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**MEMORANDUM**

**TO:** The Honorable Finance Committee Members  
Honorable Council Member Richard Clark, Chair  
Honorable Council Member Matt Schellenberg, Vice Chair  
Honorable Council Member Lori Boyer  
Honorable Council Member Reginald Brown  
Honorable Council Member Doyle Carter  
Honorable Council Member John Crescimbeni  
Honorable Council Member Kimberly Daniels  
Honorable Council Member Bill Gulliford  
Honorable Council Member Ray Holt

**CC:** Kirk Sherman, Council Auditor  
Ronnie Belton, Director of Finance  
Jason Gabriel, General Counsel  
Margaret M. Sidman, Deputy Legislative Affairs and Managing Deputy  
Stephen M. Durden, Assistant General Counsel

**FROM:** Lawsikia J. Hodges, Assistant General Counsel 

**RE:** Jacksonville Police and Fire Pension Fund – Budget Authority regarding Administrative Expenses

**DATE:** August 28, 2014

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**I. Questions Asked.**

A. May the Jacksonville Police and Fire Pension Fund, an independent agency of the consolidated City of Jacksonville (the "PFPF"), exceed the appropriated amount for administrative expenses in the PFPF's annual budget approved by City Council without obtaining further City Council approval?

B. May City Council reduce the PFPF's appropriation request for administrative expenses if determined to be unreasonable by City Council?

PFPF Budget Authority Regarding Administrative Expenses  
August 28, 2014

C. If the PFPF may not exceed the appropriated amount for administrative expenses in PFPF's annual budget approved by City Council without obtaining further City Council approval, what penalties, consequences or illegalities result from the PFPF doing so, and specifically, who would be held accountable?

D. If the PFPF may exceed the appropriated amount for administrative expenses in PFPF's annual budget approved by City Council without obtaining further City Council approval, what ordinance, statute or other provision grants the PFPF the authority to do so?

**II. Short Answers.**

A. No. The PFPF may not exceed the appropriated amount for administrative expenses in the PFPF's annual budget as approved by the City Council. The City Council as the legislative body of the consolidated government of the City of Jacksonville is the sole governing body vested with the power to make appropriations. Therefore, like other independent agencies under the City Charter, if during a fiscal year the PFPF determines that the amounts appropriated for administrative expenses in its annual budget are insufficient for the remainder of the fiscal year, the PFPF must request and obtain an additional appropriation from City Council prior to making any expenditure in excess of appropriated City funds.

B. Yes. As previously stated in the General Counsel Opinion dated August 2, 2012 attached hereto, the City Council may reduce the PFPF's appropriation request for administrative expenses so long as the reduced amount is reasonable as determined by the City Council in reliance in part on the PFPF's recommendation as the managing authority of the pension fund; however, City Council must have a reasonable and rational basis for making such determination.

C. If a PFPF officer or employee exceeds the appropriated amount for administrative expenses in the PFPF's annual budget approved by City Council, he/she may be subject to the following claims: (i) breach of fiduciary duty, (ii) personal liability for the amount of the unauthorized expense under Section 106.334, Ordinance Code, and (iii) criminal charges for a Class D misdemeanor offense under Section 106.336, Ordinance Code.

D. For the reasons stated above and below in Short Answer "A" and Discussion "A", the PFPF may not exceed the appropriated amount for administrative expenses contained in the PFPF's annual budget approved by City Council; the PFPF has no authority under law to usurp the City Council's appropriation power under the City Charter and expend City funds absent a lawful appropriation by City Council. <sup>1</sup>

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<sup>1</sup> The City's special counsel on pension matters agrees with the conclusions reached in this memorandum.

**III. Discussion.**

A. The power to appropriate is generally entrusted to the council or legislative body of a municipality. *See* 64A C.J.S. Municipal Corporations § 2100. Under Section 5.07 of the City Charter, City Council, as the legislative body of the consolidated government, is expressly vested with the power to appropriate City funds:

*The council shall review the budgets and appropriate money to the consolidated government and any independent agencies which request appropriations from the consolidated government and shall also levy taxes as required to meet the budgets approved by it.*

Further, Sections 14.01 (Proposed budgets of independent agencies) and 14.02 (Adoption of budgets) of the City Charter, respectively, provide as follows with respect to the budgets of independent agencies existing under the City Charter:

*Each independent agency entitled to receive appropriations from the council shall also prepare and submit a proposed budget for its operations for its fiscal year to the council.*

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*After the conclusion of the public hearings, the council shall adopt and approve the budgets submitted to it, with such changes as the council may deem appropriate, subject to the following: The proposed consolidated government budget may be altered by the council on a line-by-line basis or on a total basis, as the council may elect. The council may increase or decrease the appropriation requested by any independent agency on a line-by-line basis or on a total basis.*

The 1937 Pension Fund also expressly grants authority to the City Council to appropriate funds for the administrative costs of the PFPF. *See* General Counsel Opinion 69-324. Thus, based on the foregoing, the City Charter is clear on two points pertinent to this discussion: 1) the City Council, as the legislative body, is the sole governing body vested with the power to appropriate funds to the consolidated government; and 2) the City Council is empowered to increase or decrease an appropriation request of an independent agency. The PFPF is an independent

PFPF Budget Authority Regarding Administrative Expenses  
August 28, 2014

agency under the City Charter<sup>2</sup>; therefore, the PFPF would be subject to the provisions of Sections 14.01 and 14.02 referenced above.

