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FILED
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IN THE
SUPREME COURT
OF FLORIDA

NO. 80,435

FRANK R. BRANCA,

Petitioner,

v.

CITY OF MIRAMAR,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This Petition seeks review of an August 12, 1992 decision by the Fourth District Court of Appeal (Appendix A), affirming a final judgment for the plaintiff City of Miramar, and certifying a question to this Court pertaining to the Florida Constitution:[1]

> 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.

The court below did not rule on the constitutional question, but certified it for consideration by this Court. (Appendix A, p.6,8).

The case began as a declaratory judgment action brought by the City of Miramar, seeking to declare its own pension ordinance invalid. The suit named as defendants the former Mayor of Miramar, Petitioner Frank R. Branca (the only vested and retired beneficiary under the ordinance), and the current Mayor and two City Commissioners, who had contributed funds to the pension program but whose benefits had not vested. The other "defendants" were represented by counsel, but presented no evidence and no arguments at the trial.

Following a non-jury trial, the court ruled that Miramar

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[1] The Fourth District Court of Appeal also affirmed the trial court's award of attorney's fees and costs to Branca under the common law principle providing for fees for public officials who are forced to defend a suit arising out of their official duties. Thornber v. City of Ft. Walton Beach, 568 So. 2d 914 (Fla. 1990). The City has not sought review of that decision.

Ordinance 88-16 (Appendix B)[2] was unconstitutional under the Florida Constitution, Article X, § 14, and invalid under Chapter 112, Part VII, Florida Statutes (Actuarial Soundness of Retirement Systems). (Appendix D--trial court ruling). Thus, the City was relieved of its obligation to pay pension benefits under the ordinance. Branca appealed, leading to the certified question from the Fourth District Court of Appeal.[3]

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[2] Ordinance 88-16 was amended on November 21, 1988, by Ordinance 89-12, which provided for a buy-back for time spent in military service. Reference in this Brief to Ordinance 88-16 will actually be to 88-16 as amended by 89-12. (Appendix C).

[3] A third-party complaint filed by Branca against Kruse, O'Connor and Ling, Inc., the actuarial firm employed by the City in conjunction with the creation of the disputed pension ordinance, is being held in abeyance until appellate review of the main case is final. In a recently-filed independent action, the City has also sued Kruse, O'Connor and Ling, Inc. and its employee actuary Stephen Palmquist for professional negligence, seeking to recover the attorneys fees owed by the City to Branca for his defense of this case. City of Miramar v. Kruse, O'Connor & Ling, No. 92-23046, 17th Judicial Circuit, Broward County, Florida. A motion to have the two cases against the actuarial firm consolidated is pending in the trial court.

STATEMENT OF THE FACTS

Introduction

On April 4, 1988 the City Commission of the City of Miramar enacted Ordinance 88-16 which created a retirement system for elected officials pursuant to § 112.048(3), Fla. Stat.[4] Under the ordinance, an elected official retiring after twenty years would receive annually 50% of his or her average annual salary for the preceding five years; earlier retirement reduced the pension benefits.

One year later, on April 3, 1989, then-Mayor Frank Branca announced his retirement from office as an elected official, and on May 1, 1989 he began receiving retirement benefits under Ordinance

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[4] Section 112.048 provides in pertinent part:

> (1) The intent of the Legislature is to authorize and direct each city and town to provide a system of retirement for elected officials, but it is further the intent that each city or town may determine whether the system will be contributory or noncontributory.
>
> * * *
>
> (3) Each city or town may by ordinance establish a contributory retirement system for those officials defined in subsection (2). The rules for participation, the amount of the official's contributions, and the method of appropriation and payment may be determined by ordinance of the city or town.

Subsection (2) defines a mandatory state retirement system for elected officials who have held office for twenty consecutive years. Mayor Branca would have met that criterion had he completed his present term and been elected to another term, and served at least two years. (TrI-174, II-225; see Appendix A, p.5 n.5 where the court below found that Branca's possible re-election and eventual entitlement to the state pension "would be speculative.")

88-16, of $1854.17 per month. (TrI-26, 37; TrII-209).

The pension for elected officials was a political issue in Miramar, with at least one candidate for City Commission, Dan Lewis, campaigning for its repeal. (TrI-25,38). A new City Commission was elected in 1988, and one month after Branca retired, on May 15, 1989, that Commission repealed 88-16 by enacting Ordinance 89-30, at the request of Commissioner Dan Lewis (R330-331). As a vested beneficiary, Branca's monthly benefits continued, but the new City officials directed that the payments come from a budget item entitled "disputed benefits payable." (TrI-26). The dispute ripened into this lawsuit, filed by the City on October 11, 1989. (R305).

Miramar Ordinance 88-16

The idea of an exclusive retirement system for elected officials in Miramar arose in 1987. (TrI-166). Mayor Branca asked the City Finance Director, Jack Neustadt, to investigate pension plans in other municipalities for comparison purposes. (TrI-20).[5]

Neustadt had held the position of Finance Director since 1981, and served under three mayors. (TrI-17). His responsibilities included all the financial affairs of the City, including retirement benefits, and he considered himself personally

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[5] The court below correctly found that "the ordinance was requested by the administration, which at that time was under [Branca's] direction." (Appendix A, p.2). The record is clear, however, that the pension plan was initiated, developed, reviewed and passed pursuant to the City's ordinary course of business, and was not the result of any wrongdoing on the part of Mayor Branca. See, Statement of the Facts, infra p.7.

knowledgeable in such matters. (TrI-17,18). In contrast, Mayor Branca had no personal expertise in the area of pension benefits, and relied on the advise of experts, both department heads and outside consultants. (TrII-221-222). Neustadt determined that the Florida cities of Coral Springs and Plantation had retirement plans for elected officials, (TrI-20), and provided copies of those plans to the Mayor and to the City Attorney, Annette Lustgarten. (TrI-21). After some discussion at a senior staff meeting, and after researching the legal requirements and discussing the actuarial requirements with the City's consultant, the City Attorney drafted what became 88-16. (TrI-142,144,146).

