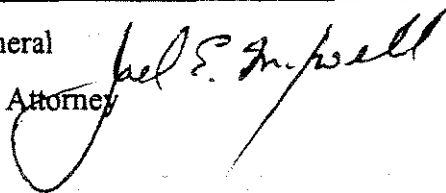


**CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM**

TO: Victor Igwe, Auditor General
FROM: *for* Alejandro Vilarello, City Attorney 
DATE: June 27, 2003
RE: Travel per diem; AGO 2003-01;
MIA No.03-00011

This is in response to your request for a legal opinion wherein you asked, substantially, the following question:

WHETHER THE CITY OF MIAMI IS SUBJECT TO SECTION 112.061(6), FLORIDA STATUTES (2002), AND PROVISIONS THEREIN PERTAINING TO MUNICIPAL PER DIEM TRAVEL AND SUBSISTENCE ALLOWANCES, AS RECENTLY OPINED BY THE FLORIDA ATTORNEY GENERAL IN AGO 03-01.

In summary, the response to your query is, conditionally, in the negative, due to the Florida Legislature's recent amendment of The Municipal Home Rule Powers Act (signed into law on June 10, 2003, retroactive to January 1, 2003).

DISCUSSION

In AGO 03-01 (January 3, 2003; copy attached hereto as "Attachment A"), the Florida Attorney General ("Attorney General") totally reversed his long-standing position of 29 years by holding that Florida's municipalities are, in fact, subject to the provisions of Section 112.061, Florida Statutes, which sets forth, with specificity, the per diem and travel subsistence allowances permitted for governmental travelers. The Attorney General, in AGO 074-18 (January 14, 1974; copy attached hereto as "Attachment B"), had, conversely, opined that, pursuant to the Municipal Home Rule Powers Act (Chapter 166, Florida Statutes), municipalities were not bound by the travel allowance limitations of Section 112.061(6), Florida Statutes, and could enact travel reimbursement provisions at variance with that statute.

As this Office has stated in previous legal opinions, the opinions of the Attorney General are not legally binding on a court or this Office, but they are entitled to careful consideration, given a great weight in legislative construction, and generally regarded as highly persuasive. *See Abreu v Cobb*, 670 So.2d 1010 (Fla. 3d DCA 1996); MIA-03-005, April 7, 2003.

Prior to AGO 03-01, the City of Miami's reliance on the grant of home rule powers embedded in Chapter 166, Florida Statutes, and AGO 074-18, we believed, substantiated its independent establishment of reasonable per diem and travel reimbursement policies. Of course, this presumption was undermined by the Attorney General's reversed position in AGO 03-01.

Whether or not this Office agrees with the subject Attorney General's opinion is no longer relevant due to the Florida Legislature's subsequent and reactive enactment of Chapter 2003-125, Laws of Florida (a/k/a "Senate Bill 1426"; copy attached hereto as "Attachment C"), in response to AGO 03-01.

Chapter 2003-125, an amendment to the Municipal Home Rule Powers Act, signed into law by the Governor on June 10, 2003, with a retroactive date of January 1, 2003, specifically and unequivocally authorizes municipalities to "provide" per diem and travel expense policies different from those set forth in Section 112.061(6), Florida Statutes. Further, Chapter 2003-125 also provides that if and when a municipality establishes such policies, they are valid and "exempt from all provisions of 112.061." Contrarily, if such policies are not or have not been adopted, the municipality shall be subject to Section 112.061.

The City of Miami initially promulgated its current reimbursement allowances, criteria and related travel Administrative Policy Manual policies (APM - 1-77) on October 1, 1977. Consequently, it satisfies Chapter 2003-125 condition precedent for deviation, and Section 112.061 does not bind the City.

On a supplemental note, please take notice that Chapter 2003-125 includes a new provision that mandates that every claim for travel reimbursement contain a statement and declaration that the expenses were actually incurred in the performance of official duties. It also provides criminal and civil penalties for infractions.

