

**IN THE SUPREME COURT OF FLORIDA**

**CASE NOS.:** SC07-2200 ; SC07-2201  
Lower Tribunal No(s): 5D06-3408

PHANTOM OF BREVARD, INC. vs. BREVARD COUNTY, FLORIDA

BREVARD COUNTY, FLORIDA vs. PHANTOM OF BREVARD, INC.

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Petitioner/Cross-Respondent(s)

Respondent/Cross-Petitioner(s)

**INITIAL BRIEF OF APPELLANT PHANTOM OF BREVARD, INC.**

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## **STATEMENT OF THE CASE**

### **PROCEDURAL BACKGROUND**

Plaintiff/Appellant Phantom of Brevard, Inc. (hereinafter: “Phantom”), on April 18, 2006, filed an Amended Complaint for Declaratory Judgment against Defendant/Appellee Brevard County (hereinafter: “Brevard County”), seeking a declaration that Brevard County Ordinance 05-60, as amended by Brevard County Ordinance 06-18 (hereinafter, collectively: the “Ordinance”), purportedly regulating the sale and use of fireworks within Brevard County, is unconstitutional on its face, is inconsistent with, and preempted by, § 791.001, *et seq.*, Florida Statutes, and, is unconstitutional by being in violation of Article VIII, Section 1(g) of the Florida Constitution.

Brevard County filed its Answer and Affirmative Defenses on May 3, 2006, asserting in its Affirmative Defenses that the Ordinance was consistent with state law and constitutional on its face, that in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2nd DCA 2005), the Second District Court of Appeal had upheld substantially the same ordinance and ruled against virtually identical legal positions advanced by Phantom in this case, and that Phantom had failed to plead facts sufficient to allege the existence of a case or controversy.

Phantom and Brevard County filed cross-motions for summary judgment and supporting memoranda. After hearing, on August 24, 2006, the Court

(Barlow, J.) entered Summary Final Judgment in favor of Brevard County, the Court finding that (1) Brevard County Ordinance 05-60, as amended by Ordinance No. 06-18, is substantially similar to the Pinellas County ordinance considered and ruled upon by the Second District Court of Appeal in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2nd DCA 2005); (2) the principles set forth by the Second District Court of Appeal in Phantom of Clearwater are controlling on the issues raised by the challenges to the Brevard County ordinances in this case; and (3) in accordance with Pardo v. State, 596 So. 2d 665 (Fla. 1992), in the absence of conflicting inter-district decisions, the Second District Court of Appeal decision in Phantom of Clearwater, Inc. v. Pinellas County is binding upon the court in this case.<sup>1</sup>

Phantom appealed the Summary Final Judgment in favor of Brevard County to the Fifth District Court of Appeal. In its decision rendered on August 31, 2007, the court of appeal defined the “central issue in this case” to be “whether local governments retain the authority to develop rules to advance their enforcement obligations under chapter 791.” (See conformed copy of the August 31, 2007, decision of the Fifth District Court of Appeal, Appendix, Exhibit A, at p. 6.) (Emphasis added.) In its decision, the court of appeal (1) concluded that Chapter

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<sup>1</sup> During the hearing held on the cross-motions for summary judgment, a Motion to Intervene filed on behalf of Thunderbolt Fireworks, Inc. and Sky King Unlimited, Inc., Florida corporations engaged in the sale of fireworks in Brevard County, was granted. Neither of the intervenors is an appellant here.

791, Florida Statutes (“**SALE OF FIREWORKS**”), “does not expressly or impliedly preempt the field of fireworks regulation”, (2) affirmed, in part, the decision of the circuit court, and (3) reversed, in part, the decision of the circuit court, concluding that Sections 8, 10 and 13 of the Ordinance were unconstitutional, the court of appeal remanding the case to the circuit court to apply the severability clause of the Ordinance to invalidate Sections 8, 10 and 13 and to determine whether Section 7 also should be severed from the Ordinance. (See decision of Fifth District Court of Appeal, Appendix, Exhibit A, at p. 7.)

Both Phantom and Brevard County petitioned this court for discretionary review of the decision of the Fifth District Court of Appeal, which petitions were granted by Order dated April 21, 2008.

## **FACTUAL BACKGROUND**

### **I. Plaintiff Phantom of Brevard, Inc.**

Phantom is a Florida corporation with its principal place of business located at 2725 King Street, Cocoa, Brevard County, Florida 32926. Phantom has been engaged in the wholesale and retail sale of fireworks at its Cocoa premises since 2002.



