of interstate commerce for the simple reason that the tax had to be paid as a condition precedent to engaging in interstate commerce. The court further pointed out that a privilege tax is burdensome

for the fact that it is subject to being duplicated by every community entered by the solicitors who are engaged in the interstate transaction.

Several cases in this state have dealt with the issue of municipal taxation of businesses located within the state which do not have a business location or office within the taxing city. In Duffin v. Tucker, 153 So. 298 (Fla. 1934), the court held that the solicitation of sales and the subsequent delivery of the items sold were not subject to local occupational licensing other than by the municipality wherein the home office was located because of the intermunicipal character of the sales operation. As noted in Isern v. City of West Miami, 244 So.2d 420 (Fla. 1971), it generally has been held that an activity may not be put under mandate to revenue license if it is inseparable from a scheme of activity outside the licensing municipality's jurisdictional limits. *Cf.* AGO 76-234. Moreover, pursuant to s. 205.063, F. S., vehicles used by any person licensed under Ch. 205, F. S., 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 a separate place of business, and no license may be levied on such vehicles or the operators thereof as salesmen or otherwise by a municipality, any other law to the contrary notwithstanding. *Cf.* Con Agra v. City of Pensacola, 286 So.2d 605 (1 D.C.A. Fla., 1973), holding that a city ordinance imposing a "license" for the privilege of using the city's streets for distributing or delivering merchandise by a wholesaler located and licensed in another county contravened the precursor statute of s. 205.063 containing essentially the same provisions.

Perhaps the case closest to your situation is West Point Wholesale Groc. Co. v. City of Opelika, 354 U.S. 390 (1957). The City of Opelika imposed a flat sum annual privilege tax of $250 upon any firm engaging in the wholesale grocery business which delivers groceries in the city from points outside the city. The appellant's only contact with the City of Opelika was the solicitation of orders and the delivery of goods. Similar to the situation you have proposed, the appellant was located in the state but outside the city limits. The court relied on Nippert, *supra*, in holding that:

> [A] municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce. [West Point Wholesale Grocery Co., *supra*, at 391.]

The court in Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969), held that solicitation and delivery were minimal activities within a state and without which the interstate commerce could not exist. The act of photography was found to be a local activity, separable from the interstate process, on which the license tax could be levied.

Other factors, in addition to solicitation and delivery, that should be considered in your situation are: Where the sales contracts are entered into; where the orders for goods are approved; and where payment for the goods is made. Depending on the particular method of operation of a wholesaler, the occurrence of the above-mentioned activities within the city limits appears to provide a "separable local incident" upon which an occupational license tax can be imposed. *See* Graybar Electric Co. v. Curry, 189 So. 186 (Ala. 1939), *aff'd.* 308 U.S. 513 (1939).

In view of the factual circumstances involved, I am unable to render a definite opinion on your authority to impose an occupational license tax on the wholesalers in question. However, it appears that unless the wholesalers in question engage in a "local activity," other than solicitation and delivery, that is separable from the interstate process, such an occupational license tax would violate the Commerce Clause of the United States Constitution. Your question is answered accordingly.

078-53—March 28, 1978

PUBLIC SERVICE COMMISSION

REGULATION OF MOTOR CARRIER RATE BUREAUS

To: George H. Sheldon, Representative, 69th District, Tallahassee

Prepared by: Staff

QUESTIONS:

1. The Public Service Commission cites s. 323.07 and 323.08, F. S., as authority for the promulgation of rules authorizing the establishment of rate organizations. Are those rules promulgated by the Public Service Commission governing rate organizations valid, based on statutory language?
2. Can the Public Service Commission delegate to rate organizations its statutory responsibility for rate setting, and does the procedure allowing the submission of rates by rate organizations constitute a delegation of the commission's responsibility for rate setting?
3. Assuming the delegation of rate setting is valid, can the Public Service Commission require an individual carrier to participate in a rate organization rather than to submit its rate request directly to the commission for approval?
4. Is the practice of price fixing encouraged by the Public Service Commission and engaged in by various motor carriers in Florida violative of Florida Statutes, specifically Ch. 542?
5. If such practice is violative of Florida Statutes, can the Public Service Commission, by rule, grant an exception to antitrust prosecution?
6. Assuming that the delegation of rate setting is valid, can those rate organizations operate without complying with the provisions of Florida's Public Records and Sunshine Laws?

SUMMARY:

In summary response to the questions posed, I conclude that:

As to question 1: To the extent that the rules of the Public Service Commission do not mandate a uniform rate, they can be interpreted to be valid.

As to question 2: So long as the commission retains and exercises final decision making authority with regard to motor carrier rates, there exists no unconstitutional delegation of power to private parties.

As to question 3: Rules of the commission should be interpreted in a manner that assures each carrier the right to submit to the commission individual rates. Your question must, therefore, be answered in the negative.

As to questions 4 and 5: An agreement among motor carriers to submit identical rates to the commission constitutes a *per se* violation of Ch. 542, F. S., and the scheme of regulation established pursuant to Ch. 323, F. S., does not immunize such conduct from application of the state antitrust law.

As to question 6: Both the Public Records Law, Ch. 119, F. S., and the Sunshine Law, Ch. 286, F. S., apply to all activities of rate bureaus.

AS TO QUESTION 1:

You request my opinion as to the validity of certain rules adopted by the Florida Public Service Commission (PSC or commission) which authorize the establishment and regulation of motor carrier rate organizations. Analysis is posited on the rule that an administrative agency may only adopt rules within the ambit of the authority granted it by statute. My review is, therefore, first directed to whether the Legislature has authorized the commission to promulgate rate filing rules and second, to whether the

commission, in promulgating its rules, has stayed within the regulatory boundaries prescribed by the Legislature.

By statute, the commission is granted the authority to regulate motor carriers and generally to promulgate rules (s. 323.07, F. S.).

More specific statutory language, critical to determination of the validity of the commission's rules pertaining to motor carrier rate organizations, is found at s. 323.08, F. S., which provides in pertinent part:

> (1) *Every motor carrier* holding a certificate of public convenience and necessity for common carriage *shall maintain* on file with the commission *a schedule of the rates, fares, charges and classifications*, if any, and a time schedule, if any, *of all motor vehicles* operated under such certificate. . . .
>
> (2) *Whenever such rates or fares* or time schedules *are found to be unreasonable, the commission*, upon its own motion, or upon complaint, *shall upon hearing prescribe reasonable rates* and time schedules *to take the place of those found unreasonable*, and such new rates shall be filed in place of the rates and schedules superseded. No rates or time schedules filed with the commission shall be charged by any such motor carrier except as provided by rules and regulations adopted under this section by the commission. *The commission may adopt rules and regulations governing the filing of tariffs and rate schedules and the method whereby changes in such tariffs and rate schedules may be made effective.* In the adoption of such rules and regulations the commission is authorized to give consideration to the desirability of having tariff filing rules similar to those of the Interstate Commerce Commission. . . . (Emphasis supplied.)

The commission's authority to promulgate rate filing rules is clear.

The PSC has promulgated rules authorizing the operation of rate organizations. A rate organization is defined in Rule 25-5.130(5), F.A.C., as any organization (association, bureau, conference, committee) approved by the commission to submit tariffs for its members. The organization may be established upon application to and approval by the commission (Rule 25-5.130). Rule 25-5.133, F.A.C., sets out criteria for approval. Of particular significance is the requirement in Rule 25-5.133(2)(e) that the bylaws of an approved organization guarantee all member carriers "the free and unrestrained right to take independent action either before, during or after the procedure" (to establish the tariff filing to be submitted to the commission).

In apparent contradiction is Rule 25-5.132, F.A.C., which identifies two types of carriers that may file tariffs: An approved rate organization or a carrier which is not a member of a rate organization. No provision is made for independent or individual rate filings by those carriers which are members of rate organizations. In addition, Rule 25-5.134, F.A.C., appears to prohibit carriers outside the approved rate organizations from filing general rate increases. The "general rate increase" is defined at Rule 25-5.130(3), F.A.C., as a "proposal to change substantially all or part of the tariff provisions" applicable to a type of carrier. In view of this prohibitory language, the filing of general rate increases appears to be exclusively within the province of approved rate organizations.

Resolution of this apparent contradiction is crucial to the validity of the commission's rules. A determination that the rules represent a valid exercise of rulemaking power requires a finding that the regulatory scheme established by the rules does not exceed the scope of regulation statutorily envisioned by the Legislature. If the commission's interpretation of its rules fails to guarantee to individual members of a rate organization the free and unrestrained right to submit individual tariff filings, the commission has, in effect, commanded a single uniform filing by a majority of the members of an industry.

If, in implementation of its regulatory authority, the commission evidences a clear preference for single filings, this preference would discourage price competition among rate organization members and would be tantamount to setting up a uniform rate structure.

Although the Legislature has clearly given the PSC rulemaking authority, it has not granted the PSC the authority to establish, by rule, a uniform rate system for the motor carrier industry. As discussed in answer to questions 4 and 5, *infra*, the degree of regulation set up in the rate approval scheme does not extend to the elimination of all price competition in the motor carrier industry. The Florida Legislature has not indicated any intention to regulate motor carriers so as to eliminate all price competition among the members of the industry. Any rules promulgated or relied upon by the PSC which

result in uniform rate structure would be invalid as beyond the scope of regulation envisioned by the Legislature.

By comparison, the Florida Supreme Court has considered a question touching on uniform rate filings by freight forwarders regulated by the PSC under ss. 323.51-323.67, F. S. *See* Florida Freight Forwarders v. Bevis, 277 So.2d 529 (Fla. 1973). In *Florida Freight Forwarders*, the issue was whether the PSC had substantial evidence to support its refusal by Order No. 10032 to allow a rate differential between freight forwarders which provided pickup services for goods and commodities collected and those forwarders which did not provide such service. Although the validity of PSC Order No. 10228 requiring freight forwarders to file uniform rates was not raised, that order was affirmed by the court at 529. However, the arguments for the validity of PSC orders of uniform rates for freight forwarders may be stronger than those favoring uniformity for motor carriers. First, the degree of regulation of the freight forwarders and the extent of the commission's rulemaking authority were more extensive and more explicit. Contrast s. 323.53 and ss. 323.55-323.57 with s. 323.07 and s. 323.08, F. S. Second, the PSC had determined by hearing that uniform rate filings by freight forwarders were desirable (Respondent's Brief in Opposition to the Petition for Writ of Certiorari, p. 2.). By comparison, the more limited statutory regulation of motor carriers and the less generous grant of specific rulemaking authority in s. 323.08 would support a finding that the PSC does not have the authority to require uniform rate filings by the motor carriers.

I do not reach a conclusion of invalidity in this instance however. The ambiguity between the apparent, albeit indirect, guarantee of individual filings by rate organization members in Rule 25-5.133(2)(e), F.A.C., and the sources of tariff filings in Rule 25-5.132, F.A.C., need not be construed to preclude individual filings. The wording of Rule 25-5.132 allows reference to Rule 25-5.133(2)(e):

> . . . *Subject to all of the provisions of Part VII, Rule Chapter 25-5*, tariffs may be filed with the Commission by either an approved rate organization for its member carriers, or a carrier which does not participate in a rate organization. (Emphasis supplied.)

A finding that Rule 25-5.133(2)(e) governs, *i.e.*, that any member of a rate organization may file independently of the organization, would preserve the validity of the rules. The PSC would not be establishing a uniform rate system and this would not exceed the statutory scheme of regulation.

The tension between Rule 25-5.132, F.A.C., and Rule 25-5.133(2)(e), F.A.C., is more appropriately characterized as an ambiguity rather than a clear inconsistency with the statute itself. In cases of ambiguity, courts will presume the validity of administrative rules and interpret the rules so as to give effect to that presumption. *Cf.*, Sumlin v. Brown, 420 F. Supp. 78, 81-82 (N.D. Fla. 1976). Following this standard of rules construction, I therefore conclude that the commission's rules establishing rate bureaus are valid to the extent those rules do not limit the unrestrained right of motor carriers to submit individual tariff filings.

The following point should be carefully distinguished. A conclusion that rules which establish rate bureaus without mandating uniform rates may be a valid exercise of statutory authority is not equivalent to a conclusion that the carriers which participate in the organizations are immune from prosecution under the state antitrust laws, Ch. 542, F. S. Both conclusions look to the scope of legislative regulation. While the result may seem anomalous, analyses of the commission's rulemaking authority and the immunity of third parties to another Florida Statute are distinct.

AS TO QUESTION 2:

Your second question may be answered by determining whether a delegation has occurred when private parties submit rates for the ultimate approval of an administrative agency. Applicable case law clearly establishes that there is no delegation of authority to private persons under these circumstances so long as the administrative agency makes the final determination. *See* State v. State Road Department, 173 So.2d 693 (Fla. 1965).

The fact that an agency grants approval of rates submitted by private parties does not mean that the agency has delegated its ratemaking function. Perhaps the leading case on point is Edwards v. United States, 91 F.2d 767 (9th Cir. 1937). In *Edwards*, a private party challenged the constitutionality of the Agriculture Adjustment Act, 7 U.S.C.A. s.

601. One theory advanced by the plaintiff was that the act permitted private parties to exercise legislative power based on the requirement that the Secretary of Agriculture's orders be consistent with a marketing agreement established by private parties. The court in rejecting this argument stated at 789:

> We think it clear that there is no delegation of legislative authority to private individuals affected by the provisions of the act which are assailed here. It is the Secretary who makes the decisions and issues the orders, not the growers or handlers whose approval he must have.

In the context of your question, application of the quoted language from *Edwards* supports a determination that no delegation of authority, in the constitutional sense, has occurred merely bacause private parties initially submit rate proposals. The crucial factor in reaching this conclusion is the administrative agency's retention and exercise of ultimate authority to determine rates. *Also see In re* Landquist, 70 F.2d 929, 933 (7th Cir. 1937); Dotty v. Love, 295 U.S. 4 (1935); Currin v. Wallace, 306 U.S. 1 (1937); Herrin v. Arnold, 82 P.2d 977 (Okla. 1938); Kaplan v. Dee, 77 So.2d. 768 (Fla. 1955); and Miller v. Ryan, 54 So.2d 60 (Fla. 1951). *Cf.* State v. Allstate Insurance Co., 97 So.2d 372 (Miss. 1957).

Sections 323.07 and 323.08(2), F. S., authorize the Public Service Commission to set or approve rates at a public hearing. Moreover, various rules promulgated by the Public Service Commission make it clear that the commission has the affirmative duty to determine that all rates approved or promulgated by it are reasonable. Rule 25-5.131, F.A.C., provides that general rate increases "shall be initiated by written petition to the Commission" and that certain minimum filing requirements, as prescribed in Rule 25-5.140, F.A.C., must be met. It is clear that the Public Service Commission is required by its own rules and by statute to thoroughly investigate any proposed general rate increase. *See* State v. Florida East Coast Ry. Co., 59 So. 385 (Fla. 1912) (commission has a duty to inquire into and investigate all rates).

AS TO QUESTION 3:

Rule 25-5.132, F.A.C., unequivocally guarantees the right of carriers not members of rate bureaus to file tariffs directly with the commission:

> Subject to all of the provisions of Part VII, Rule Chapter 25-5, tariffs may be filed with the Commission by either
> (1) An approved rate organization for its member carriers, or
> (2) A carrier which does *not participate in a rate organization* . . . .
> (Emphasis supplied.)

The procedure by which nonparticipating carriers may submit tariff filings other than general rate increases is specified in Rule 25-5.134, F.A.C.

In response to question 1, I concluded that, to give validity to the rules, Rule 25-5.132(1), F.A.C., was to be harmonized with 25-5.133(2)(e), F.A.C., in order to guarantee member carriers individual filing access to the commission as well. Any rule which precludes individual submission and thus requires a uniform submission would be invalid since it would be inconsistent with the regulatory scheme of Ch. 323, F. S.

AS TO QUESTIONS 4 AND 5:

Your fourth and fifth questions relate to the application of the state's antitrust statute, Ch. 542, F. S., to the activities of the carriers. It is proper to discuss questions four and five together since both questions turn on the scope of regulation found in Ch. 323, F. S. It is fair to say that if the Legislature intended Ch. 542 to apply to motor carriers, it did not intend to authorize the PSC to immunize activities that would otherwise be illegal. This conclusion follows from the principle that the commission only has that authority which is expressly or implicitly conferred by the Legislature. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493 (Fla. 1973).

Chapter 542 of the Florida Statutes prohibits combinations between competitors if the combination is an unreasonable restraint of trade. Section 542.05, F. S., specifically prohibits combinations to keep "transportation at a fixed or graduated figure" or agreements to set the price of transportation services:

542.05 Combinations prohibited; penalty.—
(1) Any person who shall or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons or of either two or more of them, for either, any or all of the following purposes:

* * * * *

(c) *To prevent competition in the* manufacture, making, *transportation,* sale, or purchase *of merchandise, produce, or commodities,* or to prevent competition in aids to commerce;

* * * * *

(e) *Except as otherwise provided in chapter 541, to make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves* not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, *or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price may in any manner be affected.* (Emphasis supplied.)

Chapter 541, the so-called "Fair Trade Law," allowed *vertical* price fixing under some circumstances. It was repealed by s. 1, Ch. 75-15, Laws of Florida, effective October 1, 1975. In any case, it would have no application to horizontal price-fixing agreements, *i.e.,* agreements among competitors.

The agreement under scrutiny is an agreement between members of a rate organization to submit a single joint tariff for approval, *i.e.,* an agreement not to exercise the right as guaranteed by the bylaws to submit an independent rate. So long as individual access to the PSC is guaranteed, the membership agreement among participating carriers would be of no concern unless shown to unavoidably and necessarily result in uniformity of rates.

Absent state regulation, it is clear that the agreement described above would be *per se* illegal. Combinations between competitors to set the same or a minimum price have long been held to violate the federal antitrust laws. United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). It is clear that an agreement among motor carriers to submit only one rate or to use one rate as minimum would be a price fix between competitors and would violate the Sherman Act, 15 U.S.C. s. 1. By the same token, such an agreement to fix or control prices would violate Ch. 542, F. S. City Gas, *infra;* Hardrives v. East Coast Asphalt Corp., 166 So.2d 810 (2 D.C.A. Fla., 1964); Ricou v. Crossland, 88 So. 381 (Fla. 1926).

It is fair to say that the state courts have followed federal precedent controlling at the time of the state decisions. *See* Lee v. Clearwater Grower's Association, 111 So. 722 (Fla. 1927); *compare* Marin Co. Bd. of Realtors, Inc. v. Palsson, 549 P.2d 833, 835 (Cal. 1976) (interpreting the California statute on which Ch. 542 was apparently modeled as following federal precedent). Of particular note is Pensacola Associates v. Biggs Sporting Goods Co., 353 So.2d 944 (1 D.C.A. Fla., 1978), wherein the First District Court of Appeal, in applying a rule of reason test to a restrictive covenant, relied on federal precedent in conducting its analysis.

The application of Ch. 542, F. S., takes on an entirely new perspective, however, because of the state's regulation of motor carriers under Ch. 323, F. S.

The Florida Supreme Court has utilized a single-step analysis, considering the pervasiveness of the regulatory scheme as the key to whether the agreement violated Ch. 542, F. S. City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965).

In *City Gas,* two private utility companies, regulated by the PSC pursuant to Ch. 366, F. S., agreed to allocate territories. Subsequently, the commission approved the

agreement, basing its authority on the fact that it had the statutory duty to approve capital construction of facilities and that the agreement to divide service territories avoided duplication of facilities. One party to the agreement breached its terms and the other sought enforcement of the agreement. The breaching party asserted that the agreement was invalid because it violated Ch. 542, F. S.

The court reasoned that not all agreements restraining trade violated Ch. 542, F. S. Instead, only those agreements that have the

> effect of leaving an unreasonable degree of control over price, production or quality of product or service in the hands of private parties thereto and would evidence the kind of monopolistic advantage that Ch. 542 and other statutes of [its] kind were intended to prevent [182 So.2d at 432.]

would be violative of Ch. 542.

Applying this reasoning to the question posed, the dispositive consideration is whether the public is sufficiently protected by the PSC to remove the activity in question from the reach of the state antitrust law. Under the facts in *City Gas*, the court concluded that the agreement in question did not grant private parties the power to control prices or diminish the quality of service. The court reached its conclusion because of the extensive regulatory power of the PSC under Ch. 366, F. S.

However, the court specifically stated that government regulation of an industry such as a public utility does not completely withdraw the industry from the reach of antitrust laws. Instead, the *City Gas* court seemingly adopted a case-by-case approach, requiring analysis of the conduct in question and the degree of statutory control over the industry:

> We will not go so far as to hold that the regulation of a specified industry as a public utility automatically withdraws that industry from the operation of the antitrust statutes. It is enough to say that the agreement under discussion will not be held to be violative of those statutes unless, all things considered, it threatens the results which they were designed to prevent. In determining whether the agreement threatens to result in monopolistic control over prices, production, or quality of service, it is appropriate to consider the kind and extent of control to which both of these parties are subject under F. S. Ch. 366, F S.A. [182 So.2d, at 434.]

City Gas suggests that if private parties have the power to control price, then Ch. 542, F. S., would apply. The question turns, therefore, on whether the Public Service Commission's power to set rates or approve rates provides complete protection for the public so that it would be improper to apply Ch. 542.

It may be argued with considerable force that the authority of the Public Service Commission to set or approve rates provides adequate protection to the public. Agreement among carriers not to exercise their right to submit independent tariffs would therefore not harm the public. Yet, neither *City Gas* nor any other Florida authority definitively resolves this question.

Section 323.07, F. S., authorizing commission approval of rates, serves a dual purpose of protecting the public from unreasonable rates and in aiding carriers to secure a reasonable return on their investment. Neither purpose necessitates a uniform rate. Both could be accomplished within the statutory scheme by commission approval of rates individually submitted. If administrative efficiency required a less tedious approach, the commission could approve maximum and minimum rates within a zone of reasonableness. The general policies of Ch. 323, F. S., as interpreted by Florida courts, do not require, and thus cannot be said to contemplate, a single uniform rate.

It appears, moreover, that the *City Gas* court was greatly influenced by the fact that the commission's approval of the agreement was intended to "eliminate competition between and *duplication of facilities and services by the parties within the area covered.*" [182 So.2d at 430; emphasis supplied.]. In other words, application of Ch. 542, F. S., in the context of *City Gas* would have been repugnant to the statutory scheme. This follows since a contrary result would have interfered with the commission's authority to control capital construction and avoid wasteful duplication of facilities.

In contrast to *City Gas*, wherein approval of the agreement in question was consistent with the commission's statutory duties, it seems that the form of agreement which is the subject of this discussion cannot readily be reconciled with the legislative policy of Ch. 323, F. S. That chapter does not mandate submission of uniform rates.

Florida courts have consistently emphasized that s. 323.03, F. S., is designed to avoid congestion of the public highways and to generally insulate motor carriers from "ruinous competition." *See* Central Truck Co. v. Railroad Commission of Florida, 1 So.2d 470 (Fla. 1941). Yet, it is not intended that the motor carriers be entirely insulated from competition. Florida Motor Lines v. State Railroad Commission, 132 So. 851, 861 (Fla. 1931). Legislative awareness of the need to prevent ruinous competition is manifested in the provision for certificates of public convenience and necessity required by Ch. 323, F. S., which establishes substantial market entry barriers and results in insulation of motor carriers from the most extreme forms of competition.

In State *ex rel.* McKenzie v. Willis, 310 So.2d 1 (Fla. 1975), citing *City Gas*, the court suggested that an agreement to divide territories would have to be approved by the commission. Note also that s. 350.55, F. S., requires the commission to approve any agreement regarding common carrier rates. Motor carriers are not included in the definition of common carriers under s. 350.11(1), F. S.

Since no Florida case is directly controlling, it is appropriate to review the case law of other jurisdictions. The approach taken under federal law is to determine whether the agreement violates Ch. 542, F. S., and then to determine whether the commission's regulatory power can be exercised to provide a defense for the parties to the agreement.

Federal decisions have long recognized that despite the presence of regulation of price, antitrust laws apply unless there is a specific statutory exemption or the application of the antitrust laws would be repugnant to the scheme of regulation. United States v. Trans-Missouri Freight Ass'n., 166 U.S. 296 (1897). This principle was again affirmed in United States v. Joint-Traffic Association, 171 U.S. 505 (1898), and reiterated in State of Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, (1945). In the later case, the State of Georgia alleged that numerous railroads combined to form rate bureaus that illegally established discriminatory rates violative of the Sherman Act. The defendants, members of rate organizations, asserted that the Interstate Commerce Commission had primary jurisdiction and, in any case, that the rate bureaus were sanctioned by the commission. The Supreme Court affirmed the principle that the antitrust laws generally apply to regulated industries except to the extent that their application would be repugnant to the scheme of regulation.

> Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *United States v. Borden Co., Supra*, 308 U.S., at pages 198, 199, 60 S.Ct. at pages 188, 189, 84 L.Ed. 181. [324 U.S. at 456, 457.]

In the *Pennsylvania Railroad* case, the United States Supreme Court reasoned that the regulatory power of the Interstate Commerce Commission to fix or approve rates was the power to establish a zone of reasonableness. The public was entitled to price competition between carriers within the zone of reasonableness. Price competition within the zone was deemed in no way repugnant to the ICC's power to fix and approve rates. The antitrust laws therefore applied and the conduct of the members of the rate organizations was condemned.

In 1948, in response to *Georgia v. Pennsylvania Railroad Company*, Congress amended the Interstate Commerce Act to, in some instances, specifically recognize rate bureaus and, where recognized, provide relief from antitrust laws. *See* 49 U.S.C.A. s. 5b(2),(9). The controlling fact, for purposes of this review, is that express legislation was necessary to create an exemption to federal antitrust laws because the courts had found no repugnancy between price competition and the ICC's regulatory powers. *See* State v. New York Movers Tariff Bureau, Inc., 264 N.Y.S.2d 931 (N.Y. S.Ct. 1965) (operation of rate bureaus does not violate state antitrust statute since the state specifically enacted an exemption tracking the federal exemption of motor carriers). By analogy, express legislation of the Florida Legislature would be necessary to create an exemption to the Florida Antitrust Law.

In assessing, at the federal level, the balancing of the antitrust laws and a regulatory scheme, the courts have concluded that general rate regulation does not preclude the application of the antitrust laws. The reasoning would be applicable at the state level as well; other states have followed this general rule. *See* Southwest Utilities, Inc. v. South Central Bell Telephone Co., CCH Trade Reg. Rep. (1977-1 Trade Cases) Para. 61, 303 at 70,988, 70,992 (La. Ct. App. 1976) (rates which are just and reasonable may still form part of an overall scheme violative of the antitrust laws), and Mazzola v. The Southern New England Telephone Co., CCH Trade Reg. Rep. (1976 Trade Cases) Para. 60,439 at 66,926

(Conn. 1975) (commission has no implied power to determine defendant's liability since there is only a repeal of the state antitrust law in cases of plain repugnancy). The *Mazzola* court characterized the state regulation defense as the "state action defense." This terminology is confusing since the state action defense normally refers to the concept that the federal antitrust laws were not intended to negate comprehensive state regulation. *See* Cantor v. Detroit Edison Company, 428 U.S. 579, 600 (1976). It would seem that different policies are at play when the issue is whether the federal antitrust laws were intended to displace state regulation because of the Supremacy Clause. There is a serious question as to whether the scheme of regulation detailed in Ch. 323, F. S., would provide a defense to a case brought under the federal antitrust laws. *See* Opinion of the Attorney General of Arkansas, CCH Trade Reg. Rep. (1976-1 Trade Cases) Paragraph 60584 at page 68,750. *Cf.* Opinion of North Dakota Attorney General, 5 CCH Trade Reg. Rep. (1976) Paragraph 60,586 at 68,753 (March 5, 1976) (private rate bureaus do not violate a state antitrust statute because of a specific statutory mandate of rate uniformity).

This conclusion is not at all dissimilar to that reached by the Florida Supreme Court in *City Gas*, although the Florida Court framed its analysis differently. In all cases, the central question is whether the Legislature exempted the industry from the antitrust statute. Under similar circumstances the federal courts have held that the exemption must be express, as Congress provided in 1948 in response to Georgia v. Pennsylvania Railroad. *See* 49 U.S.C.A. s. 5b(2),(9). This was true since the application of the antitrust law was not repugnant to the scheme of regulation of the Interstate Commerce Commission.

I find no express legislative authority to exempt the motor carriers from the antitrust laws. Furthermore, I am unable to find the requisite intent from other legislative circumstances. Under such circumstances, one must give clear expression of an intent to supplant Ch. 542, F. S., since the general rule is that the PSC only has those powers that are expressly or impliedly conferred upon it. Recently, in State of Florida, Department of Transportation v. Mayo, ... So.2d ..... (Fla. Slip Opinion, Case No. 50,484, Filed Nov. 30, 1977), the court applied a strict rule of construction to the existence of implied power in the Public Service Commission at p. 2:

> Our analysis begins with the recognition that the Public Service Commission was created and exists through legislative enactment. Being a statutory creature, its powers and duties are only those conferred expressly or impliedly by statute. City of West Palm Beach v. Florida Public Service Commission, 224 So.2d 322 (Fla. 1969). Southern Gulf Utilities, Inc. v. Mason, 166 So.2d 138 (Fla. 1964). *And any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.* City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493 (Fla. 1973). (Emphasis supplied.)

An implied power to adopt rules that would immunize carriers from the very specific provisions of Ch. 542 must meet the demanding standards that the Supreme Court has established in *State of Florida, Department of Transportation v. Mayo.*

It is true that s. 323.08(2), F. S., provides that in the adoption of rules the commission is authorized to give consideration to the desirability of having tariff filing rules similar to those of the Interstate Commerce Commission. The apparent purpose of s. 323.08(2), F. S., is to foster procedural uniformity and consistency with federal regulation. Questions dealing with the general policy regarding competition are clearly outside the scope of this procedural language. If the language is more than procedural, *i.e.*, if the Legislature has delegated to the PSC a choice on whether or not to permit price fixing among competitors, the delegation raises severe constitutional questions. Harrington & Co., Inc. v. Tampa Port Authority, ... So.2d ..... (Fla. Slip Opinion, Case No. 50,111, filed January 17, 1978). In any case, it is the Reed-Bulwinkle Act, 49 U.S.C.A. s. 5b(2),(9), not the ICC rules, which, under the federal scheme, immunizes the carrier. The fact that the Florida Legislature may allow the PSC to consider the desirability of having tariff filing rules similar to those of the ICC does not, standing alone, indicate that the PSC has the authority to immunize carriers from the application of the antitrust laws.

Second, it can be argued that the Legislature approves the existence and practices of rate organizations because it passed a comprehensive revision of the entire motor carrier law in Ch. 77-434, Laws of Florida, with knowledge of the organization's activities. Legislative acquiescence, however, is not sufficient to create an exemption to another statute. Legislative concern with competition in the transportation of goods is explicitly

stated at s. 542.05, F. S. Acquiescence to an administrative interpretation is not sufficient to create an exemption, which in effect repeals s. 542.05 (the specific application of Ch. 542 to the transportation industry).

The approach suggested by the *City Gas* court raises serious questions concerning the activities of carriers and the manner in which they submit rates to the commission. I conclude that the language found at s. 323.08(2), F. S., authorizing the PSC to consider the advisability of having tariff filing rules consistent with those of the Interstate Commerce Commission is not a specific adoption of the Reed-Bulwinkle Act; rather, it is intended only to facilitate procedural uniformity. *Cf.* s. 501.204(2), F. S. Therefore, in light of the foregoing analysis, the Public Service Commission should reassess its procedures concerning rate bureaus. Additionally, I urge the Legislature to address this question and more generally the appropriateness of rate uniformity among motor carriers.

AS TO QUESTION 6:

In Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977), the Florida Supreme Court held that the Public Service Commission is not exempted from operation of s. 286.011, F. S. *See also* AGO 073-344.

The Supreme Court has stated that the Sunshine Law must be broadly interpreted to avoid frustration of the underlying public policy through "evasive techniques." City of Miami Beach v. Berns, 245 So.2d 38, 41 (Fla. 1971). For example, the court will not tolerate evasion of the statute by "an informal conference or caucus of any two or more members [which] permits crystallization of secret decisions to a point just short of ceremonial acceptance." *Supra* at 41. It has since been held that application of the law does not necessarily require the presence of two or more members of the agency. In Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), a citizens' planning committee composed of *private* citizens and established by the town council which appointed its members was found to be subject to the Sunshine Law. The committee existed to oversee a planning firm retained by the town council in development of a new zoning plan for the town. Numerous private discussions between the committee and the planners took place. The plan was presented to the council which, after full public meetings and hearings, approved the plan substantially as presented by the committee and planners. The court held that the committee was an "alter ego" of the town council and, therefore, had no more right to meet privately with the planners than would the council members themselves. The court reasoned that:

> One purpose of the government in the Sunshine Law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted *by any committee or other authority* appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken. [296 So.2d at 477; emphasis supplied.]

An agency subject to the Sunshine Law may not, therefore, avoid the requirements of the statute by delegating its own statutory authority to another entity though its action might be inadvertent and in good faith. In Warden v. Bennett, 333 So.2d 97 (2 D.C.A. Fla., 1976), *cert. den.* ..... So.2d ..... (Fla. 1977), however, the district court distinguished *Town of Palm Beach* by finding that an administrator who simply carried out agency policies formulated in the sunshine was not subject to the Sunshine Law. The court found the same to be true of a factfinding council which simply reported to the administrator. The distinguishing characteristic for purposes of Sunshine Law analysis is whether the individual or body in question actually formulates or assists in the formulation of official policy and governmental decisions or acts solely in an administrative capacity. *See and compare* State *ex rel.* Reno v. Watkins, *et al.*, 11th Judicial Circuit, Case No. 78-3020, wherein an advisory board, closely related to the decisionmaking process and appointed by the single individual charged with making the final, binding appointment of a new police chief, was held subject to the Sunshine Law.

Applying these rules to the instant situation, I find the rate bureaus to be an integral link in the deliberative process from which official policy ultimately evolves. Section 323.08, F. S., provides that no rates shall be fixed or changed except in accordance with the rules and regulations of the commission. The authority delegated to rate bureaus pursuant to these rules appears to be quite broad. The commission may, of course, deny approval of a rate structure submitted by a rate bureau. However, the rules provide the mechanism for submitting rate proposals to the secretary of the organization's rate committee, for notice of hearing to all member carriers and others subscribing to the organization's publication, and for a hearing at which interested parties may be heard. Clearly, rate organizations are conducting activities which are part of the deliberative process and which, if done by the commission, would be subject to the Sunshine Law. This process opens the possibility of quick acceptance by the commission itself, albeit in a public meeting, without the benefit of public *deliberation*. Hence, even though there has been no delegation of authority in the constitutional sense, there still has been official action within the meaning of Ch. 286, F. S.

In response to your inquiry regarding the applicability to rate bureau operations of Florida's Public Records Law, s. 119.01, F. S., announces as the general state policy on public records that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." Section 119.011, F. S., defines "public records" and "agency" for the purposes of that chapter to mean:

> (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 an 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.* (Emphasis supplied.)

Section 119.07(1), F. S., requires:

> Every person who has custody of public records shall permit the records to be inspected and examined at reasonable times, 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. . . .

It can hardly be questioned that the Public Service Commission itself falls within the comprehensive definition of "agency" set forth in s. 119.011(2), F. S. *See* AGO 073-344. Since the rate organizations are established by commission approval for the purpose of developing tariff proposals and submitting recommendations to the commission for final approval, it is my opinion that a rate organization also falls within the statutory definition of "agency," as a "private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The agency's records would clearly fall within the definition of "public records" which includes records (in any physical form) "made or received . . . in connection with the transaction of official business by any agency."

078-54—March 29, 1978

PAROLE AND PROBATION

PRISONERS RELEASED ON MANDATORY CONDITIONAL RELEASE LIABLE FOR MONTHLY SUPERVISION PAYMENT

To: Charles J. Scriven, Chairman, Florida Parole and Probation Commission, and Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, Tallahassee

Prepared by: Staff

QUESTION:

Do Chs. 77-321 and 77-428, Laws of Florida, amending s. 945.30, F. S. (1976 Supp.), extend the prescribed monthly contribution requirements to persons released by virtue of gain-time allowances and deductions in addition to those persons placed on parole or probation?

SUMMARY:

The monthly contribution or payment duty imposed by s. 945.30, F. S. (1976 Supp.), as amended by Chs. 77-321 and 77-428, Laws of Florida, applies to those persons released on so-called mandatory conditional release (those who have been released by virtue of statutory gain-time deductions or allowances).

In my most recent opinion on this subject, AGO 077-39, I addressed your 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.)?

In response to that question, I concluded that unless legislative clarification as therein specified were provided by the Legislature, and unless judicially determined otherwise, the payment duty imposed by s. 945.30 applied only to those individuals placed on parole by the Parole and Probation Commission and those individuals placed on probation by the courts.

I also stated in AGO 077-39 that this matter should be brought to the attention of the Legislature so that a policy determination might be made as to whether persons on so-called mandatory conditional release should be required by law to contribute toward the cost of their supervision and rehabilitation along with parolees and probationers. I further suggested that legislative clarification be sought as to what conditions, if any, the commission or the Department of Offender Rehabilitation might impose upon persons released by virtue of statutory gain-time allowances and deductions and as to what procedures should be provided in regard to the revocation of statutory gain-time allowances and deductions. As was the case with AGO 077-39, your need for this opinion arises from the fact that the Parole and Probation Commission is again receiving warrant requests seeking the arrest of inmates placed on so-called mandatory conditional release for failure to pay cost of supervision and rehabilitation payments pursuant to s. 945.30, F. S., as amended by Chs. 77-321 and 77-428, Laws of Florida.

Chapter 77-321, Laws of Florida, does amend s. 945.30, F. S. (1976 Supp.), for the purposes of this opinion. The essence of your question is whether the conclusion I reached in AGO 077-39 (and which I had earlier reached in AGO 076-184) is affected by the 1977 Legislature's enactment of Ch. 77-428, Laws of Florida, amending s. 945.30 to now provide in pertinent part:

> Any person under probation or parole supervision . . . shall be required to contribute . . . to a court-approved public or private entity providing him with supervision and rehabilitation. Any failure to pay such contribution shall constitute grounds for the revocation of *probation* by the court or the revocation of *parole* by the Parole and Probation Commission. (Emphasis supplied.)

For the reasons that follow, I am of the opinion that the conclusions and reasoning of AGO's 076-184 and 077-39 are affected by the enactment of Chs. 77-321 and 77-428, Laws of Florida.

I have examined the titles of both Chs. 77-321 and 77-428. The title of Ch. 77-321 provides that it is an act "relating to *probation*." (Emphasis supplied.) The title of Ch. 77-428 provides that it is an act "relating to parole and probation." The title to Ch. 77-428 also provides that the act is "exempting certain persons on probation and parole from contributing to the cost of their supervision," and that failure to make the contributions constitutes grounds for revocation of "probation or parole." The title of a legislative act

serves the purpose of providing notice to the public as to the subject matter covered in the body of the act, and serves also the important function of defining and limiting the scope of the act. County of Hillsborough v. Price, 149 So.2d 912, 914 (2 D.C.A. Fla., 1963); Finn v. Finn, 312 So.2d 726, 730 (Fla. 1975).

In Ch. 77-428, Laws of Florida, the legislative change which is relevant to the instant question is the amendment of the first sentence in s. 945.30, F. S. (1976 Supp.). That sentence had begun: "Anyone on probation or parole . . . ." As amended by Ch. 77-428, it provides that "Any person under probation or parole supervision . . . shall be required to contribute . . . ." And it goes on to provide that failure to contribute constitutes grounds for revocation of *parole* or *probation.* As noted in AGO 077-39, s. 944.291(1), F. S., provides that persons released by virtue of gain-time allowances and deductions are to be supervised by the Department of Offender Rehabilitation "as if on parole . . . ." (*Excepted from supervision are those* "prisoners who, at the time of sentence, could not have earned at least 180 days' gain-time." Section 944.291[2].) It was my opinion in AGO 077-39—and I reiterate it here—that the language of s. 944.291

> 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.

The change in wording brought about by Ch. 77-428 (as illustrated in the above quotations from Ch. 77-428 and s. 945.30) when read together with s. 944.291 and the legislative intent did accomplish an obvious change in applications.

I have been provided the House Committee staff analysis of House Bill 346 [now Ch. 77-428, *supra*] which is less than concise. The staff summary of the bill states "This bill amends Section 945.30 and (1) includes persons released from prison by virtue of gain-time allowances among those required to pay monthly toward the cost of their supervision." The staff further commented on the bill's "effect on present situation" to conclude: "(1) It is intended that the wording '*under probation or parole supervision*' will include the persons under mandatory conditional release." My review of this document together with the obvious legislative intent that can be gleaned from this legislative reaction to past Attorney General Opinions leads me to the conclusion that, absent further legislative clarification or judicial decision, the monthly payment or contribution required by s. 945.30, F. S. (1976 Supp.), as amended by Chs. 77-321 and 77-428, Laws of Florida, is applicable to those persons on mandatory conditional release.

Your question is answered in the affirmative.

078-55—March 30, 1978

COUNTIES

MAY PURCHASE GYM EQUIPMENT FROM LAW ENFORCEMENT EDUCATION FUNDS

To: Glenn J. Bailey, Columbia County Sheriff, Lake City

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

May the sheriff's department purchase, by law (s. 943.25[5], F. S.), gym equipment, so that law enforcement officers may stay physically fit, from the Minimum Standards School Fund of Columbia County?

SUMMARY:

The governing body of a county may purchase gym equipment for its law enforcement officers from additional cost assessments for law enforcement education expenditures under the Police Standards and

Training Commission's interpretation of s. 943.25(5), F. S., provided that there is an existing organized educational training and development program, approved by the commission, that will utilize such equipment for the physical training and development of law enforcement officers as part of the overall educational training and development program for such officers and the governing body of the county has lawfully budgeted and appropriated funds for such purpose.

At the outset it should be noted that it is the duty and responsibility of the governing body of a county to budget and make appropriations for and approve, authorize, and account for the disbursement and expenditure of public funds, including those funds collected pursuant to s. 943.25(5), F. S. *See generally*, Chs. 129 and 218, F. S. Section 943.25(5), as amended by Ch. 77-174, Laws of Florida, provides:

> Municipalities and counties may assess an additional $1, as aforesaid, for *law enforcement education expenditures* for their respective law enforcement officers. (Emphasis supplied.)

This section was formerly contained in part IV, Ch. 23, F. S. 1973, as s. 23.105. *See* ss. 13 and 8, respectively, Ch. 74-386, Laws of Florida, which repealed s. 23.105 and enacted the same provision as s. 943.25(5), F. S., as part of the Department of Criminal Law Enforcement Act of 1974. You indicate in your letter that the "minimum standards school fund of Columbia County" was created pursuant to this statutory provision.

Under s. 943.12, F. S., the Police Standards and Training Commission [hereinafter the commission], created pursuant to s. 943.11, F. S., is authorized to establish, *inter alia*, uniform minimum standards for the training and employment of police officers. *See also* s. 943.14(4), F. S., which provides that

> [a]ll training and educational subjects which are taught, instructed, or used in any law enforcement schools or in any private police training school shall first be approved in writing by the commission.

And see s. 943.17 which provides that the commission shall prescribe the curricula and standards for advanced and specialized training courses and programs. The Division of Standards and Training [hereinafter the division] of the Department of Criminal Law Enforcement is charged with the responsibility of establishing and supervising, 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, instructing law enforcement agencies in such highly advanced and specialized areas. *See* s. 943.25(1), F. S. To accomplish this objective, the department may by contract or agreement authorize any state university, community college, or other organization to provide training for, or facilities for training, peace officers, which training shall include, but not be limited to, police techniques in detecting crime, apprehending criminals, and securing and preserving evidence. Section 943.25(9). *See also* s. 943.10, F. S., which defines a private police training school as a school devoted wholly or in part to instruction in police services, police administration, police training, police education, and law enforcement. The expenses of these programs are funded in part by the assessment and collection of $1 as court costs against every person convicted of violating a state criminal or penal statute or county or municipal ordinance not related to the parking of vehicles. Section 943.25(3), as amended by s. 1, Ch. 77-119, Laws of Florida. *See* AGO 077-59 which generally discusses the funding of these programs. The assessment of the additional $1 by counties or municipalities "for law enforcement education expenditures" for law enforcement officers essentially is subject to the same conditions and limitations as set forth in s. 943.25(3) and (7). *See* s. 943.25(5) which provides that the additional $1 may be assessed by counties and municipalities "as aforesaid" for law enforcement education expenditures. *See also* s. 943.14(4) requiring that all training or educational subjects taught in law enforcement schools be first approved in writing by the commission.

Section 943.25(5), F. S., clearly provides that the assessment of the additional $1 by counties and municipalities is *for law enforcement education expenditures* for the law enforcement officers of the respective counties and municipalities. Under the rule of statutory construction "*expressio unius est exclusio alterius*," the mention of one thing excludes the other, the expenditure of the moneys collected pursuant to s. 943.25(5) is

limited to the purpose expressly set forth in the statute—law enforcement education. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). *See also* AGO 076-64 holding that the $1 cost assessment imposed pursuant to s. 943.25(5) may be expended only for law enforcement education for law enforcement personnel.

What constitutes a valid law enforcement education expenditure for the purposes of s. 943.25(5), F. S., has not been legislatively or judicially defined; education, however, is generally defined as the act or process of providing knowledge, skill, or competence or the development and expansion of knowledge ordinarily by a course of formal study or instruction. Webster's Third International Dictionary p. 723; *see also* Black's Law Dictionary p. 604 ("Acquisition of all knowledge tending to train and develop the individual."). Section 943.25(1) provides for the establishment and supervision by the division of advanced and highly specialized law enforcement training programs "in the *prevention, investigation, detection* and *identification of crime* . . . ." (Emphasis supplied.) *See* s. 943.10(5) which defines a private police training school to mean:

> . . . any private school, corporation, or institution, for profit or not for profit, devoted wholly or in part to instruction, by correspondence or otherwise, in *police services, police administration, police training, police education, and law enforcement*, which awards any type of certificate, diploma, degree or recognition for attendance, graduation, study, or participation to students, enrollees, or participants. . . . (Emphasis supplied.)

This office has previously considered for what purposes funds collected pursuant to s. 943.25(5), F. S., formerly s. 23.105, F. S. 1973, may be expended. In AGO 073-284, I concluded that such funds may not be used to provide additional funds to local government agencies for salaries; however, the funds may be used to purchase riot equipment for the training and development of the sheriff's department personnel, provided there is an organized educational training program utilizing such equipment for such training as a part of the sheriff's department's overall educational training program. Such equipment so used in an organized and approved training program has, in my opinion, a sufficient nexus with the training and role of a law enforcement officer in riot and crowd control.

The administrative construction or interpretation of a statute by the agency or body charged with its administration or enforcement is entitled to great weight and generally will not be overturned unless clearly erroneous. *See, e.g.*, State *ex rel.* Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973); State v. Florida Development Commission, 211 So.2d 8 (Fla. 1968); and Heftler Construction Co. & Subsidiaries v. Department of Revenue, 334 So.2d 129 (3 D.C.A. Fla., 1976). The commission is charged with the responsibility of approving the programs established for the training and education of law enforcement officers. *See, e.g.*, s. 943.14(4), F. S., requiring that all training and educational subjects which are taught or used in law enforcement or police training schools be first approved in writing by the commission; s. 943.12(3), (4), and (5), F. S.; and s. 943.17(1)(a), F. S. *See also* AGO 074-134 holding that local law enforcement education programs for law enforcement officers should be submitted to the commission for approval under its minimum standards and specifications for the training and development of law enforcement officers in order to ensure that the funds collected pursuant to s. 943.25(5) are not expended in any unauthorized law enforcement education programs. I have been informed that the commission has determined that the expenditure of training and education funds under s. 943.25(5), F. S., to purchase physical fitness equipment, such as gym equipment, as part of a program designed to increase the physical fitness of local law enforcement officers constitutes a valid law enforcement education expenditure and the commission has, accordingly, approved such expenditures by the respective counties and municipalities. The commission, as the agency charged with the responsibility of approving law enforcement training and education programs, has considered that the term "law enforcement education expenditures" contained in s. 943.25(5) encompasses the expenditure of funds collected pursuant to the foregoing statute to purchase physical fitness equipment for law enforcement officers. Thus, in light of the commission's interpretation of this section and until judicially or legislatively determined to the contrary, it appears that the governing body of a county may budget, make appropriations for, approve, and authorize the disbursement of such funds for the purchase of gym equipment provided that there is an existing organized educational training and development program, approved by the commission, that will utilize the

equipment for the physical training and development of law enforcement officers as part of the sheriff's department's overall educational training program. It should be noted, however, that while it is the general responsibility of the commission to establish minimum standards and curricular requirements for the training and physical fitness of law enforcement officers it is the duty and responsibility of the governing bodies of the affected counties and municipalities to approve or disapprove the expenditures from, and the appropriation of, the funds collected under s. 943.25(5) for such law enforcement education programs and purposes. *See, e.g.*, ss. 943.12 and 943.13(6), F. S. Neither the commission nor the division has the authority to regulate the budgeting, appropriation, and expenditure of these funds as such matters are not within the statutory authority or duties of those agencies; *see* AGO 076-64; *cf.* State *ex rel.* Greenburg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla.), *cert. dismissed*, 300 So.2d 900 (Fla. 1974). The fiscal and budgetary procedures utilized by the municipality or county will, however, be governed by law and any applicable charter or ordinance provisions. Attorney General Opinion 076-64. *See generally*, Ch. 129, F. S.; s. 166.241, F. S.; and part III of Ch. 218, F. S. Thus, while the governing body of a county or municipality may budget, appropriate, and authorize the expenditure of these funds only for law enforcement education programs or purposes for its law enforcement officers as approved by the commission, it is the responsibility of the governing body of the county or municipality to determine and approve how these funds shall be disbursed or expended and for what purpose.

078-56—April 5, 1978

COMMUNITY COLLEGES

COMMUNITY COLLEGE SECURITY OFFICERS INELIGIBLE TO PARTICIPATE IN LAW ENFORCEMENT OFFICERS' SALARY INCENTIVE PROGRAM

To: Neil C. Chamelin, Director, Police Standards and Training Commission, Tallahassee

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

Are campus security officers employed by the Hillsborough Community College Campus Security Department eligible to participate in the salary incentive program provided under s. 943.22, F. S., as amended by Ch. 77-436, Laws of Florida?

SUMMARY:

Section 943.22, F. S., establishes a salary incentive program for law enforcement officers who are defined to mean persons elected, appointed, or employed full time by any municipality of the state or any political subdivision thereof and who are vested with authority to bear arms and make arrests, and whose primary responsibility is the prevention and detection of crime or the enforcement of criminal traffic or highway laws of the state. Although Hillsborough Community College, as an institution operated by the Board of Trustees of the Hillsborough Community College District pursuant to and in compliance with the provisions of part II, Ch. 230, F. S., comes within the statutory definition of political subdivision, and thus qualifies as a political subdivision for the purposes of the salary incentive program, the community college district lacks legislatively conferred authority to employ law enforcement officers and lacks conferred authority to vest officers employed by the district with authority to bear arms and make arrests. Therefore, the campus security personnel are not employed by a political subdivision employing law enforcement officers and are not vested with authority to bear arms and make arrests. Accordingly, security department personnel employed by

the district do not come within the purview of the salary incentive program established in s. 943.22, F. S., and are therefore ineligible to participate in such a program unless and until the provisions of part II, Ch. 230 are amended by the Legislature.

According to your letter, and other information furnished this office, the Hillsborough Community College District Campus Security Department employs personnel on a full-time basis for the purpose of providing campus security. These officers, pursuant to an indemnity agreement existing between the Board of Trustees of the Hillsborough Community College District and the Hillsborough County Sheriff, are deputized as special deputy sheriffs with a full police power throughout Hillsborough County, pursuant to s. 30.09, F. S.

Pursuant to the provisions of s. 943.22, F. S., the Police Standards and Training Commission is charged with responsibility of implementing the legislative intent of strengthening and upgrading law enforcement in Florida by means of a salary incentive program for law enforcement officers. *See* AGO 072-308, construing s. 23.078, F. S. (1972 Supp.), predecessor to s. 943.22. Section 943.22, as amended by Ch. 77-436, Laws of Florida, provides law enforcement officers shall receive salary incentive moneys on the following conditions:

> (2)(a) Each law enforcement officer who meets basic certification shall receive a sum not exceeding $25 per month in the manner provided for in paragraph (g).
>
> (b) Each law enforcement officer who has a community college degree or equivalent shall receive a sum not exceeding $30 per month in the manner provided for in paragraph (g).
>
> (c) Any law enforcement officer who receives a bachelor's degree shall receive a sum not exceeding $50 per month in the manner provided for in paragraph (g).
>
> (d) Each law enforcement officer who completes 320 hours of approved training courses as established by the career development program of the commission shall receive a sum not exceeding $80 per month. However, the commission may provide for proportional shares for courses completed in 80-hour units in a manner provided for in paragraph (g).
>
> (e) The maximum aggregate amount any law enforcement officer may receive under this section is $130 per month. However, no education incentive awards shall be made for any state law enforcement position for which the class specification requires the minimum of a 4-year degree, or higher. No contributions shall be required and no benefits shall be paid under the provisions of the Florida Retirement System with regard to any compensation paid under the provisions of this section.
>
> (f) No local unit or state agency employing law enforcement officers shall use any state funds received, or any federal funds made available, under s. 943.03(8) for the purpose of circumventing payment of any currently planned or existing salary or compensation plan which provides normal pay increases periodically to its law enforcement officers.
>
> (g) The Division of Police Standards and Training through its commission shall establish rules in cooperation with the department as necessary to provide effectively for the proper administration of the salary incentive program. . . .

Definitions of the terms used within s. 943.22, F. S., governing the salary incentive program for law enforcement officers are set out within subsection (1) of that section and, to the extent pertinent here, provide:

> (a) "Local unit" means any municipality, county or other political subdivision of the state employing law enforcement officers.
>
> (b) "Law enforcement officer" means any person elected, appointed or employed full-time by any municipality or the state, or any political subdivision thereof, who is vested with authority to bear arms and make arrests, whose primary responsibility is the prevention and detection of crime or the enforcement of the criminal, traffic or highway laws of the state . . . .

Additionally, s. 943.10, F. S., states:

> The following words and phrases as used in ss. 943.09-943.24 shall have the following meanings unless the context otherwise requires:
> (1) "Police officer" means any person employed full-time by any municipality or the state or any political subdivision thereof, whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic or highway laws of the state.
> (2) "Employing agency" means any municipality or the state or any political subdivision thereof employing police officers as defined in subsection (1).

Hillsborough Community College is an institution operated by the Board of Trustees of Hillsborough Community College District, which is a district established in compliance with the provisions of part II of Ch. 230, F. S. Community college districts are independent and separate legal entities governed at the local level by a board of trustees appointed by the Governor and confirmed by the Senate. Section 230.753, F. S. The express legislative intent is that:

> Community colleges continue to be operated by district boards of trustees . . . and that no department, bureau, division, agency, or subdivision of the state shall exercise any responsibility or authority to operate any community college of the state except as specifically provided by law or regulations of the State Board of Education. [Section 230.7535, F. S.]

In order to qualify as a "local unit" within the meaning of s. 943.22, F. S., the Hillsborough Community College District must be a municipality, county, *or other political subdivision* of the state employing law enforcement officers. Section 1.01(9), F. S., provides that in construing Florida Statutes and every word or phrase thereof, where the context permits the words "political subdivision" include, " . . . special tax school districts, special road and bridge districts, bridge districts and *all other districts* in this state." (Emphasis supplied.) The context of s. 943.22(1)(a) not only does not exclude, but indicates that the words "or other political subdivision" refer to and include local units of government other than counties and municipalities. Therefore, the Hillsborough Community College District, as a special district created under the provisions of part II of Ch. 230, F. S., is a "political subdivision" within the purview of s. 943.22.

Having concluded the Board of Trustees of Hillsborough Community College District should be treated as a political subdivision of the state for the purpose of s. 943.22(1)(a), the question resolves into whether within the meaning of s. 943.22 the community college district is a political subdivision of this state "employing law enforcement officers." As previously set out, s. 943.22(1)(b) as amended by Ch. 77-436, *supra*, defines "law enforcement officer" to mean

> any person . . . employed full-time by . . . any political subdivision . . . , *who is vested with authority to bear arms and make arrests*, whose primary responsibility is the prevention and detection of crime or enforcement of the criminal, traffic or highway laws of the state . . . . (Emphasis supplied.)

Implicit in the italicized portion of the last quoted provision is the proposition that such law enforcement officers are vested with authority by legislative act to bear arms and make arrests. *Cf.* s. 790.001(8), F. S., which, among other things, defines "law enforcement officer" to mean employees of the state, or subdivisions thereof, who have the authority to make arrests and are duly authorized to carry a concealed weapon, and all peace officers. Peace officers are authorized to make arrests without warrant by the terms of s. 901.15, F. S. I am not aware of any statute granting any authority to make arrests or to bear arms to the community college campus security personnel in question or vesting them with any such authority. A fundamental tenet of statutory construction to be applied here is to give effect to every part of the statute, if reasonably possible, and to construe each part in connection with other parts so as to produce a harmonious result. Snively Groves v. Mayo, 184 So. 839 (Fla. 1939). Accordingly, I conclude in order for a community college district to qualify as "local unit" as defined in s. 943.22(1)(a), and for the purposes of the salary incentive program under s. 943.22, it must, in addition to being a political subdivision of the state for such purposes, be capacitated to employ law

enforcement officers vested with authority by law to bear arms and make arrests, as defined in s. 943.22(1)(b). Part II of Ch. 230, F. S., does not appear to expressly or by necessary implication delegate such authority to the Community College District Board of Trustees, nor does it in any manner declare or provide that its campus security personnel are law enforcement officers or peace officers or conservators of the peace. It is axiomatic that the district's governing body can exercise such authority only as confided by law and the extent of its powers rests exclusively in legislative discretion. *See* AGO 075-148; *see also* Hopkins v. Special Road and Bridge District No. 4, 74 So. 310 (Fla. 1917); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); and State of Florida *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974). In obvious contrast, the Board of Regents, as established pursuant to s. 240.001, F. S., has express authority to employ law enforcement officers:

> (1) The Board of Regents is hereby empowered and directed to provide for police officers for all institutions and agencies in the State University System and said police officers shall hereafter be designated as "university police."
> (2) The university police are hereby declared to be law enforcement officers of the state and conservators of the peace with the right to arrest, in accordance with the laws of this state, any person for violation of state law or applicable county or city ordinances when such violations occur on any property or facilities which are under the guidance, supervision, regulation, or control of the State University System, except that arrests may be made off campus when hot pursuit originates on campus. Said officers shall have full authority to bear arms in the performance of their duties and to execute search warrants within their territorial jurisdiction. [Section 239.58, F. S.]

See also s. 239.53(1)(d), F. S.

As observed at the outset, Hillsborough Community College campus security personnel possess arrest powers not by virtue of statute so providing or of their employment by the district, but derivatively, through appointment as special deputy sheriffs by the Hillsborough County Sheriff. I noted in AGO 072-321 that:

> The appointment of special deputy sheriffs for the performance of specific duties or limited tasks is provided for in s. 30.09, F. S. I call your attention to s. 30.09(4)(c), which provides for appointment of a special deputy for the specific duty of serving as a watchman or guard at specified locations or areas only.

Section 30.09(4) permits the appointment of special deputy sheriffs in the following circumstances:

> (a) On election day, to attend elections.
> (b) To perform undercover investigative work.
> (c) Specific guard or police duties in connection with public sporting or entertainment events, not to exceed 30 days; or, for watchman or guard duty, when serving in such capacity at specified locations or areas only.
> (d) For special and temporary duties, without power of arrest in connection with guarding or transporting prisoners.
> (e) To aid in preserving law and order, or to render necessary assistance in the event of any threatened or actual hurricane, fire, flood or other natural disasters . . . .
> (f) To raise the power of the county, by calling by-standers or others, to assist in quelling a riot . . . .

Special deputies may be vested with full powers of arrest by the appointing sheriff. Appointees, as special deputies, except in the circumstances of s. 30.09(4)(a), (e) and (f), F. S., must meet the minimum requirements set forth by the Police Standards Board. *See* AGO's 072-321, 072-381, and 074-281. In AGO 072-381, I concluded that:

> [a] deputy sheriff is not required to come within the definition of "law enforcement officer," contained in [s. 943.22, F. S.] in order to be entitled to make arrests. That statute sets up a salary incentive program for local law

enforcement officers and has nothing to do with arrest powers of a deputy sheriff. Those powers are conferred by ss. 30.07 and 901.15, F. S.

The foremost principle in construing statutes is to ascertain the legislative intent as determined primarily from the language of the statute. 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). The statutes are to be given their plain and obvious meaning. A. R. Douglas, Inc. v. McRainey, 137 So. 157 (Fla. 1931). The verb "employ" means to make use of, to use or engage the services of, or to provide with a paying job. Webster's Seventh New Collegiate Dictionary (rev'd. 4th Ed.). Thus, the language used in s. 943.22, F. S., as amended, *i.e.*, "political subdivision in this state employing law enforcement officers," in its common significance or usage refers to "a political subdivision" empowered by statute to provide for employing police or security officers, who are vested by statute with authority to bear arms and to make arrests, or who are by law declared to be or are made peace officers or conservators of the peace and thus may enforce the laws and make arrests. *See* s. 901.15, F. S.

As earlier noted, a community college district may exercise such authority as is conferred by law, and the extent of its powers rests solely on the basis of legislative discretion. The provisions of part II of Ch. 230, F. S., do not expressly or by necessary implication delegate authority to the community college district board of trustees to enforce the law or to employ law enforcement officers vested with authority by law to bear arms and make arrests and enforce the laws. Because the Hillsborough Community College District is without authority to provide for or employ law enforcement or police officers authorized by law to bear arms and to make arrests and is not delegated any authority by law to delegate any such authority to make arrests or to bear arms or to enforce the law to employees of the community college security department, I conclude that such persons employed by the community college district's campus security department are not law enforcement officers "employed full time" by a "political subdivision . . . employing law enforcement officers . . . who are vested with authority to bear arms and to make arrests." Therefore such security department personnel do not come within the purview of the salary incentive program established under s. 943.22, F. S. Accordingly, your question is answered in the negative.

Finally, if circumstances existing on community college campuses within the state warrant employment on a full-time basis of campus security personnel, and I believe there are campuses on which full-time security personnel are required, then the respective community college district boards of trustees should be granted express legislative authority to employ law enforcement officers vested with authority to bear arms, to make arrests, and to enforce the laws on the community college campuses. Accordingly, I recommend that the provisions of part II, Ch. 230, F. S., be amended to include provisions substantially similar to those in s. 239.58, F. S., empowering the Board of Regents to employ law enforcement officers vested with the power to arrest, in accordance with the laws of the state, persons violating state laws or applicable county or city ordinances when such violations occur on campus property or facilities. An express delegation of authority to the community college board of trustees would eliminate the necessity of community college districts negotiating and entering into indemnity agreements similar to that existing between the Board of Trustees of the Hillsborough Community College District and the Hillsborough County Sheriff providing for deputization of campus security personnel. Also, it would bring community college campus law enforcement officers within the purview of the salary incentive program provided in s. 943.22, F. S., on an equal footing with similarly situated law enforcement officers.

078-57—April 7, 1978

LIVESTOCK AND LIVESTOCK SALES

FLORIDA LAW RELATING TO LIVESTOCK SALES NOT NECESSARILY IN CONFLICT WITH FEDERAL LAW

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

Are certain provisions of the Florida Statutes relating to livestock sales, ss. 534.47-534.54, preempted by the amended Federal Packers and Stockyards Act (and regulations promulgated thereunder) and, therefore, unenforceable?

SUMMARY:

Subject to a judicial determination to the contrary, the provisions of Florida law relating to livestock sales are not necessarily in irreconcilable conflict with federal law such that they are preempted thereby. However, there are various provisions that could reasonably be seen by a court to conflict, and I am accordingly recommending that you seek legislative changes in Florida law in order that it more strictly accord with federal law.

Your request arises from the following factual situation. Sections 534.47-534.53, F. S. 1977, impose several duties and responsibilities upon "livestock markets" (defined by s. 534.47(2) as any location in Florida where livestock is "assembled and sold at public auction or on a consumption basis during regularly scheduled or special sales") and upon the Department of Agriculture (hereinafter "department"). The markets must annually secure a license from the department prior to engaging in business. Section 534.48. The statute requires that livestock markets collect for livestock sold through the market to dealers, order buyers, packers, producers, and farmers on the date of sale (or date of delivery in some cases) and deposit the proceeds into their custodial accounts no later than the next banking day following the date of sale. Collection may be made only in the form of cash, check, or draft. Section 534.49. A livestock market is required to report to the department within 24 hours after having knowledge that a check or draft issued to pay for livestock has been dishonored. The department in turn shall notify all licensed livestock markets in the state of such dishonor. Section 534.50.

The penalties for violation of these requirements by a livestock market are a prohibition from filing a complaint under s. 604.21 (bond requirement for licensed agriculture dealers) in connection with the transaction involved, suspension, revocation, or a refusal to renew the license to operate, or a fine. Section 534.51. Violation of the collection (but not reporting) requirements may also subject the livestock market to a second degree misdemeanor prosecution. Such penalty may also be imposed upon a purchaser who delays payment of a livestock draft at the payor's bank. Sections 534.501 and 534.52.

Section 534.49, F. S., further provides that, for the purposes of that section, livestock drafts given as payment at livestock auction markets for livestock purchases shall not be deemed an express extension of credit to the buyer and shall not defeat the creation of a lien, as provided in s. 534.54(4), F. S., on such an animal and its carcass or products derived therefrom, and proceeds thereof, to secure all or part of its sales price. Section 534.49, as amended by Ch. 77-362, Laws of Florida. *See also* s. 534.54(4), providing that any person, partnership, firm, corporation, or other organization which sells livestock (defined by s. 534.54[1][a] to mean cattle or hogs) shall have a lien on any such animal, the carcass thereof, all products therefrom, and the proceeds thereof to secure all or a part of such animal's sales price without regard to the possession thereof by the party entitled to such lien upon the delivery of such animal to the purchaser and without further perfection of such lien. If any such animal or its carcass or products therefrom is so commingled with other livestock, carcasses, or products so that the identity thereof

is lost, then such lien extends to the same effect as if it had been perfected originally in all such animals, carcasses, and products with which it has become commingled, and all such extended liens shall be on a parity with one another. However, such extended liens on commingled carcasses or products shall not be enforceable as against any purchaser without actual knowledge thereof purchasing one or more of such carcasses or products in the ordinary course of trade or business from the party having commingled such carcasses or products or against any subsequent transferee from such purchaser, but in the event of such sale, such lien shall instead extend to the proceeds of such sale.

Section 534.54(2)(a) provides that except as otherwise provided with respect to livestock markets pursuant to s. 534.49, F. S., a meat processor (one who is in the business of slaughtering cattle or hogs) who purchases livestock from a seller, or any person or legal entity who purchases livestock from a seller for slaughter, shall make payment by cash or check for the purchase price of the livestock and actually deliver the cash or check to the seller at the location where the purchaser takes physical possession of the livestock on the day the transfer of possession occurs or by wire transfer of funds on that business day on which the possession of the livestock is transferred, or if transfer of possession occurs after normal banking hours, such payment shall be made not later than the close of the first business day following such transfer of possession. In the case of "grade and yield" selling, the purchaser shall make payment by wire transfer of funds or personal or cashier's check by registered mail postmarked not later than the close of the first business day following determination of "grade and yield." It should be noted that this section, in contrast to ss. 534.47-534.53, applies only to cattle and hogs, imposes the affirmative duties upon the purchaser rather than upon the seller, and contains no penalties for enforcement by the department.

It can be seen that the Florida statutes in question impose duties for collection and enforcement upon livestock markets. The department's sole duties in this regard concern notification to other markets of a dishonored check or draft and issuance and revocation of licenses and imposition of fines in the event of violation of the statutes by a market. Your responsibilities under the statute appear, therefore, to be very limited and your question does not ultimately seek to determine what your own responsibilities are under the statute since the limited duties placed upon the department do not seem to be in question. While I must normally restrict my reply to opinion requests received from public officials to only those matters which concern their official duties, I trust the following discussion will prove helpful.

In 1976 the Federal Packers and Stockyards Act of 1921 (hereinafter "act") was amended by Congress and regulations were promulgated thereunder in 1977. The amended act and its implementing rules and regulations concern, *inter alia*, certain requirements for the sale of and payment for livestock. Section 409(a) of the act requires that a packer, market agency, or dealer purchasing livestock shall pay the seller or his agent the full amount of the purchase price (which payment shall be by check or by wire if the purchase is for slaughter) before the close of the next business day after the purchase of livestock and the transfer of possession thereof. If the seller or his agent is not present at the point of transfer of possession to receive the check, payment may be made by wire or by mail if posted within the required time limit. Section 409(b) states that subject to such terms and conditions as the United States Secretary of Agriculture may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing before the purchase or sale to effect payment in a manner other than that required in s. 409(a) of the act. *See* ss. 201.43(b)(1) and (2)(i), (ii) and 201.200(a) and (b), regulations. The regulations allow payment to be made by a draft other than a check if written agreement therefor is obtained from the seller before the transaction. If, however, the purchaser is a packer (or one acting on a packer's behalf) who annually purchases more than $500,000 in livestock, the seller must sign a prescribed acknowledgment and such purchase method is deemed to be purchasing on credit. Sections 201.43(b)(1)and 201.200(a) and (b), regulations. The acknowledgment required before such a credit purchase may be made states that the seller relinquishes his rights under the trust provisions of s. 206 of the act. That section provides that an obstruction to interstate commerce is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on livestock purchased by packers in cash sales or on inventories of or receivables or proceeds from meat, meat food products, or livestock products therefrom when payment is not made for the livestock. In order to remedy this obstruction of commerce, Congress created in s. 206(b) a trust provision under which all livestock, and all inventories of or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, purchased in cash

sales (defined as a sale wherein the seller does not expressly extend credit to the buyer, s. 206[c]) by a packer who annually purchases more than $500,000 in livestock shall be held by the packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by all of them.

The federal act in question was enacted pursuant to Congress' power to regulate interstate commerce under the Commerce Clause of the United States Constitution. In general, it may be stated that interstate commerce is a proper and exclusive province of the federal government. The early case of Cooley v. Board of Wardens, 53 U.S. 299 (1851), established the rule that, as to those subjects of commerce which necessarily demand a "single uniform rule" throughout the United States, Congress' power is exclusive. It is also clear that, regarding activities exclusively in interstate commerce, a state is without power to enact legislation which either directly or by necessary operation burdens or obstructs the free flow of interstate commerce, regardless of its purpose. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Edwards v. California, 314 U.S. 160 (1941). Nevertheless, the states are not foreclosed by the Commerce Clause from ever exercising their police power in a way that might affect interstate commerce. The United States Supreme Court has held that state regulation based on the police power which does not discriminate against interstate commerce or disrupt its required uniformity may constitutionally stand. As stated by the Supreme Court:

> The Constitution, when conferring upon Congress the regulation of commerce, never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, although the legislature may indirectly affect the commerce of the country; legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. [Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963).]

See also Boston and Maine Railroad v. Armburg, 285 U.S. 234 (1932), and Gibbons v. Ogden, 22 U.S. 1 (1824). Therefore, there are clearly areas in which the power to regulate commerce exists concurrently in the federal and state governments. The general rule appears to be that state statutes are valid, even though they may affect interstate commerce, so long as they act evenhandedly and in a nondiscriminatory fashion to effectuate a legitimate local interest in the health, safety, morals, and welfare of the public, and so long as the effects on interstate commerce are only incidental and not disruptive of required national uniformity. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). However, a state's actions are always and necessarily subject to the exercise by Congress of its authority to control such matters insofar as may be required for enabling it to discharge its constitutional function. Pacific Tel. & Tel. Co. v. Tax Commissioner of Washington, 297 U.S. 403 (1936); Minnesota Rate Cases, 230 U.S. 352 (1913). Therefore, it is clear that exclusive federal power may exist even in situations where, in the absence of federal regulation, the states may themselves legislate.

While federal and state laws should always, to the extent reasonably possible, be interpreted in such a way as to avoid conflict in their application, the Supremacy Clause demands, where such conflict is *unavoidable* through reasonable interpretation, that federal law stand supreme. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Atchison, T. & S.R.F. Co. v. Railroad Comm., 283 U.S. 380 (1930); Townsend v. Yeomans, 301 U.S. 441 (1937).

Based upon these rules of preemption, your inquiry asks in essence for a determination as to whether there is an absolute and irreconcilable conflict between the state and federal regulation of the subject matter involved. I find no irreconcilable conflict here. However, I must emphasize several points. First, I do not possess the authority to recommend that a Florida statute be disregarded. Only a court of competent jurisdiction, in a case properly before it, would be authorized to make such a determination. Second, while I am of the opinion that there is no absolute or irreconcilable conflict in this instance, my conclusion is rendered without the benefit of judicial interpretation and is always subject to a contrary ruling by a court of competent jurisdiction. As a caveat, I would note that the question is extremely close; and a court could, in my opinion, reasonably interpret these provisions as being in conflict and rule that the state statutes are preempted.

You ask initially whether s. 534.49, F. S., is unenforceable in view of s. 409 of the federal act and ss. 201.43(b)(2)(i) and (ii) of the regulations. It must be remembered that s. 534.49 acts upon "livestock markets" and not upon those who purchase the livestock.

The federal prompt payment requirements, on the other hand, operate upon certain purchasers of livestock but not upon sellers. Hence, in this regard, federal law imposes requirements under which these purchasers must make payment while state law provides the methods by which certain sellers must receive the payment. The only situation wherein the possibility of irreconcilable conflict between s. 409 of the federal act and s. 534.49, F. S., might exist is when the purchaser is within the definition of those subject to s. 409 and the seller is a "livestock market" and, even then, it seems to me that conflict would only exist if the methods of payment available to the packer by federal law were mutually exclusive of the methods for receipt of payment available to the market under state law.

While the provisions are not entirely complementary, as can be seen from the discussion above, if the purchaser complies with federal law as set forth in s. 409, he will make his payment in a manner by which it is permissible for the market to accept the payment under state law. The regulations, however, also permit the purchaser to pay by mail, while the market is not permitted by state law to accept such payment (or to agree in writing to accept such payment pursuant to s. 201.43[2][ii]). While this may *in effect* foreclose the purchaser from using the mails to make payment, the Florida statute does not operate directly upon the purchaser, nor does it exclude the other methods of payment permissible by federal law. Therefore, since state law is preempted by federal law only in the event of an irreconcilable conflict, and since such conflict does not appear to be present here, I find, subject of course to a judicial determination to the contrary, that the state statute may be given effect.

You next ask whether ss. 201.43(b)(1) and 201.200(b) of the regulations preempt s. 534.49, F. S. You state in your letter of inquiry that ss. 201.43(b)(1) and 201.200(b) of the regulations "view the use of drafts given in payment of livestock as an extension of credit while Florida Statutes, Section 534.49 provides that such drafts shall not be deemed an express extension of credit." I should first note that the sections of the regulations to which you cite refer *only* to packers whose annual purchases of livestock exceed $500,000, *i.e.*, those purchasers who are bound by the trust provisions of s. 206 of the federal act. Payment with a draft other than a check when the purchaser is other than such a packer is not within this credit provision. Section 201.43(b)(1), regulations, states that the packer may not purchase by payment with a draft not a check without the seller's express agreement to the arrangement. Section 201.200(b) states that such arrangement constitutes a buying on credit, which in turn means that the seller's acknowledgment prescribed by s. 201.200(a)(1) must be signed, whereby the seller waives *all* his rights under the federal act including the s. 206 trust provision and expressly states that he has agreed to a sale on credit. Hence, a credit sale is not "deemed" by federal law to have occurred and is forbidden unless the seller expressly agrees to it. Florida law does not prohibit the seller from entering into an extension of credit arrangement; it simply states that payment by a draft other than a check will not be "deemed" *per se* an extension of credit. Further, it appears that the only effect of extending credit under the regulations is that the seller relinquishes all his rights under federal law respecting that sale. Hence, there are no federal remedies applicable which might conflict with state law. Therefore, s. 534.49 applies; the proceeds from the draft must be placed in the livestock market custodial account no later than the next business day following the date of sale, and under s. 534.501, F. S., the purchaser may not delay payment (*quaere* whether there actually exists a difference under Florida law between a draft and a check under these conditions), and the seller may take advantage of the lien provided in s. 534.54(4).

You also ask whether the provision of s. 534.49 that payment for livestock by draft shall not defeat creation of the lien provided in s. 534.54(4) is preempted by s. 206 of the federal act. I find that it is not. Section 206, as noted above, is a congressional response to its finding that a burden on interstate commerce is "caused by *financing arrangements* under which *packers . . . place liens* on livestock purchased by packers in cash sales . . . ." (Emphasis supplied.) The lien provided in s. 534.54(4), F. S., is not a lien placed upon the livestock or livestock products *by the packer*. It is a statutory lien which requires no action on the seller's part to perfect it. Furthermore, I see no practical difference between the s. 206 "trust" and the s. 534.54(4) "lien." The federal provisions give sellers the right to collect against *all* livestock and *all* receivables and proceeds, etc., purchased by the packer in cash sales until they are all paid off. The statutory lien does precisely the same thing. (While the federal trust provision applies only to "cash sales" as defined, noncash sales may only be accomplished by a relinquishment of federal rights

under the act, hence vitiating even the possibility of conflict between the state and federal statutes.)

Finally, you ask whether s. 534.54(2)(a), concerning the method of payment by a slaughterer of cattle or hogs to any seller other than a livestock market for purchase of such livestock, is preempted by s. 409 of the act and by s. 201.43(b)(2)(ii) of the regulations. In conformity with my answer to your first question, it appears that a packer may comply with s. 409 without violating state law in any way. The regulations, however, authorize payment by mail, which is not permissible under state law. It appears from the policy statement by the United States Department of Agriculture that the amendments to regulations, including s. 201.43(b)(2)(ii), were adopted solely to *clarify* s. 409 of the act and to "*suggest* ways in which a seller may have a check mailed to him in payment for livestock . . . ." (Emphasis supplied.) Statement, Dept. of Agr. Reg. ss. 201.43-201.200, 42 Fed. Reg. p. 49928 (Sept. 28, 1977). The state statute, clearly enacted for the seller's benefit, imposes no penalties upon a purchaser not in conformity with it other than liability to the seller for interest, 12 percent damages on the purchase amount, and a reasonable attorney's fee if the provision is breached. It is certainly questionable whether a purchaser would be held liable by a court for these amounts if he made a good-faith effort to comply with the state law and the seller was not available to receive money, or if the seller *expressly* agreed to accept payment by mail. In any event, however, s. 534.54 involves solely the rights of the parties to the purchase. Hence, the question must be properly adjudicated by a federal or state court of competent jurisdiction in an action properly brought by one of the parties to the purchase.

In sum, I reiterate that I am not authorized in *any* circumstance to recommend that a Florida statute be disregarded as invalid. Only a court may make such a determination. However, I see nothing in the federal and state statutes in question which is necessarily in irreconcilable conflict and which will not admit in any way of resolution or of consistent construction. Admittedly, it is a close question and there is no doubt a reasonable possibility that a court of competent jurisdiction, when presented with the proper factual situation, would find that the state statutes are preempted by federal law. Consequently, I recommend that you seek legislative change in Florida law in order that it be made to conform more closely with the federal act and regulations.

078-58—April 13, 1978

DOCUMENTARY STAMP TAX

WHEN PENALTIES FOR NONPAYMENT OR FRAUD MAY BE COMPROMISED

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: E. Wilson Crump II, Assistant Attorney General

QUESTION:

Does the Department of Revenue, under the provisions of s. 201.17, F. S., as amended by Ch. 77-281, Laws of Florida, have the authority to compromise documentary stamp tax penalties on proposed assessments made after July 1, 1977, and if so to what extent?

SUMMARY:

Under the provisions of s. 201.17(3), F. S. 1977, as enacted by Ch. 77-281, Laws of Florida, the Department of Revenue has the authority to compromise documentary stamp tax penalties on proposed assessments made after July 1, 1977, to the extent that its investigation reveals them to be too severe or unjust, even when such penalties result from fraud. The statute gives the Department of Revenue the specific authority to compromise penalties on previously proposed assessments which have not become final as of July 1, 1977, if its investigation discloses that the penalty would be too severe or unjust. The power to compromise such

penalties does not include the power to remit or completely waive the proposed penalty, however. Proposed assessments made prior to July 1, 1977, will not have become final by that date, if less than 30 days has elapsed even though no administrative review has been sought; or, if administrative review has been sought, until a final order has been entered by the Department of Revenue. Where review has been sought in circuit court by way of an action for declaratory judgment, but the assessment has become final, the penalty will not be subject to the compromise provisions of s. 201.17(3), as created by ch. 77-281.

Your letter inquires as to the circumstances under which proposed assessments made prior to July 1, 1977, become final, apparently for purposes of determining on which of those the Department of Revenue may appropriately compromise penalties.

The 1977 Legislature of the State of Florida, by enacting Ch. 77-281, Laws of Florida, amended s. 201.17, F. S., by changing subsection (2) and adding a new subsection (3) thereto, so that the section now provides as follows:

> (2) Any document, instrument, or paper upon which the tax under this chapter is imposed and which, upon audit or at time of recordation, does not bear the proper value of stamps shall subject the person or persons liable for the tax upon the document, instrument, or paper to:
> (a) Purchase of the stamps not affixed.
> (b) Payment of a penalty to the Department of Revenue equal to 25 percent of the purchase price of the stamps not affixed. If it is determined by clear and convincing evidence that any part of a deficiency is due to fraud, there shall be added to the tax as a civil penalty, in lieu of the aforementioned penalty under this subparagraph, an amount equal to 100 percent of the deficiency. These penalties are to be in addition to, and not in lieu of, any other penalties imposed by law.
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> * * * * *
>
> (3) The department may compromise any penalty on any proposed assessment which has not become final on the effective date of this act if its investigation reveals that the penalty would be too severe or unjust.

Prior to the amendments made by Ch. 77-281, Laws of Florida, s. 201.17, F. S., provided for a mandatory 100 percent penalty with no authority reposing in the department to waive or compromise this penalty. State of Florida Department of Revenue v. Zuckerman-Vernon Corporation, ... So.2d ..... (Fla. 1977), reversing 339 So.2d 685 (1 D.C.A. Fla., 1976); AGO 076-215; *cf.* Dominion Land and Title Corporation v. Department of Revenue, 320 So.2d 815 (Fla. 1975).

The language of this new wording itself creates some question as to its scope and application. This ambiguity is not resolved to any great extent by resort to the Journals of the House of Representatives or the Senate, inasmuch as the language in question was added to the statute as part of a floor amendment. The initial question for determination is whether the compromise provisions of subsection (3) apply to penalties on those proposed assessments initiated after the effective date of the act, or whether they apply only to those already proposed but not finalized as of the effective date of the act. When the language of a statute is not clear or is susceptible to more than one interpretation, it is generally considered appropriate to look to the title of the act as an aid to construction and in determining the legislative intent or purpose. Foley v. State, 50 So.2d 179, 184 (Fla. 1951); Jackson Lumber Company v. Walton County, 116 So. 771 (Fla. 1928), *app. dism'd*,73 L.Ed. 1011 (1928); Curry v. Lehman, 47 So. 18 (Fla. 1908); Board of Pub. Inst. v. Dade County Classroom Teach. Ass'n, 243 So.2d 210, 212 (3 D.C.A. Fla., 1971); 30 Fla. Jur. *Statutes* s. 108. Moreover, it has been held that the scope of an act is defined by its title. Finn v. Finn, 312 So.2d 726, 730 (Fla. 1975), approving 294 So.2d 57 (3 D.C.A. Fla.. 1974); Hillsborough County v. Price, 149 So.2d 912 (2 D.C.A. Fla., 1963). The title of Ch. 77-281, *supra*, contains no indication that the authority to compromise penalties is to be limited to those already proposed but not finalized on the act's effective date; the title merely indicates in pertinent part that it is an act "authorizing the department to compromise penalties which are too severe or unjust." There is no language in the title of the act which in any way qualifies or restricts the penalties which the department is

empowered to compromise or which limits the authority conferred to certain or particular penalties. This would indicate a legislative intent and purpose that the department would have the power to compromise any penalty on any proposed or unperfected assessment which might be made in the future, as well as those assessments not perfected or which had not become final on the effective date of Ch. 77-281. The body of the act is consistent with the title empowering the department to "compromise any penalty on any proposed assessment" which has not become final, or not perfected, on the effective date of the act if the same is found to be too severe or unjust.

This interpretation is buttressed by the general rule of construction relating to statutes imposing a penalty to the effect that they are to be liberally construed in favor of the person upon whom the penalty is to be imposed. Adler-Built Industries, Inc. v. Metropolitan Dade Co., 231 So.2d 197, 200 (Fla. 1970), quashing 222 So.2d 264 (3 D.C.A. Fla., 1969); Hotel and Restaurant Com'n v. Sunny Seas No. One, 104 So.2d 570 (Fla. 1958); C.D. Utility Corporation v. Maxwell, 189 So.2d 643, 647 (4 D.C.A. Fla., 1966). Somewhat more specifically, it has been held in other jurisdictions that statutes providing for the remission or reduction of penalties upon delinquent taxpayers are liberally construed in favor of the taxpayer. Beecher v. Board of Supervisors, 50 Iowa 538 (1879); 72 Am. Jur.2d *State and Local Taxation* s. 864. Additionally, the statute vests in the department the right to compromise "*any* penalty or *any* proposed assessment." (Emphasis supplied.) The word "any" has been defined to mean, ". . . one or all, one or more indiscriminately of the total number . . . ." Wilson v. Crews, 34 So.2d 114, 118 (Fla. 1948); *see also* Black's Law Dictionary 120 (Rev'd 4th Ed.). Thus, within the framework of statutory construction the term "any," as used in s. 201.17(3), F. S. 1977, would appear to carry no limitations whatsoever. Accordingly, under the circumstances, it is my conclusion that the Department of Revenue does now have the statutory power to compromise proposed penalties on proposed or unperfected assessments made after July 1, 1977, as well as those proposed assessments which had not become final or perfected on July 1, 1977, the effective date of Ch. 77-281, *supra.*

There is no provision for a limitation on or qualification of the department's power to compromise such penalties other than the necessity for finding upon proper investigation that the statutory penalty would be too severe or unjust. Such a compromise may be made only after an investigation and such finding, under the provisions of the new statute. Following the investigation, the department should exercise its discretion in a sound manner consistent with established rules of justice and equity, not arbitrarily or capriciously. State v. Knox, 14 So.2d 262 (Fla. 1943); 67 C.J.S. *Officers* ss. 102, 197. Accordingly, if the department should so find in a given case it would appear to have the power to appropriately compromise a penalty.

As noted above, the department does not seem to have any limitation specifically ingrained in the statutes on its power to "compromise" penalties. However, the term "compromise' itself generally suggests mutual concessions by the opposing parties. Black's Law Dictionary 359, *supra.* Accordingly, the use of this term by the Legislature as opposed to the term "waive," indicates that the department does not have the discretion to reduce the penalty to nothing, or to remit or waive it.

Your letter does not specifically inquire into this matter; however, the text of the new statute creates some question as to whether the authority to compromise penalties extends only to the 25 percent penalty or whether it also includes the 100 percent fraud penalty. Inasmuch as the authority to compromise penalties is stated as a separate subsection, it would seem to be equally applicable to both sentences of the previous subsection (2) imposing both of the foregoing penalties. Moreover, the broad and unqualified language referring to "any penalty" (found to be too severe or unjust) in the new subsection (3) would seem to indicate its applicability to all penalties, as noted above. As a practical matter, it may well be that there would be few, if any, equitable situations where the penalty on a deficiency due to fraud could be said to be too severe or unjust. However, if the department's investigation should reveal such to be the case, *i.e.,* unconscionable, the department would appear to have the statutory authority to compromise such a penalty as well.

Your letter goes on to inquire about the finality of certain proposed assessments made prior to July 1, 1977, for purposes of determining whether they might now be compromised. Your first question in this regard is when a proposed assessment made prior to that date becomes final when no administrative relief has been sought within the time limit authorized by the department. I am advised that the present practice of the Department of Revenue upon ascertaining that insufficient documentary stamps may have been affixed to a certain instrument is to send the taxpayer a notice of proposed

assessment in the body of which he is advised that the proposed assessment will become final in 30 days if no administrative review is requested by him within that time. Although there is no statutorily prescribed time period within which a proposed assessment becomes final, 30 days would appear generally to be a reasonable period of time within the contemplation of s. 120.57(1)(b) and (2)(a), F. S., requiring that an agency give an affected party reasonable notice of at least 15 days prior to taking final action affecting his substantial interest. Accordingly, it would be my opinion that the Department of Revenue may fix, and has properly and reasonably fixed, the period within which a proposed assessment becomes final as 30 days after its rendition in the absence of a request by the taxpayer for administrative review.

You also inquired as to the date of finality when administrative review has been requested. Under the provisions of Ch. 120, F. S., a proposed assessment would become final as such time as the head of the agency, in this case the Governor and Cabinet (s. 20.21(1) F. S.), enters a final order, regardless of whether subsequent judicial review is requested. Section 120.68(3) F. S.

Additionally, your letter inquires when an assessment made prior to July 1, 1977, becomes final where the taxpayer files suit for declaratory judgment in circuit court to have it reviewed. Although review by circuit court through an action for declaratory judgment is a judicially sanctioned method of review of a documentary stamp tax assessment, it is not a part of the statutory procedure for the rendition of an assessment. Department of Revenue v. University Square Corp., 336 So.2d 371 (1 D.C.A. Fla., 1976), *cert. den.*, ... So.2d ..... (Fla. 1977). Accordingly, unless an appropriate temporary injunction or restraining order has been issued, filing suit for declaratory judgment would not of itself prevent a proposed assessment which had not already become final from becoming final upon the expiration of 30 days as noted above. Where such assessment has become final prior to July 1, 1977, the provisions of Ch. 77-281, Laws of Florida, do not apply, even though judicial review has not been completed as of the effective date of that act. State of Florida, Department of Revenue v. Zuckerman-Vernon Corporation, *supra*. The courts, of course, do have limited equitable powers to reduce such penalties, State of Florida v. Zuckerman-Vernon Corporation, *supra*; Dominion Land & Title Corporation v. Department of Revenue, *supra*.

078-59—April 13, 1978

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

IMPLEMENTATION OF PLAN FOR STAGGERED BIENNIAL RENEWAL OF LICENSES

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

Prepared by: Joseph W. Lawrence II, Assistant Attorney General

QUESTIONS:

1. Is the plan for staggered biennial issuance of licenses to be implemented by the Department of Professional and Occupational Regulation to be accomplished by adoption of a rule pursuant to Ch. 120, F. S.? If so, under what statutory authority would the Department of Professional and Occupational Regulation promulgate a rule?

2. Is the Department of Professional and Occupational Regulation legally authorized to adopt a rule for biennial renewal of licenses in derogation of specific statutory authority for Department of Professional and Occupational Regulation boards to renew licenses annually and specific entitlement of licensees to obtain renewal annually?

3. May the Department of Professional and Occupational Regulation, by rule or otherwise, establish fees for activation of licenses?

4. May the Department of Professional and Occupational Regulation establish fees for 2 years in lieu of the 1-year fees heretofore collected?

5. Does s. 455.09, F. S., empower or require the Department of Professional and Occupational Regulation to process "registrations" and "permits" biennially?

SUMMARY:

The Department of Professional and Occupational Regulation is authorized to implement a plan, with the concurrence of each board and commission within its jurisdiction, for staggered biennial renewal of licenses. This implementation is subject to the requirements of rulemaking set forth in the Administrative Procedure Act, Ch. 120, F. S. Those sections of the enabling statutes of the relevant boards and commissions which authorize annual renewal of licenses are repealed or modified by implication. The department is not authorized to establish fees for activation of licenses. The department is, however, authorized to establish renewal fees for 2 years in lieu of the 1-year fees heretofore collected. Due to the fact that "registrations" and "permits" have the same effect and are renewable under the same terms and conditions as licenses, the department is authorized to implement a plan for staggered biennial renewal of same and to process such registrations and permits.

AS TO QUESTION 1:

Section 455.09, F. S., as created by s. 1, Ch. 76-161, Laws of Florida, provides:

> The Department of Professional and Occupational Regulation shall implement a plan for staggered biennial renewal of licenses issued by the boards and commissions within the department.

The effective date of said act was July 1, 1977.

The legislative intent of said act is clear from the history of the legislation. Senate Bill 122, as introduced by Senator J. Thomas, read as follows:

> The Department of Professional and Occupational Regulation shall *devise* a plan for staggered biennial renewal of licenses issued by the boards and commissions within the department *and shall submit the plan together with a proposal for legislative implementation to the Legislature no later than December 1, 1976.* (Emphasis supplied.)

The effective date of said act would have been July 1, 1976.

It is apparent from a comparison of the original proposal and the final version as passed, as well as from the recorded tapes of Senate Committee on Governmental Operations meeting of April 13, 1976, the date the bill was reported to the Senate floor, that the amendments to the original bill were initiated and passed in order that implementation of staggered biennial renewal of licenses could become a reality without further legislative involvement. Rather than requiring the department to prepare a plan for future legislative implementation, the final version as passed allowed implementation by the department itself. The proposed effective date of the act was moved back one year to accomplish this feat.

The Senate Governmental Operations Committee, whose members had reworked the proposal, and the full Legislature itself, were well aware of the department's administrative role over the boards and commissions. The scope and effect of s. 20.30(5)(d), F. S. 1975, now s. 455.007(1)(d), F. S. 1977, were clear wherein the Bureau of Records Administration of the department is authorized to establish renewal and delinquency periods for licenses *with* the *concurrence* of the board or commission affected. This is in line with the transfer authority set forth by the Legislature at s. 20.06(2), F. S., wherein the department exercises administration functions of the examining and licensing boards assigned thereto. A proper reading of s. 455.09, F. S., and s. 455.007(1)(d), therefore, is that the department will implement a plan, with each board's or commission's concurrence, providing for staggered biennial renewal of licenses.

The question presented, however, concerns the method of accomplishment of the department's duty of implementation of such plan and whether such is governed by Ch. 120, F. S.

The Department of Professional and Occupational Regulation is an "agency" as defined by the Administrative Procedure Act, Ch. 120, F. S. *See* s. 120.52(1)(b), F. S.; *cf.* AGO's 075-6 and 076-50. Consequently, the provisions of the Administrative Procedure Act do apply to the department, and the rulemaking procedures established at s. 120.54, F. S., must be followed by the department in order to adopt valid administrative rules. *See also* s. 20.04(7), F. S. Agencies have no inherent rulemaking authority, s. 120.54(13), and, to the extent an agency is authorized by law to adopt administrative rules, the substance and purpose of those administrative rules are limited by the legislative grant of rulemaking authority. St. Regis Paper Company v. State of Florida, Florida Air and Water Pollution Control Commission, 237 So.2d 797 (1 D.C.A. Fla., 1970); City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973). And, it is a fundamental principle of administrative law that if there is a reasonable doubt as to the lawful exercise of a particular power which is being exercised, the further exercise of the power should be arrested. Edgerton v. International Co., 89 So.2d 488 (Fla. 1956); State v. Atlantic Coast Line Railroad Company, 47 So. 969 (Fla. 1908).

Except as otherwise provided in Ch. 20, F. S., (*and see* s. 20.06(2), F. S.) the department is imbued with the authority to promulgate rules pursuant and limited to the powers, duties, and functions legislatively transferred to and created in Ch. 20. Section 20.05(5), F. S.

In this regard, it would appear that the plan which the department presents to each board or commission within its jurisdiction for its concurrence is a "rule." A "rule," as defined in s. 120.52(14), F. S., 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." Expressly removed from the definition of "rule" are internal management memoranda which do not affect the private interests of any person or any plan or procedure important to the public. The plan implemented by the department, although necessarily requiring the concurrence of each board and commission affected, would appear to fall within the statutory definition of rule and thus require implementation subject to the rulemaking procedures of Ch. 120, F. S. Thus, to the extent the department is authorized to implement the plan for staggered biennial renewal of licenses, the department is subject to the rulemaking requirements of Ch. 120.

AS TO QUESTION 2:

The primary guide to statutory interpretation is to determine the purpose of the Legislature, to ascertain the legislative will, and to carry that intent into effect. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); State v. Atlantic Coast Line Railroad Co., *supra*. It is presumed that statutes are passed with knowledge of prior existing statutes and that the Legislature does not intend to keep contradictory enactments in effect. Where there is a material repugnance in statutory regulations or where there exists evidence of intent that a later act shall modify or supersede a prior act, such should be given effect. State *ex rel.* School Board of Martin County v. Department of Education, 317 So.2d 68 (Fla. 1975); Orange City Water Company v. Town of Orange City, 255 So.2d 257 (Fla. 1971); Berkley v. State Department of Environmental Regulation, 347 So.2d 467 (1 D.C.A. Fla., 1977); Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194 (Fla. 1946); AGO 074-59.

Section 455.09, F. S. (Ch. 76-161, Laws of Florida), contemplates implementation of staggered biennial renewals of all licenses issued by the boards and commissions within the department. Pursuant to s. 455.007(1)(d), F. S. 1977, the department will prepare the administrative plan, submitting same to the boards and commissions affected for their concurrence. As this plan is implemented, annual license renewal as contemplated by the following governing statutes of the relevant boards and commissions will be irreconcilable with the now effective legislative enactment: Chapters 458, 459, and 460, and ss. 461.07, 462.08, 463.17, 464.151, 465.091, 466.17, 467.12, 470.10, 472.09, 473.111, 474.25, 476.13, 481.061, 484.08, 486.131, 489.06, 490.23, 491.11, 492.16, 475.13, and 310.21, F. S. *Cf.* AGO 074-59.

Insofar as the statutes of those boards and commissions assigned to the department authorized annual renewal of licenses, those statutes are in irreconcilable conflict with s. 455.09, F. S., when those individual boards or commissions concur with the department's

plan for staggered biennial renewal of licenses. As such, those statutes are repealed or modified by implication. State v. Digman, 294 So.2d 325 (Fla. 1974); AGO 074-59. Your second question is answered in the affirmative.

AS TO QUESTION 3:

Question 3 is answered in the negative.

The department's powers in this regard are limited to those which are granted by s. 455.09, F. S., in conjunction with s. 455.007(1), F. S. 1977. Section 455.09 authorizes the department's implementation of a plan for staggered biennial license renewal. Section 455.007(1)(d) authorizes the department to perform the *administrative* functions of the boards and commissions, among others, of issuance of licenses, collection of fees, and establishment of renewal periods. No responsibility is directly vested in the department to establish fees for activation or deactivation of licenses, as such has been previously spelled out by the Legislature in the various governing statutes for the individual boards and commissions; *and see* s. 20.06(2), F. S.

As there is no irreconcilable conflict between the department's authority pursuant to s. 455.09, F. S., and other legislative commands through the individual boards' and commissions' enabling statutes and Ch. 20, F. S., there is no necessity of implying repeal or modification of previous statutes concerning activation of licenses.

AS TO QUESTION 4:

Question 4 is answered in the affirmative.

It is readily apparent that the legislative intent of s. 455.09, F. S., was to unburden the various boards and commissions within the department from annual renewal of licenses and to ease the administrative burdens and expense associated therewith. *See* tapes of Senate Committee on Governmental Operations, April 13, 1976. It was not an attempt by the Legislature to ease the financial burden on the licensed professionals whose fees finance and support their respective regulatory bodies. *See* s. 215.37(3), F. S.

The department, in establishing the plan for implementation of staggered biennial licensing, may include establishment of the corollary fees on a biennial basis in lieu of the annual fees presently being collected, as its powers include collection of fees. *See* s. 455.007(1)(d), F. S. 1977. This implementation, of course, must be with the concurrence of the individual boards and commissions.

AS TO QUESTION 5:

Question 5 is answered in the affirmative.

Within this question, you stated that the "registrations" and "permits" in question, as issued by certain boards under the department's jurisdiction, are treated as licenses and are renewable under the same terms and conditions as licenses. These registrations and permits are requirements for practice within the state in the various occupations and professions.

The primary guide to statutory interpretation of language is to determine the purpose of the legislation, the legislative will. State v. Atlantic Coast Line Railroad Co., *supra*. A statute should be construed in such a manner as to ascertain and give effect to the evident interpretation of the Legislature as set forth in the statute, and where any ambiguity in the meaning or context of a statute exists, this must yield to the legislative purpose. *See* Smith v. City of St. Petersburg, 302 So.2d 756 (Fla. 1974).

The clear legislative purpose in the enactment of s. 455.09, F. S., is to create staggered biennial renewal of licenses to practice occupations and professions within the state. The use of the general and unqualified term "license" may and does include other authorizations such as permits and registrations. The term license has been defined by the Florida Supreme Court as a permit or privilege to do what otherwise would be unlawful. State *ex. rel.* Biscayne Kennel Club v. Stein, 178 So. 133 (Fla. 1938); Harry E. Prettyman, Inc., v. Florida Real Estate Commission, 109 So. 442 (Fla. 1926). Pursuant to Ch. 120, F. S., a "license" is a "franchise, *permit, certification, registration*, charter or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act." [Section 120.52(7), F. S.; emphasis supplied.] *Cf.* s. 215.37(3), F. S., providing each board in the department shall be financed solely and individually from income accruing to it

from fees, licenses, and other charges collected by the Bureau of Records Administration of the department and appropriating all such moneys to each such board.

It is apparent, therefore, that the term "license" within s. 455.09, F. S., would include certificates, registrations, and permits of the same type and nature, and therefore the department is authorized to implement a plan for staggered biennial renewal of same and to process such "certificates," "registrations," and "permits."

078-60—April 13, 1978

COUNTIES

MAY NOT REGULATE NONEMERGENCY TRANSPORTATION SERVICES

To: Stuart L. Simon, Dade County Attorney, Miami

Prepared by: David K. Miller, Assistant Attorney General

QUESTION:

Are transportation services within Dade County for passengers on stretchers or wheelchairs, who do not require medical assistance or professional care en route, subject to regulation by the county or by the Public Service Commission?

SUMMARY:

The Public Service Commission has exclusive jurisdiction to regulate nonemergency motor vehicle transportation services within the state. Metropolitan Dade County has no authority to regulate such services within that county.

I conclude, upon review of the applicable statutes, that the Public Service Commission has exclusive jurisdiction to regulate these services.

Your request states that on July 30, 1974, Dade County adopted Resolution No. R-931-74, governing the county's regulatory jurisdiction over passenger motor vehicles. That resolution reads in part:

> WHEREAS, this Board desires to establish, maintain and regulate a comprehensive transportation system within Metropolitan Dade County; and
>
> WHEREAS, a major element of such a comprehensive transportation system is the *for-hire passenger motor vehicle industry*; and
>
> * * * * *
>
> WHEREAS, Florida Statutes, Chapter 74-131, authorizes chartered counties to assume regulatory jurisdiction of said industry within the unincorporated areas of such counties and within those municipalities not regulating said industry as of July 1, 1974; and
>
> * * * * *
>
> NOW THEREFORE, BE IT RESOLVED . . .
>
> Section 1. That this Board hereby expresses its intent to assume regulatory jurisdiction of the *for-hire passenger motor vehicle industry* within the unincorporated areas of Metropolitan Dade County and within those incorporated areas of Dade County not regulating said industry as of July 1, 1974. (Emphasis supplied.)

In order to answer your question properly, I must discuss the classification system and terminology used to regulate motor carriers under general law in Ch. 323, F. S. The Dade County resolution quoted above was passed pursuant to authority granted in Ch. 74-131, Laws of Florida, which amended Ch. 323 to allow charter counties certain regulatory powers over for-hire passenger services within specified geographical areas.

The general power to regulate motor carrier services within Florida is vested in the Public Service Commission under s. 323.02, F. S. That section reads:

> No motor carrier shall operate any motor vehicle for the transportation of persons or property for compensation on any public highway in this state, *including the transportation of persons in nonemergency service*, without first having obtained from the Public Service Commission a certificate of public convenience and necessity, a permit as hereinafter provided, a certificate of registration of Interstate Commerce Commission authority, or an exemption as hereinafter provided. (Emphasis supplied.)

The service described in your question, the transportation of persons on stretchers or wheelchairs who do not require professional care en route, is a "nonemergency service" within the meaning of this statute. Section 323.01(18), F. S., defines "nonemergency service" as follows:

> "Nonemergency service" means the transportation by motor vehicle of persons who do not need, or do not expect to need, medical assistance en route.

Notwithstanding the Public Service Commission's general power to regulate motor carrier services, the statutes allow charter counties to exercise limited powers of regulation within specified geographical areas and upon meeting certain conditions. Those powers are set forth in s. 323.052(1), F. S., which reads in part:

> Notwithstanding any other provisions of this part to the contrary, any chartered county may regulate and license *for-hire passenger motor vehicles* in the unincorporated areas of the county and in those municipalities that do not regulate such vehicles on July 1, 1974, or that do not adopt regulations at least as strict as those initially adopted by the county, by filing with the Public Service Commission a written resolution that the county will be assuming regulatory jurisdiction of *for-hire passenger motor vehicles* throughout said county . . . . (Emphasis supplied.)

Both this provision and Dade County Resolution No. R-931-74 limit Dade County's regulatory jurisdiction to the "for-hire passenger" service category. This category was previously defined in s. 323.01(9), F. S. (1976 Supp.), as follows:

> "For hire" means any motor carrier engaged in the transportation of persons or property over the public highways of this state for compensation, which is not a common carrier or contract carrier but transports such persons or property in single casual and nonrecurring trips . . . [N]o for-hire carriage of passengers shall be authorized by any permit as herein defined and issued by the commission under the provisions of this part in motor vehicles of a greater passenger-carrying capacity than nine including the driver or chauffeur.

Chapter 77-434, Laws of Florida, repealed this definition and failed to reenact any specific definition of the term "for-hire." The act did, however, add new subsections (19) and (22) to the definitions section, s. 323.01, F. S., which subsections create and define the new categories of motor transportation services known as "common carriers" and "taxicabs," respectively. Present s. 323.01(19) reads as follows:

> "Common carrier" means any person engaged in motor carrier transportation of persons or property for compensation over the public highways of this state who holds his service out to the public and provides transportation *over regular or irregular routes.* (Emphasis supplied.)

Present s. 323.01(22) reads as follows:

> "Taxicab" means every motor vehicle of nine passenger capacity or less, including the driver, engaged in the general transportation of persons for compensation on occasional trips, not on a regular schedule or between fixed termini or over regular routes.

Examination of these statutes demonstrates the present "taxicab" category corresponds to passenger service under the former "for-hire service" category. Each involves the transportation of passengers in a vehicle of nine-seat capacity or less, on "occasional" or "nonrecurring" trips. It appears that the Legislature has simply substituted the term "taxicab" for the passenger service within the "for-hire" category.

Section 323.053(4), F. S., confirms this conclusion. That section generally requires persons operating taxicabs as defined above to obtain a master taxi permit from the Public Service Commission. Subsection (4), however, provides an exception which reads in part:

> This section shall not apply to persons operating taxicabs wholly within a municipality and its suburban territory which regulates such operations or those operating wholly within the boundaries of a chartered county which regulates such operations pursuant to s. 323.052 . . . .

This provision clearly refers to the charter counties' powers to regulate "for-hire passenger services" under s. 323.052, F. S.

The nonemergency services described in your question are a category of services apart from, and unrelated to, taxicab services under the definitional provisions of Ch. 323, F. S. Nothing in the general law purports to grant Dade County any regulatory jurisdiction over nonemergency services, nor does the Dade County resolution attempt to exercise such jurisdiction. Rather, the statutes vest exclusive regulatory jurisdiction over these nonemergency services in the Public Service Commission. Section 323.02, F. S.

I note in passing that Dade County has no authority to supersede a state public service regulatory statute. Section 11(7), Art. VIII, State Const. 1885, contained an exception to Dade County's home rule powers as follows:

> Nothing in this section shall be construed to limit or restrain the power and jurisdiction of the Railroad and Public Utilities Commission or of any other state agency, bureau or commission now or hereafter provided for in this Constitution or by general law and said state agencies, bureaus and commissions shall have the same powers in Dade County as shall be conferred upon them in regard to other counties.

This exception is preserved by s. 6, Art. VIII, State Const. 1968, although the former Railroad and Public Utilities Commission is now the Public Service Commission. Section 350.011, F. S. The same principle is found in Dade County v. Mercury Radio Service, Inc., 134 So.2d 791 (Fla. 1961), decided prior to the enactment of s. 353.052, F. S., holding that the (then) Railroad and Public Utilities Commission had exclusive jurisdiction to regulate taxicab services in the unincorporated areas of Dade County and that a county ordinance attempting to regulate such services was invalid because it conflicted with state law.

078-61—April 14, 1978

MUNICIPALITIES

ELECTION OF GOVERNING BODY FROM SINGLE-MEMBER DISTRICTS

To: Harry Landau, Chairman, Charter Review Commission, Lauderdale Lakes

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Dennis J. Wall, Legal Research Assistant

QUESTION:

Does a municipality possess the power to provide for the election of members of its legislative governing body from single-member districts?

SUMMARY:

A municipal charter may be amended so as to provide for the election of city commissioners from single-member districts, but only after approval thereof by a majority of the electors of the municipality voting thereon, regardless of whether such amendment is proposed by ordinance or by petition. If such an amendment is duly adopted and the charter duly revised in accordance therewith, the city commissioners' district lines must be drawn in accordance with the boundaries of the county precincts located in the municipality.

You state that the Charter Review Commission of the City of Lauderdale Lakes has decided to discuss and recommend single-member districting for the election of members of the city's governing body. You further state that the aforesaid charter review commission desires an opinion "in regard to the legality, the efficacy and the constitutional [*sic*] statutes that cover single district apportionment on the local level by legislation or by statutes permitting voter participation by referendum."

It is not the province of this office, but that of the judiciary, to determine the "legality" or constitutionality of duly enacted legislation under the United States or Florida Constitutions. Attorney General Opinion 075-195. Therefore, with regard to that aspect of your request, I must respectfully refrain from giving an opinion. With respect to the political "efficacy" of single-member districts in connection with the election of members of the legislative governing body of a municipality, that is not a matter requiring a legal opinion. However, should a municipality consider adopting or retaining a multimember or other at-large scheme, it would be well advised to first consider whether such a scheme would operate to "minimize or cancel out the relative voting strength of racial or political elements of the voting population." Fortson v. Dorsey, 379 U.S. 433, 439 (1965). While this standard is to be met by all types of districting plans, multimember and other at-large districting schemes have "[t]he particular vice" of minimizing "minority representation even at the lowest political levels in a way that could not occur if single-member districts existed in their stead." Wallace v. House, 515 F.2d 619, 629 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976). Indicia of voting minimization rendering at-large schemes unconstitutional at all levels of government include the following:

(1) A history of governmental neglect of the racial or political element. *E.g.*, Whitcomb v. Chavis, 403 U.S. 124, 155 (1971); Parnell v. Rapides Parish School Bd., 563 F.2d 180, 184 (5th Cir. 1977).

(2) A relatively small number of element legislators historically elected. *E.g.*, Turner v. McKeithen, 490 F.2d 191, 195 (5th Cir. 1973); Paige v. Gray, 437 F. Supp. 137, 158 (M.D. Ga. 1977).

(3) Use of the place rule (*i.e.*, requiring each candidate in an at-large election to designate a particular seat for which he or she is running). *E.g.*, White v. Regester, 412 U.S. 755, 766 (1973); Yelverton v. Driggers, 370 F. Supp. 612, 617, 619 (M.D. Ala. 1974).

(4) A majority vote requirement in primary elections. *E.g.*, Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 143 (5th Cir.), *cert. denied*, 98 S.Ct. 512 (1977); Perry v. City of Opelousas, 515 F.2d 639, 641 (5th Cir. 1975).

(5) Party obstacles to participation. *E.g.*, Turner v. McKeithen, 490 F.2d 191, 194 (5th Cir. 1973); United States v. Democratic Executive Committee, 288 F. Supp. 943, 946-48 (M.D. Ala. 1968).

(6) Lack of subdistrict residency requirements. *E.g.*, Whitcomb v. Chavis, 403 U.S. 124, 143-44 (1971); Burns v. Richardson, 384 U.S. 73, 88 (1966).

(7) A history of official discrimination bearing on effective exercise of the franchise. *E.g.*, Bradas v. Rapides Parish Police Jury, 508 F.2d 1109, 1112 (5th Cir. 1975); Robinson v. Commissioner's Court, 505 F.2d 674, 679 (5th Cir. 1974).

Given the tendency of at-large electoral schemes to unconstitutionally minimize the vote of racial or political elements of the population, and "[b]ecause the practice of multimember districting can contribute to voter confusion [and] make legislative representatives more remote from their constituents," the Supreme Court of the United States has expressed a preference for single-member district plans. Connor v. Finch, 431 U.S. 407, 415 (1977). This preference has been explained by the Fifth Circuit Court of Appeals in the case of Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976), as follows:

> The general preference for single-member district plans is founded on a judgment that the weaknesses of multi-member or at-large plans tend to impair fair representation and impede access to the political process.

The foregoing analysis and citation of authorities should be of assistance in making your decision as to the adoption of single-member districts.

As to the specific question presented by your inquiry, I have recently given my opinion that the governing body of a municipality may propose such an amendment to the municipal charter by ordinance and submit same to the electors of the municipality for approval pursuant to s. 166.031(1), F. S. 1977. Attorney General Opinion 078-32. Alternatively, such a proposed amendment of the municipal charter may be submitted to a vote of the electors of the municipality by a petition to that effect signed by 10 percent of the registered electors of the municipality. Section 166.031(1). In either case—whether the charter amendment is proposed by ordinance or by petition, as aforesaid—such amendment *must* be submitted to a vote of the electors of the municipality. The reason for this was given in AGO 078-32 as follows:

> Section 166.021(4), F. S. 1977, in pertinent part specifies that no changes in a special law or municipal charter are permitted with respect to "the terms of elected [municipal] officers *and the manner of their election*" (Emphasis supplied.) without the approval by referendum of the electors of the municipality as provided in s. 166.031, F. S., relating to charter amendments. . . . It is clear that a change . . . to the election of city commissioners from single-member districts, which is the substance of the proposal outlined in your letter, is a change in the method, way, means, plan, design or manner in which city commissioners are elected. . . . Therefore, the proposal you described is subject to s. 166.021(4), F. S. 1977, so that before the city charter may be amended in this fashion, the proposal you described must be submitted to a referendum of the electors of the city pursuant to s. 166.031, F. S.

Although AGO 078-32 was primarily directed to the case of an amendment of a municipal charter to allow or require single-member districting when such an amendment is proposed by ordinance of the governing body of the municipality, the above-quoted reasoning applies with equal force to such an amendment proposed by petition and signed by 10 percent of the electors of the municipality.

However, should such a proposed amendment of the city charter be adopted by a majority of the electors of the municipality voting in the referendum thereon and take effect pursuant to s. 166.031(2), F. S. 1977, the municipality would be limited in its power to implement single-member districting. As was stated in AGO 078-32, the municipality would then have to

> . . . redistrict in such a manner as to align the boundaries of its proposed city commissioners' districts with the lines or geographic boundaries of the county precincts within the municipality and with the boundaries of the municipality. . . . Otherwise, the city will first have to seek the assistance of the county supervisor of elections in recommending to the board of county commissioners any feasible changes in the boundaries of county precincts lying either wholly within or partly within and partly without the city limits.

See s. 98.031, F. S. 1977, granting the board of county commissioners limited authority to "alter or create" county precincts upon the recommendation of and approval given by the county supervisor of elections, and s. 98.091, F. S. 1977, vesting the board of county commissioners with the discretionary authority to delineate the boundaries of county precincts in any municipality located within said county in conformity with the

boundaries of such municipality, with the concurrence of the county supervisor of elections, and subject to the concurrence of the governing body of such municipality.

As so qualified, your question is answered in the affirmative.

078-62—April 20, 1978

ELECTIONS

SPECIAL ELECTION MAY BE HELD ON SAME DATE AS GENERAL OR PRIMARY ELECTION

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

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

May a special election called for the purpose of submitting a proposed county charter for approval by the electorate be held on the same date as the date fixed for the general election or a primary election?

SUMMARY:

A special election called by the board of county commissioners to submit a proposed county charter for adoption by the qualified electors of the county may be held on the same date as the date fixed for a general or primary election, provided it is held within the 45-day time limitation period prescribed by s. 125.64(1), F. S., and all registered voters of the county, without regard to party affiliation, are allowed to participate or vote in such special election. The substance of such public measure may be printed on the official ballot to be voted on by the electorate, provided that the form of such ballot has been approved by the Department of State pursuant to s. 101.27, F. S.

Your question is answered in the affirmative.

Section 1(c), Art. VIII, State Const., provides:

> Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed *only upon vote of the electors of the county in a special election called for that purpose.* (Emphasis supplied.)

Section 5, Art. VI, State Const., in pertinent part, provides: ". . . Special elections and referenda shall be held as provided by law."

Sections 125.60-125.64, F. S., provide procedures for the adoption, by the qualified electors of the county, of a county home rule charter proposed by a charter commission. Section 125.64(1) reads:

> Upon submission to the board of county commissioners of a charter by the charter commission, the board of county commissioners shall call a special election to be held not more than 90 nor less than 45 days subsequent to its receipt of the proposed charter, at which special election a referendum of the qualified electors within the county shall be held to determine whether the proposed charter shall be adopted. Notice of the election on the proposed charter shall be published in a newspaper of general circulation in the county not less than 30 nor more than 45 days before the election.

At the outset, it is helpful to distinguish between the terms "general election" and "special election." A "general election" has been defined as an election which recurs at stated intervals as fixed by law without any superinducing cause other than the passage of time; and, it is held to select an officer to succeed to the office on the expiration of the

full term of the incumbent. *See* s. 5, Art. VI, State Const. A "special election," however, is an election that "arises from such exigency or special need outside the usual routine, such as . . . [the need] to submit to the electors a measure or proposition for adoption or rejection." 25 Am. Jur.2d *Elections* s. 3, p. 692. *See also* 29 C.J.S. *Elections* s. 1(3), p. 19, and cases cited therein. *Cf.* s. 97.021(4), F. S. 1977, defining, for purposes of the Florida Election Code, the term "general election" as

> an election held on the first Tuesday after the first Monday in November in the even-numbered years, for the purpose of filling national, state, county, and district offices and for voting on constitutional amendments not otherwise provided for by law

and *cf.* s. 97.021(5) defining "special election" as "a special election called for the purpose of voting on a party nominee to fill a vacancy in national, state, county or district office."

As to whether a special election may be held on the same date as a general election, a majority of courts which have considered the issue have taken the view that the two elections may be held on the same date. *See* State *ex rel.* Sampson v. Superior Ct., 128 P. 1054 (Wash. 1913), and State *ex rel.* Hunt v. Tausick, 166 P. 651 (Wash. 1911). Since the time of a special election is not ordinarily fixed by law, but rather is fixed by some designated agency or official, it has been held that the officer charged with fixing the time of the special election possesses discretion or authority to hold the special election on the same day as the general election. 29 C.J.S. *Elections* s. 77, p. 175; Furste v. Gray, 42 S.W.2d 889 (Ky. 1931).

Similarly, the Florida courts have recognized that those officers responsible for setting the date of a special election possess broad discretion in so doing. For example, in Senior Citizens Protective League, Inc. v. McNayr, 132 So.2d 237 (3 D.C.A. Fla., 1961), the court considered a provision of the Dade County Charter which required the board of county commissioners to set a special election on a proposed amendment to the charter in not less than 60 days nor more than 120 days from either the date of resolution adopted by the board proposing an amendment or receipt of an initiatory petition, certified in an appropriate manner, proposing an amendment. The court held at 239:

> Within the permissible 60-day period prescribed by the time limitation, the Board of County Commissioners, as the legislative body of the county, may set such election which may not be interfered with by the courts without a showing of fraud, corruption, gross abuse of discretion, etc. [citations omitted.]

Moreover, in State *ex rel.* Watson v. Scott, 37 So.2d 330 (Fla. 1948), the court held that "[i]t might have been perfectly proper, in the interests of economy and convenience . . ." for a board of county commissioners to have called a special election to be held on the same date set for a primary election. The court reasoned as follows:

> Had such a "special election" been held it doubtless would have fulfilled the requirements of the statute, even though the same polling places had been used for both elections, and the same clerks and inspectors employed for the purpose of receiving and canvassing the ballots; provided that ballots separate and apart from the political party ballots used for voting upon party candidates had been made available, without regard to party affiliations, to all registered voters of the county.