The City engaged J. Stephen Palmquist, an actuary from the actuarial consulting firm of Kruse, O'Connor and Ling, Inc., to assist in the development of a pension plan for elected officials. (TrI-166). That firm's primary business involves creating and maintaining approximately 250 retirement programs for various cities and business corporations. Palmquist himself had been an actuary in Florida for nineteen years. (TrI-161,162). He obtained his actuarial training in 1970, and is a member of the Society of Actuaries, the American Academy of Actuaries, and the Conference of Actuaries in Public Practice. (TrI-162).

Kruse, O'Connor and Ling, Inc. performed actuarial services for Miramar with respect to three other retirement plans for various employees, with Palmquist handling all the Miramar business. (TrI-163). Through that association, Neustadt held Palmquist in high regard as an actuary. (TrI-28). Thus, when Mayor

Branca instructed the Finance Director to engage an actuary to render pension advice, Neustadt contacted Palmquist. (TrI-22,27,164). Neustadt's testimony was clear that he would not have consulted Stephen Palmquist had he not believed him to be a professional and competent actuary for the City's needs. (TrI-28).

Kruse, O'Connor and Ling, Inc. had been involved in setting up similar pensions for elected officials in other cities, including the City of Plantation's plan which had been provided to the Miramar City Attorney as a model (TrI-20,164). Palmquist understood the importance of his role in Miramar:

> Q (BY MR. ROGOW) You were hired to provide advice with regard to an ordinance that would be a legal ordinance; correct?
>
> A With regard to the design of the benefits to go into the ordinance, yes.
>
> Q In fact, you would not have recommended something that you believed to be invalid or unconstitutional or illegal under any applicable law?
>
> A That's correct.

(TrI-167). Thus, although Mayor Branca did not personally select Palmquist, he was satisfied with Neustadt's choice, because in Branca's opinion Palmquist had an "excellent reputation." (TrII-219-220).

Palmquist, as consulting actuary, was included in several meetings with Miramar officials, and pursuant to his recommendations certain changes were made to the initial drafts. (TrI-166-168). In his professional opinion the final draft fully

complied with the statutory and constitutional requirements for pension plans (TrI-170).[6]

Ordinance 88-16 was enacted in conformance with Miramar's standard procedure for new legislation. (TrI-36,37, II-222-224). The first draft was presented to the City Commission at a public hearing, attended by Palmquist and Annette Lustgarten, after which certain amendments were made by the City Attorney. (TrI-144,145, 171). There were public "workshop discussions," at which city staff members presented information to the governing body, without action being taken. (TrI-145, II-224). A second public reading was also held at a Commission meeting, as required, before a vote was taken and the Commission passed the ordinance four-to-one. (TrI-148; Appendix B, p.5). Mayor Branca did not vote on the ordinance,

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[6] Specifically, Palmquist believed that the ordinance was exempt from certain funding requirements of Chapter 112, Part VII, Fla. Stat., because it fell within an exemption, § 112.625(1)(b) (TrI-195).

> Section 112.625(1)(b) provides:
>
> (1) "Retirement system or plan" means any employee pension benefit plan supported in whole or in part by public funds, provided such plan is not:
>
> (b) A plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;

(emphasis supplied).

The court below rejected Palmquist's view, and found "substantial competent evidence in the record to support the trial court's finding that Ordinance 88-16 did not constitute a deferred compensation plan." (Appendix A, p.6 n.6).

because under the City charter the Mayor votes only if there is a tie vote in the Commission, or if he chooses to exercise a veto. (TrI-148).

Mayor Branca's Retirement

Frank Branca, holder of a doctorate degree and professor of psychology at Broward Community College[7], (TrI-49), had been a resident of the City of Miramar since 1961, and active in local politics since 1971, when, at age 37, he began by volunteering to work on a political campaign committee. (TrII-207-209). In 1973, he was elected to the City Council; after re-election in 1977 and 1981, he ran for mayor in 1983 and captured 52% of the vote from a field of six or seven candidates. (TrII-209-210). In 1987, he was re-elected with 75% voter approval. (TrII-211). As Miramar grew, Mayor Branca's duties there grew, and from 1985-1989 he took a leave of absence from his professional duties at Broward Community College in order to devote more time to the City as its full-time Mayor and chief executive. (TrI-51, II-213-215).

As the work of his public office grew with the City, Frank Branca endured personal pressures as well with the protracted illness of his wife, and her death due to cancer in 1986. (TrII-

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[7] The City will correctly point out that Branca is a member of a state retirement system as a result of his tenure at Broward Community College. Those benefits would become available to him after thirty years of service, after nine more years of teaching, or when he reaches age 62, in 1995. (TrI-52). However, any expectation of retirement benefits under the state plan is irrelevant to the legality of Ordinance 88-16 or the equities involved in this dispute between the City of Miramar and Mr. Branca.

216). In 1988, after Ordinance 88-16 was passed, he began to think seriously about retiring from office. (TrII-225). He was apprehensive about working with the newly elected City Commission:

> The commission that was seated at that time was a commission that I felt was going to bring the city back to the circus that it once was and I just did not feel that I wanted to participate in that.

(TrII-226). The immediate availability of pension benefits under 88-16 made retirement attractive, and in anticipation he sought to put his personal financial affairs in order, including liquidating assets from his deceased wife's antique shop and other properties:

> Q What was the purpose of beginning to turn these properties into cash?
>
> A Because I was retiring and wanted to get out of managing and businesses and whatever. I wanted to put the money to work for me. So along with the interest income I could have the city pension check and for awhile the college salary and then the college pension check and I could live on that very nicely.

