IN THE SUPREME COURT OF FLORIDA

Case No. 77,850

FLORIDA ASSOCIATION OF COUNTIES, INC., a non-profit Florida corporation; FLORIDA LEAGUE OF CITIES, INC., a non-profit Florida corporation; and SANDRA GLENN and ROBERT ANDERSON, citizens and taxpayers of the State of Florida and respectively of Seminole County and Sarasota County, Florida,

Appellants,

vs.

DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT, an agency of the State of Florida; PROFESSIONAL FIRE FIGHTERS OF FLORIDA, a labor organization; and FLORIDA POLICE BENEVOLENT ASSOCIATION, a labor organization,

Appellees,

INITIAL BRIEF OF APPELLANT, FLORIDA LEAGUE OF CITIES, INC.

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PRELIMINARY STATEMENT

The following references are used throughout this Brief:

DOA, DOR	Department of Administration, Division of Retirement
FAC	Florida Association of Counties, Inc.
FRS	Florida Retirement System
League	Florida League of Cities, Inc.
PBA	Florida Police Benevolent Association
PFF	Professional Fire Fighters of Florida
R	Record Reference
Vol. I, II and III	Transcript of Trial Proceeding Reference

STATEMENT OF THE CASE AND FACTS

Appellant, Florida League of Cities, Inc. concurs in and adopts as its Statement of the Case and Facts the Statement of the Appellants, Florida Association of Counties, et al.

SUMMARY OF ARGUMENT

Florida appears to be unique within the Nation in constitutionally demanding proper concurrent funding of governmental increases in public employee retirement benefits. Appellants assert that Article X, Section 14 requires the Florida Legislature to follow two distinct paths when enacting retirement system benefit increases for public employees. The first is that the basis for funding increased benefits must be substantively "sound." Appellants Florida Association of Counties, et al., will address this issue under separate Brief. The second is that the governmental units responsible for enacting retirement system benefit increases must follow a process which is procedurally "sound." Procedural soundness will be addressed in this Brief.

This case presents the Court with the opportunity to decide the extent to which Article X, Section 14 mandates a sound procedure when the Legislature adopts bills which affect the financial integrity of the Florida Retirement System. That is, the legislative process as well as the legislative product are subject to judicial scrutiny.

Article X, Section 14 requires the "governmental unit responsible" for retirement benefit increases to fund those increases on an appropriate, sound basis. The term "governmental unit responsible" infers that the governmental unit which makes increases in publicly funded retirement benefits will be the unit

held accountable and answerable for its decisions. The 1988 Florida Legislature decided to increase retirement benefits not only for the year 1989, but also for the next four subsequent years. However, the 1988 Legislature was only the "governmental unit responsible" under Article X, Section 14 for enacting and appropriately funding public retirement benefit increases becoming effective within a normal time frame after the close of its session. Appellants submit that each subsequent Legislature, elected biennially, is the "responsible" governmental unit for appropriately funding any public retirement benefit increases which were become effective within such normal time frame for its tenure as the "governmental unit" which funds FRS benefits.

The legislation at issue in this case, Ch. 88-238, Laws of Florida, was passed in a hurriedly (at the eleventh hour) manner as an amended bill; without an actuarial work-up as to the impact of the phased-in approach to the rates; without a fiscal note or inquiry as to the ability of the state, county or city governments to pay for the increased benefits; with technical flaws on the face of the bill; and over objections of the Department of Administration, Division of Retirement. The process used by the Legislature in enacting Ch. 88-238 in and of itself reeks of "unsoundness."

Under a traditional separation of powers analysis, the judicial branch may not be in a position to tell the legislature how to run its own house. However, the people of Florida have spoken loud and clear through Article X, Section 14. As a matter

of constitutional law, Article X, Section 14 requires a more knowledgeable and sounder legislative consideration of increases in benefits to public employee retirement systems than occurred during the 1988 Legislative Session.

For these reasons, Ch. 88-238 should be declared to be unconstitutional by this Court.

ARGUMENT

Introduction

> It is the task of the justices in the end to decide whether the Legislature has violated the Constitution[1]

This Court's exercise of its power to review the decision below carries out one of the most important functions of the Court. This case, more than any previous case since the adoption of

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[1] In the waning moments of the 1988 legislative session, the bill which upon amendment became the Act challenged in this litigation, Ch. 88-238, Laws of Florida, came before the full Senate. Former State Senator Dempsey Barron (D-Panama City) ruled from the chair on a point of order which challenged the propriety of taking a vote on the amended bill, in light of the language of Article X, Section 14 of the Florida Constitution. Obviously, Senator Barron ruled that the point was not well taken. See, Journal of the Senate, June 6, 1998 at 1083: R. at 191.

Ever since, the "official" State Government position in this lawsuit, by and through the Attorney General's office (as opposed to the opinion of the executive branch administrators of the defendant Department of Administration, Division of Retirement), has been that deference should be given to the decision of the Legislature. Indeed, as will be discussed, both the trial judge and the district court below did expressly "defer" to the "prerogative" of the Legislature on this matter.

The text footnoted above, simply paraphrases the similar recent statement by the justices of the United States Supreme Court in Sable Communications of California, Inc. v. Federal Communications Commission et al., 109 S.Ct. 2829, 2838 (1989):

> "To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution."

Article X, Section 14,[2] will determine the extent to which the Constitution protects Florida citizens from the imposition upon them of legislative increases in publicly funded retirement benefits which are funded in an "unsound" way.

Nature of the League's Challenge

The challenged Act, Ch. 88-238, Laws of Florida, increased public employee retirement benefits of the "special risk" members[3] of the Florida Retirement System (FRS), many of whom are employees of member cities of the Florida League of Cities.

The focus of the League's challenge here is to be distinguished from that of the other Appellants (the latter focusing on substantive "unsoundness" rather than procedural "unsoundness" of the basis for the funding). This separate Brief concerns the manner in which the Legislature enacted Ch.88-238 and provided for the funding of the cost of these particular increased benefits. Contrary to the Answer Brief on Jurisdiction of Respondent Florida Police Benevolent Association, the consolidated

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[2] Article X, Section 14. State retirement systems benefit changes.- 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.

[3] This "class" of public employees includes firefighters and law enforcement personnel. This led to the intervention by the Professional Firefighters of Florida (PFF) and the Florida Police Benevolent Association (PBA).

lawsuits do NOT question the wisdom of the legislative decision to make the particular increase in retirement benefits,[4] nor whether enough funds will eventually be generated by the funding provisions of Ch. 88-238 to pay the cost of these increased benefits.[5]

The League submits that what is at stake is the process involving increases in public employee retirement benefits. This litigation does concern the establishment of an extremely important principle of Florida constitutional law as it relates specifically to that process.