Application of the foregoing cases to your inquiry leads me to conclude that the board of county commissioners would be authorized to hold the special election contemplated by s. 125.64, F. S., on the same date as the date of the general election or a primary election, provided of course that the date fixed for such election is "not more than 90 nor less than 45 days" subsequent to the board's receipt of the proposed charter, and all registered voters of the county, without regard to party affiliations, are allowed to participate or vote in the special election. I must, however, emphasize that, although a special election may be held on the same date as the general election or a primary election, such a special election has historically been deemed to be a separate and distinct election. *See* State *ex rel.* Watson v. Scott, *supra.* This office has on past occasions ruled that should a special election be scheduled for the same day as a general or primary election, then each election must be "kept separate and distinct in all phases of the conduct of both. . . ." Attorney General Opinion 054-53, Biennial Report of the Attorney

General, 1953-54, p. 94. Separate ballots and ballot boxes were required to be furnished for each election. *See* AGO 048-103, Biennial Report of the Attorney General, 1947-48, p. 74; AGO 048-119, Biennial Report of the Attorney General, 1947-48, p. 75; AGO 054-22, Biennial Report of the Attorney General, 1953-54, p. 97; and AGO 054-53, Biennial Report of the Attorney General, 1953-54, p. 84. Moreover, separate ballots were deemed necessary whether the election was conducted with paper ballots or voting machines. In this regard, AGO 056-216 considered the question of whether or not the Tampa Board of Elections could call a special municipal election to be held in conjunction with the regular statewide election, with ballots for both elections being placed on the voting machines used. That opinion concluded, in part:

> Sections 99.131, 100.031, 101.151, 101.25, F. S. [1955], as well as other provisions, leave no doubt as to what should appear on a general election ballot. In none of these statutes is there any indication that the election of a municipal official could be accomplished through the use of space on the general election ballot. From this it may be concluded that the election of a mayor for the city of Tampa can not be had by including the names of that office and the candidates for it on the general election ballot. The old legal principle, expressio unius est exclusio alterius, is aptly applied here in that the expression in these laws of the things to be included on a general election ballot excludes anything else from being put on the ballot.

However, since the issuance of AGO 056-216, the Legislature has on several occasions amended the statutory provisions cited in that opinion. The most comprehensive revision occurred in 1977 when the Legislature enacted Ch. 77-175, Laws of Florida, which revised and amended the entire Election Code (Chs. 97-106, F. S.). Specifically, s. 101.161, F. S., has been amended to provide:

> *Whenever* a constitutional amendment *or other public measure* is submitted to the vote of the people, *the substance of such* amendment or *other public measure shall be printed on the ballot after the list of candidates*, followed by the word "for," and also by the word "against." The wording of *the substance* of the amendment or *other public measure to appear on the ballot shall be embodied in* the joint resolution, constitutional revision commission proposal, constitutional convention proposal, *or enabling resolution or ordinance* and shall be furnished to the supervisor of elections of each county in which such public measure is to be voted on. The Department of State shall give each proposed constitutional amendment a designating number for convenient reference. This number designation shall appear on the ballot. (Emphasis supplied.)

Other provisions of the Election Code relating to the preparation and casting of ballots refer, in general terms, to the placement of questions or propositions on the ballot. *See, e.g.*, s. 101.011(1), F. S., stating that an elector voting by paper ballot shall

> place an "X" mark after the name of the candidate of his choice for each office to be filled, and likewise mark an "X" after the answer he desires in case of a constitutional amendment *or other question submitted to a vote* (Emphasis supplied.)

See also s. 101.27(1), F. S., providing for the placement in voting machines of ballots of "the name of the candidate, statement of the proposed constitutional amendment, *or other question or proposition submitted to the electorate at any election*" (Emphasis supplied.); s. 101.27(2) requiring that the captions on the ballots for voting machines be placed so as to indicate to the elector what lever or other device is used or operated in order to cast his vote "for or against a candidate, proposed constitutional amendment, *or other question or proposition submitted to the electorate at any election*" (Emphasis supplied.); and s. 101.24, F. S., providing that the supervisor of elections, except where voting machines are used, "shall prepare for each polling place *one* ballot box of sufficient size to contain *all the ballots* of the particular precinct. . . ." (Emphasis supplied.) *See also* s. 125.01(1)(y) which authorizes the board of county commissioners to

> [p]lace questions or propositions on the ballot at any primary election, general

> election, or otherwise called special election, when agreed to by a majority vote of the total membership of the legislative and governing body, so as to obtain an expression of elector sentiment with respect to matters of substantial concern within the county.

It seems clear from an examination of the foregoing statutory provisions that the Election Code no longer contemplates the provision of separate ballots or ballot boxes under circumstances where a special election is held on the same day as a general or primary election. To the contrary, it would appear that the question of whether or not a proposed county charter should be adopted may be submitted to the electorate as part of the official ballot, provided that the form of such ballot has been approved by the Department of State as required by law (*see* s. 101.27(6), F. S.)

078-63—April 20, 1978

DEDICATION

RIGHTS OF THE PUBLIC IN PROPERTY DESIGNATED AS "RESERVED FOR PARKING"

To: Les W. Burke, Bay County Attorney, Panama City

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

> **What rights does the public have to a parcel of property shown on a plat filed in 1953 by a development corporation in Bay County and which is labeled "reserved for parking"?**

SUMMARY:

> **Regarding the status of title to, or the rights of the public in, a parcel of property shown on a plat filed in 1953 by a development corporation and which is labeled "reserved for parking," such property may have been dedicated to public use so long as the governing body, representing the public, can legally establish by competent proof both an intent on the part of the subdivider to dedicate it to public use and its own proper acceptance of the owner/subdivider's offer of dedication. If a dedication has indeed occurred, the public may not be deprived of the use of the subject property without its consent.**

From the facts you include in your opinion request, I have constructed the following factual situation upon which your request seems to be based. In 1953 a plat was filed by the Gulf Lagoon Beach Corporation in Bay County. It plats several blocks of property, including one known as Block 17 and consisting of 15 lots, which are platted for commercial purposes and which, according to your letter, now contain a small shopping center. Between this block and a major state highway there is situated a parcel of property labeled "reserved for parking," which apparently appears on the Bay County tax rolls as exempt property, and no taxes are assessed against it. The plat also contains the following statement signed by the President of Gulf Lagoon Beach Corporation and attested to by its secretary:

> . . . Gulf Lagoon Beach Corp. . . . hereby dedicates streets, roads & etc. [sic] for public use and public ways except that all utility and franchise rights remain with the dedicators.

Also filed in 1953 in Bay County was a document entitled Restrictive Covenants, applying by its terms to all the real property described in the plat. It states in part:

> 5. No business or store buildings shall be placed or constructed and no

> business, trade or manufacturing of any sort or nature shall be conducted upon the property herein described, *except lots 1 through 15 inclusive in Block 17* . . . . (Emphasis supplied.)

It seems from your letter that the Board of County Commissioners of Bay County has recently become aware that gas pumps, a commercial sign, a fence, and a house have all been placed upon the parcel of land designated on the plat as "reserved for parking." You specifically inquire as to the status of the rights of the public in the subject parcel. For the purposes of this opinion, I assume that your inquiry concerns the rights of the general public at large and not simply the residential or commercial property owners whose property appears on the plat, since in the latter situation it would be the property owners themselves who must take any legal action to determine or enforce their rights.

Initially, I would point out that this office is not a factfinding body and as such is without the power to adjudicate "the status of title" to real estate. Further, from the facts stated in your inquiry, which I have outlined above, I am unaware of a number of important factors which could be determinative of your question. For instance, I am unaware of how the property or any right therein is being claimed by the persons erecting the commercial sign, gas pumps, fence, and house on the parcel of land designated on the plat as "reserved for parking." Certainly, if those who have erected such structures on the "reserved" property actually have acquired title or color of title or other interests in or to such property from the original developer of the property, or its successors or assigns, the analysis will be different than if they are adverse users of the property. Neither am I aware of the circumstances surrounding or representations made at the time of the sale and conveyance of the platted properties. In any event, it should be observed that the question of whether the public or the owners of the platted lots have acquired rights in property by dedication or by implied easement is a mixed question of law and fact which must be determined by a court in appropriate adversary proceedings initiated for that purpose. However, the following analysis and discussion of Florida law may prove helpful to you.

A dedication is simply the donating or appropriating of one's own land for use by the public. That is, the owner of dedicated property is precluded from using it in any way inconsistent with the public's use thereof. No finding can be made that a dedication has occurred without an offer, express or implied, by the owner of the property and an acceptance by the public. The owner's intention to dedicate must be clearly indicated by his words or acts. There can be no offer of dedication without the owner's knowledge. This element of intent has been stated by the Supreme Court of Florida to be the "foundation and essence of every dedication." City of Palmetto v. Katsch, 98 So. 352 (Fla. 1923), cited with approval in City of Hollywood v. Zinkil, 283 So.2d 581 (4 D.C.A. Fla., 1973), and Hollywood, Inc. v. City of Hollywood, 321 So.2d 65 (Fla. 1975). However, intent need not be formally manifested and any affirmative act of the owner will suffice to show his intent. For example, one way to dedicate property to public use is by map or plat. It appears that no particular words are required to be upon the plat in order to find that an offer of dedication was made. *See, e.g.* Florida East Coast Ry. Co. v. Worley, 38 So. 618 (Fla. 1905) and Miami Beach v. Undercliff Realty and Investment Co., 21 So.2d 783 (Fla. 1945).

The plat presently under consideration recites that the developer dedicates to public use, "streets roads & *etc.* [sic]" (Emphasis supplied.) The term "etc." is generally accepted to mean other things of a type or character which has been specifically named. That is, its meaning depends upon description and enumeration of things previously named or preceding the term, since they describe the kind of subject matter the term includes. Anderson v. Kerr Drilling Co. v. Bruhlmeyer, 115 S.W.2d 1212 (Ct. Civ. App. Tex. 1938); Forman v. Columbia Theater Co., 148 P.2d 951 (Wash. 1944); Wright v. People, 181 P.2d 447 (Colo. 1947). Therefore, in the present context, the term means things *like* and similar to streets and roads, dedicated "for public use and public ways." Off-street parking areas designated as "reserved" on a plat would not ordinarily be included in this category, which appears to consist only of through passage or access ways to the platted lots. *Cf., e.g.*, s. 192.011, F. S., which provides for assessment of all property in a county by the property appraiser, except that "streets, roads, and highways," dedicated to or otherwise acquired by a governmental unit may be assessed but need not be. While not conclusive for our purposes, the statute does show that thoroughfares and accessways, not including defined off-street parking areas, constitute a category of properties commonly dedicated to public use.

The plat itself labels the subject property "reserved for parking." It may be stated as a general proposition that a reservation made on a plat for a specified purpose implies a reservation for the private use of the owner. *Cf.* City of Jacksonville v. Shaffer, 144 So. 888, 890-891 (Fla. 1932), and Powers v. Scobie, 60 So.2d 738, 739 (Fla. 1952). However, this is not always the case and particularly where a developer is concerned, the reservation may constitute an implied easement for the private use of the purchasers of the platted residential lots in the subdivision; *cf.* Feig v. Graves, 100 So.2d 192, 195 (2 D.C.A. Fla., 1958); it may be a reservation for the public at large or perhaps an easement for the benefit of customers parking at the commercial establishments provided for on the plat was intended. I am unable to make a determination about this from the facts before me, and as hereinbefore noted, I am not a factfinder or an adjudicator. *See, generally,* 10 Fla. Jur. *Dedication* ss. 26 and 27 and AGO 061-179. *Cf.* East Coast Ry. Co. v. Worley, *supra*; Reiger v. Anchor Post Products, Inc., 210 So.2d 283 (3 D.C.A. Fla. 1968); and Murrell v. U.S., 269 F.2d 458 (5th Cir. 1959).

Your letter also points out that no taxes are assessed against the parcel in question. It has been held, when an alleged dedication to the public is challenged, that the fact that no taxes are assessed against the property in dispute is evidence tending to show a dedication and its acceptance by the public. *See* U.S. v. 936.71 Acres of Land, 418 F.2d 551 (5th Cir. 1969); *cf.* Miami v. Jansik, 89 So.2d 644 (Fla. 1956); *also see* 26 C.J.S. *Dedications* s. 40.(7); *but see* Ocean Nav. Co. *et al.* v. Town of Palm Beach, 152 So. 853, 856 (Fla. 1934), which states that the mere fact that the land has not been taxed does not deprive its owners of legal rights therein. However, tax assessment is but one of a number of factors a court considers in determining the public's rights *vel non* in the property, and the fact that it is not on the tax rolls is not conclusive. If the property were found to be subject to easement rights in the commercial property owners for customer use or in the adjoining residential owners and purchasers of the platted property, but not in the public at large, then it, by law, should be on the tax rolls and is subject to ad valorem taxation regardless of whether it in fact appears thereon. *See* AGO's 074-346, 073-257, and 061-111. *Cf.* Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834 (Fla. 1969); *see also* Department of Revenue v. Morgenwoods Greentrees, Inc., 341 So.2d 756 (Fla. 1956), and McNayr v. Claughton, 198 So.2d 336 (3 D.C.A. Fla., 1967).

The second crucial element of a dedication is the acceptance, express or implied, of the owner's offer by the public. City of Miami Beach v. Miami Beach Improvement Co., 14 So.2d 172 (Fla. 1943). It is this act or acceptance that makes the dedication complete. The offer to dedicate may be revoked prior to acceptance, but it has been said that once acceptance is shown, the dedication operates in the manner of an estoppel *in pais* and the public, so long as it uses the land for the purpose of the dedication, may not be deprived of its use. Mainor v. Hobbie, 218 So.2d 203 (1 D.C.A. Fla., 1969).

Acceptance of the dedication on behalf of the public may be made by persons competent and authorized to act for the public. Your letter provides no indication of formal acceptance of the original subdivider's offer to dedicate, assuming there was such an offer in this instance. However, acceptance as well as the offer of dedication may be implied either by an act of a public body or by use by the public. Smith v. City of Melbourne, 211 So.2d 66 (4 D.C.A. Fla., 1968); Sebolt v. State Road Department, 176 So.2d 590 (1 D.C.A. Fla., 1965); Waterman v. Smith, 94 So.2d 186 (Fla. 1952). If use by the public is considered to show the requisite intent to dedicate the property and the public's acceptance of the dedication, it is to be stressed that this use need not be hostile or adverse to the interest of the owner. In fact, because the owner's intent to dedicate is paramount, a dedication presupposes public use consistent with the owner's interest and with his knowledge and consent. Though the public may use the property for an extended period of time, there can be no dedication unless it clearly appears that the owner knows of such use in order to give rise to the presumption that he intended to dedicate the property. *See, generally,* 23 Am. Jur.2d *Dedications* s. 28. It is not stated specifically in your inquiry whether the public at large has in fact used the subject parcel for parking over the years or for what purposes. However, since the plat itself appears somewhat ambiguous concerning the restriction or the reservation of the parcel or the use thereof, the actual use of the property and the purposes for such use and any representations made by the subdivider in connection with the sale and conveyance of the platted properties or subsequent instruments conveying or granting rights in the property or to the use thereof would bear on the determination of the question. The burden of proof is on the party claiming the dedication; accordingly, the county commission, asserting in court the public's right to use the parcel reserved for parking (or, the private residential owners of the platted property asserting in court their private rights to use it), would be

required to prove by "clear, satisfactory and unequivocal evidence" both the intent to dedicate land to the public and public acceptance thereof. Pocock v. Town of Medley, 89 So.2d 162 (Fla. 1956); City of Miami Beach v. Miami Beach Improvement Co., *supra*; City of Miami v. Fla. East Coast Rwy. Co., 84 So.2d 726 (Fla. 1920); Bishop v. Nussbaum, 175 So.2d 321 (2 D.C.A. Fla. 1965).

A concept similar to dedication is that of grants of private use by easement. It is necessary to consider the concept, even though your question concerns public rights in the property, since the creation of an easement in the adjoining commercial or residential lot purchasers would clearly affect the public's interest *vel non*. An easement is a privilege in the owner of a tenement to enjoy in or over that of another, who is obligated not to use his land so as to interfere with such use. An easement may be created by express grant, by prescription, or by implication. Cannell v. Arcola Housing Corp., 65 So.2d 849 (Fla. 1953); Wyatt v. Parker, 128 So.2d 431 (2 D.C.A. Fla., 1961). The easement rights of abutting or adjacent purchasers of platted lots in the subdivision do not depend upon dedication principles, but on a private easement implied from sales with reference to a plat showing streets, parks, or other areas subject to the purchasers' use or enjoyment and such easements are vested or perfected in the grantees immediately upon conveyance; such rights are determined on the basis of private property interests as opposed to public dedications. Burnham v. Davis Islands, Inc., 87 So.2d 97 (Fla. 1956); Reiger v. Anchor Post Products, Inc., 210 So.2d 283 (3 D.C.A. Fla., 1968). Whether there was an easement granted to the commercial or the residential lot owners in the instant situation or whether a reservation was made for the benefit of the customers of the commercial property owners is, as noted, up to a court of competent jurisdiction to determine on the basis of properly proven facts. It may be stated, however, that an implied easement may arise in the owners of platted lots by virtue of designation on the plat. *See, e.g.*, Wilson v. Dunlap, 101 So.2d 801 (Fla. 1958); McCorquodale v. Kayton, 63 So.2d 906 (Fla. 1953). If this is the case in the instant situation, then it may well be that the general public has no rights in or to the use of the property at all and any rights in the lot owners would have to be determined in a suit properly brought by them. (Compare the elements of and principles of law applicable to an easement appurtenant and an easement in gross. An easement of the latter type is personal to the property owners and more in the nature of a license than a property interest. Burdine v. Sewell, 109 So. 648 [Fla. 1926].)

Therefore, if it can be established by competent proof that there has been an offer of dedication to the public (as opposed to an easement created in the platted low owners) and that the offer of dedication has been properly accepted, and that the public has parking rights in the "dedicated" or "reserved" property, the county commission or a private citizen with a special injury resulting from the presence of the obstructions complained of has the requisite standing to sue to remove them. Otherwise, if there is an easement in the platted property owners, the general public has no rights in the property and such owners must seek any legal remedies that may be available to them.

078-64—April 20, 1978

TAXATION

DISTRIBUTION OF EXCESS PROCEEDS IN TAX DEED SALES

To: Joe Horn Mount, Seminole County Attorney, Sanford

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

QUESTIONS:

1. Who is the "legal titleholder of record" under s. 197.291(2), F. S., when the official records indicate ownership in "X" and an outstanding purchase money mortgage of record from "X" to "Y" on the day of sale?

2. If the "legal titleholder of record" under s. 197.291(2) refers to the record owner and not the mortgagee, does the mortgagee retain any lien or other interest in the excess proceeds from the sale?

3. If the distribution scheme required by s. 197.291(2) extinguishes any lien or other interest of the mortgagee in the excess proceeds from the tax sale, does this statute violate constitutional due process guarantees?

SUMMARY:

Because Florida is a "lien" rather than a "title" state, a mortgagor retains legal title to the mortgaged property and a mortgagee receives no more than a lien on such property. Hence, the "legal titleholder of record" described in s. 197.291(2), F. S., is the record owner and not the mortgagee.

Application of s. 197.291(2) 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.

AS TO QUESTION 1:

In answer to your first question, it seems clear that the "legal titleholder of record" described in s. 197.291(2), F. S., is the record owner and not the mortgagee. Because Florida is a "lien" state rather than a "title" state, a mortgagor retains legal title to the mortgaged property, and a mortgagee receives no more than a lien on such property. Section 697.02, 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).

AS TO QUESTIONS 2 AND 3:

Section 197.291(2), F. S., directs the clerk to hold the balance of the surplus "for the benefit of" the legal titleholder of record. The record owner is therefore entitled to receive these proceeds under the statute. The Florida courts do not appear to have considered whether a mortgagee, whose rights in the mortgaged property have been extinguished under s. 197.271, F. S., retains equitable liens or other rights in these same surplus proceeds. Other jurisdictions, however, protect the mortgagee's rights. *See* 72 Am. Jur.2d *State and Local Taxation* s. 911 (1974) and 85 C.J.S. *Taxation* s. 817(b) (1954). *See also* Moyer v. Mathas, 332 F. Supp. 357 (S.D. Fla. 1971), *aff'd*, 458 F.2d 431 (5th Cir. 1972), holding that a federal tax lien becomes a lien on the excess proceeds of a tax sale, superior to the rights of the previous record owner. If the Florida courts follow this line of cases, the mortgagee may be held to have a lien or other interest in the tax sale proceeds which has the status of a property right and is protected by constitutional Due Process guarantees.

Your second and third questions therefore raise constitutional questions which cannot be authoritatively decided by this office. In AGO 077-99 I concluded that:

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.

078-65—April 26, 1978

TRESPASS

RIGHT OF ACCESS TO MIGRANT LABOR CAMPS

To: Robert Eagan, State Attorney, Orlando

Prepared by: Wallace E. Allbritton, Assistant Attorney General

QUESTION:

May an owner deny access to persons who wish to communicate with migrant farm laborers at a migrant labor camp?

SUMMARY:

A property owner cannot deny access to persons seeking to communicate with migrant farm laborers at a migrant labor camp, subject to reasonable conditions. Therefore, persons seeking access to migrant farm laborers for the purpose of providing them with health, social, and legal services do have an affirmative defense to a charge of criminal trespass.

In an earlier opinion, AGO 073-6, I responded to a similar question involving the applicability of the Florida criminal trespass statute, then s. 821.01, F. S. 1973, to labor representatives visiting laborers at a migrant labor camp. In that opinion, I concluded that based upon available state and federal case law "Florida's criminal trespass statute would probably not be applied to divest migrant farm laborers of their constitutional rights." However, in reliance upon a then recent federal district court decision, Petersen v. Talisman Sugar Corporation, Case No. 72-198-Civ-CR (M.D. Fla. 1972), I further opined that the statute might still be applicable in the proper case. One reason for this was that the district court decision in *Petersen* stood for the proposition that justice and equity alone demand that labor representatives not be entitled to the same access to migrant labor camps as that afforded organizations providing medical supplies and services,

nutritional foodstuffs, and related services. This is contrary to the holding in Flogueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971), and I note with interest that the decision in *Petersen* has since been reversed. *See* Petersen v. Talisman Sugar Corporation, 478 F.2d 73 (5th Cir. 1973). Therefore, it is appropriate that my opinion with respect to your question be adjusted.

In the *Petersen* case, the court applied a two-pronged test to actions involving questions of access to migrant laborers as a method by which the rights of the property owner and those desiring access may be balanced. These are: The availability of alternative avenues of communication and the use to which the property is put by the owner. Applying this test, the court found that the labor camp involved did, in fact, resemble a company town, that the laborers were effectively isolated on the owner's property, and that there existed no effective alternative means of communication available to the labor organization representatives.

Of interest are two cases which have cited the *Petersen* decision. In Asociacion de Trabajadores, Etc. v. Green Giant Co., 518 F.2d 130 (3rd Cir. 1975), the court found that there was an absence of any showing that no alternative avenues of communication existed and held against the labor representatives. The decision in Lee v. A. Duda & Sons, Inc., 310 So.2d 391 (2 D.C.A. Fla., 1975), is of particular importance. There, the court affirmed a lower court order enjoining a property owner from denying to representatives of a legal service organization access to migrant farm laborers. The court noted that the lower court had apparently found the owner's labor camp to be sufficiently similar to the one in the *Petersen* case.

It is evident from these decisions and those cited therein that just as the rights of migrant laborers to communications and services have been judicially recognized, so have the rights of those seeking access to the migrant laborers. I think that, had the courts held otherwise, the rights of migrant laborers would have been rendered useless.

In my opinion, it necessarily follows that this right of access would constitute an affirmative defense to a charge of criminal trespass. Indeed, in the *Petersen* case mention is made of the fact that prior to the institution of the federal suit by the plaintiffs charges of criminal trespass against them had been dismissed. The Fifth Circuit remarked as follows:

> However, after notice of appeal was filed in this case, an information was brought charging plaintiffs with trespass on Talisman's property. The trial judge dismissed the charges on the ground that "to prevent their entry might lead to a condition where employees are subjected to a form of involuntary servitude, wherein the masters decide who may communicate with the servants." State v. Petersen, et al., Case No. 72M-8209, filed in the Small Claims-Magistrate Court, Criminal Division, in and for Palm Beach, Florida. [*Id.* at 77.]

As did the Fifth Circuit, I agree with the reasoning of the trial judge in dismissing the criminal trespass charges. It must be emphasized, however, that in this jurisdiction a showing must be made that the two-pronged test mentioned in the *Petersen* case has been met.

While the hereinabove cited decisions recognize the right of access but place conditions thereon, I believe the better reasoning is that evidenced by the decisions in State v. Shack, 277 A.2d 369 (N.J. 1971), and the *Folgueras* case wherein the courts reached their conclusion on other than constitutional grounds. Simply stated, these decisions stand for the proposition that property ownership does not itself vest the owner with dominion over the lives of people living on the property and in my opinion represent the enlightened view held by my counterpart in the State of Michigan who stated that:

> The freedom of religion, speech, press and assembly guaranteed by the First and Fourteenth Amendments to the United States Constitution are operative throughout the length and breadth of the land. They do not become suspended on the threshold of an agricultural labor camp. The camp is not a private island or an enclave existing without the full breadth and vitality of federal constitutional and statutory protection. [OAG, 1971-72, No. 4227, p. 32 (April 13, 1971).]

In my opinion, a property owner cannot deny access to persons seeking to communicate with migrant laborers subject to reasonable conditions recognized by the court in the

Shack case. For example, it is not unreasonable to require a visitor to identify himself and state his business.

078-66—April 26, 1978

SCHOOLS

COLLECTION OF NONRESIDENT TUITION FEE

To: Edwin F. Blanton, Attorney for Franklin County School Board, Tallahassee

Prepared by: Thomas M. Beason, Assistant Attorney General

QUESTION:

Must the Franklin County School Board refuse to admit or enroll nonresident pupils if the $50 nonresident tuition fee is not paid at the time of enrollment, or may the county admit such nonresident students and then file suit for recovery of the nonresident tuition fee, if it is not paid?

SUMMARY:

The provisions of s. 228.121, F. S., requiring the payment to the school board of nonresident tuition fees upon enrollment of pupils whose parents or guardians are not residents of the state, requires the school boards to charge and collect the prescribed tuition fee for such nonresident pupils at the time of their enrollment. The Franklin County School Board must refuse to admit or enroll nonresident pupils if the $50 nonresident tuition fee is not paid at the time of enrollment and may not admit such nonresident students and then file suit for recovery of the unpaid nonresident tuition fee.

According to your letter, there is a group of students attending Franklin County schools who are residents of another state and who are under the guardianship of a nonprofit foreign corporation. The students live at a facility maintained by the corporation in Florida while attending Franklin County schools.

Section 228.121, F. S., to the extent pertinent to your inquiry, provides:

> (1) Pupils in grades kindergarten through 12 whose parent, parents, or guardians are nonresidents of Florida shall be charged a tuition fee of $50 payable at the time the pupil is enrolled.
>
> * * * *
>
> (4) Funds as set forth in this section *shall be collected by the school* in which the child is enrolled *and remitted to the school board* for the district in which funds are collected. The school board shall use the funds for operation and maintenance of its schools. (Emphasis supplied.)

The provisions of s. 228.121 are express in providing that pupils whose parents or guardians are nonresidents of Florida "shall be charged" the prescribed nonresident tuition fee, which is "payable at the time the pupil is enrolled." Additionally, the provisions of s. 228.121(4) state that the nonresident tuition fee "shall be collected by the school." In its ordinary meaning the word "shall" is mandatory in its connotation; and presumably the Legislature would have used the word "may" if it intended the permissive connotation. Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (1 D.C.A. Fla., 1963); Florida Tallow Corp. v. Bryan, 237 So.2d 308 (4 D.C.A. Fla., 1970). Additionally, provisions establishing the time and manner of performing an act are mandatory unless those specified procedures relate to immaterial matters and are expressed only as a view of the proper method of performing the act. *See* Neal v. Bryant,

149 So.2d 529 (Fla. 1963), and Schneider v. Gustafson Industries, Inc., 139 So.2d 423 (Fla. 1962). Moreover, when a controlling law directs how a thing shall be done, that is, in effect, a prohibition against its being done in any other manner. Alsop v. Pierce, 19 So.2d 799, 805-806 (Fla. 1944); Weinberger v. Board of Public Instruction, 112 So. 253, 256 (Fla. 1927).

In implementing the provisions of s. 228.121, F. S., the State Board of Education has promulgated Rule 6A-1.98, F.A.C., providing in part:

> (4) The nonresident tuition fee *is due and payable at the time* the pupil is enrolled. The pupil is considered to be enrolled when he is assigned to a specific school and presents himself for instruction. (Emphasis supplied.)

The term "payable" is an adjective ordinarily meaning: Capable of being paid, or suitable to be paid or admitting, or demanding payment, Webster v. 759 Riverside Ave., 151 So. 276 (Fla. 1933); justly due or legally enforceable, Black's Law Dictionary (Rev. 4th Ed.). In context of the mandatory provisions of s. 228.121, the portion of Rule 6A-1.98 stating the "nonresident tuition fee is due and payable at the time the pupil is enrolled" means that the obligation to pay nonresident tuition fee arises and is enforceable at the time the pupil is enrolled in the school. Given the mandatory requirements of the statute and the rules, I conclude the school boards are required to charge and collect the prescribed tuition fee for such nonresident pupils at the time of their enrollment, and that, upon failure or refusal of the parents or guardians of such nonresident pupils to pay the tuition fee at the time of enrollment, the school board must deny the pupils admission to schools maintained and operated by the district.

Your inquiry questions whether a general unspecified right of students to attend school may preclude the school board from obtaining payment of nonresident tuition prior to enrolling nonresident pupils in school. I have discovered no law guaranteeing free schools to the children of parents or guardians who are nonresidents. Chapter 228, F. S., the Florida School Code, states at s. 228.04 that there shall be a uniform system of free public schools and notes in s. 228.05(1) that funds supporting such schools shall be derived from, among other sources, fees charged nonresidents. Chapter 228 further provides at s. 228.121 for the charging of nonresident tuition fees. The elemental rule of statutory construction requires giving effect to every part of the statute if reasonably possible, and construing each part in connection with every other part so as to produce a harmonious result. Snively Groves v. Mayo, 184 So. 839 (Fla. 1938). An earlier opinion of this office concluded that the provisions establishing and financing a system of free public schools are intended for the benefit of pupils who are residents of the state. Attorney General Opinion 047-433, December 10, 1947, Biennial Report of the Attorney General, 1947-1948, p. 281. In a later opinion the provisions establishing nonresident tuition fees were found not to be inconsistent with any provisions establishing a system of free public schools. Attorney General Opinion 059-167. Similarly, courts in other jurisdictions have agreed that provisions granting free instruction in public schools to children of residents in the school district do not confer upon nonresidents the privilege of tuition-free enrollment. *See* Spriggs v. Althemier Arkansas School District, 385 F.2d 254 (7th Cir. 1967), and Eisenberg v. Corning, 179 F.2d 275 (D.C. Cir. 1949).

In light of the foregoing, I conclude that the imposition and collection of nonresident tuition fees for pupils whose parents or guardians are nonresidents of the state are not precluded by provisions establishing a system of free public schools for the benefit of pupils whose parents are residents of the state.

078-67—April 26, 1978

COMMUNITY COLLEGES

MAY NOT ENTER INTO CONTRACTS EXCEPT AS AUTHORIZED BY STATUTE OR RULE

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Dennis J. Wall, Legal Research Assistant

QUESTION:

Pursuant to s. 230.754(2)(d), F. S., Rule 6A-14.247(7), F.A.C., and such other statutory and regulatory provisions as may be applicable, may a board of trustees of a community college enter into a contract with an educational institution or agency of a foreign government for the purchase of an exclusive copyright license and the right to use, distribute, and sell a videotape educational series in the United States or its territories and possessions?

SUMMARY:

The board of trustees of a community college does not possess authority to enter into a contractual arrangement for the purchase of an exclusive copyright license and the right to use, distribute, and sell a videotape educational series in the United States or its territories and possessions, or to enter into such a contractual arrangement with an agency or educational institution of a foreign government.

You state that in conducting your most recent postaudit of Miami-Dade Community College you became aware that the college had entered into a contract with "an educational institution of the British Government," called "the Open University," for the purchase of an exclusive copyright license and right to use, distribute, and sell a videotape educational series in the United States or its territories and possessions. You question the authority of the community college to enter into a contract with an agency of a foreign government.

To begin with, public officers may exercise only such powers as are expressly granted to them by statute, plus such implied powers as are necessary in order to carry the expressly granted powers into effect. *E.g., In re* Advisory Opinion to the Governor, 60 So.2d 285, 287 (Fla. 1952); Edwards v. Lindsley, 349 So.2d 817, 818 (1 D.C.A. Fla., 1977); and AGO 077-85.

Section 230.754(2)(e), F. S. 1977, provides in general terms for the duties and responsibilities of the boards of trustees of the respective community colleges:

> The board of trustees shall perform those duties and exercise those responsibilities which are assigned to it by law or by regulations of the state board and in addition thereto those which it may find necessary for the improvement of the community college.

The power to contract is "assigned to the board of trustees" by s. 230.754(2)(d), F. S. 1977, which provides in pertinent part as follows:

> The board of trustees shall constitute the contracting agent of the community college. It may when acting as a body make contracts, sue, and be sued in the name of the board of trustees . . . .

The power to contract granted by the above-quoted provision, like the other general powers granted to the boards of trustees of the community colleges under s. 230.754(2), was given to the boards of trustees in order to aid them in carrying out their responsibility for the operation of their respective community colleges, a responsibility imposed upon them by the terms of s. 230.754(1):

> Community college boards of trustees are vested with the responsibility to operate their respective community colleges and with such necessary authority as may be needed for the proper operation thereof *in accordance with regulations of the state board.* (Emphasis supplied.)

In other words, the boards of trustees of the community colleges possess, "*under statutes and other rules and regulations of the [S]tate [B]oard [of Education*], . . . all powers necessary and proper for the governance and operation of the respective community colleges." [Section 230.753(2)(a), F. S. 1977; emphasis supplied.] *See* AGO 072-319 in which it was concluded that neither district school boards nor community college boards of trustees were authorized by law to appoint students to membership on their

respective boards as nonvoting advisors, on the ground that no statute or regulation existed which would permit such appointments, and that, "[a]s administrative authorities, or agencies, these boards have only that authority and those duties prescribed by statute and rules, regulations or standards which may be adopted by the State Board of Education." *Cf.* Phillips v. Santa Fe Community College, 342 So.2d 108, 110 (1 D.C.A.), *app. dismissed*, 345 So.2d 426 (Fla. 1977), wherein the court noted at p. 109 N. 1 that although "the school code places contract authority at the operating level—in the case of each community college, with its district Boards of Trustees," dismissal from a continuing contract of employment, which was at issue in that case, is subject to administrative review pursuant to a rule promulgated by the State Board of Education, and that, pursuant to s. 229.041, F. S., the regulations of the State Board of Education implementing the Florida School Code "have 'the full force and effect of law.' " *See* AGO 078-56, wherein I concluded in pertinent part that part II, Ch. 230, F. S., does not appear expressly or by necessary implication to authorize a community college district board of trustees to employ law enforcement officers, as defined in s. 943.22(1)(b), F. S. 1977, possessing the authority to bear arms and make arrests, so that the members of said community college district's campus security department could not be said to fall within the definitional purview of s. 943.22(1)(b).

Rule 6A-14.247(7), F.A.C., promulgated by the State Board of Education and regulating the boards of trustees of community colleges with respect to the several types of individuals and entities with which said boards of trustees may validly contract, provides as follows:

> 6A-14.247. POWERS AND DUTIES OF BOARD. The board acting as a board shall exercise all powers and perform all duties listed below:
>
> * * * * *
>
> (7) Contractual agreements. Enter into contractual agreements with the federal government or any of its departments or designated agencies; other institutions, departments, agencies, districts or political subdivisions of the state of Florida and other states of the United States; and private individuals, organizations and corporations; provided, that such agreements are to the best interests of the college. Information concerning such contracts shall be submitted to the division when requested by the director.

The above-quoted rule implements s. 230.754(1) and (2), *supra*. It was promulgated under the State Board of Education's general power to prescribe policies, rules, regulations, and standards for the state system of public education (*see* s. 229.053(1), F. S. 1977) and under its power to prescribe minimum standards for community colleges, a power granted by the terms of s. 230.755, F. S. 1977, which provides in pertinent part as follows:

> The state board shall prescribe minimum standards . . . which will assure that the purposes of the community college are attained.

Although Rule 6A-14.247(7), F.A.C., contains no reference thereto, it should be pointed out that s. 230.768, F. S. 1977, provides in pertinent part that "[a]ll funds accruing to the benefit of the community college shall be . . . expended in accordance with rules and regulations of the state board."

None of the powers of the boards of trustees of the respective community colleges granted and delimited by the aforementioned statutes and rule, by any other section of part II, Ch. 230, F. S., or by any other rule promulgated by the State Board of Education appears to authorize said boards of trustees to purchase copyrights or copyright licenses for the purpose of distributing certain products and selling those products to educational institutions or others for educational training programs in the United States or its territories or possessions. In order for public officers to validly exercise a power, the authority for such exercise must affirmatively appear from the express language of a statute or as a necessary incident to such express powers. *See, e.g.*, Martin v. Board of Public Instruction, 42 So.2d 712, 713-14 (Fla. 1949); George Babcock, Inc. v. Board of Public Instruction, 140 So. 644, 644-45 (Fla. 1932); and Trustees of Special Tax School Dist. No. 1 v. Lewis, 57 So. 614, 615 (Fla. 1912). Further, all express and implied prohibitions upon the exercise of express or implied powers should be taken into account in determining whether such powers may validly be exercised in a given case. *See, e.g.*,

Martin County v. Hansen, 149 So. 616, 617 (Fla. 1933), wherein the court stated that "the implied prohibitions of law are as effective as express prohibitions"; *see* State *ex rel.* Arthur Kudner, Inc. v. Lee, 7 So.2d 110, 113-14 (Fla. 1942), and *cf.* Brown v. City of Lakeland, 54 So. 716, 717 (Fla. 1911).

Section 230.768, *supra*, provides in pertinent part that funds accruing to the benefit of a community college "shall be . . . expended in accordance with rules and regulations of the [S]tate [B]oard [of Education]." Where the contractual powers of public officers are limited by statute or by authorized or valid rules or regulations, contracts entered into by public officers which go beyond such limitations are unauthorized and invalid, regardless of any benefit which might accrue to the public were such contracts to be enforced. *See, e.g.*, Martin v. Board of Public Instruction, *supra*, and National Bank v. Duval County, 34 So. 894, 895 (Fla. 1903), wherein the court affirmed a judgment in favor of the defendant county invalidating an agreement made by the county to pay interest on county warrants presented for payment but refused for lack of funds. The court reasoned as follows:

> While the contract made with plaintiff may have been wise from a business point of view, tending, as it did, to sustain the credit of the county, we have been unable to find a statute granting the power to make it, or granting any other power from which we can clearly imply the one here attempted to be exercised.

Rule 6A-14.247(7), *supra*, contains no reference to agencies or educational institutions of foreign governments. In construing the terms of administrative rules, regulations, and standards, the rules used in statutory construction are applicable. 1 Fla. Jur. *Administrative Law* s. 97; *see* State v. Atlantic Coast Line R., 47 So. 969, 980 (Fla. 1908), in which the court sought to determine whether an administrative rule or regulation was penal in character, stating as follows:

> In determining whether a *statute* is penal in the strict and primary sense, a test is whether the injury sought to be redressed affects the public. . . . *The same principle should apply to rules and regulations made pursuant to a statute.* (Emphasis supplied.)

One rule of statutory construction, known by the descriptive phrase *expressio unius est exclusio alterius*, sets forth the general principle that, where a statute by its own terms enumerates the things upon which it is to operate, it excludes from its operation all things not expressly mentioned. *E.g.*, Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952); and *In re* Estate of Ratliff, 188 So. 128, 133 (Fla. 1939). Applying that rule of construction to Rule 6A-14.247(7), *supra*, I conclude that the board of trustees of a community college is not authorized to enter into any contractual arrangement with an agency or institution of a foreign government for the purchase of an exclusive copyright license and the right to use, distribute, and sell a videotape educational series in the United States or its territories or possessions. *Cf.* AGO 078-20 in which it was concluded that state agencies were without statutory power to enter into indemnification contracts as a subgrantee of federal funds under the Federal Comprehensive Employment and Training Act of 1973, and in which it was stated that no law had been found authorizing the state agencies

> . . . to bind the state by entering into an indemnification contract as a subgrantee of *any* federal funds, let alone federal funds disbursed under the Federal Comprehensive Employment and Training Act of 1973. (Emphasis supplied.)

Your question is answered in the negative.

078-68—April 26, 1978

COMMUNITY COLLEGES

METHOD OF PAYING OFFICERS' AND EMPLOYEES' TRAVEL EXPENSES

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTIONS:

1. **Is it legally proper, and if so, under what circumstances, for a public officer to pay to a contracting party a lump-sum amount from which amount the contracting party is to pay the travel expenses incurred by employees of said public officer in the performance of their official duties, such expenses to be paid in a manner, or at a rate, or both, different from that established under s. 112.061, F. S.?**
2. **Assuming that any such contractual arrangement would be legally permissible under certain circumstances, is Clause 19 of the contract between Miami-Dade Community College and the British Open University the type of contractual arrangement which would be legally proper?**

SUMMARY:

The board of trustees of a community college district, as the governing body of the district, may not in the absence of statutory authorization contract or delegate to any other body or entity, public or private, the authority to exercise its powers or to perform its duties in a manner or at a time in any way different from that prescribed by law. Thus, the board lacks the authority to enter into a contract with a private entity or agency or institution of a foreign government to disburse public funds in lump sum to any such agency or entity from which sum it is to reimburse public employees at a rate or in a manner different from that provided in s. 112.061, F. S., the uniform travel expense law governing all public officers and employees, and, to the extent not inconsistent with s. 112.061, the rules and regulations of the State Board of Education.

AS TO QUESTION 1:

You state in your letter that certain public agencies have proposed to enter, or have actually entered, into contractual arrangements with private entities or an institution or agency of a foreign government whereby the public agency disburses a lump-sum amount to the contracting entity. This amount is used by the contracting entity to reimburse employees of the public agency for travel expenses necessarily incurred during the performance of the employees' official duties, often at a rate or in a manner different from that established under s. 112.061, F. S. Attached to your letter, you submit for the purposes of illustration a contract between the Miami-Dade Community College and the British Open University, an educational institution of the British Government, which contains such a provision. Clause 19 of the contract provides:

> Within thirty days of the signature of this agreement, in addition to the payment of two hundred and thirty thousand United States dollars made under the provisions of Clause 6 hereof, the College will pay the University the sum of sixty five thousand United States dollars which will be maintained in United States dollars at a bank in the United Kingdom or the United States of America to be agreed between the parties, which fund will be used as a travel and expense fund. The said fund may only be used and drawn upon after receipt of authorisation of either the President of the College, Peter Masiko, Jr., or the Executive Vice President of the College, Robert H. McCabe.

You inquire as to whether or not public agencies, specifically community college districts, possess the legal authority to enter into such a contractual arrangement.

A community college district, or its governing board of trustees, possesses no inherent or common-law powers of its own but rather derives its authority from those powers which have been expressly conferred by statute or are necessarily implied from an express duty or power. *Cf.* Harvey v. Board of Public Instruction, 133 So. 868 (Fla. 1931), and Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); *See also* AGO's 076-61 and 075-148 holding that the powers of district school boards are limited by law and may be modified or enlarged only by the Legislature. The power of a school authority to contract is generally limited to that which is expressly or impliedly conferred by statute and is subject to such constitutional and statutory restrictions as may be imposed. 78 C.J.S. *Schools and School Districts* ss. 270 and 277; *cf.* George Babcock, Inc. v. Board of Public Instruction for Dade County, 140 So. 644 (Fla. 1932)(county board of education may only assume any obligation authorized by statute and only pursuant to method prescribed therein); *see also* 20 C.J.S. *Counties* s. 174 (county may contract only in manner and for purposes provided by statute and is not bound by a contract beyond the scope of its powers or foreign to its purposes or which is outside the authority of the officers making it). *Cf.* Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936)(express power duly conferred upon a county may include implied authority to use means necessary to make express power effective but may not warrant the exercise of a substantive power not conferred); Martin County v. Hansen, 149 So. 616 (Fla. 1933)(indebtedness assumed by county commission in violation of implied powers of law invalid and unenforceable against county); and National Bank v. Duval County, 34 So. 894 (Fla. 1903)(being a creature of statute, the extent of county's actions toward incurring liability must be limited by statute). Thus the governing boards of trustees of the community college districts may exercise only those powers specifically or by necessary implication authorized or granted by statute; moreover, if there is any doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested. *See* 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); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); Harvey v. Board of Public Instruction, *supra*; and White v. Crandon, 156 So. 303 (Fla. 1934).

The community college districts within the state are governed by district boards of trustees which possess *under the statutes and other rules and regulations of the State Board of Education* "all powers necessary and proper for the governance and operation" of the community colleges. Section 230.753(2)(a), F. S. *See also* 230.754(1) and (2)(d) and (e), F. S. The district boards of trustees are vested with the responsibility to operate the colleges with such authority as is necessary for the proper operation of the colleges in accordance with the regulations of the State Board of Education. Section 230.754(1). Regulations, promulgated by the board of education to implement Chs. 228-246, F. S., the Florida School Code, have "the full force and effect of law" if within the scope and intent of the statute. Section 229.041, F. S. *See also* Florida Livestock Board v. Gladden, 76 So.2d 291, 295 (Fla. 1954).

The boards of trustees of the community college districts are made the contracting agents of the respective colleges, and such boards when acting as a body may make contracts, sue, and be sued in the name of the board. Section 230.754(2)(d), F. S. In the instant inquiry, however, the contract was not executed by the board "acting as a body," but rather by the president who under existing statutes and rules of the state board is not authorized to make or execute contracts. *See* AGO 068-6 wherein it is stated that

> [w]here the state authorized a certain officer or legal body to contract for it in regard to certain purposes and subjects, no other officer or agency can exercise the authority to contract relating to those purposes and subjects, nor exercise authority to ratify or give effect to a contract not actually made by the authorized person or body.

And see AGO 068-44 in which it is stated that no board or officer of the state can contract for it without legislative authority, and although the state may delegate the power to contract to its boards and officers, the duty of doing the essential things necessary to the creation of a contract and acts which involve discretion cannot be delegated by the authorized agency of the state to another.

Rule 6A-14.247(7), F.A.C., provides that the board of trustees of a community college district may

> [e]nter into contractual agreements with the federal government or any of its departments or designated agencies; other institutions, departments, agencies, districts or political subdivisions of the state of Florida and other states of the United States; and private individuals and corporations; provided, that such agreements are to be in the best interests of the college.

While the board has been granted the general authority to enter into contracts with the Federal Government or its designated agencies and with other institutions or agencies of the State of Florida and other states of the United States, this does not in itself include the authority to contract with an institution or agency of a foreign government or to delegate any of its powers or duties vested by law. *See* AGO 078-67 in which this office concluded that the board of trustees of a community college district lacks the authority to enter into a contractual arrangement with an agency or educational institution of a foreign government for the purchase of an exclusive copyright license and the right to use, distribute, and sell a videotape educational series in the United States and its territories or possessions. While purely ministerial duties not involving the exercise of discretion or authority generally may be delegated to a public functionary or employee *of the agency*, the delegation of duties involving the exercise of independent official judgment, discretion or authority or the delegation of duties to an agency of a foreign government or to a private institution or agency is prohibited unless otherwise provided by law. *See* State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955); Florida Dry Cleaning & Laundry Board v. Cash & Carry Cleaners, Inc., 197 So. 550 (Fla. 1940); AGO 074-57; and 67 C.J.S. *Officers* s. 104; *see also* Crandon v. Hazlett, 26 So.2d 638 (Fla. 1946); State *ex rel.* Wolyn v. Apalachicola Northern R. Co., 88 So. 310 (Fla. 1921); AGO 073-380; and 81A C.J.S. *States* s. 123; *cf.* AGO's 068-44 and 068-6. The boards of trustees of the community college districts have not been expressly authorized by law to delegate to an entity, public *or* private, their duties and functions with respect to the travel expenses of their employees; nor does the general power to contract by necessary implication grant a power to delegate the board's duties or authority to a private entity or to an agency or institution of a foreign government. *See generally* 78 C.J.S. *Schools and School Districts* ss. 270 and 277 and 20 C.J.S. *Counties* s. 174; *see also* George Babcock, Inc. v. Board of Public Instruction for Dade County, *supra*. *Cf.* Martin v. Board of Public Instruction of Broward County, 42 So.2d 714 (Fla. 1949)(statute authorizing city to establish school and provide for its maintenance does not give city the authority to sell to county board of public instruction land to be used as school site); Trustees of Special Tax School District, No. 1, Leon County v. Lewis, 57 So. 614 (Fla. 1912)(general authority to supervise school does not include right to lease property); and AGO 073-374 holding that the power to purchase property does not include the power to borrow money to purchase property. In order for a power to be implied from an express grant of power, it must be necessary, indispensable, or essential to the attainment of the declared purpose or object of the public officer or body. Southern Utilities Co. v. City of Palatka, 99 So. 236 (Fla. 1923); Molwin Inv. Co. v. Turner, *supra*; AGO's 073-374 and 058-228 (authority that is indispensable to valid purpose of statute may be inferred or implied from authority expressly given). The delegation of its authority to disburse public funds and to reimburse public employees for travel expenses necessarily incurred on behalf of the district cannot be considered essential to the declared purposes or objects of the board of trustees of a community college district and to the board's general authority to contract and thus cannot be implied therefrom. Moreover, the powers conferred upon a public officer or body can be exercised only in the manner and under the circumstances prescribed by law; any attempted exercise thereof in any other manner or under different circumstances is a nullity. 67 C.J.S. *Officers* s. 103; *see also* White v. Crandon, *supra*; George Babcock, Inc. v. Board of Public Instruction, *supra*; and AGO 068-44; *cf.* AGO 058-163. Thus the board may not under its general power to contract delegate any of its statutory powers, duties, or functions to a private entity or agency or institution of a foreign government or attempt by contract to exercise its powers or duties in a way or at a time or in anywise different from that prescribed by law. *Cf.* Green v. Galvin, 114 So.2d 187 (1 D.C.A. Fla.), *cert. denied*, 116 So.2d 775 (Fla. 1959), *appeal dismissed*, 117 So.2d 844 (Fla. 1960)(a public official cannot do indirectly that which he is prohibited from doing directly); AGO 075-203.

Section 112.061(1)(a), F. S., indicates that the travel expenses and per diem of all public officers, employees, or authorized persons [as defined in s. 112.061(2)(e)] are subject to, and controlled by, the rates and limitations set forth in s. 112.061, as amended, unless *expressly* and specifically exempted by general law specifically referring to s. 112.061. A

community college district established pursuant to, and governed by, a statute clearly falls within the definition of an "agency or public agency" contained in s. 112.061(2)(a) as "[a]ny office, department, agency, division, subdivision, political subdivision, board, bureau, commission, authority, district, public body . . . or any other separate unit of government created pursuant to law." Neither s. 112.061 nor part II of Ch. 230, F. S., however, contains an exception for the officers and employees of community colleges from the rates and limitations set forth in s. 112.061. In fact, s. 230.753(5), F. S., expressly provides that the members of the board of trustees of a community college district may be reimbursed for expenses *as provided in s. 112.061.* Thus, in the absence of an express and specific preemption by general law, the officers and employees of the community college are subject to and limited by the provisions contained in s. 112.061.

The board of trustees as the governing body of the district is the "agency head or head of the agency" as defined in s. 112.061(2)(b), F. S. All travel must be authorized and approved by the head of the agency or its designated representative, from whose funds the traveler is to be paid, s. 112.061(3), and the travel expenses of all travelers are limited to those necessarily incurred by them within the limitations prescribed by s. 112.061. The agency head determines the maximum rates as set forth in s. 112.061(6) and designates the most economical method of travel for each trip, s. 112.061(7)(a). In certain cases, the agency head may authorize the use of privately owned vehicles, s. 112.061(7)(d)1., or chartered vehicles, s. 112.061(7)(e). *See also* s. 112.061(7)(f). Moreover, the agency head may make or authorize the making of advances to cover anticipated costs of travel, s. 112.061(12). These determinations must be made by the agency head under s. 112.061; in the instant inquiry, such determinations are the responsibility and duty of the board of trustees. *See*, Rule 6A-14.732, F.A.C., which provides:

> (1) The board shall determine policies and adopt rules and regulations providing the conditions and requirements for payment of travel and subsistence expense to members of the board for travel within and without the district and for travel within and without the district by the president, other college employees and other authorized persons.
> (2) Policies determined and rules and regulations adopted by the board relating to travel should provide for:
> (a) The greatest possible economy, the avoidance of unnecessary travel, and adequate auditing procedures.
> (b) Joint travel to be required by personnel in a single vehicle whenever feasible.
> (c) Limitations of such expenditures to the maximum amounts currently authorized by law to be paid employees of the state unless otherwise expressly provided by law.
> (3) Policies of the board relating to methods of reimbursement may provide for:
> (a) A flat monthly allowance for travel within the district by the president and for employees whose duties require a fairly uniform amount of travel each month or
> (b) Reimbursement on the basis of actual expenses not to exceed limitations authorized by Section 112.061, Florida Statutes or
> (c) Per diem and mileage at rates authorized by Section 112.061, Florida Statutes, for employees of the state.

The board itself must make such determinations which involve the exercise of its official judgment, discretion, or authority in the absence of express statutory authorization providing otherwise. The board, in the absence of such authorization, cannot by contract delegate its authority or duties to another body or entity, especially to a private party or to an institution or agency of a foreign government. Neither s. 112.061 nor any other statutory provision authorizes or empowers the board to reimburse its employees for travel expenses in any manner other than prescribed by s. 112.061 or to contract with a private entity or agency or instrumentality of a foreign government or *any* contracting party to exercise such powers or perform such duties. Thus, the manner of payment and the rates of reimbursement contained in s. 112.061 will prevail over any contractual provision entered into by the board of trustees of a community college district. *Cf.*Alsop v. Pierce, 19 So.2d 799 (Fla. 1944)(if statutes specifically direct how a thing should be done, that is, in effect, a prohibition against its being done in any other way); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952)(express

mention of one thing is the exclusion of another); White v. Crandon, *supra*; and First National Bank v. Filer, 145 So. 204 (Fla. 1933)("the authority of public officers to proceed in a particular way . . . implies a duty not to proceed in any manner than that which is authorized by law"). *See* s. 112.061(6)(c)1. which provides in pertinent part that "[a]ll other travelers may be allowed up to $35 per diem." The travel expenses of all travelers under s. 112.061 are limited to those expenses necessarily incurred by them in the performance of a public purpose authorized by law to be performed by the public agency. *See* s. 112.061(3)(b). Section 3 of the contract you enclosed states that the Miami-Dade College "shall stand in the relation of an independent contractor with the [British Open] University and shall not be the agency of the University for any purpose whatever." Therefore, the employees of the community college may be legally reimbursed only for travel expenses necessarily incurred by them in the performance of their lawfully authorized official duties and functions on behalf of the college, not the university. *Cf.* AGO 078-67 in which I held that the Miami-Dade Community College was not authorized by law to purchase certain copyright licenses for the purpose of selling and distributing certain products throughout the United States and its territories and possessions. Such an arrangement is not an authorized and valid district or college function and purpose under part II of Ch. 230, F. S., and is thus not authorized by law. Therefore, if the purpose of the contract is not authorized by law as a district or college purpose, duty, or function, the requirement under s. 112.061(3)(b) that the travel expense be necessarily incurred in the performance of a public purpose authorized by law to be performed by the agency cannot be met.

This office has previously stated that a public body or agency may not turn over public funds in lump sum to a private or nongovernmental entity absent express statutory or constitutional authority. *See, e.g.*, AGO 077-97. *See also* 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 with the county, it could not turn over its funds to a *governmental* agency in lump sum. I am not aware of any statutory or constitutional provision, or rule or regulation of the State Board of Education, which expressly authorizes a community college to make lump-sum payments to a private entity or an agency or instrumentality of a foreign government. *See* s. 230.768, F. S., which provides that "[a]ll funds accruing to the benefit of the community college shall be received, accounted for, and expended in accordance with the rules and regulations of the state board." Clause 19 of the subject contract provides that the travel expenses funds are to be paid over to the British Open University in lump sum; moreover, the funds are to be "maintained in a bank in the United Kingdom or the United States of America to be agreed [upon] between the parties," to be used and drawn upon as a travel and expense fund, presumably by the university, after receipt of the college president's or executive vice president's authorization. Rule 6A-14.75, F.A.C., requires that "[a]ll funds received by a community college shall be deposited intact in a designated depository as soon as possible." *See* Rule 6A-14.751, F.A.C., which provides for the establishment of such designated depositories and their regulation including the security required for deposits of the board's funds; subsection (2) of the rule provides in part that "[t]he board may utilize the services of any bank/s certified by the comptroller of the state as a county depository, as provided in Chapter 136, Florida Statutes." *See also* Rule 6A-14.751(1)(b) which defines the depository of a community college district board's funds as

> any bank designated as provided by Chapter 136, Florida Statutes, for deposit of county funds, by Chapter 18, Florida Statutes, for deposit of state funds and by Section 659.24, Florida Statutes, for deposit of all public money.

Rule 6A-14.751(1)(c) provides that "satisfactory security" means

> bonds of the United States of America, bonds the payment of whose principal and interest is guaranteed by the United States, federal certificates of indebtedness, state, county or municipal bonds, or any other acceptable security as provided in Chapter 136, Florida Statutes.

I am not aware of any law which authorizes a community college to maintain its deposits of college funds in a foreign bank, an out-of-state bank, or any bank not properly designated as a depository under the laws of Florida or the foregoing rules of the state board; nor am I aware of any statutory provision empowering the board of trustees of a community college district to contract with a private entity to use or withdraw such

funds from a depository. Rule 6A-14.751 requires that all money drawn from the depository be upon a prenumbered check signed by two authorized persons designated by the board to sign checks and who are under adequate bond. While the contract provides that the funds may be drawn only upon authorization of the community college president or executive vice president, no provision is made within the contract for an adequate bond or for security for such funds held prior to lawful disbursement. In the absence of a statutory provision or authorized rule or regulation of the state board to the contrary, the board or trustees of a community college district lacks the authority to enter into a contract prescribing a different manner or method of custodianship of such funds and disbursement thereof.

This office has previously stated that s. 112.061, F. S., clearly contemplates a reimbursement of travel expenses, not an advance of funds, with which they may be paid. *See* AGO's 066-105 and 068-24; *but see* subsequently enacted s. 112.061(12) which provides that an agency head may make, or authorize the making of, advances to cover anticipated costs of travel to travelers. All travel must be authorized and approved by the agency head who

> shall not authorize or approve such a request unless it is accompanied by a signed statement by the traveler's supervisor stating that such travel is on the official business of the state and also stating the purpose of such travel. [Section 112.061(3)(a), F. S.]

See also s. 112.061(7)(a) which provides in part that the agency head shall determine the most economical method of travel for each trip. *Cf.* s. 112.061(11)(a) and Rule 6A-14.732(2), F.A.C. Travel and the reimbursement for expenses thereof must therefore be separately audited and approved before payment may be made in accordance with law. *See* s. 230.768, F. S., providing that "[a]ll funds accruing to the benefit of the community college shall be received, accounted for, and expended in accordance with rules and regulations of the state board." While Rule 6A-14.732(2) and (3) generally provides that the board may adopt such policies relating to travel and the method of reimbursement, including adequate auditing procedures, Rule 6A-14.73(2) and (3), F.A.C., provides that a voucher, *i.e.*, a statement of an account for the purchase of materials and supplies or services, shall be filed in logical order to provide easy reference for both college personnel and the auditor and that the president of a community college present a list of warrants paid during the preceding months or accounting periods ending since the last regular meeting of the board. Moreover, this office has consistently interpreted s. 112.061 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 077-123, 076-56, and 074-132. Thus an officer or employee of the community college may be reimbursed only for travel expenses for travel away from the official headquarters of the college. If the employee, however, has been designated as "in the field" or is stationed away from the official headquarters of the college for a period of more than 30 continuous workdays, the official headquarters of the employee is the town or city nearest to the area where the majority of his work is performed; *see* s. 112.061(4)(a) and (b). The employee loses his travel status for the remainder of his tour of duty in such city unless express approval for its continuance is obtained from the Department of Administration. *See also* AGO 070-61. The subject contract contains none of the foregoing provisions regarding the reimbursement of travel expenses of public officers and employees. The travel expenses of public officers and employees of community colleges must be paid by the board of trustees in the manner and circumstances and at the time prescribed by s. 112.061 and in no other manner, time, or method; the boards of trustees of a community college district lack the power to contract with a private entity or agency or institution of a foreign government to exercise such power or to perform such duties and thus may not enter into a contract which delegates to a private entity or agency or institution of a foreign government the custodianship of public funds or the power to disburse those funds and to reimburse public employees at a rate or in a manner different from that set forth in s. 112.061.

AS TO QUESTION 2:

Based upon my response to the previous question, it is unnecessary to answer question 2.

078-69—April 27, 1978

MUNICIPALITIES

ELIGIBILITY OF PUBLIC SAFETY OFFICERS TO PARTICIPATE IN POLICE OFFICERS' OR FIREMEN'S RETIREMENT FUND

To: John C. Chew, City Attorney, Daytona Beach

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May the City of Daytona Beach receive funds collected by the state under the provisions of ordinances enacted by the City of Daytona Beach establishing an excise tax pursuant to ss. 185.08 and 175.101, F. S., on the gross receipts of insurance policies within the city when full-time "public safety officers" are members of the Daytona Beach Police and Fire Department Pension Fund?

SUMMARY:

A person holding the position of public safety officer, as established by the City of Daytona Beach, is neither a police officer nor a firefighter as contemplated by existing law. Accordingly, it does not appear that the city may participate in the distribution of excise tax moneys pursuant to Chs. 175 and 185, F. S., which are intended for the exclusive use of policemen and firefighters.

This question has been prompted by a dispute between the Insurance Commissioner and Treasurer and the City of Daytona Beach over the organization of the Daytona Beach Police and Fire Departments. Specifically, the commissioner has questioned the city's designation of a separate category of public safety officers within the public safety agency whose members are certified as police officers and may be assigned the duties of both police officers and firefighters Pursuant to s. 215.32(1)(b)1., F. S., the commissioner has refused to remit to the city the moneys collected pursuant to ss. 185.08 and 175.101, F. S., until such time as the commissioner is assured that the requirements of the respective statutes are being met by the city.

Section 185.02(1), F. S., defines "police officer" to mean a full-time police officer who receives compensation from municipal funds of any incorporated municipality of the state for services rendered. The commissioner, pursuant to s. 185.23, F. S., has more specifically defined "police officer" at Rule 4-14.07, F.A.C., to include:

> . . . a law enforcement officer paid from the public funds of a municipality for performing *the primary duties* of enforcing state laws and municipal ordinances, making arrests, testifying in court, bearing arms, and other duties commonly accepted as being the duty of a police officer. . . . Municipal employees assigned to the Police Department for the primary purpose of performing clerical or other non-enforcement duties shall not be defined as police officers even though they may be given the power of arrest. (Emphasis supplied.)

Pursuant to the Rules and Duties Manual of the Daytona Beach Police Department, a "public safety officer" is an employee of the public safety agency who is certified as a police officer, trained as a fireman and assigned to the Division of Patrol of the Police Department. Such officer is directly responsible to the Sergeant of the Uniform Patrol Section for the proper performance of his police duties *and* to the ranking fire department officer present at the scene of a fire for the proper performance of his fire duties. The duties of a "public safety officer" include the same duties and responsibilities assigned to *both* police officers and firefighters in the Fire Department Rules and Regulations. In addition to the public safety officers, both firefighters and police officers are employed by fire and police departments within the city's public safety department.

According to additional information furnished this office, a public safety officer in Daytona Beach is required to perform both firefighting and police duties in a specific designated district of the city as may be required. Assistance in fighting fires within this designated area is obtained from the fire department only in those instances where needed. Pursuant to job descriptions published by the city, the category of "public safety officer" constitutes a separate and distinct class of employees whose required training, experience, and work performed are different from those of firemen or police officers. Additionally, public safety officers wear uniforms and drive automobiles which are different from those of police officers or firefighters.

Pursuant to s. 175.351(1), F. S., in order for municipalities with their own pension plans for firemen or for firemen and other employees to participate in the distribution of the tax fund established in ss. 175.131-175.151, their pension funds must, *inter alia*,

> . . . be for the purpose of providing retirement and disability income for *firemen* or their beneficiaries. Also see s. 175.351(13), F. S., stating that ". . . the board of trustees . . . may place the income from the premium tax in s. 175.101 in its existing pension fund for *firemen* . . . ." (Emphasis supplied.)

Similarly, s. 185.35(1), F. S., provides that in order for cities with their own pension plans for policemen or for policemen and other employees to participate in ss. 185.07, 185.08 and 185.09 their retirement funds must be, *inter alia*, for the purpose of providing retirement and disability income for *policemen*.

Sections 175.041(1) and 185.35(2), F. S., further indicate that the benefits derived from the tax funds established in Chs. 175 and 185, respectively, are for the sole and exclusive use of firemen and policemen.

In AGO 063-130, this office stated that a municipality which combined its fire and police departments into a department of public safety was eligible to establish a pension trust fund for policemen or firemen under the provisions of Chs. 175 and 185, F. S. This opinion, however, included a caveat to the effect that a city would not be eligible to come within the provisions of Chs. 175 and 185 if by combining the police and fire departments into a department of public safety the members thereof lost their individual status as policemen and firemen.

Although the city has broken down the department of public safety into police and fire departments, it has also created a new category or classification of "public safety officers" who are responsible for both police and firefighting duties. Under such circumstances, it does not appear that the public safety officers' duties could be said to be primarily law enforcement or firefighting. Rather, their duties could be primarily *either* law enforcement or firefighting as needed by the city. *Also see* Paul v. Padron, 181 So.2d 24 (3 D.C.A. Fla., 1965); City of Miami v. Carter, 105 So.2d 5 (Fla. 1958); and Jackson v. McGrath, 20 So.2d 907 (Fla. 1945), in which the Supreme Court stated that the purpose of Ch. 175 was ". . . to provide a system of relief for firemen and their dependents, and for *no other class of employees*." (Emphasis supplied.)

Thus, I do not believe that a person holding the position of "public safety officer" as established by the City of Daytona Beach is a police officer as defined at s. 185.02(1), F. S., or a firefighter as defined at s. 175.032(1), F. S. *Also cf.* ss. 633.30(1) and 943.10(1), F. S.

078-70—May 2, 1978
(Supplement to 078-17)

MUNICIPALITIES

PENSION PLAN DEATH BENEFITS

To: James H. Walden, City Attorney, Fort Lauderdale

Prepared by: Jerald S. Price, Assistant Attorney General

(See 078-17 for question.)

CONTINUED

2 OF 5

SUMMARY:

Death benefits in a municipal pension or retirement plan for municipal employees funded by contributions to a pension trust fund, which benefits are payable out of the pension or retirement trust fund, are not "life insurance" or a contract for life insurance. The providing of municipal pension plan death benefits under such circumstances does not fall within the competitive bidding or other requirements of s. 112.08, F. S., relating to payment by a unit of local government of all or part of the premiums for contracts of group life insurance for its employees.

As I indicated in my letter to your predecessor dated March 31, 1978, I have considered it necessary to reexamine the statements and conclusions in AGO 078-17 which tend to indicate that death benefits contained in and provided as an integral part of a municipal pension plan funded by contributions to a pension trust fund are the same as life insurance and that the providing of pension death benefits under such circumstances invokes the competitive bidding or other requirements of s. 112.08, F. S. After examining and reading together all relevant laws (and their respective histories) and judicial interpretations relating to municipal pension plans and insurance, and after receiving the views of the Department of Insurance, I find it necessary to recede from and revise AGO 078-17, as explained below.

First, I must emphasize that this opinion is concerned (and AGO 078-17 should have been concerned) solely with death benefits which are an integral part of a municipal pension or retirement plan funded by contributions to a pension or retirement trust fund, from which pension or retirement trust fund the death benefits (and other pension benefits) are payable. For purposes of comparison and illustration, *see* s. 121.091(7), F. S., setting forth the death benefits provided as an integral part of the Florida Retirement System for state and county employees and employees of municipalities electing to participate in the Florida Retirement System.

The providing of such death benefits in a municipal pension plan must be separated and distinguished from a municipality's making group life insurance available to its employees and paying all or part of the premium for such group life insurance contracts as is commonly done with health and hospitalization insurance contracts for employees. It would be in the event that a municipality chooses to so make available group life insurance for its employees that the provisions of s. 112.08, F. S., regarding competitive bidding in the purchase of group life insurance would become applicable. I would note that the last sentence in s. 112.08(1) requiring contracting with an insurance company or professional administrator approved by the Department of Insurance to administer self-insurance plans applies only to a unit of local government which elects to self-insure health, accident, and hospitalization insurance coverage for its employees. As the self-insurance of *life* insurance is not authorized in s. 112.08, the provisions requiring contracting with an insurance company or professional administrator to administer self-insurance plans are not applicable to the purchase of contracts of life insurance from licensed life insurers, although the governmental unit may contract with professional administrators to *provide* such group life *insurance*. What is at issue here is *not* life insurance, nor is it the self-insurance of life insurance plans. It is merely the providing of death benefits, along with other customary retirement benefits, as a component or integral part of a validly adopted pension or retirement plan.

Confusion in AGO 078-17 of municipal pension plan death benefits with life insurance or contracts for life insurance (and resulting statements that the providing of such pension benefits invokes the requirements of s. 112.08) appear to have been the result of the manner in which the question was posed and answered. The question presented and addressed in AGO 078-17 was whether such pension plan death benefits were "in the nature of a contract for life insurance," rather than whether they were actually the same as life insurance or a contract of life insurance (and thus subject to all statutes, including s. 112.08, regulating life insurance and life insurance contracts). The statements made in AGO 078-17, supported by citations, that death benefits in a municipal pension plan are "in the nature of a contract for life insurance" are correct. There are certain general similarities, such as the making of payments upon the occurrence of death (although not in consideration of stated premiums fixed by contract), and the designation of persons as beneficiaries of such payments. However, the point which was overlooked in AGO 078-17, and which I now must make, is that a determination that something is "in the nature of a contract for life insurance" is not the same as a determination that that thing

actually is a life insurance contract. I have found that the cases holding such death benefits to be "in the nature of life insurance" do not state that the benefits are contracts for life insurance or that the providing of such benefits under the circumstances herein delineated is subject to statutes regulating insurers or life insurance contracts. Cases such as Shaw v. Board of Administration, 241 P.2d 635 (Cal. App. 1952), cited in AGO 078-17, stand merely for the proposition that the similarities between pension death benefits and actual contracts of life insurance make it permissible to apply generally (for analogy) to the construction of pension death benefit provisions (such as designation of beneficiary) principles applicable to the construction of contracts of life insurance. In fact, one of my predecessors in office considered the same factual situation as existed in *Shaw* (divorce of a spouse previously named as beneficiary and subsequent failure to designate a different beneficiary) and recognized—as did the court in *Shaw*—that rules of construction applicable to determination of beneficiaries in life insurance contracts may be applied, because of similarities, to questions involving the determination of beneficiaries of pension plan death benefits. *See* AGO 057-20. In 63 A.L.R. 712, in an annotation entitled "What constitutes insurance," a similar point is made as to the applicability of principles of insurance contract interpretation to the interpretation of surety agreements. It is there stated:

> The cases in which a bond of a surety company, for example, has been held to be *in the nature of insurance* as regards interpretation of the contract, cannot apparently be regarded necessarily as authority for the proposition that such obligations *are* insurance contracts *for other purposes*, but may mean *only that the contract is so far analogous to an insurance contract that it should be similarly interpreted.* (Emphasis supplied.)

It is, then, the distinction and difference between an actual contract of life insurance issued by a licensed life insurer and something merely "in the nature of a contract for life insurance" which is determinative of the applicability of statutes regulating the purchase or providing of contracts of life insurance, such as s. 112.08, *supra.* I have been advised by officials of the Department of Insurance (which is the agency charged by law with enforcing the State Insurance Code, including the regulation and licensing of life insurers and life insurance contracts) that the department does not consider the providing of death benefits by a municipality, under and as an integral part of a pension plan funded by contributions to a pension trust fund, to be a life insurance contract for purposes of applicability of s. 112.08, nor does it consider a municipality providing such pension plan death benefits to be engaged in the self-insurance of plans for life insurance. Such an administrative interpretation by an agency charged with the administration and enforcement of the laws governing insurance, including s. 112.08, is entitled to great weight and is to be followed unless ruled by a court of competent jurisdiction to be clearly erroneous. Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788, 790 (Fla. 1952).

It is thus my opinion that when a municipality validly establishes a pension or retirement plan for its employees, whereby funding of such plan is by contributions to a pension or retirement trust fund, and provides as an integral part of the pension or retirement plan death benefits payable out of the pension or retirement trust fund (as, for example, those provided in s. 121.091(7), F. S., payable out of the state's retirement system trust funds), the death benefits so provided may be said to be "in the nature of a contract for life insurance" for purposes of construction of the terms and provisions of such plans by analogous principles and rules of construction governing the construction of life insurance contracts. However, such pension plan death benefits do *not* constitute "life insurance" or a contract for life insurance as defined in ss. 624.02 and 624.602, F. S., for purposes of determining applicability of regulatory provisions of the Insurance Code and the provisions of s. 112.08, F. S., nor does the providing of municipal pension plan death benefits as herein described and limited constitute self-insurance of a plan for life insurance by a municipality.

078-71—May 2, 1978
(Revised; see AGO 078-85)

COUNTIES

EXTRA COMPENSATION OF CHAIRMAN OF BOARD OF COUNTY COMMISSIONERS

To: John L. Mica, Representative, 39th District, Tallahassee

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Is Ch. 57-507, Laws of Florida, a special act relating to Orange County, permitting the payment of extra compensation to the chairman of the board of county commissioners currently in effect?

SUMMARY:

Chapter 57-507, Laws of Florida, has no legal effect or operation on the additional or extra compensation payable to the Chairman of the Board of County Commissioners of Orange County, having been expressly repealed and supplanted by Ch. 61-1387, Laws of Florida. While Ch. 61-1387, under the provisions and for the purposes of s. 145.131(1), F. S., and s. 3(2) and (5) of Ch. 71-29, Laws of Florida, may be applicable as an ordinance of those counties within the population range fixed in s. 2 of Ch. 61-1387 as of the effective date of Ch. 71-29, Orange County is not governed by either Ch. 61-1387 or Ch. 71-29 since Orange County had grown out of the population range set forth in Ch. 61-1337 prior to effective date of Ch. 71-29. Therefore, as of July 1, 1971, there is no statute which provides for additional or extra compensation for the chairman of the Board of County Commissioners of Orange County.

The annual compensation and method of payment for county commissioners is established by law. *See* s. 145.031, F. S. The Legislature's intent in enacting Ch. 145, F. S., as expressed in s. 145.011, F. S., is to provide a uniform schedule of compensation for county officials having substantially equal duties and responsibilities. The compensation provided in Ch. 145 is to be the sole and exclusive compensation for those officers whose salary is established therein and, except as specifically provided in Ch. 145, the acceptance of salary for official duties as a result of other general or special law, general law of local application, resolution, supplement, or from any other source is a misdemeanor of the first degree. Section 145.17, F. S. In order to preserve the statewide uniformity of compensation for county officers, the Legislature, pursuant to s. 11(a)(21), Art. III, State Const., has prohibited special laws or general laws of local application pertaining to the compensation of, *inter alia*, members of the boards of county commissioners. Section 145.16, F. S. Section 145.131(1), F. S., however, provides an exception by stating:

> All local or special or *general laws of local application enacted prior to July 1, 1969*, which relate to compensation of county officials *are repealed, except laws pertaining to* travel expenses of county officers or *to payment of extra compensation to the chairmen of boards of county commissioners* or district school boards. (Emphasis supplied.)

Thus, the compensation for the chairman of a board of county commissioners for his duties as chairman is not fixed by Ch. 145. *See* AGO 069-87 in which this office stated that Ch. 145 did not appear to prohibit a county commission chairman, where properly authorized by existing local act, to receive supplemental compensation for extra services rendered as chairman; *see also* AGO 073-485. Therefore, the payment of extra compensation to the chairman of the board of county commissioners for his duties as chairman as authorized by special law *or general law of local application enacted prior to July, 1969*, would not contravene the provisions of Ch. 145.

Section 1 of Ch. 57-507, Laws of Florida, assuming the validity thereof, authorized the Chairman of the Board of County Commissioners for Orange County to receive $100 a month in addition to his salary as county commissioner. In 1961 the Legislature in Ch. 61-1387, Laws of Florida, expressly repealed and supplanted Ch. 57-507, effective October 1, 1961. Section 2 of Ch. 61-1387 provides:

> The Chairman of the Board of County Commissioners in all counties having a population of not less than two hundred thirty thousand (230,000) and not more than three hundred thousand (300,000) according to the latest official state-wide decennial census, shall be paid five hundred dollars ($500.00) per annum in addition to his salary as County Commissioner, payable in equal monthly installments.

At the time Ch. 61-1387 was enacted, Orange County was the only county within the state with a population within the limits set forth in s. 2 of Ch. 61-1387. *See* Florida Statutes 1967, Vol. 3, p. 5418, which shows that, under the 1960 Official Florida State and Federal Decennial Census, Orange County had a population of 263,540 and was the only county in the state within the population range of 230,000 to 300,000.

The 1971 Legislature, in an effort "to restore the regulation of local government to the constitutionality [sic] recognized modes of enactment . . . [and] to enact additional general legislation to expand the home rule powers of local government," repealed a number of general laws of local application; *see* ss. 1 and 2 of Ch. 71-29, Laws of Florida. Chapter 61-1387 was among those general laws of local application enumerated in s. 2 of Ch. 71-29. Section 3(2), Ch. 71-29, however, converted those general laws of local application relating to counties into ordinances of the affected counties, subject to modification or repeal as are other ordinances; moreover, Ch. 71-29 provided that these ordinances or "enactments" were authorized to conflict with general law to the extent authorized on January 1, 1971. *See* s. 3(5), Ch. 71-29.

You inquire as to whether Ch. 57-507, Laws of Florida, would be revived by the repeal of Ch. 61-1387 by s. 2 of Ch. 71-29. Section 2.04, F. S., provides that no repealed statute shall be revived by implication:

> [I]f a statute be passed repealing a former statute, and a third statute be passed repealing the second, the repeal of the second statute shall in no case be construed to revive the first, unless there be express words in the said third statute for this purpose.

See generally State v. Sholtz, 169 So. 849, 853 (Fla. 1936), and State *ex rel.* Scott v. Christensen, 170 So. 843 (Fla. 1936). However, while s. 2 of Ch. 71-29 repealed Ch. 61-1387, s. 3(2) and (5) converted the general laws of local application into ordinances of the affected counties, authorized to conflict with general law to the extent authorized on January 1, 1971. If not repealed by the county commission by ordinance, Ch. 61-1387, as an ordinance or "enactment" under s. 3(5), Ch. 71-29, may be considered to be a law "pertaining to . . . payment of extra compensation to the chairmen of the boards of county commissioners . . . " under s. 145.131(1), F. S.; the provisions contained therein would continue to govern and to control the extra compensation granted to such chairman within the population brackets or limitations set forth in Ch. 61-1387 as of the effective date of Ch. 71-29. Chapter 57-507, however, has no legal effect or operation on the compensation of such chairman, having been expressly repealed and supplanted by Ch. 61-1387. While the question as to whether the conversion of the provisions of Ch. 61-1387 to ordinances of the affected counties by Ch. 71-29 would constitute a "repeal" of Ch. 61-1387 by a "statute" within the meaning of s. 2.04 is, admittedly, a close question, its resolution is not dispositive of the question raised in your inquiry. If Ch. 61-1387 is considered to have been repealed for the purposes of s. 2.04, then under the express terms of s. 2.04, Ch. 57-507 would not be revived by the repeal of its repealing statute, Ch. 61-1387. If, however, the conversion of Ch. 61-1387 to a county ordinance by Ch. 71-29 is not deemed to be a repeal by "statute" of this general law of local application within the meaning of s. 2.04, then the provisions of Ch. 61-1387 will still control the compensation of the chairman of county commissioners of the affected counties, having repealed and supplanted Ch. 57-507.

The payment of additional or extra compensation to the Chairman of the Board of County Commissioners of Orange County is not, however, governed by the terms of Ch. 61-1387 or by Ch. 71-29. At the time Ch. 71-29 became effective, Orange County had

grown out of the population range fixed in s. 2, Ch. 61-1387 and was therefore no longer governed by its terms. *See* Florida Statutes 1977, Vol. 3, p. 1226, which provides that under the 1970 Official Florida State and Federal Census, Orange County had a population of 344,311. Section 11.031(3), F. S., provides that

> [t]he last federal decennial statewide census shall not be effective for the purposes of affecting acts of the Legislature enacted prior thereto which apply only to counties of the state within a stated population bracket until July 1 of the year following the taking of such census. (Emphasis supplied.)

Section 6 of Ch. 71-29 provides that the effective date of the act is to be the 29th day after the final adjournment of the 1971 regular session of the Legislature; the effective date of Ch. 71-29 was therefore on or about July 3, 1971, since the legislative session ended on June 4. Thus, Ch. 71-29 did not become effective until after the 1970 decennial census became applicable to Ch. 61-1387.

Accordingly, the additional compensation of the Chairman of the Board of County Commissioners for Orange County is not governed by Ch. 61-1387 or Ch. 71-29 which converted the provisions of Ch. 61-1387 into county ordinances. As of July 1, 1971, there was no statute which provided for additional compensation for the Chairman of the Orange County Commission. Moreover, s. 145.16(2), F. S., prohibits any special law or general law of local application pertaining to the compensation of members of the board of county commissioners; the compensation of any official whose salary is fixed by Ch. 145 may be determined only by general law except for those laws enacted prior to *July 1, 1969,* which authorized additional compensation to the chairman of the board. Thus, subsequent to July 1, 1969, the Legislature may provide for the additional compensation to county chairmen only *by general law.* The board of county commissioners, however, may authorize an allowance for the chairman of the commission of up to $50 per month for travel and other expenses related to the performance of his duties, provided that prior to July 1, 1969, the board had not authorized an additional monthly expense allowance. Section 145.121(2), F. S. Such compensation is not, however, to be considered as part of the chairman's income from office. *See* AGO 073-173. *See also* AGO 076-17 in which I stated that a payment under a county ordinance providing for an in-county travel expense allowance of $50 per month for each member of the board of county commissioners without complying with the requirements of s. 112.061 would not appear to be a proper reimbursement for travel expenses; however, such an ordinance may be deemed effective to implement s. 145.121(2) as applied to the chairman of the board.

078-72—May 2, 1978

OFFICERS

COMPENSATION OF SUCCESSFUL CONTESTANT
IN ELECTION CONTEST WHEN INCUMBENT HAS HELD OVER

To: Bill A. Corbin, Calhoun County Attorney, Blountstown

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the Calhoun County Board of County Commissioners authorized to compensate the successful contestant for the office of clerk of the circuit court for a 2-month period prior to the qualification of said clerk when the incumbent clerk was holding over and performing the duties of the office pending the outcome of the election contest?

SUMMARY:

In the absence of contrary judicial determination, it would appear that the board of county commissioners would not be authorized to compensate the successful contestant for the office of clerk of the circuit

court for the period prior to the time said clerk qualified for office if the incumbent clerk has been holding over and performing the duties of the office pending the outcome of an election contest.

Your inquiry is based upon the following factual situation which you outlined in your letter:

> The 1976 General Elections in Calhoun County, Florida, for the office of the Clerk of the Circuit Court resulted in the re-election of James A. Peacock, Jr., the incumbent Clerk, over Willie D. Wise by a slim margin. Subsequently, and prior to January 3, 1977, Mr. Wise filed a timely challenge and suit regarding the validity of certain election procedures and the results of the election. During the pendency of this suit, Mr. Peacock's original term of office expired, and he was reinstated as the duly-elected Clerk on or about January 3, 1977. On February 14, 1977, the Circuit Court of the Fourteenth Judicial Circuit in Calhoun County invalidated all absentee ballots cast in that election and ruled that Mr. Wise was the duly-elected Clerk of the Circuit Court. Mr. Wise's commission for that office was signed by Governor Reubin Askew on February 28, 1977, and Mr. Wise assumed the actual duties and obligations of that office as of February 28, 1977. Mr. Peacock fulfilled those duties and obligations from January 3, 1977, to February 28, 1977, and was duly compensated therefor. Mr. Wise requests payment of back salary as the duly-elected Clerk of the Circuit Court, in the approximate sum of $3,300 for the period January 3, 1977, to February 28, 1977.

Following the receipt of your letter, Mr. Wise wrote to this office for an opinion on this matter and advised that the board of county commissioners paid him the full amount of the disputed salary ($3,300) on March 15, 1977. Therefore, it would appear that your question might more appropriately be cast in the past tense, *i.e.*, *was* the board of county commissioners authorized to pay Mr. Wise the monetary amount in question.

Section 5(b), Art. II, State Const., states, in pertinent part, that "[e]ach state and county officer . . . shall . . . continue in office until his successor qualifies." This section was derived from a substantially similar provision found at s. 14, Art. XVI of the 1885 Constitution:

> All state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified.

In State *ex rel.* Landis v. Bird, 163 So. 248, 264 (Fla. 1935), the court observed that s. 14, Art. XVI, "prescribes a *duty* as well as *a substantial right* of an incumbent at the expiration of his official term to continue in office until his successor is 'duly qualified.' " (Emphasis supplied.) *See also* State *ex rel.* Hodges v. Amos, 133 So. 623, 625 (Fla. 1931), noting that this section contemplates that an incumbent "shall continue in office, or perform the official duties of the office after the expiration of his official term . . . until his successor is duly qualified. . . ."

Because of his constitutional duty to hold over until his successor was duly qualified, an incumbent officer was deemed to be a de jure officer until the qualification of his successor. State *ex rel.* Landis v. Bird, *supra*; Tappy v. State *ex rel.* Byington, 82 So.2d 161 (Fla. 1955). *See also* State *ex rel.* Davis v. Collins, 134 So. 595, 599 (Fla. 1931) (Ellis, J., concurring), noting that an incumbent entitled to hold over until his successor is duly qualified is both a de jure and a de facto officer; and State *ex rel.* Hawthorne v. Wiseheart, 28 So.2d 589, 593 (Fla. 1947), stating that "[t]he difference between the authority of a de facto officer and that of a de jure officer is that one rests on right and the other rests on reputation," and further observing that "[a] de jure officer, in other words, has the lawful title without possession, while the de facto officer has possession and performs the duties under color of title without being technically qualified to act."

Moreover, under the general rule, where the legal incumbent of an office is authorized by law to hold over at the expiration of the term until his successor is elected and qualified, the period of his holding over is as much a part of his tenure of office as the regular period fixed by law. 67 C.J.S. *Officers* s. 48(c), p. 206. An officer holding over under such circumstances "who, in good faith, performs the duties appertaining to the office, is legally entitled to the salary belonging thereto." McQuillin *Municipal Corporations* s. 12.202, p. 115; 63 Am. Jur.2d *Public Officers and Employees* s. 363, p. 847; Mason County

v. Condon, 133 S.W.2d 527 (Ky. 1939); City of Berryville v. Binam, 264 S.W.2d 421 (Ark. 1954); Mahoney v. City of Biddleford, 155 A. 560 (Me. 1931).

In Masters v. State *ex rel.* Bell, 131 So. 773 (Fla. 1931), the court followed the principles of law outlined above and ruled that a de jure officer entitled under s. 14, Art. XVI, State Const. 1885, to hold over after the expiration of his term until a successor had duly qualified was entitled to compensation during the holding over period. The court held that this rule applied even where the period of holding over was prolonged because of an election contest, at least in the absence of fraud or bad faith. *Accord:* Attorney General Opinion 046-318, Biennial Report of the Attorney General, 1945-1946, p. 203, concluding that a de jure holdover probation officer who had not abandoned or forfeited her claim to the office was entitled to the pay of such office until her successor was appointed and qualified.

The facts set forth in *Masters* are substantially the same as those presented by your inquiry. In each case an incumbent officeholder remained in office following the expiration of his term and performed the duties of the office pending the outcome of an election contest. Likewise in each situation the incumbent's opponent eventually emerged victorious in the election contest and the incumbent was ousted from office. It seems clear, therefore, that under the circumstances outlined in your letter, the incumbent holdover clerk (Peacock) was entitled to the compensation of the office until his successor (Wise) duly qualified for said office. *Cf.* s. 28.09, F. S., providing that in the case of vacancy occurring in the office of a clerk of the circuit court by death, resignation, or other cause, the judge of that court shall appoint a clerk ad interim, who shall assume all the responsibilities, perform all the duties, and receive the same compensation for the time being as if he had been duly appointed to fill the office.

The remaining consideration, therefore, is whether or not the board of county commissioners was authorized to compensate Mr. Wise in addition to compensating Mr. Peacock. My research discloses no Florida cases which has determined whether or not the successful contestant in an election contest is entitled to compensation for the period during which the incumbent held over and performed the duties of the office pending the outcome of the contest. However, for the following reasons, I believe that in the absence of judicial determination otherwise, this question should be answered in the negative.

Under the general rule, an incumbent who is required to hold over until the qualification of his successor remains in office until his appointed or elected successor qualifies as *required by law.* McQuillin *Municipal Corporations* s. 12.110, p. 474. In State *ex rel.* Landis v. Bird, at 264, the court noted that the words "duly qualified" as used in s. 14, Art. XVI, *supra*, contemplated the giving of bond or the taking of the oath of office in addition to a legal election or appointment. *See also* State *ex rel.* Coe v. Lee, 3 So.2d 497, 499 (Fla. 1941), stating that "[t]he purpose of constitutional or statutory provisions authorizing public officers to hold over is to prevent a hiatus in the government pending the time when a successor may be chosen *and inducted into office.*" (Emphasis supplied.) Thus, if an incumbent's successor is validly elected or appointed, but fails to qualify (by subscribing to the oath of office and giving bond required as by law), then the incumbent is required to remain in office until the lawfully declared successor has qualified. Shaw v. Baker, 298 P.2d 250 (Kan. 1956); City of Berryville v. Binam, *supra*; Mason v. Condon, *supra*; State *ex rel.* Masters v. Bell, *supra*; People *ex rel.* Ewell v. Robson, 1 N.Y.S.2d 476, 480 (Sup. Ct. App. Div. 1937). *Cf.* s. 114.01(1)(h), F. S., providing that a vacancy in office shall occur, "[u]pon the failure of a person elected or appointed to office to qualify for office within 30 days from the commencement of the term of office," and s. 3, Art. X, State Const., providing that a vacancy in office shall occur upon the failure of an elective or appointive officer to qualify within 30 days from the commencement of the term.

Moreover, as has been previously noted, although the holdover period of an incumbent is as much a part of his *tenure* of office as the regular period fixed by law, since the term of office is distinct from the tenure of an officer,

> the term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term but merely *shortens the term of his successor.* [67 C.J.S. *Officers* s. 48(c), p. 206; emphasis supplied.]

See also Graham v. Lockhart, 91 P.2d 265 (Ariz. 1939). Thus, until the due qualification of the successor, the office is vacant as to the new term, in the sense that any office is vacant when not occupied by a person chosen to fill it for such term. *See* State *ex rel.* Hodges v. Amos, 133 So. 623, 625 (Fla. 1931), *and cf.* s. 114.01(1)(h) and s. 3, Art. X, *supra.*

Application of these principles to your inquiry reveals that *Wise's* term and tenure of office did not actually commence until February 28, 1977, when he was able to qualify (assuming that he subscribed to the oath of office and gave the required bond on the date of his commission). Thus, since under the law Wise's term and tenure of office did not begin prior to February 28, 1977, it would seem that he would not be entitled to compensation for a period prior to that date.

Furthermore, at least one Florida court has opined that public bodies should not be compelled to pay twice for the performance of one service. *See* Ball v. State, 146 So. 830 (Fla. 1933). The *Ball* case involved a mandamus proceeding by an unlawfully removed town marshal to compel the payment of his salary which had been paid to a de facto marshal. The court denied the de jure marshal's claim because he had failed to first establish his legal right to the office. The court quoted extensively from an Oregon case—Selby v. City of Portland, 12 P. 377 (Ore. 1888)—which held in part:

> The exigencies of society require efficient performance of official duties, and to secure such performance prompt payment therefor is an essential requisite. Disbursing officers of municipalities are not clothed with judicial power to determine whether or not a person vested with the indicia of an office and performing the duties of such office is, in fact, a de jure officer where there has been no judicial determination of such fact. To require the public authorities to withhold the pay of an incumbent or public officer until a judicial decision, or pay the same at the peril of having to pay the same a second time, would be a source of much embarrassment and greatly tend to impair the efficiency of the public service.

Accordingly, it would appear that the Board of county Commissioners of Calhoun County was neither required nor authorized by law to compensate Mr. Wise for the period in which the holdover officer, Mr. Peacock, was performing the duties of the office. In this regard, I must direct your attention to s. 129.07, F. S. (providing that it is unlawful for the board of county commissioners to expend or contract for the expenditure in any fiscal year of more than the amount budgeted for each item in each county fund except as provided therein; and further providing that the members of the board of county commissioners voting and contracting for such amounts shall be liable on their bonds for the amount of such excess indebtedness); s. 129.08, F. S. (providing that any county commissioner who knowingly and willfully votes to, *inter alia*, pay an illegal charge against the county or to pay any claim against the county not authorized by law shall be guilty of a misdemeanor); and s. 129.09, F. S. (imposing personal liability upon any clerk of the circuit court, acting as county auditor, who shall pay any illegal charge against the county or pay any claim against the county not authorized by law or county ordinance). Whether a particular expenditure is authorized by law and whether there are funds properly budgeted or appropriated which may be used for this expenditure are ultimately questions for the Auditor General. *Cf.* AGO's 071-160, 075-299.

078-73—May 4, 1978

STATE ATTORNEYS

ARREST POWERS OF STATE ATTORNEY'S INVESTIGATORS

To: Harry Morrison, State Attorney, Tallahassee

Prepared by: Michael H. Davidson, Assistant Attorney General

QUESTION:

Is a state attorney's investigator who, for budgetary reasons, receives only 65 percent of the minimum salary prescribed for his position but is fully qualified in all regards under s. 27.255, F. S., to hold that position and who works a full-time schedule of at least 40 hours per week a "full-time investigator" with arrest powers?

SUMMARY:

Full-time investigators employed by the state attorney who are fully qualified under s. 27.255, F. S., and occupy full-time positions as defined in s. 110.042(3), F. S., are not precluded from exercising the arrest powers granted in s. 27.255(1) merely because they are paid a lower salary than is normally prescribed for that position.

An examination of s. 27.255, F. S., reveals, *inter alia*, that each full-time investigator is held to be a law enforcement officer and conservator of the peace with full powers of arrest in accordance with the laws of this state. Such investigators must meet the standards established by the Police Standards and Training Commission. Section 27.255(2). Nowhere in s. 27.255 is there a definition of the term "full time." Thus, we must turn to other related statutes for a *pari-materia* examination of this question.

Section 110.042(3), F. S., defines "full-time position" as "a position authorized for the entire normally established work period, daily, weekly, monthly or annually." Section 110.042(4) defines "part-time position" as "a position authorized for less than the entire normally established work period, daily, weekly, monthly or annually." Thus, it seems that the question of remuneration is not involved in a determination of whether an employee is full time or part time.

Further examination of this question reveals that there is a high degree of similarity between s. 27.255(2) and 30.09(4)(f), F. S., in regard to requiring the personnel affected by those statutes to meet the minimum requirements set forth by the Police Standards and Training Commission. As both the state attorney's investigators under s. 27.255 and the special deputies appointed under s. 30.09, except as therein exempted, are granted arrest powers only after meeting the aforementioned minimum requirements of the Police Standards and Training Commission, it seems that this factor rather than the question of compensation is more pertinent to the disposition of your question. As you noted in your inquiry, the investigator at hand meets those requirements.

Therefore, it is my opinion that an investigator employed by your office who meets all requirements of s. 27.255, F. S., and meets the definition of a full-time employee as set forth in s. 110.042(3), F. S., is not precluded from exercising the arrest powers granted him under s. 27.255(1) merely because he is paid a lesser salary than is prescribed for his position.

078-74—May 10, 1978

DUAL OFFICEHOLDING

MEMBER OF OFF-STREET PARKING BOARD MAY SERVE ON BOARD OF TRUSTEES OF A COMMUNITY COLLEGE DISTRICT

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

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May a member of the City of Miami's off-street parking board also serve as a member of the board of trustees of a community college district?

SUMMARY:

A member of the City of Miami's off-street parking board may also serve as a member of the board of trustees of a community college district since a district office is neither a state, county, nor municipal office for purposes of s. 5(a), Art. II, State Const.

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 . . . ." In AGO 075-153, this office concluded that a member of a board of trustees of a community college district is an officer of a *special district* which has been created pursuant to law to perform a special governmental function and is *not* a state, municipal, or county officer within the meaning of s. 5(a), Art. II, State Const. Attorney General Opinion 075-153 relied on AGO 073-47 which likewise held that a member of a junior college board of trustees is not a state, county, or municipal officer within the purview of s. 5(a), Art. II, State Const. It was stated therein that:

> . . . it has long been settled that officers of a special district or authority which has been created by statute to perform a special state or county function are not state, municipal, or county officers within the meaning of the Constitution.

My predecessor in office noted in AGO 069-49 that, in construing other provisions of the 1885 State Constitution which involved the phrase "state, county and municipal officers," the Supreme Court in each instance held that this language did not include special district officers. Although no case has been found which involves a construction of s. 5(a), Art. II, State Const., as it relates to officers of special districts, I see no reason why similar constitutional provisions which have been construed to exclude district officials from the definition of state, county, or municipal officers would not be authoritative in deciding this question. *Accord:* Johnson v. Johanson, 338 So.2d 1300 (1 D.C.A. Fla., 1976), in which the court noted, "[i]f the council presidency is a city or county office within the application of the removal provisions in s. 7, Art. IV, no reason is apparent why the presidency should not also be considered an 'office' within the meaning of s. 5(a), Art. II, of the same Constitution . . . ." *Also see* State v. Ocean Shore Improvement District, 156 So. 433 (Fla. 1934); State v. Reardon, 154 So. 868 (Fla. 1934); State *ex rel.* Smith v. Hamilton, 166 So. 742 (Fla. 1936); Town of Palm Beach v. City of West Palm Beach, 55 So.2d 566 (Fla. 1951); Bair v. Central and Southern Florida Flood Control District, 144 So.2d 818 (Fla. 1962), and AGO 078-11 and Attorney General Opinions cited therein discussing the legal status of special districts. Thus, if a district office is not a state, county, or municipal office as contemplated by other similar or analogous provisions of the State Constitution, it would appear that it is likewise not an office for purposes of s. 5(a), Art. II.

This office, therefore, continues to be of the view that officers of special districts are neither state, county, nor municipal officers as contemplated by s. 5(a), Art. II, State Const.

078-75—May 16, 1978

PAROLE AND PROBATION COMMISSION

COMMISSIONERS ARE OFFICERS AND NOT ENTITLED TO ACCRUE ANNUAL OR SICK LEAVE OR TO BE PAID THEREFOR UPON RETIREMENT

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

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

> **Are the commissioners of the Florida Parole and Probation Commission entitled to payment of accrued annual and sick leave upon retirement?**

SUMMARY:

> **Members of the Parole and Probation Commission are state *officers*, not merely state employees. As such, they are not entitled by law to accrue annual or sick leave or to be paid for unused annual or sick leave upon termination of duty or service with the state or upon retirement, absent express authorization by statute.**

You have stated that this opinion request was suggested by the Auditor General, by whom you have been initially advised that no statutory authority has been found allowing *members* of the Parole and Probation Commission (as opposed to commission *employees*) to accrue annual or sick leave or to receive payments based upon claims of accrued annual or sick leave upon retirement as members of the commission.

The question you now ask was addressed and answered in the negative in an informal opinion of this office dated April 8, 1976. In that informal opinion, one of my assistants concluded that members of the commission are public officers and that, as such, they are not entitled—absent statutory authority—to accrue annual and sick leave or to receive terminal payments therefor. It was noted in the informal opinion that public officers have no claim to compensation except as clearly provided by law (which law must be strictly construed), Gavagan v. Marshall, 33 So.2d 862, 864 (Fla. 1948), but that where compensation is provided by law for performance of the duties of the office, "[t]he right of an officer to compensation is not impaired by his occasional or protracted absence or a temporary incapacity to perform its duties or the neglect of its duties." Hanchey v. State, 52 So.2d 429, 432 (Fla. 1951). As was stated in the informal opinion, "[i]n other words, a set amount of money goes with the office whether you are on the job or not." Thus, absent express statutory authority to the contrary, it is to be presumed that an officer is to be paid the salary that goes with the office, regardless of the actual time spent performing the duties of the office, until such time as the officer no longer holds the office.

That the members of the Parole and Probation Commission are state officers and not merely state employees is clear. In the April 8, 1976, informal opinion to your predecessor as chairman, my assistant relied upon the description of the characteristics of an officer provided by the Florida Supreme Court in State v. Hocker, 22 So. 721, 723 (Fla. 1897). Under that judicial standard, which has been repeatedly relied upon by the courts and this office, it is said that the status of public officers contemplates

> . . . the idea of tenure, duration, emolument, and duties, and has respect to a permanent public trust to be exercised in behalf of government, and not to a merely transient, occasional, or incidental employment. A person, in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining, though the incumbent dies or is changed . . . .

I find the above-quoted standards from *Hocker* to be clearly met in the case of members of the Parole and Probation Commission. For example, the members of the commission are appointed by the Governor and Cabinet, subject to confirmation by the Senate, s. 947.02, F. S.; the term of a member of the commission is fixed by statute, s. 947.03, F. S.; each member of the commission is subject to removal by the Governor and Cabinet for the same reasons that a state officer may be removed pursuant to s. 7, Art. IV, State Const., and s. 947.03(3), F. S.; and the duties of commission members are fixed by statute, s. 947.13, F. S. In determining whether an individual is a state officer, the courts have also emphasized that, in addition to possessing characteristics such as those enumerated in Hocker, *supra*, an officer is one to whom is delegated a portion of the sovereign powers of the state. State v. Lee, 7 So.2d 110 (Fla. 1942); McSween v. State Live Stock Sanitary Board of Florida, 122 So. 239 (Fla. 1929); State v. Jones, 84 So. 84 (Fla. 1920). In my opinion, the duties delegated to members of the commission clearly constitute a delegation of a portion of the sovereign powers of the state, in accordance with the standards set forth in the cases cited immediately above. In addition, *see In re* Advisory Opinion to the Governor, 225 So.2d 512 (Fla. 1969), in which the justices placed considerable reliance on the language of the constitutional and statutory provisions creating the office there in question. In this regard, *see* s. 8(c), Art. IV, State Const., and the various provisions of Ch. 947, F. S., cited above, such as s. 947.03(3), F. S., providing in part that "[e]ach member shall devote his whole time and capacity to the duties of his *office* . . . ." (Emphasis supplied.) By applying the standards and principles provided in all of these cases, I can only conclude, beyond question, that the members of the Parole and Probation Commission are officers of the state.

It is provided in s. 5(c), Art. II, State Const., that "[t]he powers, duties, *compensation and method of payment* of state and county officers *shall be fixed by law*." (Emphasis supplied.) And, Florida courts have stated that:

> Public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such services is deemed to be gratuitous. [Rawls v. State, 122 So. 222 (Fla. 1929).]

In accord: State v. Reardon, 154 So. 868, 871 (Fla. 1934); Gavagan v. Marshall, 33 So.2d 862, 864 (Fla. 1948). It has been stated that "the statutes dealing with the compensation payable to public officials are to be construed strictly." Pridgeon v. Folsom, 181 So.2d 222, 226 (1 D.C.A. Fla., 1965). And, it is a general rule that the right to accrue vacation and sick leave and to receive payment for accumulated, unused vacation and sick leave, is dependent on statutory authorization. 81A C.J.S. *States* s. 106c., p. 513.

The amount of compensation to be paid to each member of the commission was, at one time, specifically set by the Legislature (*see* s. 26, Ch. 74-300, Laws of Florida, the 1974 General Appropriations Act, providing: "The salaries of commissioners of the Florida Parole and Probation Commission shall be increased effective July 1, 1974 from $24,000 per annum to $27,600; reference chapter 110.051(1)(c), F. S."). Since 1974, however, there has been only a lump sum salary appropriation made to the commission with no specific amount required by the Legislature to be paid to the commissioners.

In the absence of legislative direction, the salaries of the commissioners have been set by the Department of Administration, pursuant to s. 110.051(2)(c), F. S. Subsection (2) of s. 110.051 delineates those positions (including both officers and employees) which are *not* covered by any of the provisions of Ch. 110, F. S. Paragraph (c) of s. 110.051(2) exempts from the provisions and operation of Ch. 110, F. S., "[m]embers of boards and commissions and the head of each state agency, board or commission, however selected . . . ." However, s. 110.051(2)(c) goes on to provide that, notwithstanding the fact that such positions are not subject to the provisions of Ch. 110, "the department [of Administration] shall set the salary of these positions unless otherwise fixed by law." This latter provision, then, is the only part of Ch. 110, F. S., which is applicable to the members of the Parole and Probation Commission. Therefore, it must follow that the various personnel rules—including those pertaining to annual and sick leave—promulgated by the Division of Personnel of the Department of Administration (appearing in Ch. 22A, Florida Administrative Code) are not applicable to the members of the commission. (The statutory authority for these rules is s. 110.022, F. S. As s. 110.022 is expressly made inapplicable to members of the commission by s. 110.051(2), *supra*, it follows that the rules promulgated under the authority of and in implementation of s. 110.022 likewise are inapplicable to the members of the commission.) Moreover, s. 110.022(1)(e), F. S., empowers the Department of Administration to establish and maintain uniform leave policies only for "all employees in the career service." The members of the Parole and Probation Commission are officers, as stated above, and not employees in the career service system established by Ch. 110, F. S.

Having established that the various personnel rules and regulations of the Department of Administration are inapplicable to the members of the Parole and Probation Commission, I must look to the Florida Statutes for guidance as to the method of fixing compensation of members of the commission. In this regard, it is significant to note that s. 110.051(2)(c), *supra*, empowers the Department of Administration only to set the "salary" of the members of the commission when not otherwise fixed by law. It appears that what is contemplated is the setting of a specific amount of salary, as would otherwise be done by separate statute or in a line item of a general appropriations act. *Cf.* s. 19 of Ch. 77-465, Laws of Florida, and ss. 20.17(3)(a)3., 440.45(3), and 447.205(2), F. S. The provision does not authorize the Department of Administration to establish the form, elements, or method of compensation—only the fixed amount. And, I find nothing in s. 110.051(2)(c) empowering the department to grant leave or to require or authorize members of the commission to accrue annual or sick leave.

It is the apparent position of the Department of Administration that it may set the "salary" of commission members by comparing them to certain state *employees* (such as division directors) and by using a formula in computing the commissioners' salaries which contemplates and incorporates the accrual of annual and sick leave along with the periodic salary payments, in order to arrive at the total "salary" payable to the officers in question. I must reiterate that I find nothing in s. 110.051(2)(c) authorizing the Department of Administration to do more than set a specific dollar amount of salary, as would otherwise be provided in an appropriations act or other acts of the Legislature (such as those cited above). Also, I would again emphasize the above-quoted constitutional provision, s. 5(c), Art. II, which mandates that the "compensation and

method of payment" of state officers "shall be fixed by law." [*See* Dade County v. State, 116 So. 72 (Fla. 1928); State v. Lee, 197 So. 681 (Fla. 1940); State v. Lee, 5 So.2d 595 (Fla. 1941); Musleh v. Marion County, 200 So.2d 168 (Fla. 1967); and AGO 065-39, as to the exercise by agencies other than the Legislature of various functions relating to the fixing of compensation under the 1885 Constitution's requirement—in s. 27, Art. III—that state and county officers' compensation be fixed by law.]

I have been advised that, when a similar question arose in 1976 involving the retirement of a former member of the commission (which prompted the April 8, 1976, informal opinion referred to above), that former commissioner was denied terminal payment for sick and annual leave credits the commissioner claimed to have accrued. In conversations with various commission personnel, I have been advised of *no* facts distinguishing the instant case from that of the commissioner who retired in 1976 and who was denied the payment now being sought by another commissioner. In addition, I have been advised by commission personnel that the commissioner now in question was originally an employee of the commission and that, upon his appointment as a member of the commission, he was paid for all annual and sick leave which he had accrued as an *employee* of the commission. This fact leads to the inference that neither the commissioner in question nor the commission itself contemplated further accrual of leave credits for which terminal payment could be received once the commissioner in question had changed his status from employee to officer. It is also my understanding that various members of the commission have expressed the view that, as officers, they would expect to continue receiving their salaries during any period of extended illness, even if the sick leave credits they have purported to accrue were used up. All of these facts support the view expressed in the April 8, 1976, informal opinion, that the commissioners—as officers and not employees—are entitled to their official salaries regardless of actual time spent performing their official duties and are, accordingly, not entitled to accrue annual or sick leave or to be paid upon retirement for unused annual or sick leave.

Therefore, I am of the opinion that the result reached in the April 8, 1976, informal opinion of this office was correct and should continue to be followed. Until the Legislature provides clear and express authorization, or until this question is decided otherwise by the courts, the commissioner in question is not lawfully entitled to and should be denied terminal payment based on claimed accrual of annual or sick leave credits. I would urge the Legislature to reexamine the method by which the fixing of the compensation or salaries of the members of the Parole and Probation Commission, as well as other state officers, is delegated to the Department of Administration. The Legislature should either specifically set the salaries of the commissioners, and other state officers, in the annual appropriations act (which would be the most advisable course, in light of the requirement in s. 5(c), Art. II, *supra*, that state officers' compensation and method of payment be fixed *by law*) or expressly authorized the commissioners and other state officers, notwithstanding their status as officers, to accrue annual and sick leave and to be paid for unused annual and sick leave at the time of termination of service with the state (and accordingly require that accurate attendance records be kept so as to enable verification of leave time claimed and to facilitate auditing duties of the Auditor General and internal auditors or other fiscal personnel of the affected agencies).

Your question is answered in the negative.

078-76—May 16, 1978

COMMUNITY COLLEGES

COLLECTIVE BARGAINING CONTRACTS—CANNOT RATIFY PRACTICE UNAUTHORIZED BY LAW OR RULE

To: Herman A. Heise, President, Indian River Community College, Fort Pierce

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

What effect does a provision of a collective bargaining contract between a labor organization and the Indian River Community College

Board of Trustees in which the parties agree to "continue in effect all practices of the college administration not covered by the terms of this contract concerning terms and conditions of employment . . ." have upon the conclusion reached in AGO 078-12?

SUMMARY:

A provision of a collective bargaining contract between a labor organization and the Indian River Community College Board of Trustees in which the parties agree to "continue in effect all practices of the college administration not covered by the terms of this contract concerning terms and conditions of employment . . ." cannot "ratify" or otherwise validate a rule or practice of the community college board of trustees which is unauthorized by law or rule of the State Board of Education.

In AGO 078-12, I concluded that a community college district board of trustees was not authorized by law to pay the costs of employees' voluntary physical examinations. This conclusion was bottomed upon general principles of law relating to the powers and duties of public officers as well as specific statutory provisions governing the authority of community college district boards of trustees. As to the first point, AGO 078-12 noted:

> A community college district board of trustees has no inherent or common-law powers. It has only those powers which have been conferred by statutes. *Cf.*, Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); Harvey v. Board of Public Instruction, 133 So. 868 (Fla. 1931); and AGO 075-148 holding that the powers of district school boards are limited by law, and the extent of their powers may be enlarged or modified only by the Legislature. If there are any doubts as to the exercise of authority it should not be assumed. Hopkins v. Special Road & Bridge District No. 4, 74 So. 310 (Fla. 1917); Harvey v. Board of Public Instruction, *supra*; State v. Ausley, 156 So. 909 (Fla. 1934); State v. Culbreath, 174 So.2d 422 (Fla. 1937); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974); *cert. dismissed*, 300 So.2d 900.

See also AGO 072-319 providing that community college boards of trustees, "[a]s administrative authorities have only that authority and those duties prescribed by statute and rules, regulations or standards which may be adopted by the State Board of Education." *Cf.*, AGO 078-56, in part, holding that a community college district was without legislatively conferred authority to employ law enforcement officers, and also was not empowered by the Legislature to vest campus security officers employed by the district with authority to bear arms and make arrests.

As to the second point, AGO 078-12 observed that community college boards of trustees possess, "*under statutes and other rules and regulations of the state board [of education]* . . . all powers necessary and proper for the governance and operation of the respective community colleges." (Emphasis supplied.) Section 230.753(2)(a), F. S. *See also* s. 230.768, F. S., providing, in pertinent part, that "[a]ll funds accruing to the benefit of the community college shall be . . . expended in accordance with rules and regulations of the state board." In this regard, rules of the State Board of Education stipulate that the sole basis to be used by the board of trustees in determining the compensation of community college employees is the employees' salary schedule; any additional compensation or fringe benefits must be authorized elsewhere by statute or state board of education regulation authorized by law. *See* Rules 6A-14.247(5)(b), 6A-14.46, F.A.C.

However, you inquire as to whether the conclusions set forth above should be modified with respect to faculty members at Indian River Community College because of the "Past Practices" clause which has been incorporated into a collective bargaining agreement between a labor organization representing such faculty and the community college board of trustees. *See* s. 6, Art. I, State Const., stating, *inter alia*, "[t]he right of employees, by and through a labor organization to collectively bargain shall not be abridged"; and part II, Ch. 447, F. S., providing statutory implementation of s. 6, Art. I, *supra*, with respect to public employees. Specifically, Article V of said collective bargaining contract provides as follows:

> PAST PRACTICES—The parties agree to continue in effect all practices of the College Administration not covered by the terms of this contract concerning terms and conditions of employment (wages, salaries, hours, vacation, sick leave, academic freedom, appointment, reappointment, promotion, tenure, dismissal, termination, suspension, sabbatical leave), provided, however, that such practices are not in conflict with the provisions of this Contract. In the event of such a conflict, the terms of this Contract shall be controlling. As used in this Contract, the term "practice of the College Administration" refers to those practices of the Office of the President, the Office of the Vice President, and the Offices of the Deans based upon written policies of the College Administration and of its *District Board of Trustees.* (Emphasis supplied.)

Your letter further notes that the board of trustees' rule (adopted in 1973) authorizing the payment of the costs of voluntary physical examination was in effect at the time the contract was signed. Thus, in effect, you are asking whether or not the above-cited provision of a collective bargaining contract "ratifies" or "validates" an expenditure found in AGO 078-12 to be unauthorized by law or regulation of the State Board of Education. Parenthetically, it might be noted that payment of the costs of the college's employees' free voluntary physical examinations is a fringe benefit or perquisite and such benefits are not, in absence of statutory definition, ordinarily embraced within the terms "wages" or "salaries" or "sick leave," at least with respect to public employees. *See* AGO 078-12. Further, necessarily implicit in the phrase "all practices of the College Administration," is the proposition that all such practices are lawful, *i.e.*, authorized or required by law.

Although a collective bargaining agreement is not an ordinary contract, and indeed may be deemed to be more than a contract [*see* United Steel Workers of America v. Warrier & Gulf Navigation Co., 363 U.S. 574, 578 (1960)], still, valid labor agreements are not exempt from the operation of the law of contracts. 51 C.J.S. *Labor Relations* ss. 217, 239. Moreover, the power of a public board or agency to contract with a labor organization must be considered in light of statutory law and administrative regulation. 51 C.J.S. *Labor Relations* s. 218, p. 1031; Lockport Area Special Education Cooperative v. Lockport Area Special Education Cooperative Association, 338 N.E.2d 463 (3 D.C.A. Ill., 1975). Thus, as noted in Pinellas County Police Benevolent Association v. Hillsborough County Aviation Authority, 347 So.2d 801 (2 D.C.A. Fla., 1977):

> A public employee's constitutional right to bargain collectively is not and cannot be coextensive with an employee's right to so bargain in the private sector. Certain limitations on the former's right are necessarily involved. For instance, a wage agreement with a public employer is obviously subject to the necessary public funding which, in turn, necessarily involves the powers, duties and discretion vested in those public officials responsible for the budgetary and fiscal processes inherent in government.

Accordingly, general principles relating to the validity of contracts entered into by public officers are analogous to the problem presented by your inquiry.

The power of a school authority to contract is generally limited to that which is expressly or impliedly conferred by statute and is subject to such constitutional and statutory restrictions as may be imposed. 78 C.J.S. *Schools and School Districts* ss. 270 and 277; *cf.* Babcock v. Board of Public Instruction for Dade County, 140 So. 644 (Fla. 1932) (county board of public instruction may assume only such obligations as it is authorized by law to assume, and then only pursuant to the method prescribed by statute); National Bank of Duval County, 34 So. 894 (1903) (being a creature of statute, the extent of county's actions toward incurring liability must be limited by statute); Florida Development Commission v. Dickinson, 229 So.2d 6 (Fla. 1970) (if any state or agency exceeds its lawful power or goes outside the scope of discretion vested in it by law in incurring obligations, it is the duty of the comptroller to refuse to issue state warrants in payment of such obligations); and, generally, 20 C.J.S. *Counties* ss. 131 and 173.

Recently, in AGO's 078-67 and 078-68, the foregoing principles of law were applied to determine the validity of certain contracts contemplated by the boards of trustees of certain community colleges. In AGO 078-68, I concluded that the board of trustees of a community college lacked the authority to enter into a contract with an institution or agency of a foreign government to disburse funds in lump sum to such agency from

which it was to reimburse public officers and employees for travel expenses at a rate or in a manner different from that set forth in the uniform travel expense law. In a similar vein, AGO 078-67 stated that the board of trustees of a community college was not authorized by statute or rule of the State Board of Education to enter into contracts for the purchase of copyrights or copyright licenses for the purpose of distributing and selling certain products; nor was such a board authorized by statute or rule of the State Board of Education to enter into contracts with agencies or institutions of a foreign government. Specifically, in AGO 078-67, I observed:

> Where the contractual powers of public officers are limited by statute or by authorized or valid rules or regulations, contracts entered into by public officers which go beyond such limitations are unauthorized and invalid, regardless of any benefit which might accrue to the public were such contracts to be enforced.

Accord: Brumby v. City of Clearwater, 149 So. 203 (Fla. 1933) (Where municipality was unauthorized to make, execute, or perform a contract, such contract would not be enforced by the courts). *But see* Knappen v. City of Hialeah, 45 So.2d 179 (Fla. 1950), noting that:

> municipal corporations are liable to an action of implied assumpsit with respect to money or property received by them *and applied beneficially to their authorized objects* through contracts which are simply unauthorized, as distinguished from those which were prohibited by their charters or some other law bearing upon them, or were malum in se, or violative of public policy.

Therefore, since the board of trustees of a community college is not authorized by statute or authorized rule of the State Board of Education to pay the costs of employees' voluntary physical examinations, it would appear that said board may not lawfully *by contract* attempt to ratify or otherwise validate such an expenditure of public funds. It is a well-established principle that public officials cannot do indirectly that which they are prohibited from doing directly. Green v. Galvin, 114 So.2d 187 (1 D.C.A. Fla., 1959).

Moreover, I find no provision in the Public Employees Relations Act, part II, Ch. 447, F. S., which compels an alternative conclusion. My examination of part II of Ch. 447, *supra*, does not reveal any portion thereof which purports to confer independent authority upon public officers to expend public funds in a manner unauthorized by law. To the contrary, it would appear that s. 447.309(3), F. S., implicitly negates such a conclusion. That section provides:

> If any provision of a collective bargaining agreement is in *conflict with any law*, ordinance, *rule*, or *regulation* over which the chief executive officer has no amendatory power, the chief executive officer shall submit to the appropriate governmental body having amendatory power *a proposed amendment to such law*, ordinance, *rule, or regulation. Unless and until such amendment is enacted or adopted* and becomes effective, *the conflicting provision of the collective bargaining agreement shall not become effective.* (Emphasis supplied.)

As noted in AGO 078-67, implied prohibitions of law are as effective as express prohibitions. *See also* Getzen v. Sumter County, 103 So. 104 (Fla. 1925); Amos v. Mathews, 126 So. 308 (Fla. 1930). *See also* AGO 076-174 stating that, if a collective bargaining agreement conflicts with any specific statute or ordinance, the agreement does not become operative until the specific statute or ordinance is amended to encompass the agreement; and *cf.*, AGO 077-48 in which I opined 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."

It is clear from an examination of the foregoing statutory provision that the board of trustees of a community college would be empowered to amend such rules relative to personnel matters as it *has been authorized by statute or authorized and valid State Board of Education rule to adopt*, so as to effectuate a collective bargaining agreement.

In concluding that your question should be answered in the negative, I have not overlooked s. 6 of Ch. 77-343, Laws of Florida, in which the Legislature amended the definition of "legislative body" found at s. 447.203(10), F. S., as follows (the italicized language indicates the amendment to the section):

> "Legislative body" means the State Legislature, the board of county commissioners, the district school board, the governing body of a municipality, or the governing body of an instrumentality or unit of government having authority to appropriate funds and establish policy governing the terms and conditions of employment and which, as the case may be, is the appropriate legislative body for the bargaining unit. *For purposes of s. 447.403 the board of trustees of a community college shall be deemed to be the legislative body with respect to all employees of the community college.*

Thus, for purposes of the *resolution of impasses* in collective bargaining as delineated in s. 447.403, F. S., the board of trustees is designated the "legislative body." Hence, under the statute, in the event of a dispute, the decision of the special master, as well as recommendations for settling the dispute prepared by the special master, the chief executive officer of the public employer, and the employee organization, should be submitted to the board of trustees. Pursuant to s. 447.403(4)(c), the legislative body or a duly authorized committee thereof is then required to conduct a public hearing in which the parties explain their positions with respect to the recommendations of the special master. Thereafter, "the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved." Section 447.403(4)(d), *supra*.

