

IN THE SUPREME COURT OF FLORIDA

Case Nos. SC07-2200 and SC07-2201

PHANTOM OF BREVARD, INC.,

Petitioner/Cross-Respondent,

v.

Lower Tribunal Case No.
5D06-3408
Fifth District Court of Appeal

BREVARD COUNTY, FLORIDA, a
political subdivision of the State of
Florida,

Respondent/Cross Petitioner.

**BREVARD COUNTY'S ANSWER BRIEF AND
CROSS INITIAL BRIEF**

On Review from the District Court of Appeal, Fifth District

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ANSWER BRIEF TO PHANTOM'S INITIAL BRIEF

STATEMENT OF THE CASE

For purposes of both this Answer Brief and the Cross-Initial Brief contained in this document, Brevard County accepts the statement of the case presented by Phantom in its Initial Brief with the exception of one statement. Brevard County Ordinance 05-60, as amended by Ordinance 06-18, does not purport to regulate the sale and use of fireworks within Brevard County in any manner other than to incorporate the same exemptions and prohibitions against the sale and use of fireworks found in section 791.02, Florida Statutes.

STATEMENT OF FACTS

Brevard County accepts the statement of facts offered by Phantom in its initial brief with the caveat that the legislative history for chapter 791, Florida Statutes, referenced by Phantom is essentially irrelevant to the analysis of the legal issues in this case.

SUMMARY OF ARGUMENT

The respective boards of county commissioners are “officials charged with the enforcement of the laws of the state” within the meaning of section 791.001, Florida Statutes, as is readily apparent from a review of a number of statutes, including sections 125.01(1)(d); 125.56(1); and 633.025(2), Florida Statutes, which

all require counties to enforce a Florida Fire Prevention Code that incorporates both NFPA 1123, as promulgated by the National Fire Protection Association, governing outdoor displays of fireworks and NFPA 1124 regulating the manufacture, transportation, storage and retail sales of fireworks.

There is no clear or specific language expressly preempting the regulation of fireworks to the State of Florida. The enforcement authority vested in county commissioners as “officials charged with the enforcement of the laws of the state”, under section 791.001, Florida Statutes, together with the permitting authority over supervised public displays granted by section 791.02, Florida Statutes; the power to enact “more stringent regulations” governing outdoor displays, as granted by section 791.012, Florida Statutes; and the counties’ empowerment to both enforce and amend the Florida Fire Prevention Code, inclusive of NFPA 1123 and NFPA 1124 regulating fireworks, are compelling evidence that the Legislature has not intended to become the “sole regulator” of fireworks in Florida. Therefore, the legislative regulation of fireworks is not so pervasive as to impliedly preempt the field of fireworks regulation to the Legislature.

ARGUMENT

I. AS OFFICIALS CHARGED WITH THE ENFORCEMENT OF STATE LAWS—IN PARTICULAR, STATE LAWS PERTAINING TO THE SALE OF FIREWORKS—THE BOARD OF COUNTY COMMISSIONERS IS EMPOWERED TO ENFORCE THE PROVISIONS OF CHAPTER 791, FLORIDA STATUTES, AND HAS THE IMPLIED POWER TO ADOPT REGULATIONS IMPLEMENTING THAT ENFORCEMENT POWER (Phantom Initial Brief Points II and III)

According to the Fifth District Court of Appeal, the central issue raised in this case is “whether local governments retain the authority to develop rules to advance their enforcement obligations under chapter 791.” *Phantom of Brevard, Inc. v. Brevard County*, 966 So. 2d 423, 427 (Fla. 5th DCA 2007). The lower court made a point of drawing attention to the fact that nothing in the chapter 791 legislative history presented by Phantom “shed any light” on the resolution of that central issue. *Phantom of Brevard*, 966 So. 2d at 427. The Fifth District therefore drew two conclusions. First, “[n]or can it be disputed that the County is obligated to inhibit illegal uses of fireworks and to allow legal uses”, and second, “[n]either chapter 791 nor the corresponding legislative history creates any distinct line to neatly separate enforcement from regulation.” *Phantom of Brevard*, 966 So. 2d at 427-428. The lower court clearly read chapter 791, Florida Statutes, as imposing an obligation on the County to enforce the provisions of the statute and, after

pointing out that “Phantom does not challenge the County’s position that its ordinance establishes the procedures and proof necessary to benefit from a statutory exemption”, held that “chapter 791 does not expressly or impliedly preempt the field of fireworks regulation.” *Phantom of Brevard*, 966 So. 2d at 427-428.

Apparently recognizing that the County’s authority to enforce chapter 791 may have a substantial bearing on the preemption issue, Phantom has raised a challenge to the County’s enforcement powers as a point of argument in this Court. (Phantom’s Initial Brief 21-31) The central issue in this case has therefore evolved into the question as to whether the Board of County Commissioners is empowered to enforce chapter 791, Florida Statutes, because it is among the category of “officials charged with the enforcement of the laws of the state,” within the meaning of section 791.001, Florida Statutes. Phantom obviously has discerned that if the Board of County Commissioners has enforcement authority under section 791.001, then as a legislative body with the powers enumerated in section 125.01, Florida Statutes,¹ among others, the County Commission also has the

¹In relevant part, section 125.01 reads as follows:

125.01 Powers and duties.—

(1) The legislative and 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 . . .

express and implied home rule powers to adopt such business regulations as may be required to assure that the uniform state-wide definitions, standards, exemptions, penalties and prohibitions established by the Legislature in chapter 791—in particular, the ban on retail sales—are enforceable. For, as explained by the Second District Court of Appeal in *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005), by enacting such regulations, a county is regulating the business of selling fireworks without altering the statutory prohibition against sale or use and without altering any of the statutory exemptions found in chapter 791, Florida Statutes. *Phantom of Clearwater, Inc.*, 894 So. 2d at 1017.

The County Commission’s express and implied powers to require documentation and record keeping regulations for the purpose of assuring strict adherence to the limited statutory exemptions under which fireworks can be sold are another presumed reason for Phantom’s challenge to those powers. Chapter 791, while prohibiting retail sales to consumers, is utterly silent on what

(h) Establish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public; . . .

(w) Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law; . . .