The League submits that the final decision in this case will

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[4] The PBA continues to suggest otherwise. This is because the Division Director of the Division of Retirement testified that he personally believed the particular increases in benefits (from 2 percent to 3 percent) were unwise, for various reasons. The point: that portion of the Division Director's testimony is not material to the constitutional challenge here.

[5] The Final Judgment emphasizes that Ch. 88-238 will raise sufficient funds to meet the obligations of the FRS to pay the increased benefits as and when they need to be paid. However, that fact was conceded by the Appellants. Appellants contend that such factor simply is not the only factor in determining whether funding is "sound."

The focus here is and remains on the manner in which the Legislature approached the last-minute passage of a compromise package of increased benefits and funded those particular increased benefits. The Legislature did so (funded the compromise package of increased benefits) in a way that was a "clear departure" from past funding plans. Florida Association of Counties, Inc., et al. v. Department of Administration, Division of Retirement, 580 So.2d 641, 644 (Fla. 1st DCA 1991). (A copy of this decision is attached). This new and different approach was taken by the 1988 Legislature without any advice from their expert actuarial consultants at the time of passage (other than that to fund the compromise package of benefits as they did - or then proposed to do - would be a "dangerous precedent" as to the funding of increased benefits under, and payable by, the Florida Retirement System). See the letter of the consulting actuaries to the defendant Department of Administration, Division of Retirement, at Exhibit #5, Appendix TAB 5.

go to the heart of that process for assuring the future financial integrity of the FRS. The final decision here will decide the extent to which Article X, Section 14 mandates that the Legislature process any bill on this subject differently from the way it processes all others. Too often, as with Chapter 88-238, last-minute amendment of a bill results in a flawed, unorthodox, unwise and imprudent legislative product.

It is important to note that it was the multiple failures of the Legislature to restrain itself in changing retirement benefits that ultimately led to the enactment of Article X, Section 14. Vol. I at 85.

The League submits that if the legislative branch can enact a valid bill increasing retirement benefits in the way in which it was done in this case, then Article X, Section 14 will have little to no meaning in practical terms as to its impact on the legislative process as that process relates specifically to such bills. If Ch. 88-238 is upheld, then there not only can be, but also predictably will be in the future, considerable late-stage legislative gamesmanship of a similar nature in passing bills which increase public employee retirement benefits.

It may be, as here, that there will be the subtle postponement of the substantial fiscal impact to future generations of taxpayers who will be represented only by future legislators, not those who actually enacted the increased benefits for then-current political advantage. Or, next time, it may be some other tricky fiscal consequence that becomes possible, quite simply, only because last-

minute passage during the end-of-the-session logjam of bills similarly prevents the final "amended" product from being scrutinized in committee, or by actuarial consultants, or by staff of the Division of Retirement.

Thus, it is for this Court to determine whether Article X, Section 14 serves as the only meaningful constitutional constraint[6] to preclude the legislature from following non-deliberative, "unsound" funding schemes to pay for increased benefits in publicly funded retirement systems. Also, it is for this Court to determine whether Article X, Section 14 permits a "governmental unit responsible" for one year's increase in publicly funded retirement benefits to also enact retirement benefit increases to become effective in subsequent years.

POINT I

ARTICLE X, SECTION 14 IS A CONSTRAINT UPON THE PREROGATIVE OF THE LEGISLATURE TO ENACT IN A SINGLE ACT CHANGES IN RETIREMENT BENEFITS TO BECOME EFFECTIVE IN SUCCESSIVE ANNUAL INCREASES.

"Governmental Unit Responsible" for Increases in Publicly Funded Retirement Benefits

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[6] Article III, Section 7 of the Florida Constitution exists as a potential tool for slowing down the legislative process. However, the custom in the last days of every legislative session is to waive the constitutional requirement for the third reading of a bill on a separate day. For a discussion of this problem and model proposals for establishing a more deliberative legislative process, see Moore, The Power Within (Part One), 5 Fla. St. U.L. Rev. 603 (1977).

> In construing a constitutional provision, the words should be given reasonable meaning according to the subject matter, but in the framework of contemporary societal needs and structure. Insight may be gained from historical precedent, from present facts, or from common sense. The goal intended to be accomplished or the evil sought to be prevented or remedied must be examined to determine the intent of the people in initiating enactment of the provision.[7]

Article X, Section 14 was amended to the Florida Constitution by state voters in 1976. This amendment was designed to prevent political gamesmanship with publicly funded retirement systems. In its simplest form, Article X, Section 14 states that any increase in benefits to public employee retirement systems must also provide appropriate funding. Unfortunately, no specific legislative or executive branch intent information concerning the enactment of Article X, Section 14 is available at the Florida State Archives. However, it is apparent from the face of the amendment that the goal sought to be attained is a limitation on the enactment of legislation which increases benefits under public retirement systems.

In construing a constitutional provision, courts are to give reasonable effect to each provision, according to its plain and ordinary meaning.[8] Article X, Section 14 provides that a "governmental unit responsible" for publicly funded retirement systems must fund increased benefits in an appropriate, sound

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[7] State Commission on Ethics v. Sullivan, 449 So.2d 315, 316, (Fla. 1984).

[8] In re: Advisory Opinion to Governor Request of June 29, 1979, 379 So.2d 959 (Fla. 1979).

manner. This Court should give meaning to the terms "governmental unit" and "responsible."

A reasonable, plain interpretation of "governmental unit" would include elected bodies, be it the state legislature or county and city commissions. A "governmental unit" is nothing more than the individual members of that unit brought together. For instance, the Florida legislature is composed of 160 individual members and city and county commissions are composed of their lawful number of members. The "governmental unit" operates as a unit; however, without the individual members the "unit" would be meaningless.

"Responsible" is defined in Black's Law Dictionary, 5th Edition, as, "liable; legally accountable or answerable." Thus, the term "governmental unit responsible" infers that the governmental unit which makes increases in publicly funded retirement benefits will be the unit held accountable and answerable for its decisions.

In 1988, the Florida Legislature was a "governmental unit" comprised of 160 individually elected members. In that year, that unit decided to increase pension benefits for specified public employees (members of the FRS special risk classification). However, the 1988 Florida Legislature went far beyond making provision for funding increases in retirement benefits for the year 1989; rather, the 1988 Legislature made decisions on benefit increases for the next four subsequent years. Stated differently, the 1988 "governmental unit" made decisions on increases in benefits which should have been left to the "governmental units"

for 1989 to 1992.