Florida statutes and common law support the proposition that only the legislative body can appropriate public funds. *See State v. Green*, 116 So. 66 (Fla. 1928) (stating the “power to appropriate state funds for a lawful state purpose is legislative, and may be exercised only through a duly enacted statute”). Section 166.241(3), Florida Statutes, makes it unlawful for any officer of a municipal government to draw money from the treasury except in pursuance of an appropriation made by law. Similarly, Section 106.331, Ordinance Code, makes it unlawful to expend funds that have not been lawfully appropriated by the City Council. In *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991), the Florida Supreme Court stated as follows in regards to the appropriation powers of the legislative body:

Based on all these constitutional provisions, this Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes. *State ex rel. Davis v. Green*, 95 Fla. 117, 127, 116 So. 66, 69 (1928). As we stated in *State ex rel. Kurz v. Lee*:

The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts. *Such a provision secures to the Legislative (except where the Constitution controls to the contrary) the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.*

121 Fla. 360, 384, 163 So. 859, 868 (1935) (emphasis added). Furthermore, the power to *reduce* appropriations, like any other lawmaking, is a legislative function. *See Florida House of*

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<sup>2</sup> Section 22.01 of the City Charter establishes the PFPF as a body politic and corporate. Section 22.11, City Charter, also provides that the PFPF “shall continue as an independent agency under the Charter of the City of Jacksonville.”

PFPF Budget Authority Regarding Administrative Expenses  
August 28, 2014

*Representatives v. Martinez*, 555 So.2d 839, 845 (Fla.1990).

*Id.* at 265.

General Counsel Opinion 69-324 with respect to the PFPF's ability to incur obligations in excess of appropriations made by the City Council stated:

It may be observed that, while trustees certify to the Council the reasonable sums necessary to administer the pension funds, and the Council is required to appropriate such reasonable sums, the trustees are then limited to the actual appropriations made for this purpose in incurring administrative expenses on behalf of the pension fund. *As is the case with other appropriations of City funds, the trustees of the pension funds would be exposed to personal liability for obligations incurred on behalf of the pension funds in excess of appropriations made by the Council.*

Based on the express provisions of the City Charter, Florida law regarding the appropriation powers of the legislative body, and General Counsel Opinion 69-324, the PFPF would not have any authority to exceed the amount appropriated for administrative expenses in the PFPF's annual budget approved by City Council without requesting and obtaining an additional appropriation from City Council for administrative purposes.

B. As noted above and unless otherwise provided, Sections 14.01 and 14.02 are applicable to independent agencies under the City Charter. Section 14.02 expressly grants the City Council the authority to increase or decrease the appropriation request of an independent agency. Also, as previously stated in the General Counsel Opinion dated August 2, 2012 attached hereto, the City Council may reduce the PFPF's appropriation request for administrative expenses so long as the reduced amount is reasonable as determined by the City Council in reliance in part on PFPF's recommendation as the managing authority of the pension fund. However, as stated in the General Counsel Opinion 69-324 regarding the City Council's legal duty to provide for the administrative costs of the pension fund:

... pension fund laws clearly require the cost of administering the pension fund to be borne by the City. The trustees have the authority and the responsibility to determine and certify to the Council, as a part of the administration presentation of its annual budget, the reasonable cost of administering the pension funds. The Council has the duty to provide the funds so certified from general revenues of the City. The obligation of the Council is to provide appropriations to the pension funds for administration which are in addition to the contribution of the employees and the matching contributions of the City.

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PFPF Budget Authority Regarding Administrative Expenses  
August 28, 2014

It may be observed that, while trustees certify to the Council the *reasonable sums necessary to administer the pension funds, and the Council is required to appropriate such reasonable sums*, the trustees are then limited to the actual appropriations made for this purpose in incurring administrative expenses on behalf of the pension fund.

The City Council's obligations above are also codified in Section 121.113 of the Ordinance Code. Based on the forgoing, if the Council determined the administrative costs as proposed by the trustees of the PFPF to be unreasonable, such determination by the City Council must have a rational basis. Because the PFPF is entrusted with the sole and exclusive duty of managing the PFPF in a reasonable manner, the PFPF must also be given deference to an extent in determining the reasonable sums necessary to administer the PFPF.

