047

12-28

IN THE
SUPREME COURT
OF FLORIDA

NO. 80,435

FRANK R. BRANCA

Petitioner,

v.

CITY OF MIRAMAR,

Respondent.

RESPONDENT'S ANSWER BRIEF RE JURISDICTION AND ON THE MERITS

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TABLE OF CITATIONS

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Comment Regarding Branca's Statement of the Case and Facts

Respondent, The City of Miramar ("City"), has carefully reviewed the statement of the case and facts submitted by Petitioner, Frank R. Branca ("Branca"), and believes that certain supplementation and clarification is necessary. Branca's statement of the facts contains many facts not relevant to the legal issues on appeal and omits other facts which are relevant. The City believes that the following statement of the facts contains all events and evidence necessary for the determination of the issues raised in the pending case. Although there are some facts mentioned in Branca's recitation which are repeated here, such repetition is necessary for continuity and clarity.

STATEMENT OF THE CASE

Branca has sought review from this Court of a decision ("Decision") entered by the Fourth District Court of Appeal ("Fourth District") affirming all issues on appeal from a final declaratory judgment ("Judgment") entered by the trial court on April 17, 1991. [R. 669-675][1]

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[1]/ The City will refer to the record, as paginated by the clerk of the Fourth District as [R. __]. Pages 1-288 of the record contain the transcript of proceedings from the trial held on February 26, 1991, and pages 281-304 of the record represent the transcript of a hearing held on April 17, 1991. Since a copy of the Decision is attached as Appendix A to Branca's brief on the merits, references to the Decision will appear as [App. A-__].

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In its decision, the Fourth District certified the following question to this Court:

> WHETHER ARTICLE X, SECTION 14, AND THE REQUIREMENTS THEREOF APPLY ONLY TO EXISTING COUNTY OR MUNICIPAL PENSION PLANS, OR WHETHER THE REQUIREMENTS ALSO APPLY TO COUNTY OR MUNICIPAL PENSION PLANS THAT INCREASE OTHER EXISTING GOVERNMENTAL [i.e., STATE] PENSION PLAN BENEFITS.

As Branca acknowledges in his introductory statement of the case, the Fourth District specifically did not pass upon the question which it has certified to this Court as being of public importance.

Furthermore, the City maintains that Section 112.048, Fla. Stat., mandated a city-funded pension plan at the time the Ordinance was enacted. Therefore, the certified question, insofar as it refers to "other existing governmental pension plan benefits," is moot as applied to these facts since the City was obligated under Chapter 112, Fla. Stat., to fund a municipal pension plan in any case.

However, without conceding the jurisdiction of this Court to review this matter, the City respectfully suggests that the question certified by the Fourth District is somewhat ambiguous in light of the facts of this case. The City believes that the following revision of the certified question might better focus the issues raised by the Fourth District's decision:

> (A) DO THE REQUIREMENTS OF ARTICLE X, SECTION 14 OF THE STATE CONSTITUTION APPLY TO ALL NEWLY CREATED PENSION PLANS, REGARDLESS OF THE PRE-

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EXISTENCE OF OTHER PENSION PLAN BENEFITS?[2]

(B) ALTERNATIVELY, DO THE REQUIREMENTS OF ARTICLE X, SECTION 14 APPLY TO NEW PENSION PLANS THAT INCREASE OR ADD TO OTHER EXISTING GOVERNMENTAL PENSION PLAN BENEFITS, IRRESPECTIVE OF WHETHER THOSE OTHER BENEFITS ARE FUNDED BY A STATE, COUNTY OR MUNICIPALITY?[3]

The City would answer both questions in the affirmative.

This case was initiated by the City through an amended complaint in which the City sought a declaratory judgment with regard to the enforceability of Miramar Ordinance No. 88-16 ("Ordinance"). The City named Branca and [now-Mayor] Vicky Coceano, Mary Forzano and William Cresswell as defendants.

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[2]/ Although this issue is not part of the question certified by the Fourth District, Branca has, through his attempted reinterpretation of the certified question, sought to have this Court consider the issue. Admittedly, it is a logical starting point for the analysis of the application of Article X, Section 14. Nonetheless, the City maintains that both the trial court and the Fourth District resolved this issue by finding that substantial competent evidence existed to support a finding that the Ordinance constituted an "increase in benefits" since no prior benefits existed other than those mandated by Chapter 112, Fla. Stat. The Fourth District limited its certification to the issue of whether a plan which increases other existing governmental issues is governed by Article X, Section 14. It specifically did not certify the issue of whether a newly created pension plan, in and of itself, constitutes an "increase in benefits" under Article X, Section 14.

[3]/ The City disputes Branca's argument that the obligation to create a pension plan for elected officials under Chapter 112, Fla. Stat., is a state obligation. Section 112.048, Fla.Stat., clearly sets forth that the City bears the financial obligation for the pension benefits it creates.

In the trial court proceedings, the court ruled that the Ordinance, which created a pension plan for elected officials, was unconstitutional under the Florida Constitution, Article X, Section 14, and invalid under Chapter 112, Part VII, Fla. Stat., both of which require that municipal pension plans be actuarially sound. [R. 368-409] Branca was the only defendant to object to the trial court's ruling and the only defendant to pursue his appeal to the Fourth District. No other defendant is currently before this Court.

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STATEMENT OF THE FACTS

This case revolves around the Ordinance which was originated by then-Mayor Branca and enacted by the City Commission on April 4, 1988, approximately one year before Branca resigned as Mayor. [R. 381-385] The Ordinance established a retirement system for elected officials and provided for a benefit as a percentage of the elected official's average annual salary for the last five years of service. [R. 382] The goal of the Ordinance was to provide benefits to Branca and certain other elected City officials. [App. B 1-5] Branca is the only individual who seeks to enforce the Ordinance.

The parties below did not dispute that the Ordinance was not funded on a "sound actuarial basis" as required by Article X, Section 14, Florida Constitution. Branca did not and does not argue that the Ordinance is fiscally sound; rather, he sets forth various reasons why the Ordinance should be enforced despite its economic infirmities.