CONCLUSION

AGO 03-01 is of no import, having been superseded and rendered moot by the Legislature's enactment of Chapter 2003-125. Consequently, the City of Miami is at liberty to follow its established APM travel reimbursement policies and procedures or enact new ones with per diem provisions different from those set forth in Section 112.061; the existence or establishment of such policies being a condition precedent to Section 112.061 exemption.

AV:JEM:mmd

Enclosures

c: Mayor and City Commissioners
Joe Arriola, City Manager
Priscilla A. Thompson, City Clerk
Linda Haskins, Chief Financial Officer
Larry Spring, Chief of Strategic Planning, Budgeting & Performance
James Scott Simpson, Director, Finance Department
Rosalie Mark, Director, Labor Relations Department

Florida Attorney General Advisory Legal Opinion

Number: AGO 2003-01

Date: January 3, 2003

Subject: Municipalities, per diem and travel expenses

Mr. James C. Brady
Fort Lauderdale City Attorney
501 Northeast 8th Street
Fort Lauderdale, Florida 33304

RE: MUNICIPALITIES-OFFICERS AND EMPLOYEES-TRAVEL EXPENSES-PER DIEM-
expense accounts for municipal officers and volunteers for per diem
expenses. s. 112.061, Florida Statutes.

Dear Mr. Brady:

You have requested my opinion on substantially the following
question:

Is a municipality authorized to provide an expense account to its
city officials and to citizen volunteer members without a limitation
on the per diem rates established pursuant to section 112.061(6),
Florida Statutes?

In sum:

Section 112.061(6), Florida Statutes, applies to municipalities and
controls the maximum rates of per diem and subsistence allowance to
be paid to officers, employees or others authorized to act on behalf
of the municipality. While a municipality may legislate on the
subject of per diem and subsistence allowances for governmental
travelers, the rates established by section 112.061(6), Florida
Statutes, may not be exceeded.

Section 112.061, Florida Statutes, governs the per diem and travel
expenses of public officers, employees and authorized persons in this
state. The enactment of section 112.061 represents the Legislature's
efforts to establish uniform maximum rates and limitations, with
certain exceptions, applicable to public officers, employees, and
authorized persons whose travel expenses are paid by a public agency.
[1] Municipalities are included within the scope of the act. [2]

To ensure uniformity, the statute provides that section 112.061,
Florida Statutes, will prevail over any conflicting provisions in a

" ATTACHMENT A "

general law to the extent of the conflict, unless the general law contains a specific exemption. However, section 112.061(1)(b)2., Florida Statutes, expressly states that "[t]he provisions of any special or local law, present or future, shall prevail over any conflicting provisions in this section, but only to the extent of the conflict." A "local law" does not refer to local codes or ordinances, but to enactments of the Legislature.[3]

Section 112.061(6), Florida Statutes, provides the rates at which travelers may be reimbursed for official travel. The statute provides:

"(a) All travelers shall be allowed for subsistence when traveling to a convention or conference or when traveling within or outside the state in order to conduct bona fide state business, which convention, conference, or business serves a direct and lawful public purpose with relation to the public agency served by the person attending such meeting or conducting such business, either of the following for each day of such travel at the option of the traveler:

- 1. Fifty dollars per diem; or
- 2. If actual expenses exceed \$50, the amounts permitted in paragraph (b) for meals, plus actual expenses for lodging at a single-occupancy rate to be substantiated by paid bills therefor.

When lodging or meals are provided at a state institution, the traveler shall be reimbursed only for the actual expenses of such lodging or meals, not to exceed the maximum provided for in this subsection.

(b) All travelers shall be allowed the following amounts for subsistence while on Class C travel on official business

- 1. Breakfast\$3
- 2. Lunch.....\$6
- 3. Dinner\$12"

These rates are established statutorily and apply to "[a]ll travelers."