## II. Chapter 791, Florida Statutes (“SALE OF FIREWORKS”)

Chapter 791, Florida Statutes (“SALE OF FIREWORKS”), regulates, *inter alia*, the definition, storage, distribution, sale, use and public display of fireworks throughout the State of Florida. Section 791.001, Florida Statutes (“**Application and enforcement**”), enacted by the legislature in 1987, provides:

“This chapter shall be applied uniformly throughout the state. Enforcement of this chapter shall remain with local law enforcement departments and officials charged with the enforcement of the laws of the state.” Section 791.001, Florida Statutes. (Emphasis added.)

Section 791.02, Florida Statutes (“**Minimum fireworks safety standards**”), provides:

“[T]he Board of County Commissioners shall have power to adopt reasonable rules and regulations for the granting of permits for supervised public display of fireworks by fair associations, amusement parks and other organizations or groups of individuals when such public display is to take place outside of any municipality;

provided, further, that the governing body of any municipality shall have power to adopt reasonable rules and regulations for the granting of permits for supervised public display of fireworks within the boundaries of any municipality.” Section 791.02, Florida Statutes.  
(Emphasis added.)

### **III. Legislative History of Section 791.001, Florida Statutes**

The 1987 amendments to Chapter 791, Florida Statutes, added Section 791.001 (“**Application and enforcement**”) which, at the outset, provides that “[T]his chapter shall be applied uniformly throughout the state”. Examination of the legislative history of the 1987 amendments to Chapter 791, which added Section 791.001, unequivocally reveals that committees and subcommittees of both the Senate and House of Representatives of the Florida legislature considered, and rejected, amending Chapter 791 to allow local governments to enact more stringent regulations regarding fireworks than those set forth in the statute.

Specifically, on April 21, 1987, the Senate Committee on Commerce rejected by voice vote an amendment to SB 413 submitted by Senator Gordon which provided that “Nothing herein shall prohibit any local government from

enacting a more stringent ordinance”. (See Senate Committee Amendment and Bill Vote Sheet, April 21, 1987, Appendix, Exhibit 1, 2 Pages.)

Similarly, during a hearing conducted by the Technical and Consumer Resources Subcommittee of the House of Representatives Committee on Regulatory Reform, the subcommittee voted to adopt the Senate version of the bill amending Chapter 791, the subcommittee members specifically recognizing that, by adopting the Senate version of the bill, a prior amendment by Representative Rochlin to HB 548, which amended Chapter 791 by adding that “[N]othing herein shall prohibit any local government from enacting a more stringent ordinance”, which amendment was adopted by the committee on April 8, 1987, was no longer valid. (See House of Representatives Amendment Adopted April 8, 1987, Subcommittee Report/Information Record dated April 8, 1987, Amendment and Subcommittee Report/Information Record dated April 28, 1987, Appendix, Exhibit 2, 3 Pages.)

This understanding by the members of the House of Representatives Technical and Consumer Resources Subcommittee that adoption of the Senate version of the bill served to revoke the amendment previously approved by the subcommittee that “Nothing herein shall prohibit any local government from enacting a more stringent ordinance”, may be seen in the following colloquy between subcommittee members during their April 28, 1987, hearing on the bill:

“REP. ROCHLIN: Yes, we have one other problem. We had adopted an amendment that would -- that of course is not incorporated or anything -- and we had adopted the amendment which would allow for local, more stringent laws. (Emphasis added.)

“And I think that since nobody has contacted Mr. Lawson or me, and since Pinellas, I understand, has withdrawn, and it would be against this total -- the total uniformity for the state, and would put things to a much greater expense, but -- I mean to a much greater expense. (Emphasis added.)

...

“I think that we should vote to reconsider the vote on that amendment, and vote it down at this time. (Emphasis added.)

“MADAM CHAIRMAN: Okay. But we have taken up the Senate Bill, and the Senate Bill is what’s before us.

“FEMALE REP.: Uh-huh.

“MADAM CHAIRMAN: So we no longer have the House Bill, so that amendment is not on the bill. Is that correct? (Emphasis added.)

“REP. ROCHLIN: It was never incorporated in the bill. It was another -- but it was an amendment we had adopted. And I wanted everyone aware of it, and if action has to be taken --

“MADAM CHAIRMAN : Okay. Well, correct me if I’m wrong, but we’ve taken up the Senate Bill, so we no longer have the House Bill before us. (Emphasis added.)

“Is that right (inaudible)?

“MALE REP.: I would think so.

“MADAM CHAIRMAN: Okay.

“MALE REP.: Now you don’t -- unless -- unless somebody amends the Senate Bill, then --

“MADAM CHAIRMAN: We have the Senate Bill before us.

“MALE REP.: We’ve got the Senate Bill?