It can be argued that subsequent legislatures are not bound by the decisions of prior legislatures in that prior legislative decisions can be legislatively reversed. However, this reasoning fails to give meaning to the term "governmental unit responsible" in Article X, Section 14. By its action, the 1988 Legislature bound the hands of 1989 to 1992 Legislatures to either accept its actions or be forced into taking affirmative action to reverse those decisions. However, it is the 1989 and subsequent Legislatures that are "responsible" for appropriately funding public retirement benefit increases which were "mandated" onto them by the 1988 Legislature. The 1988 Legislature was only the "governmental unit responsible", under Article X, Section 14, for enacting and appropriately funding public retirement benefit increases becoming effective within a normal time frame after the close of its session. Subsequent increases were and are the prerogative of subsequent legislatures, i.e. the "governmental unit responsible", each making its determination under the political and economic realities existing at that point in time.

As a general policy, subsequent "governmental units" should not be forced into having to reverse decisions made by prior "governmental units", especially when those prior "governmental units" cannot be held accountable or answerable for their decisions. However, under Article X, Section 14, such action by prior "governmental units" must be voided. If the 1988 Legislature's actions, as far as these decisions effect future

increases in publicly funded retirement benefits, are not voided, then Article X, Section 14 is rendered meaningless as far as its accountability, answerability and responsibility provisions are concerned. This, in effect, would negate the very purpose of the constitutional amendment.

The PBA, in its Answer Brief on Jurisdiction, stated at page 7:

> "The constitutionality of single versus multi-step contributions is more an issue of form than of substance. The Legislature could have met Petitioners' objection by enacting five consecutive laws, each providing for a single-step increase in the contributions and benefits for that particular year, equalizing the contribution burden within each Act. The Legislature's consolidation of five coordinated contribution/benefit increases in one Act, rather than five Acts, should not make the enactment invalid. In any event, the application of the funding burden is not really an actuarial issue but a political one,[9] as Petitioners' actuarial witness conceded."

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[9] The funding of the burden is more than an actuarial or political issue: Article X, Section 14 makes it a constitutional issue. The PBA failed to acknowledge in its Answer Brief on Jurisdiction at pages 4 and 7 that Appellants' expert actuarial witness found the funding issue, under Article X, Section 14, to be more of a constitutional issue than a political or actuarial problem. The testimony at trial was:

> COURT: (I)s not whether that (the funding) falls equally on taxpayers over a period of years, regardless of how long that might be, a political problem as opposed to an actuarial problem?
>
> WITNESS: I would agree that it's a political problem more than an actuarial problem, but in this particular state, it's a constitutional ...
>
> JOHNSON: Object to him giving a legal opinion as to the constitution.

The League submits that "the constitutionality of single versus multi-step contributions" is more than a question of legislative form or substance. Article X, Section 14 makes it an issue of constitutional process. The enactment of "five consecutive laws" by the "governmental unit responsible" for funding increased benefits, each providing for a single-step increase in contributions and benefits for that particular year, is precisely what is required under the provisions of Article X, Section 14.

Deference to the Legislature

The opinion of the district court and an argument consistently made by the PBA and FFA is that the courts should defer to the "policy" choices made by the legislative branch. FAC v. DOA, 580 So.2d at 645; Answer Brief on Jurisdiction of Respondent Florida Police Benevolent Association at 8. This "deference to the legislature" line of reasoning is flawed in that the 1988 Legislature made a decision not only for itself, but also for the next four subsequent legislatures. Each annual increase in

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> COURT: I'm not going to accept it as a legal opinion, but from the standpoint of an actuarial interpretation.

Thereafter, the witness proceeded that he thought the constitutional provision was "beautifully written" with fiscal soundness (in the sense of adequate funds being generated) being "necessary, but not sufficient" in and of itself to constitute the full and complete meaning of constitutionally-required funding "on a sound actuarial basis." Winklevoss testimony, Vol. III at 361 - 366; Appendix Excerpts at 82 - 83.

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publicly funded pension benefits must be, as required by Article X, Section 14, addressed by the "responsible" governmental unit. That would be the later legislatures, not the 1988 Legislature. If there is to be judicial deference to the legislature, it should be in the context of deferral to the institution itself. In this case, to reserve to each future legislature the right to affect increases in and provide funding for retirement benefits during its own tenure in office.

The question involved in this case is not one of legislative policy subject to judicial deference. Rather, the question is a constitutional one: whether a particular legislature in any given year can enact a mandate to increase publicly funded pension benefits annually over a multi-year period. If it can, then those legislators who enact the legislation can enjoy the political benefits at that particular point in time, and postpone the cost of this decision to future taxpayers. If so, then those legislators also force future legislators to either accept this past legislative action or take positive steps to repeal this past decision (and suffer the political fall-out).

True, legislators are often placed with the burden of "undoing" unwise and imprudent actions taken by their predecessors. However, when it comes to publicly funded pension benefit increases, Article X, Section 14 requires legislators to act differently. It is not "business as usual." Article X, Section 14 prohibits the scenario which occurred in the passage of Ch. 88-238.

POINT II

THE MANNER IN WHICH THE 1988 LEGISLATURE ENACTED CH. 88-238, LAWS OF FLORIDA, VIOLATED THE PROVISIONS OF ARTICLE X, SECTION 14 WHICH REQUIRE FUNDING ON A "SOUND" BASIS.

The Passage of Chapter 88-238, Laws of Florida: A Shoddy Legislative Product Notwithstanding a Constitutional Imperative for "Soundness"

It is not insignificant that the state officials from DOA made clear that the DOA, the agency responsible for administering the FRS, is on record as being of the opinion that Chapter 88-238 was passed:

1) hurriedly (at the 11th hour) as an amended bill;[10]

2) without an actuarial workup as to the impact of the phased-in approach to the rates[11] (either as to the cost of the phased-in benefits or more importantly, as to the effect of phased-in contribution rates to fund payment of those costs);

3) without a fiscal note or even inquiry as to the ability of state, county or city governments to foot the bill for the increased benefits[12] (while 15 counties are at the 10 mill cap[13]

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[10] McMullian testimony, Vol. I at 142 and 160; Appendix Excerpts at 30 and 36.

[11] Ibid.