(3)(a) The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated [emphasis supplied]

documentation a purveyor of fireworks, like Phantom, must maintain in order to prove that the vendor is not engaged in retail sales to consumers and only engaged in exempt sales of fireworks to persons who actually qualify for statutory exemptions. The absence of statutory provisions addressing such documentation and record keeping requirements would otherwise make enforcement of the retail sales prohibition difficult, if not impossible. Consequently, the existence of the County Commission's authority to enforce chapter 791 by filling in the documentation and record keeping gaps in chapter 791 is critical to the success of local law enforcement efforts to enforce the section 791.02 retail sales prohibition in the field. The impact of such enforcement on fireworks vendors such as Phantom, was suggested by the Second District Court of Appeal in *Phantom of Clearwater*:

Phantom Fireworks and other sellers of fireworks would experience additional costs of doing business under these regulations, and quite possibly a drastic reduction in sales if their current sales were found in violation of the letter or the spirit of chapter 791.

Phantom of Clearwater, 894 So. 2d at 1018.

Although Phantom quotes the Fifth District's expression of the central issue in the lower court, to wit, "whether local governments retain the authority to develop rules to advance their enforcement obligations under chapter 791", and spends ten pages of its initial brief arguing that the County Commission is not a

law enforcement department—without addressing whether the Commission’s enforcement authority under section 791.001 might exist because it is numbered among the class of “officials charged with enforcement of the laws of the state”—Phantom never states what, if any, importance is attributable to its argument that the County Commission is not a law enforcement department. The reader can only be left with the assumption that the asserted lack of authority to enforce chapter 791 somehow ties into the next issue set forth in Phantom’s Initial Brief –that the County’s regulatory authority under chapter 791, Florida Statutes, is limited to public displays of fireworks. (Phantom’s Initial Brief 31)

However, as will now be shown, under the statutory framework presented in chapter 791 and other provisions of Florida statutory law, the Board of County Commissioners is not limited to regulatory authority over public displays because the Board is among the “officials charged with the enforcement of the laws of the state,” who have been empowered to enforce chapter 791, Florida Statutes, by means which may include the enactment of business regulations designed to make sure that all fireworks vendors in Brevard County adhere to the uniform standards, prohibitions, exemptions, definitions and penalties established by the Legislature in chapter 791.

A. WHEN CONSTRUED IN THE CONTEXT OF FLORIDA'S STATUTORY SCHEME REGULATING FIREWORKS, INCLUDING THE FLORIDA FIRE PREVENTION CODE, CHAPTER 791, FLORIDA STATUTES, CAN ONLY BE READ AS VESTING THE RESPECTIVE BOARDS OF COUNTY COMMISSIONERS WITH REGULATORY AND ENFORCEMENT AUTHORITY AS OFFICIALS CHARGED WITH ENFORCING THE LAWS OF THE STATE

In Florida, there are numerous officials charged with the responsibility of enforcing fire prevention laws, including county commissions under section 633.025(2), Florida Statutes, and the State Fire Marshall under section 633.01(2), Florida Statutes. In chapter 791, the Legislature made it clear that the protection of property and people from the potential fire hazards and personal injury hazards created by the use of fireworks was one of the factors driving the Legislature's enactment of the section 791.02 ban on the retail sale and use of fireworks, which section only allows the use of fireworks for supervised public displays "of such a character, and so located, discharged, or fired as in the opinion of the chief of the fire department, after proper inspection, shall not be hazardous to property or endanger any person." §791.02(1), Fla. Stat. (2007). It is therefore no surprise that the State Fire Marshal, who is charged with enforcing all laws, rules and provisions of chapter 633, Florida Statutes, relating to fire prevention and control, is also granted authority under chapter 791 including the authority test sparklers for

compliance with state standards (section 791.013, Florida Statutes) and the promulgation of rules and forms for wholesalers and manufacturers of fireworks.

Significantly, under Florida's legislative scheme, the authority of the State Fire Marshal and the County Commission to enforce fire prevention laws also expressly extends to the manufacture, transportation, storage and retail sales of fireworks. Under section 633.0215(2), Florida Statutes, the State Fire Marshal is required to adopt the National Fire Protection Association's (NFPA) Standard 1, Fire Prevention Code and the NFPA 101 Life Safety Code. The State Fire Marshal is also empowered to incorporate by reference any other fire standards or criteria needed to accommodate the specific needs of the state. §633.0215(2), Fla. Stat. (2007). The State Fire Marshal has implemented this authority by the enactment of Rule 69A-60.005, Florida Administrative Code. Subsection (2) of that rule incorporates by reference into the Florida Fire Prevention Code, NFPA 1124 which establishes the fire code governing the manufacture, transportation, storage and retail sale of fireworks and pyrotechnic articles.²

²In relevant part Rule 69A-60.005(2) reads as follows:

(2) The following publications are hereby adopted and incorporated by reference herein and added to the Florida Fire Prevention Code and shall take effect on the effective date of this rule:

NFPA 1124, 2006 edition, Code for the Manufacture, Transportation, Storage, and Retail Sale of Fireworks, and Pyrotechnic Articles

Sections 633.025(1)-(2), Florida Statutes,³ expressly require counties and municipalities to adopt and enforce the Florida Fire Prevention Code, which includes NFPA 1124 as incorporated by the State Fire Marshal—who is also empowered to enforce the state’s fire prevention laws. Therefore, county commissions, city councils and the State Fire Marshal are all officials charged with the enforcement of the fire prevention laws of the state, including the provisions of those state laws incorporated to regulate the use, manufacture and storage of fireworks. As such, these officials are certainly “officials charged with the enforcement of the laws of the state” within the meaning of section 791.001, Florida Statutes.

The Legislature’s has repeatedly emphasized the authority of counties to enforce the Florida Fire Prevention Code by setting forth that authority no less than four times, in sections 125.01(1)(d); 125.56(1); 633.025(2); and 633.0215(5),

³**633.025 Minimum firesafety standards.—**

(1) The Florida Fire Prevention Code and the Life Safety Code adopted by the State Fire Marshal, which shall operate in conjunction with the Florida Building Code, shall be deemed adopted by each municipality, county, and special district with firesafety responsibilities. The minimum firesafety codes shall not apply to buildings and structures subject to the uniform firesafety standards under s. 633.022 and buildings and structures subject to the minimum firesafety standards adopted pursuant to s. 394.879.

(2) Pursuant to subsection (1), each municipality, county, and special district with firesafety responsibilities shall enforce the Florida Fire Prevention Code and the Life Safety Code as the minimum firesafety code required by this section.