“MADAM CHAIRMAN: We no longer have the House Bill. Is that correct?

“REP LAWSON: That is correct.

“MADAM CHAIRMAN: Okay.

“REP. LAWSON: You struck all after the enacting clause and we amended it with the Senate Bill.

“MALE REP.: And if the House Bill was amended, then -- (Emphasis added.)

“REP. LAWSON: It's gone. (Emphasis added.)

“MALE REP.: - that amendment is gone. (Emphasis added.)

“MADAM CHAIRMAN: The whole House Bill was -- okay. Thank you. (Transcript of April 28, 1987, Hearing on House Bill 0548, Technical and Consumer Resources Subcommittee, Committee on Regulatory Reform, Appendix, Exhibit 3, at Page 8: Line 21 through Page 10: Line 25.)<sup>2</sup>

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<sup>2</sup> A copy of the audiotape from which was transcribed the April 28, 1987, hearing on House Bill 548 conducted by the Technical and Consumer Resources Subcommittee, Committee on Regulatory Reform, was filed in the circuit court as an exhibit to Phantom's memorandum in support of its motion for summary judgment.

Compellingly, the transcript of the April 28, 1987, hearing of the Technical and Consumer Resources Subcommittee clearly indicates the legislators' intent that local governments were not to be empowered to enact rules, regulations or ordinances regarding the sale of fireworks. Specifically, Representative Lawson, who introduced House Bill 548, in his initial statements to the subcommittee, noted:

“Now, I know there was some concern from the Hillsborough and the Pinellas Representatives from the city about (*sic*) they had some local laws that was (*sic*) much stronger, and so forth. And what I've attempted to tell them is that when you're trying to establish uniformity in the state, it makes it very hard to start exempting. (Emphasis added.)

“Just like with the gun bill, you know, some people say: We are tougher, and so forth. But all of us, you know, we voted to send the legislation out to establish some kind of uniformity on carrying a concealed weapon. (Emphasis added.)

“I think the same thing holds true here when we start to exempt two counties, but we want to make it safe

for everyone, and not just exempt two counties out of the legislation.” (Transcript of April 28, 1987, hearing on House Bill 0548, Appendix, Exhibit 3, at Page 6: Line 17 through Page 7: Line 7.) (Emphasis added.)

Further discussions between members of the Technical and Consumer Resources Subcommittee confirmed that representatives of Pinellas County, who initially supported the amendment which would have allowed local governments to enact more stringent ordinances regulating fireworks, withdrew such support. This is seen in the following discussion between committee members:

“MALE REP.: Yes. I just -- wanted Representative Lawson to confirm that Pinellas County is now in support of this bill.

“REP. LAWSON: I -- I have not heard from them since I left the committee meeting, I have no way of knowing. The committee (coughing) first the committee said that we will get together. And they apologized for not coming by to see me, and they have not been by to see me.

“MADAM CHARMAN: Okay.

“MALE REP.: Okay.



“MADAM CHAIRMAN: Excuse me, Representative Rochlin, do you still want to speak for Pinellas?

“(More than one speaker, unintelligible.)

“MS. O’NEIL: Representative Brown, I have spoken with Geneva Mannix (inaudible) in Pinellas County, and she no longer supports the amendment. She did not specify whether or not they support the bill, but she no longer supported the local option amendment.” (Transcript of April 28, 1987, hearing on House Bill 0548, Appendix, Exhibit 3, at Page 11: Lines 4 through 23.) (Emphasis added.)

Most recently, in 2004, SB 2686, which sought to amend broadly Chapter 791, Florida Statutes, was introduced in the Senate. (Appendix, Exhibit 4.) SB 2686 sought to add a new Section 791.08 (“**Nonpreemption**”) which was proposed to read as follows:

“791.08 Nonpreemption. -- The state does not preempt the regulation of fireworks and sparklers as provided in this chapter. Any authority having jurisdiction may enact any ordinance or adopt any rules related to this chapter if

such ordinance or rule is more stringent, or provides a higher degree of safety, than provided in this chapter.”

(SB 2686 - 2004, Appendix, Exhibit 4, at p. 22.)

(Emphasis added.)

Review of Senate action on SB 2686 indicates that the bill was filed on March 2, 2004, was referred to several committees, including the Banking and Insurance Committee, on March 16, 2004, and “died” in the Banking and Insurance Committee on March 30, 2004. In fact, no Staff Analysis of the bill was ever conducted. (Senate Action on SB 2686, Appendix, Exhibit 5.)

