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*BOARD CERTIFIED CITY, COUNTY
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June 1, 2016

Via Electronic Correspondence and U.S. Mail

The Honorable Pam Bondi
Attorney General
State of Florida
Department of Legal Affairs
The Capitol PL-01
Tallahassee, FL 32399-1050

Re: Legal Opinion regarding the Consolidated City of Jacksonville Government's General Counsel serving as the Chief Legal Officer for the City of Jacksonville Police and Fire Pension Fund Board of Trustees

Dear Madam Attorney General:

On Friday, May 20, 2016, the Jacksonville Police and Fire Pension Fund Board of Trustees ("JPFPF Board") voted to request guidance from you with respect to what authority the General Counsel for the Consolidated City of Jacksonville has, pursuant to the Consolidated City's Charter, to issue legal opinions that are binding as to the JPFPF Board. The JPFPF Board's request comes as a result of a binding legal opinion issued by me on April 20, 2016, concerning the JPFPF Board's lack of authority to set up an unlawful "senior staff voluntary retirement plan" ("SSVRP") for a few select participants without City Council approval. The legal opinion, cited as General Counsel Legal Opinion No. 16-01, is attached here for your review.

Any inquiries related to it are matters of local government more appropriately left to the Consolidated Government and its chief legal officer to resolve. However, in the event that your office chooses to opine on this matter, because the significance of any determination is of paramount importance to the City, I write to provide the Consolidated Government's official position on the matter.

The legal analysis below sets forth the applicable provisions of our Consolidated Government's Charter (read in concert with applicable State law), and sets forth one of the fundamental underpinnings of our Consolidated City of Jacksonville governmental structure – centralized legal services.

In particular, with respect to legal services, a sublime philosophy completely unique to Jacksonville by design, places a “chief legal officer” at the very center of the Consolidated Government who is the ultimate legal authority responsible for providing consistent, comprehensive and unitary legal advice to Jacksonville's vast government.

I. INTRODUCTION

As noted above, Section 7.02 of the Jacksonville City Charter declares that the General Counsel shall be the chief legal officer for the City and its independent agencies (including the JPPPF Board) (“Consolidated Government”).¹ It states further:

Any legal opinion rendered by the general counsel shall constitute the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and shall be considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of solely state law.

As evidenced in Section 7.02, the legislatively-approved and voter-upheld City Charter expressly confers on the General Counsel the authority to issue binding legal opinions on the entire government; an authority used to resolve intragovernmental conflict. These opinions serve to educate the various departments and agencies of the government as to the extent of their own powers and protect the government from itself and from those who would usurp its powers or use them for selfish advantage.² As former General Counsel Fred Franklin stated in 1997, in General Counsel Legal Opinion No. 97-1, “[t]he authority of the General Counsel to make binding legal decisions is the mortar that holds the structure of our consolidated government firm.”

The JPPPF Board, expressly established as an independent agency of the City of Jacksonville pursuant to Section 18.07, Charter, has the ability to employ attorneys “as the board may require.”³ Such authority, however, is subject to the requirement that the agencies engage outside counsel only after the General Counsel certifies compliance with the Charter and makes a written finding of necessity.⁴

¹ Section 18.07(d) of the Charter designates the independent agencies of the City of Jacksonville.

² See *Richard Martin, A Quiet Revolution; The Consolidation of Jacksonville-Duval County and the Dynamics of Urban Political Reform* (4th ed. 2008).

³ See City Charter, Article 22, Section 22.04; see also §§175.071(7)(a) and 185.06(6)(a), Fla. Stat.

⁴ See City Charter, Article 7, Section 7.01

II. EXECUTIVE SUMMARY

In sum, Article 7 of the Charter dictates that the General Counsel serve as the chief legal officer for the Consolidated Government, responsible for providing comprehensive legal counsel to all of the government and issuing binding legal opinions to resolve intragovernmental conflict. Neither Article 22 of the Charter, Florida Statutes Chapters 175 and 185, nor the Florida Rules of Professional Conduct, eliminates or modifies this Article 7 requirement.

The Rules of Professional Conduct do not prevent the General Counsel from providing concurrent representation to the City and the JPFPP Board, regardless of whether the General Counsel takes or has taken positions adverse to the JPFPP Board on behalf of other entities of the Consolidated Government. Likewise, the General Counsel is not disqualified based on a conflict of interest from representing the City in a lawsuit against the JPFPP Board when such conflict was self-created by the JPFPP Board.

This memorandum discusses perennial questions regarding the General Counsel's representation of the various boards, agencies, and officials. As demonstrated below, the answer to all of these questions lies in the Charter and the power of the Legislature to regulate the attorney-client relationship of the City and the independent agencies.

III. DISCUSSION

A. **The General Counsel is the Chief Legal Officer for the JPFPP Board with: 1) Authority to Issue Legal Opinions Binding upon the JPFPP Board; and 2) Responsibility for Certifying the Need for the Hiring of Outside Counsel for the JPFPP Board.**

The history of the Charter language setting forth the role of General Counsel demonstrates such role's importance. Consolidated Government's original Charter, Chapter 67-1320, Laws of Florida, contained Section 7.306, creating a legal division of central services run by a city attorney. The office had the "general responsibility for furnishing legal services to the consolidated government and to independent agencies, *except where the council may otherwise direct.*" *Id.* (emphasis added). Additionally, the original Charter granted the Council power to "vary, alter or abolish any provision in this article 7" including the provisions related to legal services. The Council, under the original Charter, could have abolished the legal division of central services. Additionally, the Council could have amended the Charter to prohibit the General Counsel from representing independent agencies.

With Chapter 85-435, Laws of Florida, the Legislature modified the powers, responsibilities, and duties of the General Counsel, the City Council and each officer and agency of the City, declaring that the General Counsel be the chief legal officer for the independent agencies, making such declaration without the proviso that the Council could "otherwise direct." Chapter 85-435 also granted the General

Counsel the power to issue binding legal opinions, a power consistent with and supportive of the duty to represent the Consolidated Government.

Chapter 85-435 amended Section 3.01 of the Charter in a manner that prohibited the Council from amending the Charter as it relates to the General Counsel (unless the electors approved such amendment by referendum). This amendment of Section 3.01 forever changed the relationship between the General Counsel and the City Council and placed within the hands of the voters (or the Legislature) the power to amend any part of Article 7. With this amendment, the Council may not amend the powers, duties, or responsibilities of the General Counsel; the Council may not modify the relationship between the General Counsel and the independent agencies; and the Council may not modify the binding legal authority of the General Counsel. In sum, this Law of Florida confirmed the importance and significance of the General Counsel to the Consolidated Government by conclusively and unequivocally designating the General Counsel as the chief legal officer for the Consolidated Government, including the JPPF Board.⁵

Last year, the electors of the City strengthened the principle that the responsibility to provide legal services to the independent agencies belongs to the General Counsel. The electors did so by adding a new paragraph to Section 7.01,⁶ which states, in pertinent part: “The General Counsel may authorize the independent agencies to engage outside counsel upon certification by the General Counsel of compliance [1] with the Charter and [2] with the agency’s authority, and [3] a finding of necessity by the General Counsel.”

The General Counsel’s binding legal authority and responsibility of overseeing the hiring of any outside counsel for an independent agency are two sides of one coin. As the chief legal officer of the Consolidated Government, the General Counsel takes a unitary position on any legal issue and takes the same legal position for each officer, agency, and employee of the Consolidated Government.⁷ The General Counsel cannot give differing legal opinions on a legal issue depending upon which officer, agency, or employee asks the question. Just as the General Counsel may not take inconsistent positions, once the General Counsel has issued an opinion, the binding nature of that opinion prohibits any agency, officer, or employee from engaging counsel to take an inconsistent position. Using the language of the Charter, no officer, agency, or employee can demonstrate the “need” to hire outside counsel if the

⁵ Chapter 85-435, is now codified, in part, in Section 7.01 and 7.02, City Charter.

⁶ See Ordinance 2014-723-E, where Council authorized a referendum to be held on the May 19, 2015 ballot where voters of Duval County approved, by a 70.64% majority, several amendments to the City’s Charter modifying the General Counsel provisions of the Charter and, which among other things, expressly upheld the long-held requirement that the General Counsel is the ultimate resolving authority and chief legal officer for all local legal affairs concerning not just the City, but all of its independent agencies, including the PFPF Board.

⁷ General Counsel Opinion 97-2

purpose of that outside counsel is to take a legal position inconsistent with the General Counsel's binding legal opinion.⁸

1. Charter Sections 22.04 and 7.02 are to be read in harmony to allow the JPFPPF Board to employ outside counsel when the General Counsel has certified the need for such counsel.

Section 22.04(e), Charter, empowers the JPFPPF Board to “[e]mploy 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.) This provision, however, does not take precedence over, or conflict with, Section 7.02, Charter. A review of Sections 7.01 and 7.02, demonstrates how Section 22.04(e) works *in conjunction with*, rather than *in conflict with*, Article 7.⁹

First, Section 22.04(e), Charter, providing the JPFPPF Board with the power to employ attorneys “as the board may require,” does not in any way conflict with the status of the General Counsel as the chief legal officer for the JPFPPF Board. Second, given that Section 7.02 dictates that the General Counsel serve as the JPFPPF Board's chief legal counsel, the Board could not possibly demonstrate that it “requires” a chief legal counsel. The JPFPPF Board may, and quite likely will, however, require outside counsel to assist with specialized areas of law or to handle special transactions or litigation.

Sections 22.04(e) and 7.01, work in conjunction with each other with regard to the need of the JPFPPF Board to hire outside counsel for specialized areas of law or for special transactions or litigation. Under Section 22.04(e), the JPFPPF Board may hire an attorney as it “may require,” and, pursuant to Section 7.01, the General Counsel has the power and duty to certify in writing that the JPFPPF Board indeed has the “necessity” to engage outside counsel. Section 7.01 states, in pertinent part: “The General Counsel may authorize the independent agencies to engage outside counsel upon certification by the General Counsel of compliance [1] with the Charter and [2] with the agency’s authority, and [3] a finding of necessity by the General Counsel.”

Section 22.04(e) does not eliminate the General Counsel’s oversight of engaging outside counsel. Instead, Section 22.04(e) authorizes the JPFPPF Board to hire counsel, and it mandates that the JPFPPF

⁸ General Counsel Opinion 97-1, sets forth that “[N]o Charter authorization exists that would allow the Mayor to obtain independent legal counsel to challenge the General Counsel’s determination.”

