April 4, 2023

Mayor and City Council
City of Doral
8401 NW 53rd Terrace
Doral, Florida 33166

Re: Elected Officials' Retirement Plan – Summary of Initial Findings

Dear Mayor and City Council:

On February 10, 2021, the City Council adopted Ordinance 2021-02 (the "Ordinance"), establishing a retirement system for former, current, and future elected officials. The Ordinance provides lifetime pension, health and life insurance benefits for elected officials who have served at least 8 years or two full terms in office, are no longer serving as an elected official, and attain age 60. Elected officers who serve 8 years or two full terms, leave office, and attain age 60, are entitled to a pension equal to 50% of the average of their last 3 years of compensation (salary and any additional emoluments), and those who serve 12 or more years are entitled to a pension equal to 100% of the average of their last 3 years of compensation, plus health and life insurance benefits.

Following its adoption, the validity of the Ordinance was called into question. Pursuant to a recommendation by the Interim City Attorney the City Council voted to retain this firm to evaluate the validity of the Ordinance and legal issues surrounding the funding and administration of the Elected Officials' Retirement Plan (hereinafter the "Plan"). We initially identified the following issues for consideration:

1. Whether an actuarial impact analysis was performed either before or concurrently with the adoption of the Ordinance as required by Florida's Constitution and Florida Statutes;
2. Whether the Ordinance and actuarial impact statement were submitted to the State Division of Retirement between first and second reading, as required by law;
3. Whether all or portions of the Ordinance contravene Section 215.425, Florida Statutes, which prohibits extra compensation to any officer after the service has been rendered, subject to certain exceptions;
4. Whether the requirement of a unanimous vote to amend the Ordinance is constitutional/enforceable;

5. Whether the City has been filing the statutorily required actuarial valuation reports with the Florida Division of Retirement; and

6. Whether certain provisions of the Plan violate state and/or federal laws/regulations governing retirement plans of public entities.

We have reviewed several records related to the creation, adoption, funding and administration of the Plan. In order to complete a detailed report on our findings and conclusions, additional information will be required. In order to obtain that information, direction by the Council is requested, as specified below.

Requirements Under Florida Law for Any Increase in Pension Benefits

Florida imposes several important requirements with respect to the establishment of a retirement plan by a unit of local government. Section 14, Art. X of the Florida Constitution states:

> A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

This provision was intended to ensure that all benefit increases under publicly funded retirement plans were appropriately funded, and to ensure that local governments did not pass on to future taxpayers the cost of funding an increase in retirement benefits. Although the language in Art. X, Sec. 14 applies to an "increase in benefits," the Florida Supreme Court has held the requirements of Sec. 14 apply to the adoption of a new pension plan, as well as an increase in benefits under an existing plan. *See*, *Branca v. City of Miramar*, 634 So.2d 604, 606 (Fla. 1994).

The Florida Legislature enacted Part VII of Chapter 112, Florida Statutes (Actuarial Soundness of Retirement System) to implement the provisions of s. 14, Art. X. F.S. §112.61. The Legislative Intent of Part VII, Chapter 112 is to:

> … prohibit the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers. Actuarial experience may be used to fund additional benefits, provided that the present value of such benefits does not exceed the net actuarial experience accumulated from all sources of gains and losses. This act hereby establishes minimum standards for the operation and funding of public employee retirement systems and plans.

F.S. §112.61.

Part VII, Chapter 112 applies to all units of state and local government that participate in, operate, or administer a retirement plan for public employees, the benefits of which are funded, in whole or in part, by public funds. F.S. § 112.62. In the event of a conflict between Ch. 112 and a local ordinance relating to a retirement system or plan, the provisions of Ch. 112 prevail. *Id*.

The adoption of the City of Doral Elected Officials' Plan was subject to the requirements of Sec. 14, Art. X of the Florida Constitution and Part VII, Ch. 112, Florida Statutes, and those provisions continue to apply to the funding, administration and operation of the Plan. Based on my research, these requirements were

not observed during adoption of the Elected Officials' Plan, and many of the requirements applicable to the administration and funding of the Plan have not been followed since the Plan's inception.

