POLICE AND FIRE PENSION FUND

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John Keane
Executive Director - Administrator

August 11, 2014

Honorable Clay Yarborough
President, City Council
City Hall – 4th Floor
117 W. Duval Street
Jacksonville, FL 32202

RE: Ordinance 2014-377

Dear President Yarborough:

I write today, in the spirit of cooperation concerning Ordinance 2014-377, and to bring to your attention issues contained in the referenced Ordinance that may impact the continued receipt of over ten million dollars in Chapter Funds for the Police and Fire Pension.

The Legislature in creating Chapters 175 and 185 declared that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of Police Officers and Fire Fighters. Further, pursuant to the provision of Article VII, Section 18, the Legislature determined and declared these Acts fulfills an important State interest. I have attached a copy of several sections of Chapter 185. Please note Chapter 175 contains virtually the identical language.

Further, the Legislature preempted changes on a local level to Chapters 175 and 185 by enacting the following language:

"The provisions of this section may not be altered by a participating municipality or special fire control district operating a chapter plan or local law plan under this chapter".

Both Chapters establish a 5 Member Board of Trustees which includes 2 legal residents of the Municipality appointed by the City Council, 1 Police Officer, 1 Fire Fighter, the fifth Member shall be chosen by the majority of the previous four Members.

I have attached a copy of Attorney General Opinion 2012-05. Only Question 1 is relevant to this discussion. Question:

1. Do sections 185.05 and 175.061(1)(a), Florida Statutes, preclude the amendment of the City of North Miami Beach's Police and Firefighters Pension Plan ordinance to add criteria for selection of the Police and Firefighters Pension Plan Board's fifth member?

The Attorney General responded – In summary:

1. The City of North Miami Beach may not, by ordinance, add criteria for selection of the Police and Firefighters Pension Plan board's fifth member.

And also noted:

"However, subsection (7) of section 185.05, Florida Statutes, specifically provides that "[t]he provisions of this section may not be altered by a participating municipality operating a chapter or local law plan under this chapter." Thus, the statutory scheme relating to the composition of the board of trustees for firefighter and police pensions may not be altered by a municipality participating in a local law plan such as the City of North Miami Beach".

Given that the required uniformity in Chapter 175 and 185, the standards for preemption in the case of uniform State laws and the recent Florida Supreme Court ruling in the City of Aventura that the Ordinance before the Court was invalid because it was in conflict with state law and was both expressly and impliedly preempted by state law, we believe this Ordinance has serious legal and financial issues.

Thank you for your service to our City and for taking time to review this important issue.

Yours truly,

John Keane
Executive Director – Administrator

JK/dm

cc: *City Council Members*
Kirk Sherman, Council Auditor
Mayor Alvin Brown
Chris Hand, Chief of Staff
Ronnie Belton, Chief Financial Officer
Joey Greive, City Treasurer
Jason Gabriel, General Counsel
Stephen Durden, Office of General Counsel
Margaret Sidman, Office of General Counsel
Cheryl Brown, Council Secretary

Encl: *Excerpts from Chapter185*
Florida Attorney General Advisory Legal Opinion- AGO 2012-05
Supreme Court of Florida Opinion – City of Aventura, Respondent – June 12, 2014 – pgs 1 & 2

Excerpts from Chapter 185

185.01 Legislative declaration.—

1) It is hereby found and declared by the Legislature that police officers as hereinafter defined perform both state and municipal functions; that they make arrests for violations of state traffic laws on public highways; that they keep the public peace; that they conserve both life and property; and that their activities are vital to public welfare of this state. Therefore the Legislature declares that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of police officers as hereinafter defined and intends, in implementing the provisions of s. 14, Art. X of the State Constitution as they relate to municipal police officers' retirement trust fund systems and plans, that such retirement systems or plans be managed, administered, operated, and funded in such manner as to maximize the protection of police officers' retirement trust funds. Therefore, the Legislature hereby determines and declares that the provisions of this act fulfill an important state interest.