#### **IV. The Ordinance**

On or about December 6, 2005, Brevard County, through its Board of County Commissioners, enacted Ordinance No. 05-60 entitled:

**“An Ordinance of the Board of County Commissioners of Brevard County, Florida Pertaining to the Regulation of the Use and Sale of Fireworks and Sparklers; Providing for Definitions; Establishing Regulations Applicable to the Sale and Use of Fireworks and Sparklers; Providing for Violations; Providing for Penalties; Providing for**

**Territories Embraced; Providing for Severability;  
Providing an Effective Date”** (Appendix, Exhibit 6.)

Thereafter, on or about April 11, 2006, Brevard County, through its Board of County Commissioners, enacted Ordinance No. 06-18 entitled:

**“An Ordinance of the Board of County Commissioners of Brevard County, Florida Amending Ordinance No. 05-60 Pertaining to the Regulation of the Use and Sale of Fireworks and Sparklers; Amending Section 1 by Creating a Definition for Ceremonial; Amending Section 5 by Making it Unlawful to Sign False Affidavits and Adding Required Proof for Exemptions Including Ceremonial and Military; Adding a Reference to Section 12; Amending Section 14(a) by Deleting Certain Penalties; Providing for Ratification and Incorporation by Reference; for Territories Embraced; Providing for Severability; Providing an Effective Date”** (Appendix, Exhibit 7.)

(As noted, Ordinance No. 05-60 and Ordinance No. 06-18, collectively, are referred to herein as: the “Ordinance”.)

Notwithstanding the express provisions of Section 791.001 (“**Application and enforcement**”) that Chapter 791 “shall be applied uniformly throughout the state”, the Ordinance purports to regulate the sale and use of fireworks within Brevard County and establishes penalties to be imposed upon both sellers and purchasers or fireworks for the violation of any provision of the Ordinance, including fines, incarceration and suspension of business operations.

### **QUESTIONS PRESENTED**

1. Did the court of appeal err by concluding that local governments have the power to enact ordinances to enforce Chapter 791, Florida Statutes?
2. Did the court of appeal err by concluding that the Ordinance is consistent with, and is not preempted by, state law?

## SUMMARY OF ARGUMENTS

The legislative history of Chapter 791, Florida Statutes (“**SALE OF FIREWORKS**”), together with the specific language contained in Section 791.001, Florida Statutes (“**Application and enforcement**”), that the chapter “shall be applied uniformly throughout the state”, unequivocally reflect the Florida legislature’s intent to preempt regulation of the sale of fireworks throughout the State of Florida.

Further, the “local law enforcement departments and officials charged with the enforcement of the laws of the state” who, by Section 791.001 (“**Application and enforcement**”) , Florida Statutes, are charged with enforcement of Chapter 791, do not include either local governments, such as boards of county commissioners, or their members, because neither those boards nor their members are “local law enforcement departments [or] officials” as recognized under Florida statutory and common law.

Finally, in enacting Chapter 791, Florida Statutes (“**SALE OF FIREWORKS**”), the Florida legislature granted local governments authority to regulate only the public display of fireworks.

## ARGUMENT

### **I. The Ordinance is Invalid Because it Improperly Encroaches Upon an Area of Exclusive State Authority**

The Ordinance is unconstitutional because it violates Article VIII, Section 1(g) of the Florida Constitution which permits a county to enact ordinances which are “not inconsistent with general law.” (Emphasis added.) Accordingly, when an ordinance, such as that *sub judice*, is inconsistent with state law, it is unconstitutional.

Ordinances are inconsistent with state law if they encroach upon an area preempted by the legislature. Tallahassee Memorial Reg’l Med. Ctr., Inc. v. Tallahassee Med Ctr., Inc., 681 So. 2d 826, 831 (Fla. 1st DCA 1996). In light of (1) the 1987 legislative history of Chapter 791 reflecting that both houses of the Florida legislature considered, and rejected, a provision for inclusion in Chapter 791 which would have permitted counties and municipal corporations to enact “a more stringent ordinance” (see Appendix, Exhibits 1, 2 and 3), (2) the specific language of Section 791.001, Florida Statutes (“**Application and enforcement**”), that “This chapter shall be applied uniformly throughout the state”, and (3) the consideration in 2004 by the Florida Senate of an amendment to Chapter 791 which would have provided that local governments were authorized to enact more stringent rules regulating the sale of fireworks, which amendment “died” in

committee (see Appendix, Exhibits 4 and 5), it is clear that the legislature intended, and intends, the provisions of Chapter 791 to preempt the area of the law regulating the sale of fireworks.

Considering the Supreme Court of Florida's holding in Florida Power Corp. v. Seminole County, 579 So. 2d 105 (Fla. 1991), that "preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject", Florida Power Corp. v. Seminole County, *supra*, at 107, when a statute, such as that here, which unequivocally states that it is to be "applied uniformly throughout the state", is examined together with its legislative history, which clearly documents the legislature's rejection of any provision which would have allowed local governments to enact "a more stringent ordinance", the preemption is, in fact, explicit.