(TrII-227-228). Branca planned to resume teaching after his retirement from elected office, which would leave his summers free for travelling. (TrII-203). He also had financial obligations that were to be met by his pension. His son, Paul, had applied to medical school. Paul Branca was accepted at the University of Miami School of Medicine in February of 1989, for the following September, and anticipated $31,000-$35,000 per year in expenses. (TrI-6,10). Branca had promised to supplement Paul's school loans

with the Miramar pension check, and in fact did so until the expenses of this litigation forced him to discontinue that assistance to his son. (TrI-6,7).

Although, before retiring, Mayor Branca discussed his pension with Jack Neustadt, the possibility that the pension benefits were in jeopardy because of any infirmity or illegality of Ordinance 88-16 was never mentioned. (TrI-38). The following colloquy demonstrates the Finance Director's position:

> Q I'm asking whether or not at some time before then [date of retirement] the mayor discussed with you whether or not his pension benefits were in order? This pension plan was passed in 1988 and he didn't retire until 1989.
>
> A We had discussions about the pension but I do not recall that the mayor asked me about the status of his rights under the pension. I believe that that was assumed.
>
> Q And you assumed that he had those pension rights?
>
> A I had no reason not to.
>
> Q You had no reason not to because the actuary had said it was all right; correct?
>
> A On the basis that it was adopted by the commission.
>
> Q And the city attorney had said it was all right?
>
> A Yes, sir.

(TrI-38).

Additionally, the testimony of former City Attorney Annette Lustgarten made it clear that the City as well as Branca

presumed that his City pension would be available:

> Q So you were satisfied that ordinance 88-16 passed constitutional and statutory muster in terms of your duties as a city attorney?
>
> A Yes.
>
> Q And based upon your experience as a city attorney, and a [former] county attorney, you had no reluctance in putting your stamp of legal approval on the ordinance, 88-16, as re-drafted?
>
> A Correct.
>
> Q And your decision to do that was based upon your own research and the work of the City hired actuary, Stephen Palmquist?
>
> A Correct.
>
> Q And you relayed to Mayor Branca your belief that this ordinance was a valid, legal and constitutional ordinance?
>
> A Correct.
>
> Q Mayor Branca relayed to you the fact that when he retired he was counting upon this pension as part of his retirement plan?
>
> A He did.

(TrI-152-153).

The Contested Validity of Ordinance 88-16

The "facts" adduced at trial regarding the City's challenge to the validity of its Ordinance 88-16 came from the testimony of Stanley Danek, Division Attorney for the Florida Division of Retirement in Tallahassee, (TrI-53); and from the

City's expert witness Frederick Mabry, a consulting actuary from Atlanta, Georgia, whose area of expertise was limited by the trial court to whether or not Ordinance 88-16 created a deferred compensation plan. (TrI-79,100) See footnote 6, supra. A summary of their testimony frames the City's position.

The Division of Retirement reviews municipal pension plans upon request, for compliance with statutory funding requirements according to actuarial principles. (TrI-54). After Branca's retirement, and at the City's request, Danek provided a legal memorandum concerning Ordinance 88-16, dated August 22, 1989, to the City on behalf of the Division. His memorandum raised the issue of 88-16's unconstitutionality, and concluded that the ordinance did not fall within the § 112.625(1)(b) exemption to Ch. 112, Part VII, and therefore lacked proper funding requirements as dictated in the statute. (R334-338; Appendix A, p.3).

In Danek's opinion, this was not a deferred compensation plan as required under §112.625(1)(b), and those covered under the ordinance were not "employees." (TrI-55-58) He admitted that the Division has no guidelines as to what is considered a "highly compensated" position. (TrI-77).

With regard to the state constitutional question, Danek said the Division's "interpretation" was that the creation of a new pension plan did constitute an "increase" in benefits such that

Art. X, § 14[8] of the Florida Constitution applied, and that Ordinance 88-16 was not in compliance. (TrI-65).

Frederick Mabry's testimony was similar--that Ordinance 88-16 was not actuarially sound; that it did not fall within the § 112.625(1)(b) exemption because 1) the pension applied to the City Commissioners, who are not highly paid and may not be management,[9] and 2) does not provide for "deferred compensation" as he understands it. (TrI-86-90). While Mabry agreed on cross-examination that deferred compensation could reflect something other than a diversion of dollars by the employee (TrI-106), he opined that Ordinance 88-16 was not deferred compensation for purposes of the exemption:

> I don't consider this a deferred compensation plan. A deferred compensation plan to me is a plan whereby an employee agrees to forgo some current payment that would otherwise be made in exchange for a further payment later on.
>
> Under as I understand Florida law, that's covered under 112.215. It's called Deferred Compensation Act or

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[8] Article X, Section 14 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. (emphasis supplied).

[9] The trial court found that as full-time Mayor, Frank Branca was "management." (TrI-104).

something like that.

(TrI-102).

The district court of appeal agreed with the City on the statutory exemption and apparently affirmed the trial court on the constitutional issue. But the court wrote:

> 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 Article X, Section 14, because no such pension benefits existed for elected officials prior to the enactment of Ordinance 88-16 apart from those mandated in section 112.048, Florida Statutes.
>
> * * *
>
> [W]e need not resolve the issue of whether the Ordinance's enactment constituted an "increase" in benefits under Article X, Section 14, Florida Constitution.

(Appendix A, p. 5,6).

This Petition seeks (1) resolution of that constitutional issue, as well as review of Petitioner's arguments which were rejected by the district court of appeal; (2) the City's lack of standing to sue to invalidate its own ordinance, and (3) Branca's entitlement to a pension under equitable principles (if the Ordinance is found to be unconstitutional).

