Pinellas County
ATTORNEY'S OFFICE

Susan H. Churuti
County Attorney

May 19, 2006

John Hubbard, Esquire
Frazer, Hubbard, Brandt, Trask & Yacavone LLP
595 Main Street
Dunedin, FL 34698

RE: Dual Referendum

Dear Mr. Hubbard:

After reviewing your email of May 16, 2006, with Mr. Spitzer, he agreed that it would be helpful for me to respond.

We both think there was a misunderstanding of Mr. Bomstein's comment about the effect of a dual referendum vote. There would be a single, uniform ballot question throughout the entire county and the vote of the electors in each city would be separately counted, so that some or all of the cities would transfer the function, service, power or regulatory authority by affirmative vote, if it also passed countywide. A negative vote in one city would defeat the countywide change in function, service, power or regulatory authority, because that city would not be included. If the measure passed countywide and within some cities, it would be effective (i.e., the BCC would have authority to implement the policy in question) within those cities. Obviously a ballot question could be drafted requiring a different result; for example, the language could make the referendum go into law upon the passage by a certain percentage of cities or voters. The cities and county used this approach in adopting the countywide sign code by our respective ordinances.

As you may know, my office, and particularly Betsy Steg, represents the Supervisor of Elections and the Pinellas County Canvassing Board, which is constituted pursuant to Section 102.141, Florida Statutes.

PLEASE ADDRESS REPLY TO:
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Clearwater, Florida 33756
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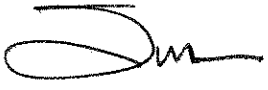
We would anticipate one election in a dual referendum. Precinct lines will be harmonized with each municipal boundary and each city would have its own ballot style. There would be one question for every voter. Each city total would be tabulated, and the countywide total would be tabulated. Canvassing of the election would be by the Pinellas County Canvassing Board.

As I'm sure you are aware, there is no clear authority on how to conduct a dual referendum. I have attached an article on the substantive law, which I'm sure you remember from the Florida Municipal Attorney's Association presentation two years ago. There is not much scholarship on the procedural aspects of such an election. I think it is fair from a due process and equal protection standpoint that "the approval by vote of the electors of the transferor and approval by vote of the electors of the transferee" referred to in Article VIII, section 4 of the Florida constitution, be done at the same time, and with the same language. We will simply tabulate the results twenty-five times.

No one has discussed the "one man one vote" issue with me, so I may not understand this question. However, my experience with Pinellas County's voting rights cases would indicate that the dual referendum provision in the Florida constitution would not violate anyone's voting rights.

I welcome any advice or legal authority you wish to offer in this process, and trust that this is responsive to your request. Betsy has also indicated her willingness to discuss any election issues with you.

Very truly yours,



Susan H. Churuti
County Attorney

SHC:sme
Attachment
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Intergovernmental Transfers

Florida Municipal Attorneys' Association
23rd Annual Seminar
July 15 – 17, 2004

By: Michael P. Spellman, Esquire

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This paper specifically focuses on the transfer of powers between counties, municipalities, and special districts pursuant to Article VIII, Section 4 of the Florida Constitution, which provides:

> **Section 4. Transfer of Powers.** By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality, or special district may be transferred to or contracted to be performed by another county, municipality, or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

Article VIII, Section 4 of the Florida Constitution, however, must be read in context with other provisions of Article VIII, which often raise tension with Section 4. Also found in Article VIII of the Florida Constitution are the following provisions:

> **Section 1. Counties.**
>
> * * *
>
> (f) **NON-CHARTER GOVERNMENT.** 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, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.
>
> (g) **CHARTER GOVERNMENT.** Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

* * *

> **Section 3. Consolidation.** The government of a county and the government of one or more municipalities located therein may be consolidated into a single government which may exercise any and all powers of the county and the several municipalities. The consolidation plan may be proposed only by special law, which shall become effective if approved by vote of the electors of the county, or of the county and municipalities affected, as may be provided in the plan.

