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ATTORNEYS AT LAW

October 19, 2015

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Chief Lawrence Schmitt
Chairman, Board of Trustees
Jacksonville Police and Fire Pension Fund
1 West Adams Street
Jacksonville, FL 32202

Dear Chairman Schmitt:

This is in response to your request for a legal opinion in which you have asked us to clarify and dispel any lingering confusion concerning two issues:

1. Are there any limitations on the Board's authority to hire and compensate its own employees and other professionals, including its own legal counsel?
2. Is Board required by law to submit its budget to the City Council for approval; or alternatively, can the Jacksonville City Council disapprove the Fund's budget?

As explained in more detail below, Florida law gives the Board unfettered authority to hire counsel of its own choosing. Similarly, Florida law does not require the Board to submit its budget to Council for approval.

The Florida Legislature is the source of the Board's power to retain its own professional advisors, including legal counsel.

The Jacksonville Police and Fire Pension Fund is a local law defined benefit pension plan created in 1937 by Chapter 18615, Special Acts of Florida, and codified in sections 121.101 - 121.401 of the City Ordinance Code. Its purpose is to provide retirement, disability and death benefits to police officers and firefighters of the City of Jacksonville. The Fund is governed by Article X, § 14 of the Florida Constitution and Chapters 112, 175, and 185, Florida Statutes. See Jacksonville, Fla., Charter, Chapter 22.

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In 1986, the Florida Legislature substantially revised the provisions of Chapters 175 and 185, Florida Statutes, which are the general state laws governing municipal police and fire retirement plans. Among the provisions of that amendment, was the establishment of independent boards of trustees of the more than 300 municipal public safety retirement plans, including Jacksonville. The boards were designated as independent bodies politic, separate and apart from the sponsoring governments. See §§ 175.311 and 185.31. Each board of trustees became an independent legal entity possessing the power to bring and defend lawsuits of every kind, nature and description. Fla. Stat. § 185.05(4). The Charter of the City of Jacksonville, at section 22.04, describes the Jacksonville Police and Fire Pension Fund Board of Trustees' ("Board") as a body politic, enumerating its powers, including the power to sue and be sued, enter into contracts and construe all terms of the pension plan. Article 22 of the Jacksonville City Charter is the product of two special acts of the Florida Legislature specifically related to the Fund.¹

The Florida Legislature has specifically preempted the area of uniform municipal public safety retirement law in the creation of Chapters 175 and 185 of the Florida Statutes. In Section 175.021 (and in identical language in Section 185.01 for police officers) the Legislature declared:

Therefore, the Legislature declares that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of firefighters and intends, in implementing the provisions of s. 14, Art. X of the State Constitution as they relate to municipal and special district firefighters' pension trust fund systems and plans, that such retirement systems or plans be managed, administered, operated, and funded in such manner as to maximize the protection of the firefighters' pension trust funds. Pursuant to s. 18, Art. VII of the State Constitution, the Legislature hereby determines and declares that this act fulfills an important state interest.

The Legislature specifically provided further:

Minimum benefits and minimum standards for each plan may not be diminished by local charter, ordinance, or resolution or by special act of the Legislature and may not be reduced or offset by any other local, state, or federal law that includes firefighters in its operation, except as provided under s. 112.65.

¹ Ch. 90-442, § 2; Laws of Fla; Ch. 92-341, § 1, Laws of Fla.

Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature. *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); *see also Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So.3d 880 (2010). The Legislature effectively created a floor with Chapters 175 and 185, under which no local government can diminish benefits, nor alter the legislative scheme. Preemption, however, need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject. *Mulligan* at 1238.