SUMMARY OF THE ARGUMENT

I. Miramar City Ordinance 88-16 is constitutional, and Petitioner is entitled to pension benefits from the City under the ordinance. 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. Prior to the enactment of Miramar City Ordinance 88-16, the City had no pension plan for its elected officials. The court below erred when it found that the establishment of a new pension plan was an "increase in benefits." The creation of the plan under Ordinance 88-16 was not an "increase in benefits" of "such program," under Article X, Section 14, because *there was no "such program"* prior to the enactment of Ordinance 88-16.

Additionally, Article X, Section 14, by its plain language only controls an increase in benefits flowing from the particular government agency which provides that pension. Thus, Petitioner's unvested pre-1989 expectation of a state pension under § 112.048, Florida Statutes (now lost by virtue of his retirement in reliance on the City pension) is an irrelevant fact when determining whether Miramar Ordinance 88-16 was an "increase in benefits" under the Florida Constitution. Thus Miramar's pension was not an "increase" and did not violate Article X, Section 14.

II. This case should have been dismissed for lack of standing. A city does not have standing to bring a suit challenging the constitutionality of its own duly enacted, presumptively valid ordinance. While § 86.011, Florida Statutes, gives the

circuit courts jurisdiction of declaratory judgments brought by "any person," other policy considerations militate against an unprecedented suit by a city against its pension beneficiary, seeking to void its own law and escape its obligation to pay the pension. A government's role is to defend its laws, not to sue to declare them invalid. No case supports the proposition that a city can pass a law, then sue to declare that law invalid.

III. If Ordinance 88-16 is unconstitutional, and if the City has standing to bring this suit, then Petitioner is entitled to his promised pension benefits under the doctrine of equitable estoppel. It is undisputed that Petitioner retired, to his detriment, in reliance on the availability of a pension from the City. The court below erred when it determined that the City's representations were of law, not fact, and that therefore estoppel should not lie. The availability of pension funds was a fact; the only representations of law made by the City were on a collateral issue--whether Petitioner's benefits would continue if the Ordinance were repealed. No representations were made by the City as to the constitutionality or legal validity of its ordinance; such validity was presumed by all parties. Nor should equitable relief be denied because it would achieve an illegal result. It is not illegal for a city to establish a pension plan for elected officials. See § 112.048(3). The City should not be allowed to do so, yet escape its obligations to a retiree, by successfully accusing itself of an "illegal" act.

ARGUMENT

I.

THE CREATION OF A NEW PENSION PLAN IS NOT AN "INCREASE IN BENEFITS" AS DESCRIBED IN ARTICLE X, § 14, FLORIDA CONSTITUTION, AND BY ITS PLAIN TERMS THAT PROVISION DOES NOT APPLY TO THE PENSION CREATED BY MIRAMAR ORDINANCE 88-16

A. Introduction

This is a case of first impression in this Court, requiring the construction of the "increase in benefits" language of Article X, Section 14 of the Florida Constitution. Although there is a paucity of case law construing Article X, § 14, the available cases and the plain meaning of "increase in benefits" require this Court to reverse the judgment below and find that Ordinance 88-16 is constitutional.

This Court has discretionary jurisdiction over this case by virtue of the state constitutional question certified by the Fourth District Court of Appeal. Art. V, § 3(b)(3) (construing a provision of the state constitution) and § 3(b)(4) (certified questions), Florida Constitution; R. 9.030(a)(2)(A)(ii) and R. 9.030(a)(2)(A)(v), *Fla.R.App.P.* However, once jurisdiction is accepted, this Court is free to rephrase the issue as presented by the district court of appeal, Dohnal v. Syndicated Offices Systems, 529 So. 2d 267, 268 (Fla. 1988), and to decide all the issues in the case which have been properly preserved for review. Zirin v. Charles Pfizer & Co., 128 So. 2d 594, 596 (Fla. 1961).

The certified question is framed by the Fourth District Court of Appeal in the alternative:

> 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.

(Appendix A, p. 6-7) (emphasis supplied).

We respectfully submit that the question(s) are not precisely on target. The second "alternative" as written *presumes* that Ordinance 88-16 provides an "increase" of some sort. In fact, the meaning of the words "increase in benefits" in Article X, § 14, is the narrow issue this Court must decide. Petitioner respectfully suggests that a more succinct and neutral statement of the issues would be:

> (1) WHETHER ARTICLE X, § 14, AND THE REQUIREMENTS THEREOF APPLY ONLY TO INCREASES IN EXISTING COUNTY OR MUNICIPAL PENSION PLAN BENEFITS?
>
> (2) WHETHER THE ESTABLISHMENT OF A MUNICIPAL PENSION PLAN, WHERE THE MUNICIPALITY PREVIOUSLY HAD NO PLAN, CONSTITUTES AN "INCREASE IN BENEFITS" UNDER ARTICLE X, § 14?
>
> (3) WHETHER THE UNVESTED EXPECTATION OF A STATE PENSION MAY BE CONSIDERED AS AN AVAILABLE BENEFIT TO A MUNICIPAL PENSION BENEFICIARY, SO THAT THE CREATION OF THE MUNICIPAL PLAN CONSTITUTES AN "INCREASE IN BENEFITS" UNDER ARTICLE X, § 14?

We submit that the answer to the first question should be "yes;" to the second, "no;" and to the third, "no."

The City argued, and the trial court found, that the establishment of a new pension was an "increase" in benefits as

described in Article X, § 14, because where there was nothing, something new was created. The court below noted this argument, but did not decide the constitutional issue.[10]

The District Court of Appeal's approach took a tack never raised, briefed, or argued below--that Miramar City Ordinance 88-16 could be an "increase" in benefits to an elected official who had an unvested expectation of a state pension under § 112.048, Florida Statutes.