Typically, Article VIII, Section 4 of the Florida Constitution is raised in a legal proceeding by a government challenging another government's amendments which have intruded upon the powers or functions of the petitioning government. For example, a charter county may attempt to amend its charter or ordinances to assume responsibility and/or power over a function controlled by a municipality within that county. As a general rule, if the amendment is *regulatory in nature*, the county will have the power to preempt conflicting municipal ordinances. On the other hand, if the amendment proposes a transfer of the functions and powers of the municipality and is related to services, dual referenda are required. Thus, the pivotal question usually boils down to whether the amendment at issue is *regulatory in nature* or constitutes *the transfer of a function and power related to services*. Case law on these issues is limited, and sometimes, what looks like a duck, sounds like a duck, and walks like a duck, isn't really a duck.

Transfer vs. Regulation

Whether an act or amendment constitutes a transfer of a function or power versus what is regulatory in nature is the determinative factor in analyzing the applicability of Article VIII, Section 4 of the Florida Constitution. The dearth of decisional case law on the issue appears to squarely focus on the specific language used in the ordinance, amendment or regulation. Unfortunately, the effect of this can result in an analysis that is based more on form than substance. Thus, crafty language, with a general savings clause, which for all intents and purposes transfers a function or power, is ruled to be regulatory in nature.

The leading case for cities attacking an amendment that purports to have or has the effect of transferring a function or power is Sarasota County v. Town of Long Boat Key, 355 So.2d 1197 (Fla. 1978). In that case, the County Commission adopted an ordinance proposing five amendments to the County Charter which would transfer the responsibilities for performing five distinct governmental functions from four Sarasota County cities to the County. These functions were (1) air and water pollution control; (2) parks and recreation; (3) roads and bridges; (4) planning and zoning; and (5) police. In rejecting the County's argument that charter counties were excluded from the dual referenda requirement, the Court held that the County's ordinance was not effective because a transfer of governmental powers requires the distinctive features provided in Article VIII, Section 4, i.e. a law or resolution

of the governing bodies of the each of the governments affected. A significant point, however, is that the County *conceded* that this was essentially a transfer of power. Thus, there was never any dispute over the issue of whether the amendments amounted to a transfer of power, or in the alternative, were regulatory. Additionally, in light of the concession of the County, the Court did not engage in any kind of meaningful discussion of what constitutes a "transfer of power."

Another case of questionable precedential value which found that an ordinance involved a transfer of power is Metropolitan Dade County v. City of Miami, 396 So.2d 144 (Fla. 1980). In that case, the Florida Supreme Court held invalid a transfer of power by the County in an attempt to regulate taxi cabs. The Court, in somewhat confusing language, ruled:

> We hold, therefore, that the ordinance is an unauthorized conflict with state law because Dade County did not follow the statutory method for transferring power. The ordinance is invalid to the extent that the county seeks to *regulate* taxi cabs in Miami and Miami Beach. Unless the cities of Miami and Miami Beach accede to *regulation* by the county, Dade County does not have the authority to usurp the *regulation* of taxi cabs within the city limits of those municipalities.

Id at 148 (footnote omitted). The holding in this case is of questionable precedential value because it can be easily distinguished or at least limited, for at least two reasons. First, Article VIII, Section 6(e) and Section 11 provide powers and responsibilities to Dade County which are unique from the state's other counties. See generally McNayr v. Kelly, 184 So.2d 428 (Fla. 1966). In Metropolitan Dade County, the Court specifically held that Section

6(e) controls over Section 4 when analyzing any conflict between those constitutional provisions. Second, the decision hinged, in part, on the applicability of Florida Statute §323.052(1), which applied to licensed for-hire vehicles, and was later repealed.

Since 1980, courts facing issues implicating the applicability of Article VIII, Section 4 have generally been loathe to find a transfer of a function or power, sometimes bending over backwards to reach such a result. In fact, the "careful drafting" of amendment or ordinance language has often been the dispositive factor. So long as "ultimate" authority or power to supervise is purportedly retained, Section 4 is not implicated.

In Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981), for example, opponents to a tourist development tax plan challenged a provision that would have allocated some of the funds raised by the County to renovation of the City-owned Orange Bowl Stadium. The Florida Supreme Court rejected the argument that the plan was an unconstitutional transfer of power since jurisdiction over the stadium would not be transferred. Instead, the County merely planned to make funds available to the City for the renovation. Because control over municipal services was not transferred, the Court did not find a transfer of power.

In AGO 92-33, the issue was whether the Village of Key Biscayne could contract with the City of Miami for the performance of firefighting, rescue, and fire inspection services without being required to go through the dual

referenda requirements in Section 4. The Attorney General opined that, "If the City of Miami contracts to perform firefighting, rescue, and fire inspection services from the Village of Key Biscayne, without being granted the *ultimate power to supervise and control* such services, there would be no referendum requirements pursuant to s.4, Art. VIII, State Const."

More recently, in AGO 2002-33, the Attorney General was asked, "Does the adoption of a charter provision creating the Broward County Fire Services and Standards Council to adopt county-wide standards regulating the provision of fire and rescue services addressing such issues as uniform fees, standardized dispatch, and minimum levels of emergency services, constitute transfer powers as contemplated by Article VIII, Section 4, Florida Constitution?" The Attorney General opined in the negative and stated, "The proposed charter amendment creating the Fire Services and Standards Council would establish a collegial body to develop standards regulating the provision of fire and rescue services on a county-wide basis. Such regulations are to include . . . a schedule of uniform fees. While the proposed amendment requires a regulation that the closest appropriate unit respond in life-threatening emergencies, it does not transfer the power to provide that function to the County."

In other cases, courts have found that Article VIII, Section 4 of the Florida Constitution did not apply because the amendment or ordinance was regulatory and addressed an area "conducive to countywide enforcement."

For example, in City of New Smyrna Beach v. County of Volusia, 518 So.2d 1379 (Fla. 5th DCA 1988), the court addressed the constitutionality of an amendment to the Volusia County charter which established a Beach Trust Commission and which authorized the County Council, with the advice of the Commission, to adopt a unified beach code ("comprehensively regulating public health, safety, and welfare on and pertaining to the [Atlantic Ocean] beach") within the County. The court rejected the City's contention that the amendment did not address a county-wide concern and concluded that the amendment did not facially conflict with Article VIII, Section 4. The court found that there was "a logical basis shown by this record for the finding that uniform regulation of the beach is required in the public interest." Id at 1384. In making its determination, the court examined the specific language set forth in the amendment:

> The City argues that the operative provisions of Amendment 4 impermissibly shift the responsibility of control of beach services from the City to the County. However, *the amendment reveals that it is carefully drafted to pertain only to regulatory matters.* The expressed intent of the amendment is to guarantee beach access to the public. To effectuate this purpose, Section 205.1 mandates the County Council to authorize "as permitted by law" vehicular access in areas of the beach not reasonably accessible from public parking facilities. Section 205.4 gives to the Council exclusive power to impose reasonable vehicular beach access fees and prohibits municipalities from charging any additional fees. Section 205.3 authorizes a comprehensive unified beach code regulating all aspects of the public health, safety, and welfare on and pertaining to the beach. Finally, Section 205.6 grants to the County exclusive *regulatory* jurisdiction over the beaches and approaches. On their face, none of these provisions relate to the provision of services. Rather, they pertain exclusively to the County's regulatory powers over the beaches,

> an area which the Beach Trust Commission found to be "conducive to uniform countywide enforcement." §125.86(7), Fla. Stat. (1985). Moreover, Section 205.5 expressly disclaims any intent to assume control over services provided by municipalities and prohibits the County from duplicating any services already provided by the City. The City argues that Amendment 4 divests it of functions and powers relating to the beach that it has previously exercised. However, the control to be exercised by the County, i.e., access fees, regulation of traffic, rules pertaining to individual conduct, operation and parking of vehicles on the beach, etc., clearly relates to regulation of those members of the public making use of the beach. These matters, like regulation of firearms, are areas which section 1(g) authorizes the county to regulate on a county-wide basis, preempting local governments.