Pursuant to Chapter 175 Florida Statutes (which addresses firefighter pensions) and Chapter 185, Florida Statutes (which addresses police officer pensions), the State of Florida rebates to municipalities and special fire control districts a portion of the tax levied on premiums for certain types of fire and casualty insurance. *See* § 175.101; § 185.08. The Jacksonville Police and Fire Pension Fund is a recipient of insurance premium tax revenue dollars, which amounts to approximately 10 million dollars per year. As a recipient of those funds, the Board is required to comply with the provisions of those chapters. *See* § 175.351 and § 185.35. Sections 175.071(7)(a) and 185.06(6)(a), Florida Statutes, both provide that in order to assist a board in meeting its fiduciary duties under each respective chapter, a board may

[E]mploy independent legal counsel at the pension fund’s expense... If the board chooses to use the municipality’s or special district’s legal counsel or actuary, or chooses to use any of the municipality’s other professional, technical, or other advisers, it must do so only under terms and conditions acceptable to the board.²

At the local level, Section 22.04(e) of the Jacksonville City Charter, grants the Jacksonville Police and Fire Pension Fund Board with the power to “Employ and fix the compensation of an administrator and any consultants, *attorneys*, actuaries, accountants, and other employees or contractors as the board may require.” (emphasis added). The State Legislature which drafted the special acts comprising Chapter 22 of the Charter clearly considered this provision’s potential conflict with the mission of Jacksonville’s Office of General Counsel,³ but resolved it with Section 22.11 of the Charter. The drafters clarified the power of

² The statute also speaks to hiring actuaries, professional and technical advisors as well.

³ The Jacksonville Charter states, “There is established an office of the City of Jacksonville to be known as the office of general counsel, which shall have the responsibility for furnishing legal services to the city and its independent agencies[.]” Jacksonville, Fla. Charter, § 7.01. Significantly, the Charter recognizes the supremacy of the Attorney General Opinions on state law. § 7.02. The provisions governing the Board *are* state laws. *See*,

the Board to appoint counsel of its choosing by articulating that, “All provisions of law in conflict with this article are repealed, except to the extent necessary to give effect to employee rights and benefits preserved as provided in this article.” As state premium tax revenues were instituted for the specific benefit of employees (See Sec. 175.021 and 185.01, Fla. Stat.), and the Board’s power derives from Chapters 175 and 185, it follows naturally that the Board is exercising employee rights by hiring outside counsel to advise it on its fiduciary duty of administering the Fund in a prudent manner.

The recent ordinance changes concerning the Board’s use of outside counsel can be found at Sec. 121.118 of the Jacksonville Ordinance Code. Those changes state that the City’s Office of General Counsel is the proper source for legal representation on routine matters (e.g., open records, public meetings, other ordinary legal issues and non-pension legal services) subject to the Charter and Ordinance Code. The ordinance changes distinguish legal matters not related to fiduciary duties with those falling within the range of trustee duties, requiring outside counsel. The ordinance is the product of an agreement between the Board and the City in an effort to diminish outside legal costs on matters not requiring expertise in local government pension law or fiduciary management. It is the precise reflection of the state statute quoted above in which a board of trustees may utilize the municipal attorney on “terms satisfactory to the board.”

This has been the standard since 1987 when General Counsel James L. Harrison opined, “Chapters 175 and 185, Florida Statutes, create relationships, which despite good intentions, place our attorneys in either a present or potential conflict of interest.” With that opinion, Mr. Harrison advised the Board that the Office of the General Counsel could not represent the Board any longer. Since that time, there have been no amendments to the statutes that would change that decision. In sum, Florida law allows for separate counsel as the Board deems necessary.

The Board is not required to submit its budget to the City Council for approval nor can the Jacksonville City Council disapprove the Fund’s budget.

Although there is no Florida case specifically dealing with this subject, the question has been addressed three times by the Florida Attorney General. While the official opinions of the Attorney General of the State of Florida are not legally binding upon the courts of this state, they

Chapters 90-442 and 92-341, Laws of Florida. As noted, the Attorney General has opined on the budget relating to the Fund on three separate occasions.

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are entitled to great weight in construing the law of Florida. *Beverly v. Div. of Beverage of Dep't of Bus. Regulation*, 282 So.2d 657, 660 (Fla. 1st DCA 1973).