Clearly, however, the mere designation of the board of trustees of a community college as the "legislative body" for purposes of *impasse resolution* does not give *legislative powers* to such a board. Therefore, I must reiterate my conclusion that the "Past Practices" article in the collective bargaining agreement under discussion cannot "ratify" or otherwise validate an *unauthorized* rule or practice of the community college board of trustees.

078-77—May 18, 1978

TAXATION

TAX COLLECTORS NOT AUTHORIZED TO APPOINT BANKS AS AGENTS

To: Harry L. Coe, Jr., Executive Director, Department of Revenue, Tallahassee

Prepared by: William D. Townsend, Assistant Attorney General

QUESTIONS:

1. Is a county tax collector authorized by law to contract with banks to have them collect ad valorem taxes or appoint commercial banks as collection agents to collect such taxes for the tax collector?

2. Is it lawful to expend county funds in connection with such contractual procedures or to compensate such tax collection agents for collecting said taxes?

SUMMARY:

In the statutory provisions which impose the duty to collect ad valorem taxes upon the office of the county tax collector, there is no authorization, expressly or by necessary implication, which would authorize a tax collector to delegate any portion of his statutory authority or duty to banks acting as his agents to collect ad valorem taxes. Therefore, the county tax collectors are not authorized by law to contract with or appoint banks to act as agents for the collection of ad valorem taxes.

The office of the county tax collector is defined in s. 192.001(4), F. S., which provides: " 'County tax collector' means *the* county *officer charged* with the collection of ad valorem taxes" (Emphasis supplied.) levied by the various local units of government authorized by law to impose such taxes.

The duties of the tax collector are established by general law in various sections of the Florida Statutes. Those which relate directly to the collection of taxes will be discussed herein.

Section 197.012, F. S., provides in pertinent part: "The tax collector is hereby vested with the power and *it shall be his duty to collect* all taxes as shown on the tax roll." (Emphasis supplied.)

In order that the performance of these duties be insured, the tax collector is required to post a bond as set forth in s. 137.02, F. S., which provides that the amount of the bond is determined by the amount of money likely to be in the hands of the tax collector at any one time. For purpose of the discussion herein, the importance of this statute is that it provides the county with protection of its funds while they are handled by the tax collector and his office.

The duties imposed upon the tax collector by the statutes are clearly set forth and there is no provision authorizing the tax collector to appoint or contract with agents for the collection of ad valorem taxes, but there is also no statutory provision prohibiting such action. It is, however, a general rule that, where the statute is silent, even if not prohibitive, the only authority available to an officer is that conferred by statute. *See* White v. Crandon, 156 So. 303 (Fla. 1934), Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944).

No power may be implied by a tax collector to enable him to engage in the type of action suggested by your inquiry. As in the case of administrative bodies, tax collectors, whose offices are created by the Constitution, and whose powers and duties are statutory, have no common law powers "and what they have are limited to the statutes." State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 at 638 (1 D.C.A. Fla., 1974), citing Florida Industrial Commission v. National Trucking Company, 107 So.2d 397 (1 D.C.A. Fla., 1958); AGO 075-120.

The Supreme Court had stated, in regard to implied power:

> An express power duly conferred may include implied authority to use means necessary to make the express power effective, but such implied authority may not warrant the exercise of a substantive power not conferred. . . . [Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936), AGO 073-375.]

Any implied power must be necessarily implied from a duty which is specifically or expressly imposed by statute. Attorney General Opinion 075-161, Florida State University v. Jenkins, 323 So.2d 597 (1 D.C.A. Fla., 1975). Any power to be implied must also be *essential* in order to carry out the expressly granted power or duty imposed, *e.g.*, AGO 073-374 and 67 C.J.S. *Officers* s. 102. The statutes establishing the duties of the tax collectors charge those officers with the duty to collect the tax moneys, which duty must be performed personally by the collector, or by employees of his office working under his direct supervision. It is not essential for the tax collector to appoint or contract with banks as agents in order to carry out or perform his statutorily imposed duties.

Moreover, in situations concerning the exercise of powers by public officers, it is clear that where "there is reasonable doubt as to the lawful existence of a particular power which is being exercised, the further exercise of the power should be arrested." Hopkins v. Special Road and Bridge District No. 4, 74 So. 310 (Fla. 1917); Gessner v. Del-Air Corporation, *supra*; *see also* State *ex rel.* Greenberg v. Florida State Board of Dentistry, *supra*; Williams v. Florida Real Estate Commission, 232 So.2d 239 (4 D.C.A. Fla., 1970); City of Cape Coral v. G.A.C. Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973); AGO 076-191, which further states:

> As stated in AGO 071-28, to perform any function for the state (or a county) or to expend any money belonging to the state (or county), the officer seeking to perform such function or to incur such obligation against public funds *must find and point to a constitutional or statutory provision so authorizing him to do.* (Emphasis supplied.) *Accord*, AGO 075-299 (quoting in part from AGO 068-12).

There does not appear, from a review of the statutes defining the office or duties and powers of the county tax collectors, any authority, expressly or necessarily implied, which would enable these officers to appoint or contract with agents to collect ad valorem taxes. A public officer can make only such contracts as are expressly or impliedly authorized by statute. 67 C.J.S. *Officers* s. 102, at p. 370; 20 C.J.S. *Counties* s. 174. The power and duty to appoint agents or enter into contractual relations with them is a

governmental power which rests with the Legislature. Attorney General Opinion 068-44. While that body may delegate this authority by statute to the office of the county tax collector, it has not done so. Clearly, there is no contractual authority vested in those officers by s. 197.012, F. S., which establishes the duties and powers of the tax collectors. That statute further states that it is the tax collector—not agents of his office—who shall collect the taxes. Additionally, there is no authority in s. 197.012, F. S., for the delegation of these powers and duties.

The prohibition against this type of delegation of the duties and powers of the tax collector has been clearly stated by the Florida courts. Absent a statutory authorization to do so, a public officer may not delegate his powers. State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955); Crandon v. Hazlett, 26 So.2d 638 (Fla. 1946); State *ex rel.* Wolyn v. Apalachicola Northern Railroad Co., 88 So. 310 (Fla. 1921). Where the statutes involved assign a duty to a particular officer, as s. 197.012, F. S., does, that duty cannot be delegated. Further, s. 5(c), Art. II of the State Constitution, which is substantially unchanged from s. 27, Art. III of the 1885 Constitution, does not contemplate that essential powers or authority may be exercised by one not a duly commissioned officer. Florida Dry Cleaning and Laundry Board v. Economy Cash and Carry Cleaners, 197 So. 550 (Fla. 1940). The courts of Florida have long held that any person who is entrusted with the receipt of public money, or through whose hands such money may pass to the treasury, are "public officers" and the administrative duties which are governmental in nature are to be performed only by them. State *ex rel.* Swearingen v. Jones, 84 So. 84 (Fla. 1920), and Dade County v. State, 116 So. 72 (Fla. 1928).

No statutory authority exists under s. 197.012, F. S., for a tax collector to contract with banks to act as collection agents for him. Accordingly, it would appear that in the situation you describe, contracts between the tax collector and banks would be void as being *ultra vires* the authority of the tax collector. Additionally, it is beyond the power of the county commission to approve any contract for agents to collect tax moneys. The duties and powers of the county commission have nothing to do with the collection of taxes. Therefore, the county commission can lend no validity to any such contracts of the tax collector. Further, the county commission cannot empower the tax collector to make such contracts because the powers and duties of county officers must be fixed by law, *see* s. 5(c), Art. II, State Const., and may not be "fixed" by the county commission, *cf.* AGO 077-88 and cases cited therein.

Accordingly, your first question is answered in the negative.

Regarding your second question, having concluded that the contracts between the tax collector and the banks, and the appointment of banks as agents for the tax collector, are not authorized by law, it is not necessary to discuss the expenditure, if any, of public funds in connection with such activities.

078-78—May 18, 1978

MUNICIPALITIES

DISPOSITION OF PERSONAL PROPERTY PURCHASED BY POLICE DEPARTMENT WITH MUNICIPAL FUNDS

To: A. Lee McGehee, Chief of Police, Ocala

Prepared by: Jerald S. Price, Assistant Attorney General, and Dennis J. Wall, Legal Research Assistant

QUESTIONS:

1. Where does ownership rest with personal property purchased with public funds by a law enforcement agency as part of a criminal investigation when such property is not determined to be stolen?

2. If ownership rests with the unit of government which provided the public funds for purchase, may it be placed on that government's inventory for its use?

SUMMARY:

When personal property determined not to be stolen is validly purchased with municipal funds by the Ocala police department in connection with a criminal investigation, such property is owned by the City of Ocala (not the police department). The management, use, and disposal of such property should be determined by the city council, pursuant to applicable provisions of the charter or code of ordinances of the municipality.

You state in your letter that these questions have arisen in connection with a criminal investigation by your police department "involving fencing operations or possession of stolen property." You further state that personal property purchased with municipal funds during the course of such an investigation and which is subsequently determined to be stolen would be handled the same as any other evidence in any resulting criminal proceedings. Your questions do not concern personal property introduced as evidence in a criminal trial; property known to be abandoned or lost within the purview of ss. 705.01(1) and 705.06, F. S., dealing with abandoned personal property generally; or personal property coming within the purview of s. 790.08(4), F. S., dealing with abandoned or discarded weapons, electric weapons or devices, and arms. Also, AGO's 076-133 and 076-101, relating to *lost* personal property, are not applicable. I assume for purposes of this opinion that the property in question has been validly purchased with municipal funds and used by the municipal police department solely for the purpose of conducting a criminal investigation, that title to the property has passed during the course of the transactions, and that the property has been validly determined *not* to be stolen property.

In accordance with the above assumptions, it appears that the property in question is owned by the City of Ocala (not the police department) and may be disposed of as the city council sees fit, in accordance with applicable provisions of the charter or code of ordinances of the City of Ocala. Sections 1.06(1) and 2.03 of Ch. 67-1782, Laws of Florida, the special act establishing the charter of the City of Ocala, set forth the powers of the city council of Ocala with respect to the acquisition and disposition of real and personal property. Section 1.06(1) provides that, in addition to other powers granted by law, the City of Ocala:

> May acquire property, either real or personal, in any manner, and may sell, lease, hold, manage, rent, control or dispose of any and all property, either real or personal, in any manner it may see fit; may make any and all rules and regulations by ordinance or resolution which may be required to carry out fully the provisions of any conveyance, lease, deed, contract, or will in relation to any gift or bequest, or the provisions of any contract, agreement or instrument by which it may acquire property.

Section 2.03 of Ch. 67-1782 provides for the exercise of the above (and other) powers by the city council:

> All powers of the city shall be vested in the council except as otherwise provided by law or this charter, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the city by law.

I am not aware of any modification of the above provisions since their enactment. And, while the provisions of the Municipal Home Rule Powers Act, Ch. 166, F. S., may have converted ss. 1.06(1) and 2.03 into ordinances of the City of Ocala, those sections are clearly not limitations upon municipal power and thus were not nullified and repealed when the Municipal Home Rule Powers Act took effect. [By the terms of Ch. 166, F. S., any "limitation of power upon any municipality contained in any municipal charter enacted prior to July 1, 1973," was nullified and repealed, s. 166.021(4), F. S., and all extant special acts "pertaining exclusively to the power or jurisdiction of a particular municipality" became ordinances of the municipality, subject to modification or repeal as other ordinances, upon the effective date (October 1, 1973) of the Municipal Home Rule Powers Act, s. 166.021(5), F. S. Excepted from the nullification and repeal provision in s. 166.021(4) and the provision in s. 166.021(5) converting special acts into ordinances were

those charter and special act provisions relating to the subjects set forth in s. 166.021(4), such as distribution of powers among elected officers, and rights of municipal employees.] Under s. 166.021(1), F. S., municipalities "may exercise any power for municipal purposes, except when expressly prohibited by law." And s. 166.021(2) defines municipal purpose as "any activity or power which may be exercised by the state or its political subdivisions."

Pursuant to the above-quoted provisions of Ch. 67-1782, Laws of Florida, and the home rule powers granted by s. 2(b), Art. VIII, State Const., as implemented by Ch. 166, F. S., the personal property in question, subject to the assumptions and limitations set forth above, is owned by the City of Ocala. The city council "may sell, lease, hold, manage, rent, control or dispose of any and all property, either real or personal, in any manner it may see fit . . . ." Section 1.06(1), Ch. 67-1782, *supra.*

Any further questions regarding the management, control, use, or disposal of the property in question should be referred to the city attorney and city council of the City of Ocala, for resolution at the local level pursuant to applicable provisions of the charter or code of ordinances of the City of Ocala.

078-79—May 18, 1978

SCHOOLS

BONDS AND REVENUE CERTIFICATES

To: Randall M. Buchanan, Superintendent, Madison County District School Board, Madison

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

If Ch. 65-1869, Laws of Florida, is still in force, may the district school board issue bonds under it to construct a high school?

SUMMARY:

The Madison County district school board is empowered by law to construct and equip school buildings and, to pay the costs of these projects, to issue certificates of indebtedness, payable solely from funds accruing to the board pursuant to Chs. 550 and 551, F. S., relating to racetracks and jai alai frontons, and Ch. 67-795, Laws of Florida. Chapters 65-1869 and 67-795 which have not been amended or repealed are presumptively valid and remain in force until repealed under the terms of s. 6(a), Art. XII, State Const.; and the school board may exercise those powers granted therein.

Chapter 65-1869, Laws of Florida, expressly authorizes the district school board of Madison County "to acquire, build, construct, erect, enlarge and improve school buildings and to furnish and equip said school buildings." Section 1, Ch. 65-1869. To pay the costs of these projects, the board is authorized to issue certificates of indebtedness not to exceed the aggregate sum of $1,500,000 and which must mature within 30 years. Section 2, Ch. 65-1869. Although s. 2, Ch. 65-1869, provides that the certificates may bear interest at a rate not to exceed 6 percent per annum, the maximum interest rate on any certificate issued under Ch. 65-1869 is now controlled by s. 215.685, F. S. *See* s. 215.685(3), F. S., which provides that all laws, general or special, in conflict with the provisions of s. 215.685 are expressly repealed and superseded subject to an exception not pertinent to the instant inquiry. Thus, under s. 215.685(1), F. S., any "[b]onds, certificates, or other obligations of any type or character, authorized and issued by . . . districts . . . or any other public body, agency, or political subdivision of the state may bear interest at a rate *not to exceed 7.5 per cent per annum.*" (Emphasis supplied.)

Section 4 of Ch. 65-1869, Laws of Florida, provides:

> The principal of and interest on the certificates herein authorized shall be payable solely from the portion of race track funds accruing annually to . . . the board pursuant to chapters 550 and 551, Florida Statutes, and senate bill no. 1071 enacted at the 1965 session of the Florida legislature.

Senate Bill No. 1071, enacted as Ch. 65-963, Laws of Florida, provided that all moneys accruing to Madison County under Chs. 550 and 551, F. S., relating to race tracks and jai alai frontons, be annually allocated and distributed equally between the board of county commissioners and the board of public instruction of Madison County. Chapter 65-963 was repealed and supplanted by Ch. 67-795, Laws of Florida, which provides:

> All moneys accruing to Madison County under the provisions of Chapters 550 and 551, Florida Statutes, relating to race tracks and jai alai frontons, shall annually be allocated and distributed as follows: The first twelve thousand five hundred dollars (12,500.00) of these moneys shall be allocated and paid for the use and benefit of the Madison county health and hospital board; all the remainder of the tax accruing from race tracks and jai alai frontons shall be distributed equally between the board of county commissioners of Madison County and the board of public instruction of Madison County. [Section 2, Ch. 67-795, Laws of Florida.]

Chapter 67-795, Laws of Florida, also provides that the moneys appropriated to the board of county commissioners and the board of public instruction shall be paid *directly* by the appropriate state officials to such bodies.

Under s. 7, Art. VII, State Const., the Legislature may allocate (in whole or in part) excise taxes levied and collected from the operation of pari-mutuel pools to the several counties of the state; when such allocations to the counties are made, the funds must be distributed in equal amounts to the several counties. *See* s. 15, Art. IX, State Const. 1885, which similarly provided for the allocation and distribution of pari-mutuel taxes to the several counties. The racetrack funds collected pursuant to Ch. 550, F. S., and distributed to the counties, however, may be appropriated for *any* valid county purpose. *See* Prescott v. Board of Public Instruction, 32 So.2d 731 (Fla. 1947), in which the court held that a special act requiring a county to pay over moneys received from racetrack funds to the board of public instruction did not violate the requirement that county funds be used for county purposes. Moreover, this office in AGO 071-112 concluded that racetrack funds distributed to a county pursuant to s. 550.14, F. S., may be appropriated to the district school board and to any lawful county purpose, but not to the use of a municipality. *Cf.* State *ex rel.* Parrish v. Lee, 23 So.2d 731 (Fla. 1945), in which the court held that a special law appropriating 50 percent of racetrack funds allocated to counties having *municipal* hospitals for the maintenance of these hospitals was violative of the constitutional provisions; City of Lynn Haven v. Bay County, 47 So.2d 894 (Fla. 1950); Okaloosa County Water and Sewer District v. Hilburn, 160 So.2d 43 (Fla. 1964).

Based upon the foregoing, it appears that the moneys received from racetrack and jai alai funds may be appropriated to the district county school without violating the constitutional provision. Section 550.13, F. S., generally provides for the division of money by the State Treasurer as the ex officio treasurer of the Division of Pari-mutuel Wagering pursuant to Ch. 550, F. S. The funds received are collected from the operating revenues and various admissions and occupational license taxes imposed by Ch. 550. *See, e.g.*, s. 550.09, 550.10, 550.4902, F. S. The moneys collected pursuant to Ch. 551, F. S., are distributed in the same manner as in Ch. 550, F. S. Section 551.10, F. S., provides that "[a]ll moneys mentioned in this chapter derived from taxes on admission, wagers and pari-mutuel pools shall be disbursed by the state treasurer pursuant to existing laws relating to the disposition of funds derived from the operation of race tracks, and in the same manner." Although all such funds collected pursuant to Chs. 550 and 551, to the extent to which such moneys, after expenses of the Division of Pari-mutuel Wagering are paid, do not exceed in any one year the total of such moneys after expenses so paid for the fiscal year 1971, are normally distributed in equal parts to the several counties (*see, e.g.*, s. 550.13[1]), s. 550.14(2) provides:

> . . . in those instances where, by virtue of any local or special law now in force or hereafter enacted, any portion of such funds is earmarked for use by the school board of any county of this state, the county commissioners shall, upon receipt of such funds, remit the proportionate allocated part thereof to such

> school board, and the money so remitted shall be used for the exclusive purposes aforesaid; *provided, further, in those instances where any other method of remittance is prescribed by local or special law, then such method shall be followed.* (Emphasis supplied.)

See s. 2, Ch. 67-795, Laws of Florida, which provides that the moneys appropriated to the board of county commissioners and the board of public instruction shall be paid *directly* by the appropriate state officials to such bodies.

Chapters 65-1869 and 67-795, Laws of Florida, have not been since amended or repealed, and, as legislative enactments, they are presumptively valid and must be given effect until judicially declared invalid. City of Sebring v. Wolf, 141 So. 736 (Fla. 1932). Although enacted prior to the adoption of the 1968 Constitution, all laws in effect upon its adoption, to the extent not inconsistent with the 1968 Constitution, remain in force until they expire by their own terms or are repealed. *See* s. 6(a), Art. XII, State Const. Moreover, although Ch. 65-1869 refers to the board of public instruction, the board has been replaced by the district school board pursuant to s. 4, Art. IX, State Const., and all powers given to the board of public instruction under Ch. 65-1869 should apply under the act with equal force to the successor district school board under the 1968 Constitution. *Cf.* AGO 069-56 in which this office stated that "Article IX, s. 4 of the State Const. of 1968 has replaced county schools and county school districts with school districts consisting of one or more counties, which differ little legally from said county schools and county school districts under the State Const. of 1885, as amended." Thus, although enacted prior to the adoption of the 1968 Constitution, Chs. 65-1869 and 67-795, Laws of Florida, appear to be still in effect and the district school board, as the successor of the board of public instruction, may exercise the powers granted therein.

Section 7 of Ch. 65-1869, Laws of Florida, provides that "[n]o referendum or election of freeholders or qualified voters in the county shall be required for the exercise of any of the provisions of this act, *unless such referendum or election is required by the Constitution of Florida.* (Emphasis supplied.) The certificates of indebtedness issued by the Madison County school board under Ch. 65-1869 are payable from and secured by a lien on and a pledge of the race track and jai alai revenues or taxes accruing to the board under Chs. 550 and 551, F. S.; these moneys are excise taxes and no referendum is required as a condition precedent to their issuance and sale under either the 1968 or 1885 Constitution. *See generally* State v. Board of Public Instruction, Okaloosa County, 215 So.2d 723 (Fla. 1968) (no referendum is required if certificates of indebtedness or revenue certificates are payable from excise taxes or sources other than ad valorem taxes); *cf.* State v. Orange County, 281 So.2d 310 (Fla. 1973), in which the court held that a noncharter county had the power to issue capital improvement bonds, repayable solely from the county's share of racetrack and jai alai funds, without an approving referendum.

078-80—May 18, 1978

STATE BOARD OF MEDICAL EXAMINERS

MEMBERS MAY NOT RECEIVE COMPENSATION FOR PERFORMING DUTIES BEYOND THE SCOPE OF OFFICIAL BOARD MEETINGS

To: George S. Palmer, M.D., Executive Director, Board of Medical Examiners, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

> **Is the State Board of Medical Examiners authorized by law to provide additional compensation to members of the board for performing certain duties, such as preparing and grading examination papers and acting as Administrative Procedure Act hearing officers, which are beyond the scope of official board meetings?**

SUMMARY:

The State Board of Medical Examiners is not authorized by law to provide additional compensation to members of the board for performing certain duties, such as preparing and grading examination papers and acting as Administrative Procedure Act hearing officers, which are beyond the scope of official board meetings.

Your question is answered in the negative.

In AGO 053-130 this office stated that the Barbers Sanitary Commission was authorized by then existing s. 476.18, F. S., to set a reasonable compensation or salary for its several members, *other than* the $10 per day allowed while attending official board meetings. This opinion was based on that provision of s. 476.18, F. S., which provided that the commission "shall fix the salary and compensation of its several members and secretary." Since 1953, the statute, s. 476.18, F. S., has been amended to delete such provision and now fixes the salary of each member of the commission at $100 per month. *See* s. 476.18(3), F. S. The prior Medical Examiners Board statute, Ch. 12285, 1927, Laws of Florida, provided at s. 1 that:

> . . . [A]ll salaries shall be fixed and paid by the board. All expenses of the board shall be paid *out of funds collected by the board and the remainder divided equally among the members of the board.* (Emphasis supplied.)

Section 4 of Ch. 28215, 1953, Laws of Florida, amended the then existing Medical Examiners Board statutes to provide:

> Members of the board shall receive ten dollars . . . per day . . . while attending official board meetings . . . . All expenses . . . shall be paid out of the state agencies fund *and all salaries shall be fixed and paid by the board.* The secretary shall be paid an annual salary of Twelve Hundred Dollars.

Section 2 of Ch. 29867, 1955. Laws of Florida, again amended the pertinent statutes to provide in part: "All expenses shall be paid out of the state agencies fund. The secretary shall be paid . . . ($1200)." (*Also see* Chs. 61-723 and 61-514, Laws of Florida, which are in pertinent part essentially the same as the 1955 statute, as well as present s. 458.04[1], F. S.)

Thus, the Medical Examiners Board statutes, like the Barbers Sanitary Commission statutes, have been amended or changed to delete the board's authority to fix salaries of members or to divide fees or funds received by the board among its members. Section 5(c), Art. II, State Const., states that the compensation of state officers shall be *fixed by law. See also* Musleh v. Marion County, 200 So.2d 168 (Fla. 1967), and AGO 077-88 and cases cited therein. Accordingly, neither AGO 053-130 nor the Informal Letter Opinion to Homer L. Pearson, dated June 2, 1954, is valid or controlling under the present statutes and amended statutes. Compensation of board members is today controlled by s. 5(c), Art. II, State Const., and s. 458.04(1), F. S.

The statute which controls the answer to your question is s. 458.04(1), F. S., which provides that:

> Immediately after the appointment and qualification of its members, the Board of Medical Examiners shall meet and organize. Said board shall elect a president, vice president, secretary, and treasurer from its membership. The office of secretary and treasurer may be held by one person. Members of the board shall receive $10 per day, or any part of a day, while attending official board meetings, not to exceed 12 meetings per year, and shall receive per diem and mileage as provided in s. 112.061, from place of their residence to place of meeting and return. The secretary shall be paid an annual salary of $1200.

Pursuant to s. 458.041(1), F. S., the board is empowered to appoint or employ an assistant secretary or secretaries and such other personnel including, but not limited to, an executive director and investigators as may be necessary to assist the board in its powers, duties, and obligations as set forth in Ch. 458, F. S. Such personnel are not required to be licensed physicians or members of the board. The assistant secretary or secretaries shall act as deputies to and under the board secretary and be authorized to

perform all the powers, duties, and obligations of the secretary as may be assigned by the secretary or the board. The compensation of such personnel shall be fixed by the board and paid in the usual manner. Section 458.041(2), F. S. However, the common-law rule of incompatibility would prohibit the board from appointing one of its members to a position under the control of the board and setting the compensation thereof. *See* AGO's 070-46 and 072-102 and authorities cited therein. Since the board assigns the duties to its assistant secretaries and other personnel, the common-law rule of incompatibility prohibits the board from appointing or employing one of its members as such staff assistant to assist the board in carrying out its duties and functions.

Thus, there is no provision in Ch. 458, F. S., which authorizes the Board of Medical Examiners to fix and pay any additional compensation for its several members and secretary. The board's powers are limited to those conferred on it by its enabling statute. State *ex rel.* Greenberg v. Florida State Bd. of Dent., 297 So.2d 638 (1 D.C.A. Fla., 1974), *cert. dismissed,* 300 So.2d 900 (Fla. 1974). The board is authorized pursuant to s. 458.041(2), F. S., to fix the salaries of *assistant secretaries and other personnel.* The secretary's salary, like the compensation of the board members, is fixed by s. 458.04(1), F. S., exclusively.

In Florida public officers have a claim for official services rendered only when the law provides for compensation. In the absence of such a law, the services of a public official are deemed to be gratuitous. Rawls v. State, 122 So. 222 (Fla. 1929); Gavagan v. Marshall, 33 So.2d 682 (Fla. 1948). Additionally, statutes dealing with compensation to public officials are required to be strictly construed. Pridgeon v. Folsum, 181 So.2d 222 (1 D.C.A. Fla., 1965). Accordingly, in the absence of a statute specifically authorizing compensation for board members *in addition* to that provided for at s. 458.04(1), F. S., the board members are not entitled to any such additional compensation for services such as preparation and grading of examination papers or acting as hearing officers.

078-81—May 18, 1978

MUNICIPALITIES

NATIONAL GUARD—MILITARY LEAVE

To: Ernest A. Sellers, City Attorney, Live Oak

Prepared by: David K. Miller, Assistant Attorney General

QUESTIONS:

1. Is a municipality required under s. 250.48, F. S., to pay its employees who are members of the Florida National Guard their municipal salaries while on military leaves of absence (not exceeding 17 days at any one time) to engage in active state duty, field exercises, or other training ordered under the provisions of Ch. 250, F. S.?

2. Is a municipality authorized under s. 250.48, F. S., to compensate or reimburse its employees who are members of the National Guard only for the difference between their municipal salary and military pay received while on military leave?

3. Is a municipality authorized under s. 250.48, F. S., to offset or deduct from accrued annual vacation time of its employees who are members of the National Guard military leaves of absence for which such employees have been paid their full municipal salaries?

SUMMARY:

The clear language of s. 250.48, F. S., requires that a municipality pay its officers or employees who are members of the Florida National Guard their full municipal salaries while on authorized military leave under that statute. The statute necessarily operates to prohibit municipalities from paying such officers or employees only the difference between their established municipal salary and their military pay. Further, the statute

prohibits any reduction in an officer's or employee's ordinary accrued vacation time by the amount of authorized military leave taken. The Municipal Home Rule Powers Act, Ch. 166, F. S., does not permit a contrary result or local alternatives to the application or operation of s. 250.48, F. S., because the regulation, compensation, and operation of the National Guard has been preempted to the state and is primarily a state, and not a municipal, purpose.

The first question is answered in the affirmative, and the second and third questions are answered in the negative.

AS TO QUESTION 1:

Section 250.48, F. S., provides:

> *All officers and employees of the State and of the several counties and municipalities* within the state, who are members of the Florida National Guard, *shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating,* on all days during which they shall be engaged in active state duty, field exercises or other training ordered under the provisions of this chapter, provided the leaves of absence without loss of pay, granted under the provisions of this section, shall not exceed 17 days at any one time. (Emphasis supplied.)

Under this statute, National Guardsmen who are officers or employees of the state and of the several counties and municipalities within the state are entitled to military leave from their governmental duties as a matter of right, "without loss of pay, time or efficiency rating." The guardsman who is a municipal officer or employee is entitled to full compensation from the municipality during military leave up to 17 days at any one time. This legal entitlement is express and unequivocal.

Section 250.48, F. S., does not expressly or impliedly grant to the state or to the several counties and municipalities within the state any discretion in the matter. The statute does not authorize any local alternatives to its application and operation. On the contrary, it requires that military leave rights be uniformly recognized and administered. The statute contains the phrase "shall be entitled," which language is normally construed as mandatory. *See* S. R. v. State, 346 So.2d 1018 (Fla. 1977); White v. Means, 280 So.2d 20 (1 D.C.A. Fla., 1973). A statutory mandate that a thing be done in a certain way operates, in legal effect, to prohibit its being done any other way. *See In re* Advisory Opinion to the Governor Civil Rights, 306 So.2d 520 (Fla. 1975); Alsop v. Pierce, 19 So.2d 799 (Fla. 1944). Because the statute, by its plain language, confers no discretion upon the municipalities and allows no local alternatives in application or operation, it cannot be construed as mere permissive or enabling legislation. On the contrary, the statute bestows an enforceable legal entitlement on the personnel described therein.

Identical language of entitlement is found in s. 115.07, F. S., which deals with military leave rights for state, county, or municipal officers or employees who are military or naval reservists and National Guardsmen on field or coast defense exercises or other training required by federal law or military or naval training regulation. Section 115.07, F. S., reads in part:

> *All officers or employees of this state, or of the several counties or municipalities of this state,* who are commissioned reserve officers or reserve enlisted personnel in the United States military or naval service or members of the National Guard, *shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating,* on all days during which they shall be engaged in field or coast defense exercise or other training ordered under the provisions of the United States military or naval training regulations for such personnel when assigned to active duty; provided that leaves of absence granted as a matter of legal right under the provisions of this section shall not exceed 17 days in any one annual period. . . . (Emphasis supplied.)

This statute relates to the same subject as s. 250.48, F. S., and should be read *in pari materia* so as to produce a harmonious and consistent effect. *See* Mann v. Goodyear Tire and Rubber Co., 300 So.2d 666 (Fla. 1974). The pertinent provisions of the two statutes

are identical: Each states that the described personnel "shall be entitled to leave of absence from their respective duties without loss of pay, time or efficiency rating."

This office has consistently ruled that s. 115.07, F. S., requires the state and the counties and municipalities of the state to pay their officers or employees their full salaries while on military leave under s. 115.07 (not to exceed 17 days in any one annual period) regardless of any other compensation from the military or other sources. *See* AGO 074-189; AGO 053-322, 1953-1954 Biennial Report of the Attorney General, p. 124; AGO 051-273, 1951-1952 Biennial Report of the Attorney General, p. 212; AGO 047-152, 1947-1948 Biennial Report of the Attorney General, p. 129. As this office held in AGO 051-273, *supra*, and AGO 048-13, 1947-1948 Biennial Report of the Attorney General, p. 359, those conclusions with respect to s. 115.07, F. S., apply with equal force to the rights of National Guardsmen under s. 250.48, F. S.

Accordingly, I conclude that s. 250.48, F. S., requires state municipalities to pay full compensation to their officers or employees who are members of the National Guard while on military leave from their municipal duties to engage in active state duty, field exercises, or other training ordered under the provisions of Ch. 250, F. S., up to 17 days at any one time.

AS TO QUESTION 2:

As stated above, s. 250.48, F. S., creates in municipal officers and employees who are National Guardsmen specified rights to military leave "without loss of pay." I concluded in response to question 1, above, that the statute requires the payment of full municipal salary or compensation regardless of any pay which the officer or employee receives from the military. Implicit in this conclusion is the proposition that the statute prohibits any offset or deduction of military pay from municipal salary during the period of authorized military leave.

If the municipality were to reduce or offset the compensation paid to its officers or employees on military leave under s. 250.48, F. S., by the amount of their military pay, such officers or employees would suffer a "loss of pay" which the statute prohibits. The statute is mandatory, as stated above, and allows no discretion or power on the part of a municipality to depart from its operation. I therefore conclude that municipalities are prohibited from reducing or offsetting the compensation paid to their officers or employees on authorized military leave under s. 250.48, F. S., in any manner whatsoever. Previous opinions from this office have reached the same conclusion. *See* AGO 048-13, *supra*. *See also* AGO's 074-189 and 053-322, *supra*, which deal with compensation under the military leave provisions of s. 115.07, F. S.

In so ruling I am particularly mindful of the status of the militia as the peace-keeping and order-preserving force of the State of Florida. The militia is established under organic law in s. 2, Art. X, State Const., and consists of all able-bodied inhabitants of the state who are or have declared their intention to become citizens of the United States, and who are not exempt by law because of religious creed. Chapter 250, F. S., implements the constitutional provisions governing the militia, and represents the authoritative legislative policy regarding this sovereign state government and military function. Within the militia, the National Guard exists as an organized and armed force established by statute, and commanded by the Governor. *See* ss. 250.02, 250.06, and 250.07, F. S. The National Guard is available for ready mobilization by the Governor to carry out the purposes of the militia, such as preserving the public peace, executing the laws of the state, suppressing insurrection, and responding to public disaster or riot. *See* ss. 250.06, 250.08, and 250.28, F. S. The state's maintenance, training, and use of the National Guard confers a benefit upon municipalities and political subdivisions of the state by protecting them and their citizens, as well as protecting the state as a whole (and sometimes the nation). The National Guard may therefore be said to serve a dual state and local purpose.

It must be emphasized that the National Guard is a state institution or organization which serves an indispensable state governmental purpose. *Cf.* State *ex rel.* Milton v. Dickenson, 33 So. 514 (Fla. 1903), in which the Supreme Court held:

> From these provisions of our organic law it will be seen that that instrument recognizes and provides for the militia as a state institution. . . . Their [the militia's] other functions and duties are summarized in section 4 of article 14, above quoted, as being subject to the call, not of a county or any local official, but of the governor, to preserve the public peace, to execute the laws of the

> state, to suppress insurrection, or to repel invasion, not confinedly in any particular county or locality, but anywhere within the borders of the state. In a democratic form of government like ours the military establishment may be said to be the dernier resort of governmental authority, that is never called upon except when all other civil authority fails and becomes powerless to preserve public order. It is the strong arm of, and represents the might of, governmental sovereignty, and is a power that should never be surrendered to an agency of the state, such as a county or municipality, but should be held, as our constitution seems to contemplate, subject to be wielded solely by the supreme sovereign arm of the state. [*Id.* at 516.]

Municipalities are creatures of the Legislature and have only limited powers and territorial jurisdiction. Section 2, Art. VIII, State Const.; City of Miami v. Kinchinko, 23 So.2d 627 (Fla. 1945); State *ex rel.* Gibbs v. Couch, 190 So. 723 (Fla. 1939). As such, municipalities have no power or authority to make policy with respect to the state's sovereign military force. On the contrary, the state military force is exclusively a state governmental function in which municipalities have no duty or power whatsoever. The state has in effect preempted the military function and no municipal action may operate to restrict the state's power or depart from its requirements.

Section 250.48, F. S., requires payment of full municipal compensation to municipal officers and employees who are National Guardsmen during the authorized and required period of military leave. In so acting, the Legislature has also determined that the payment of such compensation is also a necessary municipal purpose (as well as a function responding to a state and a federal purpose) such as would authorize and require the expenditure of municipal funds. The Legislature is competent to make such a determination.

Florida case law clearly supports the legislative use of power in this area. *See* State *ex rel.* Gibbs v. Gordon, 189 So. 437 (Fla. 1939), holding that the Legislature may appropriate state funds, and compel a county to appropriate county funds, to assist in a national defense project, where the project resulted in a material development benefiting the state and county. *Cf.* Amos v. Matthews, 126 So. 308, 324 (Fla. 1930), holding that the Legislature may compel the levy of a county tax for a purpose of both local and general concerns, or to enforce the legitimate contribution of the several counties to the state's general expenses for state government.

I recognize that municipalities are granted broad powers of home rule under Ch. 166, F. S. I am nevertheless unable to conclude that these home rule powers authorize a departure from s. 250.48, F. S. In the first place, the constitution limits the exercise of municipal power to municipal purposes, notwithstanding any broad language found in the Municipal Home Rule Powers Act. Section 2(b), Art. VIII, State Const. The provision for the militia and the granting of military leave to its members who are on duty or in training under Ch. 250, F. S., and requiring municipalities and political subdivisions to contribute toward such essential services, are powers and functions of the state in its sovereign capacity. Although the several municipalities and political subdivisions derive a benefit from the expenditure, the expenditure is primarily for a state purpose rather than a municipal purpose.

Moreover, the Municipal Home Rule Powers Act prohibits municipalities from exercising powers which have been expressly preempted to the state. Section 166.021(3)(c), F. S. The constitution and statutes do preempt to the state all powers to establish, regulate, compensate, and operate the state militia. Section 1(a) and (d), Art. IV, and s. 2, Art. X, State Const., Ch. 250, F. S. *Cf.* Public Employees Relations Commission v. Fraternal Order of Police, Local Lodge No. 38, 327 So.2d 41, 43 (2 D.C.A. Fla., 1976), holding that part II of Ch. 447, F. S., implementing s. 6, Art. I, State Const., preempted the subject of public employee bargaining to the state, to the extent that a municipality can have no jurisdiction unless the provisions and procedures of its ordinance have been approved by the Public Employees Relations Commission.

Chapter 250, F. S., is the State Military Code, which applies uniformly throughout the state. It in no sense deals with the conduct of municipal government or with any municipal purpose or powers conferred by s. 2(b), Art. VIII, State Const., or Ch. 166, F. S. If there is doubt remaining as to the powers of municipalities to operate in this area, that doubt must be resolved against the exercise of municipal power. *See* City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972); State *ex rel.* Meredith v. Borman, 189 So. 669 (Fla. 1939). *Cf.* Edgerton v. International Co., 89 So.2d 488 (Fla. 1956); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944).

As repeatedly stated above, the provisions of s. 250.48, F. S., confer no discretion on municipalities and prohibit them from adopting local alternatives to its operation or application. The statute specifically entitles National Guardsmen within its purview to military leave "without loss of pay," and therefore operates to prohibit any offset or reduction in normal municipal compensation paid to such National Guardsmen during authorized military leave. Accordingly, the instant municipality is without the power to reduce or offset municipal compensation paid to National Guardsmen who are municipal officers or employees during their authorized military leave under s. 250.48, F. S.

AS TO QUESTION 3:

Your third question is closely related to your second question, and consistency requires that the two questions be treated alike. For the same reasons discussed above, I conclude that a municipality may not reduce an employee's accrued vacation time by the amount of military leave taken under s. 250.48, F. S., or abridge in any way the ordinary vacation rights customarily provided for such employees.

My predecessors in this office reached a similar conclusion. *See* AGO 048-13, *supra*, construing former s. 250.28, F. S., and AGO 047-152, *supra*, construing s. 115.07, F. S. The conclusions reached in these opinions apply with equal force to the vacation rights of municipal employees who are National Guardsmen on authorized military leave under present s. 250.48, F. S.

078-82—June 2, 1978

LAW ENFORCEMENT TRAINING TRUST FUND

DISPOSITION TO TRAINING CENTERS OF INTEREST EARNED

To: Neil Chamelin, Director, Division of Standards and Training, Police Standards and Training Commission, Tallahassee

Prepared by: Frank A. Vickery, Assistant Attorney General

QUESTIONS:

1. If law enforcement training trust fund moneys allocated to the regional councils established by the Division of Standards and Training for training purposes or suballocated to specific training centers by the councils are placed in an interest-bearing account, should interest earned be earmarked for law enforcement training purposes rather than become a part of the general operating funds of the parent institution (vocational/technical center, college, or police department)?

2. If a certified police standards training center has properly expended funds pursuant to a statewide training plan for purchase of personal property in the form of equipment, films, etc., and later the center is decertified by the Police Standards and Training Commission and no longer is authorized to conduct certified programs, does title to such personal property revert to either the Police Standards and Training Commission or regional advisory council for redistribution rather than remain with the decertified training center or its parent agency (a vocational/technical center, college, or police department)?

SUMMARY:

When moneys appropriated to the Division of Police Standards for grants and aids and distribution to local training centers and for the express benefit of such training centers for the purpose of implementing training and educational programs and facilities for law enforcement officers is invested in an interest-bearing account by a regional council established by the division as part of a 15-region plan for disbursement

and allocation of such appropriated trust moneys to such training centers, interest earned on such investments should be distributed pro rata to the training centers for whose benefit the funds were received and held by the regional councils. If grant and aid moneys already allocated and disbursed to local training centers are invested by such training centers in interest-bearing accounts or are used to purchase equipment or other personalty for use in such training and educational programs, then interest earned on and property purchased with such grant moneys is the property of the local training centers and may not (absent a controlling statute or grant agreement or contract) be recovered by the division or the regional councils.

Your questions appear to be predicated upon the following factual situation. The Division of Standards and Training (hereinafter "division") of the Department of Criminal Law Enforcement (hereinafter "department") is statutorily directed to establish and maintain, with approval of the Police Standards and Training Commission (hereinafter "commission"), an advanced and highly specialized training program for the purpose of training police officers, support personnel, and, on request, state law enforcement agencies in crime prevention. Section 943.25(1), F. S. Funds accumulated in the Florida Police Academy Fund as of August 1, 1974, were transferred to the department for the purpose of implementing training programs and training facilities, including the establishment or construction of or improvement to any training facilities on a regional basis. Section 943.25(6), F. S.

It appears that the commission has promulgated a 15-region plan to implement the disbursement of moneys which had accumulated in a fund designed for the Florida Police Academy. The regional plan basically reallocated all of such money, and other moneys, to state and local law enforcement agencies through 15 regional councils to underwrite programs to train and educate law enforcement officers with certain exceptions not material to the instant questions. *See* AGO 077-59. In carrying out this plan, the regional councils allocate moneys to training centers located within their respective regions. These training centers are established at community colleges, vocational/technical schools, and other private and public institutions. The money is released semiannually on a project-by-project basis. Often such projects require expenditures for tangible personal property.

In 1976 the Legislature established the Law Enforcement Training Trust Fund and appropriated from the fund the moneys necessary for the 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 the regional councils. *See* s. 1, Item 281, Ch. 76-285, Laws of Florida; *also see* s. 1, Item 285, Ch. 77-465, Laws of Florida; AGO 077-59. The moneys appropriated by these acts from the Law Enforcement Training Trust Fund are earmarked for the statutorily specified purpose of "grants and aids" for "Special Education and Technical Training," and may not be used for any other purpose or in any other manner than as specified. *See* 81A C.J.S. *States* s. 241; Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970); Dickinson v. Stone, 251 So.2d 268, 273 (Fla. 1971); AGO's 075-120 and 077-59. 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 Bd. of Dentistry, 297 So.2d 628, 635 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974).

According to your letter, some of the money allocated to the regional councils is held in bank accounts by the councils prior to its disbursement. Often, the money for a particular project is disbursed by the council prior to the beginning of the project and is placed in an interest-bearing bank account by the training center. This practice has prompted your inquiry as to whether the interest earned is to be earmarked for law enforcement training purposes or whether it should become a part of the operating funds of the institutions housing the training centers. Essentially, two fact situations are involved in this question—that of interest earned by investments in savings accounts by the regional councils and that of such interest earned on investments by the training centers after disbursement to them.

Chapter 943, F. S., does not appear to provide authority for or limitation upon investments by the division or the regional councils. The regional councils are not, in fact, statutorily provided for in any respect. Although there is general statutory authority for investments of public moneys by state agencies, this authority does not appear to me to

extend to the councils. Section 215.44, F. S., authorizes investment of funds of a "state agency" by the Board of Administration. A "state agency" is defined to mean "any official, officer, commission, board, authority, council, committee, or department of the executive branch . . . of state government." Section 215.011, F. S. Since these regional councils are not provided for anywhere in the statutes, nor anywhere made a part of or assigned or transferred to the executive branch of government or any department thereof, it is my opinion that they cannot be considered a part of the executive branch of state government or a "state agency" for purposes of the application of s. 215.44, F. S. *Cf., e.g.,* AGO's 076-185, 075-56, 073-32, and 072-210. *See also* Crandon v. Hazlett, 26 So.2d 638, 642 (Fla. 1946), in part holding that committees appointed by county commissioners to aid them in some advisory capacity, not being authorized by law, had no legal or official status; s. 5(c), Art. II, State Const., providing that the powers and duties of state and county officers shall be fixed by law; and *cf.* Dade County v. State, 116 So. 72 (Fla. 1928). Pursuant to s. 665.321, F. S., "public corporations, funds and organizations, and municipalities and other public corporations and bodies," are authorized to invest funds held by them in savings accounts of savings and loan associations. While this provision would authorize investments in savings accounts of such financial institutions by municipalities or by community college districts and other districts, for instance, it would not include within its purview the regional councils as such, whose powers and duties are not prescribed by law. *Cf., e.g.,* AGO's 075-57, 074-214, and 072-26; *also cf.* Advisory Opinion to Governor, 1 So.2d 636 (Fla. 1941), wherein the members of the State Planning Board, an advisory board created by Ch. 17275, 1935, Laws of Florida, and authorized to expend public funds in the discharge of its statutory duties for the purpose of aiding and proposing to state administrative officers and the Legislature plans for the future development, welfare, and governance of the state, were held to be state officers. In sum, while the department or the division would, in certain circumstances, probably fall within the purview of state statutes, such as Ch. 215, F. S., regulating state agencies, I find no statutory authority for a regional advisory council to manage or invest public funds in its custody or possession in savings accounts or certificates of deposits of commercial banks or federal or state savings and loan associations. *Cf.* AGO 056-122, stating that the supreme court justices' and circuit judges' retirement fund existing under Ch. 123, F. S. 1955, and required to be deposited in a special fund in the State Treasury to be used for the purpose of paying the retirement compensation then provided for by Ch. 123, F. S., should not be invested in absence of any statute making express provision therefor.

As noted, the moneys in question are specifically appropriated to the division for one purpose and one purpose only—*grants and aids* for special education and technical training. As public funds are involved, the purposes for which the money was explicitly appropriated must be strictly construed and limited to those purposes. *See* AGO's 071-28 and 075-120. Moreover, the money has not been earmarked for the benefit of, or expenses of, the division but has been appropriated *to* the division for disbursement to local agencies. *See* AGO 077-59. The division is, therefore, acting as a conduit for the moneys appropriated for the benefit of local agencies. The division is not authorized to use this money for its own purposes or to do anything with the money other than disburse it to the training centers. Attorney General Opinion 077-59.

If the division acts solely as a conduit for this money, then the regional councils, in the absence of any statutory direction to the contrary, are also merely conduits of the money. Since the funds are appropriated for grants and disbursement to the local training centers, it appears to me that if they are invested before distribution to the local training centers, lawfully or unlawfully, interest earned on such investments must be distributed pro rata to those training centers for whose benefit the regional councils received and held such grant moneys. The funds are *effectively* the property of the training centers upon appropriation by the Legislature and distribution to the local agencies, the responsibility of the division (and hence the regional councils) being to distribute it to such local agencies for the purposes for which appropriated. Therefore, it is my conclusion that the division (and the regional councils) holds the funds for the benefit of the local training centers and must assure that the training centers get the full benefit of the funds and that, accordingly, the local training agencies and institutions are proportionally entitled to any interest earned on money allocated for their benefit but invested by the regional councils before distribution to such local agencies or institutions.

You next inquire whether interest on the appropriated funds, after allocation to the training centers, upon investment by a local training center itself, must be turned over to the division (or regional council) or whether such earnings may be kept by the training center and made a part of that institution's operating funds. In this situation, the

regional council has already disbursed the grant funds appropriated to the division by the Legislature for the benefit of the local training center. If these funds are then invested by the training center, interest earned thereon must surely remain the property of the training center for whose benefit the funds originally were appropriated and allocated or suballocated. Certainly, earnings must (or at least *should*) be used by the local training centers for law enforcement education and technical training purposes as explicitly provided for in the appropriation acts. However, the grant and aid moneys, once disbursed, have left the control of the division and regional council and are the property of the training center. Similarly, if such money is used to purchase equipment and other personal property for use in training and educational programs, then such property also is owned by the center.

Finally, I find no statutory provision or rule of law requiring that interest earned on or property purchased with the grant and aid moneys appropriated and allocated or disbursed to a local training center may be recouped by the division or regional council in the event of decertification. Moreover, there does not appear to be either a contract or grant agreement which might govern the occurrence of either failure to use the funds for their intended purpose or decertification. Hence, it is my opinion that title passes to the local training center on allocation or disbursement of the funds thereto. Any interest earned on or property purchased with the funds is owned by the local training center and may not be recovered by the division or regional councils.

078-83—June 5, 1978

TAXATION

WATER MANAGEMENT DISTRICTS, BASINS, AND SUBDISTRICTS—COMPENSATION FOR COUNTY TAX OFFICIALS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: William D. Townsend, Assistant Attorney General

QUESTIONS:

1. If in a particular county within a water management district there also exists a basin board, which basin board requests the governing board of the district to levy a tax and the basin board's tax is levied by the district in addition to a districtwide tax, pursuant to ss. 192.091(2)(b) and (c), 373.0697(2), and 373.539(4), F. S., and such other statutory and regulatory provisions as may be applicable, what is the proper procedure for computing the commissions due the county tax officers for services performed in connection with the collection of this combined tax levy?
2. If in a particular county within a water management district there does not exist a basin or subdistrict, or the existing basin or subdistrict chooses not to request the district to levy an ad valorem tax for basin purposes, so that the only tax levied by the water management district is for districtwide purposes, then under applicable statutory and regulatory provisions what is the proper procedure for computing the commissions due the county tax officers for services performed in connection with the district tax levy?

SUMMARY:

The proper procedure for computing the rates of compensation for county tax officials for services in assessing and collecting ad valorem taxes for basins and subdistricts within the several water management districts is governed by the explicit statutory provision, s. 373.0697(2), which states that the rate is to be the same as that applied to county taxes.

Additionally, pursuant to the provisions of s. 3 of Ch. 25270, 1949, Laws of Florida, s. 8(3) of Ch. 61-691, Laws of Florida, and s. 373.539(4), F. S. (former s. 378.29, F. S.), construed together, and as implemented by s. 192.091, F. S. (former s. 193.65, F. S.), the county property appraisers and the county tax collectors should be compensated for their services in assessing and collecting ad valorem taxes for the several water management districts at the same rates as apply to county taxes. The commission rate for county property appraisers is that specified in s. 192.091(1)(a), F. S., and the measure of compensation for county tax collectors is that prescribed by s. 192.091(2)(b), F. S.

The answer to your inquiry involves the construction of Ch. 25209, 1949, Laws of Florida, from which Ch. 378, F. S. (now Ch. 373) derives, Ch. 25270, 1949, Laws of Florida, and s. 193.65, F. S., from which s. 192.091, F. S., is derived, and s. 373.539(4), F. S., former s. 378.29, F. S., s. 8(3) of Ch. 61-691, as well as s. 6, Ch. 73-190, and s. 12, Ch. 72-299, Laws of Florida (which are *in pari materia* with Ch. 25270), and the applicability of certain special laws involving counties lying within the district.

In 1949, the Legislature of this state enacted two laws dealing with water and flood control. Chapter 25209, Laws of Florida, established the procedure by which a flood control district could be created and administered. This act provided in s. 29(4) that tax officers of the counties within the district were to receive compensation at rates provided by law for similar services or charges in other cases. This statute became Ch. 378, F. S. (now Ch. 373, F. S.), and s. 29(4) of Ch. 25209 became s. 378.29, F. S. (now s. 373.539(4), F. S.). The second law passed by the 1949 Legislature was Ch. 25270 which created the Central and Southern Florida Flood Control District.

This later legislative enactment was "to facilitate the creation and initial operation of a district under said chapter," (Ch. 25209). Section 1, Ch. 25270, 1949, Laws of Florida. The date of the passage and effectiveness of this act is after that of Ch. 25209, and therefore deemed to be controlling as the later expression of the intent of the Legislature. Attorney General Opinion 064-93. Section 3 of Ch. 25270 provides:

> The tax assessor, tax collector . . . of the respective counties within or partly within said district shall be *entitled to compensation* for services performed in connection with said tax *at the same rates as apply to county taxes.* (Emphasis supplied.)

The same wording regarding compensation for county tax officers is found in s. 8(3), Ch. 61-691, Laws of Florida, creating the Southwest Florida Water Management District to be operated under and be governed by Ch. 378, F. S., now Ch. 373, F. S.

A review of the history of the enabling acts of the South Florida and Southwest Florida Water Management Districts, Chs. 25270, 1949, Laws of Florida, and 61-691, Laws of Florida, reveals no material changes affecting these acts since their passage (for the purposes of this opinion). The history of the current statute, s. 373.539(4), F. S., former s. 378.29(4), F. S., demonstrates that it carries forward exactly the same provision as Ch. 25209, Laws of Florida, and must therefore be construed in the same light as that enactment. In a previous opinion of this office, AGO 064-93, my predecessor concluded that because former s. 378.29, F. S. (now s. 373.539, F. S.), was substantially identical to s. 3, Ch. 25270 (as well as s. 8(3) of Ch. 61-691), and provided the same rate of compensation, and because the latter law is later in time, the rates provided for in Ch. 25270 (as well as Ch. 61-691) were controlling, *i.e.*, Ch. 25270 (and Ch. 61-691) as implemented by s. 193.65, F. S. (now s. 192.091, F. S.), controls.

At the time of issuance of AGO 064-93, s. 193.65, F. S., was the statute which generally set out the rates of compensation to be paid to county tax officials for assessing and collecting county and district taxes. In that opinion it is noted that this statute was derived from Ch. 21918, 1943, Laws of Florida, and Ch. 20936, 1941, Laws of Florida, and that Ch. 25270, being the later law, controlled in the case of a conflict. The reasoning of and conclusion drawn in that opinion are equally applicable to the provisions of s. 8(3) of Ch. 61-691. Section 193.65 provided special fees for assessing and collecting "district taxes." For county taxes the fees were 10 percent on the first $5,000 levied and collected; 5 percent on the next $5,000; 3 percent on the balance to $50 million; and 2 percent on the remaining balance. The special rate for "district" taxes was 3 percent on an assessed valuation of $50 million and 2 percent on the balance. This statute, as to district taxes, would have been controlling and would have governed the rates of compensation of the

county tax officials for assessing and collecting the water management district taxes but for the fact that its passage antedates the passage of Ch. 25270 (as well as Ch. 61-691) which governs and provides that tax officials are to be paid at the rates applicable for county taxes (rather than those computed for special districts).

In 1972, the Legislature enacted Ch. 72-299, Laws of Florida. That law created in part 1, s. 12, the five water management districts. Subsequent to that enactment, Ch. 73-190, Laws of Florida, defined the boundaries of the districts and additionally amended Ch. 72-299 by provisions in s. 6(13)(b) of the 1973 act which provided that tax assessors, tax collectors, and clerks of the circuit courts should be compensated "at the same rates as apply to county taxes." This act subsequently became s. 373.0697, which is controlling of the rates of compensation for basins and subdistricts. It would be illogical to assume that the parent districts would be taxed at a different rate than the basins or subdistricts for the same services. Therefore, there is continued evidence of the intent of the Legislature in that, during the time period between 1963 and 1973, the fees payable to property appraisers for services to water management and flood control districts were the same as those payable on county taxes in s. 193.65, F. S., quoted in AGO 064-93, as well as the rates for 1943 and 1963. In 1973, the Legislature in s. 8, Ch. 73-172, amended s. 192.091(1) by deleting all of s. 192.091(1)(c), providing for the commissions for assessing taxes for flood control and water management districts. Thus, the provisions of the statute dealing specifically with commissions for assessing the taxes of water management districts were repealed, thereby placing property appraisers under the provisions of s. 192.091(1), F. S. 1973, and consequently bringing provisions of the statute relating to property appraisers under the interpretation discussed above, *i.e.*, s. 3 of Ch. 25270 (as well as s. 8(3) of Ch. 61-691), as implemented by s. 192.091(1), F. S. 1973, as amended. Accordingly, commissions due *property appraisers* for services rendered to water management districts should be based upon the rates which apply to the county taxing authorities under s. 192.091(1)(a), F. S.

In regard to commissions payable to county tax collectors, both Ch. 25270, 1949, and s. 8(3), Ch. 61-691, specify that they are to be paid "at the same rates as apply to county taxes," and these statutes, together with s. 373.539, F. S. 1973, formerly s. 378.29, F. S., as construed in AGO 064-93, and as implemented by s. 192.091(2)(b), F. S., continue to govern the commissions payable to tax collectors for collecting water management district taxes, *i.e.*, such commissions are those specified in s. 192.091(2)(b), F. S. Inasmuch as former s. 193.65(2), now s. 192.091(2), and s. 373.539 (former s. 378.29, F. S.) have remained substantially unchanged since the issuance of AGO 064-93 and in the 1965, 1967, 1969, 1971, 1973, 1975, and 1977 statutes, it is apparent that the rationale applied in AGO 064-93 is still valid and its holding and result remain controlling of s. 192.091(2), F. S. (former s. 193.65(2), F. S.) and s. 373.539, F. S. (former s. 378.29, F. S.). As stated above, the enactment of s. 6(13)(b) of Ch. 73-190, Laws of Florida, now s. 373.0697(2), F. S., is a further indication of the continuation of this legislative intent.

In passing, it should be noted that there have been numerous special laws purporting to control the rates of compensation in certain counties. Among these are Ch. 61-669, Laws of Florida (relating to Osceola County), Ch. 63-707, Laws of Florida (relating to Charlotte County), and Ch. 67-1245, Laws of Florida (relating to Collier County). As discussed in AGO 064-93, in view of decisions by the Supreme Court of Florida in State v. Shepard, 93 So. 667 (Fla. 1922), Manatee County v. Davidson, 181 So. 889 (Fla. 1938), State v. Bell, 91 So.2d 193 (Fla. 1956), and other cases cited in AGO 064-93, I do not think that acts similar to Chs. 61-669, 63-707, and 67-1245 should be held to have effectively replaced the provisions of Ch. 25270, 1949 ([Ch. 61-691], in pertinent part, is identical), or s. 378.29(4), F. S. (now s. 373.539(4), F. S.), as implemented by s. 193.65, F. S. (now s. 192.091, F. S.). Accordingly, all *tax collectors* should be compensated at the same rate as set forth in s. 192.091(2)(b), F. S., for collecting the taxes of the several water management districts.

078-84—June 5, 1978

TRAVEL EXPENSES

SARASOTA-MANATEE AIRPORT AUTHORITY MEMBERS

To: W. T. Harrison, Jr., Attorney, Sarasota-Manatee Airport Authority, Sarasota

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Are members of the Sarasota-Manatee Airport Authority entitled to reimbursement for travel expenses in traveling to and from their homes and the airport authority office, located on the Sarasota-Bradenton Airport?

SUMMARY:

In the absence of an express and explicit provision in the special act creating the Sarasota-Manatee Airport Authority, members of the airport authority are not entitled to reimbursement for travel expenses in traveling to and from their homes and the airport authority office.

The Sarasota-Manatee Airport Authority was created by Ch. 31263, 1955, Laws of Florida, as a "body politic and corporate" for the purposes of acquiring and maintaining airport facilities on behalf of the four participating political subdivisions—Sarasota and Manatee Counties and the Cities of Bradenton and Sarasota. Originally members of the airport authority were entitled to "be reimbursed for the amount of actual expenses incurred by them in the performance of their duties." Section 3, Ch. 31263, 1955, Laws of Florida. In 1977, the Legislature revised and consolidated the provisions regarding the Sarasota-Manatee Airport Authority; s. 3 was amended to provide:

> The members of the authority shall serve without compensation but shall be reimbursed for the amount of actual expenses incurred by them in the performance of their duties. All travel expenses, subsistence and lodging expenses of members of the authority and of authority employees shall not exceed those prescribed by s. 112.061, Florida Statutes, unless actual reasonable expenses in excess of those prescribed by s. 112.061, Florida Statutes, are specifically authorized prior to the incurring of such expenses by action of the authority taken in a regular monthly meeting in which the question of such expenses appears as a separate item on the agenda. [Section 3(f), Ch. 77-651, Laws of Florida (effective October 1, 1977).]

According to your letter, the airport authority is in doubt as to the propriety of paying the travel expenses of authority members traveling to and from their homes and the airport authority office and has therefore requested an opinion from this office regarding the propriety of such reimbursements for expenses incurred prior to October 1, 1977, as well as subsequent to October 1, 1977.

The provisions and limitations contained in s. 112.061, F. S., the state Uniform Travel Expense Law, are applicable to "[a]ny . . . authority, district, public body, body politic . . . or any other separate unit of government created pursuant to law," and to "all public officers, employees, and authorized persons whose travel expenses are paid by a public agency," s. 112.061(1)(a) and (2)(a), F. S., except that "[t]he provisions of any special or local law, present or future, shall prevail over any conflicting provisions in [s. 112.061], but only to the extent of the conflict." Section 112.061(1)(b)2., F. S. Thus the provisions of Ch. 31263, 1955, Laws of Florida, will prevail over any conflicting provisions contained in s. 112.061, regarding the travel expenses of the authority's members, *but only to the extent of the conflict.* Chapter 31263, 1955, Laws of Florida, and the subsequent amendment thereto in 1977 by Ch. 77-651, Laws of Florida, both, however, contain substantially the same requirement as s. 112.061 that the reimbursement of expenses be limited to those expenses incurred "in the performance of their duties." *See* s. 112.061(3)(a), F. S., requiring a signed statement by the traveler's supervisor stating

that such travel is on the official business of the state and s. 112.061(3)(b), F. S., limiting travel expenses under s. 112.061 "to those expenses necessarily incurred by them in the performance of a public purpose authorized by law to be performed by the agency . . . ."

Neither Ch. 31263, 1955, Laws of Florida, nor Ch. 77-651, Laws of Florida, expressly authorizes reimbursement for mileage or travel expenses incurred in traveling from the residence of the authority's members to the office or official headquarters of the authority and return. *Compare* s. 458.04(1), F. S., in which the Legislature expressly authorized members of the Board of Medical Examiners to receive per diem and mileage as provided in s. 112.061 from their place of residence to the place of meeting and return; *see also* s. 459.21 (State Board of Osteopathic Medical Examiners); s. 467.04 (State Board of Architecture); s. 470.06 (State Board of Funeral Directors and Embalmers); s. 473.21 (State Board of Accountancy); s. 475.08 (Florida Real Estate Commission); and s. 476.18(3) (Barbers Sanitary Commission) which contain similar provisions. The right of a public officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it directly or by necessary implication and an officer cannot recover compensation additional to the compensation fixed by statute for such expenses. 67 C.J.S. *Officers* s. 91(a). Reimbursement for mileage incurred by members in traveling to and from their homes and the authority's office is not expressly authorized by the special acts establishing the airport authority. Moreover, this office has consistently interpreted s. 112.061, F. S., to authorize reimbursement for travel expenses incurred only for travel away from the travelers' official headquarters as defined in s. 112.061(4), F. S. *See, e.g.*, AGO's 077-123, 077-117, 076-56, and 074-132. In AGO 075-237 this office concluded that district school board members are not entitled to reimbursement for mileage in traveling from their homes to the district's administrative headquarters; they are, however, entitled to "vicinity mileage" when it is officially authorized and is clearly shown to be necessary to carry out their official duties. *See* s. 112.061(7)(d)2., F. S.; *cf.* AGO's 074-132 and 064-21. This interpretation is in keeping with the general principle that "[u]nless the *legislature* has *expressly and explicitly* included in the expenses to be allowed public officers the cost of travel from their homes to the places where their regular duties are to be performed, such expenses are not a legitimate public charge." (Emphasis supplied.) 67 C.J.S. *Officers* s. 91(b), p. 330. *Accord:* Attorney General Opinions 064-21 (circuit court judges); 072-248 (state attorneys); 074-132 (district court of appeal judges); and 075-237 (district school board members; *cf.* Thompson v. Frohmiller, 107 P.2d 375, 376 (Ariz. 1940), in which the court stated that "it is going entirely too far to hold that the traveling expenses of officers from their places of residence to their offices are a 'necessary expense' in the conduct of their office, in the absence of statute expressly or by conclusive implication allowing the same."

Thus neither the enabling legislation for the airport authority nor s. 112.061, F. S., expressly authorizes reimbursement for mileage in traveling from the member's residence to the authority's headquarters and return. Section 3(f) of Ch. 77-651, Laws of Florida, empowers the authority to exceed only the rates or amounts prescribed by s. 112.061. Any rates so exceeded, however, must be for travel in performance of a duty or function of the authority authorized by law; moreover, such expenses must be authorized *by law*, not by the authority. Reimbursement for expenses incurred in traveling to the authority's headquarters from a member's residence in the absence of express and explicit *legislative* authorization would not be a legitimate public charge. Accordingly, I am of the opinion that members of the Sarasota-Manatee Airport Authority were not, prior to 1977, and are not presently entitled to reimbursement for travel expenses incurred in traveling to and from their homes and the airport authority office.

078-85—June 8, 1978
(Revision of 078-71)

COUNTIES

EXTRA COMPENSATION OF CHAIRMAN OF BOARD OF COUNTY COMMISSIONERS

To: John L. Mica, Representative, 39th District, Tallahassee

Prepared by: Joslyn Wilson, Assistant Attorney General

(See 078-71 for question)

SUMMARY:

Chapter 57-507, Laws of Florida, a special or local act relating to Orange County, is not currently in effect and has no legal effect or operation on the additional compensation of the Chairman of the Orange County Board of County Commissioners, having been expressly repealed and supplanted by Ch. 61-1387, Laws of Florida, and would not be revived by the subsequent repeal of Ch. 61-1387 by Ch. 65-785, Laws of Florida. Under the express provisions of s. 2.04, F. S., the repeal of Ch. 61-1387 by Ch. 65-785, Laws of Florida, does not operate to revive Ch. 57-507, in the absence of an express provision in Ch. 65-785 so providing. Chapter 65-785 contains no such provision for the revival of Ch. 57-507.

As I indicated to you in our recent telephone conversation, I have considered it necessary to reexamine the statements and conclusions in AGO 078-71 and, upon further consideration, I find it necessary to recede from and revise AGO 078-71. First, I must emphasize that this opinion is limited to the precise question presented in your letter, that is, is Ch. 57-507, Laws of Florida, currently in effect? My response to this question is, as in AGO 078-71, in the negative.

Section 1 of Ch. 57-507, Laws of Florida, assuming the validity thereof, authorized and required the Chairman of the Board of County Commissioners of Orange County to be paid $100 a month in addition to his salary as county commissioner. In 1961 the Legislature by Ch. 61-1387, Laws of Florida, assuming the validity thereof, expressly repealed and supplanted Ch. 57-507, effective October 1, 1961. Section 1 of Ch. 61-1387 provided:

> The Chairman of the Board of County Commissioners in all counties having a population of not less than two hundred thirty thousand (230,000) and not more than three hundred thousand (300,000) according to the latest official statewide decennial census, shall be paid five hundred dollars ($500.00) per annum in addition to his salary as County Commissioner, payable in equal monthly installments.

Section 2 of Ch. 61-1387 expressly repealed s. 1 of Ch. 57-507. Section 2 of Ch. 65-785, Laws of Florida, assuming the validity thereof, expressly repealed s. 1 of Ch. 61-1387, Laws of Florida, effective July 1, 1965, and s. 1 of Ch. 65-785 provided that the chairman of the board of county commissioners in all counties having a population of not less than 230,000 and not more than 300,000 according to the latest official decennial census should be paid $900 per annum in addition to his salary as county commissioner, payable in equal monthly installments. At the time Chs. 61-1387 and 65-785, Laws of Florida, were enacted, Orange County was the only county within the state with a population within the population brackets set forth in s. 1 of Ch. 61-1387 and s. 1 of Ch. 65-785. *See* Florida Statutes 1967, Vol. 3 at p. 5418, which shows that, under the 1960 Official Florida State and Federal Decennial Census, Orange County had a population of 263,540 and was the only county in the state within the population range of 230,000 to 300,000. Chapter 65-785, Laws of Florida, was subsequently repealed by s. 2, Ch. 71-29, Laws of Florida.

You inquire as to whether Ch. 57-507, Laws of Florida, would be revived by the repeal of Ch. 61-1387 by Ch. 65-785, Laws of Florida. Under the common law, when a repealing statute is itself repealed, the first statute is revived without any formal words for that

purpose in the absence of a contrary intention expressly declared or necessarily implied from the enactment by which the last repeal is effected. 82 C.J.S. *Statutes* s. 307(a), at p. 523. This common law rule, however, has been changed by statute in Florida. Section 2.04, F. S., provides:

> No statute of this state which has been repealed shall ever be revived by implication; that is to say, if a statute be passed repealing a former statute, and a third statute be passed repealing the second, the repeal of the second statute shall in no case be construed to revive the first, unless there be express words in the said third statute for this purpose.

See generally State v. Sholtz, 169 So. 849, 853 (Fla. 1936); State *ex rel.* Scott v. Christensen, 170 So. 843 (Fla. 1936), and 82 C.J.S. *Statutes* s. 307(a), at p. 524. Applying the aforementioned statutory provisions to the instant inquiry, it seems clear that Ch. 57-507, Laws of Florida, having been expressly repealed and supplanted by Ch. 61-1387, Laws of Florida, would not be revived by the subsequent repeal of Ch. 61-1387 by Ch. 65-785, Laws of Florida, absent an express provision in Ch. 65-785 so providing. Chapter 65-785 contains no such provision for the revival of Ch. 57-507. Accordingly, it is my opinion that Ch. 57-507, a local or special act relating to Orange County, is not currently in effect and has no legal effect or operation on the additional compensation of the Chairman of the Orange County Board of County Commissioners, having been expressly repealed and supplanted by Ch. 61-1387, Laws of Florida, and would not be revived by the subsequent repeal of Ch. 61-1387 by Ch. 65-785.

078-86—June 8, 1978

STATE MINIMUM BUILDING CODES

DO NOT INCLUDE THE "STANDARD FAMILY OF CODES"

To: William H. Ravenell, Secretary, Department of Community Affairs, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General, and Dennis J. Wall, Legal Research Assistant

QUESTION:

Does the reference to the Standard Building Code, 1976 edition, include those requirements for plumbing, mechanical, and gas construction which are published as separate documents and are commonly referred to as the "standard family of codes"?

SUMMARY:

The State Minimum Building Codes enumerated in s. 553.73(2), F. S., do not include the "Standard Family of Codes" promulgated by the Southern Standard Building Code Congress International, Inc.

Section 553.73(1) and (2), F. S., provides in pertinent part as follows:

> (1) By January 1, 1978, local governments and state agencies with building construction regulation responsibilities shall adopt a building code which shall cover all types of construction. *Such code . . . shall be in addition to the requirements set forth in Chapter 527, which pertains to liquefied petroleum gas, and parts I, II, and III of this chapter which pertain to plumbing, electrical, and glass construction standards, respectively.*
> (2) There is hereby created the State Minimum Building Codes which shall consist of the following nationally recognized model codes:
> (a) Standard Building Code, 1976 edition;
> (b) National Building Code, 1976 edition;
> (c) EPCOT Code, 1977 edition;

(d) One and Two Family Dwelling Code; [and]
(e) The South Florida Building Code, 1976 edition.

Each local government and state agency with building construction regulation responsibilities shall adopt one of the State Minimum Building Codes as its building code. If the One and Two Family Dwelling Code is adopted for residential construction, then one of the other recognized model codes must be adopted for the regulation of other residential and nonresidential structures. The State Minimum Building Codes shall include the provisions of part V relating to accessibility by handicapped persons. (Emphasis supplied.)

It will be noted from an examination of the italicized language of s. 553.73(1), *supra*, that the State Minimum Building Codes are in addition to the requirements set forth in Ch. 527 and the construction standards set forth in parts I, II, and III of Ch. 553, F. S. Chapter 527, F. S., sets forth certain requirements and restrictions regarding the sale and handling of liquefied petroleum gas, as defined in s. 527.01(1), F. S. Part I of Ch. 553, F. S., is the "Florida Plumbing Control Act of 1951," s. 553.01, F. S., and, by the provisions of s. 553.06, F. S.,

Chapter VIII of the Florida State Sanitary Code of the Department of Health and Rehabilitative Services, adopted in accordance with chapter 381, *is hereby adopted as the State Plumbing Code* . . . . (Emphasis supplied.)

Part II of Ch. 553, F. S., sets forth the "Florida Electrical Code." Section 553.15, F. S. (Part III of Ch. 553, F. S., not pertinent to your question, pertains to "the use of safety glazing materials in all glass doors, bathtub and shower enclosures, and hazardous locations in all phases of construction . . . ." Section 553.24, F. S.) It is clear that the Legislature has intended for the State Minimum Building Codes set forth in s. 553.73(2), *supra*, to be *in addition to* the provisions of Ch. 527 and of parts I, II, and III of Ch. 553, F. S., which pertain to liquefied petroleum gas, the State Plumbing Code, the Florida Electrical Code, and the use of safety glazing materials in connection with construction involving glass, respectively. *See* title to Ch. 77-365, Laws of Florida, the first section of which act amended s. 553.73(1) and (2), F. S., as set forth above, said title reading in pertinent part as follows:

AN ACT relating to building codes; . . . requiring that, by a certain date, local governments and state agencies which regulate building construction shall adopt one of certain model building codes designated as the State Minimum Building Codes, including provisions of state law on accessibility by handicapped persons *in addition to certain state laws regulating liquefied petroleum gas, plumbing, electrical, and glass construction* . . . . (Emphasis supplied.)

Therefore, I am of the opinion that the State Minimum Building Codes enumerated in s. 553.73(2), F. S., are in addition and supplementary to the above-cited state laws "regulating liquefied petroleum gas, plumbing, electrical and glass construction," which state laws provide the basic source of reference for, *inter alia*, gas, plumbing, electrical, and glass construction standards. Had the Legislature intended to include the "Standard Family of Codes" in the operation of s. 553.73, F. S., it would have done so by express language to that effect; instead, the Legislature chose the precise term "Standard Building Code, 1976 edition," to effectuate its intent. The precise words appearing in a constitutional or statutory provision must be taken to express the intent of such provisions where that is at all possible. *E.g.*, Thayer v. State, 335 So.2d 815, 816-817 (Fla. 1976); City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 5 (Fla. 1972); Brooks v. Anastasia Mosquito Cont. Dist., 148 So.2d 64, 66 (1 D.C.A. Fla., 1963).

Section 553.73(6), F. S., referred to in your letter, merely provides in pertinent part that, upon adoption of one of the State Minimum Building Codes, the municipality, county, or state agency adopting same may, in its determination, divide such code into a number of segments. "These segments may be identified as building, mechanical, electrical, plumbing, and fire prevention codes, or by other titles as are deemed proper." Section 1, Ch. 77-365, Laws of Florida, *brought forward in pertinent part as* s. 553.73(6), F. S. The aforementioned subsection thus provides for a discretionary segmentation of the State Minimum Building Code which is adopted by a given municipality, county, or

state agency; it does not on its face provide any authority to include or exclude any substantive portion of the code which such municipality, county, or state agency has chosen to adopt.

Your question is answered in the negative.

078-87—June 15, 1978

LOTTERIES

CABLE TELEVISION BINGO GAMES

To: Robert E. Stone, State Attorney, Stuart

Prepared by: George R. Georgieff, Assistant Attorney General

QUESTION:

Does a cable television bingo game, as outlined below, violate any of the Florida lottery prohibitions as embodied in the Florida Statutes, Ch. 849?

SUMMARY:

A cable television bingo game to be played by the viewing public, sponsored by merchants who buy advertising on the medium, on cards secured either at the merchants' organizations or at the cable television office, would violate s. 849.09, F. S., which prohibits lotteries.

GAME OUTLINE: The cable TV station would sell advertising time to local merchants as sponsors of the TV bingo game. The cost of advertising time would be the same as for any other televised program in that time slot.

Bingo cards would be distributed, free of charge, at all of the sponsoring merchants' locations and at the cable TV office. Participants would pick up the bingo cards at the above locations and then play the game by watching the local cable TV channel to determine the numbers to place on their card. One prize of $100 would be awarded for each day the program is aired and would be picked up at the cable TV office. Although the bingo cards would be available to anyone who wanted them, in order to play the game participants would have to have access to a television set with the cable TV hookup.

Section 849.093, F. S., reads as follows:

> **849.093 Charitable, nonprofit organizations; certain endeavors permitted.—**
>
> (1) None of the provisions of this chapter shall be construed to prohibit or prevent nonprofit or veterans' organizations engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities, which organizations have been in existence for a period of 3 years or more from conducting bingo games or guest games, provided that the entire proceeds derived from the conduct of such games shall be donated by such organizations to the endeavors mentioned above. In no case shall the proceeds from the conduct of such games be used for any other purpose whatsoever.
>
> (2) If an organization is not engaged in efforts of the type set out above, its right to conduct bingo or guest games hereunder shall be conditioned upon the return of all the proceeds from such games to the players in the form of prizes. If at the conclusion of play on any day during which bingo or guest is allowed to be played under this section there remain proceeds which have not been paid out as prizes, the nonprofit organization conducting the game shall at the next scheduled day of play conduct bingo or guest games without any charge to the players and shall continue to do so until the proceeds carried over from the previous days played have been exhausted. This provision in no way extends

the limitation on the number of prize or jackpot games allowed in one night as provided for in subsection (4).

(3) The number of days during which such organizations as are authorized hereunder may conduct bingo or guest games per week shall not exceed two.

(4) No jackpot shall exceed the value of $100 in actual money or its equivalent and there shall be no more than one jackpot in any one night.

(5) There shall be only one prize or jackpot on any one day of play of $100. All other game prizes shall not exceed $25.

(6) All persons involved in the conduct of any bingo or guest game must be a resident of the community where the organization is located and a bona fide member of the organization sponsoring such games and shall not be compensated in any way for operation of said bingo or guest game.

(7) No one under 21 years of age shall be allowed to play.

(8) Bingo or guest games shall be held only on property owned by the nonprofit organization or by the charity or organization that will benefit by the proceeds, on property leased full time by such organization for a period of not less than 1 year, or on property owned by and leased from another nonprofit organization qualified under this section.

(9) Any organization or other person who willfully and knowingly violates any provision of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For a second or subsequent offense, the organization or other person is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

Clearly, the first group to which the legislation refers (*see* subsection (1) above) does not contemplate the playing of bingo either by television stations (cable or otherwise) or merchants.

It is equally clear that the second group (subsection (2) above) referred to in the legislation does not include either such television stations or such merchants.

Accordingly, if neither the television stations nor the merchants who may advertise thereon fall within either category of the organizations permitted to play bingo in conformity with s. 849.093, *supra*, bingo cannot be played in the manner outlined above.

I further observe that the penalty for a violation of playing bingo in a fashion contrary to the manner set out in s. 849.093, *supra*, is that of a misdemeanor in the first degree. That applies only to organizations or entities who are qualified to play bingo under the statute, but do it in contravention thereof.

If an organization or an enterprise is not authorized by statute to play bingo, then its endeavor in so doing is characterized a lottery as proscribed by s. 849.09, F. S. One who violates that section is at least guilty as a misdemeanant and possibly as a felon.

Prohibited lotteries in Florida consist of three elements: A prize, an award by chance, and consideration. The clear authority for this conclusion may be found in the cases of Little River Theatre Corporation v. State *ex rel.* Hodge, 135 Fla. 854, 185 So. 855; and Blackburn v. Ippolito, 156 So.2d 550.

It is obvious that a prize is to be awarded to whomever plays the game contemplated by this promotional endeavor. It is equally obvious that such prize will be distributed by a chance filling out of a bingo card. The consideration, when viewed in light of the two authorities *ante*, is equally obvious. It seems clear that the promotional endeavor contemplated by the inquiry made of your office, if implemented, would be in violation of Florida's law against lotteries.

078-88—June 15, 1978

COUNTY ROADS

LIMITATIONS OF BOARD OF COUNTY COMMISSIONERS IN EXPENDITURE OF PUBLIC FUNDS FOR CONSTRUCTION, MAINTENANCE, AND REPAIR

To: Robert S. Ryder, Marion County Attorney, Ocala

Prepared by: Dennis J. Wall, Assistant Attorney General

QUESTIONS:

1. May the board of county commissioners of a noncharter county expend public funds for constructing and maintaining any road where said county does not have a specific dedication to the public to utilize said road or said county does not have any ownership of the right-of-way for said road, where the county has not maintained said road for a period of 4 years, or where the public has no prescriptive right for the utilization of said road?
2. May the board of county commissioners of a noncharter county expend public funds for the maintenance of roads in subdivisions that were recorded prior to 1925?
3. May the board of county commissioners of a noncharter county expend public funds for establishing and constructing roads in subdivisions which were recorded prior to 1925 where there is no specific dedication to the public for said roads or conveyance to said county of a right-of-way for said roads?

SUMMARY:

Unless a road is a county road open to and set apart for the public—such as by acquisition of a prescriptive right in a road by the members of the public in the county, by operation of law under s. 95.361(1), F. S., or by the principles of common law dedication—and unless the expenditure of public funds for the construction, maintenance, or repair of such a road would thereby serve a county public purpose, the board of county commissioners may not expend public funds for such purpose, whether such roads are designated as being dedicated to the public on a plat recorded prior to or after 1925.

AS TO QUESTION 1:

In order for a board of county commissioners to expend public funds for the construction and maintenance of a road, the road must be a "public" one, *i.e.*, the expenditure must be for a public purpose.

> The fundamental criterion for the expenditure of county funds is that such expenditure will serve a county as contrasted to a private purpose. Article VII, s. 1, State Const., impliedly limits the imposition of taxes and the expenditure of tax revenues to public purposes. . . . A private road is, by its very nature, not available to the public, and the public has no right to travel by motor vehicle thereon. This being the case, the repair or maintenance of such a road cannot serve a public or county purpose. [Attorney General Opinion 073-222.]

Cf. Escambia County Bd. County Comm'rs v. Bd. Pilot Comm'rs, 42 So. 697, 701-702 (Fla. 1906); AGO's 075-309 and 059-133. Such a road as you describe would appear to be a private one, although the authority of a county with respect to a particular road and questions as to whether the county has acquired a right-of-way or an easement for county public road purposes are mixed questions of law and fact which must be determined by the courts in appropriate adversary proceedings initiated for that purpose. This office is not a fact-finding body and as such is without power to adjudicate such matters. *E.g.*, AGO's 078-63, 075-309, and 074-176. Attorney General Opinion 073-222 sets forth several ways in which a county may acquire the right to use land for county public roadway purposes, and I shall briefly summarize them. First, the public (as distinct from the county) may acquire the right to use land as a roadway by prescription. *Id.*; *see* Downing v. Bird, 100 So.2d 57, 64-66 (Fla. 1958); Spain v. Minder, 346 So.2d 139, 139-140 (1 D.C.A. Fla., 1977) (Boyer, C. J., spec. conc.); Orange Blossom Hills, Inc. v. Kearsley, 299 So.2d 75, 76-77 (1 D.C.A. Fla., 1974), the last-mentioned case involving a prescriptive easement by members of the public in Marion County. *See also* I Elliott, *A Treatise on the Law of Roads and Streets* s. 5 (4th ed. 1926).

Second, a county may acquire a right-of-way on land for use as a public road by operation of law under s. 95.361(1), F. S., the application of which to the facts of a given case is left solely to the courts. *E.g.*, AGO's 074-176 and 073-257 (same as to s. 337.31(1),

F. S., *brought forward as* s. 95.361(1), F. S. [1977]); *cf.* State Dept. of Transportation v. Florida E. Coast R., 230 So.2d 726, 728 (3 D.C.A.), *cert. denied*, 239 So.2d 587 (Fla. 1970).

Third, there can be common law dedication of land for use as a public road by express word or unequivocal act of the owner thereof, coupled with an acceptance by the public of the dedication, such as by use of the land. *E.g.*, City of Miami v. Florida E. Coast R., 84 So. 726, 729 (Fla. 1920); Mainor v. Hobbie, 218 So.2d 203, 205 (1 D.C.A.), *app. dismissed*, 225 So.2d 530 (Fla. 1969); AGO 078-63.

Your first question as stated is answered in the negative.

AS TO QUESTION 2:

I assume for purposes of this question that you refer to a plat recorded prior to 1925 upon which a road or roads are designated as being dedicated to the public. Chapter 10275, 1925, Laws of Florida, was the first legislative effort to regulate the filing for record of maps and plats in Florida. Attorney General Opinion 071-307. Section 10, Ch. 10275, 1925, Laws of Florida, provided as follows:

> Before said map or plat shall be presented to the County Clerk for record, the owner or owners shall cause to be placed thereon a certificate of approval by the County Commissioners, Town Board, or Council, or the Board of Commissioners (in municipalities having a commission form of government) or their accredited representatives, having jurisdiction over the land described in the said map or plat. *However, such approval shall not bind the County Commissioners, Town Board, City Council or Board of Commissioners to open up and keep in repair any parcels dedicated to the public in any map or plat so offered, but they may exercise such right at any time.* (Emphasis supplied.)

One effect of the above-quoted statute was to require all plats recorded *after* the effective date of the act, June 11, 1925, *see* s. 15, Ch. 10275, *supra*, to be approved by the appropriate governmental body:

> If the plat or map is wholly within a municipality and is approved by the proper city officials then it does not have to be approved by the Board of County Commissioners. If the map or plat is of property not within a municipality then the approval of the County Commissioners should be had. [Attorney General Opinion of May 5, 1926, Biennial Report of the Attorney General, 1925-1926, p. 385.]

Accord: Attorney General Opinion 071-307. Thus, the approval required by the foregoing statute did not operate as an acceptance of an attempted public dedication by plat. Following approval of any such map or plat, the exercise of the right to affirmatively accept the specified dedication could be effectuated by formal or informal act of the county or by use by the public, in conformity with the principles of common law dedication by plat. *See* AGO's 078-63, 075-309, 059-133, and the authorities cited and discussed therein. The Supreme Court of Florida has held that

> . . . [a] common-law plat has no effect as a conveyance, and an offer to dedicate thereby created may be revoked by the owner or his grantee at any time before acceptance by the public. After a common-law dedication is once accepted by the public, it is irrevocable except with the consent of the public and of those persons who have vested rights in such dedication. The acceptance of a common-law dedication need not immediately follow the offer to dedicate, but must be within a reasonable time and before withdrawal by the offerer. What constitutes a revocation of an offer to dedicate depends very largely upon the circumstances and is usually a question of fact . . . . [City of Miami v. Florida E. Coast R., 84 So. 726, 730 (Fla. 1920).]

Accord: Marion County v. Gary, 88 So.2d 749, 750-751 (Fla. 1956); Winter v. Payne, 15 So. 211, 213 (Fla. 1894). The burden of proving acceptance within a reasonable time lies with the governmental body asserting same:

> Acceptance of such an offer of dedication may be by formal resolution of the proper authorities or by public user. The burden of proving acceptance of an

> offer to the public to dedicate lands for streets, alleys, and parks is upon the county or municipality asserting it. . . . No dedication is complete until acceptance by the public. [City of Miami v. Florida E. Coast R., *supra*, at 729.]

Accord: Marion County v. Gary, *supra*; Kirkland v. City of Tampa, 78 So. 17, 20-21 (Fla. 1918). As a matter of the law governing private property interests, as opposed to the law governing public dedications, purchasers of platted subdivision lots who take in a sale made with reference to the subdivision plat may acquire a right or rights in the nature of an easement with regard to roads or other "public" areas designated on said plat. *E.g.*, Burnham v. Davis Islands, Inc., 87 So.2d 97, 100 (Fla. 1956); McCorquodale v. Keyton, 63 So.2d 906, 909-911 (Fla. 1953); AGO 078-63. Such an easement may be used by the holder thereof in a manner consistent with an established public user of such roads or areas, *e.g.*, Wilson v. Dunlap, 101 So.2d 801, 804-805 (Fla. 1958); *see* Price v. Stratton, 33 So. 644, 646-647 (Fla. 1903); Porter v. Carpenter, 21 So. 788, 790 (Fla. 1897), or such a private right may arise and be exercised in the absence of public acceptance of the dedication, such as the right to make use of the road or area and the right to keep the road or area open for public use. *E.g.*, Powers v. Scobie, 60 So.2d 738, 739-740 (Fla. 1952); Florida E. Coast R. v. Worley, 38 So. 618, 623 (Fla. 1905); *cf.* Smith v. Horn, 70 So. 435, 435-437 (Fla. 1915). However, as I have stated herein, it is not the province of this office but that of the courts to determine such questions of fact and adjudicate such rights. *See* City of Miami v. Florida E. Coast R., *supra*, at 730; *cf.* Escambia County Bd. County Comm'rs v. Bd. Pilot Comm'rs, *supra*, at 702.

To summarize the foregoing general principles of law with specific reference to your precise question, a county may not expend public funds for maintenance of roads designated as having been dedicated to the public on a plat recorded prior to 1925, unless: The county has formally or informally or by public user accepted any such offer of public dedication; the county has so accepted such offer prior to revocation thereof by the dedicator or his successors in interest; the roads in question are in fact used or to be used as county public roads; and the expenditure of such funds would serve a county public purpose.

AS TO QUESTION 3:

My reply to your first and second questions adequately answers your third question and it therefore requires no specific answer.

078-89—June 15, 1978

ELECTION LAW

POWER OF ATTORNEY NOT AUTHORITY FOR SIGNING VOTER REGISTRATION APPLICATION

To: H. Jerome Davis, Manatee County Supervisor of Elections, Bradenton

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **May a daughter who has been granted power of attorney for her mother sign the application for voter registration on behalf of her mother?**

SUMMARY:

> **In the absence of statutory authority, an agent may not be appointed to register a person to vote. Therefore, a daughter who has been granted power of attorney for her physically and mentally impaired mother is not authorized to sign an application for voter registration on behalf of her mother; hence, a registration made in such a manner would be invalid.**

Your question is answered in the negative.

Your letter advises that a person who has been granted power of attorney for her mother has requested that you register her mother as an elector. You state that the mother is 89 years old, bedridden, unable to write, "and does not have all her mental faculties," although she has not been adjudicated mentally incompetent. However, she is unable to sign her name or even to make a mark to substitute as a signature. You state that the daughter wishes to fill out and sign the registration application form for her mother, presumably as her mother's "agent," by virtue of the power of attorney which she has been granted.

This office has stated on previous occasions that the State Constitution, as construed by the courts, provides essentially for universal suffrage for all residents of the state who have reached the age of majority if they are registered as provided by law. Section 2, Art. VI, State Const. The only disqualifications to voting 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.

Accordingly, in AGO 074-15, it was concluded that a resident of a Sunland Training Center who was otherwise qualified to vote was eligible to register and vote in an election, provided that such person had not been adjudicated mentally incompetent. Similarly, in AGO 077-1, this office stated that a person who has been adjudicated *physically* incompetent continues to be eligible to vote, provided such person is duly registered as an elector. Application of the foregoing constitutional provisions and Attorney General Opinions to your inquiry compels the conclusion that the woman described in your letter is eligible to register to vote, notwithstanding any physical or mental impairment, provided she is otherwise qualified to vote. The remaining consideration, therefore, is whether or not the daughter, who has been granted power of attorney, may make an application for registration as an elector *on behalf of* her mother. *See* s. 97.051, F. S., providing that one making an application for registration shall subscribe to an oath; and also execute a written statement, under oath, that he has never previously registered to vote in any other jurisdiction or that, if previously registered elsewhere, he has requested that such prior registration be canceled.

It is well established that powers of attorney are to be construed in accordance with the general rules governing the law of agency. 3 Am. Jur.2d *Agency* s. 28. A power of attorney has been defined as "an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform specified acts or kinds of acts on behalf of the principal." *Id.*, s. 23, at p. 433. *See also* s. 709.08, F. S., providing that a principal may create a durable family power of attorney by executing a power of attorney which designates a family member as attorney in fact.

An agent appointed pursuant to a power of attorney may be authorized to do whatever one can lawfully do individually, *except* those acts so *peculiarly personal* that their performance cannot be delegated. 2A C.J.S. *Agency* s. 25; Rich Printing Co. v. McKellar's Estate, 330 S.W.2d 361, 380 (Tenn. Ct. App. 1959); Zeeb v. Atlas Powder Co., 87 A.2d 123, 127 (Del. 1952); Skala v. Lehon, 175 N.E. 832, 834 (Ill. 1931). The authorities and decisional case law are in general accord that the acts of voting and registration are of such personal character that they may not be delegated to an agent, in the absence of statutory authority. 25 Am. Jur.2d *Elections* ss. 95, 235; 29 C.J.S. *Elections* ss. 46, 201(1); O'Brien v. Fuller, 39 A.2d 220, 224 (N.H. 1944); Rich Printing Co. v. McKellar's Estate, *supra.*

My examination of the Florida Statutes reveals no provision therein which permits one to delegate to an agent the authority to register as an elector for him or her. *Compare* Gonzalez v. Stevens, 427 S.W.2d 694 (Tex. Civ. App. 1968), in which the court considered a Texas statute which permitted certain family members to act as agent of another family member applying for registration. Florida law expressly requires that a person must be registered as an elector in order to be entitled to vote. Section 97.041(4), F. S. Registration of voters, moreover, can be made only in the manner provided by law; a registration made in any other manner is not a legal registration. State *ex rel.* Martin v. County Commissioners of Sumter County, 20 Fla. 859, 861 (1884). Therefore, it is clear that your question must be answered in the negative.

078-90—June 15, 1978

TRAVEL EXPENSES

TRAVELER ON STRAIGHT PER DIEM NEED NOT REDUCE CLAIM BECAUSE OF RECEIPT OF FREE LODGING

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

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Must a traveler who is on straight per diem pursuant to s. 112.061(6)(a)1. or (c)1., F. S., make a deduction from his or her travel expense voucher for complimentary lodging?

SUMMARY:

A traveler who is on straight per diem pursuant to either s. 112.061(6)(a)1. or (c)1., F. S., is not required by s. 112.061 to reduce his per diem claim because of his having received free lodging. Entitlement to straight per diem under s. 112.061(6)(a)1. and (c)1. is based and calculated on increments of travel time, not on actual expenditures for lodging or meals. However, a traveler on straight per diem pursuant to s. 112.061(6)(a)1. or (c)1. must reduce his claim in an appropriate amount if meals or lodging are included in a conference or convention registration fee also claimed, or if the traveler receives meals or lodging at a state institution.

This opinion is concerned solely with an authorized traveler's entitlement to the statutorily prescribed per diem allowance under s. 112.061(6)(a)1. and (c)1., F. S. No question was presented and no opinion is expressed as to any provision of part III of Ch. 112, F. S. (the Code of Ethics for Public Officers and Employees), or s. 111.011, F. S. (which is cumulative to provisions of part III of Ch. 112), or any other statute which might regulate the providing to or receiving by public officers and employees of free lodging. Also, pursuant to your request, I have excluded policy considerations and recommendations from this opinion.

The statutory basis for calculation of and entitlement to *per diem* while traveling on official business, as opposed to any other method of payment or reimbursement for travel expenses, is increments of actual travel *time*. To be allowed per diem, a traveler must be reasonably and necessarily required to stay overnight. Section 112.061(5)(a), F. S. Straight per diem may be allowed for two statutory classes of travel: Class A, defined by s. 112.061(2)(k), F. S., as "[c]ontinuous travel of 24 hours or more away from official headquarters," and Class B, which is defined by s. 112.061(2)(l), F. S., as "[c]ontinuous travel of less than 24 hours which involves overnight absence from official headquarters." Section 112.061(2)(i), F. S., defines a "travel day" as a period of 24 hours consisting of 4 quarters of 6 hours each. For the "purposes of reimbursement and methods of calculating fractional days of travel," s. 112.061(5)(a), F. S., prescribes the following formula for computation of per diem allowances for Class A and Class B travel:

> The travel day for Class A travel shall be a calendar day (midnight to midnight). The travel day for Class B travel shall begin at the same time as the travel period. For Class A and Class B travel, the traveler shall be reimbursed one-fourth of the authorized rate of per diem for each quarter, or fraction thereof, of the travel day included within his travel period. Class A and Class B travel shall include any assignment on official business outside of regular office hours when it is considered reasonable and necessary to stay overnight and for which travel expenses are approved.

The above statutory per diem formula does not incorporate any restrictions on the per diem allowances it contemplates and does not mention actual expenditures for lodging and meals. *Cf.* s. 112.061(5)(b), F. S., which prohibits reimbursement on a per diem basis

for Class C travel and prescribes a schedule for meal allowances. The basis for payment or reimbursement on straight per diem is the number of quarters of a travel day (or fractions thereof), with one-fourth of the authorized per diem rate being allowed for each quarter or fraction thereof. Likewise, neither s. 112.061(6)(a)1. nor (c)1., F. S., in terms imposes any limitations on straight per diem allowances because of receipt of free lodging or in any manner mentions lodging or meal expenses. *Cf.* s. 112.061(7)(h), F. S., forbidding either mileage or transportation expenses to a traveler gratuitously transported by another person; s. 112.061(8)(e), F. S., requiring any meals or lodging included in a convention registration fee to be deducted from allowances provided in subsection (6) of s. 112.061; s. 112.061(11)(a), F. S., requiring a copy of the program or agenda of a convention or conference, itemizing registration fees and any meals or lodging included in the registration fee, to be attached to and filed with the copy of the travel authorization request form on file with a state agency; s. 112.061(11)(b), F. S., providing that the travel voucher form required to be used by state officers and employees or authorized persons when submitting traveling expense statements for approval and payment provide, among other things, that per diem claimed has been appropriately reduced for any meals or lodging included in the convention or conference registration fees claimed by the traveler; and s. 112.061(6)(c)2., F. S., providing that, when lodging or meals are provided a traveler at a state institution, reimbursement may be made only for the actual expenses of such lodging or meals, not to exceed the maximum provided for in subsection (6) of s. 112.061.

Section 112.061(6)(a)1., F. S., for "purposes of reimbursement rates and methods of calculation" of *per diem* allowances, merely provides that a traveler may be allowed for travel to a convention or conference or for travel outside the state on state business serving a direct and lawful public purpose "[u]p to $35 per diem," and s. 112.061(6)(c)1., F. S., for such purposes, provides that all "other travelers" than those designated in s. 112.061(6)(b), F. S., may be allowed "[u]p to $35 per diem" while traveling on official business. Section 112.061(6)(b), F. S., provides that the state officers therein designated "may receive $35 per diem while traveling on official business." No limitations or exceptions or requirements such as those set forth above are expressed or declared by the Legislature in regard to the specified rates of per diem.

I would also note that the official travel voucher form promulgated by the Department of Banking and Finance (published in Ch. 3-2, F.A.C.) for use by state travelers contemplates, by its terms, entitlement to and collection of per diem only on the basis of increments of travel time. This form is required by statute to be used by any *state* traveler, s. 112.061(11)(b), F. S., and the Department of Banking and Finance is required by statute, s. 112.061(9)(a), F. S., to prescribe the uniform state travel form and to promulgate rules and regulations under s. 112.061. The only provision of the official Department of Banking and Finance form contemplating reduction of claimed *per diem*, or taking meal or lodging expenses into consideration in regard to *per diem*, is in the affirmation or certification which must be signed by the traveler. The traveler must "certify or affirm," among other things, that "any meals or lodging included in a conference or convention registration fee have been deducted from this travel claim . . . ." This provision implements s. 112.061(8)(e) and (11)(b), above, requiring such reduction and affirmation.

In AGO 076-83, I concluded in part that a traveler falling under the straight per diem provided for in s. 112.061(6)(a)1. "is *not* required to reduce his request for the *statutory per diem*" (Emphasis supplied.) because of his having received a free meal. I further stated in AGO 076-83 that "[t]he per diem authorized by s. 112.061(6)(a)1. does not contemplate itemizing the amount that the traveler to a convention or conference [and the same would be true as to a traveler on official state business outside of Florida or a traveler falling under s. 112.061(6)(c)1., F. S.] spent on each meal or lodging."

Thus, a traveler to a conference or convention or a traveler conducting official state business outside of Florida claiming straight per diem under s. 112.061(6)(a)1., or a traveler claiming straight per diem under s. 112.061(6)(c)1., is simply entitled to the prescribed flat per diem rate (as determined by the agency head up to the maximum rate of $35, and pursuant to the calculation formula prescribed in s. 112.061(5), F. S.) regardless of his actual expenditures (or lack of expenditures) during the travel period for which the per diem is claimed. However, any such per diem allowances are subject to the prohibitions and requirements of s. 112.061(6)(c)2., (8)(e), and (11)(a) and (b), F. S., as described herein, wherever applicable and appropriate. *Cf.* s. 112.061(13), F. S., relating to travel on emergency notice and providing for direct payments to vendors for

lodging and meals up to the authorized per diem rate for employees during such emergency travel periods.

As I noted above, the Legislature has expressly provided certain qualifications on a traveler's entitlement to claim per diem under specified and limited circumstances. Section 112.061(6)(c)2., F. S., provides that "other travelers" may be reimbursed *only* for the actual expenses of lodging or meals, not to exceed the maximum rates therefor provided in subsection (6) when lodging or meals are provided at state institutions. [Subsection (6) of s. 112.061, of course, does not prescribe any maximum rates for lodging, although s. 112.061(6)(d), F. S., does establish maximum rates for meals.] The other statutory qualification on per diem, as set forth in s. 112.061(8)(e) and (11)(b), F. S., is that any meals or lodging included in a conference or convention registration fee claimed by the traveler must be deducted in accordance with the allowances provided in subsection (6) of s. 112.061, which would include the flat or straight rate of per diem provided in subsection (6). *See also* s. 112.061(11)(a), F. S. Thus, it may readily be seen that the Legislature has in several particular circumstances expressly provided limitations on and exceptions to the rates of per diem (and other rates such as subsistence and the mileage or transportation expenses in s. 112.061(7)(h), F. S.) provided for in s. 112.061. But, other than these specified provisions, no conditions or limitations on or exceptions to the *per diem* allowances established by s. 112.061(6)(a)1. and (c)1. have been made in the terms of the statute.

In the absence of any additional, expressly provided legislative limitations on entitlement to and calculation of per diem, I am of the opinion that no additional limitations may be read into s. 112.061(6)(a)1. or (c)1. It is a settled rule of construction that, where a statute expressly sets forth the things upon which it is to operate, or where the statute expressly provides certain exceptions to its operation, other such things or exceptions are not to be inferred. Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952); Williams v. American Surety Company of New York, 99 So.2d 877, 890 (Fla. 1958); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976). It is also settled that exceptions and provisos in a statute must be strictly construed, Farrey v. Bettendorf, 96 So.2d 889, 893 (Fla. 1957), Coe v. Broward County, 327 So.2d 69, 71 (4 D.C.A. Fla., 1976); and that statutes imposing penalties [s. 112.061(10), F. S., imposes both criminal and civil liability based on submission of false or fraudulent travel expense claims] are to be strictly construed in favor of the person against whom the penalty is sought to be imposed. Negron v. State, 306 So.2d 104, 109 (Fla. 1974); State v. Llopis, 257 So.2d 17, 18 (Fla. 1971); Allure Shoe Corp. v. Lymberis, 173 So.2d 702, 704 (Fla. 1965). Thus, it is to be presumed that, had it been the Legislature's intention to establish additional conditions on or exceptions to a traveler's entitlement to receive a straight per diem allowance, it would have done so—or will in the future—in a clear, express, and unequivocal manner.

Your question is, therefore, answered in the negative.

078-91—June 29, 1978

COUNTIES

BOARD OF COUNTY COMMISSIONERS NOT AUTHORIZED TO PROVIDE FREE OFFICE SPACE TO PRIVATE CREDIT UNION

To: Ronald E. Clark, Attorney for Board of County Commissioners, Putnam County, Palatka

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

May the board of county commissioners provide space and utilities without charge for a credit union which is not connected in any way with county employees?

SUMMARY:

A board of county commissioners may not provide free office space and utilities in a public building to a private credit union, the membership of which is not composed of employees of the county or their immediate families, and which is in no way connected with county employees.

Your question is answered in the negative.

Your request appears to have arisen because a representative of a credit union has proposed to the Putnam County Board of County Commissioners that the board provide the credit union with free space and utilities in a county building. You state that the credit union would be in no way connected with county employees, so it follows that the membership of the credit union is not composed or made up of the employees of the county or the immediate families of such employees.

It is a basic principle of law that public officials may exercise only those powers which are expressly granted by statute or which may be necessarily implied from powers so expressly granted. In order for a power to be implied from an express statutory grant of power, the power sought to be implied must be necessary, indispensable, or essential to carry out an expressly granted power or expressly imposed duty. *See, e.g.*, 20 C.J.S. *Counties* s. 49 at 802-804 and s. 82; Hopkins v. Special Road & Bridge Dist. No. 4, 74 So. 310 (Fla. 1917); Molwin v. Turner, 167 So. 33 (Fla. 1936); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); Crandon v. Hazlett, 26 So.2d 638 (Fla. 1946); AGO's 058-228 and 073-374; *cf.* AGO 078-77.

Section 125.01(1)(c) empowers a noncharter county to "[p]rovide and maintain county buildings." This provision clearly does not constitute express authorization for a county to provide free space and utilities in county buildings to a credit union, nor can such authority be implied from the powers granted under this section since provision of free space and utilities is not necessary or essential in order to provide and maintain county buildings. *Cf.* AGO's 073-374 and 078-67. Moreover, such county buildings may not be used for any purpose other than as provided by statute. *See* 20 C.J.S. *Counties* s. 169 at p. 1001; *cf.* AGO's 072-68 and 073-486. As a caveat, it should be noted that the State Constitution restricts the type and amount of services that may be provided to nongovernmental entities, such as a credit union. Any appropriation or disbursement of moneys to such private entities or lending to them the public credit or property may violate s. 10, Art. VII, State Const. *See, e.g.*, O'Neill v. Burns, 198 So.2d 1 (Fla. 1967); Bailey v. City of Tampa, 111 So.2d 119 (Fla. 1926); AGO 074-20.

Section 657.24, F. S., provides for certain circumstances in which space in public buildings may be rented or provided gratuitously to a credit union:

> Any credit union organized under state law, or any federal credit union organized under federal law, *the members of which are presently, or were, at the time of admission into the credit union, employees of the state or a political subdivision thereof, or members of the immediate families of such employees, residing in the same households* may apply for space in any building owned or leased by the state or respective political subdivision in the community or district in which the credit union does business. The application shall be addressed to the officer charged with the allotment of space in such building. If space is available, the officer may, in his own discretion, allot space to the credit union at a reasonable charge for rent or services. *If the public board having jurisdiction over the building determines by official action that the services rendered by the credit union to the employees of the board are equivalent to a reasonable charge for rent or services, available space may be allotted to the credit union without charge for rent or services.* The officer charged with the allotment of space in such building shall report annually any space allocated pursuant to this section and the charge made for rent or services to the auditor general on a form prescribed by the auditor general. (Emphasis supplied.)

It can be seen that the Legislature has specifically delineated which credit unions may utilitize government-owned office space and services. Only those credit unions, the members of which are presently, or who at the time of admission into the credit union were, county employees or their immediate families may rent or gratuitously receive, pursuant to the statute's provisions, office space or services in a county-owned building. In accordance with the rule of statutory construction "*exclusio unius est exclusio*

alterius," meaning that the inclusion in a statute of those things upon which it is to act excludes from its operation all other things, I conclude that the Legislature, by providing that space and services in public buildings may be provided only to certain specified credit unions, has impliedly prohibited the furnishing of such space and services to any other credit union. *See* Interlachen Estates Inc. v. Snyder, 304 So.2d 433 (Fla. 1974); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944). Hence, a county is impliedly prohibited from providing free space and utilities to private credit unions *not* composed of county employees, since s. 657.24 authorizes such provision *only* to credit unions composed of county employees. An implied prohibition against doing something is just as plainly and effectively a prohibition as an express prohibition. *See* 20 C.J.S. *Counties* s. 49, pp. 802-803; Martin County v. Hansen, 149 So. 616 (Fla. 1933); *cf.* AGO's 078-67 and 078-68.

I therefore conclude that the board of county commissioners is not authorized by law to provide office space and utilities in a public building to a private credit union, the membership of which is not composed of employees of the county or their immediate families, and which is in no way connected with county employees. Having reached this conclusion, there is no need for me to comment upon any potential violations of s. 10, Art. VII, State Const. (other than as set forth above by way of caveat), that might arise if there were statutory authorization for furnishing space and services to a private credit union of the type your letter contemplates. *See, e.g.,* AGO 074-20.

078-92—June 29, 1978

MUNICIPALITIES

MAY NOT CREATE A SPECIAL TAXING DISTRICT FOR LEVYING AD VALOREM TAXES WITHIN THE DISTRICT

To: Edward L. Gerson, City Attorney, Punta Gorda

Prepared by: Dennis J. Wall, Assistant Attorney General

QUESTION:

Does the City of Punta Gorda have the authority to create a special taxing district for canal and seawall maintenance under the provisions of s. 165.041(2)?

SUMMARY:

A municipality may not by ordinance create a special district pursuant to the provisions of s. 165.041(2), F. S., and confer upon such district the power to levy ad valorem taxes within the district.

You state that the City of Punta Gorda contemplates the creation of a special taxing district in those areas of the city in which canals are located, in order that "property owners whose lands adjoin the canals can be taxed for their maintenance." You question whether such a special *taxing* district may be created by municipal ordinance, or whether such a special *taxing* district must be created by act of the Legislature.

Your question relates to the Formation of Local Governments Act, Ch. 165, F. S. By the provisions of that act, the exclusive procedure under general law for forming or dissolving special districts in this state—except in certain charter counties—is established, and preexisting conflicting general or special laws are preempted or superseded. Section 165.022, F. S. Section 165.041(2), F. S., provides:

> A charter *for creation of a special district* shall be adopted only by special act of the legislature or *by ordinance of a* county or *municipal governing body* having jurisdiction over the area affected. (Emphasis supplied.)

A special district, however created, is not by that mere act or fact itself, or by the effect of that act or fact, a special *taxing* district. The levying of ad valorem taxes by a special

district and the millage rate of such taxes must be authorized by law. The millage authorized by law must be approved by vote of the electors of the district, pursuant to constitutional requirements. *Cf.* s. 125.01(5)(a) and (c), F. S., relating to the establishment of certain special districts by county ordinance and the levying of ad valorem taxes therein.

Section 1(a), Art. VII, State Const., provides in pertinent part: "No tax shall be levied *except in pursuance of law.*" (Emphasis supplied.) Section 9(a), Art. VII, State Const., provides as follows:

> Counties, school districts, and municipalities shall, and *special districts may, be authorized by law to levy ad valorem taxes* and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution. (Emphasis supplied.)

Section 9(b) Art. VII, State Const., provides, *inter alia*, that

> [a]d valorem taxes . . . shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: . . . for . . . special districts *a millage authorized by law approved by vote of the electors* . . . . (Emphasis supplied.)

Unless a special district has been authorized by general or special law to levy ad valorem taxes, it possesses no ad valorem taxing power. Any ad valorem tax millage authorized by law must be approved by vote of the electors of the district, in order to comport with the constitutional requirements set forth above. *Cf.* AGO 075-24, holding in material part that a special fire district funded by ad valorem taxes can be established by noncharter county ordinance subject to varying conditions imposed by certain governing statutes and constitutional provisions, and subject to referendum approval of the lawful rate of ad valorem taxes to be levied by such district; AGO 074-58, concluding that water management districts established under Ch. 72-299, Laws of Florida, as amended, were authorized by law to levy ad valorem taxes upon approval by vote of the affected electors of such districts.

Section 165.041(2), *supra*, does not by its terms confer any ad valorem taxing powers upon any special district which may be created by municipal ordinance under its provisions, and I am unaware of any general law authorizing such taxing power to be exercised by any such special district. While s. 166.211(1), F. S., authorizes municipalities to levy ad valorem taxes, it does not purport to empower any special district created by municipal ordinance pursuant to s. 165.041(2) to levy such taxes within the district so created. *Cf.* ss. 163.603(1), 163.611(4), and 163.623(3), F. S., relating to the creation of community districts pursuant to part V of Ch. 163, F. S., for the special purposes prescribed therein and the levying of ad valorem taxes by such districts, subject to referendum by the electors of such districts where required by the State Constitution. I am therefore of the opinion that, unless and until a special district created pursuant to the provisions of s. 165.041(2) is authorized by general or special law to levy ad valorem taxes, such a special district possesses no ad valorem taxing power.

Your question is answered in the negative; the City of Punta Gorda may not by ordinance create a special district under s. 165.041(2), F. S., and thereby confer upon it the power to levy ad valorem taxes within such district.

078-93—July 6, 1978

FACSIMILE SIGNATURES

DEPUTY SHERIFFS NOT AUTHORIZED OFFICERS FOR THE PURPOSE OF USING FACSIMILE SIGNATURES

To: Malcolm E. Beard, Hillsborough County Sheriff, Tampa

Prepared by: Dennis J. Wall, Assistant Attorney General

QUESTIONS:

1. Is a deputy sheriff an "authorized officer" for the purpose of using a facsimile signature within the purview of s. 116.34(2) and (3), F. S.?

2. If the answer to the first question is in the affirmative, is a juror's summons an "official order, proclamation or resolution" within the meaning of s. 116.34(3)(c), F. S., and may a deputy sheriff's facsimile signature be affixed on a juror's summons in conjunction with the printed name of the sheriff?

SUMMARY:

Deputy sheriffs are not "[a]uthorized officer[s]" for the purpose of using facsimile signatures within the purview of s. 116.34(2) and (3), F. S.

Your first question is answered in the negative; since your second question is conditioned on an affirmative answer to the first question, no response thereto is required.

Section 116.34(2)(d), F. S., defines an "[a]uthorized officer" to mean, *inter alia*, any official of the state's political subdivisions (which include counties, *see* s. 1.01(9), F. S.) "whose signature to a public security, instrument of conveyance or instrument of payment is required or permitted" by law. The several designated instruments are respectively defined in paragraphs (2)(a), (b), and (c) of s. 116.34.

I know of no general law requiring or permitting a deputy sheriff to issue or sign a public security, instrument of conveyance, or instrument of payment as those terms are defined in s. 116.34(2), F. S.

Under the authority of s. 116.34, F. S., only those officials designated in s. 116.34(2)(d) may execute or cause to be executed with a facsimile signature the several securities, instruments, official orders, proclamations, or resolutions enumerated in s. 116.34(3), F. S. Parenthetically, it may be noted that s. 116.34 is a uniform law, see s. 116.34(6), F. S., which has to date been adopted by Florida and twenty other jurisdictions. The National Conference of Commissioners on Uniform State Laws gave as its reasons for drafting the Uniform Facsimile Signatures of Public Officials Act, and expressed the general purpose of said act, as follows:

> The National Conference of Commissioners on Uniform State Laws was requested some years ago through the Council of State Governments to draft a uniform act permitting the use of facsimile signatures *by fiscal officers of the states* on particularly large bond issues. . . . When this act came into the Conference, it was determined, as a matter of policy, that the act should be broadened in its scope to include not only the issuance of securities, such as bonds, by the states, permitting the use of facsimile signatures, but should also be broadened to cover checks, drafts, and warrants *issued by the states as well as by all of the political subdivisions of the states, counties*, school districts, cities, etc.; hence the present draft of the act is all inclusive and, if adopted, would permit the use of facsimile signatures *by the various disbursing and fiscal officers of the governmental units and agencies involved.* [Commissioners' Prefatory Note, Uniform Facsimile Signatures of Public Officials Act, 13 Uniform Laws Annotated 259-60 (master ed. 1975); emphasis supplied.]

There being no statutory authority for a deputy sheriff to issue or sign the aforementioned documents and instruments, it necessarily follows that a deputy sheriff may not do so. *See, e.g.*, Lang v. Walker, 35 So. 78, 80 (Fla. 1903); AGO's 078-77, 078-46, 076-191, and 075-161. Therefore, deputy sheriffs are not "[a]uthorized officer[s]" for the purpose of using facsimile signatures within the purview of s. 116.34(2) and (3), F. S.

078-94—July 6, 1978

PROPERTY APPRAISERS

MAY NOT PROHIBIT HOMESTEAD RENEWAL APPLICATIONS FROM BEING FORWARDED

To: Sam J. Colding, Collier County Property Appraiser, Naples

Prepared by: William D. Townsend, Assistant Attorney General

QUESTIONS:

1. Does a property appraiser have the authority to print the words "DO NOT FORWARD" on the envelope in which a homestead renewal application is mailed?

2. Does a person who was away and did not receive his renewal application due to the fact that it was returned to the property appraiser's office upon the request of that office have any recourse?

SUMMARY:

The governing statutes and rules promulgated by the Department of Revenue do not expressly or by necessary implication authorize or require property appraisers to have printed the direction to the postal authorities "DO NOT FORWARD" on the envelopes in which homestead exemption notices and application forms prescribed by ss. 196.111, 196.121, and 196.131, F. S., are mailed to homestead exemption applicants or claimants.

The duties of the property appraiser in regard to homestead exemptions are set forth in Ch. 196, F. S. There is no section of that statute which deals with a "homestead renewal application" to which you refer in your inquiry. Section 196.011(1), F. S., provides that a property owner "that received an exemption in the prior year may reapply on a short form as provided by the Department of Revenue." This statute appears to contemplate the inclusion of homestead exemption reapplications also. *See* s. 196.011(3), F. S. However, there is no "short form" for homestead exemption renewal prescribed in Ch. 196, F. S.; the only forms and procedures being statutorily prescribed are those prescribed by ss. 196.111(1), 196.121, and 196.131, F. S. In view of this, it is presumed that you are referring to the application for homestead exemption and notice of failure to have filed for homestead exemption provided for in ss. 196.111 and 196.121, F. S. *See also* s. 196.131, F. S.

Section 193.052, F. S., requires that returns for tax purposes must be filed on all property in the state except real property ". . . the ownership of which is reflected in instruments recorded in the public records of the county in which the property is located . . . ." From these public records the property appraiser lists and values on the real property assessment roll all the real property within his county, pursuant to s. 193.085, F. S. The real property assessment roll is required to reflect the name of "[t]he owner . . . responsible for payment of taxes on the property, (and) his address. . . ." Section 193.114(2)(e), F. S.; Rule 12D-8.07(2)(a), F.A.C.

Section 196.131(1), F. S., requires each taxpayer who claims the homestead exemption to file one of the forms provided for in s. 196.121, F. S., properly executed, with the property appraiser on or before March 1 of each year, and failure to do so constitutes a waiver of the exemption for such year. The information contained in that form is required to be true and the person knowingly giving false information for the purpose of claiming homestead exemption is guilty of a second degree misdemeanor. Section 196.131(2), F. S.

Section 196.111, F. S., provides that the property appraiser shall mail the specified notice and homestead exemption application form, as soon as practicable after February 5 of the current year, to all persons granted a homestead exemption the year immediately preceding and whose application for exemption for the current year has not been filed as of February 1, thereof. The form for the application is provided to the

property appraisers by the Department of Revenue pursuant to the provisions of s. 196.121, F. S.

There is no provision in the statutes, nor is there a rule of the Department of Revenue, which provides any authority for giving directions to the postal service not to forward mailings of the above-mentioned notices and application forms but to return the same to the property appraiser or to print the words "DO NOT FORWARD" on envelopes in which the prescribed notice and application form are mailed. The duty of mailing such notice and application form is clearly set forth in s. 196.111, F. S. While there is no statute prohibiting the printing of such directions or words on the envelopes in which such notice and applications are mailed, the prevailing rule of law is that public officers have only such power and authority as are clearly conferred by statute or necessarily implied from statutorily granted powers. *See, e.g.,* 67 C.J.S. *Officers* s. 102; Lang v. Walker, 35 So. 78, 80 (Fla. 1903); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); AGO's 078-77, 076-191, 075-299, and 071-28; and where there is doubt as to the existence of authority, it should not be assumed. *See, e.g.,* White v. Crandon, 156 So. 303, 305 (Fla. 1934), Gessner v. Del-Air Corporation, *supra*; Edgerton v. International Company, 89 So.2d 488, 490 (Fla. 1956). Moreover, unlimited authority to perform official functions as may be desired by an officer or to incur expenses against the state or county cannot lawfully be conferred upon any officer. Coen v. Lee, 156 So. 747, 750 (Fla. 1933). An officer may not do everything not forbidden in advance by some legislative act. 67 C.J.S. *Officers* s. 102, at p. 366. As in the case of administrative bodies, property appraisers, whose offices are constitutionally created and whose powers and duties are statutory, have no common law powers ". . . and what [powers] they have are limited to the statutes. . . ." State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, at 638 (1 D.C.A. Fla., 1958); AGO 075-120.

