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January 5, 2006

Mr. Alan Bomstein
Pinellas County Charter Review Commission
620 Drew Street
Clearwater, FL 346151

Re: Consolidation of fire services

Dear Mr. Bomstein:

Mr. Spitzer has relayed to me the request of the Charter Review Commission for an opinion addressing the legal and funding requirements for any consolidation of county, special district and municipal fire services within Pinellas County. The expectation is that such a consolidation would be achieved by a special act and referendum which would have the effect of an amendment of the County Charter.

I have divided the question and my opinion into two parts. The first is an examination of the legal requirements and restrictions on any proposed consolidation. The second part is an examination of the fiscal consequences of such a consolidation.

I. **By what method(s) may fire services now provided by Pinellas County and its several cities and districts be functionally consolidated**?

Brief answer; A special act may propose an amendment to the Charter authorizing the County to exercise pre-emptive authority over the regulation and delivery of fire protection services throughout the County. The special act should be subject to approval of a "vote of the electors of the County" as required by Art. VIII, § 1(c), FLA. CONST.

Discussion:

A. **Constitutional provisions.** Any examination of a transfer or consolidation of local government powers must begin with an examination of the sources and limitations of those powers. The paramount document is the Constitution of Florida.

1. **Cities**. Municipalities are creatures of the Legislature. Article VIII, § 2(a) of the Constitution provides that they may be established or abolished, and their charters amended, pursuant to general or special law. A general law is one which is applicable statewide. A relevant example of such a general law is found in § 166.031, Fla. Stat.(2005), which establishes a local procedure for amending a city charter in any respect except as to the boundaries of the city. A special law is one which does not apply statewide. A relevant example of such a special law is the initial charter of every municipality; cities cannot be created except by a legislative act.

Once chartered, cities have inherent home rule authority within their boundaries. Article VIII, § 2(b) of the Constitution provides that municipalities may exercise any power for municipal purposes except as otherwise provided by law. The exception "as otherwise provided by law" may be found in either a general or a special law. For example, the Legislature as creator of a city, may by special law restrict its otherwise inherent powers. The power to restrict is a subsidiary power of the Legislature's inherent authority to abolish the city outright.

A relevant example of a general law limiting the inherent home rule authority of cities is found in § 166.021(3), Fla. Stat. (2005). That section acknowledges that cities have inherent legislative authority, coextensive with the Legislature itself, with certain exceptions. The relevant exception is in subsection (d), which withdraws from municipal powers any subject pre-empted to a county pursuant to a county charter adopted under the authority of sections 1(g), 3, and 6(e) , Article VIII of the State Constitution.

Another example of a limitation of inherent home rule authority of cities is found in the case of *City of Ormond Beach v. County of Volusia*, 535 So.2d 302, 305 (Fla. 5th D.C.A. 1988). In that case, the charter county had adopted a road impact fee ordinance having countywide effect, to fund the non-local county roads as defined in the state transportation code. Many of the arterial and collector county roads lay within municipal boundaries. Four cities

passed ordinances of nullification effective within their boundaries. In declaring those ordinances to be beyond city home rule authority, the court held:

> Nor do the opt-out ordinances appear to fall within an area of legitimate municipal concern....This goal, however, is absolutely contrary to the scheme of general law in Florida which gives the planning, building and maintaining function for county roads exclusively to the counties--*not* to the cities.

2. **Counties**. Counties are political subdivisions of the sovereign They are " the representative of the sovereignty of the state, auxiliary to it, an aid to the more convenient administration of the government." *Keggin v. Hillsborough County*, 71 So. 372 (Fla. 1916) State. Art.VIII, § 1(a) of the Constitution requires the division of the state into such subdivisions, by law. Accordingly, every part of the state must lie within the boundaries of some county. In the absence of a charter, the Constitution itself provides for a governing board of county commissioners, a sheriff, clerk of court, supervisor of elections, property appraiser and tax collector. The constitution does not specify the powers of these officers but assumes that the Legislature will do so by general laws. Article III, § 11(a)(1) of the Constitution forbids the Legislature to enact any special laws pertaining to the election, jurisdiction or duties of officers, <u>except</u> officers of municipalities, <u>chartered</u> counties, special districts or local governmental agencies.