(2) This chapter hereby establishes, for all municipal pension plans now or hereinafter provided for under this chapter, including chapter plans and local law plans, minimum benefits and minimum standards for the operation and funding of such plans, hereinafter referred to as municipal police officers' retirement trust funds. The minimum benefits and minimum standards set forth in this chapter may not be diminished by local ordinance or by special act of the Legislature, nor may the minimum benefits or minimum standards be reduced or offset by any other local, state, or federal plan that may include police officers in its operation, except as provided under s. 112.65.

185.05 Board of trustees; members; terms of office; meetings; legal entity; costs; attorney's fees.—For any municipality, chapter plan, local law municipality, or local law plan under this chapter:

(1) In each municipality described in s. 185.03 there is hereby created a board of trustees of the municipal police officers' retirement trust fund, which shall be solely responsible for administering the trust fund. Effective October 1, 1986, and thereafter:

(a) The membership of the board of trustees for chapter plans consists of five members, two of whom, unless otherwise prohibited by law, must be legal residents of the municipality and must be appointed by the legislative body of the municipality, and two of whom must be police officers as defined in s. 185.02 who are elected by a majority of the active police officers who are members of such plan. With respect to any chapter plan or local law plan that, on January 1, 1997, allowed retired police officers to vote in such elections, retirees may continue to vote in such elections. The fifth member shall be chosen by a majority of the previous four members, and such person's name shall be submitted to the legislative body of the municipality. Upon receipt of the fifth person's name, the legislative body shall, as a ministerial duty, appoint such person to the board of trustees. The fifth member shall have the same rights as each of the other four members appointed or elected, shall serve as trustee for a period of 2 years, and may succeed himself or herself in office. Each resident member shall serve as trustee for a period of 2 years, unless sooner replaced by the legislative body at whose pleasure the member serves, and may succeed himself or herself as a trustee. Each police officer member shall serve as trustee for a period of 2 years, unless he or she sooner leaves the employment of the municipality as a police officer, whereupon a successor shall be chosen in the same manner as an original appointment. Each police officer may succeed himself or herself in office. The terms of office of the appointed and elected members of the board of trustees may be amended by municipal

ordinance or special act of the Legislature to extend the terms from 2 years to 4 years. The length of the terms of office shall be the same for all board members.

(b) The membership of boards of trustees for local law plans is as follows:

1. If a municipality has a pension plan for police officers only, the provisions of paragraph (a) shall apply.

2. If a municipality has a pension plan for police officers and firefighters, the provisions of paragraph (a) apply, except that one member of the board shall be a police officer and one member shall be a firefighter as defined in s. 175.032, respectively, elected by a majority of the active firefighters and police officers who are members of the plan.

3. Any board of trustees operating a local law plan on July 1, 1999, which is combined with a plan for general employees shall hold an election of the police officers, or police officers and firefighters if included, to determine whether a plan is to be established for police officers only, or for police officers and firefighters where included. Based on the election results, a new board shall be established as provided in subparagraph 1. or subparagraph

2., as appropriate. The municipality shall enact an ordinance to implement the new board by October 1, 1999. The newly established board shall take whatever action is necessary to determine the amount of assets which is attributable to police officers, or police officers and firefighters where included. Such assets shall include all employer, employee, and state contributions made by or on behalf of police officers, or police officers and firefighters where included, and any investment income derived from such contributions. All such moneys shall be transferred into the newly established retirement plan, as directed by the board.

With respect to any board of trustees operating a local law plan on June 30, 1986, this paragraph does not permit the reduction of the membership percentage of police officers or police officers and firefighters. However, for the sole purpose of changing municipal representation, a municipality may by ordinance change the municipal representation on the board of trustees operating a local law plan by ordinance, only if such change does not reduce the membership percentage of police officers, or police officers and firefighters, or the membership percentage of the municipal representation.

* * *

(7) The provisions of this section may not be altered by a participating municipality operating a chapter or local law plan under this chapter.

Florida Attorney General
Advisory Legal Opinion

Number: AGO 2012-05
Date: January 25, 2012
Subject: Police/Firefighter pension plan, amendment

Ms. Darcee S. Siegel
City Attorney
City of North Miami Beach, Florida
17011 Northeast 19th Avenue
North Miami Beach, Florida 33162-3100

RE: MUNICIPALITIES - PENSIONS - POLICE AND FIREFIGHTER PENSIONS - ORDINANCES - QUORUM - amendment of city's police and firefighter pension plan by ordinance. ss. 175.061 and 185.05, Fla. Stat.