⁹ A principle rule of statutory construction requires a court to avoid finding a conflict between two statutory provisions. “The rule of construction . . . is that if courts can, by any fair, strict, or liberal construction, find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is their duty to do so.” *Curry v. Lehman*, 55 Fla. 847, 855, 47 So. 18, 21 (1908). *Accord, Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 19 (Fla. 2004) (citation omitted) (internal quotation omitted) (“A law should be construed together with any other law relating to the same purpose such that they are in harmony. Courts should avoid a construction which places in conflict statutes which cover the same general field. The law favors a rational, sensible construction.”).

Board show that it “requires” counsel before hiring counsel. Because the General Counsel has the power and duty to provide legal representation to the JPPPF Board and because the General Counsel may hire such assistant counsels as he or she deems necessary, the JPPPF Board will “require” an attorney only where the General Counsel has been unable to provide its required legal services and has, therefore, certified the need for outside counsel.¹⁰

Even if a conflict between Sections 7.01 and 22.04, Charter, existed, a principle of statutory construction is that if an irreconcilable conflict exists between two provisions of equal weight, e.g., two provisions of the same Charter, the more recent prevails. The recent amendment to Article 7 underscoring the significance and importance of the General Counsel within the framework of the Consolidated Government, including the General Counsel’s oversight of engaging outside counsel by independent agencies, would mandate that Section 7.01 prevail over Section 22.04. However, no such conflict exists and the two provisions complement one another.

2. The Charter and Florida Statutes, Chapters 175 and 185, are to be read in harmony to require that the JPPPF Board choose as its legal counsel the “municipality’s legal counsel,” i.e., the General Counsel.

In its request for a legal opinion from the Attorney General, the JPPPF Board has argued that it does not have to comply with the Charter, because Chapters 175 and 185, Florida Statutes, supersede the Charter with provisions that state that boards regulated by those chapters may employ “independent legal counsel.”¹¹ This argument fails for a variety of reasons.

First, this grant of authority is not inconsistent with the provisions of the Charter requiring the General Counsel to be the chief legal counsel for the Consolidated Government. Pursuant to Sections 175.071(7) and 185.06(6), the JPPPF Board may choose the “municipality’s ... legal counsel” as its “independent legal counsel.” The Charter, however, makes that choice for the JPPPF Board. As a result, these provisions do not conflict. A conflict could exist between the Charter and Sections 175.071(7) and 185.06(6) if, for example, the state statutes mandated that the JPPPF Board choose counsel other than the “municipality’s legal counsel.”

A principle of statutory construction concludes that Chapters 175 and 185 do not preempt Article 7 of the legislatively-approved Charter. As a general rule, special law, in particular a charter provision, preempts general law.¹² Additionally, a more specific statute acts as an exception to a more general

¹⁰ As is the case with outside counsel requests by any of the various agencies and officers of the Consolidated Government, the General Counsel must work with the agency to determine need.

¹¹ §§ 175.071(7)(a) and 185.06(6)(a), Fla. Stat.

¹² “[I]f a special or local law and a later general law relating to the powers of a municipality are merely inconsistent in their respective provisions or some of them, and the general law does not in some suitable terms repeal or supersede the local law, the latter will prevail within its proper sphere of operation, unless an intent to repeal or supersede the whole or the part of the

statute.¹³ With regard to the hiring of counsel, Chapters 175 and 185 are general as to all police and fire pension funds. The Charter is specific as to the ability to hire counsel for the JPFPPF Board. Put another way, the Charter creates the JPFPPF Board as an exception to the Chapters 175 and 185 general rule regarding counsel. Courts will attempt to maintain meaning as to each section if possible. In this case, construing the Charter to be an exception to the general rule of Chapters 175 and 185 affords each provision to have meaning.¹⁴

In addition, a conclusion that Chapters 175 and 185 prevail over the Charter would make the adoption of Article 22 a pointless act of the Legislature, and the courts will not assume the Legislature adopted a pointless law.¹⁵ Article 22 and the Florida Statutes each contain counsel provisions. If the provisions are identical in meaning, then it was pointless to put it in Article 22. If the provisions are different (and they do have different terms) and the Florida Statutes *prevail*, then, again, putting a counsel provision in Article 22 is particularly pointless.

Moreover, if the Legislature wanted the JPFPPF Board to be burdened by only certain parts of the Charter as the Charter relates to the independent agencies, the Legislature would not likely have declared the JPFPPF Board an independent agency. Chapter 90-442, which created Article 22, amended Section 18.07, Charter, declaring the JPFPPF Board to be an independent agency, and Section 3 of Chapter 90-442 repeated that declaration. Later, the Legislature placed Section 3 into Article 22 as Section 22.11. Each of these declarations that the JPFPPF Board was in-fact an independent agency would be pointless if Chapters 175 and 185 are read to eviscerate the requirements the Charter imposes on independent agencies.

B. An unlawful conflict of interest does not exist preventing the General Counsel from providing concurrent representation to the City and the JPFPPF Board. Likewise, the General Counsel is not disqualified based on a conflict of interest from representing the City in a lawsuit against the JPFPPF Board when such conflict is self-created by the JPFPPF Board.

special or local law otherwise clearly appears from the provisions of the general law.” *Bryan v. City of Miami*, 139 Fla. 650, 655, 190 So. 772, 774 (1939).

¹³ “[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.” *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994).” *Heron at Destin W. Beach & Bay Resort Condo. Ass’n, Inc. v. Osprey at Destin W. Beach*, 94 So. 3d 623, 631 (Fla. 1st DCA 2012).

¹⁴ Construing the general Chapters 175 and 185 counsel provisions to prevail over the specific Jacksonville-oriented Charter provisions creates another possible conflict. Those Chapters do not define the meaning of “independent legal counsel”. Defining that phrase in a manner other than in accordance with the Charter, destroys a fundamental principle of the Charter; that each and every agency and officer of the City have the same unifying chief legal counsel.

¹⁵ “We must assume that the legislature did not enact a pointless provision.” *Hillsborough Cty. v. Florida Rest. Ass’n, Inc.*, 603 So. 2d 587, 590 (Fla. 2d DCA 1992).

The previously pending litigation between the City (represented by the Office of General Counsel) and the JPFPPF Board (represented by outside counsel) regarding the SSVRP did not modify or limit the Charter requirement that the General Counsel be the chief legal officer for the Consolidated Government for the City as to the litigation and the JPFPPF Board as to matters unrelated to that litigation. Since the General Counsel serves as the chief legal officer for the Consolidated Government, he or she is not subject to disqualification in the lawsuit regarding the SSVRP where the foundational purpose of the lawsuit is to require the JPFPPF Board to comply with the mandatory requirements of the Charter.

1. The question of whether a conflict of interest exists preventing the City from representing the JPFPPF Board and other entities of the Consolidated Government (when the General Counsel has taken positions adverse to the Board on behalf of the other entities), is beyond the scope of the Rules of Professional Conduct. The only authority on whether a conflict of interest exists is the legislatively-approved charter, which not only condones such concurrent representation, but mandates it.

An argument may be attempted that the Florida Rules of Professional Conduct prohibit the General Counsel's representation of the JPFPPF Board when the General Counsel is taking or has taken positions that are in conflict with the positions of the JPFPPF Board, on behalf of other entities of the Consolidated Government. This argument fails.

The Rules of Professional Conduct do not address whether a conflict exists preventing the City from representing the JPFPPF Board and other entities of the Consolidated Government, as such issue is beyond the scope of the Rules of Professional Conduct. The Comment to Rule 4-1.11, Rules of Professional Conduct (Special Conflicts of Interest for Former and Current Government Officers and Employees), states, in part, that: "The question of whether 2 government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules."¹⁶

The Comment to Rule 4-1.7 (Conflict of Interest) notes the difference in representation in the government context as opposed to the private context, stating that "[G]overnment lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation."

Further guidance on this issue is found in Rule 4-1.13, which addresses a lawyer's duty when the organization is the client. Rule 4-1.13 states that a lawyer for an organization who knows that an officer, employee, or other person associated with the organization intends to act or refuses to act in matter

¹⁶ While the example given in connection with this comment is when a lawyer employed by the city then becomes employed by a federal agency, this same comment would logically apply to a potential conflict between independent governmental agencies within a consolidated government.

related to the organization that is a violation of a legal obligation to the organization or a violation of law that may be imputed to the organization and may result in substantial injury to the organization, shall proceed in the best interest of the organization. The Rule goes on to give suggestions of measures the lawyer may take to address the situation.

While the Rule gives suggestions as to how the matter could be addressed, the Charter mandates how the matter is to be addressed. The Charter has appointed the General Counsel as the chief legal officer for the Consolidated Government, and has given the General Counsel the ability to resolve any intragovernmental conflict by issuing a binding legal opinion that provides consistent, comprehensive and unitary legal advice to Jacksonville's vast web of City departments and independent agencies. The Comment to Rule 4-1.13 highlights what a challenging task this can sometimes be.

In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. Although in some circumstances the client may be a specific agency, it may also be a branch of the government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. **Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority.**

Partial Comment to Rule 4-1.13 (emphasis added).

The JPPPF Board, through outside legal counsel and with no reference to any authority, would have the Charter create and the Consolidated Government exists as two separate entities: (1) the JPPPF Board, and (2) every other board, agency and officer of the Consolidated Government. If the JPPPF Board were to be construed as an entity separate and apart from the Consolidated Government for purposes of construing the Rules of Professional Conduct, then the Mayor and the City Council would also be considered as separate clients/entities in need of separate counsel. The Mayor/Council part of the Consolidated Government would then be a separate client/entity apart from the Tax Collector, the Property Appraiser and the JEA. Such an interpretation would completely obliterate Florida's only true consolidated form of local government, the City of Jacksonville.

The Charter creates one unitary City, which along with its independent agencies forms the Consolidated Government. The independent agencies are not separate agencies of the State of Florida. They are agencies of the City. Their independence and interdependence is defined by the Charter. For purposes of the Charter, the General Counsel is the chief legal officer of each and every component of the

whole Consolidated Government and is considered a part of what is referred to in the Charter as “*central services*” for the entire government. The Charter makes no provision for separate entities or for piecemeal services. This unique form of streamlined government, a product of both legislative act and voter-upheld referendum, places Jacksonville, and in particular its legal office, the Office of General Counsel, at the very nucleus of its consolidated operations.

2. Even if the Rules of Professional Conduct prohibit such concurrent representation, the Charter, adopted as a special law of the Legislature, prevails over the Rules. The Charter does so by eliminating any conflict, as the attorney-client privilege belongs to the client and with regard to a public entity, that privilege is subject to absolute control by the Legislature (as well as a legislatively-approved Charter).