For example: Prior to adoption of the Elected Officials' Plan, the City was required to have an actuarial review of the Plan performed, and to issue a statement of actuarial impact of the Plan, consistent with that actuarial review. The statement was required to certify that the Plan and the funding of the Plan complied with s. 14, Art. X of the State Constitution and with s. 112.64, Florida Statutes. A copy of the actuarial impact statement was then required to be submitted to the Florida Division of Retirement, prior to adoption. *See*, F.S. § 112.63 (3).

None of the pre-adoption requirements were performed by the City. No actuarial review was performed prior to adoption, and no statement of actuarial impact was issued. This is significant not only because the law was not followed, but because it indicates that the City adopted the Plan without possessing any knowledge of what the benefits would cost taxpayers, or how those benefits would be funded. The Division of Retirement has confirmed that no documents related to the Plan have been submitted by the City.

Since the Plan's adoption, funding requirements under Florida law have not been adhered to. The Plan appears to be funded, to some extent, on a pay-as-you-go method, which is not legal. The City's annual contribution must be equal to the normal cost and an amount sufficient to amortize the unfunded liability. It is unclear whether this is the case. The services of an independent actuary would be required for an adequate determination of the extent to which the Plan has complied with funding requirements.

Because the law requires the City to submit the Plan to the Division of Retirement, it is my recommendation that the City do so as soon as possible. With the Council's authorization, I will submit to the Division of Retirement the Plan document and documents relevant to the initial Plan funding which were created after adoption, along with a letter briefly explaining the circumstances surrounding the implementation of the Plan. In addition, I recommend the City engage the services of an actuary familiar with Florida law to conduct an independent review of the cost of the Plan and the funding calculations performed, to date.

In my opinion, the findings of the Division and the actuary are vital to making informed decisions going forward. Once we have that information, I will submit a detailed report of my conclusions and recommendations.

While not all of our conclusions are final, a summary of the legal conclusions we can report follows.

Section 215.425, Florida Statutes – Prohibition on "Extra Compensation" to Public Employees

One of the issues we addressed is whether retirement benefits can be provided retroactively to former elected officers who left office before the Elected Officials' Plan was implemented. In my opinion, providing retirement benefits to former elected city officers who left office before the Plan was in effect would be prohibited by section 215.425, Florida Statutes

Section 215.425(1), Florida Statutes states, "No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made…" The purpose of this provision is to carry out a basic and fundamental principle that public funds may be used only for a public purpose. It is contrary to this policy to use public funds to award extra compensation for work which has already been performed for agreed upon compensation. Retirement and pension rights and public

employer contributions toward retirement benefits are considered to be a part of an employee's compensation. *See, City of Hialeah v. Willey*, 189 So.2d 194 (Fla 3rd DCA 1966).

The Florida Attorney general has issued several opinions concerning the intent and application of section 215.425. In AGO 81-98, the Attorney General opined that a city may not expend public funds to reimburse retired city employees for payments made to purchase additional past service credit under the city retirement plan, where the reimbursement was not authorized by the city at the time the employees retired. The Attorney General summarized the purpose of section 215.425 as follows:

> The purpose of s. 215.425, (prohibiting extra compensation for work already performed), is to carry out the basic and fundamental principle that public funds may be used only for a public purpose, and it is contrary to this policy to use public funds to give extra compensation to public employees for work they have already performed for an agreed-upon wage.

In AGO 89-53, the Attorney General opined that a city's purchase of an annuity for a retired employee who was already receiving pension benefits from the city pension plan at the time the annuity was authorized would violate the statutory prohibition against extra compensation for work already performed.