Based upon Branca's length of service as mayor of the City, his salary and life expectancy, the monthly pension benefit of $1,854.17 created by the Ordinance would total $238,602 over Branca's lifetime. [R. 82, 563] Branca's only contribution to the pension plan, from which he could receive nearly a quarter of a million dollars, was $3,262.17. This amount represents Branca's monthly contributions of 5% of his salary to the City from May 1,

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1988 through and including his retirement date of April 3, 1989. [R. 563][4]

The idea for the Ordinance originated in 1988 when Branca, who was then mayor, approached Jack Neustadt, the finance director of the City, and requested that Mr. Neustadt inquire into exclusive retirement systems for elected officials in the State of Florida. [R. 20] At that time, the City had a strong-mayor form of government which, according to the Charter, gave Branca considerable power to perform his role as chief executive of the City. Among other powers, Branca had the right to veto commission resolutions and ordinances. Miramar City Charter, § 21 (1989) [repealed by Ordinance No. 90-11, which changed the City's form of government]. Mr. Neustadt obtained copies of certain retirement systems and submitted them to Branca. [R. 21] The City attorney then drafted the Ordinance [R. 142, 144, 146] and the City engaged an actuary named Stephen Palmquist as a consultant. [R. 22] The Ordinance was requested "by the administration," which meant that its formulation and adoption was at the direction of the chief executive, then-Mayor Branca. [R. 21] Eventually, the Ordinance was presented to the Commission and approved. [R. 148]

In accordance with the retirement system created by the Ordinance, the only contribution to be made by the elected official was 5% of his or her salary. When these contributions are

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[4]/ Branca's salary increased from $10,000 in 1984 to $50,000 in 1985; $52,500 in 1986; $60,000 in 1987; and $65,000 in 1988. [R. 17-19]

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exhausted, the Ordinance provides that the benefits "shall be paid by the City from its general funds." [R. 390, 27] Branca's contributions were exhausted two months after he retired. [R. 563]

Soon after the Ordinance was enacted, an election in the City occurred which resulted in the election of certain new commissioners. [R. 226] It was publicly stated by the officials who were running for office at that time that they would do everything they could to defeat the pension plan and the Ordinance. [R. 25, 661] Branca had concerns about his possible inability to work with the new commission and was aware of political opposition among the commissioners which might result in the repeal of the Ordinance.[5] [R. 25, 661]

Branca testified that prior to retiring, the City attorney provided him with her legal opinion that "the pension was legal, valid and good." [R. 242] Branca further testified that he relied upon this opinion and took certain actions, including retirement itself, as a result. [R. 152-153, 222, 228] Immediately upon retiring on April 3, 1989, Branca contacted Mr. Neustadt and advised him that he was entitled to his pension benefits beginning the day after his written resignation. Mr. Neustadt inquired and was told by the City attorney that Branca's entitlement would begin as of May 1, 1989. [R. 26]

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[5]/ The Ordinance was repealed by the City Commission on May 15, 1989, but Branca's payments continued. [R. 330-331, 555] The payments came from a budget item entitled "disputed benefits payable." [R. 26]

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The City clerk submitted the Ordinance to the Department of Administration, Division of Retirement for the State of Florida ("Division"). [R. 55] The Division's general counsel reviewed the Ordinance and concluded that it was in violation of Article X, Section 14, of the state constitution and Part VII of Chapter 112, Fla.Stat., both of which require that a city responsible for a retirement or pension system supported in whole or part by public funds must make provision for the funding "on a sound actuarial basis." [R. 55]

Section 112.625(1)(b), Fla.Stat., provides that a retirement system or plan is exempt from the funding requirements if it is maintained "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." The City's consultant, when questioned about the constitutional funding requirements, argued that the Ordinance was exempt because it really provided for a plan of deferred compensation. The general counsel of the Division concluded that this exemption is not applicable and, further, that the additional requirements imposed by this section did not exist in the Ordinance. [R. 58] The Fourth District ruled below, in accordance with the trial court's findings, that "substantial competent evidence" existed in the record to support "the finding that

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Ordinance 88-16 did not constitute a deferred compensation plan." [App. A-6][6]

Soon after receipt of the general counsel's legal opinion, the City filed a complaint in circuit court in order to obtain a definitive ruling in the form of a declaratory judgment with regard to the constitutionality and enforceability of the Ordinance. [R. 368-409] The City presented expert witnesses at trial who testified with regard to the violation of the Florida Constitution and Florida statutes by the Ordinance. City expert witness, Frederick Mabry, testified that the Ordinance was not actuarially sound, in violation of Article X, Section 14 which requires that retirement systems providing an increase in benefits must be actuarially sound. [R. 86-90]

Branca never contested the Ordinance's lack of fiscal soundness. Branca's principal argument, apparently abandoned in his petition to this Court, was that the Ordinance did not have to be actuarially sound since it was a plan of deferred compensation and therefore exempt from the requirements of Article X, Section 14.

The trial court entered the Judgment finding that the Ordinance was unconstitutional, violative of Article X, Section 14, of the Florida Constitution, and violative of Chapter 112, Part

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[6]/ Branca has chosen not to refute or even address the findings below that the Ordinance did not create a deferred compensation plan. As such, the City assumes that particular issue not to be before this Court and does not address it in its answer brief.

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VII, Florida Statutes. [App. D 1-7; R. 674] The court concluded that the Ordinance was unlawful from its inception and did not confer any rights upon Branca or the other defendants. [App. D-6; R. 674] The Judgment further stated that Branca was not entitled to receive any payments under the Ordinance since his contribution of 5% of his salary was exhausted on or about June 1, 1989. [R. 674] The Fourth District affirmed each of the trial court's findings, while refusing to pass upon the issue certified to this Court. [App. A-1]

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SUMMARY OF THE ARGUMENT

Jurisdiction

Branca argues that this Court may exercise its discretionary jurisdiction because the Fourth District a) construed a provision of the state constitution; or b) because it certified a question to the Supreme Court. Art. V, §§ 3(b)(3) and (4). However, neither argument confers jurisdiction on this Court given the facts of this case or the Decision.