   a. **Noncharter counties**. The Legislature has adopted general laws conferring specific powers upon all counties, whether chartered or nonchartered. A relevant example of such a general law is § 125.01(1)(d), which authorizes every county to provide fire protection. Subsection (1)(p) further provides that a county may enter into agreements with other governmental agencies within or outside the boundaries of the county for joint performance, or performance by one unit in behalf of the other, of either agency's authorized functions. Subsection (5)(a) provides that, to an extent not inconsistent with general or special law, the governing body of a county shall have the power to establish, merge or abolish special districts to include both incorporated and unincorporated areas (subject to the approval of the governing body of the incorporated area affected) within which may

be provided municipal services from funds derived from services charges, special assessments or taxes within such district only.[1]

b. **Charter counties**. Article VIII, § 6(e) specifically preserves the right of Dade, Duval, Hillsborough and Monroe Counties to establish constitutionally-based charters under the provisions of the Constitution of 1885. Article VIII, § 1(c) further authorizes the Legislature to provide by general or special law for the establishment of additional charter county governments. An example of such a general law is found in §§ 125.60-125.64, Fla. Stat. (2005). Examples of such special laws are found in the Pinellas County Charter (Chapter 80-590, Laws of Florida, as amended) and the Volusia County Charter (Chapter 70-966, Laws of Florida, as amended).

Once a charter county government is established, Article VIII, § 1(g) of the Constitution specifies the legislative powers of the charter government. Charter counties have all inherent powers of local self-government, not inconsistent with general law or with voter-approved special laws. The Constitution requires that the charter provide which shall prevail in the event of conflict between county and municipal ordinances. This section is the reciprocal of the cited provision in § 166.021(3)(d), which prohibits any home rule power of a municipality which is inconsistent with a pre-emptive charter power of the county. Section 2.01 of the Pinellas Charter currently provides:

> The county ordinance shall prevail over the municipal ordinance when a special law enacted subsequent to the adoption of this Charter and approved by a vote of the electorate provides that a county ordinance shall prevail over a municipal ordinance or when the county is delegated special powers within an area of governmental service enumerated in this Charter. In

[1] § 125.0101 also authorizes counties to contract for services with municipalities and special districts for fire protection and other services, to be funded "as agreed upon". This section specifies that it is cumulative to other existing powers. It specifically abjures any authority of the county to impose service charges, special assessments or taxes. This section invokes Art. VIII, § 4 of the Constitution providing for transfers of powers or functions between governments. That constitutional provision is addressed more fully below.

> all other cases where a county ordinance conflicts with a municipal ordinance, the municipal ordinance shall prevail.

Section 2.04 of the Pinellas Charter enumerates the special powers of the County to provide, within municipalities, the listed services and regulatory authority and to pre-empt conflicting municipal ordinances by county ordinances which directly concern the furnishing of such services and regulatory authority. Subsection (l) of the listed special powers is:

> Coordination and implementation of fire protection for the unincorporated areas of the county.

Thus the existing Pinellas Charter provides no pre-emptive authority of the County to provide services or regulatory authority with respect to fire protection within the municipalities of the County. At a minimum, a charter amendment is required to provide that authority to the county and, by the force of § 166.021(3)(d) of the statutes, remove that authority from the cities.

3. Special considerations in the transfer of services or regulatory authority.

a. **Constitutional limitations**. Art. VIII, § 4 of the Constitution governs transfers of powers. It provides that:

> 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.

At least insofar as the requirements of Article VIII, § 4 are concerned, a distinction must be drawn between the pre-emptive ordinance power which is authorized to a charter county under § 1(g), and the

transfer of a function or power relating to services, to which § 4 applies.

In *Sarasota County v. Town of Longboat Key*, 355 So. 2d 1197 (Fla. 1978), the County proposed five charter amendments transferring a number of powers, functions and services (not including fire services) from the cities to the county government. The trial court enjoined the referendum upon claims by the cities that the proposed amendments violated Article VIII, §3 and 4. On direct appeal, the Supreme Court held, first, that §3 only applied to full mergers of governments where one or more of the governments ceases to exist. But the Court found that the measure violated Art. VIII, § 4, FLA. CONST. because it had not been adopted by any of the methods allowed in that section

But in *City of New Smyrna Beach v. Volusia County*, 518 So.2d 1379 (Fla. 5th D.C.A. 1988), *rev. den.* 525 So.2d 876 (Fla. 1988), the courts let stand a county charter amendment, pre-empting to the County government the exclusive power to regulate uniformly all services and conduct on the public beaches in the unincorporated county and all of its cities, and to prescribe minimum levels of public services for all cities opting to continue such services. The District Court of Appeal affirmed the charter amendment. In doing so, it relied heavily upon the distinction made by the Supreme Court in *Broward County v. City of Ft. Lauderdale*, 480 So.2d 631 (Fla. 1985). In the *Broward* decision, the Supreme Court declared a distinction between regulatory pre-emption, for which no dual referenda are required, and a transfer of powers or functions relating to services, which the *Longboat* decision typefied.