Even if concurrent representation by the City of the JPPF Board and other entities of the Consolidated Government is prohibited under the Rules of Professional Conduct or otherwise, the Charter, adopted as a special law of the Legislature, prevails over the Rules, allowing for such representation. The Florida Supreme Court, in both the public records context and the public meetings context, has held that when the Legislature enacts laws that impact the attorney/client relationship between a public entity and its attorney, the Legislature has complete control over the public entity client with absolute power to control the public entity and its relationship with its attorney. The Legislature has the power to require that any governmental entity waive attorney-client privileges. The Legislature has the power to require that a government engage in an activity that effectively waives any attorney-client relationship.

The Supreme Court, in *Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821 (Fla. 1985), considered the validity of the Sunshine Law, i.e., Section 286.011, Florida Statutes, as it applied to a meeting between the North Miami City Council and its attorney. North Miami City Council argued “that reading Section 286.011 to deny [it] a right to private meetings with their attorney in conflict with the Florida Bar Code of Professional Responsibility Disciplinary Rule 4-101 and Ethical Consideration 4-2.” *Id.* at 825. The North Miami City Council based its argument on separation of powers, i.e., that the Judicial Branch, not the Legislative Branch, regulated the ethical obligations of the members of the Bar and that the Legislature invaded that province by prohibiting a lawyer from meeting with a client in secrecy. The Supreme Court rejected that argument in no uncertain terms, stating:

[T]he attorney/client privilege belongs to the client, not the attorney. The legislature has plenary constitutional authority to regulate the activities of political subdivisions and can require, as it has done in Section 286.011, that meetings be open to the public.

Id. at 825.

The Court added, “[I]t would truly be a case of the tail wagging the dog to hold that an attorney, or this Court, could require closed meetings of public bodies contrary to statutory law, based on the Code of Professional Responsibility.” *Id.* See also *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla 5th DCA 1987) (holding the Legislature with its “plenary authority” has the power to “require [political subdivisions] to make disclosures of otherwise confidential materials.”).

The Second District followed *Neu* in rejecting the arguments that Florida Bar ethics rules prohibited disclosure of attorney/client documents notwithstanding the Public Records Act and that the Legislative Branch invaded the province of the Judicial Branch by requiring an attorney to release attorney-client privileged documents. Seminole County and its attorney, relying on *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969) and *Graham v. Murrell*, 462 So. 2d 34 (Fla 1st DCA 1984), argued “that the rules regulating the ethics of the Florida Bar prohibit [Seminole County’s] attorneys from disclosing confidential information.” *Seminole County*, 512 So. 2d at 1002. Relying on *Neu*, the Second District explained, “[T]he attorney/client privilege belongs to the client and not to the attorney,” and “the legislature has plenary authority over political subdivisions.” *Id.*

In sum, the attorney-client privilege belongs to the client and, with regard to a public entity, that client and thereafter that privilege either belongs to, or is subject to absolute control by the Legislature. The Legislature with its “plenary authority” has the power to “require [political subdivisions] to make disclosures of otherwise confidential materials.” *Id.* at 1002-03. An attorney cannot violate an ethics rule by complying with a statute that controls the actions and choices of a government client. See also *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979) (rejecting argument that judiciary may create an attorney/client privilege inconsistent with the Legislature’s power over public entities).

3. A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the Legislature’s control of the attorney/client relationship of the public entity.

In *Neu* and *Miami Herald*, the Florida Supreme Court also considered the constitutional rights of public entities in regard to the Legislature’s control of the attorney/client relationship of such public entities. In *Miami Herald*, the Court rejected the public entity’s argument that the Legislature violated the entity’s constitutional rights by enacting a law that prohibited a public entity from asserting attorney/client privilege as it applied to disclosure of public records that would have been attorney/client privileged but for the fact that the client was a public entity. *Miami Herald*, 468 So. 2d at 210. In *Neu*, the Florida Supreme Court similarly rejected the public entity’s argument that the Legislature violated the entity’s constitutional rights by enacting a law that prohibited (except under the very narrow litigation exemption, Section 286.011(8), Florida Statutes), a public entity from meeting privately with the public entity’s attorney.

In *Neu*, the Florida Supreme Court took only a sentence to repudiate the entity's constitutional claims, *Neu, supra*, stating, simply, that the entity's constitutional "argument has been rejected by the United States Supreme Court." *Neu*, 462 So. 2d at 825. The Florida Supreme Court cited, in support, *Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933). The United States Supreme Court also took merely a sentence, (and citations to a half dozen other United States Supreme Court cases), to reject the argument that a local government may make constitutional claims against the state government:

A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator. *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *City of Newark v. New Jersey*, 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923); *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905); *Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054 (1919); *Risty v. Chicago, R.I. & Pac. Ry. Co.*, 270 U.S. 378, 390, 46 S.Ct. 236, 70 L.Ed. 641 (1926); *Railroad Commission v. Los Angeles Ry. Corporation*, 280 U.S. 145, 156, 50 S.Ct. 71, 74 L.Ed. 234 (1929); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 432, 77 L. Ed. 1015 (1933); *Mayor & Recorder of City of Nashville v. Ray*, 86 U.S. 468, 475, 22 L. Ed. 164 (1873); and *Hunter v. City of Pittsburgh*, 207 U.S. 161, 176-77, 28 S. Ct. 40, 44-46, 52 L. Ed. 151 (1907).

Obviously, home-rule provisions of the Florida Constitution have modified presumptions from the past. Municipalities and counties may not need affirmative grants of power to govern, but they continue to be subject to the centuries old law that they remain subject to Legislative control. *Neu, supra*. In this case, the Legislature exercised its control over the independent agencies by requiring each and all of them to use the General Counsel as chief legal officer. The Charter requirement that the General Counsel represent the Consolidated Government does not create a conflict of interest under the Florida Rules of Professional Responsibility.

4. The JPFPP should not be able to utilize a self-created conflict by having the General Counsel disqualified from representing the City in litigation against the JPFPP that arose solely out of JPFPP's failure to abide by the Charter, or by having the General Counsel conflicted out of representing the JPFPP Board because the General Counsel has taken positions contrary to the JPFPP Board on behalf of other entities of the Consolidated Government.

A dangerous precedent would be established if the JPFPP Board was successful in disqualifying the General Counsel from a lawsuit which arose solely out of JPFPP's failure to abide by the Charter. The fundamental purpose of the lawsuit against the JPFPP Board was to have the Court order the Board to comply with the legal opinions rendered by the General Counsel. The JPFPP Board has ignored, and

refused to act consistently with, multiple opinions from more than one General Counsel regarding the SSVRP. Two General Counsels have stated that the JPFPP Board had no authority to create the SSVRP. A third General Counsel concluded that the trustees of the City's separate pension funds were prohibited from comingling the funds for the purpose of investment unless the trust instruments or the Charter expressly authorized such comingling.¹⁷ In any event, the referenced litigation has been voluntarily dismissed by the City.

Moreover, interpreting the Rules of Professional Conduct in a manner that would conflict out the General Counsel from representing the JPFPP Board on matters unrelated to active litigation between the City and the JPFPP Board would seriously undermine and diminish the role of the General Counsel in Jacksonville's Consolidated Government, by permitting any of the City's independent agencies and departments to act outside of the scope of the Charter and then disqualify the General Counsel from representing the City in the lawsuit or the agency in matters unrelated to the litigation.

Were the Board to comply with the requirements of Section 7.02 of the Charter and recognize the General Counsel Opinions as binding, no conflict would exist. Conversely, the JPFPP Board should not be able to allege a conflict of interest of its own creation. As explained by the Second District, should a person seeking to disqualify a lawyer "fail to demonstrate a legitimate conflict of interest *apart from any that his own actions may have created* [the court] will deny any request for substitute counsel." *Compo v. State*, 617 So. 2d 362, 367 (Fla. 2d DCA 1993). A Florida District Court of Appeal has applied estoppel in the context of a governmental entity relying on its refusal to comply with its own charter. *City of Miami v. Martinez-Esteve*, 125 So. 3d 295, 298 (Fla. 3d. DCA 2013).

In this case, there would be no arguable conflict but for the JPFPP Board's inexcusable noncompliance with the requirements of the Charter. The General Counsel continues, and must continue, as "chief legal counsel" to the JPFPP Board. In any event, there is no active intragovernmental litigation between the JPFPP Board and the City, as the City voluntarily dismissed the lawsuit against the JPFPP Board.

5. A 1987 letter written by a former general counsel stating that the Florida Rules of Professional Responsibility prevents the General Counsel from representing the JPFPP Board, lacks in substance and analysis, and has since been become obsolete due to, among other things, changes to the Board's status.

Counsel to the JPFPP Board repeatedly contends that a 1987 letter (four sentences long if one does not include well wishes) written by former General Counsel James Harrison prior to a major

¹⁷ If two charter-created pension funds may not comingle funds, then a board of trustees of a charter-created pension plan may not create a new pension plan and then comingle such funds.

modification to the JPFPP Board, which made the JPFPP Board an independent agency of the Consolidated Government, is still valid and relevant. This is not the case.

On November 19, 1987, Harrison opined that the General Counsel could not represent the police and fire board of pension trustees when the board was a part of the executive branch. Harrison concluded that under the Florida Rules of Professional Conduct, a conflict would exist if the General Counsel represented the police and fire pension board of trustees in existence at that time. Unfortunately, Harrison's letter to John Keane offered almost no analysis to support this conclusion. Harrison did not explain why the police and fire pension board of trustees should be treated differently than the general employees pension board of trustees, even though at the time, each board was a division or section within the executive branch. For example, he does not explain why a conflict existed with representing a part of the executive department but no conflict existed with representing independent agencies or other parts of the executive branch, or even the legislative branch. He made no attempt to analyze the Florida Rules of Professional Responsibility in light of the Florida Supreme Court decisions analyzing those rules as they pertain to the Sunshine and the Public Records Laws. He did not explain why the General Counsel could not represent the police and fire board of trustees even though the Legislature expressly grants municipal police and fire boards of trustees the authority to use the municipality's legal counsel. He ignored history in not addressing why the lawyer for the City, i.e., the General Counsel, could no longer represent the board of trustees even though the lawyer for the City of Jacksonville represented that board for approximately a half a century.

Whatever reasons may have existed at that time for the issuance of Harrison's letter, the Legislature has since changed the equation. The Legislature, by amending the Charter, has unequivocally granted independent agency status to the JPFPP Board. With that status comes the Charter's legal obligations, including the obligation that the JPFPP Board recognize the General Counsel as its chief legal officer. Harrison's letter is obsolete and of no effect or validity.