First, the Fourth District never actually "construed" a provision of the state constitution so as to confer jurisdiction upon this Court. This Court's exercise of jurisdiction is contingent upon the Fourth District's actually construing, rather than applying, the language of the particular constitutional provision at issue. Since neither the trial court nor the appellate court actually construed the constitutional provisions of Article X, Section 14, this Court should refrain from exercising its discretionary jurisdiction.

Second, jurisdiction is inappropriate because the Fourth District never "passed upon" the question certified to this Court. The provisions of Article V which confer discretionary jurisdiction upon this Court to review decisions which certify questions of public importance to this Court are applicable solely in those instances where the district court of appeal in question has actually "passed upon" the question which was certified. As Branca

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himself has acknowledged, the Fourth District specifically refrained from deciding the certified question. In fact, the record reflects that an adequate basis existed for the Fourth District to rule as it did without resolving the certified question. Therefore, this Court should not exercise jurisdiction to entertain this case on the merits.

Unconstitutionality of the Ordinance

The Ordinance is unconstitutional because, contrary to Article X, Section 14, it provides for a municipal pension plan which is not actuarially sound. Branca does not challenge the Ordinance's lack of fiscal soundness. Instead, he argues that the Ordinance should still be enforced because either the Ordinance is not controlled by the state constitution, or because the City has no right to challenge the unconstitutional status of the Ordinance.

Branca urges an unreasonable and inequitable interpretation of the state constitution in order to exempt the Ordinance from its requirements. Branca argues that Article X, Section 14 should be interpreted to require that only an increase in benefits from a pre-existing plan must be actuarially sound, while any new pension system is permitted to be actuarially unsound. This is an absurd interpretation of the constitutional provision which would permit all government pension plans created after January 1, 1977 to avoid funding on a sound actuarial basis. In effect, only increases to old plans would be fiscally sound while new plans could unreasonably burden future taxpayers in direct contradiction to the

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language and purpose of Section 112.61, Fla.Stat., which describes the legislative intent of Article X, Section 14. This Court has repeatedly held that statutes and constitutional provisions will not be interpreted in such a manner as to achieve an absurd or meaningless result, or one which is illegal or against public policy.

Consequently, this Court must answer the certified question by concluding, as did the trial court and Fourth District before it, that, even in the absence of pre-existing pension benefits, the implementation of a new pension system constitutes an "increase in benefits" as provided in Article X, Section 14 of the Florida Constitution.

Even if, however, this Court requires the pre-existence of a city or other governmental pension plan in order to apply Article X, Section 14 to the Ordinance, such a plan did exist. Section 112.048, Fla.Stat., specifically provides that a city must provide a system of retirement benefits for elected officials who have served for twenty years or more consecutively. This particular section imposes upon the city, not the state, the obligation to fund a retirement program for elected officials. Since the Ordinance "increases" such a pension benefit, Article X, Section 14 applies. Whether Branca, by his actions, chose not to attempt to become vested under this pre-existing system is irrelevant to the determination of whether or not retirement benefits existed under Article X, Section 14. Branca's attempt to circumvent this issue by attributing the pension obligation created by § 112.048,

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Fla.Stat., to the state is incorrect and contradicted by the clear language of the statute.

As a result, this Court must affirm the trial court's findings regardless of how the certified question is answered. Section 112.048, Fla.Stat., mandates a city-funded pension plan for elected officials. The Ordinance provided an increase in those benefits.

Standing

Caselaw supports the use of declaratory judgments to determine the constitutionality of ordinances and proposed ordinances. In addition, legal and ethical principles support the City's standing to seek a declaratory judgment regarding the validity of its own pension ordinance. By seeking declaratory relief, the City attempted to defend and protect its citizens from improper, illegal and substantial expenditures of public funds. No other course of action proposed by Branca would have addressed the constitutional infirmities of the Ordinance.

Estoppel

Estoppel is inappropriate under these facts since the application of estoppel would achieve an illegal result and one which is contrary to public policy. Additionally, the alleged representations upon which Branca claims to have relied were those of law and not fact. Under both state and federal law, estoppel will not lie against a municipality under such circumstances.

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As a result, the City respectfully requests that this Court deny jurisdiction of the Petition. Alternatively, the City urges this Court to answer the certified question by finding that Article X, Section 14 applies to the Ordinance and that the Ordinance is violative of the state constitution and Section 112.61, Fla. Stat. As a further alternative, the City respectfully requests that the court rule that Article X, Section 14 applies to all new government pension plans, regardless of the pre-existence of pension benefits at the time the new plan is instituted.

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ARGUMENT

Introduction to Argument

Branca urges this Court to accept jurisdiction and rule that the citizens of the City must be forced to fund an actuarially unsound pension plan proposed by the City's mayor just prior to his retirement. Branca does not argue that the pension plan created by the Ordinance is actuarially sound. Instead, Branca seeks to defeat the City's right to challenge the constitutionality of the Ordinance. Branca also asks this Court to construe the state constitution so as to permit all new government pension plans to be actuarially unsound and to allow such plans to transfer to future taxpayers, in violation of Section 112.61, Fla.Stat., the costs of the plans which may reasonably be borne by current taxpayers.

Based upon the many legal and equitable considerations set forth in this brief, Branca's arguments must be rejected.

I. THIS COURT SHOULD REFRAIN FROM EXERCISING ITS DISCRETIONARY JURISDICTION TO REVIEW THE FOURTH DISTRICT'S DECISION AFFIRMING THE UNCONSTITUTIONALITY OF THE ORDINANCE.