Florida Statutes. Notably, the Florida Fire Prevention Code not only includes NFPA 1124—pertaining to the manufacture, transportation, storage and retail sales of fireworks—the Code also incorporates NFPA 1123, the Code for Fireworks Display⁴ governing outdoor displays of fireworks that has also been adopted by the Legislature in section 791.012, Florida Statutes, which, along with sections 791.02 and 791.03, Florida Statutes, specifically empowers counties and cities to regulate and issue permits for the outdoor display and supervised public displays of fireworks.

Under Florida’s statutory scheme, therefore, counties have the authority to enforce all provisions in the Florida Fire Prevention Code pertaining to fireworks, including NFPA 1123, the outdoor display regulations incorporated into section 791.012, Florida Statutes. The respective boards of county commissioners in the states are, therefore, certainly “officials charged with the enforcement of state laws” pertaining to fireworks. In fact, it is obvious that the above-described statutory scheme regulating fireworks authorizes counties to enforce section 791.012, Florida Statutes, since NFPA 1123 sets forth the regulations incorporated into both section 791.012 and the Florida Fire Prevention Code, the latter of which

⁴Fla. Admin. Code R. 69A-60.005.

counties must adopt and enforce in accordance with section 633.025(2), Florida Statutes.

Counties are also statutorily charged with enforcing numerous other state laws.⁵ Included among those are public nuisance laws set forth in section 823.05, Florida Statutes, which, if applied to people or places where the sale or use of fireworks was deemed an annoyance to the community, can be enforced by county attorneys under section 60.05(1), Florida Statutes. The County's enforcement authority relating to all of the aforementioned state laws can be implemented in the form of licensing/permitting; code enforcement under chapter 162, Florida Statutes; suits for injunctive relief; or, as indicated by the Second District Court of Appeal in *Phantom of Clearwater*, through the enactment of regulatory ordinances that fill in gaps left in state laws that counties are charged with enforcing, so long as such ordinances do not conflict with those laws.

Given the foregoing statutory scheme, section 791.001, Florida Statutes, can only logically be read to authorize enforcement of chapter 791 by both law enforcement departments and officials, such as the respective boards of county commissioners, who are charged with the enforcement of the laws of the state.

⁵For example, section 553.80, Florida Statutes (Florida Building Code); section 125.0104, Florida Statutes (tourist development tax); and section 253.127, Florida Statutes (protection of state lands through injunctions); section 373.033(4), Florida Statutes (enforcement of salt water barrier lines relating to salt water intrusion)

However, there is an additional reason for construing “officials charged with the enforcement of the laws of the state” as a separate category of persons empowered to enforce chapter 791 as distinct from law enforcement departments.

B. BECAUSE SECTION 791.001, FLORIDA STATUTES, MUST BE INTERPRETED TO AVOID REDUNDANCY, THE PHRASE “OFFICIALS CHARGED WITH THE ENFORCEMENT OF THE LAWS OF THE STATE,” AS USED IN THAT SECTION, MUST BE READ AS APPLYING TO “OFFICIALS” OTHER THAN LAW ENFORCEMENT OFFICERS

In its initial brief, Phantom has challenged the Fifth District’s conclusion that counties are empowered to enforce chapter 791, Florida Statutes, in apparent concern over the lower court’s recognition that if section 791.001 obligates counties to enforce chapter 791, the statute may also be read to implicitly vest those counties with “the authority to develop rules to advance their enforcement obligations under chapter 791.” *Phantom of Brevard*, 966 So. 2d at 427.

The specific authority to enforce chapter 791 is found in the second sentence of section 791.001, Florida Statutes, which reads as follows: “Enforcement of this chapter shall remain with local law enforcement departments and officials charged with the enforcement of the laws of the state.”

Without any legal analysis of the second sentence of section 791.001, the Fifth District appears to have concluded that Legislature has charged counties with

the enforcement of chapter 791, an interpretation shared by Brevard County. *Phantom of Brevard*, 966 So. 2d at 427-428. Likewise, with a similar lack of legal analysis of the language in the statute, the Second District Court of Appeal appears to have read section 790.001 as permitting local law enforcement to enforce the terms of chapter 791 while also authorizing the Pinellas County Commission to enforce the provisions of that chapter through the enactment of an ordinance establishing documentation and record keeping requirements designed as a mechanism to facilitate strict enforcement of the prohibitions against retail sales and the use of fireworks, as set forth in chapter 791. In the context of determining that the Pinellas County ordinance did not conflict with chapter 791, this is how the Second District of Appeal described the shared responsibility for enforcement of that chapter by law enforcement departments and County Commissions, as officials charged with the enforcement of state laws:

It is consistent with the legislature's intent to permit local law enforcement to enforce the terms of the statute. *See* §791.001. The ordinance may be a vigorous effort to enforce the prohibitions contained in chapter 791, but a person or entity is fully capable of complying with both chapter 791 and ordinance 03-48. [emphasis supplied]

Phantom of Clearwater, 894 So. 2d at 1021.

Both the Fifth District and the Second District appear to have read the sentence “[e]nforcement of this chapter shall remain with local law enforcement

departments and officials charged with the enforcement of the laws of the state” as establishing two separate enforcement entities—“local law enforcement departments” as one entity and “officials charged with the enforcement of the laws of the state” as the other. The Fifth District and Second District courts’ interpretations are consistent with the rule of statutory construction that requires the courts to interpret statutes in a manner that avoids a redundancy of one provision in a statute with another provision in the same statute where it is possible to attribute two distinct interpretations to the two provisions.

Avoiding Redundancy

As previously pointed out, the enforcement language in section 791.001 reads as follows: “Enforcement of this chapter shall remain with local law enforcement departments and officials charged with the enforcement of the laws of the state”.

Phantom attempts to equate the word “officials,” as used in section 791.001, Florida Statutes, with “law enforcement officers” as defined in section 112.531, Florida Statutes (Phantom’s Initial Brief 24-25) Phantom argues that the above-quoted sentence in the statute restricts enforcement of chapter 791 to local law enforcement departments and “law enforcement officials” who have the authority to bear arms, make arrests and prevent and detect crimes. (Phantom’s Initial Brief

24-29) In short, Phantom would have this Court (1) change the word “officials” to “officers” and/or (2) read the words “local law enforcement” as adjectives describing both the noun “departments” and the noun “officials”, thereby effectively causing the statute to be read as saying “enforcement of this chapter shall remain with local law enforcement departments and local law enforcement officials charged with the enforcement of the laws of the state.”

