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# MEMORANDUM

**TO:** Jason R. Gabriel, General Counsel

**FROM:** Stephen M. Durden, Chief Assistant

**DATE:** May 5, 2019

**RE:** School Capital Outlay Sales Surtax; Florida Statute Section 212.055(6)

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## I. BACKGROUND.

The School Board is considering a resolution to levy a ½-cent School Capital Outlay Sales Surtax pursuant to Section 212.055(6), Florida Statutes. This statute requires a referendum and further requires that the Council place the referendum on the ballot. Both the School Board and the Council have inquired as to the extent of Council's power under Section 212.055(6).

## II. QUESTIONS ASKED.

A. Whether the Council has legislative discretion regarding whether to place the sales surtax referendum on the ballot.

B. Whether a court has the power to order the Council to place the sales surtax referendum on the ballot.

## III. SHORT ANSWER.

A. The Council has legislative discretion regarding whether and when to place the sales surtax referendum on the ballot.

B. A court does not have the power to order the Council to place the sales surtax referendum on the ballot.

## IV. RULE.

Section 212.055(6), Florida Statutes, reads, in pertinent part, as follows:

> The school board in each county may levy, pursuant to resolution conditioned to take effect only upon approval by a majority vote of the electors of the county voting in a referendum, a discretionary sales surtax at a rate that may not exceed 0.5 percent.
>
> The resolution shall include a statement that provides a brief and general description of the school capital outlay projects to be funded by the surtax. The statement shall conform to the requirements of s. 101.161 and shall be placed on the ballot by the governing body of the county.

The statute authorizes the School Board to levy a "School Capital Outlay Sales Surtax." If the School Board levies the tax, it does not go into effect unless the voters of Duval County, in a referendum, approve the levy. Section 212.055(6) also provides that the School Board does not have the authority to place the question on the ballot. Instead, only the governing body of the county has that authority.

## V. ANALYSIS

### A. Mandatory vs. Directory

The first question raised revolves around the meaning of the word "shall". The statute, by using the word "shall" looks – on its face – like a command, and courts generally find the word to have a mandatory meaning. On the other hand, where a mandatory reading of the word "shall" would violate separation of powers, the court will interpret the word as being directory rather than mandatory.[1] In order to interpret a statute in a manner that avoided violating the Florida Constitution, the Florida Supreme Court has construed the word "shall" to be permissive as used in a statute that provided that the municipality "shall" impose a tax.[2] Courts have also construed "shall" as directory when it appeared as though the statute was creating order. "If provision, though mandatory in terms, is designed simply to further the orderly conduct of business, such provision is generally deemed directory only. See *Reid v. Southern Dev. Co.*, 52 Fla. 595, 42 So. 206 (1906)."[3] "[W]here the directions of a statute are given with a view to the proper, orderly and prompt conduct of business merely, the provision may generally be regarded as directory."[4] The word "shall" then, could be directory or mandatory.

### B. Attorney General & Trial Court Opinion Regarding "Shall"

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[1] *Fagan v. Robbins*, 117 So. 863 (Fla. 1928) and *State v. Shipman*, 360 So. 2d 782 (Fla. 4th DCA 1978).

[2] *Belcher Oil Co. v. Dade Cty.*, 271 So. 2d 118,121 (Fla. 1972) ("Constitutionally construed, the statute empowers but does not require the city to impose such a tax if the municipality in its discretion finds a particular service to be competitive.").

[3] *State Dep't of Envtl. Regulation v. Puckett Oil Co*., 577 So. 2d 988, 991 (Fla. 1st DCA 1991).

[4] *Lomelo v. Mayo*, 204 So. 2d 550, 553 (Fla.1st DCA 1967) (internal quotations omitted).

In AGO 98-29, the Attorney General assumed that an earlier version of Section 212.055(6) (indistinguishable in pertinent part from the current statute) required the board of county commissioners to put the question on the ballot. This conclusion is consistent with a Fourth Circuit decision regarding a different school board/county commission referendum.

In *School Board of Clay County v. Clay County Board of County Commissioners*, Case No. 10-2014-CA-000983, the Fourth Circuit ordered the Board of Commissioners to meet and adopt a resolution placing a school board requested referendum question on the ballot. This case concerned the application of Section 1001.461, Florida Statutes, which reads, in pertinent part:

> To submit the proposition to the electors, the district school board by formal resolution shall request an election that shall be at a general election or a statewide primary or special election. The board of county commissioners, upon such timely request from the district school board, shall cause to be placed on the ballot at such election the proposition to make the office of district school superintendent appointive.