Branca has asserted that this Court may exercise its discretionary jurisdiction by virtue of the Fourth District's either (a) having construed a provision of the state constitution; or (b) having certified a question to the Supreme Court. Art. V, §§ 3(b)(3) and (4). However, neither argument confers jurisdiction upon this Court given the facts of this case and the Decision.

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The relevant provisions of Article V which confer discretionary jurisdiction upon this Court state as follows:

> b. **Jurisdiction.** - The Supreme Court:
>
> . . .
>
> (3) may review any decision of a district court of appeal that expressly declares invalid a state statute, or expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.
>
> (4) may review any decision of a district court of appeal that passes upon a question certified by it to be of great public important, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

Art. V, §§ 3(b)(3) and (4).

Therefore, this Court can exercise its jurisdiction only if the Decision is found to "construe" a provision of the state constitution or if the Fourth District actually "passed upon" the question which was certified by it to be of great public importance. Ogle v. Pepin, 273 So.2d 391 (Fla. 1973); Revitz v. Baya, 355 So.2d 1170 (Fla. 1977); Duggan v. Tomlinson, 174 So.2d 393 (Fla. 1965). Since neither circumstance exists, this Court should decline jurisdiction.

With respect to Branca's argument that this Court may exercise discretionary jurisdiction since the Fourth District interpreted a provision of the state constitution, such an exercise of

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jurisdiction is contingent upon the district court's actually construing, and not merely applying, a provision of the state constitution. Ogle, 273 So.2d at 392; see also, Armstrong v. City of Tampa, 106 So.2d 407 (Fla. 1958). In determining whether a particular opinion "construes" a provision of the constitution, the court in Ogle stated that the decision must undertake:

> to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.

Ogle, 273 So.2d at 392.

The mere fact that the trial court and the Fourth District applied the language of Article X, Section 14 of the Florida Constitution to the facts before it does not confer jurisdiction upon this Court. Armstrong, 106 So.2d at 409. In Armstrong, the court addressed the issue as follows:

> We come now to the alternative contention of the appellants that the final decree construed "a controlling provision of the Florida or federal constitution." The problem presented by the suggestion is not without difficulty. Our study of the decisions of courts of other states operating under very similar constitutional provisions leads us to the conclusion that in order to sustain the jurisdiction of this court under the quoted provision it is necessary that the final decree under assault actually construe, as distinguished from apply, a controlling provision of the Constitution. [Emphasis supplied]

Armstrong, 106 So.2d at 409. The court further noted:

> It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution.

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Id.

In the Judgment, the trial court cites to the relevant provisions of Article X, Section 14 and finds as follows:

> That the creation and establishment of a retirement plan for Miramar elected officials under Ordinance No. 88-16 was an increase in benefits under Art. X, sec. 14, Fla. Const. (1968), because no City of Miramar retirement benefits existed for elected officials prior to the enactment of Ordinance No. 88-16, which was enacted on April 4, 1988.

[App. D-2] The trial court does not attempt "to explain, define or otherwise eliminate existing doubts arising from the language or terms" of Article X, Section 14. Quite the contrary, the trial court apparently applies the language forthrightly to the retirement benefits created by the Ordinance.

The Fourth District, in turn, does little more than adopt the trial court's findings:

> The trial court found, and certainly an argument can be made, that the creation and establishment of a retirement plan for Miramar elected officials under Ordinance No. 88-16 was an increase in benefits as contemplated in Art. X, Sec. 14, because no such pension benefits existed for elected officials prior to the enactment of Ordinance 88-16 apart from those mandated in § 112.048, Fla.Stat. As such, Ordinance 88-16 would be subject to the requirements of Art. X, Sec. 14.

[App. A-5,6]. The Fourth District failed to conduct any analysis into the possible construction of the phrase "increase in benefits" other than adopting the trial court's findings which were based upon "substantial, competent evidence." There is no discussion in the Decision of the derivation of the language contained in Article

X, Section 14; no discussion of legislative intent; no discussion of possible definitional sources for the terms.

In short, the Fourth District, like the trial court before it, did no more than apply the language of the constitutional provision to the retirement benefits created by the Ordinance. Florida law clearly holds that "applying a constitutional provision is not synonymous with 'construing' that same provision for purposes of determining this court's jurisdiction." Armstrong, supra; see also, Rojas v. State, 288 So.2d 234, transferred to 296 So.2d 627, cert. den. 419 U.S. 851 (1974). As a result, this Court should refrain from exercising its discretionary jurisdiction to review the Decision.

In addition, the Fourth District failed to "pass upon" the certified question and, as a result, jurisdiction should not be exercised based upon the existence of a certified question. In Revitz, this Court was presented with an appeal from a decision of the Third District Court of Appeal which certified a question as being of great public importance, but failed to "pass upon" the question. In refusing to accept jurisdiction to consider the appeal, the court stated as follows:

> Article V, Section 3(b)(3), Florida Constitution, provides, in pertinent part, that the Supreme Court "[m]ay review by certiorari any decision of a district court of appeal . . . that passes upon a question certified by a district court of appeal to be of great public interest . . . ." (emphasis supplied)
>
> Since, sub judice, the district court specifically found it unnecessary to pass upon

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> the question now certified to this court, we are without jurisdiction to consider and decide the question. [footnote omitted]

Revitz, 355 So.2d at 1171.

As in Revitz, where the district court in its opinion specifically refrained from deciding the certified question, the Fourth District in this case similarly did not pass upon the certified question. After acknowledging that the proposed retirement benefits provided by the Ordinance would not constitute a deferred compensation plan, and before certifying its question with respect to "other" governmental pension benefits, the Fourth District noted as follows:

> Notwithstanding, we need not resolve the issue of whether the ordinance's enactment constituted an "increase in benefits" under Art. X, Sec. 14, Florida Constitution.