However, such a reading causes a clear redundancy since both local law enforcement departments—comprised of local law enforcement officers/officials—and local law enforcement officers/officials, as Phantom defines those terms citing to section 112.531, Florida Statutes, are already charged with the enforcement of the penal laws of the state. (Phantom’s Initial Brief 25) If the word “officials” really means “law enforcement officers/officials” who, by definition, are vested with the authority to enforce the penal laws of the state, the statutory phrase “charged with the enforcement of the laws of the state” would be redundant and superfluous as used to describe “local law enforcement” officials since “local law enforcement officials”, by definition, are vested with the authority to enforce state penal laws. However, cases from this Court reject such redundant interpretations. *Clines v. State*, 912 So. 2d 550 (Fla. 2005) (subsection of criminal sentencing statute appearing to be superfluous as reiterating another subsection in the statute

should not be treated as redundant where it is possible to give an alternative meaning to the actual words used by the Legislature).

As previously mentioned, both the Fifth District Court of Appeal and Second District Court of Appeal appear to have interpreted section 791.001 to vest enforcement authority in both law enforcement departments (through law enforcement officers) and county commissions as “officials charged with the enforcement of the laws of the state.” That interpretation avoids the redundancy raised by Phantom’s interpretation. Therefore, the lower courts’ interpretation should be deemed correct under the rule requiring the avoidance of redundant interpretation, as set forth in *Cline*.

**II. THE ENACTMENT OF CHAPTER 791 BY THE LEGISLATURE DOES NOT PREEMPT THE COUNTY ORDINANCE AT ISSUE IN THIS CASE
(Phantom Initial Brief Points I and III)**

A. CHAPTER 791 DOES NOT EXPRESSLY PREEMPT THE COUNTY FIREWORKS ORDINANCE

Express preemption requires a specific legislative statement, that is, a statute containing specific language of preemption directed to the particular subject at issue. *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637 (Fla. 2d DCA 2007); *Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96 (Fla. 1st DCA 1994); *Hillsborough County v. Florida Restaurant Association*, 603 So. 2d

587 (Fla. 2d DCA 1992). Typical statutory language creating express preemption can either prohibit counties from enacting regulations in a particular area or recite an explicit preemption to the State of Florida. What follows are examples of express preemption statutes:

790.33 Field of regulation of firearms and ammunition preempted.—

(1) PREEMPTION.—Except as expressly provided by general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof, *to the exclusion of all existing and future county, city, town, or municipal ordinances* or regulations relating thereto. *Any such existing ordinances are hereby declared null and void.* [emphasis supplied]

316.75 Operator use of commercial mobile radio services and electronic communications devices.—Regulation of operator or passenger use of commercial mobile radio services and other electronic communications devices in a motor vehicle is *expressly preempted to the state.* [emphasis supplied]

In the case at bar, Phantom is really arguing that the Legislature intended the phrase “[t]his chapter shall be applied uniformly throughout the state” as used in section 791.001, Florida Statutes, to expressly preempt the field of fireworks regulation to the state. Both the Second District Court of Appeal and Fifth District Court of Appeal have rejected the notion that the “applied uniformly” language in section 791.001, Florida Statutes, constitutes an express preemption of county regulations. *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011

(Fla. 2d DCA 2005); *Phantom of Brevard, Inc. v. Brevard County*, 966 So. 2d 423 (Fla. 5th DCA 2007). Notably, the Second District has also held that similar “uniformity” language was not an express preemption as used in the Florida Elections Code which read, in part, as follows:

97.012 Secretary of State as chief election officer.—The Secretary of State is the chief election officer of the state, and it is his or her responsibility to:

(1) Obtain and maintain uniformity in the interpretation and implementation of the election laws. In order to obtain and maintain uniformity in the interpretation and implementation of the election laws, the Department of State may, pursuant to ss. 120.536(1) and 120.54, adopt by rule uniform standards for the proper and equitable interpretation and implementation of the requirements of chapters 97-102 and chapter 105 of the Election Code.

(2) Provide uniform standards for the proper and equitable implementation of the registration laws by administrative rule of the Department of State adopted pursuant to ss. 120.536(1) and 120.54. [emphasis supplied]

Browning v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637 (Fla. 2d DCA 2007)

The *Phantom of Clearwater*, *Phantom of Brevard* and *Browning* decisions all indicate that the use of the words “applied uniformly”, “maintain uniformity” and “uniform standards” or similar language, does not constitute a legislative statement of express preemption. The analysis of those courts is consistent with the way in which the Legislature has used the words “applied uniformly” throughout Florida Statutes. The phrase “applied uniformly” is used seven times in

laws other than section 791.001, Florida Statutes. Nowhere is that phrase used in a statute containing language providing for express preemption.⁶

As a rule of statutory construction, where the Legislature has used certain exact words or exact phrases in multiple statutes, as is the case with the phrase “applied uniformly”, this Court may assume that the Legislature intended those exact words or exact phrases to mean the same thing. *Goldstein v. Acme Concrete Corporation*, 103 So. 2d 202 (Fla. 1958). Therefore, it is important to know the meaning of the “applied uniformly” phrase as used in statutes other than section 791.001.

In every instance where the phrase “applied uniformly” is used in other statutes, the phrase appears in a context suggesting that the rules or standards being referenced or established in the statute are to be enforced against all persons or entities regulated by the statute in a manner that is not arbitrary or capricious. Good examples of this use of the phrase “applied uniformly” appear in section 255.20(1)(c)10, Florida Statutes, and section 316.2045, Florida Statutes. Section 255.20(1)(c)10 sets forth an exception to the general rule that local governments must obtain competitive bids for construction projects costing more than \$200,000. Subsection 255.20(1)(c)10 allows an exemption from competitive bidding if local

⁶§§218.64(2); 255.20(1)(c)10; 255.51; 316.2045(5); 627.211(2); 627.6699(5)(h)2; and 641.31071(9)(a)2, Fla. Stat. (2007)

governments had enacted pre-July 1, 1994, substantive criteria and procedures for awarding bids to private, licensed contractors. The Legislature qualified that exemption by requiring that the criteria and procedures set out in the charter, ordinance, or resolution “must be applied uniformly by the local government to avoid award of any project in an arbitrary or capricious manner.” §255.20(1)(c)10, Fla. Stat. (2007). Similarly, the phrase “applied uniformly”, as used section 316.2045(5), Florida Statutes, suggests that local government regulations governing the standing and stopping of commercial vehicles cannot be applied in a discriminatory manner. Under that statute, local governments have the authority to regulate the standing and stopping of commercial vehicles “provided that such regulations are *applied uniformly* and without regard to the ownership of the vehicles.” §316.2045(5), Fla. Stat. (2007).