AGO 91-37 addressed a city's payment for unused sick leave to a retired employee, where the payment was for leave in excess of the maximum amount of leave for which the employee could be compensated at the time he retired, in accordance with city policy. The additional payment was authorized after the employee retired and separated from city employment. Ago 91-37 states:

> In accordance with the city's policies, the employee received payment for 120 days of sick leave upon retirement as part of his "final pay." The city now is considering whether it may pay the retired employee a monetary sum equivalent to the value of his unused sick leave in excess of 120 days. The payment for sick leave in excess of 120 days would appear to be limited only to the particular employee and would not be a revision of the city's policies or retirement plan. . .
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> Section 215.425, F.S., provides in pertinent part that "[n]o extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered."[2] The purpose of this provision is to carry out a basic and fundamental principle that public funds may be used only for a public purpose. It is contrary to this policy to use public funds to award extra compensation for work which has already been performed for an *agreed upon wage*. See, e.g., AGO's 81–98 and 75–279.
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> Thus, retroactive extra compensation, lump sum allowances or other forms of compensation not provided by law or contract are prohibited by s. 215.425, F.S. Extra compensation generally refers to an additional payment for services performed or compensation over and above that fixed by contract or by law when the services are rendered.

Retroactive Application of Pension Benefits

There is also a question of whether the Plan language permits retroactive application to cover past elected officials. Unless the plain language in a pension plan clearly indicates the plan was intended to apply retroactively, it is assumed to apply prospectively only. The Plan does not mention "former" elected officials and there is no mention of individuals who separated from the City prior to adoption.

On the question of retroactive application of a law, Florida follows the general rule set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which holds that if a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases unless retroactive application was clearly intended by the legislature. Florida courts have consistently reviewed cases with the understanding that a "substantive" law will operate prospectively absent clear legislative intent to the contrary, while procedural or remedial laws may operate retrospectively. Substantive laws are those that create new rights or take away existing rights or impose new obligations or duties. Procedural laws address the means and methods under which those duties and rights are enforced. And remedial laws operate in furtherance of existing remedies but do not create new rights or take away vested rights. A law or ordinance establishing new retirement benefits, while imposing new obligations on an employer, would fall under the category of substantive law.

The recent case of *Weaver v. Volusia County*, 352 So.3d 392 (Fla. 5th DCA 2022) is instructive. In 2019, the Florida Legislature enacted a law that provided previously unavailable health insurance and retirement benefits to firefighters who were diagnosed with cancer. The law took effect on July 1, 2019. *See* F.S. § 112.1816. Kathleen Weaver retired from her employment as a Volusia County firefighter in 2012 and was diagnosed with cancer in 2017. She applied for benefits under the 2019 cancer benefit law and her application was denied by Volusia County. Weaver filed a declaratory judgment action against the County in Circuit Court. Summary judgment was granted in favor of the County on the grounds that sec. 112.1816 was substantive and applied prospectively.

The Fifth District Court of Appeal agreed with the trial court. Finding that the law provides benefits to firefighters that were previously unavailable to them, the Court concluded that the enactment of sec. 112.1816 was a substantive change in law. The Court said, "[a}s a substantive law, sec. 112.1816 is presumed to apply prospectively unless the text 'provides for retroactive application,' and such application is constitutionally permissible." *Id* at 395.

In my opinion, the Plan should not have been applied retroactively to provide benefits to former elected officials who were not in office when the Plan was adopted.

Equitable Estoppel

If the City ultimately decides that the Elected Officials' Plan is unconstitutional and should be terminated, it is likely that litigation will be pursued by former elected officers who are already receiving benefits. One of the issues that is certain to arise is whether the City is "estopped" from terminating retirement benefits of retirees who claim to have made retirement decisions in reliance on the existence of the Plan.

A Supreme Court decision in the case *Branca v. City of Miramar,* 634 So.2d 604, 606 (Fla. 1994) addressed theissue of estoppel, with respect to pension benefits. Frank Branca was the Mayor of the City of Miramar for nearly sixteen consecutive years. In 1988, the City of Miramar passed Ordinance 88-16 which created a pension plan under which an elected official retiring after twenty years would receive annually 50% of

his or her average annual salary for the preceding five years. The ordinance also provided for the elected official to contribute five percent of salary.

On May 15, 1989, a new City Commission was elected. The new Commissioners had made the retirement plan an issue during the campaign. In 1989, in the middle of a term as Mayor, Branca took an early retirement under the ordinance. The newly elected Commission then voted to repeal the ordinance; however the former Mayor continued receiving benefits.