[12] See questions by Judge Hall and responses of witness McMullian as to the "ability to pay" of counties and cities, in Vol. II at 191-197; Appendix Excerpts at 43-45. In particular, in Vol. II at 197, Judge Hall asked "who says it's feasible?" and the witness replied: "the Legislature." Judge: "Did they do it in this case?" Answer: "No." See Appendix Excerpts

with no new source of funds being identified or suggested from which local governments might meet their added contribution burden);

4) with technical flaws on the face of the bill[14] (which had to be corrected the next year); and

5) over objections of the DOA on the substantive merits or wisdom of the increased benefits, which was in addition to the way in which funding of those benefits was being required.[15]

Subsequent to passage of Ch. 88-238, the DOA officially:

1) reported to legislative leaders that it considered the legislation to be unconstitutional;[16]

2) recommended to the Governor that he veto the Act;[17] and

3) never backed off those positions through trial.[18]

Florida law is clear on the point that executive branch

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at 45.

13 Anderson testimony, Vol. I at 47; Appendix Excerpts at 12.

14 See the Act itself, Exhibit #4, Appendix TAB 4, and McMullian testimony, Vol. I at 143-144; Appendix Excerpts at 31.

15 See e.g., Exhibit #11, Appendix TAB 11.

16 See Exhibit #6, Appendix TAB 6, and McMullian testimony, Vol. I at 145; Appendix Excerpts at 32.

17 See Exhibit #11, Appendix TAB 11.

18 See e.g., McMullian testimony, Vol. I at 147; Appendix Excerpts at 32.

construction of a constitutional provision is "persuasive"[19] and entitled to great weight in the interpretation of a constitutional provision.[20] Unfortunately, it was not persuasive with the 1988 Legislature. All of this is nevertheless only too typical of the worst about the legislative process and the perennial end-of-the-session logjam of bills.

The critical consideration, in the constitutional sense, is that a bill which increases public employee retirement benefits is clearly constitutionally unique, unlike any other kind of bill coming before legislators. The League submits that Article X, Section 14 implicitly calls upon the legislative branch to utilize a process which is also unique to such bills.

The League submits that Article X, Section 14, within the context of the facts of this particular lawsuit, embraces a requirement that the procedural "process" (of enactment of an act which increases public employee retirement benefits) must itself be "sound." That is, in order for the funding of particular increases in benefits to constitute funding on a "sound" basis, the funding provisions of the bill must be established in a thoughtful, deliberative way.

Stated yet another way: if there is to be any exercise by the Legislature of legislative "prerogative" with respect to switching to a new and different approach for funding the cost of increases

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[19] State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771 (1914); Greater Loretta Improvement Association v. State, 234 So.2d 665 (Fla. 1970).

[20] Amos v. Mosley, 74 Fla. 555, 77 So. 619 (1917).

in FRS benefits, then that departure from the established way of funding the System must be accomplished knowingly and consciously, rather than unwittingly (as was the case with Ch. 88-238).

There are no material facts in dispute here with respect to the process used. This case is one which cries out for the judicial branch to declare, as a matter of law, that Article X, Section 14 of the Florida Constitution requires a more knowledgeable legislative consideration of funding increases in benefits than occurred here.

The Legislature is NOT "Free to Investigate as Much or as Little as It Wishes" Prior to Enacting Legislation That Increases Retirement Benefits

The title to this section is taken from language of the Answer Brief on Jurisdiction of Respondent Florida Police Benevolent Association.[21] It places in clear contrast the difference in

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[21] PBA's language, at page 9 of its Answer Brief on Jurisdiction, is as follows:

> "(T)he Legislature is free to investigate as much or as little as it wishes prior to enacting legislation. The proper depth of such an investigation is a political question."

PBA presents this in a section entitled: "The adequacy of the Legislature's study of actuarial soundness before enacting the statute presents no justiciable issue of constitutional law."

To the contrary, the League of Cities submits that, in light of the adoption of Article X, Section 14, it is quite properly within the power of the judiciary to scrutinize the lack of consideration by the Legislature of the soundness of the funding in enacting a bill increasing retirement benefits. The question may be partly political, but it also is a constitutional question as well.

perspectives between the League and the PBA.

The manner in which the 1988 Legislature enacted Ch. 88-238 and funded the annual increase in retirement benefits, raises the question as to whether this Court will "defer" to the "prerogative" of the legislative branch, as did the trial court and the district court.

This Court will determine just how far the judiciary will go in deferring to the Legislature's prerogative to ever-so-gradually (or not so gradually) change (increase) retirement benefits through a single legislative act in a single session, though that single act effects automatic increases in funding levels for several years into the future. If Ch. 88-238 is upheld, then the possibilities for abuse by future legislators are enormous.

If the Legislature is permitted to virtually ignore its inability to see into the future and make decisions better made by future legislatures, then any employee group that wants its retirement benefits increased simply need only pressure an optimistic and upbeat majority of legislators to look ahead to a bright future. They need only ask that the increases (both benefits and contributions) be "phased-in" over a period of time (to "ease" the immediate funding impact on taxpayers) or, that the increases be postponed to a later date (when the economy presumably will be booming).

According to the trial judge's definition of what constitutes funding on a "sound actuarial basis" (and as affirmed by the district court) - it is constitutionally enough if the legislative

package simply provides the numbers, which when massaged by the actuaries, mathematically (actuarially) demonstrates that enough money will be generated to pay for the increased benefits by the time the obligations to pay have accrued. The problem with this definition is that it is overly simplistic. More is required to demonstrate that the funding is on a "sound" basis.

With the current recession now taking its toll, the League submits that it is becoming increasingly more painful to each of Florida's 67 counties, to many Florida cities (not to mention to the state government itself), and to all Florida citizens, to fund the Ch. 88-238 automatic "phase-in" increases in required contribution rates. Each Ch. 88-238 annual increase in contribution rates is quite real. Each is felt financially and must be part of the budget for each affected unit of government in this state. These increases certainly cannot be, and should not be, flippantly dismissed as nominal or casually regarded as minuscule. In these hard times, they are neither.

The League suggests that even the most reluctant of those legislators who voted "for" Ch. 88-238 in June of 1988, could not have foreseen the depths of the current recession. Yet, on January 1, 1992, the contribution rate again will automatically rise another 1.6 percent of payroll, for the 4th straight year.

Notwithstanding the willingness of the trial judge in his Final Judgment, and the district court in its affirmance of that judgment, to characterize the disparity between taxpayers of 1993 and those of 1989, as non-discriminatory, the fact nevertheless

does remain that the ultimate financial impact of Ch. 88-238 falls most heavily upon taxpayers of 1993 and thereafter. The sad fact is: those legislators who thought about it in June of 1988, knew that such would be the case when they voted on the bill. But, current political advantages obviously were in the balance with political disadvantages that were five years away, and which hopefully might never become serious in a booming economy.