The phrase “applied uniformly” in the remaining five statutes is used in very similar contexts. Consequently, applying the rule of statutory construction that allows the courts to assume the phrase “applied uniformly” means the same thing in all of the statutes where it is used, it is evident that the Legislature intends the words “applied uniformly”, as used in section 791.001, Florida Statutes, to require the statutory rules and standards created for fireworks in chapter 791, Florida

Statutes, to be applied to all persons regulated by that chapter in a manner that is not arbitrary, capricious or discriminatory.

Application of the criteria, standards, prohibitions, exemptions and penalties of chapter 791 in a manner that is not arbitrary, capricious or discriminatory is not the same thing as an express preemption prohibiting counties from enacting regulations pertaining to fireworks. Where no express preemption exists, such regulations may be enacted as long as they are either not inconsistent—that is, not in conflict—with law, in violation of Article VIII, sections 1(f) and (g) of the Florida Constitution, and as long as there is no implied preemption. *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637 (Fla. 2d DCA 2007); *Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96 (Fla. 1st DCA 1994); *Hillsborough County v. Florida Restaurant Association*, 603 So. 2d 587 (Fla. 2d DCA 1992). The *Phantom of Clearwater* court found no inconsistency or conflict of the Pinellas County ordinance with respect to chapter 791, Florida Statutes. Likewise, the *Phantom of Brevard* court found the Brevard ordinance largely consistent with chapter 791, with a few exceptions, one of which will be the subject of the issue raised in the Cross-Initial Brief incorporated into this Answer Brief. However, neither court found that a county is expressly preempted from enacting regulations governing the documentation and record keeping required for

county officials to enforce the prohibitions and exemptions found in chapter 791. Likewise, neither the Second District Court of Appeal nor the Fifth District Court of Appeal found any implied preemption of county ordinances pertaining to those same documentation and record keeping requirements, as will be discussed later in this Answer Brief.

2004 Legislative Intent Excludes Preemption

Phantom also argues, at pages 17-21 of its Initial Brief, that the omission of a provision from a 2004 Senate bill that would have amended chapter 791, Florida Statutes, to make it clear that “[t]he state does not preempt the regulation of fireworks and sparklers as provided in this chapter” and to allow “[a]ny authority having jurisdiction . . . [to] enact any ordinance or adopt any rule related to this chapter if such ordinance or rule is more stringent . . .”⁷ is somehow evidence of the Legislature’s knowledge that local regulation of fireworks sales was already preempted by chapter 791, Florida Statutes—specifically under section 791.001. This 2004 proposal was presented as section 791.08, Florida Statutes, in SB 2686, which was never adopted. (*See*: Phantom App. Ex. 4, 5) Phantom latches on to the legislative inaction on SB 2686 to make the argument that “[t]he only reasonable inferences from the Senate’s non-action in 2004 regarding SB 2686 are that the

⁷Phantom App. Ex. 4, 5

Legislature both understood that chapter 791, Florida Statutes, as it existed then, and now, preempts regulation of fireworks sales” (Phantom’s Initial Brief 20-21)

However, Phantom ignores three things that undermine any express preemption argument predicated on legislative intent. First, there is no ambiguity in chapter 791, Florida Statutes, requiring this Court to resort to legislative intent for enlightenment on the meaning of section 791.001, Florida Statutes. Neither that section nor any other section in chapter 791 contains any express preemption language whatsoever. *See Phantom of Clearwater*, 894 So. 2d at 1018-1019.

It is a fundamental principle of statutory construction that clear and unambiguous statutes require no judicial interpretation. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla.1992). It is only proper to resort to rules of statutory construction to discern legislative intent when the statutory language is ambiguous. *See Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). In this case, there is no ambiguity with regard to the absence of preemption language, so legislative intent is irrelevant to determining the meaning of section 791.001.

Second, even if section 791.001 were considered to be ambiguous, chapter 791 must be considered as a whole in determining legislative intent. *State v. Gale*

Distributors, Inc., 349 So. 2d 150 (Fla. 1977) (it is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent).

When considered as a whole, chapter 791 undermines Phantom’s express preemption argument since the Legislature, rather than adopting a provision expressly prohibiting local governments from passing regulations governing fireworks, has adopted provisions expressly empowering state agencies, cities and counties to enact more stringent regulations relating to the outdoor display of fireworks except displays on private residential property, as set forth in section 791.012, Florida Statutes, while vesting counties and cities with the authority to adopt reasonable rules and regulations for the permitting of supervised public displays, as set forth in section 791.02, Florida Statutes. This grant of authority is limited to the state, counties and cities, however. Therefore Phantom’s argument that the 2004 Legislature’s rejection of proposed section 791.08 in SB 2686 allowing “[a]ny authority having jurisdiction . . . [to] enact any ordinance or adopt any rule related to this chapter if such ordinance or rule is more stringent . . .” evidences the Legislature’s knowledge that county fireworks regulations were expressly preempted by chapter 791 falls flat because a careful reading of the proposed but rejected section 791.08 reveals that the proposed law was really

designed to expand the number and type of governmental entities in which the power to regulate fireworks would be vested. The proposal did so by expanding states, cities and counties vested with that authority by chapter 791, to include “any authority with jurisdiction” which might include, not only state agencies and local governments, but port authorities, independent special districts, universities or even community development districts. The Legislature’s intent in rejecting SB 2686, therefore, was arguably all about preventing the expansion of fireworks regulations to governmental entities other than the state, city and county, while having nothing to do with any alleged legislative recognition of preemption.

Third, as argued above, through section 791.001 and through sections 125.01(1)(d); 125.56(1); and 633.025, Florida Statutes, the Legislature has granted counties the authority to enforce the section 791.02 retail sales ban and use ban, as well as the NFPA fireworks standards, exemptions and penalties enacted in other provisions of chapter 791, Florida Statutes.