[App. A-6]

Branca himself has acknowledged that the Fourth District did not pass upon the question it certified as being of great public importance. There was sufficient evidence in the record to support a finding that the Ordinance constituted an increase in benefits since no other pension benefits existed other than those available under § 112.048, Fla.Stat.[7] As a result, the legal issue set forth

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[7]/ The District Court focused on an independent finding that the Ordinance constituted an "increase in benefits":

> The trial court found, and certainly an argument can be made, that the creation and establishment of a retirement plan for Miramar elected officials under Ordinance 88-16 was an increase in benefits as contemplated in Art.

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in the certified question was not, and need not have been, decided by the Fourth District. Therefore, this Court lacks the requisite jurisdiction to consider and decide the certified question. Revitz, 355 So.2d at 1171.

II. THE ONLY REASONABLE INTERPRETATION OF THE PHRASE "INCREASE IN BENEFITS" MANDATES THAT THE SYSTEM ESTABLISHED BY THE ORDINANCE COMPLY WITH CONSTITUTIONAL REQUIREMENTS THAT IT BE ACTUARIALLY SOUND.

Branca urges upon this Court a hyper-technical interpretation of Article X, Section 14 of the state constitution which would require that an increase in benefits from a pre-existing plan be actuarially sound, while allowing a new pension system to avoid similar actuarial requirements.[8] Such an interpretation is absurd

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> X, § 14, because no such pension benefits existed for elected officials prior to the enactment of Ordinance 88-16 apart from those mandated in §112.048, Fla.Stat. [emphasis supplied]

[App-A-5,6].

[8]/ Article X, Section 14 of the Florida Constitution mandates that any "increase in benefits" of publicly funded retirement programs be funded in a manner which is actuarially sound. More specifically, Article X, Section 14 states as follows:

> 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, Sec. 14, Florida Constitution (1968).

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and contrary to the stated intent of this constitutional provision. The purpose of the actuarial requirement imposed by Article X, Section 14 is to protect taxpayers from unfair and burdensome obligations to use public funds for a government retirement or pension system. More specifically, the legislature expressed its explicit concerns in § 112.61, Fla.Stat.:

> 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 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 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.

§ 112.61, Fla.Stat. (1992).

The Florida legislature specifically intended that all "retirement systems or plans be managed, administered, operated, and funded" in a manner designed to protect the plans as well as the public fisc. The legislature makes no distinction between new plans and those relating to pre-existing retirement systems. Quite the contrary, the final sentence of § 112.61, Fla. Stat., states

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that minimum standards are established generally for "public employee retirement systems and plans."

To impose upon Article X, Section 14, as well as the statutory scheme imposed by Chapter 112, Fla.Stat., the limited interpretation of "increase in benefits" urged by Branca would utterly defeat the express legislative intent of both the constitutional and statutory provisions. Such an interpretation would do little more than achieve a meaningless result.

This Court has repeatedly held that statutes and constitutional provisions will not be interpreted in such a manner as to achieve an absurd or meaningless result, or one which is illegal or against public policy. Neu v. Miami Herald Publishing Company, 462 So.2d 821 (Fla. 1985) (in construing legislation, courts should not assume that the legislature acted pointlessly); City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950) (in the construction and interpretation of statutes, the legislative intent must be effectuated; courts will not ascribe to the Legislature an intent to create an absurd consequence so an interpretation avoiding absurdity is always preferred); see also, Ferre v. State, ex. rel Reno, 478 So.2d 1077 (Fla. 3d DCA 1985) (courts will not ascribe to Legislature an intent to create an absurd or harsh result); In the Interest of C.M.H., 413 So.2d 418 (Fla. 1st DCA 1982) (same holding).

The basic rule of statutory interpretation is that the use of a comprehensive term, such as "increase in benefits," ordinarily indicates the intent to include everything embraced within that

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term. Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). In light of this standard, as well as the constitutional and statutory schemes created by Article X, Section 14 and Chapter 112, Fla.Stat., Branca's position is untenable. The only interpretation of the phrase "increase in benefits" which would further the legislature's clear intent to protect both the retirement systems as well as the public fisc is one which requires that new retirement benefits such as those provided by the Ordinance meet state constitutional requirements of actuarial soundness.

In addition, the City clerk submitted the Ordinance to the Department of Administration, Division of Retirement for the State of Florida ("Division"), which is charged with overseeing the implementation and continued viability of such retirement systems. [R. 55] The Division's general counsel reviewed the Ordinance and concluded that it was in violation of Article X, Section 14 of the state constitution, and Part VII of Chapter 112, Fla.Stat. [R. 55] The law in Florida is well settled that the administrative interpretations of officers and agencies who are charged with administering a particular law, are entitled to judicial deference and will be given great weight in the courts of Florida. Raffield v. State, 565 So.2d 704 (Fla. 1990); Samara Development Corp. v. Marlow, 556 So.2d 1097 (Fla. 1990); P. W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988) (contemporaneous construction of statute by agency charged with its enforcement and interpretation is entitled to great weight; courts will not depart from the

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construction unless it is clearly unauthorized or erroneous; Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985) (reviewing court must defer to an agency's interpretation of an operable provision as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence). Since the Division has already determined that the system created by the Ordinance would be covered by the requirements of Article X, Section 14 and Chapter 112, Fla.Stat., and since the Fourth District found that there existed substantial, competent evidence to support the trial court's finding in accordance with the Division's opinion, this Court should defer to such an interpretation as binding.

The only case cited by Branca which purportedly supports his limited interpretation of the phrase "increase in benefits" is Turlington v. Department of Administration, 462 So.2d 65 (Fla. 1st DCA 1984). However, the court in Turlington never attempted to define the phrase "increase in benefits" and, as a result, the decision lends no support to Branca's argument. Instead, the court focused upon Chapter 83-76 of Florida Laws which gave an elected official the option to "retire" before his normal retirement date, yet remain employed while accruing no additional retirement benefits. Since, under the predecessor statute, an elected official would have been able to retire and received the same reduced retirement benefit, all the new statute did was permit an elected official to retain additional salary. The court stated:

> Consequently, the trial judge correctly found that the only benefit to the eligible member under the new act is the retention of salary after "retirement", which is not an "increase in benefits" forbidden by Article X, Section 14 of the Florida Constitution. [emphasis in original]

Turlington, 462 So.2d at 67. The court specifically noted that under either the new statute or its predecessor, the eligible member would "draw a retirement benefit at the same reduced rate." Id. Consequently, since the retirement benefit remained the same in either instance, the court had no occasion to define "increase in benefits." It merely made a distinction between the terms "salary" and "pension benefits."