Analysis of the relevant sections of Chapter 791 clearly reveals that, other than Section 791.001, Florida Statutes ("**Application and enforcement**"), which grants local law enforcement departments and officials authority to enforce the law, local governments have authority only (1) to adopt reasonable rules and regulations for the granting of permits for supervised public display of fireworks, Section 791.02, Florida Statutes ("**Sale of fireworks regulated; rules and regulations**"), and (2) to impose more stringent regulations pertaining to the outdoor display of fireworks. Section 791.012, Florida Statutes ("**Minimum**

**fireworks safety standards”**). Local governments have no authority pursuant to Chapter 791 to adopt any rules, regulations or ordinances which impact anything other than the public outdoor display of fireworks.

The importance of an examination of a statute’s legislative history to discern legislative intent was discussed by the Supreme Court of Florida in American Home Assurance Company v. Plaza Materials Corporation, 908 So. 2d 360 (Fla. 2005), where the court noted:

“In fact, since 1982 this Court has on numerous occasions looked to legislative history and staff analysis to discern legislative intent. See, e.g., Knight v. State, 808 So. 2d 210, 213 n.4 (Fla. 2002) (noting that while the relevant portion of the Prisoner Releasee Reoffender Act does not expressly articulate that the term ‘felony punishable by law’ includes both life felonies and first-degree felonies punishable by life, ‘the legislative history contained in the bill’s Staff Analysis indicates that the Legislature intended to include both life felonies and first-degree felonies punishable by life in that term’); Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002) (finding that ‘although section 27.711 indicates that the fee



schedule set forth in subsection (3) is the ‘exclusive means of compensation,’ the legislative history and staff analysis clearly contemplate, and indeed accommodate, fees in excess of the statutory schedule in cases where unusual or extraordinary circumstances exist’); Ivey v. Chicago Ins. Co., 410 So. 2d 494, 497 (Fla. 1982) (relying on legislative staff analysis and economic statement in reaching the conclusion that a vehicle owner’s uninsured motorist coverage was applicable to the petitioner; further noting that ‘an act’s legislative history is an invaluable tool in construing the provisions thereof’ (emphasis added)). American Home Company v. Plaza Materials Corporation, *supra*, at 369. (Emphasis added.)

The only reasonable inferences that may be drawn from the Senate’s non-action in 2004 regarding SB 2686 which, at proposed Section 791.08 (“**Preemption**”), provided that the state was not preempting the regulation of fireworks, which non-action resulted in the bill “dying” in committee, are that the legislature both understood that Chapter 791, Florida Statutes, as it existed then,

and now, preempts regulation of fireworks sales and did not wish to effect any change to that preemption. (See Appendix, Exhibits 4 and 5.)

Accordingly, in light of these explicit limitations, local governments are without authority to enact rules, regulations or ordinances regulating the wholesale and retail sale of fireworks to individuals, because such areas of regulation have been specifically preempted by the state.<sup>3</sup>

## **II. Local Governments and Their Members are not “Law Enforcement Departments [or] Officials”**

Section 791.001 (“**Application and enforcement**”), in its entirety, reads:

“This chapter shall be applied uniformly throughout the state. Enforcement of this chapter shall remain with local law enforcement departments and officials charged with

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<sup>3</sup> As noted in “Procedural Background”, the court of appeal determined that Section 10 (“Evidence of financial responsibility”) of the Ordinance, “conflicts with section 791.001, Florida Statutes, ... [b]ecause chapter 791 does not contain any financial responsibility standard or requirement, retailers and other supply-side entities are subject to potentially disparate obligations throughout the state”. (See Decision of Fifth District Court of Appeal, Appendix, Exhibit A, at p. 9.) Ironically, it is for precisely this reason that the entire ordinance should be found unconstitutional. This is so because if the county commissioners of each of Florida’s 67 counties have the authority to enact ordinances like that *sub judice*, then “retailers and other supply-side entities” would be subject to 67 “potentially disparate obligations throughout the state”.

the enforcement of the laws of the state.” (Emphasis added.)

In its analysis of the legislative history of Chapter 791, which Phantom argued reflects the legislature’s intent to preempt to the State of Florida the field of fireworks regulation, the court of appeal noted:

“The legislative history cited by Phantom, however, does not shed any light on the central issue in this case: whether the local governments retain authority to develop rules to advance their enforcement obligations under chapter 791. (Appendix, Exhibit A, at p. 6.) (Emphasis added.)