It is also the rule that, where a statute authorizes a specific act, as in s. 196.111, F. S., the act includes the authority to do those things necessary to accomplish the result intended by that act, *see* 67 C.J.S. *Officers* s. 103, Peters v. Hanson, 157 So.2d 103 (2 D.C.A. Fla., 1963). However, as stated by the Florida Court:

> An express power duly conferred may include implied authority to use means necessary to make the express power effective, but such implied authority may not warrant the exercise of a substantive power not conferred. . . . [Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936); AGO 073-374.]

Any implied power must be necessarily implied from a duty which is specifically or expressly imposed by statute. Attorney General Opinion 075-161, Florida State University v. Jenkins, 323 So.2d 597 (1 D.C.A. Fla., 1975). Any power to be implied must also be *essential* in order to carry out the expressly granted power or duty imposed, *e.g.,* AGO 073-374 and 67 C.J.S. *Officers* s. 102.

In situations concerning the exercise of powers by officers, it is clear that where, as in your inquiry, " . . . there is reasonable doubt as to the lawful existence of a particular power which is being exercised, the further exercise of the power should be arrested." Hopkins v. Special Road and Bridge District No. 4, 74 So. 310 (Fla. 1917); Gessner v. Del-Air Corporation, *supra*, *see also* State *ex rel.* Greenberg v. Florida State Board of Dentistry, *supra*, at 636. *See also* Williams v. Florida Real Estate Commission, 232 So.2d 239 (4 D.C.A. Fla., 1970); City of Cape Coral v. G.A.C. Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973); AGO 076-191, which further states:

> As stated in AGO 071-28, to perform any function for the state (or county) or to spend any money belonging to the state (or county), the officer seeking to perform such function or to incur such obligation against public funds must find and point to a constitutional or statutory provision so authorizing him to do. (Emphasis supplied.)

Accord: Attorney General Opinion 075-299 (quoting in part from AGO 068-12).

There does not appear in the governing statutes or rules promulgated by the Department of Revenue any grant of authority, expressly or necessarily implied, to property appraisers to have printed the direction to the postal authorities "DO NOT FORWARD" on envelopes in which the notices and application forms prescribed by ss. 196.111 and 196.121, F. S., are mailed to homestead exemption applicants or claimants.

Moreover, this additional printing on the envelope would necessitate the expenditure of public funds. Section 196.111(2), F. S., provides that "[t]he expenditure of funds for

any of the *requirements of this section* is hereby declared to be for a county purpose . . ." which the county commission is authorized to provide. (Emphasis supplied.) The thrust of this subsection is to facilitate the mailings, and would not validate the expenditure of additional public funds for printing the aforementioned directions to the postal authorities when such printing and additional expenditure is not authorized or required by statute. Section 196.111(1), F. S., does not authorize or require the giving of such directions to the postal authorities to not forward, but return, such mailings, nor in any manner limit the homestead exemption applicants' or claimants' rights to have such mailings delivered to them or condition such right upon the claimant's physical occupation of and presence or residence on the property for which the exemption is to be claimed at the very time the prescribed notice and application form is placed in the mail by the property appraiser. As provided by Rule 12D-7.13(3), F.A.C., temporary absence from the homestead, regardless of the reason for such, will not deprive the property of its homestead character, providing an abiding intention to return is always present. *See also* s. 196.051, F. S., Rules 12D-7.07(4) and 12D-7.13(1) and (2), F.A.C., L'Engle v. Forbes, 81 So.2d 214 (Fla. 1955), Poppell v. Padrick, 117 So.2d 435 (2 D.C.A. Fla., 1959).

It is not essential for the property appraiser to have printed the directions "DO NOT FORWARD" on the envelopes or mailings in question in order for him to carry out his statutorily imposed duty and function to mail the prescribed notice and application form to those persons designated in s. 196.111, F. S. The assessment rolls maintained by the property appraisers are required to contain the name and address, including postal zip code, of the property owner responsible for payment of the taxes. Section 193.114(2)(e), F. S.; Rule 12D-8.07(2)(a), F.A.C. That person is entitled to have the notice and the application form mailed to that address, and if he is not physically present on or occupying the premises at the time of such mailing or is for any reason temporarily absent therefrom, he remains entitled to such notice and opportunity to claim the homestead exemption and to have the prescribed notice forwarded to him by the postal service, rather than returned to the property appraiser.

In order to claim the exemption, a taxpayer must file his application therefor under the provisions of s. 196.111 or s. 196.131, F. S. After the filing of the claim for exemption, it becomes the duty of the property appraiser to examine the same and allow the claim, if it is found to be in accordance with law, s. 196.141, F. S., and carefully consider all applications for tax exemptions filed in his office before March 1 of that year, s. 196.151, F. S., and upon such investigation determine whether the claim should be approved or disapproved in the manner and in accordance with the procedure provided for in s. 196.151, F. S. Each of the claims for exemption must be considered independently and on its own unique facts. This factual determination is required to be made in the first instance by the property appraiser based upon the circumstances attending each particular claim for the exemption. Moreover, it is not essential or indispensable to the approval or disapproval of particular claims for homestead exemption that the property appraiser have printed the directions "DO NOT FORWARD" on the envelopes or mailings in question.

Accordingly, absent legislative amendment of the statute, or a judicial determination to the contrary, your first question is answered in the negative.

Having concluded that the property appraiser is not authorized to direct the postal authorities not to forward mailings of the notices and application forms provided for in s. 196.111, F. S., but to return all such undelivered mailings to his office, your second question becomes moot.

078-95—July 7, 1978

COUNTIES

CIRCUIT COURT CLERK NOT AUTHORIZED TO CONTRACT FOR INSURANCE FOR COUNTY—COUNTY LIABILITY ON UNAUTHORIZED CONTRACT

To: Ronald E. Clark, Attorney, Board of County Commissioners, Putnam County, Palatka

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the Board of County Commissioners of Putnam County authorized to pay a negotiated bill presented to it for insurance premiums under a so-called retrospective premium plan, where the insurance contract was entered into by the clerk of the circuit court rather than the board of county commissioners?

SUMMARY:

The clerk of the circuit court of Putnam County possessed no statutory authority to enter into a binding contract to provide certain types of insurance coverage for Putnam County; hence, the resulting contract was invalid and unenforceable in an action on such contract as against the county. However, the county appears to have accepted and received the benefit of the insurance coverage as well as the administrative and claims management services furnished to the county by the insurance carrier over the full term of the insurance contract or policy. Therefore, since such an insurance contract is within the scope of authority of the board of county commissioners and is not prohibited by law, the county may be liable on a contract or promise implied by operation of law for the fair and reasonable value of the insurance and claims services and claims paid by the insurance carrier over the term of the insurance contract. In such circumstances, the board of county commissioners would be authorized to pay and satisfy a negotiated settlement of the claim for premiums for such insurance coverage and services.

Your letter advises that the Board of County Commissioners of Putnam County recently received a bill totaling $75,000 from an insurance carrier. After an investigation, the board determined that the bill represented payment due for insurance premiums computed under a so-called retrospective premium plan for an insurance policy issued to the county in 1973 for a 3-year term. Under a "retrospective premium plan" the insured pays fixed standard premiums during the term of the policy; however, at the end of the period, additional "retrospective" premium payments are required, the size of which are determined and controlled by the amount of losses for the period involved. *See generally*, Bituminous Casualty Corp. v. Lewis Crane Service, Inc., 173 So.2d 715 (3 D.C.A. Fla., 1965), and Adami v. Highlands Insurance Company, 512 S.W.2d 737, 739-740 (Tex. Ct. Civ. App. 1974), in which the characteristics of retrospective premium plans are set forth. Following negotiations, the board of county commissioners has agreed to pay approximately $50,000 of the $75,000 billed by the insurance carrier under the plan as a negotiated settlement of the claim, subject to the approval of its counsel. As the board's attorney, you request my opinion on this matter prior to advising the board.

Additional information supplied to this office revealed that the insurance policy in question constituted a "package" of workmen's compensation and automobile liability insurance for a 3-year period from 1973 to 1975, inclusive. You also stated that it had been a long-standing practice in Putnam County for the clerk of the circuit court to contract with insurance companies for the county's insurance needs. Thus, the insurance contract which is the subject of your letter was agreed upon and signed only by the clerk of the circuit court and a local authorized agent of the insurance company. However, the board of county commissioners maintains that it did not authorize the clerk to obtain the policy based on a *retrospective* premium plan; the commission apparently believed that the premiums would be constant and fixed over the term of the policy. Finally, it should be noted that the insurance company paid claims presented to it during the term of the policy, and that the county also paid the periodic "fixed standard" premiums during said period.

At the outset, it is necessary to determine whether or not the board of county commissioners was empowered to delegate to the clerk of the circuit court the authority to contract for insurance.

As a general rule, the governing body of a county may not delegate its powers involving the exercise of judgment and discretion. 20 C.J.S. *Counties* s. 89. Furthermore, the board of county commissioners must make its contracts by official action and as a board. 20 C.J.S. *Counties* s. 175; *see also*, Kirkland v. State, 97 So. 502, 508 (Fla. 1923), stating that the individual members of the county commission, when not in lawful

meeting, have no power as county commissioners. Thus, it is readily evident that no single officer has the power to bind the county by contract unless expressly authorized to do so by law; likewise a county officer has only such power to contract as has been conferred upon him by law. McQuillin *Municipal Corporations* s. 29.15. *See also* AGO 068-6 noting that

> [w]here the state authorizes a certain officer or legal body to contract for it in regard to certain purposes and subjects, no other officer or agency can exercise the authority to contract relating to those purposes and subjects, nor exercise authority to ratify or give effect to a contract not actually made by the authorized person or body. . . .

Also see AGO 068-44 in which this office stated that no board or officer of the state can contract for it without legislative authority and although the state may delegate the power to contract to its boards and officers, the duty of doing the essential things necessary to the creation of a contract and acts which involve discretion cannot be delegated by the authorized agency of the state to another.

Section 1(e), Art. VIII, State Const., states that, unless otherwise provided by county charter, the governing body of each county shall be a board of county commissioners. Section 125.01(1), F. S., provides, in pertinent part, that "[t]he legislative and governing body of a county shall have the power to carry on county government. . . ." Pursuant to s. 125.01(3)(a), F. S., the county commission is empowered to enter into contractual obligations to carry out any of its enumerated or implied powers. Finally, under s. 125.15, F. S., the county commissioners must sue and be sued in the name of the county of which they are commissioners. Thus, it is clear that, under state law, the board of county commissioners is the agency which is authorized to act for or on behalf of the county. *See* State v. Kirkland, *supra.*

With specific regard to the types of insurance coverage contemplated by your inquiry (workmen's compensation and automobile liability), the governing statutes involved clearly authorized the board of county commissioners as the governing body of the county to contract for such insurance. As to workmen's compensation insurance, s. 440.02, F. S., defines the term "employer" for purposes of the Workmen's Compensation Act to mean, *inter alia*, "the state and all political subdivisions thereof, all public and quasi-public corporations therein . . . ." *See* Parker v. Hill, 72 So.2d 820 (Fla. 1954), in which a county was held to be a "political subdivision" of the state for purposes of the Workmen's Compensation Act; and s. 1.01(9), F. S., defining the term "political subdivision" to include counties. Section 440.03, F. S., binds every employer and employee as defined in s. 440.02, F. S., to the provisions of the Workmen's Compensation Act. Accordingly, a county is required to secure coverage by workmen's compensation insurance or establish itself as a self-insurer. *See* s. 440.38, F. S. Thus, it is clear that a county is authorized rather than prohibited by law to contract for workmen's compensation insurance.

As to automobile liability insurance, s. 445.06(1), F. S., provides, in pertinent part, that the governing body of a county owning and operating motor vehicles upon the public highways or streets is authorized, in its discretion, to provide for the county and its agents and employees insurance covering liability for damages on account of personal injury or death or damage to the property of any person and to pay the premiums therefor from any general funds appropriated or made available for necessary and regular operating expenses of the county.

See also s. 768.28(1), F. S. (which, for counties, took effect on January 1, 1975), under which the state has waived sovereign immunity for tort liability for "itself and its agencies or subdivisions"; s. 768.28(2), F. S., defining for purposes of that act "state agencies or subdivisions" to include counties; and s. 768.28(13), F. S., authorizing the state and its agencies and subdivisions to be "self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose . . . ."

I find no provision in the above-cited statutes which authorizes any officer or agency other than the board of county commissioners to contract for the specified types of insurance coverage for the county. Specifically, I find no statute which confers such authority upon the clerk of the circuit court. *Cf.* s. 125.17, F. S., providing that the clerk shall be the clerk and accountant of the board of county commissioners, have custody of its seal, keep its minutes and accounts, and perform such other (similar) duties *as its clerk* as the board may direct. The powers and duties of the clerk and of the county

commissioners, as county officers, must be fixed by law. Section 5(c), Art. II, State Const. Such officers possess no inherent powers and can exercise such authority only as has been expressly or by necessary implication conferred upon them by law. Hopkins v. Special Road and Bridge Dist. 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, the authority of public officers to proceed in a particular way or only upon specified 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); *see also* Alsop v. Pierce, 19 So.2d 799, 805-806 (Fla. 1944). With respect to the clerk of the circuit court, in order for his official actions to be binding, they must be in conformity with the governing statutes. Security Finance v. Gentry, 109 So. 220, 222 (Fla. 1926); *cf.* AGO 077-76 concluding that, in the absence of statutory direction, the clerk of the circuit court was 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. Thus, in the absence of any authorizing statute, it is clear that the clerk of the circuit court was not authorized to enter into the insurance contract under discussion.

The remaining consideration, therefore, is whether or not, under the circumstances outlined above, the contract is binding upon the county.

Under the general rule, a contract which is beyond the scope of authority vested by law in the board of county commissioners or which is in violation of law is invalid and unenforceable. 20 C.J.S. *Counties* s. 193; Jones v. Pinellas County, 88 So. 389, 390 (Fla. 1921); National Bank v. Duval County, 34 So. 894, 895 (Fla. 1903); *accord*: Robert G. Lassiter & Co. v. Taylor, 128 So. 14 (Fla. 1930) (applying rule with respect to contracts made by municipal corporations). Similarly, since county *officers* can exercise only such powers as are conferred on them expressly or impliedly by constitutional or statutory provision, contracts made in a county's behalf by officers or agents without lawful authority to do so are likewise invalid. 20 C.J.S. *Counties* s. 193; Ramsey v. City of Kissimmee, 149 So. 553, 554 (Fla. 1933) (in the absence of ratification by the city council, a contract will not be enforced where the mayor rather than the city council signed the contract, and where the city charter did not authorize the mayor to contract on behalf of the city); Fruchtl v. Foley, 84 So.2d 906, 908 (Fla. 1956) (where charter required the city attorney to perform such duties "as may be required of him by ordinance or resolution of the City Board of Managers" the city attorney who received only oral instructions to represent city in land transaction did not have the power to bind the city to the resulting conveyances; hence such conveyances were void). School Board of Leon County v. Goodson, 335 So.2d 308, 310 (1 D.C.A. Fla., 1976) (school board has exclusive authority to form contracts with instructional personnel of school system; hence agreement between principal and teacher in regard to teacher's employment was not binding on county school board, absent any indication board approved agreement). Accordingly, persons dealing with an officer or agent of a governmental body are bound to ascertain the authority of such an officer in all cases where the authority is derived from law. 26 Fla. Jur. *Public Works and Contracts* s. 8; Madison v. Newsome, 22 So. 270 (Fla. 1897); *see also* Bishopric v. City of Jackson, 16 So.2d 776, 778 (Miss. 1944) (all persons dealing with a municipality or its officers are charged with knowledge of the laws governing it and limiting the powers of its officers).

Application of the foregoing principles to your inquiry leads me to conclude that since the clerk of Putnam County was not authorized *by law* to enter into a contract to provide the insurance coverage in question for the county, the contract which is the subject of your inquiry is invalid and unenforceable. The fact that the board of county commissioners may have verbally directed the clerk to negotiate and enter into an insurance contract is irrelevant; the clerk possesses only such authority as had been delegated to him by law or the constitution. Furthermore, the long-standing custom or practice of the clerk to enter into such contracts for the county, does not serve to enlarge the powers and authority of the clerk. *See generally*, 67 C.J.S. *Officers* s. 102, p. 366, n. 67; 25 C.J.S. *Customs and Usages* s. 10.

However, in your letter you suggest that the board may be estopped to deny the validity of the insurance contract. You indicate that the contract has been fully executed by the insurance company, *i.e.*, the insurance protection has been furnished the county for the full term of the contract and the company has paid the insurance claims presented to it under the terms of the contract. It follows that the county has accepted and availed itself of the beneficial services and protection furnished by the insurance carrier. Thus,

it seems evident that the insurance company has fully performed its obligations under the contract while the county has received benefits therefrom. Moreover, pursuant to s. 455.06, F. S., the *county* was authorized by law to contract for automobile liability insurance, and by s. 440.38, F. S., to obtain workmen's compensation insurance. Therefore, the contract under discussion is not beyond the scope of authority of the *county* or expressly prohibited by law. This distinction is relevant for purposes of equitable remedies such as estoppel, ratification, or implied contract or promise (quantum meruit or money had and received, unjust enrichment, or restitution). *Compare* Jones v. Pinellas County, 88 So. 388, 390 (Fla. 1921), in which the court (although recognizing "the propriety of the common counts in an action against the county," *id.*, at p. 390) stated that a county was not liable under a theory of implied contract or liability where the contract represented "a direct evasion of an express mandatory provision" of law, with Knappen v. City of Hialeah, 45 So.2d 179 (Fla. 1950), in which the court recognized the rule set forth in previous cases to be as follows:

> . . . [m]unicipal corporations are liable to an action of implied assumpsit with respect to money or property received by them *and applied beneficially to their authorized objects* through contracts which are simply unauthorized . . . as distinguished from those which were prohibited by their charters or some other law bearing upon them, or were malum in se, or were violative of public policy. (Emphasis supplied by the court.)

Cf. Okeechobee County, Fla. v. Nuveen, 145 F.2d 684 (5th Cir. 1944), *cert. denied*, 324 U.S. 881; St. Johns Electric Co. v. City of St. Augustine, 88 So. 387 (Fla. 1921); Johnson v. Town of Anthony, 156 So. 732 (Fla. 1934); Board of Public Instruction v. Billings, 15 Fla. 684, 686 (1876); Board of Public Instruction v. Connor, 4 So.2d 382, 386 (Fla. 1941); and AGO 058-282, relative to the implied liability of counties, municipalities, and other governmental agencies. *See also* 20 C.J.S. *Counties* s. 194, stating that contracts within the county's power, but irregularly made, may be validated by such county through the agents who would have been authorized in the first place to make the contract; Ramsey v. City of Kissimmee, *supra*, in which the court held that a contract which was within the scope of authority of a municipality but was defective in that it was entered into by the mayor rather than the council, could be later ratified by the city council.

In Pinellas County v. Guarantee Abstract and Title Co., 184 So.2d 670 (2 D.C.A. Fla., 1966), the court was faced with a fact situation analogous to that presented by your inquiry. The case involved an action against a county to recover on quantum meruit for the value of a title search prepared by the plaintiff title company. The title search had been prepared pursuant to an oral order by the county engineer in accordance with a procedure which had been used in the county for several years. However, shortly after the plaintiff delivered the title information, the county engineer discovered that an order for the same title information had previously been placed with another title company, which company had already been paid for the work. Following his discovery of the duplication, the county engineer presented plaintiff's bill to the board of county commissioners, who refused to pay the bill except upon court order. The trial court ruled that the county was liable on quantum meruit for the value of the title search.

On appeal, the judgment of the lower court was affirmed. The appellate court noted that the *county commission* possessed ample statutory authority to secure and contract for title information, even if the county engineer was not so authorized. In addition, the court observed that the county engineer had followed a procedure which had been in existence for many years. Moreover, the title information which was furnished was available for use in the acquisition of rights of way and for the benefit of the county. The court further explained its decision as follows:

> Florida has, for many years, recognized the liability of a County on quantum meruit for the value of work done and materials furnished to a County which receives benefit therefrom: Harwell v. Hillsborough County, 111 Fla. 361, 149 So. 547; Moore v. Spanish River Land Co., 118 Fla. 549, 159 So. 673 and Webb v. Hillsborough County, 128 Fla. 471, 175 So. 874 and other cases therein cited.

The similarity between the Pinellas County decision and the instant case is easily apparent. Although this office is not a fact-finding agency and is without authority to determine whether or not the $50,000 negotiated settlement represents the fair and reasonable value of the insurance coverage, administrative and claims management

services furnished to and claims paid for and accepted by Putnam County in connection with the insurance provided thereto, it would appear that the county commission would be authorized to make such a determination and pay the claim. *See* s. 125.01(1)(b), F. S., providing that the board of county commissioners is empowered to "[p]rovide for the prosecution and defense of legal causes in behalf of the county . . . "; White v. Crandon, 156 So. 303, 305 (Fla. 1934), in which the Supreme Court held that a bona fide dispute between the county commissioners and another county officer regarding the disbursement of county revenues pursuant to acts of the county officer, whose authority to act for and bind the county as purchasing agent is reasonably questionable by the county commissioners, constituted a "legal cause" which the county commissioners were entitled to prosecute or defend under statutory authority conferred upon them to represent the county in the prosecution and defense of "all legal causes"; and AGO 060-90, in which this office concluded that "[a]s the financial agent of the county having general control over its property and the management of its business, the board of county commissioners has the power to compromise and settle claims in favor of the county and claims against the county." *Cf.* s. 17.041, F. S.

078-96—July 18, 1978

DEPARTMENT OF OFFENDER REHABILITATION

NEW GAIN-TIME FORMULA APPLICABLE TO ALL INMATES INCARCERATED ON JULY 1, 1978

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

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. Does s. 944.275, F. S. (1978 Supp.), affect all inmates incarcerated by the Department of Offender Rehabilitation on July 1, 1978?

2. If the answer to question 1 above is no, does s. 944.275, F. S. (1978 Supp.), apply to all persons *sentenced* after July 1, 1978, or only to persons sentenced for crimes *committed* after July 1, 1978?

SUMMARY:

House Bill 811 [s. 944.275, F. S. (1978 Supp.)], which revises the method of granting gain-time, applies to all inmates incarcerated by the Department of Offender Rehabilitation on July 1, 1978, the effective date of the bill.

House Bill 811 [now codified as s. 944.275, F. S. (1978 Supp.)], the effective date of which is July 1, 1978, revised the formula by which gain-time may be granted to prisoners by the Department of Offender Rehabilitation. Sections 944.27, 944.271, and 944.29, F. S., were repealed and a new s. 944.275, F. S. (1978 Supp.), was created to replace the repealed sections. I have found nothing in the new s. 944.275, or in any section of H.B. 811, or in the title to the bill, indicating that the new gain-time provisions were not intended to apply to all prisoners incarcerated by the Department of Offender Rehabilitation on July 1, 1978. There is no language in the bill limiting or delaying application to those prisoners sentenced after July 1, 1978, nor is there any language limiting application to those prisoners incarcerated for crimes committed after July 1, 1978. In addition, I know of no constitutional prohibition or rule of construction which would be invoked or violated by the application of the new formula to all inmates incarcerated by the department as of the effective date of the act (July 1, 1978). I find nothing to indicate that the statute will not operate prospectively only. Also, nothing in H.B. 811 imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate of any vested, enforceable right.

Although the courts have imposed certain procedural requirements as being necessary to guarantee due process when previously granted gain-time is to be forfeited by action of an administrative agency, such as the Department of Offender Rehabilitation, *e.g.*, Rankin v. Wainwright, 351 F. Supp. 1306 (M.D. Fla. 1972), it seems clear that the *Legislature's* allowance of gain-time and its modification, restriction, or even abolition of gain-time is subject to the broad discretion of the Legislature. The courts have repeatedly emphasized that the allowing of gain-time is an act of grace, and that a prisoner has no right to receive gain-time absent the Legislature's exercise of its grace or discretion. Similarly, the courts have emphasized the Legislature's power to make whatever changes it deems prudent in the gain-time procedure. In Dear v. Mayo, 14 So.2d 267 (Fla. 1943), the court stated: "Parole and gained time is granted by the sovereign as a matter of *grace rather than of right*," and that "[t]he state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose." (Emphasis supplied.) In Mayo v. Lukers, 53 So.2d 916, 917 (Fla. 1951), it was stated that "[t]he cases generally hold that the granting of the gain-time allowance is an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." And, in Kimmons v. Wainwright, 338 So.2d 239 (1 D.C.A. Fla., 1976), the court stated that "[g]ain-time is given to prisoners through the beneficence of the Legislature, and the Legislature has full authority to establish the terms and conditions thereof."

Thus, your first question is answered in the affirmative, and, accordingly, your second question need not be addressed.

078-97—July 18, 1978

COUNTY OFFICERS

EXPENDITURE OF PUBLIC FUNDS TO DEFRAY EXPENSE OF SELF DEFENSE

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTIONS:

1. When a complaint is filed with the Florida Commission on Ethics against a county officer, is said officer entitled ipso facto or in certain circumstances to expend the funds of his office toward the cost of the legal services incurred by him in responding to the complaint?

2. If there are certain circumstances only in which public money may be expended for payment of attorney's fees, what documentation must be provided in the public records of the officer for auditing purposes so that an adequate determination may be made as to whether the proper circumstances are present in a specific case?

3. If there is authority for payment of such fees, does such include authority to pay for costs incurred in collateral actions taken before the commission or the courts regarding the complaint?

SUMMARY:

When a complaint is filed with the Ethics Commission against a county officer, such officer is not authorized or entitled ipso facto to expend the funds or income of his office to defray the cost of the legal services incurred by him in defending against or responding to said complaint or in collateral actions taken before the commission or the courts regarding such complaints and, absent statutory authority, express or necessarily implied, there exist *no* circumstances authorizing or entitling him to do so. While the statutes do not and the Attorney General may not prescribe any particular form or manner of documentation for such expenditures by county officers, they are required by law to enter into their public

records information fully sufficient to demonstrate to the postauditor and the public the legality of any such expenditures, and with such explicitness as to permit the postauditor to determine whether any such expenditures are authorized by law and otherwise to perform a proper audit.

Your questions appear to be based on the following factual situation. A certain county officer (a fee officer) has utilized the public funds of his office to pay for legal services relative to a complaint filed against him with the Florida Commission on Ethics by a private citizen. Specifically, he filed a petition for a writ of prohibition which questioned the jurisdiction of the Ethics Commission to hear the complaint. The writ was granted and the officer then proceeded, pursuant to s. 112.317(8), F. S., to file a legal action before the commission against the private citizen who filed the original complaint charging that the complaint was filed maliciously and seeking recovery of all costs and attorney's fees incurred by him. The commission denied recovery.

The officer utilized public funds of his office to pay the attorney's fees connected with his seeking the Writ of Prohibition and with his suit to recover costs and attorney's fees from the citizen who filed the original complaint against him. However, in the public records of the officer, there is nothing specifying in what way the expenditure for attorney's fees and costs serves the public purpose of his office. Your problem arises because of the insufficiency of any evidence in the public records of the office showing such public purpose, rendering impossible the proper audit. Hence, you have sought an opinion of this office as to the circumstances under which payment of attorney's fees and legal costs for county officers out of public funds is permissible and as to what information is required to be furnished the Auditor General in order for him to perform a complete and proper audit (*see* s. 11.47(1), F. S.).

AS TO QUESTION 1:

It is a basic and fundamental principle that public funds may be spent only for a public purpose or a function which the public body or officer is expressly authorized by law 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; 20 C.J.S. *Counties* ss. 129 and 207; Davis v. Keen, 192 So. 200 (Fla. 1939); State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); 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); AGO's 071-28 and 068-12. *See also* State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, 636 (1 D.C.A. Fla., 1974); Hopkins v. Special Road and Bridge Dist. No. 4, 74 So. 310 (Fla. 1917); *cf.* AGO 075-120. Hence, the authority to pay attorney's fees from public funds must be derived from a statute. As I have stated previously, "[a]s a general rule, the power to employ counsel does not exist unless such power is expressly conferred or results by necessary implication from the powers granted." Attorney General Opinion 076-173; *see* White v. Crandon, 156 So. 303 (Fla. 1934); Watson v. Caldwell, 27 So.2d 524 (Fla. 1946), cited in 67 C.J.S. *Officers* s. 107, to the effect that the power to employ counsel "is not deemed incident to the mere existence of a board or commission, and does not exist unless it is expressly conferred or results by necessary implication from the powers granted." It is thus only when there is imposed some statutory duty upon the county officer, and it becomes *necessary*, in order to carry out such statutory duty or function, for him to engage an attorney to bring or defend an administrative or judicial action or proceeding, that such officer has the implied authority to employ and pay an attorney *as a necessary operating expense* of conducting and operating his office and performing his statutory duties. *See* AGO 076-173, *supra. See also* 67 C.J.S. *Officers* s. 91, stating:

> The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication. . . . Where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done. However, in order to justify indemnification of a public officer for an expense incurred in the discharge of his official duties, the officer must have acted in good faith, in the discharge of a duty imposed or authorized by law, and in a matter in which the government has an interest.

Cf. AGO 068-70, holding that a

> board of county commissioners is (statutorily) vested with the power to reimburse counsel for defending county officials *acting within the scope of their duties and responsibilities where in the discretion* of the commission it is reasonable and *necessary to do so in order to adequately represent the interest of the county.* (Emphasis supplied.)

See also Coen v. Lee, 156 So. 747, 750-751 (Fla. 1934), stating that "unlimited authority to perform official functions as may be desired by the officer or to incur expenses against the state or municipality cannot lawfully be conferred upon any officer." Accordingly, it has been held:

> It is a fundamental concept of the law in Florida and elsewhere that public funds *may not be expended for other than public purposes.* (Emphasis supplied.) Public officers are, of course, entitled to a defense at the expense of the public in a law suit arising from the performance of the officer's *official duties* (emphasis the court's) *and while serving a public purpose.* (Emphasis supplied.) [Markham v. State, 298 So.2d 210, 211 (1 D.C.A. Fla., 1974), citing Duplig v. City of South Daytona, 195 So.2d 581 (1 D.C.A. Fla., 1967).]

See also 20 C.J.S. *Counties* s. 129 which states that

> [w]here expenses are allowable, they must be necessary and reasonable in cost, and they may be paid only in accordance with the terms of the statute authorizing them. Thus, such expenses must be incurred by an official entitled to reimbursement within the meaning of the statute, [and] must be official, rather than personal to the officer . . . .

Accordingly, based upon the above-cited cases, textual authorities, and opinions of this office, I find that a public officer may expend the funds of his office for payment of legal costs and fees only when he is carrying out a statutorily prescribed county purpose or duty and in so doing it is *necessary, in order to do what the statute requires,* for him to bring or defend an administrative or judicial action. In short, whether or not the funds may be used for such purposes is not within the officer's discretion. In order for such expenditure to be valid, the officer *must* be acting to pursue a *legislatively* determined county purpose or statutorily imposed duty for which the incurring of legal fees and costs has been expressly or impliedly authorized or determined to be a necessary expense in carrying out that duty or effecting that purpose. Moreover, funds for such purposes must be properly budgeted. As noted in AGO 075-299, *e.g.,* a county fee officer is required to prepare an annual budget and file it with the clerk of the county governing authority by September 1 preceding the budgetary fiscal year, s. 218.35, F. S., and must file a sworn statement showing the receipts and disbursements of the officer during the preceding year, specifying in detail "the purposes, character, and amount of all official expenses and the amount of net income or unexpended budget balance as of the close of the fiscal year." Section 218.36(1), F. S. *See also* s. 116.03, F. S. All officers whose offices the Auditor General has authority to audit must keep in their public records sufficient information for his proper audit, which information must be made available to him. Section 11.47(1), F. S.

It is next necessary to apply the above principles of law to the instant situation. I assume, in determining whether the expenditure of the public funds in question was authorized by law, that there is no special or local law or general law of local application governing the question, since none has been brought to my attention. I find in the general laws no express authority for such expenditure.

Chapter 112, part III, F. S., sets forth the standards of conduct expected from the public officials of this state and prohibits violation of these standards. Section 112.322 empowers the Ethics Commission to investigate sworn complaints of violations of the Ethics Code by such officials, and to recommend an appropriate penalty (as provided in s. 112.317) if a violation is found. Your first question concerns whether a county fee officer, who incurs attorney's fees and costs in defending himself against a complaint filed against him with the commission, may ipso facto pay such fees and costs out of the public funds of his office.

In AGO 069-40, my predecessor in office concluded that county funds could not be used to pay expenses, costs, and attorney's fees incurred in the defense of a county commissioner against criminal charges in connection with the operation of his office and charges made against him by the Governor in his order suspending the said commissioner from office. It is there stated:

> The charges of malfeasance, misfeasance, neglect of duty, commission of a felony, drunkenness, and incompetency are charges against the personal action, or nonaction, of the officer, either by himself or through an agent of such officer for which he is responsible.

As was there noted, an official's defense of criminal charges against him benefits no one but himself. It confers no benefit upon the state or county, nor is the expenditure of public funds in connection therewith a public purpose or for the welfare and benefit of the public, and, hence, it was held that absent a statute providing for payment of attorney's fees and legal costs in the event of exoneration, none could be paid. That opinion was rendered prior to the enactment of s. 112.44, F. S., which confers upon the Senate the *discretionary* authority to provide that the county pay the reasonably incurred attorney's fees and costs of a reinstated county officer who was suspended by the Governor but exonerated by the Senate. *See* AGO 072-86, wherein it was determined that, in such a case, attorney's fees and costs may be paid *only* in those instances in which the Senate provides therefor. *See also* AGO 071-253, concluding that, in the absence of statutory authority, public funds may not be used to reimburse a public official for the expense of defending a criminal charge arising out of his official action, even though he may be found not guilty of the charge. *See also* State Dept. of Citrus v. Huff, 290 So.2d 130 (2 D.C.A. Fla., 1974), *cert. denied*, 295 So.2d 632 (Fla. 1974); and *cf.* AGO 074-124, referring to the position of this office that under the general rule followed in AGO's 069-40 and 071-253, *supra*, the chairman of the Florida Citrus Commission (now Department of Citrus) was not entitled to reimbursement from commission funds for the attorney's fees and costs incurred by his successful defense of criminal charges against him. This position prevailed in Huff, *supra*.

It would seem that the same consideration involved in and the rationale of AGO 069-40 compel a like conclusion in the instant case. The Code of Ethics and the standards of conduct provided for in part III of Ch. 112, F. S., essentially seek to prohibit conduct which could be characterized as abuse of public office for private gain or to require disclosure of certain information in order that the public may know whether their public officials are subject to any interests that may conflict with or compromise their ability to fully and faithfully execute their public duties. The breach of these ethical standards is in my opinion as much an injury to the government and the public and the integrity of the governmental process as the conduct at issue in AGO 069-40. It is the official himself, not the public, who benefits by his conducting a defense against complaints filed against him. I can see no way to characterize the attorney's fees and costs incurred in such a defense as *necessary operating expenses* of the office necessarily incurred in carrying out the statutory duties and functions of his office, or as a matter in which the government has a lawful interest. *Cf.*, however, Askew v. Green *et al.*, 348 So.2d 1245 (1 D.C.A. Fla., 1977), *cert. pending*, wherein the District Court of Appeal held valid, as being addressed to a declared public purpose, a county ordinance authorizing payment or use of county funds to defray the costs of defending several county commissioners against unjustified criminal prosecutions arising under s. 286.011, F. S., the Sunshine Law. This case is distinguishable from both Huff, *supra*, and the Attorney General Opinions referred to above because it involved (local) enabling legislation enacted in response to a county finding that a public purpose would be served in defending against unjustified criminal prosecutions for violating the Sunshine Law (s. 286.011, F. S.). *Huff* involved no enabling legislation. The court also indicated that its result would be *contra* if the ordinance sought to reimburse for expenses involved in defending against charges of bribery or other general criminal statutes. Moreover, the court noted that the charge made against the commissioners in that case, knowingly and unlawfully attending a closed county commission meeting to take official action in locating and establishing a public road, had been abandoned at the trial.

I am aware that there are possible situations in which a public official in carrying out his required duties may be subjected to calculated attempts, by a disgruntled citizen for instance, to cause him injury by the filing of unsubstantiated and unwarranted complaints with the commission or in a court of law. However, this same danger is

present in the event of suspension from office based on criminal charges brought against the official since, if the charges prove groundless and the official is reinstated, he has still had to incur the expense of defending himself against them. Hence, the Legislature has provided a hedge against such unfairness by granting the Senate the power to provide in its discretion for payment of attorney's fees and costs out of public funds if the official is exonerated. Section 112.44, F. S., *supra.* In contrast, there is no legislation comparable to s. 112.44 applicable to the instant situation. Moreover, as noted, my conclusion as to attorney's fees and costs incurred in defense of criminal charges (that they could not be paid from public funds) remained the same, even after enactment of s. 112.44, in those situations wherein the Senate does not provide for payment. Attorney General Opinion 072-86. Regarding a complaint filed with the Ethics Commission, an official who has a complaint filed against him may, under s. 112.317(8), F. S., recover his costs and attorney's fees *from the complainant* if the *commission determines* that the complaint was filed with malicious intent to injure the reputation of such officer and without basis in fact or law. If the complainant fails to pay such costs as determined by the commission within the prescribed period of time, the statute requires this department to bring a civil action to recover such costs for the injured officer. Hence, the official is protected from the expense of defending against a frivolous or groundless complaint brought by someone bent on injuring him, and, absent express or implied statutory authority for payment of such costs and fees from the funds or income of his office, I adhere to my conclusion that public funds may not be expended for such purpose.

Had the Legislature intended to authorize such reimbursement or payment from county or public funds or from the income of the office of the affected county officer, it would have done so (or it would have been a very simple matter for it to have done so); by providing for the recovery of such fees and costs from the complainant in the specified circumstances, and in no other cases, the Legislature has impliedly prohibited such payment in other circumstances and has also impliedly prohibited any payments or reimbursements therefor from county funds or income of the office. *See, e.g.,* Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944); Alsop v. Pierce, 19 So.2d 799 (Fla. 1944); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Interlachen Lakes Estates v. Snyder, 304 So.2d 433 (Fla. 1974); *In re* Advisory Opinion of the Governor, 306 So.2d 520, 523 (Fla. 1975).

In sum, I am of the opinion that when a complaint is filed with the Ethics Commission against a county officer, such officer is not entitled ipso facto to expend the funds or income of his office to defray the cost of the legal services incurred by him in defending against or responding to said complaint. The above discussion should also answer your questions as to whether there are "certain circumstances" in which such expenditures or payments would be authorized and, if so, what those circumstances are. Only where the requisite statutory authority, express or implied, exists, would county officers (fee and budget) be entitled to reimbursement from public funds for legal fees and costs incurred in defending against an ethics complaint. In the absence of such statutory authority, duty, or function (as hereinabove explicated) and the necessity to engage in such defense in order to carry out such duties or functions, *no* circumstances exist warranting such expenditures or reimbursements.

AS TO QUESTION 2:

You next inquire as to what documentation must be provided or information be entered into the public records of the office of the affected officer and made available to you in order for you to conduct a proper audit, assuming that any circumstances exist in which attorney's fees and costs incurred in defending against a complaint filed with the Ethics Commission may be paid for out of public funds or income of the office.

Section 11.47(1), F. S., requires:

> All officers whose respective offices the Auditor General is authorized to audit shall enter int their public records sufficient information for his proper audit, and shall make the same available to him on demand.

This section, while requiring that "sufficient information" be entered in the public records for a proper audit, does not prescribe any particular form or manner of documentation to meet the statutory requirements and this office lacks the authority to specify what the requisite documentation or form thereof should be. However, because the information must be "sufficient" for your audit, and in view of the purposes of a

postaudit and the rules of law governing the expenditure of public funds discussed in the response to your first question, it is my opinion that the officer must document in and by such public records the express statutory authority for any such expenditure or, if authority must be necessarily implied, he must document in and by such records both a statutorily authorized or required duty or function and the reason performance thereof *necessarily* requires the expenditure in order to carry out the expressly imposed duty or authorized function. In sum, the language of any such documentation or public records must be fully sufficient to demonstrate to the postauditor and the public the legality of such expenditures. The information or documentation provided by an officer should be adequate and explicit to permit the preauditor, if any, and the postauditor to determine whether the payment or expenditure is authorized by law. *Cf.* AGO's 075-299, 071-28, and 068-12, the reasoning of which and the grounds on which the pertinent conclusions are drawn therein apply with equal force and effect to the instant question.

As previously noted, expenditures for the purposes in question must be duly budgeted for, and the applicable statute governing the making and filing of budgets by particular county officers and the fiscal laws and rules of law governing the management and expenditure of public moneys by such officers and accountings therefor must be adhered to. Generally, I call your attention to ss. 218.35(1) and 218.36(1), requiring county fee officers to establish annual budgets for their respective offices, which "clearly reflect the functions for which money is to be expended" (s. 218.35[1]) and "specify in detail the purpose, character and amount of all official expenses" (s. 218.36[1]). *See also* s. 116.03.

AS TO QUESTION 3:

You next ask, assuming there is authority for paying the attorney's fees and costs in question, whether such includes the authority to pay for costs incurred in collateral actions taken before the commission or the courts regarding the ethics complaint. My response to your first question adequately answers and applies equally to this question. As there summarized, only where the requisite statutory authority, express or necessarily implied, exists, would a county officer be entitled to reimbursement from public funds or income of the office for attorney's fees and costs incurred in collateral actions taken before the commission or the courts in connection with an ethics complaint. Furthermore, the Legislature has provided authorization for the Ethics Commission to determine and require the *complainant* to pay the attorney's fees and costs incurred by the officer complained against if it determines that a person has filed a complaint against an officer with a malicious intent to injure the reputation of the officer and finds such complaint to be frivolous and without basis in law or fact. No other provision for payment of or reimbursement for such fees and costs in any other case has been made by the statute. The Legislature chose not to authorize reimbursement for such fees and costs either from county funds or from the income of the office of the affected county officer though it could easily have done so; therefore, it impliedly prohibited any such expenditure or payment or reimbursement for such fees and costs incurred in collateral actions taken before the commission or the courts relative to such ethics complaints.

078-98—July 24, 1978

MEDICAL PRACTICE ACT

NURSES SERVING AS PHYSICIANS' TRAINED ASSISTANTS NOT EXEMPTED BY ACT FROM NURSING LAW REGULATIONS

To: George S. Palmer, M.D., Executive Director, Board of Medical Examiners, Tallahassee

Prepared by: Walter Kelly, Assistant Attorney General

QUESTION:

Are formerly licensed nurses now operating as physicians' trained assistants and who are not presently licensed under Ch. 464, F. S., as professional or practical nurses but are operating under s. 458.13(4), F. S., as physicians' trained assistants in violation of the Nurses Practice Act

(Ch. 464, F. S.) when such individuals are rendering services under the responsible supervision and control of a duly licensed physician?

SUMMARY:

Section 458.13(4), F. S., does not operate to except formerly licensed nurses (but not presently licensed as nurses under Ch. 464, F. S.) rendering services as physicians' trained assistants under the responsible supervision and control of licensed physicians pursuant to s. 458.13(4), F. S., from the operative force or regulatory provisions of the state nursing law, Ch. 464, F. S. The determination of whether the specific services rendered by such physicians' trained assistants fall within the regulatory purview of the nursing law must be made by the State Board of Nursing within whose regulatory jurisdiction the practice of nursing lies. The affected persons may utilize the procedure for obtaining declaratory statements prescribed by s. 120.565, F. S., to secure a determination of the applicability of the provisions of the nursing law or any rule of the State Board of Nursing to such persons and the specific services being rendered by them to the licensed physician by whom they are employed.

The statutory history of the provisions of s. 458.13(4), F. S., may assist in analyzing its operative effect and meaning. In 1927 the Legislature enacted Ch. 12285, Laws of Florida, which, in defining the practice of medicine, made various exceptions from the act's operation:

> *This act* shall not be construed to affect . . . *any office assistant* of a legally licensed practitioner of medicine, rendering such assistance *as is usually rendered by a nurse, and who shall work only under the direct supervision and express orders of his or her employer, in his office, and not otherwise.* (Emphasis supplied.)

The Legislature in 1951 enacted Ch. 26551, Laws of Florida, which was an act amending s. 458.13, F. S.:

> **458.13, definition of practice of medicine; limitations, exceptions, etc.—**
>
> * * * * *
>
> (2) *This chapter* shall not be construed as applying to:
>
> * * * * *
>
> (j) Any office assistant to a legally licensed practitioner of medicine in this State *who renders only such assistance as usually rendered by nurses* and who shall work *under the direct supervision and express orders of his employer and in his employer's office and not otherwise.* (Emphasis supplied.)

Section 5 of Ch. 29867, 1955, Laws of Florida, in amending s. 458.13, F. S., repealed paragraph (j) of subsection (2) by omission. (*See* AGO 071-395 for the rule on repeals by omission.)

Section 3, Ch. 70-92, Laws of Florida, amended s. 458.13, F. S., by adding subsection (4) thereto "excepting from the definition of *practice of medicine* services rendered by personnel under the responsible supervision and control of a licensed physician" (Emphasis supplied.), *see* title of Ch. 70-92, which subsection now appears in Florida Statutes 1977 in substantially identical language. Section 458.13(4), F. S. provides:

> Nothing *in this section* shall be construed to prohibit service rendered by a *physician's trained assistant, a registered nurse midwife (nurse obstetric associate), or a licensed practical nurse,* if such service be rendered under the responsible supervision and control of a licensed physician. (Emphasis supplied.)

None of the statutes set forth above mention the statute regulating the practice of nursing and making it unlawful for any person to practice nursing unless such person has been duly licensed under the provisions thereof (Ch. 464, F. S.); nor did any of such statutes purport to make any exceptions or exemptions from the regulatory provision of Ch. 464, F. S. The expressed legislative intent and purpose in all of the aforecited statutes, for the purposes of this opinion, was to provide for exceptions or exemptions from the practice of medicine. It is a well-settled rule of statutory construction that where statutes enumerate or expressly mention the things on which they are to operate (here, the practice of medicine), all things not expressly mentioned therein (here, the practice of nursing) are excluded from their operation. Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944), Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952), Interlachen Lake Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973). I therefore must conclude that s. 458.13(4), F. S., does not operate to except or exempt formerly licensed nurses now operating under s. 458.13(4), F. S., as physicians' trained assistants (but who are not duly licensed under the provisions of Ch. 464, F. S.) from the operative force of the regulatory provisions of the nursing law, Ch. 464, F. S. Whether the services rendered by such trained assistants fall within the regulatory purview of Ch. 464, F. S., is a question which is committed to and within the jurisdiction of the State Board of Nursing. The affected physicians' trained assistants may, pursuant to the provision of s. 120.565, F. S., submit to the Board of Nursing a petition for declaratory statement as to the applicability of any provision of Ch. 464, F. S., or any rule of that agency to such trained assistants and the specific services being rendered by them under the responsible supervision and control of the licensed physician by whom they are employed. Parenthetically, it is clear that s. 464.22, F. S., does not in express terms except or exempt physicians' trained assistants from the operative force of Ch. 464, F. S., unless such persons should in certain circumstances come under the exception provided for by s. 464.22(2), F. S., when furnishing "[a]ssistance . . . in the case of an emergency." *Cf.* s. 458.13(2)(d), F. S., and Baxter v. State, 47 So.2d 764, 767 (Fla. 1950).

078-99—July 24, 1978

LICENSES AND LICENSE TAXES

MUNICIPALITY NOT AUTHORIZED TO GRANT TAX-EXEMPT OCCUPATIONAL LICENSE TO DISABLED VETERAN FOR OPERATION OF MORE THAN ONE TAXICAB

To: Johnie A. McLeod, City Attorney, Apopka

Prepared by: Joseph C. Mellichamp III, Assistant Attorney General

QUESTION:

Is a municipality authorized to grant a tax-exempt occupational license to a qualified disabled war veteran for the operation of more than one taxicab?

SUMMARY:

A municipality is not authorized to grant tax-exempt occupational license to qualified disabled war veteran for operation of more than one taxicab under Local Occupational License Tax Act under s. 205.171, F. S.

Section 205.171(1), F. S., grants an exemption not to exceed $50 from municipal occupational license taxes to permanent Florida resident electors who qualify as disabled war veterans under the terms and conditions prescribed by that section and who engage in any business or occupation in Florida which may be carried on mainly through the personal efforts of such licensee as a means of livelihood and otherwise meet the requirements of the statute.

Section 205.171(3), F. S., requires each municipality to issue to each person entitled thereto pursuant to s. 205.171 an occupational license subject to the prescribed conditions

and upon making proof that the applicant is entitled under the conditions of that law to receive the exemption therein provided for. Section 205.171(1), F. S., in pertinent part provides:

> . . . The exemption heretofore referred to shall extend to and include the right *of licensee to operate an* automobile-for-hire of *not exceeding five-passenger capacity, including the driver,* when it shall be made to appear that such automobile is bona fide *owned,* or contracted to be purchased *by the licensee* and *is being operated by him* as *a means of livelihood* and that the proper license tax for the operation of such motor vehicle *for private use* has been applied for and attached to said motor vehicle and the proper fees therefor paid by the licensee. (Emphasis supplied.)

When a statute purports to grant an exemption from taxation, the universal rule of construction is that the tax exemption provision is to be construed strictly against the one who asserts the claim of exemption. (51 Am. Jur. *Taxation* s. 524, Steuart v. State, 161 So. 378; Lummus v. Florida Adirondack School, 168 So. 232.)

In the above-quoted part of s. 205.171(1), F. S., reference is made to "*an* automobile-for-hire of *not exceeding five-passenger capacity, including the driver.*" Reference is also made to the automobile "*being operated by him*" ("him" being licensee). These references are in the singular and, as such, represent words of limitation. In the phrase "as *a* means of *livelihood,*" "a" is used as a singular adjective modifying "means." Throughout the statute "livelihood" is used synonymously with business or occupation.

Use of such phrases strongly evidences an intention by the Legislature that, for purposes of the local occupational license tax exemption for disabled veterans, the operation of *one* auto-for-hire be considered a "business or occupation." *Accord:* Attorney General Opinion 053-54, Biennial Report of the Attorney General, 1953-1954, p. 288, answering in the negative the question: May a County Tax Collector issue a tax-exempt occupational license under s. 206.16, F. S., to a qualified disabled war veteran for the operation of more than one automobile-for-hire.

In AGO 051-282, Biennial Report of the Attorney General, 1951-1952, p. 326, mention is made of this office's view that the Legislature intended to extend the exemption to *the business* of the disabled veteran and not to *single* occupational *licenses.* The reasoning behind this view is that, in many instances, the operation of a single business may require several types of occupational licenses. Where more than one license is required for the operation of a single business, a credit on the gross amount of the several licenses, up to an including $50, should be granted by the exemption. Therefore, where more than one license is required for the single business operated by the veteran, the exemption may be extended to such licenses so long as no more than one business is to be operated.

Several times this office has held that the exemption may not be applied to more than *one business* of the veteran (*see* 1929-1930 Biennial Report, p. 180; 1931-1932 Biennial Report, p. 772).

Attorney General Opinion 051-282 in pertinent part reads:

> . . . We doubt that the direction of a large business employing many persons who are depended upon to perform the services necessary would qualify the business for exemption from a license. The main operation of the business must be carried on through the personal efforts of the licensee; although employees may aid and assist in the operation of the said business. The operation of a single taxi cab by a veteran is clearly within the statute, but we doubt that the operation of a large fleet of taxi cabs would be. The business of the operation of the single taxi cab may be carried on through the personal efforts of the licensee, but were there a large fleet the main part of the business would of necessity be carried on by others.

One of the main requirements for the exemption is that the business or occupation engaged in must be one "which may be carried on mainly through the personal efforts of the licensee as a means of livelihood." This wording makes it apparent that the statute was designed to aid in the rehabilitation of disabled war veterans and to enable them to become self-supporting. The Legislature doubtless had in mind the small businesses that may be operated through the personal efforts of one person, a person unable to perform manual labor as the term is generally or usually understood.

To say that a municipality is authorized to grant a tax-exempt occupational license to a qualified disabled war veteran for the operation of more than one taxicab is to go beyond the wording of s. 205.171, F. S. To go beyond the wording of the statute is to go beyond the intention of the legislators.

Accordingly, your question is answered in the negative.

078-100—July 24, 1978

STATE ATTORNEYS

TRANSPORTATION SERVICES FURNISHED BY COUNTIES

To: Quillian S. Yancey, State Attorney, Bartow

Prepared by: Sharyn L. Smith and Frank A. Vickory, Assistant Attorneys General

QUESTION:

When, prior to adoption of the present Art. V of the State Constitution, a county had furnished vehicles and gasoline to the prosecuting officer of a criminal court of record, and to his investigators, to be used by them in the performance of their official duties, may or must the county now provide vehicles and gasoline to the state attorney and his investigators for the same purpose and under the same circumstances?

SUMMARY:

The state, rather than the county, is responsible for costs of transportation services of the state attorney's office for its official use, except for those services provided on a centralized basis in fiscal year 1973-1974 to all units of county government and made available for use of the state attorney's office, which cost of services was not prorated, even though the county furnished transportation services to the prosecuting officer of the Criminal Court of Record prior to the adoption of revised Art. V, State Const., effective January 1, 1973. However, where the county has previously been providing automobiles to the state attorney's office for use in the operation of that office, it should continue to do so under the terms of the proviso appended to the 1976 General Appropriations Act requiring counties to continue to provide the state attorneys any operating capital outlay items presently being provided by the counties.

Essentially, your question asks whether the state or the county should pay the vehicle and gasoline costs when the state attorney or his staff is on official business, under the circumstances you describe.

I believe the answer to your question to be unaffected by the fact that the county paid such expenses for the prosecuting officer of the criminal court of record before the adoption of the present Art. V, State Const. Clearly, the question of the county's providing transportation for your office must be examined in light of some constitutional or statutory authorization for such payment. Unless specific authority is granted to the county to pay for such services for the state attorney, the county may not do so, regardless of what services it provided for the use of the prosecuting officer of a former subordinate court. Hence, we must examine the applicable provisions of law regarding operation and costs of the state attorney's office to determine what services are provided and by whom.

Section 27.34(1), F. S. 1975, provides that "[n]o county or municipality shall appropriate or contribute funds to the operation of the various state attorneys." Section 27.34(2) provides:

> The state attorney shall be provided by the counties within their judicial circuits with such office space, utilities, telephone service, custodial services, library services, *transportation services*, and communication services *as may be*

> *necessary for the proper and efficient functioning of these offices.* The office space to be provided by the counties shall not be less than the standards for space allotment promulgated by the Department of General Services nor shall these services and office space be less than were provided in fiscal year 1972-1973. (Emphasis supplied.)

In AGO 073-458, I interpreted the quoted section in light of legislative intent expressed in Ch. 73-335, Laws of Florida, the 1973 General Appropriations Act, and legislative comments appended to the appropriations for the several state attorneys, and concluded that "transportation services 'provided for *common use* by county governmental units' are now to be made available to each state attorney 'as may be necessary for the proper and efficient functioning of these offices.' "

A proviso appended to the General Appropriations Act of 1976, Ch. 76-285, Laws of Florida, following items 755-774, indicates that the conclusion reached in AGO 073-458 remains unchanged. That proviso states:

> Provided, however, office space, and related expenses for custodial services and utilities shall continue to be provided by the counties as prescribed by section 27.34(2), F. S. Any operating capital outlay items now provided by county [sic] to state attorneys shall continue to be provided. *Notwithstanding section 27.34(2), F. S., only centralized county services as provided in FY 73-74 to all units of county government for which cost of services are not prorated may be continued.* (Emphasis supplied.)

It should be noted that the identical proviso is appended to the 1974 and 1975 General Appropriations Acts following respectively items 734-753 and 795-814. It is not, of course, within the power of this office to make a determination upon either the wisdom or the constitutionality of such a proviso. I must, therefore, presume its validity and give effect to it. Hence, the transportation services which the county must provide as required by s. 27.34(2) are limited to such centralized county transportation services as were provided by the county in fiscal year 1973-1974 to *all* units of county government and made available for use by the state attorney's office, for which the costs of such services were not prorated.

Our next inquiry is whether your office meets these specifications. It appears, on the basis of my conversations with you and with the county auditor, that your office has been provided with both automobiles and gasoline by the county at least since fiscal year 1972-1973. In that year, it seems that when the county solicitor's office was phased out, the automobiles allotted to that office were transferred to your office, resulting in the county's providing you with four automobiles and $788.89 in gas and oil for that fiscal year. In 1973-1974, two cars were apparently traded in on new ones and $217 for gas and oil was provided. In fiscal year 1974-1975, it appears again that two cars were traded for new ones and that $551 for gas and oil was provided. In 1975-1976, no new cars were provided (the four older ones were retained for your use, however) but $299 for gas and oil came from county funds. In fiscal year 1976-1977, a new additional car has apparently been ordered.

It is clear that the county did not provide centralized transportation services to all units of county government, and that, hence, centralized services were not made available for use by your office in 1973-1974. Rather, transportation services were provided by the county to the county solicitor's office prior to 1973 and to your office thereafter solely for use of the office to which they were provided and not for common use. Under these conditions, it is the opinion of this office that state, not county, funds must be used to pay for transportation service costs incurred for your official office use. Incidentally, I should also note, in light of your mentioning that transportation services were provided by the county to the county solicitor, that the solicitors were county officers rather than state officers. *See* ss. 32.16, 32.23, and 32.24, F. S. 1971. Therefore, simply because the county may quite appropriately have provided services for a county officer, it does not follow that such services should now be necessarily provided by the county to a state officer.

The proviso appended to the 1976 General Appropriations Act, and quoted in full above, also provides that "[a]ny operating capital outlay items now provided by county (sic) to the state attorneys shall continue to be provided." This sentence in the proviso must also, of course, be presumed valid and given full effect by this office. The term "operating capital outlay" is statutorily defined, for the purposes of the fiscal affairs of

the state, appropriations acts, and budgets, as "equipment, including bound books, fixtures, and other tangible personal property of a nonexpendable nature, the normal expected life of which is one year or more." Section 216.011(1)(q), F. S. 1975. These items must continue to be provided by the counties if presently provided. We must, therefore, explore this definition of the term to see if it might include, in the present context, any items connected with transportation services.

The term "equipment," as used in the term "operating capital outlay," may be defined as "that which is needful or necessary . . . to enable one to do the work involved; whatever is needed for efficient action or service," 30 C.J.S. *Equipment* or as "the physical facilities available for production including machines and tools," 14A Words and Phrases *Equipment.* Under these accepted definitions, the term "operating capital outlay" includes those items which are needful and necessary to do a certain job and which are of a nonexpendable nature and the normal expected life of which is one year or more. It should be noted that the word "equipment" in the definition is followed immediately by the phrase "*including* bound books, fixtures, and other tangible personal property . . . ." I find that this clause in no way limits the definition of "equipment" to bound books, fixtures, or things of a similar nature. The word "include" is not a term of limitation; rather, it is a term of enlargement, meaning that the enumerated items are specifically within the definition but that other items are also encompassed therein. Argosy Limited v. Hennigan, 404 F.2d 14 (5th Cir. 1968); 42 C.J.S. *Include.* Hence, as used in s. 216.011(1)(q), F. S., the term "equipment" is not restricted in any way to the enumerated things, but, rather, includes *all* items of tangible personal property of a nonexpendable nature with a normal life expectancy of one year or more, whatever the nature or characteristics of such property. Therefore, an automobile that is needful and necessary for the proper operation and functioning of a state attorney's office would be within the comprehension of "operating capital outlay." The aforementioned proviso states that "*any* operating capital outlay *items*" now provided must continue to be provided by the county. The phrase "any . . . items" must surely comprehend *any and all* such items, including automobiles (but excluding gas, oil, and maintenance costs) now provided by the county. I conclude, based upon the terms of the proviso in the appropriations act and upon the definition of the term "operating capital outlay" referred to therein, that until legislatively or judicially declared otherwise, the county should continue to provide the state attorney's office with such automobiles (but not gas, oil, or other maintenance costs) as are needful and necessary to the efficient operation of the office *where* the county has previously furnished and presently furnishes such automobiles.

My inquiries have determined that the county in question has furnished the state attorney's office with automobiles in the past for use in its operations; the county should, therefore, continue this practice under the terms of the proviso appended to the 1976 General Appropriations Act.

My conclusion that transportation services may not be provided (with the exception of capital outlay items discussed above) unless centralized transportation services were provided by the county in fiscal year 1973-1974 to all units of county government and made available to the state attorneys and were not prorated finds support in several opinions previously issued by this office. *See* AGO's 073-329, 073-458, 074-74, and 076-71. However, as mentioned in AGO 076-71, the 19th Judicial Circuit Court rendered an opinion in January 1974 rejecting the interpretation set forth in AGO 073-329, that only the costs of installation of telephone service or of connection with a central PBX system should be paid by the county. Schwarz v. Glucker, No. 73-607-CA (19th Jud. Cir. 1974). The court on the basis of s. 27.34(2), F. S., ordered the county to pay the costs of *all* telephone services including monthly charges and long distance calls. Transportation services are clearly analogous to communication services. Yet, while I deferred in AGO 076-71 to the circuit court's opinion regarding communication services, I note that the court there did not consider the issue in light of the proviso set forth above as appended to the General Appropriations Act, which I must take to be presumptively valid. I, therefore, adhere (as I did in AGO 076-71 regarding the transportation expenses of a state attorney's office) to my interpretation that the county is required to provide only "centralized county transportation services" that were provided in fiscal year 1973-1974 to all units of county government for which cost of services was not prorated.

078-101—July 24, 1978

PUBLIC FUNDS

PROPERTY APPRAISER NOT AUTHORIZED TO EXPEND PUBLIC FUNDS FOR PUBLIC RELATIONS MATERIALS

To: Herman D. Laramore, Attorney for Jackson County Property Appraiser, Marianna

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

May a county property appraiser properly expend $500 in public funds for the development and distribution of informational material, such as a photographic and sound public relations package explaining the operations of the county appraiser's office?

SUMMARY:

A county property appraiser is not expressly or impliedly authorized by statute to expend public funds for development and distribution of informational material, such as an audiovisual public relations presentation package explaining the operation of the county property appraiser's office and the duties of the appraiser.

In considering a question involving the expenditure of public funds by a public officer, it is necessary to determine whether the officer in question has been expressly authorized by statute to expend funds for the purpose under consideration, or must be considered to have been given such authority by necessary implication in order to carry out some duty or function expressly imposed or authorized by statute. I have found no statutory provision expressly authorizing or requiring a county property appraiser to expend public funds to develop and distribute informational and public relations materials as described. As to necessarily implied authority, an examination of the relevant tax laws (Chs. 192-196 and 200, F. S.) as they pertain to the duties and functions of the property appraisers fails to reveal any express or specific duty or function of the property appraisers from which it must necessarily be implied that they may expend public moneys for the development and distribution of informational material, such as an audiovisual public relations presentation explaining the operation of the office, in order to carry out any of the duties or functions expressly imposed or authorized by the statutes.

It is fundamental that a county officer in creating a charge or claim against county funds must be authorized by law so to do; and the claim or indebtedness so created must be such as may legitimately be incurred under express or clearly implied power given by a statute. Davis v. Keen, 192 So. 200, 203 (Fla. 1939). *Cf.* AGO 073-374, wherein it was held that the power to borrow money was not necessary or indispensable to carry out the expressly granted power or function to purchase land, since land might be purchased from current revenues of the affected governmental agency. While an express power duly conferred may include implied authority to use means necessary to make the express power effective, such implied authority may not warrant the exercise of a substantive power not conferred. Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). Implied authority cannot exist in the absence of some express grant of authority or the express imposition of a duty. It was emphasized in AGO 071-28 that, to perform any function for the state (or a county) or to expend any state (or county) moneys, the officer seeking to perform such function or to incur such obligation against public funds must find and point to a constitutional or statutory provision so authorizing him to do. And, as was stated in AGO 075-299 (quoting in part from AGO 063-12):

> If the authorization must be necessarily implied, the person issuing the voucher for payment "is obligated to cast such vouchers in such language as will indicate to the postauditor or the public the legality of such payments." Thus, if the authority is implied rather than express, the official must not only point to the statute expressly authorizing or requiring the performance of a

> particular duty or function but also point out why the expenditure in question is necessary in order to carry out the express duty or function.

Furthermore, a county property appraiser falls within the category of county administrative officers. Although a property appraiser is a constitutional—rather than statutory—officer, he is nevertheless a county administrative officer, whose powers and duties must be prescribed by statute. Section 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." The property appraiser possesses no inherent or common law powers. In this regard, a county property appraiser may be compared to a county commissioner, who is also a constitutional officer whose powers and duties must be prescribed by statute. In Hopkins v. Special Road & Bridge District No. 4, 74 So. 310, 311 (Fla. 1917), the court stated that "[c]ounty commissioners can exercise such authority only as is 'prescribed by law'; and, where there are doubts as to the existence of authority, it should not be assumed." *Accord*: White v. Crandon, 156 So. 303, 305 (Fla. 1934); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); Crandon v. Hazlett, 26 So.2d 638, 642 (Fla. 1946). Also appropriate for comparison is the office of sheriff, the powers and duties of which office are also as provided by statutory authority. *See* Lang v. Walker, 35 So. 78, 80 (Fla. 1903), and AGO 075-161.

That administrative officers, in general, have no common law or inherent powers, and are dependent upon statutory authority, has been clearly established by the courts of this state (and of other jurisdictions—*see* 73 C.J.S. *Public Administrative Bodies and Procedure* s. 48). In Florida State University v. Jenkins, 323 So.2d 597, 598 (1 D.C.A. Fla., 1975), the court stated:

> The powers and authority of administrative boards, commissions and officers are limited to those granted, *either expressly or by necessary implication*, by the statutes of their creation. (Emphasis supplied.)

It has also been emphasized 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." 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). Similar holdings and discussions may be found in Florida Industrial Com'n v. National Trucking Company, 107 So.2d 397, 401 (1 D.C.A. Fla., 1958); Williams v. Florida Real Estate Commission, 232 So.2d 239, 240 (4 D.C.A. Fla., 1970); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493, 495 (Fla. 1973); and Division of Family Services v. State, 319 So.2d 72, 75 (1 D.C.A. Fla., 1975). *See also* AGO's 076-191 (holding that a public officer may not expend public funds to have his or her name placed on an official vehicle used in conduct of official business), 075-299, 075-161, 075-120, and 071-28. In this regard, it should also be emphasized that the requirement for statutory authority may not be satisfied by demonstrating that the thing sought to be done has been done or approved previously as a matter of custom. This point is made in 73 C.J.S. *Public Administrative Bodies and Procedure* s. 48, at p. 368: "Mere usage cannot be invoked to invest administrative officers, agencies, or bodies with authority or powers not fairly within the legislative grant."

Finally, I would note that there are a number of statutory provisions expressly authorizing various agencies and officers to expend public funds for purposes of providing informational, educational, or promotional materials to the public concerning the duties or functions of such agencies and officers. In s. 230.23(16), F. S. (1976 Supp.), district school boards are required to "[a]dopt procedures whereby the general public can be adequately informed of the educational programs, needs, and objectives of public education within the district." Among the powers and duties of the Commissioner of Education is that set forth in s. 229.512(13), F. S.:

> To arrange for the preparation, publication and distribution of materials relating to the state system of public education which will supply information concerning needs, problems, plans and possibilities; also to prepare and publish annually reports giving statistics and other useful information pertaining to the state system of public education; to have printed copies of school laws, forms, instruments, instructions and regulations of the State Board of Education and to provide for the distribution of the same.

In s. 229.806, F. S., the Department of Education is authorized to "expend at its discretion any of the current expense funds heretofore and hereafter appropriated for the purpose of advertising and promoting the advantages of teaching in the state." The Division of Economic Development of the Department of Commerce is authorized by s. 288.03(5), F. S. (1976 Supp.), to "plan and conduct a campaign of information, advertising, and publicity relating to the business, industrial, commercial, agricultural, educational, transportation, and residential facilities, advantages, and products of the state and all parts thereof." Authority for dissemination of such informational material is provided in subsection (6) of s. 288.03. Similar powers are granted to the Division of Tourism of the Department of Commerce by s. 288.34, F. S. And in s. 369.06(6), F. S., the Commission on Marine Sciences and Technology of the Division of Marine Resources of the Department of Natural Resources is authorized:

> To collect, provide and/or disseminate information relating to oceanography by means of such documents, instruments, seminars, programs, displays, advertising or otherwise as the commission shall from time to time determine.

The existence of statutory provisions such as those cited above leads me to the conclusion that similar provisions would have been provided by the Legislature with respect to county property appraisers had the Legislature intended that the various appraisers should engage in public relations activities designed to inform the public of the various functions or duties of the county property appraiser.

It is therefore my opinion that public funds may not be expended by a county property appraiser for the development and distribution of informational material, such as an audiovisual informational presentation of the type you have described, since there exists no express statutory authority therefor and no necessarily implied authority to do so in order to carry out any of the duties or functions expressly or specifically imposed or authorized by statute.

078-102—July 24, 1978

CRUELTY TO ANIMALS

COUNTY ANIMAL CONTROL AGENT—NO POWER TO ARREST OR ISSUE CITATIONS TO OWNERS

To: Betty Lynn Lee, Broward County General Counsel, Fort Lauderdale

Prepared by: David K. Miller, Assistant Attorney General

QUESTION:

> **Do animal control agents appointed pursuant to s. 828.03, F. S., have the authority to issue citations or notices to appear to alleged violators of the animal control law?**

SUMMARY:

> **Animal control agents appointed by a county under s. 828.03, F. S., have no powers to take custody of the owner of a neglected or cruelly treated animal, to arrest such owner for a criminal violation, to issue notices to appear in lieu of physical arrest, or to serve notices in the nature of civil process upon such owner in connection with animal custody proceedings provided for in s. 898.073, F. S. The power to arrest persons without a warrant for violations of the cruelty to animals statutes is exclusively vested in the sheriffs and other peace officers under s. 828.17, F. S.**

Your question, as stated, is answered in the negative.

For purposes of this opinion I assume that your question relates to notices to appear issued upon or immediately after an arrest of an owner of an animal for violations of the criminal laws proscribing cruelty to animals. A notice to appear is a written order issued

by a law enforcement officer in lieu of physical arrest. Rule 3.125(a) RCrP; *see also* s. 901.27, F. S. If a person is *arrested* on a misdemeanor charge or for violation of a county or municipal ordinance triable in county court, and makes no demand to be taken before a magistrate, then the *arresting officer* or *booking officer*, as the case may be, may issue a notice to appear. Rule 3.125(b) and (c) RCrP; *see also* s. 901.28, F. S. Such notice to appear is issued immediately upon the arrest or immediately upon completion of the investigation by the booking officer, as the case may be, and the arrested person is then released from custody. Rule 3.125(d) RCrP. The chiefs of the respective law enforcement agencies having jurisdiction are required to establish rules and regulations of procedure governing the exercise of authority to issue notices to appear in order to implement the provisions of Rule 3.125, or ss. 901.27 through 901.32, F. S. Rule 3.125(i) RCrP; s. 901.28(6), F. S. County-appointed animal control agents are obviously *not* chiefs of law enforcement agencies within the contemplation of these rules of procedure and statutes; neither are they vested by law with any rulemaking power.

Rule 3.125 RCrP and s. 901.28, F. S., merely describe a procedure to be used in lieu of physical arrest, and do not vest powers of arrest in any person. The law enforcement officers referred to in the rule and statute must independently possess the power of arrest under some other statute, or must independently have the status of a peace officer or conservator of the peace by operation of law. These law enforcement officers may issue notices to appear only incidental to an arrest for a criminal violation.

The power to arrest persons without a warrant for violations of the cruelty to animals statutes is exclusively vested in the sheriffs and other peace officers under s. 828.17, F. S. No other persons, including county-appointed animal control agents, are granted this power.

Section 828.03, F. S. (1976 Supp.), permits counties to appoint animal control agents for the purpose of *investigating* violations of Ch. 828, F. S., or any other law of the state for the purpose of *protecting* animals or *preventing* any act of cruelty thereto. This law does not vest such agents with arrest powers, nor does it designate them to be peace officers or conservators of the peace. Section 828.073(2), F. S. (1976 Supp.), authorizes such animal control agents to take custody of neglected or cruelly treated animals, and to petition the county judge for a hearing to determine the owner's fitness to have custody of such animals and ability to provide adequately for the animal. Section 828.073(3), F. S. (1976 Supp.), requires an animal control agent taking custody of an animal as provided in subsection (2) to have written notice served on the owner in conformance with Ch. 48, F. S. Chapter 48 relates exclusively to service of *civil* process, and requires service by the sheriff or a special process server appointed by the sheriff. Section 48.021, F. S. (1976 Supp.). This section does not empower an animal control agent to serve such notice; he or she only causes the notice to be served. Finally, nothing in s. 828.073, F. S. (1976 Supp.), purports to vest animal control agents appointed pursuant to s. 828.03, F. S. (1976 Supp.), with any powers whatsoever to arrest the owner of a neglected or cruelly treated animal, or to in any way take into custody the owner of such animal.

Under established rules of administrative law and of statutory construction, county officers or agents have only such authority as is expressly granted, or granted by necessary implication in a statute. Where there is doubt, the existence of a power should not be assumed. Crandon v. Hazlett, 26 So.2d 638 (Fla. 1946); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944). A statutory enumeration of powers operates to prohibit the exercise of powers not expressly mentioned. Thayer v. State, 335 So.2d 814 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). A statutory directive that a thing be done in a certain way operates to prohibit its being done any other way. Alsop v. Pierce, 19 So.2d 799 (Fla. 1944). Under these rules county-appointed animal control agents may exercise only those powers specifically conferred on them by statute, and have no powers to take custody of the owner of a neglected or cruelly treated animal or to arrest him for a criminal violation, to issue notices to appear in lieu of physical arrest, or to serve notices in the nature of civil process upon animal owners in animal custody proceedings provided for in s. 828.073, F. S.

078-103—August 15, 1978

MUNICIPALITIES

MUNICIPAL FUNDS—USE FOR PURCHASE OF UNIFORM CRIMINAL COMPLAINT AFFIDAVITS

To: George T. Dunlap III, City Attorney, Bartow

Prepared by: Dennis J. Wall, Assistant Attorney General

QUESTION:

Does s. 27.34(1), F. S., prohibit the expenditure of municipal funds for the purchase of "complaint affidavits" which have been prepared in accordance with a form therefor prescribed by the state attorney and ordered into use by the chief judge of the judicial circuit?

SUMMARY:

The purchase or other provision by a municipality for use by its law enforcement officers of uniform criminal complaint affidavits in a form prepared by the state attorney and ordered to be followed or used by the chief judge of the judicial circuit in lodging or processing criminal complaints is not prohibited by the terms of s. 27.34(1), F. S.

Your question is answered in the negative.

You have included with your letter of inquiry a copy of a memorandum from the state attorney of your judicial circuit to all law enforcement agencies therein, attached to which is a copy of an administrative order recently issued by the chief judge of your judicial circuit. By the terms of said administrative order, the chief judge has ordered all law enforcement agencies in the judicial circuit to employ a uniform criminal complaint affidavit form for the lodging and processing of criminal complaints in a form prescribed by the state attorney and incorporated into said order by the terms thereof. Your question relates to the applicability of s. 27.34(1), F. S., which provides in part here pertinent that "[n]o county or municipality shall appropriate or contribute funds to the operation of the various state attorneys . . . ." *But see* s. 27.34(2), F. S.

The "operation of the various state attorneys" includes the performance of necessary and discretionary functions. A "necessary" function is one imposed by law. *Cf.* State *ex rel.* Parker v. Lee, 151 So. 491, 493 (Fla. 1933). No constitutional or statutory provision or rule of court has been brought to my attention and none has been found which by its express terms or by necessary implication requires the various state attorneys to promulgate and distribute at the expense of the state uniform complaint affidavit forms to law enforcement agencies for the lodging or processing of criminal complaints. *Compare* Shuman v. State, 358 So.2d 1333, 1336-1337 (Fla. 1978), wherein the Supreme Court of Florida held that s. 27.54(2), F. S. 1975, which provided that "[n]o county or municipality shall appropriate or contribute funds to the operation of the offices of the various public defenders," did not proscribe county contributions to "*costs* of appeals—those appellate expenditures which are not related to internal operation of the public defender's office," because said s. 27.54(2) related only "to *operation expenses* of the public defenders' offices, such as for employment of personnel and travel expenses." Moreover, the state attorney, as an officer of the state, may exercise any power or perform any duty or function or expend any moneys of the state only as authorized by statute or constitutional provision and only in accordance with legislative appropriations and legislatively approved budgets. *See* AGO 071-28; ss. 27.33(4), 216.181, 216.192, 216.321, F. S. Whether or not the various state attorneys purportedly possess the authority to promulgate and distribute at the expense of the state uniform complaint affidavit forms to law enforcement agencies for the lodging or processing of criminal complaints under rules of court need not be decided in order to answer your question, and I express no opinion thereon.

As approved by the chief judge, the state attorney of your judicial circuit has prepared a form for the lodging and processing of criminal complaints. As recited by the chief judge in his administrative order, this form was prepared by the state attorney pursuant

to Rule 3.115 RCrP, which provides in part here pertinent that "[t]he state attorney shall provide the *personnel or procedure for criminal intake in the judicial system.*" (Emphasis supplied.) The procedure for criminal intake in the courts of your judicial circuit has been provided by the state attorney in part by preparing a standardized form for criminal complaint affidavits. The chief judge of your judicial circuit has ordered all law enforcement agencies in said judicial circuit to use and, by implication, to purchase or otherwise duplicate and provide such form to their law enforcement officers for their use in lodging criminal complaints. Unless and until judicially determined to the contrary, I am of the opinion that the purchase and use by your municipality of the subject criminal complaint affidavits in a form prepared by the state attorney and ordered to be followed or used by the chief judge of the judicial circuit is not prohibited by the terms of s. 27.34(1), F. S.

078-104—August 15, 1978

MUNICIPAL HOUSING AUTHORITIES

SECURITY DEPOSITS—NO AUTHORITY TO EXACT

To: John A. Grant, Jr., General Counsel, Tampa Housing Authority, Tampa

Prepared by: Dennis J. Wall, Assistant Attorney General

QUESTIONS:

1. Does a municipal housing authority have the authority to require security deposits of any nature from its tenants?

2. If a municipal housing authority is empowered to exact security deposits from its tenants, is it excepted or exempted from the operation of s. 83.49, F. S., by the terms of subsection (4) thereof?

SUMMARY:

Municipal housing authorities are without express or necessarily implied statutory authority to fix or regulate the amount of or to exact and collect security deposits from their tenants.

A municipal housing authority, established as provided for in s. 421.04, F. S., is a "public body corporate and politic," s. 421.04(1), F. S., and the housing authority is defined by s. 421.03(1), F. S., to mean any of the "public corporations" created by s. 421.04. *See also* AGO 078-33, in which it was concluded that a municipal housing authority is within the definitional purview of the general law waiving sovereign immunity in tort actions (s. 768.28, F. S.), and in which it was stated that

> . . . there is no doubt but that *a municipal housing authority is a public corporation or public quasi-corporation which discharges duties delegated to it by law* within the boundaries of the municipality. *See* Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage Dist., 82 So. 346, 350 (Fla. 1919); and O'Malley v. Florida Ins. Guaranty Association, 257 So.2d 9 (Fla. 1971), in which the court listed housing authorities as examples of public corporations in Florida. *Accord:* Attorney General Opinion 077-92. (Emphasis supplied.)

Public corporations or public quasi-corporations and the governing bodies thereof may not do all that is not forbidden in advance by constitution or statute; they possess only such powers as are expressly granted by statute or necessarily implied in order to carry the expressly granted powers into effect. Forbes Pioneer Boat Line v. Board of Commissioners, 82 So. 346, 350 (Fla. 1919); *see* State Dept. of Citrus v. Huff, 290 So.2d 130, 131-132 (2 D.C.A.), *cert. denied*, 295 So.2d 632 (Fla. 1974); AGO 078-94. A necessarily implied power is one implied from an expressly granted power and essential to carry the expressly granted power into effect. Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936);

AGO's 078-94 and 073-374; *cf.* Isley v. Askew, 358 So.2d 32, 34 (1 D.C.A. Fla., 1978); Edwards v. Lindsley, 349 So.2d 817, 818 (1 D.C.A. Fla., 1977). All express and implied prohibitions upon the exercise of express or implied powers should be taken into account in determining whether such powers may validly be exercised in a given case. Martin County v. Hansen, 149 So. 616, 617 (Fla. 1933) (stating that "the implied prohibitions of law are as effective as express prohibitions"); *cf.* State *ex rel.* Arthur Kudner, Inc. v. Lee, 7 So.2d 110, 113-114 (Fla. 1942); Brown v. City of Lakeland, 54 So. 716, 717 (Fla. 1911).

The term "security deposit" does not appear in Ch. 421, F. S., the Florida Housing Authorities Law, and no provisions have been found in that law which expressly authorize or require municipal housing authorities to exact from or require security deposits of their tenants, nor am I aware of any provision of any other statute expressly authorizing or requiring same. The only power to require payments from tenants and to regulate the amount thereof which is granted to a municipal housing authority by the provisions of the Florida Housing Authorities Law is the power, subject to the limitations contained in Ch. 421, to establish and revise "rents" and "charges." *See* ss. 421.08(4), 421.09(2), 421.10(1)(c), F. S. While Ch. 421 does not purport to define either of the above terms, both "rent" and "charge" have been given fixed and definite meanings by case law. "Rent" signifies a fixed sum paid periodically for the use of property. M. E. Blatt Co. v. United States, 305 U.S. 267, 277 and 277 n.3 (1938); Peterson v. Oklahoma City Housing Authority, 545 F.2d 1270, 1274 (10th Cir. 1976); *cf.* Bay Realty Corp. v. Becker, 157 So.2d 91, 92-93 (3 D.C.A.), *cert denied*, 165 So.2d 176 (Fla. 1964) (telephone security deposit and workmen's compensation insurance premium deposit were *not* "rents, issues and profits" covered by a mortgage on appellant's hotel realty). To "charge" has been defined as "to 'lay on' or 'impose' as a load, tax or burden, to fix or demand a price for a thing or service." State *ex rel.* Ellis v. Atlantic Coast Line R., 37 So. 652, 656 (Fla. 1904). *See also* Southwestern Bell Tel. Co. v. United States, 45 F. Supp. 403, 406 (W.D. Mo. 1942); *In re* Clark's Will, 179 Misc. 75, 37 N.Y.S.2d 522, 523 (Sur. Ct. 1942). A security deposit is to be distinguished from both rents and charges in that title does not pass to money given over to the landlord by the tenant as a security deposit. Peterson v. Oklahoma City Housing Authority, *supra*; Householder v. Block, 62 So.2d 50-51 (Fla. 1952); Paul v. Kanter, 172 So.2d 26, 28 (3 D.C.A. Fla., 1965). It is not essential for a municipal housing authority to exact or impose and collect security deposits from its tenants in order to exercise its expressly granted powers to fix, collect, and regulate rents and charges, or to exercise any other power or perform any duty expressly provided for by any statute. Laws providing for fees or charges (and, analogously, "rents" and "charges" under Ch. 421, F. S.) are to be strictly construed. Bradford v. Stoutamire, 38 So.2d 684, 685 (Fla. 1948); State *ex rel.* May v. Fussell, 24 So.2d 804, 806 (Fla. 1946); Rawls v. State *ex rel.* Nolan, 122 So. 222-223 (Fla. 1929); AGO's 075-250 and 072-191; *cf.* McLeod v. Santa Rosa County, 157 So. 37, 39 (Fla. 1934); Brown v. St. Lucie County, 153 So. 906, 907 (Fla. 1933); State *ex rel.* Buford v. Spencer, 87 So. 634, 635-636 (Fla. 1921); AGO's 077-120, 076-113, 076-10, and 075-253. Thus, neither the provisions of Ch. 421 so construed nor the provisions of any other Florida statute provide for, authorize, or regulate the amount or collection and handling and disposition of security deposits with respect to the tenants of municipal housing authorities.

Moreover, it is a settled rule of statutory construction that, where the Legislature has by express terms stated the things or objects upon which a statute is to operate, other things not so mentioned are impliedly excluded from the statute's operation. *E.g.*, Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952); *In re* Estate of Ratliff, 188 So. 128, 133 (Fla. 1939). It would thus appear that, in expressly authorizing and circumscribing the power of housing authorities to establish and revise "rents" and "charges" under the Florida Housing Authorities Law, the Legislature has not only *not* authorized housing authorities to require security deposits from their tenants, but has impliedly prohibited any such requirement. Dobbs v. Sea Isle Hotel, *supra*; Alsop v. Pierce, 19 So.2d 799, 805-806 (Fla. 1944); Forbes Pioneer Boat Line v. Board of Commissioners, *supra*, at 351; Devin v. City of Hollywood, 351 So.2d 1022, 1025 (4 D.C.A. Fla., 1976); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, 434 (Fla. 1973); *cf. In re* Advisory Opinion of Governor Civil Rights, 306 So.2d 520, 523 (Fla. 1975); AGO 076-51.

Section 83.49(4), F. S., does not purport to authorize a municipal housing authority to exact and collect security deposits from its tenants or to regulate the amount of security deposits. Instead, that subsection provides in material part that the provisions of s. 83.49 shall not apply to instances "in which the amount of rent or deposit, or both, *is regulated by law or rules or regulations of a public body* . . . other than for rent stabilization."

(Emphasis supplied.) No provision of the Florida Statutes has been brought to my attention and none has been found expressly or by necessary implication authorizing or requiring a municipal housing authority to fix and impose, collect, or regulate security deposits or to adopt a rule regulating same. Moreover, it is doubtful that a municipal housing authority is a landlord or person within the intendment of part II, Ch. 83, F. S. Public corporations, bodies politic, or public bodies are not considered "persons" in the absence of clear legislative intent to include same within the purview of an act employing that term. *See* City of St. Petersburg v. Carter, 39 So.2d 804, 805 (Fla. 1949); AGO 068-10; *cf.* United States v. Mayo, 47 F. Supp. 552, 556 (N.D. Fla. 1942), *aff'd*, 319 U.S. 441, 445-446 (1946); Duval County v. Charlestown Lumber & Mfg. Co., 33 So. 531, 532-533 (Fla. 1903). *See also* s. 1.01(3) and (9), F. S. No such legislative intent has been found as would indicate that municipal housing authorities are subject to the provisions of part II, Ch. 83, F. S.

The absence of any legislative authorization, express or implied, for the collection of security deposits from tenants in public housing projects operated by municipal housing authorities, and the concomitant absence of any legislative guidelines for or limitations upon the assessment of same, require the conclusion that a municipal housing authority lacks the power to require security deposits from tenants in its public housing projects.

Your first question is answered in the negative. Having concluded that a municipal housing authority is not authorized to exact or to fix the amount of and to collect security deposits from its tenants, your second question becomes moot.

078-105—August 15, 1978

SUNSHINE LAW

POLICE COMPLAINT REVIEW BOARDS—APPLICABILITY OF LAW

To: George C. Karcher, Chief of Police, Casselberry

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

When a complaint review board is convened in accordance with s. 112.532(2), F. S., relative to a departmental disciplinary action, does such board come under the purview of s. 286.011, F. S., and, therefore, must its meetings be open to the public?

SUMMARY:

Police complaint review boards convened pursuant to the Law Enforcement Officers' Rights Law, part VI of Ch. 112, F. S., are within the purview of and subject to the provisions of the Sunshine Law, s. 286.011, F. S., and all of their meetings and proceedings must be open to the public at all times.

Your question is answered in the affirmative.

The Government in the Sunshine Law, s. 286.011, F. S., has been said to be applicable to *all* meetings of *any* board or commission of the state or of any county or political subdivision over which the Legislature exercises dominion and control. Times Publishing Co. v. Williams, 222 So.2d 470 (2 D.C.A. Fla., 1969); City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). An investigative hearing or proceeding by a public body is within the scope of the law so long as the members of the board discuss any matters on which foreseeable action may be taken by the board. Attorney General Opinion 074-84.

In AGO 075-41 this office concluded that an investigation of the police department by the mayor or outside parties pursuant to authority delegated by the city council was subject to the Sunshine Law. *Accord*: State of Florida *ex rel.* Ross and Shevin v. Cagnina, Case No. 75-2034 (Cir. Ct. Manatee County, 1976), *aff'd*, 330 So.2d 24 (2 D.C.A. Fla., 1976), finding 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 ordering the transcripts of private meetings conducted by the citizens' committee released to the public. This office has previously stated in informal opinions that the Sunshine Law is applicable to complaint review boards established pursuant to part VI, Ch. 112, F. S. *E.g.*, Informal Opinion to Mr. Ben Bolar, January 23, 1975. There have been no legislative amendments to s. 112.532, F. S., since the issuance of such informal opinions.

Section 112.532(2), F. S., which legislatively provides for and specifies the composition of "complaint review boards" does not except or exempt the meetings or proceedings of such boards from the requirements of the Sunshine Law. *Compare* ss. 106.25(5), 112.324(1), 228.093(3)(e), 447.205(10), and 447.605(1), F. S., creating statutory exceptions to or exemptions from s. 286.011, F. S.

In the absence of such a statutory exemption, police complaint review boards convened pursuant to the Law Enforcement Officers' Rights Law, part VI, of Ch. 112, F. S., are within the purview of and required to comply with the provisions of s. 286.011, F. S.

078-106—August 15, 1978

SOVEREIGN IMMUNITY

WAIVER APPLICABLE TO DISTRICT MENTAL HEALTH BOARDS BUT NOT PRIVATE COMMUNITY MENTAL HEALTH CLINICS

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

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is a district mental health board a "state agency or subdivision" for the purposes of and within the scope of s. 768.28, F. S.?

2. Are nonpublic service providers or subcontractors of the district mental health board, when performing services for mental patients whose fees are paid by the district board, within the scope of s. 768.28, F. S.?

SUMMARY:

A district mental health board is a quasi-public or public-quasi corporation or the governing body of a special district, and, therefore, is within the definitional purview of s. 768.28, F. S. Hence, assuming the validity thereof, the limitations on liability specified therein are applicable to such board. However, private service providers or subcontractors (such as mental health clinics) are not, by virtue of their contractual relationship with the board, "state agencies or subdivisions" within the definitional purview of s. 768.28, F. S.

AS TO QUESTION 1:

Your first question is answered in the affirmative.

By the enactment of s. 768.28, F. S. (brought into the statutes by Ch. 73-313, Laws of Florida, and subsequently amended by Chs. 74-235 and 77-86, Laws of Florida), the Legislature has waived sovereign immunity from tort liability for the state "and for its agencies or subdivisions" to the extent specified in the act. *See* s. 768.28(5), F. S., which establishes monetary limitations on the state's waiver, and s. 768.28(9), which precludes the personal liability of officers, employees, or agents of the state or its subdivisions for their negligent acts or omissions in the scope of their employment unless committed "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard to human rights, safety or property," subject to the monetary limitations set forth in subsection (5) of s. 768.28.

The phrase "state agencies or subdivisions" has been defined by s. 768.28(2), F. S., to include:

> . . . the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and *corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.* (Emphasis supplied.)

See also s. 1.01(9), F. S., which defines "political subdivision" to 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 Community Mental Health Act, part IV, Ch. 394, F. S., establishes a system of locally administered and controlled community mental health programs and services under the supervision of the Department of Health and Rehabilitative Services. Section 394.66(1), F. S. 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), F. S. The district mental health boards have been created to provide coordinated mental health services within the department's service districts or subdistricts as defined in s. 20.19, F. S. (*see* s. 394.67(1), (10), and (11) and s. 394.69, F. S.), and serve as a direct link between the department and community programs. *Cf.* Ch. 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 394.69(5), F. S. 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, F. S.

Financing of mental health services is based upon a uniform ratio of state government responsibility and local participation. Section 394.66, F. S. *See also* s. 394.76(4), F. S., providing that 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), 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. Counties are also required under s. 394.76(9), F. S., to participate in the funding of mental health services within their jurisdiction.

Throughout part IV of Ch. 394, F. S., reference is made to community mental health *districts. See e.g.*, s. 394.66(7), F. S., expressing the intent of the Legislature to "[i]nsure that to the maximum degree feasible, the districts of the Department of Health and Rehabilitative Services are the focal point of all district board activities, including budget submissions, grant applications, contracts, and other arrangements that can be effected at the district level"; s. 394.67(3), F. S., referring to the "district plan" as a "mental health plan adopted by a mental health board and approved by the district administrator and governing bodies in accordance with this part"; s. 394.67(11), F. S., defining "board district" to mean "that area over which a single mental health board has jurisdiction for coordinating mental health programs . . ."; s. 394.69, F. S., stating that mental health boards are to be established to coordinate mental health services within "department service districts or subdivisions . . ."; s. 394.70(1), F. S., providing that the mental health boards shall be appointed by the county commission having jurisdiction in the board district; s. 394.75, providing for the preparation of a district mental health plan by the board, which plan is to include procedures for the coordination of services and inventory of mental health resources within the board district (*see* s. 394.75(2)(c)5., (d), and (e), F. S.); s. 394.71(2) and (3), F. S., authorizing boards to receive and disburse such funds as are entrusted to them by law or otherwise, as well as to contract for and coordinate and disburse state funds; s. 394.73, F. S., providing that any county within a board district shall have the same power to contract for mental health services as the Department of Health and Rehabilitative Services has under existing statutes, which includes the power to contract with a board district or a mental health board (*see* s. 394.74, F. S.).

In light of the foregoing statutory provisions it seems evident that the mental health boards could have been intended by the Legislature to serve as the governing bodies of

special mental health districts. *Cf.* Rileigh v. Pinellas County, 200 So.2d 165 (Fla. 1967), in which it was stated that the County Free Public Libraries Act, ss. 150.01-150.08, F. S. (repealed by Ch. 71-14, Laws of Florida), created taxing districts for library purposes to be financed by property tax levies authorized by the act and imposed by the counties.

Moreover, the structure of the mental health district boards is such that they might also be considered to be public-quasi corporations or quasi-public corporations. *See* Forbes Pioneer Boatline v. Board of Commissioners of Everglades Drainage District, 82 So. 346, 350 (Fla. 1919), in which the court discussed the differences between quasi-public, public, and public-quasi corporations; and then concluded that the Everglades drainage district was a "public-quasi corporation, and as such, a governmental agency of the state for certain definite purposes, having only such authority as is delegated to it by law." *See also* O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9 (Fla. 1971); and 81A C.J.S. *States* s. 141, p. 583. In particular, in AGO 077-97, this office expressly stated that district mental health boards appeared 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." However, it is unnecessary to determine whether mental health boards should be deemed to be governing bodies of special districts or public-quasi corporations or quasi-public corporations, since the definition of state agency or subdivision contained in s. 768.28, F. S., is broad enough to encompass such boards, however they are characterized.

Accordingly, I am of the view that district mental health boards may be deemed to be "state agencies or subdivisions" within the definitional purview of s. 768.28(5), F. S.; therefore, the members of such boards as well as the "board director" and "board staff member(s)" (*see* s. 394.72, F. S.) are "officer(s), employee(s), or agent(s) of the state or its subdivisions" within the purview of s. 768.28(9), F. S. *Cf.* AGO 076-202 wherein I concluded that district mental health boards were not subject to the requirements of the State Purchasing Law (part I, Ch. 287, F. S.), since the only agencies encompassed within the definition of state agency for purposes of *that law* were those agencies assigned to the *executive* branch of state government.

I have not considered in this opinion the question of whether or not district mental health boards as districts or public-quasi corporations or quasi-public corporations were subject to tort liability prior to the state's waiver of sovereign immunity. *See* Suwannee County Hospital Corp. v. Golden, 56 So.2d 911, 913 (Fla. 1952), in which the court noted that a hospital district was not possessed of sovereign immunity because its activities fell "more clearly in the category of 'proprietary' functions than 'governmental' . . ."; Circuit Court v. Department of Natural Resources, 339 So.2d 1113, 1115 (Fla. 1976), in which the court noted that *Suwannee* stood for the principle that "a public corporation whose functions are local rather than state-wide does not share in the sovereign immunity of the state"; and AGO's 075-114 and 076-41, concluding that the liability limits contained in s. 768.28, F. S., did not apply to hospital districts and municipalities, respectively, because such entities possessed no sovereign immunity and have been held subject to tort liability. The 1977 Legislature, however, amended s. 768.28(5), F. S., assuming the validity thereof, to provide that the monetary limitations on liability specified therein are applicable to *all* state agencies and subdivisions of the state, as defined in s. 768.28(2), regardless of whether these agencies and subdivisions possessed sovereign immunity prior to July 1, 1974. *See also* AGO 078-33, concluding that a municipal housing authority was within the purview of s. 768.28, F. S., and that, in the absence of a judicial determination to the contrary, the monetary limitations on liability contained in s. 768.28(5), F. S., were applicable to such authority; and AGO 078-42 reaching the same conclusion with respect to a hospital district.

AS TO QUESTION 2:

Your second question is answered in the negative.

Section 394.74, F. S., authorizes each district mental health board, subject to certain conditions not relevant here, to contract for state funds on a matching basis in the establishment and operation of local mental health programs "with *any* hospital, clinic, laboratory, institution, or other appropriate service agency." (Emphasis supplied.) Thus, it is clear that the board is authorized to contract with private as well as public organizations in providing the services contemplated by part IV of Ch. 394, F. S. *See* s. 394.67(14), F. S., defining "community mental health facility" as "any facility in which all or any portion of the programs or services set forth in subparagraphs 394.75(2)(c)5. and 394.75(2)(e)2. and subsection 394.75(3) are carried out"; and s. 394.74(2)(d)2. requiring

the development of standard contract forms for use between district mental health boards and "community mental health service providers." In addition, the district mental health plan required by s. 394.75, F. S., is to provide, *inter alia*, a plan "[f]or the most appropriate and economical use of all existing public and *private* agencies and personnel" (s. 394.75(2)(c)3., *also see* s. 394.75(2)(c)4.), as well as "[a]n inventory of all public and private mental health resources within the board district." (Section 394.75(2)(c)5.; emphasis supplied.) *See also* Rule 10E-4.10(1)(a), F.A.C., defining Community Mental Health Clinic as "[a]ny organization which is not a comprehensive community health center that provides direct and indirect mental health services in accordance with the standards established by the Department and receives state grant and aid funds . . . ." It should be noted that this question is confined to a discussion of private or nonpublic service providers. Thus, any public institutions or service providers which are otherwise within the purview of s. 768.28, F. S., are not affected by this opinion.

Accordingly, it is evident that the district mental health boards are authorized to contract with private as well as public community mental health providers in the rendition of those services contemplated by Ch. 394, F. S. However, I find no provision in either the statutes or in relevant rules of the Department of Health and Rehabilitative Services which would categorize private community mental health clinics or other private service providers as "corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities." As you note in your letter, with regard to mental health clinics:

> Such clinics are free to service private clients whose fees are not paid through the Mental Health Boards and have substantial independence as to the form of psychiatric treatment given to all clients, including those whose fees are paid through the District Boards.

The primary characteristic of a public or quasi-public corporation is its creation by law. *See* 81A C.J.S. *States* s. 141, noting that in the absence of constitutional prohibition a state may *create* an agency for the purpose of carrying out a state duty or function; and 81A C.J.S. *States* s. 141, p. 585, stating that the powers of a public agency or corporation are limited to those conferred by statute. *See also* O'Malley v. Florida Insurance Guaranty Association, *supra*, in which the Florida Supreme Court, discussing public or quasi-public corporations, 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); emphasis supplied.]

Compare Florida Power Corporation v. Pinellas Utility Board, 40 So.2d 350, 355 (Fla. 1949), in which the court held that the power of the Legislature to regulate public utility rates (tolls for passage over a causeway) may be exercised directly by the Legislature or through some instrumentality thereof, or by a board or a commission created for that purpose, or the power may be conferred by the Legislature on the courts or some other existing board or functionary; and, *see also* Florida Gulf Health Systems Agency v. Commission on Ethics, 354 So.2d 932 (2 D.C.A. Fla., 1978), in which the court ruled that the financial disclosure law was not applicable to members of the governing body of a health systems agency:

> Neither stockholders, directors, nor officers of a private corporation can be termed "local officers" under this statute since they are neither "appointed" nor "elected" as contemplated by the financial disclosure law. Members of a private corporation accede to their positions as do members of any private business, that is by agreement among themselves without regard to the public generally.

Therefore, the mere fact that a private community mental health clinic or other private service provider may have entered into a contractual relationship with the district mental health board to provide certain mental health services does *not* bring such a private corporation (or its officers and employees) within the definitional purview of s. 768.28, F. S. It follows then that the statutory monetary limitations on tort liability

established and fixed by s. 768.36(5), F. S., would not be applicable to such service providers or subcontractors or their officers and employees.

078-107—August 16, 1978

SPECIAL DISTRICTS

VACANCIES IN OFFICE

To: Philip A. DeLaney, Counsel for Cedar Key Special Water and Sewerage District, Gainesville

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Are the elective commissioners of a special district whose elective terms of office have expired required to hold over and continue in office when no one has qualified to succeed any of them in office?

SUMMARY:

The elective commissioners of the Cedar Key Water and Sewerage District whose two-year elective terms in office have expired are not required under the terms of s. 5(b), Art. II, State Const., to hold over and continue in office when no one has qualified to succeed them in office, as that provision is inapplicable to district officers. However, under s. 114.04, F. S., the Governor is authorized to fill all vacancies in district office for the remainder of the term if less than 28 months; thus, since the enabling legislation creating the special district does not provide procedures for filling multiple vacancies on its governing board, the Governor may appoint persons to fill such vacancies for the remainder of the unexpired terms.

As to the status of the incumbent commissioners whose terms have expired, they are considered de facto officers and *may* continue in such status until their successors have been duly appointed or elected to office and have qualified for and taken office.

Chapter 63-1569, Laws of Florida, as amended by Chs. 75-426 and 76-416, Laws of Florida, establishes the Cedar Key Special Water and Sewerage District. As originally enacted, s. 2 of Ch. 63-1569, *supra*, provided that the governing board of said district shall be composed of three commissioners, each appointed by the Governor. In 1975, however, the Legislature amended the enabling legislation creating the district to provide for an *elected* five-member board of commissioners. Chapter 75-426, Laws of Florida.

Your letter advises, however, that the terms of office of three of the elected commissioners expired on May 4, 1978, but that none of said commissioners chose to run for reelection. You further state that in accordance with the terms of s. 2(e) of Ch. 63-1569, as amended, a special election had been called to elect replacements for the commissioners whose terms were set to expire. However, the candidates' qualifying period provided for in the call of such special election expired without any candidate having sought to qualify for election to the several offices. You state that the current incumbent members are in doubt as to what to do under these circumstances, but that you have advised the three affected commissioners that it is their duty to "hold over and continue in office until another election is called and a qualified successor is elected," citing s. 5(b), Art. II, State Const., as authority therefor.

Section 5(b), Art. II, State Const., in pertinent part provides that "[e]ach *state* and *county* officer . . . shall . . . continue in office until his successor qualifies." (Emphasis supplied.)

Florida Supreme Court decisions and Attorney General Opinions have, however, consistently held that a *district* office is *not* a state or county office for purposes of various constitutional and statutory provisions. *See* State v. Ocean Shore Improvement District,

156 So. 433 (Fla. 1934); State v. Reardon, 154 So. 742 (Fla. 1936); Town of Palm Beach v. City of West Palm Beach, 55 So.2d 566 (Fla. 1951); Bair v. Central and Southern Flood Control District, 144 So.2d 818 (Fla. 1962), and AGO's 078-74, 078-11, 074-169, and 074-7.

Moreover, the Florida Supreme Court has expressly ruled that officers of a special district were not within the purview of s. 14, Art. XVI of the 1885 Constitution which provided that "[a]ll state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified." *See* State *ex rel.* Smith v. Hamilton, 166 So. 742 (Fla. 1936). The pertinent requirements of present s. 5(b), Art. II, State Const., are essentially the same with respect to state and county officers. Accordingly, it is evident that the members of the district's governing body are not *required* by s. 5(b), Art. II, to hold over or continue in office after the expiration of their terms until the qualification of their successors.

The foregoing judicial decisions and Attorney General Opinions also compel the conclusion that s. 1(f), Art. IV, State Const., is not applicable to your inquiry, since that section empowers the Governor

> . . . [w]hen not otherwise provided for in this constitution . . . [to] fill *by appointment any vacancy in state or county office* . . . for the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election. (Emphasis supplied.)

As s. 1(f), Art. IV, *supra*, does not include district officers within its terms it is, like s. 5(b), Art. II, *supra*, inapplicable to your inquiry. *See also* AGO 073-245. However, s. 2(f) of Ch. 63-1569, as amended by s. 1 of Ch. 75-426, does provide a means for filling a vacancy on the governing board of the district: "In case of *a* vacancy being created in the membership of the board, *the remaining four members* shall appoint *a* qualified person to serve until the next election." (Emphasis supplied.)

It is evident, however, that this language does not contemplate or provide a solution for the situation presented by your question. As of May 4, 1974, *three* vacancies existed in the membership of the board; nothing in the above-cited language permits *two* members of the board to appoint persons to fill three vacancies. As stated by the Florida Supreme Court in State *ex rel.* Landis v. Bird, 163 So. 248 (Fla. 1935) at 260:

> Authority to appoint officers is not inherent in the general powers of any department of the government, and must be duly conferred before it can be lawfully exercised. *When such delegated authority is conferred, it should be exercised strictly within the terms, limitations and intendments of the delegating language used as judicially interpreted.* (Emphasis supplied.)

Since the enabling legislation establishing the district does not provide a procedure for filling multiple vacancies on the governing board under the circumstances contained in your letter, it is appropriate to examine pertinent provisions contained in general law relating to vacancies in office.

Section 114.04, F. S., provides in part as follows:

> Except as otherwise provided in the State Constitution, the Governor shall fill by appointment *any vacancy* in a state, *district*, or county office, other than a member or officer of the Legislature, for the remainder of the term of an appointive officer and for *the remainder of the term of an elective office, if there is less than 28 months remaining in the term*; otherwise, until the first Tuesday after the first Monday following the next general election. (Emphasis supplied.)

It is evident from an examination of the above-quoted statute that it authorizes the Governor to appoint three qualified persons to fill the existing vacancies in office in the district. Under s. 2(e) of Ch. 63-1569, as amended, the commissioners are elected to fill 2-year terms; thus the remaining portion of the unexpired terms in question is less than 28 months Accordingly, the Governor may fill these vacancies for the remainder of the unexpired terms. *Cf.* AGO 073-245, in which this office ruled that, in the absence of any specific provisions in the enabling legislation creating a special district relating to vacancies in office, the Governor was authorized under s. 114.04, F. S. 1973 (which provided that, where a vacancy existed in district office, the Governor was required to

appoint a person to fill the vacancy, which person was required to hold office until the same was filled in an election as provided by law), to fill the vacancy.

As to the status of the three commissioners whose terms have expired, it would appear that they would be authorized but not required to hold over as de facto officers until the election and qualification of their successors or until the Governor makes ad interim appointments to fill the vacancies. *See* 67 C.J.S. *Officers* s. 140, stating that an officer who holds over after the expiration of his term of office when there is no legal provision therefor may be regarded as a de facto officer. And, as noted in AGO 073-193, until the appointment or election of his successor,

> . . . a de facto officer and the title to his office or the authority to act as a de facto officer cannot be collaterally attacked or inquired into by third parties. Treasure, Inc., v. State Beverage Department, 238 So.2d 580, 585-586 (Fla. 1971); State v. Murphy, 13 So. 705, 716 (Fla. 1893).

Accordingly, it would appear that the incumbent commissioners whose terms have expired would be authorized, though not required, to hold over as de facto officers exercising the functions of their offices until their successors have by appointment or election qualified themselves to take office. State v. Wiseheart, 28 So.2d 589 (Fla. 1947); Colbath v. Adams, 184 So.2d 883 (Fla. 1966).

078-108--August 16, 1978

CIRCUIT JUDGES

RETIREMENT MANDATORY AT AGE SEVENTY WHEN JUDGE WAS MUNICIPAL JUDGE ON JULY 1, 1957

To: Milton A. Friedman, Judge, Circuit Court, Miami

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

Do the mandatory retirement requirements of s. 8, Art. V, State Const., apply to a circuit judge who was a municipal judge on July 1, 1957?

SUMMARY:

The mandatory retirement requirements of s. 8, Art. V, State Const., apply to a circuit judge who was a municipal judge on July 1, 1957.

Section 8, Art. V, State Const., provides in pertinent part that "[n]o justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which he has served." The schedule to Article V states at s. 20(e)(2) that this mandatory retirement provision does not apply to a "justice or judge holding office immediately after this article became effective who held judicial office on July 1, 1957." Thus, the answer to your question requires a determination as to whether a person who was a *municipal* judge on July 1, 1957, was a "justice or a judge" and held a "judicial office" prior to the abolition of municipal courts pursuant to the provisions of s. 20(d)(4), Art. V, State Const., within the meaning and purview of s. 20(e)(2), Art. V of the Constitution.

Section 12, Art. X, State Const., sets forth rules of construction to be used in construing the 1968 Constitution, unless qualified in the relevant text thereof. Section 12(f), Art. X, specifies that "[t]he terms 'judicial office,' 'justices,' and 'judges' *shall not* include judges of courts established solely for the trial of violation of ordinances." (Emphasis supplied.) Moreover, nothing contained in s. 8, Art. V, and more particularly s. 20(e), Art. V, State Const., qualifies the exclusion set forth in s. 12(f), Art. X. Instead, s. 12(f), Art. X, defines the terms "judicial office" and "judge" used throughout Article V. Neither s. 8 nor s. 20(e) of Article V purports in any manner to define or qualify the terms used at s. 12(f), Art.

X, and, therefore, the rule of construction set forth at s. 12(f), is applicable to ss. 8 and 20(e).

Since the only courts in Dade County which were established solely for the trial of violation of *municipal* ordinances were the *municipal* courts of the several *municipalities* within Dade County, it appears that the mandatory retirement provisions of s. 8, Art. V, State Const., are applicable to you; *i.e.*, s. 20(e)(2) of Article V does not in terms operate to except or exempt municipal judges from the operative force of s. 8, Art. V.

You state in your inquiry that "I was a municipal judge in 1957." For purposes of this opinion, I assume that you were in fact and in law a municipal judge or a judge of a municipal court duly created by legislative act or municipal charter act. No opinion is expressed as to the former Metropolitan Court of Dade County, abolished pursuant to the provisions of s. 20(d)(1), Art. V, State Const., or the judges thereof. *See* s. 20(d)(5), Art. V, and *see also* s. 20(c)(4), Art. V. For the proposition that such metropolitan court was not considered to be a municipal court *see* County of Dade v. Saffan, 173 So.2d 138 (Fla. 1965).

In AGO 075-265 this office held that a county court judge who held the office of justice of the peace on July 1, 1957, was eligible for reelection although he would attain the age of 70 before he completed one-half of his term in office. That opinion observed that the then justices of the peace under the 1885 Constitution and implementing statutes were not limited to the trial of violations of ordinances and such officers were a part of the judicial system of the state and held "judicial office," and that the courts and the Legislature had so treated them. *Cf.* AGO 074-203 holding that under s. 8 and s. 20(d)(2), Art. V, a person aged 70 or over was not qualified to run for election as a circuit judge even though he was serving as a temporary tenure circuit court judge for the remainder of a term to which he was elected as judge of a court enumerated in and abolished by s. 20(d)(2), Art. V of the State Constitution. State *ex rel.* Judicial Qualifications Commission v. Rose, 286 So.2d 562 (Fla. 1973).

078-109—August 16, 1978

PUBLIC RECORDS

STATE BOARD OF MEDICAL EXAMINERS—MAY NOT RELEASE NAMES OF CERTAIN PATIENTS TO COUNTY MEDICAL SOCIETY

To: George S. Palmer, M. D., Executive Director, Board of Medical Examiners, Tallahassee

Prepared by: Sharyn L. Smith, Assistant Attorney General

QUESTION:

May the Board of Medical Examiners release to the Monroe County Medical Society the names of each patient whose files were taken by physicians deputized by the board to conduct board investigations in Key West?

SUMMARY:

The State Board of Medical Examiners may not release to the Monroe County Medical Society the names of patients whose treatment files were taken without the authorization or knowledge and consent of the affected patients and without subpoena by physicians deputized by the board in order to conduct a board investigation in Key West.

According to your letter, the president of the Monroe County Medical Society has alleged that certain physicians, who were deputized by the board in order to assist in board investigations, engaged in certain improprieties attendant to their investigations.

The specific allegation of the president of the society was that the physicians deputized by the board took certain patient records of patients treated by other physicians and

disseminated this information to the news media without the knowledge and consent of the involved patients. The information in the possession of the society is hearsay and cannot be used as a basis for the society to institute grievance proceedings against the involved physicians. As such, the society has requested the board to release to it the names of each patient whose file or patient record was wrongfully taken by the investigating physician and forwarded to the board.

In AGO 076-225 this office discussed the scope of the exemption found at s. 455.08, F. S., which provides, in pertinent part, that:

> [i]nvestigative reports and records made or received by a board . . . in . . . the Department of Professional and Occupational Regulation shall be exempt from the provisions of s. 119.07, unless the board . . . has found probable cause to commence formal action,

and concluded that all investigative records and reports made or received by the State Board of Accountancy prior to a finding of probable cause to commence formal action are exempted from the provisions of s. 119.07, F. S., pursuant to s. 455.08, F. S., and, therefore, are not available for, or subject to, public examination and inspection prior to a finding of probable cause.

Also pertinent to your inquiry is s. 458.16, F. S., which provides that:

> Any doctor or other practitioner of any of the healing sciences making a physical or mental examination of, *or administering treatment to, any person, shall upon request of such person,* his guardian, curator, or personal representative in the event of his death, *furnish copies of all reports made of such examination* or *treatment. Such reports shall not be furnished to any person other than the patient, his guardian, curator, or personal representative, except upon the written authorization of the patient;* provided, however, that nothing herein shall prevent the furnishing of such reports without such written authorization, to any person, firm, or corporation who with the patient's consent shall have procured or furnished such examination or treatment, and where compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, copies of the medical report shall be furnished both the defendant and the plaintiff. (Emphasis supplied.)

Although s. 458.16, F. S., speaks to *reports* of examination or treatment, I am of the view that the prohibition contained therein contemplates the nondisclosure of the names of patients as well as reports of examination or treatment or other patient records. If this were not the case, it would be obvious that the privacy of individual patients could be infringed in violation of the purpose of the statute merely by ascertaining the identity of the patient. For example, many patients of a psychiatrist, a cancer specialist, or the like would, in all probability, choose to have their doctor's identity as well as their own remain confidential. This is true of many specialists in medicine in which the patients' afflictions can be reasonably ascertained by knowing the name of the treating physician. Accordingly, the name or identity of a patient as well as his or her patient or treatment records or reports is entitled to protection from disclosure pursuant to s. 458.16, F. S., in the absence of written authorization by the patient.

In Morrison v. Malmquist, 62 So.2d 415 (Fla. 1953), the court construed s. 458.16, F. S., to permit a physician to answer questions posed during a trial and ordered answered by a judge, the court interpreting the statute to apply only to copies of reports and not testimony in court. In the instant case, however, it is apparent that the patient or treatment records are protected by s. 458.16, F. S., and copies of such reports or patient records, including names of the affected patients, cannot be released to any person without the patient's consent. Thus, if the board did, in fact, by its deputies take such treatment records without the authorization or knowledge and consent of the affected patients, it acted unlawfully and in violation of the patients' statutory privacy rights.

Since the records in question apparently were not received by the board pursuant to the procedure mandated by s. 458.16, F. S., nor subpoenaed pursuant to s. 458.11(3), F. S., it does not appear that such documents lawfully became a part of an investigative record of the board which would be exempted by statute from s. 119.07, F. S. However, it likewise does not appear that the records are subject to s. 119.07(1), F. S., since such documents were not received in connection with the transaction of *official business.*

Simply stated, the board's official business does not include the acquisition or reception of records or documents in a manner prohibited by statute.

Thus, I am of the view that the names of the concerned patients may not be given by the board to the local medical society. Identifying patient or treatment records taken in violation of s. 458.16, F. S., should be returned forthwith to the affected patients or their physicians.

078-110—August 16, 1978

MUNICIPALITIES

PURCHASE OF FIRE TRUCK—FINANCING RESTRICTIONS

To: James R. White, Mayor, Town of South Flomaton, Flomaton, Alabama

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

May the Town of South Flomaton finance the purchase of a fire truck through revenue sharing funds from the state and place a lien on the fire truck without the approval of the voters of South Flomaton?

SUMMARY:

A municipality may pledge any non ad valorem tax revenues (including its guaranteed entitlement to revenue sharing funds under part II of Ch. 218, F. S.), if available and not previously encumbered, to purchase a fire truck to provide fire protection within municipality. In the absence of an approving referendum by the municipal electorate, however, a municipality may not finance, and is constitutionally inhibited from financing, the purchase of the fire truck by borrowing money and giving a lien or mortgage on the property to be purchased (or other assets or property of the town) as further or additional security for the loan or other obligation of the town.

According to your letter, the Town of South Flomaton proposes to purchase a fire truck to provide fire protection within the municipality. The purchase is to be financed by a loan from a local bank which the town intends to repay "primarily through Revenue Sharing Funds from the State of Florida" over a period of approximately 10 years. In addition, the town plans to give the bank a lien on the fire truck as additional security for the loan. You inquire as to whether the town has the legal authority to finance the purchase of the fire truck, as outlined herein, without the approval of the electors of the Town of South Flomaton.

Section 166.111, F. S., provides:

> **Authority to borrow.**—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.

See s. 166.101(8), F. S., which defines the term "project" to mean a governmental undertaking approved by the governing body, including all property rights deemed necessary for the acquisition thereof, and to embrace any capital expenditure which the governing body deems to be made for a public purpose. *See also* s. 166.101(1), F. S., defining the term "bond" to include notes and other obligations or evidences of indebtedness of any type or character; s. 166.101(4), F. S., defining the term "revenue bonds" to mean obligations of a municipality which are payable from revenues derived from sources other than ad valorem taxes "and which do not pledge the *property, credit,*

or general tax revenue of the municipality" (Emphasis supplied.); s. 166.121(1), F. S., which provides that bonds (as defined by s. 166.101(1), F. S.) issued under part II of Ch. 166, F. S., shall be authorized by resolution or ordinance of the governing body "*and, if required by the State Constitution, by affirmative vote of the electors* of the municipality . . . ." (Emphasis supplied.) *Cf.* s. 166.021(1), F. S., which empowers municipalities to exercise any power for municipal purposes except when expressly prohibited by law.

The exercise of this power to borrow is constitutionally limited by ss. 10 and 12, Art. VII, State Const. Section 10, Art. VII, operates to prohibit the loan or pledge of public funds or *property* to any person or nongovernmental entity or the use of the taxing power for other than municipal purposes. *See* O'Neill v. Burns, 198 So.2d 1 (Fla. 1967); *cf.* Bannon v. Port of Palm Beach District, 246 So.2d 737 (Fla. 1971). Section 12, Art. VII, State Const., the provision by which the answer to your inquiry is primarily controlled, applies to and authorizes a municipality to issue "bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance . . . to finance or refinance capital projects authorized by law and *only when approved by vote of the electors.*" (Emphasis supplied.) *See* State v. County of Dade, 234 So.2d 651 (Fla. 1970); AGO 076-121; *cf.* s. 166.121(1), F. S. I must assume that in the instant inquiry the bank or lender possesses the right to enforce or foreclose the lien by the terms of the note or other evidence of indebtedness to be given by the city.

The State Constitution does not require approval by the electors when certificates of indebtedness or revenue bonds are payable solely from taxes or sources other than ad valorem taxes and do not otherwise pledge the municipality's taxing credit. *Cf.* State v. Board of Public Instruction, Okaloosa County, 214 So.2d 723 (Fla. 1968); State v. Orange County, 281 So.2d 310 (Fla. 1973), in which the court upheld the issuance of capital improvement bonds without an election 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; Orange County Civic Facilities Authority v. State, 286 So.2d 193 (Fla. 1973), holding that, with the sole exception of ad valorem tax revenues, any revenues of a county could be pledged for the retirement of the proposed civil facilities revenue bond issue. Thus, if the money borrowed for the purchase of a fire truck is repaid *solely* from uncommitted revenue sharing funds making up the *guaranteed entitlement* of the city, as defined by s. 218.21(6)(b), F. S., distributed to the municipality pursuant to ss. 218.23(2) and 218.245(2), F. S., or from any other non ad valorem tax revenues, no approving election or referendum is required. Moreover, the Charter for the Town of South Flomaton, a copy of which you enclosed with you letter, does not appear to require an approving referendum when non ad valorem taxes are being pledged. When, however, the revenue bonds, certificates of indebtedness, or other obligations or evidence of indebtedness are wholly, in part, or additionally secured by a lien or mortgage on the property being financed or other assets or property of the city, the Florida Supreme Court has generally regarded such mortgages or liens as the functional equivalent of a bond requiring approval by the electorate as mandated by s. 12(a), Art. VII, State Const. Attorney General Opinions 073-164, 073-261, and 076-121.

The Florida Supreme Court has held on a number of occasions that a municipality may not borrow money under any device or contractual financial arrangement for repayment with interest which pledges both non ad valorem tax revenues and municipal property or assets, unless such a financial arrangement is duly authorized by the electors of the municipality. In Boykin v. Town of River Junction, 164 So. 558 (Fla. 1935), the court held that a municipality owning and operating a public utility may issue and sell revenue certificates and pledge as security for their discharge anticipated future revenues of the utility without holding an election; however, if the issuance of the revenue certificates is for the acquisition of a new utility secured by a pledge of the revenues of the utility *and* by a mortgage on the physical property, this creates a conditional indebtedness of the municipality and is prohibited unless authorized by the voters. *See also* Hollywood, Inc. v. Broward County, 90 So.2d 47, 51 (Fla. 1956), in which the court stated that the plan of financing

> . . . necessarily involved pledging the general credit of the County for a continuing obligation with interest thereon over a period of future years. This is so, because when the County acquired the property the mortgage to which it was subject became a charge against the property, and the County was placed in a position of being coerced to meet the annual requirements for interest and

> maturing principal under the mortgage. The alternative would be to lose the property by foreclosure.