The factual circumstances currently before this Court are entirely inapposite. In the instant case, there is no issue of possible "salary retention" by Branca under the Ordinance. The only benefits which Branca could receive under the Ordinance were, without question, pension benefits and not salary. It is also clear that the Ordinance increased the benefits Branca would have received had the Ordinance never been enacted. In Turlington, the court found that no increase in pension benefits occurred. As a result, the fact specific finding of the court in Turlington is inapplicable in the present case.

Consequently, for all the foregoing reasons, this Court must answer the certified question by concluding that, even in the absence of pre-existing retirement benefits, the implementation of a new pension or retirement system constitutes an "increase in

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benefits" as provided in Article X, Section 14 of the Florida Constitution.

III. SINCE A CITY-FUNDED RETIREMENT SYSTEM ALREADY EXISTED FOR THE BENEFIT OF BRANCA, THE ORDINANCE CONSTITUTED AN "INCREASE IN BENEFITS" UNDER ARTICLE X, SECTION 14, AND WAS UNCONSTITUTIONAL FROM ITS INITIAL ADOPTION FOR LACK OF ACTUARIAL SOUNDNESS.

The implementation of the Ordinance constituted such an "increase in benefits" under Article X, Section 14 of the state constitution because a pre-existing city pension system existed for elected officials before the passage of the Ordinance. Branca was the potential beneficiary of retirement benefits provided by a state-mandated retirement benefit system to be implemented by the City. Section 112.048, Fla.Stat., states as follows:

> . . . [W]henever an elective officer of any city or town of this state has held an elective office of such city or town for a period of twenty (20) years or more consecutively, or for a period of twenty (20) years or more consecutively, except for one period not exceeding six months, such elective officer may voluntarily resign or retire from such elective office with the right to be paid, and he shall be paid on his own requisition by such city or town during the remainder of his natural life, a sum equal to one-half of the full amount of the annual or monthly salary that such city or town was authorized by law to pay said elective officer at the time of his resignation or retirement . . . . [emphasis supplied]

Section 112.048(2)(a), Fla.Stat. As is evident from the clear language of the statute, it is the city's obligation, and not the state's, to fund this retirement benefit on behalf of its elective

officers. In fact, the Florida legislature clearly intended for the obligation to rest solely with the city or town in question:

> The intent of the Legislature is to authorize and direct <u>each city and town</u> to provide a system of retirement for elected officials . . . . [emphasis supplied]

Section 112.048(1), Fla.Stat.

In this case, Branca voluntarily chose not to seek re-election so as to become vested in this city-funded system. However, Branca's decision not to take advantage of these existing benefits does not alter the fact that other retirement benefits existed in accordance with Article X, Section 14 of the state constitution. Branca makes an erroneous argument in an attempt to circumvent this issue by attributing the pension obligation created by § 112.048, Fla.Stat., to the state rather than to the City. [Branca Brief, p.19] However, the clear language of the statute demonstrates that these retirement benefits are, in fact, the City's obligation. As a result, this Court must answer the certified question by finding that the Ordinance constituted a retirement benefit system which provided an increase in benefits and is governed by Article X, Section 14, Florida Constitution.

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IV. THE CITY HAD STANDING TO SEEK DECLARATORY RELIEF FROM THE CIRCUIT COURT AFTER THE STATE OF FLORIDA, DIVISION OF RETIREMENT, ISSUED AN OPINION FINDING THAT THE ORDINANCE WAS ILLEGAL AND UNCONSTITUTIONAL.

Because the pension plan created by the Ordinance will be totally funded by revenues generated from present and future taxpayers, once Branca's minimal contributions had been exhausted, the City had both a moral and legal obligation to resolve the existing controversy regarding the enforceability of the Ordinance. It is clear that the validity of an ordinance can be tested in an action for declaratory relief if there is an actual, present and practical need for the declaration. East Naples Water Systems, Inc. v. Board of County Commissioners of Collier County, 457 So.2d 1057 (Fla. 2d DCA 1984). Prior to initiating this action, the State of Florida, Division of Retirement issued a specific legal opinion finding the Ordinance to be unconstitutional and illegal. [R. 403-407] As a result, the initiation of a declaratory action was the appropriate and correct course of action. East Naples, supra.

Branca's claim that the City's only remedy is a lawsuit for damages against the actuary is without merit. Such an action would not address the key issue in this matter, namely the legality and enforceability of the Ordinance. The appropriate manner for a city to test its good faith concerns with regard to the unconstitutionality of an ordinance is by seeking declaratory relief. West Palm Beach Association of Firefighters v. Board of

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City Commissioners of the City of West Palm Beach, 448 So.2d 1212 (Fla. 4th DCA 1984).

Equally without merit is Branca's claim that permitting such declaratory actions would create "havoc." There is absolutely no basis to believe that permitting the resolution of disputed rights and issues which affect the "pocketbooks" of all present and future citizens of the City would have any deleterious effect on the court system. Cases such as West Palm Beach, supra, and Dade County v. Dade County League of Cities, 104 So.2d 512 (Fla. 1958) suggest that it is in the public interest to determine constitutional challenges to ordinances by way of declaratory judgments.

In fact, Chapter 86, Florida Statutes, creating jurisdiction for declaratory judgments in the circuit court, was enacted for just this kind of serious controversy. Section 86.011 permits circuit courts "to declare rights, status, and other equitable or legal relations ... ." Even though, in this case, the State of Florida, Division of Retirement, found the Ordinance to be unconstitutional and illegal, it is the circuit courts of our state which must be used to obtain a definitive declaration of the "rights, status ... [and] legal relations" encompassed by that ruling. See, East Naples, supra. Such relief cannot be rendered in a lawsuit seeking damages against the actuary, as Branca suggests. The City cannot be expected to quietly accept and maintain an unconstitutional and illegal retirement system while seeking possible damages against an actuary.