VI. CONCLUSION

The General Counsel has the obligation and duty to represent the JPFPP Board. The Board has the obligation and duty to use the General Counsel as its chief legal counsel, and to act in accordance with, and not contrary to, the binding legal opinions of the General Counsel. At times the General Counsel may "certify" the acquisition of outside counsel as the JPFPP Board may need, and such engagements are coordinated and approved through the General Counsel, as the Charter requires. The General Counsel's concurrent representation of the JPFPP Board and the rest of the Consolidated Government does not create a conflict of interest. Any alleged apparent conflict of interest during pending litigation is due to the JPFPP Board's noncompliance with the requirements of the Charter. The JPFPP Board must comply with the Charter, and the General Counsel must continue as "chief legal

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counsel” to the JPPPF Board as prescribed by the Consolidated Government’s legislatively approved and voter upheld Charter.

Please do not hesitate to contact me with any other questions or concerns.

Sincerely,



Jason R. Gabriel
General Counsel

Enclosures

1. Article 3, Section 3.01, City Charter
2. Article 7, Sections 7.01 and 7.02, City Charter
3. Article 18, Section 18.07, City Charter
4. Article 22, City Charter
5. Chapter 85-435 (Laws of Florida)
6. Letter from Former General Counsel James Harrison, November 19, 1987
7. General Counsel Legal Opinion No. 16-01

Section 3.01. - General powers.

The consolidated government:

- (a) Shall have and may exercise any and all powers which counties and municipalities are or may hereafter be authorized or required to exercise under the Constitution and the general laws of the State of Florida, including, but not limited to, all powers of local self-government and home rule not inconsistent with general law conferred upon counties operating under county charters by s. 1(g) of Article VIII of the State Constitution; conferred upon municipalities by s. 2(b) of Article VIII of the State Constitution; conferred upon consolidated governments of counties and municipalities by section 3 of Article VIII of the State Constitution; conferred upon counties by ss. 125.85 and 125.86, Florida Statutes; and conferred upon municipalities by ss. 166.021, 166.031, and 166.042, Florida Statutes; all as fully and completely as though the powers were specifically enumerated herein.
- (b) With respect to Duval County, except as expressly prohibited by the Constitution or general laws of the State of Florida, may enact or adopt any legislation concerning any subject matter upon which the Legislature of Florida might act; may enact or adopt any legislation that the council deems necessary and proper for the good government of the county or necessary for the health, safety, and welfare of the people; may exercise all governmental, corporate, and proprietary powers to enable the City of Jacksonville to conduct county and municipal functions, render county and municipal services and exercise all other powers of local self-government; all as authorized by the constitutional provisions mentioned in subsection (a) and by ss. 125.86(2), (7), and (8) and 166.021(1) and (3), Florida Statutes.
- (c) May engage in any activity in which the State of Florida or any of its political subdivisions may engage and may exercise any power which may be exercised by the State of Florida or any of its political subdivisions within Duval County, not expressly prohibited by the Constitution or general laws of the State of Florida, as authorized by s. 166.021(1), Florida Statutes.
- (d) Shall have and may exercise any and all powers which any of the former governments and former special districts possessed on September 30, 1968.
- (e) May repeal or amend any provision of this charter, and adopt other provisions of this charter, by ordinance, to the same extent as could be done by the Legislature of the State of Florida, except that:
 - (1) The following subjects may not be so acted upon:
 - (i) Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extraterritorial powers by municipalities.
 - (ii) Any subject expressly prohibited by the Constitution of the State of Florida.
 - (iii) Any subject expressly preempted to state government by the Constitution or general laws of Florida.
 - (iv) Any subject affecting the powers, rights, duties, and abilities of the Cities of Jacksonville Beach, Atlantic Beach, and Neptune Beach and the Town of Baldwin.
 - (2) Any change in this chapter made by ordinance which affects the creation or existence of a municipality, the terms of elected officers and the manner of their election, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive

boards, matters prescribed by the charter relating to the office of general counsel, matters prescribed by the charter relating to the council auditor's office, the form of government, or any rights of municipal employees cannot become effective without approval by referendum of the electors as provided in s. 166.031, Florida Statutes. For the purposes of this paragraph, "municipality" includes the county and municipality of the City of Jacksonville but excludes the Cities of Jacksonville Beach, Atlantic Beach, and Neptune Beach and the Town of Baldwin.

- (f) May not exercise any municipal power within the Cities of Jacksonville Beach, Atlantic Beach, or Neptune Beach or the Town of Baldwin, notwithstanding the provisions of subsections (a), (b) and (c) of this section, but may exercise any county power throughout Duval County.
- (g) In addition to any other construction, reconstruction, repair, or renovation projects, authorized by general or special law, may order the construction, reconstruction, repair, and renovation of sanitary sewer force mains and lift stations, all or any part of the costs of which may be paid levying and collecting special assessments on the abutting, adjoining, contiguous, or other properties specially benefitted by such improvements. Such special assessments shall be levied and collected pursuant to procedures provided in chapter 170, Florida Statutes.

(Laws of Fla., Ch. 78-536, § 4; Laws of Fla., Ch. 85-435, § 2; Laws of Fla., Ch. 86-399, § 1; Laws of Fla., Ch. 89-554, § 1; Laws of Fla., Ch. 92-341, § 1)

Sec. 7.01. - Office established; general responsibility.

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, except that the council may create an office of legislative counsel within the legislative branch whose purpose shall be to advise and assist the council and its committees and members in the achievement of a clear, faithful and coherent expression of legislative policies and to perform such other related duties for the council as the council may by ordinance direct. For purposes of utilization of central services by the city and its independent agencies, the services of the office of general counsel shall be deemed to be central services or services of the central service department, as the case may be. The general counsel shall provide to any member of the Duval County legislative delegation who resides in Duval County upon request an opinion on any matter relative to the government of the City of Jacksonville or any of its independent agencies.

The General Counsel may employ, supervise and terminate assistant counsels to assist with the efficient provision of legal services for the City's independent agencies. The General Counsel may authorize the independent agencies to engage outside counsel upon certification by the General Counsel of compliance with the Charter and with the agency's authority and a written finding of necessity by the General Counsel. The General Counsel may authorize the City to engage outside private counsel upon written certification by the General Counsel of its necessity, and such engagement shall be in accordance with procedures set forth by the City Council.

(Laws of Fla., Ch. 85-435, § 1; Laws of Fla., Ch. 92-341, § 1; Ord. 2014-723-E, § 1)

Sec. 7.02. - General counsel.

The head of the office of general counsel shall be the general counsel who shall be the chief legal officer for the entire consolidated government, including its independent agencies. The general counsel shall devote his/her entire time and attention to the business of the office and shall not engage in the private practice of law. Any legal opinion rendered by the general counsel shall constitute the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and shall be considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of solely state law.

The general counsel shall devote necessary resources and attention to all of the elected officials, departments and agencies of the consolidated City of Jacksonville and shall make legal decisions on the merits for the consolidated government without preference to any official or agency. The general counsel shall work with those elected officials, departments and agencies to advise them on new or existing state laws interfacing their duties and responsibilities, as well as related standing ordinances and resolutions, and to educate them with regard to conflicting legal issues and to assist them in amicably resolving them.

(Laws of Fla., Ch. 85-435, § 1; Laws of Fla., Ch. 86-400, § 1; Laws of Fla., Ch. 92-341, § 1; Ord. 2014-723-E, § 1)

Section 18.07. - Definitions.

For all purposes of this charter the following terms shall have the following meanings:

- (a) "Consolidated government" means the City of Jacksonville as established by this charter, as amended from time to time.
- (b) "Executive officer" means the mayor, the chief administrative officer, directors of departments, deputy directors of departments, and chiefs of divisions.
- (c) "Former governments" means the former county government of Duval County, the former municipal government of the City of Jacksonville, the former Duval County Air Improvement Authority, the former east Duval County Mosquito Control District, and the former northeast Duval County Mosquito Control District, and all boards, bodies, officers, and agencies of any of them.
- (d) "Independent agencies" means the Duval County School Board, the the Jacksonville Port Authority, the Jacksonville Transportation Authority, the JEA, the Jacksonville Downtown Investment Authority, and the Jacksonville Police and Fire Pension Board of Trustees.

(Laws of Fla., Ch. 70-749; Laws of Fla., Ch. 78-536, § 13; Ord. 84-1307-754, § 20; Laws of Fla., Ch. 90-442, § 1; Laws of Fla., Ch. 90-451, § 1; Laws of Fla., Ch. 92-341, § 1; Laws of Fla., Ch. 2001-319, § 2; Laws of Fla., Ch. 2003-341, § 3; Laws of Fla., Ch. 2004-464, § 4; Laws of Fla. Ch. 2004-465, § 4; Ord. 2012-364-E, § 10)

ARTICLE 22. - JACKSONVILLE POLICE AND FIRE PENSION BOARD OF TRUSTEES

Section 22.01. - Creation.

There is hereby created and established a body politic and corporate to be known as the Jacksonville Police and Fire Pension Board of Trustees, which is hereby authorized to exercise its jurisdiction, powers, and duties within the territorial limits of Duval County.

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

Section 22.02. - Membership.

- (a) The membership of the Jacksonville Police and Fire Pension Board of Trustees shall consist of five members, of whom two shall be legal residents of the City of Jacksonville appointed by the city council; one shall be a police officer elected by a majority vote of the police officers who are members of the pension fund, and one shall be a firefighter elected by a majority of the firefighters who are members of the pension fund, and the last shall be chosen by a majority of the previous four members. The fifth member's name shall be submitted to the City Council, which shall, as a ministerial act, appoint such person as the fifth member of the board. Effective for all new appointments after July 1, 2005, each resident member shall serve as a trustee for a period of 4 years, unless sooner replaced by the City Council at whose pleasure he or she shall serve, and may succeed himself or herself as a trustee. Effective for all elections after July 1, 2005, the police officer and firefighter members shall serve as trustees for a period of 4 years, unless they shall sooner leave the employment of the city as a police officer or firefighter, whereupon the class of employees whose elected representative has left office shall elect a successor to fill the unexpired term of office as provided for in this section. Each employee member may succeed himself or herself in office. Members shall continue to serve until their respective successors are appointed, elected, or selected. Trustees chosen and appointed by the City Council, as well as any persons selected as the fifth member of the Trustees by the other four trustees, shall continue to be persons with professional financial experience and/or public pension experience, governance experience, institutional investment experience, community experience and wisdom, or comparable professional training, knowledge, and expertise. Trustees chosen and appointed by the City Council shall not be a participant or be enrolled in a City of Jacksonville pension, shall be limited to a maximum of two four year terms, and shall have at least 10 years of professional financial experience.
- (b) The board shall elect a chairman and a secretary. The secretary of the board shall keep a complete minute book of the actions, proceedings, and hearings of the board. Board members shall not receive any compensation as such, but may receive expenses and per diem as provided by law. Three members of the board shall constitute a quorum, but at least three members of the board must approve any action to be taken by the board. Each member of the board shall have one vote. The board shall meet at such times and places designated by it, but shall hold regular meetings at least quarterly. Special meetings may be called by the chairman or any three members of the board.
- (c) The treasurer of the city shall be the treasurer of the fund.
- (d) The provisions of chapters 175 and 185, Florida Statutes, the provisions of s. 286.012, Florida Statutes, and the provisions of ss. 112.311—112.3175 and chapter 112, part VII, Florida Statutes, and as the same may be amended in the future, shall apply to each member of the board. The board shall

have the authority to invest and reinvest the assets of the plan without regard to any limitation in chapters 175 and 185, Florida Statutes, and shall be bound by the provisions of chapter 112, part VII, Florida Statutes, and the applicable provisions of s. 215.47, Florida Statutes. Prior to the adoption of any change in asset allocation or the introduction of a new asset class, the board shall give written notice of the meeting at which the proposed change shall be considered to the City Council Finance Committee.