The City Clerk submitted the plan to the Florida Department of Administration, Division of Retirement for review. The Division determined the ordinance violated Article X, Section 14 of the Florida Constitution and part VII of Chapter 112, Florida Statutes. The city then filed a declaratory judgment action, seeking a declaration that Ordinance 88-16 was unconstitutional. The circuit judge held the pension benefits to the Mayor were unlawful and should not be paid. The circuit judge also found that the ordinance violated Article X, Section 14 of the Florida Constitution. Mayor Branca appealed, claiming the City was estopped from terminating his benefits because he relied on the existence of the plan when he decided to retire.

The Fourth District Court of Appeal affirmed the decision of the lower court. Both the circuit court and the Court of Appeal rejected the argument by Branca that the City was estopped from discontinuing his retirement benefits. The case was appealed to the Supreme Court, which overturned the Fourth DCA and determined Branca presented a valid claim of estoppel.

To justify a claim of estoppel against a governmental body, there must be (1) a representation by the party estopped to the party claiming estoppel as to some material fact; (2) a reliance upon the representation by the party claiming the estoppel; and (3) a change in such party's position caused by his reliance upon the representation to his detriment. *Department of Revenue v. Hobbs*, 368 So.2d 367 (Fla. 1st DCA 1979), *appeal dismissed* 378 So.2d 345 (Fla.1979). The act on which the aggrieved party relied must be one on which he had a right to rely. *Greenhut Construction Company, Inc. v. Henry A. Knott, Inc.*, 247 So.2d 517 (Fla. 1st DCA 1971). The doctrine of equitable estoppel, however, may only be applied against a governmental entity under exceptional circumstances. *Monroe County v. Hemisphere Equity Realty, Inc.*, 634 So.2d 745, 747 (Fla. 3d DCA 1994). Those rare and exceptional circumstances must include "affirmative representations" or some "positive act" on the part of the government on which a plaintiff has a right to rely. *Hoffman v. State Dep't of Mgmt. Servs., Div. of Retirement*, 964 So.2d 163, 166 (Fla. 1st DCA 2007); *Wise v. Dep't of Mgmt. Servs., Div. of Retirement*, 930 So.2d 867, 873 (Fla. 2d DCA 2006).

Although estoppel against a government entity is usually limited, the court held that Branca relied upon the fact that Ordinance 88-16 was duly enacted by the City Commission and he irrevocably changed his position in reliance upon the ordinance when he retired. As a result, the City was estopped from denying his pension benefits.

Whether an individual establishes a valid claim of equitable estoppel depends on the individual facts and circumstances of each case, and it is a determination made by the court. While many of the facts in *Branca* are similar to those surrounding the Doral Elected Officials' Plan, there are differences. For example, Mayor Bermudez did not retire mid- term in reliance on pension benefits under the Plan, but rather elected not to run in order to seek a seat on the County Commission.

Unanimous Vote Requirement

Another issue we addressed is whether the Elected Officials' Retirement Plan can include additional voting requirements to impede termination or amendment. The Plan includes a provision requiring a unanimous

vote of the City Council to amend the Plan. In my opinion, while the City Council has the authority to include such a requirement, it has the same authority to remove the requirement, regardless of whether the vote to do so is unanimous.

Municipalities in Florida have broad home rule powers to legislate. Art. VIII, § 2(b), Fla. Const.; § 166.021, Fla. Stat. Just as the City had the authority to enact the condition precedent contained in the Retirement Plan (requiring unanimous vote), the City has the same undivided authority to eliminate that condition. If the condition precedent had been imposed by Florida law or municipal charter provision, the outcome might be different, but the City's Charter includes no such requirement. *See, e.g. Gen. Emps. Ret. Comm. v. City of N. Miami Beach*, 151 So. 3d 1271, 1273 (Fla.4th DCA 2014).

Conclusion

In order to complete our conclusions and recommendations, a review by the Division of Retirement, as well as an independent actuary are required. The City is required under Chapter 112 to submit the Plan to the Division prior to adoption. While that is no longer possible, the Plan still must be submitted for review. Upon the direction of the City Council, I will submit the Plan as described above. I further recommend the City engage the services of a Florida actuarial firm that regularly provides services for local government entities.

Sincerely,

Glenn E. Thomas