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**Sent:** Monday, September 12, 2011 9:30 AM  
**To:** mlecouris@ci.tarpon-springs.fl.us; jdipasqua@ci.tarpon-springs.fl.us  
**Cc:** James Yacavone  
**Subject:** County preemption of local building regulations

You may be aware that the County is proposing an ordinance that would allow it to preempt local building codes and fees. Attached is a memo from Alan Zimmet regarding the issue.

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**OPINION MEMORANDUM 11-01**

TO: Norton Craig, City Manager

FROM: Alan Zimmet, City Attorney

CC: Mike Staffopoulos, Assistant City Manager  
Carol Stricklin, Community Development Director

DATE: September 8, 2011

RE: Legality of Pinellas County's proposed ordinance to assume enforcement of building codes on County building and development within municipal limits

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You have asked for an opinion regarding the validity of Pinellas County's (the "County") proposed ordinance that reserves to the County the enforcement of building codes on County building and development within municipal limits. This ordinance attempts to prevent the City from enforcing the building codes over County projects on County property within the City's limits. It is my opinion that the County is without authority to grant to itself the authority to issue all permits or approvals for development of County properties within municipal boundaries.

DISCUSSION

As a chartered county, the County must act consistently with the general law and its charter. Additionally, the Florida Constitution requires that the County specify in its charter when its ordinances prevail over conflicting municipal ordinances.

In pertinent part, the County's charter provides that the following services and regulatory authority are reserved to the County, while governmental powers which are *not listed or described below* or granted to the County by general or special law, *shall remain with the municipalities*. When directly concerned with the below list of services and regulatory authority, county ordinances prevail over municipal ordinances. Sec. 2.04, Pinellas County Charter: (A complete copy of Section 2.04 is appended hereto as Appendix A.)

...

(d) Acquisition, development and control of county-owned parks, buildings, and other county-owned property.

(e) Development and operation of public health or welfare services or facilities in Pinellas County.

...

It is my opinion that Sec. 2.04 does not authorize the County to nominate itself as the local permitting agency. Additionally, there is no general or special law establishing the County as the local permitting agency.

#### **A) Building permitting services have not been preempted by the County's charter**

Based on the proposed County ordinance that we have reviewed and accompanying back-up information provided by County staff to the Board of County Commissioners, the County seems to interpret subsection (d) and (e) of Sec. 2.04 above, which provide for "development" of county-owned buildings and health and public welfare facilities, to include authority for the County to review, issue, and enforce all permits and approvals for the County's own development. The County offers a broad definition of "development" and reads development together with control to arrive at the conclusion that the County's charter intended to preempt *all permits or approvals for development* of county properties to the County.

The County's interpretation is not consistent with a plain meaning of a serial list used in a sentence, which separates "development" and "control."<sup>1</sup> Additionally, the County's interpretation is not consistent with the term "development" as defined in Sections 163.3164 and 380.04, Florida Statutes, which is referenced in the County's proposed ordinance. Development is "the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels." §380.04, Fla. Stat. *cited by* §163.3184, Fla. Stat., Pinellas County Land Development Code Sec. 134-221. The definition does not include building permitting services, or serving as the local enforcement agency of the Florida Building Code. *Id.* So, having control over development or developmental control, or any other misnomer, still does not grant the County the power to review, issue, and enforce all building codes, and issue permits or approvals for development of county properties located within the City.

Further, to expand the definition of development is contrary to the specific language of the County's charter, which provides that the charter "shall **not** be construed to authorize or grant power to county government to perform services within the various municipalities *beyond those specifically enumerated in this Charter.*" Sec. 5.02 Pinellas County Charter. The charter is entirely void of any authorization to provide building permitting services as the local enforcement agency within an incorporated area. An amendment to the County Charter would be required to grant the County the authority to perform building permitting and inspection services in the municipalities.

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When the plain meaning is clear and unambiguous, courts will not look to intent. City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993)

**B) There is no general law preempting building permitting services to the County**

Section 553.72(2), Florida Statutes, establishes that the City shall have the power to inspect all buildings, structures, and facilities within its jurisdiction. It is clear, therefore, that review, issuance, and enforcement of permits and approvals for development have not been preempted by general law.

The County's reliance on Section 163.3171, Florida Statutes (the Community Planning Act) in its legislative findings for the proposition that planning and land development regulation has been reserved to the County is misplaced. Section 163.3171 allows for a county to exercise its authority under the Community Planning Act when provided for in its charter. The authority to review, issue, and enforce building permits is not "regulation" set forth in the Community Planning Act, but rather is a service addressed in Chapter 553, Florida Statutes. The scope of the Community Planning Act is 1) to plan for future development and growth; 2) to adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth; 3) to implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements thereof; and 4) to establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of the Community Planning Act. §163.3167, Fla. Stat.

