



CITY OF TAMPA

Pam Iorio, Mayor

Office of the City Attorney
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February 18, 2011

Senator Bill Nelson
United States Senate
716 Hart Senate Office Building
Washington, D.C. 20510

Representative Kathy Castor
United States House of Representatives
137 Cannon House Office Building
Washington, DC 20515

Dear Senator Nelson and Representative Castor:

Our office has been asked to address the legal authority that exists for local governments to create an independent regional agency to construct the proposed high speed rail line from Tampa to Orlando. The brief answer is yes, under existing Florida law a regional agency can be created by interlocal agreement. Cities and Counties in Florida have broad authority to establish independent interlocal agencies that can operate inside and outside the boundaries of the local governments establishing the independent regional agency. The legal authority for this conclusion is explained in more detail below.

A separate issue is how the State of Florida would assign or sub-grant the U.S. Department of Transportation high speed rail grant (the "Grant") to the independent regional agency. This could be done through at least two mechanisms: (1) the Florida Department of Transportation could contract with the independent regional agency to assign the Grant; or (2) the Florida Legislature by statute could assign the Grant to the independent regional agency. Each of these options would be equally valid methods under Florida law for assigning the Grant from the State of Florida to the independent regional agency.

Creation of the independent regional agency

Florida statutes provide a variety of options for establishing independent interlocal agencies for a wide variety of purposes. Any authority of a local government may be conferred to the interlocal agency, and accordingly the interlocal agency may be given powers that are only available to one of the local governments establishing the interlocal agency. *See* §163.01(4), Fla. Stat. Consequently, a wide variety of options are available to establish an independent regional agency. Some options include:

1. Interlocal infrastructure agency under section 163.01, Florida Statutes. Constituent members could include cities, counties, other political subdivisions and other local agencies including regional transportation or transit agencies.
2. Regional Transit Agency under section 163.567, Florida Statutes. Constituent members could be cities, counties and other political subdivisions.
3. Transportation entity under section 339.175(6)(j)2., Florida Statutes. Constituent members could be Metropolitan Planning Organizations, cities, counties and other political subdivisions.

Any of these entities could be established in a manner that fully insulates the creating local governments from the financial liabilities of the independent regional agency. In essence, the independent regional agency could be established as a non-recourse entity. *See, e.g.,* §163.01(7)(g) Fla. Stat.

Authority of the independent regional agency to construct high speed rail

If the local governments creating the independent regional agency include a municipality or charter county, the agency can be given any power not prohibited by state law. Charter counties and cities in Florida are given broad home rule authority to take any action “not inconsistent” with state law. *See* Art. VIII, § 1(f), (g) Fla. Const.; § 125.01(3), Fla. Stat. (2010) and Art. VIII, § 2(b), Fla. Const.; §166.021(3), Fla. Stat. (2010). Florida Courts have essentially found that cities and charter counties can exercise their home rule authority in any manner that is not expressly prohibited by state law. *See St. Johns County v. N.E. Fla. Builders Ass’n*, 583 So.2d 635, 642 (FLA. 1991), *South Daytona Restaurants, Inc. v. City of South Daytona*, 186 So. 2d 78, 80 (Fla. 1st DCA 1966).

Florida courts strongly disfavor implied preemption. Unlike federal preemption jurisprudence, the Florida Legislature cannot preempt local governments by implication or by occupying a field of regulation. The Florida Second District Court of Appeal laid out the Florida standard for preemption of local governments as follows:

Courts are understandably reluctant to preclude a local elected governing body from exercising its local powers. As well explained by Judge Wolf in *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc.*, 681 So.2d 826, 831 (Fla. 1st DCA 1996), if the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute.

Phantom of Clearwater v. Pinellas County, 894 So.2d 1011, 1019 (Fla. 2d DCA 2005)

The Florida Supreme Court has held that courts may only find implied preemption when “the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, **and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.**” *Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla.1984) (emphasis added). I have

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found no reported case that has actually found an area of implied preemption since the Florida Supreme Court articulated this rule in 1984.

In the context of this Florida case law, I and the other local government lawyers I have consulted with are confident that no Florida statute preempts an independent interlocal agency from building the proposed Tampa to Orlando high speed rail line. Section 341.8225, Florida Statutes speaks to the Florida Department of Transportation ("FDOT") constructing and operating high-speed rail projects. Section 341.8225(2) contemplates local governments designing, constructing, and acquiring right-of-way for high speed rail projects through negotiation with FDOT. Accordingly, authority is established for the independent requital agency to access the FDOT right-of-way through negotiation with FDOT. Section 341.8225(1) prohibits a "governmental entity" other than FDOT from operating high speed rail except as authorized by the Florida Legislature. However, the statute does not prohibit a private entity from operating high speed rail, and it does not prohibit a local government from privatizing or consigning the operation of the high speed rail line to a private entity. As discussed above, the legislature did not expressly prohibit local governments from authorizing a private vendor to operate the high speed rail line that the Legislature specifically authorized local governments to construct. Under Florida preemption jurisprudence express preemption would be required.

Authority to procure a vendor

Under Florida law local governments have authority to procure vendors for goods and services using a variety of procurement models. In the case of the proposed high speed rail project, in addition to complying with the federal procurement requirements, the independent regional agency would have to comply with the Florida Consultants' Competitive Negotiation Act, Section 287.055, Florida Statutes. Under this statute the independent regional agency could utilize a design, build, finance, operate, maintain ("DBFOM") procurement model. Through this model the procurement could require the successful vendor to accept all the risk of failure of the project. This would include any capital cost overruns, any operating shortfalls, and any risk of failure to comply with the requirements of the Grant. As with any complex business transaction, these risks could be assigned, and financial assurance could be required from the successful vendor through construction bonds, insurance, or other methods of financial guarantees.

Sincerely,



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