See generally State v. City of Miami, 152 So. 6 (Fla. 1933); State v. City of Daytona Beach, 158 So. 300, 304 (Fla. 1934); Williams v. Town of Dunnellon, 169 So. 631, 636-637 (Fla. 1936); Spearman Brewing Co. v. City of Pensacola, 187 So. 365, 366-367 (Fla. 1939); Clover Leaf, Inc. v. City of Jacksonville, 199 So. 923, 925 (Fla. 1940), which provide that municipalities cannot pledge assets or property to secure any financial obligation or anywise, directly or indirectly, obligate the municipality's credit or coerce the use of its taxing power. Although the aforecited cases were decided under s. 6, Art. IX, State Const. 1885, the precursor of s. 12, Art. VII, State Const., they apply with equal force to the 1968 Constitution. *See* State v. Inter-American Center Authority, 281 So.2d 201 (Fla. 1973), in which cases construing the 1885 constitutional provision were held, in effect, to be applicable when determining the new constitutional requirements; AGO's 073-164 and 073-269; *cf.* AGO 077-14. In Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304, 310 (Fla. 1971), the court stated:

> Commencing with the case of Boykin v. Town of River Junction, 121 Fla. 402, 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.

Continuing at page 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.
>
> 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. Consistency is desirable and absent specific constitutional authority a mortgage securing revenue bonds of a public body should not be approved without an election.

See also AGO 073-164 in which this office concluded that the deferred payment plan created a conditional indebtedness on the part of the county (or municipality) in the nature of a legal liability for a capital venture predicated upon the general credit of the local government; the plan placed the county (or municipality) in a position of being coerced into levying a tax in order to prevent the loss of the property by foreclosure. Such a plan with the accompanying right of foreclosure is not permissible under s. 12, Art. VII, State Const., without an approving election. This principle is not qualified or limited in use to liens or mortgages placed upon real estate but applies to any assets, property, or property rights of a municipality. *See* AGO 074-269 concluding that a fire district could not, through the use of any device, obligate the ad valorem taxing power for longer than 12 months to finance a capital project, such as the purchase of firefighting equipment, without the approval of the district's electorate. *See also* s. 166.101(4), F. S., defining revenue bonds as obligations payable from revenues derived from sources other than ad valorem taxes on real or tangible personal property and which do not pledge the *property, credit,* or general tax revenue of the municipality; *cf.* Florida Industrial Commission v. Growers Equipment Co., 12 So.2d 889 (Fla. 1943) (when word is a wide and comprehensive term, statutes using word without qualification must be given an equally comprehensive meaning).

You have stated that the money borrowed to make the purchase will be repaid from revenue sharing funds from the state. 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 for such repayment. Part II of Ch. 218, F. S., the Florida Revenue Sharing Act of 1972, authorizes those units of local government as defined in s. 218.21(1), F. S., to participate in revenue sharing. *See* s. 218.21(1), F. S., defining "unit of local government" as a county or municipal government; *see also* s. 218.21(3), F. S. *Cf.* AGO's

073-246 and 074-367. The revenue sharing trust for municipalities is created and established by s. 218.215(2), F. S. To be eligible to participate in revenue sharing *beyond the minimum entitlement* defined in s. 218.21(7), F. S., a unit of local government must comply with the provisions of s. 218.23. Section 218.23(2) also provides the formula for determining entitlement for eligible municipalities, including the guaranteed entitlement, *see* s. 218.23(2)(b), F. S. Section 218.25 restricts the use of moneys received *in excess of the guaranteed entitlement* defined by s. 218.21(6)(b) and designated in s. 219.21(6)(b) by stating in pertinent 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 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 revenue shared pursuant to this part.* (Emphasis supplied.)

Thus, it appears that a portion of the funds received pursuant to the Revenue Sharing Act—the guaranteed entitlement—could be used for the purpose contemplated if available and not previously encumbered. *Cf.* AGO 077-14, concluding in part that a county could use funds received pursuant to the Revenue Sharing Act, subject to the restrictions of s. 218.25, F. S., to secure a loan to purchase real property for authorized county purposes.

You state in your inquiry that the town proposes to finance the purchase of the fire truck through a bank loan over a period of about 10 years and, in addition to pledging certain revenue sharing funds to secure the loan, the town plans to additionally secure the loan by giving the bank a lien on the fire truck to be purchased. Based upon the foregoing constitutional provisions and judicial decisions, I must conclude that such a lien or mortgage on the property to be purchased (or any other assets or property of the town) as further or additional security for the loan or obligation of the town would require the approval of the electors of the town.

078-111—August 28, 1978

MUNICIPALITIES

ENACTMENT OF ORDINANCES—ENTITLEMENT TO FINES AND FORFEITURES AND CIVIL PENALTIES

To: Gerald Holley, Washington County Attorney, and J. L. Miner, Clerk, Circuit Court, Chipley

Prepared by: Patricia S. Turner, Assistant Attorney General

QUESTIONS:

> **1. May a municipality enact an ordinance which creates offenses against the municipality for the same acts that constitute offenses against state criminal statutes, or by ordinance adopt state criminal or penal laws by specific or general reference thereto, and receive the fines and forfeitures and civil penalties generated from violations of such ordinances?**
>
> **2. Is a municipality which created a city court immediately prior to the abolishment of such courts entitled to the fines and forfeitures and civil penalties generated from violations of its ordinances occurring within the municipality?**

SUMMARY:

> **A municipality may enact an ordinance which creates offenses against the municipality for the same acts that constitute offenses against state criminal statutes, or by ordinance adopt state criminal or penal laws by**

specific or general reference thereto, and receive the fines and forfeitures and civil penalties generated from violations of such ordinance. A municipality which created a municipal court immediately prior to the constitutional abolishment of such courts is entitled to the fines and forfeitures and civil penalties generated or resulting from violations of its ordinances or violations or infractions of Chs. 316 and 318, F. S., occurring within the territorial jurisdiction of the municipality. In light of Waller v. Florida, 397 U.S. 387 (1970), and the rule of law governing double jeopardy, due care should be taken to ensure that no person is prosecuted for a violation of a municipal ordinance in those cases where the same acts or facts for which the accused person is to be charged are at the same time violations of the state misdemeanor or felony statutes.

AS TO QUESTION 1:

The first question is answered in the affirmative.

Chapter 166, F. S., serves as the implementing statutory provision for municipal home rule as set forth in s. 2, Art. VIII of the State Constitution. Specifically, s. 166.021, F. S., describes the scope of powers afforded a municipality, as well as the limitations on those powers. As stated in s. 166.021(1):

> . . . municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, *except when expressly prohibited by law.* (Emphasis supplied.)

See also City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764, 766 (Fla. 1974), stating that Ch. 166, F. S., is a broad grant of power to municipalities in recognition and implementation of s. 2(b), Art. VIII, State Const.; and s. 166.021(1), F. S., pursuant to which municipalities may exercise any power for municipal purposes except when expressly prohibited by law; and s. 166.021(3), F. S., wherein the Legislature expressly recognizes that pursuant to the aforesaid constitutional grant of power, the governing body of a municipality has the power to enact legislation on any subject matter upon which the Legislature may act.

The only other limitations placed on the powers of municipalities are set forth in s. 166.021(3). A municipality may not act when: The subjects of annexation, merger, and exercise of extraterritorial power are involved, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution; the subject is expressly prohibited by the Constitution; the subject is expressly preempted to state or county government by the Constitution or by general law; or the subject is expressly preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), (3), and 6(e), Art. VIII of the State Constitution.

The grant of power to municipalities under these constitutional and statutory provisions for municipal home rule is broad; and the intent of the Legislature to give such broad grant of power is articulated in s. 166.021(4), which provides: "The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the Constitution."

As noted in State v. City of Sunrise, 354 So.2d 1206, 1209 (Fla. 1978), municipalities are no longer dependent upon the Legislature for legislative authorization; and statutes are relevant only to determine *limitations* on the authority granted by s. 2, Art. VIII, State Const. Section 166.021 was unanimously held to be constitutionally valid in City of Miami Beach v. Forte Towers, Inc., *supra.*

The power of a municipality to enact ordinances adopting or incorporating by reference the criminal or penal statutes of the state was recently addressed by the Supreme Court in Jaramillo v. City of Homestead, 322 So.2d 496 (Fla. 1975). The court held that a municipality may enact an ordinance which creates an offense against municipal law for the same act that constitutes an offense against state law. Also, a municipality by ordinance may adopt state misdemeanor statutes by specific reference or by general reference contained in the enacting ordinance. Such an adoption by general reference of any act which is or shall be proscribed by the state criminal or penal laws permits subsequent amendments, revisions, and repeals of laws by the State Legislature to apply

to such municipal ordinances. *See also* AGO 074-240. Based upon the foregoing constitutional and statutory provisions and case authority, a municipality is empowered to enact an ordinance which creates offenses against the municipality for the same acts that constitute offenses against state criminal statutes, or by ordinance adopt state criminal or penal laws by specific or general reference thereto.

As to the receipt of fine and forfeiture moneys and civil penalties collected from the violation of such municipal ordinances, s. 20(c)(8), Art. V, State Const., and ss. 34.191, 142.03, 316.660, and 318.21, F. S., provide for the disposition of such moneys so collected. Section 20(c)(8), Art. V, State Const., states in pertinent part:

> All fines and forfeitures arising from offenses tried in the county court shall be collected, and accounted for by clerk of the court, and deposited in a special trust account. *All fines and forfeitures received from violations of* ordinances or misdemeanors committed within a county or *municipal ordinances committed within a municipality* within the territorial jurisdiction of the county court *shall be paid monthly to the* county or *municipality* respectively . . . . (Emphasis supplied.)

Section 142.03, F. S., provides in relevant part:

> *Except as to* fines, forfeitures, and civil penalties collected in *cases involving violations of municipal ordinances, violations of chapter 316 committed within a municipality, or infractions under the provisions of chapter 318 committed within a municipality, in which cases such fines, forfeitures, and civil penalties shall be fully paid monthly to the appropriate municipality as provided in ss. 34.191, 316.660, and 318.21, 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, and the proceeds of all forfeited bail bonds or recognizances in all other cases, shall be paid into the fine and forfeiture fund of the county in which the indictment was found or the prosecution commenced . . . . (Emphasis supplied.)

Section 34.191(1), F. S., states:

> All fines and forfeitures arising from offenses tried in the county court shall be collected and accounted for by clerk of the court and deposited in a special trust account. *All fines and forfeitures received from violations of* ordinances or misdemeanors committed within a county, or *municipal ordinances committed within a municipality* within the territorial jurisdiction of the county court, *shall be paid monthly to the* county or *municipality* respectively except as provided in s. 23.103. (Emphasis supplied.)

Additionally, s. 316.660, F. S. (former s. 316.0261, F. S.), providing for the disposition of revenue collected from violations involving motor vehicles, states in pertinent part:

> . . . all fines and forfeitures received by any county court *from violations of any of the provisions of this chapter, or from violations of any ordinances adopting matter covered by this chapter, committed within a municipality shall be paid monthly to that municipality.* It is the intent of the legislature that such fines and forfeitures shall be paid monthly to that municipality *in addition to any other fines and forfeitures received by a county court that are required to be paid to that municipality as otherwise provided by law.* . . . (Emphasis supplied.)

AS TO QUESTION 2:

Question 2 is answered in the affirmative.

Based upon the above-quoted constitutional and statutory provisions, it appears irrelevant whether a municipality had a city court prior to the constitutional abolishment of such courts (*see* s. 20(d)(4), Art. V, State Const.) in order to receive fines and forfeitures generated or resulting from violations of municipal ordinances committed within the municipality. Neither the Constitution nor the applicable state statutes draws a distinction between a municipality with an established court and a municipality without such a court prior to the constitutional abolition of the municipal court system.

Therefore, a municipality which created a municipal court immediately prior to the abolishment of municipal courts is entitled to the fines and forfeitures generated or resulting from violations of municipal ordinances or violations or infractions of Chs. 316 and 318, F. S., occurring within the territorial jurisdiction of the municipality. As discussed in question 1, the municipality would be entitled to *all* fines and forfeitures and civil penalties collected pursuant to ss. 34.191(1), 142.03, 316.660, and 318.21, F. S. A municipality, however, would not be entitled to receive any such revenue in circumstances where fines and forfeitures are imposed by a county court for violations of *state* misdemeanor statutes which occur within the municipality's territorial jurisdiction. Attorney General Opinion 074-137.

It is necessary to note that a caveat concerning double jeopardy exists. *See* AGO 074-240. The United States Supreme Court, in Waller v. Florida, 397 U.S. 387 (1970), held that it was impermissible for a person tried for violation of a municipal ordinance to be subsequently prosecuted for the violation of a state criminal statute growing out of the same set of facts. *Waller* concerned a person's first being tried in a municipal court for a violation of a *municipal ordinance* and later being tried for a *state violation* in county or circuit court. Should an individual now be tried in the state courts for violation of a *municipal ordinance*, and *not for a state criminal statute*, Waller, *supra*, would apply and operate to bar the prosecution of the state violation at a subsequent trial in the state courts. Therefore, due care should be taken to ensure that no person is prosecuted for a violation of a municipal ordinance in those cases where the same acts or facts for which the accused person is to be charged are at the same time violations of the more serious state misdemeanor or felony statutes. *Cf.* AGO 073-161 and City of Fort Lauderdale v. Byrd, 242 So.2d 494, 496 (4 D.C.A. Fla., 1970), n. 2., wherein the wisdom of the practice of adopting by ordinance as offenses against the municipality misdemeanors proscribed by state law was seriously questioned in the light of Waller v. Florida, *supra*.

078-112—September 1, 1978

STATE ATTORNEYS

RESPONSIBILITY OF STATE TO PROVIDE WITH OFFICE FURNITURE AND TYPEWRITERS

To: Jeff D. Gautier, State Attorney, Key West

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Is the county or the State of Florida obligated to pay for office furniture and typewriters used by the office of the state attorney in office space provided by the county, in view of the language in the Appropriations Act which provides that custodial services and utilities as provided in fiscal year 1973-1974 may be continued (by the county)?

SUMMARY:

That portion of the proviso contained in the 1978 General Appropriations Act, Ch. 78-401, Laws of Florida (assuming the validity of said proviso), providing that office space and related expenses for *custodial services* and *utilities* shall continue to be provided by the counties to state attorneys, does not include within its terms such items of operational expense of the state attorneys as office equipment, office furniture, and typewriters. The state—not the county—is responsible for providing and paying for office furniture and typewriters for the operations and offices of the state attorneys in accordance with legislative appropriations and legislatively approved budgets, subject to the proviso's further requirement (also presumptively valid) that "any operating capital outlay items now provided by county to the state attorneys shall continue to be provided."

CONTINUED

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On page 104 of Ch. 78-401, Laws of Florida (SB 1100, the 1978 General Appropriations Act), it is provided:

> Office space *and related expenses for* custodial services and utilities shall continue to be provided by the counties as prescribed by section 27.34(2), Florida Statutes, any operating capital outlay items now provided by county to the state attorneys shall continue to be provided. Notwithstanding section 27.34(2), Florida Statutes, only centralized county services as provided in FY 73-74 to all units of county government for which costs of services are not prorated may be continued. (Emphasis supplied.)

The above proviso is identical to that included in the 1977 General Appropriations Act in reference to the offices of the various state attorneys (*see* p. 1988, Ch. 77-465, Laws of Florida), regarding which your question was originally submitted.

For the purposes of this opinion, the proviso in question must and will be presumed to be valid and constitutional. (Indeed, any legislative enactment is entitled to a presumption of validity unless ruled invalid by a court of competent jurisdiction.) However, I feel obligated to mention that I have observed in recent years an increasing use of the General Appropriations Act through provisos such as the one in question to enact facially apparent substantive law. The following prohibition is set forth in s. 12, Art. III, State Const.: "Laws making appropriations for salaries of public officers and other current expenses of the state *shall contain provisions on no other subject.*" (Emphasis supplied.) This prohibition has been construed as meaning that "[a]ctual modifications of existing statutes or new provisions which are plainly substantive in nature and upon a subject other than appropriations are in violation of Fla. Const., Art. III, s. 12." Department of Administration v. Horne, 269 So.2d 659, 662 (Fla. 1972). And, in Advisory Opinion to the Governor, 239 So.2d 1, 9 (Fla. 1970), the justices offered the following standard by which to judge whether an appropriations bill proviso violates s. 12, Art. III:

> The legislature does not have the power nor the right under the Constitution of this State to make law in any appropriations bill on other subjects, *unless the other subjects are so relevant to, interwoven with, and interdependent upon, the appropriations so as to jointly constitute a complete legislative expression on the subject.* (Emphasis supplied.)

In accord: Lee v. Dowda, 19 So.2d 570 (Fla. 1944); Dickinson v. Stone, 251 So.2d 268 (Fla. 1971); and Thomas v. Askew, 270 So.2d 707 (Fla. 1973). *See also* AGO 076-21. Nevertheless, whether the proviso here in question is sufficiently "relevant to, interwoven with, and interdependent upon" the appropriations made in Ch. 78-401 to the various state attorneys is a question only the courts can decide in appropriate adversary legal proceedings brought for that purpose. Pending any such judicial determination, I must accord the proviso the same presumption of validity to which any legislative enactment is entitled. State *ex rel.* Shevin v. Metz Construction Co., Inc., 285 So.2d 598 (Fla. 1973); Village of North Palm Beach v. Mason, 167 So.2d 721 (Fla. 1964); and State v. Strickland, 166 So. 313 (Fla. 1936).

The proviso in question specifies and describes the "custodial services and utilities" as being "related expenses" to the office space provided by the counties. I am unaware of any opinion of this office or of the courts holding office furniture or typewriters to constitute "custodial services and utilities" as related to office space provided or leased by the counties but operated by the several state attorneys. Neither do I find any definition of the term "custodial services and utilities" which could reasonably or arguably be said to include office furniture or typewriters as a related expense to such office spaces. In addition to the appropriations act proviso in question, there is nothing in s. 27.34, F. S., requiring a county to provide office furniture or typewriters required in the internal operation of the offices of the state attorneys. Section 27.34(2), F. S., provides:

> The state attorneys shall be provided by the counties within their judicial circuits with *such office space, utilities,* telephone service, *custodial services,* library services, transportation services, and communications services as may be necessary for *the proper and efficient functioning of these offices.* The office space to be provided by the counties shall not be less than the standards for

space allotment promulgated by the Department of General Services nor shall these services and office space be less than were provided in fiscal year 1972-1973. (Emphasis supplied.)

It is a settled rule of statutory construction that, where a statute expressly requires or includes within its operation certain things, it is implied that no other such things are required by or included within the operation of that statute. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952). *Cf.* Shuman v. State, 358 So.2d 1333 (Fla. 1978), dealing with s. 27.54(2), F. S., providing that "[n]o county or municipality shall appropriate or contribute funds to the operation of the offices of the various public defenders" (which is essentially the same as the provisions of s. 27.34(1), F. S., relating to state attorneys) and holding that certain costs of public defender appeals for indigents must be paid by the counties since such costs were not related to the internal operation of the public defender's office, which operation expenses of that office are to be provided for by legislative appropriations.

Significant also is s. 27.33(1), F. S., which requires each state attorney to submit an annual report in itemized form detailing the amounts needed for operational expenses for the ensuing fiscal year. *See also* s. 27.33(4), F. S., providing that all provisions of Ch. 216, F. S., relating to the budgets and expense of state officers shall be applicable to state attorneys and their budgets and expenses. The state attorney's report referred to in s. 27.33(1) is simply a stage of or step in the budgeting and appropriations process governing state officers regulated by Ch. 216, F. S. One of the budget or operational expense items which must be included in this report to the Department of Administration is "[o]ffice equipment." Section 27.33(1)(f), F. S. In addition, s. 27.33(3), F. S., provides that the annual budget report required to be submitted by each state attorney to the Department of Administration shall *not* include "any amount for any expense which is required by statute to be paid from county funds." The significance of s. 27.33(3) is that it carries the necessary implication that any budget or operating expense items included in s. 27.33 (office equipment such as office furnishings and typewriters) is *not* to be paid from county funds.

It therefore appears that the Legislature intended that office equipment (including office furniture and typewriters) for the operations and offices of the state attorneys be paid for by the *state* from state funds (and not by a county or from county funds) and that the amounts needed for such operational expenses be included by each state attorney in the annual budget report submitted to the Department of Administration pursuant to s. 27.33(1), F. S., along with the other specified state budget or operational expense items, such as salaries and travel expenses, stationery, etc. And, as stated above, I find nothing to indicate that office furniture or typewriters constitute either "custodial services" or "utilities" or "related expenses" to office space provided by the county. As a result, I am of the opinion that office furniture and typewriters should be deemed to be included in the term "office equipment" as used in s. 27.33(1), F. S., and to be, accordingly, the responsibility of the state, not the county, and are to be paid from state funds in accordance with legislative appropriations and legislatively approved budgets, subject to the presumptively valid proviso language in Ch. 78-401, *supra*, requiring that "any operating capital outlay items now provided by county to the state attorneys shall continue to be provided."

078-113—September 7, 1978

SPECIAL TAXING DISTRICTS

WITHIN PURVIEW OF GENERAL LAW WAIVING SOVEREIGN IMMUNITY IN TORT ACTIONS

To: Ralph O. Johnson, Attorney for East Beach Water Control District, Pahokee

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the East Beach Water Control District a "state agency or subdivision" for the purposes of and within the scope of s. 768.28, F. S.?

SUMMARY:

The East Beach Water Control District is within the definitional purview of s. 768.28(2), F. S., as amended. Accordingly, in the absence of judicial determination to the contrary, the monetary limitations on tort liability set forth in s. 768.28(5), F. S., as amended, are applicable to such district.

Pursuant to s. 768.28, F. S., the Legislature has waived immunity with respect to tort liability for the state "and for its agencies or subdivisions." The waiver of immunity is limited to $50,000 on any claim or judgment by one person or $100,000 for all claims arising out of the same incident or occurrence. Section 768.28(5), F. S.

Section 768.28(2), F. S., defines the phrase "state agencies or subdivisions" to include:

> . . . the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; *and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.* (Emphasis supplied.)

See also s. 1.01(9), F. S., which generally defines the term "political subdivision" to 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.)

In AGO 075-114, this office concluded that the Southeastern Palm Beach County Hospital District, established by Ch. 29387, 1953, Laws of Florida, as a special taxing district with all the powers of a body corporate, including the power to establish, construct, lease, operate, and maintain hospitals within the district's boundaries (*see* ss. 3 and 5 of Ch. 29387), was included within the definitional purview of s. 768.28(2), F. S. Attorney General Opinion 078-42 recently reaffirmed this conclusion with respect to the above hospital district and further held that, pending judicial determination to the contrary, the monetary limitations on liability contained in s. 768.28(5), F. S., as amended by Ch. 77-86, Laws of Florida were applicable to the district. *See also* AGO 078-106, in which a district mental health board established as a nonprofit corporation under part IV of Ch. 394, F. S., to, *inter alia*, provide coordinated mental health services within a service district of the Department of Health and Rehabilitative Services was found to be a "state agency or subdivision" for the purposes of and within the scope of s. 768.28, F. S.; and AGO 078-33, holding that a municipal housing authority created under Ch. 421, F. S., as a "public body corporate and politic" to perform "the public and essential governmental functions" set forth therein was within the definitional purview of s. 768.28, F. S., as amended, and, pending judicial determination to the contrary, was subject to the monetary limitations contained in s. 768.28(5), F. S., as amended.

With respect to the instant inquiry, an examination of the enabling legislation creating the East Beach Water Control District reveals that said district is expressly deemed to be "a public corporation of this state." Section 2 of Ch. 75-469, Laws of Florida. *See* Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage Dist., 82 So. 346 (Fla. 1919). This district is empowered to exercise enumerated powers for general drainage and water control purposes within the boundaries of the district including, *inter alia*, the power to levy taxes, acquire property, borrow money, and construct and operate canals, ditches, drains, levees, and other works. Section 3, Ch. 75-469, Laws of Florida. Additionally, the district is to possess all of the powers provided in Ch. 298, F. S.

Accordingly, I am of the view that the East Beach Water Control District is within the definitional purview of s. 768.28(2), F. S., as amended. Therefore, in the absence of judicial determination to the contrary, the provisions of that statute, including the monetary limitations on tort liability set forth in s. 768.28(5), F. S., as amended, are applicable to such district. It might be noted that, prior to the enactment of s. 768.28, F. S., it was held that drainage districts established under Florida law were immune from tort liability. *See* Seaboard Air Line R. Co. v. Sarasota-Fruitville Drainage Dist., 255 F.2d 622 (5th Cir.), *cert. denied*, 358 U.S. 836 (1958). *Cf.* Palm Beach County v. South Florida Conservancy Dist., 170 So. 630 (Fla. 1936). Therefore, it would appear that

statutory monetary limitations upon the state's waiver of sovereign immunity with respect to the tort liability of such districts could lawfully be established by the Legislature. *See* Fisher v. City of Miami, 172 So.2d 455 (Fla. 1965).

078-114—September 12, 1978

COMMUNITY COLLEGES

BOARD OF TRUSTEES NOT AUTHORIZED TO PROVIDE PRESIDENT WITH HOUSING ALLOWANCE AND AUTOMOBILE

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the board of trustees of a community college district authorized to contract with the president of the community college to provide him with a $200 per month housing allowance and an automobile for personal and business use in addition to the regular salary established by the board?

SUMMARY:

The board of trustees of a community college district is not authorized by law to enter into a contract with the president of the community college to provide a $200 per month cash housing allowance and an automobile, together with all operating costs thereof, for personal and business use of the president in addition to the regular salary established by the board.

Your letter advises that following a postaudit of Brevard Community College you determined that the president of the college was compensated pursuant to a contract under the terms of which the district board of trustees of the college agreed

> . . . to pay the Administrator [i.e., the President] for services rendered not less than $34,584 annually in twenty-six (26) installments and a housing allowance of $200 per month shall also be provided for the same period of time and the President shall continue to be provided with an automobile for his personal and business use together with all operating costs.

It is well established that community college district boards of trustees have no inherent powers but possess only such authority and those duties prescribed by statute or authorized rule of the State Board of Education implementing statutory provisions. *See* AGO's 078-68 (community college board of trustees not authorized by statute or state board of education rule to contract with agency of foreign government to disburse funds in lump sum to such agency from which it is to reimburse public officers and employees for travel expenses at a rate or in a manner different from that provided by law); 078-67 (board of trustees not authorized by law or State Board of Education rule to enter into contracts for the purchase of copyright licenses or to enter into contracts with agencies of a foreign government); 078-56 (part II of Ch. 230, F. S., does not expressly or by necessary implication authorize a community college district board of trustees to employ law enforcement officers or confer authority upon it to vest officers employed by the district with authority to bear arms and make arrests); and 078-12 (no statute or valid rule of the State Board of Education empowers the board of trustees to pay the costs of employees' physical examinations; hence, such payments should not be made). *Cf.* Harvey v. Board of Public Instruction, 133 So. 868 (Fla. 1931); Buck v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); AGO's 078-94, 076-61, and 075-148. Furthermore, if there is any doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested. *See* 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

I of Ch. 620, as they must be in determining the legislative intent and to give effect to the entire statute, I am of the view that the term means the amount of cash or other property contributed to, or invested in, the limited partnership by the limited partners, or, in other words, the limited partners' "contributions" as stated in the statutorily prescribed original or amended certificate filed and recorded with the Department of State.

The paramount goal in construing a statute of this nature is to determine the legislative intent, if at all possible. Armstrong v. City of Edgewater, 157 So.2d 422 (Fla. 1963); Florida State Racing Comm. v. McLaughlin, 102 So.2d 574 (Fla. 1958). State Department of Public Welfare v. Bland, 66 So.2d 59 (Fla. 1953); Ervin v. Peninsular Telephone Co., 53 So.2d 647 (Fla. 1951); Ginsberg v. Ginsberg (*In re* Ginsberg's Estate), 50 So.2d 539 (Fla. 1951). This intent is to be gleaned from the entire enactment and its purpose, and the whole statutory scheme given effect. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So.2d 522 (Fla. 1973); Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969), Peninsula Land Co. v. Howard, 6 So.2d 384 (Fla. 1942); Forehand v. Manly, 2 So.2d 864 (Fla. 1941).

The only instrument required to be filed with the Department of State from which the filing fees specified in s. 620.02(2)(b), F. S., could be calculated is the limited partnership's certificate filed for record with the department; *see* s. 620.02(1)(a) and (b), F. S. The requirements of this certificate are found in s. 620.02(1)(a)1. through 14., F. S. The amount of capital referred to in the certificate to be invested by the designated contributors or limited partners is their "contribution(s)" to the limited partnership. *See* s. 620.02(1)(a)6., 7., 8., 12., and 14., F. S. Section 620.02(1)(a)6., for example, requires that the certificate shall include "[t]he amount of cash and a description of and the agreed value of the other property contributed by each limited partner."

Section 620.17(4), F. S., states: "When a *contributor* has rightfully received *the return* in whole or in part of *the capital of his contribution*, he is nevertheless liable to the partnership for any sum, not in excess of *such return*" (Emphasis supplied.) necessary to discharge the limited partnership's liabilities to all creditors whose claims arose *before such return. See also* s. 620.23, F. S., which refers to the limited partners' claim upon dissolution as the "*capital* of their contributions" (Emphasis supplied.), and to their share in the partnership assets in respect to their "claims for *capital.*" (Emphasis supplied.) This language refers to the limited partners' "contributions" as capital which they have contributed to or invested in the limited partnership and upon which they anticipate a return. Section 620.04, F. S., characterizes these contributions as "cash or other property, but not services."

Limited partnerships are statutory creations which did not exist at common law. These statutes extend the incentive of limited liability to investors who put up money or other property but do not take part in the management or operation of the business. In Vulcan Furniture Manufacturing Corp. v. Vaughn, 168 So.2d 760, at 764 (1 D.C.A. Fla., 1964), the First District Court of Appeal undertook "a review of the statutes of the various states relating to limited partnerships" and asserted that

> their general purpose is not to assist creditors, but to enable persons to *invest their money in partnerships* and share in the profits *without being liable for more than the amount of money they have contributed.* The reason for this is *to encourage investing by parties having capital,* but who will not participate in the detailed operation of the partnership business, nor induce creditors to extend credit to the partnership under the mistaken belief that the limited partner is a general partner responsible for payment of the partnership obligations. It has been stated that the uniform limited partnership act proceeds on the assumption that no public policy requires a person who *contributes to the capital* of a business, . . . to become bound for the obligations of the business . . . . (Emphasis supplied.)

Compare s. 620.11, F. S., which refers to a "person who has *contributed to the capital of a business* conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership." (Emphasis supplied.)

Section 620.02(1), F. S., requires that persons desiring to form a limited partnership file a sworn certificate with the Department of State. Upon the filing of this certificate and payment of the scheduled fee prescribed by s. 620.02(2), F. S., the subject matter of your inquiry, the Department of State issues a certificate of authority to do business in the State of Florida. *See* s. 620.02(3), F. S. This certificate of authority is renewed

078-149—December 22, 1978

LIMITED PARTNERSHIPS

"INVESTED CAPITAL" DEFINED—DIVISION OF CORPORATIONS NOT AUTHORIZED TO REFUND OVERPAYMENTS MADE UNDER LIMITED PARTNERSHIP LAW

To: Jesse J. McCrary, Jr., Secretary of State, Tallahassee

Prepared by: Craig B. Willis, Assistant Attorney General

QUESTIONS:

1. What is the legislatively intended meaning of the term "invested capital" as used in s. 620.02(2)(b), F. S.?
2. Under what circumstances, if any, is the Division of Corporations of the Department of State authorized to refund any filing fee payments or overpayments made pursuant to part I of Ch. 620, F. S.?

SUMMARY:

Unless judicially determined to the contrary, the term "invested capital," as employed in the context of and for the purposes of the State Uniform Limited Partnership Law, part I of Ch. 620, F. S., means the total capital contributions to or investments in a limited partnership made by the limited partners as determined from the filed and recorded certificate or amended certificate required by the Limited Partnership Law.
The Department of State is not authorized to make refunds of filing fee payments or overpayments made pursuant to the Limited Partnership Law even though erroneously made in excess of the amount required by that law. Any claim for a refund for filing fees erroneously paid in excess of that required must be made with the Comptroller in accordance with s. 215.26, F. S.

AS TO QUESTION 1:

Section 620.02(2)(b), F. S., requires that limited partnerships pay initial and annual filing fees as prescribed therein:

> For receiving, filing, and indexing certificates, statements, affidavits, decrees, or any other papers provided for by this chapter, a filing fee in each case to be paid at the time of the first filing and, on January 1 annually thereafter, an amount based upon the amount of *invested capital* according to the following schedule: Four dollars per $1,000 of *invested capital*; provided, however, that no filing fee shall be less than $30 nor more than $1,000; and provided, further, that the annual filing fee payable on January 1 next following the date of the original filing the amount of the filing fee shall be prorated for that portion of the year the limited partnership has existed between the original filing date and the next ensuing January 1. (Emphasis supplied.)

You question the meaning of the phrase "invested capital," which is central to the determination of the correct scheduled filing fee required by s. 620.02(2)(b), F. S. As you stated in your letter, the term "invested capital" is not found in the original Uniform Limited Partnership Act from which Florida's act was modeled; it is the Florida Legislature's modification to provide for the scheduled initial and annual filing fees. This term is not defined anywhere in part I of Ch. 620, F. S., for the purposes of the limited partnership law. Your inquiry suggests that the term "invested capital" standing alone and as used in the particular context of s. 620.02(2)(b), F. S., could be taken to refer either to the amount of cash or other property originally invested by the limited partners or to the net value of the capital of the limited partnership, including the total net capital accounts or contributions of the general and limited partners. However, when the filing fee requirements of s. 620.02(2)(b) are analyzed in the context of all the provisions of part

See s. 1, Ch. 63-249, Laws of Florida, enacting s. 175.301, F. S., and the title thereto providing for "[d]eposit of funds and securities *with municipal treasurer*." (Emphasis supplied.) From the title or heading of s. 175.301 and the language contained in the body thereof, it appears that the moneys and securities of the pension trust funds are to be deposited with the city treasurer. *See* Berger v. Jackson, 23 So.2d 265, 267 (Fla. 1945) (heading of section when provided by the Legislature is not to be classed with words or title used by compilers of statutes as sort of index to what section is about or has reference to, but it is the Legislature speaking and must be given due weight and effect); AGO 057-314; 82 C.J.S. *Statutes* s. 350. Section 185.30, F. S., contains substantially the same language as s. 175.301 although the title thereto which was not supplied by the Legislature differs from that contained in s. 175.301. Chapters 175 and 185, F. S., however, are silent as to the municipal depositories with which such trust funds are required to be deposited by the municipality. However, as I am of the opinion that these pension trust funds are municipal and public funds, these trust funds are to be deposited by the municipality or its treasurer, if any, as are other municipal funds or moneys although kept in a separate fund. As previously stated, where the applicable statutes establishing a special district, municipality, or public corporation are silent with respect to the question of deposits of the money under its jurisdiction and the depositories of and for such funds, then the provisions of s. 659.24, F. S., are applicable. Accordingly, it is my opinion that the provisions of s. 659.24 are applicable to and govern the deposits of all municipal funds, including the pension trust funds as municipal funds or "public moneys," in bank depositories as prescribed by the provisions of that section and any applicable regulations of the Department of Banking and Finance.

It should be noted, however, that the terms "investment" and "deposit" are not synonymous and interchangeable. The word "investment" denotes "the placing of capital or laying out of money in a way intended to secure income or profit from its employment" while the word "deposit" denotes a "contractual relation between one delivering money or thing to bank and bank receiving it with implied agreement to pay it out on depositor's order or return it to him on demand." Attorney General Opinions 075-57 and 064-111; *cf.* AGO's 074-169 and 073-244. The investment and reinvestment of the assets of the Municipal Firemen's Pension Trust Fund and the Municipal Police Officer's Retirement Trust Fund are powers committed to the governing boards of trustees of the respective trust funds. *See* ss. 175.071 and 185.06, F. S.

While the state cannot by statute compel a bank to accept public funds tendered for deposit, it can prescribe the manner in which such deposits shall be accepted and the obligations which shall arise on the part of the bank if it accepts such funds. 26A C.J.S. *Depositories* s. 7(c). Section 659.24(1), F. S., requires in pertinent part that banks designated as depositories of public moneys give satisfactory security by the deposit of bonds of the United States, the state or political subdivisions (including municipalities, *see* s. 1.01[9], F. S.), or other satisfactory security for the safekeeping and prompt payment of the public moneys deposited with them. Any notes, bonds, or securities other than shares of stock in which a state board is authorized by law or valid regulation to invest any of its funds will be accepted as satisfactory security for the *deposit* of funds. Section 659.24(3), F. S.

Moreover, s. 659.24(2), F. S., provides that security for such deposits of "public moneys" is not required to the extent that such deposits are insured under the provisions of the Federal Deposit Insurance Act, as amended. *See* 12 U.S.C. s. 1821(2)(A)(ii), which provides that the deposit by "an officer, employee or agent of any State of the United States, or of any county, municipality, or political subdivision thereof having official custody of public funds and lawfully investing or depositing the same in time and savings deposits in an insured bank in such State" shall be insured in an amount not to exceed $100,000 per account. *See also* s. 659.21, F. S. Thus, if the funds deposited are less than the amount insured by the Federal Deposit Insurance Corporation, additional security is not required; if, however, the funds deposited exceed the amount insured, then at least the excess amount over the federal insurance coverage of the deposit must be satisfactorily secured.

matter whether the money is derived from ad valorem taxes or gifts or otherwise, it is public money and cannot be appropriated for a private purpose; and Advisory Opinion to the Governor, 201 So.2d 226, 227 (Fla. 1967).

Chapters 175 and 185, F. S., provide for the establishment of pension trust funds for firemen and policemen, respectively, in each municipality of the state. *See* ss. 175.041 and 185.03, F. S. The funds consist in part of moneys derived from municipal excise or license taxes levied upon fire insurance companies (Firemen's Pension Trust Fund), casualty insurers (Policemen's Pension Trust Fund), and other contributions made by municipalities and their employees. *See generally* ss. 175.091 and 185.08, F. S., regarding the creation and maintenance of these funds. These tax revenues are collected by the Insurance Commissioner and Treasurer and are payable to the municipality as appropriated annually. *See* ss. 175.121 and 185.10, F. S. Any funds received by the municipality pursuant to Chs. 175 and 185 are to be paid immediately into the municipality's pension trust funds, *see* ss. 175.131 and 185.11, F. S.

The general administration and responsibility for the proper operation of these pension trust funds is vested in the boards of trustees. *See generally* ss. 175.071 and 185.06, F. S. *See also* ss. 175.061 and 185.05, F. S., which statutorily provide for the composition of these boards. This office has previously concluded that the boards of trustees for these pension trust funds, created pursuant to Chs. 175 and 185, F. S., are municipal boards or agencies of the municipalities and are not autonomous entities. *See* AGO 074-109. This conclusion was based in part upon the consideration that the creation of these pension trust funds is generally considered to be part of the compensation for services to the municipality. *See generally*, 62 C.J.S. *Municipal Corporations* s. 614(a); Voorhees v. City of Miami, 199 So. 313 (Fla. 1940); McQuillin *Municipal Corporations* s. 12.142. *See also* AGO 074-217 in which I concluded that the apparent legislative grant of authority in ss. 175.291 and 185.29, F. S., by which the board of trustees may determine which actions may be brought by the city attorney on their behalf does not alter the board's status as a municipal board or agency. Moreover, upon termination of these pension trust funds, the remaining moneys are to be returned to the municipality "less return of state's contributions to the state, provided that, if the excess is less than the total contributions made by the municipality and the state to date of termination of the plan, such excess shall be divided proportionately to the total contributions made by the city and state." Section 175.361(3)(d), F. S. *See also* s. 185.37, F. S., which contains a similar provision.

Thus, since a municipality cannot constitutionally assess and collect taxes for a private purpose or expend any public money for a private purpose regardless of the source from which derived, *see* AGO 071-28; State v. Town of North Miami, *supra*, and since the establishment of these pension funds is authorized by general law, funded by excise tax revenues and contributions of other municipal funds and employee contributions and, upon termination of the pension trust funds, such funds or moneys are returned to the municipalities, less the return of the state's contribution to the state, I am of the opinion that the municipal pension trust funds in question are "public moneys," or public funds governed by and within the purview of s. 659.24(1), F. S. *See* 62 C.J.S. *Municipal Corporations* s. 614(d) ("a fund created by law for the purpose of providing pensions for firemen or their dependents is a public fund"); 3 McQuillin *Municipal Corporations* s. 12.145. *See also* Tesch v. Board of Deposits of Wisconsin, 297 N.W. 379, 381 (Wis. 1941), in which the court concluded that a statute creating an annuity and benefit fund for municipal policemen and requiring the city treasurer as custodian of the fund to furnish a bond did not divorce such a fund from the status of a public fund within the statute relating to a public deposits guarantee fund; moreover, such an annuity fund was a public fund even though not usable for general governmental expenses since a municipality cannot constitutionally assess and collect taxes for a private purpose and since the collection of the fund is authorized by public law, paid to public officers, and deposited in a public depository.

Sections 175.301 and 185.30, F. S., require that the funds and securities of the respective pension trust funds

> . . . *be deposited with the treasurer or depository of* the municipality, who shall keep the same in a separate fund, and shall be liable for the safekeeping of same, under the bond given by him to the municipality, and he shall be liable in the same manner and to the same extent as he is liable for the safekeeping of the funds of the municipality. [Section 175.301, F. S.; emphasis supplied.]

SUMMARY:

Municipal pension or retirement trust funds for municipal firemen and policemen provided for under Chs. 175 and 185, F. S., respectively, are "public moneys" or public funds within the purview of s. 659.24(1), F. S., and deposits of such moneys in bank depositories are governed by the provisions thereof and any applicable regulations of the Department of Banking and Finance.

Your question is answered in the affirmative.
Section 659.24(1), F. S., provides in pertinent part:

> *Banks shall be depositories of public moneys* under such regulations as may be prescribed by the department [of Banking and Finance] . . . . The department [of Banking and Finance] shall require banks so designated to give satisfactory security by the deposit of bonds of the United States, the state or political subdivisions or other satisfactory security for the safekeeping and prompt payment of the public moneys deposited . . . .(Emphasis supplied.)

Section 659.24(3), F. S., states that any notes, bonds, or other securities other than shares of stock in which a state bank is authorized by law or regulation to invest its funds shall be accepted as satisfactory security for the deposit of funds

> . . . *for the safekeeping and prompt payment of moneys deposited,* and for the faithful performance of duties as financial agents, *whether such moneys so deposited be funds of, or under the control of,* the state or any political subdivision thereof, *any municipality,* or of any district, commission, board, or body, whether corporate or otherwise, created by or pursuant to the provisions of the constitution or any statute of the state, or of any officer of any of the foregoing. (Emphasis supplied.)

See also s. 659.24(2), F. S., which states that, notwithstanding any statute, ordinance, rule, or regulation of the state or any political subdivision or officers thereof or of any municipality, commission, board, or body created by or pursuant to any statute, or of any of the officers of any thereof, requiring security for deposits of funds in the form of a surety bond or any other form, "security for such deposits shall not be required to the extent that such deposits are insured under the provisions of the Federal Deposit Insurance Act, as amended, or any amendments thereto"; *and see* s. 659.21, F. S.

Public funds are generally defined as those moneys belonging to the state or a political subdivision thereof, or a municipal corporation, 25 Fla. Jur. *Public Funds* s. 1; C.J.S. *Funds,* p. 1404. *See also* AGO 072-272 stating:

> Where the applicable statutes and laws, establishing or providing for the establishment of the special taxing district, municipality or public corporation, are silent on the question of deposits of the money under its jurisdiction and as to depositories of and for such moneys, or do not otherwise provide to the contrary, then s. 659.24, F. S., . . . applies to such a governmental agency and its funds are within the provisions thereof.

See AGO 059-145 in which this office, although holding that the county depository law was inapplicable to an independent mosquito control district's funds, stated that

> [u]nquestionably, the funds of such districts are public moneys and as such, when placed on deposit with banks, are adequately secured against loss by the provisions of [s.] 659.24, Florida Statutes, . . . which designates banks as depositories of public monies under the regulation of the State Banking Commissioner. . . .

See also AGO 060-77, concluding that a special taxing district's depository accounts and its moneys or funds were governed by and within the purview of s. 659.24, F. S., in the absence of some applicable special or local law providing otherwise. *Cf.* State v. Town of North Miami, 59 So.2d 779, 785 (Fla. 1952), holding that, under the constitutional provision prohibiting the expenditure of public money for a private purpose, it does not

QUESTION:

Under what circumstances and means are members of the Armed Forces of the United States exempted from licensing requirements of administrative licensing boards pursuant to s. 455.02, F. S.?

SUMMARY:

Members of the Armed Forces of the United States on active duty who are in good standing with an administrative board shall be kept in good standing by said board without requiring the licensee to register, pay dues or fees, or perform any other act as long as he is a member of the Armed Forces on active duty and for a period of 6 months after his discharge.

Section 455.02, F. S., clearly states as follows:

> Any member of the Armed Forces of the United States now or hereafter on active duty who, at the time of his becoming such a member was in good standing with any administrative board of the state and was entitled to practice or engage in his profession or vocation in the state, shall be kept in good standing by such administrative board, without registering, paying dues or fees, or performing any other act on his part to be performed, as long as he is a member of the Armed Forces of the United States on active duty and for a period of 6 months after his discharge from active duty as a member of the Armed Forces of the United States.

Said statute requires only that the present licensee be a member of the Armed Forces of the United States on active duty to be entitled to the broad licensing exemption. There is no stated or implied exception or qualifying language to this classification of licensees, such as that the exemption only applies in times of war or national emergencies as referred to in the opinion request. Furthermore, the statutory section exempts those individuals from registering, paying dues or fees, or performing any other act, which includes continuing educational requirements.

The plain and obvious provisions of the statute control and there should be no need to resort to incidental rules of statutory construction and interpretation. Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960).

However, to the extent that the administrative licensing boards have a divergence of interpretation concerning the intent and interpretation of s. 455.02, F. S., each such interpretation must be presumed valid until passed on by the judiciary. State *ex rel.* Bennett v. Lee, 166 So. 565 (Fla. 1936); Louisville and Nashville Railroad Company v. Speed Parker, Inc., 137 So. 724 (Fla. 1931); AGO 072-393.

078-148—December 22, 1978

PUBLIC FUNDS

MUNICIPAL FIREMEN AND POLICEMEN—PENSION TRUST FUNDS CONSIDERED "PUBLIC MONEYS"

To: George T. Dunlap III, City Attorney, Bartow

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Are municipal pension trust funds for municipal firemen and policemen under Chs. 175 and 185, F. S., respectively, "public moneys" within the purview of s. 659.24(1), F. S.?

question are "drainage district . . . taxes" within the scope of s. 192.091(5), the provisions of s. 192.091(2)(c) would not apply to the Spring Lake Improvement District and the Highlands County Tax Collector would not be entitled to any commissions under s. 192.091(2)(c) for collecting and remitting these special drainage taxes.

Furthermore, the provisions of s. 192.091, F. S., are not applicable to special taxing districts which levy assessments on a basis other than ad valorem. *See* AGO 074-78. The taxes here are levied on each tract of land in the district in proportion to the benefits accruing to the property owner's land, and are not levied on an ad valorem basis. *See* Lake Howell Water and Reclamation District v. State, 268 So.2d 897 (Fla. 1972). Thus, the nature of the special drainage tax in question would also foreclose the Highlands County Tax Collector from collecting any commissions under s. 192.091(2)(c) for his services to the Spring Lake Improvement District in collecting and remitting this tax.

AS TO QUESTION 2:

Your second question concerns whether the county tax collector may negotiate with the Board of Supervisors of the Spring Lake Improvement District to charge it a reasonable fee mutually agreed upon in order to recover the administrative costs involved in collecting and remitting this special drainage tax. It is the settled law of this state that public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such service is deemed to be gratuitous. Rawls v. State, 122 So. 222 (Fla. 1929); Brown v. St. Lucie County, 153 So. 906 (Fla. 1934); State v. Reardon, 154 So. 868 (Fla. 1934); Gavagan v. Marshall, 33 So.2d 862 (Fla. 1948).

Accordingly, the provisions of Ch. 71-669, Laws of Florida, along with the provisions of Ch. 298, F. S., which are made applicable to the Spring Lake Improvement District by s. 3 of Ch. 71-669, must be looked at to determine if the Legislature has provided for the compensation of your office in collecting the special drainage taxes in question.

The provisions of Ch. 71-669, Laws of Florida, provide no authority for compensating the Highlands County Tax Collector in collecting these annual drainage or installment taxes, even though s. 37 of Ch. 71-669 makes it mandatory upon the Highlands County Tax Collector to collect and remit these taxes.

Furthermore, the provisions of Ch. 298, F. S., which are applicable to the Spring Lake Improvement District, do not provide for any compensation to the Highlands County Tax Collector for collecting these taxes. Although ss. 298.20 and 298.401, F. S., specifically make provision for compensating a tax collector for his services in connection with the taxes here, these two provisions are specifically made inapplicable to the Spring Lake Improvement District by s. 3 of Ch. 71-669, Laws of Florida.

Therefore, as no provision can be found under Ch. 71-669, Laws of Florida, or the applicable sections of Ch. 298, F. S., for compensating the Highlands County Tax Collector for his services in collecting the annual drainage or installment taxes, levied pursuant to s. 298.36, F. S., and s. 37 of Ch. 71-669, the Highlands County Tax Collector would not be entitled to compensation for collecting and remitting these taxes. Thus, your second question is answered in the negative.

078-147—December 22, 1978

ADMINISTRATIVE BOARDS

LICENSEES WHO ARE MEMBERS OF ARMED FORCES EXEMPT FROM LICENSING REQUIREMENTS WHILE ON ACTIVE DUTY

To: Nancy Wittenberg, Secretary, Department of Professional and Occupational Regulation, Tallahassee

Prepared by: Joseph W. Lawrence II, Assistant Attorney General

078-146—December 22, 1978

TAXATION

TAX COLLECTOR NOT ENTITLED TO COMMISSIONS FOR COLLECTING ANNUAL DRAINAGE TAXES IN ABSENCE OF LAW PROVIDING THEREFOR

To: J. T. Landress, Highlands County Tax Collector, Sebring

Prepared by: Cecil L. Davis, Jr., Assistant Attorney General

QUESTIONS:

1. Is the office of Highlands County Tax Collector entitled to a commission pursuant to s. 192.091(2)(c), F. S., for collecting and remitting special drainage taxes of the Spring Lake Improvement District?

2. If question 1 is answered in the negative would the tax collector be able to negotiate with the Board of Supervisors of the Spring Lake Improvement District to charge them a reasonable fee mutually agreed upon to recover the administrative costs involved in collecting and remitting the special drainage tax?

SUMMARY:

The provisions of s. 192.091, F. S., are not applicable to special taxing districts which levy annual drainage taxes, nor do they apply to assessments levied by a special taxing district on a basis other than ad valorem. Thus, the county tax collector would not be entitled to a commission pursuant to the provisions of s. 192.091(2)(c) for collecting and remitting annual drainage taxes of the Spring Lake Improvement District. Nor would it be proper for the county tax collector to charge the special taxing district a reasonable fee to recover the administrative costs involved in collecting and remitting annual drainage taxes of the Spring Lake Improvement District, where the law creating the district, as well as other applicable statutory provisions, makes no provision for such a fee.

The Spring Lake Improvement District was originally known as the Spring Lake Drainage District, which was created under the authority of Ch. 298, F. S. The name of the Spring Lake Drainage District was changed to Spring Lake Improvement District by Ch. 71-669, Laws of Florida, which, among other things, broadened the powers and functions of the Spring Lake Improvement District in relation to the construction of roads and highways, drainage and water control systems, water and sewage facilities, and recreational facilities.

AS TO QUESTION 1:

As I stated in my earlier opinion to you on a substantially similar question, s. 192.091(2), F. S., provides commissions to county tax collectors for collecting and remitting all real and tangible personal property taxes at rates according to the tax involved and the amount collected. Section 192.091(5), F. S., provides, however, that the provisions of s. 192.091 do not apply to "drainage district or drainage subdistrict taxes."

The special drainage taxes in question would appear to be "drainage district . . . taxes" within the purview of s. 192.091(5), F. S. Section 9(10) of Ch. 71-669, Laws of Florida, authorizes the Spring Lake Improvement District to assess and impose an ad valorem tax, an annual drainage tax, and a maintenance tax. The district is also authorized to impose special assessments pursuant to s. 9(11) and s. 42 of Ch. 71-669. The terminology of the resolutions you attached to your opinion request indicates that the taxes in question are annual drainage taxes, also referred to as annual installment taxes, levied pursuant to s. 298.36, F. S., and s. 37 of Ch. 71-669 for the purpose of providing funds to pay the costs of levees, canals, field ditches, roadways, pumping facilities, and other works and improvements for the district. Therefore, assuming that the taxes in

pay pursuant to" s. 768.28, F. S. *But see* Surette v. Galiardo, *supra*, at n. 5, p. 57, in which the court cautioned that the language of an insurance *policy* and of a *statute* waiving tort liability may not necessarily be the same; the language of the statute may clearly embrace the subject matter for which insurance is desired but the language of the *policy* may not embrace that particular risk or may even exclude certain aspects thereof.

Further, s. 455.06(1), F. S., provides general statutory authorization for the purchase of insurance by governmental agencies. This subsection states:

> The public officers in charge or *governing bodies . . . of every* . . . governmental unit, department, board, or bureau of the state, *including tax or other districts, political subdivisions, and public and quasi-public corporations . . . of the several counties and the state*, all hereinafter referred to as political subdivisions, *which political subdivisions in the performance of their necessary functions . . . perform operations in the state or elsewhere are hereby authorized, in their discretion*, to secure and provide for *such respective political subdivisions, and their agents and employees while acting within the scope of their employment*, insurance to cover liability for damages on account of bodily or personal injury or death resulting therefrom to any person, or to cover liability for damage to the property of any person or both, *arising from or in connection with . . . any . . . such operations, whether from accident or occurrence*; and to pay the premiums therefor from any general funds appropriated or made available for the necessary and regular expense of operations of such respective political subdivisions . . . . (Emphasis supplied.)

It is clear from a reading of s. 455.06, *supra*, together with ss. 768.10 and 768.28(13), F. S., that the governing body of a mosquito control district is authorized to purchase insurance to cover potential tort liability for itself and for its officers, agents, and employees in connection with its authorized functions and operations. And, as has been seen in the discussion in question 1, pending judicial clarification to the contrary, under s. 768.28(1), F. S., the district may be sued in tort for the negligent acts and omissions of its *officers* (or employees) committed within the scope of their office (or employment) or function. Thus, it is clear that it would not ordinarily be necessary for commission board members to purchase individual or personal liability insurance under such circumstances, since s. 768.28(1), F. S., authorizes actions in tort against the *district* for the negligent actions taken by its officers within the scope of their office, and the district can operate only through its governing officers.

As to those actions or omissions committed by an officer which are outside the scope of his office or which are otherwise committed "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property," there is no provision in s. 768.28 or elsewhere in the statutes which imposes liability upon the *district* for such actions. Such actions remain the personal responsibility of the officer who committed them. The board of commissioners of the district may exercise only those powers specifically or by necessary implication authorized or granted by statute; moreover, if there is any doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested. *See* State *ex rel.* Greenberg v. Florida State Board of Dentistry, *supra*; Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); White v. Crandon, 156 So. 303 (Fla. 1934). There is no statute which authorizes the governing board of the district to purchase liability insurance for or to protect its officers against individual or personal liability; hence, the district is not authorized by law to do so.

employee *of the state.* It is unclear from the express language of the statute whether local governments are also embraced within the terms of that enactment. *Cf.* s. 111.06, F. S., which authorizes, but does not require, the county to indemnify a sheriff or deputy sheriff for any judgment rendered in any such civil suit against the sheriff or deputy sheriff; and s. 111.08, F. S., authorizing the Department of Health and Rehabilitative Services to expend from its General Revenue Fund sums sufficient to compensate an officer, employee, or agent who has been held personally liable for the payment of a judgment rendered in a civil action arising out of his employment. In light of the lack of uniformity which is reflected in the court decisions interpreting s. 768.28(9), it is evident that the Legislature must clarify the meaning of that subsection as well as other statutes (such as ss. 111.06 and 111.08, F. S.) on the subject of individual tort liability or the immunity from suit of officers of governmental entities.

In sum, therefore, I am compelled to advise that Florida law governing the personal liability in tort or immunity from suit of individual officers of a special taxing district is currently somewhat unsettled. Under s. 768.28(1), F. S., it would appear that the mosquito district, as a corporate entity, is subject to suit in tort for the acts of its officers (or employees) committed within the scope of their authority. In addition, under s. 768.28(9), F. S., it is clear that an officer (or employee) of the district may be held personally liable for those acts or omissions committed in bad faith or with malicious purpose or in wanton and willful disregard of human rights, safety, or property. As to those acts or omissions committed by officers (or employees) which are merely negligent, however, recent court decisions fail to reflect a consensus with respect to the individual or personal liability of an officer (or employee) or his immunity from suit where the commission of the prescribed negligent acts or omissions occurs within the scope of his office or function or employment. The resolution of this conflict is not within the jurisdiction of this office, and must await action by the Legislature.

This opinion has been confined to a discussion of individual or personal civil liability of commissioners of a mosquito control district (a public quasi-corporation statutorily empowered to sue and be sued as a corporation) under Florida law and no attempt has been made to discuss the parameters of liability under the Federal Civil Rights Act, 42 U.S.C. s. 1981, *et seq.* Briefly, however, it might be noted that a state or local officer may be held personally liable under s. 1983 if such officer either acted without authority or, if such officer acted within his authority, he acted in bad faith. *E.g.*, Mark v. Groff, 521 F.2d 1376, 1379-1380 (9th Cir. 1975) (qualified governmental immunity for acts done in the course of official conduct bars suit against state officers under s. 1983 only if, *inter alia*, such officers acted in good faith); Waits v. McGowan, 516 F.2d 203, 206 (3rd Cir. 1975) (a state officer's acts done in abuse of his or her authority are actionable under the Federal Civil Rights Act).

AS TO QUESTION 2:

A threshold issue which is implicit in your second question is whether the mosquito control district is *authorized* to provide its officers with individual liability insurance. It is a basic and fundamental principle that public funds may be spent only for a public purpose or a function which the public body or officer is expressly authorized by law 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; 20 C.J.S. *Counties* ss. 129 and 207; Davis v. Keen, 192 So. 200 (Fla. 1939); State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); 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's 071-28, 068-12. *See also* 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); Hopkins v. Special Road and Bridge Dist. No. 4, 74 So. 310 (Fla. 1917). *Cf.* AGO 078-97, in which this office concluded that a county officer was not authorized by law to expend or seek reimbursement from the funds of his office to defray legal fees incurred in defending himself against a complaint filed with the Ethics Commission.

With regard to the purchase of liability insurance, s. 768.10, F. S., provides that "*[l]aws allowing the state or its agencies or subdivisions to buy insurance* are still in force and effect and *are not restricted in any way by the terms of this act*" (Emphasis supplied.) *See also* s. 768.13, F. S., which "authorizes" the state and its "agencies and subdivisions" to self-insure, to enter into risk management programs, and to purchase liability insurance, "for whatever coverage they may choose," or to provide for any combination of the above, "in anticipation of any claim, judgment or claims bill which they may be liable to

> Any agency of the state or political subdivision of the state is authorized to defend any actions in tort brought against any of its officers or employees as a result of any alleged negligence of its officers or employees arising out of and in the scope of their employment with the state or its subdivisions, unless such officer or employee acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Section 768.28(9), F. S., is also relevant with respect to individual liability in tort resulting from acts or omissions of officers. That subsection reads:

> No officer, employee, or agent of the state or its subdivisions shall be held *personally* liable in tort for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Subject to the monetary limitations set forth in subsection (5), *the state* shall pay any monetary judgment which is rendered in a civil action personally against an *officer, employee, or agent of the state* which arises as a result of any act, event, or omission of action within the scope of his employment or function. (Emphasis supplied.)

Florida appellate court decisions which have interpreted s. 768.28(9) are not in accord as to the meaning of this subsection. In Metropolitan Dade County v. Kelly, 348 So.2d 49, 50 (1 D.C.A. Fla., 1977), the First District Court of Appeal considered the question of whether a county employee could be held personally liable under s. 768.28(9) for negligent acts committed within the scope of his employment. The court ruled that, in the absence of an allegation that the employee acted in bad faith, the trial court should have granted the employee's motion to dismiss. *See also* Pennington v. Serig, 353 So.2d 107 (3 D.C.A. Fla., 1977), in which the court, in affirming a summary judgment entered in favor of two district school board employees, held that, in the absence of any allegations or proof of bad faith or malicious purpose on their part, a district school board safety inspector and his supervisor were immune from personal liability under s. 768.28(9), F. S.

However, in Talmadge v. District School Board of Lake County, 355 So.2d 502 (2 D.C.A. Fla., 1978), the court reviewed s. 768.28(9) from a different perspective. The *Talmadge* court reversed an order of the lower court which had dismissed a school district employee as a defendant from a suit filed against the employee and the school board for injuries sustained by a student as a result of the employee's negligence. In reaching its conclusion, the court reasoned as follows on page 503:

> Section 768.28(9), Florida Statutes (1975), does not clearly provide that no cause of action may be sustained against an employee of the Board, nor does it clearly provide that an individual employee is immune from suit as a result of injuries sustained due to his negligence. While it does state, "No . . . employee, or agent of the state . . . shall be held personally liable in tort . . . ," the statute goes on to indemnify such an employee for a monetary judgment rendered against him personally with the following language:
>
> ". . . [T]he state shall pay any monetary judgment which is rendered in a civil action personally against an . . . employee . . . which arises as a result of any act . . . within the scope of his employment."
>
> We hold that this statute acts only to indemnify an employee of the state for a monetary judgment entered against him as a result of negligent acts occurring within the scope of his employment, but does not operate as a bar against suing such an employee as a party defendant. Had the legislature intended that individual employees be immune from suit, they would have clearly so stated.

Implicit in the *Talmadge* court's analysis of s. 768.28(9) is the finding that the statute for its explicated purposes requires state agencies and subdivisions as well as the state to indemnify their officers or employees for negligent acts committed in the scope of their office or employment. (The *Talmadge* case involved an employee of a *school district*, not an employee of the *state*.) It should be noted, however, that s. 768.28(9) expressly obligates only the *state* to pay such monetary judgments rendered against an officer or

See also s. 1.01(9), F. S., which defines the term "political subdivision," where the context of the Florida Statutes will allow, to 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.)

It seems clear that a mosquito control district, established as a special taxing district governed by a board of commissioners with all powers of a body corporate, including the power to be sued as a corporation, is within the definitional purview of s. 768.28(2), F. S. *See* Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 82 So. 346, 350 (Fla. 1919), in which the Florida Supreme Court noted that the Everglades Drainage District, a special taxing district created with "all the powers of a body corporate" (Ch. 6456, 1913, Laws of Florida), was a public quasi-corporation and, as such, "a governmental agency of the state for certain definite purposes, having such authority only as is delegated to it by law." Accordingly, in AGO 078-113, I determined that the East Beach Water Control District, a special taxing district deemed in its enabling legislation to be "a public corporation of this state" (*see* s. 2 of Ch. 75-469, Laws of Florida), was within the purview of s. 768.28(2); and that the monetary limitations on tort liability set forth in s. 768.28(5), F. S., were, therefore, applicable to the district. *Cf.* AGO 078-33 (municipal housing authority within definitional purview of s. 768.28[2]); AGO 078-42 (hospital district within definitional purview of s. 768.28[2]).

Having determined that a mosquito control district is a "state agency or subdivision" within the scope of s. 768.28, F. S., it is now necessary to discuss that statute's impact upon the tort liability of individual members of the district board of commissioners. Section 768.28 provides that an action at law may be brought against the state or its agencies or subdivisions subject to the limitations specified in the act to recover damages in tort against the state or its agencies or subdivisions for injuries caused by the negligent actions or omissions of any *employee* of the agency or subdivision while acting within the scope of his office or employment "under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of the state."

It is clear that the members of the district board of commissioners are *officers* of the district rather than employees. Thus, the provisions of the second sentence of s. 768.28(1), F. S., regarding actions brought against the district for acts of its employees are not, on the face of the statute, applicable to acts of the district's officers. However, like other local governmental units, a mosquito control district can operate only through its officers; through them the district performs its functions. *Cf.* 20 C.J.S. *Counties* s. 100(a); Owen v. Baggett, 81 So. 888, 889 (Fla. 1919) (county performs its administrative functions through its officers); Turk v. Richard, 47 So.2d 543, 544 (Fla. 1950) (the governing body of a municipality is chosen by the electors to act for the municipality). Generally, in the absence of statute, a special taxing district such as a mosquito control district would not be liable for torts committed by it in the exercise of its governmental functions. *See* Rabin v. Lake Worth Drainage District, 82 So.2d 353 (Fla. 1955) (drainage district not responsible in tort actions, in the absence of legislative authority); Seaboard Air Line R. Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5th Cir.), *cert. denied*, 358 U.S. 836 (1958) (Florida law provides that drainage districts are immune from tort liability); Buffkin v. Board of County Commissioners of Brevard County, 320 So.2d 876 (4 D.C.A. Fla., 1975), *cert. denied*, 338 So.2d 841 (Fla. 1976) (pursuant to s. 455.06, F. S., mosquito control district waived sovereign immunity to extent of coverage secured by liability insurance purchased by district to cover liability in connection with its ownership or operation of property); Surette v. Galiardo, 323 So.2d 53, 55 (4 D.C.A. Fla., 1975) (under s. 455.06, F. S., district school board waived sovereign immunity to the extent of coverage secured and provided for under that statute although questions involving waiver of tort immunity no longer governed by s. 455.06 due to passage of s. 768.28, F. S.). Thus, in the absence of statute, the district would not be liable for the torts of its officers and employees; the cloak of sovereign immunity would extend to them. 81A C.J.S. *States* s. 198; *and see* Loucks v. Adair, 312 So.2d 531, 535 (1 D.C.A. Fla., 1975). Accordingly, inasmuch as the Legislature has waived the district's immunity for torts as limited by and to the extent provided in s. 768.28(5), F. S., the waiver of immunity specified in s. 768.28(1), F. S., in tort for the district would appear, until and unless otherwise determined by the courts, to include a waiver of the district's immunity for the negligent acts or omissions of the district's *officers* through whom the district acts, when the district is itself sued or joined as a party defendant in an action against its officers, agents, or employees. Parenthetically, under s. 111.07, F. S.,

governmental entity must be more than that owed to the public generally. *See* Modlin v. City of Miami Beach, *supra*; Florida First National Bank of Jacksonville v. City of Jacksonville, *supra*; Cheney v. Dade County, 353 So.2d 623, 626 (3 D.C.A. Fla., 1977), *cert. pending*, Case No. 53,178 (Fla., filed January 16, 1978), in which the court stated:

> Section 768.28, Florida Statutes . . . does not create a liability in the State where the act complained of does not give rise to liability in the agent committing the act, because the duty claimed to be violated is a duty owed to the citizens of the state in general and is not a duty owed to a particular person or persons.

See also Commercial Carrier Corp. v. Indian River County, 342 So.2d 1047 (3 D.C.A. Fla., 1977), and Peterson v. Metropolitan Dade County, 360 So.2d 26 (3 D.C.A. Fla., 1978). *But see* Department of Health and Rehabilitative Services v. McDougall, 359 So.2d 528, 532 (1 D.C.A. Fla., 1978), *cert. denied*, Case No. 54,590 (Fla. filed November 9, 1978).

Although one Florida appellate court has held that a municipal police officer is charged with the duty derived from the common law to render aid in emergencies to the ill, the injured, or the distressed, the general rule is that a municipal police department and its police officers are creatures of statute and not of common law origin. *See* 62 C.J.S. *Municipal Corporations* s. 568 ("The office of policeman or police patrolman or member of a police department was unknown to the common law, and wherever it exists it is a creation of statute or municipal ordinance."). *Cf.* White v. Crandon, 156 So. 303 (Fla. 1934) (statutory officers possess only such authority as is expressly conferred or necessarily implied for due and efficient exercise of powers and duties expressly granted), 67 C.J.S. *Officers* s. 102; 62 C.J.S. *Municipal Corporations* ss. 574 and 575. This office does not have the authority to declare such matters which properly must be resolved by the Legislature or by the courts. In Webster v. State, 201 So.2d 789, 792 (4 D.C.A. Fla., 1967), the district court held that the right of police officers to enter and to investigate in an emergency situation, without an accompanying intent to seize or arrest, "is inherent in the very nature of their duties as peace officers and derives from the common law"; thus no search warrant was required to legalize an entry by police for the purpose of bringing first aid to an injured or distressed person, "their duty certainly being to effect a rescue or to render aid to someone whom they had reasonable belief was in dire peril." The *Webster* court thereby declared that it is part of the nature and duty of a police officer, deriving from the common law, to render aid in an emergency situation.

Therefore, until and unless the Supreme Court of Florida overrules such an interpretation of the duties of a municipal police officer, I must conclude that a police officer is required to render assistance to the ill, the injured, and the distressed during an emergency. Accordingly, the provisions of s. 768.13, F. S., Florida's Good Samaritan Act, would not be applicable to a police officer who, being under a duty to do so, renders first aid to injured persons or serves as a "back-up" to a paramedic during an emergency. With regard to the closely related question of a police officer's duty to rescue, *see* 81A C.J.S. *States* s. 126(c), p. 557 (a "good samaritan" statute exempting an individual from liability for negligence in attempted rescue efforts does not protect a state officer who is under a duty to assist persons in need of care); *see also* Lee v. State, 490 P.2d 1206 (Alaska 1971), in which the court held that a police officer was under a duty to go to the aid of an injured minor and therefore the Alaska good samaritan statute was not applicable. Although the Alaska court noted that no case had been found which considered the applicability of a good samaritan act to a policeman, it concluded that "a holding that police officers have no duty to rescue would not comport with public conceptions of their roles." 490 P.2d at 1209. *Cf.* Wood v. Morris, 135 S.E.2d 484, 487 (Ga. 1964), in which the court concluded that the applicability of the Georgia guest statute turned in part upon whether the policeman transporting an injured girl in his care had a duty or obligation to care for her, stating:

> Whether or not the defendant policeman had any statutory obligation to care for the plaintiff, we think that there was an obligation in fact arising out of the customary role played by police officers in such emergencies, pursuant to their general responsibility of protecting the lives and welfare of citizens at large.

Thus, if in performing his duties as a police officer rendering aid to an injured, ill, or distressed person, the officer aggravates the person's condition by his negligent acts or omissions, there has been a breach of the duty owed to the victim and an action in tort

or negligence may lie. *See generally* 67 C.J.S. *Officers* s. 127(b), p. 422 (where law imposes on public officer the performance of ministerial duties in which private individual has special, direct, and distinctive interest, officer is liable to such individual for any injury sustained in consequence of officer's failure to perform duty or to perform it properly); 65 C.J.S. *Negligence* ss. 2(1), 4(1); *see* Restatement of Torts (Second) s. 323 (1965), stating:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of harm, or
> (b) the harm is sufficient because of the other's reliance upon the undertaking.

Since the actions of the police officer in rendering aid in emergencies would be within the scope of his employment, the city may be liable for the actions of its employee. *See* Florida Trust National Bank v. City of Jacksonville, 310 So.2d 19, 20-21 (1 D.C.A. Fla., 1975), *cert. discharged*, 339 So.2d 632 (Fla. 1976), in which the court held that

> a municipality may be held liable for the torts of its employee while acting within the scope of his employment in the performance of executive or administrative functions under the doctrine of respondeat superior, equating that liability with that of private corporations.

See also s. 768.28(1), F. S., which states in pertinent part that an action at law may be brought against a municipality as a subdivision of the state to recover damages in tort for injuries caused by the negligent acts of an employee of the municipality acting within the scope of his employment, if a private person would be liable under the same circumstances. The police officer, however, would not be subject to personal liability in tort for any injuries or damages suffered as a result of any act or omission of action if acting within the scope of his employment or function unless he acted in bad faith, with malicious purpose or exhibited wanton and willful disregard of human rights, safety, or property, s. 768.28(9), F. S., and the city's liability, if any, would be limited by the terms of s. 768.28(5), F. S. At present, the monetary limits specified in s. 768.28(5) are the sum of $50,000 on the claim or judgment by any one person or a maximum sum of $100,000 on all claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence.

If, however, a police officer is not in fact and in law under a common law duty to render such aid in emergencies to ill, injured, or distressed persons, he acts as a volunteer outside the scope of his employment when rendering such aid. He may be held liable for injuries resulting from his actions or omission of action unless he is held immune under the terms of the Good Samaritan Act. The city, however, is not liable for the torts or negligence of its police officers in such circumstances. A police officer who in good faith and a reasonably prudent manner provides emergency care and aid at the scene of an emergency, in the absence of a duty so requiring, would be immune from liability provided that he renders such care at the scene of an emergency outside of a place with proper emergency equipment and without the objection of the injured person. *See* AGO 074-38 in which this office, noting that the state agency had no legal duty to provide needed care or first aid to an injured visitor to a correctional institution, concluded that in the event employees of the Division of Corrections render emergency care in a reasonably prudent manner to a visitor injured on the grounds of a correctional institution, they are immune from liability under s. 768.13, F. S., when the treatment is provided outside of a hospital, doctor's office, or other place having proper medical equipment and is given without the objection of the injured person.

In light of the foregoing considerations, I would recommend that, with respect to the above-mentioned common law duties of the police department and its police officers, the city survey and examine its liability insurance programs and negotiate the appropriate coverage with the city's insurance carriers for the acts of its police department and officers in rendering such emergency aid.

078-141—December 12, 1978

MUNICIPALITIES

MUST CONTROL AND REGULATE TRAFFIC WITHIN JURISDICTION BY ORDINANCE RATHER THAN BY RESOLUTION

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

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

May a municipality pursuant to s. 316.008(1)(d) and (f), F. S., control and regulate certain traffic movement under s. 316.008, F. S., by resolution or may it act only by ordinance?

SUMMARY:

A municipality controlling and regulating traffic movement within its jurisdiction under police power delegated to it under ss. 316.002 and 316.008(1)(d) and (f), F. S. (the Florida Uniform Traffic Law), must exercise such power and enact such traffic regulations by ordinance which has the effect of and is enforceable as a local law rather than by and in the form of an administrative resolution.

In 1971, the Florida Legislature enacted Ch. 316, F. S., the Florida Uniform Traffic Control Law, in order to "make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities," s. 316.002, F. S. The Legislature, recognizing that in about 50 percent of the incorporated municipalities within the state the movement of traffic was controlled by Ch. 186, F. S. 1969, while traffic in the remaining municipalities was controlled by a "hodgepodge of ordinances which vary as to language and penalty" resulting in an inconvenience and hazard to travelers, consolidated the existing state traffic laws contained in Ch. 317, F. S. 1969, the traffic ordinances contained in Ch. 186, F. S. 1969, and the suggested laws and ordinances contained in the Uniform Vehicle Code and the Model Traffic Ordinances into one "workable uniform law throughout the state and all its municipalities and political subdivisions." *See* the preamble to Ch. 71-135, Laws of Florida, creating Ch. 316, F. S.

The Legislature recognized that there are conditions which require municipalities to pass certain other traffic ordinances regulating municipal traffic, and it expressly specified that s. 316.008, F. S., enumerates the area within which the municipalities are authorized to control certain traffic movement in their respective jurisdictions. Section 316.002, F. S. Section 316.002 also makes it unlawful for a municipality to pass or attempt to enforce any ordinance in conflict with the provisions of Ch. 316. Section 316.007, F. S., provides that the provisions of Ch. 316 shall be applicable and uniform throughout the state and in all political subdivisions and municipalities therein, "and no [municipality] shall enact or enforce any ordinance on a matter covered by [Ch. 316] unless expressly authorized." Section 316.008 provides such express authorization for the "certain other traffic ordinances in regulation of municipal traffic" and "the area within which municipalities may control certain traffic movement or parking" referred to in s. 316.002 and expressly authorizes municipalities, with respect to streets and highways under their jurisdiction *and within the reasonable exercise of the police power*, to designate "particular highways or roadways for use by traffic moving in one direction," and "any street as a through street or . . . any intersection as a stop or yield intersection." Section 316.008(1)(d) and (f), F. S.

Section 166.021(1), F. S., implements s. 2(b), Art. VIII, State Const., and, among other things, delegates to municipalities the governmental power to enable them to conduct municipal government and authorizes them to exercise any power for municipal purposes except where expressly prohibited by law. The aforestated provisions of ss. 316.002 and 316.007, F. S., operate to and have the effect of expressly prohibiting any such *legislative action under the police power* by the several municipalities. Moreover, these and other provisions of Ch. 316, F. S., constitute an express preemption of this area of traffic control and regulation to the state within the contemplation of s. 166.021(3)(c). Sections 316.002,

316.007, and 316.008(1), F. S., expressly provide for and represent exceptions to the state's exclusive or preemptive jurisdiction by expressly authorizing municipalities and other local authorities to control and regulate certain traffic movement or parking on the streets and highways within their jurisdiction in the reasonable *exercise of the police power delegated* to them by the Legislature.

Section 316.008, F. S., however, is silent as to whether the action of the governing body of a municipality in regulating traffic should be in the form of an ordinance rather than a resolution, nor does Ch. 166, F. S., specifically address the issue. Section 166.041(1)(a), F. S., however, defines "ordinance" as used therein to mean "an *official legislative action* of a governing body, which action is a regulation of a general and permanent nature and *enforceable as a local law*," (Emphasis supplied.) while "resolution" is defined as "*an expression of* a governing body concerning *matters of administration*, an *expression* of temporary character, or a provision for the disposition of a particular item of the *administrative business* of the governing body." (Emphasis supplied.) Section 166.041(1)(b), F. S. The enactment of any local legislation "enforceable as a local law" under the delegated police power of the state is the exercise of the local government's legislative and governmental power, not the exercise of administrative authority or an "expression of the governing body" in connection with the administrative business of the municipality or its governing body. *See also* 5 McQuillin *Municipal Corporations* ss. 15.01 and 15.02 (an ordinance is distinctively a legislative act); 73 Am. Jur.2d *Statutes* s. 3, p. 270 (resolution adopted by 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); 77 C.J.S. *Resolutions*. 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).

The designation of a street as a one-way street for the movement of traffic or a street as a through street or an intersection as a stop or yield intersection is a legislative act exercised under the police power, s. 316.008(1), F. S. *See also* s. 316.088, F. S., which permits local authorities to designate any highway or roadway or part thereof under their respective jurisdictions as one-way as indicated by official traffic control devices; s. 316.089(3), F. S., providing that official traffic control devices may be erected which direct specified traffic to use a designated lane or to move in a particular direction; s. 316.123, F. S., providing for stop or yield intersections; and s. 316.074, F. S., requiring the driver of any vehicle to obey the applicable instructions of any lawfully placed traffic control device. While s. 316.008 does not specify whether the prescribed regulation of traffic within a municipality shall be by ordinance or resolution, various provisions within Ch. 316, F. S., use the term ordinance with respect to local regulation. *See, e.g.*, s. 316.002, F. S., which states that the "legislature recognizes that there are conditions which require municipalities to pass *certain other ordinances* in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipality." (Emphasis supplied.) *See also* s. 316.007, F. S., stating that "no local authority shall enact or enforce any *ordinance* on a matter covered by this chapter unless expressly authorized." (Emphasis supplied.)

Moreover, s. 166.041(1)(a), F. S., defines "ordinance" to mean "an official legislative action . . . enforceable as a local law," but "resolution" is defined by subsection (1)(b) to mean "an expression of a governing body concerning matters of administration" or "an expression of a temporary character," or "a provision for the disposition of a particular item of administrative business." The Legislature has not provided that a resolution is an official legislative action, as distinguished from an administrative action, or that such administrative "expressions" or resolutions are "enforceable as a local law," or by criminal punishment or by civil penalties as Ch. 316, F. S., is enforced pursuant to its terms and the terms of Ch. 318, F. S. The discriminating language employed by the Legislature in s. 166.041(1)(a) and (b), F. S., manifests the legislative intent that the legislative and governmental power of the municipalities be exercised by ordinance or by "official legislative action of [their] governing bod[ies] . . . enforceable as a local law." Such is particularly true of local legislation under the delegated police power enforceable by the imposition of penalties in the nature of criminal punishment or civil penalties. *See* s. 6(b), Art. V, State Const., which provides that the jurisdiction of the county court shall be prescribed by general law, and s. 20, Art. V, State Const., which prescribes that, until changed by general law consistent with the provisions of Art. V, the county courts have original jurisdiction of all violations of municipal ordinances and the jurisdiction

formerly exercised by the municipal courts (now abolished). Section 34.01, F. S., implements and substantially restates these constitutional provisions. *See also* s. 316.660, F. S., which provides for the monthly payment to the municipality of all fines and forfeitures received by a county court for violations of Ch. 316 "or from violations of any *ordinances* adopting matter covered by this chapter, committed within a municipality" (Emphasis supplied.); and s. 34.191, F. S., which provides that all fines and forfeitures received by the county court from violations of municipal ordinances committed within a municipality within the territorial jurisdiction of the county court shall be paid monthly to the municipality with certain exceptions not material to the instant question. It should also be noted that under s. 901.15(1), F. S., a peace officer (including municipal police officers) may arrest without a warrant for violations of municipal ordinances occurring in the presence of the officer or upon fresh pursuit, and subsection (5) provides that, when a violation of Ch. 316 has been committed in the presence of the officer, such arrest may be made immediately or on fresh pursuit; however, such arrest power does not embrace or extend to violations of municipal administrative "expressions" or resolutions.

The foregoing considerations make evident the compelling need that such "official legislative action" or "regulation of a general and permanent nature" or "reasonable exercise of the police power" be by a duly enacted ordinance rather than a resolution. In the absence of such an ordinance, the police and the courts are not constitutionally or statutorily vested with any authority and jurisdiction to enforce the proscribed traffic offenses and regulations. Accordingly, based upon the foregoing considerations, I must conclude that a municipality, in exercising the police power delegated to it by ss. 316.002 and 316.008(1)(d) and (f), F. S., to control and regulate the traffic movement therein provided for within the municipality's jurisdiction, must exercise such power and enact such traffic regulations by "official legislative action" or ordinance, which has the effect of and is enforceable as a local law rather than by a resolution.

078-142—December 12, 1978

MUNICIPALITIES—TAXATION

WHEN BONDS ARE "ISSUED"

To: Ralph O. Johnson, Attorney, Pahokee

Prepared by: Maxie Broome, Jr., Assistant Attorney General

QUESTION:

If the City of Pahokee's water and sewer revenue bonds of 1977 were authorized by resolution of the city dated February 22, 1977, and duly validated in the circuit court on March 25, 1977, but not executed and delivered until long after May 4, 1977, have they been *issued* in the legal sense and within the meaning of that term as used in Ch. 77-251, Laws of Florida, effective October 1, 1977?

SUMMARY:

A municipality's water and sewer revenue bonds which were authorized to be issued and dated as of the date of their delivery and duly validated before the effective date of Ch. 77-251, Laws of Florida (October 1, 1977), removing the authority of municipalities to levy the municipal public service tax on the purchase of cable television service, but permitting continuation of the levy of such tax to the extent necessary to meet bond obligations to or for the benefit of bondholders of bonds issued prior to May 4, 1977, but which were not actually executed and delivered until long after that date and the effective date of Ch. 77-251, were *not* "issued" in the legal sense or in the sense in which the term is used in the context of Ch. 77-251, and as defined in the Uniform Commercial Code before the prescribed limiting date, there being no

legislative intent manifested in Ch. 77-251 that a different meaning be ascribed to such term in the application of that statute.

Your question is answered in the negative.

Section 166.231(1)(a), F. S., as amended by s. 4, Ch. 78-299, Laws of Florida, provides in pertinent part:

> (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, and telegraph service. . . . *Municipalities imposing a tax on the purchase of cable television service as of May 4, 1977, may continue to levy such tax to the extent necessary to meet all obligations to or for the benefit of holders of bonds or certificates, which were issued prior to May 4, 1977.* (Emphasis supplied.)

Chapter 77-251, Laws of Florida (Senate Bill No. 660), deleted or removed from s. 166.231(1)(a), F. S., the authority of municipalities to levy the public service tax on the purchase of cable television service and added to said subsection the provisions underscored above, effective October 1, 1977. The added provisions specifically authorize those municipalities imposing the tax on cable television service as of May 4, 1977, to continue to levy the tax "to the extent necessary to meet all obligations *to or for the benefit of holders of bonds or certificates, which were issued prior to May 4, 1977.*" (Emphasis supplied.)

There has been no specific information supplied this office as to the date that the bonds in question were in fact executed and delivered to the bondholder. The enabling resolution simply provides that the subject obligations of the city "are hereby authorized to be issued" and "shall be dated as of the date of their delivery." Resolution 77-6, Art. II, ss. 2.01, 2.02. However, based on the facts recited in your inquiry, we *assume for the purpose of this opinion* that the revenue bonds were executed and delivered after May 4, 1977, although they were validated on March 25, 1977. Apparently, the bonds were actually executed and delivered to the bondholder sometime during the summer of 1978, interim financing for the sewer and water project being arranged through a local bank. As to the issuance and delivery of the bonds in question within the contemplation of law, Ch. 77-251, *supra*, was operative and in force and effect and its validity is presumed for purposes of this opinion.

Considering the context of, or the language used in, Ch. 77-251, Laws of Florida, the answer to your inquiry turns on the legislative intent and use of the word or term "issued," and on the legal meaning or sense of that term when used in relation to bond issues by courts and by the Uniform Commercial Code (formerly under the Negotiable Instrument Law). At all times material to this opinion, the Uniform Commercial Code, s. 673.102(1)(a), F. S., defined "issue" to mean the first delivery of an instrument to a holder or remitter. The precursor Negotiable Instrument Law defined the term to mean the first delivery of the instrument, complete in form to a person who takes it as a holder. Section 674.01, F. S. 1965. Both the Uniform Commercial Code s. 673.102(1)(e), F. S., and the Negotiable Instrument Law, s. 674.01, F. S. 1965, define "instrument" to mean "[a] negotiable instrument," which the revenue bonds under consideration are. The definition of "delivery" in s. 671.201(14), F. S., with respect to instruments or securities as "the voluntary transfer of possession" is similar to, and is a broadening of, the definition of that term in the former Negotiable Instruments Law at s. 674.01, F. S. 1965, wherein "delivery" was defined to mean "the transfer of possession, actual or constructive, from one person to another." *See* Art. II, s. 2.06, Resolution 77-6, City of Pahokee, providing that bonds "shall be and shall have all the qualities and incidents of negotiable instruments under the law merchant and the laws of the State of Florida" and s. 2.08, Form of Bonds. *See also* s. 678.102(1), F. S., defining "security" and s. 678.105(1), F. S., providing that securities governed by that chapter are negotiable instruments.

We begin with the proposition that in enacting Ch. 77-251, Laws of Florida, codified as s. 166.231(1)(a), F. S., the Legislature was presumed to know about existent judicial and statutory definitions and uses of the term "issued" or similar and related terms and existent statutory provisions in relation to bond issues or the issuance of bonds. *See* Adler-Built Industries, Inc. v. Metropolitan Dade Co., 231 So.2d 197 (Fla. 1970); Williams v. Jones, 326 So.2d 425 (Fla. 1975). In effect then, in using the term "issued" in Ch. 77-251 in relation to "all obligations to or for the benefit of holders of bonds or certificates," the Legislature must be presumed to have meant what it said and to have employed the

term in the sense that it meant in subject context. *See* State v. Tunnicliffe, 124 So. 279 (1929), Thayer v. State, 335 So.2d 815 (1976).

In Mize v. County of Seminole, 229 So.2d 841, 847-848 (Fla. 1969), the court extensively quoted from City of Jacksonville v. Renfroe, 136 So. 254, 256 (Fla. 1931), which case involved the authorization and validation by the city of certain street improvement and auditorium bonds prior to the effective date of s. 6, Art. IX, State Const. 1885, which required freeholder approval in all such cases. Some of the bonds had been sold prior to the amendment and some had remained unsold. A suit was brought to enjoin the city from selling the bonds which remained unsold after the passage of the constitutional amendment. The complaint in that case alleged that all of the bonds were authorized and validated prior to the adoption of the constitutional amendment and therefore were not affected thereby. In upholding the action of the trial court in *Renfroe* in enjoining the sale of the remaining bonds, the court stated:

> Section 6, article 9 of the Constitution, as amended . . . provides in part as follows " . . . Municipalities of the State . . . shall have power to issue bonds only after the same shall have been approved . . . ."
>
> This section of the Constitution divests . . . municipalities of any authority which (they) may have theretofore enjoyed to issue bonds except upon the compliance with . . . this section. Bonds such as those here under consideration are negotiable instruments, and are controlled by what is generally known as the negotiable instrument statute of this state, section 4674, Rev. Gen. St. 1920, section 6760, Comp. Gen. Laws 1927, which in part provides as follows: " 'Issue' means the first delivery of the instrument, complete in form to a person who takes it as a holder." Under this definition of "*issue*" the bonds here under consideration had not been issued. The negotiable instrument statute was in effect at the time the above-quoted amendment to our Constitution was adopted, and we hold that the statutory definition then in force is to be applied to the word "*issue*" as contained in this provision of the Constitution. (Emphasis supplied.)
>
> In Potter v. Lainhart, 44 Fla. 647, 33 So. 251, 259, it was held: "The word 'issued,' as applied to bonds, usually includes delivery, but it does not invariably do so." But, where a different meaning is to be given the word "issue," the intention to give it such different meaning must appear upon the face of the act or document in which it is used. The word "issue" is used in the section of the Constitution above quoted without any other language being used to indicate that any except the general meaning is to be applied to such word.
>
> The bonds under consideration here were authorized, executed, and validated, but before being issued as contemplated by law under the definition given in section 4674, Rev. Gen. St. 1920, section 6760, Comp. Gen. Laws 1927, the organic law was amended in such manner as to bring the issuance of these bonds in conflict with its provisions.

The court in *Mize* observed that in the number of cases prior to and since the time of the *Renfroe* decision, the court had held that bonds are not "issued" until they have been duly executed and delivered, *Mize* at p. 848; and expressly held that it did not overrule City of Jacksonville v. Renfroe, *supra*. The *Mize* Court did, however, hold that under the particular circumstances of that case and the provisions of ss. 2 and 7(b), Art. XII, State Const., the bonds there involved could be issued and sold even though they were validated at a time when the electorate or freeholders did not have the right to vote upon the propriety of that particular issue. No such considerations, nor the cited constitutional provisions, are present or apply to the instant situation relative to subject water and sewer revenue bonds. Everything said in the quoted matter in Mize from Renfroe, *supra*, in construing the cited constitutional provision there involved with the former Negotiable Instrument Law's definition of "issue," at s. 674.01, F. S. 1965, is as applicable to the term "issued" as employed in Ch. 77-251, *supra*, and defined in s. 673.102(1)(a), as it was to the construction of former s. 6, Art. IX, State Const. 1885 and the existent statutory definitions of that term and related terms hereinbefore discussed in the Uniform Commercial Code likewise apply to and govern the term "issued" as used in Ch. 77-251. There is nothing in the language or terms of Ch. 77-251 to evidence any legislative intent that any different meaning be given the term "issued" as employed in the context of Ch. 77-251, codified as s. 166.231(1)(a), F. S. *See also* 48 C.J.S. 778 defining the term "issued," the past participle of the verb "issue," to mean "emitted or sent forth; delivered

or put into circulation; delivered to the purchaser; caused to go forth or to be delivered; assigned, transferred or delivered; sent out"; 48 C.J.S. 777 defining the verb "issue," in its transitive sense, to mean, among other things, "to send or let out; to emit; to deliver; to put into circulation; to send out; to send forth"; and Potter v. Lainhart, 33 So. 251, 259 (Fla. 1902), stating that the word "issued," as applied to bonds, usually includes delivery, but it does not invariably do so, since the sense in which such word is used by the Legislature should control in construing and applying a statute. The context of s. 166.231(1)(a), F. S., manifesting no legislative intent to the contrary, I must conclude that the definition of the word "issue" in s. 673.102, F. S., as meaning the first delivery of an instrument to a holder, as well as the judicial precedents cited in *Mize* at page 848, footnote 9, holding that bonds are not "issued" until duly executed and delivered, is to be applied to the term "issued" as it is used in s. 166.231(1)(a). Article II, s. 2.02 of Resolution 77-6, *Description of Bonds*, providing that "the bonds shall be dated as of the date of their delivery," seems to indicate that the governing body of the city contemplated that the legal "issuance" of subject bonds was to occur at the time of their delivery since the obligation of such bonds is fixed as of the date of their delivery by the enabling resolution. Section 2.01 of Article II of the resolution states that "obligations of the Issuer . . . are hereby authorized to be issued" and obviously contemplates the actual issuance thereof *in futuro*. As noted in *Mize* at page 848, the obligation of these bonds is fixed at the date of their issuance and delivery.

Since the City of Pahokee's water and sewer revenue bonds were not actually executed and delivered to the bondholder until long after May 4, 1977, and the effective date of Ch. 77-251 (s. 166.231(1)(a), F. S.), such revenue bonds were not "issued" in the legal sense or in the sense in which the term is used in Ch. 77-251 and as defined in s. 673.102, F. S., before the critical statutory limiting date, there being nothing in the context of Ch. 77-251 manifesting a legislative intent that a different meaning be given the term in applying the statute. The legal consequence or effect is that the City of Pahokee is without authority of general law to continue to levy its public service tax on the purchase of cable television service after September 30, 1977, for the benefit of the holders of subject revenue bonds "issued" after May 4, 1977, as well as after the effective date (October 1, 1977) of Ch. 77-251, *supra*.

Apart from the foregoing, Resolution 77-6, s. 1.02(c)(i), Art. I, finds that the issuer of subject bonds had theretofore enacted an ordinance levying a utilities service tax on designated utility services, *but not including cable T.V. service*, the proceeds of which tax are thereafter referred to in the resolution as the "Excise Taxes," and ss. 1.02 (D) and 3.02 of Article III thereof operate to pledge the proceeds of such excise taxes (not including excises on cable T.V. service) to the payment of the principal of and interest on the bonds, and further provides:

> It is deemed necessary and desirable to pledge as additional security for the payment of the principal and interest on the bonds all moneys of the Issuer derived from sources other than ad valorem taxation which shall be legally available for such purpose.

Section 2.08, Art. II, *Form of Bonds*, of the resolution provides that the bonds are payable solely from and secured by a lien upon and a pledge of revenues of the project being financed and the above-referenced "Excise Taxes" and payable additionally from sources other than ad valorem taxation and legally available for such purpose. Section 3.02, Art. III, of the resolution provides that the payment of the debt service of these bonds shall be secured by a pledge of and a lien upon the operating revenues and the excise taxes and a pledge of and all moneys of the issuer derived from sources other than ad valorem taxation and legally available for such purpose.

It appears from the foregoing analysis of the enabling resolution that no pledge of any excise taxes on cable T.V. service was ever expressly or specifically made by the city. Since the advent of Ch. 77-251, Laws of Florida, such tax is not a "source other than ad valorem taxation and (is not) legally available for such purpose."

078-143—December 12, 1978

BEVERAGE LAW

RECOGNIZED DISTRIBUTORS OF CERTAIN BRANDS OR LABELS LIMITED TO THOSE EXISTING ON JULY 1, 1978

To: Barry Kutun, Representative, 99th District, Miami Beach

Prepared by: Staff

QUESTION:

Does H.B. 2079 permit a manufacturer to appoint a distributor for a brand or label which another distributor now carries, thereby creating what is commonly referred to as "dual" distributors for a particular brand or label?

SUMMARY:

Pending judicial interpretation or legislative clarification, in my opinion H.B. 2079 fixes those distributors existing on July 1, 1978 as the recognized distributors of labels and brands of spirituous and vinous beverages and that "other distributors" or additional distributors of such labels may be allowed only if the division first approves the withdrawal of the label from existing distributors.

The pertinent part of H.B. 2079 (now Ch. 78-135, Laws of Florida, codified as ss. 564.045(5) and 565.095(5), F. S. [1978 Supp.]) reads as follows:

> All distributors carrying a particular brand or label of spirituous or vinous beverages as of the effective date of this act, shall be deemed to be *the distributors* for the manufacturers of such brands or labels. No *other* distributors may be appointed by any manufacturer or representative of a manufacturer to carry the brands or labels already distributed on the effective date of this act *unless* the Division first approves the withdrawal from the existing distributor pursuant to this act. (Emphasis supplied.)

The statute in clear terms states that *all* distributors carrying a particular brand or label as of the effective date of the act (July 1, 1978) shall be deemed to be *the* distributors for such brands or labels. The language used is unmistakably mandatory in nature, in effect defining as distributors for particular brands or labels only those who are carrying those brands or labels on the effective date of the act.

The sentence which follows is also equally clear in meaning. It states that "no *other distributors* may be appointed . . . to carry the brands or labels *already distributed* on the effective date of this Act *unless* the Division first approves the withdrawal from *the existing distributor* pursuant to this Act." (Emphasis supplied.) Since the term "distributor" is clearly defined in the preceding sentence to mean only those carrying the particular brands or labels on the effective date of the act, the Legislature in unmistakable terms states that "no other distributor may be appointed" unless a withdrawal from an existing distributor is approved by the division. The effect of this statute is apparent in that it precludes a manufacturer from naming a second or "dual" distributor unless a withdrawal from an existing distributor recognized as such on the effective date of the act has been approved by the Division of Alcoholic Beverages and Tobacco.

It is well established in Florida that the fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. Burr v. Florida East Coast Railway Co., 81 So. 464 (Fla. 1919); State v. Burr, 84 So. 61 (Fla. 1920); Heriot v. City of Pensacola, 146 So. 654 (Fla. 1934). In Platt v. Lanier, 127 So.2d 912 (2 D.C.A. Fla., 1961) the court stated that legislative intent must be ascertained and must govern in construing a statute and where language is plain and unambiguous, it needs no construction and in that case the statute itself fixes legislative intent.

And in Ross v. Gore, 48 So.2d 412 (Fla. 1950), the court observed at 415:

> Where language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction; and the statute must be given its plain and obvious meaning.

Since the statute is presumptively constitutional until found to be otherwise by the courts and challenges to the constitutionality of acts of the Legislature are for the courts alone to determine, administrative agencies cannot be empowered or authorized to make such a determination. *See* Adams Packing Association, Inc. v. Florida Department of Citrus, 352 So.2d 569 (2 D.C.A. Fla., 1977). Therefore, agencies are bound by the unmistakable terms of a statute, in the absence of a judicial ruling to the contrary. I am aware that the Division of Alcoholic Beverages and Tobacco may have reached in part a contrary conclusion and that the issue may have to be litigated to be resolved.

078-144—December 21, 1978

CONSTITUTIONAL LAW

COMPELLED TESTIMONY—STATUTE GRANTING IMMUNITY FROM PENALTY OR FORFEITURE EXTENDS TO ADMINISTRATIVE DISCIPLINE OF STATE EMPLOYEES

To: Emmett S. Roberts, Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Joseph W. Lawrence II, Assistant Attorney General

QUESTION:

> **Are state employees who have been granted immunity by the state attorney for the purpose of obtaining their testimony regarding a child abuse committed by another state employee subject to disciplinary action for their failure to timely report the child abuse witnessed by them?**

SUMMARY:

> **When state employees are granted immunity pursuant to s. 914.04, F. S., in order to compel their testimony regarding the criminal acts of another, the immunity extends to and precludes any administrative proceeding to discharge or otherwise discipline such employees for their conduct concerning the matter about which they were compelled to testify.**

The factual circumstances from which your inquiry arises, as presented in your correspondence, are briefly summarized as follows: A child committed to the custody of the state at Sunland Training Center was subjected to an act of child abuse by a state employee. Such abusive action was witnessed by other state employees who made no report thereof. In the subsequent criminal prosecution of the employee who committed the abuse the state attorney granted immunity to the state employee witnesses in order to compel their testimony regarding the incident. A conviction was obtained and the employment of the individual who was convicted was terminated.

Section 827.07(4), F. S., provides, in relevant part, that:

> Any person, including, but not limited to, any physician, nurse, teacher, social worker, or employee of a public or private facility serving children, who has reason to believe that a child has been subject to abuse shall report or cause reports to be made to the department.

And s. 827.09(3)(a), F. S., in pertinent part provides:

> Any person, including, but not limited to, any physician, psychologist, nurse, teacher, social worker, employee of a public or private facility serving

> developmentally disabled persons, or parent of such developmentally disabled person, who has reason to believe that a developmentally disabled person has been subjected to abuse shall report, or cause reports to be made, to the department.

Therefore, the state employee witnesses to their coworker's acts of abuse clearly had a specific duty to report the incident or cause it to be reported to the Department of Health and Rehabilitative Services.

Furthermore, willful and knowing failure by the employees to make such reports or cause them to be made would constitute guilt of a misdemeanor of the second degree, upon their being so charged and convicted. Section 827.07(11), F. S. Consequently, since testimony by the state employee witnesses would tend to be inculpatory and expose them to possible criminal sanction, they would be entitled to invoke their privilege against self-incrimination as guaranteed by the Fourth and Fifth Amendments to the United States Constitution.

However, in such circumstances the testimony of such witnesses could nonetheless be compelled pursuant to s. 914.04, F. S., which provides:

> No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper or other document before any court having felony trial jurisdiction, grand jury, or State Attorney, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, *but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.* (Emphasis supplied.)

In effect this statute operates to enable the state to obtain testimony which would otherwise be protected by the privilege against self-incrimination by granting immunity to those whose testimony is compelled by proper subpoena.

It is clear that the above statute was intended to grant use as well as transactional immunity. In other words, the statute not only prevents the use of any testimony or evidence produced by the witness in an action against him, but also protects the witness from being prosecuted at all, for any violations as to which his testimony might inculpate him. Therefore, the only remaining issue is whether or not the immunity extends to and bars administrative proceedings to discharge or otherwise discipline such a witness who is employed by the state.

This issue is resolved by the case of Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1973), which was referenced in your letter. In this case, the license of a dentist was revoked by administrative proceedings for his acts in connection with criminal activity as to which he had previously testified. His prior testimony had been compelled by subpoena and he had been granted immunity by the state attorney pursuant to a statute identical in all material respects with s. 914.04, F. S.

The court viewed the revocation proceedings to be a "prosecution to effect a penalty or forfeiture as contemplated by the statute" construing the term forfeiture to include the loss of property, position, or some personal right. Employees of the state, upon achieving permanent status in the State Career Service System, are vested with a property interest in their position and the emoluments thereof under Ch. 110, F. S. *See* AGO 075-94. Therefore, there is no basis upon which to distinguish the situation considered in the *Lurie* case.

Accordingly, I conclude that your department is without authority to subject the state employees to disciplinary proceedings for their conduct concerning the matter to which they were compelled to testify.

078-145—December 21, 1978

SOVEREIGN IMMUNITY

SPECIAL TAXING DISTRICT LIABILITY FOR NEGLIGENCE OF OFFICERS—OFFICERS INDIVIDUALLY LIABLE FOR BAD FAITH ACTIONS—WHEN DISTRICT AUTHORIZED TO PURCHASE LIABILITY INSURANCE

To: Vernon R. Bishop, Director, South Walton County Mosquito Control District, Santa Rosa Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Can a member of the board of commissioners of a mosquito control district organized and operating under Ch. 388, F. S., be sued individually?

2. Is it necessary for board members to be covered under liability insurance in the event of a suit or would a suit be against the body corporate?

SUMMARY:

Under the provisions of the general law waiving sovereign immunity in tort for state agencies or subdivisions, as defined in s. 768.28(2), F. S., actions may be brought against a mosquito control *district* for the negligent acts or omissions of its officers or employees committed within the scope of their authority. The officers or employees of the district may be held individually or personally liable, however, for those acts or omissions committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Florida appellate court decisions are in conflict as to whether the officers or employees of a governmental entity are immune from suit for negligent acts or omissions committed within the scope of their authority. The resolution of this conflict is not within the jurisdiction of the Department of Legal Affairs and must await action by the Legislature.

AS TO QUESTION 1:

Section 388.02, F. S., provides for the creation of special taxing districts for the control of mosquitos and other arthropods. Within the boundaries of the district, the board of commissioners of the mosquito district possesses "all the powers of a body corporate, including the power to sue and be sued as a corporation in said name in any court." Section 388.161(2), F. S. Section 388.131, F. S., requires each commissioner to give a "surety bond in the sum of $2,000, the cost thereof being borne by the district, conditioned on the faithful performance of the duties of his office."

An analysis of individual liability for actions taken by members of the board of commissioners of a mosquito control district must begin with a discussion of s. 768.28, F. S. With the enactment of s. 768.28, the Legislature has waived the state's immunity from *tort* liability provided therein for itself "and for its agencies or subdivisions" subject to the monetary limitations set forth in s. 768.28(5), F. S. ($50,000 on any claim or judgment by one person or $100,000 for all claims arising out of the same incident or occurrence). The phrase "state agencies or subdivisions" is defined by s. 768.28(2), F. S., to include

> . . . the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities.

Thus, when the state or its agencies as lessees enter into a new lease or a renewal of an expired or expiring lease of an existing building (either pre-1973 or post-1973), or any part or portion thereof, the leased portion of such building or facility must comply with the standards and specifications established by the Department of General Services pursuant to s. 255.21, F. S., if such leased portion is intended for use of the general public or the affected state agency must obtain a modification or waiver of the regulations promulgated by the department pursuant to s. 255.21(2), F. S.

A statute must be read and interpreted in its entirety and must be so construed that it is meaningful in all of its parts. Wilensky v. Fields, 267 So.2d 1 (Fla. 1972). Effect should be given to the entire statute as a consistent and harmonious whole. State *ex rel.* Davis v. Knight, 124 So. 461 (Fla. 1929). A statute should not be construed in such a manner as to reach an illogical or ineffective conclusion when another construction is possible. Gracie v. Deming, 213 So.2d 294 (2 D.C.A. Fla., 1968). The cardinal rule for statutory construction is that effect must be given to the intention of the Legislature. *In re* Estate of Williams, 182 So.2d 10 (Fla. 1965). The primary source from which legislative intent is to be ascertained is the statute itself. Marshall Lodge v. Woodsen, 190 So. 749 (Fla. 1939). Here, the Legislature wished to exclude pre-October 1, 1973, buildings from the application of this section except as to new leases.

078-159—December 29, 1978

COUNTIES

CLERK OF THE CIRCUIT COURT—FLORIDA RETIREMENT SYSTEM AND SOCIAL SECURITY CONTRIBUTIONS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Under what circumstances is it proper for the board of county commissioners to pay, from its own funds, such amounts as are required to be forwarded to the state by the "employer" of the officers and employees of the office of the clerk of the circuit court because of retirement and social security contribution requirements as to a clerk of the circuit court who operates under funds budgeted and paid over to his office by a board of county commissioners and as to a clerk of the circuit court who operates his office from fee receipts and whose net income is insufficient to make the required payments?

SUMMARY:

If the clerk of the circuit court, as county clerk, auditor, and custodian of county funds, operates his office from fee receipts, the board of county commissioners may pay from its own funds the retirement and social security contributions required by Ch. 121 to be forwarded to the Division of Retirement by the clerk as the "employer" of the officers and employees of the clerk's office *provided* that the income of the clerk as a constitutional fee officer is insufficient to make such contributions. If the clerk of the circuit court, however, operates under funds budgeted and paid over to his office by the board of county commissioners, the board does not have the authority to provide the clerk with sufficient money from its own funds to make the required payments. If the clerk is unable to make the required contributions, the board may, in compliance with Ch. 129, F. S., amend the county budget to provide county funds for the purpose of making such payments.

The Florida Retirement Act, Ch. 121, F. S., is a general law applicable uniformly throughout the state to public officials, including county officers and employees. *See* AGO

078-158—December 27, 1978

DEPARTMENT OF GENERAL SERVICES

LEASED PUBLIC BUILDINGS—SPECIAL FACILITIES FOR PHYSICALLY HANDICAPPED

To: Thomas R. Brown, Executive Director, Department of General Services, Tallahassee

Prepared by: Horace Schow II, Assistant Attorney General

QUESTION:

As a condition precedent to approving an agency's proposed lease, may the Department of General Services lawfully require state agencies to obtain from their respective landlords compliance with standards established by the Department of General Services for persons who are physically disabled in all space obtained under lease?

SUMMARY:

As a condition precedent to approving an agency's proposed new lease wherein the state leases a portion of a building intended for use by the general public, the Department of General Services, pursuant to s. 255.21(1), F. S., must require state agencies to obtain from their respective landlords compliance with the standards and specifications established by the Department of General Services for providing special facilities for the physically disabled in that portion of the building covered under the lease. For the purposes of this section, a renewal of an expired lease or a renegotiated or renewed lease is to be categorized as a new lease.

Section 255.21(1), F. S. 1977, provides in pertinent part:

> *Any building or facility intended for use by the general public* which, in whole or in part, is . . . *operated* as a lessee, by or on behalf of the *state* . . . or any public administrative board or authority of the state shall, with respect to the . . . *leased portion* of such building or facility, comply with standards and specifications established by the Department of General Services under this section. . . . This section shall not apply to buildings or facilities existing on October 1, 1973 *except as to . . . new leases.* (Emphasis supplied.)

The title to Ch. 72-281, Laws of Florida, states that the purpose of the act relating to the physically handicapped is to require that certain public buildings afford facilities for the physically handicapped.

Of the six sentences in s. 255.21(1), the words "lease" or "lessee" appear only in the first and last sentences. A reading of the first sentence clearly shows that it applies to such portions of existing buildings or facilities as are leased and operated as lessees by agencies of the state if intended for use by the general public and such portions must comply with standards and specifications established by the Department of General Services. Further, all such new leaseholds operated by state agencies as lessees must comply with such standards and specifications. The last sentence, however, excepts from the operation of s. 255.21(1) all buildings or facilities existing on October 1, 1973, even if intended for the use of and being used by the general public; but, if any such building or facility so accepted is newly leased and operated as a lessee by the agencies of the state and if such leasehold is intended for use by the general public, then such leasehold becomes subject to and controlled by the provisions of the first sentence.

The phrasing of your question indicates that your concern is with the new lease situation or renewals of existent or expiring leases (which are, in legal effect, new leases). Your question reads in part: "As a condition precedent to approving an agency's *proposed lease* . . . ?" (Emphasis supplied.) A proposed lease is not in existence and accordingly cannot be an existing lease or leasehold. Therefore, a proposed lease must be considered to be a new lease or a renewal of an expired lease which, as noted above, constitutes a "new lease."

(2) The tax collectors of the several counties of the state shall be entitled to receive upon the amount of real and tangible personal property taxes, and licenses, collected and remitted, the following commissions:

* * * * *

(c) On each taxing district:
1. Three percent on the amount of taxes levied on an assessed valuation of $50 million; and
2. Two percent on the balance.

Whether your office would be entitled to a commission under the provisions of s. 192.091(2)(c), F. S., for collecting and remitting the assessments levied against benefiting property pursuant to County Ordinances Nos. 76-2 and 76-3 must be determined by whether the assessments are real or tangible personal property taxes or licenses within the meaning of s. 192.091(2), F. S.

True special assessments based on some criteria such as acreage or footage and not on an ad valorem basis are not taxes. Klemm v. Davenport, 129 So. 904 (Fla. 1930); Lainhart v. Catts, 75 So. 47 (Fla. 1917); State *ex rel.* Logan v. Raulerson, 151 So. 384 (Fla. 1933); AGO 074-78. Therefore, as the special assessment taxes involved here are not assessed on an ad valorem basis but rather are based on the footage of the benefited lots located within the special districts, they are not real or tangible personal property taxes under the language of s. 192.091(2)(c), F. S.

The classification of the taxes in question here as special assessments rather than ad valorem taxes is further supported by the case of City of Naples v. Moon, 269 So.2d 355 (Fla. 1972). The Supreme Court of Florida was presented in this case with the question of whether the tax imposed on property by a special act establishing a parking authority was a special assessment or an ad valorem tax. The court ruled that even though published notice of the legislation establishing the parking authority stated that the purpose of the legislation was to grant power to a city parking authority to levy an ad valorem tax, and various sections of the special act suggested an ad valorem tax system, where the notice of legislation also stated that the tax would be levied in proportion to the amount of floor space of each improved property, its relation to parking lots acquired by the parking authority, and the amount of property presently provided by the property owners, the tax was properly classified as a special assessment and not an ad valorem tax.

It should also be noted that under s. 192.091(2)(c), F. S., no provision is made for compensating a tax collector for the collection of "licenses," as it is under s. 192.091(2)(b). Further, license taxes may be authorized only by law and must be levied in accordance therewith. *See* s. 9(a), Art. VII, State Const.

Therefore, it is my opinion that the special assessments levied pursuant to Highlands County Ordinances Nos. 76-2 and 76-3 cannot be considered real and tangible personal property taxes or license taxes and your office would not be entitled to a commission pursuant to the provisions of s. 192.091(2)(c), F. S., for collecting and remitting these special assessments.

AS TO QUESTION 2:

Your second question concerns whether a county tax collector may charge each special benefit district a reasonable fee to help defray the administrative costs involved in collecting and remitting the special assessments levied against each special benefit district.

As I stated earlier in my opinion, public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and, when no compensation is so provided, the rendition of such service is deemed to be gratuitous. Rawls v. State, *supra.* My research reveals no constitutional or statutory provision which would empower a county tax collector to charge a fee to help defray the costs of collecting and remitting these special assessments. Nevertheless, it should be noted that the lack of a statutory fee or means of reimbursement would not excuse a county tax collector from rendering statutorily required services even though he received no fee. *See* AGO 073-77.

078-157—December 27, 1978

TAXATION

TAX COLLECTORS NOT ENTITLED TO COMMISSIONS FOR COLLECTING SPECIAL ASSESSMENTS FOR SPECIAL BENEFIT DISTRICTS

To: J. T. Landress, Highlands County Tax Collector, Sebring

Prepared by: Cecil L. Davis, Jr., Assistant Attorney General

QUESTIONS:

1. Is the Highlands County Tax Collector entitled to a commission pursuant to s. 192.091(2)(c), F. S., for collecting and remitting special assessments levied against benefiting property pursuant to county ordinances Nos. 76-2 and 76-3, for the Sebring Manor Special Benefit District and the Avon Park Lakes Special Benefit District?
2. If question 1 is answered in the negative, would it be proper for a county tax collector to charge each special benefit district a reasonable fee to help defray the administrative costs involved in collecting and remitting these special assessments?

SUMMARY:

Special assessments levied by special taxing districts and based on the footage or some other criteria of the benefited lots located within the special districts, rather than on an ad valorem basis, are not real or tangible personal property taxes or license taxes within the meaning of s. 192.091(2)(c), F. S., and the county tax collector would not be entitled to a commission pursuant to the provisions of s. 192.091(2)(c) for collecting and remitting these special assessments. Nor would it be proper for the county tax collector to charge each special district a reasonable fee to help defray the administrative costs involved in collecting and remitting these special assessments, as public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and no law exists which would empower the county tax collector to charge a fee to help defray the costs of collecting and remitting these special assessments.

AS TO QUESTION 1:

Section 5(c), Art. II, State Const., provides that "the powers, duties, *compensation* and method of payment of state and county officers shall be fixed by law." (Emphasis supplied.) Similarly, the Florida Supreme Court has held that the fees or compensation for official services of public officers must be fixed by law. Bradford *et al.* v. Stoutamire, 38 So.2d 684 (Fla. 1948). The county ordinances in question are not laws and, in any event, do not provide for any compensation to the Highlands County Tax Collector for collecting and remitting the special assessments levied pursuant to the ordinances.

It is also the settled law of this state that public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and, when no compensation is so provided, the rendition of such service is deemed to be gratuitous. Rawls v. State, 122 So. 222 (Fla. 1929); Brown v. St. Lucie County, 153 So. 906 (Fla. 1934); State v. Reardon, 154 So. 868 (Fla. 1934); Gavagan v. Marshall, 33 So.2d 862 (Fla. 1948).

The Legislature has provided for the compensation of county tax collectors in s. 192.091(2), F. S., which provides that county tax collectors shall receive commissions on all real and tangible personal property taxes collected and remitted, at rates varying according to the tax involved and the amount collected. Section 192.091(2) states, in part, as follows:

obsolete or of no further use to the activity or location under his supervision and certify such fact to the division. All property so certified and transferred to the division becomes the property of the division, which is directed by statute to promulgate rules and regulations providing for classification, certification, transfer, and disposal of such property. *See* Rules and Regulations of the Division of Surplus Property at Chapter 13F-1, F.A.C. Pursuant to s. 273.055, moneys received by the division from the disposition of state-owned property are deposited into the State Surplus Property Working Capital Trust Fund, and may be disbursed for the acquisition of exchange and surplus property and for operating expenses of the division in carrying out these functions.

It appears that the crux of your question concerns whether the provision of s. 240.042, F. S., authorizing the Board of Regents to purchase and contract for the sale or disposal of property, exempts the Board of Regents and the state universities from the provisions of later enacted Ch. 273, F. S., and the rules and regulations promulgated thereunder (at Ch. 13F-1, F.A.C.).

I note that Ch. 273, F. S., by its terms, applies to *all* state-owned tangible personal property in the custody of *any* state board, officer, commission, authority, person or agency entitled to lawful custody thereof. Chapter 273 contains no exceptions to this comprehensive language. Accordingly, it appears that the Board of Regents and the state universities, as state agencies, are "custodians" of property under Ch. 273, F. S., and are, therefore, bound by the provisions thereof. Section 240.042, F. S., does not compel a contrary result. Statutes which speak to the same subject matter (here, the disposal of surplus property) should be read *in pari materia* so that effect is given to provisions of both if they can reasonably be construed together and in harmony with one another. Mann v. Goodyear Tire and Rubber Co., 300 So.2d 666 (Fla. 1974); City of Coral Gables v. Board of Public Instruction of Dade Co., 313 So.2d 92 (3 D.C.A. Fla., 1975). The two statutes of concern here can be reasonably read together to give effect to them both. Department of Education Rule 6C-9.02, adopted pursuant to s. 240.042, F. S., and concerning disposal of surplus property does precisely this. The rule states:

> 6C-9.02 Surplus Property. Upon the recommendation of the Chancellor and approval by the Board, obsolete, outmoded, or unneeded material of any institution may be disposed of by transfer, without cost, to other institutions or agencies, or by public sale, through bid or auction subject to the provisions of Sections 273.04, 273.05 and 273.055, Florida Statutes.

Hence, consistent with the rules of statutory construction as set forth above, the Board of Regents and the state universities are required by the Department of Education rule to exercise their authority over surplus property in conformity with the provisions of Ch. 273. Perhaps it should also be pointed out parenthetically that, insofar as ss. 273.04-273.055 and s. 240.042(1), F. S., could be read to be in conflict, the later-enacted statute will modify the 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 later expression of legislative intent is the law when two irreconcilable statutes are involved. Johnson v. State, 27 So.2d 276 (Fla. 1946), City of Jacksonville Beach v. Albury, 295 So.2d 247 (Fla. 1974) Accordingly, to the extent that s. 240.042(1) can be read to give the Board of Regents or the state universities authority to control disposal of state surplus property in any way other than Ch. 273 prescribes, it is impliedly modified by the later-enacted statute.

In response to your first question, it is the opinion of this office that the proper procedure to be followed for the disposal of surplus tangible personal property of state universities is for certification and transfer of such property to the Division of Surplus Property in accordance with Ch. 273 and the rules and regulations promulgated thereunder (Ch. 13F-1, F.A.C.). Your second question is also answered by Ch. 273, which requires that proceeds received by the division from the disposition of state-owned property shall be deposited into the State Surplus Property Working Capital Trust Fund.

Chapter 273, F. S., concerns state-owned tangible personal property. The chapter governs "property" (defined by s. 273.01(2), F. S., to mean "all tangible personal property owned by the state") which is under the supervision or control of a "custodian" (defined by s. 273.01(1), F. S., to mean "any elected or appointed state officer, board, commission, or authority, and any other person or agency entitled to lawful custody of property owned by the state").