Dear Ms. Siegel:

On behalf of the City of North Miami Beach, you have asked for my opinion on the following questions:

1. Do sections 185.05 and 175.061(1)(a), Florida Statutes, preclude the amendment of the City of North Miami Beach's Police and Firefighters Pension Plan ordinance to add criteria for selection of the Police and Firefighters Pension Plan Board's fifth member?

2. Do these statutes preclude amendment of the city's ordinance to add a provision defining what constitutes a quorum of the board?

In sum:

1. The City of North Miami Beach may not, by ordinance, add criteria for selection of the Police and Firefighters Pension Plan board's fifth member.

2. No provisions of Chapter 175 or 185, Florida Statutes, would preclude amendment of the city's ordinance to add an interest-based or constituency-based provision defining what constitutes a quorum of the board of the Police and Firefighters Pension Plan Board.

Chapters 175 and 185, Florida Statutes, respectively, create a uniform pension and retirement system for firefighters and police officers in a municipality and establish minimum standards for the operation and funding of the trust funds.[1] In considering these

chapters, the court in Florida League of Cities, Inc. v. Department of Insurance and Treasurer,[2] stated:

"Both chapters authorize two types of retirement or pension plans. One type is known as 'chapter plans' and the other as 'local law plans.' Chapter plans are those created under chapters 175 and 185, and the provisions of those chapters are controlling on the plans' terms, conditions, and benefits. Local law plans are those created either by special act of the legislature or by municipal ordinance and contain provisions relating to terms, conditions, and benefits that may substantially differ from many requirements found in chapters 175 and 185 for chapter plans."

The court determined that the individual sections in Chapters 175 and 185, Florida Statutes, are applicable to local law plans only if there is a specific provision expressly making them applicable to such plans.[3] This conclusion was based on a recognition of a municipality's constitutional and statutory home rule powers.

Subsequent to the decision in *Florida League of Cities, Inc. v. Department of Insurance and Treasurer*,[4] the Legislature amended Chapters 175 and 185, Florida Statutes, to address confusion over the application of the statutory standards in these chapters to local law plans.[5] The expressed intention of this legislation was clearly stated in the staff analysis: "CS/HB 261, if enacted, would establish minimum standards and benefits for ALL plans receiving funding under Chapters 175 or 185, F.S."[6] (emphasis in original) CS/HB 261 was enacted as Chapter 99-1, Laws of Florida, amending the provisions of both Chapter 175 and 185, and became effective March 12, 1999.[7]

Question One

You have asked whether the Police and Firefighters Pension Plan Ordinance of the City of North Miami Beach may be amended to add criteria for the selection of the Police and Firefighters Pension Plan Board's fifth member. You advise that the "Retirement Plan for Police Officers and Firefighters of the City of North Miami Beach" is a "local law plan" and that it includes both police officers and firefighters in one plan as described in section 185.02(10), Florida Statutes.[8] I would note that Ordinance 89-18, the ordinance creating the North Miami Beach retirement plan, states that the ordinance is intended to accomplish the "establishment of a new pension plan for police officers and firefighters pursuant to Chapters 175 and 185, Florida Statutes[.]"

Section 185.05(1), Florida Statutes, sets out the requirements for board of trustees of police pensions.[9] The statute creates a board of trustees of the pension trust fund in each municipality and makes each board solely responsible for administering the trust fund. The statute also establishes the composition of the board if a local law

plan covers both firefighters and police officers by referring to requirements that relate to chapter plans. Section 185.05(1)(b), Fla. Stat., provides that the "membership of boards of trustees for local law plans shall be as follows:

"* * *

If a municipality has a pension plan for police officers and firefighters, the provisions of paragraph (a) apply, except that one member of the board shall be a police officer and one member shall be a firefighter as defined in s. 175.032, respectively, elected by a majority of the active firefighters and police officers who are members of the plan."

