

Summary of
Incorporation: Advantages and Disadvantages

Florida League of Cities

rev September, 2013

PHILOSOPHY

First and foremost, when deciding whether to create a municipality, one must affirmatively answer 2 fundamental questions:

Are you willing to control your own destiny? If so, are you willing to pay for it?

It's surprising how often a group of people are not interested in "controlling their own destiny." Sometimes, these people are just satisfied with the way things are. Other times, they've been so accustomed to "big government" taking care of them, they're just not interested in participating in "their own government." These people, for whatever reason, "want" a better "quality of life;" however, they're unwilling to assume the responsibilities to obtain it. Persons wishing to incorporate, on the other hand, *want* a better "quality of life," are certain they know what it takes to obtain it, and are willing to "grab the bull by the horns" and obtain it.

Anyone who tells you, "You will pay less taxes if you incorporate," is probably not being entirely forthright. If you incorporate, you will likely pay more taxes! The exception to this rule is those instances where the area to be incorporated is located within the boundaries of special taxing districts, MSTUs, and the like. In any event, you will continue to pay county property taxes, school property taxes, and property taxes to the water management district. In addition, you *will* pay property taxes to the municipality. However, the fundamental distinction between city taxes and the other taxes is that *you* will control the amount of taxes, *you* will control the revenues and how the revenues are spent, and the revenues will be spent to benefit *you*. But, in the final analysis, you must be willing to pay more to "control your own destiny."

INCENTIVES TO INCORPORATE

Invariably, the citizens of the community are drawn to incorporation because of their county's activity or inactivity. Destin incorporated primarily because Okaloosa County was unwilling to control growth along Destin's waterfront and Destin was therefore losing the "small town" flavor that had made it so popular. Midway incorporated primarily because Gadsden County was planning to site a landfill adjacent to the community and was unwilling to accommodate the community's concerns. When the residents of both communities realized *they* were the only ones that could take care of themselves, they turned to incorporation as the vehicle to take care of

themselves.

Generally, absent a crisis, incorporation is the vehicle the residents of a community turn to when they decide they want to improve their “quality of life” and they find the county is either unable or unwilling to provide the necessary increase in level of services. The residents want more or better law enforcement protection or fire protection. They would prefer garbage collection service. They would like more and better recreational facilities and services. They want water and sewer services. In sum, they want the increased level of services a municipality has historically been geared to provide and they're willing to pay for it. Sure, the residents could prevail upon the county to establish a municipal service taxing unit, and the county could use the revenues derived from the taxes levied in the unit to provide the increased level of services; however, given the prospect of paying for the increased level of services, the residents invariably look to incorporation as a legitimate option. After all, given the fact the residents will indeed pay additional taxes, the residents invariably prefer that *they* determine the amount of the taxes, that *they* control the revenues derived from the taxes and how they are spent, and that the revenues are spent primarily for *their* benefit.

MECHANICS OF INCORPORATION

Ch. 165, Fla. Stat., governs the incorporation of municipalities. One should remain mindful that the law is a “guide;” in other words, a proposed incorporation need not *legally* satisfy all the prerequisites to incorporation reflected in the statute. This is because a municipality may be created only by special act, and the provisions of the special act, under traditional rules of statutory construction, prevail over the standards contained in the statute to the extent the two conflict. For example, Sec. 165.061(1)(b), Fla. Stat., requires the total population of a proposed municipality be at least 1,500 persons in counties with a population of less than 50,000; however, if a special act called for the incorporation of a municipality with less than 1,500 in such a county, then the provisions of the special act would prevail over the requirement contained in the general law.

While Ch. 165, Fla. Stat., is merely a “guide” to incorporation, from a political perspective, one is well advised to attempt to satisfy the statutory prerequisites. The polestar consideration in the incorporation process is a consensus for incorporation. A consensus for incorporation insures that the elected officials, both local and state, are not placed in a politically untenable situation. Dissension can lead to the defeat of the incorporation effort, and can very well lead to the state legislators' hesitation to even file the proposed special act.

Usually, proposed incorporations are begun by a community organization that has made the initial decision that incorporation is in the community's best interest. Typically, the organization undertakes a “feasibility study” on the proposed incorporation. Generally, the purpose of the study is two-fold; to actually analyze the impact incorporation will have on the residents of the community; and to provide a mechanism for broad citizen involvement in both initiating and developing the municipality. Again, the effect of the study is to attempt to develop a broad political consensus for incorporation.

The end result of the study should be a special act that consists of the proposed municipality's charter and the manner in which the municipality will come into existence.