The trial court concluded that the board of commissioners had no discretion whether to place the question on the ballot and no discretion as to which election, concluding that the board of commissioners must place it on the upcoming general election ballots. This statute, like 212.055(6), provided that the school board had the authority to request a referendum, but provided that the board of county commissioners place the referendum on the ballot upon "timely request from the school board." The Attorney General opinion and the Fourth Circuit decision support the conclusion that "shall" mandates that the Council put the School Board's question on the ballot.[5]

**C. Statutory Construction – Other Statutes- "Shall"**

In at least three statutes, the Legislature has authorized school boards to call an election *without* submitting it to the applicable county commission. [6] The Clay County lawsuit concerned a fourth statute, one that provided that the commission place it on the ballot if timely submitted by the school board. With regard to Section 212.055(6) the Legislature chose not to let a school board place the sales surtax directly on the ballot, in clear distinction with the statutes that permit direct placement by the school board. In construing legislation, courts should not assume that the Legislature acted pointlessly.[7] Stated another way, the Florida Supreme Court "presume[s] that the Legislature acts purposefully when it removes language from one statute, but leaves identical language in a different statute. *See, e.g., Beach v. Great W. Bank,* 692 So. 2d 146, 152 (Fla.1997); *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla.1995) ('When the [L]egislature has used a term, as it has here, in one section of the statute but omits it

[5] The Attorney General also concluded that the board of commissioners, not the school board, had the discretion to choose which election. He did not conclude that a court could order the board of commissioners to place the question on the ballot. Instead, he recommended that the board of commissioners and the school board work out an agreed upon date.

[6] *E.g.*, Section 1011.71(2) and (3); Section 1001.364(2) and (6), and Section 1001.362(2) and (7), Florida Statutes.

[7] *Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821, 825 (Fla. 1985).

in another section of the same statute, we will not imply it where it has been excluded.'). *Wright v. City of Miami Gardens*, 200 So. 3d 765, 773 (Fla. 2016). *Accord, Fla. State Racing Comm'n v. Bourquardez*, 42 So. 2d 87, 90 (Fla. 1949) (citation and internal quotation omitted) ("The use by the legislature of certain language in one instance and wholly different language in the other indicates that different results were intended and the courts have so presumed. Under this rule, where language is used in one section of the statute different from that used in other sections of the same chapter it is to be presumed that the language is used with a different intent."). It would be pointless for the Legislature to require the county commission to be involved if the result is exactly the same as statutes that permit a school board to place matters directly on the ballot.

With regard to Section 212.055(6), the Attorney General concluded that by requiring the governing body of the county's involvement, the Legislature must have intended that the county governing body has at least some power. AGO 98-29. He noted, "It is a general rule of statutory construction that where the statute imposes a duty upon a public officer, it also confers by implication such powers as are necessary for the due and efficient exercise of those powers." [8] The Attorney General, however, limited that power to having the discretion as to date of the election. The Attorney General provided no explanation as to that limitation on the Commissioner's powers. The Attorney General did not consider the possibility that the county governing body discretion might include: (1) public policy, e.g., considering the cumulative impact of the School Capital Outlay Surtax combined with existing or potentially-levied county sales surtaxes; (2) the type of election, e.g., primary, general, special, consolidated government first election, or second election; (3) form of election, e.g., traditional ballot box or ballot by mail election. Put another way, the Attorney General gave no reasoning to support his conclusion that the county governing body's discretion was limited to the date of the election, particularly in light of the fact that the Legislature has allowed the school board direct access to the ballot for other questions.

Given the complete lack of standards provided to a county commission in the statute, the word "shall" in the statute should be construed as providing *direction* and *order*, *not* a *command*. As noted by the Attorney General, county commission involvement must mean that county commissioners have at least some power. The three statutes that grant school boards direct access to the voters without the interplay of the county commission supports that conclusion. Given that nothing in the statute suggests a limitation on that power, the power should be construed at its fullest, so long as it does not conflict with the statute. Finally, construing "shall" as mandatory, will, as shown below, result in a violation of separation of powers should a court order the legislative body, i.e., the Council, to adopt legislation. Despite the mandatory appearance of "shall" in Section 212.055(b), the better understanding is that the word "shall" has *directory, not mandatory*, meaning.