Chapter 73-233, Laws of Florida, amended Ch. 273, F. S., to provide a scheme by which property held by a custodian could be exchanged with the seller of property to be acquired by the custodian or could be classified as surplus and disposed of by the Division of Surplus Property of the Department of General Services. This statutory scheme, codified at ss. 273.04-273.055, F. S., remains unchanged. The statute provides in pertinent part:

> 273.04 **Property acquisition.**—Whenever acquiring property the custodian may pay the purchase price in full or may exchange property with the seller as a trade-in after first offering such exchange property for sale to the Division of Surplus Property. The Division of Surplus Property may purchase the exchange property for the amount of trade-in allowance offered by the seller. The receipts from such sales are hereby appropriated and may be applied to the cost of the property acquisition. The division may authorize the custodian to exchange property with the seller as a trade-in and apply the exchange allowance to the cost of the property acquired. If whenever acquiring property, the custodian may best serve the interests of the state by outright sale of property rather than by exchange as a trade-in, he may make the sale in the manner prescribed in this act for the disposal of surplus property, and the receipts from the sale are hereby appropriated and may be applied to the cost of the property acquired, except that the value of the property sold must not exceed the approximate value of the property acquired, and the property to be acquired shall be contracted for within the same biennium in which the property sold is disposed of.
>
> 273.05 **Surplus property.**—The custodian shall have discretion to classify as surplus any property in his custody that is obsolete or the continued use of which is uneconomical or inefficient or which serves no useful function as to any activity or location under his supervision. The fact that property is surplus shall be certified to the Surplus Property Division of the Department of General Services, together with information indicating the value and condition of the property.
>
> 273.055 **Disposition of state-owned tangible personal property.**—
> (1) The Division of Surplus Property of the Department of General Services shall have all right, title, interest, and equity in all state-owned tangible personal property certified and transferred to it as surplus. The division shall promulgate administrative rules and regulations pursuant to chapter 120 providing for, but not limited to, the assessment of fees for services rendered and the classification, certification, transfer, warehousing, bidding, destruction, scrapping, or other disposal of state-owned tangible personal property. However, the approval of the Department of Administration shall be required prior to the disposal of property the estimated value of which is $5,000 or more.
> (2) All moneys received by the division from the disposition of state-owned tangible personal property shall be deposited into the State Surplus Property Working Capital Trust Fund, which is hereby created, and may be disbursed for the acquisition of exchange and surplus property and for all necessary operating expenditures.

It can be seen that a custodian of property is authorized to exchange property with a seller for property he is acquiring after first offering such exchange property to the division. The division may purchase it for the amount of the trade-in allowance offered by the seller and receipts from such sale may be applied to the cost of acquiring the new property. If the best interest of the state would be served thereby and certain conditions are met, the custodian may make an outright sale of the property rather than exchange it as a trade-in and apply the receipts to the cost of new property. Pursuant to ss. 273.05 and 273.055, a custodian may classify as surplus any property in his custody that is

any premises serviced by or connected to a county sanitary sewer or sewage disposal system is included within the purview of s. 153.12(2)(b) and the terms "any . . . body . . . supplying water to or selling water for use on such premises," and is subject to and governed by the terms thereof. Therefore, unless and until it is judicially or legislatively determined otherwise, it is my opinion that the term "body," as used in s. 153.12(2)(b), includes a municipality within the definition of the term "public body" set forth in s. 1.01(9).

Section 153.12(2)(b), F. S., assuming the constitutionality *vel non* thereof, expressly imposes a *duty* on any such municipality within 5 days after receipt of the prescribed notice of delinquency from the county "to cease supplying water to or selling water for use on" any premises serviced by or connected to such county's sanitary sewer or sewage disposal facilities or systems. The statute does *not* make any provision for invoking any penalties against or compelling any such municipality to disconnect or to shut off its supply of water to such premises except as may be provided for in s. 153.03(10), F. S.; but upon its failure or refusal to do so, the county is *authorized* to shut off the supply of water (by the municipality) to any such premises. The statute is presumptively valid and it must be given effect until it is judicially declared unconstitutional. *See* Evans v. Hillsborough County, 186 So. 193, 196 (Fla. 1938); White v. Crandon, 156 So. 303, 305 (Fla. 1934); City of Sebring v. Wolf, 141 So. 736 (Fla. 1932); State *ex rel.* Gillespie v. Thursby, 139 So. 372, 375 (Fla. 1932); State *ex rel.* Atlantic Coastline R. Co. v. State Board of Equalizers, 94 So. 681, 682 (Fla. 1922).

As stated above, no opinion is expressed as to the legal consequences of either the county or the municipality shutting off water service supplied by the municipality to any premises or persons as provided in s. 153.12(2)(b), F. S., or as to the failure or refusal of either body to do so as therein provided or as to any violations of any of the provisions of Ch. 153, F. S., or any resolution validly adopted pursuant to the powers granted thereby as provided in s. 153.03(10), F. S. Any remaining questions as to such matters should be submitted to the courts for resolution in an appropriate proceeding for a declaratory judgment.

078-156—December 27, 1978

STATE UNIVERSITIES

SURPLUS PROPERTY—PROCEDURE FOR SALE AND DISTRIBUTION OF PROCEEDS FROM STATE-OWNED TANGIBLE PERSONAL PROPERTY

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTIONS:

1. What is the proper procedure to be followed for the disposal by public sale of surplus tangible personal property of state universities?
2. What is the proper disposition of the proceeds derived from said sales?

SUMMARY:

The proper procedure for disposal of surplus tangible personal property of state universities is for certification and transfer of such property to the Division of Surplus Property in accordance with Ch. 273, F. S., and the rules and regulations of that division. The money received by the division from the disposition of such property is to be deposited into the State Surplus Property Working Capital Trust Fund.

Chapter 67-231, Laws of Florida, created the Board of Regents and granted to it the power, *inter alia*, "to make purchases of real and personal property and to contract for the sale and disposal of the same." This provision is codified at s. 240.042, F. S.

QUESTION:

Has the Board of County Commissioners of Collier County been granted by the Legislature the authority or discretion to determine the composition or the number of members of the Collier County Industrial Development Authority?

SUMMARY:

Under the provisions of ss. 159.44-159.53, F. S., the Legislature has created and determined the structure of, and defined the powers and duties of, county industrial development authorities as public bodies corporate and politic while it has legislatively delegated the responsibility of determining the need for such authorities within the counties and of activating the functioning of such authorities to the governing bodies of the counties. The structural organization of the authorities and the composition, terms, and cycles of office of their members, however, have been prescribed with particularity by statute, thereby precluding the board of county commissioners from altering such matters as the prescribed composition or number of the authority members.

Your question is answered in the negative.

According to your letter, the Board of County Commissioners of Collier County, pursuant to s. 159.45, F. S., recently adopted a resolution declaring a need for a county industrial development authority in the county in order for the authority to transact business and to exercise the powers granted such authorities under part III, Ch. 159, F. S. You state that the county commission, "[i]n order to have a more representative cross section of both economic and geographical interests within Collier County . . . appointed 7 members to the Industrial Development Authority," although s. 159.45(3), F. S., provides for the appointment of five persons who are residents and electors of the county as members of the authority created for the county. Section 159.45(1), F. S., states in pertinent part:

> In each county, there is *hereby created* a local governmental body as a public body corporate and politic to be known as the ". . . County Industrial Development Authority," hereafter referred to as "authority" or "authorities." Each of the authorities is constituted as a public instrumentality for the purposes of industrial development, and the exercise by an authority of the powers conferred by ss. 159.44-159.53 shall be deemed and held to be the performance of an essential public purpose and function. . . . (Emphasis supplied.)

In the absence of a constitutional restriction or prohibition, 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. Such public entities or instrumentalities are distinct and independent entities with an identity separate from that of the county or its governing board and are not in any way subordinate to the county commission. *Cf.* AGO 077-92, to the same effect as relates to county housing authorities. The industrial authorities have been created by the Legislature as public instrumentalities for the purpose of industrial development and the performance of essential public purposes and functions, s. 159.45(1), F. S., and "for the purpose of financing and refinancing capital projects . . . [and] fostering the industrial and business development of a county," s. 159.46, F. S. It is the individual governing boards of the several counties, however, to which have been delegated by the Legislature the discretion and authority to determine whether there exists a need for a development authority in their respective counties and a need for the development and financing of industry therein as a prerequisite to the operative effectiveness of the statute, and, if such a need is found to exist, to activate the functioning of such industrial development authorities within the confines of their respective counties. *See* s. 159.45(1), F. S., which provides in part:

> *No authority shall* transact any business or *exercise any power hereunder until*

> *and unless* the county commission by proper resolution shall declare that there is a need for an authority to function in such county. . . . (Emphasis supplied.)

It is well established that a statute may become effective or operative upon the happening of certain conditions or contingencies specified in the act or implied therefrom, such as those specified in s. 159.45, F. S. *See* City of Long Beach Resort v. Collins, 261 So.2d 498 (Fla. 1972); Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Town of San Mateo City v. State *ex rel.* Landis, 158 So. 112 (Fla. 1934). Thus under the provisions of ss. 159.44-159.53, F. S., it is the Legislature which has created and determined the structure of and defined the powers and duties of the county industrial development authorities as public bodies corporate and politic while it is the legislatively delegated responsibility of the several county commissions to determine the need for such authorities to function in their respective counties and to activate the functioning of such authorities. The statute, however, does not delegate any such discretionary authority to the governing bodies of the counties to determine the structural organization and powers of such authorities or the composition or number of the members thereof or their terms of office or the procedures governing the official actions of their governing bodies. These matters and others are prescribed with particularity by the statute enacted by the Legislature, as it may be amended from time to time, and the enabling legislation does not purport to delegate to the county commissions any authority whatever other than that to determine the need for and to activate the authorities and to appoint and remove their members. The statute is, of course, presumptively valid and must be obeyed and given effect unless and until it is judicially determined invalid. *See* Evans v. Hillsborough County, 186 So. 193, 196 (Fla. 1938); White v. Crandon, 156 So. 303, 305 (Fla. 1934); State *ex rel.* Gillespie v. Thursby, 139 So. 372, 375 (Fla. 1932); and State *ex rel.* Atlantic Coastline R. Co. v. State Board of Equalizers, 94 So. 681, 682 (Fla. 1922).

Section 159.45(3), F. S., provides for the appointment to and removal from office, and the composition or number and terms and cycles of office of members of the authorities:

> The aforementioned resolution [adopted by the county commission declaring a need for an industrial development authority] shall designate five persons who are residents and electors of the county as members of the authority created for said county. Of the members first appointed, one shall serve for 1 year, one for 2 years, one for 3 years, and two for 4 years and in each case until his successor is appointed and qualified. Thereafter, the commission shall appoint for terms of 4 years each a member or members to succeed those whose terms expire. The commission shall fill any vacancy for an unexpired term. A member of the authority shall be eligible for reappointment. Any member of the authority may be removed by the commission for misfeasance, malfeasance or willful neglect of duty. Each member of the authority before entering upon his duties shall take and subscribe the oath or affirmation required by the state constitution. A record of each such oath shall be filed with the Department of State and with the clerk.

See also s. 159.45(6), F. S., which provides in part that three members of the authority constitute a quorum for the transaction of any official business by the authority.

I find no provision in part III, Ch. 159, F. S., which authorizes or empowers the boards of county commissioners to alter the statutorily prescribed composition of these authorities or to increase or decrease the number of their governing heads or to change the statutorily prescribed cycles of office for the members of an authority created by statute or to affect in any manner the prescribed quorum or voting requirements for official actions of any authority in any county. The authority of public officers to proceed in a particular way or only upon specific conditions implies a duty not to proceed in any other manner than that which is authorized by law. White v. Crandon, 156 So. 303, 305 (Fla. 1934); First National Bank of Key West v. Filer, 145 So. 204, 207 (Fla. 1933); Alsop v. Pierce, 19 So.2d 799 (Fla. 1944), in which the court stated:

> When the Legislature has prescribed the mode, that mode must be observed. When the controlling law directs how a thing shall be done that is, in effect, a prohibition against it being done in any other way. State ex rel. Murphy v. Barnes, 24 Fla. 29, 3 So. 433; State ex rel. Church v. Yeates, 74 Fla. 509, 77 So. 262; Weinberger v. Board of Public Instruction, 93 Fla. 470, 112 So. 253.

Cf. In re Advisory Opinion of Governor Civil Rights, 306 So.2d 520, 523 (Fla. 1975), "when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision." It is a well-recognized principle of statutory construction that the mention of one thing implies the exclusion of another—*expressio unius est exclusio alterius.* Thus when a statute enumerates the things upon which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all things not expressly mentioned. *See* Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952); Ideal Farms Drainage District v. Certain Lands, 19 So.2d 234 (Fla. 1944). *Cf.* State *ex rel.* Reno v. Barquet, 358 So.2d 230 (3 D.C.A. Fla., 1978), *cert. pending* (Case No. 54,478, filed June 26, 1978), in which the court held that s. 501.207, F. S., clearly provides the methods by which the state may enforce the provisions of the "little F.T.C. Act," and since the state's attempted enforcement of Ch. 501, F. S., was not a method provided for by statute nor grounded upon the law in Florida, the court affirmed the lower court's order dismissing the complaint.

Applying the foregoing authorities to the instant inquiry, s. 159.45, F. S., provides with particularity for the structure, organization, and powers of these industrial development authorities and for the composition, number, and terms and cycles of office of the members thereof; it does not delegate to the counties any discretionary authority to alter these provisions. Thus, based upon the aforecited cases, it is beyond the power of the boards of county commissioners to proceed in a manner other than that prescribed by law. Accordingly, it is my opinion that the Board of County Commissioners of Collier County has not been delegated the power or discretion by the Legislature to alter the composition or number of members of the Collier County Industrial Development Authority. Since the Legislature has already made the determination that the governing body of the authority shall consist of five members, the county commissioners do not have the authority to increase the number of members to seven.

078-116—September 15, 1978

ADMINISTRATIVE PROCEDURE ACT

DISTRICT COURT OF APPEAL MAY NOT WAIVE SERVICE CHARGE FOR INDIGENT APPEALING ADMINISTRATIVE ACTION

To: Clyde L. Heath, Clerk, 4th District Court of Appeal, West Palm Beach

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Is the clerk of the district court of appeal required to charge and collect a service charge or charges from an indigent person seeking judicial review by the district court of appeal of action taken by an administrative agency, board, or other body?

SUMMARY:

In the absence of any general laws granting any right or privilege to indigent persons to seek judicial review of administrative agency actions or decisions without payment of the service charge prescribed by s. 35.22(3), F. S., or providing procedures therefor, or authorizing the clerks of the district courts of appeal to waive payment of such service charge for indigent petitioners, or authorizing or requiring the administrative agencies of the state to defray the costs of such judicial review proceedings for indigent persons, the clerks of the district courts of appeal are required by law, notwithstanding any petitioner's indigency, to charge and collect the statutorily prescribed service charge for

proceedings for judicial review of administrative agency actions or decisions docketed in the district courts of appeal.

Your question is answered in the affirmative.

This opinion is confined to the statutory duties and authority of the clerk of the district court of appeal under the general laws of Florida, and the rights or lack thereof of indigent persons to proceed in forma pauperis in proceedings for judicial review of administrative agency actions or decisions under the general laws of Florida.

Section 35.22(3), F. S., requires that the clerk of the district court of appeal,

> . . . upon the filing of a certified copy of a notice of appeal or petition, *shall charge and collect a service charge of $50 for each case docketed,* and for copying, certifying or furnishing opinions, records, papers or other instruments and for other services the same service charges as provided in s. 28.24. (Emphasis supplied.)

Section 35.22(3) does not expressly or by necessary implication authorize the clerk of the district court of appeal to waive the prescribed service charge for indigent persons seeking to proceed in forma pauperis on an appeal or proceeding for judicial review to the district court of appeal from any action or decision of an administrative agency, nor has any such provision been found in the Florida Administrative Procedure Act, Ch. 120, F. S., or specifically in s. 120.68, F. S., governing judicial review of administrative agency actions or decisions. Neither s. 35.22(3) nor s. 120.68 makes any provision for or grants any right or privilege to indigent persons to proceed in forma pauperis in any proceeding for judicial review of administrative agency actions. All such rights or privileges are matters governed by substantive law. *See* Harrell v. State of Florida, Department of Health and Rehabilitative Services, *infra*, n. 1.; *In re* Proposed Florida Appellate Rules, 351 So.2d 981, 1020 (Fla. 1977), Commentary to Fla. R.App.P. 9.430.

While s. 924.17, F. S., provides for a supersedeas without payment of costs for indigents in criminal actions, and s. 57. 081, F. S., makes provisions for insolvent and poverty-stricken persons having actionable civil claims or demands in the courts to receive the services of the courts, sheriffs, and clerks of the county in which they reside without charge, these statutes do not apply to or govern administrative actions or agencies or the judicial review of administrative agency actions or decisions, or the clerks of the district courts of appeal, and do not purport to grant any right or privilege to indigent persons to proceed in forma pauperis in any proceeding for judicial review of any administrative agency action or decision in the appellate courts. I am not aware of any general law which authorizes the clerk of a district court of appeal to waive the statutorily prescribed service charge in question for any indigent person appealing from or seeking judicial review of an administrative agency action or decision or in any manner providing for in forma pauperis proceedings in any action or proceeding for judicial review of such administrative actions or decisions. Neither am I aware of any general law authorizing or requiring the courts or administrative agencies of the state to defray the costs of such judicial review of administrative actions for indigent persons or otherwise providing a cost-free means for indigent petitioners to obtain such judicial review at the expense of the state.

Since the general laws are silent on the subject matter of your inquiry and the underlying issues implicit therein, and pending enactment of general legislation governing such matters, I must conclude that the clerks of the district courts of appeal may not waive the statutorily prescribed service charge for indigent persons appealing from or petitioning for judicial review of an administrative agency action or decision in the district courts of appeal, and that indigent petitioners in such review proceedings have no *statutory* right or privilege to proceed in forma pauperis in any such proceeding for judicial review. *Cf.* Ortwein v. Schwab, 410 U.S. 656, 658-61 (1973), in which the United States Supreme Court upheld imposition of an appellate court filing fee upon indigent persons seeking judicial review of an administrative order denying increased welfare benefits, on the ground that petitioners had not demonstrated an interest of sufficient constitutional significance to entitle them to proceed in forma pauperis therein; Harrell v. Dep't H.R.S., No. 78-33 (4 D.C.A. Fla., 1978), stating that the court had no statutory authority to require an administrative agency to furnish a transcript of agency proceedings at the agency's expense, even though the petitioner for judicial review qualified under s. 57.081, F. S., as an insolvent or poverty-stricken person for purposes of avoiding prepayment of court costs, filing fees, and service of process fees, and holding

that the court did not have the statutory authority to order a state administrative agency to furnish a transcript of agency proceedings at the agency's expense, notwithstanding the petitioner's indigency, and that such lack of statutory authority could not be circumvented on state or federal constitutional grounds. The court observed that "[i]f the legislature decides that indigent petitioners ought to be provided at state expense a transcript of agency proceedings it may so provide *by appropriate legislation.*" (Emphasis supplied.) It was also held in *Harrell* that s. 21, Art. I, State Const., relating to access to the courts, "does not apply to a cause of action seeking judicial review of an unfavorable administrative agency decision affecting welfare assistance under A.F.D.C. or the Food Stamps Program." *See also* Bower v. Connecticut General Life Insurance Company, 347 So.2d 439 (3 D.C.A. Fla., 1977), in which the court affirmed a trial court's order denying an application, pursuant to s. 57.081, F. S., seeking to charge a county for the costs of transcribing and preparing a record on appeal in a civil action. The court stated at 440:

> First, the statute does not include the costs of transcribing and preparing records on appeal in civil matters. Second, transcribing of the trial court proceedings is not a function or service by the court or the clerk . . . .

Florida Rule of Appellate Procedure 9.430 prescribes the method by which an indigent may seek review without payment of costs or fees or giving security therefor. That rule provides in pertinent part that "[a] party *who has the right to seek review without payment of costs* shall file a motion in the lower tribunal, with an affidavit showing his inability to pay fees and costs or to give security therefor." (Emphasis supplied.) However, the "right" referred to in the rule must be granted by and found in some statute. *See* Harrell, *supra*, n. 1, stating that the rights of indigents to proceed with an appeal without payment of costs or fees is a matter governed by substantive law; and *In re* Proposed Florida Appellate Rules, 351 So.2d 981, 1020 (Fla. 1977), in which it is stated in the Commentary on Rule 9.430 that the rule "is not intended to expand the rights of indigents to proceed with an appeal without payment of fees or costs. The existence of such rights is a matter governed by substantive law." Thus, Rule 9.430 does not purport to authorize the clerk of a district court of appeal to waive costs or fees or the giving of security therefor, nor does it in terms grant to or vest in indigent petitioners any right or privilege to proceed in forma pauperis in proceedings for judicial review of administrative agency actions or decisions. Neither does it authorize or require administrative agencies to bear or defray any such costs of judicial review of administrative agency actions or decisions for indigents or to provide any services at the expense of the state or local government.

There is no general law granting any right or privilege to indigents to seek judicial review of administrative agency actions or decisions without payment of statutorily prescribed costs, fees, or service charges, or providing the procedures therefor. Neither is there any general law authorizing the clerk of a district court of appeal to waive such costs for indigents, or authorizing administrative agencies to bear or defray such costs for indigent petitioners. Therefore, I am of the opinion that the clerk of the district court of appeal is required by the express terms of s. 35.22(3), F. S., notwithstanding any petitioner's indigency, to charge and collect the statutorily prescribed service charge for each case or proceeding for judicial review of an administrative agency action or decision docketed in the district court of appeal. Any question as to the constitutionality of s. 35.22(3), F. S., as applied to an indigent petitioner, must be determined by the Florida or United States Supreme Court—not by this office—in appropriate and direct proceedings brought for that purpose. *Cf.* State v. Dwyer, 332 So.2d 333 (Fla. 1976). I am not empowered to rule that any general law or the application thereof to any person is unconstitutional.

078-117—September 19, 1978

COMMUNITY COLLEGES

BOARD OF TRUSTEES NOT EMPOWERED TO PROVIDE FOR PROXY VOTING BY MEMBERS

To: Herman A. Heise, President, Board of Trustees of Indian River Community College, Fort Pierce

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is it possible for an absent board member to authorize a proxy vote at community college board of trustees meetings?
2. Which is the most appropriate description in board minutes when all board members present vote affirmatively (or negatively): Motion carried unanimously; all present voted affirmatively (or negatively); other?

SUMMARY:

In the absence of statutory authority, the board of trustees of a community college district is not empowered to provide for proxy voting by the members of the board. The board of trustees must comply with a rule of the State Board of Education which requires the board to keep minutes which reflect the individual vote of each member present on all matters on which the board takes action.

AS TO QUESTION 1:

Your first question is answered in the negative.
Section 230.753(2)(a), F. S., provides:

> There is created as a *body corporate* for each community college district a board of trustees which, under statutes and other rules and regulations of the state board, has all powers necessary and proper for the governance and operation of the respective community colleges. (Emphasis supplied.)

Section 230.753(7), F. S., authorizes the board of trustees to appoint a community college president who "shall be the *executive officer and corporate secretary of the board of trustees* as well as the chief administrative officer of the community college." (Emphasis supplied.)

While a public corporation does not possess the full corporate powers and duties conferred upon private corporations, State Department of Citrus v. Huff, 290 So.2d 130 (2 D.C.A. Fla., 1974), *cert. denied*, 295 So.2d 632 (Fla. 1974), it does operate and carry out its powers and duties in a manner similar to that of a general or private corporation. Attorney General Opinion 068-44. An examination of the provisions of part II of Ch. 230, F. S., reveals that the board of trustees of a community college closely resembles the board of directors of a private corporation in exercising its statutorily prescribed corporate powers and functions. Thus, legal principles relating to the use of proxy voting by the directors of a general corporation are analogous to and may be applied to your question. In this respect, the law is clear that, in the absence of a statute to the contrary, a director is required to attend meetings of the board and may not vote by proxy. 19 C.J.S. *Corporations* s. 750; Greenberg v. Harrison, 124 A.2d 216 (Conn. 1956); *In re* Acadia Dairies, Inc., 135 A. 846 (Del. Ch. Ct., 1927). *Cf.* s. 230.753(6), F. S., providing that it is the "duty of the chairman of each board of trustees to notify the Governor, in writing, whenever a board member fails to attend three consecutive regular board meetings in any one fiscal year, which absences may be grounds for removal." *Also cf.* ss. 607.131(7) and 607.134, F. S.

Similarly, in the absence of statutory authority or valid corporate bylaws so authorizing, a stockholder may not vote by proxy. 18 C.J.S. *Corporations* s. 550. *Cf.* ss. 607.097(3) and (4) and 607.101, F. S., which expressly authorize shareholders to vote in person or by proxy.

With regard to public officers, moreover, it is well established that such officers may not delegate those functions and duties which involve the exercise of discretion. State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955); Florida Dry Cleaning and Laundry Board v. Cash and Carry Cleaners, Inc., 197 So. 550 (Fla. 1940); 67 C.J.S. *Officers* s. 104, AGO's 078-68, 068-44, 068-6. *See also* Turk v. Richard, 47 So.2d 543, 544 (Fla. 1950), in which the Florida Supreme Court observed that "[t]he governing body of a municipality can act validly only when it sits as a *joint* body duly assembled pursuant to such notice as may be required by law." Clearly, the act of voting on official business before the board cannot be characterized as a mere ministerial function of a public officer; it is an exercise of the legislative power which may not be performed by an agent in the absence of authorization by the Legislature. *See* Rich Printing Co. v. McKellar's Estate, 330 S.W.2d 361, 380 (Tenn. Ct. App., 1959), in which the court stated, among other things:

> Of course an elected officer cannot delegate one to hold the office to which he has been elected in the absence of statutory authority so to do, *nor to cast his vote for him.* (Emphasis supplied.)

Cf. AGO 078-89 in which this office held that Florida law does not permit one to delegate to an agent the authority to register to vote for him or her; and AGO 073-260 concluding that the Legislature, unless specifically prohibited, has the authority to extend to voters the privilege of voting by proxy.

As administrative agencies, community college district boards of trustees may exercise only those powers specifically or by necessary implication granted by statutes; moreover, if there is any doubt as to the existence of authority, it should not be exercised. Attorney General Opinions 072-319, 078-12, 078-56, 078-67, and 078-68; *see also* State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944). My examination of part II of Ch. 230, F. S., reveals no provision therein which either expressly or impliedly authorizes members of the board of trustees of a community college district to cast their votes by proxy. Nor do I find any statute which permits the board to adopt a rule authorizing proxy voting. Therefore, it is clear that your question must be answered in the negative.

AS TO QUESTION 2:

Although s. 230.753 and s. 230.754, F. S., providing for the establishment, organization, duties, and powers of community college boards of trustees do not set forth any rules of procedure governing meetings of such boards, rules of the State Board of Education provide pertinent guidelines. *See* s. 230.753(2)(a), F. S., providing that the board of trustees shall have "under statutes and other rules and regulations of the state board [of education] . . . all powers necessary and proper for the governance and operation of the respective community colleges"; and s. 230.754(1) and (2)(e), F. S. Specifically, the State Board of Education has adopted Rule 6A-14.247(1)(b), F.A.C., relating to the contents of minutes to be kept of meetings of the board of trustees:

> (b) Minutes, contents. *The minutes shall show the vote of each member present on all matters on which the board takes action.* It shall be the duty of each member to see that both the matter and the vote thereon are properly recorded in the minutes. . . . (Emphasis supplied.)

See also s. 286.011(2), F. S., requiring that minutes of a meeting of a public body shall be promptly recorded and open for public inspection.

It is a well-established principle of statutory construction that when a statute by its own terms enumerates the things upon which it is to operate, it excludes from its operation all things not expressly mentioned. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); *In re* Advisory Opinion of the Governor Civil Rights, 306 So.2d 520, 523 (Fla. 1975); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952). Moreover, a legislative directive that a thing be done in a certain way operates to prohibit its being done any other way. Alsop v. Pierce, 19 So.2d 799 (Fla. 1944). Applying these rules to your inquiry, it is clear that the board of trustees is not authorized to record votes in a manner other than that prescribed by Rule 6A-14.247(1)(b), *supra.*

Furthermore, it has been held in many jurisdictions that statutory or charter provisions which prescribe the manner in which the governing body of a public agency is to vote are mandatory, and a failure to comply with them is fatal to any action taken.

See generally, 62 C.J.S. *Municipal Corporations* s. 403 and cases cited therein. This view has been adopted in Florida in the case of Nelson v. State *ex rel.* Axman, 83 So.2d 696 (Fla. 1953), in which the court held that where the minutes of a city council meeting showed that an ordinance was "carried by a unanimous vote," the ordinance was invalid because it failed to reflect the yeas and nays on the ultimate passage of the ordinance as required by the municipal charter. The *Nelson* court relied heavily on a Michigan case—Steckert v. City of East Saginaw, 22 Mich. 104 (1870), in which it was held that the record of a vote on a municipal ordinance which demonstrated that the ordinance was adopted "unanimously on call" was invalid as it did not comport with a statute requiring that the vote of each councilman be entered on the minutes.

It is apparent that Rule 6A-14.247(1)(b), *supra,* contemplates that the minutes record the vote (affirmative or negative) of each member present on each issue before the board. *Cf.* s. 286.012, F. S. Under such circumstances, it would appear that neither of the first two alternatives presented by your inquiry comports with the requirements of said rule; the minutes should reflect the names of each person present and his vote on a particular matter. The board is not authorized by law to deviate from the procedures set forth in Rule 6A-14.247(1)(b), *supra,* for the reasons outlined above; therefore, the votes should be recorded in the manner contemplated by the rule and no other method is permissible.

078-118—September 27, 1978

COUNTIES

DEDICATION AND VACATION OF COUNTY ROADS AND STREETS

To: Robert Bruce Snow, Hernando County Attorney, Brooksville

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

May a county legally divest itself of ownership and control of certain dedicated streets and roads in a subdivision, and transfer to a homeowners' association the right to exercise ownership and control of, and to maintain, the streets and roads?

SUMMARY:

A county is statutorily authorized in the sound discretion of the board of county commissioners to close and vacate dedicated roads and streets designated on a recorded subdivision plat. Such authority must be lawfully exercised in the interest of the general public welfare and may not invade or violate individual property rights. The county is not authorized, however, and cannot in any manner legally convey or transfer the ownership and control of the vacated roads or streets to a homeowners' association as such, but upon lawful vacation thereof the abutting fee owners hold the title in fee simple to the vacated roadways or streets to the center thereof unburdened and unencumbered by the public's prior easement to use such roadways or streets for travel. The county would not be liable to any abutting fee owners as a result of closing or vacating such roadways or streets *unless* an abutting owner is thereby deprived of and suffers a consequent loss of access to his property. An abutting fee owner would also have a private or implied easement and cause of action to enforce such easement for access or egress or travel as against the homeowners' association or other abutting owners seeking to obstruct such access and use of and travel upon the vacated, now private, roads and streets.

According to your letter, several miles of platted roads or streets in a large subdivision in Hernando County were dedicated to the public and accepted by the county through its approval for recording of the subdivision plat *and* its acceptance of the dedication of the

streets and roads contained thereon. A property owners' association representing the majority, though not all, of the residents and property owners of the subdivision has requested the county to relinquish its control, ownership, and maintenance of the dedicated streets and roads and turn over this control, ownership, and maintenance to the association in order that it might not only maintain such streets and roads but also restrict access to and within the subdivision to its residents and property owners. As attorney for the county, you ask whether the board of county commissioners may legally transfer its ownership and control of the streets and roads to the association and, if it does so, whether it will be subject to any liability as a consequence of its actions.

Initially, it is necessary to consider the elements and effect of a dedication. A dedication is simply the donating or appropriating of one's own land for use by the public. That is, the owner of the dedicated property is precluded from using it in any way inconsistent with the public's use thereof. There are two essential requisites to a finding of a dedication of property to the public. There must first be a clearly manifested intent by the owner of property to dedicate it to public use. Second, the public, through its authorized agents or officials, must clearly manifest its intent to accept the dedication. City of Miami v. Florida East Coast Railway Co., 84 So. 726 (Fla. 1920); Roe v. Kendrick, 200 So. 394 (Fla. 1941). An offer of dedication to the public can be accomplished by making and recording a plat and selling lots with reference thereto, the method apparently employed in the instant situation. *See, e.g.*, Florida East Coast Railway Co. v. Worley, 38 So. 618 (Fla. 1905); Miami Beach v. Undercliff Realty and Investment Co., 21 So.2d 783 (Fla. 1945); *and see* s. 177.081, F. S. It appears from your letter that the dedication of roads and streets in the subdivision in question was properly accepted by the appropriate county officials and I, therefore, assume that a proper dedication has taken place.

The effect of a dedication does not operate as a grant of the dedicated property but rather by way of an estoppel in pais. That is, the legal title to the property remains in the grantor (or his vendees) while the public takes the beneficial use of the property. Effectively, then, the fee remains in the grantor (or his grantees) while the public acquires only a right of easement in trust, so long as the dedicated land is used for the intended purpose of the dedication. The grantor (or grantees—abutting lot owners) is precluded from using the property in any way inconsistent with the public use. Burkhart v. City of Fort Lauderdale, 156 So.2d 752 (2 D.C.A. Fla., 1963), decision quashed 168 So.2d 65 (Fla. 1964); Florida State Turnpike Authority v. Anhoco Corporation, 107 So.2d 51 (3 D.C.A. Fla., 1959); Robbins v. White, 42 So. 841 (Fla. 1907). Absent a contrary showing, *not made evident here*, the legal title of the grantor-subdivider in properly dedicated property passes to the grantees of lots sold in reference to a plat, which lots abut the dedicated streets. Their title extends to the center of the streets subject to the public easement. Walker v. Pollack, 74 So.2d 886 (Fla. 1954); Smith v. Horn, 70 So. 435 (Fla. 1915); New Fort Pierce Hotel Co. v. Phoenix Tax Title Corp., 171 So. 525 (Fla. 1936); United States v. 16.33 Acres of Land in County of Dade, 342 So.2d 476, 480 (Fla. 1977); *cf.*, Emerald Equities v. Hutton, 357 So.2d 1071 (2 D.C.A. Fla., 1978), wherein the court held that, when a single owner conveys to the county the title to or an easement in a roadway which is later abandoned by the county, that owner or his successors takes back or retains title to all the abandoned property *unless* the owner is a subdivider who has later conveyed lots (and his interest in the abutting road) which abut the dedicated roadway to separate owners without specifically reserving any reversionary interest in the roadway. In such a case, the general rule prevails that the abutting owners on each side of the abandoned or vacated road become the fee owners out to the center line. *See also* ss. 177.085(2) and 336.12, F. S. These purchasers acquire their title, however, subject to the easement of the public in the dedicated property. Smith, *supra*; New Ft. Pierce Hotel Co., *supra*; Gainesville v. Thomas, 54 So. 780 (Fla. 1911).

Your inquiry does not state that the dedicator or subdivider reserved any reversionary interest or rights in the streets and roads in the plat in question. I assume, therefore, for the purposes of this opinion, that no such rights exist in or under the plat. However, if such plat was made and recorded in the public records before July 1, 1972, and if no action has since been brought to establish or enforce any such reversionary rights, they are now barred and unenforceable by operation of s. 177.085(2), F. S. *See also* 16.33 Acres of Land in County of Dade, *supra*, and Emerald Equities, *supra*.

It seems evident that the governing body of Hernando County does not "own" the streets and roads in the subject subdivision which were dedicated for public use. The public has an easement to use the streets and roads, but there is no legal title to the property vested in the county which it can convey or transfer to the homeowners'

association. Nevertheless, counties in Florida have the statutory authority to close and vacate any county streets, roads, alleyways, or other places used for travel. Section 336.09(1), F. S., provides:

> (1) The commissioners, with respect to property under their control may *in their own discretion, and of their own motion,* or upon the request of any agency of the state, or of the federal government, *or upon petition of any person or persons,* are hereby authorized and empowered to:
> (a) *Vacate, abandon, discontinue and close any existing public or private street, alleyway, road, highway,* or other place used for travel, or any portion thereof, other than a state or federal highway, *and to renounce and disclaim any right of the county and the public* in and to any land in connection therewith;
> (b) Renounce and disclaim any right of the *county and the public* in and to any land, or interest therein, acquired by purchase, gift, devise, *dedication* or prescription *for street, alleyway, road or highway purposes,* other than lands acquired for state and federal highway; and
> (c) Renounce and disclaim any right of the *county and the public* in and to land, other than land constituting, or acquired for, a state or federal highway, *delineated on any recorded map or plat as a street, alleyway, road or highway.* (Emphasis supplied.)

Upon termination of the easement acquired by the public in the dedicated property, s. 336.12, F. S., provides that the title of the fee owners in the property shall be freed and released therefrom.

> The act of any commissioners in *closing or abandoning any such road, or in renouncing or disclaiming any rights in any land delineated on any recorded map as a road, shall abrogate the easement theretofore owned, held, claimed or used by* or on behalf of *the public and the title of fee owners shall be freed and released therefrom* . . . . (Emphasis supplied.)

Hence, upon the lawful, statutorily prescribed vacation of the public's easement, the title to the fee of the dedicator or of his successors, or of the abutting lot owners, is freed of and released from the easement; therefore, those property owners who own land abutting the street or road would, upon surrender, have unencumbered fee title to the center of the right-of-way. *Cf.*, Emerald Equities, Inc., *supra.*

Applying the foregoing principles and statutes to the instant case, I conclude that the board of county commissioners has statutory authority to close and vacate the dedicated and platted roads and streets in question in accordance with the statutes, but may not by conveyance by deed or any other instrument of conveyance transfer the ownership and control thereof to the association. The title in fee simple to the vacated road beds or rights-of-way to the center thereof would remain, *unburdened* or *unencumbered,* in the abutting fee owners who presumably could, if they so chose, convey or transfer a portion of their property to the homeowners' association (assuming it is so organized and legally capacitated to hold the legal title thereto) for roadway purposes and control and maintenance thereof. As a caveat, it should be noted that if the general public is using the roads and streets in question (including public service vehicles such as garbage trucks, police, fire, or emergency vehicles), then the county *should not* close or vacate the roads or streets in question if such vacation would be injurious to the public welfare or violate individual property rights. It has been noted: ". . . [T]he power to vacate streets cannot be exercised in an arbitrary manner, without regard to the interest and convenience of the public or individual rights." McQuillin *Municipal Corporations* s. 30.186a. Hence, absent a determination by the county commission that the general public welfare would benefit from vacation, it should not be accomplished, and in any event, the roads or streets can be vacated *only* in accordance with the statute as discussed above and title thereto cannot be legally conveyed or transferred to the homeowners' association.

You also ask whether the action of the county in closing and vacating the roads and streets in the subdivision would subject it to liability in inverse condemnation based upon a loss of access to the abutting lot owners. As a practical matter, the facts delineated in your inquiry suggest that the homeowners' association does not propose to restrict the access of any of the resident or nonresident abutting fee owners to *any* of the platted

streets or roads or any property within the subdivision. Therefore, no cause of action in inverse condemnation could arise *in such factual situation.* However, a right of access to one's own property is a property right. Hence, an abutting fee owner may be entitled to compensation from a public body when it closes or vacates a public street for the consequent loss of such access on the theory that a property right has been taken without compensation. *See, e.g.,* Pinellas County v. Austin, 323 So.2d 6 (2 D.C.A. Fla., 1975).

An abutting owner, it should also be noted, would, upon vacation of the property, have a cause of action to enforce his right of access or private easement for roadway purposes as against the homeowners' association or other abutting owners who may obstruct access or travel upon any of the vacated roads. Such private (implied) easement would arise by virtue of conveyances and sales made with reference to the recorded plat which creates a private right to have the space marked on the plat as streets and roads remain open for ingress and egress and the uses indicated by the designation. As stated by the Florida Supreme Court in City of Miami v. Florida East Coast Ry. Co., 84 So. 726, 729 (Fla. 1920):

> The platting of land and the sale of lots pursuant thereto creates as between the grantor and the purchaser of the lots a *private right* to have the space marked upon the plat as streets, alleys, parks, etc., remain open for ingress and egress and the uses indicated by the designation. (Emphasis supplied.)

See also McCorquodale v. Keyton, 63 So.2d 906 (Fla. 1956); Burnham v. Davis Islands, Inc., 87 So.2d 97 (Fla. 1956); Reiger v. Anchor Post Products, Inc., 210 So.2d 283 (3 D.C.A. Fla., 1968), holding that the rights of abutting or adjacent purchasers depend upon principles of law applicable to private property rather than public dedication since these rights depend upon a "private easement implied from sale with reference to a plat showing streets [etc.]" rather than upon any dedication to the public generally. 87 So.2d at 100. *And see,* Monell v. Golfview Road Association, 359 So.2d 2 (4 D.C.A. Fla., 1978), wherein the court held that the rights of common owners of an easement on and for the purposes of a private road are limited to the purpose for which the easement was established and may not be exercised in derogation of the rights of other common owners. Hence, the court granted an injunction requiring a homeowners' association to remove speedbumps it had placed on the roadway which substantially invaded and violated the right of a particular homeowner to use his easement on the private road to get to his house and property. *Cf.,* Emerald Equities, Inc., *supra;* 16.33 Acres of Land, *supra;* and AGO's 078-88 and 078-63.

078-119—October 10, 1978

DEPARTMENT OF BANKING AND FINANCE

NOT AUTHORIZED TO DETERMINE VALIDITY OF A SPECIAL DISTRICT OR TO CONSTRUE POWERS OF BOARD OF COUNTY COMMISSIONERS

To: Gerald A. Lewis, Comptroller, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. In January 1975, did Leon County, a noncharter county, have the authority to create, by county ordinance, Falls Chase Special Taxing District with an independent governing body and budget under ss. 125.01(5)(a) and 165.041(2), F. S.?

2. Does a noncharter county have the authority to create, by county ordinance, a special taxing district with an independent governing body and budget under ss. 125.01(5)(a) and 165.041(2), F. S.?

3. What is the scope of authority of the Division of Securities under Ch. 517, F. S., to review the status of bonds issued by special districts

which were subject to bond validation proceedings in circuit court, in light of s. 75.09, F. S.?

SUMMARY:

The fiscal duties of the Department of Banking and Finance under part III of Ch. 218, F. S., do not require or authorize that department to determine the validity of a special district or the validity of any ordinance of a board of county commissioners creating a special district. The Falls Chase Special Taxing District has been the subject of a bond validation proceeding pursuant to s. 75.09, F. S., from which no appeal was taken, wherein the validity of that district was put in repose. County ordinances are entitled to a presumption of validity. Bonds issued by a special district (which falls within the definition of "political subdivision" in s. 1.01(9), F. S.) are exempted from registration under part I of Ch. 517, F. S., although a "dealer" or "salesman" falling within the definitions of those terms in part I of Ch. 517 must register with the Department of Banking and Finance even though he is selling or dealing in such exempt securities.

AS TO QUESTIONS 1 and 2:

As your first two questions raise essentially the same issues, for the purpose of this opinion, they will be considered and answered together.

The portion of Ch. 218, F. S., which is pertinent to your questions is part III (the "Uniform Local Government Financial Management and Reporting Act"). Under part III of Ch. 218, the duties and authority of the Department of Banking and Finance are specific and limited. In examining the provisions of part III, I have found no language which, on its face, requires or authorizes the department to inquire into or make any official determination of the constitutional or statutory validity of any special district or to construe the constitutional or statutory powers of a board of county commissioners.

Section 218.32, F. S., requires that every unit of local government submit an annual financial report. Section 218.31(1), F. S., defines "unit of local government" as meaning "a county, municipality, or special district." If a special district falls within the definition of "[d]ependent special district" set forth in s. 218.31(6), F. S., then, under Ch. 3D-140.02(2), F.A.C. (Rules of the Department of Banking and Finance), that district's financial statement is to be "included as a part of the financial statements of the *local governing authority* and shall be audited in conjunction with the audit of the local governing authority." (Emphasis supplied.) 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." (Emphasis supplied.) "Local governing authority" is defined by s. 218.31(3), F. S., as "the governing body of a unit of local *general purpose* government." (Emphasis supplied.) "Unit of local general purpose government" is defined by s. 218.31(2), F. S., as "a county or a municipality established by general or special law." However, if the district in question is an *independent* special district (as defined in Ch. 218), then the district, and not the local governing authority, is responsible for submitting the annual financial statement to the Department of Banking and Finance. Chapter 3D-140.03(4), F.A.C., requires independent special districts to "[p]repare and submit complete annual financial statements for examination by the [district's] auditor." And, Ch. 3D-140.03(6), F.A.C., requires that the financial statement specified in Ch. 3D-140.03(4) be filed by the independent special district with the Department of Banking and Finance. Section 218.31(7), F. S., defines "[i]ndependent special district" as:

> . . . a special district whose governing head is an independent body, either appointed or elected, *and* whose budget is established independently of the local governing authority, even though there may be appropriation of funds generally available to a local governing authority involved. (Emphasis supplied.)

Cf., s. 218.34(4), F. S., providing that "[t]he local governing authority may, in its discretion, review and approve the budget or tax levy of any special district located solely within its boundaries." While it is apparent that the Department of Banking and Finance

must determine, according to the statutory definitions referred to above, whether a special district's own governing head or that of the local governing authority (*i.e.*, the county) is responsible for submitting the required annual financial statement, it is not apparent to me, nor do I find any clear implication, that the Department of Banking and Finance may go beyond such a determination and inquire into the authority of any local governing authority to create either an independent or dependent special district. And, as I have already observed, there is no express authorization in Ch. 218, F. S., for the department to so inquire into or construe the powers of a duly elected board of county commissioners or the validity of a special district created by ordinance of a county pursuant to general law. In order to fulfill its statutory obligations under Ch. 218, it appears that the department need only determine the composition of the "governing head" of the district and the method by which its budget is established so as to apply the statutory definitions cited above. Upon making such determinations based on the statutory definitions, the department can then make a proper determination as to where responsibility rests for submitting the annual financial statement. The rulemaking authority given to the department by s. 218.33(2), F. S., similarly fails, either expressly or by necessary implication, to provide any authority to the department to enact rules other than those "reasonable rules and regulations regarding uniform accounting practices and procedures by units of local government." It is fundamental that administrative agencies, including the Department of Banking and Finance, have only such powers and authority as have been granted by *express* or *necessarily implied* statutory authority, and that, where there is doubt regarding the lawful existence of a power being exercised by an administrative agency, such doubt should be resolved against the further exercise of such power. Edgerton v. International Company, 89 So.2d 488, 490 (Fla. 1956); 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); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493, 495 (Fla. 1973); Division of Family Services v. State, 319 So.2d 72, 76 (1 D.C.A. Fla., 1975); Florida State University v. Jenkins, 323 So.2d 597, 598 (1 D.C.A. Fla., 1975); Williams v. Florida Real Estate Commission, 232 So.2d 239, 240 (4 D.C.A. Fla., 1970). And, in order for an administrative agency to proceed under implied—rather than express—powers, there must first clearly exist some express duty or power from which the implied power is to be derived. Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). I would also note that, since certain duties and powers have been clearly and expressly imposed on or granted to the department by part III of Ch. 218, F. S., it should be inferred that no other powers or duties are contemplated by part III. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952).

Also, any duly enacted ordinance of a county is entitled to a presumption of validity until the *courts*—not this office or any other agency of the executive branch—rule otherwise. *See* Union Trust Co. v. Lucas, 125 So.2d 582, 587 (2 D.C.A. Fla., 1960); City of Miami V. Kayfetz, 92 So.2d 798, 801 (Fla. 1957); State v. Ehinger, 46 So.2d 601, 602 (Fla. 1950). These cases affirm the presumption of validity to which *municipal* ordinances are entitled, but were all decided prior to municipal home rule and therefore are equally applicable to the construction of the ordinances of a present-day noncharter county. *See also*, Rose v. Town of Hillsboro Beach, 216 So.2d 528 (4 D.C.A. Fla., 1968), stating that ordinances are subject to the same rules of construction as are statutes. A fundamental rule of statutory construction is that of a statute's entitlement to a presumption of validity. Shevin v. Metz Construction Co., Inc., 285 So.2d 598 (Fla. 1973).

Moreover, Ch. 75, F. S., provides for judicial validation of bond issues such as the one about which you have inquired. Not only does the decree in such a proceeding validate the bonds, but it also "may include the validation of the county, municipality, taxing district, political district, subdivision, agency, instrumentality or other public body itself." The bonds in question were the subject of such a proceeding in circuit court and one of the findings of the court set forth in the final judgment (from which no appeal was taken) was that the Falls Chase Special Taxing District "is a legally organized and existing special taxing district within the meaning of Chapter 165 and 125, Florida Statutes . . . ." And, the final order stated, *inter alia*, that "[t]he Charter of the District is valid and in compliance with the laws of the State of Florida." The conclusiveness of the decree in such a bond validation proceeding as to future challenges to the validity of the issue is emphasized by the language of the statute and by a long line of judicial decisions construing the statutes providing for validation proceedings. Section 75.09, F. S., provides:

> If the judgment validates such bonds, certificates or other obligations, which may include the validation of the county, municipality, taxing district, political district, subdivision, agency, instrumentality or other public body itself and any taxes, assessments or revenues affected, and no appeal is taken within the time prescribed, or if taken and the judgment is affirmed, such judgment is forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby, including all property owners, taxpayers and citizens of the plaintiff, and all others having or claiming any right, title or interest in property to be affected by the issuance of said bonds, certificates or other obligations, or to be affected in any way thereby, and the validity of said bonds, certificates or other obligations or of any taxes, assessments or revenues pledged for the payment thereof, or of the proceedings authorizing the issuance thereof, including any remedies provided for their collection, shall never be called in question in any court by any person or party.

In Thompson v. Town of Frostproof, 103 So. 118, 119 (Fla. 1925), the court stated that "the purpose of a decree validating and confirming bonds . . . is to *put in repose* any question of law or fact that may be subsequently raised affecting the validity of such bonds." It has also been stated that:

> Such validation proceedings involve a determination not only of the authority of an agency or governmental unit to issue bonds or revenue certificates, but also whether the issuing authority may lawfully expend the proceeds of the bond issue for the contemplated purpose. [Crowe v. City of Jacksonville Beach, 167 So. 2d 753, 755 (1 D.C.A. Fla., 1964)]

In accord: Lipford v. Harris, 212 So.2d 766, 768 (Fla. 1968); Wright v. City of Anna Maria, 34 So.2d 737, 739 (Fla. 1948); State *ex rel.* Harrington v. City of Pompano, 188 So. 610, 626 (Fla. 1938). I would also note the duties of the state attorney in a bond validation proceeding under s. 75.09, F. S. Section 75.05, F. S., requires that notice of a proceeding under s. 75.09, F. S., be served on the state attorney for the judicial circuit in which the district in question lies, and requires that "if in the opinion of the state attorney, the issuance of the bonds or certificates in question has not been duly authorized, defense shall be made by said state attorney." And, in State v. Sarasota County, 159 So. 797, 800 (Fla. 1935), the court emphasized this duty of the state attorney, stating:

> [I]t is the duty of a state attorney upon whom process has been effectuated in a bond validation proceeding, to carefully examine the petition and, if it appears to him, or if he has any reason to believe that said petition is defective, insufficient, or untrue or if in his opinion the issuance of the bonds in manner and form as proposed, is not legally authorized, to make such defense to the petition as to him shall seem proper.

Therefore, it would be inappropriate for me to comment upon the validity of the Leon County ordinance creating the Falls Chase Special Taxing District or to make any official comment upon the validity of the Falls Chase Special Taxing District itself, when that special district's validity has been expressly adjudicated in a bond validation proceeding pursuant to s. 75.09, F. S. The foregoing comments should also illustrate why I deem it to be both unnecessary and inappropriate at this time for me to address your second, hypothetical question. To do so would require me to indirectly comment upon the validity of the Falls Chase Special Taxing District.

AS TO QUESTION 3:

Your third question relates to the powers of the Division of Securities of the Department of Banking and Finance under part I of Ch. 517, F. S. (the "Sale of Securities Law"). While, as I have explained above in detail, a bond validation proceeding under Ch. 75, F. S., puts questions regarding the validity of the bonds "in repose," this question may be answered simply by reference to the various provisions in part I of Ch. 517 which establish the scope of the division's jurisdiction under that part, as to both the type of securities and classes of persons and entities subject to regulation. The introductory paragraph and subsection (1) of s. 517.05, F. S., provide:

> Except as otherwise expressly provided, the provisions of this part shall not apply to any of the following classes of securities:
> (1) Any security issued or guaranteed by the United States or any territory or insular possession thereof, by the District of Columbia, *or by any state* of the United States *or political subdivision or agency thereof.* (Emphasis supplied.)

In the absence of any definition of "political subdivision" in and for the purposes of part I of Ch. 517, I must turn to the definition of political subdivision provided in s. 1.01(9), F. S.:

> 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 Legislature has instructed that the definitions provided in s. 1.01(9), F. S., are to be used "[i]n construing these statutes and each and every word, phrase, or part hereof, where the context will permit." I would note that the phrase, "[e]xcept as otherwise provided," at the beginning of s. 517.05, F. S., appears to refer to s. 517.12(1), F. S., which provides that a "dealer" or "salesman" (as those terms are defined in s. 517.02(4) and (6), F. S.), must register with the Department of Banking and Finance even if he is selling securities which, like those of a special district, qualify as exempt securities under s. 517.05, *supra.* (*See also,* Ch. 78-435, Laws of Florida, amending or repealing various sections of Ch. 517, F. S., which take effect November 1, 1978.)

078-120—October 11, 1978

TAXATION

MUNICIPAL OCCUPATIONAL LICENSE TAX—APPLICATION TO BUSINESS IN INTERSTATE COMMERCE

To: Thomas A. Bustin, City Attorney, Clearwater

Prepared by: Maxie Broome, Jr., Assistant Attorney General

QUESTION:

> **Is a business that publishes or prints a television guide outside the municipality's jurisdiction and distributes such publication to hotels within the municipality and throughout the state to hotels, and which also engages in such business in states other than Florida, subject to the occupational license tax pursuant to s. 205.042(3), F. S.?**

SUMMARY:

> **A business that publishes and prints television guides outside a taxing municipality's jurisdiction and distributes such publications to hotels within the municipality and throughout Florida, and whose sales representatives solicit advertising within the taxing municipality which is run in television guides subsequently published and delivered to hotels within the municipality from which the guides are distributed by such hotels to their guests and others, is not, in the absence of engaging in separable and distinct local activities or incidents other than the solicitation and the delivery, or in the absence of a permanent business location, liable to the occupational license tax provided for in s. 205.042(3), F. S.**

Section 205.042, F. S., authorizes the governing body of an incorporated municipality to levy, by appropriate resolution or ordinance, an occupational license tax for the privilege of engaging in or managing any business, profession, or occupation within its

jurisdiction. Subsections (1) and (2) of s. 205.042, F. S., provide that the tax may be levied on any person who maintains a permanent business location or branch office within the municipality for the privilege of engaging in or managing, respectively, any business in its jurisdiction, or any profession or occupation within its jurisdiction; whereas subsection (3), upon which your question is founded, authorizes municipalities to levy an occupational license tax on:

> Any person who does not qualify under the provisions of subsection (1) or subsection (2) and who transacts any business or engages in any occupation or profession in interstate commerce, if such license tax is not prohibited by s. 8 of Art. I of the United States Constitution.

The facts set forth in your memorandum of facts indicate that the television guide is published or printed outside the jurisdiction of the City of Clearwater and is distributed through hotels throughout Florida with distribution of the guide occurring from such hotels which receive free advertising on the cover of the guide. One third of the publication is devoted to advertising space which is sold by the publisher of the guide. Although sales representatives of such publisher solicit advertising in the City of Clearwater, no branch office is maintained by the publisher in Clearwater, but rather the business has its principal office in the City of Largo. You state that it has been "represented that such business is also conducted in several other states," but no evidence has been presented to me to document any such out-of-state business or the nature and extent or details thereof. Apparently, however, any such out-of-state business activities or transactions originate and transpire outside of your city's jurisdiction and any such incidents of "local activity" in other taxing jurisdictions cannot be made the basis or fulcrum to justify or support taxation in and by the City of Clearwater. As stated in AGO 078-52, it is not sufficient to find that this publisher and distributor is engaged in business or in interstate commerce elsewhere, but such publisher must be engaged in business or interstate commerce within the jurisdiction of the City of Clearwater in order for it to fall within the taxing power of the city under s. 205.042(3), F. S. In these circumstances, and assuming that the only local activity or distinct "incident of (any) interstate commerce" taking place within the City of Clearwater is the solicitation of advertising in the city (and subsequent delivery of the television guide to hotels within the city from which the guide is distributed to their guests), the publisher/distributor and its business activities described above do not appear to fall within the purview of s. 205.042(3), F. S. It is apparent that each case must be determined on the basis of its own unique facts, and that the question of what constitutes the transaction of business in interstate commerce or separable and distinct local incidents rendering such interstate business activities or transactions liable to local taxation requires legislative or judicial findings of fact which are beyond the scope of the powers of my office. *See* AGO's 078-22, 076-234, 075-208, and 072-236. However, unless the publisher/distributor in question engages in separable and distinct local activities or incidents, other than the solicitation of advertisements and the delivery of the television guide to hotels within the city from which the guide is distributed by such hotels to their guests and others, the publisher/distributor would not be liable to taxation within the city under s. 205.042(3), F. S., and any attempted taxation of such solicitation and delivery activities would probably violate the Commerce Clause of the United States Constitution.

Assuming *arguendo* that the publisher/distributor in question is engaged in interstate commerce, the city may impose an occupational license tax upon the person transacting business in interstate commerce if not prohibited by the Commerce Clause of the United States Constitution. The Commerce Clause does not operate to relieve those engaged in interstate commerce from their just share of the tax burden occasioned by local incidents or activities of such instrumentalities of interstate commerce. *See* Armstrong v. City of Tampa, 118 So.2d 195 (Fla. 1960); Green v. Western Union Telegraph Company, 123 So.2d 712 (Fla. 1960); City of Jacksonville v. Florida Fresh Water Corporation, 247 So.2d 739 (1 D.C.A. Fla., 1971). The Armstrong decision, *supra* at p. 199, sums up the cases interpreting the limitation of s. 8, Art. I of the Constitution of the United States:

> The sum of the cases simply is that if the local tax has the effect of excluding or precluding or impeding the flow of commerce into and between the states then the tax is offensive to the quoted constitutional provision . . . . This is so even though it might not be discriminatory in nature or aimed at interstate commerce for the benefit of intrastate commerce . . . .

In Real Silk Hosiery Mills, Inc. v. City of Portland, 268 U.S. 325 (1925), it was held that a state statute which required persons going from place to place soliciting orders for goods for future delivery, and receiving payment or any deposit of money in advance, to secure a license and give bond conditioned for final delivery of goods ordered, violated the Commerce Clause of the United States Constitution insofar as it was made to apply to agents soliciting orders in a state, which orders were to be forwarded to a manufacturer in another state and filled by C.O.D. shipments.

In Best & Co. v. Maxwell, 342 U.S. 389 (1946), the court found that a state statute levying an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the state, who displayed samples in any room rented or occupied temporarily for the purpose of securing retail orders unconstitutionally discriminated against commerce when the only tax to which regular retail merchants in the state were subject was a tax of $1 per annum for the privilege of doing business, even when they engaged in the sale of goods by sample in display rooms at places other than those in which their retail stores were located.

And, in Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952), the court held that a state tax upon persons soliciting business for laundries not licensed in the state unconstitutionally burdened interstate commerce, whether such tax was regarded as one on the solicitation of business or on the activities of picking up and delivering laundry.

As a general rule, municipal occupational license taxes will not be prohibited if there are sufficient "local incidents" separable from interstate commerce. *See* AGO's 073-162 and 073-172 and Olan Mills, Inc. v. City of Tallahassee, 100 So.2d 164 (Fla. 1958). The factual determination of what is separable from the scheme of interstate or intermunicipal business activity is to be made in the first instance by local authorities. Attorney General Opinion 073-162. Note that the United States Supreme Court in Nippert v. City of Richmond, 327 U.S. 416 (1946), laid down the rule that it is not sufficient to find "some local incident which might be recognized as separate and distinct" from the interstate commerce because such an approach would subject all interstate commerce to state taxation and without regard to the substantial economic effects of the tax upon the commerce:

> . . . For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves "incidents" occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.

The United States Supreme Court expressed in *Nippert* concern for the cumulative effect of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town. It is apparent that the Florida Supreme Court recognizes the concern expressed in *Nippert*, for in the Armstrong case, *supra*, the court found a flat sum license tax, which the City of Tampa attempted to impose, exclusory of interstate commerce, for the simple reason that its tax had to be paid as a condition precedent to engaging in interstate commerce. The court further pointed out that a privilege tax is burdensome for the fact that it is subject to being duplicated by every community entered by the solicitors who are engaged in the interstate transaction.

Several cases in this state have dealt with the issue of municipal taxation of businesses located within the state which do not have a business location or office within the taxing city. In Cason v. Quinby, 53 So. 741 (Fla. 1910), a flat sum privilege tax ordained by the City of Lake City was held uncollectible from the traveling salesman of a nonresident aluminum company. Similarly, in Wilk v. City of Bartow, 97 So. 307 (Fla. 1923), the court held a flat sum privilege tax ordinance of the City of Bartow unenforceable against the well-known Fuller Brush solicitor. In Myers v. City of Miami, 131 So. 375 (Fla. 1930), the City of Miami was held to be without power to collect a flat sum privilege tax from the Real Silk Hosiery solicitors. In Duffin v. Tucker, 153 So. 298 (Fla. 1934), the court held that the solicitation of sales and the subsequent delivery of the items sold were not subject to local occupational licensing other than by the municipality wherein the home office was located because of the intermunicipal character of the sales operation. And finally, in Olan Mills, Inc., *supra*, it was held that a fixed sum license tax imposed upon

photographers as a condition to exercising the privilege of engaging in that business was uncollectible from solicitors representing a nonresident photographer whose business constituted interstate commerce.

The effect of the foregoing case law was that the city could not carve out of the interstate (or the intermunicipal) process the incident of solicitation as a separate and distinct aspect of the transaction upon which the tax could be imposed. As noted in Isern v. City of West Miami, 244 So.2d 420 (Fla. 1971), it generally has been held that an activity may not be put under mandate to revenue license if it is inseparable from a scheme of activity outside the licensing municipality's jurisdictional limits. *Cf.* AGO 076-234. Moreover, pursuant to s. 205.063, F. S., vehicles used by any person licensed under Ch. 205, F. S., 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 a separate place of business, and no license may be levied on such vehicles or the operators thereof as salesmen or otherwise by a municipality, any other law to the contrary notwithstanding. *Cf.* Con Agra v. City of Pensacola, 286 So.2d 605 (1 D.C.A. Fla., 1973), holding that a city ordinance imposing a license for the privilege of using the city's streets for distributing or delivering merchandise by a wholesaler located and licensed in another county contravened the precursor statute of s. 205.063, F. S., containing essentially the same provisions.

The case of West Point Wholesale Groc. Co. v. City of Opelika, 354 U.S. 390 (1957), presented a factual situation analogous to yours. There, the city imposed a flat sum annual privilege tax of $250 upon any firm engaging in the wholesale grocery business which delivered groceries in the city from points outside the city. The appellant's only contact with the city was the solicitation of orders and the delivery of goods. The court relied on Nippert, *supra*, in holding that the city could not impose the tax since such tax, being based only on appellant's minimal contact with the city, would have a substantial exclusory effect on interstate commerce.

And, in Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969), the court, in finding the act of photography to be a local activity, separable from the interstate process on which the license tax could be levied, held that solicitation and delivery were minimal activities within a state and without which the interstate commerce could not exist.

Other factors, in addition to solicitation and delivery, that should be considered are: Where the advertising and distribution contracts are entered into; where the orders for the advertisements or publications are accepted or approved; and where payment for the advertising or publications is made. The occurrence of these activities within the city limits appears to provide a "separable local incident" upon which an occupational license tax can be imposed. See Graybar Electric Co. v. Curry, 189 So. 186 (Ala. 1939); *aff'd*, 308 U.S. 513 (1939).

In the final analysis, I am unable to perceive any sound conceptual difference between the temporary presence of salesmen or solicitors and the subsequent delivery of goods (as in the foregoing cases), and the solicitation of advertisements and the subsequent delivery of the publication containing such advertisements (as in your case). Accordingly, your question, as stated, is answered in the negative.

078-121—October 12, 1978

MUNICIPALITIES

VOLUNTARY ANNEXATION

To: Bryan W. Henry, City Attorney, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Must property proposed to be annexed under s. 171.044, F. S. (voluntary annexation), meet the requirements set forth in s. 171.043, F. S.?

SUMMARY:

The standards or characteristics set forth in s. 171.043, F. S., are not required to be met by property, the voluntary annexation of which is proposed by petititon of the property owner or owners pursuant to s. 171.044, F. S.

Section 171.043, F. S., begins:

> A *municipal governing body* may *propose to annex* an area only if it meets the general standards of subsection (1) and the requirements of either subsection (2) or subsection (3). (Emphasis supplied.)

This language appears on its face to refer to that form of annexation (involuntary) which is proposed by ordinance of the municipality (under s. 171.0413, F. S.). In s. 171.0413(1), F. S., it is provided in pertinent part:

> An *ordinance proposing to annex* an area of contiguous, compact, unincorporated territory shall be adopted *by the governing body* of the annexing municipality pursuant to the procedure for the adoption of a nonemergency ordinance established by s. 166.041. (Emphasis supplied.)

The emphasized language from s. 171.0413 indicates that involuntary annexation is proposed by the municipal governing body (by ordinance). The above-quoted provision is followed by the requirement and procedures for referendum approval. Section 171.042(1)(b), F. S., provides:

> (1) Prior to commencing the *annexation procedures under s. 171.0413*, the governing body of the municipality shall prepare a report setting forth the plans to provide urban services to any area to be annexed, and the report shall include the following:
>
> * * * * *
>
> (b) A statement certifying that the area to be annexed meets the criteria in s. 171.043. (Emphasis supplied.)

There is no mention in s. 171.042, F. S., of annexation carried out under s. 171.044, F. S. (voluntary annexation), nor is there any requirement that the prerequisites of s. 171.042 (which incorporates the standards or characteristics of s. 171.043, F. S.) be complied with as a prerequisite to annexation under s. 171.044. There is, similarly, no reference in s. 171.044 to either s. 171.043 or s. 171.042. Following the 1974 Legislature's revision of Ch. 171, F. S., by Ch. 74-190, Laws of Florida, s. 171.044 contained an express reference to "real property in an unincorporated area *which meets the standards of s. 171.042* . . . ." (Emphasis supplied.) I observed in AGO 075-66 that there was evidence to suggest that the reference in s. 171.044 to "the standards of s. 171.042" might have been the result of a drafting error and that the 1974 Legislature may have intended to refer to the standards in s. *171.043*. However, in 1975, subsequent to my observation in AGO 075-66, the Legislature enacted Ch. 75-297, Laws of Florida, which simply deleted from s. 171.044 any reference to s. 171.042 and did not add any reference to s. 171.043. And, in amending various provisions of Ch. 171, F. S. (including s. 171.044), on at least two occasions since 1975, the Legislature has not inserted in s. 171.044 any reference to s. 171.043, nor has it reinserted in s. 171.044 the former reference to s. 171.042.

As shown above, s. 171.043—irrespective of s. 171.042—begins by stating that "[a] *municipal governing body may propose to annex* an area only if . . . ." Under s. 171.044, F. S., it seems clear that voluntary annexation is proposed by the petition of the property owners, rather than by the ordinance which the governing body enacts if it accedes to the petition of the property owners. Section 171.044(1), F. S., 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. (Emphasis supplied.)

That it is the property owners' petition referred to above which proposes voluntary annexation under s. 171.044 is made even more apparent by subsection (2) of s. 171.044, F. S., which provides in pertinent part:

> Upon determination by the governing body of the municipality that the petition bears the signatures of all owners of property in the area *proposed to be annexed* [proposed by the petition], the governing body may, at any regular meeting, adopt a nonemergency ordinance to annex said property and redefine the boundary lines of the municipality to include the said property. (Emphasis supplied.)

Therefore, it is my opinion that the standards or characteristics set forth in s. 171.043, F. S., are required to be met only when involuntary annexation is proposed by ordinance of a municipal governing body under s. 171.0413, F. S., and the only conditions clearly imposed on voluntary annexation under s. 171.044, F. S., are those which are contained in s. 171.044 (*i.e.*, that the property be contiguous and reasonably compact, and that the municipal governing body establish the sufficiency of the property owners' petition and comply with the stated notice requirements). As these certain conditions or prerequisites are expressly set forth in s. 171.044, I must apply the rule of construction that, where the Legislature expressly includes certain requirements in a statute, other requirements not expressly included are impliedly excluded from the operation of that statute. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952).

Your question is answered in the negative.

078-122—October 20, 1978

SHERIFFS

PURCHASE OF SUPPLIES BY COMPETITIVE BIDS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTIONS:

1. Is a county sheriff, by law, required to utilize a system of competitive bids when purchasing goods for his office?

2. In the absence of an express or implied statutory requirement for bidding, are there circumstances under which the sheriff should or must make purchases on competitive bids, such as the effectuation of "public policy" or as a matter of "good business" or because to do so would serve the "common good" or in light of such other relevant considerations as may exist?

3. In the absence of the sheriff's being required as a matter of law or other considerations to secure competitive bids in making purchases, may he do so, and, if so, may he expend reasonable amounts of the public funds of his office in so doing (such as advertising costs)?

SUMMARY:

In the absence of statutory requirement for competitive bidding, sheriffs are not required by law or public policy to enter into competitive bidding in making purchases of goods, supplies, and equipment. Sheriffs may, but are not required to, utilize a system of competitive bids when purchasing goods, supplies, and equipment for their offices and may expend reasonable amounts of public funds to advertise for and secure such bids.

AS TO QUESTION 1:

Your first question is directed to whether sheriffs are required by law to purchase goods and equipment for his office by competitive bidding. Assuming that there are no special laws or general laws of local application that impose such a requirement upon a sheriff of a particular county, your question is answered in the negative.

As this office has previously stated, sheriffs, although constitutional officers, are county administrative officers wholly dependent upon statutory authority for their powers and duties, as are other county administrative officers. *See* AGO's 076-171 and 075-161; *see also* White v. Crandon, 156 So. 303, 305 (Fla. 1934); Lang v. Walker, 35 So. 78 (Fla. 1903); 67 C.J.S. *Officers* s. 102. The general powers and duties of sheriffs are set forth in Ch. 30, F. S. An examination of Ch. 30 and of Ch. 125, F. S., relating generally to counties, reveals no provision requiring sheriffs or any other county officer to utilize a competitive bidding system when making purchases. A statute which formerly required *counties* to submit to competitive bidding in purchasing goods, supplies, and materials (s. 125.03, F. S. 1969), was repealed by Ch. 71-14, Laws of Florida, amending s. 125.01, F. S., to implement the home rule provisions of s. 1, Art. VIII, State Const. The counties may now provide by ordinance for the procedure to be used in that county for purchasing materials, equipment, and supplies or may deal with each contract or purchase on an individual basis, with or without competitive bidding, as may best serve the public interest. Attorney General Opinion 071-366. Even so, sheriffs are statutorily guaranteed their independence from the counties in making purchases. Section 30.53, F. S., provides in pertinent part:

> The 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 . . . .

See AGO 057-369, in which this office stated that a provision containing substantially the same language as s. 30.53, F. S., *see* Ch. 57-368, Laws of Florida, authorized the sheriff to make his own purchases. To require him to submit his needs to the board of county commissioners for competitive bids would effectively take away his purchasing power and place it back in the board of county commissioners. Neither s. 30.53, F. S., nor any other provision of Ch. 30 requires that sheriffs take competitive bids in purchasing goods, supplies, and equipment; s. 30.53, F. S., however, does grant the sheriff the discretion and power to make his own purchases and to select his personnel subject only to certain conditions not applicable to the instant inquiry.

Additionally, sheriffs are not subject to the competitive bidding requirements contained in part I, Ch. 287, F. S., the State Purchasing Laws. Part I, Ch. 287 (except s. 287.055, F. S.), applies only to the purchase of commodities by state agencies. The sheriff as a county officer is not a state agency and thus is not subject to the competitive bidding requirements contained therein. *Cf.* AGO's 076-202, 074-154, 074-7, 073-374, and 073-32.

Thus, my examination of Ch. 30, F. S., and the general laws of the state relating to sheriffs fails to reveal any requirement that a sheriff purchase his goods, supplies, and equipment through competitive bidding nor has any general law of local application or special law imposing such a requirement on a sheriff been brought to my attention; accordingly, I am of the opinion that sheriffs are not required by general law to enter into competitive bidding in making purchases of goods, supplies, and equipment.

AS TO QUESTION 2:

Your second question is directed to whether, in the absence of a statute so requiring, sheriffs should or must make such purchases by competitive bidding in light of "public policy." In this regard, you refer to several opinions issued by my predecessor in which this office stated that, although a legal requirement to take competitive bids may not exist, the strong public policy of this state suggests, if not requires, that expenditures of public funds be made by competitive bidding whenever possible. *See* AGO's 051-396 and 066-9. You refer to AGO 057-369 in which this office stated that, although it did not appear that sheriffs were required by law to take competitive bids, "public policy indicates that competitive bids should be taken even when not required by law, and I believe it would be in the public interest to receive them." *See also* AGO 058-61 which states:

> [A]lthough there is no expressed requirement that contracts for the erection, construction or alteration of State buildings be let on competitive bids, the public interest in such matters requires that continued recognition of this extremely strong public policy be maintained for the common good. This fundamental policy is so firmly a part of the operation of the State of Florida, that unless some extreme emergency or unusual circumstance exists, whereby the best interest of the State will not be served by adherence thereto, this policy must be maintained. (Emphasis supplied.)

In contrast, this office stated in AGO 073-259 that "[t]here is no common law rule or public policy which *mandates* that a public body utilize competitive bidding procedures." (Emphasis supplied.)

This office is without the authority to declare what the public policy of the state is or should be; that is the prerogative of the Legislature. *Cf.* State *ex. rel.* Cummer v. Pace, 159 So. 679, 681 (Fla. 1935); State v. Barquet, 262 So.2d 431 (Fla. 1972); Golden v. McCarty, 332 So.2d 388 (Fla. 1976) (that which is harmful or injurious to public is for Legislature to decide). The Legislature has not required sheriffs, under the general laws of this state, to take competitive bids when making purchases. In fact, s. 30.53 appears to assure the sheriffs' independence in making purchases and to grant them the discretion and power to determine the manner in which purchases are to be made subject only to the limitation that their discretion may not be abused or illegally exercised. Thus, the Legislature has not declared it to be the public policy of this state that expenditures of public funds be made only by competitive bidding. *See* 82 C.J.S. *Statutes* s. 352 ("Public policy is declared by the action of the Legislature, not by its failure to act.").

Moreover, I am not aware of any Florida court which has expressly held that, in the absence of a statute requiring competitive bidding, the public policy of the state requires that competitive bids be taken although the courts have recognized the public policy involved in competitive bidding statutes. *See* Anderson v. Fuller, 41 So. 684, 687 (Fla. 1906) ("The purpose and intent of the law in requiring such contracts to be let to the lowest responsible bidder for the work is to secure the public improvement at the lowest reasonable cost."); Wester v. Belote, 138 So. 721, 724 (Fla. 1931), in which the court stated:

> Laws of this kind requiring contracts to be let to the lowest bidder are based upon public economy, [and] are of great importance to the tax payers . . . .
>
> * * * * *
>
> In so far [sic] as they thus serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and will avoid the likelihood of same being circumvented, evaded, or defeated. (Citations omitted.)

See also Robert G. Lassiter & Co. v. Taylor, 128 So. 14, 17 (Fla. 1930); City of Miami Beach v. Klinger, 179 So.2d 864 (Fla. 3 D.C.A., 1965); Armco Drainage and Metal Products, Inc. v. County of Pinellas, 137 So.2d 235 (2 D.C.A. Fla., 1962); *cf.* McQuillin *Municipal Corporations* s. 29.29 (purpose of inviting competition is to guard against favoritism, improvidence, extravagance, fraud, and corruption and to secure the best work and supplies at the lowest price practicable). In fact, Florida courts appear to be in accord with the general principle as stated in Mitchell v. Walden Motor Co., 177 So. 151, 153 (Ala. 1937),

> . . . competitive bidding and any requirement to accept the lowest bidder is purely a matter for legislative consideration. If not required by statute, competitive bidding is not necessary . . . . And, in the absence of any such statute, the contract may be made by any practicable method that will safeguard the public interest.

See Brown v. City of St. Petersburg, 153 So. 140 (Fla. 1933), holding that the authority granted by the city's charter to the city manager to make purchases or sales could be exercised without competitive bidding in the absence of an ordinance, rule, or regulation so requiring; William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So.2d 550 (2 D.C.A. Fla., 1960), stating that a public body is not required unqualifiedly to award a contract to the lowest bidder unless there is a statute imposing such a requirement; and Armco Drainage and Metal Products, Inc. v. County of Pinellas, 137 So.2d 234 (2 D.C.A. Fla., 1962), in which the court, quoting with approval Rhyne's *Municipal Law* s. 10-6, p. 262 (1957), stated:

> In making its contract a municipal corporation need not advertise for bids and let to the lowest bidder in the absence of a charter or statutory requirement; nor need it let to the lowest bidder, if, in the absence of the statutory requirement, it adopts a policy of advertising for bids.

See also 63 C.J.S. *Municipal Corporations* s. 996.

Thus, in the absence of a legislative or judicial determination to the contrary, it is the opinion of this office that, in the absence of an express statutory requirement for competitive bidding, a sheriff is not required as a matter of public policy to make purchases on competitive bids. To the extent and only to the extent that any previous opinions of this office are in conflict with this opinion, they are hereby modified and superseded.

AS TO QUESTION 3:

It was my opinion in the previous two questions that sheriffs are not required by general law or by public policy to secure competitive bids in purchasing goods, supplies, and equipment for their offices. In the absence of such a requirement, a sheriff may contract "by any practicable method that will safeguard the public interest," *see* AGO 071-366 *quoting* Mitchell v. Walden Motor Co., 177 So. 151, 153 (Ala. 1937). He is required only to act in good faith and to the best interest of the public and it is within his discretion whether or not to let the contract by means of competitive bidding. *Cf.* McQuillin *Municipal Corporations* s. 29.31; State *ex rel.* Roberts v. Knox, 14 So.2d 262 (Fla. 1943) (discretion conferred by law on officer must be exercised according to established rules of law and not in arbitrary or capricious manner or for personal, selfish, or fraudulent motives or for any reason not supported by discretion conferred); Atlantic Coast Line R. Co. v. State, 143 So. 255 (Fla. 1932); Mayes Printing Co. v. Flowers, 154 So.2d 859 (1 D.C.A. Fla., 1963) (discretion in awarding contracts may not be exercised arbitrarily or capriciously). *See also* 67 C.J.S. *Officers* ss. 102(a), p. 368 and 103(a), p. 372. Thus, a sheriff may, in the exercise of his discretion, determine that, in the best interests of the public, purchases for the sheriff's department should be made on the basis of competitive bidding. Indeed, as expressed in the authorities cited in response to your second question, purchases by competitive bids are commendable and frequently guard against favoritism and fraud and greatly aid in acquiring the best work and supplies at the lowest price possible.

A general grant of power unaccompanied by definite direction as to how the power or authority is to be exercised implies a right to employ the means and methods necessary to comply with the statute. 67 C.J.S. *Officers* s. 103(a). Thus, when the law imposes a duty or power on an officer, it also confers by implication such powers as are necessary for the due and efficient exercise of those powers or duties expressly granted or such as may be fairly implied therefrom. *See* State *ex rel.* Martin v. Michell, 188 So.2d 684 (4 D.C.A. Fla., 1966), *cert. discharged*, 192 So.2d 281 (Fla. 1966); *In re* Advisory Opinion to the Governor, 60 So.2d 285 (Fla. 1952); Peters v. Hansen, 157 So.2d 103 (2 D.C.A. Fla., 1963); *cf.* Southern Utilities Co. v. City of Palatka, 99 So. 236 (Fla. 1923); Molwin Investment Co. v. Turner, 167 So. 33 (Fla. 1936). If a sheriff determines that in the best interest of the public competitive bids should be taken, he may employ any method that is reasonable to accomplish that purpose. This office and the courts of this state have held that public funds may be spent only for a public purpose or function which the public body or officer is expressly authorized by law to carry out or which must be implied in order to carry out the purpose or function expressly authorized. *See* Davis v. Keen, 192 So. 200 (Fla. 1939); State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); 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);

AGO's 071-28, 074-74, 074-192, and 075-299. Since it is my opinion that a sheriff within the scope of his duties and functions and in his discretion may take competitive bids in making purchases for goods, under the foregoing authorities, public funds may be spent to carry out this purpose. Accordingly, he may expend reasonable sums to advertise for such bids if such funds are available and properly budgeted and appropriated.

I am, therefore, of the opinion that a sheriff may in the exercise of his discretion determine that it would be in the best interests of the public if purchases for his department were made by competitive bidding, and to accomplish this he may expend reasonable funds to advertise and secure such bids. To the extent that any previous opinions of this office are in conflict with this opinion, they are hereby modified and superseded to that extent.

078-123—October 23, 1978

COUNTIES

NOT RESPONSIBLE FOR COSTS OF TRANSFERRING NONINDIGENT, NONRESIDENT MENTAL HEALTH PATIENTS TO THEIR HOME STATES

To: Emmett S. Roberts, Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Does s. 394.477, F. S., authorize or require counties to pay the costs of transferring nonindigent, nonresident mentally ill patients in treatment facilities in Florida to treatment facilities in the states of their residence?

SUMMARY:

Section 394.477, F. S., does not authorize or require counties to pay the costs of transferring *nonindigent*, nonresident mentally ill patients in treatment facilities in Florida to treatment facilities in the states of their residence.

Your question is answered in the negative.

The letter of inquiry states that, following an audit of Florida State Hospital, the auditor suggested that the hospital seek an official opinion of this office as to whether or not under s. 394.477, F. S., "counties are responsible for the costs of transferring a non-indigent, non-resident (patient) to a treatment facility in the state of his (or her) residency." This opinion, therefore, is limited to that question under the terms of s. 394.477, F. S.

Section 394.477, F. S., provides as follows:

> No person shall be hospitalized in a treatment facility under the provisions of this part who has not been a bona fide resident of the state continuously for 1 year immediately preceding his hospitalization. However, any person not a bona fide resident of the state may be hospitalized in a treatment facility pending transfer of said person back to the state of his residence. *An indigent nonresident patient shall be transferred to the state of his residence at the expense of the county from which he was hospitalized.* The treatment facility, with the approval of the department, shall retain any nonresident who cannot be transferred subject to the provisions of this part. (Emphasis supplied.)

When the language of a statute is plain and unequivocal, and conveys a clear and distinct meaning, there is no need to resort to rules of statutory construction. Van Pelt v. Hilliard, 78 So. 698 (Fla. 1918); Voorhees v. Miami, 199 So. 313 (Fla. 1940); Wagner v. Botts, 88 So.2d 611 (Fla. 1956); Reino v. State, 351 So.2d 853 (Fla. 1977). Under such

circumstances, the sole function of the court (and of this office) is to effectuate the legislative intent since the Legislature will be deemed to have intended what it has plainly expressed. *See* Florida State Racing Commission v. McLaughlin, 102 So.2d (Fla. 1958); Winter v. Playa del Sol, Inc., 353 So.2d 598 (4 D.C.A. Fla., 1977). It is readily apparent from an examination of s. 394.477, F. S., that the statute applies to and governs the transfer of *indigent* nonresident patients and does not apply to or operate on nonindigent, nonresident patients in treatment facilities in Florida. Thus, by giving effect to the plain words of the statute, it must be concluded that counties are required to pay the costs of transferring *only indigent* nonresident patients to the state of their residence. They are not authorized by law to pay the costs of transferring any nonindigent patient to the state of his (or her) residency. County funds may be expended only for those purposes authorized or required by statute. *See, e.g.*, AGO's 071-28, 078-97, and 078-101.

Moreover, it is a settled rule of statutory construction that where the Legislature has by express terms stated the things or objects upon which a statute is to operate, other things not so mentioned are impliedly excluded from the statute's operation. *In re* Estate of Ratliff, 188 So. 128 (Fla. 1939); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Thayer v. State, 335 So.2d 515 (Fla. 1976). This rule applies to the provisions of s. 394.477, F. S., so that by clear implication *nonindigent*, nonresident patients are excluded from the operation of the statute. Any other interpretation of s. 394.477, F. S., would extend the meaning of the language of the statute to include a class of persons not referred to or provided for by the Legislature.

078-124—October 23, 1978

MUNICIPALITIES

HOUSING AUTHORITIES—TAX EXEMPTION

To: J. E. Lang, Executive Director, Housing Authority of the City of West Palm Beach, West Palm Beach

Prepared by: Maxie Broome, Jr., Assistant Attorney General

QUESTION:

Pursuant to s. 423.02, F. S., is the housing authority of the City of West Palm Beach exempt from the municipal public service tax authorized to be imposed under s. 166.231, F. S.?

SUMMARY:

Pursuant to s. 423.02, F. S., purchases by the housing authority of the City of West Palm Beach of taxable items or services enumerated in s. 166.231, F. S., are exempt from the excise taxes authorized to be levied by a municipality under s. 166.231(1), F. S., on the purchase of the taxable items or services enumerated therein.

Your question is answered in the affirmative.

Section 421.04(1), F. S., creates in each city a "public body corporate and politic" to be known as the "Housing Authority" of the city.

Section 423.01(4), F. S., provides:

> (4) *Such housing projects, including all property of a housing authority used for or in connection therewith or appurtenant thereto, are exclusively for public uses and municipal purposes* and not for profit, *and are governmental functions of state concern.* As a matter of legislative determination, it is found and declared that *the property and debentures* of a housing authority are *of such character as may be exempt from taxation.* (Emphasis supplied.)

Section 423.02, F. S., provides:

> *The housing projects, including all property of housing authorities used for or in connection therewith or appurtenant thereto, of housing authorities shall be exempt from all taxes and special assessments of the state or any city, town, county, or political subdivision of the state*, provided, however, that in lieu of such taxes or special assessments a housing authority may agree to make payments to any city, town, county or political subdivision of the state for services, improvements or facilities furnished by such city, town, county or political subdivision for the benefit of a housing project owned by the housing authority, but in no event shall such payment exceed the estimated cost to such city, town, county or political subdivision of the services, improvements or facilities to be so furnished. (Emphasis supplied.)

Section 421.03(9)(b), F. S., defines "Housing project" to mean, *inter alia*, any work or undertaking:

> (b) To provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities and other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare or other purposes . . . .

and s. 422.03(2), F. S., provides:

> (2) "*Housing project*" shall mean *any work or undertaking of a housing authority pursuant to the Housing Authorities Law* or any similar work or undertaking of the Federal Government. (Emphasis supplied.)

Section 166.231(1)(a), F. S., provides, *inter alia*, that a municipality may levy a tax *on the purchase* of certain specified services or taxable items. Section 166.231(4), F. S., in pertinent part, provides that a municipality *may exempt* from taxation *the purchase* of such taxable items by the United States Government, the State of Florida, or any other "public body" as defined in s. 1.01, F. S.

In State *ex rel.* Burbridge v. St. John, 197 So. 131, 134 (Fla. 1942), the court stated that a municipal housing authority was "a real corporation, separate and distinct from that of the municipality," and not a "mere agency of the municipality." Thus, the housing authority of the City of West Palm Beach is not a "public body" within the definitive enumeration in s. 1.01(9), F. S., as it is neither a county, city, town, village, special tax school district, special road and bridge district, bridge district, nor any other district in this state. Further, the housing authority of the City of West Palm Beach is not the "United States Government" or the "State of Florida" as those terms are used in s. 166.231(4), F. S.

It is a general rule of statutory construction that a statute enumerating things on which it is to operate or forbidding certain things must be construed as excluding from its operation all things not expressly mentioned therein. *See* Ideal Farms Drainage Dist. *et al.* v. Certain Lands, 19 So.2d 234 (Fla. 1944). Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952), Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973), Thayer v. State, 335 So.2d 815 (Fla. 1976). Section 166.231(4), F. S., read with the definition in s. 1.01(9), F. S., does not apply to or embrace "public corporations" (*see* s. 421.03(1), F. S.) such as housing authorities. Thus, the city does not have the discretion to exempt housing authorities pursuant to the terms of s. 166.231(4). Housing authorities are specifically and expressly exempted from *all* taxes of the city by the statute concerned especially with housing authorities. *See* ss. 423.01(4) and 423.02, F. S.

Section 166.231(5), F. S., provides that the tax authorized by s. 166.231(1)(a), F. S., "shall be collected by the seller of *the taxable items* from *the purchaser* at the time of the payment for such service." (Emphasis supplied.)

In Green v. Panama City Housing Authority, 115 So.2d 560, 563 (Fla. 1959), it was held that s. 423.02, F. S., "preclude[s] the levy of excise taxes upon public housing authorities." In State of Florida v. City of West Panama City Beach, Florida, 127 So.2d 665 (Fla. 1961), the court held that the utilities services tax (now designated as public service tax), is an excise tax levied and collected pursuant to general law. The excise tax authorized to be levied by s. 166.231(1), F. S., "on the purchase of" the designated taxable

items or services is analogous to the rental tax under the sales tax law on the landlord, and s. 423.02, F. S., exempts the housing authority of the city and its projects and undertakings (as defined in ss. 421.03(9) and 422.03(2), F. S.) as "the purchaser" of such taxable items, from any excise taxes imposed under s. 166.231, F. S., the same as it does the housing authority as a landlord. *See* State *ex rel.* Housing Auth. of Plant City v. Kirk, 231 So.2d 522 (Fla. 1970), Green v. Panama City Housing Authority, *supra.* If the taxable items or services are separately metered or charged and separately billed to the individual tenants by the seller of such taxable items or services, they would be taxable to or against the individual consumer/tenant or purchaser just as a rental (sales) tax on a taxable commodity or item or transaction would be taxable under the sales tax law to the consumer, lessee or renter, or purchaser.

Further, in City of Orlando v. Natural Gas & Appliance Co., Inc., 57 So.2d 853 (Fla. 1952), the court, in interpreting s. 167.431, F. S., which was the precursor of, and for purposes of this opinion substantially the same as, s. 166.231, F. S., specifically said that "the tax is upon the purchase of the commodity and is upon the person who makes the purchase."

From your correspondence, I assume that in the instant case *the purchaser* is the housing authority. If the housing authority is, in fact, *the purchaser* of the designated services or taxable items, then it is statutorily exempt from the public service tax by operation of s. 423.02, F. S., which section provides that the housing authority's "housing projects" (defined in ss. 421.03(9) and 422.03(2)), F. S., "shall be exempt from *all* taxes and special assessments of the state or any city, town, county or political subdivision of the state." (Emphasis supplied.) Thus, the Legislature, through s. 423.02, F. S., has expressly and specifically exempted housing authorities from *all* taxation, and no authority or discretion in such regard has been delegated to or vested in the municipalities by the terms of either s. 423.02 or s. 166.231, F. S. *Cf.* Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975), holding that the sovereign immunity of the state and its agencies, county and county school board was not waived by authorizing constitutional provisions or implementing statutory provisions (Ch. 166, F. S.) or the exemption clause (s. 166.231(4), F. S.) authorizing municipalities to exempt the state from the tax authorized by s. 166.231(1)(a), F. S.; and s. 166.201, F. S.

I have also considered whether s. 166.231(4), F. S., in any way expressly or impliedly operates to amend or repeal s. 423.02, F. S., insofar as it appears to give the municipality the discretion to exempt certain governmental bodies or units in the state from taxation.

In Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194, a labor union whose membership was composed of employees of the City of Miami in the Department of Water & Sewers brought suit in the Circuit Court of Dade County against the City of Miami for a declaration of rights. The circuit court granted a motion to dismiss the bill of complaint and the labor union appealed to the Supreme Court of Florida. The issue in the case was whether Ch. 21968, 1943, Laws of Florida (the general law regulating the affairs and activities of labor unions and their members in the State of Florida), was intended by the Legislature to constitute an alteration of the existing city charter so as to require the city to recognize the union as an agency with which it must deal or negotiate concerning the matter of its employees. The court pointed out that, insofar as Ch. 21968 contained no reference to the City of Miami, or its employees, or to the special acts of the Legislature by which the city was created or its charter approved and established, it could only be taken as an amendment to the city charter solely by way of implication. In holding that Ch. 21968, 1943, Laws of Florida, did not act as such an amendment of the existing city charter, the court stated:

> It is an elementary proposition that amendments by implication are not favored and will not be upheld in doubtful cases. Before the courts 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 point of time can operate lawfully without conflict. See Ferguson v. McDonald, 66 Fla. 494, 63 So. 915; Sanders v. Howell, 73 Fla. 563, 74 So. 802; Town of Hallandale v. Broward County Kennel Club, 152 Fla. 266, 10 So.2d 810.

Generally, *see also* American Bakeries Co. v. Haines City, 180 So. 524 (Fla. 1938).

In the present case, s. 166.231(4), F. S., contains no reference whatsoever to municipal housing authorities. Section 423.02, F. S., falls under a chapter entitled "Tax Exemption of Housing Authorities," and deals specifically with the tax exemption of housing authorities and certain discretionary payments in lieu of taxes for services or facilities furnished by the municipalities, whereas s. 166.231(4), F. S., falls under a chapter dealing generally with municipal home rule powers and municipal taxing powers. Such being the case, s. 166.231(4), F. S., can only be taken to be an amendment to s. 423.02, F. S., solely by way of implication. In determining whether such amendment was effected, the propositions stated in the *Miami Water Works* case must be applied. Moreover, the two statutes dealing with different subjects and there being no express intention in the latter statute (s. 166.231, F. S.) to amend or repeal anything in the earlier statute (s. 423.02, F. S.), s. 166.231 cannot operate to impliedly amend or repeal s. 423.02, F. S. Harrison v. McLeod, 194 So. 247 (Fla. 1940); Scott v. Stone, 176 So. 852 (Fla. 1937).

In reading the two statutes, it is clear that s. 166.231(4), F. S., was not intended as a revision of the subject matter of s. 423.02, F. S., nor is there such a positive and irreconcilable repugnancy between the laws as to indicate clearly that s. 166.231(4), F. S., was intended to prescribe the only rule which should govern the case provided for. Further, there is a field (tax exemption of housing authorities) in which the provisions of s. 423.02, F. S., can and do operate lawfully without conflict with s. 166.231(4). Section 423.02, F. S., contains a complete and special plan or scheme for the tax exemption of housing authorities and certain discretionary payments in lieu of taxes for services or facilities furnished by the municipalities. I can find no evidence from a study of s. 166.231(4), F. S., that the Legislature intended to abrogate or repeal that plan, or engraft thereon new conditions so entirely foreign to the present exemption given housing authorities. Had the lawmaking body intended to accomplish such a purpose in a field so important to the state as in the field of municipal housing authorities there is no reason to believe that it would not have said so in that many words, instead of leaving the matter to sheer speculation and conjecture.

078-125—October 24, 1978

MUNICIPALITIES

VACATION OF STREETS AND ROADS—RIGHTS OF PROPERTY OWNERS

To: David B. Higginbottom, City Attorney, Frostproof

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is a municipality authorized by law to require abutting landowners who request vacation of a public street to prove a reversionary interest in the property and pay for the proportionate costs of an appraisal and for the proportionate appraised value of such property interest as conditions to the vacation?

SUMMARY:

A municipality possesses no authority under the Municipal Home Rule Powers Act to require property owners whose land abuts a dedicated public street to "prove a reversionary interest" or any other property interest or property right in the streetbed prior to and as a condition to the vacation of such street. The determination and adjudication of property rights is a judicial function which may not be exercised by the legislative branches of government; hence any such exercise by a municipality does not constitute a lawful exercise of a municipal governmental power for a municipal purpose. In addition, while the vacation of streets in the public interest or when the streets are no longer

required for public use is a legislative function which may be performed by a municipality, a municipality possesses neither statutory nor constitutional authority to exact payment for or otherwise interfere with the property rights of landowners whose property abuts a public street as conditions to or in exchange for the exercise of its power to vacate streets no longer required for public use.

Your letter advises that the Frostproof City Council has adopted a "motion" which reads as follows:

> [I]n the future a qualified appraiser [shall] be used by the city to set the value of a street (to become property) when requested for closure. The person or persons making the request would have to bear the expense of the appraisal and proof of a reversionary clause. They would be notified and bills [sic] for the appraised property value before actual closing of the street could take place. Payment to be made on date of actual closing.

Section 2(b), Art. VIII, State Const., provides in pertinent part:

> Municipalities shall have 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 as otherwise provided by law. (Emphasis supplied.)

Statutory implementation of the broad grant of home rule is provided by Ch. 166, F. S., the Municipal Home Rule Powers Act. Section 166.021(1), F. S., of that act states in relevant part that "municipalities . . . may exercise any power for *municipal purposes*, except when expressly prohibited by law." (Emphasis supplied.) Thus, it is clear that the only limitation upon the exercise of power by a municipality is that it must be exercised for a municipal purpose. State v. City of Sunrise, 354 So.2d 1206, 1209 (Fla. 1977).

Although the phrase "municipal purposes" is not defined by the constitution, it is defined by s. 166.021(2), F. S., as "any activity or power which may be exercised by the state or its political subdivisions." *But see* City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764, 765-769 (Fla. 1974)(Dekle, J., concurring), in which Justice Dekle observed:

> It is not the definition of municipal purposes found in . . . s. 166.021(2) that grants power to the municipality . . . but rather the provision of . . . s. 166.021(1) which expressly empowers municipalities to "exercise any power for municipal purposes, except when expressly prohibited by law."

It is a fundamental principle in this state that the determination and adjudication of property rights is a judicial function which cannot be performed by the Legislature. Hillsborough County v. Kensatt, 144 So. 393 (Fla. 1932); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959); Daniels v. State Road Dept., 170 So.2d 846 (Fla. 1964). Legislation which constitutes an invasion of the province of the judiciary is invalid. Thursby v. Stewart, 138 So. 742 (Fla. 1931); Simmons v. State, 36 So.2d 207 (Fla. 1948). Thus, while the vacation of streets is a legislative function which may be validly delegated to municipalities (*see* Sun Oil Company v. Gerstein, 206 So.2d 439, 440 (3 D.C.A. Fla., 1968), AGO 075-171), *no* legislative body (whether state, county, or municipal) is authorized to invade private property rights or require abutting property owners to prove a reversionary or any other interest in real property as a condition to the vacation of a public street. Accordingly, the action taken by the Frostproof City Council does not constitute a municipal purpose; and, therefore, it is outside the scope of municipal home rule powers possessed by the municipality.

Moreover, under the general rule, the interest acquired in land by a municipal corporation for street purposes is held in trust for the benefit of all the public, regardless of whether the corporation owns the fee or has merely an interest therein. Sun Oil Company v. Gerstein, *supra*; 30 Am. Jur.2d *Highways Streets and Bridges* s. 159. A municipality is empowered to vacate streets only when the vacation is in the public interest or when the street is no longer required for public use and convenience. 64 C.J.S. *Municipal Corporations* s. 1668. Consequently, in AGO 078-118, I noted, as a caveat, with respect to the vacation of county roads:

> [I]f the general public is using the roads and streets in question (including public service vehicles such as garbage trucks, police, fire or emergency vehicles), then the county *should not* close or vacate the roads or streets in question as such vacation would be injurious to the public welfare or violate individual property rights.

Applying these principles to your inquiry, it is clear that the city council should not undertake to vacate any streets in the absence of a determination that the general public would benefit from the vacation or that such streets are no longer required for the public use and convenience.

As to whether a municipality is authorized to exact charges or payments from abutting landowners as a condition to or in exchange for the vacation of a public street, it is necessary to analyze the property interests possessed by the public and the abutting or adjoining landowners in public streets.

Recently, in AGO's 078-63, 078-88, and 078-118, I examined the elements and effect of the dedication of property for public use. There are two basic requirements to the existence of a valid dedication to the public. First, there must be a clearly manifested intention by the owner of the property to dedicate it to public use. Second, the public, through its authorized agents, must clearly show its intent to accept the dedication. City of Miami v. Florida East Coast Railway Co., 84 So. 726 (Fla. 1920); Roe v. Kendrick, 200 So. 394 (Fla. 1941). An offer of dedication to the public may be accomplished by making and recording a plat and selling lots with reference thereto. *See, e.g.*, Florida East Coast Railway Co. v. Worley, 38 So. 618 (Fla. 1905); Miami Beach v. Undercliff Realty and Investment Co., 21 So.2d 783 (Fla. 1945); *and see*, s. 177.081, F. S.

However the dedication to the public is accomplished, it is clear that such dedication does not have the effect of transferring legal title from the grantor to the public. To the contrary, the fee remains in the grantor (or his grantees) while the public acquires only a right of easement in trust, so long as the dedicated land is used for the intended purpose of the dedication. Attorney General Opinion 078-118. Unless otherwise specifically provided in the conveyance, the legal title of the grantor in the dedicated property passes to the grantees of those lots sold with reference to a plat, which lots abut the dedicated streets. Their title extends to the center of the street subject to the public easement. Walker v. Pollack, 74 So.2d 886 (Fla. 1954); Smith v. Horn, 70 So. 435 (Fla. 1915); New Fort Pierce Hotel Co. v. Phoenix Tax Title Corp., 171 So. 525 (Fla. 1936); United States v. 16.33 Acres of Land in County of Dade, 342 So.2d 476, 480 (Fla. 1977); *cf.* Emerald Equities v. Hutton, 357 So.2d 1071 (2 D.C.A. Fla., 1978). Therefore, a street in which the public has only an easement when properly vacated ceases to be a street; the abutting landowners continue to hold fee simple title to the center of the vacated roadbed unencumbered by the easement. Smith v. Horn, *supra*; Robbins v. White, 42 So. 841, 843-844 (Fla. 1907); AGO 078-118.

See also s. 177.081(1), F. S., providing that every plat of a subdivision filed for record must contain a dedication by the developer; s. 177.081(2), F. S., providing that all streets, rights-of-way, and public areas shown on plats approved by the affected local governments shall be deemed dedicated to the public for the uses and purposes stated in such plat, unless otherwise stated therein by the dedicator; s. 177.085(1), F. S., providing that when any landowner subdivides his land and dedicates streets or roadways on the plat but reserves unto the dedicator the reversionary interests in the dedicated streets or roadways, and therafter conveys abutting lots, such conveyance carries with it the reversionary interest in the abutting street to the center line, unless the landowner clearly provides otherwise in the conveyance; and s. 177.085(2), F. S., providing that prior holders of any interest in the reversionary rights in the streets and roads in recorded plats of subdivided lots, other than the owners of abutting lots, "shall have 1 year from July 1, 1972, to institute suit . . . to establish or enforce the right," and that, if no such action is instituted within that time, any right, title, or interest and all right of reversion shall be barred and unenforceable.

With regard to the instant inquiry, therefore, it is apparent that the Frostproof City Council does not "own" streets which have been dedicated to public use. *Cf.* AGO 078-118 in which this office concluded that a county was not authorized to convey or transfer ownership and control of dedicated streets to a "homeowners association" since the county possessed no legal title in the property which it could convey or transfer. Under such circumstances, there would appear to be no legal basis upon which the city could require abutting fee owners to pay to secure property interests which they already possess. *See* McQuillin *Municipal Corporations* s. 30.189, at 123 (3rd rev. ed. 1977),

stating: "A municipality is not entitled to compensation for loss of a public easement in streets in which it does not own the fee." *Accord*: Lockwood & Strickland Co. v. City of Chicago, 117 N.E. 81, 82 (Ill. 1917), in which the court held, among other things:

> [I]t would be beyond the power of the city to grant or convey to a private person or corporation the ground embraced in a vacated street or alley. Whether a city owns the fee in an alley or merely an easement, when it is vacated because no longer needed for public use, the law disposes of the reversionary interest, and the reversionary rights cannot be granted or conveyed by the city. . . . Whether the alley was no longer needed for public use, and whether the public interest would be subserved by its vacation, could not be made to depend on how much the city could get for its action. The legislative powers of a city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue.

The State Constitution provides that all natural persons shall have the inalienable right "to acquire, possess and protect property . . . ." Section 2, Art. I, State Const. Additionally, s. 9, Art. I, State Const., provides that no person "shall be deprived of . . . property without due process of law . . . ." Section 6, Art. X, State Const., states that "[n]o private property shall be taken except for a public purpose and with full compensation therefor. . . ." Thus, the acquisition, possession, enjoyment, use, and alienation of property and property rights are controlled by constitutional law and the common law. Moreover, the term "property" for purposes of the above-cited constitutional provisions includes more than the abutting landowner's fee simple title. As stated in Seldon v. City of Jacksonville, 10 So. 457, 459 (Fla. 1891):

> There is incident to abutting property, or its ownership, even where the abutter's fee or title does not extend to the middle of the street, but only to its boundary, certain property rights which the public generally do not possess. They are the right of egress and ingress from and to the lot by the way of the street, and the right of light and air which the street affords. Viewing property to be not the mere corporal subject of ownership, but as being all the rights legally incidental to the ownership of such subject, which rights are generally said to be those of user, exclusion, and disposition, or the right to use, possess, and dispose of, . . . we are satisfied that the rights just mentioned are within the meaning of the word "property," as it is used in this constitutional provision. [10 So. 457, 459 (1891) (construing s. 12, Declar. Rts., State Const. 1885, in part a predecessor of s. 6, Art. X, State Const.).]

See also Lutterloh v. Mayor and Council of Town of Cedar Keys, 15 Fla. 306, 308 (1875); City of Miami v. East Coast Ry. Co., 84 So. 726, 729 (Fla. 1920); McCorquodale v. Keyton, 63 So.2d 906 (Fla. 1956); Monell v. Golfview Road Association, 359 So.2d 2 (4 D.C.A. Fla., 1978).

Accordingly, it has been held that the rights of abutting or adjacent purchasers depend on principles of law applicable to private property rather than public dedication since these rights depend upon a "private easement implied from sale with reference to a plat showing streets [etc.]" rather than upon any dedication to the public generally. Burnham v. Davis Islands, Inc., 87 So.2d 97, 100 (Fla. 1956). An abutting landowner may be entitled to compensation from a public body when it vacates a public street for consequent loss of access to such landowner's property on the theory that a property right has been taken without compensation. *See* Pinellas County v. Austin, 323 So.2d 6, 8 (2 D.C.A. Fla., 1975). It follows, then, that the several property interests of abutting landowners are subject to constitutional protection. Clearly the attempt by a municipality to usurp private property rights or property interests or to barter or sell such property rights as conditions to or in exchange for the exercise of its legislative power to vacate streets no longer required for public use, does not constitute a municipal purpose and is outside the scope of municipal home rule powers.

078-126—October 24, 1978

HOSPITALS

DEPOSIT OF PUBLIC MONEYS—DISCONTINUANCE OF EMERGENCY ROOM SERVICES

To: M. L. Collier, Chairman, Board of Trustees of Century Memorial Hospital, Century

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is the Board of Trustees of Century Memorial Hospital authorized by s. 155.11, F. S., to deposit hospital funds in, and transfer its operating accounts to, a bank located in Flomaton, Alabama?
2. Is the hospital authorized by law to discontinue its present emergency room service?

SUMMARY:

The Board of Trustees of Century Memorial Hospital is not authorized by law to designate an out-of-state bank as a depository for hospital funds or to deposit hospital funds in or transfer its operating accounts to an out-of-state bank. Neither Ch. 395, F. S., nor rules of the Department of Health and Rehabilitative Services require the maintenance of emergency room facilities as a condition to licensure under state law. Therefore, the board of trustees may discontinue emergency room service at the hospital provided that a procedure is maintained for handling the occasional emergency case, as required by Rule 10D-28.55(1)(n), F.A.C., and adequate and timely notice of the discontinuance of such emergency room service is given to the general public and the ambulance or emergency service organizations in the hospital's service area.

AS TO QUESTION 1:

Your first question is answered in the negative.

According to information supplied to this office by the Department of Health and Rehabilitative Services, Century Memorial Hospital is a county-owned hospital which has been licensed under the provisions of Ch. 395, F. S. Chapter 155, F. S., provides for the establishment and operation of county public hospitals. A public hospital operating under Ch. 155 is governed by a board of trustees whose members are appointed by the Governor. Section 155.06, F. S. The chairman of the board is designated the "executive officer of the board of trustees" and is required to, *inter alia*, countersign all vouchers and warrants issued by the secretary and treasurer and give bond in a sum to be fixed by the board of county commissioners for the faithful performance of his or her duties in an authorized and reputable bonding company, s. 155.07, F. S. Section 155.09, F. S., provides for the election of a secretary and treasurer whose duties include keeping a separate itemized account of all of the expenditures and disbursements of the board. The board is required under s. 155.12, F. S., to certify each year to the board of county commissioners "the amount necessary for the improvement and maintenance of such [county] public hospital" during the ensuing year; and the board of county commissioners "shall" at its annual meeting for the purpose of determining the amount of money or revenues to be raised for all county purposes, levy a sufficient tax to produce the sum required by the board of trustees' report to the county commission, subject to millage limitations imposed by law. Additionally, s. 155.24, F. S., states:

> In addition to the tax which may be levied under the provisions of this law, the board of county commissioners may allocate to the hospital funds any other public moneys in possession of said board of county commissioners, not otherwise appropriated or allocated to other uses.

As to the deposit of funds received by a county hospital, s. 155.11(1), F. S., reads in relevant part:

> *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. (Emphasis supplied.)

The question then becomes whether the phrase "any bank designated by said board of trustees" authorizes the board to deposit hospital funds in an out-of-state bank. No question has been presented, hence no opinion is expressed, as to whether the board's authority under s. 155.011(2), F. S. (brought into the statutes by Ch. 78-406, Laws of Florida), if authorized in writing to do so by the payee, to "provide for the direct deposit of funds to the account of the payee in any financial institution which is designated in writing by the payee and which has lawful authority to accept such deposits" permits direct deposit of funds in out-of-state financial institutions.

Section 155.11(1), F. S., does not in express terms authorize the board to designate any bank as a depository of public moneys within or without the state. *Cf.* ss. 243.28, 660.10(8), F. S., and Nohrr v. Brevard County Educational Fac. Auth., 247 So.2d 304, 310 (Fla. 1971). Nor does it authorize the board to deposit public moneys in any bank that is not a lawfully designated and qualified depository of public moneys, or in any manner absolve the members of the board from personal liability for the loss of public moneys in their custody and under their control. Furthermore, the statute does not authorize the board of trustees of a county hospital to exercise any of its governmental or discretionary powers or perform any governmental duty or transact any official business outside the jurisdictional and territorial limits of the State of Florida. No such authority may be implied from the expressly granted power to designate "any bank" because the authority to deposit funds in an out-of-state bank is not *necessary* or *essential* to enable the board to carry out its statutory duties and powers. *See* State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla., 1944), White v. Crandon, 156 So. 303 (Fla. 1934).

In AGO 075-283, this office considered the question of whether the Department of Banking and Finance was authorized by s. 659.24, F. S. (or any other statute), to designate or regulate out-of-state banks as depositories of public funds, so as to authorize or enable a municipality to deposit municipal funds in out-of-state depositories. Section 659.24(1), *supra*, specifies, *inter alia*, that

> [b]anks shall be depositories of public moneys under such regulations as may be prescribed by the department . . . . The department shall require banks so designated to give satisfactory security . . . for the safekeeping and prompt payment of the public moneys deposited with them and for the faithful performance of their duties as financial agents of the state.

In addition, s. 659.24(3), F. S., provides, in pertinent part, for

> the safekeeping and prompt payment of moneys deposited . . . whether such moneys so deposited be funds of, or under the control of, the state or any political subdivision thereof, . . . or of any district, commission, board, or body, whether corporate or otherwise, created by . . . any statute of the state, or of any officer [thereof] . . . .

After examining relevant case law, this office concluded in AGO 075-283 that the department was not authorized to designate or regulate out-of-state banks for the following reasons:

> The law is abundantly clear that the jurisdiction of the state is coextensive with the territorial boundaries of the state, and similarly the jurisdiction of state officers, agents, and departments is coextensive with the territorial boundaries of the state. The legislature has no power to enact a statute extending a state's power beyond its jurisdictional boundaries or to attempt to regulate persons,

> corporations or activities beyond its jurisdictional boundaries. . . . The [Department of Banking and Finance] would be without power beyond the territorial boundaries of the State of Florida to require banks to give satisfactory security by the deposit of bonds as required in the statute for the simple reason that the statute would be of no effect outside the state.

The principles set forth in AGO 075-283 apply with equal force to the officers of a county or any governmental entity established or created by statute. Clearly, the Legislature is not empowered to delegate to a statutory entity a power which the state itself does not possess. Therefore, s. 155.11(1), F. S., does not authorize the board of trustees of a county hospital to transfer the hospital operating funds to a bank which is outside the state. *Cf.* AGO 078-68, stating in pertinent part that no statutory authority had been found for the deposit of community college funds

> . . . in a foreign bank, an out-of-state bank or any bank not properly established as a depository under the laws of Florida or the foregoing rules of the state board [of education].

Moreover, in light of the extensive responsibilities of the board of trustees with respect to the administration, control, and custody of public funds (*see* ss. 155.07, 155.11, 155.12, 155.21, and 155.24, F. S.), it is important to consider established principles relating to the liability of public officers for public funds paid into their custody. Under the general rule, in the absence of a statute to the contrary, a public officer is liable as an *insurer* of public funds in his custody. 67 C.J.S. *Officers* s. 119(a); Thomas v. Carlton, 143 So. 780 (Fla. 1932). In other words, unless otherwise provided by law, such an officer is personally liable for "loss resulting from theft, robbery, fire or the failure of his depository . . . ." 67 C.J.S. *Officers* s. 119(a); 15 McQuillin *Municipal Corporations* s. 39.47(a), n. 6, p. 143. *Cf.* Spencer v. Mero, 52 So.2d 679, 680 (Fla. 1951), in which the court indicated that unless a public officer was a voluntary trustee who held public funds in trust, he was liable for the loss of the funds by theft.

However, the Legislature is authorized to enact statutes absolving a public officer from liability for the loss of public moneys. Mordt v. Robinson, 156 So. 535 (Fla. 1934). In *Mordt*, the court ruled that a statute (C.G.L. 1927 s. 6079, the forerunner of present s. 659.24, F. S.) which authorized certain officers to deposit funds in banks designated as official public depositories of public moneys, operated to absolve officers, who in good faith deposited funds in such depositories, from liability for the loss of public funds caused by the insolvency and closing of the depository. The relevance of this case to your inquiry is readily apparent. If the members of the hospital board of trustees elect to deposit hospital funds in, and transfer its operating accounts to, a bank which is not a qualified depository of public moneys under s. 659.24, F. S., they do so at the risk of personal liability for loss of the funds.

AS TO QUESTION 2:

Chapter 395, F. S., which provides standards for licensing of hospitals, does not require a hospital to establish or maintain an emergency room as a condition to licensure. Further, Rule 10D-28.55, F.A.C., promulgated by the Department of Health and Rehabilitative Services, provides in pertinent part as follows:

> For purposes of these rules, all institutions within provisions of Chapter 395, F. S., shall be classified as either general or a special hospital.
> (1) General Hospitals—the following characteristics shall identify a general hospital:
>
> * * * * *
>
> (n) *An organized emergency service or department is not required; however, there must be at least a procedure for taking care of the occasional emergency case.* (Emphasis supplied.)

I have been informed by the Department of Health and Rehabilitative Services that Century Memorial Hospital is classified as a "general" hospital. Accordingly, the department advises that such a hospital may discontinue its emergency room service,

provided that it retains written internal procedure for handling the occasional emergency case as required by Rule 10D-28.55, (1)(n), *supra.*

My research has disclosed no cases which have considered whether a hospital is prohibited, as a matter of public policy, from discontinuing or significantly lessening the emergency services offered to the public, in the absence of a statutory duty to maintain such facilities. However, in at least one case, the court indicated that a *public* hospital may owe the public a higher duty of care with respect to emergency treatment than a private hospital. *See* Williams v. Hospital Authority of Hall County, 168 S.E.2d 336 (Ga. Ct. App. 1969), in which the court stated:

> No hospital, public or private, is under a common-law duty to accept everyone who applies for admission; nor is there a duty to maintain an emergency ward. However, this is not the same as the duty owed by a public hospital supported by public tax funds which does maintain emergency facilities for the benefit of the general public. The maintenance of such emergency facilities by a public hospital to render first aid to injured persons has become a well-established adjunct to the main business of a hospital. . . . To say that a public institution which has assumed this duty and held itself out as giving such aid can arbitrarily refuse to give emergency treatment to a member of the public . . . is repugnant to our entire system of government.

The *Hall* case specifically involved a public hospital's arbitrary refusal to treat a particular person in its emergency room. However, the court also recognized that while the hospital was under no duty to maintain an emergency ward in the first place, a public hospital that *did* maintain emergency room service for the benefit of the general public and held itself out as giving such emergency aid, could not refuse to give emergency treatment to a member of the public. In effect, the court reasoned that under such circumstances the public is entitled to *rely* on and expect such service, when it is available. *See also,* Mercy Medical Center of Oshkosh, Inc. v. Winnebago County, 206 N.W.2d 198, 200-201 (Wis. 1973).

Accordingly, I concur in the advice and recommendations of the Department of Health and Rehabilitative Services with respect to the discontinuance of emergency room service, namely, that the hospital board of trustees give adequate and timely *notice* of its intent to discontinue the existing emergency room service to the residents and members of the general public in hospital's service area as well as to all ambulance or emergency service organizations (public and private) before discontinuing such emergency room services. Further, I would suggest that the Department of Health and Rehabilitative Services be consulted as to the minimum standards to be observed in the emergency procedure contemplated by Rule 10D-28.55(1)(n), F.A.C.

078-127—October 30, 1978

SOVEREIGN IMMUNITY

PORT AUTHORITY

To: T. Terrell Sessums, General Counsel, Tampa Port Authority, Tampa

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTIONS:

1. Is the Tampa Port Authority a "state agency or subdivision" for the purposes of and within the scope of s. 768.28, F. S.?

2. If the answer to question 1 is in the affirmative, what is the extent of the liability of the authority and its insurer if a judgment is obtained against the authority in a tort action which is in excess of the monetary limitations contained in s. 768.28(5), F. S.?

SUMMARY:

The Tampa Port Authority is within the definitional purview and enacting terms of s. 768.28, F. S., for the purposes of that statute. Therefore, in the absence of contrary judicial determination, the statutorily established monetary limitations on tort liability established by s. 768.28(5), F. S., are applicable to the port authority, even though it may not have possessed sovereign immunity prior to July 1, 1974. Under s. 768.28(5), F. S. (assuming the validity thereof), the port authority is not liable for that portion of a judgment or judgments obtained against it which is in excess of the monetary limitations set forth therein unless the Legislature takes further action to authorize and require the payment of the whole or a part thereof. Unless judicially determined otherwise, the authority is empowered to secure liability insurance coverage which exceeds the monetary limitations specified in s. 768.28(5), F. S. Should the Legislature act to approve or direct payment of that portion of a claim, judgment, or claims bill which is in excess of the statutory limitations, then the insurer would be potentially liable to pay the amount of the excess, up to the limits of the policy.

AS TO QUESTION 1:

Your first question is answered in the affirmative.

With the enactment of s. 768.28, F. S. (Ch. 73-313, Laws of Florida, as amended by Chs. 74-235 and 77-86, Laws of Florida), the state has waived sovereign immunity for liability for torts for the state "and for its agencies or subdivisions," to the extent specified therein. Section 768.28(1), F. S. This waiver of immunity for the state and its agencies or subdivisions is limited to $50,000 on any claim or judgment by one person or $100,000 for all claims arising out of the same incident or occurrence. Section 768.28(5), F. S.

The phrase "state agencies or subdivisions," as used in s. 768.28, F. S., is defined by subsection (2) to include, *inter alia*, ". . . corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities." My examination of the enabling legislation creating the Tampa Port Authority reveals that the authority is within the purview of this definition. Section 4 of Ch. 23338, 1945, Laws of Florida, as amended by Chs. 63-1398 and 67-1500, Laws of Florida, states:

> . . . [s]aid Authority shall constitute a body politic and a body corporate; it shall have perpetual existence; its operation shall be deemed to be a governmental function . . . .

Under s. 7 of Ch. 23338, as amended by Chs. 57-1380, 67-1482, 67-1488, 67-1505, 69-1140, 69-1141, 72-566, 72-567, and 76-385, the authority has been vested with all of the powers "necessary to carry out the provisions of this Act . . ." including *inter alia*, the power of eminent domain, as well as the power to borrow money, acquire property, enter into contracts, and construct and operate projects. The authority is authorized to finance the costs of its projects by the issuance of revenue bonds. Section 14, Ch. 23338, Laws of Florida. In addition, the Board of County Commissioners of Hillsborough County is authorized to levy and collect an ad valorem tax on property in the port district to defray administrative expenses. Section 10, Ch. 23338, Laws of Florida, as amended by Chs. 75-387 and 77-568, Laws of Florida.

From the foregoing it is evident that the Tampa Port Authority may be characterized as a public corporation or public quasi-corporation and hence a "state agency or subdivision" within the statutory definition for purposes of and within the scope of s. 768.28, F. S. *See* Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage Dist., 82 So. 346, 350 (Fla. 1919); O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9, 11 (Fla. 1971); 81A C.J.S. *States* s. 141. Recent Attorney General Opinions have held that a corporate municipal housing authority (AGO 078-33), a quasi-corporate hospital taxing district (AGO's 078-42 and 075-114), and a corporate district mental health board (AGO 078-106) are within the definitional purview and enacting terms of s. 768.28, F. S.