A "traveler" for purposes of section 112.061 is defined in (2)(f) as "[a] public officer, public employee, or authorized person, when performing authorized travel." An "authorized person" is defined as:

- "1. A person other than a public officer or employee as defined herein, whether elected or commissioned or not, who is authorized by an agency head to incur travel expenses in the performance of official duties.
- 2. A person who is called upon by an agency to contribute time and services as consultant or adviser.
- 3. A person who is a candidate for an executive or professional position." [4]

Sincerely,

Richard E. Doran
Attorney General

RED/tgh

[1] Section 112.061(1)(a), Fla. Stat.

[2] Section 112.061(2)(a), Fla. Stat., defines an "agency" or "public agency" as "[a]ny office, department, agency, division, subdivision, political subdivision, board, bureau, commission, authority, district, public body, body politic, county, city, town, village, municipality, or any other separate unit of government created pursuant to law." (e.s.)

[3] See, Art. X, s. 12(g), Fla. Const.; Advisory Opinion to Governor, 22 So. 2d 398 (Fla. 1945) (ordinance of noncharter county not a "law" within the purview of s. 5[c], Art. II, State Const.); Op. Att'y Gen. Fla. 84-39 (1984) (municipal ordinance not a "law" within the meaning of s. 8, Art. I, State Const.); Op. Att'y Gen. Fla. 79-109 (1979) (governing body of charter county prohibited in absence of statutory authorization from providing by ordinance for imposition of civil penalties by agencies of county); and *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145 (Fla. 4th DCA 1982) (holding that provisions of a county ordinance authorizing assessment of penalties by county agency was unconstitutional, and agreeing with conclusion reached in Op. Att'y Gen. Fla. 79-109 (1979).)

[4] Compare, s. 112.061(11), Fla. Stat., relating to travel authorization and voucher forms which specifically applies only to "state officers and employees and authorized persons" and Op. Att'y Gen. Fla. 02-65 (2002).

[5] Section 112.061(2)(e), Fla. Stat.

[6] See, Op. Att'y Gen. Fla. 74-18 (1974).

[7] Section 112.061(1)(a), Fla. Stat.

[8] A legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way. *Alsop v. Pierce*, 19 So.2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So.2d 341, 342 (Fla. 1952); *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976).

[9] Cf., Op. Att'y Gen. Fla. 92-67 (1992) (charter county required to follow provisions of section 112.061[7], Fla. Stat.)

~~under s. 218.31(1), F. S., and subject to the requirements of ss. 218.32(1), 218.33, and 218.34, F. S.~~

~~AS TO QUESTION 3:~~

~~Navigational districts existing under Part III of Ch. 374, F. S., were transferred by the Reorganization Act of 1969 in the same manner as those under Part II. Sections 20.25(5) and 20.06(4), *supra*.~~

~~Similar to the Part II districts, these districts are local in nature and perform specialized functions in a defined area (ss. 374.75 and 374.76, F. S.). The issuance of bonds is subject to approval by referendum of the qualified electors of the district (s. 374.85, F. S.); and taxes may be levied on property within the district (s. 374.92, F. S.). Thus, these districts would also appear to be local units of special government created pursuant to general and special law for the purpose of performing prescribed specialized functions within limited boundaries and therefore to be "unit[s] of local government" under s. 218.31(1), F. S., subject to ss. 218.32(1), 218.33, and 218.34, F. S.~~

074-18—January 14, 1974

MUNICIPAL HOME RULE POWERS ACT

AUTHORITY TO ENACT MUNICIPAL ORDINANCE AT VARIANCE WITH GENERAL LAW

To: Dwight W. Severs, City Attorney, Titusville

Prepared by: Jan Dunn, Assistant Attorney General

QUESTION:

What is the effect of the Municipal Home Rule Powers Act, Ch. 73-129, Laws of Florida, regarding a municipality's authority to enact legislation varying from s. 112.061, F. S.?

SUMMARY:

A municipality may, pursuant to Ch. 73-129, Laws of Florida, enact per diem and travel allowances which vary from s. 112.061, F. S.

Section 112.061, F. S., provides per diem and travel allowances that may be paid to certain public officers and employees. Municipalities are included within this section. It appears that there is no provision in the Titusville Charter establishing per diem or travel allowances and that the city wishes to enact an ordinance increasing the travel expenses for its officers and employees from those fixed by s. 112.061.