Branca never satisfied the requirements for a pension under § 112.048 (20 years of consecutive elected office), because he retired after less than 18 years. (Appendix A, p.5 n.5). Thus, it confounds language usage to conclude that Branca, who had no vested benefits under § 112.048, a state pension program, received an increase in those benefits by virtue of the enactment of a city pension program. The plain words of the Florida Constitution compel the conclusion that--whatever an "increase" is--it only refers to an increase in the pension provided by a single "governmental unit":

> A governmental unit responsible for any retirement or pension system ... shall not...provide any increase in the benefits to the members or beneficiaries of such system unless [it is properly funded]. (emphasis supplied).

Art. X, § 14.

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[10] The Fourth District Court of Appeal said both "We affirm all issues on appeal;" (Appendix A, p.2), and "we affirm all points on appeal with the exception of the constitutional question, which we certify herein...." (Id. at 8).

Therefore the portion of the District Court of Appeal's certified question asking "...whether the requirements also apply to county or municipal pension plans that increase other existing governmental [i.e. state] pension plan benefits" must be answered: "No."

B. The Relevant Cases

The title of Art. X, § 14, "State retirement benefit changes" (emphasis supplied), means that it applies to changes in existing plans rather than to the creation of new plans. The only court to have examined the "increase in benefits" language refused to read it expansively. Turlington v. Dept. of Admin., 462 So. 2d 65 (Fla. 1st DCA 1984) involved a taxpayer's constitutional challenge[11] to a newly-created state statute providing for early retirement for elected officials. The statute allowed them to retire while continuing in office and continuing to receive their salary, but their retirement benefits would be reduced, and would accrue no further. The issue was whether the statute constituted an "increase in benefits" under Art. X, § 14. The court noted:

> There has, admittedly, been no actuarial study done on any possible effects upon the state retirement system, as a result of the legislative enactment.... The absence of an actuarial study does not, per se, render the statute invalid. It is first necessary to determine whether the statute...[provides]...an

[11] We note that in Turlington the taxpayer obviously had standing to raise the challenge. The City of Miramar's standing to challenge its own ordinance is not so obvious. See infra at 24.

> increase in retirement benefits. ... We cannot say that the statute, by its terms, provides an increase in retirement benefits.

Id. at 67. In making that decision, the court impliedly recognized the distinction between an increase in existing benefits, and the creation of a new plan with new collateral benefits, and held that Art. X, § 14 did not apply to invalidate the new plan.

> [T]he 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.

Id. (emphasis in original).

The same analysis applies in this case. The fact that City Ordinance 88-16 provided for Miramar elected officials something beyond what state statute § 112.048 provided, does not amount to an "increase in [Miramar] benefits" under Art. X, § 14.

Although our research has uncovered no legislative history for Art. X, § 14, another court interpreted its intent this way:

> The manifest purpose of this provision is to prevent, for example, governmental units from providing covered pensioners cost of living increases without also making provisions for funding the increase in benefits....

Young v. Dept. of Admin., 524 So. 2d 1071, 1076 (Fla. 1st DCA 1988). No mention was made of the section's applicability to the creation of a new plan by a governmental entity which had no plan.

The trial court applied Art. X, § 14 to Ordinance 88-16,

finding that the creation of a new plan, i.e., going from no benefits to some benefits, was an "increase" or change in benefits without a sound actuarial basis, and thus unconstitutional. The District Court of Appeal affirmance/ certification leaves the question open for this Court to decide.

Such a distorted reading of the word "increase" should not be allowed to stand, especially when it has the effect of altering the plain meaning of the constitutional language and denying pension benefits to a retiree. It is well-established that pension statutes are to be liberally construed, Holton v. City of Tampa, 159 So. 292 (Fla. 1934), to protect the rights of the pensioner. The court below compromised that principle, destroying Branca's pension rights.

In common parlance, to increase something presumes that that "something" exists initially, and is then made larger. The legislature which enacts a statute is presumed to know the meaning of the words it uses, and to have expressed its intent by the use of those words. Baskerville-Donovan Engineers, Inc. v. Pensacola Exec. House Condo. Ass'n., Inc., 581 So. 2d 1301 (Fla. 1991). The principle is no different for language in a constitution. Public Health Trust of Dade County v. Lopez, 531 So. 2d 946, 949 n.4 (Fla. 1988).

The dictionary confirms that an "increase" in benefits is not the same as the creation of benefits that occurred under Ordinance 88-16. An "increase" adds to what one has; it is not the acquisition of something never before possessed:

> **increase:**
> 1. to become greater in size, amount, degree, etc.; grow
> 2. to become greater in numbers by producing offspring; multiply; propagate

Webster's New World Dictionary (2d College Ed.1982). There is no reason to think that "increase" has a different meaning in a constitution. This Court has recently held:

> A settled rule of constitutional interpretation is that: "The words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the words are usually understod by the people who have adopted them."

Butterworth v. Caggiano, ___ So. 2d ___, 1992 WL 158189 (Fla. July 9, 1992) (citations omitted). Thus, the only reasonable construction of Art. X, § 14 is that it applies to changes in existing retirement systems, such as cost-of-living increases as suggested in Young, supra. The plain language of the Florida Constitution does not encompass Ordinance 88-16. Any construction of Article X, § 14 must be one that favors Ordinance 88-16's constitutionality. Belk-James, Inc. v. Nuzum, 358 So. 2d 174, 177 (Fla. 1978); Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976).

Ordinance 88-16 and Branca's vested pension rights should not be ruled unconstitutional on a misapplication of the plain meaning of "increase." The ordinance should be found constitutional, and the decision below should be reversed.

II.