In 1992, the Board asked the Attorney General,⁴ “Whether the Jacksonville Police and Fire Pension Board of Trustees is required to submit its budget to the Jacksonville City Council for approval?” Attorney General Butterworth explained that Chapter 90-442, Laws of Florida, was a special act of the legislature that established the Board as an independent agency under the City of Jacksonville charter. No provision of the special act or Chapters 175, 185, or 112, Florida Statutes, require the Board to submit its budget to the city for review. In the absence of any requirement that the Jacksonville Police and Fire Pension Board of Trustees submit its budget to the city for approval, and in light of the expressed independent nature of the board, the Attorney General opined, “it is my opinion that the board's budget is not required to be approved by the City of Jacksonville.”

In a second opinion,⁵ the Board asked the Attorney General “May the Board of Trustees of the Jacksonville Police and Fire Pension Fund delegate to the City of Jacksonville the authority to approve or disapprove the board's budget or delegate to the city the discretion to establish hiring policies for fiduciaries of the fund to a contract?” In sum the Attorney General responded that “while the Board of Trustees of the Jacksonville Police and Fire Pension Fund is authorized by Ch. 90-442, Laws of Florida, to delegate its powers to its agents or employees subject to the supervision and control of the board, it cannot vest the City of Jacksonville with the authority to approve or disapprove the board's budget or delegate the discretion to establish hiring policies for fiduciaries of the fund to the City of Jacksonville pursuant to a contract.”

Earlier this year, the Board asked the Attorney General to confirm its prior opinions, to which Attorney General Bondi responded that the above opinions are still relied upon by the Office of the Attorney General, and have been referenced in subsequent opinions. It is worth noting here that different Attorney Generals came to the same legal conclusion regarding this issue. The First District Court of Appeals found that significant in *Beverly*, a case that construed the Florida beverage licensing statute, stating,

⁴ Fla. Att'y Gen. Op. 92-35 (1992)

⁵ Fla. Att'y Gen. Op. 92-69 (1992)

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The fact that two different Attorney Generals have reached the same conclusion with respect to the exact issue now before us lends considerable persuasive influence to their opinions and weighs heavily in favor of our conclusion herein.

Beverly, 282 So.2d at 660.

Moreover, the Florida Legislature reaffirmed the independent nature of the Board and its finances with the recent passage of Senate Bill 172. The bill changes Chapters 175 and 185, to require boards of trustees of police and fire pension plans to *provide* an administrative expense budget to the plan sponsor; not to be *approved* by the plan sponsor. The bill also adopted the model that Board budgets are solely in the hands of the boards of trustees, and the only requirement is to submit administrative budgets to the plan sponsor for review.⁶

Significantly, the Legislature had the opportunity to place tighter restrictions on police and fire pension boards with House Bill 1279. Rep. Janet Adkins introduced HB 1279 in the 2015 legislative session, with the intent of curbing the power of the Jacksonville Police and Fire Pension Fund Board of Trustees, but failed. It is axiomatic under Florida law that a statute not enacted as required by the constitution is without effect. *See State ex rel. Spitzer v. Mayo*, 176 So. 434 (1937). The failed bill specified that each board would be required to draft an administrative expense budget, which would not be “effective until the budget or any budget amendment is approved by a majority vote of the plan sponsor.” H.B. 1279, 1.228 (2015)⁷. The Adkins bill died on second reading in favor of Senate Bill 172, which was clear and unambiguous in allowing Florida police and fire pension boards the ability to regulate their own budgets and maintain independence from the plan sponsors. Florida courts have long accepted the premise that the Florida Legislature does not intend to enact useless provisions. *State v. Goode*, 830 So.2d 817 (Fla. 2002). Again, the Florida Legislature has pre-empted this subject to itself as part of the uniform system of retirement administration provided for in Section 175.021 and 185.01, Florida Statutes.

⁶ This legislation was created in contemplation of application to the City of Jacksonville, yet did not change the standard by which pension boards operate.

⁷ Found at:

http://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=_h1279_.docx&DocumentType=Bill&BillNumber=1279&Session=2015

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I trust this will clarify any question you or your fellow trustees may have.

Sincerely,

ROBERT D. KLAUSNER

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