(Laws of Fla., Ch. 90-442, § 2; Laws of Fla., Ch. 92-341, § 1; Laws of Fla., Ch. 2005-330, § 1; Ord. 2015-304-E, § 5)

Section 22.03. - Definitions.

As used in this article, the following words and terms shall have the following meanings, unless the context otherwise requires:

- (a) "Board" or "board of trustees" means the body politic and corporate created by this article.
- (b) "County" means the County of Duval.
- (c) "City" means the City of Jacksonville.
- (d) "Pension plan" or "pension fund" refers to the Jacksonville Police and Fire Pension Fund as created by chapter 18615, Laws of Florida, 1937.
- (e) The "council" means the council of the City of Jacksonville.
- (f) Words importing the singular number include the plural number in each case and vice versa, and words importing persons include firms and corporations.
- (g) Words indicating the masculine mean both the masculine and feminine.

(Laws of Fla., Ch. 90-442, § 2)

Section 22.04. - General powers.

The board shall have the power to:

- (a) Be the sole entity responsible for administering the Jacksonville Police and Fire Pension Fund.
- (b) Invest and reinvest the assets of the pension fund in:
 - (1) Any lawful investment as provided in applicable provisions of s. 215.47, Florida Statutes, provided the investment is permitted in the written investment policy adopted by the board as provided in chapter 112, part VII, Florida Statutes.
 - (2) Notwithstanding anything to the contrary in the applicable provisions of s. 215.47, Florida Statutes, investments in fixed real estate assets, not to exceed 20 percent of the assets of the plan, at cost.
 - (3) Investment plan.
 - (i) In making investments for the plan, the board shall make no investment after June 30, 1996, which is not in conformance with the plan's investment plan. The investment plan must include, among other items: the investment objectives; permitted types of securities in which the board may not invest; the criteria to measure annual investment performance; and any other applicable criteria established by the board.
 - (ii) The investment plan shall be developed by the plan administrator and shall be approved by the board. Upon adoption by the board, the investment plan and any amendments shall be promptly filed with the Division of Retirement, and the plan's sponsor and plan

actuary.

- (iii) The effective date of the investment plan shall be the 31st calendar day following the filing date with the plan sponsor. Investments permitted by the investment plan shall not be made prior to the effective date of the investment plan.
 - (iv) The investment plan may be amended at any time subject to paragraphs (ii) and (iii).
 - (v) For each illiquid investment (an investment for which a generally recognized market is not available or for which there is no consistent or generally accepted pricing mechanism) the investment plan shall: include the criteria set forth in s. 215.47(6), Florida Statutes; require a statement as to the additional expected yield anticipated to compensate the plan for the additional risk of such investment which additional yield is not available from an investment for which there is a generally recognized market; require the board to verify the determination of the fair market value for each such investment as of each date as of which an actuarial valuation is prepared and that the determination complies with all applicable state and federal requirements; and require the board to disclose to the Division of Retirement and the plan's sponsor each such investment as of each date as of which an actuarial valuation is prepared for which the fair market value is not provided.
 - (vi) Immediately prior to the date as of which each actuarial valuation is prepared, the board shall determine the total expected annual rate of return for the plan's assets for the year beginning with the date as of which the actuarial valuation is prepared, for each of the next several years and for the long-term thereafter. This determination shall be promptly filed with the Division of Retirement, and the plan's sponsor and plan actuary.
- (c) Sue and be sued, implead and be impleaded, and complain and defend in all courts.
 - (d) Enter into contracts, leases, or other transactions.
 - (e) Employ and fix the compensation of an administrator and any consultants, attorneys, actuaries, accountants, and other employees or contractors as the board may require.
 - (f) Delegate to one or more of its agents or employees such of its powers as it may deem necessary to carry out the purposes of this article, subject always to the supervision and control of the board.
 - (g) Determine all facts with regard to any participant's age, normal retirement date, disability, amount of compensation, length of service and credited service, and date of initial coverage under the pension plan, and, by application of the facts so determined and any other facts deemed material, determine a participant's amount of benefit.
 - (h) Make rules and regulations for the administration of the pension plan which are not inconsistent with the terms and provisions of law.
 - (i) Construe all terms, provisions, conditions, and limitations of the pension plan; and its construction thereof, made in good faith, shall be final and conclusive upon the interested parties.
 - (j) Correct any defect or supply any omission or reconcile any inconsistency that may appear in the pension fund and make any equitable adjustments for any mistakes or errors made in the administration of the pension.
 - (k) Determine all questions relating to the administration of the pension fund in order to promote the uniform administration of the pension fund and to effectuate its purposes and provisions.

- (l) Authorize and direct the payment from the pension fund of all expenses and fees incurred in the administration of the pension fund.
- (m) Require such information as may be necessary for the proper operation of the system from any participant, beneficiary, or officer, department head, or other person or persons in authority, as the case may be, of any employer.
- (n) Cause a general investigation to be made by a competent actuary and at least once every 3 years or as required by law thereafter of the retirement, disability, separation, mortality, interest, and employee earning rates; recommended, as a result of such investigation, the tables to be adopted for all required actuarial calculations; cause an annual determination to be made by a competent actuary of the liabilities and reserves of the pension plan and the annual determination of the amount of the contributions required by the city; and maintain the funds of the pension plan on a sound actuarial basis. A copy of this actuarial study shall be furnished to the city council by the board immediately upon its receipt.
- (o) Cause an audit of the affairs of the pension plan to be made annually by an independent certified public accountant, and submit a copy thereof to all interested parties as soon as possible after the end of the fiscal year.
- (p) Issue subpoenas to compel the attendance of witnesses and the production of books, papers, and records pertinent to any investigation or hearing concerning any application for membership or benefits, and to administer oaths to witnesses.

The foregoing list of expressed powers is not intended to be either complete or exclusive, and the board shall, in addition, have all such powers as it may reasonably determine to be necessary or appropriate to the performance of its duties under the retirement system. Any decision or judgment of the board in good faith on any questions arising hereunder in connection with the exercise of its powers shall be final, binding, and conclusive upon all parties concerned.

(Laws of Fla., Ch. 90-442, § 2; Laws of Fla., Ch. 92-341, § 1; Laws of Fla., Ch. 94-466, § 1; Laws of Fla., Ch. 96-528, § 1; Laws of Fla., Ch. 2005-330, § 1; Laws of Fla., Ch. 2009-255, § 1)

Section 22.05. - Liability of the board.

- (a) Each member of the board shall discharge his duties solely in the interest of the participants and beneficiaries of the Jacksonville Police and Fire Pension Fund for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan and shall exercise such care and diligence as is necessary to accomplish this purpose according to the provisions of s. 112.656, Florida Statutes.
- (b) No board member shall be personally liable upon or with respect to any agreement, act, transaction, or omission executed, committed, or suffered to be committed by himself as a member of the board or by any other board member or agent, representative, or employee of the board. Moreover, the board and any member or agent thereof shall be fully protected when relying upon the advice of any attorney employed by the board insofar as legal matters are concerned, any accountant employed by the board insofar as accounting matters are concerned, any actuary employed by the board insofar as actuarial matters are concerned, and any investment manager employed by the board insofar as investment matters are concerned.
- (c) The board shall have the power to purchase liability insurance to cover errors and omissions, provided such insurance shall be with recourse.
- (d)

The board may, in its discretion, provide life and/or accidental death and disability insurance to the trustees and employees of the board to ensure against risks incurred while in the service of the pension fund.

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

Section 22.06. - Named fiduciaries.

The named fiduciaries with respect to the City of Jacksonville Police and Fire Pension Fund are the plan administrator, and any officer, trustee, and custodian, and any counsel, accountant, and actuary of the retirement system or plan who is employed on a full time basis, or any other person or entity who is a fiduciary according to law shall be included as fiduciaries of such system or plan.

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

Section 22.07. - Amendatory power.

- (a) The board of trustees shall have the sole and exclusive responsibility of administering the pension plan, but nothing herein shall empower the board to amend the provisions of the pension plan without the approval of the Jacksonville City Council.
- (b) No legislation shall be adopted by the Jacksonville City Council altering the terms of the pension fund without said legislation having first been referred to the board for its consideration and comment. The board may, as it deems necessary, recommend legislative changes and pass those recommendations on to the Jacksonville City Council for their consideration as ordinances.
- (c) The benefit plan administered by the board shall be as established by ordinance or charter provision, or by special act or general law of the Legislature, which shall be incorporated in this article by reference.

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

Section 22.08. - Applicability of state law.

Except as otherwise provided herein, the board shall be bound in its actions by the applicable provisions of:

- (a) Chapter 185, Florida Statutes, as amended.
- (b) Chapter 175, Florida Statutes, as amended.
- (c) Section 14, Article X of the State Constitution.
- (d) Chapter 112, part VII, Florida Statutes, as amended.
- (e) Section 215.47, Florida Statutes, as amended.

(Laws of Fla., Ch. 90-442, § 2; Laws of Fla., Ch. 92-341, § 1; Laws of Fla., Ch. 2005-330, § 1)

Section 22.09. - Rights of former city employees preserved.

- (a) Any person in the classified civil service of the City of Jacksonville who is appointed to a position in the employ of the board shall be deemed an unclassified employee while in the service of the board and shall serve at the pleasure of the board.
- (b) Any such person shall, however, retain his civil service status and be entitled to return to the same civil service classification, rights, status, and job value as held at the time of such appointment.
- (c) Any person employed by the board shall be subject to such terms and conditions as shall be set by the board.

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

Section 22.10. - Declaration of purposes.

The board created by this article and the purposes for which it is intended to serve are hereby found to be for a public purpose. The board shall be considered a governmental unit responsible for the management of an irrevocable trust as that term is used in s. 112.66(8), Florida Statutes.

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

Section 22.11. - Jacksonville Police and Fire Pension Board continuity.