A CITY DOES NOT HAVE STANDING TO CHALLENGE THE VALIDITY OF ITS OWN PENSION ORDINANCE BY SUING THE CITY'S ELECTED OFFICIALS WHO ARE THE BENEFICIARIES UNDER THE PENSION PLAN

There is no precedent for the proposition that a municipality may bring an action seeking to declare its own duly enacted ordinance unconstitutional. However, the Court below rejected Branca's argument that the City of Miramar did not have standing to challenge the constitutionality of its own duly enacted ordinance:

> Under the facts presented, we hold that the City had standing to seek this declaratory judgment, because the circuit court is the proper tribunal to determine the constitutionality of ordinances and proposed ordinances.

(Appendix A, p.3) (emphasis supplied). The district court simply did not address the argument that while the circuit court is the proper tribunal, the City is not a proper *plaintiff* to challenge the constitutionality of its own law.

The cases cited by the district court are all inapposite. City of Miami Beach v. Butcher, 303 So. 2d 378 (Fla. 3d DCA 1974), was a class action declaratory judgment brought by city employees; the city was the defendant in the trial court. West Palm Beach Assoc. of Firefighters v. Board of City Comm'rs of the City of West Palm Beach, 448 So. 2d 1212 (Fla. 4th DCA 1984) was a mandamus action brought by the firefighters to compel the city to submit a *proposed* ordinance, which the city felt was unconstitutional, to a

referendum vote. The court held that the preferred procedure would have been for the city to have sought declaratory relief regarding the *proposed* ordinance. Id. This case is different, because it is not a proposed ordinance which the City challenges, but a law duly enacted by the Miramar City Commission. Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So. 2d 1312 (Fla. 5th DCA 1982) was a declaratory judgment brought by the city, but it sought *enforcement*, not invalidation, of a city ordinance. In that case it was the defendant, not the city, which challenged the constitutionality of the ordinance. Thus, none of the district court's authorities support its conclusion that the City in this case had standing to bring this suit.

Laws are presumptively valid, until challenged by a proper plaintiff and invalidated by a court of law. A.B.A. Industries v. City of Pinellas Park, 366 So. 2d 761 (Fla. 1979). It is the duty of a city to defend the validity of its laws, and any cases involving a declaratory judgment action over the constitutionality or validity of a law invariably position the city as defendant in such a case, not as plaintiff. See Ocean Villa Apts., Inc. v. City of Ft. Lauderdale, 70 So. 2d 901 (Fla. 1954); Heinlein v. Dade County, 254 So. 2d 50 (Fla. 3d DCA 1971); City of Miami v. Franklin Leslie, Inc., 179 So. 2d 622 (Fla. 3d DCA 1965); (governmental entity in each case was the defendant). Cf. O.P. Corp. v. Village of North Palm Beach, 278 So. 2d 593 (Fla. 1973) (Village was estopped from claiming its own ordinance was invalid).

The principle that the government and government

officials are bound to defend the law was set out in Graham v. Swift, 480 So. 2d 124, 125 (Fla. 3d DCA 1985):

> In Florida, the general rule is that a public official may not seek a declaratory judgment as to the nature of his duties unless he "is willing to perform his duties, but is prevented from doing so by others." Reid v. Kirk, 257 So. 2d 3,4 (Fla. 1972); see Department of Revenue v. Markham, 396 So. 2d 1120, 1121 (Fla. 1981). The validity of the law is to be assumed by the public official who is to carry it out. By the same token, that official does not have standing to sue for the purpose of determining that the law is not valid. Department of Education v. Lewis, 416 So. 2d 455, 458 (Fla. 1982); Miller v. Higgs, 468 So. 2d 371, 374 (Fla. 1st DCA 1985).

(emphasis supplied).

While Graham v. Swift refers to the general rule, the court below relied on a limited exception described in Kaulakis v. Boyd, 138 So. 2d 505 (Fla. 1962), in which public officers may challenge a law if it involves the disbursement of public funds. (Appendix A, p. 4). In that case, county commissioners were allowed to defend the public fisc in a personal injury suit by challenging the validity of a portion of the county home rule charter. The "standing" analysis in that case, in which the commissioners were the defendants, is distinguishable from this case in which the City is attempting to use the claimed unconstitutionality of its law as a sword, rather than as a shield.

If the City enacted a pension ordinance which was a "bad deal" for its public fisc, the remedy lies with the voters, who

could vote the Commissioners who enacted the law out of office. The fact that the City may have enacted a pension plan disliked by some does not confer standing upon the City to sue its beneficiary and to revoke the vested pension. If a city could routinely sue to declare its own laws invalid, it would create havoc and uncertainty for citizens and contracting parties who would be unable to rely on the legislative acts of their government. The intolerable prospect of a governmental agency failing to comply with its own laws was unequivocally denounced in Killearn Properties, Inc. v. City of Tallahassee, 366 So. 2d 172 (Fla. 1st DCA 1979), in which that city defended an action on the ground that certain city contracts were in violation of the city Code:

> Unhappily, this case is but another example of the utter disregard with which a government views its sacred obligations to its people. Basic morality, integrity and honesty appear to no longer have any meaning to governments and their agencies. The subject agreements...were honored by the City so long as it was in its interest to do so. It then sought to disavow same alleging that it had itself violated the Sunshine Law and thereby vitiated the agreement.... The City itself, of its own volition, seeks to take refuge in its own alleged violation of law, all the while blatantly ignoring, and seeking to escape from, its moral obligations to the citizens ...for whose benefits the agreements were made. A more flagrant act of dishonor can hardly be imagined.
>
> * * *
>
> It is one thing for an aggrieved citizen to seek to have set aside an agreement between a government and

> another party...but quite another for the governmental entity itself to seek to escape its obligations based upon its own alleged wrongdoing. It has long been recognized to be unethical for a lawyer to attack his own work product. It is at least immoral and an indication of lack of integrity for a government or its agency, whose duty it is to serve not subvert its citizens, to do the same.