From these three observations it is more plausible to conclude that the Legislature refused to enact the proposed section 791.08 in 2004 because:

1. the Legislature did not want to broaden regulatory authority over fireworks to “any authority with jurisdiction” since the Legislature had already chosen to vest regulatory authority over fireworks only in state agencies, counties

and cities—as to outdoor displays—and only in cities and counties over supervised public displays; and

2. there was no need for the Legislature to empower local governments to empower counties to enact more stringent regulations or to reiterate the absence of state preemption since local governments had already been statutorily vested with the authority to regulate outdoor displays, supervised public displays and the manufacture, transportation, storage and retail sales of fireworks—virtually all of the areas relating to the use of fireworks—as well as the power to enforce the legislative ban on the retail sale of fireworks.

1987 Legislative Intent Precludes Express Preemption

Assuming section 791.001 is treated as being ambiguous on the preemption issue, the foregoing reasoning is all the more compelling when applied to the Phantom preemption argument predicated upon 1987 legislative committee decisions—in apparent deference to uniformity throughout the state—to reject a proposed amendment to chapter 791. Phantom reasons that because the rejected amendment in question explicitly granted local governments the authority to enact more stringent fireworks regulations, by rejecting the amendment, the Legislature evidenced its recognition that the “applied uniformly” phrase in section 791.001, Florida Statutes, must mean that fireworks regulation was preempted to the state.

(Phantom Initial Brief 17-18, 34) However, in making this argument, Phantom has ignored the sixty-seven year history of legislative amendments to chapter 791 and the adoption of other laws expanding the regulatory powers of counties over fireworks, clearly demonstrating that uniformity of application, as envisioned by the Legislature, had nothing whatsoever to do with preemption.

The fact is, chapter 87-118, Laws of Florida⁸ contained amendments to a composite of prior general laws regulating fireworks as far back as the year 1941 and the adoption of chapter 20445, Laws of Florida⁹—which originated the ban on the retail sale and use of fireworks now codified as section 791.02, Florida Statutes. Chapter 20445 originally authorized county sheriffs to regulate supervised public displays of fireworks. Not until a 1961 amendment to section 791.02 in chapter 61-312, Laws of Florida¹⁰ did counties and cities supplant sheriffs as the authorities empowered to regulate supervised public displays. Moreover, it was not until 1996, in chapter 96-285, Laws of Florida¹¹ where section 791.012, Florida Statutes, was created, that counties and cities were authorized, along with the state, to enact regulations more stringent than NFPA

⁸Answer Brief App. Ex. 1

⁹Answer Brief App. Ex. 2

¹⁰Answer Brief App. Ex. 3

¹¹Answer Brief App. Ex. 4

1123 governing outdoor displays of fireworks. Subsequently, in 2002, the provisions of chapter 2000-141, Laws of Florida¹² went into effect, amending sections 125.56(1) and 633.025, Florida Statutes, to expand the powers of counties to include the powers to enforce and amend the Florida Fire Prevention Code, which incorporates both NFPA 1123, governing outdoor displays of fireworks, and NFPA 1124, governing the regulation of the manufacture, transportation, storage and retail sales of fireworks.

From the foregoing history, it is fairly evident that, over the past sixty-seven years the Legislature has expanded, not preempted, the counties authority to regulate fireworks in a variety of areas. Given that history, the “applied uniformly” phrase appearing in section 791.001, Florida Statutes, can only be read as requiring uniform enforcement of the prohibitions, exemptions, standards and penalties set forth in chapter 791, Florida Statutes. However, the “applied uniformly” requirement cannot be read to expressly preempt counties from enacting regulations requiring the documentation and record-keeping necessary to implement their statutory obligation to enforce chapter 791.

¹²Answer Brief App. Ex. 5. The 2002 effective date for Chapter 2000-141 is found in chapter 2001-372, Laws of Florida.

B. CHAPTER 791 DOES NOT IMPLIEDLY PREEMPT THE COUNTY FIREWORKS ORDINANCE

Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive where the legislative scheme is so pervasive as to evidence the Legislature's intent to preempt a particular area. *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc.*, 681 So. 2d 826 (Fla. 1st DCA 1996) citing *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla.1984) Implied preemption is also "limited to the specific area where the Legislature has expressed [its] will to be the sole regulator." *Tallahassee Memorial Regional Medical Center*, 681 So. 2d at 831. In considering the application of implied preemption, courts must also look at whether the law at issue regulates an area in which some local control has traditionally been allowed and whether chaos and confusion would result from having the two-tiered regulatory process that would result if local laws were not preempted by state law." *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637 (Fla. 2d DCA 2007). In this case, there is no evidence that the Legislature has intended to be the "sole regulator" of fireworks in Florida. On the contrary, there is a large body of legislative evidence that local governments have been vested with local control over various aspects of fireworks regulation for over sixty-seven years.

As previously pointed out, over the past sixty-seven years, the Legislature has actually authorized counties to regulate fireworks in a variety of areas. Section 791.02, Florida Statutes, authorizes counties to regulate and issue permits for supervised public displays of fireworks while section 791.012 as read together with sections 125.01(1)(d), 125.56(1), 633.025(2), and 633.0215(5), Florida Statutes, not only authorizes the County to enforce NFPA 1123, governing outdoor displays of fireworks, but authorizes counties to enact more stringent regulations governing the outdoor display of fireworks—an undefined term under section 791.02 that can include outdoor displays on private commercial property such as local shopping malls; on private industrial property; on public streets; in public parks; on publicly owned property; but, as stated in the final sentence of 791.012, not on private residential property. Counties are also authorized to enforce and amend the Florida Fire Prevention Code which includes NFPA 1124 pertaining to the manufacture, transportation, storage and retail sales of fireworks.

Given the Legislature’s delegation of authority to local governments which, over a period of sixty-seven years, have been incrementally vested with statutory authority to amend and enforce fireworks regulations, the Legislature can hardly be viewed as the “sole regulator” over fireworks. Therefore, no implied preemption of fireworks can be deemed to exist in this case.

Further, in determining whether implied preemption exists, the courts must look for some strong public policy reason for finding that the Legislature has preempted an area of regulation. *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637 (Fla. 2d DCA 2007). The *Browning* court articulated the lack of a strong public policy for state preemption of fireworks regulation as follows:

It generally serves no useful public policy to prohibit local government from deciding local issues. For example, the need to control the sale of fireworks in a populated locality may be greater than the need to control the sale of fireworks in a sparsely populated county. *See Phantom*, 894 So.2d at 1011 (finding no preemption of local ordinance regulating businesses that sold fireworks).