At a minimum, as held by the Attorney General, the Council has the discretion to determine the date of the election. Where the Dade County charter prescribed a 60-day period in which to call an election, the Third District held that "the Board of County Commissioners, in their discretion as the legislative body of the county, may set such election which may not be interfered with by the courts without a showing of fraud, corruption, gross abuse of discretion,

[8] AGO 98-29 (footnote omitted) (citing to: *In re Advisory Opinion to the Governor*, 60 So. 2d 285 (Fla. 1952); *State ex rel. Martin v. Michell*, 188 So. 2d 684 (Fla. 4th DCA 1966), *cert. discharged*, 192 So. 2d 281 (Fla. 1966); *Peters v. Hansen*, 157 So. 2d 103 (Fla. 2d DCA 1963).

etc." *Senior Citizens Protective League, Inc. v. McNayr*, 132 So. 2d 237, 239 (Fla. 3rd DCA 1961). *Accord, Miller v. City of Casselberry*, 698 So. 2d 1386, 1387 (Fla. 5th DCA 1997) (The District Court upheld the trial court's order where, "[t]he trial court found that the City's scheduling of the election did not violate any provision of law and that no showing had been made of fraud, corruption, or gross abuse of discretion by the Casselberry City Commission."). This discretion to set the date of the election would include the discretion to choose the type of election, e.g., as part of a general election or as a special election. While Section 100.101, Florida Statutes, and Sections 5.06, 6.06, 8.03, 9.03, 10.03, 11.03, 13.05, and 15.01, Charter, require the calling of special elections, no law requires the holding of a special elections for a sales surtax; consequently, the Council[9] has absolute discretion whether to hold a special election. The Council also has the absolute discretion to choose or not choose a Mail Ballot Election, as authorized, but by no means required, by Section 101.6102, Florida Statutes.

**D. Separation of Powers**

Relying on separation of powers analysis, courts throughout the nation and Florida have concluded that it violates separation of powers for a court to order a legislative body to adopt legislation.[10] The City Council has only one fundamental power; to adopt legislation.[11] In *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481, 17 S. Ct. 161, 165, 41 L. Ed. 518 (1896), the Supreme Court held:

> [A] court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. . . .[T]he courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon

[9] For the purposes of Section 212.055(6), the governing body of the county is the City Council and the Mayor. In order to place a referendum on the ballot, the Council must adopt legislation, an ordinance. The Charter provides that the Mayor may veto any ordinance. Nothing in Section 212.055(6) suggests that it seeks to modify the fundamental structure of the City's government. See, Section 212.055(2) referring to a sales surtax levied by the "governing authority" in each county; Section 212.055(5) referring to an "ordinance…" approved by extraordinary vote of the county commission;" Section 212.055(8) referring to the "governing authority of a county;" and most significantly, Section 212.055(9) authorizes the "governing body of a county" to levy a Pension Liability Surtax, a tax levied by the City via ordinance adopted by the Council and submitted to the Mayor for his determination as to whether to sign it, veto it, or let it become effective without his signature.

[10] *E.g., Suffolk Cty. Ethics Comm'n v. Lindsay*, 30 Misc. 3d 1214(A), 920 N.Y.S.2d 244 (Sup. Ct. 2011) (internal quotations omitted) (In this regard, it is not the province of the courts to direct the legislature how to do its work.) (*Matter of Fornario v. Clerk to Rockland County Legislature*, 307 A.D.2d at 929, 762 N.Y.S.2d 896, *quoting New York Pub. Interest Research Group v. Steingut*, 40 N.Y.2d 250, 256, 386 N.Y.S.2d 646 [1976]; *see People ex rel. Hatch v. Reardon*, 184 N.Y. 431, 442, 77 N.E. 970, [1906] *affd.* 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415)."); *State v. Augafa*, 92 Haw. 454, 470, 992 P.2d 723, 739 (Ct. App. 1999) (internal quotations omitted) ("[A] court strays far from that function [of adjudicating cases] when it directs legislative bodies to adopt specific laws. Such action is not reasonably necessary to effectuate its judicial power." ); *Lucchesi v. State*, 807 P.2d 1185, 1189–90 (Colo. App. 1990) ("[S]eparation of governmental powers . . . prohibits the courts from ordering the legislative branch either to adopt, or not to adopt, specific legislation. *See Serrano v. Priest*, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976)."); and *Steiner v. Superior Court*, 50 Cal. App. 4th 1771, 1782–83, 58 Cal. Rptr. 2d 668, 676 (1996) (internal quotations and citations omitted) (There is a "well-established principle, rooted in the doctrine of separation of powers, that the courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation.... [B]y virtue of the separation of powers doctrine courts lack the power to order the Legislature to pass a prescribed legislative act.... Were it otherwise, courts would be involved in 'an attempt to exercise legislative functions, which ... is expressly forbidden...'").