The Municipal Home Rule Powers Act, Ch. 73-129, Laws of Florida, gives broad home rule powers to municipalities. It provides essentially that, with certain exceptions, municipalities can enact any legislation concerning any subject matter upon which the state legislature may act. Attorney General Opinions 073-267 and 073-276. Since there is no express preemption of this subject matter to the state in s. 112.061, *supra*, (even though the desire for a "uniform system" is mentioned as the legislative intent), a municipality may enact an ordinance providing for travel and subsistence allowances different from those fixed in s. 112.061 pursuant to Ch. 73-129, *supra*.

" ATTACHMENT B "

1
2 An act relating to governmental per diem and
3 travel expenses; amending s. 166.021, F.S.;
4 providing definitions; authorizing
5 municipalities and agencies thereof to adopt
6 per diem and travel expense policies for
7 travelers, notwithstanding s. 112.061, F.S.;
8 providing for retroactive application;
9 providing for applicability of s. 112.061,
10 F.S., if per diem and travel expense policies
11 are or are not adopted; providing for offenses
12 related to false or fraudulent travel claims;
13 providing misdemeanor penalties; providing for
14 civil liability; amending s. 112.061, F.S.;
15 providing that counties, county officers,
16 district school boards, and certain special
17 districts may increase specified rates;
18 providing effective dates.

19
20 WHEREAS, the Municipal Home Rule Powers Act, chapter
21 166, Florida Statutes, provides that the governing body of
22 each municipality has the power to enact legislation
23 concerning any subject matter upon which the Legislature may
24 act, and

25 WHEREAS, the Florida Attorney General, in AGO 1974-18,
26 stated that municipalities, under the Municipal Home Rule
27 Powers Act, have the home rule powers to enact per diem and
28 travel allowances that vary from those specified in section
29 112.061, Florida Statutes, and

30 WHEREAS, numerous municipalities in the state have
31 relied on the grant of home rule powers and AGO 1974-18 to

" ATTACHMENT C "

1 enact reasonable per diem and travel allowances as determined
2 by the governing body of the municipality, and

3 WHEREAS, the Florida Attorney General, in AGO 2003-01,
4 has essentially reversed the opinion set forth in AGO 1974-18
5 and has now stated that section 112.061, Florida Statutes,
6 applies to municipalities and controls the maximum rate of per
7 diem and other allowances paid to officers, employees, or
8 others authorized to act on behalf of the municipality, and

9 WHEREAS, AGO 2003-01 clearly violates the intent of the
10 Municipal Home Rule Powers Act, and places municipalities that
11 have relied on AGO 1974-18 into the position of having to
12 repeal their policies on reasonable per diem and travel
13 allowances in order to comply with AGO 2003-01, NOW,
14 THEREFORE,

15

16 Be It Enacted by the Legislature of the State of Florida:

17

18 Section 1. Subsection (10) is added to section
19 166.021, Florida Statutes, to read:

20 166.021 Powers.--

21 (10) (a) As used in this subsection, the term:

22 1. "Authorized person" means a person:

23 a. Other than an officer or employee, as defined in
24 this paragraph, whether elected or commissioned or not, who is
25 authorized by a municipality or agency thereof to incur travel
26 expenses in the performance of official duties;

27 b. Who is called upon by a municipality or agency
28 thereof to contribute time and services as consultant or
29 advisor; or

30 c. Who is a candidate for an executive or professional
31 position with a municipality or agency thereof.

1 2. "Employee" means an individual, whether
2 commissioned or not, other than an officer or authorized
3 person as defined in this paragraph, who is filling a regular
4 or full-time authorized position and is responsible to a
5 municipality or agency thereof.

6 3. "Officer" means an individual who, in the
7 performance of his or her official duties, is vested by law
8 with sovereign powers of government and who is either elected
9 by the people, or commissioned by the Governor and who has
10 jurisdiction extending throughout the municipality, or any
11 person lawfully serving instead of either of the foregoing two
12 classes of individuals as initial designee or successor.