366 So. 2d at 181. (citations omitted) (emphasis supplied). Thus, not only is there no precedent supporting a city's standing to sue to declare its own legislation invalid, but both public policy and persuasive Florida law counsel against allowing a suit such as this to flourish as a precedent for legislative bodies.

In this case, the City of Miramar has done exactly that which was forbidden in Killearn; it has brought a suit against Frank Branca, alleging that its own ordinance is unconstitutional and invalid, in order to escape its obligation to pay the pension benefits that he was guaranteed upon his retirement from public service. The Amended Complaint contained a host of such allegations:

> 19. Plaintiff, the City, contends that Ordinance No. 88-16...is unconstitutional and unlawful and void from the time of its enactment and hence never became a law (e.g. Ordinance) of the City. Ordinance No. 88-16 is void ab initio because among other legal infirmities, Ordinance No. 88-16:
>
> a) does not comply with Section 112.63....
> b) does not comply with Section 112.656....
> c) violates Article I, Section 2,

> Florida Constitution....
> d) violates Article X, Section 14....
> e) is violative of Section 112.048....
> f) violates Florida Statute 166.041....
> g) violates applicable provisions of Chapter 112....
> h) violates Article 1, Section 10, Florida Constitution....
>
> 20. In summation, the City contents [sic] that by virtue of all of the legal infirmities and arguments contained herein, Ordinance No. 88-16 was unconstitutional and illegal at its inception, is void, and can confer no benefits upon Branca (or the other named Defendants).

(R377-378). That unusual tactic was not the only available avenue. The City had other, more appropriate remedies if it felt aggrieved.

Since Ordinance 88-16 had been subsequently repealed (R330), the City's only claimed injury was a financial one derived from the bad advice it believed it had received from its actuarial firm, Kruse, O'Connor and Ling, Inc. The City could have brought a professional malpractice action against Kruse, O'Connor and Ling, Inc., which would have protected the City's fisc and been consistent with the public policy precluding a governmental entity from challenging the validity of its own duly enacted laws. Indeed, the City has just done that, seeking the fees it now has to pay Branca. See, n.3, supra.

Or, in another plausible and proper scenario, a Miramar taxpayer could have brought a declaratory judgment action challenging Ordinance 88-16, and the City would have had to defend the very ordinance it instead chose to attack, or implead Kruse,

O'Connor and Ling, Inc. as a third party defendant. see Jones v. Dept. of Revenue, 523 So. 2d 1211, 1214 (Fla. 1st DCA 1988). Instead, the City chose to do what it should not be able to do--to act as plaintiff in an action against itself, or its elected officials, seeking to declare its own law invalid. Precedent and public policy compel the conclusion that municipalities may not act as plaintiffs to denounce their own municipal laws.

III.

THE CITY SHOULD BE ESTOPPED FROM DENYING PENSION BENEFITS TO BRANCA, WHO RETIRED IN RELIANCE ON THE AVAILABILITY OF THE FACT OF A PENSION UNDER MIRAMAR ORDINANCE 88-16

At all stages of this litigation, Branca has argued that if Ordinance 88-16 is found to be invalid, he is entitled to continued pension benefits from the City on the ground of equitable estoppel. The court below rejected equitable relief:

> We conclude that the City's representations to appellant, on which appellant relied, were representations of law. As a result, estoppel will not lie. See The Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). Notably, however, even where there is reliance upon representations of fact, logically estoppel will not be applied where such application would achieve an illegal result or one contrary to public policy.

(Appendix A, p.4). Under the circumstances of this case, the court below has used equitable principles to achieve an inequitable result. If this Court should find that Ordinance 88-16 is uncon-

stitutional and void *ab initio*, equity compels reversal of the decision below, and reinstatement of Branca's City pension.

The doctrine of equitable estoppel is applicable against Florida municipalities. Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976). Estoppel applies against a local government when a citizen:

> (1) relying in good faith
> (2) upon some act or omission of the government
> (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired.

City of Lauderdale Lakes v. Corn, 427 So. 2d 239, 243 (Fla. 4th DCA 1983) (zoning); Kuge v. State Dept. of Admin., 449 So. 2d 389, 391 (Fla. 3d DCA 1984) (retirement benefits). This case fits that test like a glove. Frank Branca, who had been re-elected to office for the preceding sixteen years, and who was four years short of the twenty years of service required for the state pension under § 112.048, retired in good faith reliance on the availability of a pension under Miramar Ordinance 88-16, and the representations of the City Attorney regarding his pension.

The trial court made explicit findings which support the equitable defense which the court below rejected:

> n. That the Defendant Branca did rely on the advice of then City Attorney Annette Lustgarten and Actuary Steve Palmquist, of the actuarial firm Kruse, O'Connor & Ling, Inc., that Ordinance No. 88-16 was a valid ordinance, and the

> Defendant Branca did in fact retire in reliance on the belief based on representations of those responsible in the City that the ordinance was a valid ordinance.

(Appendix D, p. 4).

The exceptional circumstances necessary to invoke estoppel against a state agency are found to exist when state agencies deny benefits because of mistaken statements of fact. Warren v. Dept. of Admin., 568 So. 2d 568, 571 (Fla. 5th DCA 1989). In Kuge, supra, the issue was not the validity of the pension plan, but Kuge's eligibility. The Third District Court of Appeal applied equitable estoppel and awarded her benefits even though the Division's representations to her proved to be incorrect, based on the law. The court explained:

> It is true that such representations were based on a misunderstanding of the law applicable to her case, but this does not convert the factual representations into legal representations....; she was in no way advised as to the status of Florida law.