The funding provisions of Ch. 88-238 are not "sound" for no less than two specific procedural reasons:

1) because the 1988 Legislature knew too little about what it was doing (guessing at the fiscal consequences of dividing both the benefit accrual rate increase and the necessary contribution rate increase, by five), as evidenced by the total absence of any studied consideration of the entirely new ("inconsistent") and different ("unwise and imprudent") approach (funding basis) that it unwittingly enacted; and

2) because the 1988 Legislature could not possibly have known or predicted the future status of the economy as of the effective dates of each subsequent automatic annual incremental increase in the contribution rates, which it nevertheless mandated.

Nor should any future legislature be acknowledged to have the power and "freedom", as suggested by the PBA, to do the same.

The defendant Department of Administration's consulting actuaries were right: this new funding approach (phasing-in benefit changes and contribution rates) "represents a serious erosion in

the System's financial integrity" and is "a dangerous precedent"[22] for the FRS.

The League urges this Court to be more bold than the trial court or the district court in defining the constitutional constraints on legislative "prerogative."[23] The 1988 Act should be invalidated, with a clear message to future legislatures that more is expected of the legislative branch than the conduct demonstrated by the 1988 Legislature when it enacted Ch. 88-238.

The 1988 Legislature failed to measure up to the standard implicitly expected by the People and constitutionally mandated by Article X, Section 14. The basis for funding of changes in retirement benefits must be "sound" in the ways that everyday meanings of that word connote, including procedural "soundness".

Absence of an Actuarial Study on Chapter 88-238

The First District Court of Appeal made the statement in its opinion in Turlington v. Department of Administration, 462 So.2d 65, 67 (Fla. 1st DCA 1984), that:

> "The absence of an actuarial study does not, per se, render the statute invalid."

However, this statement made by the First DCA must not be read

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[22] See the letter of the consulting actuaries to the defendant Department of Administration, Division of Retirement, at Exhibit #5, Appendix TAB 5.

[23] Cf., Chiles v. Children A, B, C, D, E, and F, 16 FLW S708 (Fla. November 1, 1991) (This Court recently, boldly, but properly, checked "executive branch" power and freedom to alter the legislatively set budget).

out of context. In Turlington, a legislative act was challenged as violating Article X, Section 14. The court noted that there had been no actuarial study done on the possible effects upon the state retirement system as a result of the legislative act. The court then went on to state:

> "The absence of an actuarial study does not, per se, render the statute invalid. It is first necessary to determine whether the statute can be said to provide to those persons electing retirement, while continuing in office, an increase in retirement benefits. If the effect of the statute does confer such a benefit, then it may be deemed invalid, if no funding of the increase was made on a sound actuarial basis. We cannot say that the statute, by its terms, provides an increase in retirement benefits. Id. at 67.

Thus, the First DCA, in the Turlington case, held that the challenged statute did not provide for an "increase in benefits." The existence or lack of an actuarial study was not relevant to that decision. The Turlington court did not rule out the prospect that the failure to perform an actuarial study prior to passage of a particular challenged act which does increase retirement benefits, may be a significant if not fatal shortcoming of the legislative body which would render such act invalid. A properly performed actuarial study would be crucial in order to determine if any increase in benefits was funded on a "sound actuarial basis."

Because Chapter 88-238 made, "a clear departure from plans used to fund benefit increases (in the FRS) in the past," FAC v. DOA, 580 So.2d at 644, Footnote 7, an actuarial study, at a minimum, should have been performed before departing from the norm. An actuarial study was performed for a single-year increase in the

accrual rate for benefits (from 2 percent to 3 percent); however, this single year benefit increase did not occur. Rather, the 1988 Legislature spread the benefit increase evenly over a five year period.

As previously noted, if the 1988 Legislature wanted to increase benefits from 2 percent to 3 percent, it should have done so in a single year, 1988, when it had proper actuarial information before it and when it was the "governmental unit responsible" for increased benefits for that year. Also, the 1988 Legislature could have begun at that time to properly fund such an increase. Instead, the 1988 Legislature chose to make increases over a five year period without consulting its actuaries as to the consequences of such action. The 1988 Legislature's failure to have an accurate actuarial study performed on the five year benefit increase before it departed from the established FRS plan to fund benefit increases, was a departure from the "sound" basis dictated by Article X, Section 14.

Once again, the path taken by the 1988 Legislature in enacting Ch. 88-238 was a broken one at best. The failure of the 1988 Legislature to ascertain the actuarial consequences of its actions upon the stability of the FRS should not be overlooked by the Court in light of the Article X, Section 14 requirement of funding on a "sound" basis. The absence of an actuarial study informing the Legislature of the consequences of its actions, before those actions were taken, should alone be reason to invalidate Ch. 88-238 based on the dictates of Article X, Section 14.

RELIEF SOUGHT

Appellants, Florida League of Cities, Inc. concurs in and adopts as its request for relief the relief sought by Appellants, Florida Association of Counties, Inc., et al.

CONCLUSION

The League believes that this Court will agree the League's perception and view of the importance of the constitutional provision as it relates to the process and to the governance of future legislative proposals for increases in public employee retirement benefits.

Appellants continue to steadfastly believe, and assert, that Article X, Section 14 precludes the kind of procedural nightmare and last-minute wheeling and dealing which surrounded the enactment of Ch. 88-238, Laws of Florida. Appellants assert that "sound" funding of increases in public retirement benefits means procedural soundness as well as substantive "soundness" in order for the Legislature to produce a validly enacted bill increasing public employee retirement benefits.

Appellants also assert that the 1988 Legislature violated Article X, Section 14 when that legislative body invaded the decision making authority of the 1989 to 1992 Legislatures by enacting future increases in public employee retirement benefits. The 1988 Legislature was not the "governmental unit responsible" for retirement benefit increases in the years 1989 to 1992. If retirement benefit increases were and are desired for the years 1989 to 1992, then those respective legislative bodies are the appropriate responsible, accountable and answerable governmental units to make those decisions.

This Court's decision to strike down Ch. 88-238, Laws of

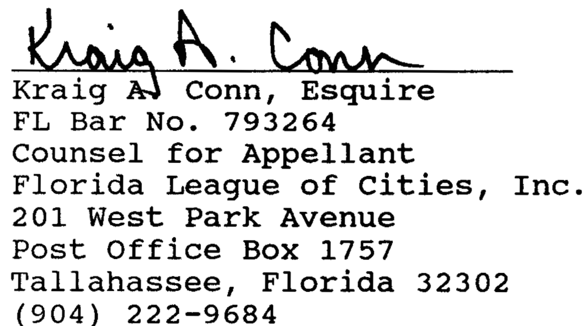
Florida, is necessary to effectively preclude any similar legislative scenario from ever happening again with respect to legislation which increases public employee retirement benefits.