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Contrary to Branca's assertion that there is no legal support for the actions of the City, statutory and caselaw support does exist. In addition to the clear language of §86.011, Fla.Stat., case law also supports the City's actions. In Metropolitan Dade County v. Floyd Pearson, et al., 559 So.2d 614 (Fla. 3 DCA 1990), Dade County brought a declaratory action seeking to determine whether an ordinance passed by the Dade County Commission, but later challenged in other litigation, was legally enacted. There was no challenge to Dade County's standing to bring such an action in the trial or appellate court. It is also clear that a city can seek a declaratory judgment to determine the constitutionality of a proposed ordinance. West Palm Beach, supra. In fact, the Fourth District in West Palm Beach questioned why the city had not sought declaratory relief with regard to the constitutionality of the proposed ordinance. Clearly, standing was not an issue in Floyd Pearson or West Palm Beach.

Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962) deals with the standing of county commissioners to challenge the constitutionality of a county law. The court specifically held that the commissioners had standing because the law involved the disbursement of public funds. Surely, the required payment of taxpayers' funds to support the unfunded pension system established by the Ordinance constitutes the disbursement of significant public funds over a long period of time and, as a result, Kaulakis applies. Branca's attempt to distinguish Kaulakis by saying that the county there challenged the constitutionality of a law in a

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defensive posture (as a shield) while the City is using it as a sword is unpersuasive. In fact, by seeking a declaratory judgment, the City is attempting to defend and protect its citizens from an improper, illegal and substantial expenditure of public funds in the future.

The fact that the City is the plaintiff in this action and not a defendant as it would be in a taxpayer lawsuit on the same issue should not be considered a relevant distinction. Branca cites no legal support whatsoever for this supposed distinction in the City's posture before this Court. The simple fact is that the City is seeking in good faith to have the propriety of a significant public expenditure determined by the Court.

Branca relies extensively upon the language in Killearn Properties, Inc. v. City of Tallahassee, 366 So.2d 172 (Fla. 1st DCA 1979), in support of its proposition that the City lacks standing to challenge its own ordinance. However, Killearn is factually inapposite to the circumstances surrounding the case currently before the Court. In Killearn, the court castigated a city for "seeking to escape from its moral obligations to the citizens." The court noted that the city in that case had entered into a contract with its citizens and was attempting to reap the benefits of the contract without providing the services for which the citizens had contracted. It was not the validity of any ordinance which was being challenged, but rather the validity of a private contract between the municipality and its residents under applicable law. No employer-employee relationship existed between

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the parties existed in Killearn and the court took pains to observe that the municipality had never objected to the validity of the contract prior to refusing to provide the benefits. Killearn, 366 So.2d at 181.

In the present case, at Branca's urging, the City erroneously adopted a substantively invalid ordinance which provided for a retirement benefit system for its elected officials. The City, upon investigation, discovered significant bases upon which to doubt the validity and constitutionality of the Ordinance. Nonetheless, the City continued to make disputed benefit payments to Branca under the plan until such time as a final legal determination could be made as to the Ordinance's validity. At no point did the City reap any benefits from the Ordinance as was the case in Killearn.[9] In all material respects, the City in this case acted to protect the citizens' interests in the public fisc and prohibit improvident expenditures of public funds. The City's failure to challenge the Ordinance would have been an attempt by the City to escape its moral obligations to its citizens contrary to the admonitions of Killearn.

In summary, Branca's argument is form over substance. A clear case or controversy affecting the citizens of the City now and for

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[9]/ In another case cited by Branca, O.P. Corporation v. Village of North Palm Beach, 278 So.2d 593 (Fla. 1973), the court refused to allow a municipality to challenge an ordinance which was procedurally defective where the municipality had for ten years accepted and retained substantial permit fees from implementation of the ordinance. The factual circumstances currently before the court are entirely distinct from those in O.P. Corporation.

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years in the future unquestionably exists. The State of Florida, Division of Retirement, has determined the Ordinance to be illegal and unconstitutional. If ever a situation cried out for a declaration of rights, it is this one. There is no legal or equitable reason to prohibit the City from taking the action it rightfully took.

V. BOTH EQUITABLE AND LEGAL CONSIDERATIONS PROHIBIT THE APPLICATION OF ESTOPPEL IN THIS CASE.

A. Estoppel Cannot Be Used to Achieve an Illegal Result.

Branca recognizes that estoppel cannot be applied to a municipality if to do so would achieve an illegal result or one that is prohibited by statute. [Branca Brief, p.33, citing, inter alia, Dade County v. Bengis Associates, 257 So.2d 291 (Fla. 3d DCA); State v. City of Hialeah, 156 So.2d 675 (Fla. 3d DCA 1963); City of Miami Beach v. Meiselman, 216 So.2d 774 (Fla. 1968)] However, that is precisely what would happen if estoppel is applied.[10]

The Ordinance, if upheld, would violate both the Florida Constitution and existing statutory law. The Ordinance provides for a pension which is not actuarially sound, yet relies almost entirely upon the City's general revenues, contrary to Article X, Section 14, Fla. Const. It also violates Part VII, Chapter 112,

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[10]/ Branca makes an unconvincing argument that these cases are distinguishable because "it was not illegal to enact a pension ordinance." (Branca Brief, p.34) However, Branca fails to explain why these cases do not apply to the enactment of a specific pension ordinance in violation of Florida law.

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Fla.Stat., since it creates a plan which is not actuarially sound and lacks other fundamental requirements. [R. 175, 176, 179, 180, 555] Therefore, based upon the substantial body of caselaw cited by Branca himself in his brief, estoppel cannot be applied under these circumstances, since doing so would violate both statutory and constitutional law in Florida.

