Mayor, emergency powers

Number: INFORMAL

Date: March 04, 2009

The Honorable S. Scott Vandergrift
Mayor, City of Ocoee
150 North Lakeshore Drive
Ocoee, Florida 34761

Dear Mayor Vandergrift:

On behalf of the City Commission of the City of Ocoee, you have asked for assistance regarding a city charter provision dealing with the duties and emergency powers of the Mayor of Ocoee. Attorney General McCollum has asked me to respond.

Initially, I must advise you that the Florida Attorney General provides legal advice and opinions on questions of state law pursuant to section 16.01(3), Florida Statutes. I am enclosing a copy of this statute and our Statement of Policy for your consideration. Thus, this office has no power to comment upon or interpret the terms of local legislation such as charters or ordinances. Further, it appears that the City of Ocoee is a municipality located within Orange County. Orange County is a charter county and this office has not been advised of any provision of the Orange County Charter that could affect this charter language and no comment is expressed regarding any possible preemption or conflict issues in that regard.

However, in an effort to provide you with some direction, I offer the following informal comments. Section 2(b), Article VIII of the Florida Constitution provides, in part that:

"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."

The Florida Supreme Court has stated that this constitutional provision "expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services."[1] The Court stated, in *State v. City of Sunrise*,[2] that the only limitation on the power of municipalities under this constitutional section is that such power must be exercised for a valid municipal purpose. As determined by the Court, "[l]egislative statutes are relevant only to determine limitations of authority" and municipalities need no further authorization from the Legislature to conduct municipal government.[3]

Pursuant to section 166.021(1), Florida Statutes, municipalities are granted "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." Subsection (3) of the statute prescribes limitations on the subjects that municipal legislation may address:

"The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
(b) Any subject expressly prohibited by the constitution;
(c) Any subject expressly preempted to state or county government by the constitution or by general law; and
(d) Any subject 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 relationship between local and state legislation was specifically discussed by the Florida Supreme Court in *City of Miami Beach v. Rocio Corporation*:

"The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails. An ordinance which supplements a statute's restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute must fail."[4]

The City of Ocoee, therefore, may legislate on any matter upon which the Legislature may act, so long as its ordinance does not forbid what the Legislature has expressly licensed or authorized, or permit what the Legislature has expressly forbidden.[5]

The issue of conflict between local ordinances and state law was addressed in *Jordan Chapel Freewill Baptist Church v. Dade County*.[6] The court in *Jordan Chapel* stated that:

"Legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required. . . . [T]he sole test of conflict for purposes of preemption is the *impossibility* of co-existence of the two laws. Courts are therefore concerned with whether compliance with a County ordinance *requires* a violation of a state statute or renders compliance with a state statute impossible."[7] (emphasis supplied in original)

Article II, Section 6, Florida Constitution, provides that the Legislature shall have the power to provide for succession for all public offices during emergencies resulting from enemy attack. The Legislature has acted on this constitutional requirement by adopting Chapter 22, Florida Statutes, the "Emergency Interim Executive and Judicial Succession Act." The act provides for the "continuity of government through legally constituted leadership, authority and responsibility in offices of the government of the state and its political subdivisions[.]" The act seeks "to provide for the effective operation of governments during an emergency[.]" Section 22.05, Florida Statutes, authorizes local legislative bodies "to enact resolutions or ordinances providing for emergency interim successors to offices [of local governmental bodies]." Such local legislation must be consistent with the provisions of the act.[8] Thus, the City of Ocoee may adopt provisions relating to succession under these conditions that are consistent with Chapter 22.

The "State Emergency Management Act," sections 252.31-252.60, Florida Statutes, sets forth

the state's emergency preparedness, response, recovery, and mitigation capabilities in dealing with a wide range of emergencies and disasters.[9] The Legislature has indicated its intent for adoption of the act:

"It is the intent of the Legislature to reduce the vulnerability of the people and property of this state; to prepare for efficient evacuation and shelter of threatened or affected persons; to provide for the rapid and orderly provision of relief to persons and for the restoration of services and property; and to provide for the coordination of activities relating to emergency preparedness, response, recovery, and mitigation among and between agencies and officials of this state, with similar agencies and officials of other states, with local and federal governments, with interstate organizations, and with the private sector."[10]