The nearly automatic waiver by legislators of the constitutional requirement of Article III for the third reading of bills on a separate day, serves to all but eliminate any constitutionally intended restraint on the legislative process by that constitutional provision, as to bills in general. But, Article X, Section 14 does require that the Legislature (the "governmental unit responsible") make provision "for the funding of the increase in benefits on a sound actuarial basis."

To be on a "sound" basis, the provision for the funding must evidence deliberation, thoughtfulness, orthodox and conservative behavior by the legislative body that enacts the increases in retirement benefits. To construe Article X, Section 14 to mean less than that, invites more of the same political gamesmanship as occurred with Ch. 88-238.

The people of Florida deserve better. Ch. 88-238, Laws of Florida, should be declared to be unconstitutional.

Respectfully submitted this 15th day of November, 1991.



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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Initial Brief of Appellant, Florida League of Cities, Inc. has been furnished this 15th day of November, 1991, by U.S. mail to Counsel for Co-Appellates and to each of the persons named below:

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refuting his claims, or hold an evidentiary hearing regarding the claims.

REVERSED and REMANDED.

DAUKSCH and DIAMANTIS, JJ., concur.

FLORIDA ASSOCIATION OF COUNTIES, INC., a non-profit Florida corporation; Florida League of Cities, Inc., a nonprofit Florida corporation; and Sandra Glenn and Robert Anderson, citizens and taxpayers of State of Florida and respectively of Seminole County and Sarasota County, Florida, Appellants/Cross-appellees,

v.

DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT, an agency of the State of Florida; Professional Fire Fighters of Florida, a labor organization; and Florida Police Benevolent Association, a labor organization, Appellees/Cross-appellants.

No. 90-2071.

District Court of Appeal of Florida, First District.

March 29, 1991.

Challenge was brought to statute which funded increases in retirement benefits of special risk members of Florida Retirement System as violating Florida Constitution. The Circuit Court for Leon County, J. Lewis Hall, Jr., J., held that the statute did not violate the Florida Constitution. Appeal was taken. The District Court of Appeal, Wentworth, Senior Judge, held that: (1) statute purporting to set forth intent of legislature in implementing provisions of section of State Constitution precluding increase in benefits to members or beneficiaries of public retirement or pension system unless governmental unit responsible for system has made provision for funding of increase was not entitled to presumption of correctness; (2) trial court properly deferred to policy choices of legislative branch as means of accomplishing legislative intent in funding increases in retirement benefits of special risk members of Florida Retirement System; (3) copies of correspondence received by Department of Administration, Division of Retirement was admissible under admissions exception to hearsay rule and business records exception; and (4) association of counties and league of cities had standing to initiate suit.

Affirmed.

1. Constitutional Law ⇐20

Statute purporting to set forth intent of legislature in implementing provisions of section of State Constitution precluding increase in benefits to members or beneficiaries of public retirement or pension system unless governmental unit responsible for system has made provision for funding of increase was not entitled to presumption of correctness. West's F.S.A. Const. Art. 10, § 14; West's F.S.A. § 121.61.

2. Officers and Public Employees ⇐101.5(1)

Statute which funded increases in retirement benefits of special risk members of Florida Retirement System did not violate state constitutional provision requiring that government unit responsible for pension system provide for increase in benefits to members or beneficiaries of such system only after the unit had made or was making provision for funding of increase in benefits on sound actuarial basis, even if legislative scheme increased taxation of future taxpayers to pay costs of increased benefits; state retirement actuaries testified that legislative plan was actuarially sound, and that actuarial consultants determined that contribution rate could be decreased after five years of increases. West's F.S.A. Const. Art. 10, § 14; West's F.S.A. § 121.61.

3. Officers and Public Employees ⟹101.-5(1)

Even if there were technical flaws in original legislative bills which funded increases in retirement benefits of special risk members of Florida retirement system, and there was lack of actuarial input concerning final version, and legislature failed to inquire into employers' abilities to pay increased contributions, there was no evidence that correction of such defects was mandated by provision in State Constitution requiring that increases in public pensions be enacted after or along with funding for such increase on sound actuarial grounds, and criticisms did not overcome strong presumption of constitutionality accorded legislative enactments. West's F.S.A. Const. Art. 10, § 14; West's F.S.A. § 121.61.

4. Statutes ⟹223.1

General rule is that in cases of conflicting statutory provisions, latter expression will prevail over former unless well-recognized exception applies.

5. Statutes ⟹223.1

Court would harmonize legislature's intent for amendment setting forth legislature's intent in enacting provision relating to governmental retirement systems and requiring such systems to be funded in such manner as to maximize protection of retirement benefits with legislature's intent for law which funded increases in retirement benefits of special risk members of Florida Retirement System, rather than following rule that latter expression of legislative intent governed. West's F.S.A. Const. Art. 10, § 14; West's F.S.A. § 121.61.

6. Officers and Public Employees ⟹101.-5(1)

Statute which set forth legislative intent in enacting constitutional provision relating to funding of governmental retirement systems did not prohibit tax on future taxpayers, but rather required that whatever cost associated with statute which funded increases in retirement benefits of special risk members of Florida Retirement System passed on to future taxpayers must be reasonable. West's F.S.A. Const. Art. 10, § 14; West's F.S.A. § 121.61.

7. Officers and Public Employees ⟹101.-5(1)

Trial court properly deferred to policy choices of legislative branch as means of accomplishing legislative intent in funding increases in retirement benefits of special risk members of Florida Retirement System, even though trial court orally indicated belief that statutory plan could be unwise and imprudent; consulting actuary testified that plan was actuarially sound, appropriate, thoughtful, and sensible. West's F.S.A. Const. Art. 10, § 14; West's F.S.A. § 121.61.

8. Evidence ⟹245

Copies of correspondence received by Department of Administration, Division of Retirement (DOA) from DOA's consulting agents and from legislator pertaining to activities of legislature relative to DOA were admissible as admissions by agents or servants concerning matter within scope of agency or employment. West's F.S.A. § 90.803(18)(d).

9. Evidence ⟹333(1)

Copies of correspondence received by Department of Administration, Division of Retirement (DOA) were admissible under business records exception; reports were submitted in connection with activity of DOA mandated by Florida law. West's F.S.A. §§ 90.803(8), 121.031(3).