In more detail, subsection (a) provides:

"The membership of the board of trustees for chapter plans consists of five members, two of whom, unless otherwise prohibited by law, must be legal residents of the municipality and must be appointed by the legislative body of the municipality, and two of whom must be police officers as defined in s. 185.02 who are elected by a majority of the active police officers who are members of such plan. . . . The fifth member shall be chosen by a majority of the previous four members, and such person(s name shall be submitted to the legislative body of the municipality. Upon receipt of the fifth person(s name, the legislative body shall, as a ministerial duty, appoint such person to the board of trustees. The fifth member shall have the same rights as each of the other four members appointed or elected, shall serve as trustee for a period of 2 years, and may succeed himself or herself in office. Each resident member shall serve as trustee for a period of 2 years, unless sooner replaced by the legislative body at whose pleasure the member serves, and may succeed himself or herself as a trustee. Each police officer member shall serve as trustee for a period of 2 years, unless he or she sooner leaves the employment of the municipality as a police officer, whereupon a successor shall be chosen in the same manner as an original appointment. Each police officer may succeed himself or herself in office. The terms of office of the appointed and elected members of the board of trustees may be amended by municipal ordinance or special act of the Legislature to extend the terms from 2 years to 4 years. The length of the terms of office shall be the same for all board members."

Thus, section 185.05(1), Florida Statutes, does not impose any qualifications on the "fifth member" of a board of trustees of a local law plan.[10]

However, subsection (7) of section 185.05, Florida Statutes, specifically provides that "[t]he provisions of this section may not be altered by a participating municipality operating a chapter or local law plan under this chapter." Thus, the statutory scheme

relating to the composition of the board of trustees for firefighter and police pensions may not be altered by a municipality participating in a local law plan such as the City of North Miami Beach.

Based on the clear language of section 185.05(7), Florida Statutes, which states that participating municipalities operating either a chapter or local law plan are precluded from altering the provisions of section 185.05, Florida Statutes, it is my opinion that the City of North Miami Beach may not by ordinance add criteria for selection of the Police and Firefighters Pension Plan board's fifth member to a municipal ordinance. The addition of such criteria would effectively "alter" the provisions of section 185.05, Florida Statutes, in contradiction of section 185.05(7). However, this would not preclude the board members who are choosing the fifth member from considering the particular qualifications of any potential board member.

Question Two

You also ask whether these statutes preclude amendment of the city's ordinance to add a provision defining what constitutes a quorum of the board. The proposed ordinance amendment you have provided suggests an interest-based or constituency-based quorum requirement.

The general powers and duties of boards of trustees for municipal firefighter and police pension plans are prescribed by section 185.06, Florida Statutes, which, by its terms applies to "any municipality, chapter plan, local law municipality, or local law plan under this chapter[.]"[11] Subsection (2) of the statute provides:

"Any and all acts and decisions shall be effectuated by vote of a majority of the members of the board; however, no trustee shall take part in any action in connection with his or her own participation in the fund, and no unfair discrimination shall be shown to any individual employee participating in the fund."[12]

However, no provision of either Chapter 185 or 175, Florida Statutes, prescribes the composition of a quorum for purposes of conducting business. While the City of North Miami Beach may not alter the provisions of subsection (2) relating to voting, in the absence of any provision of these chapters delineating quorum requirements, it would appear that this is a subject upon which the city may legislate.[13]

A "quorum" is generally defined as "[t]he minimum *number* of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business."[14] (e.s.) Thus, the most common statutory quorum requirements simply provide the number of members who must be present in order to conduct business. Included within the definitions of the term "quorum" is an "interest-

based quorum" which is defined as "[a] quorum determined according to the presence or representation of various constituencies. - Also termed constituency-based quorum."[15] The language of your proposed ordinance amendment appears to be in the nature of an interest-based or constituency-based quorum which would require that a city resident member of the board and a plan member of the board be present in order to constitute a quorum. While the Florida Statutes contain a few instances of "interest-based quorums," the vast majority of quorum requirements merely speak to the requirement of a majority of the members[16] or prescribe a definite number of members[17] necessary to constitute a quorum. Because the Florida Statutes do contain legislative examples of interest-based quorums,[18] I am of the opinion that a municipality could legislate in a similar fashion.[19]

Thus, it is my opinion that these statutes do not preclude amendment of the city's ordinance to add a provision defining what constitutes a quorum of the board of the city's Police and Firefighters Pension Plan Board.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

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[1] *See* ss. 175.021 and 185.01, Fla. Stat.