Additionally, Section 163.3171 only allows for preemption when provided for in a county charter. The generic language in the County's charter is insufficient to grant the County's land development regulations control over municipal regulations. For an example of the language which has been held to specifically preempt in this area, *see Seminole County v. City of Winter Springs*, 935 So. 2d 521 (Fla. 5th DCA 2006).

**C) The County would need to amend its charter in order to accomplish the goals of the proposed ordinance**

The County's proposed ordinance is an attempt to expand its charter's preemption of municipal regulation. However, this can only be done by a charter amendment. Since such preemption goes beyond regulation and would transfer power from the cities to the County, the amendment would have to be approved by dual referenda in both the County and the City and approved by the County Board of Commissioners by a majority plus one. *Broward County v. City of Fort Lauderdale*, 480 So.2d 631, 635 (Fla. 1985); *see also* Sec. 6.04, Pinellas County Charter.

## APPENDIX A

Sec. 2.04. - Special powers of the county.

The county shall have all special and necessary power to furnish within the various municipalities the services and regulatory authority listed below. When directly concerned with the furnishing of the services and regulatory authority described in this section, county ordinances shall prevail over municipal ordinances, when in conflict. Governmental powers not listed or described in this Charter or granted to the county by general statute or special act shall remain with the municipalities.

- (a) Development and operation of 911 emergency communication system.
- (b) Development and operation of solid waste disposal facilities, exclusive of municipal collection systems.
- (c) Development and operation of regional sewage treatment facilities in accordance with federal law, state law, and existing or future interlocal agreements, exclusive of municipal sewage systems.
- (d) Acquisition, development and control of county-owned parks, buildings, and other county-owned property.
- (e) Development and operation of public health or welfare services or facilities in Pinellas County.
- (f) Operation, development and control of the St. Petersburg-Clearwater International Airport.
- (g) Design, construction and maintenance of major drainage systems in both the incorporated and unincorporated area.
- (h) Design, construction and maintenance of county roads in accordance with law.
- (i) Implementation of regulations and programs for protection of consumers.
- (j) Implementation of animal control regulations and programs.
- (k) Development and implementation of civil preparedness programs.
- (l) Coordination and implementation of fire protection for the unincorporated areas of the county.
- (m) Operation of motor vehicle inspection facilities, including inspection of auto emissions systems.

- (n) Production and distribution of water, exclusive of municipal water systems and in accordance with existing and future interlocal agreements.
- (o) Implementation of programs for regulation of charitable solicitations.
- (p) All powers necessary to provide municipal services in the unincorporated areas of the county and in accordance with any existing and future interlocal agreement.
- (q) All powers necessary to transfer the functions and powers of any other governmental agency upon approval by the governing body of that agency and the board of county commissioners.
- (r) All power necessary, upon approval of a vote of the electors, to levy a one-mill increase in ad valorem taxes in order to make funds available to be used solely to acquire beachfront and other property to be dedicated as public parks for recreational use. This subsection shall in no manner limit a municipality from levying any such tax under any authorization it might have at this time or may receive in the future.
- (s) Countywide planning authority as provided by special law. In the event of a conflict between a county ordinance adopted pursuant to the county's countywide planning authority as provided by special law and a municipal ordinance, the county ordinance shall prevail over the municipal ordinance; however, a municipal ordinance shall prevail over a county ordinance in the event a municipal ordinance provides for a less intense land use or a lesser density land use within the corporate boundaries of the municipality than that provided by county ordinance.
- (t) All powers necessary to establish by ordinance the exclusive method and criteria for voluntary municipal annexation, including the delineation of areas eligible for annexation, to the extent provided by general law.
- (u) Development and operation of countywide mosquito control programs.
- (v) Development and operation of water and navigation control programs, including:
  - (1) regulating and exercising control over the dredging and filling of all submerged bottom lands in the waters of Pinellas County, together with all islands, sandbars, swamps and overflow lands including sovereignty lands, and regulating and exercising control over the construction of docks, piers, wharves, mooring piles and buoys therein; and
  - (2) performing all things necessary to undertake projects for the construction, maintenance and improvement of portions of the Intracoastal Waterway and other channels within the navigable water of Pinellas County; and
  - (3) undertaking programs for the dredging and maintenance of waterway channels within the incorporated and unincorporated areas of Pinellas County which have become or have been nonnavigable.