10. Constitutional Law ⟹42.3(1)

Association of counties and league of cities had standing to initiate suit challenging constitutionality of statute which funded increases in retirement benefits of special risk members of Florida Retirement System, even if none of the governmental entities that association orally represented convened in formal session to authorize participation in suit; both association and league were private, nonprofit corporations which were not boards or commissions, and substantial member of constituents comprising association and league had been substantially and adversely affected by statute. West's F.S.A. Const. Art. 10, § 14; West's F.S.A. § 121.61.

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Kraig A. Conn, Asst. General Counsel, Tallahassee, for appellant/cross-appellee Florida League of Cities, Inc.

Robert A. Butterworth, Atty. Gen., George L. Waas, Asst. Atty. Gen., for appellee/cross-appellant Dept. of Admin., Div. of Retirement.

Kelly Overstreet Johnson of Broad & Cassel, Tallahassee, for appellee/cross-appellant Florida Police Benevolent Ass'n.

Richard A. Sicking, Miami, for appellee/cross-appellant Professional Fire Fighters of Florida.

WENTWORTH, Senior Judge.

This is an appeal from a final judgment holding that chapter 88-238, Laws of Florida, which funded increases in retirement benefits of special risk members of the Florida Retirement System (FRS), does not violate article X, section 14 of the Florida Constitution.[1] Appellants sought a declaration that would hold chapter 88-238 to be an improper exercise of the state's taxing and spending authority because it funded the costs of increased benefits to special risk members, composed of fire fighters and law enforcement officers, by assertedly shifting the burdens from current to future taxpayers in violation of article X, section 14 of the state constitution. They named the Department of Administration, Division of Retirement (DOA), as defendant. The Florida Police Benevolent Association (PBA) and Professional Fire Fighters of Florida (PFF) intervened as defendants, and cross appealed, raising issues of hearsay and standing. We affirm.

Chapter 88-238 amended various sections of the Florida Retirement System Act[2] by increasing the retirement benefit of special risk members from two to three percent of average monthly compensation, and increasing the corresponding employer contribution effective January 1, 1989. The act provides for a phase-in of contributions and benefits over a five-year period as follows:

Period	% Increase in Contributions[3]	% Increase in Benefits[4]
1989	1.6	2.2
1990	3.2	2.4
1991	4.8	2.6
1992	6.4	2.8
1993+	8.0	3.0

Appellants contend that the legislative scheme facially places on future taxpayers a discriminatory and inequitable burden to pay the cost of increased benefits that assertedly should be borne by current taxpayers. They argue, for example, that the taxpayers in 1993, and after, must pay five times the rate of 1989 taxpayers, thus violating article X, section 14, which requires that benefit increases must be funded "on

1. That section provides:
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.
Art. X, § 14, Fla.Const.

2. Ch. 121, Fla.Stat. (Supp.1988).

3. Ch. 88-238, § 1, Laws of Fla. (codified at § 121.071(2)(a), Fla.Stat. (Supp.1988)).

4. Ch. 88-238, § 2, Laws of Fla. (codified at § 121.091(1)(a), Fla.Stat. (Supp.1988)).

a sound actuarial basis." Although the standard has significance in contexts not relevant here,[5] few courts have addressed article X, section 14,[6] and we find no opinion which has definitively considered the meaning of the phrase "sound actuarial basis."

The diversity of expert opinions at trial would indicate that the phrase "sound actuarial basis" is not precisely defined in actuarial science. In one instance, actuarial soundness of a plan to increase benefits of a particular class may require the plan to prefund benefits of the class such that the assets on hand are sufficient to meet current obligations. In another, a plan to increase benefits of a particular class must first provide for the funding of the unfunded liability of the entire system. An intermediate position would permit a phase-in plan that funds the normal cost and amortizes past liability over a reasonable period, and funds each benefit increase as it becomes due rather than when it is enacted.

Faced with the absence of clear agreement among the experts who testified at trial on the meaning of "sound actuarial basis," the trial court accepted a "consensus" definition, and held that "a retirement program must be funded in such a way that the retirement fund is able to meet its continuing obligations as and when they mature." The trial court found that the phase-in of benefits and contributions is reasonably coordinated, producing no significant disparity between the obligations of current and future taxpayers. The court concluded that the funding scheme used in chapter 88-238 is consistent with article X, section 14.[7]

[1] Appellants maintain that the legislature has determined the controlling meaning of article X, section 14 in chapter 83-37, Laws of Florida. The legislature there declared that liabilities required to fund public retirement system benefits must be funded equitably by current and future taxpayers alike, and expressly prohibited the "transfer to future taxpayers [of] any portion of the costs which may reasonably have been expected to be paid by the current taxpayers."[8] Appellants rely on *Brown v. Firestone*, 382 So.2d 654 (Fla. 1980), claiming that the legislative interpretation in chapter 83-37 is entitled to a presumption of correctness. We conclude that chapter 83-37 is not entitled to such presumptive weight under the circumstances.[9]

5. *See, e.g., Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So.2d 815, 819 (Fla.1983), *appeal dismissed*, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984).

6. *See, e.g., City of Tallahassee v. Public Employees Relations Comm'n*, 410 So.2d 487, 491 (Fla. 1981); *State ex rel. Watson v. Lee*, 157 Fla. 62, 65, 24 So.2d 798, 800 (1946); *Florida League of Cities, Inc. v. Department of Ins. and Treasurer*, 540 So.2d 850, 853 (Fla. 1st DCA 1989), *review denied*, 545 So.2d 1367 (Fla.1989); *Young v. Department of Admin., Div. of Retirement*, 524 So.2d 1071, 1076 (Fla. 1st DCA 1988); *Turlington v. Department of Admin., Div. of Retirement*, 462 So.2d 65, 67 (Fla. 1st DCA 1984).

7. The phase-in scheme selected by the legislature to fund the benefit increases provided in chapter 88-238 is a clear departure from the plans used to fund benefit increases in the past. Customarily, the state has paid for increases in FRS benefits by amortizing the associated costs at a single rate over a thirty-year period. Appellants concede that article X, section 14 of the Florida Constitution does not dictate such a plan.

8. The section provides:

> Legislative intent.—It is the intent of the Legislature in implementing the provisions of s. 14 of Art. X of the State Constitution, relating to governmental retirement systems, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits. Inherent in this intent is the recognition that the pension liabilities attributable to the benefits promised public employees be fairly, orderly, and equitably funded by the current, as well as future, taxpayers. Accordingly, except as herein provided, it is the intent of this act 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. This act hereby establishes minimum standards for the operation and funding of public employee retirement systems and plans.

Ch. 83-37, § 1, Laws of Fla. (codified at § 112.61, Fla.Stat. (1983)).