C. If a PFPF officer or employee exceeds the appropriated amount for administrative expenses in the PFPF's annual budget approved by City Council, several potential claims may be brought by the City against such officer or employee. Under Section 22.06 of the City Charter, the fiduciaries of the PFPF include the plan administrator, any officer, trustee, custodian, and counsel, accountant and actuary of the retirement system or plan who is employed on a full-time basis. Depending on the facts of each case, a claim for breach of fiduciary<sup>3</sup> duty may exist.<sup>4</sup>

Additionally, certain Ordinance Code provisions make it unlawful to exceed appropriations by the City Council. Section 106.331 expressly provides as follows:

No officer or employee of the city or of any independent agency receiving appropriations from the Council shall, on behalf of the city or independent agency, have any authority to expend or authorize the expenditure of any money, incur or authorize the incurring of any liability or enter into or authorize the making of any contract which by its terms involves the expenditure of money:

- (a) For any purpose for which no appropriation has been made by the Council.

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<sup>3</sup> A breach of fiduciary claim elements are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach." *Minotty v. Baudo*, 42 So.3d 824, 835-36 (Fla. 4th DCA 2010) (citing *Gracey v. Eaker*, 837 So.2d 348, 353 (Fla.2002)). A breach of a fiduciary duty is an intentional tort. *La Costa Beach Club Resort Condo. Ass'n, Inc. v. Carioti*, 37 So.3d 303, 308 (Fla. 4th DCA 2010).

<sup>4</sup> Note that Section 22.05 of the City Charter shields the board members from liability from acts or omissions in their capacity as board members and provides that board members shall be fully protected when relying upon the advice of any attorney, accountant or actuary employed by the board.

PFPF Budget Authority Regarding Administrative Expenses  
August 28, 2014

- (b) In excess of the amount appropriated for each department within each subfund by the Council for the purpose for which the money was or is to be expended, liability incurred or contract made and remaining at the time unencumbered, unexpended and unimpounded.
- (c) Contrary to the terms and purpose of the appropriation from which the money was or is to be expended, liability satisfied or contract paid.
- (d) When, at the time such expenditure, liability or contract is authorized, there are no funds in the City Treasury or independent agency treasury that are available to discharge or pay the same, even if there is an appropriation which authorizes the expenditure, liability or contract.

Likewise, Section 106.334 also provides as follows:

Any person who expends or authorizes the expenditures of any money, or who transfers or authorizes the transfer of any funds or expense credits or who purports to incur or authorize the incurring of any liability or enters into or authorizes the making of any contract which by its terms involves the expenditure of any money *on behalf of the city or independent agency* in any case in an amount in excess of the amount appropriated for such purpose and remaining at the time unencumbered, unexpended and unimpounded or in any amount contrary to the purpose for which such funds or expense credits were appropriated *shall be personally liable for such excess or such amount:*

- (a) To the holder of the indebtedness.
- (b) To the city or independent agency:
  - (1) To the extent the city or independent agency has paid or is required by law or court order to pay such indebtedness; or

**PFPF Budget Authority Regarding Administrative Expenses**  
**August 28, 2014**

- (2) For that amount of the funds or expense credits transferred or expended contrary to the purpose for which such funds or expense credits were appropriated which cannot be otherwise recovered by the city or independent agency.

These ordinances are consistent with Florida common law, which permits private lawsuits based on unlawful expenditure of public monies. *See Lainhart v. Catts*, 75 So. 47 (Fla. 1971) ; *State v. Lee*, 163 So. 859 (Fla. 1935); *Op. Att'y Gen. Fla.* 78-160 (1978); *See* Section 166.241(3), Florida Statutes and Section 106.336, Ordinance Code. Whether the City would prevail in any such potential claim against an officer or employee of the PFPF would of course depend on the facts and circumstances of each individual case.

**D.** See Short Answer "D" above.

**IV. Conclusion.**

I trust that this opinion provides the guidance you seek. I am available to discuss this with you at your convenience.



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August 9, 2012

Opinion to the Honorable John Crescimbeni,  
At Large Council District 2  
Jacksonville City Council,  
Suite 425, 117 W. Duval Street  
Jacksonville, FL 32202

Re: Legal Opinion, Police and Fire Pension Fund

Dear Chairman Crescimbeni,

You have asked the following legal question:

**Question Presented:**

May the City Council reduce the amount of administrative expenses being presented to the City Council for approval in the Police and Fire Pension Fund if the council determines that they are not reasonable?

**Answer:**

The City Council may approve a budget for the Police and Fire Pension Fund (the Fund) that contains within it a reduced amount for administrative expenses, so long as the reduced amount is reasonable as determined by the Council. Nothing in the applicable laws removes the power of the City Council to ultimately exercise its reasonable discretion in appropriating the ad valorem tax revenue and other revenues.

I trust that this opinion provides the guidance you seek. Of course, should you have any questions, please do not hesitate to call me.

Very truly yours,

Cindy A. Laquidara

August 9, 2012

Page 2

C: S. Rohan, Senior Deputy General Counsel  
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Legal opinion file

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