An analysis of the procedural requirements of Art. VIII, § 4, FLA. CONST., where it applies, reveals that the transfer of a function or power is initiated by one of two methods. It may be legislatively proposed ("by law") or it may be proposed by the resolution of each affected government. The transfer thus proposed may likewise become effective by one of two methods, either the separate concurrences of the electors of the transferor and transferee, or "as otherwise provided by law." Approval "as otherwise provided by law" may be, for example, approval only by a single countywide vote if the Legislature so authorizes. Compare, for example, the

provisions in Article VIII, § 3 of the Constitution which authorizes the outright merger of a county and one or more of its cities. That section requires that the plan of merger be proposed by a special act of the Legislature[2] and that the plan provide either for a dual vote or a single countywide vote.

b. **Charter limitations on power of amendment**.

Article VIII, § 1(c) provides that a charter shall be adopted, amended or repealed only upon vote of the electors. The legislative powers of a charter government may be limited under Article VIII, § 1(g) by a special law approved by vote of the electors. Section 6.04 of the Charter is a special law (Chapter 99-451) approved by vote of the electors. It currently provides, in pertinent part:

> [a]ny charter amendment affecting any change in function, service, power, or regulatory authority of a county, municipality, or special district may be transferred to or performed by another county, municipality, or special district only after approval by vote of the electors of each transferor and approval by vote of the electors of each transferee.

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[2] In *Sarasota County v. Town of Longboat Key*, 355 So.2d 1197, 1201 (Fla. 1978), the Supreme Court construed the "proposal" part of Art. VIII, § 4, FLA. CONST. to require a specific legislative act, rather than the general authority expressed in § 125.86(7), FLA. STAT. (2005) for counties to declare some subjects to be of regional importance. The Court noted:

> We think it clear from the specificity of the procedure in Section 4 that the "by law" reference connotes the need for a separate legislative act addressed to a specific transfer, in the same manner that two or more resolutions of the affected governments would address a specific transfer.

Likewise, at n.15, the Court found the that terminal phrase of Art. VIII, § 4, "or as otherwise provided by law" authorizes the Legislature to provide a different means of approval, but not an alternate method of proposal to the electors. For example, in *Metropolitan Dade County v. City of Miami*, 396 So. 2d 144 (Fla. 1980), the court noted that a general statute authorized the County to exercise exclusive jurisdiction over taxicab regulation upon procuring a resolution from each municipal government (without any referendum requirement) but the County complied with neither the constitutional provisions nor the alternate provision authorized by statute.

The syntax of the quoted sentence is awkward, since the subject of the sentence is "any charter amendment" and the verb is "may be transferred". However, the apparent intent is that the provisions in Section 6.04 extend beyond the limitations of Article VIII, § 4 of the Constitution, in that they apply to regulatory pre-emptions by the County which could otherwise be created by simple charter amendment approved by a single countywide vote.

So long as this section continues in the charter, it appears that dual referenda would be required either for a full transfer of powers or functions related to fire services (under the Constitution) or for mere regulatory standardization by county pre-emptive ordinance.[3] However, since the consolidation of county, district and muncipal fire services would be proposed by special act, the special act would be in substance an amendment of the Charter which would supesede any conflicting parts of Section 6.04. Moreover, in my view, the plain language of Art. VIII, § 1(c), FLA. CONST.does not permit a charter amendment to be approved otherwise than "upon vote of the electors of the county".