B. The Application of Estoppel in this Case is Contrary to Public Policy.

The same cases cited by Branca [e.g. Bengis, supra; City of Hialeah, supra., et. al.] do not apply estoppel against a municipality where the result would be contrary to public policy. There can be no question that public policy considerations in this case dictate against upholding the Ordinance.

Enforcement of the Ordinance would reward a public official who initiated a City ordinance for his own financial gain. When Branca feared repeal of the Ordinance, he abruptly resigned, carefully setting the groundwork for a future estoppel argument against the City. Immediately upon resigning, Branca requested the commencement of his retirement benefits. (R. 26) Branca obviously sought to commit the City to payment before the expected repeal of the Ordinance by the new commission. (R. 25, 661)

Branca seems to suggest that it is somehow good public policy to require present and future taxpayers in the City to support his pension under the facts of this case. Branca fails to

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articulate why enforcement of such a pension plan is an indication of good public policy and, clearly, it is not.

C. Estoppel Cannot be Applied to Mistakes of Law.

Branca's reliance upon the legal advice of the city attorney and the actuarial advice of the City's expert, if misplaced, would be a mistake of law and not fact. Mistakes of law cannot support claims of estoppel. The Department of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981). Branca even cites to the City attorney's testimony at page 11 of his brief where the attorney stated that she relayed to Branca her " ... belief that this ordinance was valid, legal and constitutional ... ." (R. 152-153) This is a clear admission of a legal, not factual, opinion. Additionally, the "exceptional circumstances" required to apply equitable estoppel do not exist. State Department of Revenue v. Air Jamaica, Ltd., 522 So.2d 446 (Fla. 1st DCA 1988).

It should also be noted that the United States Supreme Court recently issued a sweeping opinion in Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990) that estoppel could not be enforced against the government based upon erroneous advice provided by a government employee without regard as to whether the advice was factual or legal. Richmond involved facts very similar to those in the instant case. Richmond, himself an employee, obtained advice from an employee relations specialist regarding the maximum amount of money which he could earn so as not to be disqualified from obtaining a disability annuity. The advice he

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obtained was erroneous. Richmond relied upon the erroneous advice and earned too much money, thereby disqualifying himself from obtaining certain benefits. Richmond, 110 S.Ct. at 2468. The Supreme Court flatly ruled that erroneous advice by a government employee cannot estop the government from denying benefits not otherwise permitted by law. Richmond, 110 S.Ct. at 2466.

The court in Richmond sets forth a lengthy history and analysis of the doctrine of equitable estoppel against the government on behalf of private litigants. The court states that a long line of early decisions ruled out estoppel against the government, but that certain cases in the last thirty years have somehow suggested that estoppel against the government is "possible." The court notes, however, that

> . . . we have reversed every finding of estoppel which we have reviewed. Indeed no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims.

Richmond, 110 S.Ct. at 2470. While the court stopped short of holding that estoppel could never succeed against the government, the holding made it clear that the kind of estoppel Branca claims in this case could never succeed.

While Richmond fails to make the kind of distinction between mistakes of law and fact upon which Branca has relied, it is clear in this case that mistakes of law, and not fact, are at issue. Branca testified that the city attorney told him that the Ordinance "was legal" and "valid." [R. 242] Therefore, Branca's

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statement at page 32 of his brief that the City attorney's representations related to facts only is factually inaccurate.

There is no mistake of fact here with regard to whether Branca happened to be eligible to participate under the plan as was the case in Kuge v. State Dept. of Admin., 449 So.2d 389 (Fla. 3d DCA 1984), upon which Branca also relies. The issue here is the enforceability and legality of the plan itself. That is a question of law and not fact. It should also be kept in mind that even where erroneous advice is given, as in Richmond, which could arguably be interpreted as a mistake of fact or a mixed question of law or fact, estoppel against a government does not apply.

The trial court heard all of the evidence relating to Branca's alleged reliance and made certain factual findings with regard to this issue. The court found that the City attorney and the expert actuary advised Branca that the Ordinance was valid. [R. 672] Additionally, the court found that "... there was no representation of any fact by the City of Miramar relative to defendant Branca's retirement rights ... ." [R. 673] Therefore, the factual argument upon which Branca bases his claim of reliance must be rejected as inconsistent with the factual findings of the court. It is axiomatic that this Court cannot disturb the factual conclusions of the trial court. Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10 (Fla. 1976); see also, Cappadona v. Keith, 290 So.2d 545 (Fla. 4th DCA 1974). Ultimately, Branca's argument that questions of fact and not law are at issue in this case is inconsistent with his own testimony that he was advised by

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the City attorney on a question of law when she told him "the pension was legal, valid, and good." [R. 242]

Estoppel is simply inapplicable with regard to the kinds of representations made in this case. Representations relating to legal issues are the only ones of which Branca is actually complaining.

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CONCLUSION

The City respectfully requests that this Court deny jurisdiction of the Petition because the Fourth District did not "construe" a provision of the state constitution and did not "pass upon" the certified question. If this Court chooses to respond to the certified question as formulated by the Fourth District, the City urges this Court to find that the creation of benefits in addition to those mandated by Chapter 112, Fla.Stat., must comply with the requirements of Article X, Section 14. If this Court chooses to respond to the reconstruction of the certified question presented either by Branca or the City, then the City respectfully requests that the court rule that Article X, Section 14 applies to all new government pension plans, regardless of the pre-existence of pension benefits at the time the new plan is instituted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the foregoing has been furnished to BRUCE ROGOW, ESQ., Bruce Rogow, P.A. 2441 S.W. 28th Ave., Fort Lauderdale, FL 33312 and BEVERLY A. POHL, ESQ., 350 S.E. Second St., Suite 200, Fort Lauderdale, FL 33301, counsel for Frank Branca, by U.S. Mail this 1st day of December, 1992.

JOSEPH H. SEROTA

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