[11] Section 5.07, Charter.

> the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.[12]

Requiring adoption of legislation is no less a violation of separation of powers than prohibiting the adoption of legislation. On the other hand, various courts, as did the Fourth Circuit, have ruled that where a statute creates a non-discretionary duty, the court may order a local governing body to put a referendum on the ballot. Although the Fourth Circuit ordered the County Commission to place a referendum on the ballot, it did not rule on whether its order would violate separation of powers nor was that argument presented to the court.

Earlier this year the Florida Supreme Court confirmed that even where the constitution mandates adopting legislation, the court would violate separation of powers if it sought to order the adoption of legislation.[13] As explained succinctly by the South Dakota Supreme Court:

> [N]o rule of constitutional law is more firmly established that that which declares that the judicial department of state government is without jurisdiction or authority to compel the Legislature, a co-ordinate branch of the government, to enact legislation required by constitutional provisions. *State v. Bolte*, 151 Mo. 362, 52 S. W. 262, 74 Am.St.Rep.537. In that case the court said: "Where the action of the Legislature is within its legislative power, it cannot be controlled by the judiciary by mandamus, or in any other way, for to do so would be the usurpation of a power which does not belong to the latter."[14]

Justice Mosk of the California Supreme Court, though in a dissenting opinion, explained the need for application of separation of powers, even for the most recalcitrant of legislative bodies:

> In *Glendale [City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 346, 350, 124 Cal.Rptr. 513, 528, 540 P.2d 609, 624] the city council had a moral obligation to comply with an agreement made with representatives of municipal employees. Here the supervisors, out of respect for the judicial process upon which our form of government depends, have an equally clear moral obligation to comply with the directives of *California Rights Organization v. Brian* (1974) 11 Cal.3d 237, 113 Cal.Rptr. 154, 520 P.2d 970, and *Cooper v. Swoap* (1974) 11 Cal.3d 856, 115 Cal.Rptr. 1, 524 P.2d 97. I do not condone their refusal to do so.
>
> However misguided the actions of the Plumas County Board may be and however the supervisors' intransigence contributes to immobilizing orderly governmental processes, such persuasive moral imperatives do not invest the judiciary with the power to breach the wall of separation of powers. We simply cannot direct a

[12] Quoted with approval in *Sackett v. City of Coral Gables*, 246 So. 2d 162, 165 (Fla. 3rd DCA 1971).

[13] *Citizens for Strong Sch., Inc. v. Fla. State Bd. Of Educ.*, 262 So. 3d 127 (Fla. 2019).

[14] *State v. S. Dakota Rural Credits Bd.*, 45 S.D. 619, 189 N.W. 704, 706-07 (1992).

> legislative body to adopt a statute or ordinance, whether it relates to employees' salaries, payments of welfare benefits, *or any other subject requiring a vote of the body*. After being selected by the electorate, every councilman, every supervisor, and every state legislator has an inviolate right to cast an "aye" or "nay" vote upon any subject before his body, and he must be able to do so conscientiously, without apprehensively glancing up at the Damoclean sword of a potential court citation for contempt. The legislators' responsibility is to their constituency, not to the judiciary.
>
> I find nothing in the circumstances of this proceeding to justify carving out an exception to the venerable doctrine of separation of powers, such as, e. g., when the very ability of the judiciary to function is at stake (*see State ex rel. Edwards v. Murray* (1976) 48 Ohio St.2d 303, 358 N.E.2d 577). Quite the contrary, the posture of the case cries out for invocation of judicial abstention.