“...

“... If the legislature intended to prevent local governments from regulating fireworks transactions and uses, while at the same time charging local governments with an obligation to enforce state laws, then the legislature has not made its preemptive purpose clear.”

(Appendix, Exhibit A, at p. 7.) (Emphasis added.)

Phantom submits not only that Chapter 791 does not charge local governments with any enforcement duties of its provisions, but also, in conducting

its analysis, that, as is clear from the preceding quotation from its opinion, the court of appeal incorrectly equated “local law enforcement departments and officials charged with the enforcement of the laws of the state”, as specified in Section 791.001 (“**Application and enforcement**”), with local governments, i.e., county commissions and governing bodies of municipalities.

The individuals and entities identified in Section 791.001 as being charged with enforcement of Chapter 791, i.e., “local law enforcement departments and officials charged with the enforcement of the laws of the state”, do not include either the individual members of, or the entirety of, boards of county commissioners and/or the governing bodies of municipalities. Florida statutes and case law clearly attribute specific meanings to the phrases, and specific power to, “law enforcement department” and “law enforcement official”.

Section 10 (“**Definitions**”) of Chapter 943, Florida Statutes, (“**Department of Law Enforcement**”) defines “law enforcement officer” as:

“[A]ny person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic or highway

laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.” (Emphasis added.)

This definition makes clear that a “law enforcement officer” is one who has specific authority to bear arms and make arrests and whose primary responsibility is the prevention of crime. The power to bear arms and to make arrests is not vested in local governments or their members. So, too, it is not the primary responsibility of local governments or their members to prevent and to detect crime.

At Section 531 (“**Definitions**”) of Chapter 112, Florida Statutes (“**PUBLIC OFFICES AND EMPLOYEES; GENERAL PROVISIONS**”), a “law enforcement officer” is defined as:

“Any person, other than the chief of police, who is employed full time by any municipality or the state or any political subdivision thereof and his primary

responsibility is the prevention and detection of crime or the enforcement of the penal, traffic or highway laws of this state; and includes any person who is appointed by the sheriff as a deputy sheriff pursuant to s.30.07.”  
(Emphasis added.)

Similarly, in Section 9205 (“**Medicaid Fraud Control Unit**”) of Chapter 409, Florida Statutes (“**SOCIAL WELFARE**”), subsection 2 provides:

“(2) All investigators employed by the Medicaid Fraud Control Unit ... are law enforcement officers of the state. Such investigators have the authority to conduct criminal investigations, bear arms, make arrests, and apply for, serve, and execute search warrants, arrest warrants, capias, and other process throughout the state pertaining to Medicaid fraud as described in this chapter. ....”  
(Emphasis added.)

As is clear from these statutory provisions, a law enforcement official has authority, *inter alia*, to bear arms, to make arrests, to prevent and detect crimes and to enforce the penal, traffic or highway laws of the state, none of which powers is vested in local governments or their members.

That the phrase “law enforcement official” specifically means an individual with authority to bear arms, make arrests, prevent and detect crime and enforce the penal, traffic or highway laws of the state, and that county commissions, governing bodies of municipalities and their members, do not have such authority, repeatedly has been confirmed by Florida courts when discussing the activities of such officials. For example:

a. In Jones v. State, 963 So. 2d 180, (Fla. 2007), the Supreme Court of Florida, in discussing the impact of aggravating factors in the determination of the sentence to be administered to a defendant, said: “The mere fact of a death is not enough to invoke this [avoid arrest aggravator] factor when the victim is not a law enforcement official.” Jones v. State, *supra*, at 186. (Emphasis added.)

b. In Hilton v. State, 961 So. 2d 284 (Fla. 2007), the Supreme Court of Florida, in discussing whether the stop of a defendant’s vehicle was illegal under the Fourth Amendment, stated:

“[T]he inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, vigorous enforcement of the warrant requirement is impossible .... In discharging their varied responsibilities for ensuring the public’s safety, law

enforcement officials are necessarily brought into frequent contact with automobiles. ...” Hilton v. State, *supra*, at 293. (Emphasis added.)

c. In Clark v. State, 920 So. 2d 634 (Fla. 4<sup>th</sup> DCA 2005), the court of appeal, in discussing the crimes of resisting arrest without violence and escape, noted: “A prisoner is defined as a person under arrest and in lawful custody of a law enforcement official.” Clark v. State, *supra*, at 636. (Emphasis added.)

d. In Sult v. State, 906 So. 2d 1013 (Fla. 2005), the Supreme Court of Florida, in discussing the Florida statutes prohibiting the unauthorized use of law enforcement and military uniforms, noted: “But a statement by someone not a law enforcement official that he *is* one or has authority to use these official indicia of government authority has never been held to be protected speech, nor should it be.” Sult v. State, *supra*, at 1028. (Emphasis added.)

e. In Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005), the Supreme Court of Florida observed: “This Court has stated that under the dictates of *Miranda* a subject involved in a custodial interrogation by law enforcement officials is entitled to the procedural safeguard of the *Miranda* warning, ‘the key being that the suspect must be in custody’”. Fitzpatrick v. State, *supra*, at 510. (Emphasis added.)