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. The Jacksonville Police and Fire Pension Board shall continue as an independent agency under the Charter of the City of Jacksonville, without any break in its continuity solely because of the adoption of this article. The members of the board in office on the effective date of this article shall continue in office for the remainder of their respective terms and until their successors shall be appointed as provided in this article.

(Laws of Fla., Ch. 92-341, § 1)

Section 22.12. - Retirement for board employees.

- (a) The board is hereby prohibited from creating any pension or other retirement plan, and the board is hereby prohibited from administering any pension or retirement plan other than the Jacksonville Police and Fire Pension Fund.
- (b) The board is hereby prohibited from offering to any of its employees any retirement plan other than the General Employees Pension Plan or the General Employees Defined Contribution Plan.
- (c) The employees of the board are authorized to join the General Employees Pension Plan or the General Employees Defined Contribution Plan.

(Ord. 2015-683-E, § 2)

City of Jacksonville. Two (2) members of the Authority shall be members of the Duval Medical Society. The term of office of each appointed member shall be for four (4) years or until his successor has been appointed and qualified; provided, however, that the initial terms of the two additional members provided for in this act shall expire January 1, 1976. The seven (7) present members of the Authority holding office on the effective date of this act shall continue in office until the expiration of their terms, as if this act were not in effect. A vacancy occurring during a term shall be filled only for the balance of the unexpired term. Any member appointed to the Authority for two consecutive full terms shall not be eligible for appointment to the next succeeding term.

The members of the Authority shall not be entitled to compensation as such, but shall be entitled to reimbursement for their actual and necessary expenses incurred in the performance of their official duties. Five (5) members of the Authority shall constitute a quorum and ordinances and resolutions enacted or adopted by a vote of a majority of the members of the Authority shall become effective without publication or posting or any further action of the Authority.

The provisions of s. 286.012 and the provisions of ss. 112.311-112.3175, inclusive, Florida Statutes, and as they may be amended in the future, relating to financial disclosure and conflicts of interest, shall apply to each member of the Authority.

Section 2. This act shall take effect upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 20, 1985.

CHAPTER 85-435

House Bill No. 492

An act relating to the City of Jacksonville; establishing the Office of General Counsel within the Charter of the City of Jacksonville as Chapter 2 of Article 7 of Chapter 67-1320, Laws of Florida, as amended; prescribing matters relating to the selection of General Counsel, the organization and function of the Office of General Counsel; amending Paragraph (2) of Subsection (e) of Section 3.01 of Chapter 67-1320, Laws of Florida, as amended, to provide that matters prescribed by the Charter relating to the Office of General Counsel must be approved by referendum of the electors; amending Section 7.104 of Chapter 67-1320, Laws of Florida, as amended, so as to prohibit the amendment by ordinance of any provision of Chapter 2 of Article 7 relating to the Office of General Counsel; providing for the supersedure of any law or ordinance inconsistent with the provisions of this act and prohibiting the enactment of any ordinance in conflict herewith; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. A new Chapter 2 is added to Article 7 of Chapter 67-1320, Laws of Florida, as amended, to read:

Chapter 2. Office of General Counsel

Part I. General Provisions

7.201 Office established; general responsibility. There is established a department 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, except that the Council may create an Office of Legislative Counsel within the legislative branch whose purpose shall be to advise and assist the Council and its committees and members in the achievement of a clear, faithful and coherent expression of legislative policies and to perform such other related duties for the Council as the Council may by ordinance direct. For purposes of utilization of central services by the City and its independent agencies, the services of the Office of General Counsel shall be deemed to be central services or services of the Central Service Department, as the case may be. The General Counsel shall provide to any member of the Duval County Legislative Delegation who resides in Duval County upon request an opinion on any matter relative to the government of the City of Jacksonville or any of its independent agencies.

7.202 General Counsel. The head of the Office of General Counsel shall be the General Counsel who shall be the chief legal officer for the entire consolidated government, including its independent agencies. Any legal opinion rendered by the General Counsel shall constitute the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and shall be considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of state involvement or concern.

7.203 Selection and term of General Counsel. The General Counsel shall be an attorney licensed to practice law in the State of Florida and shall have at least 5 years' experience in the practice of law. The General Counsel shall be selected according to the following procedure. Upon the commencement of each mayoral term of office, the Mayor shall appoint a selection committee comprised of five attorneys licensed to practice in the State of Florida. No more than two of the members of this committee shall be former General Counsels of the City. The Mayor shall endeavor to appoint two former General Counsels to the committee, but in the event either or both refuse to serve, then the Mayor shall appoint an attorney licensed to practice in the State of Florida to serve in the stead of either or both. The selection committee shall receive applications and may consider applicants of its own choosing. The committee shall select three qualified and available candidates to serve as General Counsel and shall recommend these three to the Mayor who shall select one to serve as General Counsel. In the event that the Mayor refuses to select one of the three as recommended, then the committee shall conduct another search and recommend an additional three candidates to the Mayor. This procedure shall continue until the Mayor has made his selection. The person selected to serve as General Counsel by the Mayor shall be confirmed by the Council. The term of the General Counsel shall coincide with the term of the Mayor that appointed him.

7.204 Reappointment. A General Counsel may be reappointed by a newly elected Mayor or by a Mayor elected to serve a succeeding term of office. The reappointment of a General Counsel shall be confirmed by the Council. Any General Counsel who is reappointed by the Mayor but who fails to receive the confirmation of Council may, at the option of the Mayor, continue to serve for a period of 6 months subsequent to the refusal of the Council to confirm him. The Mayor may resubmit the General Counsel to the Council for confirmation at any time during this 6-month period. In the event the General Counsel is not confirmed by the Council, then the position of General Counsel shall become vacant and shall be filled according to the provisions of Section 7.203.

7.205 Vacancy. A vacancy occurring 1 year or less before the expiration of the mayoral term shall be filled by an acting General Counsel appointed by the Mayor and confirmed by the Council. A vacancy occurring more than 1 year before the expiration of the mayoral term shall be filled in the manner provided in Section 7.203.

7.206 Removal. The General Counsel may be removed by the Mayor, but such removal shall be only for cause. The removal of a General Counsel by the Mayor for cause shall be concurred in by a majority of the membership of the Council.

7.207 Assistant Counsels. The General Counsel shall appoint Assistant Counsels and fix their compensation, subject to the approval of the Mayor. The Assistant Counsels shall devote their entire time and attention to the business of the office.

7.208 Corporation Secretary. Subject to applicable civil service laws and rules, the General Counsel shall designate one of his employees as Corporation Secretary.

7.209 Duties of Corporation Secretary. The Corporation Secretary shall be responsible for the custody and safekeeping of such records of the Executive Office of the Mayor as the Mayor shall designate and for the performance of such additional duties as may be delegated to him by the Mayor. The Corporation Secretary is authorized and entitled to keep in his possession a duplicate official seal of the City and to affix the seal on all papers and documents necessary to be executed by the Mayor and on all certified copies of public records of which he has custody.

7.210 Litigation imprest fund. There is authorized to be established in the Office of General Counsel, in the custody of the General Counsel, a litigation imprest fund of not exceeding \$500, which shall be available, without regard to fiscal years, for the expenses of litigation conducted or defended by the Office of General Counsel, including filing fees for actions commenced by the City or an independent agency in a State or federal court and for appeals taken by the City or an independent agency, witness fees required to be tendered to persons subpoenaed on behalf of the City or an independent agency, fees for service of process for designated agents within the City and for the several sheriffs of designated agents in other counties of the State or elsewhere, the reproduction or acquisition of necessary documentary evidence not in the official possession of the City or an independent agency to be used at a deposition, hearing or trial, and similar expenses directly related to cases in litigation, but not including fees for special counsels or the payment of a monetary judgment against the City or an independent agency. The litigation imprest fund shall be maintained

as a checking account in a bank located in the City and the General Counsel shall prescribe rules for the withdrawal of funds from this checking account, including a requirement that checks be signed by at least two individuals in the Office of General Counsel. Periodically, as determined by the General Counsel, a statement of the disbursements from the litigation imprest fund shall be presented to the City Accountant, with such supporting documents as the City Accountant requires, for reimbursements of the fund. Bank service charges shall be a proper expense item of the litigation imprest fund.

Part 2. Support Enforcement Activity

7.211 Establishment. There is established within the Office of General Counsel an activity to be known as the Support Enforcement Activity. This activity shall be under the supervision of an Assistant Counsel, who shall be appointed by the General Counsel at a rate of compensation to be fixed from time to time by the General Counsel, subject to the approval of the Mayor. This Assistant Counsel shall be a member in good standing of The Florida Bar and shall devote his entire time and attention to the performance of his duties.

7.212 Lawful general county purpose; territorial application. The establishment and maintenance of the Support Enforcement Activity is a public need and is hereby declared to be a lawful general county purpose. The Support Enforcement Activity shall have authority throughout the General Services District and it may exercise like authority in any other county as provided in s. 25.204 of the Ordinance Code of the City of Jacksonville.

7.213 Functions. Subject to the general supervision of the General Counsel, the Support Enforcement Activity shall investigate and enforce all cases referred to it by the Child Support Enforcement Unit, State Department of Health and Rehabilitative Services, and more particularly:

(a) Institute paternity actions and child support actions unconnected with dissolutions of marriage.

(b) Establish and enforce any existing child support orders of any state or jurisdiction.

(c) Seek commencement of child support payments in which prior orders failed to provide for such payment.

(d) Seek increases in previously ordered child support, where warranted by circumstances.

(e) Seek collection of public debts as set forth in s. 409.2561(1), Florida Statutes.

(f) Represent persons pursuant to a contract with the State and its agencies for the purpose of implementing Title IV(D) of the Social Security Act [42 U.S.C. ss. 651-662] and Chapter 409, Florida Statutes.

(g) Handle such ancillary matters connected with the foregoing functions as shall be necessary to effect the purposes set forth in this part.

7.214 Expansion of activity into other counties authorized.

(a) The expansion of the Support Enforcement Activity into any other county contiguous to Duval County is hereby authorized. If an office is established in another county, the provisions of s. 116.910 of the Ordinance Code of the City of Jacksonville shall not be applicable with respect to the Assistant Counsels and other employees of the Support Enforcement Activity who work in the other county, so long as their principal place of work is outside Duval County.

(b) Before the Support Enforcement Activity begins operations in a county into which expansion has been authorized, the Board of County Commissioners of that county shall execute an interlocal agreement with the City to provide necessary funding, sufficient office space, clerical and stenographic assistance and investigations as are deemed necessary by the General Counsel and approved by the Board of County Commissioners of that county. This interlocal agreement shall provide that funds made available for financial support of such office shall be paid to the City.