Browning v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d at 646.

In this case, an evaluation of the foregoing three factors considered by courts in evaluating the issue of implied preemption overwhelmingly tip the scales to a finding that there is no implied preemption to the state over the regulation of fireworks. Although the *Browning* court also indicated that the need for statewide uniformity is a factor considered by the courts in evaluating implied preemption, in this case the uniformity factor is narrowed to the legislative determination that the standards, prohibitions, exemptions and penalties set forth in chapter 791 be “applied uniformly”—that is, in a manner that is not arbitrary, capricious or discriminatory. The uniformity factor has been substantially diminished in weight by the steady legislative transfer of regulatory, amendment and enforcement

authority over fireworks—both in chapter 791 when taken as a whole, and in the overall legislative scheme dealing with fireworks regulation as part of the Florida Fire Prevention Code. As a result, there is no implied preemption of fireworks regulation to the state.

ANSWER BRIEF CONCLUSION

For the foregoing reasons, Brevard County respectfully requests this Honorable Court to adopt the Second District Court of Appeal decision in *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005), as well as the Fifth District Court of Appeal decision in *Phantom of Brevard, Inc. v. Brevard County*, 966 So. 2d 423 (Fla. 5th DCA 2007) with the exception of that portion of the *Phantom of Brevard* opinion that invalidates section 10 of Ordinance No. 05-60, setting forth the financial responsibility requirement, which is the subject of the Cross-Initial Brief, below.

CROSS-INITIAL BRIEF

SUMMARY OF ARGUMENT

Chapter 791, Florida Statutes, is silent on the authority of counties to make fireworks vendors obtain liability insurance. The legislative scheme manifested in chapters 125, 633 and 791, Florida Statutes, vests counties with the authority to enact business regulations for the protection of the public, as well as the authority

to enforce and amend regulations pertaining to the buildings in which fireworks are sold and stored. Section 791.001, Florida Statutes, though requiring that the standards, prohibitions, exemptions and penalties be applied uniformly throughout the state, does not prohibit counties from enacting business regulations requiring fireworks vendors to obtain insurance and worker's compensation coverage.

The legislative scheme granting counties the authority to engage in a several areas of fireworks regulation should, therefore, be construed as granting counties the implied authority to require fireworks vendors to meet state worker's compensation requirements for the protection of employees and to obtain liability insurance for the protection of the public against the potential for catastrophic fires and explosions intrinsic to the business of selling fireworks. Consequently, the portion of the Fifth District Court of Appeal decision invalidating section 10 of Ordinance 05-60 pertaining to financial responsibility and insurance, should be reversed.

ARGUMENT

I. THE FINANCIAL RESPONSIBILITY PROVISION OF THE COUNTY FIREWORKS ORDINANCE REQUIRING FIREWORKS VENDORS TO PROVIDE PROOF OF ONE MILLION DOLLARS IN GENERAL LIABILITY AND PROPERTY DAMAGE INSURANCE COVERAGE IS A VALID BUSINESS REGULATION THAT DOES NOT IN ANY WAY CONFLICT WITH SECTION 791.001, FLORIDA STATUTES

In *Phantom of Brevard v. Brevard County*, 966 So. 2d 423 (Fla. 5th DCA 2007), without argument or briefing on the issue, the Fifth District Court of Appeal invalidated the financial responsibility provision, section 10 of the Brevard County Fireworks Ordinance No. 05-60, as being in direct conflict with the uniformity requirement set forth in section 791.001, Florida Statutes. *Phantom of Brevard*, 966 So. 2d at 428-429. In doing so, the Fifth District expressed its disagreement with the Second District Court of Appeal upholding a virtually identical provision as a valid regulation of the business of selling fireworks. *Phantom of Brevard*, 966 So. 2d at 428-429.

Chapter 791 is silent on the subject of financial responsibility, insurance and worker's compensation coverage in the context of the legislative authority granted to counties over the regulation of fireworks. As previously shown at pages 30-31 of the foregoing Answer Brief, the sixty-seven year history of amendments to chapter 791 shows a clear legislative pattern of continually expanding the grant of

authority to local governments over various areas of fireworks regulation. The legislative history of amendments to chapter 791, when combined with the enactment of several other statutes empowering local governments to adopt, enforce and amend a uniform Florida Fire Prevention Code—which includes fireworks regulations governing the manufacture, transportation, storage and retail sales of fireworks¹³—supports the holding of the Second District Court of Appeal in *Phantom of Clearwater* to the effect that counties have the power to impose a business regulation requiring insurance and worker’s compensation coverage on vendors engaged in the business of selling fireworks. As will be shown, the County’s use of its express and implied home rule authority to enact a business regulation requiring fireworks vendors to maintain a million dollar general liability and property damage insurance policy, as well as required the worker’s compensation coverage required by the State of Florida, does not directly conflict with section 791.001, Florida Statutes, since chapter 791 is utterly silent on the issue of the financial responsibility of fireworks vendors.¹⁴

¹³The County’s authority to amend the Florida Fire Prevention Code relates to technical amendments that provide for safe construction, erection, alteration, repair, securing, and demolition of any building within its territory outside the corporate limits of any municipality.

¹⁴Section 791.03 does address a bond requirement for persons engaged in the use of fireworks for outdoor displays.

The Ordinance

The provision invalidated by the Fifth District reads as follows:

Section 10. Evidence of financial responsibility.

In furtherance of the provisions of sections 8 and 9, all sellers of fireworks must keep in force an insurance policy showing general, comprehensive, liability and property damage insurance coverage on an occurrence basis with minimum limits in the policy of not less than \$1,000,000.00 combined single limit coverage for each loss that may result from the activities of the sellers. Sellers must maintain Workers' Compensation coverage as required pursuant to F.S. Ch. 440. A failure to maintain this required coverage after the procurement of a permit shall be a violation of this ordinance and grounds for suspension of their permit from the authority and the sale of the permitted goods shall cease until such time as the required insurance is obtained.