II. <u>What are the fiscal obligations, if any, from the transferee government to the transferor government in the event that functions, powers and existing supporting assets of municipalities are involuntarily transferred?</u>

[3] It is necessary at this point to reconcile the provisions of Sections 1(c) and 1(g). Section 1(c) deals with the charter structure and its division of powers among offices, and between the government and its constituents. The power of the people is always paramount under Article I, § 1 of the Constitution. The Legislature has power, by special law, to limit the powers of the county's legislative body to enact ordinances, but only if the people themselves consent to such a limitation. The provision in Section 1(g) is accordingly a proviso or exception limiting the ordinance authority of the board of county commissioners or other governing authority. It may not be extended beyond the section or subsection in which it is found. *In Re: Advisory Opinion to the Governor,* 313 So. 2d 717 (Fla. 1975). The power of a charter county to amend its own charter is as may be provided in its charter from time to time. The charter amendment may be proposed by the Legislature (as was the case in Section 6.04), by the Board of County Commissioners, by the people through popular initiative, or by one or more proposals from a Charter Review Commission. Under Article VIII, § 1(c), it is the act of the "electors of the county" which amends the charter. *City of Cocoa Beach v. Vacation Beach., Inc.*, 852 So. 2d 358 (Fla. 5th DCA 2003). Thus the charter provision for dual referenda in Section 6.04 may be constitutionally doubtful. It may nevertheless be removed by the voters in the same manner in which it was placed there, by a countywide referendum.

Brief answer: The State is the creator of both cities and counties, and may abolish them or transfer their assets without compensation. However, provision must be made for the protection of any creditors of the transferor.

Discussion: Art. X, § 6(a), FLA. CONST. provides that no private property may be taken for public use except with full compensation therefor. But that provision does not explicitly apply to property which is already publicly owned. The cases are divided on whether land held by one public body may be condemned by another without full compensation. Where the interests and powers of the two condemning bodies are relatively equal the first user has priority to avoid an endless cycle of takings and re-takings. *Florida East Coast Railway Company v. City of Miami*, 372 So.2d 152 (Fla. 3d D.C.A. 1979). This is particularly so when the existing public owner has eminent domain powers which are junior to the State's powers, and the interests of both public users can be continued without material interruption. *Housing Authority of City of Miami v. State Dept. of Transportation*, 385 So.2d 690 (Fla. 4th D.C.A. 1980). Compare *Dept. of Transportation v. Dade County*, 388 So.2d 326 (Fla. 3d D.C.A. 1980), holding that at least in the context of a quick-take, the state could not assert a blanket immunity from liability to a county, but was free to establish the absence of damages resulting from building a better highway over the County's right of way. No later decision has ever cited *Dade County* for the proposition that public landowners must be paid when their property is taken for another public use.

A more appropriate examination of this kind of intergovernmental conflict may begin with *State ex rel. Gibbs v. Couch*, 190 So. 723 (Fla. 1939). In that case, the Legislature had abolished the city of Daytona Beach and chartered a new city of the same name, to which the Legislature transferred all of the property and debts of the former city. In upholding the act of the Legislature, the Court quoted from *Attorney General ex rel. Kies v. Lowrey*, 199 U.S. 233, where the Supreme Court of the United States noted:

> If the legislature of the state has the power to create and alter school districts, and divide and apportion the property of such district, no contract can arise, no property of a district can be said to be taken...". [quoting in turn from *Laramie County v. Albany County*, 92 U.S. 307:} Institutions of the kind, whether called counties or towns, are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state.
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> It is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common

> property and common burdens in such manner as to them may seem reasonable and equitable.

The Florida court noted, as the Constitution requires in the case of municipal debt, that the legislature is bound to make provision for the protection of any municipal creditors. Such is the case in the abolition of cities (under Art. VIII, § 2(a), FLA. CONST.) or their merger into another entity under §3.

Although there is little discussion apart from these principles, it appears to me that if the Legislature proposes by special act that the fire services within Pinellas County be consolidated and that existing municipal assets for that purpose be transferred to the consolidated entity, the Legislature may do so without providing for compensation to any transferring government. This is a lesser included power of the power to abolish that government outright, and transfer its assets as the Legislature sees fit. . Indeed, if any city were to seek and obtain an award in eminent domain (notwithstanding that no private property is taken), its citizens would receive a special benefit thereby from the transferring entity, for which they might fairly be specially assessed to finance the buyout of their own assets on their own behalf. By the same token, according to the constitutional principle expressed in Art. VIII, § 2(a) and 3, FLA. CONST., any transferor city whose assets are encumbered by disproportionate debt might fairly be specially assessed for its retirement, so that the citizens who have contributed debt-free property do not pay twice. And in many cases where fire services have been financed in the past by special assessments or impact fees, the proceeds of any purchase of those assets by the transferee government would not become unrestricted funds of the transferor. but must be held in trust for their original purposes. If such purposes cannot be carried out, the trust fails.

I will be happy to respond to any remaining questions from the Commission or on its behalf. It is my privilege to be of service in this matter.

Sincerely,

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