9. *Brown v. Firestone*, 382 So.2d 654 (Fla.1980), expresses the principle that "[a] relatively contemporaneous construction of the constitution

[2] There is clear record support for the trial court's decision. A state retirement actuary testified that the legislative plan was actuarially sound because the costs paid by the employers into the system would eventually cover liabilities. DOA's actuarial consultants determined that the contribution rate required to fund the cost of benefits over a thirty-year amortization period was 7.04%, and a consulting actuary fully anticipated that the 7.04% in contributions would exceed current obligations in 1993, after the plan's fourth year. Also, a pension actuary for DOA explained that "more money is going to be paid by this non-level method the Legislature adopted because [it] deferred some of the funding."

[3] Appellants also assert that technical flaws in the original legislative bills, a lack of actuarial input concerning the final version as enacted, and the legislature's failure to inquire into employers' abilities to finance the increased contributions all render the plan unsound, and therefore constitutionally deficient. Assuming the validity of appellants' criticisms, the record does not convincingly support the conclusion that asserted defects, if corrected, are constitutionally mandated. Nor do the criticisms overcome the strong presumption of constitutionality accorded legislative enactments. *Fulford v. Graham*, 418 So.2d 1204, 1205 (Fla. 1st DCA 1982).

[4-6] Finally, appellants advance a statutory argument that chapter 88-238 conflicts with the earlier-enacted chapter 83-37, and should yield to it. Appellants rely on *Sharer v. Hotel Corp. of America*, 144 So.2d 813 (Fla.1962), which stated the general rule to be that in cases of conflicting statutory provisions, the latter expression will prevail over the former unless, as appellants suggest, a well-recognized exception applies. We find that the sounder position is to harmonize the legislature's intent for the amendment with its intent for the original law. Thus construed, chapter 83-37 does not prohibit taxing future taxpayers, but requires that whatever costs associated with chapter 88-238 are passed on to future taxpayers must be reasonable. A consulting actuary testified that the plan was actuarially sound, appropriate, thoughtful, and sensible. He added that the plan assesses the cost to the appropriate generation of taxpayers, i.e., those who are being served by the generation of special risk members who are receiving the particular benefit.

[7] Although the trial court orally indicated a belief that the statutory plan may be "an unwise and imprudent basis" for departing from the "entry age normal cost concept" (level cost method) customarily used to fund increases in FRS benefits, it deferred to the policy choices of the coordinate legislative branch as a means of accomplishing the legislative intent. Under the circumstances, the trial court acted properly. *Fulford*, 418 So.2d at 1205.

[8, 9] On cross-appeal PBA contends that the trial court erroneously admitted, under the business records exception to the hearsay rule, numerous copies of correspondence received by DOA. Each of the challenged items of correspondence was admissible under the admissions exception to the hearsay rule, as correspondence from DOA's consulting agents and from a legislator pertaining to activities of the legislature relative to DOA. § 90.803(18)(d), Fla. Stat. (1989). Also, the reports were submitted in connection with activity of DOA

by the legislature is strongly presumed to be correct." *Id.* at 671 (citing *Greater Loretta Improvement Ass'n v. State ex rel. Boone*, 234 So.2d 665 (Fla.1970)). Article X, section 14, was adopted in 1976. Neither *Brown* nor *Greater Loretta* requires the court to look to the 1983 version of section 112.61, Florida Statutes, but instead would require the court to look at its original version, which the legislature passed in 1978. *See* Chapter 78-170, § 1, Laws of Fla. The earlier version merely required that governmental retirement systems or plans "be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits." Not until 1983 did the legislature express its intent in implementing the provisions of Article X, section 14, to require that a plan be "equitably funded by the current, as well as future, taxpayers." Chapter 78-170 has greater contemporaneity with the constitutional provision than does Chapter 83-37. We note that Chapter 83-37 offers no support for the appellants' position, for their theory of the case does not turn on whether public employee retirement benefits are protected, but whether future taxpayers are burdened disproportionately.

mandated by Florida law. § 121.031(3), Fla.Stat. (1989). They were therefore properly admitted under the business records exception. § 90.803(8), Fla.Stat. (1989).

[10] On cross-appeal, PFF challenges the Florida Association of Counties' and Florida League of Cities' standing to initiate the suit. That argument proceeds on the stated basis that none of the governmental entities that the Association or League represent convened in formal session to authorize their participation in this suit, and that their participation violated the Sunshine Law. Even assuming this issue was preserved for appellate review, on the merits PFF's argument must fail. *City of Lynn Haven v. Bay County Council of Registered Architects, Inc.*, 528 So.2d 1244, 1246 (Fla. 1st DCA 1988), holds that a nonprofit corporation of architects had standing to assert that City's actions invaded a statutorily-created interest in competitive negotiations, common to its members, but not shared by taxpayers generally. Here, a substantial number of the constituents comprising the Association and League have been substantially and adversely affected by Chapter 88-238, in that they have increased their FRS contributions. There is no requirement that those entities themselves must sustain special injury.

Both the Association and League are private, nonprofit corporations, and neither is a "board or commission" under section 268.011, Florida Statutes (1989). *City of Miami Beach v. Berns*, 245 So.2d 38, 40 (Fla.1971) (on reh'g) ("the Legislature intended to extend application of the 'open meeting' concept so as to bind every 'board or commission' of the state, or of any county or political subdivision over which it has dominion or control"). Neither the Association nor League is controlled by any of the constituent local governments.

For these reasons, we affirm the final judgment of the circuit court.

SMITH and WIGGINTON, JJ., concur.

FLEMING & WEISS, P.C., Appellant,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY, et al., Appellees.

No. 90-2012.

District Court of Appeal of Florida, Third District.

April 2, 1991.

Rehearing Denied July 3, 1991.

Florida bank's insurer brought action against New York law firm, which was retained by New York limited partnership to render opinion to bank on legality under New York law of subordination agreement which bank and limited partnership were to enter into as part of mortgage agreement, alleging that law firm gave erroneous legal opinion. The Circuit Court, Dade County, Edward S. Klein, J., found that it had personal jurisdiction over law firm. Law firm appealed. The District Court of Appeal held that New York law firm did not have sufficient minimum contacts with Florida to warrant the exercise of personal jurisdiction over it.

Reversed and remanded.

Nesbitt, J., filed a dissenting opinion.

1. Courts ⚿12(2)

To render nonresident defendant subject to jurisdiction in state court, statutory requirements of long-arm statute and minimum contacts requirement must be met. West's F.S.A. § 48.193(1)(a, b).

2. Courts ⚿12(2.25)

New York law firm did not have sufficient minimum contacts with Florida to warrant the exercise of personal jurisdiction over it in action alleging that law firm gave erroneous legal opinion; New York