As to the question of whether the Tampa Port Authority was ever possessed of sovereign immunity, my research discloses no Florida cases which have considered the matter. It is clear that prior to the state's waiver of immunity, state agencies and political

subdivisions partook of the state's sovereign immunity and were not subject to tort liability. *See, e.g.*, Circuit Court of the Twelfth Judicial Circuit v. Department of Natural Resources, 339 So.2d 1113 (Fla. 1976); Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962); Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968). The state's immunity from suit has also been held to extend to a drainage district established pursuant to law. Seaboard Air Line R. Co. v. Sarasota-Fruitville Drainage Dist., 255 F.2d 622 (5th Cir.), *cert. denied*, 358 U.S. 836 (1958). But in Suwannee County Hospital Corporation v. Golden, 56 So.2d 911 (Fla. 1952), the court stated that the activities of a legislatively established corporate hospital district fell more within the category of proprietary than governmental functions as to those patients who paid for treatment. The *Suwannee* court ruled that those patients who paid for the services they received were entitled to expect that the services would be rendered free of negligence; such patients could not be divested of their constitutional rights of redress of wrongs by an attempted (special) legislative immunization. In AGO 078-33, moreover, this office found that a majority of other jurisdictions supported the view that a municipal housing authority's activities were proprietary rather than governmental; therefore it was not possessed of sovereign immunity and was subject to tort liability. As to port authorities, moreover, it has been held in other states that the activities of a port authority should be labeled proprietary with resultant tort liability. 3A Antieau *Local Government Law* s. 301.05; *cf.* General Petroleum Corp. v. City of Los Angeles, 109 P.2d 754 (2 D.C.A. Cal., 1941); Harris v. Bremerton, 147 P. 638 (Wash. 1915). However, a port authority has also been held to be an arm of the state and hence possessed of sovereign immunity. Fouchaux v. Board of Commissioners of Port of New Orleans, 186 So. 103 (Ct. App. La.), *aff'd*, 190 So. 373 (La. 1939), *cert. denied*, 308 U.S. 554 (1939).

However, in light of recent amendments to s. 768.28(5), F. S., made by Ch. 77-86, Laws of Florida (assuming the validity thereof), it is unnecessary to determine whether the Tampa Port Authority possesses or in the past has possessed sovereign immunity. Section 768.28(5), as amended by Ch. 77-86, states that the liability limits contained therein are applicable to *all* state agencies and subdivisions of the state, as defined in s. 768.28(2), regardless of whether these agencies and subdivisions possessed sovereign immunity prior to July 1, 1974. In other words, pending a judicial determination to the contrary, the tort liability of the Tampa Port Authority does not exceed the prescribed statutory limits, notwithstanding the fact that it may not have possessed sovereign immunity prior to the Legislature's waiver of same with respect to tort liability. However, a judgment or judgments may be claimed and rendered in excess of the specified monetary limitations and may be settled and paid up to the prescribed limits and that portion thereof that exceeds such limits may be reported to the Legislature, but may be paid in part or in whole *only* by further act of the Legislature. Section 768.28(5), F. S.

AS TO QUESTION 2:

As previously noted s. 768.28, F. S., operates to waive sovereign immunity for liability for torts for the state "and for its agencies and subdivisions" to the extent specified in the statute, subject to the monetary limitations set forth in s. 768.28(5), F. S. Section 768.28(5), F. S., reads in relevant part:

> . . . . Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000 or any claim or judgment, or portions thereof, which when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $100,000. *However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.* (Emphasis supplied.)

From an examination of the subject statute, it is evident that a judgment or judgments or that part thereof which is obtained against the state or its agencies and subdivisions that is in excess of the statutory limits on liability may be paid in part or in whole *only* if specifically authorized and directed by the Legislature. Should the Legislature refuse to act to approve and require payment of the excess, then the state's agencies or subdivisions may not pay and are not liable for any amounts in excess of the prescribed

monetary limits set forth in s. 768.28(5), F. S. Attorney General Opinions 075-69 and 075-284.

However, with regard to the extent of the liability of the *insurer* of a governmental body, s. 768.28, F. S., does not provide a clear and definitive answer. Formerly, the question could be answered by reference to s. 768.28(10), F. S. 1975, which provided in part:

> If the state or its agency or subdivision is insured against liability for damages for any negligent or wrongful act, omission, or occurrence for which action may be brought pursuant to this section, *then the limitations of this act shall not apply to actions brought to recover damages therefor to the extent such policy of insurance shall provide coverage.* (Emphasis supplied.)

See also Circuit Court v. Department of Natural Resources, 339 So.2d 1113, 1116 (Fla. 1976), wherein the Supreme Court stated:

> Section 768.28, Florida Statutes, constitutes a limited waiver of the state's sovereign immunity . . . . *Such waiver is coextensive with insurance coverage obtained by the agency involved.* (Emphasis supplied.)

In 1977, the Legislature enacted Ch. 77-86, Laws of Florida, which repealed s. 768.28(10), F. S. 1975. Thus it is evident that s. 768.28, F. S., no longer specifically provides an exception from the operation of that section, or for a waiver of sovereign immunity "coextensive with the insurance coverage obtained by the agency involved." However, s. 3 of Ch. 77-86, *supra*, added a new subsection to s. 768.28, F. S., which subsection has been codified as s. 768.28(13), F. S. Section 768.28(13), F. S., authorizes the state or its agencies and subdivisions to, *inter alia*, "purchase liability insurance for whatever coverage they may choose . . . in anticipation of *any claim, judgment, and claims bill which they may be liable to pay pursuant to this section.*" (Emphasis supplied.) Section 768.28(5), F. S., provides that the portion of a judgment or judgments that exceeds the monetary limitations specified therein may be reported to the Legislature, and "may be paid in part or in whole" by "further act" of that body. Hence, the italicized language of s. 768.28(13) appears to embrace *any* claim, judgment, or claims bill the payment of which may be approved or directed by the Legislature, notwithstanding the monetary limitations prescribed by s. 768.28(5), F. S.

Further, existent s. 768.28(10), F. S., provides that "[l]aws allowing the state or its agencies to buy insurance are still in force and effect *and are not restricted in any way by the terms of this act.*" (Emphasis supplied.) Therefore, existent s. 768.28(10) and (13), F. S., may not be said to have in any way impliedly modified or repealed any provision of any other law allowing state agencies or subdivisions to buy insurance. In this regard, s. 455.06(1), F. S., authorizes "[t]he public officers in charge or governing bodies . . . of every . . . governmental unit, department, board or bureau of the state, including tax or other districts, political subdivisions, and public and quasi-public corporations" to secure insurance to cover liability for damages on account of personal injury or death or damage to the property of any persons resulting from the performance of various enumerated functions and activities by the governmental entity or its agents and employees acting within the scope of their employment. Section 455.06(1), F. S., also authorizes the governing bodies of the governmental units specified therein to pay the premiums for such insurance from any general funds appropriated or made available for necessary and regular operating expenses of the governmental entity.

It is clear that the Tampa Port Authority is a "political subdivision" or "public corporation" within the purview of the above-quoted statute; therefore, the authority would be empowered to secure liability insurance coverage for the purposes set forth therein. Moreover, s. 455.06(2), F. S., provides in part that

> . . . the immunity of said political subdivision against any liability described in subsection (1) as to which insurance coverage has been provided and suit in connection therewith, are waived to the extent and only to the extent of such insurance coverage. . . .

Section 455.06, *supra*, does not limit or in any way restrict the *amount* of insurance coverage which may be carried by a governmental agency for the purposes set forth

therein, nor has it been impliedly modified or repealed in this respect by existent subsections (10) and (13) of s. 768.28, F. S.

Accordingly, until judicially determined otherwise, I am of the view that the Tampa Port Authority is authorized to secure insurance coverage which exceeds the monetary limitations specified in s. 768.28(5), F. S. And, should the Legislature act to approve or direct payment of that portion of a claim, judgment, or claims bill which is in excess of the statutory limitations, then the insurer would be potentially liable to pay the amount of the excess, up to the limits of the policy.

078-128—October 30, 1978

MUNICIPALITIES

LIMITATIONS ON CREATION OF SPECIAL TAXING DISTRICT

To: Thomas A. Bustin, City Attorney, Clearwater

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the City of Clearwater authorized by the provisions of Ch. 165, F. S., or Ch. 166, F. S., to create a special taxing district for the purpose of surface water management and weed control of a privately owned lake?

SUMMARY:

The City of Clearwater is not authorized by the Formation of Local Governments Act or the Municipal Home Rule Powers Act to create a special taxing district for the purpose of surface water management and weed control of a privately owned lake.

Section 1(a), Art. VII, State Const., provides, in relevant part, that "[n]o tax shall be levied except in pursuance of law." With regard to special districts, s. 9(a), Art. VII, State Const., states that such 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." Section 9(b), Art. VII, provides, *inter alia*:

> [a]d valorem taxes . . . Shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: . . . for . . . special districts a millage authorized by law approved by vote of the electors . . . .

From the foregoing, it is evident that the State Constitution imposes two conditions upon the levy of ad valorem taxes by a special district: the special district must be authorized by general or special law to levy ad valorem taxes; and the tax must not be levied in excess of the millage authorized by law and approved by vote of the electors within the district.

My examination of the Formation of Local Governments Act, prescribing the exclusive procedure for forming or dissolving special districts, reveals no provision therein which authorizes a municipality to create a special *taxing* district for the purposes described in your letter, or to confer upon such district the power to levy ad valorem taxes within the district. *Cf.* s. 125.01(5)(a) and (c), F. S., relating to the establishment of certain special districts by county ordinance and the levying of ad valorem taxes therein subject to approval by vote of the district electors; part V of Ch. 163, F. S., relating to the creation of new community districts for the special purposes prescribed therein and the levying of ad valorem taxes by such districts subject to referendum by the electors of such districts where required by the State Constitution. Section 165.041(2), F. S., provides for the creation of a special district by ordinance of a municipal governing body, if such action is the best alternative available for delivering the specialized service and the

> [E]ach board [of county commissioners] shall make and publish a statement monthly and at such other time as now required, or at such other times as may be required by the department [of Banking and Finance] or the board of county commissioners and other such reports and statements regarding the conditions of each and every fund, as now or as may be hereafter required by law.

A substantially similar provision was present when the section was first enacted in 1915. *See* s. 8, Ch. 6932, 1915, Laws of Florida. I am not aware, however, of any decision by the courts of this state which has considered or interpreted this provision. Moreover, I have been informed that the Department of Banking and Finance has not promulgated any rules or regulations regarding this provision or the requirements thereof.

The intent of this provision of s. 136.07, F. S., because of its grammatical structure and punctuation, is ambiguous; however, it appears from a reading of the clause and the catchline or heading to s. 136.07 stating "board to publish monthly statements," that the board of county commissioners is required by the terms of the section to make and publish a monthly statement regarding the conditions of each and every fund of the county or each account on deposit with a county depository. The language in the heading or catchline, although initially provided by the statutory reviser, was subsequently adopted by the Legislature. *See* s. 6, Ch. 59-23, Laws of Florida, in which the Legislature amended s. 136.07; the heading or catchline, "Board to Publish Monthly Statements," is included in the Legislature's amendment to the section. *See* Berger v. Jackson, 23 So.2d 265, 267 (Fla. 1945) (heading of section when provided by the Legislature is not to be classed with words or titles used by compliers of statutes as sort of index to what the section is about or has reference to, but it is the Legislature speaking and must be given due weight and effect); AGO 057-314; 82 C.J.S. *Statutes* s. 350. *Cf.* Curr v. Lehman, 47 So. 18 (Fla. 1908); State *ex rel.* Church v. Yeats, 77 So.2d 262, 263 (Fla. 1917) (title to an act cannot add to or enlarge operation or effect of a statute, but it may be looked to for aid in the construction of a statute); Foley v. State *ex rel.* Gordon, 50 So.2d 179 (Fla. 1951); Finn v. Finn, 312 So.2d 726 (Fla. 1975). Therefore, until judicially or legislatively determined to the contrary, I am of the view that s. 136.07, by force of its own terms, requires the board of county commissioners to make and publish a monthly statement regarding the county's accounts in banks acting as depositories.

Unlike other statutory provisions requiring statements or reports to be made and published, the clause contained in s. 136.07, F. S., requiring the boards to make and publish a statement monthly is silent as to the form and contents of such monthly statements or the method of publishing such statements. *Cf.* s. 129.03(2)(b), F. S., providing that the board of county commissioners shall prepare a statement summarizing all of the tentative budgets showing for each budget and the total of all budgets the several matters specified therein, and requiring the board to cause such summary and other such particulars as specified in the statute to be advertised one time in a newspaper of general circulation published in the county or by posting at the courthouse door if there be no such newspaper; s. 116.05, F. S., providing that the Department of Banking and Finance examine and verify reports received from state and county fee officers under s. 116.03, F. S., whenever it deems it necessary and to cause the matters contained therein to be published one time in a newspaper in the county in which the report originated, in such form as it directs, at the expense of the county commissioners of such county. *See also* ss. 50.011 and 50.031, F. S. Moreover, I am not aware of any judicial interpretation of s. 136.07 which establishes the form and the contents of the monthly statement or the method of its publication.

A general grant of power or authority unaccompanied by definite direction as to how the power or authority is to be exercised implies a right to employ the means and methods necessary to comply with the statute. 67 C.J.S. *Officers* s. 103(a). Thus, when the law imposes a duty or power on an officer, it also confers by implication such powers as are necessary for the due and efficient exercise of the duties or powers expressly granted or such as may be fairly implied therefrom. *See* State *ex rel.* Martin v. Michell, 188 So.2d 684 (4 D.C.A. Fla., 1966), *cert. discharged*, 192 So.2d 281 (Fla. 1966); *In re* Advisory Opinion to the Governor, 60 So.2d 285 (Fla. 1952); Peter v. Hansen, 157 So.2d 103 (2 D.C.A. Fla., 1963); *cf.* Molwin Investment Co. v. Turner, 167 So. 33 (Fla. 1936); Southern Utilities Co. v. City of Palatka, 99 So. 236 (Fla. 1923). The term "publish" ordinarily encompasses the act of making public or known. *See, e.g.*, William G. Meier Glass Co. v. Anchor Hocking Glass Corp., 95 F. Supp. 264, 267 (D.C. Pa. 1951). *See also* 73 C.J.S. *Publication*, p. 638, stating that "[i]nseparable from the term [publication] is the idea of circulation, and intended distribution, and the thought running through all the uses of

district is amenable to separate district government (*see* s. 165.061(3), F. S.). However, s. 165.041(2), F. S., "does not by its terms confer any ad valorem *taxing* power upon any special district which may be created by municipal ordinance under its provisions . . . ." (Emphasis supplied.) Attorney General Opinion 078-92. Further, while s. 166.211(1), F. S., authorizes municipalities to levy ad valorem taxes, it does not purport to empower any special district created by municipal ordinance pursuant to s. 165.041(2) to levy such taxes within the district.

Therefore, in the absence of a statute authorizing the City of Clearwater to create a special *taxing* district for the purposes of surface water management and weed control of privately owned fresh water lakes, the city is not empowered to do so. *See* AGO 078-92 noting that a special district, however created, is not ipso facto a special *taxing* district.

In reaching the foregoing conclusion, I have not overlooked the broad powers of home rule which have been granted to municipalities under Ch. 166, F. S. However, the Municipal Home Rule Powers Act prohibits municipalities from exercising powers which have been expressly prohibited or preempted to the state by the Constitution. Section 166.021(3)(b) and (c), F. S. In this regard, the Constitution, in effect, states that *only* the *Legislature* has the authority to confer ad valorem taxing power upon special districts. Sections 1(a) and 9(a) and (b), Art. VII, *supra*. *Cf.* s. 125.01(5)(a) and (c); 163.623, F. S. Thus, a municipality possesses no authority under the Municipal Home Rule Powers Act to confer ad valorem taxing power upon a special district; such taxing power must be conferred pursuant to authorization found in general or special law.

078-129—November 3, 1978

COUNTIES

BOARD OF COUNTY COMMISSIONERS TO PUBLISH STATEMENTS OF COUNTY FUNDS IN DEPOSITORIES

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

What method or methods for publication will be sufficient for a board of county commissioners to be in compliance with the requirement contained in s. 136.07, F. S.?

SUMMARY:

In the absence of a judicial or legislative determination to the contrary, s. 136.07, F. S., appears to require the board of county commissioners to make and publish a monthly statement regarding the condition of the county's accounts and funds in banks acting as depositories. Section 136.07, F. S., however, is silent as to the form and contents of such monthly statements or the method of publication and, in the absence of any statutory direction or valid rule or regulation of the Department of Banking and Finance as to the form and contents or manner of statement to be made or the method of publication, the board of county commissioners may prepare such a statement in whatever form and make available to the public in whatever manner that the board in its discretion deems reasonable.

According to your letter, a question has arisen as to the proper interpretation of the provisions of s. 136.07, F. S., specifically as to what must be done by a board of county commissioners "in order to comply with the requirement contained in said statutory provision that the board shall publish a statement monthly . . . setting forth the conditions of each and every fund, as required by law." Section 136.07, F. S., provides in pertinent part:

the word is an advising of the public, a making known to the public for a purpose"; Black's Law Dictionary, *Publication* p. 1393. In the absence, however, of any statutory direction as to the form and contents or manner of the monthly statement to be made or the method or methods of publication, the board of county commissioners may prepare such a statement or summary thereof regarding the funds on deposit in banks acting as depositories and publish or make known to the public in whatever form and in whatever manner that the board may in its discretion deem reasonable in accomplishing the objective or purposes of the statute. The board in the exercise of its discretion may, for example, make such statements available for public inspection by publishing in a newspaper, by posting in a specifically designated place such as the county courthouse, or by filing with the clerk of the circuit court as county auditor the statement as a public record.

Accordingly, I am of the opinion that, in the absence of a statutory provision setting forth the method of publication or valid rule or regulation of the Department of Banking and Finance so providing and until judicially determined to the contrary, the board of county commissioners has the discretion to determine the form and contents and manner of making available to the public for inspection such monthly statements regarding the condition of county funds in banks acting as depositories.

078-130—November 3, 1978

COUNTIES

COUNTY COMMISSION MAY RATIFY PUBLICATION CONTRACT AND PAY BALANCE OF COSTS OF INVALID CONTRACT ENTERED INTO BY TEMPORARY COMMITTEE

To: William A. Wilkes, Clay County Attorney, Green Cove Springs

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Is the Clay County Board of County Commissioners authorized or required by law to expend county funds under a contract of the type and made under the circumstances outlined in the Statement of Facts?

SUMMARY:

Based on facts set forth by the Clay County Attorney, the Clay County Bicentennial Steering Committee had no statutory authority to enter into a binding contract for or on behalf of Clay County for the publication of a book containing the history of Clay County, and the resulting contract is therefore invalid and unenforceable against the county. However, the county appears to have had statutory authority to make such a contract in the first instance, and it could also have lawfully employed a quasi-public entity such as the Bicentennial Steering Committee, a nonprofit corporation, to carry out a *public purpose authorized by law*. Possessing such statutory authority in the first instance, as well as the authority to publish its historical book, the copyright on which was owned and held by the county, the county commission in the exercise of its sound discretion and judgment may now ratify the publication contract and the publication of the historical books and, upon due ratification thereof, pay from county funds the unpaid balance of the publication costs remaining outstanding on the original publication contract.

STATEMENT OF FACTS:

A contract for the publication of a book containing the history of Clay County was entered into by the "Clay County Bicentennial Steering Committee," which was organized as a nonprofit corporation under the laws of Florida but is now dissolved. The

Clay County Board of County Commissioners by motion or resolution "officially named" the committee "as the official county body to carry out Bicentennial functions in the county" without specifying the nature of those "functions" and without purporting to confer any powers on the committee. In addition, the board owned and held the copyright to the manuscript of a book containing the history of Clay County and "authorized" the committee to use same "without assuming any financial obligation for the publication." Of the books printed or published under the committee's contract for publication, one-half have been sold and the remainder given into the physical custody of the clerk of the circuit court (for lack of other storage space). It appears that approximately $5,000 remains unpaid on the publishing contract.

In reply to your question, the powers and duties of county officers, including those pertaining to contracts, must be fixed by law. Section 5(c), Art. II, State Const. *See also* AGO 078-95, and *cf.* AGO 078-77. The committee in question was not established or provided for by any statute. As the committee was created by motion or resolution of the Clay County Board of County Commissioners, it was simply an advisory body and had no legal or official status. *See* Crandon v. Hazlett, 26 So.2d 638, 642 (Fla. 1946), in which the court stated:

> It is true that Section 5 of Article 8 of the Constitution provides that the powers and duties of County Commissioners shall be prescribed by law. They have no powers other than those expressly vested in them by statute, or that must be necessarily implied to carry into effect the powers thus expressly vested, and we have frequently held that their *governmental powers* cannot be delegated. While the County Commissioners may voluntarily appoint advisory committees, such as a welfare Committee and a Chairman thereof, to aid them in some advisory capacity, such as to gather information for the Commissioners and offer them their advice with reference thereto, the County Commissioners are not expressly compelled or authorized by law to appoint such a committee as the Welfare Committee, and therefore such a committee and its chairman have no legal or official status . . . . (Emphasis supplied.)

The governing body of the county could not lawfully delegate to the committee any governmental power, including the power to contract for the county or to make the contract which is the subject of your inquiry, without statutory authority. *See* AGO's 078-95, 078-77, and 078-68, and the authorities cited therein; Crandon v. Hazlett, *Supra; cf.* Pinellas County v. Jasmine Plaza, Inc., 334 So.2d 639 (2 D.C.A. Fla., 1976); Flesch v. Metropolitan Dade County, 240 So.2d 504 (3 D.C.A. Fla., 1970); Barrow v. Holland, 125 So.2d 749 (Fla. 1960); Florida Dry Cleaning and Laundry Board v. Economy Cash & Carry Cleaners, Inc., 197 So. 550 (Fla. 1940). In the absence of such statutory authority, the contract for publication of the historical books in question is invalid and unenforceable in an action on the contract as against the county, and the county is not *required* to expend any funds in payment of the contract.

However, the county could have lawfully employed a nonprofit corporation, such as the committee in question (if a quasi-public agency or entity, as it apparently was) to carry out a *public purpose*, such as county participation in the national and state bicentennial program. *See* s. 13.9972(2), F. S. 1975, repealed effective December 31, 1977 (repealed after execution of the contract in question), and *cf.* s. 286.24, F. S., which included among the duties of the Bicentennial Commission of Florida those of planning a statewide bicentennial commemoration program, "including participation by all . . . counties," and of "coordinating all such plans with any programs which may be developed by local governments or other recognized organizations," but also providing that "the position of the commission shall be advisory only and not managerial in relation to local observances." The county could also have employed the committee for the purposes designated in s. 125.01(1)(f), F. S., read in light of implied powers and liberal construction provisions in s. 125.01(3). Section 125.01(1)(f) authorizes a county to:

> Provide parks, preserves, playgrounds, recreation areas, libraries, museums, historical commissions, and other recreation and cultural facilities and programs.

Section 125.01(3)(a), F. S., provides:

> (a) 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.

And s. 125.01(3)(b) provides that the "provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section." The county could have contributed county funds or property to such a quasi-public entity for public purposes as described in s. 125.01(1)(f), or the board of county commissioners could have itself directly entered into a contract of the type in question for such *public purposes* and distributed the historical books to organizations such as the county historical commission, public libraries, etc., and to the public for a reasonable charge to recover costs of publication. *See*, for example, O'Malley v. Florida Insurance Guaranty Association, 257 So.2d 9 (Fla. 1971); Burton v. Dade County, 166 So.2d 445 (Fla. 1964); Florida Power Corporation v. Pinellas Utility Board, 40 So.2d 350 (Fla. 1949); and *cf.* O'Neill v. Burns, 198 So.2d 1 (Fla. 1967).

In 20 C.J.S. *Counties* s. 194, p. 1030, it is stated:

> Contracts made on behalf of a county, and *within the general powers of the county to make*, but made in an irregular manner or by agents without the requisite authority, may be ratified by such county through the agents who would have been authorized in the first place to make such contract, provided some official action by the proper authorities is taken with reference to the particular matter in question. If the ratification be express it must have the essentials required for an original authorization, that is, it must be made by the proper authorities in the same capacity in which they were required to act in making the contract in the first instance, and with full knowledge of the existence and nature of the contract in question, and in the manner required by law. (Emphasis supplied.)

That section also cautions, however, that:

> It is also essential that the contract be of such a nature that the body assuming to ratify it would have had the power to make it in the first instance; a contract wholly unauthorized and void cannot be ratified.

While the payment of money on an invalid contract does not by itself constitute a ratification of the contract, the board of county commissioners may in a proper case, and where its authority to make the contract existed as it did here, ratify a contract made in behalf of the county by agents lacking the requisite statutory authority. *See* AGO 078-95; *cf.* Ramsey v. City of Kissimmee, 149 So. 553 (Fla. 1933). Thus, possessing such statutory authority in the first instance, as well as the authority to publish its historical book, the copyright on which was owned and held by the county, the board of county commissioners, *in its discretion*, may now ratify the book's publication and upon proper ratification thereof pay from county funds the unpaid balance of the publication costs.

078-131—November 9, 1978

COUNTIES

POWER TO REGULATE TAKING OR POSSESSION OF SALTWATER FISH EXPRESSLY RESERVED TO THE STATE

To: Arthur I. Jacobs, Nassau County Attorney, Fernandina Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Has a county ordinance which was enacted to amend a special act regulating the size of nets to be used for fishing "in any of the salt waters of Nassau County" been expressly or impliedly repealed by general law?

SUMMARY:

A noncharter county possesses no home rule power under s. 6(d), Art. VIII, State Const., to amend a special act antedating the 1968 revision of the constitution regulating the taking of saltwater fish "in any of the salt waters of the county" when a municipality in the county includes salt water within its corporate limits. Under such circumstances, the special act does not relate only to the unincorporated area of the county, and the county possesses no constitutional home rule power to amend or repeal such special act. Under ss. 370.102 and 125.01(4), F. S., the power to regulate the taking or possession of saltwater fish is expressly reserved to the state. Thus, these statutes operate to prohibit a noncharter county from enacting ordinances for the purpose of regulating such actions, and also operate to repeal or supersede any such existing ordinances.

Your letter advises that the board of county commissioners of Nassau County enacted an ordinance, the purpose of which was to amend Ch. 19993, 1939, Laws of Florida. As enacted by the Legislature, this special act provided in part:

> It shall be unlawful for any person, persons, firm or corporation to catch any fish in any of the salt waters of Nassau County, Florida, with any seine, gill-net, pocket-net or any other kind of net of less size than *one and one-half inch* bar measured from knot to knot or a stretched mesh of *three inches* from knot to knot after being tarred or shrunk. (Emphasis supplied.)

Chapter 19993 also provides for a different measure of net to be used for the taking of mullet.

The county ordinance under discussion purported to amend Ch. 19993, to state that it shall be unlawful to use a net "of less size than *one-quarter (¼) inch* bar measured from knot to knot or a stretched mesh of *two and one-half (2 ½) inches* from knot to knot after being tarred and shrunk." (Emphasis supplied.) In addition, the ordinance deleted the section providing for a different measure of net to be used for mullet, and added a requirement that no net will exceed 150 feet. The county ordinance also provides that "persons using seines or other fishing devices shall not interfere one with the other, or harass each other in catching fish along the beaches and shall not leave on the beaches and [sic] marine life or refuse." This clause which purports to regulate the conduct of *fishermen* as opposed to the taking of saltwater fish is not on the same subject as Ch. 19993, and does not appear to have been intended as an amendment or modification of same. Thus, no opinion is expressed as to its validity.

Although your letter requests this office to opine as to the "*continued* validity" (Emphasis supplied.) of the county ordinance in question, your inquiry initially requires a determination as to whether the county ever possessed the authority to amend the special act. Section 1(f), Art. VIII, State Const., provides:

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

Section 6(d), Art. VIII, State Const., reads:

> Local laws relating *only to unincorporated areas of a county* on the effective date of this article may be amended or repealed by county ordinance. (Emphasis supplied.)

See also s. 12(g), Art. X, State Const., in which "special law" is defined to mean "a special or local law"; and Davis v. Gronemeyer, 251 So.2d 1 (Fla. 1971), in which the court stated that "at least one definition of a local law is a special law; that is, a special act of the Legislature."

Thus, Nassau County, as a noncharter county, possesses only such home rule power as is provided by general or special law, or to the limited extent provided under s. 6(d), Art. VIII, State Const. Davis v. Gronemeyer, *supra*; State *ex rel.* Volusia County v. Dickinson, 269 So.2d 9, 11 (Fla. 1972); AGO 069-99; *see also* AGO's 077-38, 076-20. With regard to the instant inquiry, s. 125.01(4), F. S., operates to deprive the county of any home rule power under s. 125.01, F. S., to regulate the taking of saltwater fish, and Ch. 19993, *supra*, does not purport to grant any such home rule power to the county. As for s. 6(d), Art. VIII, *supra*, that constitutional provision permits a noncharter county to amend or repeal only those special or local laws which are solely applicable to the unincorporated areas of the county. *See* AGO's 069-99, 071-146, 073-462. *Cf.* AGO's 072-102, 071-154, stating that special laws which establish autonomous statutory entities or special districts may not be amended or repealed by county ordinance. Thus, a special law which is applicable throughout the county or which "pertains to—and is potentially applicable to—the *incorporated* areas as well as the unincorporated areas thereof" may not be amended or repealed by the county. Attorney General Opinion 070-55.

With respect to the instant case, you have advised this office that at least one municipality in Nassau County includes salt waters within its corporate boundaries. The body or enabling terms of Ch. 19993, as well as the title thereof, states that the act relates to the taking of fish "in any of the salt waters of Nassau County." Thus, the special law clearly relates to incorporated as well as unincorporated areas of the county. Accordingly, it would appear that the county was not in the first instance authorized to and possessed no home rule power to amend Ch. 19993. *See* Davis v. Gronemeyer, *supra*.

Moreover, even assuming that the county possessed the authority to enact an ordinance amending Ch. 19993, such ordinance would have been superseded and repealed by operation of s. 2 of Ch. 73-208, codified as s. 125.01(4), F. S., which states:

> (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. (Emphasis supplied.)

See also s. 370.102, F. S., which provides "[t]he power to regulate the taking or possession of saltwater fish, as defined in s. 370.01, is expressly reserved to the state."

Applying ss. 125.01(4) and 370.102, F. S., to the instant inquiry, it is evident that insofar as the ordinance in question purports to regulate the taking or possession of saltwater fish it has been superseded and repealed by operation of these statutes. *See* AGO 075-213. *Cf.* AGO 074-161 in which this office stated that s. 370.102 prohibits a municipality from enacting legislation purporting to regulate the taking or possession of saltwater fish; and that s. 370.102, F. S., serves to nullify any existing ordinances purporting to regulate the taking or possession of saltwater fish, since such regulatory power is expressly reserved to the state.

As to the status of Ch. 19993, this office has previously concluded that "[s]pecial 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." Attorney General Opinion 077-40. Hence, Ch. 19993 continues to remain in effect as originally enacted, notwithstanding the invalidity of the county ordinance which purported to amend the act.

078-132—November 28, 1978

COMMUNITY COLLEGES

BOARD OF TRUSTEES MAY NOT REGULATE CAMPUS PARKING AND TRAFFIC

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTION:

May the board of trustees of a community college district adopt rules regulating parking and traffic on the college campus and enforce such rules, adjudicate guilt or innocence of violators, and fix, exact, and dispose of fines or penalties or otherwise impose penalties for violation of such rules?

SUMMARY:

The board of trustees of a community college district is without lawful authority to adopt rules regulating parking and traffic on the community college campus and to enforce such rules, adjudicate the guilt or innocence of violators, fix, exact, collect, and dispose of fines or penalties for violations thereof.

Your question appears to arise from the following factual situation. The Auditor General's Office, during the course of postaudits, has become aware that several of the boards of trustees of community colleges in Florida have adopted rules and regulations concerning parking and traffic control on community college campuses and have imposed monetary penalties or fines for violation of these rules. Your office questions whether or not the boards of trustees possess the legal authority to adopt these rules and impose fines or monetary penalties for violations thereof.

A community college district board of trustees has no inherent or common law powers. It has only those powers which have been conferred by statute. *Cf.* Bucks v. McLean, 115 So.2d 764 (1 D.C.A. Fla., 1959); Harvey v. Board of Public Instruction, 133 So. 868 (Fla. 1931); and AGO's 076-61 and 075-148 holding that the powers of district school boards are limited by law and that the extent of their powers may be enlarged or modified only by the Legislature. This concept is based upon the doctrine that the police power is an inherent attribute of the state's sovereignty which is vested in and resides in the Legislature, and not in community college districts or other creatures of the Legislature. Section 1, Art. III, State Const. Such entities may be and often are delegated a part of this police power to carry out their functions. *Cf., e.g.*, ss. 239.53, *et seq.*, F. S., wherein the state universities (not including community colleges) have expressly and in detail been delegated the authority to regulate traffic on campuses, including the power to promulgate parking and traffic rules, the quasi-executive power to make arrests for violations thereof, the quasi-judicial power to adjudicate guilt or innocence of offenders, and to fix and exact fines or penalties for violation. Without statutorily delegated police power from the Legislature, however, a community college board of trustees or like entity is without power to exercise any part of the state's police power or sovereignty. *See* Barrow v. Holland, 125 So.2d 749 (Fla. 1960); Lewis v. Bd. of Health, 143 So.2d 867 (1 D.C.A. Fla., 1962), *cert. denied*, 149 So.2d 41 (Fla. 1963). *See generally* 16 C.J.S. *Const. Law* ss. 66, 70, and 106. *Also, compare* Lopez v. Williams, 372 F. Supp 1279 (S.D. Ohio 1973) *aff'd*, Goss v. Lopez, 415 U. S. 912 (1975), *with* Banks v. Bd. of Pub. Instruction, 314 F. Supp 285, 290 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1970), *vacated*, 401 U. S. 988 (1971). Hence, such boards may exercise only those powers specifically or by necessary implication authorized by the Legislature. If there are any doubts as to the existence of authority, it should not be assumed. Hopkins v. Special Road and Bridge District No. 4, 74 So. 310 (Fla. 1917); Harvey v. Board of Public Instruction, *supra*; State v. Ausley, 156 So. 909 (Fla. 1934); State v. Culbreath, 174 So.2d 422 (Fla. 1937); Gessner v. Del-Air Corp., 17 So.2d 522 (Fla. 1944); State *ex rel.* Greenberg v. Florida State Board

of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974) *cert. dismissed*, 300 So.2d 900 (Fla. 1974); *cf.* AGO 078-12.

I find no express provision in the statutes governing community colleges, ss. 230.741-230.776, F. S., which delegates any part of the police power to regulate traffic, to promulgate and enforce parking and traffic regulations, to adjudicate guilt, or to set or exact fines or penalties. (*Cf.* AGO 077-56, wherein I stated that community college boards of trustees could not employ security or police officers vested with the power to make arrests nor could they grant such authority to employees of their security departments since such exercise of the police power must be lawfully delegated before it can be exercised and there was no statutory delegation thereof.) In contrast, I note the explicit and specifically detailed authorization granted by ss. 239.53, *et seq.*, *supra*, and ss. 316.006, 316.008, and 316.072, F. S., to state universities and to municipalities and counties, respectively, to regulate within the exercise of expressly delegated police power on university campuses or grounds or within the jurisdiction of the counties and municipalities. These sections grant extensive power to promulgate parking and traffic regulations governing vehicles, pedestrians, and ridden or herded animals (ss. 239.53 and 239.54, F. S.), and vehicles, bicycles, and pedestrians (ss. 316.008 and 316.072, F. S.), and the power of enforcement, arrest, adjudication, and imposition of fines. The community college boards of trustees are granted no such express powers by the Legislature.

I note that prior to the enactment of Ch. 29723, 1955, Laws of Florida, codified in ss. 239.53-239.58, F. S. 1975, this office answered a number of questions from the University of Florida and the Board of Control (now Board of Regents) regarding their authority to promulgate traffic regulations enforceable by imposition and collection of fines. Attorney General Opinion 047-395, Biennial Report of the Attorney General, 1947-1948, p. 339; AGO 051-165, Biennial Report of the Attorney General, 1951-1952, p. 421; AGO 052-73, Biennial Report of the Attorney General, 1951-1952, p. 419. It was held that the Legislature had not delegated any part of its police power to the university or to the Board of Control (Board of Regents) to set and enforce fines for traffic violations.

Accordingly, my predecessors in office concluded that, without express legislative authorization to promulgate parking and traffic regulations, to set and enforce fines, to arrest, and to adjudicate the guilt of offenders, the Board of Control (Board of Regents) could not lawfully do so. Similarly, since the Legislature has not granted the community college boards of trustees these powers, I conclude they may not exercise them. I note that ss. 239.53-239.58, F. S., grant the Board of Regents traffic control authority on the "[g]rounds" of "institution[s]." "Institution" for the purposes of ss. 239.53-239.58 is defined as "any university or agency under the jurisdiction of the Board of Regents." Section 259.53(1)(g), F. S. Further, for purposes of the Florida School Code (of which Ch. 239 is a part) "[i]nstitutions of higher education" is defined as consisting of "all state-supported educational institutions offering work above the public school level, *other than community colleges*" (Emphasis supplied.), s. 228.041(1)(c), F. S., while "[c]ommunity colleges" is defined to "consist of all educational institutions operated by local community college district boards of trustees under specific authority and regulations of the state board (of education)." Section 228.041(1)(b), F. S.

I now turn to an analysis of the authority which the Legislature has granted to community college boards of trustees to determine whether the authority to control parking and traffic, to enforce traffic regulations, to make arrests, to adjudicate guilt, and to impose penalties may be implied from such powers as have been granted. For the reasons set forth below, I conclude that it may not.

A community college board of trustees has been created for each community college district, "which, *under statutes and other rules and regulations of the state board* (of education)" (Emphasis supplied.) shall have "all powers necessary and proper for the governance and operation" of the community college. Section 230.753(2)(a), F. S.; *see also* s. 228.041(1)(b), F. S., defining community colleges as those "educational institutions operated by local [boards] *under specific authority and regulations of the state board* . . ." (Emphasis supplied.) These boards are vested with responsibility to operate the community colleges with such authority as may be needed for the proper operation thereof *in accordance with the regulations of the State Board of Education.* Section 230.754(1), F. S. The regulations promulgated by the State Board of Education implementing the Florida School Code, Chs. 228, *et seq.*, F. S., have "the full force and effect of law," if within the scope and intent of, and not in conflict with, the statute. Sections 229.041 and 229.053, F. S.; *see also* Florida Livestock Board v. Gladden, 76 So.2d 291, 295 (Fla. 1954). Section 6A-14.56, F.A.C., the State Board of Education rule regarding control and discipline of community college students, provides that the boards of trustees

"shall adopt such rules as are necessary for the proper control and discipline of students in a community college."

It can be seen from the above that the boards of trustees and the State Board of Education have been granted general rulemaking authority as regards the control and discipline of students within the colleges. The question now becomes whether such general grant of authority includes the authority to exercise the police power of the state to regulate parking and traffic, including the power to arrest, adjudicate guilt, levy fines, or impose other penalties. Section 18, Art. I, State Const., prohibits any administrative agency from imposing any penalty *except as provided by law.* It must be borne in mind that a general grant of rulemaking authority is always circumscribed by and subject to the limitations of the statute authorizing the rules. The board may make only those rules and regulations which are necessary to carry out the prescribed statutory responsibilities or to enforce the act creating the board. Rulemaking power is limited to making rules that fairly may be said to fall within the scope and intent of the statute. Gladden, *supra;* 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). None of the statutes or the rule quoted above may fairly be said to authorize the boards of trustees to exercise any part of the police power of the state to control and regulate traffic, or to impose penalties for traffic violations. None of the authorizing statutes refers directly or indirectly to traffic control or regulation. None bestows the power of arrest on, or authorizes the boards to grant arrest power to, any officers or to establish or create an adjudicatory body, to impose fines or penalties and dispose of moneys collected, or to take any other penal action.

In 1977, the Legislature enacted Ch. 77-59, Laws of Florida, "[a]n act relating to discipline in community colleges and state universities," codified as s. 230.754(2)(j), F. S., which provides:

> The board of trustees may adopt, by rule, a uniform code of appropriate penalties for violations of rules by students and employees. Such penalties, unless otherwise provided by law, may include fines, the withholding of diplomas or transcripts pending compliance with rules or payment of fines, and the imposition of probation, suspension, or dismissal.

By this provision, the Legislature has obviously undertaken to broaden the power of the board over discipline of students and employees and setting penalties for violation of the rules of conduct. However, it is my opinion that the language of this section in no way manifests a legislative intent to grant to the boards of trustees authority in the exercise of the police power to control and regulate traffic on campus or to enforce such rules with fines or monetary penalties. Apart from the fact that the title of Ch. 77-59 provides no notice of any legislative intent and purpose to delegate any part of the state's police power to community colleges to regulate traffic and fix monetary penalties for violations of authorized traffic control rules or regulations and otherwise enforce such regulations, my conclusion is based upon the following considerations.

First, Ch. 316, F. S., the "Florida Uniform Traffic Control Law," was enacted "to make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities." Sections 316.001 and 316.002, F. S. The provisions of Ch. 316 apply "*wherever* vehicles have the right to travel." (Emphasis supplied.) Section 316.072(1), F. S. Jurisdiction to control traffic is vested specifically and solely in the state, municipalities, and counties of Florida. Section 316.006, F. S. Section 316.008(1), F. S., specifically grants to municipalities and counties the authority to exercise the police power to regulate certain traffic and parking within their respective boundaries or jurisdictions in the particulars specified therein.

I am unable to find any legislative intent and purpose clearly manifested in the title to or in the enacting terms of Ch. 77-59, *supra* (s. 230.754(2)(j), F. S.), to grant this same authority under the police power to any other subdivision or agency of this state merely by use of such general language and authority as is employed and granted to community colleges by the Legislature. The difficulty with giving such a broad and extended meaning to the above-quoted provisions in light of Ch. 316, F. S., is emphasized by the fact that state universities have been expressly granted the power to regulate traffic and impose fines or penalties for violations by the *specific* language of ss. 239.53-239.58, F. S. Section 239.54, F. S., grants to each of the state universities the authority "to adopt rules which govern traffic on the grounds of that institution, which provide penalties for the infraction of such traffic rules." Sections 239.55-239.57, F. S., provide for the imposition and collection of fines or penalties. Moreover, s. 239.54, F. S., explicitly provides that

such rules prevail in the event of conflict with traffic ordinances of the municipality, if any, in which the university is situated, but that no rule may be adopted which conflicts with any provision of Ch. 316, F. S., which extends to and is applicable to the grounds of the institution. Further, municipal ordinances not in conflict with university rules extend to and are applicable upon university campuses and grounds. Section 239.55, F. S., provides that a violation of any traffic regulation enumerated in Ch. 316, F. S., shall be charged and proceeded against in accordance with Chs. 316 and 318, F. S.

Thus, the grant of power by which the universities derive authority to control and regulate traffic is express and detailed, and was so written as to mesh with and complement Chs. 316 and 318. In contrast, s. 230.754(2)(j), F. S., is a general grant of authority relating to rules of conduct and discipline for students and employees making no mention of traffic control and regulations or enforcement thereof. Consistent with Chs. 316 and 318, F. S., and ss. 239.53-239.58, F. S., and the legislative intent expressed in the title of Ch. 77-59, *supra*, I conclude that s. 230.754(2)(j) is, in and of itself and without more, legally insufficient to confer on or grant to the boards of trustees of state community colleges the authority to control and regulate campus traffic under the state's police power, to enforce such traffic regulations, to adjudicate guilt of violators thereof, or to fix and dispose of fines or penalties collected pursuant to any such traffic rules.

Second, Ch. 77-59, Laws of Florida, applies to and relates to discipline in state universities as well as in community colleges. It amended s. 240.045, F. S., relating to "[d]isciplinary rules and regulations," and added thereto new subsection (2), which grants to the Board of Regents the identical rulemaking powers over discipline in the state universities as s. 230.754(2)(j), F. S., grants to the boards of trustees of community colleges. Hence, s. 230.754(2)(j), F. S., must be read *in pari materia* with s. 240.045(2), F. S. The purpose of Ch. 77-59 and both of said sections is the same, to provide a uniform code of penalties for violations of *disciplinary* rules for the students and employees of both state educational institutions. Section 240.045(2), F. S., clearly was not intended by the Legislature to supplant or modify or replace the very explicit statutory scheme already enacted and operating regarding traffic control and regulation on university campuses and the enforcement of and imposition of penalties for violations of authorized traffic regulations. The title of Ch. 77-59, the catchline of the section, and the body thereof refer or relate to *discipline* and *disciplinary* rules and regulations, not to traffic control or regulation or enforcement of traffic regulations and penalties for violations thereof, making no references thereto or to ss. 239.53-239.58, F. S. It was obviously intended to supplement other powers relating to discipline already conferred. *See* s. 239.045(1), F. S. It is my opinion that s. 230.754(2)(j), F. S. (Ch. 77-59), grants to the boards of trustees neither more nor less authority than that conferred upon the Board of Regents by s. 240.045(2) (Ch. 77-59). It confers powers over discipline of students and employees on campus and neither by its terms nor by necessary implication grants authority to control and regulate traffic and parking on campus or to enforce traffic regulations, including those contained in Ch. 316, F. S. I also note that Rule 6A-14.56, F.A.C. (relating to control and discipline of community college students), was amended in 1977, after the effective date of Ch. 77-59 and concerns only the control and discipline of students, making no reference to traffic control and regulation or enforcement of traffic regulations.

Third, there is some question as to whether rulemaking authority over traffic control and regulation, including enforcement, power of arrest, adjudication of guilt, and levying of fines or penalties could be constitutionally delegated by the Legislature to the Board of Education or the boards of trustees by such a broad indefinite grant of the police power as that contained in s. 230.754(2)(j), F. S. It is well established that the Legislature may delegate quasi-executive, quasi-legislative, and quasi-judicial powers to administrative agencies and vest them with rulemaking authority. However, it is equally settled that unbridled discretion may not be delegated to administrative officials. Statutes delegating powers to administrative agencies must set forth clear and definite guidelines and standards to guide and limit the agencies in their execution of the delegated discretion and powers and must "so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism or exercising unbridled discretion." Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1977); State Dept. of Citrus v. Griffin, 239 So.2d 577 (Fla. 1970); Pinellas County v. Jasmine Plaza, Inc., 334 So.2d 639 (2 D.C.A. Fla., 1976); Flesch v. Metropolitan Dade County, 240 So.2d 504 (3 D.C.A. Fla., 1970). A statute that is too vague or incomplete in itself to provide adequate safeguards and guidelines may not constitutionally be used by an administrative body as authority to promulgate rules. Lewis v. Fla. St. Bd. of Health, 143 So.2d 867, *cert. denied*, 149 So.2d 41 (Fla. 1963).

These requirements are particularly applicable where imposition of penalties, including the levying of fines, is concerned. As with penal statutes, statutes imposing fines must be strictly construed and may not be extended by construction to acts not within the express intent of the Legislature. The presumption is against an agency or officer who seeks to impose a fine for an act which is "beyond the letter [of a statute] even though within [its] spirit." 70 C.J.S. *Penalties* ss. 1 and 1(b); Adler-Built Industries, Inc. v. Metropolitan Dade Co., 231 So.2d 197 (Fla. 1970); Hotel and Restaurant Commission v. Sunny Seas No. One, Inc., 104 So.2d 570 (Fla. 1958); Jasper v. St. Petersburg Episcopal Community, Inc., 222 So.2d 479 (2 D.C.A. Fla., 1969). *And see*, National Education Assoc. v. Lee County Bd. of Public Instruction, 299 F. Supp. 834 (M.D. Fla. 1969), stating that, in Florida, the "principle of narrow construction is particularly applicable to the question of whether a governmental agency has authority to impose a fine, a function normally confined to courts." Hence, even assuming a fine may be imposed by rule, the Legislature, in authorizing the rule, must make it clear that its grant of power includes the authority to levy fines for specified acts or conduct and must establish sufficient specifications and limitations to guide the administrative agency in promulgating and enforcing any such rule. *See* s. 18, Art. I, State Const., which provides that no administrative agency may provide a penalty "except as provided *by law*." (Emphasis supplied.) *Cf., e.g.*, s. 125.69, F. S., by which the Legislature has authorized punishment by fine for violations of county ordinances (which are declared to be misdemeanors) and has specifically set out a maximum amount of $500 which may be imposed and collected; *see also* AGO 071-223; *and see* s. 9, Art. IV, State Const., granting to the Game and Fresh Water Fish Commission the regulatory and executive authority over wild animals and fresh water aquatic life, excepting that "penalties for violating regulations of the commission shall be prescribed by specific statute." Chapter 372, F. S., prescribes these penalties with specificity.

It is highly questionable, if not beyond question, that s. 230.754(2)(j), F. S., could be read in light of the above discussion to lawfully authorize the boards of trustees to adopt rules regulating traffic, authorizing arrest of violators, providing for adjudication of guilt, or granting power to impose, exact, and dispose of fines or penalties. These are all quasi-executive, quasi-legislative, or quasi-judicial functions exercised under the police power of the state. As I stated in AGO 078-56, a community college district "lacks legislatively conferred authority to employ law enforcement officers and lacks conferred authority to vest officers employed by the district with authority to bear arms and make arrests." Moreover, I find no statutory provision authorizing the establishment of an adjudicatory body or the imposition and collection of fines or penalties for violations of any traffic regulations, which pursuant to s. 18, Art. I, State Const., must be "provided *by law*." (Emphasis supplied.) I find nothing purporting to set an amount that can be imposed and exacted as a fine or penalty, or authorizing anyone to impose, exact, collect, or dispose of fines or penalties. Once again, I note the contrast between this provision, a broad and indefinite (except as to discipline) grant of power with no guidelines or specifications for the agency to follow in promulgating rules and regulations, governing traffic control and regulation, and ss. 239.53-239.58, F. S., in which all of these things are spelled out with particularity in granting to the Board of Regents authority to control traffic on state university campuses. Had the Legislature intended to grant the same authority to community colleges, it could have easily done so by essentially duplicating ss. 239.53-239.58, F. S., and applying their provisions to the boards of trustees of the community college districts. It is my opinion, however, based upon the authority cited and discussed above that the Legislature would not, and indeed lawfully could not, attempt to confer such authority upon the boards of trustees by the language employed by it in s. 230.754(2)(j), F. S. (Ch. 77-59, *supra.*)

078-133—November 28, 1978

ELECTIONS

MUNICIPAL OFFICERS—USE OF OFFICIAL TITLES IN PUBLICATIONS ENDORSING OR CRITICIZING CANDIDATES

To: Michael J. Satz, State Attorney, Fort Lauderdale

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Does the writing and publication of an open letter or newsletter by elective municipal officers using their official titles for the purpose of endorsing or criticizing a candidate for municipal office constitute the use of official authority or influence for the purpose of interfering with an election, or the coercing or influencing of another person's vote, or affecting the result thereof in violation of s. 104.31(1)(a), F. S.?

SUMMARY:

Section 104.31(1)(a), F. S., does not prohibit elective municipal officers from using their official titles in connection with the writing and publication of open letters or newsletters endorsing or criticizing candidates for public office since such conduct, standing alone, would not of itself evince the corrupt use of official authority or influence for the purpose of interfering with an election, or coercing or influencing votes, or affecting the result of the election. Moreover, s. 104.31(1)(c), F. S., exempts such conduct as "political activity" of exempted elective officials from the operation of s. 104.31(1)(a), F. S.

Your letter advises that your inquiry has been prompted by the conduct of certain elective municipal officers in two municipalities during the course of municipal elections. You state that in one municipality "the present Vice-Mayor (not up for reelection) and an out-going Councilman, wrote an open letter, using their official titles, endorsing a candidate for the outgoing councilman's seat." You further state that the letter "was published as a political advertisement by the endorsed candidate, all in accordance with applicable statutes." In the second municipality, you advise that "[a] present sitting Councilman had a Newsletter printed at his own expense, in which he attacked the voting record of two Councilmen who were running for reelection."

Your inquiry then is whether such conduct on the part of these elective municipal officers under these circumstances violates s. 104.31(1)(a), F. S., which provides:

> (1) No officer or employee of the state, or of any county or municipality thereof, *except as hereinafter exempted from provisions hereof,* shall:
> (a) Use his official authority or influence for the purpose of interfering with an election or a nomination of office or coercing or influencing another person's vote or affecting the result thereof. (Emphasis supplied.)

Section 104.31(2) F. S., provides that "[a]ny person violating the provisions of this section shall be guilty of a misdemeanor of the first degree . . . ."

An examination of the subject statute does not provide a clear and definitive answer as to the precise nature of the conduct which is proscribed and penalized by its terms. However, s. 104.31(1)(a), F. S., is part of a larger statutory scheme of prohibited election practices derived from the Corrupt Practices Act, Ch. 6470, 1913, Laws of Florida. The Corrupt Practices Act was initially enacted in 1913 in order to "Define, Prevent, and Punish Certain Offenses and Corrupt and Illegal Practices in connection with . . . Elections . . . ." Title, Ch. 6470, *supra.* The act was also passed in response to a mandate found in s. 26, Art. III of the 1885 State Constitution:

> Laws shall be passed regulating elections, and prohibiting under adequate

> penalties, all undue influence thereon from power, bribery, tumult or other improper practice.

Although the 1968 Constitution does not expressly require the Legislature to prohibit and provide penalties for improper election practices, the power to do so is inherent in the legislative power of the state vested in the Legislature by s. 1, Art. III, State Const., and that body remains "charged with the responsibility and authority of regulating the election process to protect the integrity of that process and to insure free and fair elections." Sadowski v. Shevin, 345 So.2d 330, 332 (Fla. 1977).

It is well established that, where uncertainty or ambiguity exists in a statute, the legislative intent should be ascertained by a consideration of the entire act and others *in pari materia. See, e.g.*, Mann v. Goodyear Tire & Rubber Co., 300 So.2d 666 (Fla. 1974); State v. Beardsley, 94 So. 660 (Fla. 1922); State *ex rel.* Triay v. Burr, 84 So. 61 (Fla. 1920). Applying this principle to your inquiry, it would be helpful in interpreting s. 104.31(1)(a), F. S., to consider other statutes enacted on the same subject matter—unlawful or corrupt election practices—so as to determine legislative intent.

In State v. Brown, 298 So.2d 487 (4 D.C.A. Fla., 1974), the court commented generally upon the provisions of the Corrupt Practices Act, carried over into Ch. 104, F. S. The court noted that the act

> makes unlawful a variety of acts which subvert the elective process, *e.g.*, false swearing, fraud in connection with casting a vote, corruptly influencing voters, illegal voting, and any act by an official who willfully and fraudulently violates any of the provisions of the election code. [*Id.* at 489.]

The *Brown* court also referred on several occasions to the prohibitions and penalties for "corrupt practices" contained in Ch. 104. Thus, it may be inferred from *Brown* that the prevention of corruption and fraud in the election process is the common thread which links the various unlawful practices prohibited under that chapter.

In Johnson v. Harris, 188 So.2d 888 (1 D.C.A. Fla., 1966), the appellate court affirmed the trial court's dismissal of a complaint against a candidate and his campaign treasurer charging violation of a statute which prohibited the incurrence of expenses in excess of funds on deposit in the campaign account. The court ruled that "it is not every infraction of the election code that calls for the imposition of penalties prescribed thereby. The infractions, in order to be subject to the sanctions of the statute, must have been *knowingly committed.*" (Emphasis supplied.) 188 So.2d 892. The court further noted that there had been no showing that "the acts of [the defendants] were *corrupt* or the product of an evil design to defeat the free choice of voters in a democratic election." [*Id.*; emphasis supplied.]

Accordingly, I am of the view that s. 104.31(1)(a), F. S., should be construed so as to prohibit the *corrupt* use of official authority or influence for the purposes set forth therein. *Cf.* Board of Public Instruction v. Doran, 224 So.2d 693, 699 (Fla. 1969), in which the court ruled that a criminal violation of the Government in the Sunshine Law, s. 286.011, F. S., impliedly required a charge and proof of scienter; and *In re* Dekle, 308 So.2d 5 (Fla. 1975), in which the Supreme Court ruled that under existing law a judge should not be removed from office unless his actions reflected a corrupt motive or purpose.

My conclusion that s. 104.31(1)(a), F. S., should be construed to require a corrupt intent as an element of the criminal offenses embraced by its terms is also supported by s. 104.31(1)(c), F. S., which states, in part:

> The provisions of paragraph (a) shall not be construed so as to limit the political activity in . . . any . . . election of any kind or nature, of elected officials or candidates for public office in the state or of any county or municipality thereof . . . .

Cf. AGO 072-62, in which this office noted that s. 104.31(1)(a), *supra*, was designed "to prevent the misuse of official authority or position . . ." and further observed, parenthetically, that certain elected public officials (including municipal officers) and certain appointed officers were exempted from the provisions of s. 104.31(1)(a), F. S., by the provisions of what is now s. 104.31(1)(c), F. S.

Accordingly, I am of the view that the affixing of a public officer's official title to an open letter or newsletter criticizing or endorsing another person's candidacy does not, per

se or standing alone, violate s. 104.31(1)(a), F. S., since such conduct does not itself evince a corrupt use of official authority or influence for the purpose of interfering with an election, or coercing or influencing votes, or affecting the result of an election. The mere use of an official title in political advertisements or other political related writings falls within the realm of "political activity" and is not within the scope of activities prohibited by s. 104.31(1)(a). Moreover, I am of the view that s. 104.31(1)(a), F. S., as construed in this opinion, does not appear to infringe upon any constitutionally protected political speech which may be engaged in by such officers. An illustration of this principle may be found in a recent Louisiana case. State v. Newton, 328 So.2d 110 (La. 1976). The *Newton* case involved a challenge to the constitutionality of a statute which, among other things, prohibited:

> . . . the giving or offering to give [and the acceptance or offer to accept], directly or indirectly, any money, or anything of apparent present or prospective value to any voter at any . . . election . . . with the intent to influence the voter in the casting of his ballot.

In its original opinion, the court ruled the quoted portion of the statute unconstitutional because it was overbroad. According to the court, the statute prohibited activities entitled to protection under the First Amendment (such as to promise better government; give voters handbills, buttons, etc., to influence them to vote for a candidate; promise to lower taxes) as well as those activities which may constitutionally be proscribed (such as bribery).

On rehearing, however, the court reversed its earlier opinion on the overbreadth issue, stating that in its prior opinion the majority had "failed to adequately consider the context and purpose of the statute." State v. Newton, *supra* at 117. The court stated on rehearing that "[t]he purpose of the statute is to prohibit the *corruption* of voters, which it seeks to do by criminalizing the giving or accepting of money or anything of value at any election with the *corrupt intent* to influence the elector's vote." [*Id.*; emphasis supplied.] The court thus concluded that the statute was constitutional:

> As used in the statute, value is determined by the application of a subjective, rather than an objective, test. The requirement of value is satisfied if the thing has sufficient value in the mind of the person to whom it is corruptly offered to influence his actions. . . . Contrary to our first impression, it is clear that a platform promise of better government, lower taxes, or welfare reform made generally to a group of voters or to individual voters is not bribery within the meaning of the statute. . . . *The restriction achieved by the requirement of a corrupt intent to influence the recipient's vote effectively prevents the statute from infringing upon a candidate's freedom of expression.* [*Id.* at 118; emphasis supplied.]

With respect to the instant case, it is clear that the purpose of s. 104.31(1)(a) is to prevent *corruption* of the election process, not to limit protected political speech by public officers (or the "political activity" of elective officers exempted therefrom by s. 104.31(1)(c), F. S.). *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976); Mills v. Alabama, 384 U.S. 214 (1966); Spears v. State, 337 So.2d 977 (Fla. 1976), as to the protections afforded political discussions, political speech, and other activities under the First Amendment.

Your question is accordingly answered in the negative.

078-134—November 28, 1978

CIRCUIT COURT CLERKS

SERVICE CHARGES IN PROBATE AND GUARDIANSHIP PROCEEDINGS

To: Roger Poitras, Clerk, Circuit Court, Fort Pierce

Prepared by: Craig B. Willis, Assistant Attorney General

QUESTIONS:

1. Is the $5 service charge required by s. 28.2401(1)(a), F. S. 1977, for the deposit of a will of a decedent with the court, to be credited to and deducted from the other service charges for summary or formal administration required by other paragraphs of s. 28.2401(1), F. S. 1977?
2. Does the $10 service charge for disposition of personal property without administration fixed by s. 28.2401(1)(e), F. S., cover all letters or other writings under seal of the court required to be issued by the court, or must an additional charge of $10 be exacted for each such letter or other writing required to be issued when, for example, the assets are not congregated in one institution or location?
3. When a service charge for a formal administration has been paid under s. 28.2401(1)(h) or (i), F. S., and an inventory subsequently filed reveals assets in excess of those amounts upon which the charges for formal administration were based and fixed by paragraph (h) or paragraph (i) of s. 28.2401(1), F. S., and this greater inventory value falls into a higher scheduled charge category, should the difference in the prescribed charges between the lower estate valuation and the higher estate valuation be charged and collected?

SUMMARY:

The $5 service charge required by s. 28.2401(1)(a), F. S., for the deposit of a will of a decedent has been repealed by s. 2, Ch. 78-367, Laws of Florida, effective October 1, 1978, and, therefore, any question as to its credit to or deduction from other service charges for summary or formal administrations of estates has become moot.

The $10 service charge required by s. 28.2401(1)(e), F. S., for disposition of personal property without administration covers all services performed and all letters or other writings under the seal of the court which are issued by the court in the proceedings.

A subsequent inventory filed in a probate or guardianship proceeding, which shows an estate or inventory value greater than the inventory value upon which the prescribed service charge was initially paid and such greater value falls into a higher scheduled charge category, requires that the difference between the two scheduled charges fixed by the statute be charged and collected.

AS TO QUESTION 1:

Your question is apparently prompted by the enactment of s. 2, Ch. 77-284, Laws of Florida, codified as s. 28.2401(1)(a), F. S., effective October 1, 1977, that required a $5 service charge to be paid upon the deposit of a will of a decedent. The custodian of a will was required by s. 732.901, F. S. 1975, to deposit a decedent's will with the clerk of the court having venue of the estate of a decedent within 10 days of the death of the testator. Upon a petition therefor, and service of notice on the custodian, he could be compelled to comply with this statutory requirement. Prior to the enactment and effective date of s. 2, Ch. 77-284, the will's custodian was not statutorily charged for this initial deposit of the will since he did not necessarily have any real interest in opening an estate. *See* AGO 072-414. Effective October 1, 1978, s. 2, Ch. 78-367, Laws of Florida, repealed s. 28.2401(1)(a), F. S., as amended by Ch. 77-284, the statutory requirement for the service charge for the deposit of a will. Therefore, any question regarding its credit to or deduction from other service charges for summary or formal administrations required by other paragraphs of s. 28.2401(1) has become moot.

AS TO QUESTION 2:

Section 28.2401(1)(e), F. S., reads: "Except when otherwise provided, the service charges for the following services shall be: . . . For disposition of personal property without administration . . . $10.00." You question whether this $10 service charge is to cover all letters or other writings under seal of the court which are issued by the court, or whether an additional $10 service charge must be paid for each such letter or other writing so issued.

Subsection (2) of s. 735.301, F. S., provides:

> *Upon informal application by affidavit, letter, or otherwise* by any interested party, and if the court is satisfied that subsection (1) is applicable, *the court, by letter or other writing under the seal of the court,* may authorize the payment, transfer, or disposition of the personal property, tangible or intangible, belonging to the decedent to those persons entitled. (Emphasis supplied.)

Rule 5.420(6), Fla. PGR, restates, substantially verbatim, the language of s. 735.301(2), F. S.

It is my understanding from communications with personnel in your probate division and with the clerk's office here in Leon County that the practice in your office and elsewhere in the state is for the clerk's office to issue separate letters or authorizations to each individual or institution holding a decedent's personal property. The $10 service charge is for "disposition of personal property without administration"; this service charge is not specifically for individual letters or other writings under seal of the court authorizing payment or transfer of the personal property of a decedent, but for all services and letters or other writings issued in the proceedings. The rule that a fee statute must be strictly construed is applicable. Only that charge which is clearly provided for can be exacted. *See* Bradford v. Stoutamire, 38 So.2d 684 (Fla. 1949). Therefore, it is my conclusion that unless, and until, the Legislature clearly provides that this $10 service charge is to be based upon the number of such letters of other writings that are issued by the court pursuant to s. 735.301(2), F. S., the $10 service charge is the total charge which may be made for such services pursuant to s. 28.2401(1)(e), F. S.

AS TO QUESTION 3:

Section 28.2401(1)(h), (i), and (j), F. S., requires specified service charges in designated probate and guardianship proceedings based upon the value of the inventory:

> (h) Formal administration, guardianship, ancillary, curatorship, or conservatorship proceedings, with an inventory below $60,000.00 . . . . . $60.00
> (i) Formal administration, guardianship, ancillary, curatorship, or conservatorship proceedings, with an inventory of $60,000.00 but less than $100,000.00 . . . . . $75.00
> (j) Formal administration, guardianship, ancillary, curatorship, or conservatorship proceedings, with an inventory of $100,000.00 or more $100.00

You want to know if an inventory filed subsequent to the payment made for the above service charges shows a value in excess of that for which the payment was made and such value falls under a higher scheduled charge category, should your office charge and collect the prescribed charges on the higher inventory value, or the difference between the charges initially paid and the charges that would have been due on the increased inventory value. These three paragraphs of s. 28.2401(1) took their present form from s. 2, Ch. 77-284, Laws of Florida. Prior to this amendment, s. 28.2401, F. S. (1972 Supp.), had required a fee to be paid based upon a two-fold classification:

> (c) For filing of all documents in any estate having an inventory value not exceeding $60,000.00 . . . . . $60.00
> (d) For filing of all documents in all other estates $75.00

In AGO 072-327, I construed the above provisions and concluded that if a corrected inventory showed an estate value in excess of $60,000 and the filing fee had been paid on an inventory for less than $60,000, the difference, $15, must be paid. This conclusion and the expressed reason therefor apply with equal effect to your third question.

The only changes made by the 1977 Legislature were to increase to $100 the charge for estates with an inventory value of $100,000 or more, and to specify that the charges were being made for "[f]ormal administration, guardianship, ancillary, curatorship, or conservatorship, proceedings." It is, therefore, my conclusion that if an inventory filed subsequent to the payment of the service charges required by paragraph (h) or paragraph (i) of s. 28.2401(1), F. S., shows an estate or inventory value greater than the inventory value upon which the service charge was initially paid and the greater value

falls into a higher scheduled charge category, then the difference between the two scheduled charges must be charged and collected.

078-135—November 28, 1978

COUNTIES

TAX COLLECTOR MAY NOT ESTABLISH OR MAINTAIN BRANCH OFFICES

To: Sam A. Cornwell, Manatee County Tax Collector, Bradenton

Prepared by: William D. Townsend, Assistant Attorney General

QUESTION:

May a county tax collector, if he has a resolution duly adopted by the board of county commissioners authorizing the establishment of branch offices, maintain an office in commercial banks, staffed by the tax collector's own employees, for no or minimal rent, for collection of ad valorem taxes?

SUMMARY:

A county tax collector is not authorized by law to establish and maintain or enter into contractual arrangements for branch offices for the conduct of his statutory duties and functions or expend income of the office therefor, whether within or without the limits of the county seat.

In the event that the county commission is unable to provide necessary office space in the courthouse or other county building in the county seat for the county officers, then such officers may provide for and rent such necessary office space and pay rents therefor out of the income of the office as a necessary operating expense of the office.

The tax collectors, like the other county officers, are constitutional officers whose duties are imposed by, and their powers derived from, statutes. The tax collectors' powers, duties, and functions are set forth in Ch. 197, F. S. This statute contains no provision whatever expressly or impliedly authorizing the tax collectors to establish or maintain branch offices outside the county seat in commercial banks or any other location or to enter into any contractual arrangements or expend any income of their offices therefor or as rents therefor. While there is no statute expressly prohibiting such action, the prevailing rule of law is that public officers have only such authority or power as is clearly conferred by statute or necessarily implied from expressly granted or imposed statutory powers or duties. *See, e.g.*, 67 C.J.S. *Officers* s. 102; Lang v. Walker, 35 So. 78, 80 (Fla. 1903); Gessner v. Del-Air Corporation, 17 So.2d 522 (Fla. 1944); AGO's 071-28, 075-299, 078-77, 078-94, and 078-101; and where there is doubt as to the existence of authority, it should not be assumed. *See, e.g.*, White v. Crandon, 156 So. 303, 305 (Fla. 1934), Gessner v. Del-Air Corporation, *supra*; Edgerton v. International Company, 89 So.2d 488, 490 (Fla. 1956). Moreover, unlimited authority to perform official functions as may be desired by an officer or to incur expenses against the state or county cannot lawfully be conferred upon any officer. Coen v. Lee, 156 So. 747, 750 (Fla. 1933). An officer may not do everything not forbidden in advance by some legislative act. 67 C.J.S. *Officers* s. 102, p. 366. As in the case of other administrative officers, tax collectors, whose offices are constitutionally created but whose powers and duties are statutory, have no common law powers "and what [powers] they have are limited to the statutes. . . ." State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628, 638 (1 D.C.A. Fla., 1974); AGO 075-120; *See also* AGO's 075-148, 075-161, 078-95, 078-97, 078-101, and 078-114.

Although an express power duly conferred may include implied authority to use means necessary to make the express power effective, such implied authority may not warrant the exercise of a substantive power not conferred. Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1933); AGO 073-375. Any implied power must be necessarily implied from a duty or

power which is specifically or expressly granted or imposed by statute. *See* AGO 075-161; Florida State University v. Jenkins, 323 So.2d 597 (1 D.C.A. Fla., 1975), and also be *essential* in order to carry out the expressly granted power or duty imposed, *e.g.*, AGO 073-374 and 67 C.J.S. *Officers* s. 102.

In the situation proposed in your inquiry, as in the situation discussed in AGO 078-77, there is no necessity to imply a power to the tax collector to establish and maintain or enter into contractual arrangements for a branch office outside the county seat as the constitutional and statutory law otherwise provides for and vests the authority and discretion in such matters in the board of county commissioners. *See, e.g.*, AGO 076-173. Accordingly the tax collectors of this state are not authorized by statute, expressly or impliedly, to establish and maintain or enter into contractual arrangements for branches of their offices in any location outside the county seat.

Section 1(k), Art. VIII, State Const., provides that branch offices for the conduct of county business may be established by the county commissioners outside the county seat. *See* AGO 070-166. In s. 125.01(1)(c) and (3)(a), F. S. 1977, the county commissioners are further empowered to provide county buildings and lease property for the county and for county purposes. *See generally* AGO 076-173 in part concluding that under constitutional and general law provisions and certain special laws *only* the county commission may establish branch offices for the conduct of county business by the county offices outside of the county seat, and the county officers possess no such authority. Possessing no constitutional or statutory authority in this particular, the tax collectors are without lawful authority to maintain or enter into any contractual arrangements for branch offices outside the county seat, or pay rent for such offices from the income of their offices.

The county commission is therefore required to provide necessary office space for all county offices. In AGO 073-99, I stated that, in the case of the school board and superintendent of schools, it was not necessary that offices provided these officials be located in the courthouse but merely in the county seat. I have previously stated that the county commission has the sole authority to allocate space in county buildings to the various officers, and that, acting within their discretion, the decision of the county commission will not be interfered with, absent a clear showing of fraud or abuse of that discretion. Attorney General Opinion 071-275; *see also* Mathis v. Lovett, 215 So.2d 490 (1 D.C.A. Fla., 1968). This discretionary power applies to locations outside county-owned (or county-leased) buildings or the county seat, also. *See* AGO 064-63. The principal offices and permanent records of all county officers must be in the county seat—however, not necessarily in the courthouse. The county commission should provide such offices free of charge to the county officers. *Only* when the county is *unable* to do so may a county officer rent an office for himself in the county seat. Absent statutory authority to do so, a county officer may not establish and maintain or enter into contractual arrangements for a branch office outside the county seat or rent such office facilities, nor expend office income or funds to pay rent therefor. Only the county commission may lease buildings or office facilities for the conduct of county business by the county officers within or without the county seat.

It should be noted that the authority imposed on the board of county commissioners to provide office space for the county officers carries with it the proviso that, in the event commissioners are unable to provide necessary office space for one of the county officers, then that officer may provide the necessary space. *See* AGO's 073-99 and 076-173. In this circumstance only would the tax collector be empowered to provide for such office space or to rent and pay rents for such necessary office space in the county seat out of the income of his office as a *necessary* operating expense of the office. The tax collector, however, possesses no lawful authority to lease or rent, or otherwise provide and maintain, office facilities for branch offices for the conduct of his statutory duties and functions outside the county seat. Attorney General Opinion 076-173.

Accordingly, your question is answered in the negative to the extent of the power of the tax collector to establish and maintain or enter into contractual arrangements for branch offices for the collection of ad valorem taxes.

078-136—November 28, 1978

CLERKS OF COUNTY COURTS—SERVICE CHARGES

CLERK MAY NOT RETAIN FOR HIS OFFICE MONEYS COLLECTED UPON FILING CIVIL ACTIONS OR PROCEEDINGS IN COUNTY COURTS—MUST REMIT MONTHLY TO COUNTY

To: Newman C. Brackin, Clerk, Circuit Court, Crestview

Prepared by: Craig B. Willis, Assistant Attorney General

QUESTION:

Must the "service charges" collected pursuant to s. 34.041(1), F. S., be remitted monthly to the county, or may these charges be retained as income of the office of the clerk?

SUMMARY:

Filing charges, now denominated as "service charges," collected by the clerk of the county court upon the filing of a civil action or proceeding in the county court pursuant to s. 34.041(1)(a)-(e), F. S., must be remitted monthly to the county by the clerk in the manner prescribed by the auditor general. The clerk of the county court is not authorized by law to retain these payments as income of the clerk's office.

Section 4, Ch. 77-284, Laws of Florida, amended s. 34.041(1), F. S., to change, among other things, the amounts of the charges to be paid for filing an action or proceeding in county court and to substitute the phrase "service charges" for "filing fees" in the title or catchline of s 34.041 and in the body of subsection (1) thereof. These "filing fees" or "service charges," as they are referred to now, are to be paid by the plaintiff "when filing his action or proceeding." However, the phrase "filing fees" was retained in the unamended last sentence of subsection (1) of s. 34.041. This sentence reads as follows: "All filing fees shall be remitted monthly to the county in the manner prescribed by the auditor general." You state that this inconsistency in the language employed has caused some confusion in your office as to the proper disposition of the service charges collected pursuant to s. 34.041(1).

Black's Law Dictionary, Rev. 4th Ed. at p. 470, defines a fee as "[a] charge fixed by law for services of public officers or for use of a privilege under control of government." 36A C.J.S., p. 248, defines fee as follows:

> The word "fee" is frequently employed to denote a charge, and is defined as meaning a charge fixed by law for the services of a public officer or for the use of a privilege under the control of the government; a charge for services; a charge or emolument; a fixed charge.

See also Flood v. State *ex rel.* Homeland Co., 117 So. 385, at 386 (Fla. 1927), citing a number of authorities to the same effect. The Third District Court of Appeal has defined "fees" as "compensation to an officer for service rendered in the progress of the cause." Dade County v. Strauss, 246 So.2d 137, 141 (3 D.C.A. Fla., 1971). Fees collected by public officers, however characterized, represent charges which the state makes for services rendered by the state through its officers, and constitute a fund subject to the control of the state to be applied as the Legislature directs. *See* State *ex rel.* Buford v. Spencer, 87 So. 634 (Fla. 1921).

Chapter 77-284, Laws of Florida, was an act "relating to service charges and fees of clerks of court" and amended several sections of Chs. 28 and 34, F. S. It is clear from the language of the introductory paragraph of s. 34.041(1), F. S., that the charges specified, however denominated, are to be paid by the plaintiff when his action or proceeding is filed in county court. These payments represent charges made by the state for services rendered by it through the clerks of the county courts upon the filing of a civil action or proceeding in the county court. Other than the legislative command expressed in the unamended last sentence of s. 34.041(1), there is no statutory direction as to the

application or disposition of the prescribed filing or service charges. Neither this statute, nor any other, has any provision allowing the clerk to retain these "service charges" collected pursuant to s. 34.041(1) as income of the office. The State Constitution, s. 5(c), Art. II, states, "[t]he powers, duties, compensation and method of payment of the state and county officers shall be fixed by law." As stated in Florida Ind. Comm. v. National Trucking Company, 107 So.2d 397, 401 (1 D.C.A. Fla., 1958), "officers have no common-law powers; but are limited to such powers as may be granted, either expressly or by necessary or fair implication, by the statutes creating them." Absent any statutory authorization empowering the clerk to retain these charges as income of the office, they must be remitted to the county. While the clerk of the circuit court is a constitutional officer, his powers and duties are fixed by law and the above-quoted rule applies with equal force to the clerk and other constitutional officers of the county as it does to state and local administrative bodies or officers. *Cf.* AGO's 078-95, 078-94, 078-77.

The substitution of the phrase "service charges" for "filing fees" effectuated by s. 4, Ch. 77-284, Laws of Florida, is merely a change in phraseology, and the two expressions represent synonymous terms. As it is stated in 82 C.J.S. *Statutes* s. 384, at 902-903, "[a] mere change in the phraseology does not indicate a change in construction of the statute." *Accord*: State *ex rel.* Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529, at 531 (Fla. 1973); Seaboard Coast Line R. R. v. O'Connor, 229 So.2d 663 (2 D.C.A. Fla., 1969). The statute, as amended, does not purport to authorize the clerk of the county court to retain any of the prescribed filing charges as income of his office. The statutory direction that all such filing charges or filing fees be remitted monthly to the county has not been amended by the Legislature. Therefore, the filing charges or service charges collected by the clerk of county court upon the institution or filing of a civil action or proceeding in the county court must be remitted monthly to the county and may not be retained by the clerk as income of the office.

078-137—November 28, 1978

MUNICIPALITIES

MANDATORY RETIREMENT—AGE DISCRIMINATION IN MUNICIPAL PENSION PLANS PROHIBITED BY FEDERAL EMPLOYMENT ACT—EXCEPTIONS

To: Janice Ward Parrish, City Personnel Administrator, Delray Beach

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Is the establishment of a mandatory retirement age of 65 in a municipal pension plan for policemen and firemen, and the establishment of a mandatory retirement age of 60 (65 with the city's consent) in a pension plan for all other municipal employees, unlawful?

SUMMARY:

The 1978 Amendments to the Federal Age Discrimination in Employment Act prohibit a municipality from requiring its employees to retire at age 60 solely because of age, even where such a mandatory retirement provision is part of a bona fide pension or retirement plan, unless age is a bona fide occupational qualification reasonably necessary to the operation of a particular business or for a particular job or occupation. Effective January 1, 1979, federal law will prohibit mandatory retirement of municipal employees between 40 and 70 solely because of age, even if required under an existing bona fide municipal pension or retirement plan, unless age is a bona fide occupational qualification reasonably necessary for a particular job or occupation, or the employee has been in a bona fide executive or high policymaking position for two years prior to retirement and is entitled to immediate

specified retirement benefits, or if such retirement is required or permitted by a bona fide employee benefit plan or seniority system provided by collective bargaining agreements in effect on September 1, 1977, in which case the prohibitions do not take effect until the termination date of the collective bargaining agreement or January 1, 1980, whichever occurs first. The Florida Age Discrimination in Employment Law, codified as s. 112.044, F. S., would continue to cover municipal employees who are 65 (before January 1, 1979) or 70 (after January 1, 1979) years of age or older. Such employees may not, under state law, be required to retire solely because of their age unless age is a bona fide and reasonably necessary occupational qualification or the mandatory retirement provision is part of a bona fide seniority system or other employee benefit plan such as a pension or retirement plan.

STATEMENT OF FACTS:

In 1974 the City of Delray Beach enacted legislation which amended the retirement and pension plans for municipal employees. The city currently provides two pension plans: One plan is for municipal firemen and policemen, the other serves all other general municipal employees. The policeman/fireman plan provides that although a member of the plan may, if eligible, elect to retire prior to his 65th birthday, he *must* retire no later than his 65th birthday. Moreover, a member may be required to retire earlier, if eligible, upon a determination by the member's departmental chief and the city manager that the member "is no longer physically or mentally capable of satisfactorily performing his duties." *See* s. 3(1)(a) and (b) of the Police and Firefighters Retirement Pension Plan, Ordinance No. 12-74.

The retirement plan for general employees provides for a normal retirement date on the first day of the month following a member's 60th birthday, or after 10 years of credited service, if later. However, an employee may continue his employment beyond the normal retirement date with the city's consent, but may work no longer than the first day of the month following his 65th birthday. *See* s. 4.2(a) of the General Employees' Pension Plan, Ordinance No. 13-74. Thus, it is clear that neither plan permits employment past the age of 65.

Initially, it should be noted that legislation establishing or permitting the establishment of a mandatory retirement age for public employees has been repeatedly sustained against challenges that such laws deny equal protection of the laws to the employees. *See, e.g.*, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement of uniformed police officers at age 50); McIlaine v. Pennsylvania, 415 U.S. 986 (1974) (mandatory retirement of state police officers at age 60); Johnson v. Lefkowitz, 566 F.2d 866 (2nd Cir. 1977) (mandatory retirement of tenured civil service employees at age 70); Rubino v. Ghezzi, 512 F.2d 431 (2nd Cir. 1975), *cert. denied*, 423 U.S. 891 (1975) (mandatory retirement of state court judges at age 70); Fazekas v. University of Houston, 565 S.W.2d 299 (Ct. Civ. App. Tex. 1978) (mandatory retirement of university professors at age 65); Hawkins v. Preisser, 264 N.W.2d 726 (Iowa 1978) (mandatory retirement of state employees at age 65).

It has been held that the right to be employed by a governmental agency is not a fundamental right. Massachusetts Board of Retirement v. Murgia, *supra*, at 312; *see also* Board of Regents v. Roth, 408 U.S. 564 (1972); Headley v. Baron, 228 So.2d 281, 284 (Fla. 1969); Jones v. Board of Control, 131 So.2d 713, 717 (Fla. 1961). Nor does a classification based upon age constitute a suspect classification. Massachusetts Board of Retirement v. Murgia, *supra*; *and see* Quicker v. City of Fort Lauderdale, 354 So.2d 400 (4 D.C.A. Fla., 1978). Therefore, mandatory retirement statutes have been found to be constitutional, provided that they are reasonably or rationally related to legitimate state interests such as efficiency or economy or motivation of younger employees. *See, e.g.*, Johnson v. Lefkowitz, *supra*, at 869; Hawkins v. Preisser, *supra*, at 730.

A consideration of Florida law on the subject of involuntary retirement reveals that only certain classes of governmental employees are required to retire at a designated age. *See, e.g.*, s. 8, Art. V, State Const., providing that no justice or judge shall serve after attaining the age of 70 except upon temporary assignment or to complete a term, one-half of which he has served; s. 231.031, F. S., requiring mandatory retirement at age 70 for instructional personnel in the public schools; s. 321.04(4), F. S., providing that "[n]o patrol officer of the Florida Highway Patrol shall serve beyond the age of 62, any provision of the laws of this state to the contrary notwithstanding." Moreover, with regard to state employees within the Career Service System or any other merit system

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plan or system providing for tenure, s. 112.051(1), F. S., states that such employees may *not* be retired by the agency or department in which they are employed solely because of the attainment of age 65. And, although the statute permits retirement if the agency or department specifies charges or other cause for retirement, "[t]he attainment of age 65 or older shall not be considered as such specified cause for retirement."

The present provisions of s. 112.051(1), F. S., were brought into the statutes as part of the "Florida Age Discrimination in Employment Act," ss. 9-12, Ch. 76-208, Laws of Florida. The remaining provisions of the act has been codified as s. 112.044, F. S. With the enactment of s. 112.044, the Legislature stated its intention "to promote the employment of older persons, based upon ability rather than age, and to prohibit arbitrary age discrimination in employment." Section 112.044(2)(a) defines "employer" to mean:

> . . . the state or any county, municipality or special district or any subdivision or agency thereof. This definition shall not apply to any law enforcement agency or firefighting agency in this state.

From the foregoing, it is evident that the City of Delray Beach is an "employer" within the scope and for the purposes of the statute. Thus, it is important to determine what employment activities and practices are prohibited by the terms of s. 112.044.

With regard to mandatory retirement, s. 112.044(3)(a), F. S., states, in relevant part:

> (a) Except as provided in paragraph (f), it is unlawful for an employer to:
> 1. Fail or refuse to hire, discharge or mandatorily retire . . . any individual . . . because of age.

However, s. 112.044(3)(f), referred to in the above-cited statute, states, in part:

> (f) It is not unlawful for any employer, employment agency, or labor organization to:
> 1. Take any action otherwise prohibited under paragraphs (a), (b), (c), or (e), based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.
> 2. Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this act.

In light of the provisions of s. 112.044(3)(f), *supra*, it seems evident that the Delray Beach municipal pension plans which have been in existence since 1974 (two years prior to the enactment of s. 112.044, F. S.), could not have been adopted as subterfuges to avoid the requirements of that statute. Hence, such pension plans could, *under state law*, lawfully require employees embraced within the system to retire at age 60 or 65. *See* United Air Lines v. McMann, 54 L.Ed.2d 402 (1977), in which the Supreme Court considered 29 U.S.C. s. 623 (4)(f)2, which, in terms virtually identical to s. 112.044(3)(f)2., provided an exception to the Federal Age Discrimination in Employment Act, 29 U.S.C. s. 623 *et seq.*, enacted in 1967. The court ruled that a mandatory retirement provision in a pension plan adopted in *1941*, was permissible and valid, because "a plan established in 1941 if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later." United Air Lines, *supra*, at 413. *Accord*: Brennan v. Taft Broadcasting, 500 F.2d 212 (5th Cir. 1974); Thompson v. Chrysler, 569 F.2d 989 (6th Cir. 1978). *But see*, The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, *infra*.

Moreover, with regard to policemen and firemen, it would appear that the city would be able to establish pursuant to s. 112.044(3)(f)1., F. S., that age is a "bona fide occupational qualification" [hereafter BFOQ] reasonably necessary for such jobs or occupations which would reasonably preclude the continued employment of persons over the age of 65. *See* Massachusetts Board of Retirement v. Murgia, *supra*, at 314, in which the court considered the record which included testimony as to the rigors and demands of police activities, as well as medical testimony concerning the relationship of age to the ability to perform these functions, in finding that the state had a rational basis for requiring retirement at age 50 for uniformed state police officers; and Ridaught v. Division of Florida Highway Patrol, 314 So.2d 140, 144 (Fla. 1975), a case decided under s. 112.043, F. S., in which the court ruled that a requirement that applicants for the

highway patrol be less than 35 years old was valid and reasonable in light of the "character of such duties as requiring special attributes of agility, alertness and dexterity necessary in the patrolling of highways in the state, and in dealing with persons violating the traffic laws of the state." *Cf.* Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976), in which the court developed a framework to be used in analyzing a BFOQ defense under the Federal Age Discrimination in Employment Act.

The preceding discussion of Florida law is not entirely dispositive of your inquiry, however. The provisions of the Federal Age Discrimination in Employment Act [hereafter ADEA], 29 U.S.C. s. 623 *et seq.*, must be considered. In particular, the impact of the 1978 amendments to the ADEA, Pub. L. No. 95-256, 92 Stat. 189 (April 6, 1978), must be analyzed.

At the outset, it should be noted that the prohibitions against discrimination in employment on the basis of age set forth in the ADEA are applicable to state and local governments as well as to private employers. 29 U.S.C. s. 630(b), defines the term "employer" to mean, *inter alia*:

> a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . . The term also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State.

Thus, a municipality is an "employer" for purposes of the act, and is required to observe the act's prohibition against age discrimination in the same manner as a private employer.

The Supreme Court's decision in Usery v. National League of Cities, 426 U.S. 883 (1976), raises the question of whether Congress may constitutionally extend coverage of the ADEA to include state and local governmental employers. In *National League of Cities*, the court held that Congress exceeded its authority under the commerce clause by attempting to extend the minimum wage and maximum hour provisions of the 1974 Fair Labor Standards Amendments to state and local government employers. A number of federal courts have analyzed the impact of *National League of Cities* upon the ADEA and have concluded that since the ADEA was an exercise of Congressional power under s. 5 of the Fourteenth Amendment rather than under the commerce clause, the provisions of the ADEA could be applied constitutionally to state and local governments. *See, e.g.*, Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Remmick v. Barnes City, 435 F. Supp. 914 (D.C. N.D. 1977); Usery v. Board of Education of Salt Lake City, 421 F. Supp. 718 (D.C. Utah 1976).

Prior to its amendment in 1978, the ADEA was virtually identical in many respects to Florida's age discrimination law. Section 4(a)(1) of the act makes it unlawful for an employer to

> discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. [29 U.S.C. s. 623(a)(1).]

The ADEA differs from Florida law in one significant respect, however, in that the ADEA places minimum and maximum age limits upon the coverage of the act, while Florida's statute contains no such limits. Thus, until January 1, 1979, the prohibitions contained in the ADEA apply only to persons between the ages of 40 and 65. *See* 29 U.S.C. s. 631. With the enactment of Pub. L. No. 95-256, *supra*, however, Congress has amended the act to raise the upper age limit to 70, subject to certain exceptions, effective January 1, 1979.

Turning now to a consideration of the provisions of the ADEA which are relevant to your inquiry, I note that the act, like s. 112.044, F. S., provides certain exceptions or employer defenses to the anti-discrimination provisions set forth therein. For example, s. 4(f)(1) of the ADEA, provides in terms similar to those contained in s. 112.044(3)(f)1. that the act's prohibitions do not apply where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the operation of the business. 29 U.S.C. s. 623(f)(1). This section was *not* affected by the 1978 congressional amendments. However, s. 4(f)(2) of the ADEA has been significantly amended, and now provides as follows (the italicized language indicates the language of the amendment by s. 2 of Pub. L. No. 95-256):

> It shall not be unlawful for an employer . . .
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 65; as of January 1, 1979, between the ages of 40 and 70] because of the age of such individual.* [29 U.S.C. s. 623(f)(s), as amended; emphasis supplied.]

From an examination of the above-cited statute, it is evident that federal law now expressly prohibits mandatory retirement of persons under the age of 65, even if such retirement is permitted or required as part of a bona fide pension plan unless the employer can show that age is a BFOQ which requires separation at an earlier date. *See* 29 U.S.C. s. 623(f)(1); and *see also* Senate Report No. 95-493, 4 U.S. Code Cong. & Admin. News 976, 985 (1978). Moreover, as of January 1, 1979, federal law will prohibit mandatory retirement of persons under 70 years of age unless the employer can show that age is a BFOQ. Involuntary retirement of persons between the ages of 65 and 70 will also be prohibited unless:

> 1. The employee is serving under a contract of unlimited tenure at an institution of higher education, s. 12(d) of the ADEA, 29 U.S.C. s. 631, as amended; or
> 2. The employee has, for a two-year period immediately prior to retirement, been "employed in a bona fide executive or high policy making position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan or any combination of such plans, of the employer of such employee, which equals in the aggregate, at least $27,000," s. 12(c) of the ADEA, s. 29 U.S.C. s. 631, as amended; or
> 3. If such retirement is required or permitted by bona fide employee benefit plans or seniority systems provided by collective bargaining agreements in effect on September 1, 1977, in which case the effective date of the prohibitions is the termination date of the collective bargaining agreement or January 1, 1980, whichever occurs first. [Section 2(b) of Pub. L. No. 95-256.]

It should be noted that to the extent that s. 112.044(3)(f)2., F. S., permits the terms of pension or other retirement plans to require mandatory retirement of employees who are less than 65 (and after January 1, 1979, less than 70), it is in direct conflict with federal law. Under such circumstances, while federal and state laws should always, to the extent reasonably possible, be interpreted in such a way as to avoid conflict in their application, the supremacy clause demands, where such conflict is *unavoidable* through reasonable interpretation, that federal law stand supreme. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Atchison, T. & S.F.R. Co. v. Railroad Comm., 283 U.S. 380 (1930); Townsend v. Yeomans, 301 U.S. 441 (1937). It should be noted, however, that the ADEA protects *only* those employees who are between the ages of 40 and 65 (40 and 70 on January 1, 1979). Thus, municipal employees who are age 65 (before January 1, 1979) or age 70 (on or after January 1, 1979) or older would still be covered by state law on the subject. Therefore, the prohibitions and exceptions set out in s. 112.044(3) would continue to be applicable to such employees. *Cf.* Ch. 78-49, Laws of Florida, which amended s. 13.261(8)(b), F. S., to permit involuntary retirement in the private employment sector pursuant to bona fide employee benefit plans to the extent that such involuntary retirement is otherwise permitted by the ADEA, as amended by the ADEA Amendments of 1978.

In light of the foregoing discussion, therefore, I have no other alternative but to advise you that federal law currently does not permit an employer (whether public or private) to require employees to retire at age 60 (in the absence of a BFOQ) solely because of their age, even if such a mandatory retirement provision is part of a bona fide pension plan. In addition, as of January 1, 1979, it will no longer be lawful for the city, even where so stipulated under a pension or retirement plan for municipal employees, to require *all* employees to retire between ages 65 and 70, in the absence of a BFOQ based on age, or a showing that an employee is in an executive or high policymaking position with the retirement benefits specified in s. 12(c) of the ADEA, as amended.

However, it should be noted that both federal and state law permit the retirement or discharge of an employee "for good cause." *See* s. 112.044(3)(f)3.; 29 U.S.C. s. 623(f)(3). In other words, an employee may be involuntarily discharged even though he is under 65 (before January 1, 1979) or 70 (after January 1, 1979), provided that his age is not the reason for the discharge.

It also should be emphasized that the requirement that municipal policemen and firemen retire at age 65 would in all probability remain unaffected by the changes in the ADEA, since age would almost certainly be considered a BFOQ for such occupations.

078-138—December 12, 1978

MUNICIPALITIES

MUNICIPALITIES ENTITLED TO RECEIVE FINES FOR TRAFFIC VIOLATIONS—MUST CITE ORDINANCE TO RECEIVE FINE WHEN ORDINANCE SAME AS STATE LAW

To: Newman C. Brackin, Clerk, Circuit Court, Crestview

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTIONS:

1. If a municipality has adopted by ordinance certain matters covered by Ch. 316, F. S., is it necessary for the municipality to cite the appropriate section of the state traffic control law in addition to the municipal ordinance violated in order for it to be paid the fines and forfeitures and the civil penalties received by the county court for such traffic violations?

2. If a municipality has adopted or by reference incorporated the state's criminal laws or enacts an ordinance which creates offenses against the municipality for acts which also constitute offenses under the state criminal laws, is it necessary for the municipality to cite the municipal ordinance when a violation of the ordinance adopting or incorporating the state's criminal laws occurs within the municipality in order to receive the fines and forfeitures imposed by the court?

SUMMARY:

A municipality may enact ordinances which create offenses against municipal law for the same acts that constitute offenses against state law or by reference incorporate the state penal or criminal laws, and it may, pursuant to s. 316.008, F. S., adopt certain matters contained in the Uniform Traffic Control Law. While it is not necessary to cite a municipal ordinance unless the offender is charged with a violation of the ordinance, under the provisions of ss. 316.660 and 318.21, F. S., a municipality is entitled to receive all fines and forfeitures and all civil penalties received by a county court for traffic violations occurring within the municipality regardless of whether they are violations of Chs. 316 or 318, F. S., or of a municipal ordinance. If, however, a violation of a municipal ordinance adopting or incorporating the state's criminal laws has occurred, then the ordinance must be cited if the municipality is to receive the fines imposed by the court. If the state criminal laws are cited, the county receives the fines pursuant to s. 142.03, F. S.

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

This office has previously stated that a municipality, pursuant to its home rule powers, has the power to enact an ordinance which creates offenses against the municipality for the same acts that constitute offenses against the state criminal statutes, or to adopt by ordinance state criminal or penal laws by specific or general reference thereto. *See* AGO's

078-111 and 074-240 in which this office stated that an adoption by general reference of any act which is or shall be proscribed by the state criminal or penal laws permits subsequent amendments, revision, and repeal of laws by the Legislature to apply to such amendments. *See also* Orr v. Quigg, 185 So. 726 (Fla. 1938); State *ex rel.* McFarland v. Roberts, 74 So.2d 88 (Fla. 1954), wherein a city ordinance forbidding acts recognized by state law as misdemeanors and authorizing penalties for performing such acts was found valid; State v. Malone, 227 So.2d 896 (3 D.C.A. Fla., 1969); and Jaramillo v. City of Homestead, 322 So.2d 496 (Fla. 1975), in which the Florida Supreme Court held that a municipality may enact an ordinance which creates an offense against municipal law for the same act that constitutes an offense against state law. With respect to local traffic ordinances, s. 316.007, F. S., provides in pertinent part that no municipality "shall enact or enforce any ordinance on a matter covered by [Ch. 316, F. S.] *unless expressly authorized.*" (Emphasis supplied.) Section 316.008, F. S., represents such express authorization and "enumerates the area within which municipalities may control certain traffic movement or parking in their respective jurisdictions." Section 316.002, F. S. The last cited section also makes it unlawful for any municipality to pass or attempt to enforce any ordinance in conflict with the provisions of Ch. 316, F. S.

Section 316.660, F. S. (formerly s. 316.0261, F. S.), provides for the disposition of revenue collected from violations involving motor vehicles and provides in pertinent part:

> *[A]ll fines and forfeitures received by any County Court from violations of any of the provisions of this chapter, or from violations of any ordinances adopting matter covered by this chapter, committed within a municipality shall be paid monthly to that municipality.* It is the intent of the Legislature that such fines and forfeitures shall be paid monthly to that municipality in addition to any other fines and forfeitures received by a county court that are required to be paid to that municipality as otherwise provided by law. (Emphasis supplied.)

Most traffic violations of Ch. 316, F. S., are now noncriminal infractions. *See* s. 318.14, F. S., which 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, Rule 6.040, which generally defines criminal and noncriminal traffic offenses and infractions. Section 318.21, F. S., provides:

> All civil penalties and forfeitures received by a county court pursuant to the provisions of this chapter shall be distributed and paid monthly to the municipalities and counties, respectively, in the same manner, upon the same basis, and upon the same terms and conditions that fines and forfeitures are distributed and paid to municipalities and counties under the provisions of s. 316.660.

See AGO 073-11, in which this office stated that after January 1, 1973, a municipality is entitled to the fines and forfeitures received for convictions of traffic offenses committed within the municipality and tried in the county court without regard to whether the citations for the offenses were issued by the state, county, or municipal law enforcement officers.

The language of the foregoing statutory provisions clearly states that all fines and forfeitures and all civil penalties and forfeitures received by the county court pursuant to Ch. 318, F. S., or from violations of Ch. 316, F. S., *or* any ordinance adopting matters covered by Ch. 316 committed within the municipality are to be distributed and paid monthly to the municipality. No distinction is made between a violation of a state statute regarding traffic control or of such municipal ordinance with respect to the disposition of such fines and forfeitures or civil penalties and forfeitures, nor is there anything in these statutory provisions which indicates that a violation of a municipal ordinance must be cited in addition to a violation of Ch. 316 or Ch. 318 in order for the municipality to receive from the county court clerk the fines and forfeitures or civil penalties and forfeitures for such traffic violations committed within the municipality. The revenues received pursuant to s. 316.660 or Ch. 318, F. S., are in addition to the other fines and forfeitures received by a county court that are required by law to be distributed and paid to the municipality.

When a municipality has by ordinance adopted the state's criminal laws and a violation of the adopting ordinance occurs, it is an offense against the municipality and the offender should be charged with the violation of the municipal ordinance, not the state

criminal laws. The charging document should cite the ordinance and, since the accused is charged with violating the ordinance, any fine imposed by the county court should be in accordance with the terms of the ordinance. Such fines and forfeitures are required to be paid and distributed to the municipality. *See* s. 34.191(1), F. S., which provides that a municipality shall be paid monthly all fines and forfeitures received by the county court from violations of municipal ordinances committed within a municipality within the territorial jurisdiction of the county court except as provided in s. 23.103, F. S. This office has previously stated that fines and forfeitures imposed by the county court for violations of state criminal misdemeanor statutes which occur within a municipality's territorial jurisdiction are *not*, pursuant to s. 34.191(1), to be remitted monthly to that municipality; thus, if a state criminal statute is cited and a fine imposed by the court, then the fine or forfeiture is to be paid into the fine and forfeiture fund of the county as provided by s. 142.03, F. S. *See* AGO's 074-96, 074-137, and 078-111. *See also* s. 142.03, which states:

> *Except as to fines*, forfeitures, and *civil penalties* collected in *cases involving violations of municipal ordinances, violations of chapter 316 committed within a municipality, or infractions under* the provisions of *chapter 318* committed within a municipality, *in which cases such fines, forfeitures, and civil penalties shall be fully paid monthly to the appropriate municipality as provided in ss. 34.191, 316.660, and 318.21*, 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, and the proceeds of all forfeited bail bonds or recognizances in all other cases, *shall be paid into the fine and forfeiture fund of the county* in which the indictment was found or the prosecution commenced . . . . (Emphasis supplied.)

Therefore, with respect to the traffic offenses, ss. 316.660 and 318.21, F. S., expressly provide that all civil penalties and forfeitures and all fines and forfeitures received by any county court for traffic violations occurring within the municipality, regardless of whether they are violations of the provisions of Ch. 316 or Ch. 318, F. S., or violations of an ordinance adopting matter covered by Ch. 316, are to be fully paid and distributed monthly to the municipality. When, however, a violation of an ordinance adopting the state's criminal laws occurs, the offense is the violation of the ordinance, not of the state's criminal laws, and the accused should be charged accordingly. Thus the charging document should cite the municipal ordinance and the fine imposed by the court should be in accordance with the ordinance's terms. Such fines and forfeitures are required to be paid and distributed to the municipalities. If, however, the accused is convicted of violating a state criminal statute, then the fine or forfeiture is paid into the fine and forfeiture fund of the county.

In addition, it must be noted that a problem of double jeopardy arises when a municipality enacts an ordinance which creates an offense against the municipality for the same acts as constitute offenses against the state criminal statutes. The United States Supreme Court in Waller v. Florida, 397 U.S. 387 (1970), held that it was impermissible for a person tried for a violation of a municipal ordinance to be subsequently prosecuted for the violation of a state criminal statute growing out of the same acts. In *Waller*, the defendant was first tried in a municipal court for a violation of a municipal ordinance; he was subsequently tried in circuit court for a violation of a state criminal statute arising out of the same acts. The court held that such subsequent prosecution constitutes double jeopardy and was constitutionally prohibited. Therefore, due care should be taken to ensure that a person is not prosecuted for a violation of a municipal ordinance where the same acts or facts for which the accused person is to be charged are also violations of the more serious state misdemeanor or felony statutes. *Cf.* AGO's 073-161 and 074-240 and City of Fort Lauderdale v. Byrd, 242 So.2d 494, 496 n.2 (2 D.C.A. Fla., 1970), in which the wisdom of the practice of adopting by ordinance misdemeanors proscribed by state law as offenses against the municipality was seriously questioned in light of Waller v. Florida, *supra*.

078-139—December 12, 1978

POLICE OFFICERS

VIOLATION OF PROVISIONS OF UNIFORM TRAFFIC CONTROL LAW PROHIBITING DISPOSAL OF TRAFFIC CITATIONS BY TRAFFIC ENFORCEMENT OFFICERS NOT A CRIMINAL ACT

To: Frederick Fernez, Chief of Police, Indian Harbour Beach

Prepared by: David K. Miller, Assistant Attorney General

QUESTION:

Is violation of s. 316.650(4), F. S., a criminal act?

SUMMARY:

The violation of the provisions of s. 316.650(4), F. S., prohibiting disposal of traffic citations, or copies thereof, or the record of the issuance thereof, in a manner contrary to the requirements of s. 316.650, F. S., by traffic enforcement officers of other public officers or employees is not made a criminal act by any provision of the Uniform Traffic Control Law. Such violations are specifically made infractions by s. 316.655, F. S., punishable by the civil penalties provided therein.

Section 839.24, F. S., penalizing certain officers for failure to perform duties required of them under the criminal procedure law (Chs. 900-925, F. S.) is not applicable to violations of s. 316.650(4), F. S.

The Department of Legal Affairs is not empowered to rule on the validity of s. 839.25(1)(a) and (b), F. S., purportedly proscribing official misconduct by public servants, as therein defined, or to make findings of fact as to the elements of corrupt intent and criminal knowledge required for prosecution and conviction thereunder.

Whether violations of the provisions of s. 316.650, F. S., constitute criminal offenses within the purview of ss. 839.13 and 839.25, F. S., and meet the prerequisite element of criminal knowledge thereunder are mixed questions of fact and law which must be adjudicated or determined on a case-by-case basis by the local prosecuting officials and the courts. The Department of Legal Affairs has no authority or capacity to serve as a fact-finding forum in such matters.

Section 316.650, F. S., provides:

> (1) The department shall prepare, and supply to every traffic enforcement agency in this state, an appropriate form traffic ticket containing a notice to appear which shall be issued in prenumbered books with citations in quadruplicate and meeting the requirements of this chapter.
>
> (2) Every traffic enforcement officer, upon issuing a traffic citation to an alleged violator of any provision of the motor vehicle laws of this state or of any traffic ordinance of any city or town, shall deposit the original and one copy of such traffic citation with a court having jurisdiction over the alleged offense or with its traffic violations bureau.
>
> (3) Upon the deposit of the original and one copy of such traffic citation with a court having jurisdiction over the alleged offense or with its traffic violations bureau as aforesaid, the original or copy of such traffic citation may be disposed of only by trial in the court or other official action by a judge of the court, including forfeiture of the bail, or by the deposit of sufficient bail with or payment of a fine to the traffic violations bureau by the person to whom such traffic citation has been issued by the traffic enforcement officer.
>
> (4) *It is unlawful and official misconduct for any traffic enforcement officer* or other officer or public employee *to dispose of a traffic citation or copies thereof or of the record of the issuance of the same* in a manner *other than as required herein.*

(5) The chief administrative officer of every traffic enforcement agency shall require the return to him of a copy of every traffic citation issued by an officer under his supervision to an alleged violator of any traffic law or ordinance and of all copies of every traffic citation which has been spoiled or upon which any entry has been made and not issued to an alleged violator.

(6) The chief administrative officer shall also maintain or cause to be maintained in connection with every traffic citation issued by an officer under his supervision a record of the disposition of the charge by the court or its traffic violations bureau in which the original or copy of the traffic citation was deposited.

(7) Every chief administrative officer shall submit on or before the first day of each month a copy of the traffic citations to the Department of Highway Safety and Motor Vehicles.

(8) Such citations shall not be admissible evidence in any trial. (Emphasis supplied.)

This statute does not by its terms designate or define the unlawful disposal of traffic citations or copies thereof as a criminal offense, nor does it expressly provide any criminal penalties for violation thereof. For an act to be considered criminal, it is necessary that it be clearly so defined in the statutes. Unless the Legislature clearly makes an act criminally punishable by statute, that act, no matter how wrongful, cannot be considered a crime. Bradley v. State, 84 So. 677 (1920); Holmes v. State, 342 So.2d 134 (1 D.C.A. Fla., 1977). The absence of express language designating violations of s. 316.650(4), F. S., by administrative or enforcement officers or other officers or employees as crimes, and prescribing criminal penalties for violations, clearly indicates that such violations are not criminal offenses or criminally punishable.

Moreover, the Legislature has provided in s. 316.655, F. S., that a violation of *any* of the provisions of Ch. 316, F. S., except criminal offenses enumerated in subsection (4) thereof, shall be deemed an infraction, as defined in s. 318.13(3), F. S. This latter provision defines "infraction" to mean a noncriminal violation which is not punishable by incarceration and for which there is no right to a trial by jury or a court-appointed counsel. The criminal offenses enumerated in subsection (4) of s. 316.655, F. S., do not include violations of s. 316.650(4), F. S. I therefore conclude that violations of s. 316.650(4) must be deemed noncriminal violations or infractions punishable by civil penalties as provided in ss. 316.655 and 318.13.

Your inquiry directs my attention to ss. 839.13, 839.24, and 839.25, F. S., which are criminal statutes relating generally to offenses by public officers and employees and others. Section 839.25 relates to official misconduct by public servants and provides as follows:

(1) "Official misconduct" means the commission of *one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:*

(a) Knowingly refraining, or causing another to refrain, from performing a duty imposed upon him by law; or

(b) Knowingly falsifying, or causing another to falsify, any official record or official document; or

(c) Knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.

(2) *"Corrupt" means done with knowledge that act is wrongful and with improper motives.*

(3) Official misconduct under this section is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (Emphasis supplied.)

The Florida Supreme Court has held that s. 839.25(1)(c), F. S., is unconstitutional under the due process guarantees of the federal and state constitutions, in that it is too vague to give persons of common intelligence sufficient notice as to what conduct is outlawed, and is susceptible to arbitrary application. State v. DeLeo, 356 So.2d 306, 308 (Fla. 1978). The court also ruled that subsection (2) of the statute, defining the term "corrupt" and establishing a standard of scienter or criminal knowledge necessary to support a criminal prosecution under the statute, did not cure the deficiency.

The Supreme Court did not rule on the constitutionality of subsection (1)(a) and (b) of s. 839.25, F. S., and this office has no power to determine that issue. The "corrupt intent" element of the offenses proscribed by those provisions is the same, however, as that found unconstitutionally vague in conjunction with subsection (1)(c), and the court may well apply the same principles in ruling on subsection (1)(a) and (b) if that issue is presented to the court for determination. Assuming *arguendo* that paragraphs (a) and (b) of subsection (1) are valid, however, a municipal traffic enforcement officer or other municipal officer or employee charged under those provisions must also be shown to have acted "with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another."

Section 316.650(4), F. S., does not include any comparable element of corrupt intent or guilty knowledge, and does not expressly criminalize or prescribe criminal penalties for violations of s. 316.650, F. S. The determination of such matters and the prerequisite "corrupt intent" or guilty knowledge must be done on a case-by-case basis, and that determination is the province of the prosecuting officials and the court. This office is not a fact-finding agency and is without authority or capacity to adjudicate or determine such matters.

Section 839.24, F. S., provides as follows:

> A sheriff, county court judge, prosecuting officer, court reporter, stenographer, interpreter, *or other officer required to perform any duty under the criminal procedure law* who willfully fails to perform his duty shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. (Emphasis supplied.)

Under the rule of statutory construction ejusdem generis there is at least reasonable doubt that the phrase "or other officer" in the context of this statute would apply to a "traffic enforcement officer or public employee" under s. 316.650(4), F. S. The rule of construction requires that this general language, "or other officer," be limited to things in the same genus or class as the enumerated specific persons or things mentioned in the statute. *See* Van Pelt v. Hilliard, 78 So. 693 (1918). Consequently, it would appear that this statute applies only to officers in the same category as, or performing functions similar to, those officers enumerated in the statute.

Moreover, s. 316.650, F. S., is not the "criminal procedure law" to which s. 839.24, F. S., makes reference, nor is a municipal traffic enforcement officer or employee acting under the former statute performing, or required by terms thereof to perform, a duty under the "criminal procedure law." The "criminal procedure law" is Chs. 900-925, F. S. *See* s. 900.01, F. S. For these reasons, I conclude that s. 839.24 is inapplicable to alleged violations of s. 316.650(4), F. S.

Section 839.13, F. S., defines offenses relating to public records. The statute provides, in pertinent part, that it is unlawful to "steal, embezzle, alter, *corruptly* withdraw, falsify or avoid any record, process . . . or any paper filed *in any judicial proceeding in any court* of this state." (Emphasis supplied.) The statute also makes it unlawful "*knowingly and willfully* [to] take off, discharge or conceal any issue, forfeited recognizance, or other forfeiture, or *other paper above mentioned*." (Emphasis supplied.) The statute further makes it unlawful "*fraudulently* [to] alter, deface, or falsify any minutes, documents, books, or any proceedings whatever of or belonging to any public officer within this state." (Emphasis supplied.) Violation of the statute is punishable as a first degree misdemeanor.

Whether individual acts or omissions which constitute violations of s. 316.650, F. S., are criminal acts or offenses within the purview of s. 839.13, F. S., and whether the prerequisite element of criminal knowledge or corrupt or fraudulent intent existed at the time of such violations are mixed questions of fact and law which this office is without authority to adjudicate or determine. Such matters must be determined on a case-by-case basis by local prosecuting officials and the courts. This office is therefore unable to render any opinion as to the application of this criminal statute to unestablished facts (or acts or omissions) relating to any alleged disposition of traffic citations in a manner inconsistent with s. 316.650.

078-140—December 12, 1978

MUNICIPALITIES—POLICE OFFICERS

LEGAL DUTY OF MUNICIPAL POLICE OFFICERS TO PROVIDE AID DURING EMERGENCY—LIABILITY OF MUNICIPALITY LIMITED BY TERMS OF s. 768.28(5), F. S.

To: Paul Mannino, Chief of Police, Lighthouse Point

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

What are the limits of liability under the law that may be incurred when a police officer renders first aid or acts as a "back-up" to paramedics?

SUMMARY:

In view of Florida appellate court decision recognizing a common law duty of a municipal police officer to render aid to ill, injured, or distressed persons during an emergency and until and unless determined to the contrary by the Florida Supreme Court, municipal police officers are under a legal duty to provide aid to the ill, injured, and distressed during an emergency. Therefore, the provisions of s. 768.13, F. S., the Good Samaritan Act, would not be applicable to police officers acting within the scope of their employment. The liability of a municipality, if any, for the acts of its employee would be limited by the terms of s. 768.28(5), F. S., to $50,000 on the claim or judgment by any one person or a maximum of $100,000 on all claims or judgments arising out of the same incident or occurrence.

Your letter states that your department has been informed by its insurance carrier that it has only general liability coverage and does not possess any medical malpractice insurance. I have also been informed by your office that there is no charter provision, ordinance, or valid rule or regulation of the City of Lighthouse Point or its police department which imposes a duty such as providing first aid or acting as a "back-up" to paramedics upon its police officers, nor has any state statute imposing such a duty upon a police officer been brought to my attention.

The Florida Good Samaritan Act, s. 768.13(2), F. S., provides:

> Any person, including those licensed to practice medicine, who gratuitously and in good faith renders emergency care or treatment at the scene of an emergency outside of a hospital, doctor's office, or other place having proper medical equipment, without objection of the injured victim or victims thereof, shall not be held liable for any civil damages as a result of such care or treatment or as a result of any act or failure to act in providing or arranging further medical treatment where the person acts as an ordinary reasonably prudent man would have acted under the same or similar circumstances.

Generally, in the absence of a contractual, special professional, or trustee relationship or statutory requirement, a person is not under a legal duty to assist or care for the injured when the injury is not due to the fault of the person sought to be charged. *See* 65 C.J.S. *Negligence* ss. 4(4), 4(9) (duty, breach of which may constitute negligence, must be a legal duty); 63(104), and 63(107). *See also* Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967) (fundamental element of actionable negligence is the existence of a duty owed by person charged with negligence to person injured); Florida First National Bank of Jacksonville v. City of Jacksonville, 310 So.2d 19 (1 D.C.A. Fla., 1975), *cert. discharged*, 339 So.2d 632 (Fla. 1976); Drady v. Hillsborough County Aviation Authority, 193 So.2d 201 (2 D.C.A. Fla., 1966) (negligence is a breach of a legal duty). Moreover, a legal duty on any given set of facts exists only if the courts or the Legislature declares that there is a duty. 65 C.J.S. *Negligence* s. 4(9). The duty owed to a particular person by a

annually on January 1, conditioned upon the payment of the annual filing fee. These initial and annual filing fees are required only for limited partnerships; no filing fee is required for partnerships under part III of Ch. 620, F. S.

At the time Florida enacted its Limited Partnership Act in 1943, the statutory provisions dealing with filing fees for corporations were analogous to the fee statutes enacted for limited partnerships. *See* s. 612.58, F. S. 1943. On filing a certificate of incorporation, there was to be paid: "Two dollars for each one thousand dollars of *par value of stocks* authorized up to and including one hundred and twenty-five thousand dollars." (Emphasis supplied.) The distinction was that the filing fee for corporations was to be based upon the total amount of "par value" authorized up to the prescribed maximum rather than the amount of "invested capital." However, the par value of the stocks equals the amount of capital which the incorporators anticipate investors paying into the corporation for investment purposes. Therefore, "par value" was a legislatively used synonym for "invested capital" and both terms were used to express the capital which the investors or limited partners invested or contributed to the business and upon which they anticipate a return.

We can see then that an analysis of the entire context and purpose of part I of Ch. 620, F. S., points to the conclusion that the Legislature intended that the term "invested capital" apply or refer to the limited partners' contributions or capital contributions to the limited partnership. The limited partners' "contributions" are referred to throughout part I of Ch. 620 as the "capital" of the limited partnership. This line of reasoning is bolstered by the fact that the certificate or amended certificate is the only writing required to be filed and recorded with the Department of State and is, therefore, the only instrument from which the initial and annual filing fee required by s. 620.02(2)(b) could be determined. No annual returns or reports of any nature are provided for by the statute from which the department could calculate or determine an annual fee on any other basis. Moreover, the statute does not require any other amounts or data to be included in the recorded certificate or amended certificate which might indicate that the term "invested capital" could refer to anything other than the capital contributions of the limited partners.

The character of the limited partners' contributions is set forth in s. 620.04, F. S.: "The contributions of a limited partner may be cash or other property, but not services." These capital contributions can change in a number of ways, but in all instances these changes would be reflected either in the original certificate or in an amended certificate which is required to be filed and recorded with the Department of State. For example, s. 620.02(1)(a)7., F. S., requires that the original certificate when filed shall state the "additional contributions, if any, agreed to be made by each limited partner and the time at which or events on the happening of which they shall be made." Section 620.02(1)(a)8., F. S., requires the certificate to show "[t]he time, if agreed upon, when the contribution of each limited partner is to be returned." Also, s. 620.24(2)(a), F. S., requires that a certificate shall be amended when "[t]here is a change in the name of the partnership or in the amount or character of the contribution of any limited partner." Therefore, the recorded certificate or an amended certificate would at all times reflect accurately the total amount of the capital contributions by and investments of the limited partners in the limited partnership.

Based on the foregoing considerations and unless judicially determined otherwise, I conclude that the term "invested capital," in the context of part I of Ch. 620, F. S., and as employed in s. 620.02(2)(b), F. S., for purposes of the limited partnership law means the total capital contributions to or investments in a limited partnership by the limited partners as determined from the filed and recorded certificate or amended certificate required by s. 620.02, F. S.

AS TO QUESTION 2:

Various Florida statutes require the Department of State to deposit in the State Treasury filing fees or charges that they have collected pursuant to law. *See, e.g.*, ss. 15.09, 215.31, and 620.32, F. S. Section 620.32, F. S., requires the Department of State to pay into the State Treasury, to the credit of the General Revenue Fund, all moneys collected under the provisions of part I of Ch. 620. More generally, s. 215.31 requires that all

> [r]evenue, including licenses, fees, imposts or exactions collected or received under the authority of the laws of the state by each and every state official,

> office, employee, bureau, division, board, commission, institution, agency or undertaking of the state shall be promptly deposited in the State Treasury, and immediately credited to the appropriate fund . . . .

You question whether a partnership which has paid or overpaid a scheduled filing fee required by the Limited Partnership Law may obtain a refund from the Department of State for any overpayments or payments made in error. The general rule of law is that no such refund can be made unless there is a governing statute or law providing therefor. It is stated at 53 C.J.S. *Licenses* s. 57 (1948) that "the right to a refund of license fees and taxes is a matter of legislative grace," and further that "[t]he application for a refund must be made in the manner and within the time provided by the statute, and in compliance with such conditions as the statute may impose." Analogously, in discussing the refund of taxes, the Florida Supreme Court stated that "unless there is some statute which authorizes a refund or the filing of a claim for refund, money cannot be refunded or recovered once it has been paid." State *ex rel.* Victor Chemical Works v. Gay, 74 So.2d 560 at 562 (Fla. 1954). *See also* State *ex rel.* Butler's, Inc. v. Gay, 27 So.2d 907 (Fla. 1946). Florida Livestock Board v. Hygrade Food Products Corp., 145 So.2d 535 (1 D.C.A. Fla., 1962); AGO 075-293.

I can find no statutory or constitutional provision which authorizes the Department of State to make refunds for such fee overpayments or erroneous payments. Therefore, I conclude that the Department of State is not authorized by law to make any such refunds.

When a limited partnership has made an overpayment of a filing fee or payment not due under the governing laws or has made a payment erroneously in excess of that required by law, it may apply to the Comptroller for a refund pursuant to s. 215.26, F. S., which provides:

> (1) The Comptroller of the state may refund to the person who paid same, or his heirs, personal representatives or assigns, any moneys paid into the State Treasury which constitute:
> (a) An overpayment of any tax, license or account due;
> (b) A payment where no tax, license or account is due; and
> (c) Any payment made into the State Treasury in error;
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> * * * * *
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> (2) Application for refunds as provided by this section shall be filed with the Comptroller within 3 years after the right to such refund shall have accrued else such right shall be barred and such application shall be on a form to be prescribed by the Comptroller and shall be sworn to and supplemented with such additional proof as is necessary to establish such claim; provided, such claim is not otherwise barred under the laws of this state.

I am not aware of any statute authorizing or empowering the Department of State to refund filing fees collected by the department and paid into the State Treasury as required by law. Any claim for a refund for filing fees erroneously paid in excess of that required of a limited partnership accordingly must be made with the Comptroller, not with the Department of State.

078-150—December 22, 1978

DIVISION OF STATE PLANNING

MUST CHARGE THEREFOR WHEN LISTS OF NOTICES OF APPLICATIONS FOR DEVELOPMENTS OF REGIONAL IMPACT ARE MAILED

To: Wallace W. Henderson, Secretary, Department of Administration, Tallahassee

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTION:

Is the Division of State Planning required to charge and collect from all recipients a reasonable charge for costs of preparation and mailing of its biweekly list of all notices of applications for developments of regional impact pursuant to s. 380.06(9), F. S.?