7.215 Authority to execute contracts. The Mayor and Corporation Secretary shall have the authority to enter into contracts between the City and the State of Florida and its agencies and also with other counties to provide for financial and other support that may be made available by the State or the counties for the operation of the Support Enforcement Activity. A contract which would obligate the City financially may not be executed without prior approval from the Council.

7.216 Nonpublic assistance cases authorized. The Support Enforcement Activity is authorized to accept cases not referred to it under s. 25.204 of the Ordinance Code of the City of Jacksonville in which there already exist court orders for child support entered by the courts of this State or any other jurisdiction and may, with respect to these cases, request the Circuit Court to enforce the orders, using contempt proceedings only. The General Counsel, Assistant General Counsel or an Assistant Counsel assigned to the Support Enforcement Activity may represent private individuals for the purpose of seeking enforcement of court orders for child support as provided in this section and the General Counsel shall establish a schedule of fees to be charged in these cases, which schedule may provide for the charging of no fee in appropriate instances and a requirement that public assistance moneys being furnished to a client be used to pay a fee so charged. The Support Enforcement Activity may conduct investigations and handle ancillary matters connected with the cases hereby authorized to be accepted as shall be necessary to effect the purpose expressed in this section. The authority granted under ss. 25.204 and 25.206 of the Ordinance Code of the City of Jacksonville shall apply to the cases authorized under this section.

Part 3. Duval County Legislative Delegation Activity

7.217 Establishment; Legislative Delegation Coordinator. There is established within the Office of General Counsel an activity to be known as the Duval County Legislative Delegation Activity. This activity shall be under the supervision of a Legislative Delegation Coordinator, who shall be exempt from the classified civil service system of the City and who shall be appointed by the General Counsel at a rate of compensation to be fixed from time to time by the General Counsel, subject to the approval of the Mayor and the

chairman of the Duval County delegation to the Legislature. The Legislative Delegation Coordinator shall serve at the pleasure of the chairman of the Duval County delegation to the Legislature and shall devote his entire time and attention to the performance of his duties.

7.218 Legislative Delegation Secretary. The General Counsel is authorized to appoint a Legislative Delegation Secretary, who shall be exempt from the classified civil service system of the City, at a rate of compensation to be fixed from time to time by the General Counsel, subject to the approval of the chairman of the Duval County delegation to the Legislature. The Legislative Delegation Secretary shall devote his entire time and attention to the performance of his duties.

7.219 Functions. Subject to the general supervision of the General Counsel, the Duval County Legislative Delegation Activity shall have the following functions:

(a) To provide a local office at which to maintain the records and files of the Duval County delegation to the Legislature.

(b) To assist the chairman and members of the Duval County legislative delegation in preparing for sessions of the Legislature, meetings of committees and subcommittees of the Legislature and meetings of and hearings by the delegation itself.

(c) To serve as a liaison office between the Duval County legislative delegation and the units of local government represented by the members of the Duval County legislative delegation.

7.220 Legislative Delegation Coordinator and Secretary to attend sessions of Legislature, etc. The Legislative Delegation Coordinator and Legislative Delegation Secretary shall attend sessions of the Legislature, meetings of committees and subcommittees of the Legislature and meetings of and hearings by the Duval County legislative delegation itself, as directed by the chairman of the Duval County legislative delegation. While attending the sessions of the Legislature and meetings of committees and subcommittees in Tallahassee and elsewhere in the State (except in the City), the Legislative Delegation Coordinator and Legislative Delegation Secretary shall receive travel expense reimbursement as authorized by s. 106.716 of the Ordinance Code of the City of Jacksonville.

Section 2. Paragraph (2) of Subsection (e) of Section 3.01 of Chapter 67-1320, Laws of Florida, as amended, is amended to read:

Section 3.01 General Powers. The consolidated government:

(e) May repeal or amend any provision of this charter, and adopt other provisions of this charter, by ordinance, to the same extent as could be done by the Legislature of the State of Florida, except that:

(2) Any change in this charter made by ordinance which affects the creation or existence of a municipality, the terms of elected officers and the manner of their election, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, matters prescribed by the charter relating to the Office of General Counsel, the form of government or any rights of municipal employees cannot become effective without approval by

referendum of the electors as provided in section 166.031, Florida Statutes. For the purpose of this paragraph (2), "municipality" includes the county and municipality of the City of Jacksonville but excludes the Cities of Jacksonville Beach, Atlantic Beach and Neptune Beach and the Town of Baldwin.

Section 3. Section 7.104 of Chapter 67-1320, Laws of Florida, as amended, is amended to read:

Section 7.104 Changes in Departments. Changes in the departmental organization of the consolidated government, including combinations, terminations or creations of departments or divisions, transfers of responsibility between departments or divisions, or changes in the salaries of department directors or division chief, may be made by ordinance adopted by a majority of the membership of the Council. Any such ordinance may vary, alter or abolish any provision contained in this Article 7, except the provisions of Sections 7.102, 7.103, 7.104 and Section 7.201 through Section 7.220 inclusive.

Section 4. The provisions of this act shall supersede and take precedence over any provision of the Ordinance Code of the City of Jacksonville or any other ordinance of the City which is in conflict with the provisions of this act and any such conflicting law is hereby superseded by the provisions of this act and is hereby repealed, but only to the extent of such conflict. The Council shall enact no law which would in any manner conflict with the provisions of this act.

Section 5. This act shall take effect upon becoming a law, except that the provisions of Chapter 2 of Article 7 relating to the method of selection of a General Counsel shall not take effect until the commencement of the 1987 mayoral term of the City of Jacksonville.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 18, 1985.

CHAPTER 85-436

House Bill No. 505

An act relating to the City of Jacksonville; amending Section 28.104 of Article 28 of Chapter 67-1320, Laws of Florida, as amended, to provide that any member of the Jacksonville Downtown Development Authority appointed for two consecutive full terms shall not be eligible for appointment to the succeeding term; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of Section 28.104 of Chapter 67-1320, Laws of Florida, as amended, is amended to read:

Section 28.104.

(1) The governing body of the Authority shall consist of seven (7) members who shall be appointed by the Mayor and confirmed by the



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AREA CODE 904
630-1700

November 19, 1987

Mr. John Keane, Chairman
Police and Fire Board of Pension Trustees
1010 E. Adams Street
Jacksonville, Florida

Dear Mr. Keane:

The purpose of this letter is to confirm the position stated during our discussions this morning with you and members of your Board to the effect that the Office of General Counsel can no longer represent the Board of Pension Trustees of the City of Jacksonville, Police Officer and Firefighter Pension Fund. Chapters 175 and 185, Florida Statutes, create relationships, which despite all good intentions, place our attorneys in either a present or potential conflict of interest.

I will not quote the rules regulating the Florida Bar. Suffice it to say, professional ethics require me to make this decision as being in the best interest of your Board and the City at this time.

I wish you, the Board members and your staff the very best in your endeavors.

Sincerely,


James L. Harrison

JLH/jt

cc:

B. Shainbrown
R. Cohee
B.J. Laster
C. Suggs
T. Woods

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*BOARD CERTIFIED CITY, COUNTY
AND LOCAL GOVERNMENT LAW

April 20, 2016

Via Hand Delivery

The Honorable Lenny Curry, Mayor
City of Jacksonville
117 W. Duval Street, Suite 400
Jacksonville, FL 32202

Re: General Counsel Legal Opinion 16-01; Authority of Board of Trustees of Police and Fire Pension Fund to Establish the Jacksonville Police and Fire Pension Fund Senior Staff Voluntary Retirement Plan and Related Legal Issues

Dear Mayor Curry:

This letter is written in response to your recent request for a legal opinion regarding the status of the Jacksonville Police and Fire Pension Fund Senior Voluntary Retirement Plan ("SSVRP") with the understanding that you have been briefed by your Administration as to all pertinent matters concerning the well-being of the City. Because the creation of the SSVRP and the events that unfolded when its existence was discovered predate your term as Mayor, a brief historical account is useful to provide an understanding of the current circumstances.

Furthermore, Mayor, you have inquired as to what the City can do to rectify issues related to the SSVRP. The scope of your authority, as the consolidated government's chief executive and administrative officer, is set forth below.

BRIEF HISTORY

While PFPF Board employees have always participated in, and currently participate in, the City's General Employees Retirement Plan¹, in 2000, the Jacksonville Police and Fire Pension Fund Board of Trustees ("PFPF Board" or "Board") attempted to devise a special defined benefit plan for the interest of a few select employees, by replacing a money purchase retirement account at the time with a proposed defined benefit pension plan that is now known as the SSVRP. The select few employees for which the SSVRP was created decided to not participate in the General Employees Retirement Plan because it would have meant, among other things, that such employees would be unable to continue receiving pension benefits for prior City service.

In 2012, the City (the ultimate insurer and taxing authority responsible for funding all City pension plans) became aware of the SSVRP during one of the City Council Auditor's routine audits.² Shortly thereafter, the City Council Finance Committee Chair requested an opinion from the General Counsel regarding whether the Board was authorized to create the SSVRP. On August 10, 2012, then General Counsel Cindy A. Laquidara issued a binding legal opinion in which she held that the Board was not authorized to create the SSVRP. A copy of General Counsel Legal Opinion 12-03 is attached hereto.

To briefly summarize, that opinion held that: (1) Article 16 (Retirement and Pension Benefits) of the Charter establishes the entire pension system of the Consolidated Government and does not authorize any agency other than the Council to amend existing plans or create new plans, and (2) Article 22 (Jacksonville Police Fire and Pension Board of Trustees) establishes the PFPF Board for the purpose of solely *administering* the Police and Fire Pension Fund, and *not* for any other purpose such as creating new or amendatory pension plans or classifications. Further, the opinion found that by the Charter's very own terms (Section 22.07), nothing empowers the Board to amend the provisions of the pension plan "without the approval of the Jacksonville City Council" and that the benefit plan administered by the Board shall be "as established by ordinance or charter provision, or by special act or general law of the legislature...."³

¹ Article 16 of the City Charter establishes the City's retirement and pension benefits. Section 16.01 requires that all officers and employees of the consolidated City of Jacksonville be members of either the 1937 police and fire pension fund, as established under chapter 18615, Laws of Florida, or the 1937 pension fund for employees of the City of Jacksonville, as established under chapter 18610, Laws of Florida, and further provides that the retirement system encompassing these two pension funds "shall be the retirement and pension system for the consolidated government."

² See pp. 16-20 of Council Auditor's Office Police and Fire Pension Fund Audit, Report #736, dated November 21, 2012.

³ See also, 1969 OGC Legal Division Advisory Opinion No. 254 which discusses whether funds of two systems having common trustees could be commingled. That opinion held that trustees do not have the right to invest moneys in different pension fund systems in total and then prorate the earnings back to the funds based on each fund's equity.