Art. III, Sec. 10, Fla. Const., provides that one of two things must occur before a special act (including one that creates a municipality) becomes law: the intention to seek the special act must have been published as prescribed by law; *or* the law must contain a referendum provision and the effectiveness of the special act must depend upon a favorable vote in a referendum. The creation of a municipality therefore need not be conditioned upon the approval of the electors in the area proposed to be incorporated if notice of the intention to be incorporated has been published as prescribed by law. However, again as a practical matter, a special act calling for the creation of a municipality will invariably be conditioned upon voter approval because that is the politically palatable way to go. Statutes governing notice of special acts include Sec. 11.02, 11.021, 11.03, Fla. Stat.

SPECIAL ACT

As stated, the charter for the incorporation of a municipality may be adopted only by a special act of the state legislature. Generally, the special act should contain a title, the charter of the proposed municipality, a transition schedule, and an effective date.

Title

All state legislation, general or special, must contain a title. The title must briefly summarize the subject of the legislation and may embrace only one subject (in this case, a proposed incorporation).

Charter

The charter is the municipality's "constitution." One should bear in mind one doesn't need an 80-page document to organize and run a municipality; a municipality can run just fine on a 13-page charter. The typical municipal charter, at the minimum, contains the following articles:

Corporate Existence

This article typically contains the name of the municipality, its form of government (e.g., commission-manager, strong mayor, etc.), the general powers of the municipality, the construction to be placed on the municipality's powers, and a description of the boundaries of the municipality. When one is considering the municipality's proposed boundaries, one is well advised to consider basing the municipality's boundaries on election precincts to facilitate the referendum on the municipality's creation.

City Commission

This article usually provides for the composition of the city commission (e.g., 5 or 7 members, elected at-large or from single member districts, etc.), the terms of commissioners and time of their election (e.g., 2 or 4 year terms, date of general election, etc.), any compensation to be paid the commissioners, the powers of the commission and the mayor, the manner in which commission vacancies will be filled, the manner in which general or special meetings will be called

and held, and the order in which business at meetings will be conducted.

Charter Officers

This article typically designates the charter officers (e.g., city manager, city clerk, city attorney, etc.), provides for their appointment and removal, and provides for their powers and duties.

Elections

This article typically provides the qualifications of electors, the qualifications of candidates, the manner in which the candidates qualify for election, the schedule under which elections will be conducted, and the manner in which votes will be tabulated.

General Provisions

This article typically contains miscellaneous provisions such as the oath of officers, the manner in which budgets will be adopted and revenues will be appropriated, and any limitations placed on the municipality.

The last matter, charter limitations, deserves a special note. As stated earlier, a municipality can run just fine on a 13-page charter. The larger a charter, the more likely it is to contain limitations on the municipality. One is well advised to initially go with a charter that places very few limitations on the municipality. After all, the emphasis in creating a municipality is to create an entity that can timely respond to the needs and conveniences of the residents of the community, and it's simply incongruous to place artificial limitations on the municipality "right out of the box." The plain fact is you elect residents of the community to run your municipality and you can unelect them. If you place a bunch of restrictions in your charter, then you no doubt eventually tie the hands of the municipality and restrict its ability to timely respond to the needs and conveniences of its citizens. If the business community wants to put an ad valorem millage cap in the charter, then the environmental community will undoubtedly want to put a development density cap in the charter, the minority community will want to put a minority bid preference in the charter, and some other interest group will want to put some other limitation in the charter (e.g., term limitations). The next thing you know, you have so many limitations in the charter, you would have been just as well off never to have incorporated. Also, remain mindful that state law (Sec. 166.031, Fla. Stat.) provides a relatively easy process by which the electors of a municipality may call an election to propose an amendment to the municipality's charter. Thus, one will always have a mechanism to place restrictions in the charter should the necessity arise.

On a related matter, one is also well advised to refrain from placing unnecessary charter provisions in the charter. Examples of these provisions include, for example, procedures governing the adoption of ordinances, the adoption of amendments to the charter, and the recall of the members of the municipality's governing body. Each of these subjects are covered under state law and the state law would prevail over the charter provision to the extent the two conflict. To the extent there is no conflict, the provisions are simply redundant and therefore clutter up the charter. The least that can be said is that these types of provisions (i.e., those addressing subjects already

covered by state law) can confuse the average citizen.

Transition Schedule

A special act's transition schedule is designed to insure the newly created municipality does not turn into a temporary “Dodge City” between the time of its creation and the time the newly created municipality can “get up and operating.”

Typically, the transition schedule will contain the following:

First Election

This provision will typically outline the election of the first commission, the time and manner in which the election will be held, and the manner in which the costs of the election will be borne. Additionally, this provision will usually provide abbreviated terms for a portion of the first commissioners elected so that subsequent commission terms will be staggered.