13 4. "Traveler" means an officer, employee, or
14 authorized person, when performing travel authorized by a
15 municipality or agency thereof.

16 (b) Notwithstanding s. 112.061, the governing body of
17 a municipality or an agency thereof may provide for a per diem
18 and travel expense policy for its travelers which varies from
19 the provisions of s. 112.061. Any such policy provided by a
20 municipality or an agency thereof on January 1, 2003, shall be
21 valid and in effect for that municipality or agency thereof
22 until otherwise amended. A municipality or agency thereof that
23 provides any per diem and travel expense policy pursuant to
24 this subsection shall be deemed to be exempt from all
25 provisions of s. 112.061. A municipality or agency thereof
26 that does not provide a per diem and travel expense policy
27 pursuant to this subsection remains subject to all provisions
28 of s. 112.061.

29 (c) Travel claims submitted by a traveler in a
30 municipality or agency thereof which is exempted from the
31 provisions of s. 112.061, pursuant to paragraph (b), shall not

1 be required to be sworn to before a notary public or other
2 officer authorized to administer oaths, but any claim
3 authorized or required to be made under any per diem and
4 travel expense policy of a municipality or agency thereof must
5 contain a statement that the expenses were actually incurred
6 by the traveler as necessary travel expenses in the
7 performance of official duties and shall be verified by a
8 written declaration that it is true and correct as to every
9 material matter, and any person who willfully makes and
10 subscribes any such claim that he or she does not believe to
11 be true and correct as to every material matter, or who
12 willfully aids or assists in, or procures, counsels, or
13 advises the preparation or presentation of such a claim that
14 is fraudulent or is false as to any material matter, whether
15 or not such falsity or fraud is with the knowledge or consent
16 of the person authorized or required to present such claim,
17 commits a misdemeanor of the second degree, punishable as
18 provided in s. 775.082 or s. 775.083. Whoever receives an
19 allowance or reimbursement by means of a false claim is
20 civilly liable in the amount of the overpayment for the
21 reimbursement of the public fund from which the claim was
22 paid.

23 Section 2. Subsection (14) is added to section
24 112.061, Florida Statutes, to read:

25 (14) APPLICABILITY TO COUNTIES, COUNTY OFFICERS,
26 DISTRICT SCHOOL BOARDS, AND SPECIAL DISTRICTS.--

27 (a) Rates that exceed the maximum travel reimbursement
28 rates for nonstate travelers specified in s. 112.061(6)(a) for
29 per diem, in s. 112.061(6)(b) for subsistence, and in s.
30 112.061(7)(d)1. for mileage may be established by:
31

- 1 1. The governing body of a county by the enactment of
- 2 an ordinance or resolution;
- 3 2. A county constitutional officer, pursuant to
- 4 Article VIII, s.1.(d) of the State Constitution, by the
- 5 establishment of written policy;
- 6 3. The governing body of a district school board by
- 7 the adoption of rules; or
- 8 4. The governing body of a special district, as
- 9 defined in s. 189.403(1), except those special districts that
- 10 are subject to s. 166.021(10), by the enactment of a
- 11 resolution.
- 12 (b) Rates established pursuant to paragraph (15) (a)
- 13 must apply uniformly to all travel by the county, county
- 14 constitutional officer and entity governed by that officer,
- 15 district school board, or special district.
- 16 (c) Except as otherwise provided in this subsection,
- 17 counties, county constitutional officers and entities governed
- 18 by those officers, district school boards, and special
- 19 districts, other than those subject to s. 166.021(10), remain
- 20 subject to the requirements of this section.
- 21 Section 3. This act shall take effect upon becoming a
- 22 law and section 166.021(10) (a) and (b), Florida Statutes, as
- 23 created in section 1, of this act shall apply retroactively to
- 24 January 1, 2003.
- 25
- 26
- 27
- 28
- 29
- 30
- 31