*Ross v. Superior Court*, 19 Cal. 3d 899, 917–18, 569 P.2d 727, 739 (1977) (Mosk, J. dissenting) (emphasis added). *See, Whiley v. Scott*, 79 So. 3d 702, 708 (Fla. 2011) ("'[S]eparation of powers recognizes three separate branches of government—*the executive, the legislative, and the judicial*—each with its own powers and responsibilities.' *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).").

> As explained by the Third District in Florida:
>
> It is fundamental to our system that the members of a county commission or any governing body of a political subdivision who act in that capacity do not do so as judges-subject to judicial canons and standards-but rather, using the term in its Aristotelian sense, as politicians. Any supposed errors in the substance of their views or the manner in which their opinions are expressed are therefore ordinarily subject only to relief at the polls, not in the courts. *See generally, Davis v. Keen*, 140 Fla. 764, 192 So. 200 (1939); *Osban v. Cooper*, 63 Fla. 542, 58 So. 50 (1912); *Broward County Rubbish Assn. v. Broward County*, 112 So.2d 898 (Fla. 2d DCA 1959); *Senior Citizens Protective League, Inc. v. McNayr*, 132 So.2d 237 (Fla. 3d DCA 1961); 2 McQuillin, Municipal Corporations § 10.33 (3rd ed. 1979); 12 Fla.Jur.2d Counties and Municipal Corporations § 145 (1979).

*Izaak Walton League of Am. v. Monroe Cty.*, 448 So. 2d 1170, 1171 (Fla. 3rd DCA 1984).

In summary, even where the constitution requires adoption of legislation, the court cannot order such adoption.[15] A court, then, would violate separation of powers by ordering the Council to adopt legislation.[16]

[15] *Accord*, N.D.A.G. Opinion 86-31 Oct. 16, 1986:

> The legislative branch of state government has the exclusive authority to enact legislation. . . . Therefore, under the separation of powers principle, neither the executive branch nor the judicial branch of the state may compel the legislative branch to exercise the powers and duties bestowed upon the Legislature by the constitution, including the Legislature's authority to enact legislation. In other words, the Legislature cannot be compelled to enact legislation, even when the enactment of such legislation is constitutionally mandated.

### E. Mandamus

Mandamus is only ordered where no discretion exists.[17] The Attorney General has clearly held that the governing body of the county has at least some discretion. If an ordinance is not adopted to place the referendum on the ballot, the Council would be justified in defending any request for a writ of mandamus as not available arguing that: (1) the statute leaves discretion to determine (a) the date of the election and (b) that the proposed sales surtax would impact the City's choices with regard to future surtaxes, and (2) that a mandamus order would violate separation of powers. No court and no Attorney General opinion has entered an order or opinion regarding any of these arguments, either for or against.[18]

### F. Justiciability

Even if a claim for declaratory judgement were brought to construe the purpose or duty or responsibility of City Council involvement in implementation of Section 212.055(6), there exists no "manageable standard by which to avoid judicial intrusion into the powers of the [legislative body]."[19] The statute gives no standard by which to judge any action of the City Council. In other words, attempting to define the role of the City Council would violate separation of powers, because nothing in the statute creates or suggests a standard by which a court could determine the limits of the Council's power to choose the date of the election or the form of the election. Indeed, nothing in the statute explains why a court should limit the council's discretion to merely the date, or the form, of the election.

## VI. CONCLUSION

In sum, the Council has discretion as to whether and when to place the sales surtax referendum on the ballot.

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[16] *See, New Orleans Water Works Co. V. New Orleans,* 164 U.S.471, 481, 17 S.Ct. 161, 41 L.Ed.518 (1896) ("a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character").

[17] *Miami-Dade Cty. Bd. of County Commissioners, et al. v. An Accountable Miami-Dade,* 208 So. 3d 724 (Fla. 3rd DCA 2016).

[18] Reviewing a different provision purporting to require a county commission to place a matter on the ballot, the Third DCA concluded, "[N]o ministerial duty existed for the Board to place the petition on the ballot." *Id.*

[19] *Citizens for Strong Sch., Inc. v. Fla. State Bd. Of Educ.*, 262 So. 3d 127, 141 (Fla. 2019).