Id at 1383 – 84 (emphasis supplied and in original).

In Broward County v. City of Ft. Lauderdale, 480 So.2d 631 (Fla. 1985), the City sought to enjoin a county-wide referendum to amend the County Charter to provide that county ordinances relating to the regulation of handguns would prevail over conflicting municipal ordinances. The request was denied, and the City appealed. On appeal, the Florida Supreme Court distinguished between Article VIII, Section 1(g) and Section 4, opining:

> We hold that Section 1(g) permits regulatory preemption by counties, while Section 4 requires dual referenda to transfer functions or powers relating to services. A charter county may preempt a municipal regulatory power in such areas as handgun sales when county-wide uniformity will best further the ends of government. §125.86(7), Fla. Stat. (1983). Dual referenda are necessary when the preemption goes beyond regulation and intrudes upon a municipality's provision of services.
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> * * *
>
> We believe the distinction between regulatory preemption, and transfer of functions and powers relating to services, achieves

the balance between Sections 1(g) and 4 intended by the framers of the 1968 Constitution.

480 So.2d at 635.

In City of Coconut Creek v. Broward County Board of County Commissioners, 430 So.2d 959 (Fla. 4th DCA 1983), the District Court of Appeal approved a county ordinance permitting county veto of municipally-approved plats. While Section 4 of Article VIII was not an issue in the decision, the District Court found support in Article VIII, Section 1(g) and direct statutory authority for this narrow exercise of county regulatory preemption. In particular, the court found that the County had final authority for plat approval both within and outside municipalities and could impose both procedural and substantive requirements for final plat approval in furtherance of an overall scheme set out in the county's land use plan. The substantive requirements set forth in the county land development code were to be supplemental to the municipalities' land use ordinances such that both the code section and the ordinances were effective. However, in the event there was conflict, it would be resolved in favor of the County in the area of land use planning.

Finally, one of the more technical holdings in Article VIII, Section 4 jurisprudence is found in City of Palm Beach Gardens v. Barnes, 390 So.2d 1188 (Fla. 1980). There, the Florida Supreme Court reversed the trial court's permanent injunction restraining the City from implementing a contract between the City and the County Sheriff for the performance of law

enforcement services to the City at a stated price. The issue of preemption under Section 1(g) of Article VIII was not raised. However, the question of whether dual referenda were required under Article VIII, Section 4 was at issue. The Florida Supreme Court held that contracting for services, without divesting ultimate authority to supervise and control, did not constitute a transfer of powers under the purview of Article VIII, Section 4. Thus, the provision of services could be transferred without Section 4 implications if the ultimate responsibility for supervising those services was not transferred. In rather technical terms, the Court premised some of its holding on the fact that a Sheriff is a "county officer" under Article VIII, Section 1(d), but not a county taxing entity contemplated by Article VIII, Section 4. The Court held, "In our opinion, the framers of Section 4 had no intention of applying its provisions to a Sheriff as a county official, and his contracting for services with a municipality is clearly different from a municipality transferring or contracting away the authority to supervise and control its police powers to the county government." Id at 1189.

In conclusion, the determination of whether Article VIII, Section 4 of the Florida Constitution applies hinges on whether an amendment or ordinance is regulatory in nature or transfers the power or function vested in a governmental entity. From the limited case law, it can be discerned that unless the language or patent effect of the amendment or ordinance transfers ultimate power to supervise, and is not conducive to countywide enforcement,

it will probably be found to be regulatory in nature, thus obviating the dual referenda requirement of Article VIII, Section 4.