Transitional Ordinances

This provision usually provides that the ordinances of the county, including the county's comprehensive plan and land development regulations, remain in effect within the geographic boundaries of the newly created municipality until such time as the municipality adopts its own ordinances. Typically, this provision permits the newly elected governing body of the municipality to assume jurisdiction to enforce the county's ordinances upon their election.

Service Transition

Upon the creation of the municipality, it is not unusual for the county to take the position it is no longer obliged to provide services (e.g., law enforcement services, fire protection services, etc.) within the geographical boundaries of the newly created municipality. Typically, this provision directs the county to continue to provide the same level of services it has historically provided within the geographical boundaries of the newly created municipality until such time as the governing body of the municipality, by resolution, notifies the county the county's services are no longer necessary.

Property Transition

It's fairly common for various local governments to hold fee title to various properties located within the boundaries of the proposed municipality. Examples of these properties include public rights-of-way, drainage easements, and the like owned by the county, drainage districts, and the like. Consideration should be given to the extent, if any, to which fee title to these properties should be transferred as a matter of law to the municipality. After all, the municipalities' authority to require franchise fees from utilities operating within their boundaries is tied directly to the municipalities' ownership of rights-of-way. On the other hand, one should bear in mind that maintenance responsibilities usually follow ownership. Therefore, one should carefully consider the timing and manner in which these properties are transferred to the municipalities.

Special Acts

It's fairly common for there to be special acts that apply in all or a part of the geographical area of the newly created municipality. For example, there may be a special act creating a fire district and its provisions may authorize the fire district to provide fire protection services in a portion of the newly created municipality. Typically, this provision will state the extent, if any, special acts will continue to be applicable within the boundaries of the newly created municipality.

Revenue Transition

Following its creation, the municipality will eventually become eligible to receive various state-shared and county-shared tax revenues; however, under general law, it will undoubtedly take some time for the municipality to become eligible to receive the revenues. For example, state law provides a municipality may not receive state-shared revenues from the Municipal Revenue Sharing Trust Fund for Municipalities unless a municipality conducts an annual audit of its finances. As an audit on the newly created municipality will not be conducted until after its 1st year of operation, the newly created municipality may be looking at several years before it is eligible to participate in the municipal revenue sharing program. Therefore, this provision typically provides that the newly created municipality will be eligible to receive all state-shared and county-shared revenues upon the effective date of the municipality's creation. This provision in turn insures the newly created municipality will have at least some revenues with which to operate during its 1st year of operation.

Effective Date

Typically, this section of the special act provides that the act, and hence the creation of the municipality, will take effect only upon an approval by a majority of the registered electors residing in the geographical boundaries of the proposed municipality. This provision should also affirmatively state the actual date the municipality is created (e.g., the date the voters approve the charter or the date the commission is sworn in, etc.). This provision also typically directs the county's Supervisor of Elections to hold the referendum, provides the time of the referendum, provides the question to be posed at the referendum, and provides how the costs of the referendum will be borne.

REVENUES

Once the municipality has been created, a number of revenue sources become available to the municipality to fund its operations. Everyone understands the ultimate source of municipal revenues is the public; however, municipal revenue sources can be placed in 3 broad categories: revenues derived under the municipality's authority, state-shared revenues, and county-shared revenues.

Municipal Revenues

The municipality may generate revenues under its own authority. These revenue sources include the following.

A municipality is authorized to levy property taxes of up to 10 mills on the value of real and personal property located within the municipality. The Florida Constitution intended this source to be a local government's primary source of taxation.

Sec. 166.231, Fla. Stat., authorizes a municipality to levy up to a 10% municipal utility tax (Public Service Tax) on the purchase of electricity, water service, and metered natural gas, liquefied petroleum gas either metered or bottled, manufactured gas either metered or bottled.

Sec. 202.19, Fla. Stat. also authorizes municipalities to levy a Local Communication Services Tax up to 5.12% on a broad range of statutorily determined communication services.

Municipalities are authorized to enter into franchise agreements, and thus receive franchise fees, from private electric, telephone, water, sewer, natural gas, and other utilities for the use of the municipality's rights-of-way and for the privilege of doing business within the municipality.

A significant percentage of a municipality's revenues are derived from charges for services (impact fees, user fees and special assessments) for such municipal services as water, wastewater, natural gas, mass transit, garbage collection, building inspections, infrastructure and the like. Municipalities are generally authorized to charge a reasonable fee to offset the costs of providing the services.

Ch. 205, Fla. Stat., authorizes municipalities to levy a Local Business Tax for the privilege of engaging in a business, profession or occupation within its boundaries. Revenues derived from the occupational license tax typically represent less than 1% of the municipality's total revenues.

Municipalities derive revenues from fines and penalties imposed for the violation of various municipal ordinances and statutes. In addition, municipalities derive revenues from the sale of contraband property seized by its law enforcement agencies. Revenues from fines and forfeitures typically represent approximately 1% of a municipality's total revenues.