Significantly, this provision cross-references permitting requirements found in subsection 9 of the Ordinance—a provision that was not invalidated by the Fifth District Court. Those permitting requirements include, among other things, that the vendor provide proof of compliance with all *state* and federal regulations regarding the *storage and sale* of fireworks at each location.¹⁵ As a condition for maintaining a permit, the permittee is required to comply with all *state*, federal and *local* regulations governing the *sale* and *storage* of fireworks.¹⁶ In a related

¹⁵Answer Brief App. Ex. 6, Ordinance No. 05-60, section 9.

¹⁶These two specific sections read as follows:

Section 9. Fire authority to issue permits governing the sale of fireworks...

provision, section 14 of the Ordinance authorizes the fire official to obtain compliance with permitting requirements relating to the *sale, storage and manufacture* of fireworks.¹⁷

Section 9 of the Ordinance, therefore, requires fireworks vendors to adhere to *state regulations* governing the storage and sale of fireworks including NFPA 1124 as incorporated into the Florida Fire Prevention Code by the State Fire Marshall in accordance with Rule 69A-60.005, Florida Administrative Code.

The Statutory Scheme Governing Regulation of Fireworks

The Florida Legislature has expressly required counties to adopt and enforce the Florida Fire Prevention Code, which includes NFPA 1124. §125.01(1)(d), Fla. Stat. (2007); §125.56(1), Fla. Stat. (2007) and §633.025(2), Fla. Stat. (2007). In section 125.56(1), the Legislature has also empowered counties “to adopt . . . local

(c) In order to obtain a permit, the applicant, must provide proof of compliance with all state and federal regulations regarding the *storage, display for sale and sale* of fireworks at each location listed on the application.

(j) As a condition of maintaining the permit, the permit holder must comply with all federal, state and local regulations governing the *sale and storage* of fireworks, and must maintain all necessary permits required by federal, state or local law, ordinance or regulation. The permit holder must also comply with the record keeping provisions of this ordinance.

¹⁷Section 14. Penalties and enforcement.

(f) Fire officials in their respective jurisdictions shall be responsible for obtaining compliance with respect to building code and permitting requirements applicable to the display, *sale, storage and manufacture* of fireworks and sparklers.

technical amendments to the Florida Fire Prevention Code, pursuant to s. 633.0215, to provide for the safe construction, erection, alteration, repair, securing, and demolition of any building within its territory outside the corporate limits of any municipality.”

Significantly, the very same authority granted by section 125.56(1), Florida Statutes, is also vested in counties under section 125.01(1)(d), Florida Statutes, a statute derived from chapter 71-14, Laws of Florida,¹⁸ section 1, the first post-1968 law which substantially broadened and implemented the home rule authority of counties granted under Article VIII, sections (1)(f) and (g), of the 1968 Florida Constitution. Section 125.01(1)(h), Florida Statutes, also grants counties the power to enact “such business regulations as are necessary for the protection of the public” together with all “all implied powers necessary or incident to carrying out such powers enumerated”¹⁹ and to “exercise all powers and privileges not specifically prohibited by law.”²⁰ Under this statutory scheme, a county with the authority to enforce and amend the State of Florida Fire Prevention Code, including the fireworks storage and sale regulations contained in that code, certainly has the express authority to enact a business regulation requiring

¹⁸Answer Brief App. Ex. 7

¹⁹§125.01(3)(a), Fla. Stat. (2007)

²⁰§125.01(1)(w), Fla. Stat. (2007)

fireworks vendors, who store large quantities of highly explosive materials at their sales locations, to obtain operating permits conditioned upon the vendor's maintenance of a million dollar general liability and property damage insurance designed to protect the public from financial disaster in the event the very real possibility of fire or explosion fireworks ever takes place.

This rationale is implicit in the Second District Court of Appeal statements that such an ordinance “is not designed to regulate the use of fireworks. It regulates the business of selling fireworks . . .”, *Phantom of Clearwater*, 894 So. 2d at 1018, and “[a]lthough the ordinance does establish a permitting process for all businesses involving fireworks and that process imposes additional requirements on businesses wanting to avail themselves of the benefits of doing business in Pinellas County, this permitting process does not directly conflict with the provisions of chapter 791.” *Phantom of Clearwater*, 894 So. 2d at 1023. Given the statutory scheme which vests counties with the authority to enforce, amend and adopt fireworks regulations, as set forth in both chapters 125 and 791, Florida Statutes—including more stringent regulations pertaining to outdoor displays—the legislative scheme does not support the Fifth District Court's conclusion that “there is no reason to believe that the legislature would have countenanced a system in which a seller of fireworks or sparklers must maintain a particular amount of liability

insurance simply because one of the counties in which it does business requires such coverage.” *Phantom of Brevard*, 966 So. 2d at 429.

It is, therefore, respectfully submitted that this Honorable Court should adopt the decision of the Second District Court of Appeal and reverse the portion of the Fifth District Court of Appeal decision invalidating section 10 of the Brevard County Fireworks Ordinance No. 05-60.

CROSS-INITIAL BRIEF CONCLUSION

For the foregoing reasons, Brevard County respectfully requests this Honorable Court to reverse the portion of the Fifth District Court of Appeal decision invalidating section 10 of the Brevard County Fireworks Ordinance No. 05-60.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark D. Shuman, Esquire, 1800 West Hibiscus Blvd., Suite 138, Melbourne, Florida, 32901, this 20th day of June, 2008.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing instrument complies with the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure.

OFFICE OF THE COUNTY ATTORNEY
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//s//

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Florida Bar No. 211291

Attorney for Brevard County

IN THE SUPREME COURT OF FLORIDA

Case Nos. SC07-2200 and SC07-2201

PHANTOM OF BREVARD, INC.,

Petitioner/Cross-Respondent,

v.

Lower Tribunal Case No.

5D06-3408

Fifth District Court of Appeal

BREVARD COUNTY, FLORIDA, a
political subdivision of the State of
Florida,

Respondent/Cross Petitioner.

APPENDIX

**BREVARD COUNTY'S ANSWER BRIEF AND
CROSS INITIAL BRIEF**

Appendix

1. Ch. 87-118, Laws of Fla.
2. Ch. 20445, Laws of Fla. (1941)
3. Ch. 61-312, Laws of Fla.
4. Ch. 96-285, Laws of Fla.
5. Ch. 2000-141, §§ 3, 102-105, Laws of Fla.
6. Ord. 05-60, Code of Ordinances of Brevard County, Florida
7. Ch. 71-14, Laws of Fla.