449 So. 2d at 391-392 (citations omitted). The City of Miramar's representations to Branca were similarly "fact," not "law," because he had no reason to inquire about the legality of the ordinance, which was never raised as an issue--even within the City--until after Branca's retirement. (See Statement of the Facts, supra at 12). The City Attorney's representations were merely addressed to Branca's entitlement to a pension, should he retire under the ordinance and should it be subsequently repealed by a City

Commission that was politically opposed to its terms. (TrI-149).[12]

Thus, even if the City Attorney gave bad advice, based upon a misunderstanding of the law, her representations about the availability of a pension under 88-16 if it were to be repealed, after his retirement, were representations of fact that cannot be converted into representations of law in order to now deny Branca, who retired in good faith reliance, his pension. The ultimate representation of the City was a representation of a fact--the fact of a pension.

We recognize the line of authority which holds that estoppel may not be applied against a municipality if to do so would achieve an illegal result or sanction "transactions that are forbidden by statute or that are contrary to public policy." See Salz v. Dept. of Admin., 432 So. 2d 1376, 1378 (Fla. 3d DCA 1983) (citing Dade Co. v. Benhis Assoc., 257 So. 2d 291 (Fla. 3d DCA); City of Miami Beach v. Meiselman, 216 So. 2d 774 (Fla. 3d DCA

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[12] Although the City Attorney did make certain representations of law, they were not with respect to the legality of Ordinance 88-16, but rather related to the security of Branca's benefits should he retire and the ordinance be subsequently repealed. The law on that point is clear:

> [O]nce a participating member reaches retirement status, the benefits under the terms of the act in effect at the time of the employee's retirement vest. The contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments. City of Jacksonville Beach, State ex rel. Stringer v. Lee, 147 Fla. 37, 2 So. 2d 127 (1941).

Florida Sheriffs Ass'n v. Dept. of Admin., 408 So. 2d 1033, 1036 (Fla. 1981).

1968); State ex rel. Schwartz v. City of Hialeah, 156 So. 2d 675 (Fla. 3d DCA 1963)). Those cases are distinguishable, however, in that the municipalities were wholly without the authority to act under the law. Here, Miramar had explicit statutory authority, under § 112.048(3), to provide a pension program for elected officials. It was not illegal to enact a pension ordinance. The fact that the City created a program which was found to be improperly funded does not negate that inherent authority, and should not preclude relief under the doctrine of equitable estoppel.[13] Judge Farmer, dissenting below, agreed that if the ordinance is unconstitutional, the remedy is to direct the City to fund it, not to bury it:

> [I] do not understand how the fact that this plan may violate these [constitutional and statutory] provisions yields the conclusion that the city can just stop paying its retirees. I should have thought that the remedy for the constitutional/statutory violation would be to order the city to make the plan actuarially sound out of its own pockets (whether from tax increases or other revenues) but not to order it to stop paying retirement income.

(Appendix A, p.9-10).

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13 Compare the line of authority which grants qualified immunity to a public employee who is alleged to have violated a plaintiff's constitutional rights. Qualified immunity is evaluated based on an objective reasonableness standard, considering what the public employee should have objectively believed the law to be *at the time of the alleged violation*. Courson v. McMillian, 939 F.29 1479,1487 (11th Cir. 1990). Here, the alleged illegality of Ordinance 88-16 could not have been known by the City at the time of Branca's retirement, since at this writing it is not conclusively determined, and even the District Court of Appeal was unsure of whether the Ordinance was valid or invalid.

> To deny benefits to a retiree where the plan is unsound but the city is able to pay is to shoot the patient rather than to find the cure.

(Id. at 11).

In City of Tarpon Springs v. Koch, 142 So. 2d 763 (Fla. 2d DCA 1962), the court applied estoppel against the city in a real estate transaction even though the deed was void at its inception for failure to comply with city charter requirements. Other states have applied estoppel despite "illegal" action by a municipality, as long as that municipality had the general authority to act. In Stahelin v. Board of Educ., 230 N.E. 2d 465 (Ill. App. Ct. 1967), a municipality had the power to enter into a contract, but, as in this case, that power was "irregularly exercised." Id. at 472. The court applied estoppel against the municipality and held:

> As to this class of contracts, a municipality may not assert its want of authority or power, or the irregular exercise thereof, where to do so would give it an unconscionable advantage over the other party. Municipal corporations, as well as private corporations and individuals, are bound by principles of common honesty and fair dealing.

Id. (citations omitted). Therefore, even if Ordinance 88-16 was void ab initio, as the City contends, because the City had the authority to provide a pension--and despite the fact that its attempt to do so may have been "irregularly exercised," estoppel should be applied against the City in favor of Branca, who changed his position substantially in reliance on the City's representations.

> Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon.

Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 573 (Fla. 2d DCA 1975). The City of Miramar snatched the mat away from its former Mayor. Equitable relief is designed to remedy such a situation, and should be applied in this case.

CONCLUSION

For the foregoing reasons, Petitioner Frank R. Branca respectfully requests that the Court quash the decision below, and remand for entry of an order upholding his entitlement to a pension under Miramar Ordinance 88-16.

The first part of the Fourth District Court of Appeal's certified question should be answered in the affirmative: Article X, Section 14 of the Florida Constitution applies only to existing county or municipal pension plans. The second alternative part of the certified question should be rejected as written, and answered as follows: The creation of a new municipal pension plan for a class of persons who have no pension does not constitute an "increase in benefits" under Article X, Section 14.

If the Court finds Ordinance 88-16 to be unconstitu-

tional, it should nevertheless reinstate Branca's entitlement to a pension on equitable grounds, or dismiss the City's entire case on the ground that the City lacked standing to challenge the validity of its own law.

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 JOSEPH H. SEROTA, Weiss Serota & Helfman, P.A., 2665 South Bayshore Drive, Suite 204, Miami, Florida 33133, counsel for the City of Miramar, by U.S. Mail this 13th day of October, 1992.

BRUCE ROGOW

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