Municipalities also derive a small portion of their total municipal revenues from interest and investment income derived from the investment of temporarily idle municipal funds.

The typical municipality will derive less than 1% of its annual revenues from private gifts and donations.

Revenues are also derived from such miscellaneous activities such as regulatory programs and rentals.

State-Shared Revenues

The state levies several taxes and shares the proceeds derived from the taxes with Florida's municipalities. The primary state-shared revenues come from the Municipal Revenue Sharing Trust Fund for Municipalities and the Local Government Half-Cent Sales Tax.

The Revenue Sharing Trust Fund for Municipalities consists primarily of 1.3409 percent of the state sales and use tax, and the 1¢ per gallon State tax on motor fuel. Proceeds from the Revenue Sharing Trust Fund for Municipalities are calculated annually and distributed monthly to eligible municipalities. Generally, proceeds from the Revenue Sharing Trust Fund for Municipalities are distributed to eligible municipalities under a formula that is based on three equal factors; the proportion of the population of a given municipality to a total population of all eligible municipalities, their proportion of sales tax collections and a factor measuring the relative revenue raising capacity of their property tax base. Additional factors have been added to the distribution that are too difficult to describe in this paper. In order to receive revenues from the Fund, a municipality must satisfy a variety of state created criteria. Chief among the criteria is that the municipality must have an annual audit conducted on its finances, it must derive the equivalent of 3 mills in ad valorem tax revenues (based on property taxable values in the year of incorporation) from the levy of ad valorem taxes, public service taxes, and/or local business taxes, and it must hire only state certified law enforcement officers or firefighters and pay them a minimum annual salary.

The Local Government Half-Cent Sales Tax is funded from approximately 8.814% of the state's 6% sales and use tax. The proceeds from the Fund are distributed among Florida's counties and municipalities on a weighted population basis, with municipalities receiving approximately one-third of the Fund's proceeds.

County Shared Revenues

State law authorizes counties to levy various taxes, a portion of the proceeds of which must be shared with municipalities located within the county. Relatively small county taxes that must be shared with municipalities include the county mobile home license tax, the county alcoholic beverage license tax, and the county occupational license tax. Chief among the county taxes that must be shared with the municipalities located within the county are the local option gas tax (1-6 cents), the local option gas tax or ELMs Nickel (1-5 cents) and the

One cent Local Government Discretionary Infrastructure Surtax.

Upon approval by the county's electors, Sec. 212.055(2), Fla. Stat., permits a county to levy a discretionary sales surtax of up to 1% to fund the construction, reconstruction, or improvement of public infrastructure facilities. Optionally, counties with a population of less than 75,000 may levy a surtax up to 1% by a majority vote of the governing board and the proceeds for any public purpose except payment of debt obligations. Proceeds derived from the county's local option sales tax must be shared with the county's municipalities in accordance with an interlocal agreement between the county and its municipalities or, in the absence of an agreement, in accordance with the population formula used to distribute the local government half-cent sales tax (see above).

Sec. 336.025, Fla. Stat., authorizes a county, by a majority vote of the governing board, to levy a local option gas tax of up to 6¢ upon every gallon of motor and diesel fuel sold in the county. In addition, Section 336.025, Fla. Stat., authorizes a county, by a majority plus one vote of the governing board, to levy a local option gas tax up to 5 cents upon every gallon of motor fuel sold in the county. Proceeds from both taxes are distributed between the county and the municipalities located in the county in accordance with an interlocal agreement, or in the absence of an interlocal agreement, on the basis of the county and municipalities' transportation expenditures, which are statutorily defined in paragraph (7) of the above referenced section, for the immediately preceding 5 fiscal years. A newly incorporated municipality is entitled to a distribution in the first full fiscal year following incorporation. Its distribution is either determined by the special act incorporating the municipality or based on the lane miles located within the municipality, which would be derived from the county's portion of the local option gas tax.

The Office of Economic and Demographic Research (Florida EDR), the Florida Department of Revenue (DOR), the county's property appraiser, and the county's tax collector are usually in a position to provide the residents of a community with sufficient information to assist the residents in estimating the amount of revenues that will be available to the newly created municipality upon incorporation; however, both the Florida EDR and the DOR are more likely to timely respond to requested information if the request for information is processed through the residents' state representative or senator.

CONCLUSION

Incorporation is not for everyone, nor will everyone support incorporation; however, incorporation is an excellent option for those residents in the community who want increased levels of service and are willing to pay for them.

revised 8/23/96
revised 3/5/97
revised 3/4/98
revised 7/27/00
revised 8/15/00
revised 8/23/05
revised 10/14/05

revised 9/23/13