Similarly, the specific meaning assigned by Florida courts to the phrase “law enforcement departments” make it clear that county commissions and governing bodies of municipalities do not constitute such law enforcement departments. For example:

a. In Jenkins v. State, 855 So. 2d 1219 (Fla. 1<sup>st</sup> DCA 2003), the court, in discussing testing the accuracy of breathalyzer machines, noted: “These inspections of each breath testing machine are done either by [the Florida Department of Law Enforcement] or local law enforcement departments”, Jenkins v. State, *supra*, at 1223, the court further noting that “Prior to January 1, 1997, each local law enforcement department was required to make its own [alcohol reference solution] using alcohol stock solution prepared by [the Federal Department of Law Enforcement] ....” *Ibid.* (Emphasis added.)

b. In Mitchell v. State, 787 So. 2d 224 (Fla. 2<sup>nd</sup> DCA 2001), the Second District Court of Appeal, in discussing a “controlled buy” of narcotics from a suspected dealer, stated: “In a standard controlled buy situation, most law enforcement departments follow a specific protocol.” Mitchell v. State, *supra*, at 227;<sup>4</sup> (Emphasis added.)

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<sup>4</sup> In Mitchell, the Second District Court of Appeal also noted that: “In determining whether reasonable suspicion exists [to conduct a brief investigatory stop], the conduct of the law enforcement officer must be examined by the use of ‘common sense judgments and inferences about human behavior.’” Mitchell v. State, 787 So. 2d 224, 228 (Fla. 2<sup>nd</sup> DCA 2001). (Emphasis added.)

c. In Strahorn v. State, 436 So. 2d 447 (Fla. 2<sup>nd</sup> DCA 1983), the court of appeal, in discussing the pursuit of a vehicle by a police officer, stated: “The officer signaled the van to stop, using lights and sirens, but the vehicle did not heed the signals. The officer notified other local law enforcement departments that he was in pursuit, and Officer Culberson of the Kenneth City Police Department joined the chase.” Strahorn v. State, *supra*, at 448. (Emphasis added.)

As is evident from the foregoing, neither under statutory definitions nor pursuant to judicial interpretations do the phrases “law enforcement department” or “law enforcement official” refer to county commissions or the governing bodies of municipalities, and/or their members.

Finally, examination of the powers and duties statutorily conferred upon county commissions also makes clear that those responsibility do not include law enforcement.

Specifically, in Section 01 (“**Powers and duties**”) of Chapter 125, Florida Statutes, (“**COUNTY GOVERNMENT**”), states:

“[T]he ... governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to: ... (d) provide fire protection, including the enforcement of the

Florida Fire Prevention Code, ... , and adopt and enforce  
local technical amendments to the Florida Fire  
Prevention Code as provided in those sections ....  
....” (Emphasis added.)

Similarly, Section 56 (“**Enforcement and Amendment of the Florida Building Code and the Florida Fire Prevention Code; Inspection Fee; Inspector; etc.**”) of Chapter 125, Florida Statutes (“**COUNTY GOVERNMENT**”) provides, at subsection (1):

“(1) The board of county commissioners of each of the several counties of the state is authorized to enforce the Florida Building Code and the Florida Fire Prevention Code; and, at its discretion, to adopt local technical amendments to the Florida Building Code ... and local amendments to the Florida Fire Prevention Code, ... , to provide for the safe construction, erection, alteration, repair, security, and demolition of any building within its territory outside the corporate limits of any municipality;” (Emphasis added.)

As may be seen from these grants of specific authority to county commissions, nowhere is there found any legislatively-authorized power granting a

county commissions or the governing bodies of municipalities, and/or their members, with power to act as law enforcement officials or departments.