[2] 540 So. 2d 850, 853 (Fla. 1st DCA 1989).

[3] *Id.* at 859.

[4] *Id.*

[5] *See* 1999 Florida House of Representatives Staff Analysis on CS/HB 261, p. 2, dated 2/4/1999.

[6] *Id.* at p. 4.

[7] *See* s. 83, Ch. 99-1, Laws of Fla.

[8] *See* Ordinance 89018, City of North Miami Beach and email from Darcee Siegel, City Attorney, dated November 10, 2011.

[9] *And see* s. 175.061, Fla. Stat., relating to firefighter pensions.

[10] This language parallels that of s. 175.061(1), Fla. Stat.

[11] *See also* s. 175.071, Fla. Stat.

[12] *And see* s. 175.071(2), Fla. Stat.

[13] *See* Art. VIII, s. 2(b), Fla. Const., and s. 166.021, Fla. Stat., and *Florida League of Cities, Inc. v. Department of Insurance and Treasurer*, 540 So. 2d 850 (Fla. 1st DCA 1989).

[14] *See* "quorum," Black's Law Dictionary, p. 1284 (8th ed. 2004).

[15] *Id.*

[16] *See, e.g.*, ss. 14.29 and 43.291, Fla. Stat.

[17] *See, e.g.*, ss. 39.702, 69.021, and 106.24, Fla. Stat.

[18] *See, e.g.*, s. 194.015, Fla. Stat., relating to value adjustment boards and providing that "[a]ny three members shall constitute a quorum of the board, except that each quorum must include at least one member of said governing board, at least one member of the school board, and at least one citizen member and no meeting of the board shall take place unless a quorum is present[;]" s. 298.11(3), Fla. Stat., relating to water control districts and stating that "[t]he owners and proxy holders of district acreage who are present at a duly noticed landowners' meeting shall constitute a quorum for the purpose of holding such election or any election thereafter."

[19] Section 166.021, Fla. Stat., recognizes that, under Florida's Municipal Home Rule Powers Act and s. 2(b), Art. VIII, State Const., a municipality has the power to enact legislation "concerning any subject matter upon which the state Legislature may act" with certain inapplicable exceptions.

Supreme Court of Florida

No. SC12-644

RICHARD MASONE,
Petitioner,

vs.

CITY OF AVENTURA,
Respondent.

No. SC12-1471

CITY OF ORLANDO, FLORIDA,
Petitioner,

vs.

MICHAEL UDOWYCHENKO, etc., et al.,
Respondents.

[June 12, 2014]
CORRECTED OPINION

CANADY, J.

In these consolidated cases, we consider whether municipal ordinances imposing penalties for red light violations detected by devices using cameras were invalid because they were preempted by state law. At issue in these cases is the

operation of ordinances prior to July 1, 2010, the effective date of the Mark Wandall Traffic Safety Act, ch. 2010-80, Laws of Fla., which authorized—subject to statutory requirements—the use of red light traffic infraction detectors by local governments and the Florida Department of Highway Safety and Motor Vehicles.

In City of Aventura v. Masone, 89 So. 3d 233, 234 (Fla. 3d DCA 2011), the Third District Court of Appeal held that Aventura's ordinance was a valid exercise of municipal power under section 316.008(1)(w), Florida Statutes (2008), which specifically grants "local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power," authority for "[r]egulating, restricting, or monitoring traffic by security devices or personnel on public streets and highways." The Fifth District Court of Appeal reached a contrary conclusion in City of Orlando v. Udowychenko, 98 So. 3d 589, 591 (Fla. 5th DCA 2012), holding that Orlando's ordinance was invalid because it was in conflict with state law and was both expressly and impliedly preempted by state law. The Fifth District ruled that the imposition of penalties other than those specifically provided for by state statute "for running a red light in a particular municipality does not fall within the specific authority of section 316.008(1)(w)[,]" Florida Statutes (2008), which the court concluded "appears to contemplate only unique situations for which a statewide law is lacking or is inadequate." Id. at 599. The Fifth District certified conflict with the decision in City of Aventura. Id.