Section 252.36, Florida Statutes, sets forth the emergency management powers of the Governor, which include the issuance of executive orders. An executive order or proclamation of a state of emergency shall, among other things, "[a]ctivate the emergency mitigation, response, and recovery aspects of the state, local, and interjurisdictional emergency management plans applicable to the political subdivision or area in question[.]" Thus, the "State Emergency Management Act" contemplates a comprehensive statewide program of emergency management.[11]

The Division of Emergency Management of the Department of Community Affairs is charged with maintaining an emergency management plan and coordinating the elements of this plan with the other governmental entities including municipal governments.[12] Included in the emergency management plan is a postdisaster response and recovery component that must "describe the chain of command during the postdisaster response and recovery period;. . . identify the roles and responsibilities of each involved agency and organization[.]"[13] The division must also:

"Adopt standards and requirements for county emergency management plans. The standards and requirements must ensure that county plans are coordinated and consistent with the state comprehensive emergency management plan. If a municipality elects to establish an emergency management program, it must adopt a city emergency management plan that complies with all standards and requirements applicable to county emergency management plans."[14]

The division is charged with assisting political subdivisions in preparing and maintaining emergency management plans[15] and with coordinating federal, state, and local emergency management activities.[16]

Section 252.38, Florida Statutes, makes provision for the emergency management powers of political subdivisions. With regard to municipalities, subsection (2) provides:

"Legally constituted municipalities are authorized and encouraged to create municipal emergency management programs. Municipal emergency management programs shall coordinate their activities with those of the county emergency management agency. Municipalities without emergency management programs shall be served by their respective county agencies. If a municipality elects to establish an emergency management program, it must comply with all laws, rules, and requirements applicable to county emergency management

agencies. Each municipal emergency management plan must be consistent with and subject to the applicable county emergency management plan. In addition, each municipality must coordinate requests for state or federal emergency response assistance with its county. This requirement does not apply to requests for reimbursement under federal public disaster assistance programs."

Subsection (3) of this statute authorizes political subdivisions, including municipalities, to exercise certain specific powers and duties in carrying out the provisions of the act.

To ensure maximum coordination among governmental entities and in light of the emergency management powers and duties specifically assigned by the "State Emergency Management Act," it would be advisable for the City of Ocoee to work with the Division of Emergency Management of the Department of Community Affairs and with Orange County in adopting local legislation relating to responses to emergencies.

This informal advisory opinion was prepared by the Opinions Division in an effort to be of assistance to you. The conclusions expressed herein are those of the author and do not constitute a formal Attorney General's Opinion.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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Enclosures: Section 16.01(3), Florida Statutes
Statement of Policy

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[1] *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978).

[2] *Id.*

[3] *Supra* n.1 at 1209. *See also City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1974).

[4] *City of Miami Beach v. Rocio Corporation*, 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981), *petition for review denied*, 408 So. 2d 1092 (Fla. 1981).

[5] *See generally* 12 Fla. Jur. 2d "Counties and Municipal Corporations" s. 187.

[6] 334 So. 2d 661 (Fla. 3d DCA 1976). *And see City of Kissimmee v. Florida Retail Federation, Inc.,* 915 So. 2d 205 (Fla. 5th DCA 2005) (generally the fact that local legislation imposes additional requirements on a person or business is not evidence of conflict); *F.Y.I. Adventures v. City of Ocala,* 698 So. 2d 583 (Fla. 5th DCA 1997) (if no issue of preemption, conflict with state

statute is given a very strict and limited meaning; they must contradict each other in the sense that both legislative provisions cannot co-exist, *i.e.*, in order to comply with one, a violation of the other is required).

[7] *Id.* at 664.

[8] Section 22.05, Fla. Stat.

[9] *See, e.g.,* s. 252.34(1), Fla. Stat., defining "[d]isaster" and (3), defining "[e]mergency."

[10] Section 252.311(2), Fla. Stat.

[11] *And see* s. 252.35, Fla. Stat., prescribing the emergency management powers of the Division of Emergency Management.

[12] *Id.*

[13] Section 252.35(2)(a)3., Fla. Stat.

[14] Section 252.35(2)(b), Fla. Stat.

[15] Section 252.35(2)(c), Fla. Stat.

[16] Section 252.35(2)(l), Fla. Stat.