**III. IN ENACTING SECTION 791.001, FLORIDA STATUTES, *ET SEQ*,  
THE FLORIDA LEGISLATURE GRANTED LOCAL  
GOVERNMENTS LIMITED AUTHORITY TO REGULATE ONLY  
THE PUBLIC DISPLAY OF FIREWORKS**

Pursuant to Chapter 791 (“**SALE OF FIREWORKS**”), local governments have authority only (1) “to adopt reasonable rules and regulations for the granting of permits for supervised public display of fireworks by fair associations, amusement parks, and other organizations or groups of individuals”, Section 791.02, Florida Statutes (“**Sales of fireworks regulated; rules and regulations**”), and (2) to provide for “more stringent regulations for the outdoor display of fireworks, ....” Section 791.012, Florida Statutes (“**Minimum fireworks and safety standards**”). Local governments have no authority pursuant to Chapter 791 to adopt any rules, regulations or ordinances which impact anything other than the public outdoor display of fireworks.

The grant of authority to local governments in Sections 791.012 (“**Minimum fireworks safety standards**”) and 791.02 (“**Sales of fireworks regulated; rules and regulations**”) to regulate the issuance of permits for the supervised public display of fireworks, does not constitute authorization of local government to promulgate rules and regulations impacting every other section of Chapter 791. Indeed, if the legislature intended that local governments were to have the authority to promulgate rules and regulations affecting every section of Chapter 791, then the legislature would not have granted such authority only in those sections of Chapter 791 dealing with the public display of fireworks.

It is settled that where a legislature “includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion.” Beach v. Great Western Bank, 692 So. 2d 146, 152 (Fla. 1997). Accordingly, in the case at bar, in light of the provisions of Sections 791.012 (“**Minimum fireworks safety standards**”) and 791.02 (“**Sale of fireworks regulated; rules and regulations**”) specifically authorizing local governments to enact rules and regulations in the areas addressed by those sections, i.e., the public display of fireworks, then the absence of such explicit authority in other sections of the statute unequivocally reflects the legislature’s

intent that local governments were to have no authority to regulate the subject matter of such sections.

Such an interpretation is a corollary of, and consistent with, *expressio unius est exclusio alterius*, the principle of statutory construction that “[T]he mention of one thing implies the exclusion of another.” Young v. Progressive Southeastern Insurance Company, 753 So. 2d 80, 85 (Fla. 2000). Accordingly, the only inference that reasonably may be drawn from the fact that the legislature, while granting specific powers to local governments in Sections 791.012 (“**Minimum fireworks safety standards**”), 791.02 (“**Sale of fireworks regulated; rules and regulations**”) and 791.03 (“**Bond of licensees**”) (authorizing boards of county commissioners to require licensees conducting public displays of fireworks to post a bond) did not grant such powers to, or even mention, local governments in any other section of Chapter 791, is that it was the legislature’s intent that local governments were to have no authority to regulate the subjects addressed in those sections.

## CONCLUSION

For the foregoing reasons, Plaintiff/Appellant Phantom of Brevard, Inc., submits that the combination of (1) the 1987 legislative history of amendments to Chapter 791, Florida Statutes (“**SALE OF FIREWORKS**”), (2) the specific language contained in Section 791.001, Florida Statutes (“**Application and enforcement**”), that the chapter “shall be applied uniformly throughout the state”, and (3) the rejection, in 2004, by the Florida Senate of an amendment to Chapter 791 which would have authorized local governments to enact “more stringent” laws regulating fireworks, establish that the legislature unequivocally expressed its intent to preempt regulation of the sale of fireworks throughout the state of Florida.

Accordingly, Phantom requests that this Court reverse the judgment of the court of appeal and enter judgment that the Ordinance is unconstitutional because it is violative of Section VIII 1(g) of the Florida Constitution prohibiting the enactment by local governments of ordinances which are not consistent with general law.

Respectfully submitted,  
Plaintiff/Appellant Phantom  
of Brevard, Inc.,  
By its attorney,

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**IN THE SUPREME COURT OF FLORIDA**

**CASE NOS.:** SC07-2200 ; SC07-2201  
Lower Tribunal No(s): 5D06-3408

PHANTOM OF BREVARD, INC. vs. BREVARD COUNTY, FLORIDA

BREVARD COUNTY, FLORIDA vs. PHANTOM OF BREVARD, INC.

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Petitioner/Cross-Respondent(s)

Respondent/Cross-Petitioner(s)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class Mail to Scott L. Knox, Esq., Office of the County Attorney, 2725 Judge Fran Jamieson Way, Viera, FL 32940, counsel for Defendant/Appellee Brevard County, and Scott Widerman, Esq., 202 N. Harbor City Blvd., Suite 101, Melbourne, FL 32935, counsel for Intervenors Thunderbolt Fireworks, Inc., and Sky King Unlimited, Inc., this \_\_\_\_ day of May, 2008.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that Appellant's foregoing Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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Mark D. Shuman  
Counsel for Plaintiff/Appellant  
Phantom of Brevard, Inc.