SUMMARY:

Each and every "person," as defined in s. 380.031(12), F. S., including governmental agencies, to whom a list of notices of applications for developments of regional impact filed with the Division of State Planning is *mailed* by the division must pay a reasonable charge as required by s. 380.06(9), F. S., to cover costs of preparation and mailing. The division has no statutory authority to furnish such lists *by mail* to any person without charging and collecting the reasonable charge required by s. 380.06(9).

As part of its responsibilities regarding "developments of regional impact" under Ch. 380, F. S., "The Florida Environmental Land and Water Management Act of 1972," the Division of State Planning of the Department of Administration has been given the following duty by s. 380.06(9), F. S.:

> The state land planning agency *shall print* biweekly, and *mail to any person upon payment of a reasonable charge to cover costs of preparation and mailing,* a list of all notices of applications for developments of regional impact that have been filed with the state land planning agency. (Emphasis supplied.)

You stated that your request was prompted by the Auditor General's questioning of the practice of "providing free subscriptions [to the lists in question] to members of the Cabinet, the State's regional planning councils, numerous other State agencies and the news media."

In considering the above-quoted requirements it is essential to note that, while the state land planning agency (the division) is required to "print biweekly . . . a list of all notices of application . . . ," the prescribed "reasonable charge" payment is required only from those persons to whom the list is *mailed.* The division is not authorized to exact the charge from any person other than one to whom the list is furnished by and through the mails or postal system. The requirement now appearing in s. 380.06(9), F. S., was first enacted by Ch. 72-317, Laws of Florida. Part of the title of Ch. 72-317 supports the conclusion that the Legislature was concerned with the furnishing of the lists in question *by mail* when it imposed the "reasonable charge" requirement. The title describes the act as "providing for the mailing by the state land planning agency of a weekly list of development proposals having regional impact." (As first enacted, the act provided for weekly printing and mailing of the lists. That provision was subsequently amended to provide for biweekly printing and mailing.) While the title of an act is not an operative part of the basic act, it does serve the function of defining the scope of the act and providing notice thereof. Finn v. Finn, 312 So.2d 726, 730 (Fla. 1975); County of Hillsborough v. Price, 149 So.2d 912, 914 (2 D.C.A. Fla., 1963).

As used in and for the purposes of Ch. 380, F. S., "[p]erson" is defined by s. 380.031(12), F. S., to mean "an individual, corporation, *governmental agency,* business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal entity." (Emphasis supplied.) "Governmental agency" is defined in s. 380.031(5), F. S., to mean:

> (a) The United States or any department, commission, agency, or other instrumentality thereof;
> (b) This state or any department, commission, agency, or other instrumentality thereof;
> (c) Any local government, as defined in this chapter, or any department, commission, agency, or other instrumentality thereof;
> (d) Any school board or other special district, authority, or other governmental entity.

"When a statute contains a definition of a word or phrase that meaning must be ascribed to the word or phrase whenever repeated in the same statute unless a contrary intent *clearly* appears." Vocelle v. Knight Brothers Paper Company, 118 So.2d 664, 667 (1 D.C.A. Fla., 1960). *Accord:* Richard Bertram & Co. v. Green, 132 So.2d 24, 26 (3 D.C.A. Fla., 1961). No such contrary legislative intent is made evident in the context of s. 380.06, F. S., or any other section of Ch. 380, F. S. Thus, the statutory definitions set forth above control the operative meaning and terms of s. 380.06(9), F. S. Accordingly, *all* persons enumerated in s. 380.031(12), F. S., including all governmental agencies and instrumentalities listed in s. 380.031(5), F. S., to whom the "list of all notices of applications for developments of regional impact that have been filed with the state land planning agency [Division of State Planning]" is *mailed* by the division are required to pay to the division the prescribed charge to cover the costs of "preparation and mailing" of the lists in question.

The division is without express or implied statutory authority to mail such lists at the expense of the state or at the division's own expense to any individual, corporation, association, firm, group, or legal entity whatsoever. Administrative bodies created by statute have only those powers granted by statute and should not undertake to exercise any power or perform any function if there is doubt as to the existence of express or necessarily implied statutory authority. Edgerton v. International Company, 89 So.2d 488 (Fla. 1956); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973); Williams v. Florida Real Estate Commission, 232 So.2d 239 (4 D.C.A. Fla., 1970); State *ex rel.* Greenberg v. Florida State Board of Dentistry, 237 So.2d 628 (1 D.C.A. Fla., 1974), *cert. dismissed*, 300 So.2d 900 (Fla. 1974).

I am of the opinion, therefore, that the Division of State Planning must charge and collect from every "person" (as that term is defined in s. 380.031(12), F. S., including governmental agencies as defined in s. 380.031(5), F. S.) to whom is *mailed* a copy of the list of notices of applications for developments of regional impact a "reasonable charge to cover costs of preparation and mailing," pursuant to s. 380.06(9), F. S.

078-151—December 22, 1978

SHERIFFS

MAY NOT OFFICIALLY RECEIVE, PROCESS, OR DISBURSE PRIVATE PAYMENTS TO PRIVATE INSTITUTIONS NOR COMMINGLE WITH PUBLIC FUNDS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Carol Z. Bellamy, Assistant Attorney General

QUESTION:

Is a sheriff authorized to receive and process through his official accounts and records and to disburse on official checks membership payments or contributions made by private individuals to the Florida Sheriffs Association or the Florida Sheriffs Association Boys Ranch and Girls Villa?

SUMMARY:

A sheriff is not authorized by law to receive in his official capacity, process through his official accounts and records, and disburse on official checks private dues or membership payments and contributions or donations to private institutions; nor may a sheriff deposit such private funds in or commingle such private moneys with the public funds of the office, or with other official collections of the sheriff held in the statutorily required depository trust account of that office; nor may a sheriff incur expenses against or use the funds, facilities, personnel, equipment, or property of the office for such private functions and purposes.

Your question is answered in the negative.

Your letter states that during a postaudit of the office of a county sheriff, questions arose relating to the sheriff's activities in support of certain private nonprofit organizations. Specifically, you found on such audit that the sheriff had received from private individuals membership fees for the Florida Sheriffs Association and donations to the Florida Sheriffs Boys Ranch and Girls Villa, sponsored by the Florida Sheriffs Association. Upon receipt of these moneys, the sheriff recorded the same in his official accounts and records and disbursed such moneys to the appropriate private institution or organization by his official checks. You ask whether the sheriff is authorized to receive and disburse such private moneys in his official capacity. You also question the propriety of charging the expense of these activities, however small that expense may be, against the public funds budgeted and provided for the operation of the sheriff's office.

The sheriff is a county officer, s. 1(d), Art. VIII, State Const., and "[t]he powers, duties, compensation and method of payment of state and county officers shall be fixed by law." Section 5(c), Art. II, State Const. The Florida Supreme Court has held that this provision makes the powers and duties of sheriffs dependent upon legislative action. Lang v. Walker, 35 So. 78 (Fla. 1930), interpreting s. 6, Art. VIII, State Const. 1885, the predecessor of current s. 5(c), Art. II; *see also* AGO 075-161.

Chapter 30, F. S., provides specially and with particularity for the powers and duties of the sheriff and the procedures which govern the operation of his office. The specific enumeration of the powers, duties, and obligations of the sheriffs and their deputies contained in s. 30.15, F. S., makes no mention whatever of any activities or functions of the sheriffs or their deputies such as those implicit in your questions, and the provisions of that section neither expressly nor impliedly authorize the sheriffs or their deputies to receive and process through any official accounts or records and to disburse on office checks the membership dues and gifts or donations which are the subject of this inquiry. Nowhere do I find within Ch. 30, F. S., or any other general law of Florida any express statutory grant of authority to, or imposition of any duty on, the sheriffs from which any authority may be *necessarily* implied for them in their official capacity to receive and process through their official accounts and records these private dues, payments, and donations to private institutions in the manner you have described or to in anywise handle such moneys in an official capacity. For an implied power to exist there must be an express power or duty from which to infer it. Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). The sheriffs therefore are not authorized or empowered by law to carry on or perform in their official capacity the activities or functions in question.

If the sheriff is without statutory authority to perform the questioned activities—and I can find none—then there is no lawful authority or basis for the sheriff's office to incur expenses in the performance of such unofficial and unauthorized operations. This governing principle has been stated in previous opinions of the Attorney General with regard to sheriffs and other county officers.

> While an express power duly conferred may include implied authority to use means necessary to make the express power effective, such implied authority may not warrant the exercise of a substantive power not conferred. Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). Moreover, no state or county funds may be disbursed or expended for any purpose unless properly budgeted or appropriated as prescribed by law and in strict accordance with the procedures prescribed by specific legislative authorities.
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> * * * * *
>
> An implied power cannot exist in the absence of some express grant of authority or the express imposition of a duty. As stated in AGO 071-28, to perform any function for the state (or a county) or to expend any money belonging to the state (or a county), the officer seeking to perform such function or to incur such obligation against public funds must find and point to a constitutional or statutory provision so authorizing him to do. [Attorney General Opinion 076-191.]

See also AGO's 075-161, 078-94, and 078-101. The rules of law enumerated therein, though applied to other county officers and factual circumstances, are equally applicable to the sheriff and the question at hand. Moreover, the constitution prohibits the expenditure of

public money for a private purpose, and it matters not whether the money is derived from taxes or otherwise. State v. Town of North Miami, 59 So.2d 779 (Fla. 1952).

Sections 30.49 and 30.50, F. S., provide for the fiscal operation of the sheriff's office by budget appropriations from the board of county commissioners. The sheriff is required to 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," s. 30.49(2) (Emphasis supplied.), and 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.)

To receive, deposit, and disburse the moneys in question through the sheriff's office would necessarily involve personnel, paper, equipment, postage, and space of the office which has been provided by public funds. In my opinion such expenses are neither "reasonable" nor "necessary"; they are outside the scope of the sheriff's statutory authority, and, if permitted, would constitute an improper burden on the office, rather than promote its "proper and efficient operation." Those funds budgeted and appropriated for carrying out the powers and duties of sheriff and for the operations of his office may not be spent for such things as personnel, supplies, postage, equipment, and accounting and bookkeeping functions used for receiving and processing through official accounts and records and disbursing by official checks, dues, and donations from private persons for private nonprofit institutions or organizations, all of such functions being for private persons and organizations and for private purposes. Any such activity on the part of the sheriff is undertaken in a personal and individual capacity and NOT in his official capacity; public employees, public equipment, and public supplies—stationery or postage or official accounts and checks—may not be employed for such purposes.

Section 30.50(2), F. S., authorizes the sheriff to deposit the warrants for his budgeted county funds in his "*official* bank account" (Emphasis supplied.) in a "depository trust account," s. 30.50(3), F. S., and to "draw his own checks thereon in payment of the *salaries* of himself and his deputies, clerks and employees and the *expenses* of his office." (Emphasis supplied.) Section 30.50(4), F. S., requires the sheriff to keep necessary budget accounts and records, and to charge all paid bills and payrolls to the proper budget accounts. Section 30.51, F. S., requires all fees, commissions, or other remuneration authorized or provided for by law for the services of the sheriff to be collected and paid over to the county as provided therein, which fees or commissions may be deposited and commingled with other *official* collections in the aforementioned depository trust account. *Private* dues payments and *private* contributions or donations to *private* institutions are not mentioned in these statutes; their exclusion is thereby implied and the sheriff is not authorized to deposit private moneys in such accounts or make disbursements therefrom by official check for private purposes.

If the Legislature had intended to give the sheriff authority to collect, receive, disburse, and handle private funds from private individuals on behalf of private institutions, it would and easily could have provided therefor. Since the Legislature has expressly provided for the depository funds, fees, and commissions and the manner of handling them by the sheriff, those not included within the categories provided are impliedly excluded by operation of the rule of statutory construction *expressio unius est exclusio alterius*. *See* Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944); Interlachen Lake Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973). "An officer may not do everything not forbidden in advance by some legislative act." 67 C.J.S. *Officers* s. 102, at page 366. *See* AGO 075-161 (finding that sheriffs are without authority to retain vehicles found abandoned on public highways) which discussed the principle from White v. Crandon, 156 So. 303, 305 (Fla. 1934), applicable to constitutional officers that "where there is doubt as to the existence of authority, it should not be assumed."

Finally, that which the sheriff is not expressly or impliedly authorized by law to do in his official capacity may not be undertaken *unofficially with* the personnel, equipment, and facilities *of his office provided by public funds for designated public purposes. Cf.* s.

145.121, F. S., pertaining to funds derived from use of personnel, equipment, or space of the office of a county official, and providing that such funds shall be included as income of the office, and "[n]othing herein shall be construed as authorizing a county official to use his office or its personnel or property for a *private purpose*" and s. 219.02(2), F. S., prohibiting certain county officials from commingling public money with personal funds. Absent statutory authority therefor, the sheriff is without authority to commingle funds of his office with personal funds or private funds of any nature or to use the facilities, personnel, equipment, or property of the office for any private purposes.

You have directed my attention to AGO's 051-303, September 5, 1951, Biennial Report of the Attorney General 1951-1952, p. 51, 055-285, and 056-172, all of which were issued by this office at a time when sheriffs were fee officers, not budget or salaried officers, and before the enactment of present ss. 30.48, 30.49, 30.50, 30.51, 30.52, and 30.53, F. S. *See also* s. 30.231(3), F. S. Further, those opinions had to do with public funds and the expenditure thereof in connection with certain activities found to constitute official or public functions or purposes and as an incidental, legitimate, and proper charge or expense against the income of the office. Those opinions do not apply to or control the questions which are the subject of this opinion.

078-152—December 22, 1978

TAX COLLECTORS

SURPLUS FUNDS TO BE INVESTED IN LOCAL GOVERNMENT SURPLUS FUNDS TRUST FUND

To: Winifred S. Hill, St. Johns County Tax Collector, St. Augustine

Prepared by: Craig B. Willis, Assistant Attorney General

QUESTION:

May a tax collector having, receiving, or collecting any money, either for his office or for another office of state or local government, while such money is surplus to the current needs of his office or is pending distribution, invest such surplus funds in savings accounts in local banks and savings and loan associations?

SUMMARY:

Tax collectors are not authorized by law to invest funds, which have been received or collected either for their office or for another office of state or local government and which are surplus to the current needs of their office or are pending distribution, in savings accounts in local banks or in savings and loan associations.

Section 219.075, F. S., requires that, except as otherwise provided by law, tax collectors who have collected or received money for their office which is surplus to the current needs of their office, or who have collected or received money for another officer of state or local government which is pending distribution

> *shall invest such money, without limitation, in the Local Government Surplus Funds Trust Fund,* as created by s. 218.405, *or in bonds, notes,* or *other obligations of the United States guaranteed by the United States or for which the credit of the United States is pledged for the payment of the principal and interest or dividends.* These investments shall be planned so as not to slow the normal distribution of the subject funds. The investment earnings shall be reasonably apportioned and allocated and shall be credited to the account of, and paid to, the office or distributee, together with the principal on which such earnings are accrued.
>
> (2) Except when another procedure is prescribed by law, ordinance, or court order as to particular funds, the tax collector shall, as soon as feasible after

> collection, deposit in a bank designated as a depository of public funds, as provided in s. 659.24, all taxes, fees, and other collections received by him and held prior to distribution to the appropriate taxing authority. *Immediately after such funds have cleared and have been properly credited to his account, the tax collector shall invest such funds according to the provisions of this section.* The earnings from such investments shall be apportioned at least quarterly on a pro-rata basis to the appropriate taxing authorities. However, the tax collector may deduct therefrom such reasonable amounts as are necessary to provide for costs of administration of such investments and deposits. (Emphasis supplied.)

Section 2, Ch. 77-394, Laws of Florida, amended s. 219.075, F. S., by changing the statutorily enacted investment decision of the tax collector from discretionary to mandatory by substituting "shall invest" for "may invest" and by creating the Local Government Surplus Funds Trust Fund. *See* s. 218.405, F. S. Except where the context of a statute manifests a contrary legislative intent, the ordinary usage and meaning of the word "shall" is mandatory. *See, e.g.*, Florida Tallow Corp. v. Bryan, 237 So.2d 308 (4 D.C.A. Fla., 1970); White v. Means, 280 So.2d 20 (1 D.C.A. Fla., 1973). No such contrary intent can be gleaned from the statutory context or the legislative history of s. 219.075, F. S. Moreover, the title of Ch. 77-394 specifically makes evident the legislative intent to enact legislation "*requiring* tax collectors to deposit funds collected by them held prior to distribution to the appropriate taxing authority and to invest such funds" and requiring tax collectors "to invest surplus public funds in obligations of or obligations guaranteed by, the United States Government, or in the Local Government Surplus Funds Trust Fund." (Emphasis supplied.) When the Legislature has prescribed a particular way something is to be done, that mode must be followed. A controlling law directing how something is to be done is, in effect, a prohibition against its being done any other way. *See* Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 1976); Thayer v. State 335 So.2d 815 (Fla. 1976); Dodds v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Alsop v. Pierce, 19 So.2d 799 (Fla. 1944).

I can find no statutory authorization for the investment in local banks or savings and loan associations of "surplus funds," as defined by s. 219.075, F. S., either in this section or any other chapter or section of the Florida Statutes.

Based upon the above analysis, and applying the foregoing principles to your specific question, I conclude that tax collectors are not authorized by law to invest funds which are "surplus to the current needs of his office" or which are pending "distribution to another office of state or local government" in savings accounts in local banks and savings and loan associations.

Accordingly, your question is answered in the negative.

078-153—December 22, 1978

COUNTY HOSPITAL BOARD OF TRUSTEES

SPECIAL ACT CHANGING PROCEDURE FOR APPOINTMENT OF MEMBERS OPERATES PROSPECTIVELY—DOES NOT TERMINATE TERMS OF OFFICE OF INCUMBENT BOARD

To: John R. Weed, Attorney, Board of County Commissioners, Taylor County, Perry

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

> **Does a special act which substitutes the Taylor County Board of County Commissioners in place of the Governor as the appointing authority for the governing board of trustees of a county hospital operate to terminate the terms of office of the incumbent board members and thereby require the board of county commissioners to appoint a new board of trustees?**

SUMMARY:

A special act which substitutes the board of county commissioners in place of the Governor as the appointing authority of a county hospital governing board of trustees does not terminate the staggered terms of office of the incumbent members nor does such special act require or authorize the board of county commissioners to appoint an entire new board of trustees. To the contrary, such legislation appears to have been designed to operate prospectively; therefore, it authorizes the board of county commissioners only to appoint successors to the incumbent members upon the expiration of their terms of office. The successors must be appointed to serve the staggered terms of office of their predecessors.

Your question is answered in the negative.

Pursuant to Ch. 31319, 1955, Laws of Florida, as amended by Ch. 61-2938, Laws of Florida, the Taylor County Board of County Commissioners was authorized to enter into a lease purchase contract to purchase Taylor County Hospital. Prior to its amendment by Ch. 78-622, *infra*, s. 4 of Ch. 31319 provided for a governing board of trustees for the hospital (now apparently called Doctors Memorial Hospital) consisting of five members to be appointed by the Governor to serve staggered terms of 1 to 5 years. In addition, s. 8 of Ch. 31319 formerly required the members of the board to hold office until the appointment of their successors by the Governor.

The 1978 Legislature, however, amended s. 4 of Ch. 31319 to require the Board of County Commissioners of Taylor County rather than the Governor to appoint the five members of the hospital's governing board. Section 1, Ch. 78-622, Laws of Florida. This opinion assumes the validity of Ch. 78-622, *supra*. *See* s. 11(a)(1), Art. III, State Const., prohibiting the passage of special laws pertaining to the jurisdiction or duties of state and county officers, *cf.* Wilson v. Hillsborough County Aviation Authority, 138 So.2d 65 (Fla. 1962); and s. 1(f), Art. IV, State Const., which requires that vacancies in state or county office be filled by the Governor unless otherwise provided in the constitution, *cf.* Carol City Utilities Inc. v. Dade County, 183 So.2d 227 (3 D.C.A. Fla., 1966), and s. 114.04, F. S. Chapter 78-622 also amended s. 8 of Ch. 31319 to provide that the members of the hospital board therein provided for are to hold office until the appointment of their successors by the board of county commissioners. *Cf.* s. 5(b), Art. II, State Const., requiring, among other things, that each county officer qualifying for an office "continue in office until his successor qualifies." It is important to emphasize, therefore, that the substitution of the Taylor County Board of County Commissioners in place of the Governor as the appointing authority for the hospital board is the only textual change effected by Ch. 78-622.

From an examination of Ch. 31319, as amended, it is assumed that the members of the hospital governing board are statutory county officers. A public officer has been held to possess a property right in his office, which right may not be unlawfully taken away or illegally infringed upon. *See* Holley v. Adams, 238 So.2d 401, 407 (Fla. 1970); Piver v. Stallman, 198 So.2d 859, 862 (Fla. 1967). Accordingly, under the general rule, any elective or appointive officer, properly qualified and serving, remains such an officer until removed or the office becomes vacant by operation of law. 67 C.J.S. *Officers* s. 46, p. 199; *see also* State *ex rel.* Landis v. Bird, 163 So. 248, 254 (Fla. 1931), in which the Supreme Court observed that

> [a]n office which the law contemplates shall continue in existence as created until abolished remains in existence unless otherwise provided by law even though the beginning of the cycle terms of office be changed, and the incumbent continues in office after the expiration of his term until the new cycle term begins under an amendment of the law.

Thus, while it is clear that the Legislature is empowered to abolish an office even during the term of the incumbent (City of Jacksonville v. Smoot, 92 So. 617, 623 [Fla. 1922]), as well as to shorten terms of office even though occupied by an incumbent (Klein v. Shultz, 87 So.2d 406 [Fla. 1956]), it has been held that a legislative intention to do so must be clearly expressed in the statute or constitutional amendment before the enactment will be applied to oust an incumbent from office before the end of his term. *See* State *ex rel.* Reynolds v. Roan, 213 So.2d 425, 428 (Fla. 1968). No such legislative intent is clearly manifested in the title, purview, or body of Ch. 78-622, Laws of Florida.

In State *ex rel.* Reynolds v. Roan, *supra*, the Supreme Court ruled that a constitutional amendment which provided that school superintendents shall serve at the pleasure of their appointing board did not authorize a school board to oust the incumbent superintendent who had received a preamendment appointment from the board to serve for a fixed term beyond the amendment's effective date. The court explained its decision as follows:

> . . . [W]e think that an intention to apply the shortened term of an office or the changed qualifications thereof, to an incumbent, resulting in his ouster from the office before the end of his term, must be clearly expressed in the statute or constitutional amendment making the change before it will be given that effect. [213 So.2d at 428; emphasis supplied.]

Similarly, in Hancock v. Board of Public Instruction of Charlotte County, 158 So.2d 519, 522 (Fla. 1963), the court held that passage of a referendum approving a constitutional amendment making the office of county superintendent of public instruction appointive rather than elected did not terminate the term of the incumbent superintendent. To the contrary, the court ruled that the amendment did not purport to abolish the office of superintendent but merely constituted a "change in the method of selecting a person to fill *the office* of county superintendent of public instruction—when a vacancy might exist—this and nothing more." 158 So.2d 522. *Cf.* Hall v. Strickland, 170 So.2d 827, 831-832 (Fla. 1964), in which the court upheld an amendment to the Dade County Charter which terminated the offices of certain incumbent judges; the court noted that the amendment, by providing that appointment to the office of judge of the Metropolitan Court of Dade County would henceforth be subject to the approval of the electorate, worked a "substantial change in the method of selection" of such judges so as to justify the shortening of the terms of the incumbents.

Application of the foregoing principles to your inquiry leads me to conclude that Ch. 78-622 was designed to operate prospectively with regard to appointment of the members of the hospital board. *See* 82 C.J.S. *Statutes* s. 432, pp. 1005, 1006, stating the general rule that amendatory acts are ordinarily prospective in operation; *and see also* Hancock v. Board of Public Instruction of Charlotte County, *supra*, at 522. In other words, there is nothing in Ch. 78-622, Laws of Florida, which indicates that the Legislature intended to shorten the terms of incumbent members of the hospital board of trustees or to abolish the offices to which they were appointed by the Governor. To the contrary, Ch. 78-622 requires only that, upon the expiration of the term of an incumbent member of the board, his successor must be appointed by the board of county commissioners rather than the Governor. Moreover, it should be noted that s. 4 of Ch. 31319, as amended by Ch. 78-622, continues to require that the members of the hospital board serve staggered terms of office. Thus, for example, upon the expiration of an incumbent's 3-year term of office, his successor should be appointed to serve an identical 3-year term.

078-154—December 22, 1978

CLERKS OF CIRCUIT COURTS

SERVICE CHARGES—PROBATE—COUNTY COURT FILINGS—SUMMARY CLAIMS

To: Arthur H. Beckwith, Jr., Clerk, Circuit Court, Sanford

Prepared by: Craig B. Willis, Assistant Attorney General

QUESTIONS:

1. Does the $2 additional service charge required by s. 28.241(1), F. S., for each civil action filed in the circuit court apply to probate matters or proceedings in the circuit court?

2. Does the $2 additional service charge required by s. 28.241(1), F. S., for civil actions filed in circuit court apply to civil actions and proceedings filed in the county court, including summary claims?

SUMMARY:

Clerks of the circuit courts should charge and collect the $2 service charge required by s. 28.241(1), F. S., for all probate filings not included in the scheduled charges of s. 28.2401, F. S. Clerks of the circuit courts should not exact this $2 additional service charge for county court filings, including summary claims.

AS TO QUESTION 1:

Section 28.241(1), F. S., provides, *inter alia*:

> *The party instituting any civil action, suit, or proceeding in the Circuit Court shall pay to the clerk of said court a service charge of $20* in all cases in which there are not more than five defendants, and an additional service charge of $1 for each defendant in excess of five. . . . *An additional service charge of $2 shall be paid to the clerk for each civil action filed, such charge to be remitted by the clerk to the State Treasurer for deposit into the General Revenue Fund unallocated.* (Emphasis supplied.)

Section 4, Ch. 75-124, Laws of Florida, amended s. 28.241(1), F. S., by, *inter alia*, enacting the requirement of a $2 additional service charge, which is the subject of your inquiry. While this amendatory act was probably constitutionally defective since the title of Ch. 75-124 referred only to the section number, s. 28.241(1), being amended, *see* McConville v. Ft. Pierce Bank & Trust Co., 135 So. 392 (Fla. 1931), this defect was subsequently cured by the adoption by the Legislature of the 1977 Florida Statutes, s. 11.2421, F. S. *See* Spangler v. Florida State Turnpike Authority, 106 So.2d 421 (Fla. 1958); Rodriguez v. Jones, 64 So.2d 278 (Fla. 1953); State *ex rel.* Badgett v. Lee, 22 So.2d 804 (Fla. 1945); AGO 069-29. The meaning and scope of this additional $2 service charge is determined by its location in subsection (1) of s. 28.241, F. S. This "additional service charge of $2" has to be additional to some other charge within s. 28.241(1). The basic and only specified service charge in s. 28.241(1) is the $20 service charge the "party instituting any civil action, suit, or proceeding in the Circuit Court" must pay to the clerk of the circuit court. Therefore, the additional $2 service charge is additional to the $20 service charge which is paid by the "party instituting any civil action, suit, or proceeding in the Circuit Court," and should be charged and collected only in those civil actions, suits or proceedings for which the $20 service charge required by s. 28.241(1) is exacted. Thus, the question becomes: In what instances should the $20 service charge be charged and collected, and consequently the $2 additional service charge?

Prior to the 1972 Florida constitutional revision, which extensively changed Article V, the judicial article of the constitution, the scope and application of the service charges required by s. 28.241(1), F. S. 1971, were clear and unambiguous. Previous to 1972, Florida's Constitution and the fee statutes prescribing service charges divided Florida's judiciary on the trial court level into a number of distinct courts. Section 1, Art. V, State Const. 1968, provided:

> The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish.

Pursuant to this section, the Legislature established the civil courts of record. *See* Ch. 33, F. S. 1971 (repealed by Ch. 72-404, Laws of Florida). Section 33.02, F. S. 1971, specified the jurisdiction of these civil courts of record. The clerks of the civil courts of record received as compensation for their services the same charges as the clerks of the circuit court received for similar services. Thus, the party instituting any civil action, suit, or proceeding in a civil court of record paid his service charge to the clerk of the civil court of record.

Section 34.01, F. S., statutorily established the jurisdiction of the county courts granted by s. 8, Art. V, State Const. And s. 34.041, F. S. 1971, specified that "[u]pon the institution of any civil or criminal action, suit, or proceeding in the county court of any county, there

shall be paid by the party or parties so instituting such action, suit or proceedings service charges as provided in ss. 28.24 and 28.241 for clerks of the circuit court."

Prior to the 1972 revision of the State Constitution, there were also county judges' courts. The jurisdiction of these county judges' courts was set out in s. 36.01, F. S. 1971. The county judge had:

> (1) Original jurisdiction in all cases at law in which the demand or value of property involved shall not exceed one hundred dollars, said jurisdiction to extend throughout the county;
> (2) Original jurisdiction of proceedings relating to the forcible entry and unlawful detention of lands and tenements which shall include actions for forcible entry and unlawful detainer and proceedings against delinquent tenants;
> (3) Jurisdiction of the settlement of estates of decedents and minors; to take probate of wills; to order the sale of real estate of minors; to grant letters testamentary, of administration and of guardianship; and to discharge the duties usually pertaining to courts of probate;
> (4) Original jurisdiction, in counties where there are no county courts or criminal courts of record, to try and determine all misdemeanors committed in his county; and
> (5) The power of a committing magistrate.

Section 36.19, F. S. 1971, stated:

> Upon the institution of any civil action, suit or proceeding in the county judges' court of any county of the state, there shall be paid by the party or parties so instituting such action, suit or proceeding, as and for fees of the county judge, for all services to be performed by him therein, in lieu of all other fees heretofore charged, except as hereinafter provided, the sum of five dollars.

Thus, we can see from the foregoing that prior to the constitutional revision of Article V, State Const., the fee statutes found in ss. 28.241, 33.04, 34.041, and 36.19, F. S. 1971, were not less ambiguous or more certain in their application than the present text of s. 28.241(1), F. S., which is the subject of your inquiry. However, Article V of the 1968 State Constitution, prior to its revision in 1972, and the statutes setting out the jurisdiction of the several different trial and initial proceedings courts made these fee statutes certain as to the scope of their application. The fee was to be paid only for an action, suit, or proceeding filed in the court with jurisdiction over the subject matter of said action, suit, or proceeding, and was paid pursuant to the provisions of that court's fee statute. For example, the county judges' court had jurisdiction over probate and guardianship matters (s. 36.01[3], F. S. 1971), and thus all fees for probate and guardianship matters were paid pursuant to ss. 36.17-36.19, F. S. 1971. *See also* Ullendorff v. Brown, 24 So.2d 37, at 40 (Fla. 1945) setting out the county judges' court's jurisdiction with regard to probate and guardianship proceedings.

The 1972 constitutional revision abolished the county judges' courts as well as the other various trial-level courts specified in former s. 1, Art. V, State Const. The jurisdiction of these various courts was lodged either in the circuit courts or in the county courts. No other trial-level courts are allowed by the 1972 revision; *see* s. 1, Art. V, State Const. All probate and guardianship jurisdiction is today in the circuit court. *See* s. 20(c)(3), Art. V, State Const.

The Florida Legislature responded to the 1972 revision by amending s. 36.17, F. S. 1971, to deal exclusively with filing fees for probate matters and this section was relocated to s. 28.2401, F. S., which deals with clerks of the circuit courts. *See* Ch. 72-397, Laws of Florida.

Subsequently, the 1975 Legislature amended s. 28.241(1), F. S., by lowering the service charge from $5 to $2 for granting a severance and by adding the $2 additional service charge for "each civil action filed." *See* s. 4, Ch. 75-124, Laws of Florida. We can see then that the question becomes: Did the judicial reorganization of Article V in 1972 and the subsequent statutory modifications operate to require that the service charges called for by s. 28.241(1) be applied to probate and guardianship proceedings?

The paramount rule of statutory construction is that legislative intent should be ascertained and effectuated, if at all possible. Lewis v. Mosely, 204 So.2d 197 (Fla. 1967); State Dept. of Public Welfare v. Bland, 66 So.2d 59 (Fla. 1953); Ervin v. Peninsular

Telephone Co., 53 So.2d 647 (Fla. 1951). A secondary rule of statutory construction is that "statutes on the same subject should be harmonized when possible, but that a statute dealing specifically with a subject takes precedence over another statute concerning the same subject in general terms." State v. Young, 357 So.2d 416, at 417 (2 D.C.A. Fla., 1978). In the face of the constitutional revision of Article V, s. 28.2401, F. S., was transferred from repealed Ch. 36 dealing with county judges' courts, retained as a fee schedule separate from the more general filing fees of s. 28.241, F. S., and subsequently modified and expanded to deal with, among other things, a variety of probate and guardianship matters. Thus, as a general conclusion, the Legislature has evinced an intent to perpetuate the separate fee treatment of probate and guardianship matters from the filing charges of s. 28.241, F. S.

The title of s. 28.241, F. S., which reads "[f]iling charges for trial and appellate proceedings," is a part of the act being enacted and, since it was placed at the heading of this section by the Legislature, it can thus be used as an aid in construing the provisions of the section to determine legislative intent. *See* Board of Public Instruction of Broward County v. State *ex rel.* Allen, 219 So.2d 430 (Fla. 1969); Berger v. Jackson, 23 So.2d 265 (Fla. 1945); Jackson Lumber Co., v. Walton County, 116 So. 771 (Fla. 1928). *See also* AGO 057-314. Probate and guardianship proceedings have not been in the past, nor are they presently, considered in the ordinary use of the words to be a trial or appellate proceeding. It has been stated that "[a] proceeding to probate a will is generally regarded as a special proceeding, equitable in nature, and *ex parte.* Its purpose, strictly, is to establish the legal status of an instrument as a will, or, more broadly, to determine the disposition of a decedent's property." 95 C.J.S. *Wills* s. 308 (1957). Section 731.105, F. S., defines probate proceedings as "in rem proceedings." The Second District Court of Appeal stated in *In re* Estate of Biederman (Biederman v. Cheatham), 161 So.2d 538, at 541 (2 D.C.A. Fla., 1964): "The probate of a will is a judicial proceeding to establish the legal status of the purported will and to furnish the means of establishing by record evidence [sic] the validity of rights existing thereunder. Probate is not an action; it is in the nature of a proceeding in rem." *See also, In re* Estate of Williamson (Hoffman v. Murphy), 95 So.2d 244, at 246 (Fla. 1957), stating the same proposition. However, a probate proceeding becomes an adversary proceeding in the nature of a civil suit or action for certain types of probate matters. Rule 5.025(a), Florida Rules of Probate and Guardianship Procedure, states:

> The following shall be deemed adversary proceedings:
> (1) Proceedings to revoke a will, probate a lost or destroyed will, probate a later-discovered will, determine beneficiaries, construe a will, cancel a charitable bequest, partition property for the purposes of distribution, determine and award the elective share; and
> (2) Any other proceeding which shall be determined by the court to be an adversary proceeding.

This is the Florida Rule of Probate and Guardianship Procedure which implements s. 731.107, F. S. Section 731.107 requires that "[t]he rules of civil procedure shall be applied in any adversary proceeding in probate." Subsection (b)(2) of Rule 5.025 provides that "[a]fter service of formal notice, such [adversary] proceedings as nearly as practical shall be conducted similar to suits of a civil nature and the Rules of Civil Procedure shall govern, including entry of defaults."

In *In re* Estate of Estes (Lacy v. Estes), 158 So.2d 794, at 796 (3 D.C.A. Fla., 1963), the court, in deciding whether the rules of civil procedure, and particularly rules of discovery, should be allowed in a will contest filed pursuant to s. 732.30, F. S. 1963, stated:

> A proceeding for revocation and to have a will declared invalid is no less a "civil matter" or "action" because filed in a probate case, than it would be if filed separately. The proceeding is one conferred by statute, and would be by separate suit except that the statute directs it to be filed in the probate case. Such a will contest is a civil matter—a "case" or "action." It is commenced by an initial pleading setting forth the interest in the estate which is held by the petitioner and the grounds relied on for seeking a determination of invalidity of a probated will. The representative of the estate is made defendant. Other parties interested may join and prosecute or defend. Issues bearing on the validity of the will are made on the pleadings and tried by the court, and a

> decision is rendered thereon holding the challenged will to be valid or invalid. It is common knowledge that some such cases require days or even weeks for trial, in the course of which many witnesses may appear and a large number of documents be involved. Such cases and their preparation may present fitting if not compelling occasions for use of discovery procedures.

Section 732.30, *supra*, was the predecessor to present s. 733.109, F. S., which is one of the enumerated matters deemed to be adversary proceedings by Rule 5.025, PGR. Further, petitions filed pursuant to s. 732.30, *supra*, were considered the institution of a "civil action suit or proceeding" for which the general filing fee of s. 36.19, F. S. 1971, (*see* above for text of statute), was required.

When the county judges' courts were constitutionally dismantled in 1972 and the jurisdiction for probate and guardianship matters transferred to the circuit court, the fee schedule for these matters was transferred to s. 28.2401, F. S., and later expanded to encompass a variety of fee requirements for probate, guardianship, and other matters. But the matters deemed by Rule 5.025, PGR, to be adversary proceedings are not included in the schedule of service charges in s. 28.241, F. S. These are the probate matters that were formerly charged by s. 36.19, F. S. 1971, the general filing fee section for county judges' courts. Compare the text of s. 36.19, set out above, with the text of present s. 28.241(1), F. S. These two statutes are similar in their wording and purpose. Both are general filing-charge statutes intended to be applied to all filings made in the court having jurisdiction over the subject matter, except where otherwise provided for by law. The Legislature, by retaining and expanding s. 28.2401, has evinced an intent to specifically charge for certain enumerated probate and guardianship matters. However, the general filing-charge section, s. 28.241, should be applied, as was former s. 36.19, to all probate and guardianship matters not specifically enumerated in s. 28.2401. It is therefore my conclusion that while the $20 service charge and the $2 additional service charge required by s. 28.241 should not be exacted for probate and guardianship matters specified and charged by s. 28.2401 these two service charges should be charged and collected for all other matters not specified in the schedule of s. 28.2401.

AS TO QUESTION 2:

You secondly question whether the $2 additional service charge provided for in s. 28.241(1), F. S., for trial proceedings in the circuit courts should apply to actions and proceedings in county court, including summary claims.

Again, the primary rule for construing the terms of a statute is that the legislative intent should be determined and effectuated, if at all possible. Lewis v. Mosely, *supra*; State Dept. of Public Welfare v. Bland, *supra*; Ervin v. Peninsular Telephone Co., *supra*. If the Legislature had intended that an additional $2 service charge be exacted for filings in the county court, it could have easily so provided by adding this charge to the terms of s. 34.041(1), F. S. Chapter 75-124, Laws of Florida, did not purport to amend s. 34.041(1) or add any other service charges to it. Moreover, the $2 additional service charge is additional to the $20 service charge to be paid by the "party instituting any civil action, suit, or proceeding in the Circuit Court" and should be charged and collected only for those filings for which the basic $20 service charge is made in the circuit court. This $2 additional service charge is not additional to any service charges made in the county court.

078-155—December 22, 1978

MUNICIPALITIES

APPLICABILITY OF COUNTY SEWER SYSTEM AND SANITARY SEWER FINANCING LAW

To: Don J. Caton, City Attorney, Pensacola

Prepared by: Joslyn Wilson, Assistant Attorney General

QUESTION:

Does the language "district, private corporation, board, body or person supplying water to or selling water for use on such premises" contained in s. 153.12(2)(b), F. S., include a municipal corporation?

SUMMARY:

Until judicially or legislatively determined to the contrary, any municipality supplying water to or selling water for use on any premises serviced by or connected to a county sanitary sewer or sewage disposal system is included within the purview of s. 153.12(2)(b), F. S., a part of the County Water System and Sanitary Sewer Financial Law, and the terms "any . . . body . . . supplying water to or selling water for the use on" any premises as provided therein, and is subject to and governed by the terms thereof.

As hereinafter qualified, your opinion is answered in the affirmative. This opinion is limited to the precise question raised in your letter; no opinion is expressed as to the legal consequences of a county or a municipality disconnecting or failing or refusing to shut off water service to any person or premises for nonpayment of county sewer bills under the provisions of s. 153.12(2)(b), F. S.

Section 153.12(2)(b), F. S., provides in pertinent part:

> [I]f such owner, tenant or occupant shall not cease such disposal [of sewage or industrial waste for nonpayment of the user fees or charges] at the expiration of such 30-day period, *it shall be the duty* of *any district*, private corporation, *board, body* or person *supplying water to or selling water for use on such premises to cease supplying water to or selling water for the use on such premises* within 5 days after receipt of notice of such delinquency from the county; and that *if such district*, private corporation, *board, body* or person *shall not*, at the expiration of such 5-day period, *cease supplying water* to or selling water for use on such premises, *then the county may unless it has theretofore contracted to the contrary, shut off the supply* of water to such premises. (Emphasis supplied.)

No provision of part I of Ch. 153, F. S., or of s. 153.12(2)(b), F. S., defines the terms "district, private corporation, board, body or persons" as used therein, nor does the section expressly or specifically refer to a municipality. *Cf.* s. 153.03(1) and (10), F. S., specifically referring to municipalities and other public corporations and persons in certain particulars relating to the furnishing of sewage collection and disposal services and enjoining the pollution of a county source of water supply by "any persons or corporations, public or private," or the violation of "any provision of this chapter," except as to "any existing contract that a municipality may have for water or sewage disposal without the consent of both parties to said contract." I am unaware of and no judicial decision has been brought to my attention which considered, applied, or defined these or similar statutory terms in a similar or related context to that in which they are used in s. 153.12(2)(b), F. S.

Section 1.01(9), F. S., however, defines the phrase "public body" as used in the Florida Statutes, where the context will permit, to 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.) Although s. 153.12(2)(b), F. S., does not use the exact language of s. 1.01(9), it seems clear that the term "body" as it appears in the phrase "*any* district, private corporation, board, body or person *supplying water to* or selling water for the use on such premises" (Emphasis supplied.), within the context of that section and the provisions and purposes of part I of Ch. 153, F. S., as a whole, encompasses by necessary implication *all* public bodies "supplying water to or selling water for the use on such premises" or a "public body" as defined by s. 1.01(9), as well as private corporations or persons who may be furnishing or supplying water service to the owner or occupant of those premises designated in the statute. As there is nothing in the language of part I, Ch. 153, to inhibit such a construction or manifesting any legislative intent to the contrary and in view of the overall purpose of the statute, I am of the view that any municipality "supplying water to or selling water for the use on"

any premises serviced by or connected to a county sanitary sewer or sewage disposal system is included within the purview of s. 153.12(2)(b) and the terms "any . . . body . . . supplying water to or selling water for use on such premises," and is subject to and governed by the terms thereof. Therefore, unless and until it is judicially or legislatively determined otherwise, it is my opinion that the term "body," as used in s. 153.12(2)(b), includes a municipality within the definition of the term "public body" set forth in s. 1.01(9).

Section 153.12(2)(b), F. S., assuming the constitutionality *vel non* thereof, expressly imposes a *duty* on any such municipality within 5 days after receipt of the prescribed notice of delinquency from the county "to cease supplying water to or selling water for use on" any premises serviced by or connected to such county's sanitary sewer or sewage disposal facilities or systems. The statute does *not* make any provision for invoking any penalties against or compelling any such municipality to disconnect or to shut off its supply of water to such premises except as may be provided for in s. 153.03(10), F. S.; but upon its failure or refusal to do so, the county is *authorized* to shut off the supply of water (by the municipality) to any such premises. The statute is presumptively valid and it must be given effect until it is judicially declared unconstitutional. *See* Evans v. Hillsborough County, 186 So. 193, 196 (Fla. 1938); White v. Crandon, 156 So. 303, 305 (Fla. 1934); City of Sebring v. Wolf, 141 So. 736 (Fla. 1932); State *ex rel.* Gillespie v. Thursby, 139 So. 372, 375 (Fla. 1932); State *ex rel.* Atlantic Coastline R. Co. v. State Board of Equalizers, 94 So. 661, 682 (Fla. 1922).

As stated above, no opinion is expressed as to the legal consequences of either the county or the municipality shutting off water service supplied by the municipality to any premises or persons as provided in s. 153.12(2)(b), F. S., or as to the failure or refusal of either body to do so as therein provided or as to any violations of any of the provisions of Ch. 153, F. S., or any resolution validly adopted pursuant to the powers granted thereby as provided in s. 153.03(10), F. S. Any remaining questions as to such matters should be submitted to the courts for resolution in an appropriate proceeding for a declaratory judgment.

078-156—December 27, 1978

STATE UNIVERSITIES

SURPLUS PROPERTY—PROCEDURE FOR SALE AND DISTRIBUTION OF PROCEEDS FROM STATE-OWNED TANGIBLE PERSONAL PROPERTY

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTIONS:

1. What is the proper procedure to be followed for the disposal by public sale of surplus tangible personal property of state universities?
2. What is the proper disposition of the proceeds derived from said sales?

SUMMARY:

The proper procedure for disposal of surplus tangible personal property of state universities is for certification and transfer of such property to the Division of Surplus Property in accordance with Ch. 273, F. S., and the rules and regulations of that division. The money received by the division from the disposition of such property is to be deposited into the State Surplus Property Working Capital Trust Fund.

Chapter 67-231, Laws of Florida, created the Board of Regents and granted to it the power, *inter alia*, "to make purchases of real and personal property and to contract for the sale and disposal of the same." This provision is codified at s. 240.042, F. S.

071-157 in which this office stated that the prohibition against providing additional compensation for county officials designated in Ch. 145, F. S., applies only to special laws or general laws of local application (population acts) and does not prevent the Legislature from providing additional compensation to county officials designated in Ch. 145, F. S., on a uniform statewide basis:

> It follows that it is entirely proper for the counties to contribute county funds toward retirement and social security benefits for county officers and employees—including the county officials designated in Ch. 145, *supra*—as authorized by s. 121.061, F. S. [Attorney General Opinion 071-157.]

See also s. 121.051, F. S., which requires participation in the Florida Retirement System by all officers and employees employed on or after December 1, 1970, and s. 121.021(11), F. S., which defines "officer or employee" as used therein 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."

The clerk of the circuit court is a constitutional county officer who serves not only as clerk of the court but as county clerk, accountant, auditor and custodian of county funds. *See* s. 16, Art. V and s. 1(d), Art. VIII, State Const.; s. 28.12, F. S. The amount of compensation payable to the clerks of circuit court is set forth in s. 145.051, F. S. Section 145.121(1), F. S., provides that any fees or charges received in excess of the salary provided in Ch. 145, F. S., are considered to be "income of the office."

> *Except for the salary receivable under this chapter, all fees*, costs, salaries, commissions, extra compensation, *or any other funds which are paid or payable to a county official or to his office, either by law or on account of any service* (including, for the purposes of this section, service arising out of official duties, ex officio duties, and private nonofficial acts) performed by the official for any agency or instrumentality of the state or of any county or municipality in the state, or for any officer, board, district, authority, or unit of state or local government, or for individuals, wherein any of the personnel, equipment, or space of the office is employed, *shall be included as income of the office and shall not be retained by the county official as personal income.* Nothing herein shall be construed as authorizing a county official to use his office or its personnel or property for a private purpose. (Emphasis supplied.)

See s. 218.36(2), F. S., which requires that on or before the date for filing the annual report, "each county officer shall pay into the county general fund all money in excess of the sum to which he is entitled under the provisions of chapter 145." *See also* s. 218.35(2), F. S., which requires the clerk of the circuit court, functioning as clerk of the court and as clerk of the board of county commissioners, to prepare his budget in two parts:

> (a) The budget relating to the state court system, including recording, which shall be filed with the state courts administrator as well as with the board of county commissioners; and
> (b) The budget relating to the requirements of the clerk as clerk of the board of county commissioners, county auditor, and custodian or treasurer of all county funds and other county-related duties.

Section 121.021(10), F. S., defines the term "employer" as used in Ch. 121, F. S., as:

> . . . any agency, branch, department, institution, university, institution of higher education, or board of the state, *or any county agency, branch, department, board,* district school board, or special district of the state, or any city of the state which participates in the system for the benefit of certain of its employees. (Emphasis supplied.)

I am not aware of any judicial decision interpreting this provision nor has any such decision been brought to my attention. In Parker v. Hill, 72 So.2d 820 (Fla. 1954), however, the court considered whether a deputy sheriff was an employee within the meaning of the Workmen's Compensation Act. The court concluded that a deputy sheriff was not an "employee" but an "officer not elected at the polls" *of the county* and therefore the county, not the sheriff, was liable for compensation benefits. *See also* AGO 076-8, in

which this office stated that a property appraiser, a constitutional officer, is a county official and his employees are *county* employees even though employed and paid by him from funds budgeted with the approval of the Department of Revenue and derived from taxing authorities other than the county; AGO 073-363. *Cf. In re* Florida Board of Bar Examiners, 268 So.2d 371 (Fla. 1972), in which the court stated that the board of bar examiners was "a state agency under the judicial branch of the government and its employees are state employees just as, for example, legislative employees under the legislative branch are state employees"; thus, the board's employees were entitled to participate in the state's group insurance program. It is evident that the clerk and the employees of his office are county officers and employees; however, the term "employer" as defined in s. 121.021(10), F. S., specifically includes "*any county agency, branch, department* [or] board." (Emphasis supplied.) Thus, the term "employer" as used in Ch. 121, F. S., would appear to include the clerk's office as a department or agency of the county.

Section 121.061(1), F. S., requires that all employers withholding contributions of members (as defined in s. 121.021[12], F. S., to include officers and employees), under Ch. 121, F. S., for the purpose of providing retirement benefits and social security benefits to and on behalf of such members

> . . . shall budget, set aside, and pay over to the administrator, for deposit into the proper retirement and social security trust funds, matching payments for retirement and social security contributions as required by this chapter.

See s. 121.021(5), F. S., defining "administrator" as used in Ch. 121, F. S., to mean the director of the Division of Retirement. Since 1975, however, no retirement contributions from members have been required. *See* s. 121.071(3)(a), F. S., as amended by s. 5, Ch. 78-308, Laws of Florida. *See also* s. 121.071(2), F. S. (1978 Supp.), which provides that "[e]ffective October 1, 1978, each employer shall contribute 9.10 percent of gross compensation each pay period for each of its regular members, and 13.95 percent of gross compensation each pay period for each of its special risk members." Each employer *and* member, however, is required to contribute to social security in the amount required for social security coverage as provided by the Federal Social Security Act, in addition to the contributions specified in s. 121.071(2) and (3), F. S. (1978 Supp.). Section 121.071(4), F. S. (1978 Supp.). Section 121.071(5), F. S. (1978 Supp.), requires that the employers pay into the system trust funds contributions made in accordance with subsections (2), (3), and (4) in accordance with rules promulgated by the administrator pursuant to Ch. 120, F. S. In the case of retirement contributions, an employer will be assessed a delinquent fee of one half of 1 percent of the contributions due for each calendar month or part thereof that the contributions are delinquent. Delinquent social security contributions are assessed a delinquent fee as authorized by s. 650.05(4), F. S.

If the contributions required by Ch. 121, F. S., are not paid by any employer (other than a state employer), then, upon request by the administrator, the Department of Revenue or the Department of Banking and Finance, as the case may be, shall deduct the amount owed by the employer from any funds to be distributed by it to the county, municipality, special district, or consolidated form of government and transfer the amounts so deducted to the administrator for further distribution to the trust funds. Section 121.061(2)(a), F. S. *See also* s. 121.061(2)(b), F. S., which provides that the tax collector, at the request of the administrator and upon receipt of a certificate from the administrator showing the amount owed by the employer, "shall deduct the amount so certified from any taxes collected for the employer and remit the amount to the administrator for further distribution to the trust funds in accordance with this chapter." Moreover, the governing body of each county, municipality, special district, or consolidated form of government participating in the Florida Retirement System or the administrator may, individually or jointly, sue the employer to require it to remit retirement or social security contributions due the retirement or social security trust funds. Section 121.061(2)(c), F. S.

The appropriations for each state agency are to include sufficient funds to pay the contributions required for social security and retirement as required by Ch. 121, F. S., and a state agency is precluded from employing any person on its payroll unless it has allotted sufficient funds to meet the required payments. Section 121.061(3), F. S. The clerk of the circuit court, however, is required to prepare a budget relating to the requirements of the clerk as clerk of the board of county commissioners. *See* s. 218.35(2)(b), F. S.; *see also* s. 218.35(1), F. S., requiring that each fee officer establish an

annual budget for his office clearly reflecting the revenues available to the office and the functions for which the money is to be expended. Section 121.061(1), F. S., expressly requires an "employer" to budget and set aside such contributions. Thus the clerk should budget for these contributions and when required pay over all such contributions to the retirement and social security trust funds through the Division of Retirement. If the clerk fails to pay over such contributions to the administrator, the governing body of the county or the administrator may jointly or individually file an action in the courts to require the clerk to remit any retirement or social security contributions due. Section 121.061(2)(c), F. S.; *see also* s. 121.061(2)(a), F. S. If, however, the income of any constitutional fee officer is not sufficient to make such payments, section 121.061(2)(d), F. S., provides that the board of county commissioners "shall provide such fee officer sufficient funds to make the required payments when due." Thus the Legislature has prescribed when a board of county commissioners may properly pay such contributions from county commission funds. The authority of public officers to proceed in a particular way or only upon specific conditions implies a duty not to proceed in any other manner than that which is authorized by law. Alsop v. Pierce, 19 So.2d 799 (Fla. 1944); White v. Crandon, 156 So. 303, 305 (Fla. 1934); First National Bank of Key West v. Filer, 145 So. 204, 207 (Fla. 1933). *Cf.* State *ex rel.* Barquet, 358 So.2d 230 (3 D.C.A. Fla., 1978), *cert. denied*, Case No. 54,578 (Fla., filed Dec. 18, 1978), in which the court held that s. 501.207, F. S., clearly provides the methods by which the state may enforce the provisions of the "little F.T.C. Act," and since the state's attempted enforcement of Ch. 501, F. S., was not a method provided for by statute nor grounded upon the law in Florida, the court affirmed the lower court's order dismissing the complaint.

Therefore, under the provisions of s. 121.061(2)(d), the board of county commissioners may provide a constitutional fee officer with sufficient funds from its own funds to make the payments required under Ch. 121, F. S., *if* the income of the clerk as a county fee officer is not sufficient to make such payments; in the absence of a legislative or judicial determination to the contrary, however, I am of the opinion that the county may not otherwise properly pay from county commission funds such contributions.

If, however, the clerk is a county officer operating his office under funds budgeted and paid over to his office by the board of county commissioners and the clerk is unable to make the retirement and social security contributions, there is no provision similar to s. 121.061(2)(d), F. S., which would authorize the board of county commissioners to provide the clerk with sufficient money from its own funds to make the required payments. In the absence of such statutory authorization, I am of the opinion that the board of county commissioners may not make such payments to the retirement and social security trust funds from its own funds on behalf of the clerk, as a county budget officer, and his employees. The board of county commissioners may, however, amend an existing county budget to provide *county* funds for the purpose of making these payments when the funds appropriated for such a purpose were insufficient. *See* s. 129.06(2), F. S., which provides in pertinent part that the board of county commissioners may amend a budget at any time within the fiscal year by reducing appropriations for expenditures in any fund and correspondingly increasing other appropriations in the same fund by motion recorded in the minutes, provided that the total of the appropriations of the fund is not changed, or applying the appropriations from the reserve for contingencies to increase the appropriation for any particular expense in the same fund or to create an appropriation in the fund for any lawful purpose provided no expenditure is directly charged to the reserve for contingencies. *See also* AGO 064-73. Such amendments to the county budget to provide for such contributions and any disbursements made thereto, however, must be made in accordance with Ch. 129, F. S.

078-160—December 29, 1978

STATE MONEYS

PAYMENT OF TERMINATION CHARGES PURSUANT TO CONTRACT FOR TELEPHONE SERVICE

To: Thomas Brown, Executive Director, Department of General Services, Tallahassee

Prepared by: Frank A. Vickory, Assistant Attorney General

QUESTIONS:

1. Is a contract between a state agency and a telephone company void and unenforceable insofar as it requires the payment of termination charges when service is terminated prior to the expiration of the contractual period?

2. If question 1 is answered negatively, can termination charges be made from the agency's general funds or must there be a specific line-item entry in the approved budget expressly providing for such charges?

SUMMARY:

To the extent that the requirement in a telephone service contract for payment of "termination charges" in the event of termination of telephone services prior to the end of the contract period is otherwise lawful, a state agency may lawfully contract to pay such charges and they are not invalid by virtue of either s. 216.311, F. S., or s. 1(c), Art. VII, State Const. No specific line-item entry in either the Legislature's appropriation to the agency or the agency's own budget is required for such payment to be valid.

Your questions appear to have arisen from the following factual situation. Various state agencies have entered into contracts with various telephone companies for the provision of communication services. Often, such contracts require the payment of "termination charges" if service is discontinued at the agency's request prior to the expiration of the contract period. I gather from information you have furnished to me that a typical contract provision for such charges provides substantially as the following provision.

> If for any reason the CENTREX System covered by this agreement is disconnected in its entirety, a termination charge in the amount of $1,425,000.00 shall be paid by the customer based on installment cost, plus cost of removal, less salvage value, reduced by 1/60th for each month from the date of installation of the equipment, subject to appropriation of the Florida Legislature.

I further gather that when an agency receives its appropriation from the Legislature for "expenses," such funds are allocated in the agency's budget among the various expenses necessary to run the office, *e.g.*, "telephone service," etc.

The question has apparently arisen whether the payment of termination charges pursuant to a provision such as that quoted above would violate the requirements of s. 216.311, F. S. That section provides in pertinent part:

> **216.311 Unauthorized agency contracts in excess of appropriations, prohibited; penalty.—**
>
> (1) No agency of the state government shall contract to spend, or enter into any agreement to spend, any moneys in excess of the amount appropriated to such agency unless specifically authorized by law, and any contract or agreement in violation of this chapter shall be null and void. . . .
>
> (2) Any person who willfully contracts to spend, or enters into an agreement to spend, any money in excess of the amount appropriated to the agency for whom the contract or agreement is executed is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Specifically, you seek to ascertain whether payment of termination charges violates the quoted statutory provision and, even if such charges can be paid, whether they can be paid only pursuant to a specific line-item entry in the agency's budget or whether they can be paid from the agency's general funds.

Generally, it can be stated that rules of law pertaining to the contracts of a governmental body or agency are no different from those which apply to any other contract. 73 C.J.S. Supp. *Public Contracts* s. 2. Therefore, it seems clear as a general proposition, that the state and the telephone company are bound by contractual provisions lawfully entered into. It must be assumed, when a contract is written in clear,

unambiguous terms, that the language employed represents the intent of the contracting parties and accordingly full effect will be given such terms. Nevertheless, I note that the Constitution and laws of Florida are a part of every contract entered into in Florida. Bd. of Public Instruction v. Bay Harbor Island, 81 So.2d 637 (Fla. 1955); General Development Co. v. Catlin, 139 So.2d 901 (3 D.C.A. Fla., 1962).

Accordingly, the provisions of s. 1(c), Art. VII, State Const., s. 216.311, F. S., and similar statutory and constitutional provisions limiting or restricting the entering into contracts by governmental agencies are a part of every such contract entered into in the state even though not expressly made a part thereof.

The purpose of the statute in question and of the constitutional provision quoted is to prevent the expenditure of public moneys without the consent of the people as expressed by their elected representatives in legislative acts. These provisions secure to the Legislature the exclusive power to determine how, when, and for what purpose the public moneys will be spent in running and conducting the affairs of government and the maximum amount that can be spent for a specific purpose. Lainhart v. Catts, 75 So.47 (Fla. 1917); State *ex rel.* Davis v. Green, 116 So.66 (Fla. 1928); *see also* AGO's 066-90 and 071-28. Such appropriations consist of the setting apart of money out of public revenues for a specific use or purpose, and in such manner that the state's executive officers will have the authority to withdraw and use such money for such specific purpose or object and for no other. State *ex rel.* Kurz v. Lee, 163 So. 859 (Fla. 1935).

Before any expenditures may be made by any executive officers of the government from state funds, there must be a specific appropriation authorizing the expenditure in question. Florida Development Commission v. Dickinson, 229 So.2d 6 (1 D.C.A. Fla., 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970); AGO's 068-12, 071-28.

Any such officer, in order to incur any obligation against the moneys of the state, must find and point to an appropriate constitutional or statutory authorization. (It was held in Thomas v. Askew, 270 So.2d 707 (Fla. 1972), that such legislative authorization may be contained in the General Appropriations Act.) Section 216.311, F. S., prohibits the officer from spending or agreeing to spend any money in excess of the amount appropriated to such agency.

While the questions you pose concern various state agencies presumably operating under various appropriations items, I assume that each has entered into contracts with the telephone company pursuant to an appropriation for "expenses," though such appropriations may be broken down in the agency's own budget for various expenses necessary to run the agency, including telephone service. In any event, it appears that the courts have recognized the great difficulty inherent in requiring an appropriation action to specify in minute detail every expenditure authorized and the exact amount that may be spent for each expenditure. It has been said that "the fact that an appropriation measure vests wide discretion in the persons entrusted with the expenditure thereof does not affect its validity." 25 Fla. Jur. *Public Funds* s. 18; State v. Lee, 27 So.2d 84, 87 (Fla. 1946). In *In re* Opinion to the Governor, 239 So.2d 1, 9 (Fla. 1970), it was noted by the Supreme Court that "in the early history of the State, it was customary for such bills to fix in minute detail each authorized expenditure. In later years appropriations to state offices and for state activities have been in large sums and have been more flexible as to how these funds may be expended." A New York court has stated that "details must not run into absurdities and only those details need be given which are necessary and appropriate to show where and for what the money is to be expended." Saxton v. Carey, 403 N.Y.S.2d 779 (N.Y. App. 1978).

Hence, while an appropriation must be specific enough so as not to result in an unbridled delegation of legislative power to the executive branch, and must accordingly specify the amount to be spent and the purpose and object for each appropriation, AGO 078-28, minute detail is not required. Applying these principles to the instant fact situation, it would appear that the appropriation for "expenses," pursuant to which an agency entered into the contract for such services, would at least be sufficient to permit such contract to contain any lawful provisions common to such a contract and reasonably related to its purpose. I gather from your letter that the telephone companies are authorized by the Public Service Commission to require termination charges as a part of their service contracts. Hence, such charges appear to be a lawful provision of such contracts.

As noted previously, when contract terms are clear and unambiguous, it is assumed that they represent the intent of the parties to the contract and they will accordingly be given their plain meaning and effect. I also call your attention to AGO 075-217, in which I stated that the clear language of a contract provision nearly identical to the one of

concern here required payment of the termination charge *only* for termination of the "Centrex System" and did not require or authorize payment for termination of a unit or a piece or pieces of equipment. The same language and accordingly the same conclusion apply in the present contract.

In response to your first question, it is my opinion that a contract between a state agency and a telephone company may lawfully and validly require a termination charge to be paid if service is terminated prior to the end of the initial contract period. The constitutional requirement for an appropriation before public moneys can be expended for any purpose would appear to me to be met in the situation under consideration so long as the contracting for telephone services can fairly be said to be within the agency's appropriation for "expenses" and the contract requires a "termination charge." This is so regardless of how an appropriation may be broken down into "telephone service" and other specific lawful expenses in the agency's own budget. The requirement of s. 216.311, F. S., would also appear to be met so long as there are sufficient funds in the agency's appropriation for "expenses" to cover the termination. Accordingly, in response to your second question, it is my opinion that a line-item entry in the agency's approved budget for "termination charges" is not required before such charges may be validly paid.

078-161—December 29, 1978

SUNSHINE LAW

NONPROFIT PRIVATE CORPORATIONS—NOT SUBJECT TO SUNSHINE LAW UPON RECEIPT OF PUBLIC FUNDS

To: Art Clark, President, West Coast Mental Health Board, Inc., Sarasota

Prepared by: Patricia R. Gleason, Assistant Attorney General

QUESTION:

Does the receipt of public funds by private nonprofit corporations under contract with a district mental health board to provide mental health services subject to such corporations to the requirements of the Government in the Sunshine Law?

SUMMARY:

The receipt of public funds by a private nonprofit corporation under contract with a district mental health board to provide mental health services does not, standing alone, subject such private nonprofit corporation to the requirements of the Government in the Sunshine Law.

Your question is answered in the negative.

Your letter advises that the West Coast Mental Health Board contracts with several "private nonprofit corporations for service delivery." You further state that each of these organizations receives state or county funds.

The Government in the Sunshine Law, s. 286.011, F. S. (1978 Supp.), provides in pertinent part:

> (1) All meetings of any board or commission . . . of any agency or authority of any county, municipal corporation or any political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times . . . .

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 over which it has dominion or control." *See also* City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). Thus, the Sunshine Law is inapplicable to a private organization which is *not* a state or local governmental agency, or subject to the control of the Legislature, and which does

not serve in an advisory capacity to such a state or local governmental agency. *See* AGO's 078-40 and 076-194. *Cf.* Town of Palm Beach v. Gradison, *infra*. Moreover, as concluded in AGO 074-22, the fact that a private nonprofit organization receives public funds does not, standing alone, subject such an agency to the requirements of the Sunshine Law. The Legislature has not amended the Sunshine Law so as to alter the conclusion reached in AGO 074-22; hence, the statements made in that opinion apply with full force and effect to your inquiry.

I have also considered whether the various private nonprofit entities listed in your letter are subject to the requirements of the Sunshine Law by virtue of their contractual relationship with the district mental health board. *See* AGO 076-202, in which this office opined that district mental health boards were public agencies within the contemplation of s. 286.011, F. S.

In Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), the Supreme Court ruled that a citizens' planning committee appointed and established by a municipal governing body to act in an advisory capacity to the governing body was subject to the Sunshine Law. *See also* 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."

However, a contract between a nonprofit private corporation and a district mental health board in which the private corporation agrees to provide mental health services as authorized and contemplated by the Community Mental Health Services Act, part IV of Ch. 394, F. S. (*see* s. 394.74, F. S., authorizing district mental health boards to contract for services with public and private mental health service providers), does not in itself constitute a delegation of the district board's governmental or legislative powers to the private organization. Thus, the principles espoused in *Town of Palm Beach* do not govern the instant inquiry. *Cf.* AGO 078-106, in which this office concluded that private service providers or subcontractors (such as mental health clinics) are not, by virtue of their contractual relationship with the board, "state agencies or subdivisions" within the definitional purview of s. 768.28, F. S.

078-162—December 29, 1978

FLORIDA SCHOOL FOR THE DEAF AND THE BLIND

BOARD OF TRUSTEES TO DEPOSIT GIFTS OR BEQUESTS IN STATE TREASURY

To: Ernest Ellison, Auditor General, Tallahassee

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

QUESTIONS:

1. Is the Board of Trustees of the Florida School for the Deaf and the Blind required by law to deposit moneys received by it pursuant to gifts or charitable bequests in the State Treasury or may it deposit such funds in an outside depository of its choice?

2. Is the Board of Trustees of the Florida School for the Deaf and the Blind empowered by law to manage and invest moneys received by it pursuant to gifts or charitable bequests or is such management and investment function reposed in the State Board of Administration?

SUMMARY:

The Board of Trustees of the Florida School for the Deaf and the Blind is empowered to accept gifts and bequests of moneys in furtherance of the duties, purposes, and functions of said school authorized by law. Immediately upon receipt of such funds, the same become public funds which must be identified as to source and promptly deposited in the State Treasury to be held in a trust account for the specific use for which they

were contributed. The investment of such funds is, pursuant to s. 215.44(1), made the responsibility of the Board of Administration, and the Board of Trustees of the Florida School for the Deaf and the Blind is without authority in law to separately deposit any gifts or bequests of moneys outside of the State Treasury or to independently invest any such gifts or bequests.

Pursuant to s. 242.331(4), F. S., the Board of Trustees of the Florida School for the Deaf and the Blind is invested with the full power and authority to effectuate the proper management, maintenance, support, and control of the Florida School for the Deaf and the Blind, subject however to the requirement in s. 242.331(3) that the board act at all times in conjunction with and under the supervision and general policies adopted by the State Board of Education. Your opinion request notes that the Florida School for the Deaf and the Blind in the name of the board of trustees has received gifts and bequests of moneys to be used in furtherance of the purposes and functions of the Florida School for the Deaf and the Blind. Your opinion request specifically is directed to the duties and responsibilities under law of the board of trustees upon receipt of such moneys as well as in connection with the management and investment of such funds.

Initially it is to be noted that the Board of Trustees of the Florida School for the Deaf and the Blind does have authority to receive such gifts and bequests of money. The Florida Supreme Court in the case of Advisory Opinion to the Governor, 200 So.2d 534, 536 (Fla. 1967), held that no constitutional impediment existed to the receipt and use by the state or its officials of contributions from citizens "provided the same are received and used for a public purpose in the manner authorized by the legislature." The court further noted that legislative authorization for the acceptance of such contributions existed pursuant to s. 215.32(2)(b)1. pursuant to which the Legislature created a fund within the State Treasury denominated "trust fund" which "shall consist of moneys received by the state which under law or under trust agreement are segregated for a purpose authorized by law." The court in reaching its decision also referenced the requirements of s. 215.31 which requires that all revenues received under authority of law by any state official, office, employee, bureau, division, board, commission, institution, or agency shall be promptly deposited in the State Treasury except as otherwise provided by law.

In a clarification to the above-cited opinion, Advisory Opinion to the Governor, 201 So.2d 226 (Fla. 1967), the court held that gifts and contributions received by a state official pursuant to law:

> . . . immediately upon receipt thereof . . . become public funds which must be identified as to source and promptly deposited in the State Treasury to be held in a trust account for the specific use for which they were contributed.
>
> 3. Thereafter, they cannot be disbursed from the Treasury except pursuant to specific legislative authority . . . . [*supra* at 227]

Pursuant to the above-referenced cases, the Board of Trustees of the Florida School for the Deaf and the Blind would be authorized to receive gifts and bequests of moneys for the furtherance of the functions and duties and responsibilities of the Florida School for the Deaf and the Blind as are authorized by law. Pursuant to Advisory Opinion to the Governor, 201 So.2d 226 (Fla. 1967) and ss. 215.31 and 215.32, such moneys immediately upon their receipt by the board of trustees become public funds which must be identified as to source and be promptly deposited in the State Treasury. Pursuant to s. 215.32(2)(b)1., such funds are to be held in the State Treasury in a trust fund for the specific use for which they were contributed. Pursuant to s. 215.32(2)(b)3., such moneys are automatically appropriated by the Legislature for the purpose for which they were received and their expenditure pursuant to law in accordance with the trust agreement under which they were received is authorized "subject always to other applicable laws relating to the deposit or expenditure of moneys in the State Treasury."

The requirements of s. 215.31 that all revenues received by any state official, board, or institution be deposited in the State Treasury except "as otherwise provided by law" require express legislative authorization for the deposit of funds in a depository selected by any such board or official. An example of such express authorization is found in s. 402.18(1), F. S., which provides that:

> All moneys now held in any auxiliary, canteen, welfare, donated or similar fund in any state institution under the jurisdiction of any division under the Department of Health and Rehabilitative Services shall be deposited in the Welfare Trust Fund of that division, which fund is hereby created in the State Treasury, or in a place which the department shall designate.

In the duties and responsibilities of the Board of Trustees of the Florida School for the Deaf and the Blind as enumerated by the Legislature in s. 242.331, no such express authorization is provided to depart from the mandatory legislative requirements embodied in ss. 215.31 and 215.32. Consequently, the first question posed at the outset of this opinion is answered in accordance with the mandatory legislative requirement that such gifts and bequests of moneys to the Board of Trustees of the Florida School for the Deaf and the Blind be immediately deposited upon receipt in the State Treasury to be held in a trust account for the specific use for which they were contributed.

The legislative authorization for the investment of the public moneys of a state agency is found in s. 215.44(1) which provides:

> Except where otherwise specifically provided by the State Constitution and subject to any limitations of the trust agreement relating to a trust fund, the Board of Administration, hereinafter sometimes referred to as 'board,' composed of the Governor as chairman, the State Treasurer, and the State Comptroller, shall 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.

Section 216.011(1)(e) defines a state agency as "any official, officer, commission, board, authority, council, committee, or department of the executive branch . . . ."

The Florida School for the Deaf and the Blind is an educational institution owned by the State of Florida and constitutes a part of the executive branch of government. *See* s. 2, Art. IX, State Const., s. 242.331, and AGO 075-150. Further, the Board of Trustees of the Florida School for the Deaf and the Blind is likewise a part of the executive branch of state government and pursuant to s. 242.331(3) is required to act at all times in conjunction with and under the supervision of and general policies adopted by the State Board of Education, which is the head of the Department of Education. *See* s. 20.15(1).

Consequently, the Board of Trustees of the Florida School for the Deaf and the Blind clearly falls within the definition of a state agency pursuant to s. 216.011(1)(e), and investment of trust funds and agency funds of the Florida School for the Deaf and the Blind is governed by s. 215.44(1). Pursuant to s. 215.49(1) it is the duty of each state agency charged with the administration of funds referred to in s. 215.44 to make such moneys available for investment as fully as is consistent with the cash requirements of the particular fund and it must transfer such funds to the board for investment. Since statutory authority does not exist for the deposit outside of the State Treasury of gifts and bequests of money to the Board of Trustees of the Florida School for the Deaf and the Blind, and since administrative bodies are purely creatures of the Legislature and are limited to the exercise of those powers provided by the legislative enactments creating such bodies, Edgerton v. International Company, 89 So.2d 488 (Fla. 1956), and State *ex rel.* Greenberg v. Florida State Board of Dentistry, 297 So.2d 628 (1 D.C.A. Fla., 1974), the Board of Trustees of the Florida School for the Deaf and the Blind is without authority in law to independently invest (or separately deposit outside of the State Treasury) any moneys received from such gifts or bequests. Consequently, your second question posed at the outset of this opinion is answered in favor of the investment power over trust funds and agency funds of the Florida School for the Deaf and the Blind being reposed solely, in accordance with s. 215.44(1), in the Board of Administration.

078-163—December 29, 1978

FEDERAL COURT

FORECLOSURE CASES—OFFICIALS DESIGNATED TO REPRESENT STATE OR COUNTY

To: John W. Briggs, U.S. Attorney, Middle District of Florida, Jacksonville

Prepared by: Maxie Broome, Jr., Assistant Attorney General

QUESTIONS:

1. What state officials are empowered to appear on behalf of the State of Florida and represent a lienhold interest of the State of Florida in a federal mortgage foreclosure action in federal court?

2. Is a public defender empowered under s. 27.56, F. S., to represent the State of Florida in federal foreclosure action in federal court wherein the "public defender lien" is subject to being extinguished?

SUMMARY:

Unless otherwise provided by statute, the Attorney General and the Office of the Attorney General, and the Department of Legal Affairs, of which the Attorney General is the department head, are the only state officials statutorily authorized to represent the state in suits in federal courts involving state agencies or departments holding a state lien on property being foreclosed in federal court.

As of the effective date of s. 27.56, F. S., as amended by s. 1, Ch. 77-264, Laws of Florida (October 1, 1977), the board of county commissioners of the county in which assistance was rendered, rather than the public defender, is empowered to enforce judgments and liens *on behalf of said county* in federal foreclosure actions in federal court wherein the "public defender lien" is subject to being extinguished.

Section 6, Art. IV, State Const., provides in pertinent part:

> *All functions of the executive branch of state government shall be allotted among not more than twenty-five departments*, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be *placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor* . . . . (Emphasis supplied.)

Section 4(c), Art. IV of the State Constitution provides that the attorney general shall be the chief state legal officer.

Section 16.01, F. S., in pertinent part reads:

> The Attorney General *shall . . . perform the duties prescribed by the Constitution of this state, and also perform such other duties appropriate to his office, as may from time to time be required of him by law or by resolution of the Legislature*; he shall . . . appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party; or in anywise interested, in the Supreme Court and district courts of appeal of this state; he shall appear in and attend to such suits or prosecutions in any other of the courts of this state, or in any courts of any other state, or of the United States . . . . (Emphasis supplied.)

Section 16.015, F. S., in pertinent part, 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. Each board, however designated, of which the Attorney General is a member may retain legal services in lieu of those provided by the Attorney General and the Department of Legal Affairs. (Emphasis supplied.)

As can be seen from a reading of the foregoing, it is the constitutional duty of the Attorney General to serve, by way of the Department of Legal Affairs, as chief state legal officer to the various departments exercising executive functions of state government. Unless otherwise provided in the constitution, such departments are placed either under the direct supervision of the Governor, the Lieutenant Governor, the Governor and Cabinet, a Cabinet member, or an officer or board appointed by and serving at the pleasure of the Governor.

Pursuant to s. 16.015, F. S., the Department of Legal Affairs, which department is headed by the Attorney General, shall be responsible for providing all legal services required by any department unless otherwise provided by law. In those instances where the Attorney General is the legal representative of a particular department, he may authorize other counsel where emergency circumstances exist, and he shall authorize other counsel when professional conflict of interest is present.

It seems clear that *unless otherwise provided by some statute*, the Attorney General and the Office of the Attorney General and the Department of Legal Affairs, of which the Attorney General is the department head, are the only state officials statutorily authorized to represent the *state* in suits in federal courts involving the Department of Commerce or the Department of Revenue *or any other state agency or department* holding a *state* lien on property being foreclosed in federal court.

The answer to your second question is in the negative.

Section 27.56, F. S., prior to its amendment by s. 7 of Ch. 67-539, Laws of Florida, was derived from s. 3, Ch. 63-410, Laws of Florida, and consisted of but a single paragraph. Section 7 of Ch. 67-539, retained the provisions of s. 27.56, prior to its amendment without change, designating said section as subsection (1) of the revised or amended section, and adding thereto revised subsections (2) and (3), subsection (2) being divided into three paragraphs; s. 27.56. F. S., as amended read as follows:

(1) There is hereby created a lien, enforceable as hereinafter provided, upon all the property, both real and personal, of any person who is receiving or has received any assistance from any public defender of the state. Such assistance shall constitute a claim against the applicant and his estate, enforceable according to law in an amount to be determined by the court in which such assistance was rendered. Immediately after such assistance is rendered and upon determination of the value thereof by the court, a statement of claim showing the name and residence of the recipient shall be filed for record in the office of the clerk of the circuit court in the county where the recipient resides and in each county in which such recipient then owns or later acquires any property. Said liens shall be enforced on behalf of the state by the several public defenders, and shall be utilized to reimburse the state to defray the costs of the public defender system. The lien herein created shall be a continuing obligation, irrespective of any statute of limitations.

(2)(a) In lieu of the procedure above described, the court is authorized to require that the recipient of the public defender's services execute a lien upon his real or personal property, presently-owned or after-acquired, as security for the debt created hereby for the value of the services rendered or to be rendered by the public defender. Such lien shall be recorded by the public defender in the public records of the county at no charge by the clerk of the circuit court and shall be enforceable in the same manner as mortgages.

(b) The board of county commissioners of the county wherein the recipient is tried is authorized to enforce, reduce to judgment, satisfy, compromise, settle, subordinate, release, or otherwise dispose of any debt or lien hereby imposed.

(c) No lien thus created shall be foreclosed upon the homestead of such recipient.

(3) The court having jurisdiction of the defendant-recipient, may, at such stage of the proceedings as the court may deem appropriate, determine the value of the services of the public defender, at which time the defendant, after adequate notice thereof, shall have opportunity to be heard and offer objection

> and to be represented by counsel, with due opportunity to exercise and be accorded the procedures and rights provided in the laws and court rules pertaining to civil cases at law.

Prior to amendment, the original and first subsection of s. 27.56, F. S., created a lien upon the property of the person receiving assistance from the public defender or his assistant, which lien constituted a claim against the person receiving such assistance and his estate. Said liens were then enforced on behalf of the State of Florida by the several public defenders and were to be utilized to reimburse the state to defray the costs of the public defender system. Those provisions provided a procedure for enforcing the lien against persons receiving assistance from public defenders, which prior to the effective date of Ch. 67-539, Laws of Florida, was the sole and only procedure for enforcing the said lien. Section 27.56(2)(a), F. S., provided that: "In lieu of the procedure above described" the procedure set out in paragraph (a) may be used to enforce the said lien. This procedure differed from that set out in subsection (1) in that it provided for the filing of the statement of the claim as therein provided, while subsection (2) provided a procedure by which the person receiving the assistance made and executed a written lien, under the supervision of the court. The two lien procedures resulted in liens against the property of the defendant which were subject to enforcement in the circuit court. The right to the lien and the proceeds therefrom was explicitly in the state.

As evidenced in AGO 067-85, it was felt that the provision in s. 27.56(2)(b), F. S., that: "The board of county commissioners of the county wherein the recipient is tried is authorized to enforce, reduce to judgment, satisfy, compromise, settle, subordinate, release or otherwise dispose of any debt or lien hereby imposed" was not sufficient to vest title or right to the lien or its proceeds in the county or in the board of county commissioners as such. There it was said:

> The relationship of the said board of county commissioners to the state is that of ex officio officers; the statute makes the county commissioners ex officio state officers for the purpose of s. 27.56, F. S. The Supreme Court of Florida, in Carlton v. Mathews, 103 Fla. 301, 137 So. 815, text 842, recognized the power of the Florida Legislature to make the state treasurer an ex officio county treasurer for a proper purpose, so long as his duties as county treasurer do not conflict with his duties as state treasurer. We see no conflict of interest or duties which would prohibit a board of county commissioners from performing the functions required of them by s. 27.56(2)(b), F. S. The right of the legislature to impose additional duties upon an officer, even to the extent of requiring him to perform ex officio duties for other officers and offices, has been recognized by the Florida courts. The legislature appears to have made the boards of county commissioners of the several counties ex officio state officers, charged with the enforcement of such liens and the administration thereof, for and in behalf of the state, to the extent provided for in s. 27.56(2)(b), F. S.

By way of s. 1 of Ch. 77-264, Laws of Florida, the language to the effect that said liens were to be enforced on behalf of the state by the several public defenders and the language to the effect that liens were to be utilized to reimburse the state to defray the costs of the public defender system was stricken from s. 27.56, F. S. The effect is that effective as of October 1, 1977, *judgments* pursuant to the original and first subsection of s. 27.56, F. S., *are to be enforced on behalf of the county by the board of county commissioners of the county* in which assistance was rendered. Apparently, now the liens are to be utilized to reimburse the *county* to defray the costs of the public defender system. Note that liens as described in the "in lieu of the procedure" in the original and second subsection of s. 27.56, F. S., were from the beginning enforceable by the county commissioners of the county wherein the recipient was tried. So s. 27.56, F. S., has now been made consistent, in this respect, throughout.

Further evidence of the intent of the amendments to s. 27.56, F. S., can be gleaned from the fact that by way of s. 1 of Ch. 77-264, Laws of Florida, s. 27.56(2)(c), F. S. (which subsection had been added by s. 1 of Ch. 72-41, Laws of Florida), was amended so as to authorize the board of county commissioners of the county claiming such lien to contract with a collection agency for collection of said liens. Before said amendment, such authority was placed in the public defender.

Section 27.56, F. S., has since been amended by s. 2 of Ch. 77-378, Laws of Florida, which section authorizes the enforcement of liens against the parents of minor children who receive assistance from the public defender or special assistant public defender.

The bottom line is that effective as of October 1, 1977, only the board of county commissioners of the county in which assistance was rendered is authorized to enforce public defender liens on behalf of such county.

Also note that s. 125.01(1)(b), F. S., provides:

> (1) 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:
>
> * * * * *
>
> (b) Provide for the prosecution and defense of legal causes in behalf of the county or state and retain counsel and set their compensation.

078-164—December 29, 1978

DRIVER'S LICENSES

NONRESIDENT SERVICEMAN AND FAMILY STATIONED IN STATE—WHEN FLORIDA DRIVER'S LICENSE MUST BE OBTAINED

To: Chester Blakemore, Executive Director, Department of Highway Safety and Motor Vehicles, Tallahassee

Prepared by: Joseph W. Lawrence II, Assistant Attorney General

QUESTIONS:

1. Are a nonresident serviceman and his wife, children, and other members of his family, if any, stationed in Florida in compliance with military orders, exempt from having to obtain a Florida Driver's License under the provisions of Ch. 322, F. S., provided said nonresidents have in their possession valid driver's licenses issued to them in their home state?

2. When a nonresident person in the military service, stationed in Florida, accepts employment in Florida in addition to his normal military duties or places his children in the public schools, are the military person and his wife and children required to obtain Florida driver's licenses?

3. If the spouse or family of a nonresident person in the military service, stationed in Florida, accepts employment in Florida is the spouse or family of the military person required to obtain Florida Driver's licenses?

4. If military service personnel stationed in Florida and their spouses and children are subject to Florida driver's license statutes what license fees, if any, are they required to pay?

SUMMARY:

A nonresident serviceman and members of his family, stationed in Florida in compliance with military orders, are exempt from having to obtain Florida driver's licenses provided said nonresidents have in their possession valid driver's licenses issued to them in their home state. This exemption is not applicable when the serviceman accepts other employment or places his children in a Florida public school. Those nonresident servicemen or members of their families required to obtain driver's licenses must pay the license fees as set forth in s. 322.21, F. S.

AS TO QUESTION 1:

Your first question is answered in the affirmative. Section 322.03(1), F. S., provides that no person, except those expressly exempted by other provisions of Ch. 322, F. S., shall drive upon the state highways without a valid Florida driver's license.

Section 322.04(1)(c), F. S., specifically provides an exemption for the following class of persons:

> A nonresident who is at least 16 years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this state only as an operator.

Therefore, nonresident servicemen and their family members need not obtain a driver's license to operate a motor vehicle in the state, provided they possess valid operator's licenses from their home state.

AS TO QUESTIONS 2 AND 3:

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

By accepting nonmilitary employment in Florida or placing his children in public schools, the nonresident person in military service and his family become subject to the driver licensing provisions of Ch. 322, F. S., when they operate a motor vehicle on the highways of the state. Section 322.031, F. S., provides.

> In every case in which a nonresident, except a nonresident migrant farm worker as defined in s. 316.003(62), accepts employment or engages in any trade, profession, or occupation in the state or enters his children to be educated in the public schools of the state, such nonresident shall, within 30 days after the commencement of such employment or education, be required to make application for his driver's license if he operates a motor vehicle on the highways of the state.

Additionally, s. 322.04(2), F. S., expressly states:

> The provisions of this section shall not apply to the nonresident, except nonresident migrant farm workers as defined in s. 316.003(62), who shall accept employment or enter his children to be educated in the public schools of this state, or a child of such nonresident who is at least 16 years of age, but in such case or cases such nonresident, except nonresident migrant farm workers as heretofore defined, or child of the nonresident shall be required to obtain a driver's license in the same manner as is required of residents of the state before such nonresidents or children shall be permitted to operate any motor vehicle on the highways of the state.

However, it should be noted that the military person operating a motor vehicle owned by or leased to the United States Government and being operated on official business is not required to possess a Florida driver's license. *See* s. 322.04(1)(a), F. S.

AS TO QUESTION 4:

Military service personnel stationed in Florida and their spouses and children, if statutorily required to obtain driver's licenses, are obligated to pay the same fees as all other drivers as set forth in s. 322.21, F. S.

Your letter specifically makes reference to the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C.A. App. s. 574). Said federal statute grants to nonresident servicemen immunity from state personal property taxation. Section 574(2)(b) of the federal act defines the term "taxation," as applicable to the question presented, as including, but not limited to, the following:

> Licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided* that the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid.

The immunity applies to those taxes on the use of property which are imposed by all states on the use of motor vehicles through a registration fee, similar to an ad valorem tax on property. It does not apply to payment of licenses or taxes which are in the nature of excise or privilege taxes. *See* Sullivan v. United States, 395 U.S. 169 (1969); California v. Buzard, 382 U.S. 386 (1966).

The immunity, therefore, does not apply to the driver's license fees in s. 322.21, F. S., which fees are not based upon ownership of property and would not appear to be aimed at increasing the general revenues but which are essential to the functioning of the state's licensing and registration law.

078-165—December 29, 1978

MUNICIPALITIES

STATE IMMUNE FROM PAYMENT OF LATE UTILITY CHARGES AND TERMINATION OF SERVICE

To: Dewey R. Burnsed, Attorney, Leesburg

Prepared by: Edwin J. Stacker, Assistant Attorney General

QUESTIONS:

1. Is the State of Florida immune from paying late charges on municipal utility bills?

2. Does the municipality have the right to cut off a state agency's electricity upon failure to timely pay for said services?

SUMMARY:

In the absence of any specific statutory provision or contractual agreement authorizing a municipality to charge the State of Florida a late fee for failure to timely remit payment of utility services provided by the municipality, or authorizing the municipality to discontinue said services for failure to pay, the State of Florida is deemed to be immune from such sanctions, said immunity being considered an "attribute of sovereignty" implied by law.

These questions must be answered in the negative.

Initially, it should be pointed out that the Florida Supreme Court has held that municipally owned utilities are not subject to regulation by the Public Service Commission. Justice Thornal, speaking for the majority of the court, detailed the scheme of regulation of utilities, as follows:

> The established state policy in Florida is to supervise privately-owned electric utilities through regulation by a state agency. By the same policy municipally-owned electric utilities are expressly exempted from state agency supervision. Fla. Stat. s. 366.11 (1967) F.S.A. . . . . Under Florida law, municipally-owned utilities enjoy the privileges of legally protected monopolies within municipal limits . . . . [Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968), *cert. denied*, 395 U.S. 909.]

Thus, the regulations promulgated by the Florida Public Service Commission, Ch. 25, Florida Administrative Code, may not be looked to in answering your questions.

The Legislature has, however, specifically authorized municipally owned electric utilities to establish rates and methods of collection for the services which they provide. Section 180.13(2), F. S., reads as follows:

> (2) The city council, or other legislative body of the municipality, by whatever name known, may establish just and equitable rates or charges to be paid to the municipality for the use of the utility by each person, firm or

corporation whose premises are served thereby; and provided further, that if the charges so fixed are not paid when due, such sums may be recovered by the said municipality by suit in a court having jurisdiction of said cause or by discontinuance of service of such utility until delinquent charges for services thereof are paid, including charge covering any reasonable expense for reconnecting such service after such delinquencies are paid, or any other lawful method of enforcement of the payment of such delinquencies.

Although the State of Florida is not specifically exempted from the grant of regulatory authority to municipalities in s. 180.13(2), F. S., the great weight of authority recognizes such an exemption or immunity as an attribute of sovereignty.

The general principle of law applicable hereto is that a state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by a lawful contract of its executive officers. United States v. North Carolina, 136 U.S. 211 (1890).

The Florida Supreme Court has held that the state is immune "from liability for interest payments not assented to . . . " as "an attribute of sovereignty and is implied by law for the benefit of the State. . . ." Treadway v. Terrell, 158 So. 512 (Fla. 1935). This same principle of law has been found to be applicable to governmental units of the state. Board of Public Instruction v. Barefoot, 193 So. 823 (Fla. 1939).

At common law, delay in payment could not be attributed to the sovereign, and liability for interest on that account could not be imposed as against the sovereign. Yancy v. North Carolina State Highway and Public Works Commission, 22 S.E.2d 256. The theory upon which this rule is based is that delay or default cannot be attributed to the government, which is presumed to be always ready to pay what it owes. The apparently favored position of the government in this respect has been declared to be demanded by public policy. Boxwell v. Department of Highways, 14 So.2d 327; *see also* Bankers Bond Co. v. Buckingham, 97 S.W.2d 596.

Applying the rationale of the above-cited case law, it would appear that there is no authority for the City of Leesburg to charge the State of Florida a late fee for its failure to timely remit payment for utility services provided by the municipally owned utility. Furthermore, while there is no case law on point, this same rationale espoused by the courts would operate to preclude the discontinuance of utility service to the State of Florida for its failure to timely remit payment.

078-166—December 29, 1978

CANAL AUTHORITY

DISPOSITION OF UNDISBURSED FUNDS

To: Ernest Ellison, Auditor General, Tallahassee

Prepared by: Edwin J. Stacker, Assistant Attorney General

QUESTIONS:

1. Where funds granted to the Canal Authority of the State of Florida by the Department of Natural Resources, or its predecessor, out of the Water Resources Development Account in the General Revenue Fund of the state under s. 373.498, F. S., have remained in the authority's depositories after the expiration of the appropriation or fiscal period, are they subject to reversion under the provisions of s. 216.301, F. S.?

2. Where interest has been earned by the authority because of its investments of such funds, may the interest be retained and spent by the authority for the purposes of the original grant, or must it be paid into the General Revenue Fund of the state?

SUMMARY:

Undisbursed funds granted to the Canal Authority of the State of Florida from the Water Resources Development Account are not subject to reversion to the fund pursuant to s. 216.301, F. S., in that said funds are not "appropriations" as contemplated by s. 216.301, F. S., and interest earned on the undisbursed funds is also not subject to reversion.

The first question is answered in the negative. The second question, dependent on an affirmative answer of the first, is therefore inapplicable.

Your questions specifically pertain to funds which have been received by the Canal Authority of the State of Florida in the form of grants out of the Water Resources Development Account under s. 373.498, F. S., which reads, in pertinent part, as follows:

> . . . Also, subject to the provisions of this chapter, there shall be available to any navigation district or agency created under chapter 374 or by special act of the Legislature, out of said Water Resources Development Account upon approval of the [department], a sum or sums of money not exceeding in the aggregate the total estimated amount required to cover the costs allocated to the district for constructing the works, for highway bridge construction, for the acquisition of land for rights-of-way, for water storage areas, and for administration and promotion. Said sum or sums shall be available as money is required for said purposes and may be a grant to said districts or agencies.

The Canal Authority of the State of Florida is created by s. 374.011, F. S., as a body corporate to operate "under the supervision of the Department of Natural Resources." Pursuant to Ch. 374, part I, F. S., the Canal Authority has broad powers through its board of directors that include, but are not limited to, the power to make contracts; to sue and be sued; to lease, buy, acquire, hold, and dispose of real and personal property; to employ and dismiss employees; to incur obligations of indebtedness; to condemn property; amend, and repeal bylaws, rules, and regulations governing the manner in which its business is conducted.

The Canal Authority initially operated under the supervision of the Board of Conservation, but pursuant to the Governmental Reorganization Act of 1969, Ch. 69-106, Laws of Florida, s. 20.25(6), F. S., the Canal Authority was transferred to the Department of Natural Resources by a "type one" transfer. A "type one" transfer is defined as follows in s. 20.06(1), F. S.:

> (1) TYPE ONE TRANSFER.—A type one transfer is the transferring intact of an existing agency or of an existing agency with certain identifiable programs, activities, or functions transferred or abolished so that the agency becomes a unit of a department. Any agency transferred to a department by a type one transfer shall henceforth exercise its powers, duties, and functions as prescribed by law, subject to review and approval by, and under the direct supervision of, the head of the department.

Section 20.03(1), F. S., defines "agency," as the context of Ch. 20 requires, to mean any "official, officer, commission, authority, council, committee, department, division, bureau, board, section, or another unit or entity of government." As has been previously expressed by an opinion of this office, AGO 062-160, the Canal Authority was created as a corporate authority of the state, as an agency of the state, and thus was transferred intact to the Department of Natural Resources, as a unit within the department and a part thereof. *See also* AGO 074-17.

As was stated in your letter, s. 216.301, F. S., relates to the reversion into the State General Revenue Fund of any unexpended balances of appropriations for state agencies. Section 216.011(1)(e), F. S., defines "state agency" as any "official, officer, commission, board, authority, council, committee, or department of the executive branch, or the judicial branch, as herein defined, of state government." The issues raised by implication within your letter are whether the Canal Authority is a "state agency" within the purview of this statute, or, whether the past "grants" were in fact and in law "appropriations" to the Canal Authority, and, thus, subject to the provisions of s. 216.301, F. S.

It is my opinion that the Canal Authority is a "state agency" within the purview of said definition found in s. 216.011(1)(e), F. S. As is stated above, the Canal Authority is a unit of, and a part of the Department of Natural Resources and its directors are "officers" of the executive branch of state government.

In the informal letter to you on November 14, 1972, I expressed the view that the Suwannee River Authority was not a "state agency" within the purview of Ch. 216, F. S., and that those provisions of that chapter relating specifically to "state agencies" as therein defined should not apply to that authority. Unlike the Canal Authority, however, the Suwannee River Authority was created by special act, Chs. 57-700 and 61-545, Laws of Florida, and collected local funds for its operations and did not submit legislative budgets.

Having determined that the Canal Authority is a "state agency" as contemplated by s. 216.301, F. S., it is next necessary to determine whether the "grants" in question were "appropriations," and, thus, subject to said provisions.

In AGO 067-10, it was stated that the Central Florida Flood Control District was a "state agency" within the purview of s. 282.081, F. S. 1965, and that unexpended balances of state appropriations to the district reverted to the fund from which appropriated. A review of s. 1, Ch. 65-135, Laws of Florida, discloses that the funds received by the Central Florida Flood Control District (items 323 and 324) were specific "appropriations" from the General Revenue Fund, and not grants made to aid or assist the district out of money appropriated to a special account.

Based upon a review of the general appropriations acts (specifically, Chs. 65-135, 67-300, 69-100, and 70-95, Laws of Florida), and an analysis of the provisions of ss. 373.495 and 373.498, F. S., which created the Water Resources Development Account and authorized the disbursement of funds from said account, it is my opinion that the "grants" received by the Canal Authority are not "appropriations" as contemplated by s. 216.301, F. S. In my opinion, the "grants" made by the Department of Natural Resources, or its predecessor, the Board of Conservation, were made pursuant to legislative authority, to the Canal Authority out of the appropriations to the Water Resources Development Account as contributions to the Canal Authority, and, as such, were "grants" in aid of the Canal Authority, or to assist it, in the nature of state contributions to the operating capital of the corporation for those purposes enumerated in s. 373.498, F. S.

Therefore, it is my conclusion that the "grants" are not subject to reversion under the provisions of s. 216.301, F. S., in that said "grants" are not "appropriations" as contemplated therein. Thus, any interest which has been earned by the Canal Authority because of its investments of such funds also would not be subject to a reversion to the General Revenue Fund of the state.

078-167—December 29, 1978

DISASTER PREPAREDNESS ACT OF 1974

DELEGATION OF AUTHORITY TO POLITICAL SUBDIVISIONS

To: James T. Humphrey, Lee County Attorney, Fort Myers

Prepared by: Jerald S. Price, Assistant Attorney General

QUESTIONS:

1. May the Governor delegate to a board of county commissioners acting as the local disaster agency the power conferred upon him by s. 252.36(5)(d), F. S., which is the power to commandeer or utilize any private property, if necessary, to cope with a disaster emergency?

2. Does a board of county commissioners acting as the local disaster agency, with a director appointed pursuant to s. 252.38, have *exclusive* jurisdiction over the entire county, to include the municipalities, should a disaster emergency be declared, pursuant to s. 252.36(2), F. S.?

SUMMARY:

The Governor is authorized by statute to delegate by executive order or proclamation to political subdivisions (including counties and municipalities) such powers under the State Disaster Preparedness Act of 1974 "as he may deem prudent." While both counties and municipalities may exercise powers granted or delegated under the act to "political subdivisions," only counties are authorized to establish local disaster preparedness agencies pursuant to s. 252.38, F. S., with jurisdiction and powers under Ch. 252, F. S., throughout and over the *entire county*, including incorporated areas.

AS TO QUESTION 1:

Section 252.36, F. S., sets forth powers and duties of the Governor in regard to implementation of the State Disaster Preparedness Act of 1974 (Ch. 252, F. S.). Subsection (5)(d) of s. 252.36 provides that the Governor may, "[s]ubject to any applicable requirements for compensation under s. 252.43, commandeer or utilize any private property if *he* finds this necessary to cope with the disaster emergency." (Emphasis supplied.) Although s. 252.36(5)(d) is clearly directed to the Governor, various other provisions in Ch. 252 evidence legislative intent that the emergency powers provided in Ch. 252 should be available to local disaster agencies, including s. 252.43(3), F. S., which provides:

> Compensation for property shall be owed only if the property was commandeered or otherwise used in coping with a disaster emergency and its use or destruction was ordered by the Governor *or* a member of the disaster emergency forces of this state. (Emphasis supplied.)

In s. 252.32, F. S., the Legislature set forth the policy and purpose of the act, and specifically stated its intention "[t]o confer upon the Governor, the Division of Disaster Preparedness, *and the governing body of each political subdivision* of the state the emergency powers provided herein." (Emphasis supplied.) Section 252.32(1)(d), F. S. The term "political subdivision" is defined in s. 252.34(2), F. S., as including "any county or municipality created pursuant to law." *See also* s. 1.01(9), F. S.

In addition, there are two provisions of Ch. 252 in which delegation by the Governor is specifically authorized or directed. Section 252.36(8), F. S., provides:

> The Governor shall delegate emergency responsibilities to the officers and agencies of the state *and of the political subdivisions thereof* prior to a disaster or threat of a disaster and shall utilize the services and facilities of existing officers and agencies of the state and of the political subdivisions thereof . . . . (Emphasis supplied.)

It should be noted in regard to s. 252.36(8), *supra*, that the duty to delegate imposed on the Governor is qualified by the requirement that such delegation be effected *prior to* any disaster or threat of a disaster. Also, such delegation must be by executive order or proclamation, as provided for in s. 252.36(2), F. S., and the particular authority given in s. 252.36(5)(d), *supra*, would have to be expressly set forth in the executive order or proclamation.

The other provisions of Ch. 252 relating specifically to delegation by the Governor is s. 252.35(1), F. S., providing in pertinent part that "[t]he governor is authorized to delegate such powers as he may deem prudent." *See also* s. 252.35(2)(n), F. S., authorizing the Division of Disaster Preparedness to "delegate authority vested in it under ss. 252.31-252.52 and to provide rules for the subdelegation of authority."

Hence, it seems clear that the Legislature intended that counties and municipalities should be able to exercise emergency powers and duties under Ch. 252. And, it is also clear that the Legislature has provided express authorization for the delegation of duties and authority by the Governor, including the authority granted by s. 252.36(5)(d), F. S. However, the interpretation of any such power or duty of the Governor, or of any statutory provision authorizing delegation by the Governor, is a matter to be initially determined by the Governor. The delegation of any specific power or duty of the Governor under Ch. 252 will depend on the Governor's decision that such delegation

would be "prudent." Section 252.35(1), F. S. It would be inappropriate for this office to comment further (particularly to comment hypothetically) on such a power of the Governor, absent a request from him that we do so.

AS TO QUESTION 2:

While various provisions of Ch. 252 refer simply to "political subdivisions" (defined in Ch. 252, F. S., to include municipalities along with counties), s. 252.38, F. S., authorizing the creation of local disaster preparedness agencies, appears to contemplate the creation only of a countywide agency (or multicounty agency) whose director would have charge of all operations within a particular county or counties (including municipalities). Section 252.38(2), F. S., provides in pertinent part:

> . . . each county within this state shall be within the jurisdiction of, and served by, the division. Except as otherwise provided in this act each local disaster agency *shall have jurisdiction over* and serve *an entire county. The board of county commissioners* of each county of the state, or the legally constituted governing body of any combined county-city government, *is hereby authorized and directed to establish and maintain such a local disaster preparedness agency* in accordance with, and in support of, the state civil defense plan and program. (Emphasis supplied.)

The above provision applies by its terms not to "political subdivisions," but only to *counties* (except in cases of consolidated city-county governments). It authorizes boards of county commissioners to establish local disaster agencies, and unequivocally gives such agencies "jurisdiction over . . . an entire county." *Cf.* s. 252.38(3), F. S., providing for appointment of a director for each local disaster agency, which refers to appointment "by the board of county commissioners of the county or the governing body of a city or town, as appropriate." (This reference to appointment by a "city or town" governing body "as appropriate," when read *in pari materia* with s. 252.38(2), *supra*, appears to evidence legislative intent that the director be appointed by the governing body of a city or town *only* in cases where there is a "combined county-city government," although the act's inconsistencies prevent an unequivocal interpretation of this provision.) Section 252.38(3) goes on to provide that "[t]he local director [of the *county* disaster agency] shall coordinate the activities, services, and programs for civil defense *within his county* and shall maintain liaison with other local organizations for civil defense . . . ." (Emphasis supplied.) Thus, notwithstanding the unclear language, such as that in s. 252.38(3), above, it appears that the act contemplates the existence of no more than one local disaster preparedness agency (or director thereof) for each county of the state. (Note that counties may be joined in a single agency. Section 252.38(7), F. S.)

This conclusion may be reinforced, and some of the ambiguity and inconsistency of language explained, by reference to the provisions of the state disaster law as it appeared prior to the revision which produced the State Disaster Preparedness Act of 1974. Former s. 252.09, F. S. 1973, authorized boards of county commissioners, s. 252.09(1)(a), F. S. 1973, *and* municipal governing bodies, s. 252.09(1)(b), F. S. 1973, to create and establish a "local organization for civil defense." (Under those provisions, counties were authorized and directed to establish the organizations, while municipalities were merely authorized to do so. *See* AGO 071-234.) Each such "local organization" was then authorized to have its *own* director, s. 252.09(2), F. S. 1973, and to fully exercise within the particular political subdivision (county or municipality) civil defense functions. Section 252.09(3), F. S. 1973. And—as opposed to the current s. 252.38(2), F. S., which gives the director of the *county* disaster agency (appointed by the county commissioners pursuant to s. 252.38(3), F. S.) the authority to "have jurisdiction over" civil defense activities within the entire county and to "coordinate" such activities within the entire county—former s. 252.09(2), *supra*, provided that the director of a "civil defense organization" (municipal or county) had "direct responsibility for the organization, administration, and operation of such local organization *subject only to the direction and control of the governing body of the political subdivision*[county or municipality] *concerned*." (Emphasis supplied.)

I would also note that ambiguities arising from the current definition of "political subdivision" in Ch. 252 may be the result of the Legislature's having simply carried forward definitions from the 1973 version of Ch. 252 without restating them to conform to the overall direction of the 1974 act. Not only does the present act define "political

subdivision" as including municipalities, but there still appears, in s. 252.34(3), F. S., a definition of "[l]ocal organization for civil defense" (the term used in the 1973 version of Ch. 252) even though the term adopted and used throughout the 1974 act and the current Ch. 252 is "local disaster preparedness agency" or "local disaster agency." Other than in the definition inexplicably (and perhaps unintentionally) carried over from the 1973 version of Ch. 252, the term "local organization for civil defense" is no longer used in Ch. 252.

Therefore, I am of the opinion that, when the Legislature enacted the State Disaster Preparedness Act of 1974, it intended to provide jurisdiction *under Ch. 252*, F. S., only for *county* disaster agencies, and accordingly intended to remove authority *under Ch. 252* for the creation of municipal disaster or civil defense agencies or organizations (with directors subject only to the control of the municipal governing bodies), and to substitute for that old system one wherein the county disaster agency has jurisdiction over and coordinates the activities in question throughout the *entire county*, including incorporated areas.

However, this is not to say that municipalities, as "political subdivisions" under the act, cannot be delegated certain powers under Ch. 252 by the Governor (pursuant to s. 252.36(8), F. S.), or by the Division of Disaster Preparedness (pursuant to s. 252.35(2)(n), F. S.), subject, though, to the county disaster agency's statutory responsibility under s. 252.38(2) and (3), *supra*, to "have jurisdiction over," to "serve," and to "coordinate" civil defense activities, services, and programs within the *entire county*. Except for the creation of a local disaster preparedness agency and appointment of a director of a local disaster preparedness agency under s. 252.38, F. S., counties and municipalities are both classified as "political subdivisions" under the definition provided in s. 252.34(2), F. S. ("any county or municipality created pursuant to law"). "When a statute contains a definition of a word or phrase that meaning must be ascribed to the word or phrase whenever repeated in the same statute unless a contrary intent *clearly* appears." Vocelle v. Knight Brothers Paper Company, 118 So.2d 664, 667 (1 D.C.A. Fla., 1960). *Accord*: Richard Bertram & Co. v. Green, 132 So.2d 24, 26 (3 D.C.A. Fla., 1961).

The questions you have presented are answered accordingly. Any further questions regarding this act should be directed to the Division of Disaster Preparedness or to the office of the Governor.

078-168—December 29, 1978

REGULATION OF PROFESSIONS

HEARING AID FITTERS—LICENSING—PHYSICIAN'S ASSISTANTS EXEMPT

To: Emmett Roberts, Secretary, Department of Health and Rehabilitative Services, Tallahassee

Prepared by: Richard A. Hixson, Assistant Attorney General

QUESTION:

Is a nonphysician who works for and directly under the supervision and control of a licensed physician exempt from the requirements of part III of Ch. 468, F. S., if that individual, as part of his duties while working for the physician, assists the physician who fits and sells hearing aids?

SUMMARY:

Assuming a registered nurse or a physician's trained assistant or other person specified in s. 458.13(4), F. S., assists a physician under his supervision and control in the physician's fitting and selling of hearing aids, then such physician and nurse, or trained assistant or other person specified in s. 458.13(4), F. S., are not required to comply with registration under part III of Ch. 468, F. S. Such activities are considered the practice of medicine or the rendition of medical services in the course of the

physician's practice of medicine exempted from the registration requirements of part III of Ch. 468, F. S.

Part III of Ch. 468, F. S., provides generally for regulation of the fitting and selling of hearing aids. The purpose of part III is to

> require registration for protection of the public of any person engaged in the fitting or selling of hearing aids, to encourage better educational training programs for such persons to provide against unethical and improper conduct and for the enforcement of this part, and to provide penalties for its violation. [Section 468.121, F. S.]

Section 468.137(2), F. S., exempts from the provisions of part III "any physician licensed to practice in the State of Florida."

The provisions regulating the licensure of physicians to practice in the State of Florida are set forth in Ch. 458, F. S., and, specifically, s. 458.13, F. S., sets out the definition of the practice of medicine. Section 458.13(4), however, provides for the following exemption:

> (4) Nothing in this section shall be construed to prohibit service rendered by a physician's trained assistant, a registered nurse, a registered nurse midwife (nurse obstetric associate), or a licensed practical nurse, if such service be rendered *under the responsible supervision and control of a licensed physician.* (Emphasis supplied.)

It appears from your inquiry that your question is limited to the "staff" or "nursing staff" of a licensed physician. As set forth above, s. 458.13(4), F. S., allows a specified category of persons under the responsible supervision and control of a licensed physician to perform medical services.

Since s. 468.137(2), F. S., assumes that the fitting and selling of hearing aids fall within a licensed physician's practice of medicine which is not subject to regulation under Ch. 468, F. S., it would follow, unless judicially determined otherwise, under s. 458.13(4), F. S., that a licensed physician, fitting and selling hearing aids, may be assisted by his "trained assistants" or "registered nurses" (or specifically any of those persons listed in s. 458.13(4), F. S.) under his responsible control and supervision, and such persons may perform such services without registration under part III of Ch. 468, F. S. In this respect, *see* AGO 076-149 wherein it was opined that psychiatric aides and assistants may administer certain medications so long as such duties were performed under the adequate supervision of a licensed physician, dentist, or registered nurse. *See also* AGO 075-218.

Your question is, therefore, answered in the affirmative.

078-169—December 29, 1978

ADMINISTRATIVE PROCEDURE ACT

DEFAULT LICENSES—NOT EXEMPT FROM RULES APPLIED TO NORMAL LICENSES

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

Prepared by: Walter Kelly, Assistant Attorney General

QUESTION:

> **May an agency place as conditions in a default license issued pursuant to s. 120.60(2), F. S., standard conditions such as the reporting of water quality violations, periodic operating reports, and monitoring requirements which are routinely placed in agency licenses which do not**

call for project design changes, or impose other such substantive requirements of Ch. 403, F. S., or rules duly adopted thereunder?

SUMMARY:

Default licenses issued pursuant to s. 120.60(2), F. S., are governed by Ch. 403, F. S., and any rules duly adopted thereunder and all mandatory requirements of Ch. 403, F. S., and rules duly adopted thereunder are applicable to default licenses in the same manner as to normal licenses.

Section 120.60(2), F. S., is procedural only. I indicated in an earlier opinion the effect of this provision. As stated in AGO 077-41:

> The effect of s. 10, Ch. 76-131 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, 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.

It is clear that the legislative intent was that an agency must act within a specified time frame or the applicant will in effect become entitled to be issued the license applied for by default. However, s. 120.60(2), F. S., does not purport to exempt or relieve a party receiving a default license from complying with agency statutory requirements or rules adopted pursuant to Ch. 120, F. S.

Section 120.60(2), F. S., as amended by s. 6 of Ch. 77-453, Laws of Florida, in pertinent part provides:

> 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 affected parties or aggrieved persons. . . . *Every application for license shall be approved or denied within 90 days after receipt of the original application or receipt of the timely requested additional information or correction or errors or omissions. . . . Any application for a license not approved or denied within the 90-day period,* within 15 days after conclusion of a public hearing held on the application, or within 45 days after the recommended order is submitted to the agency and the parties, whichever is latest, *shall be deemed approved and, subject to the satisfactory completion of an examination, if required as a prerequisite to licensure, the license shall be issued.* . . . Each agency, upon issuing or denying a license, shall state with particularity the grounds or basis for the issuance . . . of same, except where issurance is a ministerial act. . . . (Emphasis supplied.)

In construing s. 120.60(2), F. S., one rule of statutory construction that must be considered is whether the interpretation would lead to an unreasonable or ridiculous conclusion. *See* Johnson v. Presbyterian Homes of Synod, 239 So.2d 256 (Fla. 1970). To conclude that the Legislature expressed or implied that default licenses issued pursuant to s. 120.60(2), F. S., granted the licensee exemption from the governing statutory provisions of the agency would be to ignore the plain meaning of the provision, which simply dealt with processing applications within a certain time frame and provided that licenses be issued if the time frame was not met. It would be unreasonable to construe s. 120.60(2), F. S., to exempt a default licensee from complying with Ch. 403, F. S., therefore making its provisions a nullity. Certainly that was not the intention of the Legislature when enacting s. 120.60(2), F. S., and in the absence of an express legislative direction to exempt default licenses from the requirements of Ch. 403, F. S., I am unwilling to conclude that such licenses are not required to comply with the substantive requirements of Ch. 403, F. S., and rules duly adopted thereunder.

Therefore, based upon the foregoing, the answer to your question is that substantive requirements of Ch. 403, F. S., and rules adopted pursuant thereto are applicable to default licenses in the same manner as licenses issued in the normal process. Thus to the extent that standard conditions of a license, such as reporting of water quality violation or operating reports, are required by Ch. 403, F. S., or rules duly adopted thereunder, such conditions are equally applicable to default licenses.

078-170—December 29, 1978

JUVENILES

STATE REQUIRED TO PAY FOR EMERGENCY MEDICAL TREATMENT OF JUVENILE IN STATE DETENTION CENTER

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

Prepared by: Carol Z. Bellamy, Assistant Attorney General

QUESTION:

Is the county or the state authorized or required to pay the hospital bill for emergency medical treatment of a juvenile who was admitted to the hospital while under the custody and control of persons at a state juvenile detention center?

SUMMARY:

The state is required to provide emergency medical care for juveniles detained in the lawful custody and control of persons at a state-operated detention facility, and it is necessarily implied that the state has the authority *to pay for* such care through legislative appropriations duly authorized and budgeted.

In your letter you described the following situation which you stated later by telephone was typical of a pattern in your county. A juvenile picked up by a local law enforcement officer for suspected violation of law was taken to the state juvenile detention center and delivered into the custody and control of persons there. The person in charge of the facility at that time determined that the child needed emergency medical treatment and the child was admitted to a hospital. After discharging the child, the hospital forwarded the bill for his treatment to the juvenile division of the circuit court which submitted the bill to the county for payment. As clerk of the circuit court and county court and as county auditor, you have asked whether the county or the state should pay this bill.

Chapter 39, F. S., concerns "Proceedings Relating to Juveniles," and s. 39.08, F. S., as amended, provides as follows:

> (5) *A physician shall be immediately notified by* the person taking the juvenile into custody or *the person having custody* if there are indications of physical injury or illness, *or the child shall be taken to the nearest available hospital for emergency care.* A child may be provided mental health or retardation services, in emergency situations, pursuant to the procedures and criteria contained in s. 394.463(1) or chapter 393, whichever is applicable. *After a hearing, the court may order* the custodial parent or parents, guardian, or other custodian, if found able to do so, *to reimburse the county or state for the expense* involved in such emergency medical or surgical treatment or care. (Emphasis supplied.)

The four subsections preceding this one pertain to medical, psychiatric, and psychological examination and treatment of a juvenile *following a court order* and therefore do not apply to the situation you described. The plain meaning of subsection (5) is that the person taking or having custody of a juvenile is *required to obtain* emergency medical treatment for him from a physician or at a hospital, and that the county or the state will be entitled to seek reimbursement for the expense involved at a subsequent court hearing. Such language on its face neither authorizes nor requires the state or the county *to pay* for the emergency treatment but clearly *implies* that either the state or the county will have the authority *from another source* to pay for the medical expenses initially.

From the situation or pattern you described, the need for medical treatment apparently was not recognized by the person who initially took the juvenile into custody, and custody was transferred to another person authorized to provide the emergency

treatment and seek reimbursement therefore pursuant to s. 39.08(5), F. S., as amended. Since it appears that the emergency treatment was authorized by a person having custody of the juvenile at a state juvenile detention center, the authority for *payment* of the treatment must be found in the state. Of course, it is well established that a state agency cannot be held financially responsible unless a statute so authorizes and the Legislature has appropriated and budgeted therefor. 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.

Under Ch. 959, F. S., the Department of Health and Rehabilitative Services (the department) has authority to provide a wide range of youth services, including the operation of state juvenile detention facilities. The department "shall be responsible for the planning, development, and coordination of a statewide, comprehensive youth services program for the prevention, control, and treatment of juvenile delinquency," s. 959.011(1), F. S., and the department "shall develop and implement . . . programs in order to provide for the treatment of persons referred . . . to [it]," including detention care and intake, among others. Section 959.011(2), F. S. "*The department shall be responsible for* the implementation of law and policy relating to youth services and . . . for *establishing standards*, providing technical assistance, *and exercising the requisite supervision, as it relates to youth services programs, over all state-supported juvenile facilities.*" Section 959.021(1), F. S. (Emphasis supplied.) Rulemaking authority "for the efficient government and maintenance of *all facilities* and programs" is provided in s. 959.021(3), F. S. (Emphasis supplied.)

State-operated detention is expressly authorized in s. 959.022(1), F. S., and subsection (2) requires the department to implement by December 31, 1973, "a comprehensive plan for . . . the regional administration of *all* detention services in the state." In those regions where the state has assumed operation of detention services according to the implementation plan, s. 959.022(4), F. S., provides that "*counties . . . shall lose the statutory authority to provide such services*, whether such authority is granted by chapter 39, chapter 416, or other applicable law. On said implementation date the *statutory authority* to provide operation of detention services in that region *shall be transferred to and be vested in the department.*" (Emphasis supplied.)

From all of the above, it seems clear that the state *and not the county* has sole authority for the care and treatment of a juvenile detained in the custody of persons at a state juvenile detention center. Furthermore, s. 959.24(2)(a), F. S., authorizes and directs the department "to adopt rules and regulations prescribing standards and requirements with reference to . . . [t]he *furnishing of medical attention*" (Emphasis supplied.) *at* county and *state detention facilities.* By this authority the department adopted Rule 10H-2.41, F.A.C., which provides in pertinent part as follows:

> (1) *A physician shall be immediately called* if there are indications of serious injury, illness or other situations requiring medical attention. If a physician cannot be immediately contacted, *the child shall be taken to the nearest available hospital for emergency care.*
>
> * * * * *
>
> (3) *The Superintendent or person in charge shall obtain a satisfactory arrangement with the nearest available hospital for the admission and treatment of children on an emergency basis.* (Emphasis supplied.)

These rules promulgated pursuant to the lawful statutory authority of the department are binding on the state as well as any county in the operation of juvenile detention facilities. Where the state has exercised its authority *to operate* detention facilities, and other rules require that emergency medical treatment be provided by such a facility, the state is obliged to comply with the rules. The state is required to provide what the rule requires. Implicit in the rule is the authority for the person in charge to do what the rule requires. From this it follows that *the expense* of providing such medical treatment *is a necessary operating expense of the facility*, and at a state-operated facility the state will be liable therefor. The *state has been* not only authorized but *required* by law to provide emergency medical treatment to juveniles at detention facilities. Such power duly conferred includes the implied authority to employ appropriate means to make the express power effective. *Cf.* Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). This includes reasonable payments for such treatment from budget appropriations for the operating expenses of the facility. *Cf.* Molwin Inv. Co., *supra.*

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CITATOR

CITATOR TO FLORIDA STATUTES, LAWS OF FLORIDA, AND STATE CONSTITUTION, CONSTRUED OR CITED IN OPINIONS RENDERED FROM JANUARY 1 THROUGH DECEMBER 31, 1978

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77-414		078-37	77-475		078-39
77-428		078-54	77-568		078-127
77-429		078-15	77-651		078-84
		078-23	78-49		078-137
			78-135		078-143
77-434		078-53	78-299		078-142
		078-60	78-308		078-159
77-436		078-56	78-318		078-96
77-452		078-4	78-367		078-134
		078-22	78-401		078-112
			78-406		078-126
77-453		078-169	78-435		078-119
77-457		078-8	78-622		078-153

END