Following the issuance of the August 2012 binding legal opinion, the General Counsel sent a letter to the PFPF Board Chair in September 2012, indicating the City's surprise to learn that the PFPF Board had created its own new defined benefit pension plan for the benefit of certain select employees, and informing the Board that the SSVRP was not authorized and that the City was seeking to recover all contributions to the SSVRP made with public funds. The General Counsel further directed the Board to terminate any further alleged obligations to the employees. In March 2013, a second letter was sent to the PFPF Board Chair stating:

This is to put the Board of Trustees on notice that the Board is to take action to cease making payments to beneficiaries under the Senior Staff Plan and to cease making contributions to such Plan. In addition, within thirty days of receipt of this letter, please provide to the City a plan for recovery and repayment to the Police Fire and Pension Fund those monies taken from the Police and Fire Pension Fund for funding of the Senior Staff Plan.

Both letters requested numerous specific public records be produced by the Board for the purpose of assisting the City in the reconciliation of funds. Rather than follow the legal advice of their chief legal officer, the City's directives and requests were each ignored by the PFPF Board. The City of Jacksonville's Charter does not authorize the PFPF Board to ignore the binding legal opinions and directions of the General Counsel.

The City Council over time has expressed its opinion on the matter of the SSVRP, passing resolutions in 2012 and 2014 authorizing the Office of General Counsel to commence litigation to determine, among other things, the legal validity of the establishment of the SSVRP.⁴ Additionally, on or around September 4, 2013, during the 2013/14 budget process, the Finance Committee of City Council proposed, and eventually the full City Council approved, a budgetary amendment to reduce the PFPF budget by an amount equivalent to the employer pension contribution the PFPF pays into the SSVRP.

Throughout this time period, pension reform efforts were underway as well as efforts to settle this issue without the need for litigation. While the pension reform efforts were successful in many regards, efforts to resolve the SSVRP dispute were unsuccessful. In fact, during pension reform discussions, Council specifically reserved the right to further dispute the SSVRP matter. Therefore, on November 20, 2015, the City filed suit against the PFPF Board and John Keane⁵, requesting the Court, among other things, to enter a declaratory judgment as to the Board's authority to create the SSVRP. On January 26, 2016, proposed Ordinance 2016-80 was introduced, proposing a potential settlement agreement to resolve

⁴ See Resolutions 2014-769-A and 2015-83-A.

⁵ *City of Jacksonville v. Jacksonville Police and Fire Pension Board of Trustees, John Keane et al.*, 16-2015-CA-007380.

the litigation. The Council postponed the bill indefinitely pending further study and consideration of the issues.

CITY AS FUNDING SOURCE AND AUTHORITY TO RECTIFY UNLAWFUL PLAN

In addition to the express Charter requirements designating City Council as the only authorized body to amend or create defined benefit pension plans or classifications in the City's retirement system, a City agency (such as the PFPF) that has no ability to generate revenue and is completely dependent on appropriations and contributions of the City and City employees, cannot lawfully obligate the City to fund a defined benefit pension plan for the agency's employees without City Council approval. This issue is critical due to the nature of defined benefit pension plans. Under state law, defined benefit pension plans obligate the plan sponsor to fund the plan on a sound actuarial basis - which includes the obligation to pay off unfunded actuarial accrued liabilities over a period of not more than 30 years. In essence, defined benefit pension plans involve a form of debt. In the judgment of the City's pension legal counsel, only the entity that is ultimately responsible for paying off the debt has the legal authority to approve the creation of a defined benefit plan. In this case that entity is the City, and the governing body is the City Council.

The City, as the ultimate insurer and taxing authority responsible for funding City pension plans, has the power to halt or modify unlawfully funded pension payouts being made by the City.⁶

BINDING LEGAL AUTHORITY OF THE GENERAL COUNSEL

Section 7.02 of the Jacksonville City Charter provides that the General Counsel shall be the chief legal officer for the entire consolidated government, including its independent agencies. It states further:

Any legal opinion rendered by the general counsel shall constitute the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and shall be considered valid and binding in its application unless and until it

⁶ See, e.g., *Hill v. City of Los Angeles*, 24 Cal.App.3d 18 (Cal. 2d Dist. Ct. App. 1972); *Wheeler v. City Santa Ana*, 185 P.2d 373 (Cal. 4th Dist. Ct. App. 1947) (finding that the Civil Service Commission erroneously assumed it had power to adopt a rule authorizing payments did not estop the City from discontinuing such payments. "The fact that said commission has operated for a number of years under the interpretation appellants are contending for here cannot be held to affect the present legal situation, for the reason that the exercise of powers by city officers, in excess of their authority for a great length of time, will raise no presumption of a grant to the city of such powers..."); *People ex rel. Green v. Wood*, 22 How. Pr. 286 (1861). See also *Jack M. Beermann, The Public Pension Crisis*, 70 Wash. & Lee L. Rev. 3 (2013) ("The government should be viewed as having an interest in closing loopholes that allow abusive practices. In general, government has an interest in protecting the integrity and fairness of programs it administers."); *United States v. Borjesson*, 92 F.3d 954, 955-56 (9th Cir. 1996) (recognizing as important the government's interest in maintaining integrity and the appearance of integrity in government programs); *Donovan v. Fitzsimmons*, 778 F.2d 298, 319 (7th Cir. 1985) ("[A]side from protecting the individual beneficiaries of these pension programs, the government in this case clearly has a separate and unique interest in protecting the very integrity, heart and lifeline of the program itself.").

is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of solely state law.

As former General Counsel Fred Franklin stated in 1997, in Legal Advisory Opinion No. 97-1, “[t]he authority of the General Counsel to make binding legal decisions is the mortar that holds the structure of our consolidated government firm.” He further opined that there is no Charter authorization allowing an officer or entity of the Consolidated Government to obtain independent legal counsel to challenge the General Counsel’s determination.

PERPETUAL DISREGARD OF OFFICE OF GENERAL COUNSEL LEGAL ADVICE

The Board’s obstinacy has not just been in regards to the creation of SSVRP, but also the Board’s insistence that it has complete authority over its administrative expenses and that, like the SSVRP, the Council has no authority to determine whether the appropriations are reasonable. On three occasions, the Office of General Counsel has issued letters and memoranda explaining that the Board does not have complete autonomy as to all of its financial decisions.⁷

The last memorandum, dated August 28, 2014, advised that not only is the City Charter clear that the City Council, as the legislative body, is the sole governing body vested with the power to appropriate funds to the consolidated government, Florida Statutes and common law support that proposition as well. The memorandum responded to questions raised by the City Council’s Finance Committee as to the penalties and consequences that result from the PFPF Board exceeding the appropriated amount for administrative expenses in its annual budget approved by City Council. The Office of General Counsel advised as to the consequences of expenditures exceeding appropriations without obtaining further City Council approval, advising:

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.

Section 106.331, *Ordinance Code*, prohibits any officer or employee of an independent agency who receives appropriations from Council to expend such money for any purpose that Council has not

⁷ See *Jones v. Bd. of Trustees of Ky. Ret. Sys.*, 910 S.W.2d 710, 714-15 (Ky. 1995) (“While the Board’s necessary function is the management of the [Kentucky Employees Retirement System], such does not encompass an unrestricted right to demand funding from the General Assembly The contract between the Commonwealth and its employees is for retirement funding. It is not a contract which denies the General Assembly the ability to fashion its ways or means in providing the pension funds It was the duty of the General Assembly to take steps to ensure the continued operation of government without excessive generosity to one governmental entity at the expense of others.”).

authorized. Section 106.333, *Ordinance Code*, makes any contract or other indebtedness in violation of this ordinance null and void.

In addition, as recently as October 2015, the Board approved an amendment to the unauthorized SSVRP to provide for an “excess benefit arrangement,” because Section 415(b) of the Internal Revenue Code establishes a maximum dollar limitation on annual payments to a beneficiary from a qualified defined benefit pension fund, and John Keane’s purported SSVRP pension benefit exceeds the allowable amount. At that meeting, the Office of General Counsel requested that the Board defer any action on the excess benefit arrangement, questioning the Board’s authority as to such action in several regards. The Board once again ignored the Office of General Counsel.

PERSONAL LIABILITY

The legal opinions of the General Counsel bind each and every officer of the City and its independent agencies as well as any and all employees. Any person who acts inconsistently with these opinions, particularly any person who expends or authorizes expenditures of any public funds in contravention of these opinions and in dereliction of the City’s laws, risks personal liability. Section 22.05(b), City Charter providing protection for PFPF Board members “when relying upon the advice of any attorney employed by the board,” does *not* shield the PFPF Board members who rely on the advice of an attorney who disagrees with a binding legal opinion of the General Counsel.⁸

A General Counsel opinion loses both its value and integrity as binding if an independent agency such as the PFPF Board can ignore such advice merely because another attorney disagrees with the General Counsel. Such a reading is anathema to the Charter and in direct contradiction to the very founding documents of the City.

CONCLUSION

In light of the above, it is my opinion that the unauthorized SSVRP pension benefits should be immediately discontinued. While a court could determine the participants are only entitled to a return of their employee contributions, the equities of the situation may warrant providing the plan participants with a prospective pension benefit for their years of service that is equitably equivalent to the amount they would have received had they participated in the City’s only existing and legitimately authorized retirement plan (other than the Police and Fire Pension Fund Plan), the General Employees Retirement Plan. Therefore, it is my opinion that in the event that the unauthorized SSVRP pension benefits are discontinued, the plan participants be provided retirement benefits as if they had been participating in the

⁸ See e.g., *Chicago Park Dist. v. R.E. Herczel & Co.*, 26 N.E.2d 119 (Ill. 1940) (finding that officers of park district were held to have notice of law covering their duties and would be held liable for unauthorized issuance of checks, notwithstanding advice from attorney for district that such action was legal).

City's General Employees Retirement Plan during the time period that they were participating in the unauthorized SSVRP.

Per your inquiry Mayor, the City, as the ultimate insurer and taxing authority responsible for funding City pension plans, has the power to halt or modify unlawfully funded pension payouts being made by the City. As the chief executive and administrative officer of the consolidated government⁹, you have the authority to affect such directive in accordance with all applicable Federal, State and Local Law.

Please do not hesitate to contact me with any other questions or concerns.

Sincerely,



Jason R. Gabriel
General Counsel

CC: Sam E. Mousa, Chief Administrative Officer
Kerri Stewart, Chief of Staff
Mike Weinstein, Director of Finance
Joey Grieve, City Treasurer
Rita Mairs, Chief of Litigation
Loree French, Senior Assistant General Counsel

⁹ Article 6, Section 6.04, City Charter.